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Citation: 11 Geo. J.L. & Pub. Pol'y 481 2013



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# ARTICLES

## The Legacy of Social Darwinism: *From Railroads to the “Reinvention” of Regulation*

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*According to accepted wisdom, new paradigms of regulation are upon us. This Article challenges this conception. It revisits the work of the leading regulator and theoretician of regulation in post-Civil War U.S., Charles Francis Adams, Jr., and argues that contemporary regulation reverts to Adams' theory of regulation, rather than introducing a revolutionary chapter to the intellectual history of regulation in the United States. The Article operates on three levels. On one level, it offers a new interpretation of Adams' seminal theory by revealing the hold that Herbert Spencer and Social Darwinism had on his work. On another level, the article uncovers the influence evolutionary thinking had on the rise of the American administrative state in general, and on the work of one of its greatest regulators in particular. Finally, in exposing the imprint of Social Darwinism in Adams' theory of regulation and connecting this theory to present models of regulation, the Article unearths and explores key theoretical foundations of much of contemporary thinking and practice in the field of administrative regulation. Thus, the Article reveals that the legacy of Social Darwinism, which originated in nineteenth century U.S. regulation, persists to this day.*

I. INTRODUCTION .....	482
II. ON RAILROAD REGULATION: ADAMS' AGE AND WORK .....	487
A. <i>A Muckraker in Context</i> .....	487
B. <i>Legal Context</i> .....	491
C. <i>The Railroad Problem</i> .....	495
D. <i>What to Do? The Adams Model</i> .....	497

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III. INTELLECTUAL CONTEXT: NATURAL AND SOCIAL EVOLUTION . . . . .	500
A. <i>On Natural and Other Evolutions: Introduction</i> . . . . .	501
B. <i>John Stewart Mill vs. Auguste Comte</i> . . . . .	502
C. <i>Herbert Spencer</i> . . . . .	505
D. <i>Evolution to Adams</i> . . . . .	510
IV. ON SOCIAL DARWINISM: SPENCERISM AND ADAMS . . . . .	511
A. <i>Survival of the Fittest</i> . . . . .	511
B. <i>The Power of Concentration</i> . . . . .	512
C. <i>Remedies in an Age of Evolution</i> . . . . .	513
D. <i>On the Importance of Scientific Investigation</i> . . . . .	515
E. <i>The Man Regulator</i> . . . . .	517
F. <i>Adams and Spencer: Conclusion</i> . . . . .	519
V. THE “REINVENTION” OF REGULATION: WHY ADAMS? WHY NOW? . . . . .	520
A. <i>The Regulator as a Facilitator</i> . . . . .	521
B. <i>Regulation-Through-Information and Self-Regulation</i> . . . . .	522
C. <i>Regulation-Through-Networking</i> . . . . .	525
D. <i>A Weak State</i> . . . . .	526
VI. CONCLUSION: THE LEGACY OF SOCIAL DARWINISM . . . . .	526

## I. INTRODUCTION

The talk of the need to “reinvent” federal regulation has become common at least since the 1990s.<sup>1</sup> The rhetoric of reinvention has been carried along by a sense of crisis, even alarm, triggered by the recognition that, all told, “traditional”—i.e., control-and-command<sup>2</sup>—regulation has turned from profit to

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1. See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 3 (1997) (“The language of regulatory reinvention is ubiquitous.”); Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 171 (“At present, there is a remarkable burst of interest in ‘rethinking’ or ‘reinventing’ the next generation of environmental regulations.”); Daniel A. Farber, *Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection*, 2000 U. ILL. L. REV. 61, 61–62 (2000) (declaring that “[r]einvention is all the rage today,” and that it “is here to stay.”). See also BILL CLINTON & AL GORE, REINVENTING ENVIRONMENTAL REGULATION (1995), available at <http://purl.access.gpo.gov/GPO/LPS30367>, and Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

2. The “command method” of regulation, which is a top-down, centralized system of regulation whereby the regulator orders the regulatee to undertake a specific course of action, encompasses the

loss.<sup>3</sup> Critics have faulted the traditional mode of regulation with insensitivity to the toll levied on regulated industries and society in pursuit of idealistic objectives<sup>4</sup> and have argued that it ran counter to participatory democratic values.<sup>5</sup> In the past generation, we have witnessed an explosion of novel regulatory strategies that seek to address these and related critiques.<sup>6</sup>

While there is a considerable amount of literature studying the “reinvention revolution,” not much attention has been given to its historical origins in the annals of regulation in the United States. This is understandable given the ubiquitous conception that the reinvention campaign has ushered in a “revolution” or a “new paradigm” of regulation.<sup>7</sup> This Article seeks to challenge that conception and argues that it is a severely misguided misconception. The Article harkens back to the nineteenth century U.S., and demonstrates the striking theoretical similarities between that era’s foremost model of regulation and models of regulation espoused by the reinvention revolution. It is argued that in important respects contemporary regulation reverts to prior theories of regulation, rather than introducing a revolutionary chapter to the intellectual history of regulation in the United States.

Specifically, the Article revisits and offers a new interpretation of the work of the leading regulator and theoretician of regulation in post-Civil War U.S., Charles Francis Adams, Jr. (1835–1915).<sup>8</sup> Adams, a member of one of the country’s most distinguished political families of the day, was truly an Ameri-

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two main administrative procedures outlined in the Administrative Procedure Act of 1946: Rulemaking and Adjudication (Pub. L. 79-404, 60 Stat. 237 (1946), codified at 5 U.S.C. § 501 et seq. (2010)). See Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 438, 454 (2003) [hereinafter Stewart, *Administrative Law in the Twenty-First Century*], and Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and ‘Fine-Tuning’ Regulatory Reform*, 37 STAN. L. REV. 1267, 1267 n.2 (1985).

3. For a survey of critiques of the command method and a short history of reinvention initiatives, see Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 103–118 (1998). See also sources cited *infra* note 266.

4. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993). For counter arguments, see, e.g., Latin, *supra* note 2.

5. See, e.g., Freeman, *supra* note 1, and Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

6. See *infra* Part IV.

7. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 345 (2004).

8. For Adams’ biography, see EDWARD CHASE KIRKLAND, CHARLES FRANCIS ADAMS 1835–1915: THE PATRICIAN AT BAY (1965); THOMAS K. McCRAW, PROPHETS OF REGULATION (1984), ch. 1; and CHARLES FRANCIS ADAMS, AN AUTOBIOGRAPHY 1835–1915 (1916) [hereinafter ADAMS, AUTOBIOGRAPHY]. A son of Massachusetts, Adams was a true *patriote local* and wrote lengthy essays outlining ways to bolster Boston’s precarious position in the national market through a reform in its transportation system. See Charles Francis Adams, *Boston*, 106 N. AM. REV. 1 (1868) [hereinafter Adams, *Boston I*], and Charles Francis Adams, *Boston II*, 106 N. AM. REV. 557 (1868) [hereinafter Adams, *Boston II*].

can aristocrat<sup>9</sup>—and lived as such.<sup>10</sup> He devoted much of his life to a study of the railroad industry at a time when its development was in full swing and the revolution that would follow on its heels loomed large, making himself “an unrivaled authority on [the railroad industry].”<sup>11</sup> Most pertinently, Adams is remembered as the originator of a distinct model of regulation. It was a model of “weak” regulation to be carried out by public, investigatory “sunshine” commissions. Introducing the model to the American polity was his great contribution to the practice and theory of regulation in the United States. He was the founding father and consequently the Chairman of the epoch-defining Massachusetts Board of Railroad Commissioners, which was created in 1869 by an act Adams himself authored.<sup>12</sup> It did not take long for the Adams model to become a truly “national prototype” of regulation.<sup>13</sup>

The Article offers a fresh interpretation of the immense<sup>14</sup> Adams corpus.<sup>15</sup> This interpretation focuses on the hold of *evolutionary thinking* on Adams’ work.<sup>16</sup> It argues that Adams’ theory of regulation—a theory that resonates with current strategies to “reinvent” the administrative process—relies on one particu-

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9. Adams was the grandson of John Quincy Adams, the sixth President of the United States, whose own father, John Adams, was the second President of the Union. See PAUL C. NAGEL, DESCENT FROM GLORY: FOUR GENERATIONS OF THE JOHN ADAMS FAMILY (1983).

10. See Adams’ grandsons’ description of various aspects of his daily life in Elliot Perkins et al., *Three Views of Charles Francis Adams, II*, 72 PROC. MASS. HIST. SOC’Y 212 (1957–1960). See also sources cited *supra* note 8.

11. Wendell Garrett & L. H. Butterfield, *The Published Writings of Charles Francis Adams, II (1835–1915): An Annotated Checklist*, 72 PROC. MASS. HIST. SOC’Y 238 (1957–1960).

12. For an analysis of the Act, see *infra* Section I.D.

13. McCRAW, *supra* note 8, at 57. By 1887, the year the Federal Interstate Commerce Commission (ICC) was established, the Adams model had been adopted by Colorado, Connecticut, Iowa, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New York, Ohio, Rhode Island, Vermont, Virginia, Wisconsin, and the territory of Dakota. See ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSION 25 (1941).

14. Adams would prove to be an exceptionally prolific writer. See Garrett & Butterfield, *supra* note 11 (An Annotated Checklist of Adams’ published writings), where it is said that “Charles Francis, it must be admitted, wrote and published *too much*.” (emphasis in original; *id.* at 239). The Annotated Checklist includes nearly 450 publications (!), “not including some hundreds of newspaper articles and letters to the press on almost every imaginable topic . . . .” *Id.* at 239. For a balanced appraisal of the Adams style in writing, see his grandson’s survey in Thomas B. Adams, *A Word Worth Remembering*, 72 PROC. MASS. HIST. SOC’Y 230, 234 (1957–1960).

15. Reading this Article, one might get the wrong impression that Adams constructed a fully coherent corpus in his expansive writing through the years. Well, he did not (for he was human). Elsewhere I point to tensions in his “corpus.” See Yair Sagy, *The Manager, The Judge, and the Empiricist: American Administrative Law as a Theory of Expertise* (2006) (unpublished JSD Dissertation, New York University) (on file with the New York University Law School Library) [hereinafter Sagy, *The Manager, The Judge, and the Empiricist*]. In this Article I have tried to capture the core of Adams’ thinking by focusing on the themes that recur throughout his work. These themes are in many respects the center of the Article.

16. As noted, I will approach these and related questions by reading Adams through the lens of the raging nineteenth century debate about evolution, conducted by the leading evolutionists of the day, such as Auguste Comte (1798–1857), Louis Agassiz (1807–1873), Charles Darwin (1809–1882), Asa Gray (1810–1888), Thomas Henry Huxley (1825–1895), and Herbert Spencer (1820–1903). See *infra* Part III.

lar school of natural and social evolution. That school is identified in the Article as Spencerism, as it is associated with Herbert Spencer (1820–1903), the leading evolutionist thinker in the United States at the time,<sup>17</sup> who has been (in)famous from the late nineteenth century to this day for his robust advocacy of Social Darwinism.<sup>18</sup>

The unique interpretation put forward in the Article presents new answers to old puzzles associated with the Adams model. Notable is the following: Adams lived and worked in an era that saw unparalleled economic growth, but also the rise of giant, all-too-powerful monopolistic corporations, which were widely held to pose a real threat to American democracy.<sup>19</sup> How, then, could Adams' acrid analyses of the power of gigantic railroad corporations be reconciled with his model of weak regulation? How could they be reconciled with his endorsement of business "combinations" and even monopolies?<sup>20</sup> Moreover, if, as Adams argued, a regulatory commission's sole role was to objectively inform the public and the railroads of the state of the industry, would it not be more appropriate to assign expert professionals (for example, lawyers, engineers, etc.) to the job? After all, his was also "the era of the professional."<sup>21</sup>

The following discussion will demonstrate how the controversy concerning evolution in general, and Spencer in particular, provided Adams with intellectual tools—concepts, understanding of natural and social processes, and even metaphors—with which to analyze issues concerning public regulation of the

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17. See RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (1955), especially ch. 2 and *passim* [hereinafter HOFSTADTER, SOCIAL DARWINISM]. See also *infra* notes 168–172 and accompanying text.

18. "Social Darwinism" can be defined as "the belief that competitive struggle between individuals, tribes, nations, and races has been the chief engine of progress in social evolution." JOHN C. GREENE, *Darwin as a Social Evolutionist*, in SCIENCE, IDEOLOGY, AND WORLD VIEW: ESSAYS IN THE HISTORY OF EVOLUTIONARY IDEAS 95 (1981) [hereinafter GREENE, *Darwin as a Social Evolutionist*]. See also HERBERT HOVENKAMP, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 654–655 (1985). So viewed, Spencer, who coined the phrase "the survival of the fittest," was undoubtedly a major figure in Social Darwinist thinking. See, e.g., 1 HERBERT SPENCER, PRINCIPLES OF BIOLOGY 444–45 (1864) ("This survival of the fittest, which I have here sought to express in mechanical terms, is that which Mr. Darwin has called 'natural selection,' or 'the preservation of favoured races in the struggle for life.'"). It may be noted that some find fault with this characterization of Spencer. See, e.g., THOMAS C. LEONARD, *Origins of Myth of Social Darwinism: The Ambiguous Legacy of Richard Hofstadter's Social Darwinism in American Thought*, 71 J. ECON. BEHAV. & ORG. 37 (2009). Generally, and especially in light of such contrary views, it should be clarified that the inclusion of Spencerism under the heading of Social Darwinism is not to imply that Spencerism and Darwinism do not differ on substantial issues in their respective descriptions of evolutionary processes. They do. Suffice it to say that Spencerism is premised on the inheritance of acquired traits, psychological features included. Modern Darwinism rejects this idea. See, e.g., RICHARD DAWKINS, *THE BLIND WATCHMAKER* (1986). Finally, it should be noted that it would be a mistake to equate the theories of Charles Darwin and "Darwinism," for over the years the latter term has come to embrace a concept of evolution which is somewhat different than that of Darwin. Notably, Darwin believed in the inheritance of acquired characteristics, while his followers reject the idea. See generally PETER J. BOWLER, *EVOLUTION: THE HISTORY OF AN IDEA* (3rd ed., 2001).

19. See *infra* text accompanying note 47.

20. See *infra* Section I.D.

21. See *infra* notes 164–165 and accompanying text.

railroad industry.<sup>22</sup> Accordingly, evolutionary thinking provides us with a “conceptual map”<sup>23</sup> that renders Adams’ model “reasonable” or “complete.”<sup>24</sup>

Exposing the imprint of Spencerism and Social Darwinism in Adams’ seminal theory of regulation and connecting this theory to present models of regulation, the Article unearths and explores the key theoretical foundations of much contemporary thinking and practice in the field of administrative regulation. Therefore, the Article makes an important contribution to the literature in three ways. First, it offers an original interpretation of the theories of Adams, rightly considered one of the few “prophets of regulation” in the history of the United States.<sup>25</sup> Second, it uncovers the influence evolutionary thinking had on a critical era in the history of the American administrative state and explores the school of evolution that was most influential at the time (i.e., Spencerism). And third, in connecting Adams to the present, it sheds a new light on current so-called revolutionary models of regulation and exposes their deep intellectual ties to modern evolutionary thinking. In so doing, the Article reveals the long-lasting legacy of Social Darwinism in the history and theory of regulation in the United States—a legacy that persists to this day. Consequently, the Article contributes to debates about contemporary models of regulation by providing a fuller understanding of their theoretical foundations.

The Article proceeds as follows. The next part, Part II, will thrash out Adams’ model of regulation. It will first introduce his age and put his model in the context<sup>26</sup> of the advent of mammoth, national corporations in the U.S. economy. Further, it will examine Adam’s relevant legal context by pointing at alternative means available at the time to tame unruly behavior of railroads (e.g., legislation, or trust-busting). This Part will also canvass the Adams model of regulation, following an analysis of Adams’ unique conceptualization of “the Railroad Problem,” that is, his understanding of the challenge faced by the American polity with the rise of monopolistic railroads.

Part III will turn to the intellectual context of Adams’ work. Specifically, this

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22. It is already worth emphasizing here that in putting forward a Spencerian interpretation of the Adams corpus I do not mean to suggest that the two thinkers were necessarily of one mind with respect to every aspect of railroad (and other) regulation. See, e.g., *infra* note 59 for an example of how Adams and Spencer differed on the question of railroad regulation. Nor am I suggesting that Spencer *et al.*, and they alone, could account for all of the details in Adams’ theories and their contemporary progeny, nor that Adams’ approach to regulation incorporated every detail of Spencerism. Rather, evolutionary thinking is brought forward as a useful and instructive frame of thought that was much in vogue in late-nineteenth-century U.S., in light of which Adams’ model “made sense.” Ultimately, my argument is that Adams and Spencer shared similar (evolutionary) principles, and that these principles tell us something important about Adams’ own and (later, even contemporary) Adams-like models of regulation.

23. See STEVEN LUKES, POWER: A RADICAL VIEW 15 (2d ed., 2005).

24. An analogy to Ronald Dworkin’s known method of “constructive interpretation” may, perhaps, be suggested here. Cf. RONALD DWORKIN, LAW’S EMPIRE 52 (1986) (constructive interpretation imposes “purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong.”).

25. See McCRAW, *supra* note 8.

26. See *infra* note 209 (on contextual historiography).

Part will focus on the debate on evolution raging at the time. As we shall see, “evolution” has never been a settled concept. This complexity raises the following questions: What was “evolution” for Adams? What were its lessons? What does Adam’s interpretation of evolution tell us about his theory of regulation? Part III will address these questions, showing that the teachings of Spencer left the clearest marks on Adams’ thinking.

