Instrumentalism and Property Rights: A Reconsideration of American Styles of Judicial Reasoning in the 19th Century

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INSTRUMENTALISM AND PROPERTY RIGHTS: A RECONSIDERATION OF AMERICAN "STYLES OF JUDICIAL REASONING" IN THE 19TH CENTURY

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The portrayal of antebellum American law as robustly pragmatic on the subject of property rights has been one of the major contributions of recent scholarship in American legal history. Prior to the work of Willard Hurst and other revisionist scholars, the American legal system was interpreted as giving property "extreme protection" through a "durable . . . ideology" that committed American law to the preservation of vested rights and of stable property relationships. This view assumed that the law operated to maximize the "liberty" and minimize the "duties" or "public obligations" of private property.

Hurst and other writers, however, have postulated a different model of early nineteenth-century American property law. To be sure, the Hurst model recognizes that powerful juridical doctrines evolved to protect private property from capricious governmental interference, and that while laissez-faire by no means prevailed, many


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highly important functions were relegated to the realm of private contract law. But the essence of the Hurst model is his contention that lawmakers (judges, legislators, and constitution-writers alike) distinguished between "static" and "dynamic" property. Static property was an institution "merely of security"; it commanded respect so far as the citizenry regarded stability and security of private holdings as being conducive to entrepreneurial investment and risk-taking. But dynamic property "as an institution of growth" was given a higher priority; when new forms of technology required an abridgement of older types of property (as when building of mill dams required taking or flooding of privately owned farmland), the older forms were forced to yield. The society wanted economic growth to be expedited, and legal norms were fashioned accordingly. Hence in the 1830's and 1840's a "new utilitarian orthodoxy" eroded old doctrines of vested rights: pragmatic judges elevated instrumentalism to the level of doctrine, validating abridgement of vested rights when it was necessary for the achievement of economic growth.

Recently, Professor William Nelson has reexamined this instrumentalist, or pragmatic, "style of judicial reasoning" with a view toward explaining why it fell into disfavor after mid-century. He does not challenge the Hurst model so far as it depicts the dominant mode of judicial reasoning prior to about 1850. But Nelson argues that in the post-Civil War period, an entirely different style, one which followed precedent derivable from certain fundamental principles and treated legal decisionmaking as a process of expanding or elaborating on existing doctrine—a style he terms formalism—became the dominant mode of judicial reasoning. He attributes the change to what he argues was a successful challenge to instrumentalism by "antislavery jurisprudence," beginning in the 1850's. The fundamental moral crisis over slavery, Nelson maintains, discredited the amoral instrumentalism which had become "an obstacle in the path of the antislavery movement . . . ." Principle-oriented antislavery jurisprudence, reinforced by the greater use of precedent,

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4. "Not the jealous limitation of the power of the state, but the release of individual creative energy was the dominant value" in antebellum society—and in its law. LAW AND THE CONDITIONS OF FREEDOM, supra note 1, at 7. See L. FRIEDMAN, CONTRACT LAW IN AMERICA (1965); L. FRIEDMAN, supra note 1, at 163-66.


8. Id. at 519.
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as part of what Nelson terms "law as science" doctrine, thus helped to replace instrumentalism with formalistic norms. Instead of deciding cases on the basis of what would best promote economic growth and development (i.e., in the instrumental mode), judges "saw their task . . . as the preservation of the logical structure of the rules and fundamental principles of the law [i.e., in formalist terms]."9 By the closing decades of the nineteenth century, formalism had become entrenched as the dominant judicial style.10

Nelson's study is an ambitious revisionist effort, and it merits close examination. In the present article, I will argue (1) that Nelson has overstated and oversimplified the pre-Civil War role of instrumentalism through a selective examination of the evidence, and (2) that in the second half of the nineteenth century, long after what Nelson has represented as the mid-century discrediting of instrumentalism, judges continued to adhere to the instrumental style of reasoning in adjudicating major issues of public policy.

I. THE INSTRUMENTAL STYLE

"Between 1820 and 1850," Nelson writes, "much of the American legal profession . . . thought that courts should change the rules of law in order to effectuate socially desirable policies."11 In that era, judges pursued "socially expedient policy goals"12 and adopted an instrumental style that mandated (and legitimated) decisionmaking by which:

1. they "refused to give effect to ancient English and American authorities."13
2. they " . . . rejected arguments that sought to deduce results in a formalistic style from fundamental premises about the inalienable rights of man." (The formalistic style, Nelson avers, was one "in which judges . . . asked . . . whether a proposed rule . . . was consistent with an existing body of doctrine" that embodied natural-law or fundamental-law principles.)14

