

Pre-Classical Public Law

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The particular ideas that composed Classical legal thought are the familiar elements of American political-legal discourse: federalism, the system of individual rights against the state, the common law, the separation of powers. These had all been important parts of legal thought since 1789, and we can follow their permutations during the period before the Civil War, as they gradually assumed the configuration that would be integrated in Classicism. Conversely, we can trace the system of 1900 back toward 1800, watching its well knit elements gradually drift apart, lose their common physiognomy, become disparate objects no one thought to relate among themselves in what now seems the obvious ways.

The difficulty in such an inquiry is to imagine that the elements, as they appeared in pre-Classical legal thought, were at once heterogeneous, not systematically interrelated at all, if we choose the Classical mode as the criterion of integration, yet perfectly adequately integrated from the perspective of the pre-Classical legal thinkers themselves. It is true that when we look at 1830 in terms of the categories and in terms of the perceived problems of theory that have pre-occupied us since 1885, we discover

a state of confusion or insouciant unawareness. We are assessing legal thought in terms of difficulties they had not thought of or didn't care about. It may well be that the typical Supreme Court justice of 1830 felt more confidence in the way things legal hung together than his equivalent 60 or 90 years later. When we assess their thought in terms of the conflicts and theoretical contradictions that preoccupied them, we may find this appropriate and in no way paradoxical.

Once we adopt the notion of integrating subsystems within consciousness, it is easy to see that there may be more than one such structure at work at a given moment of time, and that there may be many unintegrated elements or none at all. Consciousness as a whole is an enduring unity that evolves through time. Within consciousness, different subsystems flourish and decay. Their particular histories are only a part of the history of the whole. For example, a broadening and tightening of one subsystem may coincide with a loosening of the ties within others. Indeed, the growth of one may require or cause the disintegration of others. The characterization of consciousness as a whole therefore poses problems that are quite distinct from those posed by a part. It is one thing to inquire into the condition, in 1830, of each of the elements that were to be integrated in the Classical subsystem, to ask to what extent they had come to be interrelated theoretically in the Classical fashion. It is a more difficult task altogether to portray the state of the larger pre-Classical consciousness that *actually* linked those elements in 1830.

When the common lawyers theorized about private law, they drew on European sources in the tradition of natural rights, according to which all of private law was the rational working out of immutable, divinely established principles. They thereby created what seems to us a striking incoherence within private law, typified by Blackstone's combination of sweeping natural rights generalities with meticulous rehashing of the mass of medieval precedents. To Classical eyes, private law natural rights theorizing further aggravated the split between public and private law, since the positivist, legislatively oriented principles of constitutionalism would not square with the anti-state, mystically based approach of

the natural lawyers. On the other hand, Classical eyes were blind to elements that may have played an integrating role in the earlier mode of thought, such as the ordering of the social universe according to God's laws, or the notion of the Great Chain of Being, or the use in private law of a utilitarian calculus of social policies not much different in practice from the purposive interpretation of general constitutional provisions.

My purpose in this part is to sketch in the outlines of the legal consciousness of the American legal elite of the year 1870. Classical legal thought was emerging throughout the period between 1850 and 1885. I believe that as a consequence the legal universe was radically different in 1900 from what it had been in 1830. 1870 was a year of transition. This was true both of the theory of federalism and of the theories of rights against the state, private law, and the separation of powers. In this chapter, I will describe the pre-Classical and Classical versions of federalism and rights against the state, with the emphasis on the contrast of ways of thought rather than on the stuff of legal doctrine. We will revert to public law at the end of Book One, when we have the whole of Classical legal thought before us.

2

The great accomplishment of the immediate post Civil War period was the firm establishment of the analogy of state-state relations to state-federal relations through the settling of the pre-War disputes about sovereignty and citizenship. Thomas M. Cooley's statement, in his *Treatise on Constitutional Limitations* (1868), was definitive:

Sovereignty, as applied to States, imports the supreme, absolute, uncontrollable power by which any State is governed. . . The sovereignty of a State commonly extends to all the subjects of government within the territorial limits occupied by the associated people who compose it; and. . . the dividing line between sovereignties is usually a territorial line. In American constitutional law, however, there is a division of the powers of sovereignty between the national and state governments by subjects: the for-

mer being possessed of supreme, absolute, and uncontrollable power over certain subjects throughout all the States and territories, while the States have the like complete power, within their respective territorial limits, over other subjects.²

Footnote 2: . . . "The powers of the general government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge of a State court, as if the line of division was traced by landmarks and monuments visible to the eye." Taney, Ch. J., in *Abelman v. Booth*, 21 How. 516.

These statements assert that there is an essential similarity between the territorial line dividing conventional sovereigns and the non-material line dividing state and federal jurisdictions. In one sense, this was a legal commonplace going back to Marshall: it was expected that in the division of functions the federal government would act on state territory yet with "plenary" power. But in another sense, the quote had quite a different meaning after the Civil War than it could have before it. The problem was that, as Cooley's definition suggested, the idea of sovereignty as developed by the Romans, by Blackstone, and by the Utilitarians, had in it a notion not only of absoluteness within a sphere, but of unlimited, absolute absoluteness.

In this conception, it was the "very nature" of sovereignty that it knew no bounds. As a matter of fact, there might be different sovereigns with different territorial jurisdictions, but this state of facts was inherently unstable. There was no way to draw a line around the ambitions of the rivals; boundaries were simply the outcome of the struggle for power. It followed that the notion of boundaries *within* a territorial unit was peculiar to say the least. Such a line between state and federal could be accepted as the outcome of a struggle between nation and state. It could not be conceived as a meaningful statement about legitimate political power, since either the state or the federal government must be the *real*

sovereign. If neither was the real sovereign, then the Union was in a state of war. The peaceful coexistence of two *legitimate* sovereigns was "simply incompatible" with the "Idea" of sovereignty.

Although Marshall and Taney represented opposite sides of the controversy between federalism and states rights, they were in full agreement about the formal mode of resolution of this legal dilemma. Only the people were "really" sovereign; the Constitution allocated spheres *within which* state and federal government were sovereign; the role of the federal judiciary was to enforce this allocation. This way of looking at the matter was sometimes acceptable to one side in the states rights conflict, and sometimes to the other, but it was never uncontroversial; and it had to be admitted that it constituted an anomalous body of doctrine, not obviously compatible either with the extreme positivism or the extreme natural rights standpoints prevalent at the time.

The Civil War settled the controversy, but not in the obvious way of asserting that the federal government was the "real" sovereign. Indeed, it might be more accurate to say that the Civil War killed off the states rights party and substantively satisfied (more or less) the extreme federalists, so that the pre-War Supreme Court theory was the victor by default. At any rate, the most controversial propositions of Marshall's theory of federalism came to be among the least controversial premises of Classicism. Chief Justice Chase's conversion from radical Republican to moderate Democrat symbolized the emergence of a new equilibrium on the issue of federalism. In 1866, he cast it in terms that were to acquire a sort of magical incantatory power in later discussions of the subject:

The Union of the States never was a purely artificial and arbitrary relation . . . It received definite form and character and sanction by the Articles of Confederation. By these the Union was solemnly declared to be "perpetual." And when these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than

by these words. What can be indissoluble if a perpetual union, made more perfect, is not? But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States.... It may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States.

The pre-war court had developed, for use in the legal analysis of the American federal system, a concept of state and federal powers lacking the characteristic of unlimited, absolute absoluteness that was central in the reigning jurisprudence. The Civil War validated this enterprise. *Everyone* within the legal elite seemed to conceive the absoluteness of the state and federal governments *within* their spheres as consistent with a condition of peace, of legitimate harmony, rather than as the provisional and contingent outcome of the struggle to establish the states or the Union as the "real" sovereign. The formulas of Marshall's and Taney's commerce clause cases passed from the status of uneasy compromises, always open to attack as disingenuous and politically self-serving, to the status of revered monuments, unquestionably right, and, just as important, unquestionably *legal*. Henceforth the fundamental *legal* conception in America was not the sovereign of positivism but a form of governmental power that was (a) inherently limited rather than inherently expansive, and (b) not intrinsically linked to the notion of plenary jurisdiction over a territory, but rather sufficiently abstract so that it could exist over a "subject matter" (e.g. commerce, internal police) or a type of "question" (judicial question; legislative question) within a territory. Bryce, writing in 1889, puts this clearly:

A State is, within its proper sphere, just as legally supreme, just as well entitled to give effect to its own will, as is the National government within its sphere; and for the same reason. All authority flows from the people. The people have given part of their

supreme authority to the Central, part to the State governments. Both hold by the same title, and therefore the National government, although superior wherever there is a concurrence of powers, has no more right to trespass upon the domain of a State than a State has upon the domain of Federal action. . .

. . . The inextricable knots which American lawyers and publicists went on tying down till 1861, were cut by the sword of the North in the Civil War, and need concern us no longer. It is now admitted that the Union is not a mere compact between commonwealths, dissoluble at pleasure, but an instrument of perpetual efficacy, emanating from the whole people, and alterable by them only in the manner which its own terms prescribe. It is "an indestructible Union of indestructible States."

He also saw the peculiarity, from a European point of view, of non-territorial sovereignty:

The French or English reader may ask how it is possible to work a system so extremely complex, under which every yard of ground in the Union is covered by two jurisdictions, with two sets of judges and two sets of officers, responsible to different superiors, their spheres of action divided only by an ideal line, and their action liable in practice to clash. The answer is that the system does work, and now, after a hundred years of experience, works smoothly.

In *The Unwritten Constitution*, a brilliant conservative tract of 1890, now forgotten, Christopher G. Tiedeman argued the special significance of this development in a passage that deserves full exhumation:

. . . It was reserved for an American to create an absolutely new political idea of the most transcendent importance, and which has ultimately solved the problem of combining a strong central government with an independent local government.

In February, 1783, Pelatiah Webster published "A Dissertation on the Political Union and Constitution of the Thirteen United States of North America," which was a year later followed by

another of the same tenor, by Noah Webster, in both of which was proposed "a new system of government which should act, not on the States, but on individuals, and vest in Congress full power to carry its laws into effect." When we consider for a moment the wonderfulness of two separate and in many respects independent governmental agencies exerting their powers over the same territory, and each within its own sphere commanding the obedience of the same people, there is no occasion for surprise that it required a century of experience under the new government to fully appreciate its significance and effect. The successful maintenance of the separate autonomy of the Federal and State governments for a century, through all the vicissitudes of political fortune which fell to the lot of the people of the United States, furnished an enigmatical contradiction of the prevalent notions of an indivisible sovereignty.

