FIVE

The Progressive Transformation in the Conception of Property

Redefining the Nature of Property

The basic problem of legal thinkers after the Civil War was how to articulate a conception of property that could accommodate the tremendous expansion in the variety of forms of ownership spawned by a dynamic industrial society. At a time when legal conceptions were still overwhelmingly derived from ideas about landed property, new forms of property developed and expanded that were increasingly difficult to fit into the conventional categories. The rise of the business corporation generated a number of novel questions about property rights, in terms both of constitutional protection of corporate property and of shareholders' property rights in the corporation. The enormous expansion in the variety of commercial instruments produced new forms of ownership in need of legal classification.

Above all, the prevailing emphasis in traditional law had been on a "physicalist" definition of property derived from land. Property thus was usually understood in terms of a tangible parcel with clear boundaries. Trespass to land was the essence of legal interference with property rights. But how could a physicalist and concrete definition of property incorporate new, abstract, and intangible forms of wealth such as business goodwill or copyright and patent rights?[1] During the course of the nineteenth century, there was a consistent tendency toward generalization and abstraction of the idea of property in order to accommodate these new and intangible interests. And as the abstraction of the legal idea of property reached its culmination near the end of the century, it became more and more vulnerable to certain fundamental contradictions that the earlier, more modest, physicalist understanding of property had been able to conceal or suppress.

"Property is everything which has exchangeable value," declared Supreme Court Justice Noah H. Swayne in his dissent in the *Slaughterhouse Cases* (1873).[2] As

John R. Commons has shown, Swayne's statement was one of the earliest post-bellum efforts to abstract and generalize the conception of property in American constitutional law. This minority conception thereafter "began to creep into the constitutional definitions given by state and federal courts, as indeed was inevitable and proper if the thing itself was thus changing. Finally, in the first *Minnesota Rate Case*, in 1890, the Supreme Court itself made the transition and changed the definition of property from physical things having only use-value to the exchange-value of anything."[3]

This shift, Commons saw, had been foreshadowed by Justice Stephen Field's dissent in *Munn v. Illinois* (1876),[4] which upheld state regulation of grain elevator rates against a due process attack. "There is, indeed, no protection of any value under the constitutional provision," Field declared, "which does not extend to the use and income of the property, as well as to its title and possession."[5] At last, as Commons noted, the Court held in the first *Minnesota Rate Case*[6] "that not merely physical things are objects of property, but the *expected earning power* of those things is property; and property is taken from the owner, not merely under the power of *eminent domain* which takes *title* and *possession*, but also under the police power which takes its *exchange-value*."[7]

Eminent Domain

One of the most dramatic examples of the move away from a physicalist conception of property during the late nineteenth century can be seen in the law of eminent domain.

For the purpose of determining when a taking of property has occurred sufficient constitutionally to require just compensation, post-revolutionary judges had developed a distinction between "direct" (compensable) and "consequential" (uncompensable) injuries.[8] The effect of this distinction was to restrict severely the obligation of the state—as well as that of state chartered railroad corporations—to pay damages for activity that, while concededly reducing the value of land, nevertheless did not amount to a physical trespass.

By the middle of the century, the distinction between direct and consequential injuries had been further extended. As cities began to develop more extensive controls over land use, courts held that public regulation that reduced the value of land by restricting various uses was not a taking because it did not physically appropriate the land.[9] Restrictions on land use were thus also brought within the uncompensated category of mere consequential injuries.

Until the 1870s, the law of eminent domain turned on various judicial definitions of what sorts of physical intrusions constituted a taking. Above all, it was well recognized that the state or its agents were legally immune from paying compensation for many of the forms of interference with land for which a private person would unquestionably have been required to pay.

As the varieties of commercial and intangible property grew during the nineteenth century, land slowly receded as the model for property conceptions. As the most significant forms of new property were incorporeal, judges were pressed to redefine the nature of interference with property rights more abstractly, not as an invasion of some physical boundary but as any action that reduced the market value of property.

The effort to generalize and abstract the idea of property in terms of market value brought to the surface some of the most significant contradictions concerning any legal definition of property and, at the same time, destroyed the power of the mechanisms existing within the previous system of thought for obscuring and concealing those contradictions. Abstraction, in short, rendered the system both more vulnerable to attack and more difficult, eventually, to defend.

This shift in law away from physicalist conceptions of property based on land began to take shape during the last quarter of the nineteenth century. One of the most self-conscious and influential efforts to redefine these ideas was John Lewis's *Treatise on the Law of Eminent Domain in the United States* (1888). Lewis was "convinced that the earlier cases as to what constitutes a taking were based upon a radically defective interpretation of the constitution. . . ."[10] This interpretation "denied the right to compensation in many cases where it ought to be given. . . ."[11] These erroneous doctrines arose, Lewis observed, because "[t]hese early cases attacked the question wrong end first, so to speak, through the word *taken* instead of through the word *property*."[12] "We must . . . look beyond the thing itself, beyond the mere corporeal object, for the true idea of property. . . . The dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights."[13] Thus property does not consist of mere physical invasion but should be understood "to include every valuable interest which can be enjoyed as property and recognized as such."[14]

> If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property . . . though his title and possession remain undisturbed. . . .[15]

By insisting that "based upon the nature of property itself" every interference with "the possession, use or enjoyment" of property must be compensated, Lewis thus delivered a major challenge to existing legal doctrine.[16]

As late as the time of the Civil War, it was still regarded as settled that a taking meant that "property must be actually taken, in the physical sense of the word."[17] Yet, even this restrictive definition of eminent domain had been criticized for demonstrating "[t]he tendency under our system . . . to sacrifice the individual to the community."[18] A strong shift to individualism during the 1870s eventually combined with a gradual move away from tradition physicalist definitions of property to produce a major judicial expansion in constitutional doctrine. Lewis thus was aided in his own reformulation by what he called these "radical changes" in judicial attitudes during "the last few years."[19]

In the leading case of *Eaton v. Boston, Concord & Montreal R.R.* (1872),[20]

the New Hampshire Supreme Court decided that any action by the state that interfered with the *use* of land was constitutionally a taking. The view that only a physical appropriation constituted a taking, the court declared, "seem[s] . . . to be founded on a misconception of the meaning of the term 'property'. . . ."[21]

> In a strict legal sense, land is not "property," but the subject of property. The term "property" . . . "means only the rights of the owner in relation to it." "It denotes a right . . . over a determinate thing." "Property is the right of any person to possess, use, enjoy, and dispose of a thing."[22]