9. Id. at 515.
10. Id. at 514, 550. For purposes of convenience in the critique that follows, I shall often refer to 1820-1850 as the period of "instrumentalism," when—according to Nelson—the judicial style described in the text accompanying notes 13-15 infra prevailed. But it should be kept in mind that Nelson contends that the 1850's were a time when instrumentalism was challenged by "antislavery jurisprudence." The two doctrines competed for ascendency, and only after 1865—when the Civil War's outcome legitimated antislavery ideas, and when antislavery lawyers were given appointments to the judiciary—did the alleged ascendency of the new formalism become secure. See id. at 550-51.
11. Id. at 514.
12. Id. at 544.
13. Id. at 522.
14. Id. at 522-23, 516.
3. they generally adopted instead a standard that subordinated considerations of fundamental law to the twin goals of expediting economic growth and assuring national economic unity.\textsuperscript{16}

These three points are the essence of Nelson's particular version of instrumentalism. Let us now consider the scope and nature of the evidence on which this version is based. Nelson's evidence is drawn mainly from the reasoning and rhetoric of judicial decisions in the fields of contract, property, and commercial law.\textsuperscript{16} Neither his focus nor his characterization of the decisions as instrumentalist is surprising, in light of the pioneering studies by Hurst\textsuperscript{17} and the recent work of Friedman and other scholars.\textsuperscript{18} Also mirroring their scholarship and other writers' efforts, Nelson contends persuasively that the major federal commerce clause decisions were similarly instrumentalist in their style. For while those decisions addressed the formalistic principles of federalism and of sovereignty, they also were intended to promote economic growth by creating the constitutional foundations of an American common market.\textsuperscript{19}

Nevertheless the validity of Nelson's version of antebellum instrumentalism depends upon the accuracy of his points 1 and 2, \textit{viz.}, that judges in the 1820-50 period generally rejected Anglo-American authorities and that they refused to strike down "legislation interfering with property rights" when the argument for their doing so depended upon the notion that "such legislation deprived men of their natural rights . . . .\textsuperscript{20} Moreover, the accuracy of Nelson's version of instrumentalism is crucial to assessing his contention that "antislavery jurisprudence"—with its formalism, its stress on core doctrines of fundamental rights, and its higher-law notions—represented a thoroughgoing departure from the judicial thought of the earlier period.\textsuperscript{21} For if the "instrumentalist" judges of the 1820-50 period did not, in fact, reason and decide cases in the manner

\textsuperscript{15} Id. at 514, 524-25.
\textsuperscript{16} Id. at 521-24.
\textsuperscript{17} See works cited, note 1 supra.
\textsuperscript{18} See L. Friedman, supra note 4; Gates, Tenants of the Log Cabin, 49 J. Am. History 3 (1962); Horwitz, supra note 6; Horwitz, The Emergence of an Instrumental Conception of American Law 1780-1820, 5 Perspectives in Am. History 287 (1971); Scheiber, supra note 5.
\textsuperscript{19} Nelson, supra note 7, at 524-25. See also S. Bruchey, The Roots of American Economic Growth 97 (1965); A. Miller, The Supreme Court and American Capitalism, 25-28 (1968).
\textsuperscript{20} Nelson, supra note 7, at 532. It should be noted that Nelson seeks to distinguish analysis of judicial beliefs bearing on the legal system and analysis of "judicial reasoning in individual cases." \textit{Id.} at 516. I do not think Nelson maintains this distinction consistently in his ensuing arguments, but I am not concerned with this problem here. See especially \textit{Id.} at 544.
\textsuperscript{21} Id. at 525-38 \textit{et passim}.\n
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that Nelson's version of instrumentalism avers, then Nelson's portrayal of the confrontation between the dominant mode of 1820-50 and the competing style of antislavery jurisprudence may be a distortion of historical realities.

Hence let us turn immediately to the alleged refusal of instrumentalist judges "to give effect" to ancient precedents. It may be conceded that antebellum American judges frequently rejected or modified common-law doctrines and precedents. But these same jurists, on the other hand, often bent far to adopt outright—or at least to acknowledge the basic validity of—"ancient English and American authorities." The American courts' reception of riparian law—which as Lauer has shown,22 was undergoing significant change in contemporary England—offers an illuminating example. The American riparian decisions were in fact no less noteworthy for their perpetuation of ancient doctrines (e.g., the distinctions among waters publici juris, waters wholly private, and waters private in ownership but public in use or subject to a public trust) than for their modifications of ancient doctrine to meet the needs of an industrializing society.23 Far from rejecting common-law precedents out of hand, American judges felt constrained to cast emergent riparian law in the traditional framework.24 Indeed, the same courts that effected significant change in the old principles often invoked the ancient rules and distinctions to determine the limits of the police power and to distinguish compensable from non-compensable takings.25 In the closely related field of eminent domain law, moreover, important notions of compensability survived—in the face of powerful instrumentalist tendencies in the law—because judges continued to honor formalistic precedents that had relied upon higher-law notions of inalienable property rights.26

