Doctrinal Legacies and Institutional Innovation: Law and the Economy in American History

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I. INTRODUCTION

For the last thirty years, the function of the legal system in shaping economic institutions and the dynamics of economic change has constituted one of the central themes of legal historical scholarship in the United States. It can now be said with some confidence that study of this question has moved from the periphery, if not to say the Purgatory, of academic studies to near the centre of contemporary scholarship in economic history as well: economic historians have rediscovered, after years of obsession with quantification, that institutions do, after all, matter in the processes of economic change. This fusion of substantive interests in two disciplines — a converging focus, though of course not an entire merger of methodologies — is stimulating reappraisal of some major issues in the economic and legal history of the United States (Keller, 1979; Scheiber, 1980b, 1981).

It is perhaps an opportune time, therefore, for an American worker in this field to stand back and survey the New World's doctrinal and systemic heritage.1 By examining the transfer of this heritage from the Old World and its diffusion in the New, and by identifying continuities and discontinuities within this process, we may well discover lines along which to compare the political experiences of Australia and other nations formerly under colonial regimes.

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1. The literature of legal-economic history is surveyed by Gordon, 1975; Holt, 1974; Zainaldin, 1978; and Scheiber, 1975. Many of the currently dominant concerns of scholars in the field were foreseen in two landmark methodological articles by Katz (1966) and Friedman (1970). But the fountainhead of the new methodology, a work that virtually set the agenda for research, was Hurst, 1960.
By way of preface, it is worth underscoring that American scholarship not only gives little attention to comparative analysis of legal regimes but also tends to truncate the historical record when analysing twentieth-century phenomena. We lose sight, in other words, of the more remote (but often fundamental) developments in the law. Colonial law has been kept in the background, either as a backdrop or as a foil against which to illustrate the enormous magnitude of shifts associated with the Revolution and the founding of the new nation under the 1787 Constitution. Thus study of the adaptation of things English and European has been left almost exclusively to students of the seventeenth and eighteenth centuries. It is true that to some degree antebellum (pre-Civil War) national legal development is being reappraised with a view to delineating the common law's development as it broke with the colonial heritage, and to that extent concern with continuities is reappearing. Once we come to post-Civil War phenomena, however, such concern fades completely. The bureaucratic positive state crowds out, it seems, all consciousness of continuity. The past is seen as prelude, and only to a slight degree as determinant.

In what follows I shall attempt to avoid this regrettable tendency by giving attention to doctrinal legacy in counterpoint with institutional innovation and change in the United States. While one objective is to recapture some measure of continuity in the record, another is to make this essay serve as a partial inventory of the literature as it illustrates socio-legal change.

II. THE COMMON LAW AND AMERICAN DOCTRINAL INNOVATION IN THE COLONIAL EPOCH

An important question all too easily dismissed or trivialised as a 'lawyer's puzzle' concerns the reception of the common law in colonial North America. There has been abundant scholarly controversy on the general question of whether colonial lawmakers considered their systems of law as having incorporated wholesale the rules and precedents of the King's courts. In studies by Paul Reinsch (1899) and others eighty years ago, a strong denial of colonial Americans' adherence to common law was offered. Reinsch contended that 'rude, untechnical popular law' prevailed at first in the colonies. This was followed by 'the gradual reception of the rules of the English common law' only after lawyers with formal training took charge. To Max Radin (1937), the common law seemed to have 'certainly made great strides' in North America from the 1600s to the Revolution; but on the whole 'it remained a subsidiary, supplementary law, . . . regarded sometimes with veneration and at others with suspicion and hostility'. In his great study of King's law and local custom, Julius
Goebel (1931) recast the analysis on a new basis — later taken up by George L. Haskins (1960, 1962) — by demonstrating that colonial law was not a unilinear, one-dimensional common-law heritage from King’s bench, but rather a combination of customary law and religious doctrines in a rich amalgam with common law that shaped the rules and doctrines of New England in the seventeenth century.  

More recently, William B. Stoebuck has reappraised both the doctrinal evidence and the institutional history. He argues that we must distinguish two phases. In the first, the seventeenth-century phase, the colonists’ preoccupation with ‘the mundane, often grim, aspects of securing a beach-head on a hostile shore’ rendered it unlikely at the outset that there would be a systematic, technical reception of either substantive doctrine or procedural rules. Moreover, lay judges were widely used, and there was a lack of formally trained lawyers. In the second phase, comprising the eighteenth century, a ‘maturation of colonial legal systems’ occurred, characterised by movement of rules of decision, forms of action, institutional structures, and substantive doctrine towards a much truer ‘reception’ of the common law than before. This whole process of reception was ‘very much an indigenous affair’, as the home government had never insisted upon imposition of common law on a wholesale basis — contrary to initial experiences in some other, later colonial ventures. In 1765, Stoebuck observes (1968), Chief Justice Daniel Horsmanden of New York believed that ‘in the main’ the colonies applied the common law; and he concludes that certainly by the time of the Revolution, a decade later, this was generally true.

