THE TRANSFORMATION OF AMERICAN LAW, 1780-1860

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III Subsidization of Economic Growth through the Legal System

The Slow Emergence of the Just Compensation Principle

The process of economic development in the United States necessarily involved a drastic transformation in common law doctrines, which required a willingness on the part of the judiciary to sacrifice "old" property for the benefit of the "new." The most potent legal weapon used to further this process of redistribution was the power of eminent domain—coerced "takings" of private property, usually for roads, for canals, and somewhat later, for railroads. Given the central role that eminent domain played in legal controversy during the nineteenth century, it is rather surprising to see how infrequently it arose as a legal question before that time. Until the end of the eighteenth century, it appears, development was so meager that the problem of compensation for land taken or injured by public authorities hardly played a significant role in American law.

Perhaps still more surprising is that the principle that the state should compensate individuals for property taken for public use was not widely established in America at the time of the Revolution. Only colonial Massachusetts seems rigidly to have followed the principle of just compensation in road building.[1] New York, by contrast, usually limited the right of compensation to land already improved or enclosed or else it provided that compensation should be paid by those who benefited from land taken to build private roads.[2] Despite the efforts of Thomas Jefferson to establish the principle of just compensation in postrevolutionary Virginia, no law providing compensation for land taken for roads was enacted until 1785, although the state had regularly compensated slave owners for slaves killed as a

result of unlawful or rebellious activities.[3] Until the nineteenth century, Pennsylvania and New Jersey still denied compensation on the ground that the original proprietary land grants had expressly reserved a portion of real property for the building of roads.[4]

Not only was eighteenth century practice strongly weighted against compensation but so was its constitutional theory. Of the first postrevolutionary state constitutions, only those of Vermont and Massachusetts contained provisions requiring compensation. By 1800 only one additional state—Pennsylvania—constitutionally provided for compensation for takings under the power of eminent domain. Even by 1820 a majority of the original states had not yet enacted constitutional clauses providing for compensation for land taken.[5] Yet, under the influence of Blackstone's strict views about the necessity of providing compensation,[6] reinforced by the antistatist bias of prevailing natural law thinking,[7] by this time statutory provisions for compensation had become standard practice in every state except South Carolina, whose courts continued to uphold uncompensated takings of property.[8] And even without the benefit of a constitutional or statutory provision, some judges were remarkably quick to hold, in Chancellor Kent's words, that "provision for compensation—in a statute—is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property."[9] He established a practice of enjoining public officials from undertaking any activity for which there was no advance provision for compensation.[10]

The movement toward establishing the just compensation principle during the nineteenth century reveals a variety of important conflicts over theory and practice that the process of economic development brought to the surface. At the turn of the century, there still existed a perhaps dominant body of opinion maintaining that individuals held their property at the sufferance of the state. In 1802, for example, the Pennsylvania Supreme Court upheld an uncompensated taking of land to build an incorporated turnpike, over the objection that it violated the recently enacted just compensation provision of the state constitution.[11] There had been a long standing practice in colonial Pennsylvania, the judges noted, of including a surplus 6 percent in every land grant from the proprietor on the assumption that the state could later take property for the building of roads. This practice, the judges held, was not intended to be barred by the constitution.

It was, in fact, true that colonial Pennsylvania had usually compensated landowners only for improvements but not for unimproved

land taken to build roads. Beginning in 1787, however, the legislature had often, if irregularly, included compensation provisions in road and canal building statutes.[12] Indeed after the political uproar that resulted from the Pennsylvania Supreme Court's endorsing of uncompensated takings in *M'Clenachan v. Curwin* (1802) it appears to have become "usual" for the legislature to provide for compensation in turnpike acts.