24. Id. This was so even in the creation of the competing doctrine of appropriation. Cf. Wiel, Fifty Years of Water Law, 50 Harv. L. Rev. 252 (1936); Wiel, Public Policy in Western Water Decisions, 1 Calif. L. Rev. 11 (1912). Also see Scheiber & McCurdy, Eminent Domain Law and Western Agriculture, forthcoming in 49 Agricultural History (1975).
25. L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 229-65 (1957); Scheiber, supra note 5, at 335-38, 373-76.
26. That subject was explored thoroughly in Grant, The Natural Law Background of Due Process, 31 Colum. L. Rev. 56 (1931); and Grant, The 'Higher Law' Background of the Law of Eminent Domain, 6 Wis. L. Rev. 67 (1931). My own studies of eminent domain law stress that statutes and judicial decisions generally tended to expedite economic innovation and development, even serving to subsidize state and private enterprises; yet the compensation requirement remained a force that judges had to contend with, and as Grant's scholarship demonstrated, "higher law" doctrines had long since been mobilized to sustain that force. See Scheiber, Property Law, Expropriation and Resource Allocation by Government: The United States 1789-1910, 33 J. Econ. History 232 (1973).
A further objection to Nelson's use of the evidence is that he selectively focuses on two different areas of the law for his comparison over time, thus ignoring the possibility that judicial attitudes may have originally been at variance between the two areas. More specifically, Nelson bases his propositions about pre-Civil War instrumentalism heavily upon decision in the property and commerce clause areas; but when he portrays the "antislavery jurisprudence" of the 1850's as formalistic (honoring precedent and fundamental-law precepts, rather than expediential doctrine), he shifts and narrows the scope of evidence radically, relying instead entirely upon evidence drawn from cases concerning fugitive-slave rendition or the status of slaves in transit through free states and territories. This shift in focus leaves open the question of whether Nelson's version of instrumentalism as the "common denominator" of jurisprudence during 1820-50 would be supported by examination of decisions in criminal law in that earlier period. To make wholly persuasive his contention that core ideas (and the "common denominator") of judicial style changed after the Civil War, Nelson would need to provide a parallel investigation of pre-1850 cases bearing upon personal liberty—not only criminal cases but, for example, writings and judicial decisions upon insolvency and imprisonment for debt. Should such an inquiry produce evidence that the pre-1850 courts were adopting "ancient precedents," higher-law doctrines, and notions of inalienable rights—much as they did in adjudicating riparian and eminent domain questions—it would cast doubt on the entire validity of Nelson's view of post-Civil War jurisprudence.

Similarly Nelson's interpretation of the late-19th-century due process decisions is predicated on his contention that they reflected the newly established hegemony of "[the antislavery ideal of equality]," "antislavery notions of freedom of contract," and "the antislavery concerns with according special protection to property and contract


28. See Nelson, supra note 7, at 555-57, discussing The Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873) and the other due process cases in which Field's ideas eventually prevailed.
In other words, Nelson assumes they had no significant antecedents in the jurisprudence of the period 1820-1850. Something seems amiss, however, in attributing doctrines of equality, freedom of contract, and property protection so exclusively to formalistic "antislavery jurisprudence" dating only from about 1850. For instance, the antebellum constitutional conventions in the states demonstrated an absorbing concern with the problem of suffrage and political equality, as well as with protection of private property. Similarly, "freedom of contract" was hardly unknown in pre-1850 jurisprudence. Indeed, it was a central theme in antebellum labor decisions—not least important, in Chief Justice Shaw's Massachusetts court, which is given attention by Nelson only for the instrumentalism that Shaw represented in other fields of law. The vitality of persisting notions of inalienable contract and property rights is perhaps nowhere better illustrated than in a decision of Shaw's court upholding the legislature's explicit charter grant of a route monopoly to a railroad corporation. In this case, the court upheld the monopoly despite seemingly compelling instrumentalist arguments that such monopolies would ineluctably impede economic growth and commercial unity.

In sum, even a judiciary that shared a commitment to expediting economic change (and was therefore inclined to support legislative policies that might abridge vested property rights) was also ready to invoke extra-constitutional principles or "ancient precedents," and to recognize the "principles which hold human society together; which, while they recognize the power of the legislature to be supreme, do not admit it to be arbitrary."

