The Transformation of American Law

1870-1960

THE CRISIS OF LEGAL ORTHODOXY

MORTON J. HORWITZ

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PREFACE

In terms of its chronology, this book can be regarded as taking up the story of the history of American law as I left it in *The Transformation of American Law, 1780–1860* (1977). But it is a very different book.

The reader will notice that I have begun this book in 1870, not 1860. Though I make many references to the influence of the Civil War, I believe that only a separate book can do justice to the profound significance of the Civil War in American legal history. I hope to write that book someday.

As compared to *Transformation I* this book gives cultural factors somewhat more explanatory weight, although I continue to insist that the development of law cannot be understood independently of social context. Questions of power are obviously an important part of that context. The source of the change in emphasis derives from the massive challenge to traditional ideas of historical explanation that have invaded both the worlds of theory and historical practice since *Transformation* was written.

This is not the place to say a great deal about these changes. Briefly, they involve the disintegration of the nineteenth-century conception of explanation in the natural as well as the social and historical sciences. Nineteenth-century social theory sought to find general laws of society modeled on the natural sciences, just as historical thinkers as varied as Hegel and Marx, or Whig historians like McCauley, or conservatives like Sir Henry Maine, sought to find the general laws of history, change, and social progress.

In social thought, belief in the explanatory possibility of very general "covering laws" capable of making "if-then" predictive statements has plummeted (except as economics deploys ever more elaborate tautologies to conceal this fact). The result has been a dramatic turn toward highly specific "thick description" in which narratives and stories purport to substitute for traditional general theories. Today there

are scholars in all fields of social thought who view orthodox claims to objectivity as contests over the appropriate generality of discourse. I have acknowledged this problem by offering perspectives at different levels of generality.

At the same time, several of the most important assumptions underlying nineteenth-century social thinkers' and historians' confidence in the objectivity of their explanations have been severely challenged.* Not only has the separation between fact and value as the basis for value-free social science or history been drawn into question, but self-consciousness of the contingency of categories, theories, and frames of reference has been accelerating as the message of the sociology of knowledge has been absorbed into interpretative and deconstructive intellectual movements. Also, intense skepticism about the nineteenth-century working assumption that causation was objective—notwithstanding Hume, Kant, and Mill—has, in the twentieth century, begun dramatically to undermine the claimed objectivity of explanation. A complex, multi-factored interdependent world has lost confidence in single-factor "chains of causation" that were embedded in most nineteenth-century explanatory theories. But how does one *explain* anything objectively in a world of complex multiple causation?

The practicing historian needs to be conscious of these theoretical debates without either solving the problems or being paralyzed by them. Yet these debates have influenced me in taking many more factors into account than before. There remains the serious question of whether the new cult of complexity does not simply avoid through fiat the admirable generalizing and simplifying goals of nineteenth-century modes of explanation.

One of the prominent casualties of multi-factored explanation is the disintegration of those philosophical dualisms that have stereotyped all forms of theoretical debate over the last two (or is it four?) centuries. Just as recent neo-pragmatism has rejected the "on-off" choice between deontological and utilitarian moral theory, so too has it followed John Dewey in refusing to accept a deep chasm between "principled" and "result-oriented" ethics or jurisprudence. Whether it is the "fact-value" or "mind-body" or "theory-practice" or "subjective-objective" or "idealism-materialism" or "freedom-coercion" dualities, almost all these efforts at mutually exclusive categorical formulations have come to seem less and less satisfying.

My acceptance of multi-factored complexity has produced a certain tendency in this book toward multiple (and perhaps sometimes contradictory) explanations. As one sees both theories and causes as more contingent, one's belief in one's own objectivity is also drawn into question. Is it just my story, with all the connotations of skepticism and subjectivity that the word "story" implies? No; I still aspire to give the best possible explanation, but without the wish to suppress all difficulties by intoning pieties about what a terrible place the world would be without an objective account.

* See the brilliant book by Peter Novick, *That Noble Dream: The "Objectivity Question" and The American Historical Profession* (Cambridge University Press, 1988).

As a result, the book constantly wavers between, on the one hand, conventional efforts at historical explanation that continue to derive from nineteenth-century models of objectivity, and, on the other hand, the recognition that modernism has challenged the objectivity of these forms in many different ways.

A portion of chapter 2 has previously appeared in *The Politics of Law* (Pantheon, 1982) as "The Doctrine of Objective Causation." Chapter 3 has been somewhat revised from a version that appeared in the *The West Virginia Law Review* and was reprinted in Warren J. Samuels and Arthur S. Miller, eds. *Corporations and Society* (Greenwood Press, 1987). Chapter 4 was originally presented as the Julius Rosenthal Lectures at Northwestern University Law School.

During the time I have been working on this book, I have been the beneficiary of an extraordinarily dedicated and talented group of research assistants, all of them Harvard Law School students. I wish to thank Greg Bibler, Thomas Brown, Stephanie Farrior, Anthony Herman, Carl Landauer, Mark Linder, Judson Lobdell, and, especially, Marta Wagner. Stephen Wagner was very helpful in preparing the manuscript for publication. Kenneth Halpern prepared an outstanding index. At Oxford University Press, Valerie Aubrey was the very ideal of a supportive but critical editor.

I also wish to express my gratitude to my colleagues Todd Rakoff, who commented on chapter 8, and Duncan Kennedy, with whom I have been discussing the ideas in this book over the course of a decade. Robert Gordon, Stanley N. Katz and G. Edward White offered valuable comments on the manuscript. In addition to providing significant suggestions for improving chapters 6 and 9, Pnina Lahav has been a source of love and inspiration throughout.

I have received extensive research support during the period of writing this book. The National Endowment for the Humanities and the Guggenheim and Rockefeller Foundations were generous sources of research grants. The legal history program at the University of Wisconsin during the summer of 1982 not only provided stimulating discussion of the legal history of organizations but also supported my research into the history of corporate theory. The generous research support program of Harvard Law School was indispensable.

Cambridge, Massachusetts M. J. H.
February 1992

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Introduction

The recent political crises over the appointments of judges Robert Bork and Clarence Thomas to the U. S. Supreme Court have once again raised to consciousness the question of whether and in what sense law is political. The appointments triggered political crises because they were widely understood to represent the culmination of a constitutional revolution initiated by the Reagan Administration.

Like scientific revolutions, constitutional revolutions have been rare events in American history. The New Deal constitutional revolution of 1937 represented a fundamental shift in the constitutional relationship of the states to the federal government as well as of government to the economy. The constitutional legitimation of an interventionist and redistributionist federal government did not only reflect the political triumph of the New Deal. It also constituted the successful culmination of a generation of intellectual struggle against the legal foundations of the old order. The New Deal constitutional revolution thus represented a genuine paradigm shift, a fundamental overthrow of a system of legal consciousness that reached the apex of its development a century and a half after the ratification of the Constitution. Whether the Warren and Rehnquist courts will also come to be regarded as having produced constitutional revolutions will become clearer as time passes.

A constitutional revolution can take place only when the intellectual ground has first been prepared. The New Deal revolution can only be understood in light of the success of the previous generation of legal thinkers in undermining the existing system of legal orthodoxy.