While the increasingly regularized practice of statutory compensation during the nineteenth century muted much of the conflict over the state's power to take land without payment, there continued to be a strong current in American legal thought that regarded compensation simply as a "bounty given . . . by the State" out of "kindness" and not out of justice.[13] South Carolina courts continued to uphold uncompensated takings.[14] And even where a state constitution required compensation, practical consequences flowed from this view that compensation clauses were gratuitous limitations on an otherwise inherent and unlimited sovereign power. For example, beginning in the 1830s, lawyers began to argue that even where the state was required to compensate for takings for a public purpose, there was no corresponding constitutional obligation to compensate for private takings.[15] "The provision in the state constitution authorizing the taking of private property for public uses, is not a grant, but a limitation of power," a New York railroad lawyer argued in 1831. "The states, representing the whole people are sovereign, and possess unlimited power in all cases except where they are restricted by either the federal or their own constitution. The legislature of a state, unless restricted by the state constitution, would even have power to take private property for private use."[16] The thrust of this argument was that those who claimed that railroads were not "public"—and hence not entitled to exercise the eminent domain power—would nevertheless be conceding a still more potent inherent power to take for "private" purposes *without* compensation.

Another practical consequence of the view that just compensation clauses were not grants but narrowly drawn limitations on an originally unrestrained sovereignty was that it enabled its proponents to confine the scope of the constitutional protection. Chief Justice Gibson of Pennsylvania, the foremost judicial advocate of the view that just compensation provisions were "disabling, not . . . enabling" clauses, held, as a result, that the Pennsylvania constitution did not restrain uncompensated takings for private purposes. The fact that there had "usually, perhaps always," been compensation in

such cases, he declared, was "done from a sense of justice, and not of constitutional obligation."[17] He also insisted that there was no constitutional requirement that "consequential damages" be compensated, since they were not literally "takings." Even though such "indirect" injuries had "usually [been] compensated," Gibson declared, "it was of favour, not of right."[18]

There is nevertheless a clear trend throughout the first half of the nineteenth century in the direction of enacting state constitutional provisions requiring just compensation. While this trend does offer unmistakable evidence of the gradual crystalization of sentiment in favor of the abstract principle of compensation, we shall see that there was also an equally clear countertrend during the same period in the direction of limiting the scope of application of the compensation principle. This tendency toward limitation often drew upon a surprisingly widespread and powerful earlier view that all property was originally held at the sufferance of the sovereign.

The significance of the delay in establishing the constitutional principle of compensation as well as the success of the movement to narrow its scope has not been fully appreciated. The basic source of early nineteenth century resistance to the compensation principle were those entrepreneurial groups who regarded it as a threat to low cost economic development. Until around 1850, when there are unmistakable signs of a shift in opinion, these emergent groups in American society generally cast their influence on the side of limiting the compensation principle or even of justifying uncompensated takings. At the same time, there were those who sounded the alarm against all redistributions of wealth through use of the eminent domain power. "At no time has there been such a spirit of improvement pervading the country, as at present," one legal writer observed with alarm in 1829. "The vast plans, indeed, which are now in embryo in most of the States for *turnpikes, canals, railroads, bridges,* and other means to facilitate internal communication, are almost without number." He feared that "in an age and in a country, where the expediency, if not the necessity, of public improvements is constantly presenting itself to the attention of the legislative bodies . . . attempted encroachments upon private property by a State" were likely to increase.[19] By the 1850s, this apprehension that the eminent domain power might be used to bring about egalitarian redistributions of wealth finally came to unite most orthodox legal opinion around the principle of compensation. By then, however, many of the important benefits of cheap economic development had already been achieved.

The Burden of Damage Judgments

Just as the principle of just compensation was becoming well established in America, a period of sustained economic growth made the problem of damage judgments central to the concerns of economic planners. As early as 1795 the directors of the Western and Northern Inland Lock Navigation Companies reported that the problem of land valuations had caused the company "serious embarrassment," apparently because of large damage judgments awarded by juries. The company "humbly entreated" the New York legislature to allow the courts to appoint appraisers, "whose decisions shall be conclusive."[20] Again, in 1798 the canal company informed the legislature that the mode of assessing damages was "injurious and expensive, and . . . justice requires some amelioration" of the law's provisions.[21] This time the main emphasis of the report was on the cost of litigation, with the company observing that in one case a jury had assessed damages at only one dollar, while the costs of the lawsuit amounted to $375. The company also reiterated its earlier plea that damage judgments be taken away from juries and suggested that the legislature include in its charter a provision similar to one recently granted to the city of Albany, which made the valuations of assessors final for land taken to establish a system of water supply.[22] While the legislature immediately acceded to the company's request,[23] the courts also continued to be solicitous of the canal's interests. After the company had paid damages for land taken, it found it necessary to overflow adjoining land still owned by farmers bordering on the canal. And even though there was not the slightest suggestion that the appraisers had taken such an eventuality into account, the Supreme Court of New York in 1807 held that the destruction of the productive value of the land had already been included in the original damage award.[24]