Part IV will illustrate the ways Adams’ model of regulation followed Spencer’s principles, while Part V will connect Adams’ work to the present by highlighting the similarities between his model of regulation and current attempts to “reinvent” regulation. Finally, Part VI will conclude.

## II. ON RAILROAD REGULATION: ADAMS’ AGE AND WORK

### A. A Muckraker in Context

Adams immersed himself in the study of railroads in the years following the Civil War,<sup>27</sup> an era that went down in history as the Gilded Age.<sup>28</sup> In this era the American economy underwent a major transformation that was spurred by massive urbanization<sup>29</sup> and phenomenal expansion of the railroad industry.<sup>30</sup> During the years between the Civil War and World War I, the annual value of products manufactured in the United States increased nearly seventeen times, and the railroad network increased eightfold, practically covering the entire land.<sup>31</sup> This intense economic activity was the handiwork of a new kind of business organization. Once run by individuals or relatively small businesses, by mid-century, major markets were dominated by sizeable corporations.<sup>32</sup>

Countless Americans were startled by the rise of large-scale corporations;

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27. Adams himself participated in the Civil War. He fought as an officer in the U.S. cavalry. See ADAMS, AUTOBIOGRAPHY, *supra* note 8.

28. See generally H. Wayne Morgan, *An Age in Need of Reassessment: A View Beforehand*, in THE GILDED AGE: A REPRISAL 1 (H. W. Morgan ed., 1963).

29. As noted by Richard Hofstadter, in this era it became clear that “[t]he United States was born in the country,” yet it “has moved to the city.” RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYANT TO F.D.R. 23 (1955) [hereinafter HOFSTADTER, AGE OF REFORM]. Urbanization was also a result of the “immigration invasion,” which brought about “a breakdown in the relative homogeneity of the [American] population,” which had been “down to about 1880 . . . not only rural but Yankee and Protestant in its basic notions.” *Id.* at 8.

30. See generally, e.g., JOHN F. STOVER, AMERICAN RAILROADS 1–166 (2d ed., 1997). Indeed, railroad expansion was so dramatic that it seemed to Adams (in 1875) that “. . . railroads were constructed as if by magic.” Yet Adams was quick to add that some “lines were laid out from points where no one lived to points where no one wanted to go.” Charles Francis Adams, *The Granger Movement*, 120 N. AM. REV. 394, 397 (1875). Adams’ second comment relates, of course, to the problem of railroads’ overexpansion. See *infra* note 77 (Adams’ critique of “railroad mania.”).

31. STOVER, *supra* note 30, at 135, 164. These were not the only records set during that epoch. See generally THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE (1977) ch. 2, and Morgan, *supra* note 28.

32. See generally ALFRED D. CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 377–454 (1977). See also, e.g., MICHAEL McGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA 3–39 (2003).

some were even frightened. As John Tipple aptly writes, “[B]y sheer magnitude the large industrial corporation overshadowed the society around it.”<sup>33</sup> Many Americans thought that the big, national corporation was based on premises alien to the American credo. So much so, that Tipple goes on to remark that “the large industrial corporation was an anomaly in nineteenth-century America; there was no place for it among existing institutions and no sanction for it in traditional American values.”<sup>34</sup>

The American economic landscape was transformed not only by the advent of a new kind of business organization—the mammoth, national corporation—but also by its aggressive business mores. For, big as they had grown to be, countless corporations were still faced with fierce competition, which frequently turned into “competition run mad.”<sup>35</sup> In particular, alarmed observers were concerned about brutal competitive strategies employed by rivaling railroad corporations. These strategies included the lowering of rates to unprofitable levels at the expense of public safety, secretive rebates, and discrimination against entire communities.<sup>36</sup>

What drew particular attention was the plethora of trusts (or “combinations”) among various firms, which every so often led to the formation of monopolies.<sup>37</sup> As they faced “predatory competition,”<sup>38</sup> corporations repeatedly chose to join forces and even merge with their competitors.<sup>39</sup> “In New York,” noted Adams in 1868, “everything now tends to consolidation, and consolidation in the hands of able men portends as assured a success as does the massing of troops under brilliant generals in war.”<sup>40</sup>

The run for bigness in general, and the formation of combinations in particular, did not mix well with the ubiquitous commitment to and the belief in the

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33. John Tipple, *The Robber Baron in the Gilded Era*, in THE GILDED AGE: A REPRISAL 16 (H. W. Morgan ed., 1963).

34. *Id.* at 18–19. See similarly Standard Oil of N.J. v. U.S. 221 U.S. 1, 83 (1911) (Harlan, J. concurring and dissenting).

35. CHARLES FRANCIS ADAMS, RAILROADS: THEIR ORIGIN AND PROBLEMS 148 (1878) [hereinafter ADAMS, RAILROADS]. See similarly Tipple, *supra* note 33, at 25–28.

36. Cf., Charles Francis Adams, *The Last Railroad Grievance*, NATION, March 23, 1876, at 189 [hereinafter Adams, *The Last Railroad Grievance*].

37. “Trust”—as well as “combination,” a popular term in the late nineteenth century—is a confusing term, which may encompass various business strategies whereby different corporations joined forces to better their standing in the market. More specifically, it may relate to “pooling” (cartels and other forms of coordination among firms) and/or various forms of merger among firms, possibly to the point of forming a monopoly. Compare McCRAW, *supra* note 8, at 65 (referring to the turn-of-the-century “trust movement” as “the powerful tendency of businessmen to combine with their competitors in associations and mergers.”) with RICHARD T. ELY, MONOPOLIES AND TRUSTS (1900), e.g., at 217 (“trust” as “industrial concentration”). For a recent review of the difficulties in the late nineteenth century to conceptualize such business strategies, see Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2328–2335 (1995).

38. John B. Clark, *The Limits of Competition*, 2 POL. SCI. Q. 45, 47 (1887).

39. On the merger movement, see Milton Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 COLUM. L. REV. 179, 179–182 (1932), and Mark Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 6–7 (2003).

40. Adams, *Boston II*, *supra* note 8, at 571.

merits of open, monopoly-free competition among enterprising local entrepreneurs.<sup>41</sup> Here was a place where the dangers to the average American posed by “the new giantism in the American economy”<sup>42</sup> became most salient. This was, it seemed, a life-or-death struggle<sup>43</sup>—a struggle waged by corporations against the American citizenry; indeed, against American democracy.

Adams was well aware of all these economic developments and wrote about them profusely throughout his adult life. In fact, he first emerged on the public scene as a muckraker.<sup>44</sup> Adams published a long series of articles analyzing the evils inflicted both on the public at large and on railroad lines due to unbridled, dishonest management and pressures of savage competition so common in the industry of the time.<sup>45</sup> His *A Chapter of Erie* (1869) in particular was and still is considered a masterpiece of muckraker literature. It was characterized as a study “of moral disintegration in the heart of a great nation.”<sup>46</sup> Referring to Cornelius (“Commodore”) Vanderbilt as one of the railroad industry’s “Titans,” Adams wrote in *A Chapter of Erie* that in his “path of centralization” Vanderbilt “has introduced Cæsarism into corporate life.” Adams went on to prophesize ominously, “The individual will hereafter be engrafted on the corporation,—democracy running its course, and resulting in imperialism; and Vanderbilt is but the precursor of a class of men who will wield within the State a power created by the State, but too great for its control.”<sup>47</sup>

Surprisingly, Adams’ proposal to cure the predicament imposed by anti-competitive practices of railroad magnates was not to curtail railroads’ combinations. Rather, convinced that “[c]ombinations of capital and labor which amount to monopolies can alone satisfy the present enormous requirements of modern society,”<sup>48</sup> he chose a different route. Adams thought that the introduction of

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41. See ROBERT H. WIEBE, *BUSINESSMEN AND REFORM: A STUDY OF THE PROGRESSIVE MOVEMENT* 45–46, 136–137 (1962); HOFSTADTER, *AGE OF REFORM*, *supra* note 29, at 305.

42. McCRAW, *supra* note 8, at 64.

43. Tipple, *supra* note 33, at 27.

44. On the muckrakers and progressivism, see, for example, Theodore Roosevelt, *The Man with the Muckrake*, in *THE MUCKRAKERS: THE ERA OF JOURNALISM THAT MOVED AMERICA TO REFORM—THE MOST SIGNIFICANT MAGAZINE ARTICLES OF 1902–1912* (Arthur and Lila Weinberg eds., 1961); WIEBE, *supra* note 41; and McGERR, *supra* note 32. It is interesting to note that if I am correct in my interpretation of Adams, he was an exception among Progressives, who were “Reform” Darwinists, while Adams the (Progressive) muckraker endorsed “Social” Darwinism. See Hovenkamp, *supra* note 37, at 2311. See also *supra* note 18 (defining Social Darwinism).

45. See, e.g., Charles Francis Adams, *The “Pooling” of Railroad Receipts*, *NATION*, Nov. 10, 1870, at 309 [hereinafter, Adams, “Pooling” of Railroad Receipts], and Charles Francis Adams, *The Reign of King Cotton*, *ATLANTIC MONTHLY*, Apr. 1861, at 459 [hereinafter Adams, King Cotton] (“What principle of political economy is better established than that a monopoly is a curse to both producer and consumer? . . . a healthy competition is the one essential to all true economy and real excellence.”).

46. Thomas Adams, *supra* note 14, at 234.

47. See Charles Francis Adams, *A Chapter of Erie*, in CHARLES F. ADAMS, JR., AND HENRY ADAMS, *CHAPTERS OF ERIE AND OTHER ESSAYS* 1, 12 (1871) [hereinafter Adams, *A Chapter of Erie*; ADAMS & ADAMS, *CHAPTERS OF ERIE*].

48. Charles Francis Adams, *The Railroad System*, 104 N. AM. REV. 476, 502 (1867) [hereinafter Adams, *The Railroad System*]. See similarly *Vegelahn v. Gunther*, 167 Mass. 92 (1896) (Homes, J. dissenting), and ELY, *supra* note 37.

public “advisory bodies” was the right vehicle to check railroads’ malevolent behavior, for they “might scientifically study and disclose to an astonished community . . . the remedies no less than the causes of obstructions.”<sup>49</sup>

In his work, Adams lays the first principles, or natural laws, of the transportation revolution,<sup>50</sup> principles that explain the past and augur the future.<sup>51</sup> Adams’ survey of the railroad system of his day began with the understanding that railroads played havoc with the “old New England[]”: “The revolutions of these few years,” he wrote in 1867 of the previous twenty years, “have swept away the last vestiges of colonial thoughts and persons.”<sup>52</sup> As much as Adams’ style was hyperbolic at times, his analysis was often truly prescient. He relentlessly hammered into his readers’ minds the profound, irreversible influence steam transportation had and would surely have on their lives. As previously remote localities drew close with the coming of railways, a one-directional movement was certain to evolve; a movement that would sweep food and commodities, men and nations, ideas and artifacts: “The tendency of steam has universally been towards the gravitation to the center,—toward combination and concentration of forces, whether intellectual or physical.”<sup>53</sup> It has already “nationalized people and cosmopolized nations.”<sup>54</sup>

Yet, to Adams, there would be a dark side to the pull of human centralization propelled by railroads—for, it was responsible for moral corrosion. In one of the most elitist samples of his writing, Adams proclaimed that the increase in trade resulted in “those portentous accumulations of the evil humors of society which men call railroad centres,” and warned that “[a]lready [steam] has accumulated a populace in the city of New York, in whose hands the principle of self-government has become a confessed failure.”<sup>55</sup>

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49. Adams, *Boston I*, *supra* note 8, at 16.

50. “A community must go back to first principles,” Adams writes of Boston: Adams, *Boston I*, *supra* note 8, at 25.

51. Cf. HERBERT SPENCER, FIRST PRINCIPLES 281 (De Witt ed., 1958) (1862) [hereinafter SPENCER, FIRST PRINCIPLES] (“. . . knowledge has obviously not reached its limits until it has united the past, present and future histories into a whole.”).

52. Adams, *The Railroad System*, *supra* note 48, at 488. As we shall see, Adams was ambivalent about these “revolutions.” Compare, e.g., *infra* text accompanying note 55 with text accompanying note 97.

53. Adams, *The Railroad System*, *supra* note 48, at 484. See also *id.* at 489 (“Thought draws to intellectual centres as trade draws to commercial centres, and all are railroads centres.”).

54. *Id.* at 484. See similarly Charles Francis Adams, *Railroad Management as a Profession*, RAILROAD GAZETTE, March 19, 1886, at 197. In the late-1880s, he would write that “the running of trains is to the modern body politic very much what the circulation of blood is to the human being.” Charles Francis Adams, *The Prevention of Railroad Strikes*, SCRIBER’S MAG., Apr. 1889, at 425 [hereinafter Adams, *Prevention of Railroad Strikes*]. This last article was written when Adams was still the president of the Union Pacific. This did not prevent him from putting forward a progressive scheme of regulating employer-employee relations in the railway industry that, among other things, would assure employees a voice in the management of the various railroads. See *id.* To be sure, Adams’ suggested these measures with a view to pacifying disgruntled employees and even breaking down of their trade unions. See also Charles Francis Adams, *The Brotherhood of Locomotive Engineers I & II*, NATION, March 15 & 22, 1877, at 158 & 173.

55. Adams, *The Railroad System*, *supra* note 48, at 490 & 492.

Reading Adams reveals that in his eyes he was engaged in a missionary cause. Adams the muckraker was sorrowed and driven to action by “the deep decay which has eaten into our social edifice.”<sup>56</sup> It is for this reason that he did not put much stock in legislative remedies offered *in vacuo*, that is to say, on measures not backed by a committed public.<sup>57</sup> Adams’ various publications were set to bring about public awakening. A credible exposure of the far-ranging repercussions of, and interests involved in, the spread of railways around the globe constituted the first stop on his mission: Before any action could be taken with regard to the railroad problem, “the first preliminary is to induce the community to realize the true magnitude of the question involved.”<sup>58</sup> Adams’ weak regulation was designed to do exactly that.

Having introduced Adams’ age, I now move to introduce the legal background against which he worked. The main idea behind the legal context canvassed in the following Section is to make clear that Adams had several (legal) options available to him, as he reflected on ways to regulate railroad corporations.

### B. Legal Context

It would be wrong to assume that Adams analyzed the state of the railroad industry against a lawless background in which railroads were allowed to do as they pleased. That was not the case. Actually, several options presented themselves at the time.

In the nineteenth century, railroad corporations could be (and were) brought to court under the well-established common-law common-carrier cause of action.<sup>59</sup> Yet with the passage of time, it became clear, at least to progressives, that courts were inept to handle the enormous challenges brought about by the

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56. Adams, *A Chapter of Erie*, *supra* note 47, at 94.

57. “It is well to reform the currency, it is well to enact laws against malefactors; but neither the one nor the other will restore health to a business community which tolerates successful fraud, or which honors wealth more than honesty.” Rather, “[t]he only remedy lies in a renovated public opinion . . . .” *Id.* at 95 & 98. Cf. 2 HERBERT SPENCER, THE PRINCIPLES OF SOCIOLOGY, PART V: POLITICAL INSTITUTIONS 749 (1900) (1882) [hereinafter SPENCER, PRINCIPLES OF SOCIOLOGY] (“political institutions cannot be effectually modified faster than the characters of citizens are modified . . . .”).

58. Adams, *The Railroad System*, *supra* note 48, at 480.

59. It was well established in the common law already in the early nineteenth century that “common carriers” were normally obliged, unlike most other businesses, to serve pretty much every client knocking at their door. *See generally* WILLIAM J. NOVAK, PEOPLE’S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA 93–95 (1996). Certain restrictions were obviously drawn. *See, e.g.*, ICC v. Baltimore Ohio R. Co., 145 U.S. 263, 275 (1892), and JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENT WITH ILLUSTRATIONS FROM CIVIL AND FOREIGN LAW 533 (5th ed., 1851). It is interesting to note that in an essay published in October 1854, Herbert Spencer suggested that the predicament of over-expansion of railroads should be remedied (only) by judicial imposition of the *ultra-vires* doctrine, at the behest of disgruntled shareholders, on reckless, unscrupulous directors. *See* Herbert Spencer, *Railway Morals and Railway Policy*, 99 EDINBURGH REV. 420 (1854). It seems, then, that Spencer would have been distrustful of the Adams model. *See generally* SPENCER, *The Proper Sphere of Government, in THE NONCONFORMIST §§ 6 ff.* (1842–1843) [hereinafter SPENCER, *The Proper Sphere of Government*].

economic transformation of the nineteenth century.<sup>60</sup> Next, railroad corporations were the creations of legislative charters that determined their powers and liabilities.<sup>61</sup> As in other cases, such charters were issued under the understanding that "corporations were not immune from the general functioning of state police power—the legislature's ongoing ability to enact regulations for public safety, morals, health, and welfare."<sup>62</sup> Given this structure of charters and legislation, state governments were steeped in the inner operation of the railroad business from the outset. As pointed out by Adams, state legislators were repeatedly called upon to issue charters or other forms of private legislation. "It is scarcely an exaggeration to say," he maintained in 1871, "that our legislatures are now universally becoming a species of irregular boards of railroad direction."<sup>63</sup>

Turning to Adams' home state, it should be noted that years before 1869 (when Adams' legislation went on the books)<sup>64</sup> the Massachusetts legislature had ratified a comprehensive piece of legislation that dealt with varied related issues, such as the corporate and finance sides in railroad management (their organization and capital), the construction and maintenance of roads and the taking of lands for that end, and liability for damages associated with railroad operation.<sup>65</sup> The Massachusetts legislature also stipulated that railroads were obliged to submit a detailed annual report canvassing every conceivable aspect of their day-to-day business to the Secretary of the Commonwealth; failure to comply carried a monetary penalty.<sup>66</sup> Lastly, the said legislation even broached the sensitive subject of the tolls that the railroad corporations were to collect from their patrons. It authorized the legislature to "alter or reduce" the railroad rates, but set a cap on such intervention.<sup>67</sup>

A separate issue was, of course, the question of whether the law "on the books" was also the prevailing "law in action," namely, were the comprehensive legislation and constraining charters actually enforced by the state? It seems that, generally, this was seldom the case.<sup>68</sup> But, as we shall now

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60. See generally Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986), and Stewart, *Administrative Law in the Twenty-First Century*, *supra* note 2.