29. Nelson, supra note 7, at 554-56 (emphasis added).
30. See, e.g., J. Barnhart, Valley of Democracy: The Frontier versus the Plantation in the Ohio Valley 1775-1818 (1953); F. Green, Constitutional Development in the South Atlantic States 1776-1860 (1930); The State Constitutional Conventions of the 1820's (M. Peterson ed. 1966); C. Williamson, American Suffrage, From Property to Democracy, 1760-1860 (1960).
We need to take a close look, too, at the “style of legal reasoning” that characterized pre-1850 criticism of instrumentalism. Were arguments that invoked inalienable rights, in opposition to instrumentalist views, in fact formulated only in abstract, principled terms? Or were champions of the old higher law doctrines—doctrines that Nelson argues were in a “waning” tradition, revitalized only when antislavery ideas gained hold—also ready to validate rules on pragmatic grounds, to promote economic growth? The critics were champions of the old higher-law doctrines that favored protection of vested rights—men such as Joseph Story and Daniel Webster. To be sure, they cited abstract principle and ancient precedents in opposing such doctrines as Taney’s in his Charles River Bridge opinion of 1837. They also set forth the classic doctrine of “vested rights” when they fought vainly against judicial validation of sweeping state powers of eminent domain. But what is equally important, Story and Webster opposed enlargement of state regulatory and eminent-domain powers on the corollary grounds that such interventions by government would discourage new investment in corporate enterprises and thereby impede economic development. In short, they too were ready to invoke an instrumentalist rationale; even when professing the inalienable rights of men, theirs was no unalloyed “formal” or principled style of reasoning.

If the picture was thus a mixed one in the 1820-50 period—with “instrumentalist” judges often invoking formalistic doctrine, and doctrinaire critics adducing instrumental arguments—it was also so in the late nineteenth century. For even though Nelson posits that formalism held sway, and that instrumental styles of reasoning were discredited, he also makes a rather startling concession:

Judges . . . of course, decided cases [in the late nineteenth century] in favor of those forms of business enterprises which promised to contribute most substantially to the nation’s economic growth no less frequently than they had at the century’s outset.

35. Scheiber, supra note 5, at 376-80.
36. Id. Also see D. Webster, Boston and Lowell Railroad Argument (1845), 15 The Writings and Speeches of Daniel Webster 381 et seq. (1903). Story’s dissent in the Charles River Bridge case stated at 608:

For my own part, I can conceive of no surer plan to arrest all public improvements, founded on private capital and enterprise, than to make the outlay of that capital uncertain, and questionable . . . . The very agitation of a question of this sort, is sufficient to alarm every stockholder in every public enterprise . . . throughout the country.

37. Nelson, supra note 7, at 518.
If this is accurate (and I agree that it is) we seem to have a portrayal of judges who subscribe to a new style of reasoning, but who come to pretty much the same conclusions—so far as balancing vested rights against instrumentalist goals was concerned—as the judges of the earlier epoch.\textsuperscript{18}

Even Nelson's contention that "national economic unity" was a corollary objective to "economic growth" in the instrumentalist era (1820-50) requires some modification. That the Supreme Court's major commerce clause decisions were nationalist, and tended to affirm that internal commerce must be free and open, cannot be denied. But these same major Supreme Court cases involved the review of decisions by state courts that had asserted a contrary view. For state judges frequently supported state "mercantilist" policies—which placed significant burdens on interstate commerce and indeed seriously threatened to balkanize the economy—on anticentralist grounds of state sovereignty.\textsuperscript{9} And although John Marshall's Supreme Court erected powerful doctrinal obstacles to such balkanization, judges in the state courts continued to exert continuous pressure by validating state policies that were clearly in violation of nationalist principles.\textsuperscript{40} Moreover, in some areas of policy relating to commerce, state administrative agencies successfully evaded the Supreme Court's nationalist mandates without ever facing legal challenges that would probably have been sustained by the federal judiciary.\textsuperscript{41} It is, therefore, difficult to accept Professor Nelson's view that economic nationalism was a natural corollary of instrumentalist

\textsuperscript{38} Also see the discussion in part II, infra.

\textsuperscript{39} See, e.g., Livingston v. Van Ingen, 9 Johns. 507 (N.Y. Ch. 1811) and other cases leading to the decision of Gibbons v. Ogden, 22 U.S. 1 (1824). These are considered ably in Campbell, Chancellor Kent, Chief Justice Marshall and the Steamboat Cases, 25 SYRACUSE L. REV. 497 (1974).

\textsuperscript{40} See, e.g., the attack on the Dartmouth College Case doctrine in The Bank of Toledo v. Bond, 1 Ohio St. 622 (1853); or the Ohio court's continuing confrontation with the U.S. Supreme Court over tax exemptions (granted to banks) as an inviolable contract in Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1855); The Sandusky City Bank v. Wilbor, 7 Ohio St. 481 (1857); Skelly v. Jefferson Branch Bank, 9 Ohio St. 607 (1859). Cf. Padelford v. City of Savannah, 14 Ga. 438 (1854); Hunter v. Martin, 18 Va. (4 Munf.) 1 (1815) in which the state courts denied the validity of U.S. Supreme Court rulings and jurisdiction.

doctrine; in fact, instrumentalism was as often found in tandem with
decentralizing, state-mercantilist doctrines.

