

THE LEGAL ORIGINS OF THE MODERN AMERICAN STATE

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The transformation of the State is also
the transformation of its Law.
-- Léon Duguit (1913)

Between 1877 and 1937 (between the formal end of Reconstruction and the formal constitutional ratification of the New Deal), the American system of governance was transformed with momentous implications for twentieth-century social and economic life. Nineteenth-century traditions of self-government and local citizenship were replaced by a modern approach to positive statecraft, individual rights, and social welfare very much with us today. The last such formative transformation in the structure of American public life occurred in the late eighteenth-century and was dubbed by Gordon Wood as “The Creation of the American Republic” (Wood 1969). This late nineteenth- and early twentieth-century revolution in governance is best characterized as “The Creation of the American Liberal State.”

By “The Creation of the American Liberal State” I mean to suggest that the period from 1877 to 1937 was not just an “age of reform” or a “response to industrialism” or a “search for order” (Hofstadter 1955; Hays 1957; Wiebe 1967). Rather, it was an era marked by the specific and unambiguous emergence of a new regime of American governance -- the modern liberal state. Nineteenth-century patterns of social governance and local economic regulation -- what I have described elsewhere (Novak 1996) as “the well-regulated society” -- were displaced by a decisive twentieth-century reconfiguration of the relationship between state, capitalism, and population in the United States. A central nation-state consolidated around new positive and political conceptions of sovereignty and administration radically extended its reach into American economy and society. In the social sphere, new forms of cultural policing and social policymaking transformed the relationship of state and society. Social welfare emerged as a new object of a national administration increasingly committed to guaranteeing social rights and

managing and insuring its population. In the economic sphere, the relationship of government and business underwent a similar restructuring. The state regulation of monopoly capital and mass production and consumption ushered in a new understanding of the interdependence of statecraft and economic growth and a new political-economic vision of planning and managed capitalism. Together these changes contributed to a portentous restructuring of American liberalism and democratic governance that arguably is the most significant legal-governmental development of the twentieth century.

Of course, this transformation in American governance and the creation of a modern administrative state in the United States has not escaped the notice of historians, social scientists, and legal scholars. Indeed, as Dorothy Ross (1991), Daniel Rodgers (1998), and James Kloppenberg (1986) have most recently reminded us, the very origins of modern social-scientific inquiry in the United States were wholly coincident with and participatory in the construction of the new state-centered socio-economic policies of the progressive era (Haskell 1977; Furner 1975; Lacey and Furner 1993). By mid-century, the theme of the relationship between American capitalism and democracy on the one hand and new forms of state organization on the other consumed innumerable liberal commentaries from Thurman Arnold's *The Folklore of Capitalism* (1937) to Karl Mannheim's *Freedom, Power, and Democratic Planning* (1950) to John Kenneth Galbraith's, *The New Industrial State* (1967). More recently under the rallying cry "Bringing the State Back In," new institutional sociologists and political scientists like Theda Skocpol (1992) and Stephen Skowronek (1982) have re-centered attention on the transformative changes in the political structure and socio-economic policies of the emerging American welfare state (Evans, Rueschemeyer, and Skocpol 1985). In the field of American history, such concerns did not need to be brought "back in," because they remained a staple of twentieth-century political history through the work of scholars like William Leuchtenburg (1963), Morton Keller (1977 & 1990), Barry Karl (1983), Ellis Hawley (1966), and Louis Galambos (1970). Even after the dramatic shift to social and cultural historical methodologies in the 1970s, historians of American labor, gender, and race relations have maintained a focus on the policies and social consequences of the creation of a twentieth-century American welfare state. Whether examining the tortuous emergence of New Deal labor regulations,

the maternalist origins of welfare policy, or the racially-constructed hierarchies of modern social services, social and cultural historians continue to expand our understanding of the multi-valent social and political components of the American version of a social welfare state (Lichtenstein and Harris 1993; Gordon 1990; Katz 1993).

But within the rapidly expanding social-scientific literature on the emergence of a modern state in America, there lurks a consistent and curious interpretive deficiency. That deficiency concerns the role of *law* in that governmental transformation. Overwhelmingly, and with few exceptions, the rule of law is portrayed throughout the synthetic literature as something of an obstruction, a brake, an inertial force, a structural impediment, an ideological hindrance, an exceptionalist constitutional barrier to the development of a modern regulatory and administrative welfare state in the United States. From the first treatises of progressive social science to the newest institutional studies, law, courts, and judges are represented continuously as great bogeymen of liberal reform – the agents of an exceptionalist and backward-looking American jurisprudential tradition that regularly frustrated modern welfare-state-building efforts. This essay is an attempt to challenge (indeed, reverse) that pervasive mischaracterization.

The thesis that American law has operated as a negative check on the development of a modern bureaucratic welfare-state in the United States is flawed in two respects. First, it neglects the important creative and constitutive (what some have called the *juris-generative*) role of law in the creation of the modern American state. For more than a century, historical and sociological jurisprudence has tried to move our conception of law beyond a negative and transcendental “series of Thou Shalt Nots addressed to power holders” towards a more positive and realistic conception of law as “the application of politically organized compulsion upon men’s wills.”² Such an active and constructive understanding of law downplays the significance of occasional tabloid constitutional cases like the *Slaughterhouse Cases*, *In Re Debs*, *Lochner v. New York*, and *Schechter Poultry*; and emphasizes instead the massive amount of everyday law-making (judicial, legislative, and administrative) and the structural socio-legal changes accruing beneath surface political-constitutional skirmishes.³ For example, in the arena of public law (the arena most susceptible to charges of welfare-state obstructionism), this essay will introduce

some of the new legal definitions of Union, national citizenship, constitutionalism, the state, sovereignty, positive law, legislation, federal police power, and administrative law without which it is difficult to contemplate the rise of any kind of welfare state in the United States. Such definitions embodied legal transformations of the first order that constituted the modern American state. The countless changes in private law (property, contract, tort, corporation law, commercial law, insurance law, etc.) that aided and abetted the creation of the American liberal state must also be factored into our story of modern political development. The failure to account for this positive (as opposed to negative) role of law in the construction of a central regulatory welfare state raises serious questions about our understanding of basic mechanisms of twentieth-century political-institutional change.

The second flaw in this “lag-and-drag” interpretation of the role of law in modern state-building is the way it distorts our characterizations of historical changes in American liberalism. For the negative legalism that is seen as obstructing twentieth-century social democracy is often identified as the residuum of a nineteenth-century jurisprudential tradition of natural law and individual rights out-of-step with the needs of a modern economy and society. The obstructionist interpretation of law and the welfare state, in other words, comes with a historical account of American political change. That account is dominated by the notion of a wholesale shift in the nature of liberalism between the nineteenth and the twentieth centuries -- a shift precipitated by the rise of industrial and corporate capitalism. Whether characterized in A.V. Dicey’s (1914) terms as a shift from individualism to collectivism or in Roscoe Pound’s (1909) notion of a move from negative liberty to positive liberty or in John Dewey’s (1935) ideas about the progression from old to new liberalism, this interpretation emphasizes the great transformation from nineteenth-century laissez-faire to the twentieth-century general welfare state. Particular political and intellectual attention is paid to the fierce turn-of-the-century battles that accompanied the transition: e.g., battles between conservative reaction and liberal progressivism in politics and between classical legal thought and legal realism in jurisprudence.

The myths of nineteenth-century laissez-faire, possessive individualism, and vested rights have sustained repeated critiques by legal historians since the break-

through historical-sociological work of Willard Hurst (1956; Handlin and Handlin 1947; Hartz 1948; Lively 1955; Scheiber 1972; Novak 1996). Unfortunately, not as much critical legal attention has focused on the other half of the omnipresent laissez-faire/welfare-state; individualism/collectivism; negative liberty/positive liberty formula – the role of law in the creation of a twentieth-century welfare-state. This essay attempts to look into that other hand clapping; first, by investigating the origins and objectives of the persistent progressive critique of law versus the state; second, by confronting that critique with rather obvious evidence of law's ubiquitous and positive role in welfare-state development (particularly in the transformative field of public law); and finally, by suggesting the degree to which a fuller account of legal change in this crucial period of governmental development alters our perception of the evolution of American liberalism.

The formative period from 1877 to 1937 in United States history was not about a simple shift from laissez-faire individualism to interventionist statecraft, from a bourgeois *Rechtstaat* to a modern welfare state. Nor was it about a polarized battle between a backward-looking liberal rule of law and a forward-looking social-democratic welfare politics. Rather, the story was one of the mutual re-constitution of a jural *and* a welfare state, of liberalism *and* social welfare, of the rule of law *and* modern political administration – the synthetic story of the creation of a decidedly new liberal constitutional state in America.