This book traces the struggle between late nineteenth-century legal orthodoxy, often called "Classical Legal Thought,"[1] and "Progressive Legal Thought," which began to crystallize in reaction to the decision of the U.S. Supreme Court in *Lochner v. New York* (1905). That struggle, which drew into question the funda-

mentals of the legal order, expressed a deep crisis the stress lines of which could be traced directly to the ideological foundations of American society. The most basic conflict was over whether law could be characterized as neutral and non-political.

The Progressive attack on Classical Legal Thought developed, above all, into a challenge to the world view that endowed nineteenth century orthodoxy with legitimacy. In law, it came to represent no less than a fundamental reexamination of the core of ideas that constituted the "rule of law"—the conviction that there existed a structure of impartial and self-executing norms suggested by the phrase "a government of laws, not of men."

Classical Legal Thought was rooted in what I call an "old conservative" world view, one that presumed that the existence of decentralized political and economic institutions was the primary reason why America had managed to preserve its freedom. A self-regulating, competitive market economy presided over by a neutral, impartial, and decentralized "night-watchman" state embodied the old conservative vision of why America had uniquely been able to avoid falling victim to tyranny.

The Progressive critique of Classical Legal Thought emerged out of a crisis of legitimacy generated by the fantastic social and economic changes during the generation before World War I. The rapid centralization of economic power resulting from the cartelization and concentration of the American economy during the last years of the nineteenth century shook the authority of those who had proclaimed the naturalness and necessity of decentralized institutions. Moreover, the dislocating forces of urbanization, massive immigration, and industrialization triggered unprecedented levels of social struggle. This, in turn, placed enormous stress on the traditional legitimating ideal of equality of opportunity as practiced within a market system that was thought to distribute rewards more or less fairly according to the value of one's economic contribution. In particular, an increase in social and economic inequality drew into question the dominant old conservative commitment to the ideal of a neutral, non-redistributive state. The assault on Classical Legal Thought cannot be understood independently of struggles over the meaning of social justice and challenges to the moral foundations of individualism that had emerged by the turn of the century.

As in any authentic legitimacy crisis, Classical Legal Thought was forced to confront both external and internal attacks on its very foundations. Externally, it suffered from its close connection to a world of decentralized institutions that was rapidly fading away. In particular, much of the system of private law rules—contract, tort, property, and commercial law—had been infused with the individualistic premises of a self-executing market economy composed of small, competitive units. As these common law rules were themselves transformed to accommodate an increasingly interdependent and organizational society, they frequently contradicted established legal principles that had been derived from an earlier vision of American society. Often, however, these increasingly anachronistic principles stood unyielding against the winds of change, adding fuel to the ever more

prominent accusation that American law had grown fundamentally out of touch with society.

If private law was forced to come to terms with the emergence of organizational society and the decline of decentralized markets, American public law, both constitutional and regulatory, was made to confront the meaning of its longstanding commitment to the ideal of neutrality. Amidst increasing pressure to bring law into closer touch with society, what could remain of the post-revolutionary ideal of a government of laws whose judges saw their role as impartially discovering and declaring pre-existing law? What was to be the fate of the still-broader nineteenth-century liberal ideal of a neutral, non-redistributive state standing astride an American society becoming ever more unequal in wealth and power?

In this book, I seek to provide a picture of the structure of Classical Legal Thought and of the crisis of legitimacy it encountered. That crisis was manifested both inside the structure of thought, where increasingly numerous and serious stress points emerged from attempts to accommodate changing reality, and outside of that structure, as represented by the pervasive challenge of Progressive Legal Thought itself. That challenge took the form of narrowly focused and technically powerful internal assaults on one or another postulate of Classicism, as well as of large and expansive jurisprudential critiques of the political and philosophical legitimacy of the old order.

The culmination of the Progressive challenge to legal orthodoxy was the emergence of "Legal Realism" during the 1920s and 1930s. In this book, I make the case for regarding realism as essentially a continuation of the reform agenda of pre–World War I Progressivism. In particular, I wish to dispute the view put forth by its most important spokesman, Karl Llewellyn, that Realism was simply a methodology or "technology" unrelated either to substantive intellectual disputes or to social or political struggle. I seek to show instead that Llewellyn's positivism—his wish to sharply separate law and morals, as well as facts and values—was hardly typical of Realism. Moreover, the intellectually fertile alliance between reformist social science and Realism should not be confused with the austere positivism that Llewellyn advocated.

Yet it is true that one branch of Realism did succumb to the most barren forms of value-free social science, and that Llewellyn's commanding position in the movement has persuaded historians to see this as both the essence and the fatal flaw of Realism. While I too see important connections between this positivistic strand of Realism and the increasingly conservative and apologetic turn of some Realist thinkers after World War II, the important point is that many Realists remained consistently hostile to any sharp separation between law and morals or facts and values. Moreover, while the supposed "value relativism" of Legal Realism has been emphasized, its "cognitive relativism" expresses what is most lasting and significant about its contribution to legal thought.

Beginning with their challenge to the constitutionalization of "freedom of contract" in *Lochner v. New York* (1905), which struck down a maximum-hours law for bakers, Progressive legal thinkers sought to undermine the claim of Classical

Legal Thought that law was a "science" that could be separate from politics and that legal reasoning could be sharply distinguished from moral or political reasoning.

This attack on the autonomy of law was combined with an increasing insistence that law had lost touch with society. Explaining why the "law in books" was out of touch with the "law in action" produced a powerful and intellectually self-conscious body of writing about law that continues, even after a half century, to radiate critical power. In their challenge to the self-executing and nondiscretionary character of legal reasoning, Progressives and Legal Realists were among the earliest American thinkers to see the implications of cognitive relativism and cultural modernism for legal justification and explanation. As they mounted their assault on Classical Legal Thought, it began to dawn on them that they faced a broad interlocking structure of thought, a complex system of categorization and classification that could be thought of as a form of legal architecture. The point of the Realist critique was to emphasize that the architecture of Classical Legal Thought was neither neutral, natural, nor necessary, but was instead a historically contingent and socially created system of thought. The Realists were thereby led to connect with many of the intellectual movements of the 1920s and 1930s that today we would identify as creating an interpretativist or hermeneutic understanding of the relationship between thought and reality. The discovery of "frames of reference" in the sociology of knowledge or in the newly emerging field of anthropology marched hand in hand with an insistence that all schemes of categorization and classification embody debatable political and moral premises.

The Progressive critique of legal orthodoxy as oblivious to questions of social change and social justice developed side by side with its modernist recognition of the plastic and malleable character of law and legal categories. It sought to combine a pre-modern sense of moral outrage with both the social reformers' instrumental commitment to the social sciences and the modernists' critique of positivist social science. It thus nurtured both objectivists and those who believed that the objectivity of the social sciences, like the supposed objectivity of legal doctrine within Classical Legal Thought, was a delusion. In the process, Progressive legal thought attained a level of critical brilliance and self-consciousness that makes it speak to us across almost an entire century.

