Volume 11 | Number 4 Article 1

12-1-1980

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ST. MARY'S LAW JOURNAL

VOLUME 11 | 1980 | NUMBER 4

JUDICIAL DECISIONS WITHIN THE FRAMEWORK OF AN ECONOMIC STRUCTURE

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I. INTRODUCTION

"One of the most interesting developments in American higher education over the past decade has been the emerging recognition by lawyers that an understanding of elementary economic principles is a vital component in their professional equipment."[1] Contributing to this recognition has been the growing awareness by the legal profession that rules of law promulgated by the legislature and ruled upon by the judiciary have, as their underlying foundation, economic theories well settled in the economic sphere of thought. Economic models and theories are manifestations of social attitudes and moral values of society and, therefore, play an important role in shaping general principles of law. Consequently, an understanding of economic theory can help explain the basic rationale underlying judicial and legislative decisions. The three economic theories having the greatest influence on American jurisprudence have been the Classical, Keynesian, and Institutional philosophies. The purpose of this article is to examine the impact of these major economic theories on judicial and political decisions. By examining legal decisions from an economic point of view, we can gain greater understanding of the reasons behind legal decisions in the past and present, as well as gaining the insights necessary to predict more accurately the path of the law in the future.

II. CLASSICAL ECONOMICS

A. *Adam Smith's "Wealth of Nations"*

Generally speaking, the birth of modern economics followed the publication in 1776 of Adam Smith's *An Inquiry into the Nature and Causes of the Wealth of Nations.*[2] In this monumental work

1. Buchanan, *Good Economics—Bad Law,* 60 VA. L. REV. 483, 483 (1974).
2. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS

Adam Smith attempted to extend the earlier defined natural laws of science and politics to economics. He was particularly impressed with John Locke's argument that the state should serve only to support natural laws and that within this structure individuals should have free play. Smith's argument was that if business were left to its own devices it would achieve a system responsive to natural economic laws and hence one that worked for the mutual benefit of all. This theoretical construct was premised on two assumptions: first, man is a rational maximizer of his ends in life, and, therefore, if left on his own will be the best judge of his self-interests and maximize them;[3] and second, the welfare of society is the sum of all these individual welfares.

Smith viewed his theory of "self-interest" as the manifestation of an exchange for value, with that received being more valuable to the recipient than what he actually gave up for it. According to Smith, this uncompromising effort on the part of each individual to improve his own personal welfare would lead, as though impelled by an "invisible hand," to a maximization of the public good in the long run. In the *Wealth of Nations* he stated:

> Every individual . . . endeavors as much as he can both to employ his capital in the support of domestic industry and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, *he intends only his own security;* and by directing that industry in such a manner as its produce may be of the greatest value, *he intends only his own gain,* and he is in this, as in many other cases, led by an *invisible hand* to promote an end which was no part of his intention. Nor is it always the worst for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectively than when he really intends to promote it.[4]

(1937).

3. *See* R. Posner, Economic Analysis of Law 1 (1972). "Self-interest should not be confused with selfishness; the welfare of other people may be part of one's satisfactions." *Id.* at 1.

4. A. Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations 423 (1937) (emphasis added).

Thus, Smith considered the market a regulatory system constituting an institution of social control.[5] The "invisible hand" controls individual conflict and excesses in competition while safeguarding the public good through healthy competition.[6] In other words, individual self-interest will guide resources to proper usage.[7]

The *Wealth of Nations* sets forth, therefore, a social theory of market capitalism envisioning a social organization in which the market constitutes the principal mechanism coordinating and controlling economic activity.[8] In this Classical economic system the government is assigned a limited role. It assists the free enterprise market system by maintaining justice, furnishing a national defense, erecting public works, and providing those institutions too complex or costly for individuals to create. In effect, it is assigned to the role of the referee.[9]

The Classical theory of business freedom and governmental restraint dominated the world of economic thought until the Great Depression. In the United States the thoughts of John Locke and Adam Smith moved the pens of the founding fathers to write of the God-given rights to life, liberty, and property. Such rights existed beyond man's power to alter them, and the state was merely a device to protect such rights, never to create, diminish, or redefine them.

B. *Laissez-Faire Capitalism*

1. *The Rise of Social Darwinism.* One of the grandest state-

5. Samuels, *The Political Economy of Adam Smith*, 15 NEB. J. ECON. & BUS. 3, 11 (1976).

6. *Id.* at 11.

7. *See* Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J. L. & ECON. 461, 461 (1974).

8. Stanfield, *Institutional Economics and the Crisis of Capitalism*, 11 J. ECON. ISSUES 449, 450 (1977). With self-interest the impelling force of the economic machine, Adam Smith envisioned a tidy mechanism of self-adjusting markets where each proffered item had a natural price based on the cost of production and adjusted to public demand. Should the quantity of a given product exceed the demand of the purchasing public, then its price must fall. When the demand exceeds the sum of goods available the price would rise, and, drawn by rising prices, more producers would compete for the sale. Once more the supply would become excessive, and prices would fall in a natural harmonic rhythm. In this way the market would retain a basic self-regulating equilibrium for the greatest social good.

9. *See* Gruchy, *Law, Politics, and Institutional Economics*, 7 J. ECON. ISSUES 623, 628 (1973).

ments of the laws of human progress during the 19th century was the *Synthetic Philosophy* of Herbert Spencer, published between 1860 and 1896.[10] What Herbert Spencer attempted to do was to turn Charles Darwin's theory of evolution into a social philosophy. In society, as in nature, according to this theory, the weak were weeded out and the fittest survived. Thus, the less vigorous social institutions, as well as the less gifted humans, perished in the struggle. "Social Darwinism" became a common, tough-minded approach to issues of human progress.[11] In the United States support for the laissez-faire position was justified by this newly promulgated theory of social evolution.[12] In this way, Adam Smith's universe was infused with the law of the jungle. The market place, it was argued, provided the true test for the survival of the fittest.[13] Poverty, corruption, laziness, and ignorance could be eliminated only by centuries of evolution. To tempt with free competition, to hand out charity to the unfit, was to mar the operation of the machinery that God in eons past had set spinning.

2. *The Rise of the Robber Barons*. Adam Smith's philosophy, combined with Social Darwinism, ultimately led to great increases in raw power which were manifested in the robber barons. These were rugged, individualistic business tycoons who looked on the growth of large business as, in John D. Rockefeller's words, "merely a survival of the fittest . . . the working out of a law of nature and a law of God."[14]

Herbert Spencer argues that powerful business leaders and industrialists of the era had attained their powerful positions by emerging at the top in the struggle for survival.[15] Businessmen had to be left alone to "fight it out among themselves"[16] for

10. *See generally* M. CHAMBERS, R. GREW, D. HERLIHY, T. RABB, & I. WOLACH, THE WESTERN EXPERIENCE SINCE 1640 (1974).