61. For the history of the American railroads, see, for example, STOVER, *supra* note 30, and GEORGE ROGERS TAYLOR, *THE TRANSPORTATION REVOLUTION 1815-1860* (1951), ch. v.

62. NOVAK, *supra* note 59, at 106. Indeed, as pointed out by William Novak regarding antebellum United States "[t]he early corporate character was simultaneously a tool of promotion, regulation, and control." *Id.*

63. Charles Francis Adams, *The Government and the Railroad Corporation*, in ADAMS & ADAMS, *CHAPTERS OF ERIE*, *supra* note 47, at 417 [hereinafter Adams, *The Government and the Railroad Corporation*]. See also Charles Francis Adams, *Railway Problems in 1869*, 110 N. AM. REV. 116, 116-120 (1870) [hereinafter Adams, *Railway Problems*]. See generally HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW 1836-1937*, 125-127 (1991).

64. See *infra* text accompanying notes 114-121.

65. MASS. GEN. LAWS ch. 63 (1859).

66. *Id.* §§ 132-135, 143-144.

67. *Id.* § 112. On the rise of the "price-regulated markets," see HOVENKAMP, *supra* note 63, at 125-130.

68. McCRAW, *supra* note 8, at 11 & 24.

see,<sup>69</sup> for Adams, the solution to the railroad problem could not in any event be found in the halls of the legislature.

Up to this point, we have addressed the options of taming the railroads without taking into consideration their anti-competitive practices. However, as noted, such practices were common throughout the American economy, certainly in the railroad business. The hardship inflicted by the merger and trust movements<sup>70</sup> on many sectors of the economy could be (at least, theoretically) curtailed in more ways than one.

For example,<sup>71</sup> the government could theoretically seek to control railroads through direct (federal or state) ownership of some or all lines,<sup>72</sup> although it seems that adopting such policy in turn-of-the-century America would have run up against a wall of opposition.<sup>73</sup> Furthermore, typical of the Progressive Era, Adams the muckraker fulminated against what he saw as the dire state of politics at the time and was always suspicious of politicians.<sup>74</sup> This suspicion informed his rejection of the state ownership solution, which had been tried in Europe.<sup>75</sup> State-run—that is, politician-run, as Adams saw it—railroads was anathema to him. But there was something deeper at play here than merely Adams' dislike of politicians. The option of state ownership did not sit well with

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69. See *infra* notes 79 & 80 and accompanying text.

70. See *supra* note 39.

71. There were other options to those mentioned here: First, there was the option of a *laissez-faire* regime of some sort. However, “[r]uinous competition” among railroads in particular illustrated to all the dangers involved in “a sublime faith in *laissez-faire*,” as Adams put it. Adams, *The Railroad System*, *supra* note 48, at 501. Next, governmental management (even without ownership) of the industry was yet another option. Adams’ opposition in this regard rested again on Progressives’ fear of “eager and corrupt[] [politicians].” *Id.* at 508, 509. (Adams’ opposition hit a promising vein of public sentiment, as was demonstrated by the fact that it took the United States the outbreak of world wars, decades after he had written these lines, to put government oversight into practice (See Rabin, *supra* note 60, at 1236–1240, and Stover, *supra* note 30, at 167–191)). Third, substantial taxes could have been levied on corporations as a way of reimbursing, as it were, the community for its losses. See ELY, *supra* note 37, at 256–257, and Winerman, *supra* note 39, at 82. *But see* Jeremiah W. Jenks, *Capitalistic Monopolies and Their Relation to the State*, 9 POL. SCI. Q. 486, 508 (1894) (opposing taxation of monopolies). However, as Michael McGerr comments, at the time “Americans were not yet willing to endorse taxes large enough to make a big business small,” as was made clear by the minimalist first corporate tax, adopted by Congress in 1909. McGERR, *supra* note 32, at 154.

72. Several notable American economists in principle favored this option, at least when it came to “natural monopolies”: see ELY, *supra* note 37, at 180–216 and Jenks, *supra* note 71, at 505 (“natural monopolies . . . must be either owned by the public, or strictly controlled by some public agent.”).

73. Tellingly, Henry Seager called this option, “*government ownership and operation*, or state socialism.” (emphasis in original). Henry R. Seager, *The New Anti-Trust Acts*, 30 POL. SCI. Q. 448, 448 (1915). *See also* ADAMS, RAILROADS, *supra* note 35, at 198–199.

74. On the state of American politics in the years following the Civil War and reformers who tried to mend its ways, see generally, for example, RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 162–182 (1991 [1948]) [hereinafter HOFSTADTER, THE AMERICAN POLITICAL TRADITION]; MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955), chs. 1 & 2; MARTIN J. SCHIESL, THE POLITICS OF EFFICIENCY (1977), e.g., at 73–76; and STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920, at 1–162 (1982).

75. The option of state ownership of railroads had been tried with much success in Belgium and France. See ADAMS, RAILROADS, *supra* note 35.

his clear penchant for small government<sup>76</sup> and, even more so, with his concerns about the distributive consequences of big(ger) government.<sup>77</sup> In 1870 he stated that the government “was to confine itself to its simple functions, chief among which was provision for external defence and internal order, while for all else it accepted a policy expressed in the two forcible words, ‘Hands off!’”<sup>78</sup>

Similar sentiments informed Adams’ reaction to the option of supplanting existing legislation with additional legislative strictures to further competition in the market and more aggressively check railroads’ unsavory behavior. Moreover, to Adams, legislation, even if it were to be enforced, was too crude an instrument to regulate such a complex enterprise as railroads.<sup>79</sup> And in any event, Adams feared legislators’ populist tendencies.<sup>80</sup>

As we know, aggressive trust-busting would be much in vogue in the post-Civil War United States.<sup>81</sup> To many, the economic and legal landscapes of the time, which were discussed above, seemed to demand it. But, although fully

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76. In 1867 Adams stated, “It is rapidly becoming throughout the world—and the more rapidly the better—a cardinal principle of polity, that the more the functions of government can be reduced, the better.” Adams, *The Railroad System*, *supra* note 48, at 508. See similarly Adams, *Railway Problems*, *supra* note 63, at 125–126, 146–148. Spencer was likewise strongly opposed to the idea of state ownership of railroads. See HERBERT SPENCER, *The Coming Slavery*, in THE MAN VERSUS THE STATE 38–39 (1885) [hereinafter SPENCER, *The Coming Slavery*].

77. Adams strongly criticized the common practice of towns, cities, and states pledging their credit in the service of railroad construction, as a part of a veritable “railroad mania.” Charles Francis Adams, *Town Follies*, NATION, Feb. 17, 1870, at 101. For Adams, this amounted to “the meddling of Government in matters which are none of its concern—the substituting the voice of the majority for the hard, calculating instinct of the moneyed man—the interference . . . with the law of supply and demand.” *Id.* As suggested in this last sentence, Adams was indeed concerned by the distributive consequences of the “town follies” that had led to the generous aid offered by the public to special (railroad) interests. “If Government must meddle . . . if it will take from me and give to another, then the rule here found good as regards railroads would be found good as regards all things else,” is the way he put it (*id.* emphasis added). He therefore insisted “that a two-thirds affirmative vote is the least protection which the public safety requires.” *Id.* As rightly pointed out by William Novak, future scholars would be inclined to conceptualize such “follies” as instances of “capture.” See William J. Novak, *A Revisionist History of Regulatory Capture*, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David Moss eds., forthcoming 2013). See also *infra* note 293 (additional sources on capture).

78. *Id.*

79. In 1871 Adams would lay down “a principle that no general law can be framed which will meet the exigencies of a whole railroad system in all its manifold details.” Adams, *The Government and the Railroad Corporation*, *supra* note 63, 424. See similarly Charles Francis Adams, *Of Some Railroad Accidents II*, ATLANTIC MONTHLY, Dec. 1875, at 743 [hereinafter Adams, *Railroad Accidents II*]. The argument made here is not original, of course. For one of its classic formulations, see ARISTOTLE, NICOMACHEAN ETHICS § 1137a-b (J.A.K. Thomson trans., 1977).

80. See Adams, *Railroad Accidents II*, *supra* note 79, at 743, where Adams wrote of legislators’ reaction to the 1853 Norwalk railroad accident, in which 46 people lost their lives, in the following manner: “It so happened . . . that the legislature of the State [of Connecticut] was unfortunately in session at the time, and consequently the public panic and indignation took shape in a law . . . [which] [i]n point of fact . . . imposes a most absurd, unnecessary, and annoying delay on travel, and rests upon the Connecticut statute book a curious illustration of what usually happens when legislators undertake to incorporate running railroad regulations into the statutes-at-large.”

81. On the anti-trust campaigns of the turn of the century, see, for example, Winerman, *supra* note 39, and RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW (2000).

aware of the danger that lay in leaving railroad monopolies untamed, Adams took exception to the rule against monopolies in this case.<sup>82</sup> In fact, as noted, Adams actually advocated their preservation under a regime of weak regulation.<sup>83</sup> I have referred to this tension in Adams' theory of regulation as a great puzzle. It is high time we address it squarely. As we shall now see, I believe it is resolved by Adams' understanding of "the Railroad Problem."

### C. The Railroad Problem

Adams devoted much of his time to elucidating and elaborating "the Railroad Problem." His conceptualization of "the Problem" was based on (1) a particular understanding of economic competition (2) a conviction of the inevitability of the monopolization of the railroad industry; and (3) a realization of the acute threat posed to American democracy by the monopolization of an industry as central as the railroads. The following discussion will address each of these points in turn.

First, on the nature of competition: To Adams, competition was (a) the rule of nature; (b) critical for the betterment of society—he believed that the natural process of competition resulted in the survival of the fittest;<sup>84</sup> and (c) was beyond the rule of man. The three emphases were stated, for example, in Adams' testimony to the Cullom Committee,<sup>85</sup> where he spoke of the "the uncontrolled law of competition," and said: "I do not think competition can be controlled by human law. I think it quite beyond it."<sup>86</sup>

Next, on the inevitable monopolization of railroad lines: Adams proclaimed in 1867 that now "[e]verything is done on a grand scale and by intricate machinery, so that competition, theoretically free, is practically impossible."<sup>87</sup> This rule, he emphasized, applied all the more to the railroad industry. Adams was the great commentator on the effects of economies of scale on the railroad business.<sup>88</sup> He succinctly observed in 1870 that "*competition and the cheapest*

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82. See, e.g., Adams, "*Pooling*" of Railroad Receipts, *supra* note 45.

83. See *infra* text accompanying notes 105–107.

84. See *infra* note 86.

85. "The Cullom Committee" was the Senate Select Committee to Investigate Interstate Commerce, chaired by Senator Shelby M. Cullom. It was a five-member committee chosen in 1885 to comprehensively investigate the railroad problems. See SKOWRONEK, *supra* note 74, at 146–147. Founded by a Senate resolution passed on March 17, 1885, it filed its report on January 18, 1886, which consequently led to the passage of the Interstate Commerce Act in 1887. See Senate Report No. 46, 49th Cong. 1st Sess., *Report of the Senate Select Committee on Interstate Commerce*.

86. Cullom Committee Rep., Test. P. 1208. Adams went on to comment on various British legislative attempts to regulate the railroad industry in the following manner: "The natural process has gone in spite of legislation, working by its own laws," resulting in the "survival of the fittest; that is, the strongest and best managed corporation gradually controls the territory." *Id.* at 1209. On British experimentation in that field in Adams' time, see, e.g., Charles F. Adams, *The State and the Railroads*, ATLANTIC MONTHLY, Mar. 1876, at 360 & June 1876, at 691.

87. Adams, *The Railroad System*, *supra* note 48, at 502.

88. See McCRAW, *supra* note 8, at 9, 68–74.

*possible transportation are wholly incompatible.*”<sup>89</sup> That being the case, “while the result of other and ordinary competition was to reduce and equalize prices, that of railroad competition was to produce local inequalities and to arbitrarily raise or depress prices.”<sup>90</sup> Accordingly, Adams proclaimed publicly that he did not “object at all” to the prospects that a single American railroad company would have emerged if open competition among railroads had been allowed to take place.<sup>91</sup> Indeed, he went so far as to say, “I am not prepared to say that such a result would work any evil.”<sup>92</sup>

The third, last, element in “the Problem” was the conviction that the monopolization of the railroad industry posed a real danger to American democracy. As we have seen, as a muckraker Adams published a series of influential articles reiterating this message.<sup>93</sup>

Why is Adams’ conceptualization of “the Problem” important? For it reveals that, in his mind, “the Railroad Problem” was the outcome of a colossal collision between two orders: the economic v. the republican-democratic.<sup>94</sup> As such, it was a battle between an order driven by centripetal, centralizing forces and a diffused order of checks and balances in which force is divided. Moreover, and more important in the present discussion, to Adams, the two orders were *in conflict*; a conflict whose outcome was clear. Namely, the economic forces at play were certain to vanquish the republic.

Adams observed that the administrative apparatus of his time was not able to dismantle the immense challenges that had been foisted on the American people and its government by industrialization and the introduction of railroads. Due to the fact that “[a]t the time the framework of our government was put together, a system of necessary monopolies was the very last thing which was expected to present itself on this continent[,] . . . [a]t present” he wrote in 1871, “our government occupies the impossible position of a wooden liner exposed to the fire of modern artillery.”<sup>95</sup>

What made the government so inept at regulating railroads was its inferior organization. In 1870, while still a young Commissioner in Massachusetts, Adams opined that consolidation of railroads was the result of a natural “law of gravitation[]” and the outcome of that consolidation was “a more elaborate and

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89. Charles Francis Adams, *Railway Commissions*, 2 J. Soc. Sci. 233, 234 (1870) (emphasis in original) [hereinafter Adams, *Railway Commissions*]. See similarly Charles Francis Adams, *The Experience of a Great Corporation*, NATION, Oct. 22, 1874, at 264.

90. ADAMS, RAILROADS, *supra* note 35, at 119–20.

91. Cullom Committee Rep., Test. P. 1204. But Adams was quick to add that this result “would be attended with immense waste of wealth and would wipe out of existence forms of securities which in amount probably would far exceed the national debt of the country.” *Id.* at 1204.

92. *Id.* at 1214.

93. See *supra* text accompanying note 47. See also, for example, Charles Francis Adams, *The Erie Ring and American Credit*, NATION, May 5, 1870, at 282.

94. See Novak, *supra* note 77.

95. Adams, *The Government and the Railroad Corporation*, *supra* note 63, at 414, 428.

perfect organization.”<sup>96</sup> What’s more, the emerging organization was comprised of several (railroad) corporations, each of which was “[t]his superb, effective organism, the last development of modern civilization . . .”<sup>97</sup> Corporations, and by extrapolation their consolidation, were so perfect thanks to their unitary, disciplined organization.<sup>98</sup> Contrarily, the representative republican state was a feeble, decentralized entity, “adapted to a simple and somewhat undeveloped phase of society . . .”<sup>99</sup> It was a state imperiled by “the difficulty of concentrating as one force all possible forms of mind and phases of interest.”<sup>100</sup> Therefore, to Adams, it was “a sad fact” that “government has not an equal chance” in a conflict with the corporations.<sup>101</sup> Indeed, he went so far as to argue that several States were “owned by corporations within their limits.”<sup>102</sup> As we have seen, this conclusion truly frightened Adams.<sup>103</sup>

#### D. What to Do? The Adams Model

Having identified the problem—for the railroads to work best in the public interest they had to be monopolistic and exert monopolistic powers—Adams makes the case that a novel state-instrument be deployed to deal with it and proposes the idea of regulatory commissions. Concurrently, he advocates the cultivation of monopolies. I will begin with the second element.

As we have seen, Adams did not believe that open competition held the key to regulating the railroad market. In fact, Adams went so far as to argue that the state should legalize railroad associations: “A confederation, or even a general combination among all railroad corporations having some degree of binding force, might, therefore, . . . not improbably prove the first step in the direction of a better and more stable order of things.” He asserted that this should be done under three conditions: “[I]t must be legal; it must be public; it must be responsible.”<sup>104</sup> And he made clear that the government should stay as much as possible out of the dealings of such confederations. “The confederation,” he contended, “would be a responsible one, with power to enforce its own decisions upon its own members.”<sup>105</sup> Accordingly, Adams beseeched Congress

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96. Adams, *Railway Problems*, *supra* note 63, at 127.

97. *Id.* at 150.

98. *Id.* (“[the corporation] is a disciplined, organized army.”).

99. *Id.* at 148. *See also id.* at 150 (“a political administration . . . originates in caucus, is continually trembling for its retention in the temporary power which it received on the principle of rotation in office . . .”).

100. Adams, *Boston I*, *supra* note 8, at 15.

101. Adams, *Railway Problems*, *supra* note 63, at 150.

102. *Id.* at 149.

103. *See supra* text accompanying note 47. *See also* Adams, *Railway Problems*, *supra* note 63, e.g., at 146.