From a literature that is now quite considerable on sources of law and reception of common law, a number of points emerge that bear on the dynamics of legal and economic change. First, it is clear that whether we speak of the seventeenth or the eighteenth century, in the relationship between law and economy the citation of common law in colonial political discourse was important because of claims based on that law to support the rights and liberties of the colonists as English subjects. Such rights and liberties were invoked to serve as the basis of legitimacy for colonial elites’ claims to autonomy in regulation of their provinces’ internal affairs. In this sense, therefore, common law was more important for its political principles than for its technical content as the body of precedent arising out of the royal courts. Thus, for example, charter provisions were cited in moments of political confrontations as documents protective of autonomy and rights rather than as documents that constrained and limited the colonials. The 1612 Virginia Company charter, which empowered the

2. Many of the essays in Flaherty (ed.), 1969, an invaluable anthology of major articles, treat the theme of reception of the common law.
council to make laws and ordinances ‘so always as the same be not contrary to the laws and statutes of . . . England’ was used in this way, as was the same provision in the Massachusetts Bay charter of 1629.3

Second, it becomes strikingly clear from study of evidence produced in the course of the ‘reception’ controversies that — despite some common institutional denominators — when we analyse problems of colonial law and economic change, what we are dealing with is a continuance of separate and individual legal systems, each specific to a particular colony. Advisedly did Stoebuck (1968) refer to maturation of the ‘colonial legal systems’ in the plural. On many matters of critical importance to the organisation of social and economic relationships — inheritance, tenure of landownership, forms of action — there was very considerable variation from one colony to another. Nor was it only substantive law that varied: differences were also apparent in the ‘mix’ of sources of law, in the terms and interpretation of charters and in the weight assigned to orders of council, English decisions, and British mercantilist legislation (some of which was directed specifically at individual colonies, or at industries peculiar to one or several colonies only). Finally, there were also substantial differences in local institutions of governance.

Third, there arises the narrower question of how colonial lawyers and judges understood ‘reception’ to operate in particular cases. What Jefferson termed in Notes on Virginia (1767) ‘the particular circumstances of [the] Province’, was recognised universally in the colonies as a basis for legitimation of interpretation and handling of precedent. Needless to say, confusion often prevailed, especially in the early years. In his Essay Upon the Government of the English Plantations (1701), for example, Robert Beverley complained of ‘a great Unhappiness, that no one can tell what is Law, and what is not, in the Plantations’. Some contended, he went on:

that the Law of England is chiefly to be respected, and that where that is deficient, the Laws of the several Colonies are to take place; others are of the Opinion, that the Law of England is in force only where they are silent. Others . . . contend for the Laws of the Colonies, in Conjunction with those that were in force in England at the first Settlement of the Colony . . . alleging, that we are not bound to observe any late Acts of Parliament made in England, except such only where the reason of the Law is the same here, that it is in England; but this [leaves] too great a Latitude to the Judge.

3. Kettner (1978) provides analysis that serves as an excellent starting-point for analysis of claims to rights. Recently Professor John Reid has published a series of articles and monographs on the issue of rights and liberties in the Revolutionary crisis. The relationship of economic issues and the elite colonial leadership’s drive to maintain autonomy in economic affairs is a central theme in the classic article by Curtis Nettels, 1952. See also Egnal and Ernst, 1972.
Even after Independence and the adoption of state constitutions, such confusions continued to generate legal controversy. Many of the new constitutions, or at least formal ‘reception’ statutes, stated in fairly standard language that the common law was adopted along with statutes in effect at the time of independence, except as such might be ‘repugnant’ to the state constitution or in conflict with newly adopted legislation. Some constitutions ruled out elements of the common law that were ‘inapplicable’, a notion that embodied the same perplexities as ‘reason of the Law’ in Beverley’s lament of 1701!

Interpretation of reception became an important practical problem for American courts. Typically, judges in the state courts took a broad and somewhat vague view of the legacy of doctrine. For example, in 1837 the New Hampshire court declared that ‘the body of the English common law, and the statutes in amendment of it were in force here, as part of the law of the province [before Independence], except where other provision was made by express statute, or by local usage’ (8 N.Hamp. 350 at 361–2, emphasis added). Writing prior to the Revolution, William Smith (1756) summarised the situation in a few words: ‘The practice of our Courts is not less certain than the Law. Some of the English Rules are adopted and others rejected!’.

Against this background the rather pragmatic view of Chief Justice (later Chancellor) Kent made good sense:

But whatever may be our opinions on this point, as an abstract question, or whatever may be the decisions of the civil law, or the feudal and municipal law of other countries, we must decide this question by the common law of England (2 Cai.R. [N.Y. 1804] 188, 191).

No judge was more masterful than Kent in finding in that heritage relevant law for the matter at hand! For our purposes, it is important to add quickly that some of Kent’s most important decisions applying common law invoked principles that were soon cast aside by other courts and relegated to the doctrinal ashbin.

For courts struggling with substantive issues of great significance in shaping economic institutions in the nineteenth century, matters were further complicated because the common law continued, of course, to change and evolve in England itself. Thus when an American judge in the antebellum years sought to apply the legacy of the common law relevant to

4. A good introduction to the problem is offered by the technical articles collected in Morris (1931) on features of American law that involved controversy over reception and the proper role in doctrine for the imperatives of circumstances peculiar to the American situation.

5. For example, Kent’s famous holding that the state had an obligation to protect ‘the custom’ of a franchised road or turnpike company. His view was overturned — and relegated to constitutional oblivion — by the Charles River Bridge decision of the Supreme Court in 1837. See the discussion in Dorfman (1961).
a given set of facts, that judge had to consider (1) whether the applicable law from the provincial period had been recognised as 'received'; (2) whether, subsequent to reception, the law in the matter at hand had substantially changed with the development of doctrine in the English courts; (3) whether there had been doctrinal change on the matter in the courts of that judge's own state or in courts of sister states and, if so, whether it had been consistent with the direction of English adaptations; and (4) the great question, whether some overarching principle might be derived from whatever legacy was deemed relevant so as to justify some further adaptation of the rules to meet local conditions or changing circumstances!