The first seven chapters of this book present a detailed story of the battle of Progressive and Realist thinkers against the orthodoxy of the old order. They include a focused study of the history of corporate theory in chapter 3 as well as a close examination of the significance of the legal thought of Justice Oliver Wendell Holmes, Jr., in chapter 4. Every discussion of specialized areas of the law, such as torts and contracts or taxation and regulation, has been designed to illustrate my conviction that there has always been a close connection in legal history between practical and theoretical discourse, between social struggle and jurisprudential controversy. I hope that the readers will bear this in mind as they find themselves in the midst of one or another difficult or unfamiliar legal discussion.

Chapter 8 demonstrates the close connection between the Legal Realist cri-

tique and the emergence during the New Deal of administrative law in the regulatory welfare state. Neither the intimate relationship between Realists and New Dealers nor the influence of the New Deal in blunting the critical edge of Realism has been fully appreciated. Finally, chapter 9 assesses the fate of Realism after World War II. I offer an overview—not a complete account—of the state of postwar legal culture, focusing on the effects of totalitarianism, McCarthyism, and the astonishingly hostile academic reactions to the monumental decision of the U.S. Supreme Court in *Brown v. Board of Education*.

What became of Legal Realism after World War II? Here I differ from previous accounts that treat Realism not only as having expired in the postwar period but, in fact, as having self-destructed due to its alliance with value-free social science. I suggest that Realism—at least its critical dimension—continued to be an intellectual force in the postwar period. Where it did retreat, it did so primarily because its heirs had lost all connection to the Progressive politics that originally gave it meaning and inspiration.

One of my most fundamental goals in this book is to challenge what continues to be the dominant form of legal historiography of the Gilded Age. Although in every other field of American history, Progressive historiography, premised on a conflict between the "people" and the "interests," has been overthrown as simplistic, in the constitutional history of the *Lochner* era it has continued to be the standard mode of explanation. This, I have suggested elsewhere, has as much to do with the legitimating needs of the New Deal as with the realities of Classical Legal Thought. The New Deal's constitutional revolution of 1937 was justified not as a powerful break with the old order but as a conservative restoration of neutral constitutional principles that had supposedly been thrown overboard by the *Lochner* Court. The result has been to buttress historical intepretations that, for example, continue to treat the late-nineteenth-century judiciary as having capitulated to big business. In fact, it is quite clear, as I hope to show, that the *Lochner* Court was strongly representative of the old conservative view that big business was unnatural and illegitimate. Indeed, by seeking to stigmatize the *Lochner* era, Progressive historians lost sight of the basic continuity in American constitutional history before the New Deal. The constitutional revolution of 1937 was itself the culmination of a generational revolt against a structure of legal thought that had crystallized over more than a century since the American Revolution.

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ONE

The Structure of Classical Legal Thought, 1870–1905

The separation between law and politics has always been a central aspiration of American legal thinkers. Operating uncomfortably within a democratic political culture that has been obsessed with the threat of "tyranny of the majority," American jurists since the Revolution have striven to embody "a government of laws and not of men" in a conception of an autonomous system of law untainted by politics.

The conflict between law and politics has taken many different forms in American history. Its most prominent expression during the antebellum period was in the debate over codification of the law.[1] The underlying argument between Jacksonian proponents of codification and the orthodox defenders of the common law system turned on whether judges "make" or "declare" law.[2] The question of whether law is "political"—and, hence, to be appropriately determined by democratic legislators enacting codes—or, instead, is "scientific," and thus capable of being expounded by judges, was at the heart of the codification controversy.

The law-politics controversy was itself an expression of the fear of tyranny of the majority that has been a persistent theme in American legal and political thought. Throughout the revolutionary period and for a time thereafter, the problem of tyranny of the majority expressed as much the fear of religious as of cultural, political, or economic domination. Yet already in *The Federalist*, its central future meaning had been propounded: It stood for the paramount dangers of redistribution of wealth and of leveling. As Madison declared, "the most common and durable source of factions has been the various and unequal distribution of property."[3] The fundamental issue of American political thought was how this most politically democratic country in the world could avoid the threat of coerced economic equality.

Law carried an unusual burden in this conception. It was hoped that it could provide a non-political cushion or buffer between state and society. Unless law

could be rendered non-political, how could it avoid becoming simply an instrument of democratic politics?

At precisely the moment that the codification movement of the 1820s and 1830s produced the first sustained challenge to the democratic legitimacy of the common law, there arose a countervailing movement to defend the non-political character of judge-made law. Beginning with the first volume of James Kent's *Commentaries*,[4] published in 1826, the treatise tradition continued for the next century to propound the orthodox view that law is a science and that legal reasoning is inherently different from political reasoning.[5] Replicating similar debates that had resonated throughout modern English constitutional history—symbolized by the early-seventeenth-century confrontation between James I and Sir Edward Coke over whether law depended on "natural" or "artificial" reason[6]—the treatise writers sought, above all, to establish a non-political oasis through law.

After the trauma of the American Civil War, amid heightening social conflict produced by immigration, urbanization, and industrialization, orthodox legal thinkers and judges sought ever more fervently to create an autonomous legal culture as part of their "search for order."[7] Through a process of systemization, integration, and abstraction of legal doctrine, they refined and tightened up what had previously been a loosely arranged, ad hoc system of legal classification. To understand late-nineteenth-century Classical Legal Thought, one must first appreciate the significance of that process of systemization.

Legal Architecture

Every complex legal system presents a structure of classification and categorization that reveals many of its dominant concerns and points of tension and contradiction. For example, Eugene Genovese has focused on the structure of the law of slavery to understand how Southern society sought to resolve the contradiction between the wish to conceive of slaves as property and the reality of slaves exercising will.[8] He has emphasized how the universal problem of generality versus particularity of legal classification was especially evident in the contradictory efforts of Southern judges to assimilate slaves to property while recognizing the impossibility of applying inanimate property concepts generally to human beings with will. Mark Tushnet also shows how slave law was structured according to the contradictory principles of interest and humanity.[9]

Similarly, the effort of late-nineteenth-century legal thinkers to create a system of legal thought free from politics produced a structure of classification that sought to depoliticize law by mediating a series of basic contradictions in antebellum legal thought. It is to that structure of classification that we now turn.

The Distinction between Public and Private Law

One of the most powerful tendencies in late-nineteenth-century law was the move to create a sharp distinction between what was thought to be a coercive public

law—mainly criminal and regulatory law—and a non-coercive private law of tort, contract, property, and commercial law, designed to be resistant to the dangers of political interference.

The distinction between public and private law was in part a culmination of more long-standing efforts of conservative legal thinkers to separate the public and private realms in American political and legal thought.[10] One of the earliest efforts to create an oasis of private rights free from state interference was the distinction between public and private corporations first elaborated in the *Dartmouth College Case* (1819).[11] It was soon to be incorporated into a more general antebellum constitutional doctrine of "vested rights,"[12] whose function was to posit the existence of a private realm immune from political coercion.