In some cases, even the title to property was drawn into doubt under the pressure to reduce costs of economic development. For almost two decades after the completion of the Erie Canal in 1825, New York judges continued to debate whether mill owners on the banks of various large upstate freshwater rivers were entitled to compensation for injuries resulting from diversion of water into the canal.[25] Since these rivers were not subject to the ebb and flow of the tide, they were regarded as nonnavigable under the test of the English common law. And since title to the bed of nonnavigable streams had long been held to vest in the owners of the adjoining banks, it appeared that the state was required to compensate them for injury

to their water rights. On the other hand, while the English test of navigability was an accurate description of reality in that small country, it was hardly applicable in America where there were many navigable fresh water rivers in which the tide did not ebb and flow.[26] If the common law rule were abandoned, the state's title to these rivers surrounding the Erie Canal would relieve it of the obligation of providing compensation.

It was estimated by the counsel for the canal commissioners in 1826 that "probably more than $100,000 on the lines of the canals [were] involved" in that particular decision,[27] and future Supreme Court Justice Cowen calculated that for the whole state, "with its immense inland waters," the legal precedent would determine property rights amounting to "an aggregate of millions."[28] In an era in which $7,500,000 invested by the state in the Erie Canal made it, according to Chancellor Kent, "a great public object, calculated to intimidate by its novelty, its expense and its magnitude"[29] all that had preceded it, the stakes involved in the decision were enormous.

For two decades the New York courts attempted to decide the question, first following Pennsylvania[30] and South Carolina[31] in rejecting the common law rule,[32] then reversing that decision,[33] and finally ending up with an inconclusive ad hoc test of whether in particular cases there was an original intent by prior owners to grant title to the stream along with the adjoining land.[34] The result was that the state was relieved of a considerable portion, but not all, of potential damage claims.

There were similar expressions of apprehension over damages in other states. In 1807 an officer of the Schuylkill and Susquehanah Navigation company in Pennsylvania reported that the company could not complete the largest branch of its canal because, among other reasons, of "the enormous sums paid for land and water rights."[35] And in Connecticut one observer noted that in building that state's turnpikes "the purchase of the land was a very heavy charge."[36] By 1807 the proprietors of the Middlesex Canal had already spent $58,000 for impaired water rights and land values out of a total expenditure of $536,000.[37] And this expenditure would have represented but a fraction of the potential cost of damages were it not for beneficial intervention of the Massachusetts Supreme Court. Under the pressure of mounting damage claims, the court held in 1815 that landowners had no common law action for the flooding of property adjoining the canal, since the canal's charter, passed twenty-two years earlier, though admittedly "obscure, confused, and almost unintelligible in its terms," had provided its own mode

of recovery for damages.[38] While the court merely purported to dismiss the common law suit in order to allow the plaintiffs to pursue their statutory remedy, it failed to mention that having neglected to sue within the one year period required by the statute, these landowners were foreclosed from recovering at all.[39]

A similar concern for the cost of damage suits was evident in the building of the Erie Canal, since abutting property owners' contributions of free land "were small and [the] value almost negligible." An 1825 report of the New York Canal Commissioners complained that "the extravagance of some of these damage claims is equalled only by the pertinacity with which they are urged." Conceding that "the owners of lands through which the canals are made, must have been necessarily incommoded in the occupancy of their farms during the time of their construction," the commission nevertheless maintained that a general increase in land values and access to markets justified refusing damages entirely.[40]