But clearing the path for such a symbiotic understanding of the relationship of twentieth-century legal and state development first requires a reckoning with a powerful old paradigm – the legacy of *Lochner* – the idea of “legal orthodoxy” and the persistent progressive conviction that higher law obstructed the people's welfare state. For the intellectual constructions of laissez-faire vs. the welfare state and the rule of law vs. social-democratic politics were very much the products of the fierce political, economic, and constitutional battles that greeted the arrival of the twentieth century. And though they have dominated our understanding of law and statecraft for the last hundred years, they now mask more than they reveal. Laissez-faire vs. the welfare state; law vs. the state; negative vs. positive liberty, and individual rights vs. collective goods are basically turn-of-the-century ideological constructions that continue to obscure more significant, systemic, and structural changes in the modern American governmental regime. We should resist carrying over such constructions

into our analyses of law and modern political economy as we greet the arrival of a new century.

Inventing the Lochner Court:

The Progressive Discovery that Law Obstructs Politics

It is easy amid the rapid shifts in contemporary intellectual fashion to forget the long and pervasive hold of “progressive historiography” on American thought during the first half of the twentieth century (Hofstadter 1968; Benson 1960; Horwitz 1984). From the turn-of-the-century through the late New Deal, American political and economic development was interpreted primarily through the filter of intellectual categories developed in contests over progressive reform in the early twentieth century. The essence of progressive historiography was a remarkably simple understanding of the dynamics of historical change that stressed the determinative role of foundational socio-economic conflict (often portrayed in a crude and normatively-charged good fellow/bad fellow dialectic: e.g., the people vs. the interests, agriculture vs. commerce, democracy vs. capitalism). In the muckraking context of the turn-of-the-century, such categories reflected the sense that the United States was riven with a basic class conflict pitting the private economic interests of industrial robber barons against the public goods of democratic legislators seeking to curb the excesses of unregulated capitalism. Such stark normative juxtapositions of private and public, individual and democracy, self-interest and benevolence in the hands of provocative writers like Vernon Parrington and Charles Beard produced a powerful paradigm for thinking about the relationship of capitalism and the state in the United States. As Vernon Parrington summarized: “A lawless and unregulated individualism was destroying democracy. Government was becoming the mouthpiece and the agent of property interests. Something had gone wrong with the democratic plans and it was time for the friends of democracy to take stock of the situation” (Parrington 1930: ix). Progressive history provided a usable past -- a great morality play -- with which to promote the cause of reform legislation in the early twentieth century.

At the heart of the progressive paradigm was a comparably simple understanding of the role of law in this great political contest. Parrington characterized it as the progressive “distrust of the judicial exercise of sovereign

powers.” As he put it, “Discovering when it attempted to regulate business that its hands were tied by judicial decrees, the democracy began to question the reasons for the bonds that constrained its will” (Parrington 1930: xii).⁴ For many progressives, that was the basic story: the socio-economic inequities of industrialization galvanized a mass of democratic reform legislation that was in turn frustrated by legal and judicial obstructionism. Law and the courts became in Max Lerner’s (1933: 672) words “one of the great American ogres, part of the demonology of liberal and radical thought.”

Charles Beard was the fountainhead for the progressive critique of law. Beard’s *Economic Interpretation of the Constitution* (1913) served as a thinly-veiled critique of the U.S. Supreme Court. His historical analysis of the Constitution as an instrument through which specific economic interests of the founding generation were secured fit all too easily with a progressive interpretation of a Supreme Court suspected of reading class interests into American constitutional law. In his *Contemporary American History, 1877-1913* (1914: 54), Beard was more explicit. In a section entitled “Writing Laissez-Faire into the Constitution” Beard described a “new senatorial philosophy” that emerged in the late nineteenth century epitomized by Roscoe Conkling, corporate lawyer. That philosophy exalted personal private property rights and vigorously opposed the efforts of state legislatures to regulate property, franchises, and corporate privileges. According to Beard, Mr. Conkling’s “group” actively sought a new jurisprudence – “some juristic process for translating laissez-faire into a real restraining force.” In the development of Fourteenth Amendment constitutionalism, Conkling’s army found a potent weapon to secure “federal judicial supremacy for the defense of corporations and business enterprises everywhere.” As evidence for his thesis, Beard devised an oft-cited litany of the malevolent cases through which laissez-faire was written into the Constitution by a pro-business, anti-regulatory Supreme Court. Beard reached the constitutional pinnacle of this era *Lochner v. New York* (1905) with the same conclusion articulated by Justice Holmes in dissent – American courts were guilty of deciding cases upon a social theory and economic interests out of synch with the democratic majority and the public welfare. Thus the idea of “Lochnerism” – of the invention of laissez-faire constitutionalism by an activist, economically interested Supreme Court to bolster the conservative status quo against the regulatory, social-welfare

initiatives of progressive reform – received one of its earliest statements.

But, of course, Charles Beard did not invent the progressive critique of law single-handedly. Rather, legions of reformers, scholars, and publicists mounted an unprecedented progressive campaign against the power of American courts and judges that continued into the 1960s (well after other parts of the progressive paradigm expired) and that still resonates in legal-political scholarship to this day. In the early twentieth century, Beard was joined in his crusade by Louis Boudin (1932), J. Allen Smith (1930), Edward Corwin (1938), Frank Goodnow (1911), and Gustavus Myers (1912) among others whose very titles reflected the main lines of the progressive critique of law: *Government by Judiciary*; *The Growth and Decadence of Constitutional Government*; *Court over Constitution*; *Social Reform and the Constitution*. Frank Goodnow (1911: v) opened his investigation with a straight-forward statement of progressive purpose: “To ascertain, from an examination of the decisions of our courts, . . . to what extent the Constitution of the United States in its present form is a bar to the adoption of the most important social reform measures which have been made parts of the reform program of the most progressive peoples of the present day.” J. Allen Smith (1930: vii) more aggressively attacked the immanent “reactionary” spirit of U.S. constitutional law -- “its inherent opposition to democracy, the obstacles which it has placed in the way of majority rule.” Louis Boudin (1932: viii) began *Government by Judiciary* with a typical, foreordained acerbic conclusion: “We are ruled by *dead Men* . . . generations of dead judges.” As if to seal the fate of the possibilities for law in the eyes of progressives, to this critique of economic interest, conservative reaction, and anti-statism was added the nebulous and damaging charge of the revival of natural law. Progressives like Pound (1909: 457, 460, 464) and Corwin (1955) honed the critique that lawyers and judges were trapped in anachronistic “eighteenth century theories of natural law” developed in the “high tide of individualistic ethics and economics” exaggerating “the importance of property and of contract.” Law was thus not only obstructionist, but decidedly backward-looking, cloaked in the ancient metaphysics of the vaguely theocratic language of natural law (Haines 1930; Wright 1931; Fine 1956).

The confrontation between FDR’s New Deal legislation and Supreme Court constitutional review breathed new life into the progressive critique of law. In 1938

Benjamin Twiss began his *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (1942) as a direct response to the “revolution of 1937” and as a direct attack on the “Four Horsemen” of anti-New Deal judicial apocalypse: Justices Van Devanter, McReynolds, Sutherland, and Butler. Twiss’s story about law and the New Deal re-deployed the stock figures and simple morals of a mature progressive historiography. Citing Beard, Boudin, Corwin, Goodnow, Holmes, Myers, Pound, and Veblen, Twiss began, “Americans are today ‘beginning to learn that judicial decisions are not babies brought by constitutional storks but are born out of the travail of economic circumstance.” Pushing Beard’s economic interpretation almost to the point of self-caricature, Twiss portrayed a self-interested capitalist bench and bar brimming with lawyers like Joseph Hodges Choate – so “effectively quarantined from the Great Unwashed” that “his words virtually smelled of soap” (114, 260). From 1870 through 1937, lawyers like Choate amounted to “an inner council containing and representing the intelligence of . . . the dominant economic class” whose jurisprudential preoccupation was the elaboration of new doctrines (e.g., implied constitutional limitations⁵, dual federalism, liberty of contract, substantive due process) to protect established business interests and to eviscerate progressive and New Deal reform initiatives.