This abstraction of the conception of property made sense as new varieties of legal interests, different from land, began increasingly to force themselves on the attention of courts. "A refusal to pay a debt is an injury to the property of the creditor," the New Hampshire Supreme Court noted two years later in explaining the *Eaton* case.[23]

> A patent right, a copyright, a right of action, an easement, an incorporeal hereditament, may be property as valuable as a granite quarry; and the owner of such property may be practically deprived of it,—such property may be practically taken from its owner,—although it is not corporeal. So those proprietary rights, which are the only valuable attributes or ingredients of a landowner's property, may be taken from him, without an asportation or adverse personal occupation of that portion of the earth which is his. . . . Property is taken when any one of those proprietary rights is taken, of which property consists.[24]

The case that was most influential in highlighting this dephysicalized definition of property was *Pumpelly v. Green Bay Co.*,[25] decided by the U.S. Supreme Court in 1871. *Pumpelly* involved the question of compensation for the destruction of property due to flooding caused by a governmentally authorized dam. In rejecting the traditional distinction between direct and consequential damages, Justice Samuel F. Miller wrote that "[i]t would be a very curious and unsatisfactory result, if . . . the government . . . can destroy [property's] value entirely, can inflict irreparable and permanent injury . . . without making any compensation, because, in the narrowest sense . . . it is not *taken* for the public use. . . ."[26]

Though the broadest implications of *Pumpelly* only gradually emerged, the case immediately presented a challenge to the prevailing idea that a taking constituted either a physical trespass or appropriation of title. Instead, it soon came to stand for the increasingly prevalent proposition that all restrictions on the use of property that diminished its market value were takings in the constitutional sense. By 1893, *Pumpelly* was being cited to support the expansive conclusion that any interference with the future income stream of an owner constitutes a taking of property.[27]

Property and Expectations

As legal thinkers sought to move away from physicalist definitions of property, they found it necessary to find some more abstract measure of interference with

those "bundles of rights" that legal writers and judges now identified with increasing frequency as constituting property. They tended, therefore, to turn to "market value" as the common denominator for measuring whether an interference with property represented a taking.[28] Indeed, there seems to have been a convergence between writings in law and those in economics, which with increasing regularity identified "market price" as the closest practical measure of objective value.[29]

The abstraction of property into market value at once freed the legal system from an increasingly archaic emphasis on physical invasion and brought to the surface many more fundamental difficulties that a concrete and tangible conception of property had been able to avoid.

With the development of the market value theory of property, legal thinkers were forced to face a basic contradiction in all legal theories of property built upon market value. How does one avoid the conclusion that any governmental activity that changes expectations and hence lowers the value of property constitutes a taking? While this question had emerged very early in American constitutional history, the legal conceptions then prevailing made it possible to avoid seeing its full implications.

At the heart of the post-Revolutionary American constitutional system was the principle that all retroactive lawmaking was an interference with property rights. The story of precisely how this principle was worked into American constitutional doctrine is long and complex. The problem appeared for the first time in the very early case of *Calder v. Bull* (1798)[30] in which the U.S. Supreme Court wrestled with the constitutional status of an act by the Connecticut legislature ordering a court to grant a new trial to a losing litigant. The case is famous for the Supreme Court's determination that the constitutional bar on ex post facto laws was limited to crimes and hence did not apply to the Connecticut legislature's actions. Since the meaning of the ex post facto clause was the only question formally submitted to the Court, the judges' more general unease with non-criminal retroactive laws did not find focused constitutional expression. Nevertheless, Justice James Iredell's defense of the constitutional validity of civil retroactive laws was perhaps the earliest expression of the fear that such a restriction would bring all governmental change to a halt. "The policy, the reason and the humanity of the prohibition" against retrospective criminal laws, Iredell wrote,

> do not . . . extend to civil cases that merely affect the private property of citizens. Some of the most necessary and important acts of legislation are, on the contrary, founded upon the principle, that private rights must yield to public exigencies. Highways are run through private grounds; fortifications, light-houses, and other public edifices, are necessarily sometimes built upon the soil owned by individuals. In such, and similar cases, if the owners should refuse voluntarily to accommodate the public, they must be constrained, so far as the public necessities require; and justice is done, by allowing them a reasonable equivalent. Without the possession of this power, the operation of government would often be obstructed, and society itself would be endangered.[31]

At this very early point in American constitutional history, the dilemma was clearly stated. How could one bar all retroactive laws while still managing to avoid

the absurd conclusion that every governmental action that interferes with settled expectations is unconstitutional?

Within two decades after *Calder v. Bull* was decided, the contracts clause of the Constitution came virtually to serve as a civil anti-retroactivity provision.[32] Through a series of distinctions thereafter developed under the contracts clause, however, the Supreme Court managed to avoid having to face the basic contradiction that if property rights consist of stable expectations, all changes in legal rules can be regarded as governmental interference with property.

Ultimately, it was the dominant physicalist conception of property that muted the contradiction during the antebellum period. Its most significant application under the contracts clause was the distinction between "vested" and "non-vested" rights. Drawing on the law of landed estates, the constitutional distinction sought to establish a delimited category of vested rights that the state could not retroactively change. No other expectations were constitutionally protected against changed legal rules.[33]

For our purposes, the most important aspect of the vested rights doctrine was that it enabled courts to avoid the *reductio ad absurdum* that every change in legal rules constituted an interference with property rights. Yet since the vested rights doctrine itself was founded by analogy to the vesting of landed property by way of title, it became increasingly difficult to decide whether other, more abstract and intangible property interests had also been vested. Indeed, the problem was already foreshadowed as early as 1827 in the great case of *Ogden v. Saunders*.[34] In that case, by a four to three vote, the U.S. Supreme Court decided that a state insolvency law that affected future debts was not unconstitutional. Eight years earlier, the Court had held unconstitutional an insolvency law discharging debtors from obligations previously incurred.[35]

Ogden v. Saunders was decided just as the nature of property was in the process of substantial transformation. In 1789, no one would have doubted that a vested right to property meant, above all, fee simple ownership of land. But during the intervening forty years, a dazzling variety of abstract and intangible property claims had developed out of an increasingly commercial society. Vested rights therefore could no longer be defined simply in terms of concrete and universally recognized interests in land. It was now necessary to decide whether corporate charters, stock ownership, contractual debts, and a host of other abstract and intangible commercial interests should also be counted as vested property. The question thus began to turn on attempting to define a more abstract, arguable, and elusive set of expectations that government was bound to respect. As it became necessary in these increasingly novel areas to define vested rights more abstractly, legislative claims to interfere with the very definition of property posed a correspondingly greater threat.