11. *Id.* at 902.

12. Fletcher, *Lawyers, Economists, and Laissez-Faire*, 16 NEB. J. ECON. & BUS. 19, 31 (1977). In the United States Spencer's foremost advocate was Yale University economist William Graham Sumner. *See generally* Bannister, *William Graham Sumner's Social Darwinism: A Reconsideration*, 5 HISTORY OF POLITICAL ECONOMY 89 (1973).

13. M. CHAMBERS, R. GREW, D. HERLIHY, T. RABB, & I. WOLACH, THE WESTERN EXPERIENCE SINCE 1640, at 902 (1974).

14. *See* Fletcher, *Lawyers, Economists, and Laissez-Faire*, 16 NEB. J. ECON. & BUS. 19, 32 (1977).

15. *Id.* at 31-32.

16. *Id.* at 32.

"[i]ntervention in behalf of the weak and unsuccessful could only serve to reduce the rate of economic"[17] and social progress. Moreover, if business success was proof of progress, greater success in business represented greater progress.[18] This theory provided justification for the robber barons' acquisition of power and wealth. The most unscrupulous tycoon of this conscienceless age was Jay Gould. Gould launched on a ceaseless quest for economic power, an undertaking undeterred by sentiment, conscience, patriotism, justice, piety, pity, or the desire for admiration.

Perhaps best known of the robber barons was John D. Rockefeller who in the 1870's built an empire that completely controlled the domestic oil industry and owned substantial foreign oil interests.[19] Another famous robber baron was Andrew Carnegie who cornered the steel market, aggregating 180 companies into United States Steel.[20] At a time when the United States had no income tax, no social security, no unemployment insurance, no workers compensation, and the average American worker earned less than $500 annually, Carnegie had a personal income of $23 million.[21] The American economy, characterized until about 1870 by the individual entrepreneurship of small artisans and family farms, was so transformed by this era that by 1900 the economy was dominated by great aggregations of capital controlled by trusts or corporations.[22] Under the Classical dogma of Adam Smith, these giant corporations demanded absolute freedom from all restrictions except those imposed by the market place. With the natural law theories of John Locke and Adam Smith exerting a pervasive influence on American jurisprudential thought, the courts did not hesitate, in most cases, to clear the way for these corporate giants.[23]

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17. *Id.* at 32.

18. *Id.* at 32.

19. Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining the Entities Subject to the Antitrust Laws*, 125 U. PA. L. REV. 1244, 1259 (1977). *See generally* R. HIDY & M. HIDY, PIONEERING IN BIG BUSINESS 1882-1911, at 24-32 (1955).

20. Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining the Entities Subject to the Antitrust Laws*, 125 U. PA. L. REV. 1244, 1256 (1977).

21. *Id.* at 1256.

22. *See* Kristol, *On Corporate Capitalism in America*, in THE AMERICAN COMMONWEALTH 124, 126 (1976).

23. *See* Fletcher, *Lawyers, Economists, and Laissez-Faire*, 16 NEB. J. ECON. & BUS. 19, 31-32 (1977).

In 1873 the Supreme Court decided the famous *Slaughter-House Cases*[24] in which it ruled that a state could preclude an individual from engaging in a particular business without violating rights guaranteed by the fourteenth amendment.[25] In his dissent to this opinion, Justice Bradley set forth a rationale that would eventually become the law of the land.

> Rights to life, liberty, and the pursuit of happiness are equivalent to rights of life, liberty, and property. These are fundamental rights which can only be taken away by due process of law . . . .
>
> For the preservation, exercise, and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right.[26]

"In the ensuing years the Supreme Court moved toward, and in 1897 adopted, the Bradley position,"[27] in *Allgeyer v. Louisiana*:[28]

> The liberty mentioned in the fourteenth amendment means not only the right of the citizen to be free from the mere physical restraint of his person . . . but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[29]

In *Allgeyer,* therefore, the Supreme Court completed a full circle and incorporated "Lockean materialistic individualism into the

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24. 83 U.S. (16 Wall.) 36 (1873).

25. Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining the Entities Subject to the Antitrust Laws,* 125 U. Pa. L. Rev. 1244, 1253 (1977); *see* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80-81 (1873).

26. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116 (1873) (Bradley, J., dissenting); *see* Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining the Entities Subject to the Antitrust Laws,* 125 U. Pa. L. Rev. 1244, 1253 (1977).

27. Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining the Entities Subject to the Antitrust Laws,* 125 U. Pa. L. Rev. 1244, 1253 (1977).

28. 165 U.S. 578 (1897).

29. *Id.* at 589.

due process clause" of the fourteenth amendment.[30]

Although the courts during this era clearly favored the doctrine of laissez-faire, thus perpetuating the interests of big business, the American public began demanding a more active policy of government intervention.[31] The passage of the Sherman (Antitrust) Act of 1890[32] was a direct congressional response to this mounting public pressure. The avowed purpose of the Sherman Act was to respond to "the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition."[33] An early challenge to this new act was presented in *Standard Oil Co. v. United States.*[34]

3. *Laissez-Faire and Antitrust: The Standard Oil Case.* The powerful combination of companies put together by Rockefeller[35] in the 1870's was organized into a holding company in 1899, the Standard Oil Company of New Jersey.[36] The activities of this combination, prior and subsequent to the incorporation, were attacked by the government as an unlawful conspiracy to monopolize and restrain trade under the Sherman Act.[37] The combination obtained control of 90 percent of the business of producing, shipping, refining, and selling petroleum and its products.[38] In 1911 Standard Oil employed 70,000 persons, had $860 million in total assets, and $95 million in earnings.[39]

The government won its case against Standard Oil and, as a re-

30. Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining the Entities Subject to the Antitrust Laws*, 125 U. PA. L. REV. 1244, 1253 (1977).

31. *See* Fletcher, *Lawyers, Economists, and Laissez-Faire*, 16 NEB. J. ECON. & BUS. 19, 32 (1977).

32. Ch. 647, §§ 1-7, 26 Stat. 209-10 (current version at 16 U.S.C. §§ 1-7 (1976)).

33. 21 CONG. REC. 2460 (1890) (remarks of Sen. Sherman), *quoted in* United States v. Aluminum Co. of America, 148 F.2d 416, 428-29 n.1 (2d Cir. 1945); *see* Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining the Entities Subject to the Antitrust Laws*, 125 U. PA. L. REV. 1244, 1246 (1977).

34. 221 U.S. 1, 47, 64-65 (1911).

35. *See* Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining the Entities Subject to the Antitrust Laws*, 125 U. PA. L. REV. 1244, 1259 (1977).