From this, it would seem fair to conclude that Nelson's charac-
terization of antebellum judicial reasoning as dominantly instrumen-
talist, while not inaccurate, is severely oversimplified. To be sure,
although Nelson fails to recognize that formalistic and instrumentalist
styles often intermingled in pre-1850 jurisprudence, he does not
make the extreme claim that instrumentalism held exclusive sway;
and so the critique I am offering is in that sense one of degree.
However, if similar problems are also encountered in Nelson's treat-
ment of post-Civil War jurisprudence, his conclusions must be quali-
ified and perhaps rejected: instead of a sharp and conscious repudia-
tion based on antislavery jurisprudence, the alleged shift from in-
strumentalism to formalism looks at best like a gradual and incom-
plete transition. If indeed instrumentalist reasoning became “un-
usual” in the late nineteenth century\(^2\) (which I doubt was actually
true), we must seek another explanation for the shift.\(^3\) With this
in mind, we now turn to Professor Nelson's analysis of post-Civil War
formalism.

Antislavery jurisprudence, according to Professor Nelson, was
“an amalgam of three strands of American thought”—religious
higher-law notions, Transcendentalist philosophical doctrines, and
the heritage of eighteenth century “traditions about human rights.”\(^4\)
By examining the general history of abolitionism and then narrowing
his focus to consider the fugitive slave decisions of the 1850's, Nel-
son seeks to demonstrate that:

1. “[t]he rise of antislavery . . . rescued the waning tradition”
of natural law jurisprudence, which had supported judicial
invalidation of laws violating fundamental personal and
property rights;\(^5\)
2. the triumph of antislavery ideas, a triumph sealed with the
Civil War, discredited instrumentalism;\(^6\)

\(^2\) Nelson, supra note 7, at 548.
\(^3\) My own view of the matter, as will become clear in the argument that fol-
lows, is that instrumentalism survived in full vigor. Further, I think that the ascend-
cy of higher-law and formalistic modes of judicial reasoning has already been pers-
usively explained in the standard literature on conservative jurisprudence and four-
teenth amendment applications—a literature which does not receive close attention
for persuasive refutation in Nelson's study. See C. Jacobs, Law Writers and the
Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and
John F. Dillon Upon American Constitutional Law (1954); A. Paul, Con-
servative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895
(1960); Hamilton, The Path of Due Process, in The Constitution Reconsidered
(C. Read ed. 1938).
\(^4\) Nelson, supra note 7, at 525, 526, 528.
\(^5\) Id. at 532.
\(^6\) Id. at 548.
3. the loss of legitimacy suffered by instrumentalism—which largely faded from sight after 1865, so that judicial reasoning on instrumentalist lines became (at best) "unusual"—created a void that had to be filled; and

4. the "void" was filled at first by antislavery jurisprudence—but only partially so, requiring creation of still another "amalgam," this time between antislavery and "law as a science" paradigms.

Points 1 and 2 incorporate a major theme in the standard historical literature on the antislavery movement—the development of higher law ideals, the rising ideological commitment to the rights of man as superior to constitutionalism, and the radicalization of "gradualist" abolitionists. Nelson's argument goes beyond the conventional interpretive views, however, for he asserts that the ascendent antislavery movement discredited not only pro-slavery doctrines but also the whole "judicial style" of instrumentalism. What, precisely, happened to this style of judicial reasoning? In Point 3, we are told that it nearly disappeared. At any rate, its loss of legitimacy created "a void that had to be filled."

A "void" of this sort is an intellectual historian's metaphor—a product of the scholar's creative imagination. So far as I can tell, Nelson does not contend that lawyers and judges of the mid-nineteenth century were explicitly aware of a broad confrontation between instrumentalism and formalism as contending "judicial styles." Only by implication, and only insofar as it concerned the discrete issue of slavery, was instrumentalism challenged. Perhaps it is implausible to expect that a "style" of judicial thought—representing dominant precepts, "core" ideas, and doctrines that are "the common

47. Id.
48. Id. at 548-66. At this point in his argument, Nelson is so thoroughly committed to the view that instrumentalism died out (and that only "antislavery jurisprudence" stood available to fill it in 1860-65) that he posits an historian's puzzle—one that, to my knowledge, has never before appeared in the voluminous scholarship on post-Civil War jurisprudence. This novel puzzle raises the question: why "the language of antislavery jurisprudence never became the sole source of American law" in the postbellum years. Id. at 558 (emphasis added). As the ensuing text here seeks to demonstrate, the premises of the puzzle have no foundation in the empirical evidence of jurisprudence in that period.
49. See D. Dumond, Antislavery: The Crusade for Freedom in America (1961); Kraditor, Means and Ends in American Abolitionism (1968); S. Lynd, Intellectual Origins of American Radicalism (1969). See also the important revisionist analysis, in L. Perry, Radical Abolitionism: Anarchy and the Government of God in Antislavery Thought chap. 7 (1973), illuminating influences that ran between abolitionists and communitarian and other reform sects, a theme also considered in The Antislavery Vanguard (M. Duberman ed. 1965), especially chap. xi. What Nelson portrays as a conservative thrust of "antislavery jurisprudence" seems far removed from this element, at least, of the abolitionist tradition.
50. Nelson, supra note 7, at 548.
"denominator" of judicial reasoning—would be attacked wholesale, explicitly, and with a view toward undermining its "legitimacy." However that may be, we are given no evidence by Nelson that the principal historical actors understood the confrontation in the way that it is presented in his construct.