Though other aspects of progressive history suffered intense critical assaults in the 1950s and 1960s, the progressive critique of law continued to flourish as historians like Clyde Jacobs (1954), Arnold Paul (1960), and Sidney Fine (1956), embellished the simple storyline of Beard and Twiss. Jacobs emphasized the roles of treatise writers like Thomas Cooley, Christopher Tiedeman, and John Dillon in forging the laissez-faire doctrines of liberty of contract and the public purpose maxim restricting the taxing and spending powers of state and local governments. In the aptly titled *Conservative Crisis and the Rule of Law*, Arnold Paul examined battles over anti-trust, labor law, and the income tax in coming to the familiar progressive conclusion that turn-of-the-century economic conflict transformed the American judiciary into the principal bulwark of capitalist conservatism. But perhaps most significant for extending the progressive critique of law beyond the New Deal was Sidney Fine’s historical popularization of the idea of a great intellectual transformation in *Laissez Faire and the General-Welfare State*. In a chapter entitled “Laissez Faire Becomes the Law of the Land,” Fine synthesized the

great mass of progressive constitutional historiography (including the controversial charge of “the revival of natural law”) in reaching the powerful conclusion that “it was in the courts that the idea of laissez faire won its greatest victory . . . establishing the courts as the ultimate censors of virtually all forms of social and economic legislation.” Fine celebrated the victory of the general-welfare state over laissez-faire by the time of Harry Truman’s Fair Deal and extended the progressive’s negative opinion of the role of law in that process: “The judiciary placed itself between the public and what the public needed and helped to protect individuals who did not need protection against society, which did need it” (126, 164).

Historians and social scientists have long since rejected many aspects of the progressive synthesis – its economic reductionism, its instrumentalist treatment of ideas, its dichotomous conception of socio-economic interest and conflict, its explicit moralizing, its presentist political partisanship, and its simple good fellow/bad fellow dialectic. As Richard Hofstadter argued, one of the key developments in social scientific thought since the 1950s was “the rediscovery of complexity in American history” as “an engaging and moving simplicity, accessible to the casual reader of history, [gave] way to a new awareness of the multiplicity of forces.” Admitting the attraction of the simple schemas of progressive history, Hofstadter contended, “we [could] hardly continue to believe in them” (1968: 442). But despite the general disenchantment with progressive categories, the influence of the progressive critique of *law* persists.

Though the techniques of modern American legal history were first honed by Willard Hurst and others in search of the legal roots of modern economic and administrative policy, of late legal history has returned to variations on a neo-progressive theme. Morton Horwitz, the most influential of Hurst’s successors, has quite consciously re-invigorated one of the progressives’ oldest and most powerful legal theses – the idea of *law as politics*. In 1933, Max Lerner summed up the progressive legal project: “At the heart of these polemics is the recognition that the real meaning of the Court is to be found in the political rather than the legal realm, and that its concern is more significantly with power politics than with judicial technology” (1933: 669). Though Horwitz’s *Transformations of American Law* (1977; 1992) paid more attention to doctrinal technology and private law than any of the progressives, his underlying objective in those volumes remained the same –

to unveil the distinct politics of American law. Those politics echoed the progressive critique: the American rule of law as calculatingly anti-democratic, economically conservative, and anti-redistributive – a hindrance to social-democratic or radical politics. Similarly, in the well-developed field of labor law, the progressive theme of American law obstructing and constricting a more radical form of social-democratic politics has become something of a mantra. Starting with “Tocqueville’s emphasis on the powers of the American legal and judicial elite over against society’s ‘democratic element,’” William Forbath has influentially argued for the “constitutive power of law” in narrowing the ambitions of the American labor movement. As Forbath concluded, “Labor’s law-inspired laissez-faire rights rhetoric imported some of the liberal legal order’s key assumptions about the uses and limits of state power. Thus it helped to recast many of labor’s aspirations for reform and redistribution as not fit to be addressed to the state and polity” (1991: x, 169-171).⁶

But while the critical legal studies movement (Kairys 1982) has been particularly adroit in expropriating the progressive themes of law as politics and law as an obstacle to social democracy, the more general theme of a fundamental turn-of-the-century shift from legal orthodoxy to progressive reform has pervaded histories of all ideological tenors. Herbert Hovenkamp’s law-and-economics tale of the rise and fall of nineteenth-century legal classicism perfectly complemented Sidney Fine. His conclusion that “American constitutional law came to be built on the political economy of an unreconstructed Adam Smith” (i.e., hostile to state regulation and committed to wealth maximization, laissez-faire, private rights, and the virtues of self interest) was classically progressive (1991: 69). The disproportionate amount of attention devoted to legal realism and its critique of classical legal thought in twentieth-century legal history has directly extended progressive themes (e.g., Hull 1997; Kalman 1986; Schlegel 1995; Twining 1973). The field of constitutional history, recently revived through the contributions of Jack Rakove (1996), Akhil Amar (1998), and Bruce Ackerman (1991), has basically returned to the classic interpretive framework and chronology of progressive Edward S. Corwin with his focus on three great constitutional moments: 1787, 1868, and 1937; and his emphasis on three overarching themes: the origins of constitutional review, the content of constitutional rights, and *Lochnerism* and its New Deal repudiation.

But legal and constitutional historians have not been alone in the continued

propagation of progressive priorities. American political scientists and historical sociologists have assembled a portrait of a long, complex, and interdependent American statebuilding process that contrasts with the episodic and exceptionalist chronologies of some constitutional history. By examining the rise of the American welfare state and the development of American political organization in the broader context of western socio-economic and political modernization (a la Marx, Weber, Durkheim and their progeny), scholars like Theda Skocpol (1992), Stephen Skowronek (1982), and Daniel Rodgers (1998) have increased our understanding of the range of variables and the trans-Atlantic forces driving the expansion of the American polity in the early twentieth century. They have made certain aspects of the progressive synthesis increasingly untenable: e.g., the harsh dichotomy of laissez-faire and welfare state, the over-determined force of economic interest, and the causal personification of “reaction” and “democracy.” But unfortunately, they have embraced progressive legal history with enthusiasm. For front and center in the best new works on modern American state and political development is the classic progressive trope: law as obstruction.⁷

Stephen Skowronek re-energized the historical study of American political development in political science with his highly-influential thesis describing the nineteenth-century American polity as a wholly operational “state of courts and parties.” Skowronek’s argument about the actual local and functional use of nineteenth-century legal-political power was an important repudiation of naive progressive ideas about laissez faire. More problematic and more progressive, however, was his conclusion that it was this very legalism of the early American state that frustrated twentieth-century reform efforts to build a more modern, national apparatus. One of the main reasons for “the limits of America’s achievement in regenerating the state through political reform” for Skowronek was the “outmoded judicial discipline” created by “the constancy of the Constitution of 1789.” As he concluded, “Forged in the wake of a liberal revolt against the state, the American Constitution has always been awkward and incomplete as an organization of state power” (287). Similarly, Theda Skocpol, who perhaps more than any other scholar has expanded the depth and breadth of our understanding of the rise of a modern American social-welfare state, has also isolated the rule of law primarily as a constraint, forcing American reform in an exceptionalist maternalist direction (as

opposed to the more paternalist workingmen's policies of European nations). Drawing directly on the secondary interpretations of Forbath and Skowronek (as well as Paul and Horwitz), Skocpol has argued that "repeated experiences with a court-dominated state around the turn of the century" deterred trade unionists from advocating the kinds of comprehensive social insurance and labor regulations behind the more centralized, bureaucratic social-welfare states of western Europe (227).⁸ Law functioned as "hindrance" as well in Daniel Rodgers comparative examination of the origins of modern social policy. In assessing the reasons for the limits of urban planning in early twentieth-century America, Rodgers pointed his finger directly at "the peculiarities of the law in the United States," what Thomas Adams called "the practically cast-iron Constitution" that "hemmed in American urban reformers in ways no progressives elsewhere experienced" (201). Thus, despite the progress of recent political history and political science to deepen our understanding of the emergence of a modern American welfare state, when it comes to the issue of law and constitutionalism, we have not moved far past the original observations of the progressives themselves. Like H.G. Wells, we continue to stress (and blame) the exceptional anti-statist predilections of constitutional limitations for the peculiar structures and weaknesses of the American version of a modern polity. As Wells summarized, "America is pure eighteenth century. They took the economic conventions that were modern and progressive at the end of the eighteenth century and stamped them into the Constitution as if they meant to stamp them there for all time."⁹

Mark Twain once quipped that "though history may not repeat itself, it often rhymes." And indeed when the topic is law and the creation of a modern social welfare state in the United States, historians and social scientists seem to speak in metrical verse. Since the early twentieth century, law has been characterized primarily as an obstruction to social-democratic political aspiration and as a principal reason for the exceptionalist trajectory of twentieth-century American state development. American progressives felt that their legislative agenda was threatened by a Supreme Court and American jurisprudential traditions hostile to regulation, redistribution, and reform. In response they assembled an unprecedented powerful and polemical assault on American constitutionalism. The main elements of that critique resonate today in familiar phrases that furtively import the seemingly self-

evident progressive indictment into late-twentieth-century analyses: government by injunction, government by judiciary, laissez-faire constitutionalism, legal (or Langdellian) orthodoxy, substantive due process, liberty of contract, the revival of natural law theory, classical legal thought, Holmes and Brandeis dissenting, the Four Horseman, the revolution of 1937. The specter of “The Lochner Court” thus continues to loom large in analyses of the limits on American statebuilding. Why no socialism in America? Why no social rights? Why no social-democratic welfare state? Why no fundamental redistribution of wealth? The chief culprit in classic neo-progressive style remains . . . the American rule of law.