104. ADAMS, RAILROADS, *supra* note 35, at 190.

105. *Id.* at 200. *See also* Adams, “Pooling” of Railroad Receipts, *supra* note 45.

to “legalize pooling, and impose a heavy penalty on any violation of pooling agreement.”<sup>106</sup>

What should the state do apart from legalizing monopolies? Adams’ main recommendation was to create “in the various States . . . bureaus of railroad statistics,” which would work “under the superintendence of competent commissioners.”<sup>107</sup> They “should be permanent,”<sup>108</sup> and, Adams further clarified, would “collect information from all civilized countries,” as well as from railroad corporations.<sup>109</sup> Speaking of the difficulties of Boston, which was then falling from favor as a leading commercial hub, he held that “some scientific direction can alone save the day.”<sup>110</sup> The tools to infuse the scientific perspective to the democratic discourse were “[c]ommisssions—advisory bodies . . .”<sup>111</sup> Taken together, these various comments chart the contours of the Adams regulatory commission.

As noted, in 1869 Adams saw his suggestions put into law.<sup>112</sup> The *Act to Establish a Board of Railroad Commissioners*,<sup>113</sup> which he had drafted, ordered the governor to appoint three “competent” Board members and a salaried clerk.<sup>114</sup> These Commissioners were to have no conflict of interest. Competent as the Commissioners might have been, the Act allowed them to employ ad-hoc “experts, or other agents . . .”<sup>115</sup> This was all the Act had to say about the Board’s bureaucracy.

The Act further provided that the three Commissioners were to generally supervise the railroads, “examine” them, and “keep themselves informed” as to their compliance with the law and “the security and accommodation . . . [they offered to] the public.”<sup>116</sup> The Board, if it saw fit, could inform the railroads of their failures to comply with the law; suggest repairs or any other modification

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106. Cullom Committee Rep., Test. P. 1205. *See also* Adams, *The Last Railroad Grievance*, *supra* note 36, at 190 (“The great railroad system is to be allowed to develop, subject only to its natural laws—to combine, to consolidate, to monopolize.”). For a similar approach, *see* Jenks, *supra* note 71, e.g., at 504 (“These capitalistic monopolies involve too much that is good and beneficial to society to make it advisable to abolish them.”). *See also* Clark, *supra* note 38 (holding a similar position with respect to trusts).

107. Adams, *The Railroad System*, *supra* note 48, at 497. This proposition most probably seemed reasonable to his contemporaries as it coincided with the coming of age of statistics in Europe and the United States. *See* LOUIS MENAND, THE METAPHYSICAL CLUB 177–195 (2001).

108. Adams, *The Railroad System*, *supra* note 48, at 497. *See also* Adams, *Railroad Accidents II*, *supra* note 79, at 741, where Adams argued that the American methodology of railroad-accident investigation was inferior to the English for whereas in England “a trained expert” was in charge of the investigations, in the U.S., “[t]he same man never investigates two accidents . . .”

109. Adams, *The Railroad System*, *supra* note 48, at 497.

110. Adams, *Boston I*, *supra* note 8, at 17.

111. *Id.* at 16.

112. For the Act’s background, *see* Charles Francis Adams, *Legislative Control over Railway Charters*, 1 AM. L. REV. 451, 473–476 (1867).

113. MASS. GEN. LAWS ch. 408, §§ 699–703 (1869).

114. *Id.* §§ 1, 7 & 13.

115. *Id.* § 7.

116. *Id.* § 2.

to their modus operandi; and recommend changes in their rates. Such steps should have been included in the Board's annual report to the legislature.<sup>117</sup> The railroads, on their part, were required to furnish the Board with all pertinent information;<sup>118</sup> they should also have informed the Board of any accident involving personal injury or loss of life;<sup>119</sup> and finally, the railroads were to bear the Commission's expenses.<sup>120</sup>

Timid as this measure was, it did contain the core of Adams' theory of regulation. First, it was based on the realization that the democratic machinery as it then operated was ill-equipped to tackle the immense challenges of industrialization and that the introduction of a new state organ to the governmental apparatus was the much-needed remedy to the predicament.<sup>121</sup> (A different issue concerned, of course, that organ's design and powers.)

Second, the proposal captured Adams' fervent confidence in the absolute necessity of an orderly collection of information as a prerequisite to beneficial regulation. To him, information was the key to success. To illustrate, early on in his career as a public commentator, Adams argued that the monopolization of industry was intimately connected to "the suppression of free discussion" and would lead to the demise of democracy.<sup>122</sup> Adams shared this insight with his readers in a pre-Civil War article in which he criticized the Southerners' sole reliance on the cotton industry ("King Cotton"). To Adams, "the monopoly of the cotton-culture" in the South was based on the cultivation of ignorance among the poor whites<sup>123</sup> who were thus unaware of the fact that "the whole tendency of the Cotton monopoly [was] to blight all branches of industry in the Cotton States save only that one."<sup>124</sup> His appraisal of capitalist Southerners was succinct and clear: "They are seeking to found a great and prosperous republic on the cultivation of a single staple product, and not on intelligence universally diffused: consequently they have founded their house upon the sand. *Among them, cotton, and not knowledge, is power.*"<sup>125</sup> Now, once Adams came to endorse—to him, of necessity—railroad monopolies, he must have felt the need to complement this endorsement with a means of public education about

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117. *Id.* §§ 3 & 11.

118. *Id.* § 6.

119. *Id.* § 14.

120. *Id.* § 9.

121. See *supra* text accompanying note 96. See also the important historical perspective provided in Novak, *supra* note 77.

122. Adams, *King Cotton*, *supra* note 45, at 455.

123. Adams depicted the white "master-class" of the South as constructed of "two great opposing orders of society[:] . . . the capitalist owning the labor of a thousand slaves, and . . . the laboring white unable, under the destructive influence of profitable monopoly, to make any use of that labor which is his only property." *Id.* at 455. Although Adams does treat the black slaves in this article, they are not the focal point of his discussion. On the one hand, according to Adams, the slaves, too, are the victims of the white-elite's policy of ignorance. Yet, on the other hand, Adams says this of the black slaves of the South: "Fit for freedom at present they are not, . . ." *Id.* at 463.

124. Adams, *King Cotton*, *supra* note 45, at 456.

125. *Id.* at 458 (emphasis added).

railroads; therefore, the spread of information was vital in his schema.

Third, Adams insisted that the Massachusetts Board members would be left “[w]ithout remedial or coercive powers.”<sup>126</sup> As he stated in 1885, reflecting on the Massachusetts Railroad Board of his design when he appeared before the Cullom Committee,<sup>127</sup> “I attribute the success we met with to the fact that our only organs of agitation were investigation, publicity, and public opinion.”<sup>128</sup> Among other things, Adams thought this strategy of regulation would create the conditions necessary for the Board to command the trust of all sides to a controversy, including that of the railroads, of course. He took pride in the fact that “the railroad corporations have never appeared in opposition to [the Board] as a body.”<sup>129</sup> This is not surprising given the fact that, according to Chairman Adams’ own account, he and his colleagues were “under the necessity of cultivating friendly relations with the railroad officials.”<sup>130</sup>

Finally, a quite specific image of the regulator emerges from the various elements of the Adams model. In Adams’ world, the regulator should merely *facilitate* or, at most, *orchestrate* public action.<sup>131</sup> Indeed, it is for the public to decide what to do in the face of a social challenge and it is the public at large who should effect that decision. The regulator only takes the necessary steps to enable the public to knowingly debate the social issues of the day.<sup>132</sup> She is a mere promoter of public debate that might lead to grassroots regulatory initiatives. Elsewhere I have demonstrated how different Adams’ regulator is from that of the New Dealers, who expected commissioners to manage and actively direct the operation of whole industries.<sup>133</sup> Adams, who favored a minimalist government, would have none of that.<sup>134</sup>

### III. INTELLECTUAL CONTEXT: NATURAL AND SOCIAL EVOLUTION

Having canvassed the essentials of Adams’ approach to regulation, I wish to offer a particular interpretation of key elements in the extensive body of literature he produced. As noted, I suggest we read it through the prism of dominant modern theories of evolution.

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126. ADAMS, RAILROADS, *supra* note 35, at 143.

127. *See supra* note 85.

128. Cullom Committee Rep., Test. P. 1202. Adams was not alone in holding this view. The well-respected economist Jeremiah Jenks opined in 1894 that “[r]ailroad commissions have shown that great benefit is to be derived from publicity alone, where no other power has been granted to the commission.” Jenks, *supra* note 71, at 507.

129. ADAMS, RAILROADS, *supra* note 35, at 143. Cf. GABRIEL KOLKO, RAILROADS AND REGULATION 1877–1916 (1965).

130. ADAMS, RAILROADS, *supra* note 35, at 140.

131. *See* Yair Sagy, *A Triptych of Regulators: A New Perspective on the Administrative State*, 44 AKRON L. REV. 425, 432–435 (2011) [hereinafter Sagy, *A Triptych of Regulators*]. *See also* Lobel, *supra* note 7, at 400–404 (“Law as Competence and Orchestration”).

132. *See, e.g.*, Adams, *Boston II*, *supra* note 8, at 591 (“What is now asked for is discussion.”).

133. *See* Sagy, *Triptych of Regulators*, *supra* note 133.

134. *See supra* text accompanying and notes 76–78.

By all accounts, theories of evolution were all the rage among the American intelligentsia when Adams concerned himself with the railroads.<sup>135</sup> But “evolution” has always been a protean concept. Different scientists explained organic and inorganic evolutionary processes differently, and assessments of its social ramifications varied greatly. This part is dedicated to a cursory mapping of some of the dominant renditions of evolution available to Adams (and his generation) to choose from as he conceptualized the railroad problem. It focuses on those versions of evolution that pervaded the intellectual atmosphere in the Northeast during the Gilded Age.

#### A. *On Natural and Other Evolutions: Introduction*

Modern ideas about the transformation of human society over time surfaced in tandem with comparable ideas in biology.<sup>136</sup> Both doctrines drew on the growing body of geological, paleontological, and ethnological findings pointing at the antiquity of planet Earth in general, and of floral, animal, and human life on earth in particular. While geologists and biologists unearthed the planet’s natural history and exposed evidence of the unimaginable diversity of past (and present) forms of life, colonialism brought the West in contact with “primitive” forms of human behavior and organization in America, Australia, and Africa.<sup>137</sup>

Taking a panoramic view, by the nineteenth century it seemed to scientists from different fields that nature had the tendency to develop or “progress,” rather than to be fixed as had been the received wisdom for ages.<sup>138</sup> It has now become clear to many that just as the Earth became cooler and more habitable (and ultimately, more hospitable to human existence) with the progression of time, animals honed their adaptive skills and humans became more sophisticated in their thinking and organization.<sup>139</sup>

Following the highly anticipated publication of Darwin’s *The Origin of Species* in 1859,<sup>140</sup> it became clear that, whereas the time was indeed ripe for the idea of evolution, “natural selection”—nature’s mechanism of development according to Darwin—would prove to be a much harder sell.<sup>141</sup> No doubt, the

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135. See, e.g., HOFSTADTER, SOCIAL DARWINISM, *supra* note 17, and Hovenkamp, *supra* note 37.

136. See JOHN C. GREENE, *Biology and Social Theory in the Nineteenth Century: Auguste Comte and Herbert Spencer*, in SCIENCE, IDEOLOGY, AND WORLD VIEW: ESSAYS IN THE HISTORY OF EVOLUTIONARY IDEAS 60, 60 (1981) [hereinafter GREENE, *Comte and Spencer*] (“The first truly evolutionary speculations in modern social theory appeared at approximately the same time as the first transformist ideas in biology.”).

137. See, e.g., BOWLER, *supra* note 18.

138. *Id.* Even Darwin himself entertained the idea of progress. See ERNST MAYR, ONE LONG ARGUMENT: CHARLES DARWIN AND THE GENESIS OF MODERN EVOLUTIONARY THOUGHT 57 *et seq.* (1991) [hereinafter MAYR, ONE LONG ARGUMENT].

139. See generally RICHARD DAWKINS, *THE BLIND WATCHMAKER* (1986), and ERNST MAYR, *WHAT EVOLUTION IS* (2001).

140. CHARLES DARWIN, *THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION: OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE* (1859). See JANET BROWNE, *DARWIN’S ORIGIN OF SPECIES: A BIOGRAPHY* (2006).

141. See BOWLER, *supra* note 18, at 177–187.

theory of natural selection put forward an unpalatable picture of nature torn by a constant struggle for survival; a struggle whose outcomes are randomly dictated.<sup>142</sup> Fully developed, Darwinism rejects the theory of the inheritance of acquired characteristics, which is associated with the French naturalist Jean Baptist Lamarck.<sup>143</sup> Importantly, chance plays a much smaller role in evolution under Lamarck's theory, where it is species' attempts to better adapt itself to its environment that determines (at least in part) its ultimate survival. Not so in Darwinism.

Contrary to Darwinism's naturalistic, "materialistic" description of evolution, several naturalists adhered to one form or another of "natural theology," which included "unnatural" elements (most notably, of course, God) in its descriptions of natural processes, well into the nineteenth century. Notably, the highly respected naturalist Louis Agassiz, who came to Harvard from Continental Europe in 1847, fiercely objected to Darwinism.<sup>144</sup> Other American naturalists were more receptive to Darwin's ideas. Notably, Asa Gray, the leading American botanist of the nineteenth century, not only provided Darwin with evidence to support the theory of natural selection, but was also particularly instrumental in introducing the theory to the United States.<sup>145</sup>

### B. John Stewart Mill vs. Auguste Comte

Auguste Comte was an important piece of the intellectual puzzle against which both Spencer and Adams worked for at least two reasons: first, Comte was a particularly significant precursor to Spencer;<sup>146</sup> and second, Adams, by his own account, encountered Comte through John Stuart Mill's *critique* of Comte's work.<sup>147</sup>

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142. According to Darwin, there is nothing intrinsically superior in the individual that survives. It is the creative power of sexual reproduction that is responsible for what *in hindsight* proves to be superior adaptation. He also spoke of "sexual selection," namely, cases where "individuals make a higher genetic contribution to the next generation not by having superior survival attributes but merely by being more successful in reproduction." MAYR, ONE LONG ARGUMENT, *supra* note 140, at 88. As we know, many found this line of argument hard to swallow: it ran counter to established convictions that nature was purposeful, namely, the comforting certainty that "the world must have a purpose because, as Aristotle had said, 'Nature does nothing in vain,' and neither, a Christian would say, does God." MAYR, *supra*, at 50. See also GREENE, *Darwin as a Social Evolutionist*, *supra* note 18.

143. See BOWLER, *supra* note 18, at 86–95.

144. See MAYR, *Agassiz, Darwin, and Evolution*, in EVOLUTION AND THE DIVERSITY OF LIFE: SELECTED ESSAYS 251 (1997).

145. *Id.* at 251, 268. Interestingly, Gray was a devout Christian, who believed that God had wonderfully devised a world that had the potency of evolving. *See id.*

146. *See generally*, e.g., 1 RAYMOND ARON, MAIN CURRENTS IN SOCIOLOGICAL THOUGHT 59 (Richard Howard & Helen Weaver trans., 1965).

147. *See JOHN-STUART MILL, AUGUSTE COMTE AND POSITIVISM* (2005) (1865). Although he finds fault with various aspects of Comte's analysis, overall Mill is very impressed with Comte's intellectual achievement. For Adams' rendition of his encounter with Comte, through Mill, see ADAMS, AUTOBIOGRAPHY, *supra* note 8, at 179 ("That essay of Mill's revolutionized in a single morning my whole mental attitude."). Interestingly, Adams confessed that he had never even heard of Darwin when he encountered Mill's book on Comte. *Id.* Adams' biographer speculates that he eventually made his

Comte's distinctly evolutionary account of human intellectual history was not unique at the time.<sup>148</sup> What was exceptional about Comte was his distinct treatment of humans' changing understanding of the universe around them. He famously posited that "the progress of thought,"<sup>149</sup> or "philosophizing"<sup>150</sup> had been going through three stages: theological (natural phenomena are held to be—immediately or ultimately—governed by a supernatural entity or entities); metaphysical (explanation for natural phenomena should be sought in some quality or force that resides in nature itself); and positive ("The law of phenomena are all we know respecting them. Their . . . ultimate causes . . . are unknown and inscrutable to us.").<sup>151</sup>

Famously, Comte analyzes the various sciences in terms of their degree of development. The order of sciences, according to Comte, is: Mathematics, Astronomy, Physics, Chemistry, Biology ("Physiology"), and Sociology ("Social Physics").<sup>152</sup> This scale is organized from the abstract to the concrete, in the sense that the former had first to mature—that is, go through the three phases of development—to allow for the development of the latter.<sup>153</sup> Comte accordingly believes that the remnants of theological and metaphysical thinking are still to be found in biology and even more so in sociology. His professed ambition was to bring sociology to maturity, thus rendering all human thought positive.<sup>154</sup>

To Comte, the hierarchy among sciences reflects their subject matters' increasing complexity and the corresponding difficulty in explaining phenomena rel-

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acquaintance with Darwinism via Herbert Spencer or John Fiske. KIRKLAND, *supra* note 8, at 140. According to Louis Menand, Fiske was an important "Spencerian philosopher." MENAND, *supra* note 108, at 216. Adams explicitly mentioned Spencer in *The Railroad System*. See Adams, *The Railroad System*, *supra* note 48, at 490 ("Herbert Spencer says that it would require a volume to trace through all its ramifications the contingent effects of the everyday act of lighting a fire. These effects are imperceptible, but the influence of steam locomotion as applied to trade is as apparent as it is infinite.").