Another set of problems was raised where land was not actually appropriated but nevertheless was made less valuable because of injurious actions of the state or of private adjoining landowners. In a variety of complex and ingenious ways, courts began to establish rules which substantially limited the liability not only of the state but of private corporations chartered to undertake works of economic improvement. The effect of these decisions was to ameliorate the widespread fear, as expressed by one legal commentator, that "the government may create a franchise, and yet its grantee cannot exercise it without being subject to ruinous damages. . . . If a canal company, or a railroad company, can be required to provide for consequential damages, so as to swell the cost of their enterprise, they must be remunerated in the rate of tolls, or in some other form by the public."[41]

The cry that ruinous judgments would be visited on transportion companies became especially strong on the eve of the great boom in railroads during the two decades before the Civil War. In 1841 the New York State Assembly happily noted that because of land donations the damages resulting from construction of the New York and Erie Railroad would prove "comparatively small" where, by contrast, land damages "constitute . . . a large item in the expenditure of other roads."[42] For example, the Boston and Maine Railroad reported in 1844 that its expenditure for land and land damages in building an extension road constituted almost 50 percent of its total costs.[43] By this time railroads also had begun to fear those damage judgments that resulted from personal injuries or from fires started

by sparks from locomotives. In 1844 the Western Railroad warned of "the extraordinary expenses arising from accidents which human foresight cannot always prevent, the liability to which increases in a greater ratio than the business of the road."[44] In that same year the Boston and Worcester Railroad complained of increased expenses due to "some considerable charges for damages occasioned by accidents."[45]

These concerns led to a proposal which was quite popular for a time—that government alone should be held legally responsible for damages inevitably resulting from the operation of a private franchise.[46] Much of this theory was no more than self-serving propaganda of the transportation companies, and no court ever adopted this view. However, the fact that some apparently disinterested legal scholars also arrived at the same conclusion underlines the grim legal consequences facing those who entered upon vast schemes of economic improvement.

Under traditional legal doctrine, trespasses or nuisances to land could not be justified by the social utility of the actor's conduct nor could the absence of negligence serve as a limitation on legal liability for injury to person or property.[47] And since many schemes of economic improvement had the inevitable effect of directly injuring or indirectly reducing the value of portions of neighboring land, common law doctrines appeared to present a major cost barrier to social change.[48] Nor could the issue really be avoided by transferring these costs to the government, since state governments themselves were faced with the possibility of crushing expenditures for public works.[49] Because of large damage judgments before 1830, for example, Pennsylvania was compelled to abandon various public works entirely before it finally took damage assessments away from juries.[50] In short, there existed a major incentive for courts not only to change the theory of legal liability but also to reconsider the nature of legal injury. In an underdeveloped nation with little surplus capital, elimination or reduction of damage judgments created a new source of forced investment, as landowners whose property values were impaired without compensation in effect were compelled to underwrite a portion of economic development.

The Breakdown of the Principle of Just Compensation

Under the pressure of damage judgments, American courts before the Civil War began to change legal rules in order to subsidize the

activities of great works of public improvement. Looking back at the developments in the law of negligence before the Civil War, the New York Supreme Court in 1873 summarized the changes that had taken place in the conception of property:

> The general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization.[51]

The court's statement reflected a fundamental transformation in private law doctrines that had taken place over the previous three quarters of a century. At the beginning of the nineteenth century, the law of nuisance provided an almost exclusive remedy for indirect interferences with property rights, and courts were prepared to award damages for injury to property regardless of the social utility or absence of carelessness of the actor's conduct. By the time of the Civil War, by contrast, American courts had created a variety of legal doctrines whose primary effect was to force those injured by economic activities to bear the cost of these improvements.

Consequential damages

The earliest efforts to limit the scope of liability in American law centered not on any grand conception of the nature of legal responsibility but on the need to reduce the burden of damage judgments and to make economic planning more coherent. The first movements in this direction were characterized by an effort to redefine the scope of legal injury, as judges tended to focus on the old concepts while gradually giving them imperceptibly different meanings. In the first decade of the nineteenth century, courts began to hold that certain types of costly injuries were nevertheless too trivial to be compensable[52] or that they were previously included in calculating the compensation provided for the actual taking of other land, even in cases where, in fact, the subsequent injury could hardly have been anticipated.[53] In the next decade judges also began to hold that indirect injuries to buildings on adjoining land were not compensable where they were the consequence of economic exploitation of one's own land.[54] The result was that by the end of the first quarter of the century there already existed a body of legal doctrine which immunized proprietors from liability for cer-

tain kinds of injurious activity in the interest of promoting competitive development of land.