If there be such a thing in politics as sovereignty, it is necessarily indivisible, and hence it is impossible to subject a territory and people to two separate and independent governments without one of them becoming subordinate toward the instrument of the other. And I am satisfied that the political leaders of the day, such as Hamilton, Madison, and Randolph, who made such strenuous efforts to establish a strong federal government, put no faith in the feasibility of a dual government of this sort. For, upon the assembling of the constitutional convention, these statesmen advocated the establishment of a supreme federal government, which would reduce the States to subordinate provinces; and they did not yield to the demands of the advocates of State rights until it was demonstrated that the convention would not adopt a centralized government. They feared, and the struggles of seventy five years justified their fears, that the two governmental agencies could not maintain their independent autonomy. But against their will and in spite of their fears this became the fundamental principle of the American governmental agencies, about which the political force, played with more or less vehemence for three quarters of a century, until, as a declaration of the results of the mighty crisis, the Supreme Court of the United States pronounced this country to be "an indestructible Union composed of indestructible States."

Within the system of co-equal powers, the role of the federal judiciary was that of umpire and line drawer. Given the premises of the system, there could be no presumption in favor of any participant's status at the expense of the other's. The problem of burden of proof was ingeniously solved through Marshall's formula that the federal government being of enumerated powers, bore the burden of establishing the existence of authority over a subject matter, but that authority once established included all reasonable subsidiary implications and superseded all conflicting state interests. The point was that the federal judiciary was in theory impartial among the contenders.

Nonetheless, before the Civil War, the Court did not once, except in the *Dred Scott* case, strike down a federal statute as invasive of state powers, although it frequently struck down state laws on the inverse ground that they invaded the sphere of Congress (which had, often, not legislated or otherwise expressed itself on the subject matter). In 1869, however, Chief Justice Chase applied the symmetrical conceptual scheme of Marshall and Taney to a federal law banning the sale of a dangerous illuminating gas:

That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

Chase then rejected the government's contentions that the act was in aid of federal taxes on other items. "Standing by itself, it is plainly a regulation of police. . . ." The decision in the case followed as a matter of deduction from major and minor premises:

As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can

have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.

As a federal institution, the Court was not, and could not well have been truly neutral in the pre-War struggle over the nature of the Constitution. The *DeWitt* case marked the beginning of a new attitude, one that led the Court to attempt to strike in practice a balance that had previously been theoretical and rhetorical rather than actual. As Bryce put it twenty years later, though it might be "in the last resort a federal court," yet it was not supposed to be "biased in favor of the Federal government," but rather to avoid "unfairness" as between the powers. [See *The Collector v. Day*, 11 Wall. 113 (1870) for another example.]



The other system that eventually emerged within legal consciousness, that of individual rights, had exactly this same structure: substantive authority was divided, along both territorial and "ideal" or "subject matter" lines, between public and private powers absolute but limited within their spheres. The parallel is easy to grasp today; in fact, it is almost second-nature to us, along with the various critical routines by which the analogies can be redissolved into their constituent parts. In the making, however, the possibility of constructing two parallel systems was by no means obvious, and the tortuosity of the path of emergence suggests something factitious in our most familiar habits of thought.

I believe that the post-war conception of the state-state-federal relationship served as a model or exemplar or paradigm in the construction of the citizen-citizen-state relation in Classical legal thought. For purposes of analogical borrowing, the important things about the federal system were (a) that sovereignty within the system, whether state or federal, was an inherently limited concept, (b) that state sovereignty was a unified or "multi-dimensional" legal concept: the State of Massachusetts was legally the

same entity in relation to Rhode Island that it was in relation to the federal government, although in the latter case its boundary was, as Bryce put it, "ideal" rather than physical; (c) that state and federal governments were "absolute within their spheres" while (d) the federal judiciary was the equally absolute master of the operation of drawing the boundary lines between spheres, using a technique of construction of the Constitution that was legal rather than prudential or political.

By 1898, there existed a federal jurisprudence of the citizen-citizen-state relation which was identical, in each of the respects just mentioned, to the federal system. (a) The concepts of state power and individual right were equated as instances of legally effective will limited by the Constitution. (b) The individual rights of property and contract were unified or "multi-dimensional" legal entities, equally applicable to private disputes and to conflicts between state and citizen. The freedom of contract protected by the 14th Amendment against legislative interference was the same entity as the freedom of contract enforced by the common law in litigation between businessmen. (c) Private right and state power were each "absolute within their spheres," while (d) the federal judiciary had the exclusive power to draw the boundaries of the spheres, using a technique of construction that was legal rather than prudential or political.

This very broadly integrated system of thought was unique in American history. Such a system of thought could not easily come into existence at the state level since the federal analogy was not available there as a constant source of guidance in the evolution of the theories of private and public law rights. And it could not exist at the federal level before the Civil War: there was no general acceptance of the legal character and legitimacy of the Marshallian federal formulas, and there was no general federal jurisdiction over private rights against the state. Finally, until the 1870's and 1880's there were no theories of public and private law of a type capable of sustaining the analogy to the theory of federalism.

In Classical legal thought, rights against the state occupied a central position: they were part of public, of constitutional law,

and were therefore thought of as in the same general universe as the law of federalism. On the other hand, they were "rights" of private parties, and so bore a close relationship to the "rights" of private parties the courts protect through the common law of property or contracts or torts. The law of federalism and private law were much more clearly autonomous from one another than rights against the state from either.

In *pre*-Classical legal thought, rights against the state were much more closely linked to federalism, within the rubric of public or constitutional law, than to private law. The creation of an individual-individual-state parallel to the state-state-federal system was a slow process. The individual-state relation was analogized to that of state and federal power before there was a clear identification of the private law rights of property and contract with those federally guaranteed against the state as the "life, liberty of property" of the 14th Amendment. For this reason, it seems best in expounding the pre-Classical system to present rights against the state in juxtaposition with the law of federalism, and to save for later the back and forth interaction between public law and private law rights.

It is important to keep in mind that the emergence of rights against the state within Classical legal thought involved, in fact, a *double* relationship to the law of federalism. First, the power of the federalism model derived from more than intrinsic aptness. The federal courts were trying to develop a brand new federal law of individual rights against the state. They had to go somewhere for models of legal relationship. The federal model was both intimately familiar and recently vindicated as legally legitimate.

The second kind of interrelationship is more complex. The theories of public and private rights within Classicism were what they were partly because they were theories of what the *federal* courts could and should do about rights. When federal courts dealt with public and private law rights, they did so *always* in a context of jurisdictional uncertainty. In principle, according to the original understanding, the main job of protecting rights in general belonged to the states. The federal rules were a system grafted onto or imposed upon a state system which

everyone, at least as late at 1885, took to be the "real" system.

The substantive theories of public law rights that emerged within Classicism were shaped by the necessity the federal judges felt of creating doctrines that would be compatible with the peculiar federal role. Unlike state court judges, federal court judges had to defend themselves against attacks on the very existence of a rights jurisdiction. Their choice among theories of rights was therefore responsive to a whole range of tactical pressures absent at the state level. For example, the first federal personal rights against the states (aside from those explicitly guaranteed by, e.g., the Contracts Clause) were, according to the judges, logical derivations from the existence and peculiar characteristics of a federal system. Such were the right to travel from state to state and the right to engage in interstate commerce. Only with time and abstraction did these develop into fundamental rights unrelated to the peculiarities of federalism, such as the freedom of contract.

There is a striking analogy between the emergence of Classicism and the emergence of the common law of the national courts of England after 1066. In both cases, the necessity of establishing the jurisdiction of the central authority against a background of autonomous local legal systems profoundly influenced the substantive doctrines that courts could adopt. Maitland and Milsom seem to agree that the law of torts and contracts was secreted "in the interstices of the rules of procedure" not because of some inherent primitivism of the medieval legal mind, but because the procedures were the only way to get a case out of the control of local authority. The federal law of individual rights against the state was secreted in the interstices of the rules governing the relations of state and federal powers. This origin made the federal law of rights as different from state law based on state constitutions as the manorial law of contracts was from that administered in the Court of King's Bench.

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In most important respects, the legal concept of a constitutional right—a right the courts are legally bound to vindicate against

50 the legislature—is the same today as it was in 1900. The Classical conception that emerged in the interpretation of the Fourteenth Amendment was that individual rights and governmental powers are opposed entities. The claims of right of the individual conflict with and encroach on legislative claims of power. The courts find themselves in the middle, without any other help than the Constitution. The Constitution, in turn, recognizes if it does not positively create the dilemma. When the judge refers to it, he finds both rights and powers given extensive treatment as indisputably real legal entities with which he must reason legally, but precious little concrete information about how he is to resolve conflicts between them.

We have shifted the emphasis from property rights to personal rights. But the great difference between our view and that of 1900, is that we no longer believe in the existence of an objective or scientific method of reasoning the judge can apply to the resolution of the dilemma of opposing entities. The court speaks of “fundamental” individual rights vs. “compelling” state interests, but just about everyone seems to agree that these are simply ways of structuring a process of “balance” which is essentially prudential, or political or subjective in character. It is simply a premise that legislative power and individual rights are, as Corwin put it in 1929, “balanced and antithetical concepts” whose “essential contradiction” is “manifest.” [42 HLR 407, 391] The basic anti-interventionist argument follows directly.

It is that the judge should defer to the legislature in cases of any doubt at all: the legislature’s balance of preference has the warrant of democracy, if not of Reason. In 1900, it seems the judges had much greater confidence in their tools for performing the job the Constitution thrust upon them. They perceived rights and powers as in conflict, but not as contradictory. The essence of judicial method was the correct resolution of conflict. There was correspondingly less need to defer to popular bodies when the meaning of the document was in doubt.

1870 was a different matter altogether. In this section, I will attempt a conceptual map of what, by analogy with early English law, we might call the “manorial” doctrine of rights that existed

before the conflict of state and federal jurisdictions forced conceptual innovation. The concepts are those of "general constitutional law" (i.e. state as opposed to federal). My purpose is to explain how it was that pre-Classical thinkers dealt with the rights-powers problem without resort either to the notion of a pseudo-scientific legal method for resolving a conflict, or to the various counsels of despair we adopt in dealing with our contradiction.