148. Cf. notably G. W. FRIEDRICH HEGEL, *THE PHILOSOPHY OF HISTORY* (1837).

149. The trajectory charted by Comte is progressive for it advanced the human race's mastery of nature, thus allowing it to bootstrap itself from many of the miseries afflicting its natural existence. MILL, *supra* note 149, at 5. Mill's interpretation of Comte claims that positivism facilitates the adoption of utilitarian social thinking. See *id.* at 31 ("All theories in which the ultimate standard of institutions and rules of action was the happiness of mankind, and observation and experience the guides . . . , are entitled to the name Positive.").

150. MILL, *supra* note 149, at 5, 6.

151. *Id.* at 5. Typical to evolutionary thinking, Comte emphasizes the essential role played by the two earlier modes of thinking in the advancement of human thinking. Moreover, nowhere does he claim that these two were completely elbowed out by Positivism.

152. See AUGUSTE COMTE, *View of the Hierarchy of Positive Sciences*, in AUGUSTE COMTE AND POSITIVISM: THE ESSENTIAL WRITINGS 87 (Gertrud Lenzer ed., 1998) [hereinafter COMTE, *View of the Hierarchy of Positive Sciences*; ESSENTIAL WRITINGS].

153. See, e.g., AUGUSTE COMTE, *General View of Physics*, in ESSENTIAL WRITINGS, *supra* note 154, at 149–150.

154. AUGUSTE COMTE, *Necessity and Opportuneness of This New Science*, in ESSENTIAL WRITINGS, *supra* note 154, at 195–207.

event to each science.<sup>155</sup> That the science of society is the most complex of sciences for Comte is not surprising given his aspiration to salvage—that is, to convert into positivism—all theological and metaphysical thinking about society, which encompasses not only “proper” political theories but also morality and ethics.<sup>156</sup> Note well that in making it his aspiration to “convert” the science of society, thus perceived, into positivism, Comte is making the case that contentious social questions could be answered positively by a sociologist, that is, in an objective, scientific manner—just as a chemist, for example, would answer questions in chemistry.<sup>157</sup>

Therefore, why was Mill so troubled by Comte’s theory? On reviewing Comte, Mill was quick to realize the political implications of Comte’s evolutionary historiography.<sup>158</sup> Not that Comte shied away from spelling out the operative organizational outcomes of his analysis. He unabashedly called for the establishment of centralized “Spiritual Power,” to be charged with moral and intellectual guidance of citizens as well as with their education; he held that the Spiritual Power’s “judgments on all matters of high moment should serve, and receive, the same universal respect and deference which is paid to the united judgment of astronomers in matter astronomical.”<sup>159</sup> Moreover, Comte thought that an increase in social control would be called for along the way to counteract the gradual disintegration of traditional social bonds.<sup>160</sup> To Mill all this sounded like a recipe for a nightmarish “spiritual despotism.”<sup>161</sup>

Mill’s concern must have resonated well with Adams. The post-bellum American industrial revolution accelerated an on-going process of professionalization. Thomas Haskell makes the case that, in that tumultuous period, “one’s familiar milieu and its institutions were drained of casual potency.”<sup>162</sup> Consequently, a new breeds of experts—the new professionals—offered their advice

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155. See COMTE, *View of the Hierarchy of Positive Sciences*, *supra* note 154.

156. As pointed out by Mill, some of Comte’s classifications of “theological” and “metaphysical” social theories may be disputed. Still, Mill does accept Comte’s general argument that the field had been dominated by these two “schools.” Examples of theological and metaphysical political thinking are the theory of a ruler’s divine right to rule and the conception of natural rights, respectively. MILL, *supra* note 149, at 30–33.

157. See *supra* text accompanying note 154.

158. See MILL, *supra* note 149, at 33–44.

159. *Id.* at 42. Comte believed that traditional forces of society were in decline and anticipated the rise of two new forces that would reign supreme: positivism and industrialism. Accordingly, his scheme of government was bifurcated into the spiritual and temporal authorities, which were to be mutually exclusive in terms of their respective powers. The first was to be composed of positive thinkers, while the latter of capitalists. There was no room for representative elements in this scheme. See Gertrud Lenzer, *Introduction: Auguste Comte and Modern Positivism*, in ESSENTIAL WRITINGS, *supra* note 154.

160. GREENE, *Comte and Spencer*, *supra* note 138, at 74 (“Comte envisaged an ever-increasing interposition of social control to make up for the gradual dissolution of social solidarity, . . . ”).

161. MILL, *supra* note 149, at 44. Mill named among his reservations his deep skepticism regarding the likely attainment of consensus among sociologists about their issues of expertise, which, he thought, was not the case in other sciences. *Id.* at 54–55.

162. HASKELL, *supra* note 31, at 40. See also *id.* at 1–47. But cf. Dorothy Ross, *Professionalism and the Transformation of American Social Thought*, 38 J. ECON. HIST. 494 (1978).

to disoriented communities, thus responding to an “expanding market for insight into social problems.”<sup>163</sup> Comte’s analysis brought to the fore not only human beings’ tendency to specialize, but also its potential to harm.<sup>164</sup> No wonder, then, that (as we shall see below) Adams’ work reflects Mill’s suspicion of the commingling of professionalism and public control. Both seem to think that specialization and professionalization may very well be the rule of nature, but this does not mean that professionals should rule.

### C. Herbert Spencer

We now turn to Spencer. A longer excursion into Spencer’s system of thought is warranted for two reasons: first, for his unparalleled intellectual influence in America during the second half of the nineteenth century; and, second, because Spencer fell into such disfavor during the twentieth century that his work is practically unknown to most people today.<sup>165</sup>

Spencer’s influence in the United States during the second half of the nineteenth century cannot be exaggerated—it surpassed even Darwin’s impression on the American mind. As Hofstadter put it, “In the three decades after the Civil War it was impossible to be active in any field of intellectual work without mastering Spencer.”<sup>166</sup> Spencer was endorsed by men with the highest business and academic credentials. Thus, as a notable example, William Graham Sumner, one of the greatest American sociologists, was an avid Spencerian and a strong believer in Social Darwinism.<sup>167</sup> So was the steel tycoon Andrew Carnegie.<sup>168</sup> The imprint of Spencer’s robust individualism on the legal discourse of his time as well was made known by Justice Holmes’ famous reprimand in *Lochner* that

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163. HASKELL, *supra* note 31, at 199. Moreover, the end of the nineteenth century was the period of the rise of the great universities (and the decline of seminaries and theology) and professional philosophers (at the expense of “amateur men of letter”). See BRUCE KUKLICK, *A HISTORY OF PHILOSOPHY IN AMERICA 1720–2000*, at 97–110 (2001). It was the time of the emergence of the “professional” social scientists, and the professionalization of various white collar occupations in a number of fields, such as medicine, law, pharmaceutical chemistry, accountancy, and social work. See Henrika Kuklick, *The Organization of Social Science in the United States*, 28 AM. Q. 124 (1976); HASKELL, *supra* note 31; and MAGALI SAFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 246 app. (1977).

164. Comte was diligently followed by other sociologists. See, e.g., EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (1997) (1893). See also the following Section for Spencer’s notion of specialization.

165. See, e.g., W. G. Runciman, *Evolution in Sociology*, in *EVOLUTION AND ITS INFLUENCE* 19 (Alan Grafen ed., 1989). But see the recent MARK FRANCIS, *HERBERT SPENCER AND THE INVENTION OF MODERN LIFE* (2007).

166. HOFSTADTER, *SOCIAL DARWINISM*, *supra* note 17, at 33. Elsewhere Hofstadter writes that Spencer “was idolized in the United States as has been no other philosopher before or since.” HOFSTADTER, *THE AMERICAN POLITICAL TRADITION*, *supra* note 74, at 218.

167. See Hovenkamp, *supra* note 37, at 2327 (Sumner was “America’s leading Social Darwinist intellectual . . . ”). See generally, e.g., GREENE, *Darwin as a Social Evolutionist*, *supra* note 18, at 123 (Social Darwinism was “endemic in much of British thought” in the mid-nineteenth century). But see Leonard, *supra* note 18.

168. See Andrew Carnegie, *Wealth*, 148 N. AM. REV. 654 (1889), and ANDREW CARNEGIE, *THE AUTOBIOGRAPHY OF ANDREW CARNEGIE* 327 (1920).

"the 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."<sup>169</sup> Holmes himself, needless to say, was also an admirer of Spencer.<sup>170</sup>

It should again be noted that Spencer was audacious enough to propose that the past and future annals of the entire universe, literally speaking, from dust, to flora and fauna, to the planets, to human physique, psychology, and organizations, could be explained by a cycle of evolution and dissolution.

According to Spencer, the transition from one phase to the other is directed by shifts in the balance between motion and consolidation in a given system—the more movement there is, the less solidified the system is, and vice versa. A move toward consolidation is evolutionary and toward motion, dissolutionary: "[T]he general history of every aggregate is definable as a change from diffused imperceptible state, to a concentrated perceptible state and again to a diffused imperceptible state; every detail of the history is definable as a part of either the one change or the other."<sup>171</sup> And again, with regard to evolution, "[A]ll sensible existences *must*, in some way or other and at some time or other, reach their concrete shapes through processes of concentration."<sup>172</sup>

Furthermore, Spencer asserts that an evolutionary process involves a movement of specialization from homogeneity to heterogeneity, the latter being the *more* stable condition. "As we now understand it," Spencer writes, "Evolution is definable as a change from incoherent homogeneity to a coherent heterogeneity, accompanying the dissipation of motion and integration of matter."<sup>173</sup> Anything homogeneous is unstable, he argues, as its (standardized) parts are exposed to different pressures/forces (depending, for example, on their position in the system), and are therefore sure to develop differently.<sup>174</sup> This process brings about differentiation that produces, in turn, a heterogeneous and internally-dependent, thus stable, system. As noted, Spencer applied this principle not only to the organic world, but carried it also to the field of political theory.<sup>175</sup> A nice illustration for this train of thought, as applied to the business of railroading,

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169. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes J., dissenting).

170. HOFSTADTER, SOCIAL DARWINISM, *supra* note 17, at 47.

171. SPENCER, FIRST PRINCIPLES, *supra* note 51, at 288.

172. *Id.* at 308 (emphasis in original). While its thrust is captured in these comments, the process of evolution, as described by Spencer, is much more complex, of course. For example, it includes "secondary redistributions" or secondary cycles of evolutionary processes. *See id.* especially ch. 15.

173. *Id.* at 359.

174. To illustrate, Spencer writes with regard to the formation of planet Earth: "Were the conditions to which the surface of the Earth is exposed, alike in all directions, there would be no obvious reason why certain of its parts should become permanently unlike the rest. But being unequally exposed to the chief external centre of force—the Sun—its main divisions become equally modified: as the crust thickens and cools, there arises that contrast, now so decided, between the polar and equatorial regions." *Id.* 407. As noted, Spencer argued that the same dynamics are at play when it comes to protozoa and human associations. *See id.* 410 *et seq.*

175. This is the thrust of the argument: "With this advance from small incoherent social aggregations to great coherent ones, which, while becoming integrated pass from uniformity to multiformity, there goes an advance from indefiniteness of political organization to definiteness of political organization." SPENCER, PRINCIPLES OF SOCIOLOGY, *supra* note 57, at 733. The force of the argument is readily realized by the fact that Spencer prophetically predicted that on the political level the process would

was provided by Adams in an 1870 essay in which he made the following argument on the workings of the law of gravitation:

Just as the larger material body attracts in space the smaller—just as development naturally leads to a more complex and yet to a more simple condition of being—so our railroad system tends ever to consolidation, and that consolidation rapidly casts off old trammels, the fruitful source of discord, and result in a more elaborate and perfect organization.<sup>176</sup>

Spencer is probably most renowned for his assured application of the laws of evolution on human socialization.<sup>177</sup> His elaborate scheme of social development cannot be outlined here. For our purposes, I believe it sufficient to touch upon Spencer's theory of the evolution of societies from "the military type," to "the industrial type," as outlined in *The Principles of Sociology*.<sup>178</sup>

The military society is typified by status and fixed castes; it is a society rife with armed conflicts and governed by a despot.<sup>179</sup> Its tyrannical nature is reflected in the extensive and intrusive schemes of personal regulation, which mandate compulsory co-operation among members of society.<sup>180</sup> The industrial society, contrariwise, is ruled by a regime of contracts, namely, it is based on voluntary cooperation.<sup>181</sup> The post-military society is pacific. It is dedicated to the preservation of individual autonomy; it is in that sense "popular."<sup>182</sup> It seeks, and is required, to interfere with the lives of citizens to the least extent possible,<sup>183</sup> thus allowing for the natural flow of their personal evolution, which is mirrored in overall social evolution.<sup>184</sup>

Spencer, an ardent Lamarckian,<sup>185</sup> was certain that the industrial society

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result in the formation of a "European federation," during a century when Europe was splintered by jealousies and strife. SPENCER, FIRST PRINCIPLES, *supra* note 51, at 317.

176. Adams, *Railway Problems*, *supra* note 63, at 127.

177. Spencer was not alone in this, of course. See notably CHARLES DARWIN, *THE DESCENT OF MAN, AND SELECTION IN RELATION TO SEX* (1871), and CHARLES DARWIN, *THE EXPRESSION OF MOTIONS IN MAN AND ANIMALS* (1872).

178. SPENCER, PRINCIPLES OF SOCIOLOGY, *supra* note 57, at 658–730. Comte had proposed this division prior to Spencer. See, e.g., ARON, *supra* note 148.

179. See SPENCER, PRINCIPLES OF SOCIOLOGY, *supra* note 57, ch. 17.

180. SPENCER, *The Coming Slavery*, *supra* note 76, at 29–41.

181. SPENCER, PRINCIPLES OF SOCIOLOGY, *supra* note 57, at 750 (the "industrial type . . . is the *régime* of voluntary corporation . . ."). See also SPENCER, *The Coming Slavery*, *supra* note 76, at 26 (advocating "the system of voluntary co-operation by companies, associations, unions, to achieve business and other ends . . .").

182. SPENCER, PRINCIPLES OF SOCIOLOGY, *supra* note 57, at 750 (the rise of the industrial society "implies that the political structures simultaneously become popular in their origin and restricted in their functions."). See Durkheim's critical assessment of this part in Spencer's analysis: EMIL DURKHEIM, *Organic Solidarity and Contractual Solidarity*, in EMIL DURKHEIM: ON MORALITY AND SOCIETY 86 (Robert N. Bellah ed., 1973).

183. See, e.g., SPENCER, PRINCIPLES OF SOCIOLOGY, *supra* note 57, at 747 ("as industrialism has progressed, the State has retreated from the greater part of those regulative actions it once undertook.").

184. *Id.* ch. 18.

185. See *supra* text accompanying note 145.

would produce better human beings, that is, independent, kind, and honest citizens who would—and this may sound surprising—embrace altruism, but only out of choice.<sup>186</sup> Thus, as much as individualism must reign supreme, social order is not jeopardized, he insisted. On the contrary:

As surely as the tree becomes bulky when it stands alone, and slender if one of a group; as surely as a blacksmith's arms grown large; as surely as a clerk acquires rapidity in writing and calculation—so surely must the human faculty be moulded into complete fitness for the social state; so surely must evil and immorality disappear; so surely must man become perfect.<sup>187</sup>

To conclude, “Progress, therefore, is not an accident, but a necessity.”<sup>188</sup>

It should be obvious by now that Spencer’s vision of progress is what we today call an extreme libertarianism. He was, after all, a staunch believer in natural rights, laissez faire, minimal government and total privatization.<sup>189</sup> To him, state regulation was an extreme case of extraneous intervention in the natural course of human evolution.<sup>190</sup>

What is left, then, for the government to do under this framework? This is the short answer: According to Spencer, the legitimate state should only “administer justice.”<sup>191</sup> In other words, he argues that ideally the state should limit itself to resolving judicially disputes among individuals, a process which would diminish as members of society perfect their sense of justice with the progress of time.<sup>192</sup> Spencer reached this conclusion with reference to the familiar concept of the state of nature, and argued that men wanted government

[n]ot to regulate commerce; not to educate the people; not to teach religion; not to administer charity; not to make roads and railways; but simply to

186. See SPENCER, PRINCIPLES OF SOCIOLOGY, *supra* note 57, at 720–730.

187. HERBERT SPENCER, SOCIAL STATICS TOGETHER WITH MAN VERSUS THE STATE 32 (1892) [hereinafter SPENCER, SOCIAL STATICS].

188. *Id.* See also SPENCER, PRINCIPLES OF SOCIOLOGY, *supra* note 57, at 745–746. Truth should be told that in some of his later work Spencer sounds less assured about the attainment of progress. While he remained convinced that the form political institutions would take in the future would be dependent on the persistence of peace for considerable periods of time, he admitted that he could not predict whether societies of the future would take a peaceful or belligerent attitude toward each other. Thus, at some point he wrote that “throughout approaching periods, everything would depend on the courses which societies happen to take in their behaviour to one another—courses which cannot be predicted.” *Id.* at 736. This admission is not to be taken lightly, since, as we have seen, Spencer had originally stipulated a deterministic scheme with a clear end in sight: the production of a peaceful, liberal man befitting the industrial society.

189. See *infra* text accompanying notes 194–197.

190. See, e.g., SPENCER, PRINCIPLES OF SOCIOLOGY, *supra* note 57, at 724 (“Long ago it had ceased to be thought that Government could do any good by regulating people's food, clothes, and domestic habits . . .”). Spencer generally predicted the decline in dominance of the executive branch in industrial societies and “the functions to be discharged by its occupant will become more and more automatic.” *Id.* at 741.

