their timeliness. Cause and Effect have properly been eliminated from physical sciences, and equations have been substituted. Mathematical economists incline also to eliminate cause and effect from economics. But cause and effect are of the essence of economics and of its principle of willingness, which accomplishes future ends by timely control of the present limiting factors.

Thus we have an economic concept of the Will—the Will-in-action, guided by purpose and expectation. Both the empirical theory of cause and effect set forth by J. S. Mill and the absolutist theory set forth by Bradley are realized in the economic theory of the Will controlling the limiting factors in order to multiply the future output for all, or to acquire a larger income for self by diminishing the income of others, or of extending the Will to distant space or distant future by control of corporations or other concerns, each of which, in its own field, depends upon the best proportioning, by means of transactions, of all limiting and complementary factors in view of what may be intended.


CHAPTER X
REASONABLE VALUE

1. From Corporeal to Intangible Property

Two diverse theories of the modern intangible property have been developed since the year 1890. The one is the exploitation theory of Veblen, the other is the reasonable value theory of the courts. Each is founded on the new idea of property as the present value of future profitable transactions; but Veblen took as the source of his materials the testimony of industrial and financial magnates before the United States Industrial Commission of 1903, and published it as his Theory of Business Enterprise in 1904. The judicial idea was developed slowly and can be found only in the decisions of the Supreme Court since 1890.

From the United States Industrial Commission’s hearings and findings come such illustrations as follows: Andrew Carnegie had the strategic position in the steel industry in that his costs of production were the lowest and he owned iron and coal mines and the lake barges and railways needed to bring his materials to his furnaces and mills in Pittsburgh. He had not carried his product into the tinplate end of the industry; but he announced his intention of building such a plant with the latest improvements on the shores of Lake Erie. It became plain to all who knew Carnegie’s methods of destructive competition that this new plant would drive them out of the market. J. Pierpont Morgan and Company and their lawyers were then called upon to construct a huge holding company which should take over all of the plants necessary to form an integrated whole of all corporations in all branches of the industry. It was necessary for this combination to buy all of Carnegie’s interests, whose value as corporeal property was estimated on the basis of reconstruction cost at about 75 million dollars. But, owing to Carnegie’s threatening position in the markets, he was

able to command 300 million dollars in gold bonds. This difference of 225 million dollars could not be ascribed, on the traditional theory of economics, as the value of the corporeal property. Nor was it incorporeal property since it was not a debt owed to Carnegie. The only other name that could be given to it was “intangible property,” the name given by the financial magnates themselves. Veblen rightly interpreted this intangible property as merely an exploitation or “hold-up” value, because it arose solely from the need of all competitors to remove Carnegie from the price-cutting competition which it was known he would initiate.

As for all the other companies taken over by the holding company, they were willing to exchange their stocks for stocks in the holding company. The valuations given to them in terms of holding company stocks were likewise much in excess of the corporeal value of their property. So that when the United States Steel Corporation was finally organized it had a total capitalization of two billion dollars, including 300 million dollars debt owing to Carnegie and one billion seven hundred million dollars of common and preferred stock, whereas the value of the corporeal property at cost of reproduction was probably less than one billion dollars. This intangible valuation was eventually built up out of profits into a corporeal plant equal in value to the original intangible value. The excess original valuation of one billion dollars above the corporeal property value was given the name “intangible property,” or “intangible value,” because it was asserted that the increased prospective earning power of the holding company would justify that amount of valuation, which eventually proved true.

Veblen, in 1904, could properly say that intangible value based on expected earning power was literally only a “pecuniary” valuation, and not the “industrial” valuation of the traditional economics which always held that value tended towards the cost of reproduction of the plant and commodities. The Steel Corporation was evidently not a monopoly. It should therefore come under the economists’ competitive standard of cost of production, for the holding company purchased only the number of companies needed to round out an integrated industry. It was purely the exercise of the rights of private property, without monopolization, and this was so decided by the United States Supreme Court in 1920.

Hence Veblen distinguished “capital” as the value of the corporeal property; but he distinguished intangible value, or intangible capital, as the purely pecuniary valuations by business men, according to their strategic power of holding up the community and “getting something for nothing.” In this he was correct.

Thus Veblen was the first who built upon the modern concept of intangible property, which he derived directly from the customs of business men who used the term. Veblen practically disregarded the corporeal property of primitive society and of the classical, Marxist, and hedonic economists, as well as MacLeod’s incorporeal property of the future. He capitalized the new concept of intangible property as the present value of the future bargaining power of capitalists.

But he did not investigate the decisions of the Supreme Court. The Supreme Court of the United States, when cases arose, rested its decisions on this same new phenomenon of intangible property, not, however, on Veblen’s exploitation, but on its own historic concept of reasonable value. In some cases this doctrine sustained the contentions of the capitalists, as in the United States Steel Dissolution Suit (1920). In other cases it greatly reduced the values contended for by the capitalists. In still other cases it gave a much higher value to the properties than the capitalists contended against.

The court’s valuation of intangible property, however bitterly fought on both sides, plaintiff and defendant—always contained a public purpose—while Veblen strongly contended that a science of economics, like other sciences, does not properly permit the introduction of purpose.

The beginning of the court’s recognition of the new concept of intangible property was in the year 1890, when the court declared that the reduction of railway rates by the Minnesota Railway Commission was a “taking of property,” although it was taking, not the corporeal property, but the intangible property of power to fix prices. The court also decided that the taking of property was a judicial question, and not a legislative question, under the Fourteenth Amendment to the Federal Constitution which prohibited a state from taking property without due process of law. In the preceding similar case of Munn v. Illinois (1876), when the court’s meaning of property was corporeal property, the court had held that the reduction of rates by a state legislature was not a taking of property, but was only a regulation of the use of property. But in 1890 the lawyers of the railway company petitioned the court to reverse itself and to hold that taking the “value” of the property by reducing freight rates was also a “taking” of property under the constitution. They were correct in that what was now taken was not the corporeal property of the company but was the intangible

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3 Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota, 134 U.S. 418 (1890)
property of the right to charge such prices as the corporation wished and could. In other words, the lawyers were standing for Veblen's meaning of intangible property. The court accepted their contention to the extent that the taking of the newly defined intangible property was a judicial question to be decided by the Supreme Court and not by the state of Minnesota, and therefore the state rates were invalid.

In this way it was in the year 1890 that the first step was taken toward changing the meaning of property from corporeal property to intangible property. With this change the meaning the Supreme Court usurped what had previously been considered the right of the states, acknowledged in the Munn case, to regulate prices charged by public utilities.

The next significant step in recognizing intangible property as a value entirely different from the economists' meaning of corporeal property was in the case of Adams Express Company v. Ohio. This was a taxation case, and the Supreme Court, against the protest of the corporation, raised the value of the property in question, for purposes of taxation in the state of Ohio, from $23,000 to $449,377. The corporeal property of the economists and the common law were the horses, wagons, safes, pouches, and similar tangible property. The intangible property was the whole market value of the stocks and bonds based on the expected earning capacity of the corporation as a going concern, of which Ohio's proper share among the states was $449,377. In this case the intangible property was eighteen times as much as the corporeal property. The court said, on rehearing, that "It is enough that it is property which though intangible exists, which has value, produces income and passes current in the markets of the world."*

In this case it will be seen that the court recognized precisely Veblen's distinction between "capital" as the value of corporeal property ($23,000)—corresponding indeed to the prevailing theories of economists—and the new phenomenon of the value of intangible property ($449,377). But instead of leaving the matter, as did Veblen, as a purely scientific hypothesis of economics about which nothing should be done, the court proceeded, under that rule of public purpose which requires equality of treatment in matters of taxation, to raise the reasonable value for taxation purposes from the older value of corporeal property to the 18-fold greater value of intangible property.

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* * Adams Express Co. v. Ohio State Auditor, 165 U. S. 194 (1897); rehearing 166 U. S. 185 (1897). Commons, op. cit., 172.

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One more case will indicate a difference between Veblen's "scientific" treatment of intangible property and the court's public purpose treatment: The San Joaquin and King's River Canal and Irrigation Company had built an irrigation system which, on the principle of Veblen's intangible property, the Corporation had valued at $18 million. The state of California had furthermore authorized the company to charge rates for water at such amounts as would yield 8 per cent on this valuation. The United States Supreme Court, in the case on appeal from a lower court which had decided favorably to the company, reduced the value from $18 million to $6 million, and reduced the rate of return on this reduced intangible capital from the original contract rate of 8 per cent to the reasonable rate of 6 per cent. In other words, the court reduced the allowable earning capacity of the company about 30 per cent and ordered a corresponding reduction in water rates. So that, while recognizing Veblen's scientific observation of what the capitalist actually does to build up intangible capital, the Supreme Court deemed it extortionate in this case and reduced the earning capacity to what it thought was a reasonable earning capacity. The court said, in justification of its decision:

"It is not confiscation nor a taking of property without due process of law, nor a denial of the equal protection of the laws, to fix water rates so as to give an income of 6 per cent upon the then value of the property actually used for the purpose of supplying water as provided by law, even though the company had, prior thereto, been allowed to fix rates that would secure to it one and a half cent a month income upon the capital actually invested in the undertaking. . . . The original cost may have been too great; mistakes of construction, even though honest, may have been made, which necessarily enhanced the cost; more property may have been acquired than necessary or needful for the purpose intended."*

We can thus see the highly different conclusions reached by Veblen and the Supreme Court upon the newly arrived concept of intangible property which each of them was investigating at the same time after its recognition by the court, in the year 1890. The Veblen conclusion reaches a theory of exploitation, the Court reaches a theory of reasonable value. Veblen reaches it suddenly in a book; the court reaches it experimentally by investigation, by mistakes.