For an inventive judge, the common law was a marvellous armoury; the ambiguity of provincial law, compounded by the pragmatic stance of judges in the nineteenth century, offered manifold opportunities to respond creatively to the circumstances of a society experiencing rapid, accelerating technological change.6 The courts thus made the common law the material for adaptation and innovation. Chief Justice Shaw of Massachusetts, for example, mused on the evolutionary record of the common law in both England and the American colonies, and found its essence to be its susceptibility to modification. That law, he wrote, 'consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it' (1 Gray [Mass. 1845] 263).

Fourth, the interpretation of English common law in American courts — along with its modification in American statutes and customary local usage — involved important substantive variation with regard to land, estates, labour, rules of commercial transactions, and other matters. When scholars address the question 'Did law make a difference?' they need to do so in light of evidence that is rather bewildering in its variety. A few examples will suffice to indicate the complexities.

One area of scholarly inquiry in which the literature is both exceptionally rich and at the same time exceptionally diverse concerns the towns of New England, specifically such questions as how they allocated their resources, how far they were able to accommodate the heady energies of economic individualism on the one hand and collective values on the other, and with what degree of harmony or disharmony their public affairs

6. As will be considered later in this paper, the precise character of modifications that judges introduced and also the nature of their impact on economic institutions and the distribution of income and wealth are a difficult subject for historians today; they are the object of much controversy.
were conducted. These studies all show that the rising pressure of population growth on the land generated strains in the legal system, a phenomenon which also features prominently in James T. Lemon’s study (1972) of eastern Pennsylvania’s rich agricultural region. Studies which disagree on a great many other issues thus have one important theme in common: namely, that the process of settlement used common law to play a major role in managing disputes and reconciling diverging values, and also prompted the emergence of additional legislative and administrative institutions to order the society, to set the rules of governance, and to provide improved day-to-day mechanisms for settlement of disputes. Such evidence reinforces our appreciation of the importance of such classic works as Curtis Nettel’s *Roots of American Civilization* (1938), a book which gave enormous weight to the social effects of the process by which land was stripped of its feudal legal character and made into a commodity readily bought and sold in the marketplace.

Laws of descent represented another aspect of resource allocation, social control and economic ordering in which colonial innovation overshadowed the accepted English heritage. Indeed few elements of law speak so eloquently of the aspirations of colonial lawmakers. At the same time it may be said that the American colonial record, far from being unique, was an extension of the great European and English debate over rules of inheritance that went on continuously from 1500 to the eighteenth century (Thirsk, 1976). Labour law, too, revealed much about the social priorities imposed and the conflicts over social control. Recent studies such as that by Carr and Menard on the Chesapeake servants (1979) indicate how legal records can help reveal the structure of opportunity, the dimensions of mobility, and the coercive potential of contract. With regard to both labour and inheritance law, moreover, the great variety of policy choices made by individual colonies serves to illustrate further the importance of diversity among the North American legal systems.

It is the history of black slavery, however, that throws the coldest, brightest light on the question of whether law mattered; it illuminates as well the question of the long-term institutional and behavioural effects of innovations and transfers of law. Edmund Morgan’s brilliant study (1975)....

7. One point of entry into the now-vast literature on New England town society and politics is the hard-hitting review essay by Wroth (1971). Powell’s analysis of a Puritan village (1963) and the more recent, highly important work of Allen (1981) both draw upon both English and American town archives and constitute major contributions to socio-legal history.
8. Including both the courts and the processes of mediation and arbitration through a variety of mechanisms.
9. The classic study of labour law and its effects by Morris (1946) is methodologically important for, unlike nearly all other major works in legal-economic history, it spans the Revolution and deals with the early national period in the context of diversity in the colonial experience.
of slavery in Virginia shows how powerful were the imperatives of economic advantage, how controlling the forces of greed, and with what stunning rapidity the law was successfully reshaped to transfer vast powers over other human beings' lives from the sovereign to planter masters. Indentured servitude was an important instrument of exploitation and social control, and there is no denying that this institution for recruitment of a labour force embodied harshness and left room for great human cruelty both under sanction of law and outside it. Even the darkest side of indentures, however, pales alongside the barbarities that were the semblance of legality in the cause of subjugating black Africans in what became a permanent caste system, or at least one permanently enough fastened on American society that it required strong national measures in the 1960s (three centuries later) to begin the process of achieving civil rights for minorities and of ending segregation under the law. Recent studies such as Peter Wood's history of South Carolina's race relations (1974) provide detailed accounts of how, through use of the criminal justice system, through mobilisation of community force in the patrol system (with all its potential for vigilante-style action), and through the development of the Black Codes, the repression of the slave communities was achieved.11

Fifth, the heritage of positive law and active government was also part of the legacy of colonial experience that concerned relationships of law and economy. We have seen already how in many ways the individualism and private aspirations of the colonial white settlers — the 'possessive individualism' of this society founded on a legal order geared to capitalist development — were accommodated by the common law. The colonies' governmental institutions and positive law were similarly harnessed to advance economic development, in ways indeed that were as inventive as were the varied uses of law to impose moral standards and maintain an 'order'd society' (see for example Powell, 1963). A provincial 'mercantilism' mirrored in the statute law of each colony the premises, style, and self-interested aims of the home country's mercantilism. Individual colonies engaged in interventionism designed to support parochial interests, to disadvantage outside competition, and to achieve the blending of wealth and power — those twin elements, indissolubly

10. Unfortunately the most ambitious quantitative study to date, by Galenson (1981), fails to deal in any depth with law. Here is an opportunity for comparison with the Australian colonial experience that has yet to be fully exploited.