191. SPENCER, *The Proper Sphere of Government*, *supra* note 59, § 6.10.

192. See SPENCER, PRINCIPLES OF SOCIOLOGY, *supra* note 57, at 702–703.

defend the natural rights of man—to protect person and property—to prevent the aggressions of the powerful upon the weak—in a word, to administer justice. This is the natural, the original, office of a government. It was not intended to do less: it ought not to be allowed to do more.<sup>193</sup>

Following these strong words, Spencer went so far as to question the state's inherent power to hold a standing army,<sup>194</sup> thus breaking ranks, for example, with Adam Smith, another icon of liberal political thought.<sup>195</sup>

It seems that the reason for Spencer's visible hostility to any form of state regulation lay in his deep-seated Lamarckism. His fear was that such regulation would damage not only the constitution of the present generation but also that of the next, through the process of inheritance of acquired characteristics.<sup>196</sup> Particularly troubling from Spencer's perspective were various (quite minimal) social-welfare schemes undertaken in his time.<sup>197</sup> To Spencer, state regulation in general and this kind of regulation in particular was detrimental both to the recipients of state assistance and to those forced to sustain it.<sup>198</sup> Furthermore, running through the Spencer corpus is the conviction that administrative regulation invigorates the state *at the expense* of voluntary associations and at the price of the ossification of healthy, humane sentiments in society.<sup>199</sup>

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193. SPENCER, *The Proper Sphere of Government*, *supra* note 59, § 6.10. Later on Spencer spells out the institutional ramifications of this prescription, when he stipulates that the state should "establish courts of justice, which should be easy of access, speedy in their decisions, and in which every man should be able to obtain the protection of the law, free of cost." *Id.* § 6.97.

194. *Id.* §§ 6.44–6.48. Spencer likewise argued that colonialism was an immoral enterprise for it entailed the expansion of governmental powers, benefited only "the monopolists" in the Western countries, and led to inhumane treatment of the colonized people. *See id.* §§ 6.6.50–6.70.

195. *See* 2 ADAMS SMITH, THE WEALTH OF NATIONS 184–185 (1776). Turning to another hero of the liberal tradition, as we know, John Locke was quite terse when directly addressing the issue of the role of government (thus triggering much controversy among future scholars). *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 2.135 (Peter Laslett ed., 1988) (1689) (government has "no other end but preservation . . ."), and 6 JOHN LOCKE, WORKS 42 (1963) (1823).

196. SPENCER, *The Proper Sphere of Government*, *supra* note 59, § 6.33 ("We are told that the sins of the wicked shall be visited upon the children to the third and fourth generation. That visitation may either exhibit itself in mental derangement, bodily disease, or temporal want. The parent may either transmit to the child bad moral tendencies, a constitutional taint, or may leave it in circumstances of great misery.").

197. *See, e.g.*, SPENCER, *The Coming Slavery*, *supra* note 76, which is a diatribe against various "Poor Laws" and other forms of social-welfare legislation.

198. Put differently, welfare policies wrong recipients of welfare benefits, who are thus unable to better themselves in the ruthless struggle for survival, but also the taxed population, which is denied the opportunity to organically develop humane sentiments towards others. *See* SPENCER, SOCIAL STATICS, *supra* note 189, at 205 ("[N]ature secures the growth of a race who shall both understand the conditions of existence, and be able to act up to them."); SPENCER, *The Proper Sphere of Government*, *supra* note 59, § 6.33 ("Adversity is, in many cases, the only efficient school for the transgressor."); and SPENCER, *The Proper Sphere of Government*, *supra* note 59, § 6.27 ("Forced contributions rarely appeal to kindly feelings . . .").

199. *See infra* text accompanying note 231.

#### D. Evolution to Adams

“Evolution” could mean different things to different people in the nineteenth century (and in later centuries, of course).<sup>200</sup> Which option did Adams embrace? A good place to examine what “evolution” meant for him, before examining in detail what he took from it as he mulled over the railroad problem, is in his professed philosophy of history.

Throughout his life, the more so after his retirement from the railroad businesses, Adams saw himself as a historian. He lectured on topics in American history on various occasions in the United States and abroad and published a series of studies relating to Massachusetts and his family history.<sup>201</sup> So prominent was Adams’ stature as a historian that, while the head of the Massachusetts Historical Society, he was invited to be the keynote speaker in the dedication ceremony of the building of Wisconsin’s State Historical Society in mid-October 1900.<sup>202</sup> The address may be best characterized as progressive (or Reform) Darwinian, which is to say that it falls in line with key tenets in the thinking of Comte and, even more so, Spencer (neither of whom are mentioned by name in the address).

Adams presents a distinct interpretation of Darwin’s work in outlining his own newfound philosophy of history. Revealing his superficial understanding of Darwin, he purports to import two arguments from Darwin, the first more warranted than the second: First, natural species are connected, rather than simply forming a chain of distinct, separate entities. Second, that species progressively evolve over time towards some ultimate end.<sup>203</sup> Likewise, Adams maintains that a historian should construct history so that it demonstrates these two movements, by showing how what may seem at first to be disorderly facts are actually connected to form a teleological structure. “To each development, each epoch, race and dynasty its proper place [is] to be assigned[]” Adams concludes his prescription for the new historians, “and to assign that place [is] the function of the historian.”<sup>204</sup>

Adams writes as if he does not know where the train of history may lead. Yet he is certain the ride will prove to be worth the price of the ticket; he is certain

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200. See generally, e.g., Leonard, *supra* note 18. It should be noted further that the review in the previous Parts did not exhaust, of course, the various understandings of evolution that circulated in Adams’ time. Thus, for example, Thomas Henry Huxley, Darwin’s greatest panegyric in Britain, is missing from the review. Huxley, who was a Reform Darwinist (see Hovenkamp, *supra* note 37), thought, for example, that the government should take an active role in the dissemination and acquisition of knowledge in society by financially supporting scientific research, accessible education, and the construction of libraries and museums. See, e.g., ADRIAN DESMOND, HUXLEY: FROM DEVIL’S DISCIPLE TO EVOLUTION’S HIGH PRIEST 166–167, 243–244 (1997), and 1 THOMAS H. HUXLEY, *Administrative Nihilism*, in COLLECTED ESSAYS (1983–1894) (1880).

201. KIRKLAND, *supra* note 8.

202. The address was later published. See Charles Francis Adams, *The Sifted Grain and the Grain Sifters*, 6 AM. HIST. REV. 197 (1901) [hereinafter Adams, *Sifted Grain*].

203. This is a problematic characterization for post-Darwin Darwinism came to reject the notion of progressive evolution. See *supra* note 18. But see *supra* note 140.

204. Adams, *Sifted Grain*, *supra* note 204, at 199.

that “the evolution of man [is] from a lower to a higher stage.”<sup>205</sup> As noted, in so claiming, Adams unhesitatingly paints Darwinian evolution in clear progressive colors, something modern evolutionists would be reluctant to do, to put it mildly—unless, of course, they subscribed to a Spencerian school of thought.

Indeed, Adams’ reasoning seems to follow the essentials of Spencer’s principles more than any other single evolutionary thinker. He probably deemed Comte too authoritative and Darwin too open-ended.<sup>206</sup> The next part will demonstrate several ways in which Adams’ theory of regulation followed Spencer’s theory of evolution.

#### IV. ON SOCIAL DARWINISM: SPENCERISM AND ADAMS

As I have argued throughout the Article, Spencer’s theory provides coherence to Adams’ theories that they otherwise lack. This Part is dedicated to substantiating that argument.<sup>207</sup>

##### A. *Survival of the Fittest*

As noted, it was Spencer who coined the principle of “the survival of the fittest.”<sup>208</sup> This short phrase captures the essence of the Spencerian worldview of life, in nature and in society, as a constant struggle for survival. This life-or-death struggle is a Hobbesian “war . . . of every man against every man.”<sup>209</sup> Yet out of this war emerges the fittest, whose victory is therefore

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205. *Id.* at 200.

206. Likewise, Adams must have deemed Huxley too eager to intervene in the natural course of the civil society. *See supra* note 202.

207. The proposed interpretation of the Adams corpus does not require me to point at a smoking-gun type of evidence which would resolutely attest to Adams’ adherence to Spencerism/Social Darwinism/etc. (*But see supra* note 149). Rather, as this Article is engaged in contextual intellectual history, it is predicated on the understanding that the intellectual climate within which Adams pondered on the railroad problem must have left its mark on, and were reflected in, his theories, whether Adams would concede this or not (without denying that Adams had considerable discretion in molding his theories). On contextual methodology, *see generally* William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997), and PAUL HAMILTON, *HISTORICISM* (2d ed., 2003). *See also* PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* 9–12 (1988); Dominick LaCapra, *Intellectual History and Its Ways*, 97 AM. HIST. REV. 425 (1992); and John E. Toews, *Intellectual History after the Linguistic Turn: The Autonomy of Meaning and the Irreducibility of Experience*, 92 AM. HIST. REV. 879 (1987). Tellingly, Adams stated on one occasion that his model of regulation, as had been adopted by the State of Massachusetts, was the result of “nothing but a happy guess . . . .” (Cullom Committee Rep., Test. P. 1202). The methodology of this Article argues that, given the intellectual atmosphere in Massachusetts at the time, it was no accident that Adams’ “happy guess” bore the imprints of the evolutionary thinking of the day. On the intellectual environment of Adams’ time, *see generally*, for example, BRUCE KUKLICK, *THE RISE OF AMERICAN PHILOSOPHY: CAMBRIDGE, MASSACHUSETTS 1860–1930* (1977), and MENAND, *supra* note 108. *See also* Charles Francis Adams’ brother’s classic, HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* 224–232 (Ernest Samuels ed., 1973) (1918).

208. *See supra* note 18.

209. THOMAS HOBES, *LEVIATHAN* 82 (1946).

wholly justified<sup>210</sup> and absolutely needed for the forward march of society's progressive evolution.<sup>211</sup>

Adams used the phrase repeatedly when he spoke of the railroad industry.<sup>212</sup> Many others at the time thought, as Adams did, that contending lines were engaged in "predatory competition."<sup>213</sup> As noted, Adams' age witnessed "competition with a vengeance and the inauguration of a species of commercial warfare of a magnitude and violence unheralded in economic history."<sup>214</sup> In that context Spencer's phraseology must have appeared particularly inviting. As we have seen, Adams not only employed the phrase, but was also willing to draw the necessary conclusion from it: To him, the losing ("unfit") party must perish.<sup>215</sup>

### B. The Power of Concentration

In one of his appeals to his fellow Bostonians, Adams explained why a commission would be more suitable as an investigator of the railroad problem than any individual: "Wielding all the influence of a community, having every source of information thrown open to them, such officials [i.e., commission members] become the recipients of light from all quarters, and can, if they be competent, concentrate the scattered rays into a powerful focus."<sup>216</sup> As noted, in a democracy, this was easier said than done because of "the difficulty of concentrating as one force all possible forms of mind and phases of interest" "amid the ebbs and floods of a democratic form of government."<sup>217</sup>

In an earlier article, Adams, speaking of the movement toward centralization in the newspaper business, wrote, "The newspaper press is the engine of modern education; and that press, obeying the laws of gravitation, is everywhere centralized,—the rays of light once scattered are concentrated into one great all-powerful focus."<sup>218</sup> It seems, then, that Adams relied on the idea of concentration (and focus) to convey an image of regulation as a confluence of

210. As suggested in the text, today it is indeed widely held that the phrase "the survival of the fittest" is tautological. See Matthew K. Chew & Manfred D. Laubichler, *Natural Enemies—Metaphor or Misconception?*, 301 SCI. 52 (2003).

211. It has been long noticed that Spencer attempts to reconcile between a thoroughly individualistic worldview, which centers around individuals' natural rights, and an organicist conception of society, which posits the precedence of the collective over the individual. Many have argued that Spencer failed to reconcile the two, but there have been other, more favorable views on the issue. For an overview of the debate and one such attempt of reconciliation, see T. S. Gray, *Herbert Spencer: Individualist or Organicist?*, 33 POL. STUD. 236 (1985).

212. To take one relevant example, the phrase "the survival of the fittest" recurred in comments made by Adams and by members of the Cullom Committee throughout the former's testimony in front of the Committee. See, e.g., Cullom Committee Rep., Test. Pp. 1204 ("[pooling] is an attempt on the part of the railroads to hold in check a natural law which would result in the survivalship of the fittest."), 1209, & 1213.

213. *Supra* note 38.

214. Tipple, *supra* note 33, at 27.

215. See *supra* text accompanying notes 91–92 and note 86.

216. Adams, *Boston II*, *supra* note 8, at 558.

217. Adams, *Boston I*, *supra* note 8, at 15.

218. Adams, *The Railroad System*, *supra* note 48, at 489.

forces dedicated to one goal; it was a conception of regulation as a prism through which a concentrated communal activity could be made effective. Hence, Adams had this to say of his Massachusetts Board of Railroads Commissioners, “[It] was set up as a sort of lens by means of which the otherwise scattered rays of public opinion could be concentrated to a focus and brought to bear upon a given point.”<sup>219</sup>

Thus viewed, regulation was conceived of as a natural part of the modern movement of “gravitation of the parts to the centre,—toward the combination and concentration of forces[.]”<sup>220</sup> Just as railroads were drawn to combinations,<sup>221</sup> so, on the other side, regulatory boards would concentrate public “forces.” In that sense, regulation was portrayed as a modern phenomenon. The analogy made between public regulation and journalism suggested the remedy proposed by Adams to the railroad problem—information. The process, it was emphasized, was inevitable. “We must follow out the era on which we have entered to its logical and ultimate conclusion, for it was useless for men to stand in the way of the steam-engines.”<sup>222</sup> “No human power,” he concluded, “can stop it.”<sup>223</sup>

As we have seen, Adams—following Mill’s analysis of Comte—had ample reason to resent this outcome for he feared centralization would stifle personal freedom.<sup>224</sup> The way he designed the Massachusetts Board might have been the result of this resentment.

### C. Remedies in an Age of Evolution

Speaking of the Massachusetts Board of Railroad Commissioners, Adams noted with satisfaction, “Undesignedly the Massachusetts legislators had rested their law on the one great social feature which distinguishes modern civilization from any other of which we have a record,—the eventual supremacy of an enlightened public opinion.”<sup>225</sup> “That secured,” he proclaimed, “all else might safely be left to take its own course.”<sup>226</sup> This proposition takes us back to Adams’ intentional refusal to endow the Board with any coercive powers. It was left for Massachusettsians to pull the chestnuts out of the fire, based on the

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219. ADAMS, RAILROADS, *supra* note 35, at 138.

220. *See supra* note 53.

221. *See supra* text accompanying note 97.

222. Adams, *The Railroad System*, *supra* note 48, at 495.

223. *Id.* Adams reasoned in a different context that “[p]eople may say, and legislators may enact, what they please; the stern logic of taxation will at last convince us that that there is a science of revenue.” Adams was certain that there would be a time when the laws of this science worked their way “through the pockets into the heads of the people.” Adams, *Boston II*, *supra* note 8, at 590. Adams reiterated this deterministic message when he appeared in front of the Cullom Committee. *See* Cullom Committee Rep., Test. Pp. 1208–1209 & 1211.

224. *See supra* text accompanying notes 47 & 163.

225. ADAMS, RAILROADS, *supra* note 35, at 140, 215.

226. *Id.*

results of the Board's investigation, should they choose to do so.<sup>227</sup>

Framing the issue in Spencerian terms is instructive. Being a classical liberal, Spencer adheres to the private/public division,<sup>228</sup> and provides it with a seemingly naturalistic, evolutionary "explanation." To him, one of the manifestations of the rivalry between the man and the state is the "fact" that the more vital the private sphere becomes, the slimmer the chances of the public sphere are to survive, and vice versa. Spencer warns against "State-usurpation of all industries," a result that might follow from dynamics where "the private forms . . . , disadvantaged more and more in competition with the State . . . will more and more die away."<sup>229</sup> Namely, as long as regulation thrives, there is little hope that some (non-governmental) agent will emerge to carry the awesome task of derailing society from its road to mediocrity and decay. Put in contemporary terms, Spencer points to the advantages of the logic of collective action, as he argues that, in general, the state is better organized than dispersed individuals or private organizations.<sup>230</sup> Additionally, he argues that the state can "arrange everything for its own convenience . . . ."<sup>231</sup>

According to his own account, Adams faced a reality where there was a chance that *private* corporations would evolutionarily emerge to predominate society.<sup>232</sup> Now, as a true believer in the public-private division,<sup>233</sup> he—like Spencer—could not recommend counteracting this development by investing the state with more power, for that (allegedly) meant further stifling liberty. Nor could Adams stand idle in the face of such contingency. His only option was to turn to the public.

In putting the emphasis on the public, Adams offered a correction to Spencer. For Adams realized only too well that in the emerging industrial economy, the private sphere can be as threatening to private liberty as the state. At the same time, the remedy Adams suggested—essentially, publicity and the spread of information—was purely Spencerian, for Adams' objective was merely to create the minimal conditions necessary for every "able" person to freely evolve if she so chooses. Put differently, Adams, like Spencer, was concerned with allowing the "*right*" public to benefit from evolution. He therefore appealed to the "*right*" men, that is, to an educated, knowledgeable, intelligent public that truly cared

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227. In 1870 he accordingly censured an early proposal to found a national railroad commission for "[i]t sought to regulate corporations and confer powers on a comptroller, when what was really wanted was only information, and the conclusions derived from careful study." Adams, *Railway Commissions*, *supra* note 89, at 235.