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* Stanislaus County v. San Joaquin and King's River Canal and Irrigation Co., 192 U. S. 201, 24 Sup. Ct. 241 (1904). Whitten, R. H., Valuation of Public Service Corporations, 59 (1912). The language of the Court in determining reasonable value was used in the Public Utility law of Wisconsin, 1907, drafted by the present author, and copied by other states.
Yet in institutional economics it is exactly this bias which we investigate as a part of the whole economic process. Even when Veblen comes to a specification of these attitudes of worldly wisdom, which he assembles under the name of pragmatism, they turn out to be special cases of his general idea of institutional conduct, for, he says, the intellectual output of worldly wisdom

"is a body of shrewd rules of conduct, in great part designed to take advantage of human infirmity. Its habitual terms of standardization and validity are terms of human nature, of human preference, prejudice, aspiration, endeavor, and disability, and the habit of mind that goes with it is such as consonant with these terms."

When we examine these terms of "worldly wisdom," we find that they are summarized in our concept not of a vague human nature, but of transactions and the working rules of going concerns wherein collective action controls individual transactions. In the field of jurisprudence these terminate in the theories of reasonable value and due process of law, always inspired by the collective purposes of the parties who make rules for a conflict of interest to be decided with the public interest in view. But, with Veblen, whose theories are not derived from judicial decisions but from the evident exploitation of capitalist transactions when left unregulated by law, institutionalism becomes all of the exploiting devices which capitalists can invent and use.

In other words, we use the term "pragmatism" always in the scientific sense of Peirce as a method of investigation, but we consider that Peirce used it only for the physical sciences where there is no future and no purpose, while James and Dewey used it always for the human sciences, where the subject-matter itself is a pragmatic being always looking to the future and therefore always motivated by purposes. Thus, without leaving in the air all the enumerated special cases of exploitation, we collect them together in the general concept of all kinds of collective action in control of individual action according to the evolving working rules of the various customs and concerns. These rules and concerns can also be investigated by the pragmatic method of science, just as the technological rules of the physical sciences can be investigated; and they can thus be investigated as "matter of fact" in the evolving decisions of courts and arbitration tribunals, and in the changing meanings of reasonable value, as well as in the unregulated exploitations of Veblen.

*ibid., 19-20.

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1 Veblen, T. "Why Is Economics Not an Evolutionary Science" (1898); "The Place Science in Modern Civilization" (1904); "The Point of View" (1908). Reprinted in the Place of Science in Modern Civilization and Other Essays (1909).
3 Veblen, T., The Place of Science in Modern Civilization and Other Essays, 17.
4 Ibid., 19.
It is in the changes of these collective rules, including custom and going concerns, and all kinds of social philosophies, that we find, as does Veblen, the evolutionary theory of economics. No better demonstration of the reason why the orthodox economist could not develop an evolutionary theory has been given than Veblen's characterization of the faulty conception of human nature of the Austrian economists. This we have quoted above, as being the same as Bentham's concept. But we avoid the faulty concept by making the subject-matter of economics the transactions of individuals and the going concerns of collective action.

2. From Accrual of Wealth to Accrual of Ideas

We have noted the incoming of the idea of society in the decades of the 1830's and 1840's and the accompanying naïve and magic formulae of an infinite accrual of the social services of the past embodied in the material goods and fixed capital of the present. But is it a physical accrual, when those embodied services of the past have long since been worn out, depreciated, and obsolete; when they must be continually replaced by new labor and improved by new inventions, giving rise to the concept of turnover? Is it not rather the accumulation of embodied ideas from the dawn of civilization to the present steam, gasoline, and wireless? The scientist, engineer, or mechanic of today is simply repeating the ideas of the lever of Archimedes, the gravitation of Galileo and Newton, the electricity of Franklin, and the thousands of ideas of scientists, engineers, and mechanics of the centuries of civilization.

Veblen, under the name “instinct of workmanship,” substituted this evolutionary institutional process of ideas for the physical concepts of accrual of physical capital, and thus gave a proper setting for the turnover concepts of recent years. His “instinct” of workmanship, however, we should name the custom and law of managerial transactions. It led to the orderly production of commodities and services regardless of quantities, prices, and ownership. But this custom and law, as we have seen, is controlled by the modern rendering of the original legal doctrines of assumpsit, quantum meruit, and the right of the owner to command the behavior of those whom he admits on his premises.

Veblen had seen the attempt of Karl Marx to separate the classical double meaning of wealth or capital, as material and ownership of the material, into two antagonistic entities—social labor-power and the collective capitalist ownership of the materials which that labor converted into use-values. But Veblen perceived that the two entities which Marx thus constructed were only two metaphysical substances, the one derived from Hegel's dialectics, the other from the natural rights and natural liberty of the economists. The Hegelian scheme was directed towards a predetermined goal which, on the spiritual side of Hegel himself, was the unfolding of the spirit until it should reach a German world empire of unity and liberty, but which, on the heterodox side (led by Feuerbach), had become Marx's materialistic unfolding of modes of production until it should reach a world empire of the proletariat. Marx's essential interpretation was the foreordained decay of the capitalist system of ownership and the revolutionary capture of that system by the unpropertied and unemployed class who all along, as Veblen interprets Marx, had had a natural right to the whole product of their labor.

Hence the Marxian scheme, according to Veblen, was pre-Darwinian, for the Darwinian evolution has no foreordained goal, but is a continuity of cause and effect without any trend, any final term, or consummation. It is “blindly cumulative causation.” It is the rise and fall of civilizations and not the unfolding of any one civilization to Marx's foreordination of labor ownership. It may as likely turn out to be ultimate control by capitalists as control by labor, wherein Veblen foretold the possibility of Fascism as well as Communism. These variabilities would be the Darwinian evolution, not foreordained, and Veblen endeavored to work them out as mere process without a goal.

But Darwin had two kinds of “selection” among the variabilities: Natural Selection and Artificial Selection. Ours is a theory of artificial selection. Veblen's is natural selection.

According to Veblen, the Marxian theorists, on account of the Darwinian theory of “natural” selection then entering the field of economics, were reaching a period of doubt as to the inevitability of the irrepressible class conflict, and the resort to force was deprecated by them. The leading Marxists were making concessions to patriotism, and to the changing international situations into which they were being thrown. Herein Veblen foretold their changed attitude at the opening of the World War, where patriotism overcame their ideas of class struggle and ultimate world domination by the proletariat.

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16 Above, p. 218, Bentham.
17 Above, p. 372, From Division of Labor to Association of Labor.
18 Above, p. 294, From Circulation to Repetition.

19 Veblen, T., The Place of Science in Modern Civilisation and Other Essays, 431.
To meet this new Darwinian idea of continuous change and its abandonment of a foreordained goal, Veblen simply substituted the idea of Process, without ascertainable goal. But in doing so he created an even greater antagonism than did Marx himself, between the labor process of increasing the nation's material goods and the capitalistic process of withholding, holding back and putting the workers out of employment.

While Veblen rightly charged Marx with the pre-Darwinian concept of foreordained evolution derived from the metaphysics of Hegel, yet it is hardly conceivable that Marx could have built upon any other foundation, when he held only to the classical idea of corporeal property. If property was only the mere ownership of materials, and if the value of that property was merely the amount of socially necessary labor embodied in it, then the only concept of change that Marx could introduce was that of the augmentation of the materials produced by labor, paralleled, of course, by the augmentation of ownership.

But this is not the Darwinian process of minute changes, ending eventually in the different species. Hence Veblen could move from the metaphysics of entities, with foreordained goals, to the Darwinian idea of a process, only by changing from the Marxian and orthodox concept of corporeal property to the new and indeed post-Marxian concept of intangible property. The latter is a process itself of buying, selling, borrowing, lending, and augmenting the pecuniary value of property rights; while corporeal property has, in itself, no power of buying or selling, and its augmentation is only the increase of use-values by the labor process of working and invention.

Consequently if, according to Marx, this mere ownership of material things was being centralized in the hands of the few, ownership itself becomes a kind of entity entirely separate from the other entity, social labor-power. Veblen, when he changes from entities to processes, must change from corporeal property which contains no pecuniary process of buying and selling, to intangible property which is none other than the pecuniary process itself. Correspondingly, when he changes from Marx's social labor-power he must substitute an orderly process of the creation of material wealth, uncontrollable by the pecuniary process. This we name the expected orderly repetition of Managerial Transactions. Veblen named it the Instinct of Workmanship.

Veblen knew of the scientific management theories of Frederick Taylor only in their beginnings, when they had not reached the humanitarian content contained in the analysis of a managerial transaction which we have quoted from Henry Dennison. Nor had scientific management yet reached the general social well-being as the goal of the managerial economists of recent years. Taylor's idea of scientific management was solely the engineer's idea of measurement applied to labor as it had been applied to machinery. The manager's position was just how much and how the laborer should produce. Veblen in 1914 revolted against this idea and built up the contradictory idea of the idealized workman, whether manual, scientific, or managerial, carrying forward the traditions of good workmanship.

For these reasons Veblen became the intellectual founder of all the modern schemes which would place the engineer, instead of the capitalist, at the head of the social process.

Veblen's theory here was again a substitution, in place of the orthodox static theories of equilibrium and harmony of economic facts, of an evolutionary theory of knowledge, science, arts, habits, and customs of the producers of wealth regardless of the sabotage of capitalistic ownership. Thus the material things themselves of the orthodox and Marxian economists, such as machines, commodities, natural resources, disappear as the subject-matter of economics, and reappear as the applied knowledge and acquired habits of the instinct of workmanship, headed by engineers.

Indeed, in this, Veblen is quite correct, for the material things of the older economists are only the use-values which appear, disappear, are renewed and invented by the continuous repetition, or turnover, of what we resolve into managerial transactions. But it is knowledge, habit, invention, that endure and reconstruct new materials, because these are the human abilities unfolding through the ages by instruction, tradition, experience, experiment, investigation. This knowledge is simply technological, and is, as Veblen says,

"the matter-of-fact knowledge of the physical behavior of materials with which men have to deal in the quest of a livelihood. ... To say that minerals, plants and animals are useful—in other words, that they are economic goods—means that they have been brought within the sweep of the community's knowledge of ways and means."