11. How violent behaviour in dispensing informal justice on the plantation, or in the repression of slaves more generally, related functionally to the phenomenon of mobs and violence in political disputes is a matter not yet fully explored. Studies that pursue into the American colonial experience lines of research suggested by George Rude, Eric Hobsbawm and others in their studies of Great Britain and the Continent include Pauline Maier's (1970) and Richard Brown's (1973).
fused, of mercantilism — that would support the colony's chances for growth and development. Land grants to individuals, to companies, and (in New England) to township settlement projects were a central feature of such supportive policies. On the regulatory side there were warehousing laws, the imposition of grading and classification standards (especially for tobacco, grain, and other staples), and legislation that practically excluded competing colonies' goods. As is so often true of economic regulations, such legislation had promotional and not merely constraining objectives. The picture of active government and support of entrepreneurial interests through law was rounded out by the regime that supported slavery and the regulation of servants and indentures.12

Sixth, there is an institutional dimension in the colonial heritage, one that has begun to attract the attention of scholars because it complements what we have learned of public law and the positive state more generally. Of particular importance is the fascinating new work of Hendrik Hartog on the municipal corporation of New York in the colonial era and during the years of the early Republic. The municipal corporation, Hartog has shown, exercised its power through property-holding and property-management functions. It enjoyed privileges in the provincial and state structures of governance 'as a wealthy, independent, and private corporation' (Hartog, 1979: 14). Thus after 1790 the constitutional and public law of New York had to tame and subdue this autonomous municipal giant. In the process, the institutional context of doctrine and of public power — determinative of citizens’ property rights and, conversely, of the limits of municipal power on matters such as streets and easements, or 'public trust' claims to shoreland structures and ways — changed radically over time. As Hartog persuasively argues, the history he has depicted forces on us a basic reconsideration of how to define the spheres 'public' and 'private', and it raises significant questions about how entrepreneurial interests were served in a governmental structure that itself had an entrepreneurial dimension. To historians concerned with the much better known role of the state as entrepreneur in the nineteenth century, especially in the canal era, this depiction of the colonial institutional landscape raises important questions (issues, too) about heritages and continuities.

Finally, one needs to consider an aspect of the North American colonial legacy normally left out of studies that focus on Anglo-American community building and provincial law, namely, the multiplicity of legal heritages. The civil law, natural law, Continental jurisprudence in a variety of modes, even ecclesiastical law — all were part of the intellectual baggage

12. Here again, the great study of labour law by Morris (1946) is the best work in the literature relating law to the larger legal culture and public policy; on slavery, see also Morgan (1975).
that lawyers and judges brought into American courtrooms after Independence. There was in addition a continuing civil law regime in Louisiana after statehood, while in California, Texas and other states formerly under Spanish and Mexican control, the legacy of predecessor governments was long felt. In land law and settlement of claims, as well as in other important respects such as the adoption of community property rules, the law of these non-Anglo-American predecessor regimes vitally affected economic institutions and property relationships. Thus, for example, the Spanish and Mexican grants dominated the entire process of confirming titles in California for more than two decades after the Anglo-American conquest. Indeed down to the present day the doctrine of 'public trust', and its relationship to pueblo rights of municipalities and to water-law claims derived from the civil law and Mexican codes, is one of the controlling features of resource allocation and control in California and other areas of the West. Like the common-law doctrinal inheritances concerning 'great ponds', 'common lands' and public-easement law in the English-dominated eastern region of the U.S., the civil law doctrines have done much to define the limits of governmental discretionary power and private uses of water, shorelines, and other resources (Gates, 1975; Selvin, 1980).

The one overarching generalisation about the colonial experience that stands up unassailably, I think, is that there was diversity in substantive law and an impetus to innovation on all sides. This is evident both in the seventeenth-century experience of establishing new communities on a durable institutional and economic foundation, and in the processes of the next century that culminated in the quest for autonomous control over colonial political and economic affairs. The whole record of the provincial governments in pursuing economic policy objectives through law so independently from an early period intensified the sense of outrage when the British tried to impose centralised control in the 1760s. The colonials' determination to control their own economic policies was reinforced by the notions of prerogative and sovereignty that had long justified (in their minds, at least) their control of their own 'internal' affairs (see Nettels, 1952). When the Constitution was adopted, the desire of political leaders to preserve and perpetuate diversity and autonomy — this enduring particularism and its political concomitant, the claim to state sovereignty — found expression in the structure of federalism which was adopted.\footnote{It is well to remember that American federalism, like the Australian, was designed not to give representation to racial or cultural groups; it was designed to give representation to political units as they had existed in the colonial era.}

