The Integration of Classical Legal Thought

In the last three chapters, we have examined the conceptual structure of the horizontal dimension of Classical legal thought. My purpose has been to show that that structure changed through the middle decades of the century so that by the 1870's both public and private law were coming to share a number of significant characteristics. All legal rules were more and more cast in terms of areas of autonomy for the wills of legal actors, whether those were private individuals, state legislatures or the federal Congress. The rules required the judge to identify the relevant will objectively, by reference to a formal, external language, rather than attempt to get at "real" or subjective intent.

This conceptual parallelism of all legal rules was one of three kinds of integration achieved by Classical legal thought. This chapter describes in an abstract and schematic fashion the second and third of these. It is a first attempt at a picture of Classical legal thought as a structured whole with a great deal of internal consistency and a powerful internal logic through which it could assimilate new matter.

The only major structural element in this whole that we have not yet addressed directly is the theory of the judicial role. The next section remedies this deficiency, using what should by now
be the familiar model of consciousness as a mediator of the contradictions of experience.

The constant theme of the theory of the separation of powers, in pre-Classical, Classical and modern legal thought is that the activity of the judges is an objective, rational one, while that of the legislature is political and, if not arbitrary, at least arational and contingent. It is a striking fact that during the pre-Classical period, a belief in objectivity and rationality as the hallmarks of the judicial role was consistent with a general indifference to the problem of judicial method. Moreover, the sense of acting objectively was consistent with methodological electricism in practice.

As we have seen already many times, pre-Classical judges unhesitatingly mingled direct appeals to natural rights, morality, sovereignty, policy and implied intent. These coexisted with arguments from precedent and deductions from legal conceptions without any apparent tension. By contrast, in Classical and modern legal thought, the requirement of objectivity appears to have as corollaries both a near obsessive concern with defining and defending what judges do, and the belief that there is only one judicial method, applicable to all legal problems.

In both Classical and modern legal thought, the basic strategy in defense of the objectivity of legal reasoning has been to assert that judges make new rules by developing the implications of legal principles that pre-exist them. In both periods, there have been two main sources for such principles: natural rights and morality; and the idea of the maximization of social welfare. The difference between the periods is that the Classical theorists proclaimed the creed of principle with confidence, enthusiasm, and aggressiveness, while the moderns consider it to be problematic.

Modern theorists preoccupy themselves with attempting to show that there is some sense in which it is meaningful to describe the process of legal reasoning as bounded and determinate, and with attacking as inadequate all the solutions previously put forward by other theorists. The main difficulties that each new
The general belief in the incompatibility of natural rights/morality as a premise with social welfare maximization as a premise. When the implications conflict, the judges must have a way to choose between them, or he is not bound.

(2) The general belief that there are conflicting sets of principles both of morality and right and of social welfare maximization. These sets have radically different implications for the design of particular rules. If the judge is free to choose between the conflicting sets, he is not bound.

(3) The general belief that the federal Constitution does not unequivocally direct the judge in making choices between or within the conflicting traditions. Since the basic public law source of authority points in all directions at once, the judge can justify any choice he may want to make.

(4) The general belief that there is no neutral, objective way to generate a ratio decidendi from a case. It follows that the system of precedent only very rarely determines either the choice among conflicting sets of principles or the outcome of particular cases.

(5) The general belief that even where, in a particular jurisdiction, a particular principle has been adopted, there is no such thing as an objective process of derivation of particular rules for new situations. Both the passage from principle to rule and that from the mass of raw facts to the legally operative facts are inescapably open to influence by factors other than the principle itself. ("No rule can determine the scope of its own application.")


The upshot of all the critical and constructive efforts of the
modern theorists has been that the only rational decision process consists in a detailed, ad hoc weighing of all the "interests," or "values," or "utilities" that will be affected by adopting one rule or another. This methodological conclusion applies regardless of one's choices between or within the traditions of natural rights/morality and social welfare maximization. The point is that wherever one gets one's criteria, it is impermissible to erect them into principles.