228. See *supra* Section II.C.

229. SPENCER, *The Coming Slavery*, *supra* note 76, at 39.

230. *Id.*; cf. the classic MARCUS OLSON, THE LOGIC OF COLLECTIVE ACTION (1965), and *supra* text accompanying notes 97–103 (Adams' contrast between state and business organizations).

231. SPENCER, *The Coming Slavery*, *supra* note 76, at 39. Furthermore, under these conditions, decay spreads through the civil society and its ability to resist the state apparatus further diminishes. *Id.* at 33 ("Increasing power of a growing administrative organization is accompanied by decreasing power of the rest of the society to resist its further growth and control.").

232. See Adams, *A Chapter of Erie*, *supra* note 47, at 12.

233. Cf. *supra* text accompanying note 95.

about social issues and could be trusted to take part in the betterment of society.<sup>234</sup> For that reason, information played such an important role in his scheme of regulation. I would further argue that, in making his appeal, Adams depended on men cast in his image. I will return to both arguments below.

#### *D. On the Importance of Scientific Investigation*

Adams was certain that a scientific study of vexing social problems by specialized advisory bureaus was essential to successful tackling of such problems in a democratic society. However, Adams' grasp of the scientific methodology and of scientificity was rather crude.

Consider Adams' description of the procedure employed by a commission "of scientific men" that had been formed by the Boston gentry to study the ailments of the city's harbor. "They went quietly to work," he reported in 1868 in an admiring tone, "and studied currents, measured canals, [and] observed the tidal flood."<sup>235</sup> Only then did they present their conclusions for the consideration of their fellow citizens. By endorsing this method of investigation, Adams indicated that the true mission of the commissions of his design was to serve as public tribunals for the evaluation of disputed data.

Yet at the same time, Adams expected that, at the completion of its data-collection, this public tribunal would provide the community "with laws ascertained, [and] with a system defined."<sup>236</sup> This seamless leap from quantitative facts to the laws of reality and, more doubtful still, to normative conclusions is a remarkable sleight-of-hand commonly performed by reform-minded thinkers.<sup>237</sup> "Whatever is attempted," Adams commented with regard to Boston's ossified channels of trade, "let it be attempted knowingly and systematically, in obedience to some natural law."<sup>238</sup> To the question of the genealogy or authorship of these laws he paid no attention. His assumption seems to have been that a gifted fact-finder would have no trouble observing the natural law embedded in the collected data. He expected that the underlying law would loom large for all objective viewers to see.

It is hard to pigeonhole neatly Adams' pronouncements into any one school in the philosophy of science. They surely leaned toward positivism that was developed by Comte and later refined by Rudolf Carnap, among others.<sup>239</sup> Mark Francis remarks specifically with regard to Spencer's methodology, "Spencer's

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234. Namely, people "in whose hands the principle of self-government has [*not!*—Y.S.] become a confessed failure." *Supra* note 55. See also *supra* note 57 and accompanying text.

235. Adams, *Boston I*, *supra* note 8, at 16.

236. *Id.* at 25.

237. See, e.g., the seminal JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938), which is critically analyzed in Sagy, *The Manager, The Judge, and the Empiricist*, *supra* note 15, ch. 6.

238. Adams, *Boston II*, *supra* note 8, at 591.

239. See RUDOLF CARNAP, *THE UNITY OF SCIENCE* 21–29 (1934). On positivism and scientific realism, see generally, for example, IAN HACKING, *REPRESENTING AND INTERVENING* (1983), DAVID J. HESS, *SCIENCE STUDIES: AN ADVANCED INTRODUCTION* 8–14, 30–34 (1997), and SIMON BLACKBURN, *TRUTH: A GUIDE* 109–128 (2005).

deliberate simplicity and reliance on description was a thesis in itself; it demonstrated that portrayal of structure and function exhausted the need for explanation; it was all of Life that could be examined. In lieu of inner drives or archetypes, the shape of organism became the sole evidence for the meaning of Life.”<sup>240</sup>

Heed well the assumption undergirding this methodology, at least in Spencer: The “is” equals the “ought”; reality manifests what should be.<sup>241</sup> Spencer is well aware of the fact that, when it comes to human affairs, current reality may *not* manifest the “ought.” This may be so for various reasons, mainly society’s shortsightedness (for which it pays a heavy penalty).<sup>242</sup> However, Spencer is certain that in the future, following inevitable natural processes, reality will be aligned with the “ought”; eventually, he is certain “[n]ature will be obeyed.”<sup>243</sup> As can be easily seen, Spencer’s is a tautological methodology (what ought to become is the “right” reality, that is, the reality that ought to come into being). Later commentators would challenge this approach and expose its shaky footings.<sup>244</sup> This is a complex philosophical subject that need not detain us here. Suffice it to point out that “nature” (or “Life”) does not present itself “directly,” as it were, to the observer, but rather always through a conceptual grid.<sup>245</sup> Interestingly enough, Adams seems to have been aware of this facet of life. His 1876 article dedicated to a close examination of the statistics of railroad death and injury rates in the U.S. and Europe was a testament to the great difficulty in comparing such data<sup>246</sup>—even though the data should have “simply” recorded the number of people hurt as a result of railroad operations. In this context Adams offered the following clarification: “The great difficulty . . . of comparing the results deduced from equally complete statistics of different countries[] lies in the variety of the arbitrary rules under which the computations in making them are affected.”<sup>247</sup>

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240. FRANCIS, *supra* note 167, at 219. Cf. modern historians’ similar approach in the investigation of their subject matter. NOVICK, *supra* note 209, at 31–34 (the scientists should “empty himself . . . [T]ruth was accurate presentation. . . . [F]acts, appropriately arranged would reveal their inner connection.”).

241. See SPENCER, *The Proper Sphere of Government*, *supra* note 59, e.g., § 6.74.

242. See, e.g., SPENCER, *The Coming Slavery*, *supra* note 76, at 18, where Spencer berates his generation for its welfare legislation.

243. SPENCER, *The Proper Sphere of Government*, *supra* note 59, § 6.4.

244. See, e.g., Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value* 19–24 (1973). See generally Willard V.O. Quine, *Two Dogmas of Empiricism*, in *From a Logical Point of View* 20 (2d ed. rev., 1980), and Alasdair Macintyre, *After Virtue* 79–81 (2d ed., 1984).

245. See, e.g., NOVICK, *supra* note 209, e.g., at 1–2. Future scientists (especially quantum physicists) and philosophers of science would come to doubt these propositions; some would demonstrate the ideological commitments evinced by such claims of objectivity. See, e.g., sources cited *supra* note 246.

246. Charles Francis Adams, *The Railroad Death-Rate*, ATLANTIC MONTHLY, Feb. 1876, at 214.

247. *Id.* Maybe this difficulty accounted for Adams’ suggestion that “bureaus of railroad statistics” would be created “in the various States.” *Supra* note 108. Such bureaus might be able to skillfully analyze statistical data. See also Charles Francis Adams, *Of Some Railroad Accidents*, ATLANTIC MONTHLY, Nov. 1875, at 571.

The fact that both Spencer and Adams adhere to a positivist methodology is significant for at least two reasons. First this methodology assumes that all the regulator/scientist needs to do in order to fulfill her duties is to collect scrupulously the “right” facts. It thus turns out that the scientific methodology underlying the Adams’ and Spencer’s thinking on regulation supports their non-interventionist political philosophy. Second, the methodology rests on very strong assumptions about the profile of regulators (and scientists) and about their work: their (alleged) impeccable cognitive and intellectual abilities as well as steadfast adherence to (“the right”) moral values; the belief in attainable objectivity and the possibility of ideology-free inquiry of social (and natural) phenomena.<sup>248</sup>

It follows again that Adams must have had quite a specific vision of the ideal regulator in his mind in prescribing a positivist regulatory methodology. The next Section will pursue this hypothesis further.

#### *E. The Man Regulator*

The last remark takes us to another element in Adams’ model of regulation that should be fleshed out, namely, its ambivalence towards professionalism.

As noted, Adams’ age saw the rising prestige of professionals in general in society. This process was accompanied by greater emphasis on adequate training, rigorous methodology, and objectivity in their practice.<sup>249</sup> As we have also seen, Adams valued objectivity and careful methodology above all. Still, he was apparently reluctant to make professionalism a prerequisite to commissionership. Comte’s work (especially as interpreted by Mill) might provide a clue as to what led Adams to this position. Comte’s description of the evolution of human thought was a happy tale of growing professionalization in Western society. Mill’s critique countered that, taken too far, this trend might result in despotism.<sup>250</sup>

Professionalization of regulation could mean that only railroad executives or engineers would be deemed competent to serve on a railroad commission. Following Mill, this result might have turned a progressive development (the introduction of advisory commissions) into a regressive instrument if professionalism had been allowed to reign supreme. I would argue that Adams proposed to avert this danger by shifting the emphasis from certified professionalism to highly regarded social standing. He insisted on the selection of society’s best, that is, those who had already proven their commitment to “*the*” public interest, whatever their profession might be. He was able to do so, *inter alia*, in reliance

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248. Here, too, the analogy to Novick’s discussion of post-Civil War American historiography is instructive. See NOVICK, *supra* note 209, at 61–85.

249. LARSON, *supra* note 165, at 211–212. See *supra* notes 164–165 and accompanying text.

250. See *supra* Section III.B. Later generation would share this concern. See, e.g., Harold J. Laski, *The Limitations of the Expert*, 162 HARPER’S MONTHLY MAG. 101 (1930), and ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN WORLD 197 (1997) (1925) (“professionalised knowledge . . . produces minds in a groove.”).

on his preferred scientific methodology. As we have just seen, one did not have to go through a certain certified professional training to command the methodology of inquiry prescribed by Adams to his ideal commissioner. Thus, Adams was able to proclaim, "All in such cases depends upon the men."<sup>251</sup>

Professionalization of regulation might bring about another regrettable results from Adams' point of view: the disqualification of people like himself from serving on commissions. To put it bluntly, one might reasonably argue that, in advancing the view that "[a]ll . . . depends upon the men," Adams is essentially telling his audience: "I and my peers are 'the men.'" This was plainly the case with Adams, who, when his proposed legislation was debated in the Massachusetts legislature in 1869, "actively pursued the commission post by asking influential friends to intercede on his behalf."<sup>252</sup> Adams eventually succeeded in acquiring the coveted position. His run for the Commission tells us something about his perception of the experience needed for the job. After all, he was at the time "a man of thirty-four who had tested personal success only in the fleeting context of military glory" during the Civil War.<sup>253</sup> An astute, opinionated, and thoroughly-informed student of the railroad business as he was, he had little to show for it, if only because of his age.<sup>254</sup>

So we are left with Adams as the *persona grata*. Indeed, if there was one thing that Charles Francis Adams could successfully vouch for, it was his social standing and reputation. In the end, to him, a would-be commissioner's prior education and financial achievements, or, just as important, previous knowledge of the regulated industry, were much less consequential.<sup>255</sup> This way of thinking was not at all alien to Adams' contemporaries, as shown by his brother, Henry. "Down to 1850, and even later," relates Henry Adams, "New England society was still directed by the professions[,] [l]awyers, physicians, professors, mer-

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251. Adams, *The Government and the Railroad Corporation*, *supra* note 63, at 427. Adams was not alone, of course, in so asserting at the time. For example, another great railroad regulator, Joseph Eastman, would declare similarly seven decades after Adams: "Good men can produce better results with poor law than poor men can produce with good law." JOSEPH B. EASTMAN, *A Twelve Point Primer on the Subject of Administrative Tribunals*, in *SELECTED PAPERS AND ADDRESSES OF JOSEPH EASTMAN, 1942-1944*, 375, 376 (G. Lloyd Wilson ed., 1948). See also *infra* text accompanying notes 257-258. Eastman was a legendary ICC Commissioner in the first half of the twentieth century. See, e.g., Carl B. Swisher, *Joseph B. Eastman—Public Servant*, 5 PUB. ADMIN. REV. 34 (1945).

252. McCRAW, *supra* note 8, at 18.

253. *Id.* at 17. Adams' self-appreciation must have been great indeed, as he wrote at some point that the proposed commission should be composed "of such men in material life as Story was in law, Mann [(1796-1859) an influential education reformer] in education, and Bache [(1806-1867) a well-known Superintendent of the U.S. Coast Survey] in science." Adams, *Boston I*, *supra* note 8, at 25.

254. Incidentally, in the years following his retirement from a ten-year commissionership, Adams did not prove himself a particularly savvy president of the Union Pacific Railroad, a post he assumed in 1884, nor was he a successful real-estate investor. See Paul C. Nagel, *A West That Failed: The Dream of Charles Francis Adams II*, 18 W. HIST. Q. 397 (1987).

255. See similarly EASTMAN, *supra* note 253, at 376. ("It is not necessary for the members of the tribunals to be technical experts on the subject matter of their administration. As a matter of fact, you could not find a man who is a technical expert on any large part of the matters upon which the [ICC] finds it necessary to pass.").

chants.” However, he goes on to say, when it came to politics, “the system required competent expression; it was the old Ciceronian idea of government by the *best* . . .”<sup>256</sup> Given his illustrious pedigree, Adams could be safely, and had every reason to be, considered one of Boston’s *best*.

#### *F. Adams and Spencer: Conclusion*

Similar to a great many liberals nowadays, Adams saw himself as caught between the Scylla of unbridled economic giantism, which might bring about a situation where the “individual will . . . be engrafted on the corporation,”<sup>257</sup> and the Charybdis of centralized government violating the dicta that government should be parsimoniously structured. As this Part has demonstrated, putting the dilemma in these terms carries with it certain ideological baggage. Before moving to the next Part, which is dedicated to connecting Adams to the present, I wish to bring to the fore two components in the Spencer-Adams ideological baggage.

The first point is salient. The Spencerian system is premised on the notions that life is a struggle for survival and that, therefore, it *should be* ordered as a struggle for the survival of the fittest.<sup>258</sup> *Ergo*, it seems to follow that it is advisable to put minimal government in place. Adams certainly endorsed this conclusion.<sup>259</sup> However, there is nothing “natural,” of course, in this conclusion, even if one subscribes to a progressive evolutionary theory. The abysmal gap between Comte’s and Spencer’s political outlooks—and the range of possibilities lying between them—should serve as conclusive evidence to the following simple fact: there was never a simple, “logical,” non-ideological way to translate evolutionary thinking into social policies.

The second point is more subtle, but just as important. As devised by Adams, his “non-interventionist” regulatory mechanism enhanced the submission and re-submission of (the same) one group in society to the (same) other group of society—the latter being the group of society’s “best.”<sup>260</sup> As a result, Adams’ model enshrined a regime inimical to social mobility. Thus, we find Adams, in what could easily characterized as a “progressive” article,<sup>261</sup> calling upon the railroad corporations to create “[r]ailroad educational institutions”: “The children of employees *would naturally* go into these schools, and the best of them

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256. HENRY ADAMS, *supra* note 209, at 32 (emphasis in original). Robert Cushman writes apropos of the history of the ICC, “Impartiality, or at least neutrality, was looked upon as more important than expertness.” It was “honesty and fairness” which were believed to be “so essential to adequate railroad regulation.” CUSHMAN, *supra* note 13, at 63.

257. *Supra* note 47.

258. See, e.g., SPENCER, PRINCIPLES OF SOCIOLOGY, *supra* note 57, at § 567 (“the final survival and spread must be on the part of those societies which produce the largest number of the best individuals—individuals best adapted for life in industrial state.”).

259. See, e.g., *supra* text accompanying note 228.

260. *Supra* note 258.

261. See Adams, *Prevention of Railroad Strikes*, *supra* note 54.

would . . . be sent out upon the road to take their places in the shops, on the track, or at the brake.”<sup>262</sup>

Adams held on to such conservative views in an era pregnant with potential for social change thanks, *inter alia*, to the advent of modern evolutionism. Since, if we follow Adams’ and Spencer’s logic, the fittest are the ones destined to emerge triumphant from the competition for survival at the expense of society’s lesser individuals whose lower “credentials” predestined them to oblivion. This is a recipe for social stagnation. This conclusion was realized by none other than Spencer himself, who said at one point, “For however great the degree of evolution reached by an industrial society, it cannot abolish the distinction between the superior and inferior—the regulators and the regulated . . . [nor] the difference between those whose characters and abilities raise them to the higher positions, and those who remain in the lower.”<sup>263</sup>

#### V. THE “REINVENTION” OF REGULATION: WHY ADAMS? WHY NOW?

It is time to go back to Adams’ future, namely, to the reinvention revolution: As noted, that revolution was the result of a growing sense among friends and foes of regulation that traditional models of regulation were not working well enough. Consequently, it was widely held that the legitimacy of these regulatory models was eroding.<sup>264</sup>

As a result of this critical discourse, the last generation of regulation has witnessed an obsessive discussion of novel models of regulation that aspire to break loose of the (perceived) constraints of traditional models of regulation.<sup>265</sup> This critical debate, in turn, has had a real effect on the regulatory landscape. This was made apparent by the innumerable novel regulatory strategies put forward in the past twenty years or so<sup>266</sup>—several of which will be discussed presently. When considering these methods, it should be noted again that the

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262. *Id.* at 429 (emphasis added).

263. SPENCER, PRINCIPLES OF SOCIOLOGY, *supra* note 57, at 740. See similarly SPENCER, *The Coming Slavery*, *supra* note 76, at 42 (“There is no political alchemy by which you can get golden conduct out of leaden instincts.”).