The first striking difference between the pre-Classical and the Classical (and modern) approaches is that earlier thinkers split the problem up. In the Classical and post-Classical models, the relation of rights to powers is diadic: there are two and only two concepts which are in conflict in a rather fundamental fashion. The choice of the judge is typically to support one at the expense of the other. In pre-Classical legal consciousness there were at least four different conceptual contexts within which the right-power problem might arise:

- (1) A claim that legislative action violated the natural rights of the individual. Judges were sometimes asked to disregard or set aside legislative action, even in the absence of an explicit constitutional provision, a legally vested right, or an implied limitation, because it violated principles of justice that were *intrinsically* binding on everyone, whether or not institutionally recognized. The usual example was a legislative decree forcibly transferring the property of A to B, or declaring X to be the wife of Y rather than of Z.
- (2) A claim that the legislature had violated some particular, defined, "legally vested right" of the plaintiff protected under one or another of the general clauses of the constitution in question, or as part of a practice of judicial review to secure natural rights. It would violate a vested right if the legislature were to revoke arbitrarily privileges that had been granted a corporation in order to induce it to invest large sums in some development project.

- (3) A claim that the legislature had violated an explicit limitation on its power, a limitation created to protect the plaintiff (for example a Just Compensation Clause, or the Contracts Clause of the federal constitution).
- (4) A claim that the legislative action exceeded one of the "implied limitations" imposed by the constitutional separation of powers. For example the legislature might be "usurping the judicial function" or acting in a way that was simply "not within the definition of legislative powers" if it were to take it upon itself to determine the amount of compensation to be paid in an eminent domain proceeding.

Within each of these categories there could be endless dispute not just about particular cases, but also about the definition and use of concepts. But the dispute was *within* the concepts, not about their meaningfulness. For example, it was a difficult question whether the contracts clause of the federal constitution applied to a corporate charter. But no one disputed that the Contracts Clause had *some* meaning and was judicially enforceable against the states.

Likewise with the vested rights doctrine. Today, we find the notion that there is an objectively determinable moment when a legal advantage vests, and becomes a constitutionally protected right, absurd. For a writer like Thomas M. Cooley, whose treatise on constitutional law sums up the pre-Classical wisdom, there might be a difficulty in fixing the moment of vesting. It might be necessary to resort to case by case analysis to cover the diverse judicial solutions in different situations. But there was no question of the reality of the distinction the judge struggled to apply correctly. A phrase of Justice Bradley, dissenting in a case decided in 1885, gives a sense of the striking difference between our conceptions and theirs:

The suggestion that the words "vested rights" are not to be found in the Constitution does not prove that there are no such rights. The name of the Supreme Being does not occur in the

Constitution; yet our national being is founded on a tacit recognition of His justice and goodness, and the eternal obligation of His laws.[115 U.S. 620, 632]

A more difficult example: there was a perennial argument about whether a judge could legitimately strike down or disregard a law for no other reason than that it violated natural right. But everyone seems to have agreed that the natural rights concept was meaningful. Those most opposed to making it a basis of jurisdiction did not hesitate for a moment to appeal to the concept in deciding how to interpret an ambiguous constitutional clause. Moreover, it seemed to be accepted as a matter of course that a judge could legitimately choose between two plausible interpretations of a statute on the ground that one of them was less in conflict with natural justice than the other.

For example, in *Pumpelly v. Green Bay Company* (1872), Justice Miller had to construe the clause of a state constitution forbidding the taking of property without just compensation. The agents of the state had, without instituting condemnation proceedings or paying compensation, rendered the plaintiff's land useless by flooding it. The defendant's argued that there had been no "taking" of property.

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not taken for the public use. . . .

In the case of *Gardner v. Newburgh*, Chancellor Kent granted

an injunction to prevent the trustees of Newburg from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this though there was no provision in the Constitution of New York such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. . . .

If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights.

What today is an argument about the meaningful existence of natural rights was then an argument about their justiciability.

As they existed in pre-Classical legal consciousness, the concepts of natural and vested rights and express and implied limitations overlapped, but were largely autonomous from each other. *Legally* speaking, they were not just four instances of a general conflict between individual right and legislative power. The legal operations the judge performed in each situation were *sui generis*, rather than instances of the application of a single scientific method, or occasions for performing the essential judicial task of balancing interests. The tendency to reduce all situations involving either a right or power of any kind to a single situation of right-power confrontation did not exist even in the most sophisticated constitutional writing.

Moreover, in *none* of the four situations did the judges use concepts like those modern legal writers apply to all questions of the

opposition of rights and powers. Some typical Classical legal rights are freedom of contract secured by the Due Process Clause of the Fourteenth Amendment; the right to Just Compensation secured in the same way; and the right to Equal Protection typified by a case like *Yick Wo v. Hopkins* (differential enforcement of a local ordinance so as to discriminate against Chinese laundries). The modern equivalents are rights like Free Speech, inferred from the First Amendment's prohibition on federal laws abridging freedom of speech; privacy, inferred from a variety of amendments; and the 'new' equal protection the Court has developed in cases like *Brown v. Bd. of Education* and the *Reapportionment Cases*.

The characteristics of Classical and post-Classical rights are: abstraction (the right as formulated applies over a broad, initially indeterminate range of very disparate situations); firm formal grounding in explicit constitutional language, rather than in extra-legal concepts like natural justice; appeal to concepts of individual autonomy and legal equality; and hence inconsistency with unlimited exercise of legislative powers that are equally if not more firmly grounded in the Constitution.

The modern liberal enemies of the right-wing Classical Court have looked for the origins of the Classical and modern sort of rights in natural rights, vested rights and implied limitations. Classical thinkers, by contrast, claimed that Fourteenth Amendment rights were an instance of the fourth category of concrete and explicit constitutional limitation. For our purposes, what is important is that the very heterogeneous structure of the pre-Classical concepts probably reduced the perception of conflict and masked the flat contradictions that emerged with a more abstract and coherent treatment.

In other words, I am asserting that a purely formal characteristic of the pre-Classical doctrines, their heterogeneity, made it easier to believe that taken together they represented an adequate treatment of the problem. We will encounter similar structural traits in the discussion of private law. But, at least for rights, there were also substantive aspects to the pre-Classical concepts that allowed legal thinkers to fit them together with a degree of harmony long since passed beyond our powers.

In pre-Classical thought, natural rights animate all of public law. Vested rights, and express and implied limitations, as well as sovereignty itself, were comprehensible only by reference to the long tradition of thinking about a transcendent ordering of the social universe, an ordering that actual government could mirror but whose principles were beyond change by human agency. Within this tradition, it was possible to order the concepts of right and power in such a way as to sharply reduce what we regard as inherent incompatibilities.

Pre-Classical natural rights have abstraction in common with the Classical (and modern) variety, and they were even then strongly associated with the idea of autonomy. But they were not fully legal. We tend to see the rights-powers relation in terms of two diadic opposition representing a single structure on two levels:

Natural Rights	Sovereignty
Legal Rights	Legal Powers

In pre-Classical legal consciousness, the relationship was hierarchical:

Natural Rights
Sovereignty
Legal Powers
Legal Rights

Within this arrangement, natural rights and sovereignty were defined, in utterly incompatible terms, as unlimited, absolutely absolute, unconstrainable concepts. Natural rights were entitled to vindication no matter what. As Justice Bradley put it in the *Slaughterhouse Cases*:

In this free country the people of which inherited certain traditional rights and privileges from their ancestors, citizenship means something. It has certain privileges and immunities attached to it which the government whether restricted by express or implied limitations, cannot take away or impair. It may do so temporarily by force, but it cannot do so by right. [16 Wall.114]

Likewise, sovereignty was absolute dominion and knew no restraints of any kind, including constraints of right. But this situation of logical incompatibility of concepts posed (almost) no problem at all for the judge. The absoluteness of natural rights was a *political* datum. The kind of rights he dealt with as a lawyer were *legal* rights, and these were not only not absolute, they were wholly the creatures of legal powers derived from sovereignty. In pre-Classical legal consciousness, law of the positive kind, the law of the actual legal system in force in the United States, the law of treatises and judicial opinions and advice to clients, was the law of legal powers. Rights, within the system of legal reasoning, were the reflex of powers, what one secured by the manipulation of powers.

Right into the Classical period, judges who wanted to deny individual claims to rights against the state used language suggesting that, not only in private, but also in public law, legal power was anterior to legal right. As Justice Harlan put it in an 1887 opinion:

Nor can it be said that government interferes with or impairs any one's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage. Those rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by competent authority to promote the common good. No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare.

But even judges famous for their uncompromising endorsement of judicial review based on natural rights adopted the same perspective. For example, in *Calder v. Bull* (1798), Justice Chase, often treated as the original natural law advocate, spoke of rights as follows:

It seems to me, that the right of property, in its origin, could only arise from compact express, or implied, and I think it the better opinion, that the right, as well as the mode, or manner, of

acquiring property, and of alienating or transferring, inheriting, or transmitting it, is conferred by society; is regulated by civil institution, and is always subject to the rules prescribed by positive law. [3 Dall. 394]

The pre-Classical notion was that men created the sovereign, namely the People gathered in their constitution-making capacity, in order to secure their natural rights against lawless neighbors. This the sovereign did by creating legal powers, legislative and judicial, which in turn operated to protect the citizen against his neighbors' encroachments. The judicial power was that of applying to particular fact situations the general rules set by the legislative power to this purpose. The result was the *indirect* protection of natural rights through the medium of positive law. A hierarchical arrangement of institutions (the People; the legislature; the courts; individual citizens) mirrored that of concepts.

In their constitutions, the sovereign people limited the legal powers they created so as to prevent the legislatures in particular from becoming subverters of the natural rights they were meant to protect. The courts enforced these limitations imposed by sovereign power on legislative power, just as they enforced the limits legislative power laid on private autonomy. In each case, the court carried out a purely legal task — the interpretation and execution of a power — in order to *indirectly* secure natural right. The operation of enforcing at least the explicit limitations in the texts was thus sheltered from the problem of the logical incompatibility of sovereignty and natural right.

It followed, within this conception of the legal universe, that an appeal beyond the structure of powers to the natural rights motivating its creation could not claim to be judicial in the conventional sense. There was an argument that the judge who heeded the appeal was scrambling the hierarchical arrangement of concepts and institutions that suppressed the contradiction of natural right and sovereignty. As Justice Clifford put it, dissenting in *Loan Assoc. v. Topeka* (1874):

Courts cannot nullify an act of the State legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither

the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism. [12 Wall. 669]

On the other hand, the system of powers was designed to secure particular objectives, the protection of certain real, God-given transcendently rational human entitlements. When the judge saw that the set of indirect checks and balances were not working to their proper end, he might feel himself bound in conscience to use his power to intervene to prevent a subversion of the original scheme. Natural right was far from the inherently subjective concept we know today. The judge enforcing it might feel he was taking an advanced or controversial or statesmanlike position on a difficult question of legal philosophy; he need not concede that he was engaged in an act of usurpation. As Justice Miller pointed out in the *Loan Association* case just cited, when the argument is about natural rights the charge of despotism can go in either direction:

. . . A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism . . .

The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter

be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B. [20 Wall. 662-3]

The modern reader, reacting to these declarations of Justices Miller and Clifford, may have in the back of his or her mind that there was an association between solicitude for big business, for the rich, for entrepreneurs and the middle class, latent in the appeal to natural rights against a "despotism of the many." Conversely, Clifford's appeal to the sovereignty of the people and the Constitution over the judges suggests the populist, progressive, liberal rhetoric of the period 1890-1940. This set of associations cannot be extrapolated back to 1874, as the facts of *Loan Association* show clearly enough.

Topeka had issued bonds, promising to pay the interest from taxes, and handed over the capital raised to local manufacturers as an inducement to set up business in the city. Miller's opinion, applying the general constitutional law of the state in the context of diversity jurisdiction, held that the bonds were worthless because the city could not tax for the "private purpose" of subsidizing manufactures. The political context in which *he* saw the question is clear enough:

If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving of the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.

By contrast, Justice Clifford saw the issue in terms of that holy of holies of the propertied classes, the public credit:

In my judgement there is much more to be dreaded from judicial decisions which may have the effect to sanction the fraudulent repudiation of honest debts, than from any statutes passed by the

State to enable municipal corporations to meet and discharge their just pecuniary obligations.

Because he was anxious to defend him against the clearly spurious charge of being an early Classical reactionary, Charles Fairman was led to try to state precisely how Miller's assumptions in *Loan Association* differed from those of *Lochner*:

It would wrench Miller's words out of historical context to imagine him to have been a forerunner of the defenders of economic laissez faire, on the Court and in the country, in the latter part of the nineteenth century and for nearly four decades of the twentieth. He was affirming that no man should be taxed - not even by vote of the majority - to make a lure for private businesses. He maintained, as he had said in a dissent (Chase, C.J., and Field, J., concurring) -

"We do not believe that any legislative body, sitting under a State constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State . . .

"The result of such a principle, under the growing tendency to special and partial legislation, would be, to exempt the rich from taxation, and cast all the burden of the support of government, and the payment of its debts, on those who are too poor or too honest to purchase such immunity."

He argued that for Miller the existence of rights reserved to the people was "axiomatic." These rights and the express limitations of the constitutions "belonged to one universe of discourse," which was that of the late 18th, early 19th century rhetoric of the Rights of Man.

What was important about pre-Classical natural rights was not that they were inherently biased in favor of one class of the community or another. It was that they existed right at the borderline of operativeness within legal consciousness. They defined the context and limits of judicial daring within public law, drawing the judge onward to intervene, but also into the danger that a strong dissent would make the label of usurper stick.

Unlike his successors, the pre-Classical judge made up his mind about this problem as one of choice between two compelling

- 62 ideals: the defense of the unquestionably real, cognizable, politically fundamental concept of rights, or deference to the positivist institutional scheme that allocated the political role to the legislature. He did not confront the modern dilemma: there was no contradiction of equally legitimate 'balanced' concepts, and no gnawing worry about the very possibility of deciding in a rational, objective fashion whether or not a legal wrong had been committed.



The hierarchical structure of natural rights, sovereignty, legal power and legal right was one characteristic of the pre-Classical concepts that mediated the contradiction of rights and powers. A second characteristic was the availability of the notion of an implied limitation on legislative power. Implied limitations were a half-way house between unabashed appeal to natural rights and the relatively legal and respectable notion of judicial review of express limitations.

Implied limitations were those that assertedly arose from the fact that the constitutions expressly delegated to the legislature only "the legislative power." It followed, according to the argument, that if the legislature performed acts that were not legislative, they violated the constitution by usurping a part of sovereign power not granted them by the sovereign people. It was then up to the judges to enforce the document by denying recognition to the pseudo-legislative act.

If a "legislative act" was simply "whatever the legislature does," then the doctrine of implied limitations would have been without importance. But pre-Classical commentators argued that the term had an ascertainable meaning, and that actual practice was no more than strong evidence of legality. For example, trying and rendering judgment in private law disputes between individuals was part of the judicial, not the legislative function. The legislature would therefore act illegally, and the judge should ignore it or countermand it, if it attempted to do such a thing.

It was apparently possible to believe that the implied limitations argument involved only a minor extension of that of express

limitations. It was also possible to argue sincerely that the legislative power was not an undifferentiated mass split off from the people's sovereignty, but rather structured. It consisted of the police, eminent domain, and taxing powers. Each of these had its own definition. A legislative act that could be assimilated to none of the three sub-powers was necessarily *ultra vires*. Under this interpretation, the doctrine of implied limitations acquired both generality and bite so that it might serve as a vehicle for wide ranging judicial review of legislation. But it lost, at the same time, some of its claim to being merely an instance of judicial execution of the sovereign will.

Express limitations were hard to interpret at all if they were not binding conditions placed on the grant of legislative power, intended to prevent specific abuses by the people's representatives. Implied limitations lacked this quality. It was not obvious that the separation of powers had as an implication that a vast range of actions not explicitly forbidden the legislature could be struck down by the courts. It was at least plausible that the meaning of the separation of powers was the creation of mutually checking institutions by the parceling out of aspects of sovereignty. The legislature would then have full, uncontrollable, absolutely absolute law making authority except in those cases where the higher sovereign had plainly and explicitly withheld it.

In this situation of theoretical conflict, there was a tendency on both sides to merge the implied limitations argument into that about the justiciability of natural rights. In *Calder v. Bull* (1798), for example, the famous dictum of Justice Chase seems intended to obliterate the distinction:

I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and, to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foun-

dation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal, or State Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection of which the government was established. An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or in other words, for an act, which, when done was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them [3 Dall. 387-88]

Eighty years later, the same elision occurs in Justice Miller's *Loan Association* (1874) opinion:

We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State legislature to tax the people, but conceded

that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right.

It must be conceded that there are such rights in every free government beyond the control of the State. . . . To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is no legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes."

Coulter, J., in *Northern Liberties v. St. John's Church*, says, very forcibly, "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a public purpose."

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose. [20 Wall. 662-64]

In both cases, the opinions taking the opposite view of legislative power simply ignore the implied limitations gambit. Iredell, in *Calder v. Bull*, is clear that in the absence of express limitations "whatever the legislative power chose to enact, would be lawfully enacted," but he proceeds to refute only the position of "some speculative jurists" that "a legislative act against natural justice, must, in itself, be void." The refutation is not inconsistent with the existence of implied limitations:

If, . . . the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgments, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are but two lights, in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act. [3 Dall. 398-99]

Clifford, dissenting in *Loan Association*, conceded that the courts enforce constitutional prohibitions, "express or implied," against the legislature. [20 Wall. 668] He then proceeded to argue against a "natural justice" jurisdiction as though that were the only argument Miller had made.

I think it a fair inference that the implied limitations concept had a good deal of force in legal argument, bridging the gap between natural rights and express limitations. Edward Corwin writing in 1914, treated the attempt to distinguish implied limitations from natural rights as pure obscurantism but conceded that, before the Civil War, the former doctrine had been "of most varied and widest serviceability" to the latter. Implied limitations had brought natural rights "within reach of the haven of the written constitution." He even argued that the use of the separation of powers as a basis of implied limitations had had an impact on results:

Courts which continued to appeal to natural rights were compelled by their own logic to consider constitutional questions not

simply in their legal aspects but in their moral aspects as well. . . . Those courts, on the other hand, which sought to effect an absolute separation of legislative and judicial powers regarded any enactment disturbing vested rights, whatever the justification of it, as representing an attempt by the legislature to exercise powers not belonging to it and ipso facto void. [14 Mich. L. Rev. 259-261]

While natural rights existed as available concepts at the outer limits of the operative core of legal consciousness, they were almost always fused in argument with implied limitations. My point in this section has been that this fusion helped soften what was to be the conflict and then the contradiction of rights and powers.



The last structural characteristic of pre-Classical thought that helped to reduce the sense of contradiction within it was the existence of vested rights as a mediator between natural rights and legal rights. The concept of a vested right is by a good deal the most exotic in the pre-Classical repertoire. "When I say that a *right* is vested in a citizen," said Chase in *Calder v. Bull* (1798), I mean, that he has the *power* to do certain actions; or to possess *certain things, according to the law of the land.*" [3 Dall. 394] Here is Corwin's definition of 110 years later:

a right which a particular individual has equitably acquired under the standing laws to do certain acts or to possess and use certain things, [and] the doctrine of vested rights regards any legislative enactment infringing such a right, whether by direct intent or incidentally, without making compensation to the individual affected, as inflicting a penalty *ex post facto*. [24 HLR 375]

It seems to have been more or less universally believed that to disturb a vested right was to violate a natural right. In other words, once the property or whatever (a crucial whatever) had vested "equitably," "under the standing laws," according to the law of the land," it was an outrage against natural justice for the

68 state to interfere with it. There were, as well, two senses in which a vested right was "legal." First, its existence, as the definitions show, could be ascertained only by the careful examination of the body of positive law under whose auspices the owner had allegedly acquired it. Second, given that it existed, and that the state had interfered with it, and that this constituted a violation of the owner's natural right to retain it, there might or might not be a constitutional text authorizing a judge to give it legal protection through judicial review.

During most of the pre-Classical period, there seems to have been a degree of consensus that judges could protect vested rights against the legislature either through the direct appeal to natural justice, through the implied limitations-separation of powers notion, or through express prohibitions such as the Contracts and Just Compensation Clauses. The question for us is: What did they think they were protecting? The core notion seems to have been based on an imagined fact situation: a person acquires title to real property by legal means (say, purchase), such that any court would enforce his property rights; the legislature then arbitrarily and for base motives passes a law purporting to transfer the title to another; a court refuses to enforce the legislative "sentence."

Now this same dramatic scenario also played a prominent role in Classical legal thought. For example, in the case of *Reagan v. Farmer's Loan and Trust* (1894), Justice Brewer used it in arguing for a judicial power to determine the reasonableness of railroad rate fixing by the states:

This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore, within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, a citizen of another State, to enter

upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission.