This outcome is the exact reverse of that sought by those who brought it to pass. Each of them proposed some formulation that would distinguish the judicial from the legislative role, while attacking previous formulations. The misfortune has been that the attacks have been cumulatively successful, and none of the suggestions of why judges differ from legislatures, in their reasoning process, has survived them.

It is important to keep in mind that we are speaking of judicial methods for elaborating new rules to fill gaps. It is not uncommon to believe that this is an exceptional function, and that in some high percentage of cases (say, 90%) the judge is confronted with a situation in which there is only one possible decision. A variant is to argue that although the mere fact of a lawsuit is some evidence of leeway to choose, the overwhelming number of transactions are completed without litigation, indicating that gaps in the system are relatively infrequent. There is a counter-position to the effect that only a small percentage of the cases that could be litigated are litigated, and only a small percentage of these can be decided by an unproblematic application of rules to facts; the absence of a satisfactory theory of judicial reasoning is consequently an extremely important piece of information about the legal system. This dispute is not important, for the moment, since both sides to it concede the existence of the problems of legal reasoning I have just referred to.

The Classics conceded the first two (the incompatibility of natural right/morality with social welfare maximization and the existence of alternative sets of premises within each of the two traditions). But they believed that the Constitution and the common law embodied definite choices, at a very high level of
abstraction, among the conflicting premises available. It was possible to induce these from the cases and the sacred text. Moreover, the set of principles chosen was internally consistent, or at least in the process of becoming so, through a natural, organic, incremental evolution. Finally, they believed in the possibility of deducing rules from these principles, so that new cases could be decided in accordance with the pre-existing scheme.

Pollock, in his seminal book on Torts (1886), began by stating that:

If the collection of rules we call the law of torts is founded on any general principles of duty and liability, those principles have nowhere been stated with authority. [4]

He then induces a general principle:

Liability for delict, or civil wrong in the strict sense, is the result either of wilful injury to others, or wanton disregard of what is due to them (dolus), or of a failure to observe due care and caution which has similar though not intended or expected consequences (culpa). [13]

From this it followed that the rules of liability without fault for interference with property were “extraneous matter,” [12] “accounted for by historical accident,” [13] a “special case.” [15] This conclusion was the result of a “scientific” [vi] and “rational” [12] exposition of the subject.

A few pages later, Pollock laid down, in passing, another fundamental idea: “It is not only certain favored kinds of agreements that are protected, but all agreements that satisfy certain general conditions are valid and binding, subject to exceptions which are themselves assignable to general principles of justice and policy.” [16] As we have seen already the “general conditions” he refers to concern voluntariness (will theory), and the objective manifestation of assent.

The “exceptions” to the principle of enforcement meant mainly the requirement of consideration, which Classical thinkers used as the principle device for what policing of contracts seemed appropriate to them. They conceived the doctrine as the rational
working out of a general idea. The definition of consideration was “detriment to the promisee bargained for or given in exchange for the promise.” It followed as a matter of “logic” that the discharge of a debt in exchange for part payment was an unenforceable agreement.

The belief that judicial rulemaking in torts and contracts could proceed by deduction from scientifically induced general principles corresponded to an across-the-board rise in the possible level of abstraction of operative legal concepts. This phenomenon may be crudely but suggestively represented through the notion of a tree of legal rules and principles analogous to a family tree. Let us suppose that the Constitution positively mandates three different rules, which can be arranged as follows:

The idea of operativeness is that a number of more concrete subrules are somehow implicit in a legal principle or concept. It is possible to infer the existence of the more abstract whole from the concrete part and the concrete part from the more abstract whole. Supposing that a dotted horizontal line represents the level beyond which concepts are inoperative, we can represent the situation:
Supposing that rules or principles above the line are considered mere catchalls rather than operative categories, it will follow that neither due process nor just compensation can be applied by the judiciary except by the relatively indeterminate and open-ended processes, such as appeals to morality or natural rights or utility, that were typical of pre-Classical legal thought. The Contracts Clause, in our example, is altogether different: it has rules implicit in it, represented here by solid lines (e.g., the rule of the Dartmouth College Case and that of Ogden v. Saunders); and if it has been once enacted, then the whole of which it is an inseparable part has also been enacted. The dotted lines running up from it represent the influence of the existence of a more abstract rule not expressly written into the Constitution, e.g., the principle that once a private right "vests" the state may not interfere with it. The dotted lines running downward represent the idea that a court can, objectively, infer concrete subrules from an abstraction whose presence in the Constitution is itself an inference from explicitly enacted provisions, e.g., Gelpke v. Dubuque. In this figure, the 5th Amendment requirement of just compensation when private property is taken for a public use is too abstract to be the basis of more concrete subrules objectively derived. Of course, the Court must still enforce it, using its moral intuition, interest-balancing, or whatever other technique it can devise.

Now suppose that the level of abstraction at which operative-ness ceases moves upward:
The raising of the level of abstraction makes it possible to demonstrate that rules previously thought applicable only through subjective processes have objective implications; that several rules previously thought isolated and distinct are implied in a single principle; that the more abstract unifying principle is part of the Constitution; and that previously unknown concrete subrules can be derived from the new abstraction.

What was disruptive about the increasing potency of the method of deduction based on abstract operative concepts was that the method's claims to determine results were inconsistent with the continued viability of the other pre-Classical approaches to judicial reasoning. The claim to objectively determine results was consistent with other methods so long as it applied only to clauses like the ban on titles of nobility. This left all the hard questions to be disposed of through the complex and eclectic arguments of rights and utility. When deduction laid claim to the administration of the due process clause, there was a problem. If the bare language of the Constitution compelled a result in these cases, there were simply no questions left to which the method of philosophy could be applied.

This result is implicit in the concept of operativeness itself: it refers to the experience of being bound. The process of deriving subrules from operative concepts is experienced as compulsory. Disagreement can reflect only bad faith or error on one side or the other. It follows that if other methods lead to results different
from those of the process of derivation of subrules from rules, then either the premises of the deductive method are wrong, or we must scrap the other methods. In Classical legal thought, the claim was that the judges could use the clauses of the Constitution and the most abstract common law maxims as operative premises. It followed that the judge had no choice but to abandon appeals to right, morality, utility or practicality where they conflicted with the results of deduction.

The gradually increasing importance of the method of induction and deduction in all the different areas of law amounted to a second kind of integration exactly analogous to the first. Scientific method created a parallelism of all the judge’s actions in the vertical dimension, as will theory, autonomy and objectivism established parallelism in the horizontal. The steps of the process were also somewhat similar, as we will see in the next chapter. Scientific method appeared first in the law of federalism, and specifically in Marshall’s famous opinions on the Commerce Clause. It also began to predominate in opinions on property law in the decade before the Civil War. After the War, it spread to the body of private law; only in the 1890’s did it finally become commonplace in the field of rights against the state.

There were at least two senses in which the increasing breadth of horizontal integration was causally interrelated with increasing tightness in the vertical. One of these we might call the snowball effect. The concepts of will, autonomy and objectivism were among those discovered to have important particular implications. Their amenability to the new method was a strong argument in its favor. But their very existence as operative elements in the system was in part the outcome of the inductive side of the method. Classical thinkers discovered them everywhere; each discovery confirmed both their reality and the validity of the method that brought them to light.

The irony was that the very success of the enterprise of subsuming all legal relationships under a single small set of concepts eventually destroyed belief that it was the concepts themselves that determined the outcomes of their application. When the abstractions had performed their task of integrating legal thought,
it became apparent that while pre-Classical particularity had been irrational, the new unity was merely linguistic—a verbal trick—rather than a substantive reconstruction. We came gradually to see that there were an infinity of possible results that might all plausibly find expression in the new conceptual language, and, what was worse, might all claim to be derivations of the abstract governing principles. The concepts, then, could be nothing more than a vocabulary for categorizing, describing and comparing, rather than the elements in a method for deriving outcomes. The famous principles, taken together, appeared either self-contradictory or so vague as to be worthless as guides to particular decisions.