In *Ogden v. Saunders*, the majority simply reaffirmed what had by now become a conventional formal distinction between prospective and retrospective laws. But Chief Justice John Marshall, in dissent, argued for the first time that *all* statutory interferences with a contractual obligation were in fact retrospective laws.

According to Chief Justice Marshall as well as to Justice Joseph Story, all state bankruptcy laws, whether they operated on past or future contracts, were unconstitutional. Marshall maintained that virtually all established expectations, including the expectation of the power to contract in the future, were vested property rights. The obligation of a contract was not "the mere creature of society, . . . deriv[ing] all its obligation from human legislation." Some argued that contractual obligation "is not the stipulation an individual makes which binds him, but some declaration of the Supreme power of a State to which he belongs, that he shall perform what he has undertaken to perform." "On the contrary," Marshall argued, contract establishes "a pre-existing intrinsic obligation which human law enforces." Contracts exist "anterior to, and independent of society . . . [and] like many other natural rights, . . . although they may be controlled, are not given by human legislation."[36]

This was Marshall's only dissent in a constitutional case. That he could not bring a majority with him underlines how, from its earliest decisions, the Supreme Court had struggled to avoid the conclusion that every change in the laws that adversely affected the value of property constituted either an unconstitutional taking or, as its closest functional equivalent under the antebellum federal Constitution, an interference with the obligation of contract.[37] By confining the prohibition on state retroactivity within the limits of vested rights and by attempting to define the vesting of those rights by analogy to the law of real property, the Court sought to create manageable and practical limits on the confiscatory power of the state.

The gradual collapse of a physicalist definition of property after 1870 revived all of the contradictions that had been barely suppressed in traditional doctrine. For as the definition of a property right became divorced from concrete physical objects with bright-line boundaries and came to turn more and more on abstract ideas of individual expectations of stable market values, the very conception of property became infinitely expandable. The result was that during the 1880s and 1890s a variety of new property interests for the first time received recognition by American courts. These property interests were endowed with what, by traditional standards, can only be called extravagantly expanded prerogatives. During this period, American courts came as close as they had ever had to saying that one had a property right to an unchanging world.

But the very abstraction in the conception of property during the last two decades of the nineteenth century was ultimately the source of its own undoing.

Hohfeld's Influence on Legal Thought

If abstraction threatened to "propertize" the entire world of legal relations, it also encouraged the earliest efforts to undermine and subvert the extreme conceptualism of orthodox legal thought. Every move of intellectual integration eventually encountered an equally powerful movement aimed at resisting any imperial idea

of property. Every attempt at construction of a systematic conception of property based on market value generated an effort at deconstruction thus sought to demonstrate the tautological and all-consuming character of the concept. Each effort at aggregation of the multiple and varied areas of property doctrine under the concept of "right" produced a reaction aimed at disaggregating the very idea of property itself.[38]

One of the most influential figures in the Progressive assault on the conceptualism of the old order was Yale Law Professor Wesley N. Hohfeld, whose analytical system of "jural relations" had an electrifying impact on some of his most brilliant contemporaries.

In a famous 1913 article,[39] Hohfeld set forth his two tables of eight "fundamental legal conceptions":

Jural Opposites

right	privilege	power	immunity
no right	duty	disability	liability

Jural Correlatives

right	privilege	power	immunity
duty	no right	liability	disability

The problem of recapturing the political and theoretical significance of Hohfeld's categories is not without its difficulties. For while it has become "a staple of academic legal culture," Hohfeld's system "survives, like a sack of dried beans, unesteemed by those who have lost the recipe for its use. . . . By today's law students (not to speak of their teachers), Hohfeld is often envisaged as a chap with a scholastic passion for terminological nicety—at worst a carping bore, at best an authentic, if pedantic exemplar of the academic virtue of precision."[40]

To understand where Hohfeld was "coming from," we need first to place him squarely within pre–World War I Progressive legal culture. Hohfeld's speech before the Association of American Law Schools in 1914 captures his relationship to the Progressive movement.[41] Hohfeld endorsed President Woodrow Wilson's call for a "fresh and critical analysis" that would lead to "nothing less than a radical reconstruction" of American society. "Society is looking itself over in our day from top to bottom," Hohfeld quoted Wilson as saying, Then he asked: "Have our university law schools been giving full recognition to what Mr. Wilson calls the conscious struggle for change and readjustment which characterizes our era?"[42]

Within this political context, Hohfeld explained the need for a "Formal, or Analytical, Jurisprudence" that would provide "an accurate and intimate understanding of the fundamental working conceptions of all legal reasoning." It was "not . . . a mere matter of juridical ornament or intellectual delight. On the contrary, it would be difficult to overestimate the economic and social value" of such an undertaking.[43]

While analytical jurisprudence appealed to logical consistency, another branch,

critical or teleological jurisprudence, sought "a more comprehensive, coordinated and synthetic consideration of the underlying psychological, ethical, political, social and economic causes and purposes of the various branches and specific rules of the law."[44] Hohfeld clearly regarded his own efforts at analytical jurisprudence as a preliminary step toward understanding how law related to what he called society's "underlying policies and purposes."[45]

Here he stood in a line of analytical jurisprudence that had begun in England with Jeremy Bentham and John Austin and was made prominent in America by Oliver Wendell Holmes, Jr., as well as by that obscure classifier, Henry Terry. In late-nineteenth-century England, academic jurisprudence was dominated by Austin's disciples Thomas Holland and John Salmond.[46]

What of the actual system Hohfeld created? It appears to be one of the pioneering attempts by a Progressive legal thinker to deconstruct the abstract character of orthodox conceptions of property.[47] Hohfeld seems to have had two broad intellectual strategies in mind in creating his tables of jural "correlatives" and "opposites." Each of the correlatives was, in effect, no more than a tautology. Each of the opposites was, in effect, a contradiction. By showing, for example, that rights and duties were correlatives, Hohfeld reintroduced a theme highlighted by Holmes forty years earlier.