It is this that gives an institutional character to even the material things themselves which had formed the basis of orthodox eco-

18 Above, p. 64, Managerial Transactions.
19 The Taylor Society, Scientific Management in American Industry (1920).
20 See his The Engineers and the Price System (1917).
21 Veblen, T., The Place of Science in Modern Civilization and Other Essays, 355, 310.
nomic. It is the reason why we substitute “managerial transactions” for the physical concepts of “material” and “labor.” The material things come and go with a rapid turnover by depreciation, obsolescence, and consumption; but that which keeps up their renewal and increasing efficiency is the traditions, customs, and innovations handed down from one generation to the next in the evolving character of managerial transactions, but which Veblen, by a kind of “reification,” names “the immaterial equipment of industry, the intangible assets of the community.” This “immaterial equipment” is inherited and transmissible, for it is “the conscious pursuit of an objective end which the instinct in question makes worth while.”

For this reason Veblen gives the name “tropism,” or “tropismic activity” for such animal or human behavior as is unreflective or non-deliberative, and he reserves “instinct” for human volitions. For this reason we name it custom, as he intended, instead of instinct. Such instinct, he says, is “a matter of tradition out of the past, a legacy of habits of thought accumulated through the experience of past generations.” It “falls into conventional lines, acquires the consistency of custom and prescription, and so takes on an institutional character and force.”

These accustomed ways of doing and thinking are “sanctioned by social convention and so become right and proper and give rise to principles of conduct. By use and wont they are incorporated into the current scheme of common sense.” While thus the instincts are not so much hereditary as educated, they are subject to variation, selection, and survival through competition and struggle, primarily as adaptations to meet the material requirements of life and the cultural changes of civilization.

The instinct of workmanship, or, as we should say, the custom of workmanship, runs, according to Veblen, through all other proclivities, for it is the sense of fitness respecting the ways and means for accomplishing any ultimate purpose. In the arts, “where the sense of beauty is the prime mover,” the instinct of workmanship provides the technique; in religion it is the ritual; in courts of law it is procedure and legal technicalities; in industry it is the process of production and the organization of a force of employees. The business man, too, shows the instinct of workmanship in his manipulation of markets and of human needs for the purpose of obtaining a profit. “So that this instinct may, in some sense be said to be auxiliary to all the rest, to be concerned with the ways and means of life rather than with any one given ulterior end.” “It involves holding to a purpose.” It is concerned with “practical expedients, ways and means, devices and contrivances of efficiency and economy, proficiency, creative work and technological mastery of facts. It is a proclivity for taking pains.”

Thus Veblen is compelled to introduce purpose into his instinct of workmanship, and thereby to change from Darwin’s “natural” selection to Darwin’s “artificial” selection.

Veblen’s second and complementary concept which converts physical capital into an evolutionary process is his concept of a going concern. His concept is, however, what we have named a technological “going plant,” reserving the term “going concern” to include both the going plant and the going business. Veblen’s “going concern,” or rather going plant, is a turnover of materials, machines, buildings, operated and maintained by an organization of superintendents, experts, foremen, and workers turning out use-values. Karl Marx had given his attention to the physical materials and equipment of “embodied labor”; Veblen gave attention to the organization of workmanship within the plant, which we name the hierarchy of managerial transactions. Hence Marx expressed the concept in the passive and metaphorical terms of an “organic composition of capital,” but Veblen expressed it in terms of a managerial process under the “foremanlike oversight and correlation of the work in respect of kind, speed, [and] volume,” a “function of the foreman’s mastery of the technological situation at large and his facility in proportioning one process of industry to the requirements and effects of another.”

This is “efficiency,” said Veblen, although he rejects the term “purpose,” parts with “modern scientists” who would reject such a word as efficiency because it is said to contain the metaphysical concept of “causation.” Efficiency is, in truth, as we agree with Veblen, a concept of cause and effect, for it is the intentional control “exercised by the master-workman, engineer, superintendent,” and it “determines how far the given material equipment is effectually to be rated as ‘capital goods’.”

This we should certainly name purpose, and Veblen’s physical capital becomes, not a quantity of things, but a changing process of usefulness directed by “prevalent habits of thought.” The “physical properties of the materials are constant,” and it is “the human

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22 Ibid., 33o.
24 Ibid., 16 ff.
25 Ibid., 29–35.
26 Veblen, T., The Place of Science in Modern Civilisation and Other Essays, 345.
27 Ibid., 345.
agent that changes. Capital is not an accumulation of past products of stored-up labor—these are transitory and aimless—capital is a going plant of industrial knowledge and experience guided by the master-workman for the service of mankind. Capital is Henry Ford and his hundred thousand workers, and Ford’s book, My Life and Work, is Veblen in action.

But Veblen and Ford recognized another instinct and had another meaning of Capital. This instinct might have been derived from Adam Smith’s “propensity to truck, barter and exchange one thing for another,” were it not that Smith saw in it the invisible hand of beneficence, while Veblen saw in it the malignant hand that disrupts the technical process in order to obtain “something for nothing.” This “pecuniary instinct” is Property. Property is Capital, and, just as Veblen’s capitalist makes his pecuniary gain by the “right of abuse” rather than the “right of use,” so Ford, as a result of the court’s decision, conforms to Veblen by buying out the stockholders and getting rid of their legal claims for profits and interest, in order to become in truth Veblen’s “master workman” moved by the instinct of workmanship.

Adam Smith’s concept of property, according to Veblen, belonged to the regime of handicraft and petty trade, before the machine process ripened, when the workman was the master-workman producing and selling his product, and when the merchant made his profit by adapting himself to changes in demand and supply of commodities, over which he had no control. But modern business property is an investment, not in commodities as they pass between producer and consumer, but in the mechanical processes of industry itself. Smith’s concept of property, we noted, went back to John Locke, who substituted a natural right of property and liberty, based on the worker’s ownership of his own person and the products of his labor, in place of the authority of a superior based on prowess, service, and fealty running back from secular authority to divine authority. In the time of Smith, economic life had become standardized “in terms of workmanship and price.” Retaining, however, these ideas of natural right and liberty, modern business has abandoned John Locke’s finding of the origin of property in the creative efficiency of the workman, and finds its basis in the capitalistic or expected earning capacity. Property is not merely the ownership and liberty to dispose of what one produces; it is the present value of what is expected will be acquired from others who will produce. Thus property is the monetary capitalization of earning power, and this capitalization is modern Capital.

This is because the machine process has succeeded the handicraft process. The “machine process” is larger than the machine, it is a whole nation. It is procedure on the basis of a systematic knowledge of forces employed; agricultural and animal industries are also machine process. It is larger than the single plant, since none of the processes are self-sufficing but the “whole concert of industrial operations is to be taken as a machine process.” Hence, summarizing Veblen, there must be adjustments within the plant, adjustments between plants and between industries, measurements of materials and appliances, standardized sizes, shapes, grades, gauges, not only of commodities and services, but also of time, place, and circumstance. It is a world-wide “comprehensive, balanced, mechanical process”—the engineer and not the capitalist.

So nicely is this process balanced that any disturbance at any point spreads quickly to other points and may bring down the entire process with idleness, waste, and hardship. Here, says Veblen, is where the business man comes in. “It is by business transactions that the balance of working relations between the several industrial units is maintained or restored, adjusted and readjusted, and it is on the same basis and by the same method that the affairs of each industrial unit are regulated.” All of these relations are “always reducible to pecuniary units, since the business man, as such, is interested not in the “plant” as an industrial equipment, but in the plant as pecuniary “assets.” It is to him an “investment,” and investment is a pecuniary transaction whose aim is pecuniary gain in terms of value and ownership. He makes his gains, not by workmanship which is serviceable to the community, but by business which is not serviceable.

The distinction occurs in two kinds of assets, “tangible” and “intangible,” the former being “peculiarly serviceable capital goods,” the latter being “immaterial items of wealth, immaterial facts owned, valued, and capitalized on an appraisement of the gain to be derived from their possession.” These intangible assets arise from the fact that ownership of the community’s physical equipment makes the capitalist the “de facto owner of the community’s aggregate knowledge of ways and means,” that is, owner of the community’s “immaterial equipment” as found in the technological abilities of engineers and workmen. But ownership gives to the capitalist not only the right of use of this technological capacity of the workers,
but also the “right of abuse and of neglect and inhibition.”

Thus the legally prohibited “restraint of trade” is not the only form of abuse—the characteristic and all-prevailing abuse is that of making a pecuniary gain by “advised idleness of plant,” by “what the traffic will bear,” by “obstructive tactics designed to hinder the full efficiency of a business rival,” by “growing out” rival firms, by raising prices, so that, “under the regime of capital, the community is unable to turn its knowledge of ways and means to account for a livelihood except at such seasons and in so far as the course of prices affords a differential advantage to the owners of material equipment.”

For “diserviceability may be capitalized as readily as serviceability.” Not to mention naval and military establishments for protecting trade, or investments in race tracks, saloons, etc., or wasteful and spurious goods which involve “a perverse use of the technological expedients used,” there is also the characteristic capitalization of intangible assets known as “good-will.” This is Veblen’s name for the capitalization of differential business advantages, including not only the original “kindly sentiment of trust and esteem on the part of a customer,” but the more modern meaning of special advantages inuring to a monopoly or a combination of business concerns. It is these differential advantages over the community and over rivals, created by power to withhold supply, that constitutes the bulk of intangible assets, and this attribute furnishes us with the distinction to be drawn between tangible and intangible assets. Although both tangible and intangible assets are valuable on account of their income-yielding capacity to the owner, yet the presumption is that the former are productive of actual gain to the community, representing “materially productive work,” which furnishes use-values, while intangible assets “in the aggregate, and on the average” are “presumably disserviceable to the community,” since they furnish only money values to the owner.

The substantial difference lies in the fact that tangible assets are a capitalization of the technological proficiency of the community, that is, of the processes of production; whereas intangible assets are a capitalization of the adjustments or maladjustments, the differential control of supply, between industries and markets, that is, of “expedients and processes of acquisition not productive of wealth, but affecting only its distribution.” Hence intangible assets are pecuniary privileges of business arising only from control of supply and power to withhold supply if prices are not satisfactory, and are

Veblen, T., The Place of Science in Modern Civilization and Other Essays, 357 ff.

Therefore exactly the opposite of productive efficiency of workers, which increases the supply.