In both Classical and pre-Classical thought, the importance of the scenario was as the starting point in an argument: So you accept that it is abhorrent for the legislature to take A's goods and give them to B? Then you must also accept that it is abhorrent for the legislature to... But the nature of the argument that followed, the list of asserted implications of the premise, changed greatly between one period and the other.

In Classical legal thought, the point of the scenario was that the legislature had arbitrarily assaulted the autonomy of the individual, his freedom or liberty to go about the activity of acquiring and enjoying. The implications of our abhorrence of this interference had to do with other ways in which the legislature might arbitrarily assault individual autonomy. The form of the argument was that "in reason" our legal liberty to do *anything* is a kind of property, because it is an area of autonomy. Classical thinkers reasoned from the case of legislative confiscation toward the establishment of the system of Classical rights of property and contract. As I said above, these were highly abstract yet legal in character, and their relationship to powers was one of "balanced antithesis."

At the end of the road of Classical reasoning, our abhorrence at confiscation led to the fusion of the concepts of property and liberty. Justice Harlan's opinion for the court in *Adair v. U.S.* (1908) makes this clear. The case raised the question of the constitutionality of a federal statute making it a crime for an employer to fire an employee for union membership:

[A]s agent of the railroad company and as such responsible for the conduct of business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal liberty, and was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to

become or not, as he chose, an employee of the railroad company upon the terms offered to him.

Pre-Classical legal thinkers were aware of the argument by which the concept of property could be abstracted to cover most human activity. Locke in the *Second Treatise* referred to men's "Lives, Liberties and Estates, which I call by the general Name, *Property*." [123, Laslett] Hamilton speaks of a "property in rights." But within the *legal* consciousness of the period, the operative legal concepts derived from abhorrence of legislative spoliation were those of the vested rights doctrine, and, according to Corwin,

the doctrine of vested rights was interposed to shield only the property right, in the strict sense of the term, from legislative attack. When that broader range of rights which is today connoted by the terms "liberty" and "property" of the Fourteenth Amendment were in discussion other phraseology was employed, as for example the term "privileges and immunities" of Art. IV, S.2, of the Constitution. In his famous decision in *Corfield v. Coryell*, rendered in 1823, Justice Washington defined this phrase to signify, as to "citizens in the several states," "those privileges and immunities which are in their nature, fundamental, which belong of right to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this union." "What these fundamental principles are," he continued, "it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following heads; protection by the government of the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the good of the whole."

But now of all the rights included in this comprehensive schedule, one only, and that in but a limited sense, was protected by the doctrine of vested rights, the right namely of one who had already acquired some title of control over some particular piece of prop-

erty, in the physical sense, to continue in that control. All other rights, however fundamental, were subject to limitation by the legislature, whose discretion as that of a representative body in a democratic country, was little likely to transgress the few, rather specific, provisions of the written constitution. [12 Mich. L. Rev. 275]

Insomuch as Corwin here tried to distinguish the Classical (and modern) from the pre-Classical variety of legal rights by emphasizing "property, in the physical sense," he was misleading. Most of the pre-Civil War federal cases involving vested rights arose under the Contracts Clause, which, after the *Dartmouth College Case* (1819), applied to corporate charters. The corporations involved were virtually *never* defending "some title of control over some piece of property." They wanted to retain particular legal advantages of a non-physical kind, such as monopolies and exemptions from taxation. Cooley's definition makes this clear enough:

And it would seem that a right cannot be regarded as a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another. [391]

The true distinction between vested rights and Classical (and modern) property rights is that the older variety was concerned with the effects on expectations formed under existing legal rules of legislative changes in those rules. The vesting of a right created an entitlement, as against the legislature, to the maintenance of some advantage created by reliance. The great theoretical problem with the concept was to decide, in some at least apparently judicial (as opposed to legislative) fashion when particular established expectations about the continuance in force of legal rules were legitimate and when not. The practical problem was to do so in such a way as to avoid both the freezing of the legal system around a static distribution of advantages, and a state of insecurity

ty such that men would not take the risks involved in creating wealth.

The vested rights involved in actual litigated cases were highly particularized advantageous positions, often in the form of corporate charters. Likewise the alleged infringements took the form of highly particularized assaults on agglomerations of private economic power, as by the repeal or circumvention of corporate privileges in favor of competitors or the community at large, the repudiation by municipalities of bonds issued to finance private railroads, or the depreciation of debts by changing the medium of payment or the remedies available to creditors.

The difference between the right to be free of this kind of legislative interference and the right of free speech or of contract is obviously important, but difficult to formulate clearly. The vested right is fully consistent with the notion that legal rights are merely the reflection of legal powers. The right is to the continued existence of a legislatively created arrangement. The right of speech, on the other hand, inheres in the individual regardless of the legislative schemes that regulate it. It exists *in opposition* to them rather than as a position of security in their interstices.

The vested rights doctrine applies in principle to every kind of right. It is not restricted to a particular part of social life or a particular type of activity. In this sense, it is much more general, more abstract than the First Amendment, which applies only to speech, press and religion, or the Fourth, which concerns very specific kinds of official behavior such as warrantless searches. The vested rights doctrine is more like our notion of procedural due process, which applies to every kind of governmental activity.

But the abstraction of vested rights did not mean that they were more restrictive of the state than our particular substantive rights. The doctrine protected only the results of *reliance* on a previously existing legal regime, for example, the acquisition of a mortgage in the expectation that judicial process would be available to foreclose it if necessary. The doctrine created no substantive limitation on legislative power, no limitation at all on the rules that the state could impose on those who had not yet relied. The trustees of Dartmouth College could not be deprived of the priv-

ilege of running it, given the terms of their charter. But the court in so holding imposed no general restriction on legislative power over educational corporations. It remained free to insert in every future charter a clause reserving its power to replace the trustees at will.

By contrast, incidents of protection of First Amendment rights do delimit legislative power for the future. Indeed, they commit the court to a program of limitation involving efforts to prevent the legislature from doing indirectly what it cannot do openly. Again, the modern analogy, though imperfect, is procedural due process, which tells the legislature how but not what. The vested rights doctrine was a sort of constitutional grandfather clause, likewise in theory concerned with means rather than ends.

The common law analogue was the equitable doctrine of estoppel, which prevents a party from taking advantage of an acknowledged legal right or power because his prior actions and another's reliance would make his doing so unjust in the particular circumstances. Like the party estopped, the legislature had an acknowledged power to change the law, and by derivation to change private rights, at will. But in some specific circumstances, the judges refused to permit this. No one questioned the general validity of power. There was no subject matter and no particular action distinguished by the judges as an exception to power. No counterrules protecting an area of individual autonomy from state interference came into existence. Equity intervened to prevent an abuse of a system whose fundamental legitimacy was not in doubt for an instant. As Cooley put it:

In its application as a shield of protection, the term "vested rights" is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice. The right to private property is a sacred right; not, as has been justly said, "introduced as the result of princes' edicts, concessions and charters, but it was the old fundamental law, springing from the original frame and constitution of the realm."

But as it is a right which rests upon equities, it has its reasonable limits and restrictions; it must have some regard to the general welfare and public policy; it cannot be a right which is to be examined, settled, and defended on a distinct and separate consideration of the individual case, but rather on broad and general grounds, which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all. [358]

It is of the utmost importance to distinguish between the theory of vested rights and their actual significance in pre-Civil War America. I have been emphasizing how different they were in theory from the Classical rights which were supposed to guard the autonomy of private economic actors against attempts at regulation of business practices and the redistribution of business profits. In practice, the system of corporate charters, combined with sporadic business control of legislatures, could operate under the vested rights doctrine to withdraw a large part of the economy from public control. Eventually exemptions from taxation ran out and new businesses and new economic activities grew up without the benefit of charter protection. In the long run, the vested rights doctrine could not eliminate the threat of legislative control. But "in the long run" meant after the initial advantages had been seized: time was worth something, even though external, substantive, direct protection of the same advantages *might* have been even better.

I am not concerned, as a general matter, with the quantum of power that business, or for that matter other groups such as racial or religious minorities, were able to exercise under one regime of rights rather than another. With respect to all such questions, I am content to suspect the worst without being able to prove it. My point has been that the pre-Classical concept of vested rights was an intermediary or mediator between natural rights whose legality was doubtful and legal rights that existed only as the reflex of legislative powers. They focused courts and commentators on questions like: Does a shortening of the period of the statute of limitations, which bars a cause of action that would otherwise

have been valid, interfere with a vested right of the "owner" of that cause of action? Given such a focus, the problem of the direct confrontation, of individual legal rights to autonomy, with public legal powers to regulate individual action, could remain peripheral.

I do not mean, in anything I have said, to suggest that our conception of a contradiction of rights and powers is in any sense an obvious, natural, inevitable, or intrinsically correct one. Quite the contrary. The investigation of pre-Classical thought shows, I think, the contingent character of the conceptual schemes that make the legal universe intelligible at any given moment. It is as true of our notions as of theirs that we must understand them historically if we are to understand them at all.

[The reader interested in pursuing the subjects of natural and vested rights, implied limitations and vested rights should begin with Cooley's discussion in his *Constitutional Limitations*, Chapters VII and XI. My treatment is based primarily on the cases cited by Cooley in the notes on pages *174-*176 and *353- *358.]

8

The transformation of rights against the state in the years after 1870 involved the slow breakdown of the hierarchical manner of suppressing the contradiction of rights and powers, and the fading of both implied limitations and vested rights. By 1900, their presence in a federal judicial opinion was exceptional and faintly embarrassing rather than the norm. In Classical (and modern) legal thought, the judge deals with legal rights he must protect up to their boundary with equally legal powers, or must balance the two entities one against the other. The irony is that the rise of the younger generation of legal rights has corresponded to the agonized demise of the older generation of natural rights. They lived to see their offspring admitted to the center of the legal universe, and then deprived the event of what should have been its meaning by disappearing from the scene.

Over a period of 100 years, there was a progressive legalization first of the express limitations in constitutional texts, second of

76 the ground rules of federalism, and third of the general right of freedom from legislative regulation. In the process, the model of a political equilibrium stable *only* because of the skillful distribution of political power among mutually checking institutions was abandoned. The contrary model of an equilibrium stabilized by the neutral enforcement of ground rules—the vision of Hamilton—won the day. One way to understand this process is in terms of the contrast between the core of legal consciousness and the periphery of inoperative or weakly operative concepts.