The question of whether to have a jurisprudence of rights or of duties had been one of the classical issues in analytical jurisprudence, beginning with Bentham. It resurfaced as a central preoccupation of Anglo-American legal theory only with the posthumous 1863 publication of the complete edition of John Austin's *Lectures on Jurisprudence*.[48] Austin, an intimate of Bentham and of James and John Stuart Mill, had originally given his lectures at the University of London in 1828 and had published some of them in 1832. Yet "no notice was taken" of the book, and "it was never reviewed in any learned journal."[49] Indeed, Sarah Austin, who arranged for the publication, observed that her husband had lived "a life of unbroken disappointment and failure." Yet, because of her efforts, "within a few years of [Austin's] death, it was clear that his work had established the study of jurisprudence in England."[50]

"Right, like Duty, is the creature of Law, or arises from the command of the Sovereign,"[51] Austin wrote. "[T]he term 'right' and the term '*relative* duty' are correlating expressions. They signify the same notions, considered from different aspects, or taken in different series."[52]

"Law is the Command of the Sovereign" is a traditional positivist formula that begins with Thomas Hobbes, appears in both Blackstone and Bentham (notwithstanding Bentham's vicious attack on Blackstone),[53] and is repeated by Austin. How much of Austin's positivism derived from Bentham's attack on the "anarchical" implications of the French Declaration of the Rights of Man,[54] and how much from Bentham's radical schemes of legislative codification[55] and his corresponding contempt for the common law and its "fundamental law" tradition,[56] is very difficult to measure.

Austin's positivism seems to have resonated with Holmes's own post–Civil

War fears of the anarchical implications of the abolitionists' use of natural rights theories.[57] In 1870, Holmes joined in the revival of Austin's jurisprudence. "Duties precede rights logically and chronologically," Holmes declared in the first systematic essay he ever published.[58] Though less famous than many of his aphorisms, it was perhaps his most revolutionary statement.

The rediscovery of Austin tells us much about the need of late-nineteenth-century legal thinkers for a systematic and integrated system of jurisprudence. Even more significantly, it underlines the widespread desire to attack any system of law built on a foundation of natural rights. In England, with its relatively weak natural rights assumptions, such a turn could easily be assimilated into the dominant tradition of parliamentary supremacy. In America, however, Holmes was declaring his opposition to perhaps the most basic element of political and legal culture. To import Austin into America was, therefore, to challenge the most fundamental underlying premise of American law.

What was Progressive about analytical jurisprudence when Hohfeld reintroduced it in America in 1913? We have seen that it contributed to the subversion of absolute property rights and substituted a vision of property as a social creation.[59] From the 1870s, we have seen as well, a de-physicalized conception of property had vastly expanded the outer limits of the right to property.[60] During the 1880s, the federal courts had begun to use the idea of interference with these more abstract and intangible property rights to generate the labor injunction.[61] Some courts expanded the idea of business goodwill well beyond its traditionally narrow usage, so that every form of coercive labor union activity was defined as an interference with property. Others concluded that any organized labor activity that reduced the market value of a business could be treated like a common law nuisance.[62] The breathtaking speed with which the federal courts instituted the labor injunction was partly a function of this propertizing conceptual move. To the extent that courts conceived of unions as inflicting damage on property no differently from a common law nuisance, they were more than ready to deploy one of the traditional weapons against a nuisance—the injunction. Indeed, in their passion to legitimate the non-discretionary character of the labor injunction, some courts in this period generalized the principle and saddled American law with the formalistic doctrine that whenever a nuisance is found, an injunction must be issued as a matter of course.[63]

Holmes began to resist the propertizing move in the labor cases around 1895, in his famous dissent in *Veghelan v. Guntner*[64] and his article "Privilege, Malice, and Intent."[65] The main thrust of his effort was to challenge the dominant rights-based theory of the labor cases. In this sense, he was re-connecting with the Austinian interests of his youth. The labor cases were also closely related to the issue of "competitive injury," which raised the question of whether property rights were compatible with the right to inflict injury on one's competitors.[66]

We have seen that the question of competitive injury—of the relationship between the right to property and the legitimacy of injurious competition—was one of the dominant intellectual issues in the law during the 1890s. It appeared

in constitutional challenges to the Sherman Act, as well as in common law discussions of whether cartelization was a legitimate form of competition. Finally, it was Holmes who insisted in the labor cases that the struggle between labor and capital was but another version of competition and should be understood in the same way.[67] In framing the issue as one of competition versus property, Holmes was erecting a challenge to orthodox rights-based conceptions of legal reasoning. Hohfeld appears to have understood and carried forward this Holmesian move.

Late-nineteenth-century courts were "conceptualistic" in the sense that they believed that one could derive particular legal rules and doctrines from general concepts such as property.[68] And they were formalistic in believing that one could logically deduce these rules from the nature of property itself. Property, then, was thought to have an essence or a core of meaning, even if there could be legitimate argument about what was to be included at the periphery. Moreover, the orthodox idea of property was that it was a pre-political, Lockean natural right not created by law, though all lawyers recognized that the law might be needed to specify rights for the hard cases at the periphery of the concept.[69]

In late-nineteenth-century orthodox legal thought, it was thus possible to make statements such as "a labor boycott is inconsistent with the right to property" or "coercive picketing violates the employer's property rights and therefore should be enjoined." What workers could and could not legitimately do was thought to follow logically from the very definition of their employers' property rights.

By calling rights and duties "correlatives," therefore, Hohfeld sought to subvert the privileged position that rights had occupied as the starting point for orthodox legal analysis. He thus wished to relativize rights discourse by emphasizing that one might just as logically begin such an analysis with the concept of a duty created by law. A right therefore became simply the legal enforcement of a socially created duty.

Equally important was Hohfeld's classification of "privilege" as not logically entailing a right. "The lesson is that there is no logically necessary bond between a right over some act . . . and a privilege over that same act . . ., no logical reason why having the right must go with having the privilege, or vice-versa."[70]

Hohfeld's analytic scheme seemed to have had an electrifying influence on his Yale Law School contemporaries, Walter Wheeler Cook and Arthur L. Corbin, who were struggling to break out of the prevailing orthodoxy of rights discourse in their respective fields, conflicts of laws and contracts. Indeed, in his devastating analysis of the *Hitchman Coal Case* (1917),[71] published shortly after Hohfeld's tragically premature death, Cook self-consciously offered the only extant example of an application of Hohfeldian analysis to an actual legal problem.[72]

In the *Hitchman Coal Case*, the U.S. Supreme Court held that an employee's agreement with his company not to join a union created a right in the company to enjoin a union organization drive. The fact that the company had the *privilege* of employing non-union labor—that is, the state did not bar such activity—did not mean that it also had a *right* to prevent unionization, Cook showed. "So far, therefore, as the learned justice meant to say that the *right* of the plaintiff to

protection *necessarily* followed as a matter of mere logical inference from the *privilege* to make the agreements . . ., the reasoning is clearly fallacious," Cook concluded.[73]

The most important consequence of Hohfeld's system of classification was that it carried through the radical implications of a de-physicalized system of property.[74] Property consisted of abstract legal relations, not physical things, Hohfeld showed. As Arthur L. Corbin put it in 1922, "Our concept of property has shifted; incorporeal rights have become property. And finally, 'property' has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities."[75]