Beginning in the 1840s, the public-private distinction was further developed in state constitutional cases that created a sharp distinction between legitimate public and illegitimate private purposes for state exercise of its power of eminent domain.[13] In the eminent domain cases, the public purpose doctrine was explicitly designed to prevent state redistribution of wealth. By the 1870s, this idea was extended to the taxing power.[14] Cases dealing with the constitutionality of municipal sales of bonds to support railroad development invoked the public-private distinction to invalidate taxation for mere private purposes.[15]

Standing behind the widening public-private distinction in law were developments in nineteenth-century political, social, and economic thought that posited basic dichotomies between state and society, between the market and the family, and between politics and the market.[16] All of these conceptualizations sought to establish a separate, "natural" realm of non-coercive and non-political transactions free from the dangers of state interference and redistribution.[17]

The more formal and systematic distinction between public and private law that began to be articulated in the 1870s was in one sense a logical outgrowth of these earlier developments. The private law of tort, contract, and property, legal writers regularly maintained, was concerned only with *meum* and *tuum*, with private transactions between private individuals vindicating their pre-political natural rights.[18] In these matters, it was insisted, the state had no independent interest beyond ensuring that the legal order was impartial and non-political. An independent realm of private law was thus conceived of as the perfect analogue to an increasingly dominant conception of a self-regulating market, whose "invisible hand" reflected natural and impartial economic laws that needed to remain uncorrupted by political interference.

The Creation of Increasingly Abstract and General Classifications

While the creation of a public law-private law distinction owes much to developments outside of the law, it should also be understood in terms of important internal changes in the structure of legal ideas. At the beginning of the nineteenth century, American law was still dominated by the system of common law

writs or forms of action.[19] The common lawyers' practical understanding of the writ system as remedies provided by the state stood in sharp contrast to the efforts of liberal social contract theorists after Locke to establish the pre-political origins of individual rights. Despite Blackstone's attempt to integrate the lawyers' history of the forms of action with the liberal theorists' ideas of natural rights,[20] it was only with the demise of the writ system between 1825 and 1850[21] that any fundamental restructuring of the architecture of the legal system became possible. Perhaps the best place to see this change is in the common law treatise literature itself.

In virtually every field of law, late-nineteenth-century legal literature became more integrated, systematic, general, and abstract. At the beginning of the century, a handful of published American law texts were supplemented by widely circulated handwritten manuscript "precedent books," as well as English law books. The systematic and "scientific" *Commentaries* of Blackstone remained very much the exception compared to the still more widely used eighteenth-century English "abridgements." Joseph Story's 1805 book of pleadings[22] and Nathan Dane's *Abridgement*,[23] begun in 1823, were the typical source books for practicing American lawyers. The dominant purpose of these texts was to offer a useful catalogue of the appropriate forms of pleadings for bringing and defending different kinds of common law actions.

As the old forms of action disintegrated, successive legal writers began to attack the "fragmentary and disconnected"[24] structure of legal classification. In his treatise on *The Law of Torts* (1859)—the first effort at writing a systematic treatise on the subject—Francis Hilliard wrote that under the traditional forms of action, "the natural order of things" was "reverse[d]," presenting "a false view of the law, as a system of forms rather than principles."[25]

Hilliard criticized the typical legal treatise of the day for arranging its subject matter with "no scientific basis" and for failure "to present a connected, systematic, or complete view of any one of the somewhat heterogeneous topics of which they promiscuously treat." "I have never been able to understand upon what principle, in treatises of this description, some subjects are selected, and others wholly omitted," he concluded.[26]

When Hilliard published his treatise on *Torts*, negligence still played a modest role in his scheme of classification. Shearman and Redfield also noted in 1869 that although it had been part of the "original plan" of their treatise on torts to make negligence the organizing concept, they had been forced to yield to "the present chaotic state of legal literature."[27] "This plan was modified, however, for the sake of the convenience and advantage of the profession, by adding chapters upon the law of negligence with reference to Attorneys, Bankers, Passenger Carriers, Physicians and Telegraphs. . . ."[28]

By the middle of the century, a burgeoning number of American law books had begun to be similarly organized according to functional categories useful to practicing lawyers. A typical treatise on contracts, for example, contained separate chapters on the law of sales, insurance, negotiable instruments, agents, railroads,

and so forth. This new organizational structure was itself symptomatic of the demise of the forms of action as the dominant mode of legal classification.

Yet further generalization continued to be hindered not only by conservative attachment to an already disintegrating system of common law forms of action but, more important, by professional resistance to any move away from organizing the law according to particular statuses and functional relationships—for example, attorneys, bankers, passengers, doctors, and telegraphs. Practicing lawyers feared that such a move would not yield sufficiently usable general principles, and might therefore only encourage the development of abstract and integrated fields of law that sacrificed professional utility.

By the 1870s, nevertheless, legal thinkers began to call for a more "philosophical" or "scientific" arrangement of the law while heaping scorn on the practical and functional classifications still in vogue.[29] In contract law, the effort centered on attempts to subsume all rules and doctrines under the heading of "will."[30] In tort law, there were various attempts to unite all sub-categories under the heading of duty.[31] But the most prominent efforts at generalization focused on making "negligence" and "fault" the organizing concepts of the law of torts.[32] Consequently, between 1870 and 1900, the architecture of law was once more rearranged, this time around general concepts that submerged the concrete particularity of the previous organizing schemes. For example, legal writers sought to subsume the different branches of contract law under general and abstract headings such as "offer and acceptance" and "consideration." The modern categorization of intentional, negligent, and strict liability torts also appeared for the first time, providing a new organizational structure based on general principles.

In 1873 Oliver Wendell Holmes, Jr., wrote "The Theory of Torts,"[33] which represented one of his most influential early efforts to establish a general theory. He accomplished this by ignoring traditional status or functional relationships while searching for more abstract and transcendent principles of liability. For the next twenty years, Holmes and other writers sought to make the negligence principle the normal and ordinary rule of tort liability. In the process, it was necessary to attack contradictory and competing legal principles as "anomalous."

Everywhere after 1870, negligence was proclaimed to be the general rule of the common law. In case law, the most powerful recognition of the triumph of the negligence principle can be seen in two leading cases decided in 1872–1873 rejecting strict liability principles laid down in the English case of *Rylands v. Fletcher* (1868). Under strict liability, enterprises, especially railroads, would be held liable for all injuries regardless of fault. Many jurists, including Holmes, devoted themselves to marginalizing this feared authority for redistribution in torts.[34]

Two other areas of tort law stood out as most resistant to recasting according to principles of negligence, and each became a famous battleground in the legal literature. The first was the rule that shippers and other common carriers were strictly liable to their customers. "If there is a sound rule of public policy which ought to impose a special responsibility upon common carriers . . . and upon no others," Holmes declared in *The Common Law*, "it has never been stated." He

proceeded to trace the history of strict liability of common carriers for the purpose of showing that it was a latecomer to the common law—a "public policy invented by Chief Justice Holt" early in the eighteenth century and "part of a protective system which has passed away." Any attempt generally to apply Holt's paternalistic and regulatory premises "at the present day," Holmes wrote, "would be thought monstrous." So, Holmes concluded, strict liability of common carriers was an anomaly—"a merely empirical exception from general doctrine"—for which there was "no common rule of policy." Hence, "courts may well hesitate to extend the significance" of any supposed principle of strict liability derived from this area. Indeed, Holmes endorsed the recent strong tendency of American courts to allow common carriers—especially railroads—to "contract out" of strict liability, since "notions of public policy which would not leave parties free to make their own bargains are somewhat discredited in most departments of the law."[35]

Just as strict common carrier liability stood as a disquieting exception to the attempt of legal thinkers to organize an abstract and integrated system of tort law around the negligence principle, so too did the rule that masters were liable for most of the torts of their servants. By imposing "vicarious liability" on employers, the common law seemed to make them liable regardless of their own fault.