Hence we are left to ascertain whether or not a "void" appeared, and a near-disappearance of discredited instrumentalism occurred, by examining the jurisprudence of the late nineteenth century. Nelson's last point, numbered 4 above, will stand or fall on the results of inquiry into the actual content of judicial decisions in the post-Civil War era. In the following section of this article, such an inquiry is undertaken. I shall argue that, at best, the alleged new "amalgam" of antislavery jurisprudence and "law as a science" coexisted with a persisting instrumentalist mode of judicial reasoning. There was no "void" at midcentury, for there was no eclipsing of instrumentalist styles of judicial thought.

II. THE VITALITY OF PERSISTENT INSTRUMENTALISM

In fact, instrumentalism was alive and well in the late nineteenth century. This was true in part because (as Nelson himself concedes) even when they posited formalist doctrines of higher law and inalienable rights, post-1865 due process decisions favored "those forms of business enterprise which promised to contribute most substantially to the nation's economic growth . . . ." But the survival of instrumentalism was also attributable to the persistence with which American judges invoked doctrines that validated broad legislative discretion in setting economic priorities. Thus, American courts continued to rule that vested property rights could be abridged, often dramatically, if economic-growth goals established by the commonwealth dictated that they should yield. And those same courts continued to sanction "state mercantilism"—the pursuit by the individual states of their particularistic economic goals and interests, in competition with other states of the Union.

Not surprisingly, the evidence for the foregoing interpretation—which is so contrary to Professor Nelson's views—derives from an examination of post-1865 decisions on property, eminent domain, and resource-allocation law. These are much the same areas of law which, in the work of Willard Hurst and others, provided the data.

51. Id. at 566. Elsewhere Nelson argues that after 1865 "the temper of the age required courts to deduce their decisions from first principles and to demonstrate that their judgements were in some ultimate sense 'right' rather than merely politically wise or economically expedient." Id. at 550.
52. Id. at 518 n.24.
53. See works cited at notes 1, 5, 18 supra.
for the 1820-50 paradigm of instrumentalism adopted by Professor Nelson. Moreover, the vigorous survival of instrumentalism in the late nineteenth century was especially manifest in the states and territories of the Rocky Mountain and Far Western regions, where judges and legislators proved keenly sensitive to a need to shape laws in ways consistent with "the circumstances of the country." Lack of sufficient capital and labor to fully exploit the area's natural resources, and confronted with the peculiar regional problems of an arid climate, vast mountain ranges, and a mineral treasure largely located remote from populated centers, the Far West had a special need for law as "a practical system, adapted to the condition and business of its society."55

These last-quoted phrases are from a Kentucky decision of 1836 and a Massachusetts decision of 1825. But the view of law they expressed, the classic instrumentalist view, was repeatedly proclaimed after the Civil War by western constitution writers, legislators, and judges. Hence in one of the most widely cited western decisions on eminent domain, the Nevada court in 1876 upheld a law authorizing a mining company to condemn a right-of-way across privately owned land for purposes of transporting timbers and other material needed for the mine.56 The court declared that this property taking was "for a public use." Rejecting the argument of counsel, that mining was a private use, not public, the court declared:

[T]hat mining is the paramount interest of the state is not questioned; that anything which tends directly to encourage mineral developments and increase the mineral resources of the state is for the benefit of the public and is calculated to advance the general welfare and prosperity of the people of this state, is a self-evident proposition.

Nature has denied to this state many of the advantages which other states possess; but by way of compensation to the citizens has placed at her doors the richest and most extensive silver deposits ever yet discovered. The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future development unobstructed by the obstinate action of any individual or individuals.57

55. Steele v. Curle, 34 Ky. (4 Dana) 381, 390 (1836), also cited as exemplary of instrumentalist reasoning in Nelson, supra note 7, at 521.
56. Dayton Mining Co. v. Seawell, 11 Nev. 394 (1876).
57. Id. at 402, 409-10. See also Scheiber, note 26 supra.
Some years earlier, the California Supreme Court employed a similar rationale to uphold state laws that authorized miners to enter and condemn holdings on public lands on which farmers and ranchers were already located, with occupancy rights vested in them under terms of the 1852 Possessory Act\textsuperscript{58} and the 1855 Indemnity Act.\textsuperscript{59} "It is the duty of the Courts to protect private rights of property," the judges declared, "but it is no less their duty to secure, as far as possible, the entire freedom of the mines, and to carry out and enforce the obvious policy of the Government in this respect."\textsuperscript{60}