36. *Id.* at 1259.

37. Standard Oil Co. v. United States, 221 U.S. 1, 41 (1911).

38. *See id.* at 41; Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining the Entities Subject to the Antitrust Laws*, 125 U. PA. L. REV. 1244, 1259 (1977).

39. *See* Dorsey, *Free Enterprise vs. the Entrepreneur: Redefining the Entities Subject to the Antitrust Laws*, 125 U. PA. L. REV. 1244, 1259 (1977).

sult, the combination was dissolved into thirty-eight companies.[40] Upon initial observation this result may seem at odds with the theory of laissez-faire which was pervasive in American society. In fact, the case was well within the Classical economic model. Social Darwinism was a deviation from Adam Smith's basic theory, and Smith, a moral philosopher,[41] would have rejected it as an economic theory of progress. Under the Classical model, a "self-regulating market system . . . not only calls on the state to referee the competitive game and keep intruders off the field, but also calls for the government to provide a definite framework within which the game is to be played."[42] Accordingly, laissez-faire, meant not "leave us alone," but "leave us alone except where you can help us."[43] The "invisible hand" of Classical economics is supposed to control "excess of competition" and safeguard the public good through healthy competition.[44] Since the ultimate interest of Standard Oil was to eliminate competition, the decision of the Supreme Court was not only justified, but was called for under the Classical model.

Antitrust legislation under the Classical theory, therefore, was viewed as consistent with the role of government as "umpire" of the free market system. Its goal, at the risk of oversimplification, was to promote competition under the market economy.[45] During the progressive era of American history, the surge of business consolidation quickened anti-big-business sentiment and provided support for antitrust enforcement. In this period, antitrust was in high gear.[46] Laissez-faire was an institution in American economic

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40. *See* Standard Oil Co. v. United States, 221 U.S. 1, 45-46, 81-82 (1911). Included among the companies established by the dissolution are such giants as Exxon amd Mobil. *See* Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining the Entities Subject to the Antitrust Laws*, 125 U. PA. L. REV. 1244, 1259 (1977).

41. *See generally* Coase, *Adam Smith's View of Man*, 19 J. L. & ECON. 529 (1976); Hutchinson, *Adam Smith and the Wealth of Nations*, 19 J. L. & ECON. 507 (1976).

42. Fletcher, *Lawyers, Economists, and Laissez-Faire*, 16 NEB. J. ECON. & BUS. 19, 25 (1977).

43. *Id.* at 27.

44. See text accompanying notes 5-9 *supra*.

45. *See* Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1200 (1977); Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1214-15 (1977).

46. *See generally* Hofstadter, *What Happened to the Antitrust Movement?*, in PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188-237 (1965).

thought, however, and by the First World War antitrust enforcement was at a minimum. The 1920's were a time in which business and businessmen were held in high esteem and the political leadership of the country was conservative. The anti-business sentiment of the progressive era had passed, and it was not until 1937 that antitrust enforcement was once again revived.[47]

C. *Classical Market Failures*

The fundamental principle of Classical economics is that people will pursue their own self-interest.[48] The basic policy premise of Classical economists is that so long as "market failures" do not arise, this self-interest, like an invisible hand, will guide resources to their proper usage.[49] Market failures do arise, however, and they represent the most important justification for government regulation of the economy. Professor Stephen Breyer has enumerated a number of important "classical market failures."[50] These defects are classified by Professor Breyer as follows:

1. Monopolization[51]
2. Rent Control[52]
3. Correction of Spillovers[53]
4. Correcting for Inadequate Information[54]

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47. *See generally id.* at 188-237.

48. *See* R. Posner, Economic Analysis of Law 1 (1972).

49. *See* Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J. L. & Econ. 461, 461 (1974).

50. Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 Harv. L. Rev. 549, 553 (1979).

51. *Id.* at 553.

52. Rent control refers to sudden price increases that may allow those holding commodity interests to realize windfall profits. *Id.* at 554-55.

53. *Id.* at 555. Referring to this defect, Professor Breyer stated:

> Regulation is frequently justified as needed to compensate for the fact that the price of a product does not reflect certain major costs that its production and use impose upon the economy. The price of steel does not reflect the spillover of external costs that it imposes in the form of air pollution that harms or irritates those who live near the plant. As a result, more steel may be demanded than is warranted in light of its adverse side effects.

Id. at 555.

54. Before competitive markets can function effectively consumers must possess sufficient information to evaluate competing products. This supply information alone is an important commodity, reflecting both costs and demand. Government regulation is typically intended to promote consumer awareness or reduce the cost of obtaining consumer information. *See id.* at 556.

5. Excessive Competition[55]
6. Moral Hazard[56]
7. Rationalization[57]

The Classical economic theory would deal with these defects in a manner consistent with minimal government regulation. For example, antitrust would be employed to break up monopolies and control excessive competition.[58] Additionally, the Classical economist would argue many regulatory programs fail in their objectives and create more severe problems.[59] Consequently, proponents of Classical economics advocate deregulation upon the firm belief that the market system itself can cure any market defects in time. For those defects beyond the competence of the free market, government can intervene, in the limited capacity of referee, by enacting legislation to remedy the specific market failure.[60]

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55. "A commonly advanced justification for the regulation of airlines, trucks, and ships is the need to control 'excessive competition.'" *Id.* at 556.

56. "The term 'Moral Hazard' is used to describe a situation in which someone other than a buyer pays for the buyer's purchases." *Id.* at 557. "The most obvious current example is escalating medical costs. As medical care is purchased to an ever greater extent by the government or by large private insurers . . . the buyer will not feel any . . . pocketbook constraint, and will purchase a good oblivious to the resource costs he imposes upon the economy." *Id.* at 557-58. "When ethical or other institutional constraints or direct supervision by the payer fail to control purchases, government regulation may be demanded." *Id.* at 557.

57. Government intervention is sometimes necessary to help small firms in an industry that would be unable otherwise to institute efficient production. *Id.* at 558.

58. *See id.* at 579.

59. *See id.* at 579-81.