In two articles on agency published in 1891 but written eight years earlier, Holmes described the strict liability underlying the rule of *respondiat superior* as a "series of anomalies" that were contrary to "common sense." "I assume," he wrote, "that common-sense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass. . . ." The history of the development of vicarious liability of the master could, therefore, be explained only as "the resultant of a conflict at every point between logic and good sense." "The survival from ancient times of doctrines . . . based on substantial grounds which have disappeared long since" could have occurred only because they were "generalized into a fiction" and subsequently took on a life of their own.[36]

Between 1870 and 1900, one sees everywhere this tendency to generalize and systematize fields of law that had previously been conceived of as a series of special cases and particular rules. This reorganization of legal architecture can be understood as an effort to create a systematic and autonomous system of private law derived from concepts such as will, fault (that is, the impairment of will), and property. It strove to erect an abstract set of legal categories that would subordinate particular legal relationships to a general system of classification. As we have witnessed the disintegration of these late-nineteenth-century imperial categories during the past seventy-five years—as the law of contract, for example, has been disaggregated into specialized areas of sales, labor, consumer, and landlord-tenant law—we see once again the historically contingent character of legal architecture.

We have seen how the late-nineteenth-century process of abstraction was accompanied by a strong effort to purify legal categories through identification and isolation of various anomalies that contradicted the basic structure. One early example is the law of insurance. In 1800, American lawyers regarded insurance law as one of the three or four most prominent sub-categories of a still loosely

defined law of contract. By 1850, the law of insurance had been relegated to an independent and separate area of legal categorization. The explanation for this reclassification seems to be that as contract law was becoming increasingly generalized around the law of sales—with its developing doctrine of *caveat emptor*—long-standing insurance doctrines requiring the insured to "disclose fully all material risks" *(caveat venditor)* became ever more subversive of the general system. As it stood in the way of further generalization of the law of contract, it needed to be expelled.[37]

This identification of anomalies was a central part of the task of legal integration after 1870. We have seen how Holmes consistently labeled various strict liability doctrines as anomalies whose appearance in the law could be explained only by historical peculiarities. We have also seen that he sought to discredit strict master-servant and common carrier liability, both of which contradicted his project of integration. In a similar spirit, we shall soon see, William Keener published a book on *Quasi-Contract* in 1893 for the purpose of isolating a paternalistic, non-will-based set of doctrines from a pure and supposedly voluntaristic system of contract law.[38]

The process of generalization and abstraction in late-nineteenth-century law was identified with the goal of rendering private law more scientific and less political. It also had the effect of freeing legal rules from the reality testing that regular encounters with the concrete particularities of social life might entail. For example, generalization permitted judges to apply the same set of rules that were applicable between sophisticated businessmen of relatively equal information and bargaining power to labor and consumer contracts between vastly unequal parties. Indeed, such indifference to context was regarded as an important safeguard that would ensure that law would remain neutral and non-political.

While the task of integration and abstraction was undertaken to create a powerful system of private law insulated from politics, it ultimately sowed the seeds of its own destruction. Although its very general and abstract character led eventually to the charge that it was out of touch with reality, in fact it had also already rendered itself internally vulnerable. First, the process of integration gradually eliminated a series of built-in "mediation" devices that had allowed various contradictory principles and doctrines to coexist without totally consuming each other. As we will see in a number of areas of law, systematization simply exposed contradictions that earlier compartmentalized structures had been able successfully to suppress. For example, as the concept of property was made more abstract, judges and jurists turned away from an earlier, more restricted, "physicalist" conception of property that limited "takings" to physical expropriations of land.[39] As the definition of property was expanded to include not only various *uses* of land, but also stable market values as well as expectations of future income from property, virtually every governmental activity was rendered capable of being regarded as a taking. Earlier mediation devices for preventing such a *reductio ad absurdum*, to be discussed later, were swept away by this process of abstraction, thus rendering the entire system more vulnerable to attack.

What follows is an effort to capture initially the essential structure of Classical Legal Thought by focusing in some depth upon several major areas of legal doctrine that help to express its characteristic tensions and contradictions. First, we look at the well-known income tax case of 1895, *Pollock v. Farmers' Loan & Trust Co.*,[40] in order to highlight perhaps the most central tenet of late-nineteenth-century legal orthodoxy—its commitment to a neutral, non-redistributive state. Next, we turn to the famous Supreme Court decision in *Lochner v. New York* (1905)[41] to identify the moment at which many of the suppressed contradictions within the classical ideal of a neutral state came to the surface and produced a powerful political and intellectual reaction. In particular, we study the development of limits on police power, which were used in *Lochner* to deny the authority of the state to regulate maximum hour laws.

As we seek to capture the texture of Classical legal consciousness by focusing on these specific areas, we also need to see the particular ways in which orthodoxy made itself more vulnerable to attack, often by eliminating earlier legal distinctions that existed precisely in order to mediate or deny some political, social, or moral contradiction.

The Structure of Legal Reasoning

The late-nineteenth-century effort to integrate legal doctrine was accompanied by an equally important attempt to create a self-contained system of legal reasoning that would be immune to the charge that it was simply political. As a first approximation, it is accurate to describe this mode of reasoning as "formalistic" or "conceptualistic." It aspired to import into the processes of legal reasoning the qualities of certainty and logical inexorability. Deduction from general principles and analogies among cases and doctrines were often undertaken with a self-confidence that later generations, long since out of touch with the inarticulate premises of the system, could only mistakenly regard as willful and duplicitious. However difficult it is for us to recapture this aspect of the late-nineteenth-century mindset, it stood as among the most important elements that supported the conviction of legal thinkers that it was possible to distinguish the legal from the political.

Late-nineteenth-century legal formalism represented the crystallization of a "legalistic" mindset[42] that had emerged in seventeenth- and eighteenth-century English constitutional thought and was further elaborated in liberal political theory and post-revolutionary American legal thought. It was marked by a series of basic dichotomies: between means and ends, procedure and substance, processes and consequences. In a world of conflicting ends, it aspired to create a system of processes and principles that could be shared even in the absence of agreed-upon ends. Law played a crucial role in this system of thought. If legal concepts could be neutral, they could then be used to decide disputes without resort to the substantive merits of a case. Thus, well before the late nineteenth century, the ideal

of the rule of law had emerged to oppose "result-oriented" or consequentialist modes of legal thought.