With the increase in economic development in the second quarter of the century, these doctrines began to be expanded to a point where they directly challenged the now almost universally acclaimed principle of just compensation. Drawing on the spirit of the earlier cases, judges began to develop a distinction between immediate and consequential injuries, so that, especially where actions of the government were involved, injurious acts that were neither direct trespasses to land nor actual appropriations for public use were often held to be noncompensable. In the leading case of *Callender v. Marsh*[55] (1823), the Massachusetts Supreme Court denied recovery for an indirect, though substantial, injury to the foundation of a person's house resulting from a city's action in regrading an adjoining street. Similarly, where the state undertook to improve navigation on public rivers through various public works, the New York Supreme Court held that both overflowing of riparian lands and obstruction of access to private docks were noncompensable injuries, even though the value of the plaintiff's property was considerably reduced.[56]

The explanation of how the exemption of consequential injuries from liability could be reconciled with the principle of just compensation was never made clear. In *Callender v. Marsh*, Chief Justice Parker seemed to suggest a theory of unjust enrichment, declaring that the risk of consequential damage was already discounted in the price originally paid for a piece of land.[57] Not only was this theory circular in ascribing a set of expectations to landowners for the purpose of deriving a legal rule that in turn would determine these expectations, but of even greater importance was the court's failure to acknowledge that the principle of just compensation had created a strong expectation of compensability. Indeed, it is difficult to see why the theory of unjust enrichment would not also lead the court to conclude that the necessity of compensation was always superfluous, since the threat of actual appropriation by the state was equally discounted in the price paid for any property. This was precisely what the Pennsylvania Supreme Court had held when it decided in 1802 that the state's 6 percent system of land grants had already compensated landowners in advance for all subsequent takings.[58] In any case, by the second quarter of the nineteenth century, most judges agreed with a similar, though more candid, statement by the New York Supreme Court in 1828 that "every great public improvement must, almost of necessity, more or less affect individual convenience

and property; and where the injury sustained is remote and consequential, it is *damnum absque injuria*, and is to be borne as part of the price to be paid for the advantages of the social condition. This is founded upon the principle that the general good is to prevail over partial individual convenience."[59]

The mere suggestion that "the general good" could prevail over "partial individual convenience" without compensation was enough to convince many that the doctrine of consequential damages was nothing more than an excuse for violation of the principle of just compensation. Although both Kent and Story vigorously attacked this line of decisions on precisely this ground,[60] courts after 1825 usually continued to defend it as a vindication of the general good.

From the very beginning the exemption of consequential damages from the general principle of just compensation stood as a doctrine in search of a rationale. At the outset, it was often justified by a mechanical conception of causation borrowed from the emerging doctrine of contributory negligence. Since a person was liable only for the "natural and proximate" causes of his act, courts began to suggest that every indirect injury was also remote and hence entailed no liability.[61] At every point, however, they were confronted with the objection that, whether indirect or not, the action of the defendant was the sole cause of the resulting injury and "that justice would seem to demand that the compensation should proceed from the quarter to which the benefit flows."[62] By the middle of the century, this mechanistic explanation was buttressed by a theory which sought to explain on the same ground the immunity from consequential damages in both tort and contract. Consequential injuries resulting from breach of contract had long been regarded as noncompensable because they were not part of the risk which the contracting parties had undertaken. In a similar fashion, the attempt to extend the contract analogy to tort damages was based on the growing conviction that economic planning required that the liability of entrepreneurs be limited only to those injuries which they could have anticipated.[63]

But this theory was never really adequate either, since most consequential injuries to land were, in fact, entirely predictable, so that the question invariably returned to which party was to bear the cost of economic improvement. By 1850 the New York Supreme Court was prepared to assert that it was "a very common case, that the property of individuals suffers an indirect injury from the constructing of public works."[64] Yet, the only justification it could offer for denying compensation was Justice Parker's original theory "that

when men buy and build in cities and villages, they usually take into consideration all those things which are likely to affect the value of their property."[65] And the court never did explain why this theory did not also obliterate the necessity of providing compensation even when property was actually appropriated.