Hence arises the distinction between “industrial” and “pecuniary” employments. The classical division of factors of production as land, labor, and capital, proved inadequate, and a fourth factor, the entrepreneur, was introduced by economists as a peculiar kind of laborer with a peculiar kind of wage. At the same time, says Veblen, the original premises of a providential order of nature remained, with its theorem of a natural or normal equilibrium which worked out an “equivalence between productive service and remuneration.” Profits, therefore, became, for the economists, the just equivalent of enterprise—=rent, wages, and interest had been the equivalent of land, labor, and capital.

Afterwards, a peculiar class of business men, called speculators, came into view, not having any “interest in or connection with any given industrial enterprise or any industrial plant.” A half-century ago the business manager might have been construed as “an agent occupied with the superintendence of the mechanical processes.” At that time the speculative function might have been considered inseparable from the industrial function, and therefore a distinction could be made between “legitimate” and “illegitimate” speculation, the former connected with “the successful operation of some concrete industrial plant,” the latter furnishing no service to the community. But, in recent times, according to Veblen, the connection has been severed, so that a complete line of business or pecuniary employment has been separated from industrial or mechanical employment. Hence “the line falls not between legitimate and illegitimate pecuniary transactions, but between business and industry,” that is, between power to withhold supply and power to increase supply.

Business activities, Veblen continues, are “lucrative without necessarily being serviceable to the community.” They include the activities of speculators in securities, real estate agents, attorneys, brokers, bankers, and financiers, who shade off “insensibly from that of the bona fide speculator who has no ulterior end of industrial efficiency to serve, to that of the captain of industry or entrepreneur as conventionally set forth in the economic manuals.” Their characteristic is that “they are concerned primarily with the phenomena of value—with exchange or market values and with purchase and sale—and only indirectly and secondarily, if at all, with such mechanical processes.” They are not concerned with production or consumption, but with distribution and exchange, that is, with the

Veblen, T., The Place of Science in Modern Civilization and Other Essays, 279 ff.
institution of property, which is "not to be classed, in economic theory, as productive or industrial activity at all," since the function of private property is simply that of power to withhold supply. Industry is, indeed, "closely conditioned by business," since the ownership of property means "the discretionary control of wealth." The business man decides what shall be produced and how much or little, but his object is not production or serviceability, but "vendibility." And he often gains as much or at least avoids a loss, by disrupting industry as by promoting it. In short, the gains from Veblen's pecuniary employments arise from power to obstruct and withhold production vouchsafed by the institution of property, whereas the gains from his industrial employments arise from increasing production vouchsafed by the instinct of workmanship.

It is these pecuniary gains that Veblen defined as vested interests. "A vested interest is a marketable right to get something for nothing." Vested interests are "immaterial wealth," "intangible assets." They are the outgrowth of three main lines of business, namely, limitation of supply, obstruction of traffic, and meretricious publicity, all with a view to profitable sales. They are "devices of salesmanship, not of workmanship." They are not, however, dishonest—"they are conducted strictly within the lines of commercial honesty." They are simply unearned incomes allowed by law.

For this reason they are named "free income," in that they are obtained by their recipients out of the total mechanical production of the community, through power to withhold supply and opportunity, but without rendering an equivalent service through increasing the supplies of commodities and opportunities of employment.

What, then, are the objects with which pecuniary employments are occupied? The early physical economists, Quesnay, Ricardo, and Marx, eliminated money entirely or reduced it to a commodity, and represented rent, profits, and wages as quantities of commodities exchanged in a barter economy, with money as a mere unit of account not different from other weights and measures. But Veblen's modern business man is occupied solely with obtaining money itself, or rather with obtaining various legal instruments such as stocks, bonds, and checking accounts at the bank, which have the capacity of commanding commodities and labor in exchange. These legal instruments are evidences of ownership and not products of workmanship. They have no necessary connection with commodities, in fact are not commodities at all, but are legal instruments for controlling the supply of commodities. The oldtime workman or merchant brought actual commodities, previously produced, upon the market. But these modern intangible properties, taken as a whole, are, according to Veblen, titles or claims to something which has not yet been produced, namely, an expected profit earning capacity, that is, differential advantages over and above expected profit. "Intangible assets," in Veblen's phrase, are all the advantages of keeping up prices by restricting supply, and keeping down wages by restricting the demand and increasing the supply of labor. On this account, Veblen's intangible properties are claims to differential marketing advantages, which, when distributed among the claimants, take the form of profits, interest, and rent. They have no necessary basis in the mechanical processes of industry, and depend solely on rights of ownership and resulting control of supply.

In this respect, it will be seen, Veblen followed historical lines and made the same distinction which the United States Supreme Court finally made in the Adams Express Company case in 1896. He has enlarged, as did the court, the definition of both property and capital from that of corporeal property to that of expected earning capacity. It is the buying and selling of this earning capacity that constitutes "traffic in vendible capital." This vendible capital, as we saw in the Adams Express Company case, has no definite relation to the physical capital. It is, according to Veblen, a "fund of money values," and "bears but a remote and fluctuating relation to the industrial equipment... of the old-fashioned concept of industrial capital." The old basis of capitalization was "the cost of material equipment owned by any given concern... The basis is now no longer given by the cost of material equipment, but determined by the capacity of the corporation as a going concern." In other words, "the nucleus of capitalization is not the cost of the plant, but the concern's goodwill, so called."

And the meaning of "good-will" has been enlarged, says Veblen, to meet the requirements of modern business methods. "Various items, of very diverse character, are to be included under the head of good-will; but the items included have this much in common that they are 'immaterial wealth,' 'intangible assets'; which, it may parenthetically be remarked, signifies among other things that these assets are not serviceable to the community, but only to their owners." And he proceeds to itemize the constituents of goodwill in what he considers its modern application.

"Goodwill... comprises such things as established customary business relations, reputation for upright dealing, franchises and

above, p. 63. From Corporations to Going Concerns.
Veblen, T., The Place of Science in Modern Civilization and Other Essays, 380.
privileges, trade-marks, brands, patent rights, copyrights, exclusive use of special processes guarded by law or by secrecy, exclusive control of particular sources of materials. All these items give a differential advantage to their owners, but they are of no aggregate advantage to the community. They are wealth to the individuals concerned—differential wealth; but they make no part of the wealth of nations. 27

If then, vendible, or immaterial, capital is identical with good-will, and good-will is but titles of ownership, what are the physical things that are owned? There must be a substantial basis of ownership. The primitive master-workman owned his building, materials, tools, and products, and the modern business man owns his physical plant but is not concerned with its technological properties. He owns "vendible capital," which, however, must also refer to something tangible which can be held and owned like a house, horse, or machine. Hence Veblen's corporeal concept of property, which led Fisher to assert that the business man owns his customers, 28 leads Veblen to assert that the business man owns his laborers. 29 Intangible capital, or good-will, is like physical capital or commodities, the only difference being that the owner of intangible capital owns his laborers, while the owner of physical capital owns buildings and tools. By owning his laborers, he owns the producing organization inseparable from the going plant, to which that producing organization is attached. This makes possible a quantitative difference, in that the traffic is vendible—that is, intangible capital—and is conducted on a much larger scale than traffic in physical products, and yields greater profits. 30

We have seen the same figure of speech in the court's opinion in the Hitchman case, 42 affirming what became known as the "yellow-dog" contract, where the term "good-will" was so defined as to give the employer a "right" of ownership in the services of his employees as against not only duresse and coercion, but even against persuasion by a labor union. Veblen's concept is not far removed from the court's in that case.

Yet it must be remembered, from our formula of equal rights, 43 that the alleged ownership of consumers and laborers is not ownership at all, but is the liberty-exposure relation of buyer and seller.

15 Veblen, T., The Theory of Business Enterprise, 139-140.
17 Veblen, T., The Place of Science in Modern Civilization and Other Essays, 146.
18 Veblen, T., The Theory of Business Enterprise, 166; The Place of Science in Modern Civilization and Other Essays, 369 ff.
19 Commons, John R., Legal Foundation of Capitalism, 266.
20 Above, p. 78, Formula of Economic and Social Relations.
had not got beyond a broad concept of productivity. Taylor had to find something that defined the problem narrowly enough to be amenable to measurement and universally applicable. These limits were found in the engineering problem of improving human capacity and in the economic problem of inducing greater willingness. The former, for Taylor, was not different at all from any problem of mechanical engineering—the human being is, not a commodity, but a machine. But the economic problem was, in the words of Ewan Clague, that of "selling" scientific management to the workers.

"It should be perfectly clear," said Taylor, "that the greatest prosperity for the workman, coupled with the greatest prosperity for the employer, can be brought about only when the work of the establishment is done with the smallest combined expenditure of human effort, plus nature's resources, plus the cost for the use of capital in the shape of machines, buildings, etc. . . . The general adoption of scientific management would readily in the future double the productivity of the average man engaged in industrial work. Think of the increase, both in necessities and luxuries of life, which becomes available for the whole country, of the possibility of shortening hours of labor when this is desirable, and of the increased opportunities for education, culture and recreation which this implies. Scientific management will mean . . . the elimination of almost all causes of industrial dispute. What constitutes a fair day's work will be a question for scientific investigation, instead of a subject to be haggled and bargained over. . . . We do not bargain whether the sun rises in the East, we measure it."

Thus economics is reduced to the engineering problem of man's relation to nature. Taylor, like Marx and Veblen, carefully excludes all so-called productive factors which confused the physical economists' notion of productivity, such as land, capital, machines. These are only tools. Productivity is a relation between output and labor, including management and the installation of the plant. It is the rate of output per man-hour. This is efficiency.

Increasing efficiency creates a surplus without increasing fatigue. The capitalist should share it with the laborer, but the latter is not entitled to it if he gets the going rate of wages. It is not a question of rights, it is a problem of management.

For the next step in the transition from Marx's metaphysical social labor-power, Veblen's biological instinct of workmanship, and Taylor's mechanization of labor, to the social problem of managerial transactions, we turn to Henry S. Dennison, the employer-

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4 Above, p. 567, Averages.

4 Taylor, Frederick W., Principles of Scientific Management (1911); Copley, F. B., Frederick W. Taylor, 2 vols. (1923); Hoxie, B. F., Scientific Management and Labor (1918); Bulletin of Taylor Society; Clague, Ewan, Theory and Measurement of Physical Productivity (MSS). The following is mainly an abstract of Clague's dissertation on Taylor.