It was only for a relatively brief moment, that during which the process of abstraction and unification was proceeding apace but had not yet achieved its disillusioning total triumph, that it was possible to believe in the objectivity of the new method. But it does not follow that the emergence of the new language was without long range influence on results. The work of destruction was in itself of massive impact on what could be thought about the legal order. Because the old way of thought was swallowed whole and digested by Classicism, we are without anything more than an indirect, quasi-antiquarian access to it. We attempt the construction of operative categories and integrating schemes in a world dominated by the death of the Classical organism, rather than in the naively pluralist world in which Classicism itself arose.

The second kind of causal interaction between the elements of the horizontal and vertical dimensions of Classical legal thought is more obscure. To modern eyes, the elements of the horizontal dimension all embody choices among the contradictory positions available within private and public law theory. Moreover, the choices made were by no means obviously harmonious. Objectivism means the sacrifice of an individual will in favor of a generalized social entity (the reasonable man) whose definition seems to us inherently arbitrary. The will theory implies that the will of the parties cannot extend to putting the judge in any role
smacking of the arbitral, even where this limitation inevitably leads to sanctioning arbitrariness. The strategy of autonomy means rejecting the direct enforcement of communal obligations without any more than a hope of achieving these objectives indirectly and "over the long run."

Likewise, in the vertical dimension we tend to regard the "scientific" character of the Classical theory of legal reasoning as illusory. To begin with, we doubt that any consistent set of principles can be induced from the relevant sources. Second, we do not believe in the deductive derivation of rule from principle. Where they claimed objectivity, we charge the vice of being "mechanical." Where they saw certainty, we see "formalism." Holmes' propositions, that the Constitution does not enact a social philosophy, and that, even if it did, general principles don't decide particular cases, have carried the day.

It is important to understand the precise point of disagreement. They admitted freely that legal rules were based on judgments of a political, moral and economic character. The right to contract was based on the political/moral/economic ideal of freedom; the limitation of the sphere of contract by consideration doctrine was based on reasons of policy and morality. The right to collect compensation for injuries was based on moral/economic ideals, limited by the moral notion that a person should not be held liable unless his conduct was morally or socially reprehensible. But they claimed that these foundations were plain for everyone to see: they were highly abstract and strikingly uncontroversial statements like *pacta sunt servanda*, or that a system of entails is inconsistent with political and social democracy, and they had been authoritatively established alike by popular acceptance, common law, and Constitution.

A basic question posed in this book is: How could Classical legal thinkers have believed in such a system? The question can be answered only by putting the system into a much larger context of moral, political and economic belief. The ideas of will theory, autonomy, objectivism and scientific method appeared both meaningful, neutral, and mutually consistent because of their places in a larger body of ideas that, as a whole, suppressed the
contradictions of modern legal thought. This relation between Classical legal thought and late nineteenth century thought in general might be called the external dialectic. The second part of this book will describe it in detail. It must be distinguished from the internal dialectic.

My premise is that although Classical legal thought is unintelligible except in relation to thought as a whole, it was nonetheless an entity. It was not a mere reflection upon law of extra-legal ideas. It had elements of internal coherence and a logic of its own that made it partially autonomous. The notion of the internal dialectic is to describe this autonomous systemic character. What this means is that we can give a partial explanation of the credibility of will theory, autonomy, objectivism and scientific method in terms of the internal needs of Classical legal thought. The explanation is that this group of ideas made possible the harmonious integration of the court-legislature relationship into the general schema.