I have already mentioned those general legal categories we use routinely to group rules, without any sense that they influence those rules. Contract law and corporations are examples.

There are also, in legal consciousness at any moment, concepts that legal thinkers find in the legal literature of a preceding age, and perhaps themselves mouth ritualistically, without any confidence that they have a meaning. This is an inoperativeness of a much more decisive kind than that of the taxonomic doctrinal categories. Such is the concept of natural rights today and of legal fictions in their decadence. Illusory concepts of this kind do not add to an argument (except perhaps sometimes esthetically). They are not useful in the task of convincing an interlocutor because no one believes in them *at all* any more.

Natural rights belonged in 1870 to yet a third variety of legally inoperative concepts: that of entities of acknowledged reality, meaning, and relevance to legal thought, but of doubtful legitimacy in legal argument because falling within the province of the legislature. All legal powers and their derivative rights might spring from the enterprise of protecting natural rights. The legal universe might therefore be unintelligible without reference to the concept. Yet the judge could not refer to them directly as the sole basis of decision without opening himself to criticism. "Social policy" plays a similarly ambivalent role in modern legal consciousness.

Finally, within the consciousness of an historical period, there will be principles, concepts, operations, that everyone accepts as typically, unquestionably, both operative and legal. Judges use them to explain and justify decisions, without doubts or even con-

sciousness of a problem of correct legal method or of definition of the judge's institutional role. To challenge these operations seems pointless: if there is anything the judge can undertake without qualms, they are it. A modern legal thinker occasionally feels impelled to articulate what he thinks is in this core. Here is an example:

But am I not too much obfuscating what is basically clear? The function of the judiciary is simply, is it not, to administer justice? It is, indeed, and there is a sense in which this is the unique and the most important task of the judiciary. A man is put on trial for, we will say, murder; his liberty, perhaps his life, is at stake. Under the systems prevailing in modern Europe and America, the facts must be proven by relevant, only by relevant, evidence produced at a trial—the adequacy of the evidence must be measured in terms of the law, the law as it is authoritatively understood. The judges and the jury must be impervious to considerations of state or to howls for blood. The accused may be politically noxious; the victim may have been a popular figure. No matter. Every person, however high or low, where life or liberty is concerned, is to be judged by the known law, pursuant to the due observance of the established rules for the law's enforcement. And in the private law—the law of *meum and tuum*—the objectives are the same. No person, public or private, if he unlawfully injures my person, or fails to fulfill his obligations, or takes my property, shall escape the disinterested judgment of the law.

... In this sense, then, of the unqualified application of the known law to facts fairly found, we have a definition of the central core of the administration of justice as that term is understood, a definition for which we can claim near universality in modern societies. But once this much is agreed upon, the next step in the argument is confounded by doubt. [Jaffe]

For any given moment, all the concepts, doctrines and operations in legal consciousness might be distributed among or on the borderlines of the categories I have just described. Yet if we look at consciousness as it evolves through time, it is clear that a static map would be misleading. First, concepts can move from one class

to another, as natural right has done. Second, there are differences among the elements within a given category. When a new doctrine or concept or problem appears, or when the operativeness of an existing concept is for some reason brought into question, legal thinkers have to find analogies. They do so by comparing the new matter to the core of each category. If it resembles core illusory, or core alegal, or core legal elements, then it will be so classified. Its relation to other, peripheral members of these categories is much less important.

Throughout the period with which we are concerned, the core legal concepts and operations, the models to which other elements were compared, were the execution of legal powers (doing of the will of the sovereign) by statutory interpretation, and the common law (not equitable) adjudication of private rights. A good deal that is confusing to us in pre-Classical legal thought becomes clearer if we keep in mind that until the Classical synthesis of the '80s and '90s, these two powerful models seemed to exist in different universes from one another. There were few cross-references. Much that was most characteristic in each was flatly contradicted or rejected out of hand in the other. No one seemed to mind.

If we look at the matter statically, the feeling of conflict and disorder that would have existed had legal thinkers attempted to integrate public and private law was avoided simply by thinking in pigeon-holes. Looked at dynamically, a process of change and convergence had been going on imperceptibly for decades. But the impulse of self-conscious integration still had ample scope *within* the pigeonholes, in the tasks of rationalizing the apparent chaos of the common law, and of first preserving then rebuilding the fragile structure of American federalism.

Both the exemplar of statutory interpretation and that of common law adjudication exercised an enormously powerful modeling influence on peripheral bodies of doctrine whose full legality was less clear, on doctrinal solutions for new problems, and on arguments about how judges should respond to legal challenges from other institutions. The basic mode of influence of the core on the peripheral elements arose from the fact that there was often *advantage* to be gained from making a given doctrine look very

legal, or very non-legal, or illusory.

If a particular judicial operation could be made to look like common law or statutory interpretation, then the judge's action was legitimized at least in the large. He might be open to challenge on the merits, but not for the bare act of assuming jurisdiction to determine them. The eagerness of lawyers to exploit this sort of advantage in the interests of their clients was a source of energy, like the reproductive urge in biological evolution or the profit motive in the theory of economic competition. A large number of legal actors constantly strained their ingenuity to recast legal doctrines just enough to win a case, so that judges were constantly offered the chance to engage in the incremental modification of the system of concepts.

The first great public enterprise of this kind was the legitimization of judicial review of legislation by application of express constitutional limitations. Express limitations were most obviously compatible with the model of law as will of the sovereign people. In form, they were legal limitations on the grant of the legal power of legislation. If law was the will of the sovereign, and the people were the sovereign, then the will of the people constitutionally expressed was law. If it was law, it was the duty of the judges, trustees of the judicial power, to enforce it.

Commentators have been insisting off and on for 200 years that there is nothing either logically or historically necessary about this argument. It may be true that the judges are bound to obey the will of the sovereign as the only source of law. Does it follow, then or now, that the judges have the final power to decide whether the legislature's action is in accord with the Constitution? But there is no question that there is a strong legal argument, based precisely on the premise of positivism, that the judge should not enforce a congressional statute that to his mind plainly and deliberately "abridges the freedom of religion" by, say, prohibiting the observance of the rites of the Catholic Church. That this will involve him in difficulties when a case arises involving a religious group using dangerous and illegal drugs in its service is obvious. But it weakens the underlying argument only a little, if at all.

Express limitations were compatible with the idea that sovereignty is the primary legal conception, but this alone did not establish their legitimacy as legal doctrines. Insomuch as they were successful they drew on the common law analogy as well. The argument was that the people were a legal principal or a *cestui qui trust*, who had created an agency or trust and an agent or trustee. No one could doubt the fully legal character of what a common law judge did in enforcing the limits on the scope of an agency or the terms of a trust.

The use of the common law analogy gave both structure and legitimacy to the judicial role. Since the constitutions generally said nothing at all about the theory and practice of review, it was necessary to go somewhere else for suggestions about the basic organization of the process. Take the question of whether the court should enjoin the enforcement of an unconstitutional statute the day it is enacted into law. The analogy to the common law suggested that the role of the courts was the passive one of responding to concrete complaints by particular parties aggrieved. Against this analogical background, the rather involved consequences that are said to be the will of the sovereign people expressed in the limit of federal jurisdiction to "cases or controversies" become more plausible.

But the common law agency or trust analogy served also to legitimate review by affirming its wholly legal, apolitical, everyday character. It was not plausible that the Founding Fathers intended to create a radically innovative legal institution without precedent anywhere in the world, yet failed to mention it explicitly. It was much more plausible that as skilled lawyers they adapted an utterly familiar common law technique, from agency or the law of trusts, to the problem of the sovereign's control of the legislature. This kind of activity might be carried on without the need of fanfare: the legal meaning of the language used would be clear within the community of the initiated.

Through the alternate appeal to the Constitution as "law like any other law" and to the common law of agency and trusts, judicial review achieved full legality, at the price of renouncing any reference at all to the concept of rights. The argument was fully consistent with, indeed it was an aspect of the idea that natural

rights were political while legal rights were simply the outcome of the exercise of legal powers. The judge carried on the task of policing the legislature *as though* there were no other entities involved than the Constitution and the Statute to be reviewed. Of course, his every move was guided by the “nonlegal” knowledge that powers were both created *and* limited to secure rights. It was simply that rights could speak neither for themselves nor through legal intermediaries like the modern equal protection clause. They were shielded but never expressed.

At this point, we confront a second phenomenon complementary to that just described: the influence exercised on the core concepts by the elements assimilated to them. In other words, the core organizing concepts transform, but are at the same time transformed. The point about the core elements is that their *location* in the set of categories is unquestioned, so obvious as not to merit discussion. By contrast, their *nature* is open to dispute, and changes according to the composition of legal consciousness as a whole. In fact, we change the concept of statutory interpretation by extending it to cover judicial review of legislative acts. We change the notion of enforcing the scope of an agency by treating constitutional limitations on legislative power as an instance of that general category.

The conflict over federalism already described illustrates the process. The initial effort of the Court and the nationalist opinion was to present the task of drawing the lines between state and federal power as one identical with, or at least analogous to, the interpretation of the statutory will of a legislative sovereign. A second string to the bow was that the court merely interpreted the scope of the agencies entrusted by the sovereign people to state and federal governments respectively. This argument was highly controversial: many countered that the court's action was not the carrying out of sovereign will or the enforcement of an agency, but the usurpation of an autonomous judicial power in derogation of the “real” sovereignty of the states or of Congress. My argument is that after the Civil War, the Marshallian vision was accepted as fully legal, and transformed the legal core to which he had struggled to assimilate it.

The post-Civil War notion was that the judicial interpretation

of the Constitution on the basis of the limited, bounded absoluteness of state and federal governments, was the very essence of the federal judicial role. But the success of the analogy of judicial review to statutory interpretation of the scope of agencies had a significant implication. It meant acceptance of the legal character of the basic Marshallian conceptual tool: the notion of state and federal powers as neither beyond the control of the court—i.e. sovereign—nor subject to detailed review by an omnipresent superior acting through the court. The judges could review the action of a power holder without annihilating the power, because the power was, in theory, just as absolute within its sphere as it was void outside of it.