The law of nuisance

While immunity from consequential injuries was usually extended only to the state,[66] another application of the same doctrine provided similar immunity to private companies. Economic development brought forth a host of nuisance actions for intangible but continuing injuries to property because of the smells and noises emitted from neighboring enterprises or because access to one's property or water privileges was impeded by various public works. While other areas of the law were changing to accommodate the growth of American industry, the law of nuisances for the longest time appeared on its face to maintain the pristine purity of a preindustrial mentality.

With almost complete unanimity, American courts before the Civil War continued to echo Blackstone's view that even a lawful use of one's property which caused injury to the land of another could be enjoined as a nuisance, "for it is incumbent on him to find some other place to do that act, where it will be less offensive."[67] One of the rare early suggestions of the pressure for change was expressed by Judge Tapping Reeve in his 1813 lectures at the Litchfield Law School. In his discussion of "whether a stable could be erected so near a house as that the stamping of the hooves would keep the people awake," he contended that "this would depend very much on the necessity of the case—as whether the man could exercise his business in another place—for men must be allowed to carry on their business."[68] But there are few indications that such an explicit balancing of interests was actually undertaken by many other American judges.

Perhaps the most notable exception to the general unwillingness of American courts before the Civil War openly to admit the need to accommodate the law of nuisance to the demands of a developing society appeared in one of the earliest railroad nuisance cases. In *Lexington & Ohio Rail Road v. Applegate*[69] (1839), the highest court in Kentucky reversed an injunction issued by the chancellor, who had restrained the Lexington & Ohio Rail Road from running its trains through the city of Louisville on the ground that it consti-

tuted a nuisance. Expressing sentiments that rarely were acknowledged in judicial opinions of the time, the Kentucky Court of Appeals asserted that "private injury and personal damage . . . must be expected from . . . agents of transportation in a populous and prospering country."[70]

> The onward spirit of the age must, to a reasonable extent, have its way. The law is made for the times, and will be made or modified by them. The expanded and still expanding genius of the *common law* should adapt it here, as elsewhere, to the improved and improving conditions of our country and our countrymen. And therefore, railroads and locomotive steam-cars—the offsprings, as they will also be the parents, of progressive improvement—should not, in themselves, be considered as *nuisances,* although, in ages that are gone, they might have been so held, because they would have been comparatively useless, and therefore more mischievous.[71]

In balancing the social utility of railroads against the resulting injury, the Kentucky decision stands virtually alone among pre-Civil War cases in its candid attempt to adapt the law of nuisance to the demands of economic development.[72] Even in England it was only after 1865 that the courts began to acknowledge that a process of weighing utilities and not the mere existence of injury was necessary for deciding whether a particular use of land constituted a nuisance.[73]

In light of the nuisance doctrine that prevailed throughout most of the nineteenth century, it seems difficult at first glance to understand how the United States could have succeeded in becoming industrialized. Where other less well-established legal categories were more amenable to early doctrinal change, the law of nuisance long continued to reflect the deepest eighteenth century notions of the absolute prerogatives of private property. The abundance of undeveloped land was surely a major factor in postponing the profoundly antidevelopmental effects of the law of nuisance on the course of industrialization. Indeed, this abundance allowed courts to ignore what the relative scarcity of resources already forced them to see in the area of water rights: that an absolute and exclusive conception of property inevitably retarded the emergence of competition.

Still, the prevailing nuisance doctrine immediately threatened most transportation companies not only with the likelihood of substantial damage suits but also with injunctions.[74] If most judges did not follow the Kentucky court in openly reshaping the law of nuisance, they shared that court's partiality toward economic devel-

opment. As a result, while the formal doctrine appeared to change very little, judges began to establish a variety of ingenious variations in its application that eventually transformed the substantive doctrine itself. The effect of these changes was that individuals who sought damages due to injuries from great works of public improvement were frequently denied the benefits of a nuisance doctrine that, formally at least, seemed to provide the injured party with all the advantages.