Judges, like everyone else in the Classical system, had their sphere of absolute power. It was the power to decide "judicial questions," which meant the power to "apply" (as opposed to "make") the law. But the judges differed from all other actors in the system in that they were not exercising "will," but merely carrying out the wills of others. The impersonal, neutral character of the judicial function was what differentiated it from the legislative, and what justified the enormous power of judges in an otherwise democratic political system.

Each of the salient characteristics of Classical law was an indispensable element in the case for an impersonal, neutral judicial role. The casting of all legal rules in terms of the wills of legal actors meant that the judge could always claim that he was acting in subordination to an external compulsion. The parties to the contract, or the sovereign, decided everything; he decided nothing. He simply executed.

Autonomy and objectivism were protections against the danger that the judge would carry out his own will behind a smokescreen of interpretation. If the law prescribed only a minimum of duties of solidarity, it withdrew from the judge any right to appeal to the
uncertain and fluctuating standards of his own particular morality of aspiration. If boundary lines were defined by the literal meanings of words or the behavior of the reasonable man, the judge lost the chance to import his prejudices by way of an inquiry into subjective intention.

Both autonomy and objectivism implied, perhaps, a willingness to frustrate the expectations of the parties. But random disappointment of expectations in the application of a rigid standard meant judicial subordination. The parties could control the judge by mastering the formalities. Communal standards and subjectivism might secure their real will in a few cases, but only at the expense of institutionalizing judicial discretion.

Deduction from a small number of abstract first principles did for judicial rule formulation what autonomy and objectivism did for rule application. Since the process of derivation was neutral and impersonal, it could not be said to involve will of the kind legislatures exercised. And to put the judges above politics was therefore not inconsistent with democracy.

Given these characteristics, the role of the judiciary was as different as possible from that of the legislature. To begin with, the legislature was the proprietor, or master, or guardian of the public sphere of social and economic life. With respect to the management of the Army, the regulation of railroads and other activities "affected with a public interest," the printing of money, or the administration of public lands, the legislature was a legal power holder able to command absolute obedience to its will objectively construed. There was a strong, conscious analogy between the state and private economic actors so far as their relationship to the judiciary was concerned.

But there was a second legislative function that created a much more problematical relationship with the judges. In the exercise of the police power, the legislature had unquestionable jurisdiction to modify the common law rules laid down by the courts. The great battleground of Classical legal thought was the question of the exact nature of this jurisdiction. The dispute over "strict construction of statutes in derogation of the common law" was one incident in the larger struggle.
The details are not important for present purposes. It is enough to point out that even those who advocated codification of private law saw themselves as attempting to simplify, clarify and purify the existing body of judge made doctrine. Furthermore, their program required them to argue just as vociferously as their opponents that there existed an impersonal judicial role radically distinct from that of the legislator.

At the other extreme, those most hostile to legislation acknowledged that the very mechanisms that made judicial rule making neutral and impersonal—namely deductive method and adherence to precedent—also created rigidities. If judges were to be “bound,” then there must be some mechanism to undo mistakes. Rapid changes in the conditions to which judges applied the general principles made prospective modifications of the rules desirable in at least a few cases. And there were cases where an arbitrary rule—the fixing of a statute of limitations, designation of which contracts must be in writing—was positively desirable. If judicial action was in its very nature rational rather than arbitrary, legislation was a necessity.

Given consensus on the sharp distinction between legislative and judicial functions, the theory of the separation of powers fitted neatly into the larger schema of Classical legal thought. The two institutions were powers absolute within their spheres. Judicial legislation was as reprehensible as legislative adjudication. But because of the peculiarity that it never asserted its own will, but only those of other actors in the system, the judiciary could be outside the schema as well as within it. Judges could define the limits of everyone else’s powers/rights, without usurping sovereignty, because those limits were always implicit in the general principles they merely interpreted and applied.