Perhaps the best example of the triumph of these ideas is the position of equity in the Anglo-American system of legal ideas. During the late Middle Ages, the English chancellors had succeeded in erecting a system of equitable jurisdiction that often stood in conflict with the common law courts. While many of the disputes between "law" and "equity" dealt simply with questions of power or with technical issues of jurisdiction, one major ideological issue came to be increasingly prominent during the eighteenth century. Common lawyers frequently charged that the chancellors, still often acting out of a medieval or paternalistic conception of their role as "a court of conscience," were deciding questions of substantive justice in ways completely at odds with the rule of law. The charge that chancery cases were decided according "to the length of the chancellor's foot" was contrasted unfavorably with "fixed and settled principles of law."

By the beginning of the nineteenth century, the system of equity had been almost completely subordinated to the common law, as even the chancellors began to maintain that the substantive doctrines of law and equity were the same; only their remedies were different.[43] The merger of law and equity in the New York Field Code of 1848 symbolizes the end of a separate, equitable system of substantive justice. Equity thus had finally submitted to the long-standing criticism that judicial enforcement of substantive conceptions of justice was contrary to the rule of law.

The Categorical Mind

Nothing captures the essential difference between the typical legal minds of nineteenth- and twentieth-century America quite as well as their attitude toward categories. Nineteenth-century legal thought was overwhelmingly dominated by categorical thinking—by clear, distinct, bright-line classifications of legal phenomena. Late-nineteenth-century legal reasoning brought categorical modes of thought to their highest fulfillment.

By contrast, in the twentieth century, the dominant conception of the arrangement of legal phenomena has been that of a continuum between contradictory policies or doctrines. Contemporary thinkers typically have been engaged in balancing conflicting policies and "drawing lines" somewhere between them. Nineteenth-century categorizing typically sought to demonstrate "differences of kind" among legal classifications; twentieth-century balancing tests deal only with "differences of degree."

There were a number of familiar categories that late-nineteenth-century judges invoked to decide cases: "direct-indirect" tests in a number of legal areas, especially under the commerce clause;[44] "business affected with the public interest";[45] "intervening" and "supervening" causes in the law of causation;[46] a "literalist" interpretation of the Sherman Act that purported to distinguish clearly between

contracts in restraint of trade and those not in restraint of trade;[47] legislation that interfered with contract "rights" versus contract "remedies";[48] distinctions between "taxation" and "takings"[49] and between exercises of police power (or regulation) and confiscation;[50] and the exercise of eminent domain or taxing powers that served a public purpose and those that did not.[51] One could extend the list indefinitely.

Nineteenth-century legal classification expressed a mindset that also sharply distinguished legal from legislative reasoning by separating the legislative functions of trading and balancing among competing policies or interests from the supposedly judicial task of simply identifying the existing legal categories to which a dispute belonged. It was an extension of modes of legal reasoning that had long existed under the forms of action, where the lawyer's basic task was to identify the appropriate writ or form of pleading that would cover a particular case.

While judges and lawyers of the nineteenth century clearly believed that there were identifiable bright-line boundaries that judges could apply to a case without the exercise of will or discretion, it is all too easy to caricature their position. Most legal thinkers believed that legal categories contained what we might call a "core" and a "periphery." There was a class of cases that clearly belonged to the core; there were others, more difficult, that were part of the periphery. If the state should assign the title of A's property to B without compensation, that was clearly a core case of taking. But there were many cases of "indirect" or "consequential" injury to property that were at the more problematic periphery of the category. While the task of applying these categories frequently required difficult exercises of judgment in particular cases, the intellectual goal was the same: to decide whether a dispute fell within one or another mutually exclusive category.

This distinction between core and periphery led nineteenth-century judges to intone a formula that is all but incomprehensible to twentieth-century jurists. While the application of a constitutional provision varies with changing circumstances, these judges often declared, its meaning is nevertheless fixed and unchanging. For late-nineteenth-century jurists, the difference between the meaning and the application of a legal rule or doctrine was the difference between the core and the periphery of that doctrine. The task of the judge in hard cases was to decide whether they looked more like the core cases in one class rather than another.

Early-twentieth-century legal thought was devoted to attacking these modes of categorical thinking by portraying them as formalistic and artificial. The emergence of balancing tests in numerous areas of the law is a prominent measure of the success of Progressive legal thinkers in undermining categorical thought. One sees the appearance of balancing tests in many different areas of the law after 1910: in the "rule of reason" in anti-trust law;[52] in the law of nuisance;[53] in the "reasonableness" (Hand) standard in negligence;[54] in the test of when a regulation becomes a taking;[55] and in the clear and present danger test for free speech.[56] In 1921 the most important Progressive legal thinker, Roscoe Pound, declared that a new jurisprudence should encourage a "weighing of social interests."[57]

In the realm of academic thought, it was Holmes who had prepared legal

thinkers for the attack on categorical modes of thought. His emphasis on line drawing and his insistence that legal reasoning was all a matter of degree were designed to subvert the dominant mode of thought. Yet ultimately one feels that it was the old order itself that had prepared the seeds of its own destruction. For one can identify the moments at which categorical thought began to break down within legal orthodoxy itself. As proponents of the old system of thought began the process of abstraction and integration, they extended its categories too far. The compartmentalizing mechanisms within orthodoxy for regulating or denying the limits of categorical thought were stretched to the breaking point. And the old order itself reached in desperation for a balancing test.

The Neutral State and Classical Legal Thought

In progressive constitutional historiography, the decision of the U.S. Supreme Court in *Pollock v. Farmers' Loan & Trust Co.* (1895)[58] has always stood for the essence of judicial usurpation. In that case the Court held, seemingly contrary to the existing precedents, that an income tax was a direct tax requiring apportionment among the states. And since state-by-state apportionment of a tax on individual income was practically impossible to implement, the decision delayed for eighteen years—until the passage of the Sixteenth Amendment—any federal tax on incomes.

I will show that, far from marking a sharp break with the past, the decision in *Pollock* instead exemplified the crystallization and culmination of ideas that had been gathering strength in American constitutional thought for over fifty years. *Pollock* simply represented one of the most dramatic applications of a recent convergence of constitutional doctrines that would restrict the power of the state to redistribute wealth.

The "night watchman" state that was first outlined for Americans in Madison's Tenth *Federalist* embodied what would become a pervasive nineteenth-century liberal vision of a neutral state, a state that could avoid taking sides in conflicts between religions, social classes, or interest groups. While the hope of achieving such neutrality was articulated from the beginning of the Republic—with law being assigned a special cultural role as neutral arbiter—there were other, perhaps more dominant political or legal ideas that first needed to be defeated or marginalized. In some states, religious disestablishment did not take place until 1833.[59] The vision of law embodied in the English and American constitutional systems did not really gel until the 1820s. For example, judicial review at the state level was not entirely legitimated until the 1840s and, at the federal level, until after the Civil War.[60] While one strand of the antebellum codification movement challenged the neutrality of the common law, its considerable practical success can only be appreciated once we realize that by 1840 a majority of the states, which had once appointed judges, now elected them.[61] There were, in short, many institutional and ideological impediments to reaching the ideal of a government of laws and not of men.

What has variously been called a Republican or Whig or Commonwealth conception of the state stood opposed to the liberal idea of neutrality.[62] In political economy as well, the triumph of laissez-faire liberalism can be dated from the second half of the century.