One of the most heavy-handed limitations on recovery grew out of a theory that had been suggested by the New York courts as early as 1807:[75] that after an eminent domain proceeding there could be no recovery for any subsequent injury to one's land, since the original damage award had already accounted for such injury. In 1843 the New Jersey Supreme Court moved one step further and denied recovery to property owners injured by the Delaware and Raritan Canal "whether [the injuries] were clearly to be seen and easily estimated before the construction of the canal, or whether they were uncertain and doubtful results from such construction."[76] In short, the court was even prepared to deny recovery for all *unanticipated* injuries!

A more pervasive limitation on the nuisance action arose out of a new and extensive application of an old doctrine. Though a distinction between public and private nuisances had long been recognized by the common law, American courts before the Civil War succeeded in reshaping this distinction into a major barrier against individual interferences with the process of internal improvements. "The law," Blackstone had written, "gives no *private* remedy for anything but a *private* wrong." Therefore, the only means by which a public or common nuisance could be reached was through indictment instituted by public authorities "because the damage being common to *all* the king's subjects, no *one* can assign his particular proportion of it; or if he could, it would be extremely hard, if every subject in the kingdom were allowed to harass the offender with separate actions."[77] The reason assigned by Blackstone bore a close relationship to the theory of consequential damages simultaneously emerging in American law. While consequential damages were usually conceived of as causally remote injuries, at other times they were regarded as noncompensable because they were spread evenly throughout the entire community. However, the distinction between public and private nuisances did not necessarily lead to noncompensability according to Blackstone, for "where a private person suffers some extraordinary damage, beyond the rest of the

king's subjects, by a public nuisance . . . he shall have a private satisfaction by action."[78] Yet as the process of internal improvements progressed, courts frequently expanded the public nuisance concept into a barrier to all private suits.

Among the earliest cases in which courts used the public nuisance doctrine to defeat private damage remedies were actions by wharf and dock owners on navigable streams who complained that the value of their property had been substantially reduced by the actions of public authorities in diverting water or impairing access to their wharves.[79] When dock owners complained that New York State's construction of the Albany basin had rendered their property inaccessible to ships moving up the Hudson River, the New York Supreme Court was quick to hold that if the nuisance "operates equally, or in the same manner, upon many individuals constituting a particular class, though a very small portion of the community, it is not a special damage" sufficient to allow a private recovery.[80] On the other hand, the New York court allowed municipal authorities to use the nuisance doctrine to eliminate a privately owned floating storehouse situated on the Albany basin on the ground that it obstructed navigation.[81] This time the court maintained that any member of the public had standing to abate a common nuisance, thus freeing these officials from any obligation to provide compensation for destruction of private property.

The most significant fact about the public nuisance doctrine was that it enabled courts to extend to private companies virtually the same immunity from lawsuits that the state received under the theory of consequential damages. As the transportation revolution progressed, the most frequent beneficiaries of the public nuisance doctrine were railroads. When the city of Boston closed down a portion of Market Street so that the Boston and Maine Railroad, as provided in its charter, could extend its tracks through that part of the city, landowners attempted to show that this impairment of access had rendered their property less valuable. But Chief Justice Shaw revived again the once narrow and technical public nuisance doctrine in order to dismiss the plaintiff's claim. Even though the plaintiff "may feel [the injury] more," Shaw wrote, "in consequence of the proximity of his lots and buildings; still it is a damage of like kind, and not in its nature peculiar or specific."[82] The fact that "he suffers a damage altogether greater than one who lives at a distance" does not establish the basis for recovery, because "in its nature it is common and public." Thus, recovery for injuries to property began to turn more and more often on whether an injury was

labeled as one of degree or one of kind. And ironically, the more extensive the "indirect" injury from public improvements, the more often the public nuisance doctrine was invoked to defeat any recovery.[83] While the formal notion of what constituted a nuisance still did not admit of judicial evaluation of the usefulness of a particular project, the public nuisance concept, which purported to be only a technical remedial doctrine, nevertheless enabled courts to decide whether the utility of an undertaking was sufficient to immunize it from private damage suits or injunctions.