The idea that property consists merely of "a bundle of legal relations" is perhaps the most radical and far-reaching implication of Hohfeld's system. "By breaking property into its constituent parts, Hohfeld both demonstrated that property does not imply any absolute or fixed set of rights in the owner and provided a vocabulary for describing the limited nature of the owner's property."[76]

The Higher Law Basis of Classical Legal Thought

The struggle over whether there should be a jurisprudence of rights or of duties highlights one of the most complex questions about how to understand Classical Legal Thought. A pervasive Progressive criticism of Classical Legal Thought charged orthodox jurists with having imported natural law into constitutional interpretation. The "revival of natural law concepts" came to be treated as one of the major explanations of how the Supreme Court during the *Lochner* era was able to write its own views of the Constitution into law.[77] The charge is also closely related to criticism of the emergence of so-called substantive due process during the twenty years before *Lochner*.[78]

Much of the confusion over this question derives from lack of clarity about how late-nineteenth-century lawyers thought about the character of higher law. At the time of the drafting of the Declaration of Independence, there was confusion over four different conceptions of higher law.[79] The first was medieval Thomistic natural law, with its premise that any positive law that violated natural law was void.[80] While this view had never been as influential in England as it was on the Continent, by the late eighteenth century it had been largely marginalized by English jurists.[81]

The communitarian and hierarchical character of traditional natural law also began to be transformed by the emergence of individualistic ideas of natural rights in seventeenth-century social contract theories. Emphasizing the primacy of prepolitical rights in nature, the liberal social contract thinkers believed that positive law, especially laws dealing with property, should reflect those natural rights that individuals retained when they agreed to enter into civil society. Unlike traditional natural law, natural rights theories were centered on conflict between the individual and the state.[82]

In the period leading up to the American Revolution, these two very different versions of higher law were perhaps overshadowed in English and American constitutional thought by the notion of fundamental law, which usually referred to the "immemorial rights of Englishmen" or some other conception of immemorial custom.[83] Jefferson's great accomplishment was that he managed to weave all of these different strands of higher law thinking into the Declaration, adding perhaps a fourth variation as traditional natural law ideas were slowly reformulated into a Newtonian vision of universal moral laws.[84]

The Progressive charge that legal orthodoxy illegitimately turned to natural law in the late nineteenth century was built on several foundations. Beginning with the early Supreme Court case of *Calder v. Ball* (1798),[85] there had been a running debate in early American constitutional history over whether it was appropriate for judges to go outside of the specific provisions of a written constitution to invoke higher law principles. And while judges and jurists of the *Lochner* era were virtually unanimous in concluding that it was inappropriate to go outside of the Constitution, the charge that they did so nevertheless has been widely shared among constitutional historians.

The first count in the historians' indictment derived from what Edward S. Corwin called the "doctrine of implied limitations."[86] As we saw earlier,[87] late-nineteenth-century courts were willing to hold that, for example, an unequal tax "impliedly" violated a state constitutional provision requiring separation of powers because only taxation for revenue, not for purposes of redistribution, was a legislative act. Using similar reasoning, antebellum state courts had struck down uncompensated takings, even without a specific just compensation provision.

The question of how much one can legitimately imply from a provision in a contract, statute, or constitution has been a perennial issue in legal theory. It appeared early in American constitutional history in debates over Jeffersonian strict constructionism, as well as in Chief Justice John Marshall's expansive conception of the implied powers of the national government in *McCulloch v. Maryland*.[88] Similarly, in the late nineteenth century, we saw, the scope of implication in contract law was a major subject of controversy.[89]

The debate over the legitimate scope of implication was closely related to the more general Progressive challenge to the breadth of legal reasoning in Classical thought. As we shall see,[90] to the extent that Progressive jurists insisted that analogical reasoning needed to be restricted because analogies were productive of judicial legislation, they would similarly be suspicious of any claims about the neutral or necessary character of legal implication. If general propositions could not decide concrete cases, it was unlikely that one would believe that legal implication from highly abstract conceptions could be non-discretionary. If, by contrast, a concept was thought to have a fixed essence or core of meaning, it was correspondingly easier to derive particular sub-rules or doctrines from more general principles. Much of the Progressive charge that the *Lochner* court turned to higher law was really an expression of Progressive disbelief in the claimed power and scope of traditional legal reasoning.

The other, more obvious source of the Progressive charge that legal Classicists turned to natural law focuses on the question of the rise of substantive due process after the Civil War. In my judgment, this argument was largely a fabrication of Progressive thought, designed to delegitimate the *Lochner* court by arguing that it had taken a completely unprecedented turn in the late nineteenth century. In fact, under the due process clause of the Fourteenth Amendment, the Supreme Court after the Civil War promulgated doctrines not very different from those that had previously been developed under, for example, the contracts clause or state just compensation provisions. While there was considerable debate among *Lochner* court judges over whether the Civil War amendments should result in a vastly more interventionist federal constitutional system—a debate that included the very important claim that the amendments were meant to be limited to the protection of newly freed blacks—the controversy did not significanlty turn on whether due process had previously been restricted to a procedural meaning. It was easy to confuse the controversial expansion of federal judicial power under the Fourteenth Amendment with a supposed change in constitutional methodology from "procedural" to "substantive" due process. That confusion was largely produced by later critical Progressive historians intent on delegitimating the *Lochner* court.

While natural rights conceptions were extremely important in shaping the character of Classical Legal Thought, they did not usually operate as higher law principles that alone could determine the validity or invalidity of positive law. Rather, natural rights discourse structured legal argument by suggesting starting points, background assumptions, presumptions, or first principles in the law.