* Mathewson, S. B., and others, Restrictions of Outfit among Unorganized Workers (1917).

4 Taylor, F. W., op. cit., 11, 142.
3. From Managerial Transactions to Bargaining Transactions

Managerial transactions arise from the relations of a legal superior to a legal inferior. The psychological relation, at law, is command and obedience. But bargaining transactions arise from the relations of those who are legally equal. The psychological relation is persuasion or coercion. Just as Veblen's instinct of workmanship afterwards resolves into Dennison's "reasonable" managerial transactions of a going plant, so Veblen's pecuniary acquisiteness resolves afterwards into the United States Supreme Court's reasonable values as they would be agreed upon by "willing" buyers and sellers in bargaining transactions of a going business. It requires the two to construct the concept of a going concern, each acting on the other—a producing organization, a buying and selling organization. And the two kinds of transactions may be made reasonable instead of oppressive, confiscatory, or exploitative.

Here it is that Veblen's instinct of workmanship, we must observe, is also an instinct of acquisiteness and pecuniary valuation. The respectable line of disturbances created by Veblen's technological workers, such as strikes, boycotts, labor turnover, sabotage, and the bargaining by high-skilled workers for higher wages, suggests the idea that the same acquisitive instincts belong to both workmen and business men. His antithesis of efficiency and bargaining holds true—efficiency is the increase of supply, bargaining is the withholding of supply. Yet the instinct of workmanship does not go on producing goods regardless of wages. The power to withhold supply unless the terms are satisfactory is indeed Veblen's pecuniary motive and his rights of property. It also is an institutional, historical fact. It has also its evolving customs. The foreman or laborer does not find the materials and labor ready at hand, furnished by nature. He finds them held by owners of materials and owners of labor-power. Before he can use them he must obtain permission from the owner. It is for this reason, perhaps, that Veblen opposed trade unions just as he opposed combinations of capital. Each was collective restraint of trade. Each is a pecuniary instinct, and each is the intangible property of bargaining power. The difference between capitalists and workers is not that the former have the pecuniary instinct and the latter do not, but that the power to withhold, protected by the laws and customs of property, is perhaps greater in capitalistic organizations than it is in labor organizations. But this is a question of degree, and questions of degree are questions of reasonableness. If they are questions of degree of power in managerial or bargaining transactions, then they can be dealt with on that basis, and there is no good reason for separating them into two entities, the idealized instinct of workmanship and the bedeviled instinct of acquisition.

The historical explanation of Veblen's cynical antithesis of business and industry is in the failure to trace out the evolution of business customs under the decisions of courts, as he had traced the technological customs. Such an investigation reveals the evolution of his "intangible property" which has consisted in making the distinction, not allowed by Veblen, between good-will and privilege, good-will being the reasonable exercise of the power to withhold, and privilege being the unreasonable exercise of that power. It is only in the analysis of a bargaining transaction that the economic foundation for this evolution can be found. Psychologically it is the distinction between persuasion and coercion; legally it is the distinction of rights, duties, liberties, and exposures; economically it is the three differences between free competition and fair competition, between equal opportunity and discrimination, between reasonable and unreasonable price, all of which are included in the evolution of the meaning of due process of law. These psychological, legal, and economic aspects are inseparable, as may be seen from our preceding formula of a bargaining transaction derived from the economist's concept of a market and the jurist's concept of legal relations. These are true equally of laborers and capitalists, each of whom are acquisitive and pecuniary, as well as workmanlike. It is just because this fact of evolution in the decisions of courts is not observed by Veblen that he does not arrive at a concept of reasonable value.

4. Flow of Time and Lapse of Time

The distinction between managerial and bargaining transactions is the distinction between efficiency and scarcity. The evolutionary

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43 Above, p. 64, Managerial Transactions.
44 Above, p. 59, Bargaining Transactions.
to be derived from the enforcement of a right and its equivalent duty.

The difference is doubtless subtle and its explanation is difficult for those who think in terms of modern physical science, or in terms of legal negotiability. The way in which Veblen rejected the distinction is seen in the foregoing double meaning of "lapse of time" and also in his contrast of "vendible products" with "vendible capital." Products, or tangibles, as well as intangible good-will and incorporeal debts, are each bought and sold, and the gains from buying and selling are profit or loss. The gains, he says, may in both cases "emerge under the form of a per cent per time-unit; that is to say, as a function of the lapse of time." "Yet . . . the business transactions themselves are not a matter of the lapse of time. Time is not of the essence of the case. The magnitude of a pecuniary transaction is not a function of the time consumed in concluding it, nor are the gains which accrue from the transaction." 48

True enough. The terms of a selling-buying transaction are agreed upon at a point of time, when the minds meet and titles are transferred; but, if an interval of time is agreed upon between negotiations and the future performance or payment, then Lapse of Time is of the essence of the case. An increment of profit or loss occurs, in each transaction, at a point of time, and a succession of such increments is a flow of time. Hence an interval of time is not of the essence of profit. But if the product is bought now and sold 30 days from now, the interval of time is of the essence of interest.

The interval appears, indeed, both as risk and as waiting, and each has an effect on present valuation. But Veblen eliminates the waiting and attends only to the riskings.

"The modicum of truth," he says, "in Böhm-Bawerk's proposition that 'present goods are preferred to future goods' . . . would appear to be better expressed in the formula 'prospective security is preferred to prospective risk'; . . . whereas the dictum that 'present goods are preferred to future goods' must, on reflection, commend itself as substantially false. . . . Even for the individual's own advantage 'present goods are preferred to future goods' only where and in so far as property rights are secure, and then only for future use. It is . . . present 'wealth,' not 'present goods,' that is the object of desire; and present wealth is desired mainly for its prospective advantage." 49

By "present wealth" Veblen means present value of present property rights. But this present value has two dimensions, expected

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48 Veblen, T., The Place of Science in Modern Civilization and Other Essays, 359.
risk and expected postponement. Evidently a distinction is needed in the double meaning of Veblen’s “lapse of time,” corresponding to the difference between expected repetition, including variability or risk, and expected postponement of goods or of payment. Veblen furnished indeed a notable contribution to economic theory when he substituted “change” for “certainty.” He thereby made time an essential fact of economics. But he could not see the difference between change and waiting—which is the difference between a moving point of time in the ever-present, when change occurs, and an interval between a present point and a future point of time, when waiting occurs. The first may be named a flow, the second a lapse of time. The two go together, but it was Veblen’s failure to recognize the distinction that permitted him to eliminate the incorporeal property of debt by identifying it with the intangible property of expected beneficial transactions. Not until Fisher’s *Booms and Depressions*, in 1932, was the incorporeal property of debt given its proper place in economic theory.64

Thus it was that Veblen, the pioneer of institutional economics, next to MacLeod, did not, however, have the advantage of the conclusions which, during 15 years later, were being worked out experimentally by the courts and legislatures. His critical and constructive work covered the years 1888 to 1914; his writings thereafter were mainly expositions of what he had previously done with extraordinary insight. During his pioneering days the double meaning of wealth as materials and their ownership was just beginning to be broken down in a practical way by the court’s transition from corporeal property to intangible property, but the administrative machinery for research in ascertainment of reasonable value had not yet been set in motion. This did not begin until the powers of the Interstate Commerce Commission were extended in 1908, followed by hundreds of state commissions on fair competition, reasonable discriminations, and reasonable values, as well as by industrial commissions, after 1911, the latter to ascertain reasonable relations in the conflicts of capital and labor.

Also, the movement towards scientific management had only just begun, and a professional class devoted to ascertaining and installing reasonable conditions in all the parts of managerial transactions had not yet begun to find itself.

Other applications of the principles of intangible property, especially the stabilization of prices, had not yet even been thought of, much less the administrative machinery to be devised. And Veblen’s exclusion from his system of the incorporeal property of debts, in-

64 Above, p. 668, *The Risk Discount—Overindebtedness and Depressions*. including differential rates of interest, made it impossible for him to lay the foundations (as his Scandinavian contemporary Wicksell had done) for a proposed regulation of this same intangible property by stabilizing prices through central control of discount rates and open market operations.

The problem set by Veblen of a dualism in economics between materials and intangible property has only recently been attacked by economists65 whose work we epitomize under the terms transactions, going concerns, stabilization of prices, and reasonable value. Each transaction is a valuation, not of materials, but of Veblen’s ownership of materials; each concern is both Veblen’s going plant and the business man’s going business; each fluctuation of general prices is Veblen’s exploitation; each approach towards a better understanding of reasonable value reduces this exploitation. And these are scientific, not in the sense of Veblen’s physical sciences, but in the sense of the human will in action.

II. FROM INDIVIDUALS TO INSTITUTIONS

Veblen ended in a cynical dualism of materials and ownership. Other outstanding economists in Italy, Austria, and America, whose span of life extends from the dominance of the hedonic man at the end of the Nineteenth Century to the collective suppression of hedonism in the post-war Twentieth Century, were also unable to reconcile the dualism. They abandoned, tacitly or openly, their earlier theory of individualism and went over bodily to the collective control of individuals in the conflict of interests, upon which institutional economics is built.

Friederich von Wieser, the eminent Austrian economist, wrote in 1889 his *Natürliches Werth*66 and nearly forty years later *Das Gesetz der Macht* (1926). In the first book he revised and illuminated the great work of Menger. In the second book, after the World War, he went back to his own pre-war historical studies. The two books are as different as two worlds, and no attempt was made by Wieser, in his later book, to reconcile the two or to build a whole political economy giving to each its due place.67 It turns

65 Cl. Taylor, *Horace, Making Goods and Making Money* (1898) “... as time goes its becoming increasingly necessary, in manufacturing industries, to make goods in order to make money.” (Preface, vi.)

66 *Natural Value* (1883). On the part played before the war by Tausch-Buzaworsky, Oppenheimer, and others, see Tausta, Y., “Macht und Wirtschaft,” *Jb. Staatswissenschaft* (1912), 156.