60. *See id.* at 583. Professor Breyer argues that the merits of classical regulation can be judged only after a comparison with the available alternatives. Deregulation is not the only choice. Among the available alternative tools are unregulated markets policed by antitrust legislation; disclosure regulations; taxes; market based incentives or allocations; bargaining; changes in liability rules; and, nationalization. *Id.* at 578-84. Professor Breyer presents the following solutions for certain market failures:

Problem	*Tentative Solution*
Natural Monopoly	Cost-of-service rate making
Rent Control	Taxes or deregulations
Spillovers	Taxes, market based incentives, bargaining
Excessive Competition	Deregulation (with antitrust enforcement)
Inadequate Information	Disclosure regulation

Id. at 603. Professor Breyer concludes that these solutions prevent mismatches of problems

As might be perceived, the economic model of the Classical theory viewed market depressions as mere interruptions of progress. The cataclysm of 1929, however, shook the very foundations of the Classical theory.[61] The deep depression which followed the market crash of October 29, 1929, undermined the basic philosophy of a free, unregulated market economy and "pushed the Keynesian revolution to the forefront of economics."[62]

III. KEYNESIAN ECONOMICS

A. *The Great Depression*

On October 29, 1929, historically known as Black Tuesday, the bottom fell out of the stock market, forcing the United States into economic collapse.[63]

> The market crash was bad enough in its own right; it brought financial ruin to hundreds of thousands of people in the space of a few panicky days in late October.
>
> But the plunge in stock prices turned out to be only the first step toward a catastrophe unlike anything the nation had endured before—a business slump that was to be known forever afterward as the Great Depression.[64]

Between 1929 and 1933, the tremendous impact of the Great Depression was felt in every sector of the economy: residental construction dropped 95 percent; nine million savings accounts were lost; real disposable income was sliced 28 percent; eighty-five thousand businesses failed; production fell more than half; and total output of goods and services dropped by one third.[65] In addition, salaries dwindled 40 percent and dividends fell 56 percent. The worst aspect of the depression, however, was the level of unemployment which rose from 1.6 million in 1929 to 12.8 million in 1933; by the lowest point of the depression one fourth of the labor force was unemployed.[66] Economists, faithfully adhering to the

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with solutions while striving for "less restrictive alternatives." *Id.* at 603-04.

61. T. COCHRAN, AMERICAN BUSINESS IN THE TWENTIETH CENTURY 112 (1972).

62. Peterson, *Institutionalism, Keynes, and the Real World*, 16 NEB. J. ECON. & BUS. 27, 27 (1977). *See generally* G. MYRDAL, AGAINST THE STREAM 3-4 (1973).

63. U.S. NEWS & WORLD REPORT, Oct. 29, 1979, at 32.

64. *Id.* at 32.

65. *Id.* at 32.

66. *Id.* at 32.

teachings of Adam Smith, could offer neither diagnosis nor remedy. The free market system simply was not dealing with the problems facing the nation.

In response to the Great Depression, John Maynard Keynes published his *General Theory*[67] contending the Classical model was invalid and providing a substitute analytical framework.[68] In the *General Theory,* Keynes urged that government action would promote equilibrium at the full employment output level.[69] According to the Keynesian view, full employment and steady economic growth could be ensured only through active governmental intervention.[70] The government, eager to bring the economy around, energetically accepted the new Keynesian economics and "for the first time ever, Americans delegated economic management to the federal government."[71]

B. *The General Theory*

The theoretical construct of the *General Theory* was, generally, a justification for utilizing other practical anti-depression weapons, such as public works financed by government deficit spending. According to Keynes, if business failed to invest enough to create reemployment, the government could take up the slack either by more spending or by tax reductions leading to a deficit.[72] Once a sufficient reduction in unemployment was attained, the government could reduce expenditures and resume previous levels of activity.[73] Fiscal policy, in other words, could provide the support and control necessary for a stable economic system.

Keynes envisioned a society that was both economically just and economically efficient.[74] His "Agenda" for government proposed that good government should not:

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67. *See* J. Keynes, The General Theory of Employment, Interest and Money (1936).

68. *See id.* at 3; Fletcher, *Lawyers, Economists, and Laissez-Faire,* 16 Neb. J. Econ. & Bus. 19, 34 (1977).

69. Fletcher, *Lawyers, Economists, and Laissez-Faire,* 16 Neb. J. Econ. & Bus. 19, 34 (1977).

70. J. Galbraith, Economics and the Public Purpose 12 (1973); *see* T. Cochran, American Business in the Twentieth Century 118 (1972).

71. Wall St. J., Oct. 10, 1979, at 18, col. 2.

72. *See* T. Cochran, American Business in the Twentieth Century 118 (1972).

73. J. Galbraith, Economics and the Public Purpose 24 (1973).

74. Johnson & Johnson, *The Social and Intellectual Origins of The General Theory,* in 6 History of Political Economy 261, 264 (1974).

> attempt to do the things that private enterprise or semiautonomous public bodies were doing well already, but [should] apply itself to those things that were not being done at all. Here at different times he proposed some far-reaching areas of government activity. . . . He was careful, however, not to recommend measures that would discourage business . . . .[75]

The kinds of government spending Keynes preferred, therefore, were those supporting projects of social utility, such as housing, schools, hospitals, and parks. The ultimate objective of the *General Theory*, however, was the substitution of an activist government for the negative government of the Classical model.[76] This aspect of Keynes' theory was manifested in the New Deal program of President Franklin D. Roosevelt, and subsequently enacted in the Employment Act of 1946.[77] The Employment Act, by assigning to Washington the task of promoting maximum employment, production, and purchasing power, brought government in as an equal participant in the managing of the economy. There is little doubt that Keynes has emerged as the dominant economic figure of the twentieth century, and his theories have profoundly influenced contemporary thought about the economy and perception of the economic process.[78] In this sense most of us may be referred to as Keynesians.[79]

C. *The Keynesian Society*

The combined effects of the Great Depression and Keynes' new economics resulted in an expansion of government analogous to the growth of big business in the late 19th century. Keynes had envisioned a program of discretionary fiscal policy; the government would step in when necessary to effectuate a reduction of unemployment, and then recede to its previous level of activity once full employment was obtained.[80] The government, however, expanded

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75. *Id.* at 264.

76. Gruchy, *Law, Politics, and Institutional Economics*, 7 J. Econ. Issues 623, 631 (1973).

77. Ch. 33, § 2, 60 Stat. 23 (current version at 15 U.S.C.A. §§ 1021-1025 (West 1976 & Supp. 1979)).

78. *See* Peterson, *Institutionalism, Keynes, and the Real World*, 16 Neb. J. Econ. & Bus. 27, 38 (1977).

79. *See id.* at 38.

80. J. Galbraith, Economics and the Public Purpose 24 (1973).

beyond Keynes theoretical constructs and exerted pervasive influence over every facet of the economy. During the New Deal period, for example, legislation was passed affecting the following areas of the economy: industrial and trade regulation, credit extension, banking, securities regulations, and monetary regulations.[81] The government went beyond mere fiscal policy and entered the realm of direct regulation of the market and business. Business was suddenly asked to forget its tradition of unquestioned pre-eminence and to adopt a new philosophy of cooperation with labor unions, acceptance of new rules and regulations, and reform of many of its practices.