The third form of integration of Classical legal thought had its origin in the descriptive generalization that legal rules involved will theory, autonomy and objectivism, and that the judicial role consisted of induction and deduction. The third integration trans-
formed these empirical statements into necessary implications of the "very nature" of fundamental legal concepts. For example, the Classics argued that it was implicit in the "very nature" of judging to proceed by induction and deduction. Since the various constitutions allocated only the judicial power to the judge, it would be a usurpation for him to proceed otherwise than scientifically.

We can describe the two steps of this process of integration schematically. First, there is the establishment of formal analogy:

The judicial power is to the private-private relation as
the judicial power is to the private-legislature relation as
the judicial power is to the state-state relation as
the judicial power is to the state-federal relation.

The second step is the assertion of the unity of the judicial power:
private-private
judicial power
private-legislature
state-state
judicial power
state-federal

It is essential to remember that what occurs here is the result of abstraction. The particularity of the different relationships of legal actors to the judiciary is a primary fact: the judge develops and applies contract law between private parties, but constitutional law between individual and legislature. He does "the same thing" in the two situations only when through an analytic effort we bring into mental existence a concept that transcends this particularity. In this case, it is the complex concept of the judicial role as characterized by induction and deduction within the context of will theory, autonomy and objectivism.

During the classical period, a similar process of abstraction was at work on each of the other crucial legal concepts. Individuals have property rights among themselves and also property rights against the state. States have sovereign powers with respect to individuals and sovereign powers with respect to other
states and the federal government. The content of these rights and powers varies from relation to relation, according to the identities of the actors involved, the sources of rule, and the modes of administering them. But the Classics conceived the property right as "the same thing" whether exercised against a neighbor or against the state, and sovereignty as the same thing whether its object was the citizen or another government.

We can distinguish three important phases in this process of fusion. The first, and easiest to grasp, concerns words like "property" in the just compensation clause and "contract" in the contracts clause of the federal constitution. Before the Civil War, there was only a limited tendency to identify the constitutional law meanings of these words with their common law meanings. After the Civil War, there was a striking tendency to argue that "property" is "property," whether we are talking about state takings or about neighborly violations of easements.

The second form of identification involved the phrase "police power." The police power was a crucial concept in the law of federalism. We have already seen that it came after the Civil War to be conceived as the countervailing entity to the federal commerce power. The two were formally identical but factually antagonistic. But the police power also figured in the law of rights against the state. In the 1880's, it became common to treat it in this context as the countervailing entity to individual rights to substantive autonomy. Its two aspects finally fused into a single more abstract entity whose nature was unitary, and whose implications could be worked out deductively in the different contexts of public law.

Finally, individual rights inter se came to be more than analogues of rights against the state. They came to define those rights. The rules of property and contract law were thought of as derived from abstract principles of property and contract that the people had enacted constitutionally in the due process clauses. The particular common law rules thus derived were no more subject to legislative change than the text itself. The rules constituted the body of substantive private economic rights. It was the function of the judges to police the boundary between individual and legislature exactly as they policed that between individual and individual.
Once again, we can begin with the formal analogies:

Private rights are to private rights
\[ \text{as} \]
Private rights are to sovereign legislative powers
\[ \text{as} \]
Sovereign state legislative powers are to sovereign state legislative powers
\[ \text{as} \]
Sovereign state legislative powers are to sovereign federal legislative powers.

The second step is the identification of the private or public right/power in one relation with that in the other.

Finally we can add the judicial power, which was identical with
respect to each of the relationships in the structure, and also cen-
tral to the whole, as the representative of the overarching constitu-
tional scheme.

The third systemic characteristic of Classical legal thought was
the assimilation of all of law to the highly integrated structure just
described. The process of abstraction went beyond the creation of
analogies, to the constitution of fused legal entities corresponding
to the institutional actors in the system. The result was an inter-
locking pattern that was a kind of legal mirror image of the real
world of political and economic action.