67 In his *Grundzüge der Soziologie* (1924; tr. *Social Economics*, 1927), as a matter of contrast, he starts with the “simple economy” of a supposed isolated being and then generalizes, by contrast, to “social,” “state,” and “world” economy, somewhat as we have done in passing from Crusoe to Going Concerns. But this is only illustrative and pedagogic;
out that the first book was individualistic, the second collectivist. The first was a relation of man to nature, the second a relation of man to man. The unit of the first was a commodity that satisfies wants, the unit of the second was a moral, monopolistic, or violent force that collectively subdues the individual. One was the law of Value, the other the law of Might. In the law of value all individuals are alike, equal, and free, because they are isolated and have similar relations to nature; in the law of might the individuals are the passionate and stupid masses organized by astute leaders. In the law of value Wieser sought what is permanent and enduring under all historical and institutional changes. In the law of might he sought what was changeable and compulsory throughout the ages. In the law of value he found himself conforming to the individualistic schools. In the law of might he asserts that he cannot follow either the classic or hedonic individualism, or the organic analogies to the human body. He can take things only as he actually finds them in history, and he finds that history is the history of collective suppression of individuals. “Alle geschichtlichen Bildungen sind Machtbildungen.”

Quite similarly, and with a similar emphasis, does Pareto, the distinguished Italian economist whom Mussolini honors as the economic founder of Fascism, construct two antagonistic social philosophies. In his Manual of Political Economy (1909), society is a world of “molecules” acting upon each other; “utility” is the individualistic wants of these molecules, diminishing in intensity, which induce them to act; and out of these interactions comes Pareto’s world-renowned contributions to the “equilibrium” doctrines of the mathematical economists.

But in his Treatise on Sociology, ten years later, Pareto expressly repudiates his own “molecular” concept of society. Instead of individual “utility” and individual wants, he substitutes “social utility” and “collective wants.” “Social utility” is “non-logical,” “non-mathematical,” “immeasurable,” exactly the opposite of his “individual utility.” He finds it therefore used as a cloak for political and financial corruption which has changed modern democracy, notably in Italy, France, and America, into a “demagogic plutocracy.” It degenerates into violence at home and abroad.

Pareto’s is indeed another Malthusian shift from the Age of

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Reason to the Age of Stupidity. And it is for the very reason that social utility is non-logical, non-mathematical, immeasurable, stupid, passionate, and yet collectively dominates individuals that he calls for a Fascist dictatorship that will subordinate his “demagogic plutocracy.” We have, in America, along with the Fascism towards which we are tending, the alternative problem of the formation and distribution of that social utility which calls for a social theory and practice of Reasonable Value.

When we look for the ultimate unit of investigation on which the Fascist philosophy is founded, we find it in Othmar Spann, the recognized leading economist of German Fascism. His “structure” of economy is built on the two foundations of service and value (Leistung and Wert). When we analyze these foundations, as detailed by Spann, we find that they resolve into either Managerial or Rationing Transactions, which are the social relations of Superior and Inferior. If it be individual value for the private economy, then the relation is that of a Managerial Transaction. If it be social value for the national economy, then the relation is a Rationing Transaction.

In this respect the ultimate social unit of Fascism is the same as that of Marx’s Communism; they differ only as to who shall be the managers and the rationers, whether the proletariat or the capitalists. There is neither in Pareto, Spann, nor Wieser, as there is not in Veblen, an analysis of bargaining transactions as they have, for example, been developed in Anglo-American decisions of the common law, the law arising from the customs of the people. Managerial and rationing transactions, based, as they are, on the legally superior and inferior, lead to a social philosophy of dictatorship and its social psychology of Command and Obedience. But bargaining transactions, based on the concepts of willing buyers and sellers, and therefore on an idea of persuasion versus coercion between those who are deemed to be equal before the law, lead to a social philosophy of freedom of the will in non-discriminatory choice of opportunities, in fair competition and in reasonable bargaining power, under the protection of due process of law.

This latter Anglo-American aspect of the shift from the individualistic psychological to the collective standpoint is seen strikingly in the forty years’ work of the American economist, Fetter. More than others he developed illustrously the psychological foundations of individualistic economics. But when he turns to practical eco-

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68 Pareto, Villrato, Manuel d’économie politique (tr. from Italian, 1901); Traité de Sociologie Générale (tr., 2 vols., 1913), Chapter XII, “Forme Générale de la Société.”


70 Fetter, “Unilateral versus Individualism,” derived from Fichte, is summarized in Historical Economics (tr. from the 24th German ed., 1929).
nomic and the decisions of the courts, he writes heatedly his institutional economics on The Masquerade of Monopoly (1931), which is his equivalent to Pareto’s demagogic plutocracy and to Veblen’s capitalistic sabotage.

There are doubtless many economists who remain immune to these institutional changes, and those we have just now mentioned are definitely in the minority. Yet they are types of what is being forced, avowedly or disavowedly, into economics by the massive collective movements of the Twentieth Century.

But is it necessary to abandon the older individualistic, molecular, and equilibrium theories in despair and disgust when they can readily be adapted to the newer collective theories of Wieser’s Macht, Pareto’s Social Utility, or Fetter’s Masquerade? The waves of the water seek their equilibrium just as naturally when the water is raised ten feet by a dam or sunk ten feet by a drainage canal, as when the lake remains at its “natural” level. The difficulty with the older theory was in ascertaining how high up or low down the “marginal utility” was located. Wherever it may be located, the “equilibrium” and the “marginal utility” occur at that level. If labor organization raises the level of wages 100 per cent, then the capitalists, employers, and laborers adjust their individual competitions at that higher level. Or if the employers’ organizations depress the wages 50 per cent, then the capitalists, employers, and laborers adjust their competitions to that lower level.

There is a tendency towards equilibrium amongst the individual molecules, though collective action, or Pareto’s demagogic plutocracy, the business man’s demagogic democracy, depress or raise the level of social utility according to their power to dictate the rules of the game.

We find that the marginal utility theories had extended an ethical doctrine of equal opportunity into an economic doctrine of equal individuals. There may be equal opportunity for all individuals, though some may have enormously greater capacity than others to use or enjoy the opportunities. And human nature is so adaptable that, no matter how high or low the level of those equal opportunities, the competitive adjustments can passably be made among individuals for considerable periods of time. It is not needful to repudiate the older theories of individual economics when all that is needed is to adjust them to the newer theories of collective economics.

III. FROM NATURAL RIGHTS TO REASONABLE VALUE

The doctrine of Reasonable Value is superseding the doctrine of Natural Rights. The present writer, in his fifty years of experience, has seen it happen. The foregoing chapters may have given a premonition of this outcome. The doctrine of natural rights prevailed from the Eighteenth Century and the French Revolution to the American Civil War of the Nineteenth Century which was the true American Revolution. The natural rights doctrine continued its conflicting interpretations to senility in the opening years of the Twentieth Century. The individualizes their proposal on the natural rights of man to the gifts of nature; Quetelet had founded his claim to ownership by landlords on the natural order; the landowners had a natural right to the land which they had acquired; the small businessman had a natural right to run his business as they saw fit; the individual had all the natural rights to life, liberty, and happiness, later interpreted to mean property; the testator had a natural right to dispose of his property for generations after his dead hand. Natural rights were written into the Constitution by amendments and interpretations.

Many events had served to disqualify the claim of natural rights. Philosophers have questioned it and the literature is abundant. But philosophers conflicted and had no workable substitute. Not until subordinate classes organized, and not until the revolutions of the World War, was it brought home to the millions that such rights as we have proceed from national and other collective action, and are not “natural.”

The preceding sections of this book brought us to the problems of Public Policy and Social Utility. These are the same as the problems of Reasonable Value and Due Process of Law. The problem arises out of the three principles underlying all transactions: conflict, dependence, and order. Each economic transaction is a process of joint valuation. The single taxes founded wherein each is moved by diversity of interests, by dependence upon the others, and by the working rules which, for the time being, require conformity of transactions to collective action. Hence, reasonable values are reasonable transactions, reasonable practices, and social utility, equivalent to public purpose.

The first idea usually suggested by the term Reasonable Value is the individualistic, subjective, and rationalistic idea, formulated by John Locke and transmitted to modern life through the Age of Reason of the Eighteenth Century: Man is a rational being and needs only to learn the truth in order to obey. Reason exists only in the individual mind, and reasonable value is what each individual thinks is reasonable. There are, therefore, as many meanings of reasonable value as there are individuals. This theory logically ended in the French Revolution and Godwin’s anarchism.
But Reason differs from Reasonableness. Man is not a rational being, as the Eighteenth Century thought; he is a being of stupidity, passion, and ignorance, as Malthus thought. Hence Reasonable Value contains a large amount of stupidity, passion, and mistake. According to the historical analysis by Malthus, reason and moral character are a slow evolution out of overpopulation, conflict of interests, and the resulting necessity of having a government of law and order to regulate the conflict.

Yet, during all these years of the Age of Reason, the common-law courts were developing an institutional idea of reasonableness and reasonable value, in the process of deciding conflicts of interest and bringing order out of incipient anarchy. This institutional idea of reason and reasonable value has been collective and historical, whereas the rationalistic idea was individualistic, subjective, intellectual, and static. The institutional idea undoubtedly reaches its clearest evolutionary change in the common-law method of making new law by taking over the changing customs of the dominant portion of the people at the time, and formulating them, by a rationalizing process of justification, into working rules for future collective action in control of individual action. Since this process has reached its pinnacle in the sovereignty of the Supreme Court of the United States, the evolution of the idea of reasonable value requires, as its institutional background, an understanding of the historic evolution from executive to legislative, and then to judicial sovereignty.  

Still further back of this institutional development is the technological development from hand-work to machine-work and then the aggregation of machines into mass production, from the Digger Indian to Henry Ford. And along with this are the transitions from the agricultural stages of Feudalism to the marketing stages of Capitalism in its sequence from merchant-capitalism to employer-capitalism and world-wide banker-capitalism. Equally important is the closing-up of free land by conquest and overpopulation, which shut the outlets for independent spirits and reduced the margin for profit by nation-wide and even world-wide competition. This in turn proceeded from another technological process, the extension of markets and the market information by steam, electricity, gasoline, and wireless.