The result of the Keynesian economic philosophy, therefore, has been government's expansion of its sphere of influence and encroachment upon the rights of individuals, business, and corporate structures. By utilizing its political power, the government has established firm economic principles by which society is to be governed. The full implication of this is the fusion of political and economic power to accomplish national goals, particularly, full employment, economic growth, and stable prices. Within this new economic system the judiciary has been assigned the role of "referee" and empowered, within the confines of the Constitution, to render economic decisions affecting the distribution of laws, goods, and services. Keynesian economics, then, simultaneously assaulted orthodox economic theory, substituted a dazzling and novel theory of employment and income, and supplanted that doctrine with a whole series of public policies and regulations.

Keynes' *General Theory* was aimed at the specific problems facing the world during the Great Depression, namely, unemployment and low levels of business investments. It provided a set of tools for dealing with periods of business recessions. Keynes, however, could not have foreseen the explosive growth of government and its intrusion into every sector of the economy. The Keynesian philosophy, distorted by Washington, has resulted in a mass of bureaucratic regulations and agencies. The complex system of regulation that has emerged, without any coherent plan, is estimated to have cost $500 billion in 1978. New regulations with astounding economic impact were developed, in many cases, without adequate input from the parties most affected and without sufficient consid-

81. *See generally* COMMERCE CLEARING HOUSE, NEW DEAL LAWS (1934).

eration of their future impact on the economy. The result has been excessive and duplicative economic controls.[82]

Many of the regulations present today were developed during the catastrophe of the early 1930's and were addressed to problems no longer existing. The increase in regulation has been so rapid, however, that no check system has been designed to scrap outmoded or ineffective regulations. One of the best examples of this problem is the Federal Reserve Board's Regulation Q, which sets a ceiling on the amount of interest a bank is allowed to pay its customers on time and saving deposits.[83] Between June 1929 and June 1933, the number of banks declined 43 percent and total deposits fell 35 percent.[84] Excessive rate competition for deposits and speculative investment policies were blamed for the thousands of bank failures resulting during this period.[85] The government responded with the Banking Act of 1933[86] which instructed the Federal Reserve to set rate ceilings on commercial banks.[87] What followed was Regulation Q.[88] There is almost general consensus today that Regulation Q has outlived its usefulness.[89] Federal deposit insurance and new supervisory practices have made bank failures extremely rare today.[90] In addition, Regulation Q has had the effect of restraining competition and discriminating against small depositors.[91]

82. Several bills have been introduced recently in Congress to deal with the problems of regulatory proliferation. The aims of this "regulatory reform movement" are to improve rulemaking procedures and the mechanism for review of current regulations. *See* Regulation Reform Act of 1979, S. 755, 96th Cong., 1st Sess.; Reform of Federal Regulation Act of 1979, S. 262, 96th Cong., 1st Sess.; Administrative Practice Regulation Act of 1979, S. 262, 96th Cong., 1st Sess.; Administrative Regulatory Control Act of 1979, S. 1291, 96th Cong., 1st Sess.; Regulatory Procedures Improvement Act of 1979, S. 93, 96th Cong., 1st Sess.

83. Regulation Q, 12 C.F.R. §§ 217 to 217.153 (1979) (revised and amended) (regulations concerning interest on deposits).

84. *See* Jacobs, *The Framework of Commercial Bank Regulation: An Appraisal*, 1 NAT'L BANKING REV. 343, 347 (1964).

85. L. RITTER & W. SILBER, MONEY 192 (2d ed. 1973).

86. Ch. 89, 48 Stat. 162 (current version at 12 U.S.C. § 227 (1976)).

87. *See id.* § 11(b).

88. *See* 12 C.F.R. §§ 217 to 217.153 (1979) (revised and amended).

89. *See, e.g.*, Dunne, *The Swan Song of Regulation Q*, 91 BANKING L.J. 819, 819 (1974); Holmberg, *Regulation Q and Consumer Protection: Legal and Economic Guidelines*, 92 BANKING L.J. 1073, 1073 (1975); Verkuil, *Perspectives on Reform of Financial Institutions*, 83 YALE L.J. 1349, 1358 (1974).

90. *See* L. RITTER & W. SILBER, MONEY 197 (2d ed. 1973).

91. *See id.* at 197-98. Since Regulation Q allows higher interest rates on larger deposits

Keynesian economics has resulted in a highly regulated economy perhaps not equipped to deal with present day problems. The presence of stagflation must be as shocking to Keynesians as the Great Depression was to the Classical economists.[92] Keynes' theories, limited in time and function, therefore, are ill-equipped to deal with the problems facing America today. Government regulations have become so detailed and pervasive that they have begun to threaten the American free enterprise system.[93]

IV. Institutional Economics

A. *Conflict: The Analytical Framework*

1. *An Overview.* Institutional economics is a school of thought that receives its name from basic models that characterize economic institutions and the structure of the United States' economy. The premise of the Institutionalist is that development in the basic institutions of the American economy, such as the market, corporations, and governmental structures, can substantially affect functioning of the economy.[94] These economists view economic institutions as part of a larger social structure in which all parts are interrelated. Consequently, any meaningful inquiry into one portion, such as the economy must be based on a pervasive general theory of social structure or social organization.[95] This is one of the most fundamental principles of Institutional economics—even if attention is focused on a specific problem, the analysis must take into account the entire social system.[96] Institutionalists are also concerned with the distribution of power in society, and, more gen-

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it discriminates against the small, average depositor. Moreover, by setting what might be termed draconian restrictions on the amount of interest that can be paid lawfully on deposits, it produces inefficient operations by precluding healthy competition. Two presidential commissions have recognized these problems and have recommended interest rate deregulation. Regulation Q, however, still remains in full force. Report of the President's Commission on Financial Structure and Regulation (1972) (Hunt Commission).

92. Stagflation refers to the phenomenon of inflation combined with abnormally slow economic growth causing high unemployment.

93. Dorsey, *Free Enterprise vs. The Entrepreneur: Redefining The Entities Subject to the Antitrust Laws,* 125 U. Pa. L. Rev. 1244, 1244 (1977).

94. *See* Tool, *A Social Value Theory in Neoinstitutional Economics,* 11 J. Econ. Issues 823, 841-42 (1977).

95. *See* Fusfeld, *The Development of Economic Institutions,* 11 J. Econ. Issues 771, 773-74 (1978).