This new core of fully legal activity served, in turn, as a model and incentive for the transformation of the concept of rights against the state. The dilemma of the logical incompatibility of natural rights and sovereignty was identical in structure to that of state and federal sovereignties. The pre-Classical solution to the rights-powers dilemma was the relegating of rights against the state to the domain of the political. The success of the pre-Classical solution for federalism suggested that banishment might be outmoded. If sovereignties could co-exist, with the court in the role of setting, by legal action, their legal limits, then the same might be true of rights and sovereignty. Once it was possible to imagine a system of sovereignties that were fully legal, absolute only within their spheres, subject to judicial control as well as to judicial obeisance, then the same might be imagined of rights. They could cease to be natural and political, and become legal and judicially enforceable.

Classical legal thinkers took up the challenge and attempted to reconcile sovereign power and legal right without subordinating one to the other. The judiciary assumed the role of carrying out the terms of reconciliation, without bias in favor of either side. The direct appeal to natural right no longer figured as a sporadically operating balance wheel to legislative power. But natural rights found permanent representatives within legal consciousness in the form of the highly abstract rights of person and property secured by the 14th Amendment.

A hallmark of Classical legal thought was thus the denial of the logical incompatibility of important legal concepts. Classical legal thinkers asserted that the Constitution provided a charter for the direct, scientific, judicial resolution of the perennial but non-essential conflict of rights and powers, state and federal authority. They rejected the notion of a balance of power among mutually checking institutions in favor of that of a rational division of functions in accordance with an overarching legal settlement entrusted by the people to judicial enforcement.



The *Slaughterhouse Cases* (1872) illustrate various aspects of the pre-Classical consciousness I have been describing in this chapter. They represent, besides, the first in the line of great cases that were to be the vehicle of the development of Classical legal thought. The cases were great because they involved politically volatile issues that combined difficult questions of federalism with equally difficult questions of individual rights against the state, before a Court with four or five members blessed with breadth of understanding and technical legal skill. Even occurring in isolation, such circumstances were likely to produce conceptual innovation. But once the *line* of cases had come into existence, this tendency was multiplied many times over. The judges knew, in the later cases, that they were participating in the tradition of powerful thinking, and they studied to fit themselves within it, seeing their chance at what passes for immortality in law.

But the *Slaughterhouse Cases* are more than the first in the line. *Because* they were first, they are the only ones that can also serve as a full embodiment of an earlier legal universe. They represent the very brief transitional moment during which all of the past was in the presence of much of what was to come. For our purposes, the cases provide a test of the conceptual map of pre-Classical legal consciousness. I believe that a great deal that is otherwise simply unintelligible to the modern reader springs into life and significance once we understand it within their lost conceptual scheme.

The factual background of the case was as follows: the Carpetbag legislature of Louisiana had passed a set of sanitary regulations governing the slaughtering of livestock in and around New Orleans, and included in the new regime a requirement that the trade be carried on in a single slaughterhouse. This establishment was to be run by a private corporation whose charter required it to provide space to all comers at legislatively fixed prices. It was clear that the future monopolists had bribed everyone in sight several times in order to secure their exclusive privilege. On the other hand, the scheme itself was of a general type to be adopted successfully, for purely sanitary reasons, in many other states. (Sometimes the single slaughterhouse was State owned, but often it was a private corporation, exactly as in New Orleans.)

When the cases came to the U.S. Supreme Court, the issue was whether butchers who had previously slaughtered on their own premises were denied rights under the brand new Fourteenth Amendment by the requirement that they move to the new facility and pay a fee there. The language in the Amendment that seemed most relevant went as follows:

All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Congress shall have power to enforce this article by appropriate legislation.

Although the basis of federal jurisdiction was the claim that the statute violated this Amendment, Justice Miller's opinion for a majority of five sustaining the statute began with a discussion of its validity under the general constitutional law of the American states. Miller was part of that pre-Classical camp that believed in the justiciability in state courts of individual claims based on an amalgam of natural rights and implied limitations. (See his statements in *Loan Association* and *Pumpelly v. Green Bay*, quoted

above.) The Court had no jurisdiction to hear such a claim in this non-diversity case, but as always in pre-Classical thought, the natural rights perspective on the situation was important in deciding how to interpret whatever federal constitutional provisions did apply.

The discussion began as follows:

It is true that [the statute] grants, for a period of twenty-five years, exclusive privileges. And whether those privileges are at the expense of the community in the sense of a curtailment of any of their fundamental rights, or even in the sense of doing them an injury, is a question open to considerations to be hereafter stated. But it is not true that it deprives the butchers of the right to exercise their trade, or imposes upon them any restriction incompatible with its successful pursuit, of furnishing the people of the city with the necessary daily supply of animal food. [16 Wall. 60]

Miller thus distinguished two questions: the rights of the butchers to carry on their trade — a typical “natural” but not “vested” right — and the “fundamental rights” of the “community.” The second head is that of implied limitations: the whole community, as opposed to just the plaintiff butchers, had a right that the legislative branch should not violate its grant of powers.

The answer to the argument based on the butcher’s natural rights is as follows:

The statute under consideration defines these localities and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter-House Company is required, under a heavy penalty, to permit any person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place.

The wisdom of the monopoly granted by the legislature may

be opened to question, but it is difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation, or the people of their daily service in preparing food, or how this statute, with the duties and guards imposed upon the company, can be said to destroy the business of the butcher, or seriously interfere with its pursuit. [16 Wall.61-62]

I will argue a little further on that Miller's approach to the "right to labor in [an] occupation" was strongly conditioned by the fact that he saw this as a natural right whose *legal* definition was wholly a legislative matter. In other words, his jurisdiction under general constitutional law had nothing to do with making out its precise contours. Since in that jurisdiction he must appeal to a quasi-legal entity, the question was simply one of preventing abuses so gross as to subvert the purposes for which the people had created the sovereign. He was quite aware that the butchers lost something when they had to move and pay rent. But the quasi-legal natural rights concept was consistent not only with legislative power to define legal rights, but with much arbitrariness therein, before it rose to a level justifying a kind of judicial civil disobedience.

The implied limitations argument was a good deal more legal, and Miller considered it much more seriously. The statute was, at least in form, a police regulation, so that the question was whether it was "really" an exercise of the police power. Recall the discussion of the taxing power in *Loan Association*.

Miller began by quoting various definitions of the police power, some of them explicitly referring to butchering as a proper subject of regulation. He then considered the rationale and operation of the statute in detail, arguing that it fitted within the definition of power. A crucial point was that "the interested vigilance of the corporation will be more efficient in enforcing the limitation prescribed for the . . . slaughtering business . . . than the ordinary efforts of the officers of the law." But Miller also pointed out how little the rules interfered with the trade of butchering, and that the prices to be charged for space were limited by statute, and "we are not advised that they are on the whole exorbitant or

unjust." He then considered and rejected the idea of a flat per se rule against exclusive privileges, on the ground that the legislative police power had never been understood to be subject to any such restriction. [16 Wall. 65-6].

It was implicit in the discussion that one way of deciding whether a statute was a police regulation, and so within the implied limitations on legislative power, was to ask whether it was reasonably adapted to achieve a community purpose, here sanitation, without doing any more harm than necessary to the butchers. Be it noted that this was a relatively activist approach that many judges, like Iredell and Clifford in *Calder v. Bull* and *Loan Association*, would have rejected. But the important thing was that he confirmed state power. In other words, in his preliminary discussion he reached the conclusion that as a state supreme court judge he would have upheld the statute, so far as "general constitutional law" was concerned.

Any applicable express limitations in the Louisiana constitution had been finally passed on by the State Supreme Court. It followed that the only remaining basis of attack was the Fourteenth Amendment, and in particular the clause forbidding states to abridge the privileges and immunities of U.S. citizens.

The important point about the *Slaughterhouse Cases* is that both for Miller and for the dissenters, to admit that the butchers' "right to labor in their profession" was protected as a privilege or immunity of U.S. citizenship *would change its nature from a natural right to a legal right*. The state constitutions contained no express prohibitions against a state "abridging the privileges and immunities of the citizens." All those natural rights to autonomy in the business of life that the Court had defined as privileges and immunities in *Corfield v. Coryell* [see quote on page 70 supra] were open to full legislative definition and control, subject only to the kinds of review based on implied limitations, vested rights or natural rights that I have already described. Miller's first point had been that none of these bases of review would avail the plaintiffs.

But if these privileges and immunities were those of citizens of the U.S., then there was now an express federal constitutional prohibition against abridging them. They became, *ipso facto*, legal

rights the federal courts must protect through judicial review of the most conventionally legal kind. As was to be the case over and over again, the struggle to *federalize* rights was also a struggle to *legalize* them.

There was considerable irony in the outcome. Miller refused to federalize rights, on the basis of arguments that legitimized the Marshallian conception of federalism. As a result, that conception was available, as it would not have been had the dissenters prevailed, as a model for rights when they finally were both federalized and legalized under the due process clause. Miller prevented a premature legalization but strengthened, unwittingly, the structures within legal thought that would eventually make legalization seem easy. The dissenters developed the concept of rights, and thereby contributed mightily to the evolution that was to come. But they did so in the context of arguments about federalism inconsistent with the notion of due process that was ultimately to win acceptance.

Miller's federalism argument began with a quotation from Marshall's opinion in *Gibbons v. Ogden* (1824):

In *Gibbons v. Ogden*, Chief Justice Marshall, speaking of inspection laws passed by the States, says: "They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the General Government - all which can be most advantageously administered by the States themselves. . . . No direct general power over these objects is granted to Congress; and consequently they remain subject to State legislation." [16 Wall. 63]

He then referred to the illuminating gas case (*U.S. v. DeWitt*) already described. A few pages later, he pointed out that the various rights traditionally classed as privileges and immunities also fell within the domain of State law.

The phrase privileges and immunities

embraces nearly every civil right for the establishment and protection of which organized government is instituted. They are, in the language of Judge Washington [in *Ward v. Maryland*],

those rights which are fundamental. Throughout his opinion they are spoken of as rights belonging to the individual as a citizen of a State And they have always been held to be the class of rights which the State governments were created to secure. [16 Wall. 76]

Miller's repeated reference to the establishment of State government to protect rights meant *both* that they had been understood to be outside federal jurisdiction *and* that rights of the kind involved here were, in the main, the reflex of legal powers. The rights did not exist, legally, separated from the sovereign who defined and enforced them. For this reason, a holding that the 14th Amendment put all "those rights which are fundamental" under Federal protection would overthrow the Marshallian scheme:

But with the exception of those and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all leg-

isolation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt [16 Wall. 77-78]

As Miller saw it, the interdependence of legal powers and legal rights meant that the premise of "powers absolute within their spheres" would fall if rights were federalized. The other consequence, that "fundamental" rights would become legal entities the Federal courts were responsible for defining and protecting, was also present to his mind. There is his famous phrase about the Court as "censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this Amendment." I do not think he was talking about the kind of review under "general constitutional law" that he himself had gratuitously performed on this statute earlier in the opinion. He anticipated, if he read the dissents, that the creation of an independent federal jurisdiction would mean the recognition of privileges and immunities as legal entities of an altogether novel kind.