In counterpoint with changes in the common law and in legal culture, the degree of institutional innovation during the colonial epoch was a
remarkable feature of the record. Thus while Sumner Powell confirms in his study of Sudbury that when the English settlers established their new town in Massachusetts ‘the most significant institution to be reintroduced was the English common law’, he also acknowledges the ‘staggering number of changes ... in religion, in social organisation, in local government’ that were introduced in the founding phase. Institutional mutation and transformation were sweeping indeed. In the Massachusetts legal regime, for example, courts-baron, courts-leet and courts of hundreds, investigation and ordination were all discarded, along with all the officers of the established church, the institutions and officers of King’s bench, and ‘seneschal, bailiff, jurymen, virgate, yardland, reversion, messuage, tenement, toft, croft, heriot, close, fealty to the lord’ and the like (Powell, 1963:140-5). One suspects that when the residents of colonial Sudbury resorted to the common law for settlement of disputes, it was in part to achieve some measure of continuity and certainty in a situation of experiment, flux, and reordering of social relationships and of legal mores. Matched in the Middle Atlantic colonies, this was the New England version of the use of law to effect change that found its cruel caricature and most extreme variant in the slave regimes of the South.14

III. THE NINETEENTH CENTURY

What follows is an overview of law and economic change in the nineteenth century, taking as its focus the following essential features of the American record: (1) the establishment of a federal system of governance, the effect of that system upon policy processes, and its impact upon the development of economic institutions and the dynamics of economic change; (2) the positive, interventionist thrust of the state governments and their impact, together with developments in legal doctrine that supported the state role; (3) common law innovations in the realms of property, contract, and torts, serving to augment positive-state interventions and to establish the conditions of enterprise or the rules of the game.

Federalism is of course the overarching concern, for it subsumes the rest by furnishing the structure of governance within which public law, activist state governments and common-law jurisprudence in the states all operated. In addition, legal innovations distinctive to the American federal system — constitutionalism and the doctrine of limited powers, enumeration of powers for the central government and the concept of powers ‘reserved’ to the states, and the inherited notions of state autonomy and ‘sovereignty’ — all had further profound effects on the legacy of institutions and doctrine inherited from the colonial epoch.

14. Outside the scope of this analysis, but obviously relevant at least to legal culture as it bore on law and economy, is the mode of analysis that draws heavily from the methodology of cultural anthropology. The leading work is that of Rhys Isaac.
In the period from 1789 to the Civil War, the formal doctrines of 'dual federalism', of the national government and the constituent states each operating in independent spheres of authority with equal constitutional standing within the system, came close to describing the realities of political power. It was in vital respects a truly decentralised legal and political system (Scheiber, 1980a, 1980b). To be sure, the great decisions of the Supreme Court — on judicial review, on the Commerce Clause and on the Contract Clause — established national power on a firm basis. But a set of countervailing doctrines and forces worked against centralising tendencies. Formal doctrine reserving power to the states was of great importance, exemplified particularly by slavery. But other areas of policy also remained by doctrinal commitment or in practice under the states' control. The political hegemony of the Jeffersonian and Jacksonian parties also worked against centralising tendencies throughout most of the antebellum period. Placing limits on the reach and scope of national authority became a matter of doctrinal orthodoxy, exemplified in banking and currency and in internal improvements (Hammond, 1958; Goodrich, 1960; Scheiber, 1982). Such political sectionalism reinforced constitutionalist barriers, and those barriers proved remarkably durable.

Forces originating within the states themselves militated against activism at the centre. It was not simply a matter of passivity on the states' part, nor indeed simply a matter of constitutional (as opposed to interest-based) objections to centralisation. What I have termed 'rivalistic state mercantilism' pitted one state against another in the competition for capital, immigrants and enterprise. The states manipulated the instruments of law to mobilise resources, provide infrastructural investment and employ positive government in the quest for parochial advantage. Every state distributed largesse in one form or another, either through devolution of valuable charter privileges and grants of tax exemptions, or through direct subsidies to selected enterprises (mainly in the transport sector). Many states undertook outright state enterprise in the construction of canals or other transport facilities. Some organised and operated state-owned banks (Taylor, 1951; Friedman, 1973). Just as the colonial governments had done in their use of warehouse regulations and inspection, many states imposed rules that were explicitly designed to place out-of-state competition at a disadvantage, or to exclude out-of-state goods altogether in some cases (Scheiber, 1969). One could make the argument that this competitive drive, animated by strident parochialism, sometimes bordered on paranoia, and that it became a leading feature of legal process (both before and after the Civil War) in the design of public law and in state administration.15

15. I have sought to make this argument in extenso elsewhere, on the basis of both general jurisprudential evidence and a case study of California (Scheiber, 1984).
Reinforcing this picture of decentralised power is evidence of multi-dimensional diversity in public policy and legal doctrine throughout the mosaic of jurisdictions that constituted the federal system. Studies of expenditures and public-finance patterns, for example, reveal major differences from one state to another in the ‘mix’ of expenditures by functional category and in the overall tax bite. Apparently variables such as per capita income levels or the degree of economic development do not explain these differentials; they seem to be the result of divergent policy preferences (Davis and Legler, 1966). Tony Freyer’s studies of commercial law and Charles McCurdy’s work on California’s jurisprudence in the 1850s have provided further detailed evidence of the distinctiveness of each state’s ‘mix’ of law.