The Transformation of American Public Law

I don't buy it. In fact, the rest of this essay advances a thesis almost directly antithetical to the progressive critique of law. American law, *especially* American *public* law, far from being an obstruction or hindrance to the formation of a modern social-welfare state, was in fact a font of creative energy – of legal ideas, institutions, and practices -- that was absolutely crucial to the creation of new regime of centralized, administrative, regulatory governance in the United States. Behind the progressive mythology of negative laissez-faire constitutionalism lies an alternative story of law's positive force in producing a modern state in America. And contrary to oddly influential European proclamations of the weakness and incompleteness of that state, the obvious empirical reality is that the story of the twentieth-century American state is about the creation of a most powerful geo-political entity. That entity, which has wielded staggering global influence in the twentieth century, was patently not the simple outgrowth of possessive individualism or the protection of private rights of property and contract or a governmental willingness to “leave alone.” It was the product of a continuous and energetic process of statebuilding from 1776 through the Second World War (of the establishment of basic governing institutions, of the acquisition and distribution of new territory, of the promotion of national and international commerce, of the development of a powerful national defense, of the achievement of a regularized yet flexible national legal system, and of the growth of aggressive policies of police, regulation, administration, and redistribution) that should replace our parochial obsession with *Marbury*, *Lochner*, *Field*, *Holmes*, and the revolution of 1937 as the main story of American

constitutional history. For the powerful twentieth-century geo-political entity that is the American nation-state was distinctly the product of law – of a surprisingly effective common law tradition, of important civil law conceptions of private right and public legislation, and of a constitutional law that (opposite the progressive critique) embraced change. Without this flexible, regularizing, and nationalizing force of law, it is difficult imagine the diverse, divided, sectionalized, and conflicted population of the United States achieving anything like a modern state, yet alone one of the most powerful in the world. Contrary to its many critics, the many-sided legality of the American polity was not a weakness, rather, it was the key to its distinctive strength.

There are several places to begin an effort to recapture the story of the positive force of law in modern American statebuilding. One is the nineteenth century. Though progressives liked to posit a nineteenth century of laissez-faire, negative liberty, and old liberalism, legal histories of the period tell a different story -- a tale of law crucially deployed in the creation of a national state and economy.¹⁰ One of the most common themes in American constitutionalism, after all, is the central role of the Marshall Court in forging the legal prerequisites for a strong national commercial union through opinions like *Fletcher v. Peck*, *Dartmouth College*, *McCulloch v. Maryland*, and *Gibbons v. Ogden* (Beveridge 1916; Corwin 1919; Newmyer 1986; White 1990). The instrumentality of American private law in creating and regulating the conditions for the growth of a national economy has been agreed to by scholars as ideologically different as Willard Hurst and Morton Horwitz (Hurst 1956; Horwitz 1977; Friedman 1973). And the so-called “commonwealth historians” have definitively demonstrated the active role of the nineteenth-century state through law in establishing, promoting, and regulating the nation’s socio-economic infrastructure through public works, subsidization, corporate charters, public lands policies, eminent domain, mixed enterprises, and the police power (Handlin and Handlin 1947; Hartz 1948; Lively 1955; Scheiber 1972; Novak 1996). With this established picture of the prolific role of law in nineteenth-century statebuilding and economic growth, do we really believe that somewhere in the late nineteenth-century American law reversed course -- that it in a moment of conservative and class crisis it froze into a sclerotic, anachronistic, formalist impediment to modern political and economic development?

Of course not. And the second place to begin reconstructive work is the scholarship of a handful of legal historians who over the years have taken direct aim at that progressive-era fantasy. In the 1960s and 70s, Alan Jones and Charles McCurdy began to suggest that the progressive indictment of laissez-faire constitutionalism was skewed. Alan Jones (1967) carefully examined the legal career of progressive villain Thomas Cooley and discovered him to be not only the first head of the Interstate Commerce Commission but also something of a Jacksonian democrat with a special fondness for common law statutory interpretation.¹¹ McCurdy's extensive inquiries (1975 & 1979) into the jurisprudence of that other progressive antagonist Stephen Field established that he was neither a "handmaiden for 'business needs'" nor the product of "the Gilded Age with its Great Barbecue for the Robber Barons and for the rest – 'let the public be damned.'"¹² More recently historians like Daniel Ernst (1995), Howard Gillman (1993), and Barry Cushman (1998) have taken these early threads of revision and have begun to weave a different pattern of generalizations about law and reform. Taking seriously the complexities of this era's labor law, its opposition to class legislation, and the quite early expansion of commerce clause jurisprudence, these historians have criticized progressive notions of "government by injunction," "laissez-faire constitutionalism," and the "constitutional revolution of the New Deal."

But the most intriguing of all these revisionists was actually a progressive himself – Charles Warren. One of the best legal historians of the early twentieth century, Warren challenged the progressive interpretation of the turn-of-the-century Supreme Court before the ink was dry. In 1913, he penned two important articles (1913a: 294; 1913b: 667) that challenged the contemporary indictments that the Court was guilty of "judicial oligarchy" and "usurpation" in overturning "social justice" legislation "based on the individualist theories of a century ago." Curious about the representativeness of the omnipresent citation to *Lochner v. New York* in the progressive critique of law, Warren undertook a comprehensive survey of the constitutional fate of state regulatory legislation between 1887 and 1911. Organizing his findings according to constitutional objection – due process (social justice); due process (private property); obligation of contract; and commerce clause – Warren found that of 560 Fourteenth Amendment cases, only 3 state laws relating to social

justice were overturned (including *Lochner*); with an additional 34 relating to private property turned back primarily on taxation or eminent domain grounds. Of 302 cases decided upon the more established grounds of contract and interstate commerce, only 36 general state social and economic regulations were declared unconstitutional. Overwhelmingly, the vast majority of state regulatory laws in Warren's catalogue were upheld by the U.S. Supreme Court: "anti-lottery laws; anti-trust and corporate monopoly laws; liquor laws; food, game, oleomargarine and other inspection laws; regulation of banks, telegraph and insurance companies; cattle, health and quarantine laws; regulation of business and property of water, gas, electric light, railroad (other than interstate trains) and other public service corporations; negro-segregation laws; labor laws; laws as to navigation, marine liens, ferries, bridges, etc., pilots, harbors and immigration" (1913b: 695). Warren's survey perfectly grasped one important, immutable fact about the constitutional jurisprudence of the turn of the century that eluded other progressives -- this was an era of unprecedented expansion of state (and federal) police power.

Warren's survey also suggests a third place from which to begin revising progressive preconceptions about law and modern statebuilding – the simple empirical reality of the explosion of law in the early twentieth century. Any researcher moving from the manageable world of pre-Civil War jurisprudence into the wholly unwieldy terrain of early twentieth century law can testify to the overwhelming increase in the sheer quantity and diversity of law. By the late 20s according to some measures, Americans were being subject to some 23,000 new federal and state statutes biennially. New York State alone passed some 1595 statutes during 1928-29 (Fuchs 1930). According to Attorney General's Reports, the total amount of federal litigation in the United States rose from 47,553 cases in 1911 to 196,953 cases by 1930 (Clark and Douglas 1933: 1450). Whereas the United States Supreme Court had only 253 cases pending before it in 1850, as early as 1890 the docket had swollen to an unmanageable 1800 appellate cases (Frankfurter and Landis 1927: 60, 86). The number of lawyers in the United States grew from an estimated 39,000 in 1870 to 161,000 by 1930; and as one might expect, the number of degree-granting law schools with a three-year course of study grew from seven schools in 1890 to over 170 in 1931 (Clark and Douglas: 1481, 1486-87). By any quantitative measure, the period from 1877 to 1937 was the real "formative era of

American law.” But beyond quantification, legal thought and legal policymaking pervaded the social, economic, and political transformations of the late nineteenth and early twentieth centuries. Those years marked the emergence of a new sociological jurisprudence emphasizing the close interconnections of law and society (Pound 1911-12). And despite the pervasive progressive lament about legal obstructionism, law played a most prominent role in progressive socio-economic policymaking. Reformers from Grace Abbott to Woodrow Wilson enthusiastically endorsed and wielded law’s positive reconstructive power, what E.A. Ross dubbed “the most specialized and highly finished engine of control employed by society” (Ross 1901: 106). Behind the highly visible anti-legal polemics of Beard, Smith, Myers, and Boudin, another group of reformers including John Commons (1924), Richard Ely (1914), and Ernst Freund (1904) worked on a much more sophisticated analysis of the relationship of law and economic and political modernization in which jurists played crucial creative roles.