It was perhaps the trauma of the Civil War that crystallized these separate antebellum tendencies in favor of a state that could stand above all factions and interests. Or perhaps each of the separate strands in law, politics, and economics grew stronger and finally converged around the ideal of a neutral state. Or perhaps the triumph of the neutral state in late-nineteenth-century thought should be seen in relationship to the clear increase in social conflict and inequality that was emerging at the same time. In this version, the ideal of neutrality represents a form of denial: As the level of social conflict produced ever more anxiety, the yearning to believe in an idealized oasis of neutrality became correspondingly greater.

Whatever the explanation, the ideal of the neutral state came to represent a central form of legitimation during the late nineteenth century. At just this moment, Classical Legal Thought emerged as perhaps the dominant expression of the idea of neutrality.

Taxation and the Idea of Neutrality

The power of taxation presented the most formidable difficulties for nineteenth-century jurists intent upon establishing a neutral state by limiting the redistributive capacities of government. The English constitutional tradition provided virtually no legal limitations on redistributive legislative designs. The great constitutional struggles of the seventeenth century were waged entirely over the legitimate constitutional powers of king and Parliament, not over whether there were general limitations on the government's power to tax.

When Michigan's Chief Justice Thomas Cooley came to write his *Treatise on the Law of Taxation* in 1876, he had to concede in his opening pages that the constitutional tradition provided few legitimate grounds for judicial restrictions:

> The power of taxation is an incident of sovereignty, and is coextensive with that of which it is an incident. All subjects, therefore, over which the sovereign power of the state extends are, in its discretion, legitimate subjects of taxation; and this may be carried to any extent to which the government may choose to carry it. In its very nature it acknowledges no limits, and the only security against abuse must be found in the responsibility of the legislature which imposes the tax to the constituency who are to pay it. The judiciary can afford no redress against oppressive taxation, so long as the legislature, in imposing it, shall keep within the limits of legislative authority.[63]

By importing his conception of "fixed principles of justice" into his definition of "legislative authority," however, Cooley was eventually able to establish anti-

redistributive tax principles.[64] Yet he was never able entirely to constitutionalize limits on a taxing power that had been derived from a long tradition of wide legislative discretion.

Cooley's most important contribution to the constitutional law of taxation was to formalize the norm of "equal and uniform" taxation as a guiding principle of American constitutional law. In this sense, his treatise represented the culmination of a generation of efforts in the states to amend their constitutions in order to add equal and uniform tax provisions.

A vast expansion of state taxation had begun during the 1840s in reaction, after the Panic of 1837, to the elimination of extensive state revenues derived from canal tolls. Urbanization after the Civil War also produced a massive increase in local property taxes devoted to public works; and by 1875, systems of special assessments, primarily for road building, had "of late years become very frequent and extensive."[65]

Between 1840 and 1870, a movement to add strict constitutional provisions requiring equal and uniform taxation prevailed in the vast majority of states. Whereas in 1792 the state constitutions of ten of the thirteen former colonies contained no such restrictions, and even the remaining three (Maryland, Massachusetts, and New Hampshire) had promulgated only vague constitutional provisions, "there was a sharp turn in practice" in 1818–1820, and after that time almost all newly admitted states included some type of uniformity clause in their constitutions.[66] But it was only after a flurry of activity during the period 1845–1851 that equal and uniform taxation became the constitutional norm in the states.[67]

Cooley wrote his treatise for the purpose of codifying these new developments in the constitutional law of taxation. The reader, he acknowledged, might think "that on some points, too much importance has been attached to those fundamental principles which restrict the power to tax" until "one considers how vast is this power, how readily it yields to passion, excitement, prejudice or private schemes, and to what incompetent hands its extention is usually committed."[68]

The *Treatise on Taxation* is duly modest about the "serious and often insurmountable difficulties in the way of equal taxation. . . ."[69] "Perfect equality" in the assessment of taxes, Cooley constantly reiterated, is practically unattainable.[70] Yet, despite cautious pragmatism about the difficulties of institutionalizing the principle of equality, Cooley had no doubt whatsoever concerning the correctness of the principle.

> [A]re there not cases which on their face are manifestly so unequal and unjust as to furnish conclusive evidence that equality has not been sought for but avoided; that oppression, not justice was desired, and confiscation, not taxation intended?[71]

The central purpose of the *Treatise on Taxation*, then, was precisely to distinguish between "taxation" and "confiscation" by establishing the norm of equality as a "fixed principle of justice,"[72] a "fundamental principle which [would] restrict the power to tax."[73] For if the principle of inequality were "once admitted there is no reason but its own discretion why the legislature should stop short of impos-

ing the whole burden of government on the few who exhibit most energy, enterprise and thrift."[74] Thus, under the inspiration of recent state constitutional changes, Cooley sought to shift the law of taxation away from its historic association with unfettered legislative sovereignty and to articulate clear constitutional barriers against the use of taxation for redistributive ends. Compared to other constitutional restrictions on the redistributive impulse, the movement to constitutionalize the taxing power was a relative latecomer in American law, reflecting the fact that until the 1840s taxation played only a minor role in state financing.

There were substantial difficulties confronting anyone who wished to constitutionalize the law of taxation. Treating equality as a fundamental principle of justice, Cooley sought to make this norm applicable regardless of whether a state had specifically incorporated it into its constitution. For this purpose, he enthusiastically cited a Kentucky case that derived constitutional limitations on taxation from "the declared ends and principles of the fundamental laws. Among these political ends and principles, *equality*, as far as practicable, and security of property against irresponsible power, are eminently conspicuous in our state constitution."[75]

Cooley's argumentative strategy is a prominent example of what Edward Corwin has called the "doctrine of implied limitations."[76] Since separation of powers is a basic doctrine of American constitutional law, the argument went, the legislative branch is confined to acts of legislation. Taxation is within the definition of the legislative power only when it is used to raise revenue. It follows that an unequal tax, being clearly for redistributive purposes, is not within the legislative power. Unequal taxation was thus defined to be in fundamental conflict with the theory underlying separation of powers and was unconstitutional even without a specific provision requiring equal and uniform taxation.

Another version of the effort to create implied limitations on the taxing power was to derive such limitations from constitutional provisions requiring just compensation for a taking of property. "[W]henever the property of a citizen shall be taken from him by the sovereign will, and appropriated without his consent to the benefit of the public, the exaction should not be considered as a tax unless similar contributions be made by the public. . . ."[77] In Pennsylvania, which did not have a constitutional provision requiring equal and uniform taxation, the judges in 1871 held a local special assessment unconstitutional. Anticipating the spirit of Cooley's treatise, they declared that unless taxation is "reasonably just and equal in its distribution," it "is confiscation, not taxation, extortion not assessment."[78] Any other conclusion would result "in the overthrow of the right of private property."[79]

The Uses of the State Taxation Decisions

The Supreme Court justices who struck down the federal income tax in 1895 came to legal maturity when the central constitutional question of taxation fo-

cused on the power of municipalities to issue bonds in order to encourage the building of railroads. After the Civil War, Midwestern towns outdid each other with promises of financial subsidies in order to encourage railroads to build lines through the towns. Eventually, especially after the Panic of 1873, many towns defaulted on these bonds, and courts in Iowa, Michigan, and other states were besieged by the lawsuits of disappointed municipal bondholders.