This decentralisation of real power (as well as formal constitutional authority) prior to 1861 served, I would contend, as an impetus to institutional innovation and doctrinal inventiveness. Authority over such matters as transportation planning and development, labour relations, commercial law, corporation law, natural-resources allocative law and policy, family law, property law and contract was dispersed throughout the federal system. Eminent domain and torts were the nearly exclusive subject of state control.

After the Civil War, there was a movement toward centralisation of authority in matters of political economy. This trend was evident, for example, in the use of the western lands to shape development, in land grants and other subsidies to the transcontinental railroad projects, in the establishment of the national banking system, and in reform of the national tax structure. It was accompanied by a parallel movement in constitutional doctrine associated with the antislavery and civil rights Amendments (13th, 14th and 15th) of the Reconstruction period. Even so, the power of the states remained substantial and the content of their public law and judge-made law continued to be of vital importance in shaping economic institutions and the market. The states continued to exercise nearly exclusive control in major areas of law bearing on economic affairs, including contract, tort, property and resources law. They continued to make tangible contributions to capital formation with their aid to railroads (including their approval of municipal aid programs) and their construction of road and harbour facilities. The states also persisted in their rivalries, imposing discriminatory taxes and licence fees designed to advance their ‘mercantilistic’ objectives in a competitive system at the expense of ‘foreign’ (out-of-state) interests. By their virtually exclusive

16. American historians differ, sometimes radically, on how the war affected the course of economic growth — whether it produced a retardation of growth trends or was, either in the long run or short run, a stimulus; but I find little substantial disagreement on the matter of centralising trends in public economy policy and law.
control of corporation law, moreover, the states became embroiled in a sordid competition to achieve the lowest levels of taxation or state oversight. In this respect, Delaware and New Jersey managed to create the most 'hospitable' climates of enterprise. Federal regulatory initiatives meanwhile lagged far behind economic realities. The private sector often outran the power or the political will of government. Often, too, the line between 'promotional' and 'regulatory' objectives, as in state railroad regulation, was hard to discern; and it was a commonplace that promotional objectives, especially the fear of driving away capital investment, overwhelmed regulatory goals. In the late nineteenth century struggle over child-labour regulations, culminating in an abortive effort to obtain action from Congress in later years, the terrible human effects that could result from absence of uniform national standards became evident (S. Wood, 1968; Scheiber, 1975; Farnham, 1963; Hurst, 1956).

Against this background in public law, we come to the intriguing question of what role the courts and the common law played in the relationship between government and a developing economy. This relationship is the focus of a great deal of the most recent scholarship in American legal history, scholars such as Willard Hurst, Lawrence Friedman, William Nelson, Morton Horwitz, the present writer and many others having given their energies heavily to economic themes.

At the outset when we think about courts, two models come to mind. The first is the traditional one with the judge in quest of specific rules or applicable principles from precedent, seeking to decide like cases alike, yet also mindful that it is legitimate to advance the common law by small steps in response to changing social realities in order to 'do justice'. The second model, very different, is exemplified by the decision of a New York judge in an 1873 tort action (Losee v. Buchanan, 51 N.Y. 476) that involved the claims of an injured party for damages when a steam boiler exploded. In this decision we find a judicial calculus based on a pragmatic view of law and its functions that seems to inhabit a different intellectual universe from the inherited common-law style:

[T]he general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbour, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals, and rail-roads. They are demanded by the manifold wants of mankind and lay at the basis of all our civilisation. If I have any of these on my lands, they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor.

Similarly explicit judicial reasoning from concern to advance technological and economic progress came from the Pennsylvania state
supreme court in *Penn. Coal Co. v. Sanderson* (113 Pa. 126, 149) in 1886. The court held that, in view of the coal industry's importance to the state economy, mining companies were not to be held liable for pollution to streams. 'The necessities of a great public industry, which although in the hands of a private corporation, subserves a great public interest' will justify such 'trifling inconveniences to particular persons' as contamination of a downstream riparian owner's domestic water supply! To assess the impact of the common law on the economy in nineteenth-century America, one must know to what extent the courts in this way submitted 'natural right or natural liberty . . . to the chisel of the mason, that it enter symmetrically into the social structure' (*Hughes v. Anderson*, 68 Ala. 280). (See Abel, 1981; Scheiber, 1982.)

Still a third model of judicial style and reasoning must be considered alongside the other two: decision-making based on the premise that the polity as a whole has principled claims, which American judges termed 'rights of the public', and that the courts are obliged to protect those rights. The claims of the public thus become constraints both upon private uses of property and upon the government's own uses and disposition of certain types of property such as waterfront or navigable ways. In the great tradition of common-law judges, advancing the organic law as new circumstances seemed to require the reappraisal of inherited rules, a state appellate judge such as the great Chief Justice Shaw of Massachusetts could invoke 'rights of the public' as a validating canon in assessing the constitutionality of regulatory statutes. By such reasoning, the public interest could not be defined adequately as a residual, as something left over after the 'vested rights' of private property had been defined (Levy, 1954; Scheiber, 1984).

All three of the foregoing styles of judging were to be found in the record of state courts in the nineteenth century. Exercising judicial power in all three modes, the courts generated rulings that formed a major element of overall public policy on social and economic matters. The distribution of burdens and benefits, the assignment of priorities to particular types of economic activity, and the contributions of law to both economic efficiency and social welfare were all dependent in considerable measure upon the actions of courts.