Perhaps the best way to see this is by turning to Robert M. Cover's discussion of the influence of natural rights ideas on anti-slavery judges before the Civil War. In a typical expression, one of these judges declared in 1845:

> Slavery is wrong, inflicted by force and supported alone by the municipal power of the state or territory wherein it exists. It is opposed to the principles of natural justice and right, and is the mere creature of positive law. Hence, it being my duty to declare the law, not to make it, the question is not, what conforms to the great principles of natural right and universal freedom—but what do the positive laws and institutions . . . command and direct.[91]

As Cover indicates, this statement captures the place of natural law/natural rights doctrines in the structure of antebellum constitutional discourse. He writes:

> [T]he courts uniformly recognized a hierarchy of sources of law . . . in which "natural law" was subordinate to constitutions, statutes, and well-settled precedent. This hierarchy was clearly established and unambiguously articulated by the courts. The reason for natural law's subordinate place was a thoroughgoing positivism concerning the origin of "law." Law was perceived as operative and valid because of a human constituent process and by virtue of valid lawmaking processes in pursuance of that Constitution. It was the will of men that gave law its force. But men look to various sources for the content of their law. And one very important kind of source is that which declares what is right and just. Most of the jurists of this period felt comfortable designating this tradition as "natural law" and finding it in books and maxims that were self-styled statements of the law of nature. This body of principles and rules was conceived of as "existing," though without authority, apart from its incorporation, by virtue of men's wills, in the "law" of a particular state. Natural law was, indeed, a subject for study by the lawyer or law student because it was helpful in understanding the principles underlying so much of a rational legal system. It was also one potential source for formulating new rules or modifying old ones.[92]

Cover's understanding is confirmed by virtually all Classical legal thinkers. For example, Christopher G. Tiedeman, whose influential *A Treatise on the Limitations of the Police Power in the United States* (1886) was a major building block of laissez-faire constitutionalism, has been regularly portrayed as a natural law thinker.[93] Yet Tiedeman began his treatise by rejecting Justice Chase's early view in *Calder v. Bull* that it was appropriate to appeal above the Constitution to natural law principles. "[T]he current of authority, as well as substantial constitutional reasoning, is decidedly opposed to the doctrine," Tiedeman proclaimed.

> It may now be considered as an established principle of American law that courts, in the performance of their duty to confine the legislative department within the constitutional limits of its power, cannot nullify and avoid a law, simply because it conflicts with judicial notions of natural right or morality, or abstract justice.[94]

Like Cover's anti-slavery judges, Tiedeman was willing to appeal to higher law principles in the interpretation and "reasonable construction" of positive law. "[A]lthough these fundamental principles of natural right and justice cannot, in themselves, furnish any legal restrictions upon the governmental exercise of police power . . . yet they play an important part in determining the exact scope and extent of constitutional limitations."[95]

Nor was Tiedeman unique in his views. The other great exponent of laissez-faire constitutionalism, Judge Thomas M. Cooley, was equally clear in his *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* that a court could not declare a statute unconstitutional "solely on the ground of unjust and oppressive provisions or because it is supposed to violate the natural, social, or political rights of the citizen. . . ."[96]

For Progressive jurists bent on de-legitimating the claimed autonomy of orthodox legal reasoning, any distinction between judicial interpretation and construction, on the one hand, and judicial lawmaking, on the other, simply represented an effort to disguise the appeal to natural law principles. Yet just as anti-slavery judges acknowledged that these ideas restricted the scope of what they could legitimately do as judges, so too is there no reason to doubt that Classical legal thinkers felt just as constrained by their own positivistic framework. It is that framework that Progressive constitutional historians ultimately failed to acknowledge.

Rate Regulation

Legal positivism combined with the de-physicalization of property to produce dramatic legal changes in the area of judicial oversight of the "reasonableness" of governmentally regulated rates. The process of overseeing the reasonableness of rates forced courts to articulate abstract conceptions of property, and especially of value, that constituted a sharp departure from the emphasis on physical intrusions across boundaries that had marked earlier legal definitions of interference with property. Moreover, the rate cases impelled most courts to think in terms of the "market value" of property for the first time. This process of abstracting the idea of property into market value was not only dangerously over-inclusive—it made virtually every change in government policy that caused a decline in market value potentially a taking—it also eventually exposed the circularity in the very conception of property, a circularity that had been hidden from view by the traditional land-centered distinction between direct and consequential injuries.

Perhaps the best way to see the influence of judicial oversight of rate making on the conception of property is to turn to the intense debate during the 1920s about value in determining the base from which to judge the fairness of a public utility's rate of return.

From the moment that the U.S. Supreme Court imposed a reasonableness requirement as a check on confiscatory rates, the definition of the value of property became a major question of federal constitutional law. In *Smyth v. Ames* (1898),[97] the Court sought to establish a test to determine the reasonableness of rates. "The conflicting desires which plagued the Supreme Court in the [rate] cases were reconciled by the unanimous adoption of a formula which conceded what the majority of the court desired, the power to regulate, and yet guarded against what the minority feared, confiscation."[98]

Whether the Court's decision in *Smyth v. Ames* should be given its traditional reading as establishing a set of multiple (and hence difficult to administer) factors to be considered in determining the fair value of property or, as one scholar has argued,[99] be read as in fact adopting a "reproduction cost" standard, everyone agrees that somewhat later, during the 1920s, the Court did finally fix upon reproduction cost as the required constitutional measure of value.[100]

By this time, reproduction cost had begun to be extremely controversial, since it had only recently become extraordinarily favorable to railroads and other utilities as a result of war-induced inflation. While "[o]ver the first decade and a half after *Smyth v. Ames* the price level slowly rose," between 1913 and 1920 prices increased by almost 150 percent. Suddenly, "[t]he relative equivalence of historic and present costs was broken; decidedly different results once again followed from whether reproduction [or historical cost] set the limits on government rate regulation."[101] The standard for measuring value suddenly became both a central issue of public policy on which millions of dollars turned and a fundamental theoretical question about the nature of property. Beginning in 1920, a number

of prominent legal scholars addressed these questions.[102] They showed how, by the time *Smyth v. Ames* was decided, the idea of reasonableness in rate regulation and come to rest "on the analogy of the law of eminent domain."[103]

It had not always been so. Justice John Marshall Harlan had proposed analyzing rate regulation under a contract theory by which the corporate charter had impliedly required reasonable rates.[104] Even Justice David J. Brewer, who eventually became the leading proponent of a property theory that analogized the problem to eminent domain law, had seemed to propound the contract theory as late as 1901. "[I]s there not force in the suggestion," Brewer wrote, "that as the State may do the work without profit, if he voluntarily undertakes to act for the State he must submit to a like determination as to the paramount interests of the public?"[105]

The debate over contract versus property theories symbolized much deeper conflicts over basic ideas about property. The analogy to eminent domain law—the property conception—was correctly charged with having a bias in favor of higher valuations. As Donald R. Richberg wrote in 1927:[106]

> In the public utility field, monopoly (partial or complete) is accepted as a desirable condition. But for many centuries such monopolies have been subject to regulation in order to prevent the charging of unreasonable rates. The charging of unreasonable rates, if skillfully imposed, undoubtedly would enhance the value of the property used. Thus we find that the very purpose and necessary effect of public regulation is to diminish the value that otherwise might be realized.[107]