In each of these historical stages new concepts of rights and reasonable practices have rapidly impinged upon the old, until we reach the present contesting concepts of reasonable value in a world that inherits the old but is compelled by economic maladjustment to evolve a future new out of the obsolescent old.

A good example is Jacques Bainville's Napoleon (tr. 1931).

Smythe v. Ames, 169 U. S. 466 (1888); see Commons, John R., Legal Foundations of Capitalism, 196.
view of all the changing political, moral, and economic circumstances and the personalities that arise therefrom to the Supreme bench. Natural rights lose their inflexibility and even begin to disappear in the determination of reasonable values. We can offer only a broad outline of the institutional and other changes which lie behind the historically changing concepts of reasonable value.

IV. Sovereignty

Sovereignty is the extraction of violence from private transactions and its monopolization by a concern we call the state. But sovereignty has been looked upon as an entity as well as a process. As an entity it is personified as The State, and seems to exist apart from the people. As a process it is the extraction of the sanction of violence from what had been considered to be a private affair, and the specialization of that sanction in the hands of a hierarchy of officials guided by working rules and habitual assumptions. Sovereignty, thus, is the changing process of authorizing, prohibiting, and regulating the use of physical force in human affairs.44

Three notable epochs in change in this process characterize the genesis of Anglo-American sovereignty, distinguishable as the periods of executive, legislative, and judicial sovereignty. The first began with the Norman Conquest of 1066, which made the King supreme over the hierarchy of officials; the second, with the English Revolution of 1689, which made the legislature supreme; the third, with the American Constitution of 1787 and the Fifth and Fourteenth Amendments (1791 and 1868), which, after judicial construction, made the Supreme Court of the United States supreme over federal and state officials.

1. Executive Sovereignty

In the early years of the first period there was no distinction between the physical and economic sanctions. Sovereignty was identical with property. The King was sole sovereign and sole proprietor. A grant by him of land to a tenant, or of a charter to a corporation, was a grant of sovereignty over sub-tenants on the land, or of sovereignty over persons who practiced the trade or profession. Latterly the distinction between sovereignty and property began to be made, and sovereignty, which now may be distinguished as physical jurisdiction over the bodies of subordinates, was taken away from these grantees, leaving to them only proprietary.

44 For an earlier rendering of this subject see Commons, John R., "A Sociological View of Sovereignty," *Amer. Jour. of Social*. (July 1899 to July 1900).

or economic jurisdiction over their transactions. Cases of this kind may be cited, such as the grant of lands with power to set up courts having physical jurisdiction, or the grant of a guild charter which had both physical and economic control over persons within its jurisdiction.45

Survivals of these grants of sovereignty occur in modern cases in America where corporations obtain from the sheriff a deputy sheriff's license for their employees to use violence under the jurisdiction of the corporation.

2. Legislative Sovereignty

In the second epoch, beginning in 1689, property had already been distinguished clearly from sovereignty by a line of decisions similar to the foregoing in Bonham's case. The Revolution now placed a parliament of property owners superior to the King and his hierarchy of judicial and executive officials. This was certified by the Act of Settlement of 1700, which made the Judiciary independent of the Crown and paved the way for the appointment of all officials by a Cabinet that could command a majority in parliament.46

3. Judicial Sovereignty

In the third epoch, peculiar to the American Constitution, the definition of property and liberty was placed under the jurisdiction of the Supreme Court. The Fifth Amendment, as interpreted by the Court, gave the Court jurisdiction over Congress, and the Fourteenth Amendment, under judicial interpretation, gave it jurisdiction over the states as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By a "State" is meant certain officials of a state. Henceforth any private citizen is placed on an equality, before the law, with an official who exercises over him the physical jurisdiction of sovereignty. He can bring or defend a suit at law against an official, just as he can bring suit against any private citizen. The subject-matter now, however, becomes the exercise of physical force in

45 Cf. Dr. Bonham's Case (3 Cr. 113, 116, 77 Eng. Rep. 616), where physical jurisdiction of imprisonment was granted by Henry VIII to the physicians and surgeons, but was revoked by the court in 1608, leaving them only economic jurisdiction. Commons, *Legal Foundations of Capitalism*, 238.

46 Commons, op. cit., 50.
commanding obedience. Hence we have, in the stage of judicial sovereignty, the citizen Munn defending and appealing a suit brought against him by the State of Illinois; or the citizen Holden bringing suit against the sheriff, Hardy. The first assertion of what is meant by judicial sovereignty was made in 1833 in the case where Marbury, a private citizen, brought suit against Madison, the Secretary of State for the United States.44

It is in the light of this equality of citizens and officials before the law, on the issue of using physical force upon the citizen, that we interpret the meanings of the terms “privileges” and “immunities” as used in the Fifth and Fourteenth Amendments to the Constitution. It is evident, from the above reading, that privileges have a different meaning from immunities. Neither privileges nor immunities may be abridged. We conclude that these are two different relations between citizens and officials regarding the use of physical force by the latter upon the former.

There are only two such relations conceivable, namely a right and liberty. Each has its equal correlative. The right of the citizen is the duty of the official. In this case it is the right of the citizen to require the official to use physical force in his behalf. It is the right to require a policeman to arrest a thief and return the goods, correlative to the equal duty of the policeman to do so. Or, it is the right of the creditor to require the court to hear his case, to render a decision, to order the sheriff, if the decision is favorable, to levy execution on the goods of the debtor, and the subsequent right of the citizen to require the sheriff to carry out the court’s order. This right of the creditor to require the use of physical force, if necessary, to collect the debt, is no greater nor less than the duty of the court and the sheriff to decide the case and to use that force in his behalf. The right and the duty are correlative and equal—they are indeed one and the same. If the duty cannot be enforced, the right does not exist. It is apparent, then, that by the word “privilege” as used in the Constitution is meant these rights of citizens to require officials to perform their duties to the citizens by using physical force on other people, if necessary.

But the terms right and duty usually imply the right of one citizen and the duty of another citizen, neither of whom is permitted to use physical force, except in self-defense. Only the public official is so authorized. Hence, since the use of physical force is the question at issue, and not the use of economic power, we infer that the term privilege is substituted for the term right, though the


term right might have been and often is used with the meaning of a right of a citizen against an official. Precision, however, would suggest that the term right should be used in the sense of a right, not against officials in their public capacity of using physical force, but in their private capacity of economic or other private transaction with other private citizens.45

This interpretation is confirmed by the opposite meaning of immunities. Immunity, here, means freedom from the use of physical force by the official. In the case of Munn v. Illinois the state proposed to use physical force on Munn, if necessary to compel his obedience, and Munn appealed the suit, asking the court to enjoin the state officials from using that force. He claimed what he alleged had always been one of the immunities of citizens. So Holden, the employer, brought suit against the sheriff, Hardy, claiming immunity from the sheriff’s proposed use of force to prevent him from running his business as he pleased.

But the term “privilege,” as often used in legal terminology, has another meaning, equivalent to immunity. As such its meaning is the same as “no-duty,” which in its economic meaning is liberty of action, indicated by such terms as free trade, free access to markets, and so on. Thus liberty is a “privilege” enjoyed by reason of the absence of duties.

This treble meaning of “privilege” requires us to make a choice, or else to substitute other words. Privilege means either a right, equivalent to a duty of officials, to use physical force; or an immunity from the physical force exercised by officials; or a liberty to engage in transactions with other citizens. The first meaning we express by the word Power, the second by Immunity, the third by Liberty.

By the first is meant Political Power, the power vested in the citizen to require the courts, executives, and legislatures to execute his will on others by using the concerted physical force of sovereignty. To “abridge” the privileges of citizens is to abridge their share of the political power by which they could otherwise require public officials to use force in executing their will on others.

By the second is meant immunity from the physical force of sovereignty. To abridge the immunities of citizens is to abridge the share of political power of others by which they otherwise could require public officials to use the physical force of sovereignty in executing their will on him.

By the third is meant Economic Liberty, the freedom of the citizen with reference to other citizens to buy or not buy, to sell or

45 Above, p. 38, Formula of Economic and Social Relations.
withhold, to hire or quit, according to one's own inclinations, circumstances, and alternatives at the time.

Thus to the term Power is given the meaning which, under different ways of looking at it, has been known as Ability, Capacity, Freedom, Citizenship, or Membership. In the sense of Ability, or Capacity, or Power, it is the power of a citizen to set in motion the courts, and other officials of sovereignty in enforcing what one claims as his rights or liberties. This is the same as Freedom, in the ancient meaning of "freedom of the city," freedom of the guild, freedom of the corporation—which meant, not liberty, the absence of duty, but included mainly a capacity to set in motion the collective forces of the concern on one's own behalf. And this is the meaning of Citizenship and Membership. A citizen, or member of any concern, is one who has power or recognized "capacity" to call upon the collective forces of the concern to protect and assert for him all the claims against others which the rules of the concern recognize and enforce. Power is the individual's share of collective power.

Consequently, the total lack of this power may be variously expressed as non-membership, non-citizenship, incapacity, or disability. The last term, Disability, comprehends the others. A disability is a denial of power to put in motion the collective physical force of sovereignty in one's behalf.

But this share of collective power would be meaningless if the officials did not recognize an equivalent duty. The broadest meaning of this duty of officials is Responsibility. But this term is too broad. It leaves to the official himself the decision, according to the accidents of his sense of honor or duty, his indifference, favoritism, or even caprice. There is needed a higher authority, having superior political power, to compel the official to act. This higher power is the Supreme Court. The term fitted by economic and legal usage to indicate what this higher authority will be expected to do to the official, if he does not act, is Liability.

Hence, the correlative and equivalent of Power is Liability. The citizens' power to require the official to act is no greater and no less than the liability of the official to be compelled to act by the Supreme Court.

It follows, therefore, that the correlative of Disability is Immunity—not the immunity of self, but the immunity of other people against whom the physical force of sovereignty was claimed. He, whose legal disability is total, has, by the same word, no power to call upon the courts to command the physical force of sovereignty to be used against others in his behalf. Their immunity is his disability. He is a non-citizen, a slave, or alien.