In the same year, the California court validated unique features of the mining codes—those famous bodies of local laws adopted by the first settlers in the mining camps—on grounds that resource law "must . . . be controlled and modified by the peculiar nature of the subject and by surrounding circumstances."\textsuperscript{61} As Webster and Story had done,\textsuperscript{62} moreover, the California judges employed instrumentalist arguments to justify recognizing and perpetuating common-law rules and guarding the "inalienable" rights of property. Thus, in imposing judicially constructed limitations upon the reach of a miners' license to enter previously occupied land, the court said that a proprietor must be "secure in his possessions, and without security there would be little development, for the incentive to improvement would be wanting."\textsuperscript{63} Similarly, in wrestling with the vexing problem of water law—trying to shape some compromise between traditional riparian principles and claims based on appropriative doctrines—\textsuperscript{64} the California judges declared that "[c]ourts are bound to take notice of the political and social condition of the country which they judicially rule."\textsuperscript{65}

In the late 1880's, when the legislature authorized the creation of local irrigation districts and vested eminent domain powers in them,\textsuperscript{66} the California court again had recourse to an instrumentalist rationale in upholding the new law. A general irrigation scheme, the court declared, "by which immigration may be stimulated, the taxable property of the state increased . . . and the comfort and advantage of many thriving communities subserved, would seem to redound to the common advantage of all the people

\begin{itemize}
\item \textsuperscript{58} Ch. LXXXII, [1852] Stat. Calif. 3d Sess. 158.
\item \textsuperscript{59} Ch. CXIV, [1855] Stat. Calif. 6th Sess. 145.
\item \textsuperscript{60} Smith v. Doe, 15 Cal. 100, 106 (1860).
\item \textsuperscript{61} English v. Johnson, 17 Cal. 108, 117 (1860).
\item \textsuperscript{62} See note 35 supra and accompanying text.
\item \textsuperscript{63} Biddle Boggs v. Mercer Mining Co., 14 Cal. 279, 379 (1859).
\item \textsuperscript{64} See generally Wiel, \textit{Fifty Years of Water Law}, 50 HARV. L. REV. 252 (1936); Wiel, \textit{Public Policy in Western Water Decisions}, 1 CALIF. L. REV. 11 (1912). I am also indebted on these points to Charles McCurdy; see his forthcoming article on Mr. Justice Field in \textit{The Journal of American History}.
\item \textsuperscript{65} Irwin v. Phillips, 5 Cal. 140, 146 (1855).
\item \textsuperscript{66} The Wright Act [1887] Calif. Stat. 27th Sess. 29.
\end{itemize}
During the last quarter of the nineteenth century, western courts, constitutional conventions, and legislatures generally expanded the definition of "public purpose" and "public use" to validate devolution of eminent domain powers not only on transportation enterprises but also on mining, drainage, irrigation, log-boom, and wharf companies. Enterprises in these categories either were declared "public use" ventures by the state constitutions or else were brought under the same umbrella by legislation or judicial fiat. Instrumentalist doctrines were uniformly invoked by courts that approved this movement in the law. Similarly, in the initial adoption and later spread of the "Colorado doctrine" of appropriation in water rights, judges commonly justified departures from traditional riparian law—even while heroically attempting to adapt such riparian doctrine rules as "reasonable use" to the emerging law of appropriation—by citing local conditions and needs. The argument that appropriation "is the lineal descendant of the law of necessity," that it was essential if western "advantages and resources may receive the fullest development for the general welfare," and that it was required by "[i]mperative necessity, unknown to the countries which gave [riparian doctrine] birth," were all put forward by instrumentalist judges in favor of the appropriation doctrine and new irrigation laws.

If the metaphorical figure of an "amalgam" be used in characterizing western law in these policy areas, the judicial style manifest here was an amalgam between instrumentalist notions of imperative necessity and notions of the legitimate power of legislatures to

68. See Bakken, The Impact of the Colorado State Constitution on Rocky Mountain Constitution Making, 47 COLO. MAGAZINE 152-75 (1970); Scheiber, supra note 26, at 244 et seq.
69. See Dayton Mining Co. v. Seawell, 11 Nev. 394 (1876); Butte, Anaconda & Pacific Ry. v. The Montana Union Ry., 16 Mont. 504, 530, 41 P. 232, 240-41 (1895), that "the 'good of the whole' is the very foundation of the constitution," and that "In this state . . . the publicity of the use of railroads into the camps is too obvious to require more extended comment." Cf. Potlatch Lumber Co. v. Petersen, 12 Idaho 769, 88 P. 426 (1906); Nash v. Clark, 27 Utah 158, 75 P. 371 (1904); Ellinghouse v. Taylor, 19 Mont. 462, 48 P. 757 (1897).
70. See Miller, supra note 67, passim.
71. Drake v. Earhart, 2 Idaho 750, 754, 23 P. 541, 542 (1890).
fashion laws consistent with economic goal-definition. Professor Nelson's interpretation of post-1865 judicial style rests too heavily upon eastern cases. West of the humid regions and older-settled areas, judicial decisions reflect robust survival of instrumentalism.