264. See generally the exchange between Latin, *supra* note 2, and Bruce A. Ackerman and Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985). See also, for example, Daniel J. Gifford, *The New Deal Regulatory Model: A History of Criticisms and Refinements*, 68 MINN. L. REV. 299 (1983); Cass Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Administrative Law*, 54 LAW & CONTEMP. PROB. 311 (1991); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); William Ruckelshaus, *Stopping the Pendulum*, in *LAW AND THE ENVIRONMENT: A MULTIDISCIPLINARY READER* 397 (Robert V. Percival and Dorothy C. Alevizanos eds., 1997); Stewart, *Administrative Law in the Twenty-First Century*, *supra* note 2, at 446-448; David Levi-Faur, *Regulation & Regulatory Governance*, 1 JERUSALEM PAPERS IN REGULATION AND GOVERNANCE 1, 22–23 (2010).

265. See the sources mentioned *supra* notes 1–5. See also Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21 (2001) [hereinafter Stewart, *New Generation*].

266. See *supra* note 267.

many resulting novel strategies are said to usher in a “new paradigm” of regulation.<sup>267</sup>

It is difficult to generalize about this abundance. Tentatively trying its hand at it, a recent survey<sup>268</sup> divided many of the novel strategies into two main groups: (1) strategies that seek to further pluralist and participatory interests in regulatory settings by advocating government-stakeholder networks;<sup>269</sup> and (2) those that focus on laying out “economic incentives systems.”<sup>270</sup>

Yet, as indicated at the outset of this Article, I believe that a closer examination of these new models reveals that several key elements of the Adams legacy are clearly echoed in the “reinvention revolution.” Indeed, I believe that some of the regulatory practices that belong in that “revolution” were already put forward by Adams in the late-nineteenth century. This Part highlights the striking similarities between these purportedly novel strategies of regulation, especially network models, and the Adams model of the late nineteenth century. In other words, it argues that the “old” (Adams) model and the new (network) models of regulation share key theoretical and operational principals, to be outlined in the ensuing discussion.

#### *A. The Regulator as a Facilitator*

I begin with the role of the regulator in the regulatory state. To recall, for Adams, the regulator has two main responsibilities: first, the collection and processing of information; and second, providing the public with a suitable arena where communal energies can be focused on the attainment of public goods.<sup>271</sup> A similar attitude permeates theories of the reinvention campaign of the last generation, where the regulator is no longer perceived as a professional, expert public official, who is separated from the public and whose main task is to command-and-control, but rather as a *facilitator* of public action.<sup>272</sup> This shift is informed by a pluralistic-democratic ethos that envisions the various segments composing a political community—the state, market, and the civil

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267. See Lobel, *supra* note 7, at 345.

268. Stewart, *Administrative Law in the Twenty-First Century*, *supra* note 2.

269. See *infra* Section V.C. Many of the network strategies are also referred to in the literature as examples of the “new governance” paradigm. See generally, for example, Freeman, *supra* note 1; Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism* 98 COLUM. L. REV. 267 (1998); Lobel, *supra* note 7; Louise G. Trubek, *New Governance Practices in US Health Care, in LAW AND NEW GOVERNANCE IN THE EU AND THE US* 261–68 (G. de Búrca & J. Scott eds., 2006) [hereinafter *LAW AND NEW GOVERNANCE*]; and Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819 (2008).

270. See generally Stewart, *New Generation*, *supra* note 267, at 94–127. Examples of the latter systems include emissions and effluent credit trading programs and risk bubbles. *See id.*

271. *See supra* Section II.D.

272. *See, e.g.*, Lobel, *supra* note 7, at 375, and Sagiv, *Triptych of Regulators*, *supra* note 133, at 446 n.232.

society—as forming one integrated entity.<sup>273</sup> Accordingly, regulatory processes are no longer designed primarily for the hierarchical, unilateral ordering of society (by regulators), but rather for multilateral resolution of social problems.<sup>274</sup>

The idea that a regulator's responsibility includes the promotion of responsible, local, on-the-ground, grassroots regulatory initiatives is commonly known as “orchestration.”<sup>275</sup> Under this vision, the regulator should create a legal environment which is conducive to the (organic) budding of a variety of local practices, so that she will eventually be able to pick, choose, and support those practices that prove to be more successful.<sup>276</sup>

### B. Regulation-Through-Information and Self-Regulation

One of the main tools a regulator-as-orchestrator uses in Adams' weak model is the collection of information. As so often noted, Adams thought that an essential preliminary to any regulatory action was the systematic collection of information.<sup>277</sup> But even more than that, we have seen that the orderly collection of information was, to Adams, the essence of the regulatory activity. This emphasis in his thinking was best captured in Adams' advocacy of the establishment of “bureaus of railroad statistics”<sup>278</sup> that would collect, analyze, and publicize information about the railroad industry. Herein lay the key to successful regulation; indeed, the key to regulation.

Turning to the present, one can observe that a similar consumer-protectionist agenda, coupled with a pluralist, civil-republican<sup>279</sup> sentiment, have likewise triggered a spate of “information-forcing” policies.<sup>280</sup> The idea here is that the

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273. See, e.g., Bridget M. Hutter, *The Role of Non-State Actors in Regulation*, 37 CARR DISCUSSION PAPER SERIES 1 (2006); Scott Burris et al., *Changes in Governance: Cross-disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1, 12–14 (2008).

274. See, e.g., Lobel, *supra* note 7, at 371–379.

275. *Supra* note 133.

276. See Dorf & Sabel, *supra* note 271, e.g., at 323–336, and David M. Trubek & Louis G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539 (2006).

277. See *supra* Section II.D.

278. See Adams, *The Railroad System*, *supra* note 48, at 497.

279. See Seidenfeld, *supra* note 5, and Freeman, *supra* note 1, at 19–21.

280. See Bradley C. Karkkainen, *Information-Forcing Regulation and Environmental Governance, in LAW AND NEW GOVERNANCE*, *supra* note 271, at 293–321. See also, e.g., Clifford Rechtschaffen, *How to Reduce Lead Exposure with One Simple Statute: The Experience of Proposition 65*, 29 ENVTL. L. REP. 10581 (1999); Cass Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613 (1999); and David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS MGMT 155 (2006).

Related to this development is the imposition of disclosure duties on governmental bodies—certainly in the age of the Internet, and even more so during the years of the Obama Administration. For a recent comprehensive survey, see Jennifer Shkabatur, *Transparency with(out) Accountability: The Effects of the Internet on the Administrative State*, 31 YALE L. & POL. REV. \_ (forthcoming). See also, e.g., The Freedom of Information Act of 1966 (Pub. L. No. 93-502, 1–3, 88 Stat. 1561, 1563–1564 (1974), codified as amended at 5 USC § 552 (2006)); Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668 (1993); Stephen M. Johnson, *The Internet Changes Everything:*

surfacing of information is an essential vehicle to facilitate educated public discussions on the burning issues of the day—discussions that should result in multi-party social agreements on the management of these issues.<sup>281</sup> Accordingly, the end of the twentieth century saw the advent of new kinds of legal regimes whose tool of regulation was indeed only information,<sup>282</sup> just as Adams had envisioned. At the core of “the information revolution” is the imposition of duties to collect and publicize information on both private and public bodies.<sup>283</sup>

Further, apart from the more traditional strategies, whose primary goal is to (directly) facilitate informed consumer choice, there are other regulatory information-generating strategies, whose aim is to trigger reflexive processes within the regulated industry. A whole group of regulatory strategies, which go by the telling name of *reflexive regulation*, are included in this category.<sup>284</sup> Reflexive law largely refrains from directly ordering regulatees’ conduct, often contenting itself with offering information-disclosure mechanisms. Its aim is the promotion of business internalization of desirable social goals to be translated into responsible business behavior.<sup>285</sup> Crucially important for our purpose, its means is information, and its aim is *self-policing* and *self-regulation*.<sup>286</sup>

Self-regulation relates to Adams’ theory of weak regulation in more than one respect. For it is not only its reliance on information but also the fact that it is based on private, rather than public, enforcement mechanisms that makes it a modern incarnation of the Adams model. Adams made it a cardinal rule of faith in his teachings that regulatory bodies would refrain from the use of coercive power.<sup>287</sup> Likewise, a common thread running through contemporary literature on regulation is a reluctance to use the state’s coercive power to bring about social welfare. This is made readily apparent when we compare the brave new world described in the last few paragraphs to the world of the command-and-

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*Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277 (1998); William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171 (2009); and Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617 (2010).

281. See Freeman, *supra* note 1, at 30–31.

282. See the sources mentioned *supra* note 282.

283. For recent critical assessments of “the information revolution,” see, e.g., Sagiv, *Triptych of Regulators*, *supra* note 133, at 445–447, 465–466, and Shkabatur, *supra* note 282.

284. See Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC’Y REV. 239 (1983), and Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227 (1995). But see also Sanford E. Gaines, *Reflexive Law as a Legal Paradigm for Sustainable Development*, 10 BUFF. ENVTL. L.J. 1 (2002–2003).

285. See Stewart, *New Generation*, *supra* note 267, at 127–134. See also Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC’Y REV. 691 (2003).

286. There is a large body of literature on the theory and practice of self-regulation. See generally, e.g., IAN AYERS & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 3–53 (1992); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 644–653 (2000).

287. See *supra* text accompanying notes 128–132.

control.<sup>288</sup> Reflexive law provides an excellent illustration. It clearly limits the role of government in the overall process of social regulation, as do—maybe to a lesser extent—other contemporary examples, such as performance-based regulation and management-based regulation.<sup>289</sup> Adams, I believe, would have approved of many of these options. As we have seen, he believed that the state's non-coercive position would enable commissioners to enjoy the confidence of both the industry and the public. He thought, in other words, that this position was vital for the legitimacy, and thus the success, of the regulatory endeavor.<sup>290</sup>

In hindsight, Adams could be commended for realizing early on that market regulation would normally face the fierce opposition of the industry. The power held by railroad barons must have instilled this understanding in his mind, as he took his first steps in the regulatory arena. Mid-twentieth century commentators would famously build impressive theories of capture and commissions' life cycles whose point-of-departure would be the simple understanding that regulation was normally done in a hostile environment.<sup>291</sup> Later commentators would complement capture critiques with the abovementioned pluralist critiques of regulation. What is worth emphasizing in this latter critique in the present context is its argument that top-down regulation erodes public legitimacy.<sup>292</sup> Others would put the emphasis on top-down regulation's inefficiencies—a leading argument here was that hierarchical regulation was insensitive to the peculiarities of local circumstances and therefore rigid and expensive.<sup>293</sup> Taken together, these various strands of critique nicely correspond to Adams' fervent belief in the illegitimacy of coercive, centralized, top-down regulation.

Finally, as noted, self-regulation in particular but also other forms of regulation-through-information ascribe a minimal role to the state in market regulation. These schemes of regulation ask the state merely to see to it that information is generated with the expectation that once information is exposed either internal,

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288. See generally Levi-Faur, *supra* note 266, at 21–22.

289. See Coglianese & Lazer, *supra* note 287.

290. On the legitimacy challenge of administrative regulation in U.S. history, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Lazarus, *supra* note 266; and Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

291. See, e.g., Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952); BERNSTEIN, *supra* note 74; see also, e.g., Thomas K. McCraw, *Regulation in America: A Review Article*, 49 BUS. HIST. REV. 159 (1975); Barry M. Mitnick, *Capturing "Capture": Definition and Mechanisms*, in *HANDBOOK ON THE POLITICS OF REGULATION* 34 (David Levi-Faur ed., 2011); Daniel Carpenter & David Moss, *Introduction*, in *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* (Daniel Carpenter & David Moss eds., forthcoming 2013).

292. See, e.g., Freeman, *supra* note 1, at 3 ("Regulation is currently under attack from all quarters as inefficient, ineffective, and undemocratic."), and Stewart, *Administrative Law in the Twenty-First Century*, *supra* note 2, at 447 ("In addition to undermining the efficacy of regulation, the proliferation of rigid and unresponsive controls undermines the legitimacy of regulation in the eyes of the regulated community and impairs regulatory accountability.").

293. See *supra* note 294.

reflexive processes would be set in motion or external pressures would be unleashed; either way, exposure of previously undisclosed data is believed to create the conditions for setting a possibly beneficial chain reaction in motion. Either way, the state's sole job is to incentivize information exposure. Adams would be delighted.

### C. Regulation-Through-Networking

Next, government-stakeholder network strategies share important operational elements with the Adams model. The various pluralist/participatory models of regulation included in this category<sup>294</sup> also grew out of the abovementioned critique of traditional, top-down, command-and-control regulation. It argues that government should foster the creation of government-stakeholder networks that would challenge hierarchical, one-directional regulation. Contrarily, these networks would encompass a wide variety of government and non-government (e.g., business and civil-society) stakeholders in an effort to harness all relevant parties to the solution of specific public ailments, with the hope that the various parties would combine their respective knowledge and experience. Ideally, such networks would cooperatively set the solution and overview its implementation. The resulting regulatory process is purported to be much more flexible than command-and-control regulation.<sup>295</sup> Just as important, all government and non-government parties are regarded as *stakeholders* and all are expected to—and, according to sympathetic commentators, do<sup>296</sup>—take an active role in the regulatory process. The public is thus transformed from a passive object of regulation to a norm-generating subject.<sup>297</sup> Lastly, the products of a network-styled regulatory process could and should not be tailored in a one-size-fit-all manner. Rather, the end-results of the process may take the shape of flexible procedures or general outlines of desirable solutions.<sup>298</sup> In any event, they are a far cry from formal sanction imposed unilaterally from the top down.

Important similarities exist between the Adams model and the network approach.<sup>299</sup> For one thing, both emphasize the need to base regulation on productive cooperation between government, business, and other constituencies. For another, both construct regulatory endeavors as fora in which government does not rely on its coercive powers, but rather on its power to persuade. In conclusion, both the Adams and the network approaches share a similar vision with regard to both spatial (regulation is done horizontally rather than verti-

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294. To repeat, the sizeable literature on “new governance” is included in the present category. See *supra* note 271.

295. See, e.g., Freeman, *supra* note 1.

296. See *id.*

297. See Lobel, *supra* note 7, at 373 (“Renew Deal governance is a regime based on engaging multiple actors and shifting citizens from passive to active roles.”).

298. See, e.g., Trubek & Trubek, *supra* note 278.

299. Mainly, I think, because this approach may require government to play a substantial role in the actual carrying out of the regulatory scheme as devised by the network.

cally) and remedial dimensions of regulation (argumentation instead of coercion).

#### D. A Weak State

Finally, the role of the state: True, the different network strategies do not necessarily share an identical vision of the state, nor do they openly carry the banner of small government (as Adams did). Still, as pointed out by various commentators,<sup>300</sup> they inescapably advocate a vision of regulation in which government is *de facto* downsized. It seems that many network strategy principles “dilute,” as it were, the role of government in the regulatory process. Reference may be made, in support of this argument, to the following network model traits: cultivation of business-public-government partnerships; preference given to local, tailor-made solutions over standardization; promotion of “soft law.”<sup>301</sup> All these and others, so the argument goes, advocate a new division of labor between the government and the public, where the private side of the equation is expected to aggrandize its role in the regulatory process at the expense of the state. Bringing Adams back to the discussion, one is tempted to say that whether they willed or meant it or not, the promoters of network-style models of regulation conjure up a regulatory universe in which government is expected to do what Adams expected the government of his time to do, which is very little.

On an even more abstract level, we can argue that the primary goals of regulation are shared by Adams, the network approach, and economic incentive systems. These shared goals are (a) the promotion of an environment that is beneficial to the emergence of dispersed, local, private initiatives to tackle pressing social problems; and (b) the orchestration among such initiatives.<sup>302</sup> Note, again, that under these visions, state regulation co-exists with robust private regulation—and the former is not necessarily superior to the latter in terms of expediency.<sup>303</sup> Under these visions, state regulation is normally superior to private ordering (only) in its ability to coordinate among different sectors of the market.<sup>304</sup>

### VI. CONCLUSION: THE LEGACY OF SOCIAL DARWINISM

This Article suggests the ways in which Adams’ views on state regulation correlated to the essentials of the leading evolutionary theories of his age. It

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300. See, e.g., Steinzor, *supra* note 3; H. Brinton Milward & Keith G. Provan, *Governing the Hollow State*, 10 J. PUB. ADMIN. RES. & THEORY 359 (2000); and Larry D. Terry, *The Thinning of Administrative Institutions in the Hollow State*, 37 ADMIN. & SOC’Y 426 (2005).

301. See, e.g., Orly Lobel, *Setting the Agenda for the New Governance Research*, 89 MINN. L. REV. 498, 506–508 (2004), and David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination*, 11 EUR. L.J. 343 (2005).

302. See Lobel, *supra* note 7, e.g., at 400.

303. See Hovenkamp, *supra* note 37.

304. See Lobel, *supra* note 7, e.g., at 403.

argues that this intellectual affinity is significant in its contribution to the understanding of the ideological foundations of, and the institutional notions underlying, public regulation in the United States in Adams' time and in ours.

Adams' model is relevant to regulation in the twenty-first century because it is premised on principles that ring familiar to contemporary discussions on the future of the administrative state. As noted, Adams' thinking is caught in the all-too-familiar tension between two convictions: first, only mega corporations, which threaten human liberty, can supply the demands of extant economy; and second, "the more the functions of government can be reduced, the better."<sup>305</sup> Going back to Adams enables us to clearly see the ideology and values that *simultaneously* support the two convictions. They are encapsulated in the powerful Spencerian-Social-Darwinist framework, which undergirds Adams' nineteenth-century model of regulation. In illustrating the connections between Adams' and present-day models of regulation, this Article demonstrates how pertinent Spencerism is to contemporary theory and practice of regulation.

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305. Adams, *The Railroad System*, *supra* note 48, at 508.