All students of the period would agree, I think, that appraisal of the judicial function would need to embrace six major themes. First was the development of eminent-domain doctrines, for without the power to take private property the course of the Transportation Revolution would have been different, and even water-powered manufacturing would have been affected adversely. Second was the abrogation of formerly applicable common-law remedies when courts validated legislative grants of power
and immunity to certain entrepreneurial undertakings such as irrigation, drainage, resource extraction in forests and mines, manufacturing of certain types, and transport projects (Horwitz, 1976; Scheiber, 1971). Third was the development of doctrines designed to support the functioning of contractual relations in the market place, lending flexibility and durability to private-sector legal structures (Hurst, 1956). Fourth was the judicial response to development of a law of corporations, generally supportive of the statutory initiatives. Fifth was the application and modification by legislatures as well as courts of common-law riparian doctrines regulating the uses of flowing and underground waters (Lauer, 1963). Finally, there was the growing complexity of commercial-law litigation as the state courts continued to generate their own bodies of rules despite strong counter-efforts by nationalists on the Supreme Court, most notably Justice Story, to generate a federal common commercial law (Freyer, 1979).

What scholars find it difficult to agree upon, however, is the larger meaning of either the judicial role or of specific doctrinal innovations. Did the courts embrace pragmatism on all counts, exemplified by the exploding steam-boiler case quoted earlier? Did principles of 'rights of the public', especially as they were invoked to support innovations in law under the police power, represent a meaningful concern for the public interest? Or were they merely a smokescreen for still further cynical class exploitation through manipulation of the law? Even if a pragmatic standard making the imperatives of technology and material progress a validating canon by which to measure legislation’s constitutionality and generating new judge-made law was in fact dominant, could it have been in any measure perfidious and exploitative? Where did costs fall when entrepreneurs were given effective subsidies? Who were the winners and who the losers?17

Perhaps the search for a ‘dominant’ theme is mistaken and we ought instead to stress the great diversity and complexity of doctrinal innovation by courts. I have tried, for example, to argue (1984) on lines pioneered by Hurst and Levy that the most accurate view of legal process is one that

17. Horwitz (1977) contends that it is ‘likely’ that legal subsidy through doctrinal innovation ‘contribute[d] to an increase in inequality by throwing a disproportionate share of the burdens of economic growth on the weakest and least organized groups in American society’ (101). Hurst, in his works generally, has always stressed redistributive consequences of laws that favoured active enterprise over ‘static' propertied interests; but he does not indicate there was systematic exploitation. Schwartz (1981) challenges head-on the Horwitz view on the matter of industrial torts. My own eminent-domain studies (1971) provide evidence of redistributive effects and subsidy for both governmental and private enterprises — but without the alleged increase in inequality of wealth that Horwitz contends was ‘likely’. Freyer (1981) modifies my own view and challenges Horwitz’s even more.
portrays doctrinal tension and multiplicity of motivations. It is a view that
goes beyond courts, assessing legal process in the context of public law and
even constitution-writing and amendment; and it is a view that adduces
evidence from the record of state courts to the effect that doctrinal
innovations by judges did not, in fact, always favour the 'active'
entrepreneur as against the older-established economic interests and did
not always favour industrial interests over agricultural.

This is not the place for a full exposition of how the model of tension I
have just described is different from models such as Hurst’s (1956) with its
emphasis on ‘drift and default’ in undirected change, or from Horwitz’s
(1977) with its stress on judge-made law as exploitative and uniformly
class-oriented, geared to serve industrial interests over agricultural
interests and the rich over the rest of society. Instead I wish only to
emphasise here that even while doctrinal innovation was a powerful
influence, there were also present many elements of legal continuity. These
had a vital bearing on economic institutions and their rights, privileges and
real power, and they certainly affected the terms of entrepreneurial and
technological innovation as well. A host of issues before the courts — in
property law, eminent domain, commercial law, resource law — were
adjudicated in a variety of modes of decision. Some were settled in ways
that discarded inherited doctrines. Others, however, were the objects of
rulings based on ‘public rights’ or a progress-oriented pragmatism that
built upon the doctrinal heritage towards a new constitutional and
jurisprudential synthesis. Even as late as the 1890s we find striking
evidence that the doctrinal heritage was still shaping the legal configuration
of major issues in public policy. Both the labour conspiracy prosecutions of
that decade and the premises of ‘restraint of trade’ in the Sherman Act
controlling trusts provide just such evidence (see Letwin, 1956; Paul,
1960).