It is noteworthy, too, that Professor Nelson has cited decisions of the federal courts, and particularly the opinions of Justices Bradley and Field, to illustrate the impact of "antislavery" concerns with inalienable rights, higher law, and the judicial responsibility to protect freedom of contract and property rights when threatened by state legislatures. But even in the doctrines proclaimed by Field and Bradley, there appeared at least an occasional willingness to modify such ideological commitments. Bradley's notorious decision of 1890, validating confiscation of the Mormon Church's property in Utah, comes immediately to mind. But more directly germane were Justice Field's doctrines upholding exceptional western judicial style and substantive law in the field of resource law. Thus in Basey v. Gallagher, Field applied an "amalgam" of common law and instrumentalist ideas to the validation of water appropriation. The appropriator's rights, Field declared, "must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual." And in Jennison v. Kirk, Field spoke of the importance of first appropriator's water rights in the development of mining: "Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities ... became, therefore, an important and necessary business ...." He reminded his colleagues that "properties to the value of many millions" rested on the recognition of such rights. That Field's posture on this question can be

74. It is noteworthy, too, that the western courts perpetuated judicial validation of "offsetting"—the practice by which when only part of a property owner's land was taken in an eminent domain proceeding, the alleged benefits from the enterprise of the condemnor, to the remaining property of the owner, were assessed and offset against the damages assessed. At this time, in many older-settled states, the practice was being reformed, as indeed it was in California by the 1879 Constitutional Convention. See San Francisco, Alameda & Stockton R.R. v. Caldwell, 31 Cal. 368 (1866); California Pacific R.R. v. Armstrong, 46 Cal. 85 (1873); Willamet Falls Canal & Lock Co. v. Kelley, 3 Ore. 99 (1869); Gallatin Canal Co. v. Lay, 10 Mont. 528, 26 Pac. 1001 (1891); I DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1024 et seq. (1880).

75. Nelson, supra note 7, at 551-53.

76. Mormon Church v. United States, 136 U.S. 1 (1890).

77. 87 U.S. (20 Wall.) 670 (1875).

78. Id. at 683.

79. 98 U.S. 453 (1878).

80. Id. at 458. "Special burdens" on vested rights, Field declared elsewhere "are often necessary for general benefits." Barbier v. Connelly, 113 U.S. 27, 31 (1885).
interpreted as instrumentalism mixed with a doctrinal defense of vested property rights should warn us, again, that in constructing a paradigm of judicial style, complex and even ambiguous realities may be obscured.

Finally, lest an impression be left that western decisions and judicial style were a unique regional phenomenon, the ambiguity of law even east of the Monongahela deserves recognition. Thus it was Pennsylvania's high court which, in 1886, struck down the claims of a riparian landowner who sought to hold a mining company upstream liable for polluting the waters supplying the domestic needs of the riparian. This was no public nuisance requiring abatement or for whose effects compensation should be required, the court declared:

The plaintiff's grievance, is for a mere personal inconvenience, and . . . [it] must yield to the necessities of a great public industry, which although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way . . . .

The culmination of late-nineteenth-century public-purpose doctrine came when the Supreme Court rejected a claim that special district tax assessments made to support irrigation constituted a taking of property in violation of "public use" limitations and the fourteenth amendment, and, more especially, in Clark v. Nash, a decision that upheld Utah's rule that even an individual private irrigator might condemn a neighbor's land for a right-of-way to convey water to his own property. Far from adhering to the precepts of Professor Nelson's version of "formalism," the Court insisted that peculiar conditions of the soil or climate must be taken into account. The state's own courts "understand the situation which led to the demand for the enactment of the statute," the Court declared, "and they also appreciate the results upon the growth and prosperity of the State."

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82. Id. at 149, 6 A. at 459. Ironically, at about the same time a federal decision in California was enjoining the vast hydraulic-mining industry from continued operation in the Sacramento Valley because debris from the mines was destroying farms and threatening the safety of cities downstream. Woodruff v. North Bloomfield Gravel Mining Co., 18 F. 753 (D. Cal. 1884). Cf. Hill v. Standard Mining Co., 12 Idaho 223, 85 P. 907 (1906). The California case and its background are considered fully in R. Kelley, Gold vs. Grain: The Hydraulic Mining Controversy in California's Sacramento Valley (1959).
84. 198 U.S. 361 (1905).
85. See Nash v. Clark, 27 Utah 158, 75 P. 371 (1904).
86. 198 U.S. at 368.
In sum, Professor Nelson's ambitious attempt to recast the framework of our understanding of nineteenth century "judicial styles" is severely faulted by oversimplification. If what has been offered in this article in the way of modifications and a critique of his views does not solve the central problem of what precisely was "typical" and what precisely was "exceptional" at any given time, at least it may serve to challenge premature logical leaps across the complex tangle of relevant evidence.