96. *See* Myrdal, *Institutional Economics,* 12 J. Econ. Issues 771, 773-74 (1978).

erally, with economic, social, and political stratification.[97] Accordingly, they view the economic process as a dynamic, open system forming a single component of the complex network of sociocultural relationships.[98] Consequently, Institutionalists reject the notion that the economic system can be organized adequately through markets and the unrestricted interaction of self-interests.[99] According to the Institutionalists, then, the "emphasis in economics should be on the economy itself, as a socio-political, culturally conditioned entity from which society's economic choices emerge."[100]

As previously stated, Institutionalists are concerned with the distribution of power in society.[101] Proponents of this theory are preoccupied with power because conflict, rather than harmony, constitutes the analytical point of departure for Institutionalism.[102] Under this approach, the economist must necessarily give consideration to the circumstances under which conflicts are resolved:[103]

> In the heartland of the advanced industrial economy, conflicts are settled not by the operations of the forces of the competitive market system, but, rather, by the exercise of economic power buttressed by political and legal power. Power resides very largely in the large corporations and other private economic organizations, the state, and the courts, which are involved in deciding how individuals and groups are to share goods, services, claims, rights, and obligations. In the opinion of the institutionalist the scientific paradigms of the neoclassical and Keynesian economists do not come to grips with the conflict-power issue.[104]

Institutionalists, therefore, have a scientific paradigm in which the conflict-power nexus is a central concern; they incorporate a "tridimensional approach to the study of the politico-juridico-economic system that explains how the economic, political, and legal deci-

97. *Id.* at 774.

98. *See* Peterson, *Institutionalism, Keynes, and the Real World,* 16 NEB. J. ECON. & BUS. 27, 29 (1977).

99. *See id.* at 29.

100. Klein, *American Institutionalism: Premature Death, Permanent Resurrection,* 12 J. ECON. ISSUES 251, 263 (1978).

101. Myrdal, *Institutional Economics,* 12 J. ECON. ISSUES 771, 774 (1978).

102. *See* Gruchy, *Law, Politics, and Institutional Economics,* 7 J. ECON. ISSUES 623, 623 (1973).

103. *See id.* at 623.

104. *Id.* at 623.

sion-making processes are interrelated."[105]

2. *Spheres of Influence.* Although there is no simple Institutional "model" purporting to illustrate how the economy works, there is what might be termed a "vision" or view of how things interrelate in the economy.[106] This "vision" consists, generally speaking, of three spheres of influence that interlock with each other and act, or react, against each other.

a. *The Government Sphere.* The first sphere of influence in the Institutional model is that of government. The government sphere has two major characteristics. The first characteristic is the division of this sphere into two components: politics and jurisprudence. Secondly, the government sphere, operating under a democratic system, is characterized by a lack of planning unlike the Socialist systems.[107] The political component of the sphere is "concerned with the allocation of scarce, valued items which are considered to be the proper concern of political units such as cities, counties, states, and the nation."[108] The established authority of the separate units of government constitutes the bases of political decision making. These governmental units are vested with the power to require public compliance with the decisions concerning safety, defense, transportation, education, health, and social welfare.[109]

The judicial component of the sphere also makes decisions concerning the allocation of scarce and valuable items. The judicial system, however, deals with conflicts about the claims and obligations arising in connection with valuable items distributed by the political system. This component interprets legislative and constitutional norms, then applies these norms to individual claims and obligations.[110] Further, the judicial component authoritatively scrutinizes conflicts arising from these claims and obligations, then provides enforceable remedies consistent with its interpretation of

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105. *Id.* at 623.

106. *See* Peterson, *Institutionalism, Keynes, and the Real World,* 16 NEB. J. ECON. & BUS. 27, 30 (1977).

107. The only type of long range planning found in the government sphere of influence is perhaps in the military.

108. Gruchy, *Law, Politics, and the Institutional Economics,* 7 J. ECON. ISSUES 623, 626 (1973). *See generally* D. EASTON, A FRAMEWORK FOR POLITICAL ANALYSIS 50-57 (1965); D. EASTON, THE POLITICAL SYSTEM 129-34 (1953).

109. Gruchy, *Law, Politics, and Institutional Economics,* 7 J. ECON. ISSUES 623, 626 (1973).

110. *See id.* at 626.

the Constitution and laws.[111]

The lack of planning characteristic of the government sphere is, according to the Institutionalists, responsible for many of the current crises facing the nation. Allan G. Gruchy in *Institutionalism, Planning, and the Current Crisis,*[112] sets forth a number of variables that call for national economic planning:

> (1) [the] failure to deal successfully with large economic units and the issue of economic and political power; (2) the . . . [problems] over income distribution; (3) [the] . . . inability to cure unemployment without creating inflation; . . . (4) [the] . . . failure to develop an . . . [income] policy that can be added to fiscal and monetary policy in the effort to achieve economic stability; . . . (6) the . . . inadequacy of Keynesian economics in the face of problems that were not of major importance when [the theory] . . . was conceived . . . —problems such as economic power, stagflation, dissatisfaction with national income distribution, consumerism, worker alienation, and environmental deterioration; . . . (8) the spreading belief that economics is now at an impasse and that economists are at bay . . . .[113]

Institutionalists view economic planning as almost essential in order to raise the quality of life to the maximum, and to deal effectively with current social and economic problems.[114]

b. *The Corporate Sphere.* Interlocked with the government sphere of influence is the corporate structure sphere.

> This sector, which probably accounts for half of all output, is dominated by giant corporations (Galbraith estimates that some 2,000 form its core), serving both national and international markets. The organizational structure is corporate and bureaucratic, dependent upon a highly professional management. In terms of the dollar value of their sales and assets, many of the corporate giants which dominate the economy's center rival in economic size and power most of our states and many foreign nations.[115]

111. *See id.* at 626.

112. Gruchy, *Institutionalism, Planning, and the Current Crisis,* 11 J. ECON. ISSUES 431, 431 (1977).

113. *Id.* at 431-32.

114. *Id.* at 431-32; *see, e.g.,* A. GRUCHY, MODERN ECONOMIC THOUGHT 1-2 (1947); Gruchy, *Institutionalism, Planning, and the Current Crisis,* 11 J. ECON. ISSUES, 431, 437 (1977); Stanfield, *Institutional Economics and the Crisis of Capitalism,* 11 J. ECON. ISSUES 449, 449 (1977).

115. Peterson, *Corporate Concentration, Small Business, and the Economy,* 15 NEB. J.

Large corporations are in many ways similar to a political unit. These corporations are characterized by well-defined objectives, a bureaucratic system, and the power to impose many of their decisions upon other organizations and individuals.[116] Because it is so similar to a political unit, the corporate structure is said to have political, jurisprudential, and economic components. It is through these components that the sphere operates, influences, and is influenced by government.

The influence this sphere is able to exert over the economy is substantial. More significant, however, is the fact that only a few corporations account for this vast power.