And that is the fourth and final perspective helpful in generating an alternative understanding of the role of law in modern statebuilding – the perspective afforded by legal and social theory. Without launching a prolonged theoretical digression, it is worth noting that the critical period in modern American state formation, 1877 to 1937, was simultaneously the great creative era in socio-legal thought. Far more significant than the over-emphasized legal realist deconstruction of classical legal thought, was the emergence of a powerful new school of socio-legal thinkers working on the direct correlation between modern legal and socio-economic change: Durkheim, Weber, Ehrlich, Duguit, and Pound. In contrast to the American progressive critique, these thinkers stressed the degree to which law was absolutely central in creating and understanding the transformations in economy, society, and polity that gripped all western nations in the late nineteenth and early twentieth centuries. Artfully mixing methods of the new sociology of Comte and Spencer and the historical jurisprudence of Maine and Vinogradoff, Durkheim proved that “one needs only cast an eye over our legal codes” to gain insight into modern social change and the shift from mechanical to organic solidarity (1984, 101). Particularly significant for understanding law and the modern state was Durkheim’s challenge to Spencer and Tönnies that the growth of contract and statecraft were *directly* rather than inversely related, i.e., that state regulation *increased* with the growth of modern

individualism and organic solidarity.¹³ Extending further the sociological correspondence between modern law and political economy, Max Weber placed formal legal rationalization, from the reception of Roman law to the emergence of new forms of administrative-bureaucratic authority, at the very heart of the story of the development of modern state and economy (Weber 1978). But it was perhaps Leon Duguit (1919) who provided the most direct focus on the specific transformations in public law on which new twentieth-century states were being built: transformations in public legal conceptions of contract, corporation, office-holding, legislation, administration, and sovereignty. More recently, legal theorists as diverse as Franz Neumann, Otto Kirchheimer (Scheuerman 1996), Jürgen Habermas (1996), and Gunther Teubner (1987 & 1988) have continued in-depth theoretical explorations of the important linkages between law, liberalism, organized capitalism, and modern forms of state development. History should be no slave to theory, but critical legal-theoretical insights like these are very helpful in widening the interpretive frame with which to approach law and the creation of the modern American liberal state.

With insights garnered from these four literatures and perspectives, it is possible to begin re-thinking the relationship between law and modern state-formation in the United States. Such interpretive avenues hint that beyond the progressive critique of law in modern American society, lies a different structural, causal, and normative story about law and twentieth-century statebuilding that needs to be fleshed out. From these hints, I would assert that at bottom the creation of the American liberal state involved a foundational *legal* revolution of unprecedented scope in American history -- the transformation of American public law. That revolution creatively destroyed nineteenth-century patterns and institutions of legal rule and constructed in their place a newly juridified constitutional state. This transformation of American public law consisted of three overarching features that separated it from nineteenth-century experience and altered the relationship of law and American society and economy: (a) the centralization of power, (b) the individualization of right, (c) the rationalization and constitutionalization of American law.

The themes of central power and individual liberty define modern liberal statecraft. Though seemingly opposed at first glance, the essence of the

governmental regime established in early twentieth-century America was the *simultaneous* centralization of new state powers and individualization of new private rights. Nineteenth-century understandings of associative citizenship in a confederated republic were supplanted by a new articulation of the rights of individual subjects in a nation-state.

On the public powers side of the equation, political scientists honed new theories of the central state and its sovereign powers while jurists invented constitutional room for new federal administrative and police powers. Economic policy was an obvious site for governmental centralization with such bureaucratic innovations as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board. But public morals and health policies witnessed a similar trend with federal legislation like the Narcotic Drug Act, the Mann Act, and the Volstead Act and national administrative inventions like the National Public Health Service, the Food and Drug Administration, and the Children's Bureau of the Social Security Administration. The result of these and innumerable other federal experiments was a revolutionary shift upward in American political decision-making power (Hays 1980). A national administrative regulatory state overcame nineteenth-century local preferences and common-law limitations and assumed new comprehensive responsibilities for regulating business, maintaining infrastructure, providing social services, preventing risk, and planning for a national economy and population.

This centralization of power was complemented by a distinct individualization of the notion of right. Though most of the public initiatives of the nascent American welfare state were accompanied by a legitimating rhetoric of "socialization" (e.g., languages of social control, social organization, social reform, and social rights),¹⁴ one should not be fooled about the general direction of change in the definition of liberal rights. In contrast to the positive and relative conception of rights *within* a community prevalent during the nineteenth century, the American liberal state entailed a more negative and individual definition of rights *against* a nation-state (though not at all *against* state-building). The experiments in collectivism and nationalism in this period were rooted in a new individualism that separated the rights-bearing citizen from intermediate loyalties of family, church, and locality. An expanded zone of private protection and individual autonomy was *quid*

pro quo for the radical extension of state power in this period. Such negative individual liberties and civil rights ultimately were not opposed to the general process of welfare state-building; on the contrary, they integrated individual citizens with the national socio-economic ambitions of the new state. Particular examples of this phenomenon include the invention of a new legal conception of privacy in this period, featuring a prominent concern for the protection of personality and personhood, and the post-bellum transformation of the notion of civil rights from freedperson's guarantee to corporate bill of rights to civil liberties to the social rights of the early American welfare state. Such rights were an indispensable part of the new balance struck in the pursuit of public order and the protection of private liberty by the American liberal state.

A heightened separation of more capacious understandings of public power and private right was a hallmark of the liberal state, and the constitutionalization of American law played a key role in constructively mediating these seemingly antagonistic tendencies. Constitutional law replaced the common law in this period as the final authority on the legitimacy of exertions of state power and expressions of individual right. The significance of constitutionalization for modern civil rights is well documented. But three other crucial elements of legal-constitutional development have been comparatively neglected in histories of the late nineteenth and early twentieth centuries: legal positivism, administrative law, and federal police power. It is impossible for me to imagine four more important prerequisites for modern social-welfare state-building than the creation of a national constitutional law, a new understanding of public law as legislative fiat, the legal invention of a fourth bureaucratic branch of government, and the radical expansion of national social and economic police powers. Yet despite all the new attention on social science, economic organization, and social-welfare policy in this period, we have fairly little understanding of this foundational legal revolution.

But though the centralization of power, the individualization of right, and the constitutionalization of law capture the general direction of legal-political change in early twentieth-century America, a full appreciation of the transformation of American public law requires an outline of some of the more specific changes in legal doctrine and practice that buttressed the creation of a new American state. Though an elaborate exposition of doctrine and especially practice is beyond the

bounds of this essay, it is possible to introduce four sets of jurisprudential innovations that underwrote modern state development in the U.S.: a) the new legal definitions of state and sovereignty represented in the work of J.W. Burgess; b) the new conceptions of constitutional and positive law captured in the important treatises of W.W. Willoughby; c) the expansion of legislation and police power symbolized by the work of Ernst Freund; and d) the invention of a centralizing administrative law as articulated by Frank Goodnow.¹⁵

One of the most important legal-political theoretical developments of the late nineteenth and early twentieth centuries was a fundamental rethinking of the nature of the state and state power. Part of a much broader reexamination of group identity generally, theorists of the period vigorously pursued new ideas about the nature of corporation, association, and state that challenged purely individualist or contractual conceptions of group organization. And though this extraordinary conversation was carried on by political scientists, sociologists, and historians as well as jurists, this was a distinctly legal discussion. The legal personality and the legal authority of groups was the key question, and the legal personality and authority of the state was its highest form (Gierke 1900; Maitland 1968; Laski 1917).

Legal and constitutional scholars first began fundamentally rethinking the nature of the American nation-state during the Civil War. With roots in the nationalist oratory of Webster and Lincoln, the immediate post-Civil War period was flooded with treatises advocating a strong nationalist theory of the state and a constitutional defense of the Union. Sidney George Fisher (1862), J.A. Jameson (1867), Orestes Brownson (1866), John C. Hurd (1881) and others downplayed the original significance of compact, contract, states' rights, and constitution in the creation of state authority and defended the overriding prerogatives of nation, Union, and national government. As Fisher wrote in the heat of battle: "If the Union and the government cannot be saved out of this terrible shock of war constitutionally, a Union and a government must be saved unconstitutionally" (199). Hurd went even further arguing that all antebellum attempts to derive the nature of sovereignty from constitutional standards were futile: "Sovereignty cannot be an attribute of law, because, by the nature of things, law must proceed from sovereignty. By the preexistence of a sovereignty, law becomes possible" (97). As Charles Merriam (1915: 296) summarized, "In the new national school, the tendency was to disregard

the doctrine of the social contract, and to emphasize strongly the instinctive forces whose action and interaction produces a state” (Frederickson 1965; Keller 1977).