The abstractions that composed this system (e.g., judicial
power, property, sovereignty) were fully operative. The property
right was an entity from which both private and public law rights
followed as deductions or implications. In itself, it was neither
public nor private: it was the more abstract notion of absolute
dominion within a judicially delimited sphere. It was possible to speak of the various bodies of subrules, for example the law of easements, as "essential aspects" of the "very nature" of this concept. This meant that the whole system was as fully integrated in the vertical as in the horizontal dimension. In other words, the abstract concepts that fitted all legal relationships together in a pattern also provided the source of all particular legal rules.

When we add that all of the operative abstractions could be found in the federal Constitution, then we can close the system, in the sense of making it self-perpetuating through time. The constitutionalization of the first principles put the whole beyond the danger of subversion through the aggressiveness of any of its parts. The judiciary, as interpreter of the Constitution, became the custodian of the orderliness of the structure, and the judiciary had no particular "will" of its own. As long as the judges, according to the "nature" of the judicial power, operated always in the context of will theory, absoluteness, objectivism and deduction constrained by precedent, the will controlling the whole would be that of the People.

This brings us to a final point about the relationship between public and private law in Classical legal thought: the use of the common law rules to provide a meaning for concepts like property, liberty, contract, and so forth, reinforced the judges' claim to a neutral, apolitical method of public law adjudication. The process of abstraction made the unquestionable legality of private law available as a structure for public law rights that would otherwise have seemed too dangerously undefined for judicial administration. This is the "parasitism hypothesis." It suggests that there was something more to the process of abstraction by which we acquired fused notions of property, contract, etc., than the autonomous systematizing impulse. The type of abstraction that occurred served to further integrate the system, to further elaborate its "logic." It gave the theorists of the relatively weak public law sector access to the strength of the private law sector.

I mean to suggest a property of the system here, rather than a causal hypothesis. There is a parallel with the emergence of will theory, absoluteness and objectivism. These functioned to support
the judges' claim to act in a neutral and apolitical fashion. Likewise, the use of common law rules, supposedly implicit in operative constitutional abstractions like liberty and property, functioned to make rights against the state seem legal rather than political. If freedom of contract was part of the liberty guaranteed against state action by the Fourteenth Amendment, and if the common law provided the definition of contract, then there was a neutral, apolitical basis for judicial review of social legislation.

At that point the "logic of the system" created intense jeopardy for the theory of private law. Feeding on the felt operativeness of common law concepts, the legal elite made radical claims about judicial power under the due process clause. A basic objective of sociological jurisprudence and then of legal realism came to be to undermine the basis for this judicial activism. And beginning around the turn of the century, it was clear that the system was so fully integrated that an attack on a part was an attack on the whole. One of the most effective tactics proved to be the demonstration that the supposed operativeness of the private law concepts was illusory. Public law issues thus drew the attention of liberals and progressives to the critique of private law.

4

The famous 1933 case of Home Building & Loan Association v. Blaisdell may serve as an illustration of each of the preceding points about Classical legal thought. Wisconsin had passed a mortgage moratorium, temporarily allowing debtors to avoid foreclosure in spite of their inability to make scheduled payments. The question was whether this law violated the constitutional provision against impairment of the obligation of contracts. For Justice Sutherland dissenting, the "obligation" consisted of the common law rights of the creditor as defined by the parties in the mortgage agreement:

The phrase, "obligation of a contract," in the constitutional sense imports a legal duty to perform the specified obligation of that contract, not to substitute and perform, against the will of the parties, a different, albeit equally valuable, obligation. And a state,
under the contract impairment clause, has no more power to accomplish such a substitution than has one of the parties to the contract against the will of the other. [482]

In this view of the matter, the public law right against impairment of the obligation of contract was defined by the private law rules of contract. To discover just what entity it was that the legislature must leave alone, we consult the common law rules about what the contract creditor is entitled to receive from the debtor. If the legislature is changing those rules after the fact then it is impairing the obligation. The judge resisting a legislative interference with the contract is performing exactly the same function as the judge who orders specific performance or damages for a private breach.