> These giant corporations which dominate the economy's center are but a tiny fraction of the nation's more than 11 million business firms; yet they have latched firmly onto the levers of economic power in our society. How and where we live, what we consume, and even, perhaps, how we vote is strongly influenced (if not dominated) by decisions and actions taken in the economy's corporate center.[117]

Within the corporate sphere, therefore, there is what might be termed a "sub-sphere" composed of the smaller, less powerful business entities. In manufacturing, for example, "many small firms are virtually satellites of corporate giants, existing either as suppliers of material inputs or as outlets for their products."[118] This sub-sphere, influenced by government and giant corporations, is able to exert only minimal influence over the economy.

To appreciate the magnitude of vast assets and capital possessed by corporations, it is helpful to analyze one such as IT&T. In 1964 IT&T embarked on a major diversification through merger program. Between 1961 and 1968 it acquired fifty-two domestic and fifty-five foreign corporations, with the domestic companies alone holding combined assets of about 1.5 billion dollars. During 1969, IT&T's board of directors approved twenty-two domestic and eleven foreign acquisitions. The three largest—Hartford Fire Insurance Company, Grinnell Corporation, and Canteen Corpora-

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ECON. & BUS. 25, 28 (1976).

116. Gruchy, *Law, Politics, and Institutional Economics*, 7 J. ECON. ISSUES 623, 625 (1973).

117. Peterson, *Corporate Concentration, Small Business, and the Economy*, 15 NEB. J. ECON. & BUS. 25, 28 (1976).

118. *Id.* at 29.

tion—added assets of over two billion dollars, which brought its acquisition total for the decade to nearly four billion dollars. Moreover, it should be noted that part of each tax dollar spent on defense or space programs goes to IT&T, one of the nation's leading defense contractors. It also maintains Washington's "Hot-Line" to Moscow and mans the Air Force Distance Early Warning System and the giant Ballistic Missile Early Warning System sites in Greenland and Alaska. Unlike the government sphere of influence, the corporate structure is premised on the idea of long range planning. Through long range planning corporations are able to acquire knowledge and skill in developing and acquiring assets and capital.

c. *The Consumer Sphere.* Interlocking with the government and corporate spheres in the Institutional model is the consumer sphere, characterized by a single economic component. This sphere lacks the coordination and cohesive self-interest necessary to have any significant political clout or legal representation. As a consequence of concentrated economic power, consumers are manipulated so that instead of producing in response to demand the corporate sphere can create demands according to its own calculations.[119] Until the late 1960's, little effort was made to organize consumers for the protection of their own self-interest. In the Institutional model, therefore, the consumer sphere is at the mercy of the government's political and legal influence as well as the corporate sphere's political, legal, and economic influence.

3. *Interlocking Relationship of the Spheres of Influence.* The interlocking between the government sphere and the corporate sphere is considered the corporate government. The corporate government is defined in terms of the relationship existing between government officials and corporate management. For example, with its numerous foreign operations, IT&T is an important force in international economic affairs. Some IT&T employees are better known in circles of international diplomacy than in business. They have included such notables as former U.N. Secretary General Trygve Lie as Director of IT&T-Norway, former Belgian Premier Paul-Henry Spaak as Director of IT&T-Belgium, two members of the British House of Lords, a member of the French National Assembly, and, in the United States, John A. McCone, former direc-

119. *See* Klein, *American Institutionalism: Premature Death, Permanent Resurrection,* 12 J. ECON. ISSUES 251, 266 (1978).

tor of the CIA, and Eugene R. Black, a prominent figure in international economic and political circles.

The interlocking sphere of influence between the corporate sphere and the consumer sphere is called the corporate market. The corporate market is defined as a market system wherein the largest corporations have expanded rather steadily their shares of an ever-growing economy. Moreover, although the pursuit of profits is still a major goal, this pursuit often takes the modern corporation into both national and international political affairs. In many instances, the power of the large corporation is grounded in concentrated markets, in its conglomerate and multinational makeup, and in its sheer size. These characteristics permit the large conglomerate corporation to engage in strategies not open to smaller firms. Included among these strategies are cross-subsidization and business reciprocity. Cross-subsidization involves the use of resources from one line of business to expand, if necessary at a loss, another product line. Relatively specialized firms have limited opportunities and capacity to engage in cross-subsidization because their resources come from a single line of business. Conglomerate firms, on the other hand, operate in many product lines and thus have both the opportunity and the capacity to engage in the practice. Business reciprocity involves the practice of buying from those who can buy from you. It becomes a potentially harmful competitive strategy when some firms in a market can make more sales on this basis than others. A single-line corporation has relatively few opportunities to pursue the practice, whereas a conglomerate firm that buys and sells a large variety and volume of products has the best opportunity to engage in reciprocal dealing.

The last interlocking system within the Institutionalist economic model occurs between the government sphere of influence and the consumer sphere. This interlock is called the government market, a marketplace wherein the government provides goods and services for the consumer. For example, the government provides social security insurance for the old-aged, as well as food stamps and unemployment payments to those members of society unable to help themselves. Hence, the government is able to influence directly the consumer market system by injecting money that would not otherwise enter that market. In this way government affects the prices of goods and commodities and, ultimately, unemployment.

When all three spheres of influence interlock with each other, a center core, which is a part of each individual sphere, is created. This central core is the fusion of the government, corporate, and consumer spheres, and is regulated by legal, political, and economic decisions. According to the Institutionalist, this central core forms the "conflict-power nexus" from which all economic analysis must begin.

B. *Institutional Economics and Changing Social Attitudes*

Proponents of the Institutional theory contend a significant recent trend is exhibited by increasing concern with social interests while private interests diminish. The concept that an individual is entitled to own private property has been jeopardized by the increasing interdependency of human life accompanying the nation's shifting economic and social priorities.[120] To Institutionalists the economic process is but one component within a complex network of sociocultural relationships.[121] Any meaningful inquiry into economic processes, therefore, must include an analysis of such issues as civil rights, discrimination, and environmental deterioration. Although not articulated in Institutionalist terms, some recent judicial decisions have recognized the evolving trend to some extent. In *Kramer v. Union Free School District No. 15*,[122] for example, the Supreme Court addressed the constitutionality of a New York law limiting voter eligibility in school district elections to persons owning or leasing taxable real property within the district.[123] Reversing the lower court's holding that the law was constitutional,[124] the Court held that a standard of rigid examination is applicable to statutes denying the voting franchise to citizens otherwise qualified by residence and age.[125] The Court pointed out that such a statute would deny the right to vote to persons with distinct and direct interests in school meeting decisions by drawing artificial lines inconsistent with the equal protection clause.[126] The significance of

120. *See* Gruchy, *Law, Politics, and Institutional Economics*, 7 J. ECON. ISSUES 623, 624-25 (1973).