By the turn of the century, these crisis-induced reconsiderations of nation-state and sovereignty grew into the foundations of a new political science and jurisprudence. Drawing on European state theories, Theodore Woolsey (1878), John W. Burgess (1890), Woodrow Wilson (1890), and W.W. Willoughby (1896) moved American conceptions of state, sovereignty, and public law well beyond the nineteenth-century understandings captured by Alexis de Tocqueville and Francis Lieber. Whereas Tocqueville and Lieber oriented their inquiries around concepts of local authority and self-government, Woolsey, Burgess, Wilson, and Willoughby explicitly emphasized the nation-state and its encompassing sovereign powers. All began like Wilson’s aptly titled *The State* (1890) with explicit critiques of divine, social contract, and natural law theories of the state. They then typically followed Burgess in his new delineation of the relationship of state and sovereignty: “The essence of the state is everywhere, and at all times, one and the same, viz; sovereignty” (I: 74). “However confederate in character the Union may have been at the time of its creation,” Willoughby declared about political development in the United States, “the transformation to a Federal State was effected.” The essence of that state was not compact or natural rights or constitutional limitations, rather it was sovereignty – that power that was “the source of all law” but “not itself founded upon law” (Willoughby 1904: 33).

Part and parcel of this positivist redefinition of state and sovereignty was a similar rethinking of the nature of law – constitutional law and positive law. Despite progressive claims of the revival of natural law thinking or the rise of legal orthodoxy, far more significant for turn-of-the-century jurisprudence was the thorough-going constitutionalization of American law and the growing influence of analytical jurisprudence. Constitutionalization was directly linked to the growth of the American state; new conceptions of positive law underscored the influence of new legal ideas of sovereignty.

As suggested above, federal constitutional law displaced local common law as the preeminent legality in post-Civil War America. The post-war constitutional amendments further nationalized American law and precipitated a veritable cult of constitutionalism in the late nineteenth century. The consequences were legion as

area after area of American law formerly left to a wide variety of local, state, and common law interpretations came under the purview of the United States Supreme Court and its definitive renderings of the national boundaries between private and public right and state and federal power. The state police power, for example, was thoroughly constitutionalized in the late nineteenth and early twentieth centuries as age-old regulatory issues were reframed in a national context in *Munn v. Illinois* (1877), *Mugler v. Kansas* (1887), *Budd v. New York* (1892) and hundreds of other Supreme Court cases.¹⁶ The modern state articulated by Woolsey, Burgess, and Wilson required a clearer national standard for delimiting private right and public power than the customary and hermeneutic standards of the common law tradition. Constitutional law provided an ideal mechanism for promoting the simultaneous expansion of individual rights and governmental power that characterized the modern liberal state.

The themes of state, sovereignty, and positive constitutional law came together in the synthetic constitutional treatises of W.W. Willoughby (1896; 1904; 1910; 1924; Mathews and Hart 1937). Willoughby joined the new theories of the state to a historical reinterpretation of U.S. constitutional law that laid the groundwork for twentieth-century public law. At the heart of Willoughby's system was the endorsement of analytical jurisprudence and a positivist conception of law as the command of a sovereign. In contrast to antebellum jurists who regularly rejected a Blackstonian or utilitarian argument for the force of law, Willoughby drew the nature of state sovereignty and all subsequent delineations of governing power strictly from a "conception of law as wholly a product of the State's will" (1896: 180).¹⁷ In this way, early nineteenth-century concerns with custom, local self-government, compact, and common law gave way to a new emphasis on the positive constitutional powers of a central state. This more realistic and positivistic conception of law and state sovereignty lay at the heart of the constitutional expansion of American governing power in the twentieth century.

The third important category of doctrinal change that made up this transformation of American public law concerned legislation – the nature of statute law and the extent of the police powers of state and federal legislatures to regulate in the public interest. Though we are all positivists now to the extent that we understand by the legislative power the plenary authority of the state to pass laws,

the emergence of an omnibus legislative power distinct from a judicial one is a much thornier historical problem as suggested by the work of Charles McIlwain (1910; 1947).¹⁸ In pre-Civil War American, the line between statute and common law (and legislature and court) was often quite murky, as indicated by the prevalence of private legislation as well as the defining role of the common law of nuisance in the antebellum police power. “What was legislation in the nineteenth century?” remains one of the unresolved questions in American legal history. By the post-Civil War period, however, two things sharpened the distinction between law and politics: the comprehensive legislative experiments of the 1840s and 50s (prohibition, police reform, married women’s property acts, Field codes, and general incorporation laws); and relatedly, the clearer scope given to the judicial power through the treatise-writing of Theodore Sedgwick (1857) and Thomas Cooley (1868).

Like definitions of state, sovereignty, law, and constitution, conceptions of legislative power grew clearer and more realistic as radical legislative initiatives proliferated between 1877 and 1937. The best example was the police power which became an explicit constitutional doctrine after the Civil War, trading in its ambiguous origins in common and police law for Ernst Freund’s positivist and progressive definition as the legislative “power of promoting the public welfare by restraining and regulating the use of liberty and property” (Freund 1904: iii). Lewis Hockheimer echoed Wilson and Willoughby: “The police power is the inherent plenary power of a State . . . to prescribe regulations to preserve and promote the public safety, health, and morals, and to prohibit all things hurtful to the comfort and welfare of society” (1897: 158). Contrary to the progressive critique of restraint, the police power exploded in the early twentieth century. Statute books swelled, case numbers rose exponentially, and treatises and law review articles proliferated. A new forcefulness and resourcefulness crept into discussions of the police power as progressives expanded the scale and scope of American legislative power, calling for the police power to be “more freely exercised and private property more freely controlled to meet the needs of the changed conditions of society.” Some progressives saw in the police power “almost unlimited opportunities for adopting whatever legislation the augmenting demands of social pioneers may require” (Brace 1886: 341; Ramage 1902: 698). And as Charles Warren hinted, despite the singular power of *Lochner v. New York*, an overwhelming number of cases embraced a more

affirmative, open-ended use of the police power. Less time was spent legitimating the police power or sketching its roots in common or civil law as judges placed greater emphasis on the doctrine's capacity to directly promote the public good rather than merely protect or preserve it. In *Bacon v. Walker* (204 U.S. 311, 318; 1907), the United States Supreme Court declared that the police power "is not confined . . . to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people" (Reznick 1978: 31-32).

But perhaps the most important development in the expansion of legislative and police power between 1877 and 1937 was the invention of a federal police power -- the extraconstitutional centralization of general welfare lawmaking in the United States. In *United States v. DeWitt* (9 Wall. 41, U.S.; 1870), the U.S. Supreme Court adopted the clear antebellum constitutional consensus that the police power was explicitly a state rather than a federal power. The powers of the federal government were constitutionally enumerated, delegated, and limited -- Congress wielded nothing analogous to the general plenary police authority of the state legislatures to regulate liberty and property in the public interest. Of course, one of the great stories of the period after 1870 is about Congress securing that power *de facto* if not *de jure* through its commerce, taxing, and postal powers. As Charles Evans Hughes told the American Bar Association in 1918, the most significant decisions of the recent Supreme Court involved "the extended application of the doctrine that federal rules governing interstate commerce may have the quality of police regulations" (Hughes 1918: 93-94). In the areas of business, labor, transportation, morals, health, safety, and education, powers and issues that were once the exclusive domain of state and local governments moved up into the purview of the national government in one of the most significant expropriations of political power in American history. And as Ernst Freund argued in 1920, the role of law and the judiciary in that expropriation was pivotal: "The consolidation of our own nation has proved our allotment of federal powers to be increasingly inadequate; and had it not been aided by *liberal* judicial construction, our situation would be unbearable" (Freund 1920: 181; Thompson 1923: 10). From *U.S. v. DeWitt* (1870) to *Hammer v. Dagenhart* (247 U.S. 251; 1918) to *United States v. Darby* (312 U.S. 100; 1941), American courts fashioned legal doctrine to accommodate a society looking more and more to the

federal government for regulatory solutions.