The Thirteenth and Fourteenth Amendments to the Constitution of the United States confirm these meanings of words. The Thirteenth Amendment (1865) liberated the slaves but did not make them citizens. The Fourteenth Amendment, three years later, made them "citizens of the United States and of the State wherein they reside." It changed their political disability into political power. It changed the immunity of other people into liability, by imposing on all state officials the liability to be compelled, by the physical force of the Federal government, to use their physical force on behalf of the now-enfranchised citizens.

But since the Fourteenth Amendment also required "equal protection of the laws" it follows that all citizens, in this relation to officials, have, under similar circumstances, the same relations of power, liability, disability, and immunity. From this equality there results reciprocity, which may be indicated by the following formula.

<table>
<thead>
<tr>
<th>Supreme Court</th>
<th>Official</th>
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<tbody>
<tr>
<td>Power</td>
<td>Liability</td>
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<tr>
<td>Disability</td>
<td>Immunity</td>
</tr>
<tr>
<td>Liability</td>
<td>Disability</td>
</tr>
<tr>
<td></td>
<td>Power</td>
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</table>

The foregoing relates to Macleod's "rights of action," which we now distinguish from economic rights. A right of action is simply "the right to enforce one's demands in a court of law." It is a "Power," rather than a "right." But economic "rights" are the rights to enforce one's will on others in their economic transactions. Economic rights are, indeed, equivalent to rights of action, for only in so far as the citizen has power to bring an action in court does he have a right that has security of economic value.

Thus the duty to pay a debt is the creditor's right of action. For this reason it has economic value and can be bought and sold. Likewise, when Holden brought suit against the sheriff Hardy, the economic issue was whether the sheriff had constitutional power to enforce an eight-hour law upon the mine owners of Utah. The Supreme Court decided against Holden and in favor of the sheriff. Translated into terms of the foregoing formula, the court decided that Holden, the employer, was under a disability in that particular exercise of his will, and the sheriff enjoyed therefore immunity from damages or imprisonment if he should enter upon Holden's property and enforce the law. But, reciprocally, the court decided that the sheriff possessed the constitutional power and therefore Holden was under the correlative liability of the sheriff's forcible entrance on his premises if he violated the eight-hour law. The economic con-
sequences were that Holden's disability was equivalent to "no-right" to require more than eight hours' labor. Economically, we name this an Exposure. The decision also meant that the correlative immunity of Holden's employees from action by the sheriff in evicting them from the premises was equivalent to "no-duty" to work more than eight hours; this no-duty is, economically, their liberty. Thus Holden's disability was the sheriff's immunity, and this, economically, was Holden's exposure to the liberty of his employees.

Had the court's decision been the reverse, then Holden's power to call on the Supreme Court would have been the sheriff's liability to damages due to Holden, or imprisonment for contempt of court, if he trespassed on Holden's property. The economic consequences in this case would have been that Holden had the right, of his own free will, to require his laborers to work more than eight hours, and they, correlatively, would have been under the legal duty to obey the will of Holden if they entered and worked upon his premises.

Other applications of the foregoing analysis might be made, and can be made in any of the court decisions on constitutional law. The significance of the analysis is discovered when we observe that legal rights and liberties play a part in economic transactions only to the extent that the citizen can get a hearing in court and a decision ordering executive officials to enforce the court's opinion.

The hearing and decision are merely listening to pleadings and arguments and giving a meaning to words; and it is by the changing meanings of words that rights, liberties, duties, and exposures are changed in the changing economic conditions. For the court proceeds, in these disputes between citizens and officials, as it had done in disputes between citizen and citizen, by the judicial process of weighing practices, customs, precedents, statutes, and constitutions in the light of changing conditions and conflicting habitual assumptions. This process has required changing definitions of all the words of the Fifth and Fourteenth Amendments to fit the economic and ethical changes of the past sixty years. The process of change

46 The foregoing meanings of words would doubtless be disputed by lawyers as not coming within the technical meanings current with the profession. But when lawyers attempt to organize their terminology into a consistent logical system, they differ so greatly among themselves that the economist may be permitted to dispense with meanings and organize them, provided he does so by showing, not abstractions, but what the courts do, and thereby fitting the terms to the economic consequences. For the principal differences among lawyers, see the publications by Hobfeld, Cook, and Kuczynski, referred to in Commons, Legal Foundations of Capitalism, 39 ff. Kuczynski has organized his terminology in his Juridical Relations (1927). In their discussions only private law furnishes the subject matter. We are dealing with Constitutional law, wherein the officials of government are placed on an equality with private citizens under the judicial sovereignty of the Supreme Court.

is still going on. Further changes cannot be predicted, but the more important in the past, for the science of economics, have been the changes in meaning of the words: person, liberty, property, due process, and equal protection.

For the meanings of all these terms arise out of the practices, customs, and habitual assumptions of the people and judges; and the changes that occur in these practices, customs, and assumptions bring with them changes in the meanings of the words. Then, when conflicts arise between citizens and officials, the court itself must change the meanings of the terms as found in precedents, statutes, and constitutions in order to arrive at their application to the new disputes arising out of the change in conditions and assumptions. The court does so, not by trying to formulate academic or scientific definitions that shall be good for all time, but by the experimental process of "exclusion and inclusion," which is the universal process of the human mind by which language itself changes. By "exclusion" a former meaning of these terms is deemed not to be applicable to the present dispute. By "inclusion" the issue in the present dispute is brought within a former meaning which had not hitherto been deemed to include it. Thus constitutions, statutes, and even precedents change in process of time through the gradual but universal process of human speech which excludes old meanings and includes new meanings in order to fit the language to the changing practices and customs which require language to reach agreements.

The process goes on quietly in the pleadings, briefs, arguments, and opinions of lawyers and judges, and it is not until several years have passed that the change can be formulated in a "leading case." For the United States Supreme Court has in its hands the exercise of the two powers of sovereignty that create, revise, or enlarge the rights, duties, liberties, privileges, and immunities of persons and associations of persons. These are, in popular language, the mandatory and injunctive powers, or the mandamus and the injunction. The mandatory power is the power to command what individuals, associations of individuals, and officials of government must do. The injunctive power is the power to command what they must not do. They must pay their debts. Courts and sheriffs must enforce the payment of debts. They must not interfere with other persons. It is these commands that constitute the rights, liberties, privileges, and immunities of persons and associations. They extend, by the Constitution, to legislatures and executives, as well as
individuals. If the legislature must not interfere with a holding company, then the company has immunity in doing as it pleases within the limits of non-interference laid down for the legislature by the court. This process may be seen in the changed meanings of words brought about to fit the changes in economic conditions and habitual assumptions of the past sixty years.

It is evident, however, that the above analysis of powers, liabilities, disabilities, and immunities applies to the working rules of any going concern which sets up a judicial system to decide whether the executives of the concern shall or shall not enforce obedience upon its members who are subordinate to the concern. It applies to voluntary commercial arbitration, to voluntary labor arbitration, to ecclesiastical organizations, to the judicial committees of stock exchanges and produce exchanges, or to any form of collective "voluntary" action which uses the economic or moral sanctions with or without recourse to the physical sanctions of sovereignty. While the ethical relations of members in their dealings with each other in all concerns are expressed by the terms rights, duties, no-rights, and no-duties, and while the corresponding status of the members is expressed by the terms security, conformity, exposure, and liberty, the relations of the superiors to the inferiors are expressed in the terms power, liability, disability, and immunity. The latter terms signify the use of the physical, economic, or moral sanctions of collective action which enforce the approved relationships of security, conformity, liberty, and exposure between individuals in their private transactions.

4. Analytical and Functional Law and Economics

In our preceding formula 60 of legal, economic, and volitional correlation we have distinguished legal relations by the terms, right, no-right, no-duty, and duty. These may be designated as the functional relation between law and the corresponding economic relations of security, exposure, liberty, and conformity. Hence, these legal terms are semi-economic and semi-governmental. But if law is entirely separated from economics, and each is analyzed for its own field, then back of the semi-legal relations are the pure relations of sovereignty itself, in its control of individuals. In the American system especially, this comes about because the officials of government are brought, before the courts, into an equality with all citizens who do not have official authority. It is this that makes necessary a different set of terms indicating the relations set up in public or constitutional law.

It is this public law that sets up the relations between citizens and officers, that furnishes the physical sanctions without which individuals would not have the private rights and duties previously noted. These relationships are indicated by the terms "privileges and immunities" of citizens, which must not be taken from them without "due process of law," i.e., without judicial decision. They may be correlated by taking, for example, the constitutional relation of the lowest public official who actually uses force, and the citizen upon whom the force may or may not be exercised. This is one type of managerial transaction—the relation between sheriff and citizen. But it may be expressed as a continuation of the formula of rights, duties, etc., in the preceding formula. The same formula would apply to all other officials under jurisdiction of the Supreme Court.

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<thead>
<tr>
<th></th>
<th>Citizen</th>
<th>Scarcity</th>
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<tbody>
<tr>
<td>Public Law</td>
<td>Private Law</td>
<td>Transactions</td>
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<tr>
<td>Power</td>
<td>Right</td>
<td>Opportunity</td>
</tr>
<tr>
<td>Disability</td>
<td>No-right</td>
<td>Competition</td>
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<tr>
<td>Immunity</td>
<td>Duty</td>
<td>Bargaining</td>
</tr>
<tr>
<td>Liability</td>
<td>No-duty</td>
<td>power</td>
</tr>
</tbody>
</table>

The two relations here distinguished may be named Force and Scarcity. The term "transaction" indicates, as we have already shown, the outgrowth of the relations of relative scarcity between individuals. The terms right, duty, with their opposites and reciprocals, indicate the intermediate relations between force and scarcity. But the terms privilege and immunity, as previously said, are terms used in the Constitution, which, if drawn out to include the official and the citizen, would be equivalent to Power (privilege), Disability, Immunity, and Liability. It is the latter set of terms that, although differently used by jurists, we find are logically the correlative and reciprocal terms applicable to the sovereignty of the Supreme Court over all officials and citizens.

From these terms is worked out analytically the whole system of due process of law; while functionally they are the rights, duties, no-rights, and no-duties which impinge on the economic relations between individuals in their transactions. We may say that these constitutional terms, entirely separated from economics, apply to the purely analytic science of Force, and that (though the analytic