121. *See* Peterson, *Institutionalism, Keynes, and the Real World*, 16 NEB. J. ECON. & BUS. 27, 29 (1977).

122. 395 U.S. 621 (1969).

123. *See id.* at 623.

124. *See id.* at 633.

125. *See id.* at 626 (standard), 632-33 (standard applied).

126. *See id.* at 626-27, 632-33. The Court stated the following persons would be denied

Kramer to an Institutionalist is its refusal to classify individuals according to property interests. In other words, it divorces the concept of property rights from that of social rights and interests.

Trimble v. Gordon[127] presents another case in which the Supreme Court focused on individual personal rights. At issue in this case was an Illinois probate statute that extended the intestacy rights of illegitimate children to inheritance from their mothers only.[128] The Court held the statute discriminated against illegitimates in violation of the equal protection clause.[129] Although classifications based on illegitimacy are not "suspect" under the equal protection clause, the Court reasoned a heightened level of judicial scrutiny is justified because such classifications encroach on fundamental personal rights.[130] In so holding, the Court rejected the argument that the statute advanced a substantial state interest by establishing an accurate and efficient method of disposing of property at death.[131]

Notable developments, consistent with the Institutionalist model, have also resulted in the area of gender-based discrimination. In *Craig v. Boren*,[132] for example, the Supreme Court announced that classifications based on sex survive scrutiny under the equal protection clause only if substantially related to the achievement of important governmental objectives.[133] For some time Institutionalists have argued that if the "male economic monopoly" is to be broken, greater educational opportunities must be established for women.[134] They have taken the position that educational institutions must, for a period, discriminate affirmatively in favor of women; to do otherwise, would implicitly perpetuate past discrimination.[135] This position was given recognition in the recent

the right to vote notwithstanding a direct interest in school meeting decisions: persons living with relatives; military personnel and others living on tax-exempt property; and parents who neither own nor lease qualifying property and whose children are too young to attend school. *See id.* at 630.

127. 430 U.S. 762 (1977).

128. *Id.* at 762, 763.

129. *See id.* at 776.

130. *See id.* at 766-67. *See generally* Note, *Equal Protection and the "Middle-Tier": The Impact on Women and Illigitimates*, 54 NOTRE DAME LAW. 303, 311-12 (1978).

131. Trimble v. Gordon, 430 U.S. 762, 776 (1977).

132. 429 U.S. 190 (1976).

133. *Id.* at 197, 199.

134. *See* J. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE 229-30 (1973).

135. *See id.* at 229-30.

case of *Califano v. Webster*,[136] in which the Court recognized that reducing the financial disparity between men and women caused by historical economic discrimination constitutes an important government objective.[137] Consequently, the Court held that benign sex discrimination preferring women over men to ameliorate historical economic discrimination is constitutionally permissible.[138]

Issues involving the environment present still another area of deep concern for Institutional economists. In two important "environment" decisions, *Sierra Club v. Morton*[139] and *United States v. SCRAP*,[140] the Supreme Court recognized that aesthetics "and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society."[141] The Court reasoned individuals could suffer recreational and aesthetic harm as a consequence of environmental deterioration.[142] The combined result of these two cases was to reduce the barriers to litigation facing environmental groups.[143] *E. I. duPont DeNemours & Co. v. Train*,[144] presents another significant environmental decision under the Institutional economic model. In this case the Court sustained the authority of the Environmental Protection Agency to impose industrywide, as opposed to plant-by-plant, limitations on the discharge of water pollution.[145] The Court also held new plants were barred from obtaining variances from the effluent limits under the Federal Pollution Control Act.[146]

Generally speaking, the Institutional theory states there is an interrelationship between political, legal, and economic functions in society that should be considered in long range planning decisions by government. Recognition of this interrelationship is particularly important, according to the Institutionalist, in dealing with envi-

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136. 430 U.S. 313 (1977).
137. *See id.* at 317, 320.
138. *See id.* at 317-18, 321.
139. 405 U.S. 727 (1977).
140. 412 U.S. 660 (1973).
141. Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972) (proposed skiing development in national forest challenged as harmful to area's aesthetics and ecology); *see* United States v. SCRAP, 412 U.S. 669, 686 (1973) (railroad surcharge challenged as causing wasteful depletion of natural resources and discouraging use of recyclable materials).
142. *See* Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).
143. *See* C. STONE, SHOULD TREES HAVE STANDING? 21-22 (1974).
144. 430 U.S. 112 (1977).
145. *See id.* at 131-33, 136.
146. *See id.* at 137-38.

ronmental and energy problems. As a fundamental premise the theory assumes a substantial power imbalance in the present economic structure. A balance of power can be achieved only by redistributing economic wealth through legal, political, and economic vehicles. Institutionalists firmly believe their theory will become more prevalent because a broader approach will be needed for dealing effectively with the practical and political problems facing the nation.[147] Conventional economics will be abandoned according to the Institutionalists, because its scope is restricted to narrow models encompassing a limited number of variables; it is thus limited to basic economic analysis only.[148] This is not to suggest that Institutionalists reject the analytical tool kit of the classical economist; however, as Institutionalists, they are concerned with explaining various phenomena. Consequently, while the Classical economist's view of the world is shaped by the mechanism and formalism of the physical sciences, the Institutionalist's perception is shaped by history and evolutionary biology. Institutionalists cannot work with the classical, mechanistic human. Instead, they work with the organic human, a member of a continuously evolving society. Their principal criticism of orthodox economics is that it works with formalistic, mechanical, narrowly defined models.[149] By design, it is ignorant of "a whole world of relevant things."[150]

V. Conclusion

The interrelationship between legal and economic theory has had a profound effect on legal, political, and economic decision making. Because economic theories manifest social attitudes, many legal and political decisions can be explained in terms of the economic theories prevalent in society. The New Deal era of the 1930's, for example, can be best understood by an examination of the Keynesian economic philosophy. By the same token, the Great Society of the 1960's reflected the Institutional economic influence by drawing attention away from individuals as property owners, and focusing instead on the individual as a person with economic

147. *See* Myrdal, *Institutional Economics,* 12 J. Econ. Issues 771, 780 (1978).
148. *Id.* at 775.
149. *See* Dugger, *Institutional and Neoclassical Economics Compared,* 58 Soc. Sci. 449, 451-52 (1977).
150. Myrdal, *Institutional Economics,* 12 J. Econ. Issues 771, 776 (1978).

and social claims. It is no longer disputed that many of the public issues facing the nation have serious economic implications. Because of this, it has become increasingly important for lawyers to have at least a basic understanding of economic theory. By examining the interrelationship of law and economics, it may be possible to deduce the basic formal characteristics of the law from economic theory.[151]

151. R. POSNER, ECONOMIC ANALYSIS OF LAW 393 (1972).