But despite this dramatic revolution in legislative power, one might argue that an even bigger transformation in American law concerned changes in administrative authority from 1877 to 1937. As Ted Lowi noted, “The modern method of social control involves the application of rationality to social relations. . . . Rationality applied to social control is administration. Administration may indeed be the *sine qua non* of modernity” (Lowi 1979: 21). Herbert Croly was equally insistent about the centrality of administration to progressivism: “The progressive democracy is bound to be as much interested in efficient administration as it is in reconstructive legislation. . . . Its future as the expression of a permanent public interest is tied absolutely to an increase of executive authority and responsibility” (Croly 1912: 132). Accordingly political scientists and theorists have spent a great deal of time charting the rise of administrative organization and bureaucracy in the early twentieth-century United States (Rohr 1986; Cook 1996; Stillman 1998). But less attention has been devoted to the legal causes and consequences of that transformation. Two chief areas of legal innovation were: a) a reconceptualization of the relationship of office-holding (Orren 1997) and self-government; and b) the problem of the constitutional separation of powers. Like the common-law generally, nineteenth-century conceptions of the legal nature of office-holding and administration assumed the kind of general continuity between ruler and ruled, office-holder and citizen, implied in the nature of local self-government. In contrast, modern administrative law and theory posited a foundational separation between the professional office-holder and the political life of the citizenry -- a separation of ownership from control of the American polity.¹⁹ As Woodrow Wilson aristocratically justified the idea of administrative discretion and the limits of public opinion on modern bureaucracy: “Self-government does not consist in having a hand in everything, any more than housekeeping consists necessarily in cooking dinner with one’s own hands. The cook must be trusted with a large discretion as to the management of the fires and the ovens” (1887: 213; 1908: 197; Waldo 1948: 104-155). But even more subject to change than nineteenth-century conceptions of local self-government was the constitutional doctrine of the separation of powers. The American system of divided and mixed government counterbalancing executive, legislative, and judicial and state and federal authority, posed a challenge for

administrative reformers seeking to centralize administrative power in the hands of the executive. In short, the administrative revolution was not just a revolution in governmental organization, it entailed a decided transformation in American public law.

The career of Frank J. Goodnow embodied that transformation. In his pioneering casebooks and treatises on administration (1893; 1905; 1906), Goodnow laid the groundwork for the jurisprudential transition from nineteenth-century conceptions of the powers and duties of office-holders to modern administrative law. In *Social Reform and the Constitution* (1911), Goodnow attempted to create jurisprudential room for the expansion of administrative power through a critique of an overly rigid constitutional understanding of federalism and the separation of powers. The tendency to emphasize the rights of states and individuals, he argued, “has resulted in a constitutional tradition which is apt not to accord to the federal government powers which it unquestionably ought to have the constitutional right to exercise.” Goodnow called on courts to continue “to abandon certainly the strict application of the principle of the separation of powers whenever the demand for administrative efficiency would seem to make such action desirable” (1911:11, 221). In *Politics and Administration* (1900), he went so far as to attempt to reduce the morass of the traditional American constitutional system to two primary functions: “the will of the state [politics] and the execution of that will [administration].” In direct opposition to nineteenth-century common-law notions of customary, participatory, and local self-government, Goodnow advocated a centralized and professionalized bureaucratic corps insulated from popular politics:

The fact is . . . that there is a large part of administration which is unconnected with politics, which should be relieved very largely, if not altogether, from the control of political bodies. It is unconnected with politics because it embraces fields of semi-scientific, quasi-judicial and quasi-business or commercial activity – work which has little if any influence on the expression of the true state will. (1900: 22, 85-86).

Though the struggle over administration and administrative law in the twentieth-century United States is one of the more complex and on-going developments to unpack historically, Goodnow’s early work captured the general thrust of progressive

legal innovation. In many ways, his initiatives in administrative law were the capstone of the changing conceptions of state, sovereignty, law, and legislation that began with the Civil War.

Together, the three broad tendencies of the centralization of power, the individualization of right, and the constitutionalization of law, coupled with these more particular changes in legal conceptions of the state, sovereignty, positive law, legislation, and administration, constitute what I refer to as the transformation of American public law. That legal transformation was central to the creation of a modern administrative welfare state in the United States. The fundamentally legal nature of this transformation should force us to revise the long-held progressive idea of law as primarily an obstruction to statebuilding and social democracy in America. More significantly, the transformation of public law makes problematic some popular short-cuts explaining American political change from the nineteenth to the twentieth century: e.g., laissez-faire to the general-welfare state; negative to positive liberty; old to new liberalism. For the transformation of public law suggests that below surface generalizations about individualism to collectivism lie deeper changes and more complex evolutions in governmental theory and practice – changes in conceptions of law, sovereignty, police, legislation, and administration

Conclusion

One simple way to sum up the primary objective of this essay might be the slogan “bringing the *law* back in” to the story of modern American statebuilding. And such an emphasis on law has much to recommend it. Law’s propensity for generalization and synthesis is one of its main attributes, a fact diversely illustrated by the legal-historical roots of Max Weber’s modern theoretical synthesis as well as the recent proliferation of legal scholars as public intellectuals. Of the *constitutive* capaciousness of law, Pierre Bourdieu commented: “The law is the quintessential form of ‘active’ discourse, able by its own operation to produce its effects. It would not be excessive to say that it *creates* the social world” (1987: 839). Law’s location at the nexus of the private and the public, of ideas and actions, of the individual and the collective, of the socio-economic and the political, of violence and the word make it an excellent vehicle for re-integrating the disparate intellectual, political, cultural, and economic issues that currently preoccupy a sprawling monographic

literature.

But a renewed focus on the positive role of law in modern social and economic policymaking involves more than providing a supplemental variable – a richer, more complete historical story. Rather this essay has argued that the incorporation of law changes the story fundamentally. First, a focus on law disrupts the master trope of the shift from laissez-faire to the general-welfare state in the United States. Though bolstered by state modernization theories and Franco-Germanic models of political development that highlight the “on-off” absence or presence of national sovereignty and central bureaucratic capacity, law introduces a more complex, conflicted, and long-term story of the evolution of police, administrative, and constitutional powers that is irreducible to our politically charged, over-determined meta-narratives about shifts from statelessness to statebuilding; negative to positive liberty; old to new liberalism; or individualism to collectivism. The legal story simply does not break down around such routine binaries.

Secondly, and relatedly, a fuller study of law should put to rest the currently widespread invocation of an exceptionalist American legal tradition as primarily a restraint, a limit, a check on progressive statebuilding efforts (i.e., the persistent notion of law as an ogre frustrating liberal reform). Beyond the ubiquitously invoked unholy trinity of laissez-faire constitutional cases *E.C. Knight*, *In Re Debs*, and *Lochner v. New York*, lies a largely unstudied, untapped mass of police, regulatory, administrative, corporation, utility, tax, eminent domain, health, insurance, telecommunications, monetary and fiscal law that plays a crucial creative role in building the American liberal state. Statebuilding is about much more than institutions and political mobilization. It involves a substantive *legal* project deeply embedded in everyday private as well as public economic and social policymaking.

Finally, and perhaps most importantly, law introduces directly into the heart of the story of the creation of modern governance a normative set of questions about liberalism, rule, self-government, and democracy in a national regulatory welfare-state regime. The redefinition of American liberalism around a more negative and individualistic understanding of private right displaced an earlier rights tradition focused on participation and the possibility of self-government by a mutually regulating citizenry. The reorganization and centralization of public power in the

liberal state made such acts of truly popular sovereignty difficult. The revolutionary constitutional invention of administration undermined it altogether, replacing a representative and legislative model of democracy with a practice of rule-making by insulated and specialized bureaucratic experts. Mass producerist and consumerist economic policies coupled with compensatory social-welfare provisions and national risk management have made democratic practice a seeming anachronism.

Legal thinkers as diverse as Francis Lieber, Otto von Gierke, A.V. Dicey, Paul Vinogradoff, James Bryce, and Roscoe Pound worried about this problem – the fate of a democratic, liberal rule of law in a centralized and rationalized nation-state – since the middle of the nineteenth century. Their concerns were shared by social and political philosophers like Tocqueville, Mill, and Dewey. Social theorists have identified a principal role for the transformation of law in the problems and possibilities of modern economy and society, from Max Weber’s initial preoccupation with legal rationalization to Jürgen Habermas’s and Gunther Teubner’s more recent focus on the “juridification of modern social life.” As Teubner most recently summed up this concern, “Law, when used as a control medium of the welfare state, has at its disposal modes of functioning, criteria of rationality, and forms of organization which are not appropriate to the “life-world” structures of the regulated social areas and which therefore either fail to achieve the desired results or do so at the cost of destroying these structures” (1987: 4). The modernization of polity and economy through law came with important costs and foregone alternatives. Nineteenth-century conceptions of law, community, and self-government were creatively destroyed in the process of building the modern American liberal state. Such complex causation and sometimes unintended consequences should be kept in mind before we resort to simple normative shibboleths about the obstructionism of law or the natural and inevitable evolution from laissez-faire to the general-welfare state.