The Court, in insisting on reproduction cost as the measure of value, Richberg wrote, was assuming, by contrast, "that the private owner of public utility property should be given the same value for his property that it would possess if it were being used in private business."[108] The Supreme Court's adoption of reproduction cost grants the utility its "monopoly value," not its competitive value, Richberg charged:

> The theory of the opinion . . . permits the utility to disregard its implied promise . . . that the private operation of the public service should not be used as the means for compelling the public to pay rates grossly in excess of those which could be secured for the public by public operation of public service. Public competition has been prevented by assurance that the benefits of "free competition" would be preserved. Essentially the demand of the utilities for a monopoly value is a breach of faith.[109]

The Supreme Court's adoption of the eminent domain theory represented an acceptance of the view that the natural starting point for analysis was private, not governmental, ownership and that rate regulation was thus essentially confiscatory. Richberg had begun to develop the alternative Legal Realist view—given its classic formulation the very same year by Morris R. Cohen in "Property and Sovereignty"[110]—that property constituted a delegation of state power to private individuals. And more specifically, Richberg was part of a movement that emphasized that the measure of value was not simply a factual or scientific question but

also one deeply embedded in controversies about the nature and purpose of property.

The Supreme Court's rate-making decisions, Gerard Henderson saw in 1920,[111] were regularly shrouded in an aura of science—he called it "the illusion of juristic necessity." "[T]he [C]ourt has been trying to ascertain not a rule of policy, but a discoverable fact. The question has been, not what is it wise to allow the company to earn, but what is the value of the property on what it must be allowed to earn a return."[112]

Why invoke the authority of science, of the "conception that there is a fact which can be discovered . . . and which, once it is found, will provide a mathematical solution of all rate-making problems . . . ?"[113] Henderson answered:

> Above all, the judges must have been anxious to avoid the suspicion that they were substituting their own discretion for the will of the legislature. . . . What the value of a railroad was, seemed on the surface to be a pure question of fact. . . . A judge who upset a state statute on the ground that it failed to allow a reasonable return on the fair value of the property seemed protected against any charge of usurping legislative power.[114]

The brilliant and extensive technical writing on the measure of value in rate-making seems clearly to have inspired some of the more general theoretical Legal Realist literature on the nature of property. Not only do both bodies of writing share a common hostility to "the illusion of juristic necessity"—to the substitution of scientific for political discourse—but each sought to demonstrate how de-physicalization encouraged the view that the legal conception of property was completely circular. Just as the shift in the eminent domain cases from physical invasion to reduction in market value threatened to "freeze" the world by "propertizing" expectations of stable market values, the identification of value with market value in the rate cases created a similar dilemma.

The first thinker to see the relationship between the de-physicalization of property and its abstraction into market value was the great Wisconsin institutional economist John R. Commons. His penetrating—though often obscure—*Legal Foundations of Capitalism* (1924) traced the late-nineteenth-century judicial shift to a market value standard. The Rate Cases, in particular, allowed Commons to appreciate that it was the guarantee of a *future* income stream that determined the *present* value of property. "All value is expectancy," Commons proclaimed.[115] In rate-making cases, "market value is the present value of the expected rates. If the rates are unreasonable, so is the market value."[116]

Judges who believed that reasonable rates could be deduced from fair market value were "reasoning in a circle," Commons declared.[117] He relied on Gerard C. Henderson's extraordinarily brilliant demonstration of circularity four years earlier.[118] Henderson had imagined a dialogue between an economist and a lawyer before a rate-setting commission:

> The company's attorney . . . suggests that it be allowed always a certain percentage on the value of the property. If value goes up, rates should go up proportionately. But the economist points out that the only accepted and sensible meaning of the word "value" is "value in exchange,"—the amount which the property would bring at a free sale, and that obviously this depended mainly on earnings. "But earnings," he said, "will depend partly on what we allow you gentlemen to charge the public. If we reduce your rates, your value goes down. If we increase them, it goes up. Obviously we cannot measure rates by value, if value is itself a function of rates.[119]

Henderson's demonstration of the circularity of prevailing notions of value was widely accepted. Indeed, it may have provided the model from which Commons succeeded in generalizing the point to cover all forms of property. Commons was thus able to claim not only that the shift from landed to intangible forms of property required an increasingly abstract idea of property, but also that it made any distinction between present market value and future income entirely circular.

If, as Commons argued, "all value is expectancy," it pushed the legal idea of property to the verge of the *reductio ad absurdum* that antebellum land-based ideas had for so long succeeded in obscuring. Since any prospective change in the law that reduced future income necessarily also reduced the property's present market value, it seemed to mean nothing less than a constitutional guarantee that the future should remain unchanged. Antebellum physicalist ideas had long managed to avoid this dilemma.

The next step in the developing critique of the property idea was taken by Robert L. Hale, an extraordinarily fertile economist on the Columbia Law School faculty. In "Rate Making and the Revision of the Property Concept" (1922),[120] Hale argued that the developing analysis of value in the public utility area needed to be generalized to all property.

A "monopoly" analysis of the justification of public utility regulation was too restrictive. "There is scarcely a single advantage possessed by a business affected with a public use which cannot be matched in the case of some unregulated concern. . . . [T]here is not a single income-yielding property right, inside or outside the utility field, which can be enjoyed on equal terms by *everyone*. To speak of equal rights of property is ridiculous."[121]

> The truth which most rate bodies lack the courage to face is, that in regulating the rates of utilities the law is trying the experiment in one limited field of turning its back on the principles which it follows elsewhere. The experiment may perhaps be extended to other fields if successful. We are experimenting with a legal curb on the power of property owners. In applying that curb, we have to work out principles or working rules—in short a new body of law. Those principles will necessarily differ from the ones upon which the law acts in other fields—for in other fields it acts on the assumption that whatever income a property owner can get without fraud by virtue of his ownership is legitimately his. In the utility field, standards of what it is proper for an owner to get out of his ownership have to be worked out *de novo*. Because, therefore, the law permits various kinds of income outside the regulated field, it does not follow that similar forms are to be approved within the

regulated field. The revision of property rights worked out within the utility field may very well serve as a model, wherever applicable, for the revision of other property rights.[122]

Next, Hale used Hohfeld's analytical scheme to reach a striking conclusion:

> The right of ownership in a manufacturing plant is, to use Hohfeld's terms, a *privilege* to operate the plant, plus a *privilege* not to operate it, plus a *right* to keep others from operating it, plus a *power* to acquire all the rights of ownership in the products. The analysis is not meant to be exhaustive. Having exercised his power to acquire ownership of the products, the owner has a *privilege* to use them, plus a much more significant *right* to keep others from using them, plus a *power* to change the duty thereby implied in the others, into a privilege coupled with rights. This power is a power to release a pressure which the law of property exerts on the liberty of the others. If the pressure is great, the owner may be able to compel the others to pay him a big price for their release; if the pressure is slight, he can collect but a small income from his ownership. In either case, he is paid for releasing a pressure exerted by the government—the law. The law has delegated to him a discretionary power over the rights and duties of others.[123]

Hale's conclusion that "the law has delegated" to property owners "a discretionary power over the rights and duties of others" represented a major analytical breakthrough that should perhaps be considered one of the moments at which Legal Realism separated itself from Progressive jurisprudence. It not only laid the foundation for one of the great classics of Legal Realism, Morris Cohen's "Property and Sovereignty" (1927);[124] it also anticipated Hale's own original gem, "Coercion and Distribution in a Supposedly Non-Coercive State" (1923).[125]

Hale not only totally reconceptualized property as a delegation of state power to private individuals but also pushed this conclusion still further. "Ownership is an indirect method whereby the government coerces some to yield an income to the owners. When the law turns around and curtails the incomes of property owners, it is in substance curtailing the salaries of public officials or pensioners."[126]

> Frequently the owner can only exercise his power of coercion as a result of having rendered in the past some service in the production of wealth, or of having abstained from consuming all the wealth which he might lawfully have consumed. For this and other reasons of policy it would be as bad to abolish all incomes arising from ownership as it would be to abolish all salaries and pensions. On the other hand it would be as absurd to justify any particular utility values on the ground that their legitimacy is generally recognized in other fields, as it would be for a municipal administration to justify a salary of a sinecure on the ground that some other administration of some other city still pays that sort of salary. Any value which is still to be allowed to a utility company must be justified on some independent ground of policy.[127]

Property as Public Law

With the relativization of the concept of property, Progressive legal thinkers pushed on to challenge the distinction between public and private law as it applied to property.

By and large, Progressives of Brandeis's generation had great difficulty in transcending the great gulf posited by the legal system between public and private law. Instead, they tended to conceptualize most legal questions as involving the need to strike a balance between private property and the public interest. Thus, while they seemed to accept the private law character of property, they agreed that it might be modified constitutionally in the case of "businesses affected with the public interest."

The really radical reconceptualization of property that I would identify with Legal Realism is associated with a far more fundamental challenge to the private law status of property ideas. The most prominent example is the great article "Property and Sovereignty" (1927), in which the philosopher Morris Cohen offered a major contribution to the disintegration of the orthodox distinction between public and private law.[128]

"Th[e] distinction between public and private law is a fixed feature of our law-school curriculum," Cohen began.[129] First, he emphasized what Hohfeld and Hale had begun to make clear. "Whatever technical definition of property we may prefer, we must recognize that a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things."[130] Next, he challenged the unbounded claims of legal orthodoxy to protect all forms of property. "[I]n all civilized legal systems there is a great deal of just expropriation or confiscation without any direct compensation."[131] The abolition of slavery and the prohibition of liquor were two examples. "We may go farther and say that the whole business of the state depends upon its rightful power to take away the property of some (in the form of taxation) and use it to support others."[132] Here we see clear evidence of the dramatic defeat that ratification of the Income Tax Amendment in 1913 represented for the orthodox goal of creating a clean distinction between a tax and a taking. Not only had the constitutional legitimacy of the progressive income tax muddied that distinction but, even more important, it had discredited the Classical notion that a neutral state entailed opposition to redistribution.

Finally, under the heading "Property as Power," Cohen challenged the Classical private law definition of property. "The character of property as sovereign power compelling service and obedience may be obscured for us in a commercial economy by the fiction of the so-called labor contract as a free bargain and by the frequency with which service is rendered indirectly through a money payment."[133] Here Cohen was summarizing almost a generation of American legal and social thought emphasizing the coercive character of property.

Since at least the turn of the century, Progressive economists had highlighted the coercive character of property. As early as 1903, for example, in a book ded-

icated to Justice Holmes, the Progressive economist Richard T. Ely emphasized that an increasingly concentrated and unequal distribution of wealth had resulted in "the coercion of economic forces."[134] "The coercion of economic forces is largely due to the unequal strength of those who make a contract, for back of contract lies inequality in strength of those who form the contract."[135]

Beginning with the founding of the American Economic Association in 1885, anti-laissez-faire economists had developed arguments either for public ownership or for regulation of monopoly, as well as for governmental intervention to improve working conditions, to prohibit child labor, and to allow concerted action by labor unions.

Perhaps the most influential Realist work to highlight the connection between property and power for an entire generation was *The Modern Corporation and Private Property* (1932), by Adolph A. Berle and Gardiner C. Means. Its famous distinction between absentee shareholder ownership and management control of the property of the modern public corporation captured the imagination of a wide array of scholars of law and economics.

Berle and Means argued, "The shifting relationships of property and enterprise in American industry . . . raise in sharp relief certain legal, economic, and social questions which must now be squarely faced." Under "the traditional logic of property" the shareholders—the legal owners—were entitled to the entire profits of the enterprise. But "since the powers of control and management were created by law, in some measure this appeared to legalize the diversion of profit into the hands of the controlling group." Under the traditional logic of property, "it is clear that these powers are not absolute" but rather "are powers in trust" for the legal owners, the shareholders. "Yet, while this conclusion may result inevitably when the traditional logic of property is applied to the new situation, are we justified in applying this logic? . . . [M]ust it *necessarily* follow that an owner who has surrendered control of his wealth" by becoming "a supplier of capital, a risk-taker pure and simple . . . should likewise be protected to the full?"[136]

The economist starts from different premises than the lawyer, Berle and Means maintained.

> He is preoccupied not with the rights of property but with the production of wealth and distribution of income. To him property rights are attributes which may be attached to wealth by society and he regards them and their protection, not as the inalienable right of the individual or as an end in themselves, but as a means to a socially desirable end. . . .[137]

The separation of ownership and control therefore creates a situation under which shareholders,

> by surrendering control and responsibility over the active property, have surrendered the right that the corporation should be operated in their sole interest,—they have released the community from the obligation to protect them to the full extent implied in the doctrine of strict property rights. . . . They have placed the community in a position to demand that the modern corporation serve not alone the owners or the control [group] but all society.

More than any other development, the separation between ownership and control in the modern corporation became the catalyst for the legal realist reconceptualization of private property rights. The large national corporation not only drew into question the orthodox separation between public and private law but it also challenged the notion that modern property could continue to be represented as a pre-political right and not as a creature of social choice.