Judge Thomas Cooley of Michigan and U.S. Supreme Court Justice Samuel F. Miller of Iowa were among many Midwestern jurists whose legal views on taxation were deeply affected by the bond cases.[80] Both Cooley and Miller wrote judicial opinions that deprived bondholders of relief on the ground that municipalities did not have the power to spend and hence to tax for "non-public" purposes.[81]

The "public purpose" doctrine in taxation was an extension of constitutional principles that had been forged in many state courts during the antebellum period to limit the power of the state to take property for non-public purposes.[82] Its extension to taxation after the Civil War was an important development in the movement toward legal integration during the late nineteenth century. The powers of eminent domain and taxation, formerly treated under widely divergent legal conceptions, began to be subordinated to a common set of anti-redistributive principles after the Civil War.

The views of Cooley and Miller on the bond cases were expressions of long-standing Jacksonian fears that the state would be used to favor special interests at the expense of the public interest. Earlier Jacksonian attacks on corporate monopolies and on the use of the eminent domain power to subsidize transportation companies were eventually generalized into an ideal of a neutral state free from the corruption of "class legislation." "To lay with one hand the power of the government on the property of the citizen," Justice Miller wrote in *Loan Association v. Topeka* (1874), "and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."[83]

Traditional conservative fears that the state might be used to protect debtors or to take property in order to equalize wealth were thus matched by neo-Jacksonian anxieties that the state would be taken over by corporate interests. It is important to recognize that these twin fears of state power combined to produce laissez-faire ideology after 1850.[84]

If the public purpose doctrine brought the eminent domain and taxing powers into the same sphere of legal discourse, it was only a matter of time before the question of what constituted a taking under eminent domain law would be extended to the taxing power as well. If it was clear, as antebellum judges had frequently reiterated, that the state could not take the property of A and give it to B, could the taxing power be used to accomplish the same illegitimate objective? How, in short, could one distinguish between a tax and a taking?

By degrees, then, judges and jurists, aided by state constitutional provisions,

worked their way to the principle that only equal taxation could avoid the charge that the use of the taxing power was simply a disguised form of confiscation.

The Federalization of Taxation Doctrine

In 1873, Justice Miller wrote his famous opinion in *The Slaughterhouse Cases*,[85] holding that the recently ratified Fourteenth Amendment, and in particular its privileges and immunities clause, had introduced only minor limitations on state power. The facts of the case seemed to present an extreme version of the Jacksonian nightmare of the use of state power to favor special interests.

Miller's majority opinion resisting the constitutional challenge to a New Orleans slaughterhouse monopoly was dominated by his effort to prevent the Fourteenth Amendment from becoming a centralized charter of federal regulation that would overthrow the federal system. The dissents of Justices Stephen Field and Joseph Bradley were classical Jacksonian polemics on the evils of monopoly, polemics that on other occasions Miller himself endorsed with enthusiasm.

Progressive historiography, written from the perspective of the subsequent development of "substantive due process" and its culmination in *Lochner v. New York*,[86] has tended to overlook the considerable substantive agreement in the social visions of Justices Miller, Field, Bradley, and, later, even John Marshall Harlan. In the 1870s and 1880s, the real source of division in the Supreme Court, except perhaps over questions of race, turned on different views of the dangers of federal power and of governmental centralization, not on substantive conceptions of social justice.

A Miller opinion written one year after the *Slaughterhouse* decision underlines this interpretation. *Loan Association v. Topeka* (1874) was a diversity case[87] in which Miller held that a city had no power to issue municipal bonds to subsidize private enterprise. In a diversity case, Miller felt free to decide the question under state constitutional law, so that the reach of the Fourteenth Amendment did not need to be addressed. Deciding as if he were a state court judge, he held that even in the absence of any express constitutional provision, a tax not for a public purpose was in reality a taking. The power of taxation, Miller wrote, "can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."[88] Three years later, he made it clear that, out of respect for the federal system, he was unwilling to extend these views to the Fourteenth Amendment.[89]

By contrast, Justice Field sought to force just such an expansive view of the Fourteenth Amendment on the Supreme Court. In two circuit court tax cases in 1882 and 1883, he held that a California statute providing different tax rates for individual and corporate property was a violation of the equal protection clause of the Fourteenth Amendment.[90] "Unequal exactions in every form, or under any

pretense, are absolutely forbidden," Field wrote, "and of course unequal taxation, for it is in that form that oppressive burdens are usually laid."[91] "What is called for under a [state] constitutional provision requiring equality and uniformity in the taxation of property must be equally called for by the fourteenth amendment," Field concluded.[92]

Field's circuit court decisions were affirmed by the Supreme Court but on very limited grounds.[93] Before its decision in *Pollock v. Farmers' Loan & Trust Co.* (1895),[94] in fact, the Supreme Court managed to avoid the question Field had already decided. By the time of this decision, however, the distinction between a legitimate tax and a tax that was really an illegitimate taking had been turned into a deeply ingrained part of American constitutional doctrine. It was buttressed by the simultaneous de-physicalization of the takings doctrine during the preceding generation, a development that eliminated earlier conceptual blocks to regarding taxes and takings as in the same sphere of legal discourse.[95]

Progressive constitutional historiography has regarded *Pollock* as one of the prime examples of judicial usurpation during the 1890s.[96] It is true that the formal holding of the Supreme Court, that a federal income tax was a direct tax requiring apportionment among the states according to population, was contrary to a small number of earlier Supreme Court precedents that consistently limited the category of what constituted a direct tax.[97] Yet, if we regard the direct-indirect tax provision as the most acceptable available federal constitutional vehicle for expressing more fundamental ideas about taxation that had crystallized in state courts during the preceding half century, the result reached should have come as no surprise.

As *Pollock* was being heard by the U.S. Supreme Court, one of the most influential American jurists, former Judge John F. Dillon, delivered a rousing defense of private property before the New York State Bar Association. "[I]n our own day," Dillon declared, ". . . great primordial rights, including the right of private property," were being "drawn in question by combined attacks upon them and upon the social fabric that has been builded upon them. This assault upon society as now organized is made by bodies of men who call themselves . . . communists, socialists, anarchists, or by like designations."[98] While Dillon's speech addressed the full range of suggested restrictions on the power of property holding, we should pause over the section entitled "Attacks Upon Private Property Through the Exercise of Power of Taxation."[99]

"Socialistic organizations," Dillon began, had mounted various "attacks" on private property; "[t]he most insidious, specious and therefore, dangerous" were "those that are threatened" concerning "the State's power of taxation."[100]

> Forasmuch as the power to tax is supposed to involve the power to destroy, it is boldly avowed by many socialistic reformers, and it is implied in the schemes of others, that the power of taxation is an available and rightful means to be used for the express purpose of correcting the unequal distribution of wealth, and that this may be done without a violation of the essential or constitutional rights of property.[101]