Notes

1. Associate Professor of History, University of Chicago; Research Fellow, American Bar Foundation. This essay owes much to long-standing conversations with Morton Keller on modern state power, James Kloppenberg on the intellectual foundations of progressive statebuilding, and Morton Horwitz on progressive legal historiography; as well as recent commentary from Owen Fiss, Bryant Garth, Robert Gordon, Robert Kagan, Michele Landis, Austin Sarat, Christopher Tomlins, Michael Willrich, and the community of scholars at the American Bar Foundation.

2. This is a vast literature, some of which is discussed below, encompassing historical jurisprudence, sociological jurisprudence, legal realism, and critical legal studies. These particular renderings of the agenda are from Willard Hurst (1971: 228; 1964: 109). Hurst is also the author of one of the best calls for an integration of legal and political history:

In deciding what to include as “law” I do not find it profitable to distinguish “law” from “government” or from “policy.” The heart of the matter is that we formed organizations for collective action characterized by their own distinctive bases of legitimacy. . . . In order to see law in its relations to society as a whole, one must appraise all formal and informal aspects of political organized power – observe the functions of all legal agencies (legislative, executive, administrative, or judicial) and take account of the interplay of such agencies with voters and nonvoters, lobbyists and interest groups, politicians and political parties. This definition overruns traditional boundaries dividing study of law from study of political history, political science, and sociology.

For a fuller discussion see (Novak 2000: 114).

3. *Slaughterhouse Cases*, 83 U.S. 36 (1872); *In Re Debs*, 158 U.S. 564 (1895); *Lochner v. New York*, 198 U.S. 45 (1905); *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935).

4. Note the moralizing anthropomorphism of Democracy.” As Max Lerner noted, part of the powerful attraction of the progressive paradigm was that it allowed for the “personal identification of villainy” and, of course, goodness (Lerner 1933: 677).

5. Twiss was particularly intrigued with the formative role of Thomas McIntyre Cooley and his influential treatise *Constitutional Limitations* (1868). Ignoring his regulatory work for the Interstate Commerce Commission, Twiss portrayed Cooley as a staunch conservative ideologue who “made up many of the principles out of his own head” and *Constitutional Limitations* as “a direct counter to the appearance a year earlier of Karl Marx’s *Das Kapital*” (Twiss 1942: 18, 33).

6. Though Forbath’s emphasis on legal ideas and the shaping of labor consciousness contrasts with progressives’ more direct emphasis on economic interest, his basic story about the force and direction of *law* is almost classically progressive: “During the decades bracketing the turn of the century, courts exacted from labor many key strategic and ideological accommodations, changing trade unionists’ views of what was possible and desirable in politics and industry. Judicial review and administration of labor legislation helped make broad legal reforms seem futile. Similarly, the courts’ harshly repressive law of industrial conflict helped make broad, inclusive unionism seem too costly and a more cautious, narrower unionism essential” (1991: 6-7). Of course, not all of the new labor legal history

follows Forbath's classic progressive story. See for example (Tomlins 1985; Ernst 1995; Tomlins and King 1992).

7. I am, of course, deeply indebted to this political science/political history literature and proceed cautiously with this critique. For if there's one thing the "Bringing the State Back In" revolution has accomplished in the capable hands of Skocpol and Skowronek (not to mention those working so ably on the American state before it was "brought back in," e.g., Morton Keller, Barry Karl, Ellis Hawley, Thomas McCraw, and Martin Sklar among others), it has been the de-centering of the New Deal and the re-centering of attention on the transformative changes in the political structure and socio-economic policies of the emerging American administrative welfare state in the critical period after 1877 and before the shift in the late New Deal that Alan Brinkley provocatively dubs "the end of reform." Still, one of the central defects of current state-centered approaches to this governmental revolution is the neglect or over-simplification of the pivotal role of law. While the state-centered paradigm has successfully challenged functionalist and instrumentalist conceptions of the state as a mere arena for social, cultural, and economic conflict, and established the relative autonomy of the state as an independent historical actor, most of these interpretations have not moved beyond an instrumentalist conception of the role of the rule of law in American state-building. Where they see the historical problem of the building of an American administrative welfare state as primarily a problem of political and institutional organization and mobilization, I would like to suggest that modern American statebuilding looks quite different from the perspective of the problem of law and legal legitimation.

8. Skocpol's thin reading of American legal history is a real weakness in an otherwise brilliant investigation into American statecraft. Skocpol begins with Tocqueville's well-known observations about the power of bench and bar: "There is hardly a political question in the United States which does not sooner or later turn into a judicial one." Then, after a passing reference to *Marbury v. Madison*, she sums up nineteenth-century legal development this way:

Private property rights and norms of market behavior were instrumentally adjusted to the needs of an entrepreneurial and rapidly growing capitalist economy. To limit the activities of labor unions, the courts used conspiracy doctrines, and then contract and equal-protection doctrines and interpretations of anti-trust laws. In spheres from the economy to the family, U.S. courts sought to maintain the boundaries of public versus private authority in American democracy. . . . Arnold Paul has summed up late-nineteenth-century legal developments as 'a massive judicial entry into the socioeconomic scene' effecting 'a conservative-oriented revolution' in the name of concentrated private property" (69-70).

9. Quoted in (Rodgers 1998: 207). The thesis of the "inertial force" of law on American statebuilding extends right up to the present. In their excellent work on contemporary regulatory policy in the U.S., Richard Harris and Sidney Milkis (1996) adopt an almost classic progressive position and chronology arguing that "Clearly, the constitution foundations of the American political system generate powerful inertial forces that must be overcome if a qualitative shift in regulation is to be accomplished." They argue that the constitutional "bias against big government has been one of the most serious obstacles faced by advocates of regulatory regime change in the twentieth century, and in a sense the history of American regulatory politics since the Progressive Era has been the history of the erosion of that bias" (34).

10. Here Stephen Skowronek's thesis about the power of nineteenth-century courts and parties is right on the mark: "The early American state maintained an integrated legal order on a continental scale; it fought wars, expropriated Indians, secured new territories, carried on relations with other states, and aided economic development" (1982: 19).

11. Jones criticized the progressives for assuming that legislative initiatives and regulation were a priori public goods and that obstructions to legislative power must thus be the product of economic self interest. Jones battled this misinterpretation by uncovering Cooley's creative impulse not in an alliance with economic interests but in a Jacksonian ideological persuasion that battled class privilege and concentrated economic power.

12. McCurdy located the key to Field instead in the issue of legal legitimacy and the constitutional necessity of generating lasting rules for separating public and private spheres. McCurdy insisted that Field's legal ideas were not subservient to economic interests. Field used his rigorous separation of public and private to squelch internal improvement bonds and to divest corporations of tax exemptions, lottery rights, and special grants. He upheld state legislation that prohibited certain businesses as detrimental to the public interest, that prescribed standards of fitness for lawyers and doctors, and that required railroads to erect cattle guards and grade crossings at their own expense. Also see (Benedict 1985).

13. For a brief but excellent discussion of this point that also includes a fine English introduction to the work of Léon Duguit and Maurice Hauriou, see (H.S. Jones 1993: 154-159).

14. For a provocative analysis of the "socialization of law," see (Willrich 1998).

15. It is almost impossible to appreciate the full significance and reach of this transformation in public law without exploring the degree to which these legal ideas are put into actual practice in twentieth-century economic and social policymaking. But that inquiry requires a monograph not an article. My hope is that the shortcuts provided by the synthetic works of Burgess, Willoughby, Freund and Goodnow give at least a rough sense of the character and scope of this legal revolution.

16. *Munn v. Illinois*, 94 U.S. 118 (1877); *Mugler v. Kansas*, 123 U.S. 623 (1887); *Budd v. New York*, 143 U.S. 517 (1892).

17. Also see Woodrow Wilson's similar (but more qualified) endorsement of an analytical account of sovereignty in *The State* (1910: 634-635). Wilson struggled to mesh sovereignty, positive law, and constitutionalism in his definition of law as "the command of an authorized public organ, acting within the sphere of its competence. What organs are authorized, and what is the sphere of their competence, is of course determined by the organic law of the state; and *this* law is the direct command of the sovereign."

18. Also see (Gough 1955; Pocock 1957). For a recent attempt to wrestle with this problem in an American context see (Desan 1998).

19. For the classic statement of the same theme with respect to the administration of the private business corporation see (Berle and Means 1932). As suggested in the discussion of state sovereignty, the parallels in debates about what is happening to the corporation and what is happening to the state

is extraordinary.

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