My own conclusions on the relationship of law and the economy in the
nineteenth century can be summarised as follows. First, the federal system
not only resulted in decentralised power but also contributed to a
competitiveness that reduced the will of the states to regulate private
business interests. Federalism also contributed to the creation of enclaves
of private power in particular states — by the cattle industry in the Rocky
Mountain states and by mining firms and railroad corporations in many
others. Federalism also provided escape routes for business interests that
did come under state regulation, both by allowing ‘forum-shopping’ in the
courts and also occasionally by the supplanting of tough state laws by
federal regulations more congenial to business. In both respects, the
advantage tended to be on the side of large-scale entrepreneurial interests
as against public authority (Scheiber, 1975).
Second, as to the burdens and benefits of judge-made law, the identification of winners and losers is not so easy a matter as some legal historians have contended. In some of the great cases in eminent domain and property law, for example, one wealthy and powerful interest was pitted against another. The evidence does not run all one way and does not unequivocally support the view that the disadvantaged were uniformly the losers. Thus, for example, there were prominent instances when federal courts stood four-square against populistic pressure to impose crippling economic and civil liabilities upon racial minorities; this was true in the case of the Chinese in California and in the West generally.18 Similarly, the recent work of Gary Schwartz on industrial torts law concludes that much of the evidence demonstrates that ‘the 19th-century negligence system was applied with impressive alertness to major industries and that tort law exhibited a keen concern for victim welfare’ (Schwartz, 1981:1720). We should note, however, that Schwartz’s evidence consists of case outcomes only and that unfortunately he does not probe beneath the surface to inquire into the adequacy of sums awarded in industrial tort judgments. A similar ambiguity about winners and losers comes through in my own work on the impact of eminent-domain law. Formal judgments based on compensation doctrines in takings frequently used benefit offsets, so called, against damages. Often the final outcome was no payment at all, or only nominal compensation, as alleged benefits to a particular property were offset against damages sustained (Scheiber, 1971). On the other hand, Freyer’s more recent work on eminent-domain judgments in the Middle Atlantic states suggests that in general entrepreneurs were not treated so well as some scholars have thought (Freyer, 1981). In sum, while I do not mean to doubt that a substantial subsidy effect derived from courts’ decisions in the tort, property, and eminent-domain fields, the extent of that subsidy and other questions bearing on winners and losers ought to be viewed as an urgent subject for additional research, not as a matter firmly settled or to be taken as axiomatic.

Third, as was implicit in what was said earlier on ‘rights of the public’, I think that we ought not, in our enthusiasm for finding cynical exploitation of law and pervasive pragmatism in judicial style, to overlook the considerable vigour and strong continuity of the regulatory tradition. Constitutional decisions upholding regulatory powers of the state, such as Munn v. Illinois (94 U.S. 113) in 1877, did not manifest a startling doctrinal break with the past, as has often been contended. Rather they had deep roots in the prior history of jurisprudence in water rights, eminent domain, and police power in the state courts — in what I have argued in ‘Road to Munn’ (1971) was a coherent body of law expressing the principle

18. John Wunder of Texas Tech (Lubbock) University has in progress a major study on treatment of the Chinese in the law of the western states.
of public purpose and public rights (see also Miller, 1970). That regulatory tradition, which is scarcely mentioned in some of the recently published legal history on the nineteenth century, forms one of the iron chains that links modern administrative law to historic moorings. It is a line of substantial, often dramatic continuity into the contemporary legal culture of the regulatory state.

IV. CONCLUSION

Nearly twenty years ago, Professor Julius Stone admonished legal historians in the United States to heed the example of Willard Hurst, who had just published his monumental study of law and the Wisconsin lumber industry. ‘If it is good for jurists to pause at the graves that mark the movement of legal history,’ Stone wrote, ‘Americans may wish to pause more frequently at the graves that mark their own past. There may well be more to instruct and inspire them in the state of the La Follettes than in that of Edward the Confessor’ (1965:1687).

In the time since those words were written, American scholars have indeed taken heed of Professor Stone’s advice. Much of the new work in legal history is, in fact, directly inspired by Hurst’s own studies and is termed ‘legal–economic history’ because of its focus on the history of law and political economy.19 Still lacking, however, is work which will establish the relevance of themes from even the late nineteenth century — when the economy and society already had assumed most of their modern characteristics and the United States was already the world’s leading industrial power — to the contemporary era. The positive state continues successfully to obscure continuities. The opportunities are evident. Even a cursory glance at the law reports today reveals dramatically that the doctrines associated with Roosevelt the Innovator have blended with the heritages of both Edward and La Follette. Judges continue to fashion an organic common law from such materials. There is, in short, continuity. But it must be discerned in a context that seems as far removed from F.D.R. as it is from the Tudors and Stuarts.

This new context includes pervasiveness of administrative discretion; welfare measures dwarfing in reach anything known in the U.S. prior to 1960, let alone 1933; a complex federalism marked by a technocratic element termed ‘inter-governmental relations’; and withal, a government whose share of national income and product has risen to six times the public-sector share of half a century ago, and whose massive military complex and intelligence apparatus defies all comparison with the pre-World War II situation. Yet the innovative lawmaking of a modern

19. See note 1, supra.
judge such as Roger Traynor of California, architect of strict liability
document, is familiar in style and justification to anyone conversant with the
record of, say, Chief Justice Shaw in antebellum Massachusetts (see Ursin,
1981). Similarly, institutional persistence is evident in such modern-day
phenomena as the American courts' statutory interpretations and
assertions of 'rights of the public' in the environmental-regulation field
(Stewart, 1981; Keller, 1981). Similarly, while the institutional structures
of law and doctrinal tensions in other major areas of public law fairly shout
of things new and profoundly different from the preoccupations of the
nineteenth century, they also bear the markings of earlier developments
and reflect the accustomed modes in legal process.

Sorting out the products of doctrinal heritage from the product of
modern innovation and measuring the significance of institutional changes
will provide a challenge more than enough to command the energies of the
next generation of legal-economic historians. Should this scholarly
enterprise be successful, it will help us to understand better the legal
system's potential for change, reform and persistence. More important, it
will help us to understand the central issue about law in contemporary
society: how giant aggregates of economic power in the private sector can
be subjected to the sort of control that is effectual on the one hand, yet on
the other is accountable in ways that measure up to the highest
constitutional standards.

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