I think it plausible that if the dissenters could have broken out of the conceptual impasse of contradictory theories of rights and

federalism, they might have carried the day. They did not. Both Field and Bradley conceded that the recognition of a broad range of rights as privileges and immunities of U.S. citizenship would profoundly change the nature of the union. According to Bradley, the Fourteenth Amendment meant that "citizenship of the United States is the primary citizenship in this country; and that state citizenship is secondary and derivative. . . ." [112] Field's statement was even stronger:

A citizen of a state is now only a citizen of the United States residing in that state. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any state. . . . They do not derive their existence from its legislation, and cannot be destroyed by its power. [95-96]

This laid them open to Miller's classic riposte affirming the peculiar neutral status of the federal judiciary in the federal system:

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this . . . Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation. . . .

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so

long as it shall have duties to perform which demand of it a construction of the Constitution or of any of its parts. [16 Wall. 81-82]

This was exactly the same attitude the Classical Court was to strike, 30 or 40 years later, toward the problem of the "line which should separate" the right of the individual from the "right of the state" to regulate. The beginnings of that attitude, but only the beginnings, appeared in the three *Slaughterhouse* dissents.

The dissenters were concerned to make their position as convincing as possible, and so made all the pre-Classical arguments, and kept what was new masked behind them. For example, there was a great deal in their opinions that suggested that the Fourteenth Amendment federalized the vested rights doctrine, rather than establishing legal rights of a novel kind. This was the view of Cooley—it would have assimilated the Amendment to the existing pattern of thought about constitutional limitations, and followed the path of expansion of the definition of what was "property" and what "vested," rather than breaking with the past. Justice Field objected that the statute "restrains the butchers in the freedom and liberty they previously had," [102] and argued that the English common law, adopted into American constitutional law "declared void all special privileges, whereby others could be deprived of any liberty which they previously had. . . ." [107].

I pointed out earlier that the notion that the capacity to do *anything* legally, i.e., under the protection of the State, can be conceived as an abstract form of property. Field quoted Adam Smith (1776) to the effect that "the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable." Justice Swayne's dissent baldly adopted this conception as the meaning of the "property" of the due process clause: "Property is everything that has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property and as such merits protection." [127] Bradley said that "a calling, when chosen, is a man's property and right." [116]

The logical outcome of this line of attack is something like the unsuccessful argument in the early federal contracts clause cases, that everyone has a vested right to the set of values created for them by the body of law in existence at any given moment. *All* legislation then becomes a taking of property without compensation, and *all* legislation is also retroactive in the very special sense of destroying existing expectations. This kind of reasoning had great importance in the theoretical disputes of the 1920's, but the evolution of the Classical concept of rights got to it only by a circuitous route that started out in a different direction.

The striking characteristic of Classical rights is that they referred not to the maintenance of a body of pre-existing legal rules, but to areas of autonomy within which the individual was *free* of rules. Classical legal thinkers thought the essence of rights was freedom or liberty, a thing the law delimited and protected, but which was quite distinct from the law itself. Such a conception had definite implications, very different from the implications of the pre-Classical and modern conceptions, and Justices Bradley and Field began to work these out in their dissents.

Recall Miller's remark that forcing the butcher to slaughter on another's premises, and pay a fee for it, did not deprive him of "his right to labor in his occupation." Miller defended this proposition by pointing out that the states were constantly engaged both in regulating trades and in granting exclusive privileges. In other words, a pervasive practice of ordering the citizenry around, directing them and prohibiting them, was perfectly compatible with the existence of their "rights" to their callings. The rights did not represent autonomy, individual free choice to do what one would without government interference. They did not even represent some particular legal structure, minimal or maximal, that the citizen could rely on as defining the limit of government interference with his or her life. Because rights were quasi-legal, political entities, they were much vaguer than that. More, they were "natural;" what was legal, and so justiciable, was the body of the sovereign's regulations. A given regulation could be said to define a legal right, but only in the sense that until the regulation was changed, one could insist that it be enforced to one's advantage.

There was a radical disjunction (mediated, it is true, by vested rights and implied limitations) between the mundane judicial activity of applying these laws, and the transcendent judicial duty to preserve a large political ideal.

Bradley and Field argued that the large political ideal was a legal concept, and that by reasoning legally from its existence, one could: first, define areas of individual autonomy and areas of state autonomy; second, specify what legislative rules were and what were not consistent with private autonomy (liberty, freedom). The first step was the claim that the privileges and immunities of *citizens in general* is but another phrase for "natural and inalienable rights," which "belong to the citizens of all free governments." [96-97] United States citizens therefore possess them. The Amendment is an express limitation on their abridgment. The judges must therefore enforce it as law. This involves defining these "natural and inalienable rights" as legal entities, and reasoning from the definitions to conclusions about what state laws are abridgments. It was implicit in this that the "right," e.g. "to acquire property and pursue happiness," [101] was a different, indeed an opposed legal concept to the law that "abridged" it, e.g., a monopoly statute.

The dissenters scheme for classifying a statute as an abridgment began by distinguishing a private and public sphere. They thereby disposed of Miller's argument about the prevalence of State granted monopolies: all of these had to do with the area of State autonomy, in which individuals acted only at the behest of the state; none referred to the area of private autonomy, i.e. of the exercise of a right.

The next question was what followed legally from the classification of butchering as an activity falling within the sphere of private autonomy. The answer was that anything that "hindered" [104] the butcher in the exercise of the trade was a restriction or abridgment of his freedom or liberty. "Hindrance" was defined in terms of the butcher's freedom of action, rather than in terms, say, of the welfare of the beneficiaries of the activity of butchering. "To compel a butcher...to slaughter [his] cattle in another person's slaughterhouse and pay him a toll therefore, is such a restriction

upon the trade as materially to interfere with its prosecution.” [119] Since the right was the legalized version of the freedom, the hindrance abridged it, too.

This was the Classical structure very fully stated, very early. How different it was from the pre-Classical should already be apparent. Neither the opposition of public and private spheres nor the concept of reasoning from the character of a *legal* right to a conclusion about the validity of a legal rule existed in that system. Field and Bradley saw opposed legal entities, from *either* of which one could reason legally to conclusions about the other, where Miller saw a hierarchy.

Modern legal thought also, as we will see, rejects the concept of opposed realms of state and private autonomy—the “right-privilege distinction” so important to Classicism. It also rejects the notion that a regulatory scheme is *essentially* the imposition of legal coercion on legal freedom, the invasion of right by power. Modern critics of Classicism point insistently to the elaborate background of property and contract rules that heavily legalize the butcher’s trade before anyone dreams of public slaughterhouses. The new statute should therefore have been conceived as an adjustment of a pre-existing framework rather than as a qualitatively new irruption of state interference.

One of the main purposes of developing the concept of legal consciousness is to explain how men like Field and Bradley could have failed to see things in the way that seems obvious to us. Surely they were both intensely aware that there were hundreds of legal rules, of varying degrees of specificity, that applied to every action of every butcher every day. Surely they realized that how much the butcher earned, how well he did in competition with others in the trade, the value of his property, and so forth, were all heavily conditioned by the existing regime of property, contract and tort. They also would have agreed that these legal rules were the product of sovereignty — that is, that the sovereign or his agents were responsible for promulgating and enforcing them. Yet they both seemed to feel that there was a self-evident difference between “hindrance” or “interference” of the kind involved here, and the “hindrance” or “interference” involved in forcing a man

to respect a neighbor's boundaries and keep his promises.

Somehow, when Field and Bradley thought about rights against the state, *the common law background of rules of conduct the state enforces against private parties in their relations among themselves disappeared*. All that was left, if they disapproved, was a legislative invasion of private liberties. This in spite of the fact that, in cases like *Slaughterhouse*, the common law played a prominent role in the argument.

Justice Field, for example, put great emphasis on the English common law hostility toward monopolies that culminated in Coke's famous opinion nullifying a royal grant:

The common law of England, as is thus seen, condemned all monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. .

The common law of England is the basis of the jurisprudence of the United States. It was brought to this country by the colonists, together with the English statutes, and was established here so far as it was applicable to their condition. That law ...[was] claimed by the Congress of the United Colonies in 1774 as a part of their "indubitable rights and liberties." . . . And when the Colonies separated from the mother country no privilege was more fully recognized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others. The immortal document which proclaimed the independence of the country declared as self-evident truths that the Creator had endowed all men "with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness; and that to secure these rights governments are instituted among men."

...[The Fourteenth Amendment] was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes. If the trader in London could plead that he

was a free citizen of that city against the enforcement to his injury of monopolies, surely under the fourteenth amendment every citizen of the United States should be able to plead his citizenship of the republic as a protection against any similar invasion of his privileges and immunities. [104-106]

Miller found this argument mystifying. It seemed to be possible to answer it as follows:

The great Case of Monopolies, reported by Coke, and so fully stated in the brief, was undoubtedly a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the crown; for whoever doubted the authority of Parliament to change or modify the common law? [65]

For Field, the common law rules that form the background of legislation are not invisible at all. It is rather that, in our terms, they have gone over to the enemy. They are not State imposed restrictions on liberty with which we can blend the new statute, but the very essence of the liberty the statute invades. This attitude was fanciful in 1872. I believe its implausibility had something to do with the outcome of the case. But it more or less triumphed in Justice Bradley's *Civil Rights Cases* opinion of 1883, and had triumphed fully by 1900. The rights the Fourteenth Amendment guaranteed against state abridgment got their legal definition from common law rules governing the relations of neighbors. My argument is that this development was as much the result of the evolution of the theory of common law rules as of the gradual transformation of public law. In order to understand it, it is necessary to pass now to a sketch of the pre-Classical and Classical conceptions of private law. The task was well stated by Corwin:

The question is no longer how certain principles that ought to be restrictive of political authority took on a legal character or of the extent to which they did so, but rather how certain principles

of a legal character in their origin assumed the further quality of principles entitled to control authority and to control it as law. In other words, the problem is not how the common law became law, but how it became higher, without at the same time ceasing to be enforceable through the ordinary courts even within the field of its more exalted jurisdiction. [42 HLR 170].