What this view suppressed was the similarity between legislative regulations of existing contracts and common law judicial rule making by the case method. Sutherland’s way of putting it suggested that the private law rules were simply facilitative of the will of the parties, rather than inherently regulatory in their own right. What he dropped out was the “will” of the judges, who, in the modern view, had from the beginning defined just what kind of enforcement mortgages were to receive.

The importance of the suppression of the “legislative” regulatory character of the common law rules was that it allowed Sutherland to claim that the moratorium obviously impaired the mortgage obligation. He saw that obligation as fixed by the parties; the legislature was interfering; ergo it was impairing. In the modern view, however, to show interference is not enough. There is a need to show that the statute in question is more of an interference than the common law rules, so that it does, although the common law rules do not, impair the obligation of contract.

Justice Hughes based his majority opinion in part on the proposition that no such distinction was possible. The State, through its judges had all along been impairing or regulating contract rights. It followed that the Contracts clause had never protected an “absolute” obligation, but rather an obligation subject to “reasonable” limits on individual autonomy. Judged by this standard, the statute was acceptable:
In the absence of legislation, courts of equity have exercised jurisdiction in suits for the foreclosure of mortgages to fix the time and terms of sale and to refuse to confirm sales upon equitable grounds where they were found to be unfair or inadequacy of price was so gross as to shock the conscience. The "equity of redemption" [which allows the debtor to avoid foreclosure by paying up even after he has violated his contract by falling in arrears] is the creature of equity. . . . This principle of equity was victorious against the strong opposition of the common law judges, who thought that by "the Growth of Equity on Equity the Heart of the Common Law is eaten out." The equitable principle became firmly established and its application could not be frustrated even by the engagement of the debtor entered into at the time of the mortgage, the courts applying the equitable maxim "once a mortgage, always a mortgage, and nothing but a mortgage." Although the courts would have no authority to alter a statutory period of redemption, the legislation in question permits the courts to extend that period, within limits and upon equitable terms, thus providing a procedure and relief which are cognate to the historic exercise of the equitable jurisdiction. If it be determined, as it must be, that the contract clause is not an absolute and utterly unqualified restriction of the State's protective power, this legislation is clearly so reasonable as to be within the legislative competency. [397-98]

In effect, Sutherland was claiming that the public law right was certain and judicially administrable because founded on highly legal, operative private law concepts. The critics set out to show that, on the contrary, the common law rules represented the policy and moral judgments of a corps of economic regulators. It followed that the constitutional references to property, contract, liberty, and so forth, could not provide operative bases for judicial review, and that the judges should defer to the legislatures. Unfortunately, the legitimacy of common law adjudication was exploded along with the public law edifice that had been built upon it.

Before we return to the investigation of the origins of this dilemma, we may pause on the ironies of generational conflict.
The spirit of Classicism, of writers like Holmes, Bishop, Gray, Smith, Brewer, Peckham, was that of post-Civil War disillusionment with an old ethos, and of willingness to try a Grand Scheme on problems the pre-Classical thinkers had preferred to duck. The spirit of the post-World War I modernism that laid that Grand Scheme low was not dissimilar. Henry James, who knew many of the participants in the making of Classicism, described the mood of his generation in words that apply *mutatis mutandis* to that which followed:

Such was the bewildered sensation of that earlier and simpler generation of which I have spoken; their illusions were rudely dispelled, and they saw the best of all possible republics given over to fratricidal carnage. This affair had no place in their scheme, and nothing was left for them but to hang their heads and close their eyes. The subsidence of that great convulsion has left a different tone from the tone it found, and one may say that the Civil War marks an era in the history of the American mind. It introduced into the national consciousness a certain sense of proportion and relation, of the world being a more complicated place than it had hitherto seemed, the future more treacherous, success more difficult. At the rate at which things are going, it is obvious that good Americans will be more numerous than ever; but the good American, in days to come, will be a more critical person than his complacent and confident grandfather. [James, *Hawthorne*, 139-40]

He ends sententiously (but one can sympathize): "He has eaten of the tree of knowledge."