Statutory justification

In England, where the issue of just compensation had long ceased to be a major issue by the end of the eighteenth century, judges were far more candid than their American brothers in dealing with the problem of damages arising from social change. In two important cases at the turn of the century,[84] English courts held that no damages could be recovered against public officials who caused injuries to land inevitably resulting from public works authorized by Parliament. The effect of these decisions was to bar recovery for injury caused without negligence by public authorities, even in cases where the same injury, if caused by private parties, would have been compensable. Although a small number of American cases in the early years of the nineteenth century seemed to assume this principle,[85] it was never expressly followed as American judges appeared unwilling to adopt a rule that would openly acknowledge that acts of public and private officials were not subject to the same rule of law.[86] Others openly deplored the English cases for allowing the taking of property without compensation.[87]

The appeal of the English cases, however, revived during the second quarter of the nineteenth century as state courts were persuaded gradually to extend the theory to include private companies within the scope of public immunity from damage suits. One of the first such beneficiaries of the new theory was a Pennsylvania canal corporation[88] in which the state owned a small portion of the shares.[89] And in 1831 the Maine Supreme Court extended the immunity to injuries inflicted by a wholly private canal company. "It does not necessarily follow," the court declared, "that because a plaintiff may have sustained a serious injury in his property, consequent upon the voluntary acts of a defendant, that therefore he has a right to recover damages for that injury." There were some acts, the court observed, which might be "justified by an express pro-

vision of law." Other kinds of damage may have arisen from "acts which others might lawfully do in the enjoyment and exercise of their own rights and management of their own business." Finally, injury "may have resulted from the application of those principles by which the general good is to be consulted and promoted, though in many respects operating unfavorably to the interests of individuals in society."[90]

It was only after 1840, however, that the English cases were widely cited, as American lawyers contended that all legislatively authorized acts, whether by public officials or private holders of franchises, were equally immunized from damage actions if exercised with care. In defense of this position, one legal writer complained that under the existing law "the government may compel its grantee to carry [the franchise] into effect in such a manner that injury to private interests will be inevitable, and the courts whilst acknowledging the authority of the government, sustain an action in favor of the proprietor against whom the government authorized the alleged wrong."[91] This contention was especially well received by Theodore Sedgwick, the brilliant New York legal writer. In his influential *Treatise on Damages* (1847), Sedgwick constructed out of a handful of prior English and American cases a "general rule . . . that where the grantees have not exceeded the power conferred on them, and when they are not chargeable with want of due care, no claim can be maintained for any damage resulting from their acts."[92] Yet, very few American cases had ever expressly gone so far as to immunize private injuries to land from damages on the ground that the acts had been authorized by the legislature,[93] and some courts had expressly rejected this theory.[94] But so powerful was the impulse to reduce damage judgments that by 1863 the highest court in New York could hold that even though the street railway built through New York City was an "interference with, and injury to the use and enjoyment" of the neighboring property "to such an extent that the same would constitute a continuous private nuisance" were it not for legislative authorization, still the state could constitutionally immunize private businesses from suit without compensation to those who were injured.[95] Two years earlier, the New York court had allowed the New York Central Railroad to build a road across a stream, by which it obstructed the flow and flooded the property of an adjoining landowner. There could be no recovery without negligence, the court held, since a road built under legislative authority for a public purpose could not be a nuisance.[96]

With these cases, the public law rule of just compensation began

to be limited and eroded by the still developing private law principle of negligence, which held that injuries resulting from socially useful conduct were not compensable in the absence of carelessness. Yet, it was still too early for courts, in the absence of a legislative determination, openly to decide which activities were sufficiently desirable to suspend the historic rules governing liability for nuisance.[97] The result was that the courts fashioned two different standards for recovery for nuisance: one under which the ordinary companies remained absolutely liable for injuries caused by nuisance and another for authorized works of public improvement, though privately financed, for which only negligent conduct would permit an injured property owner to recover.[98] Still more important, perhaps, were the many cases which in 1800 had been analyzed as "nuisance" cases but which by 1850 were simply conceived of as "negligence" cases, thereby imposing a less stringent standard of care. Liability of railroads for fire was a prominent example of this reclassification from nuisance to negligence.[99]

The idea of legislatively conferred immunity from nuisance actions was carried to still greater lengths by courts determined to remove restrictions on economic development. Just as statutory authorization of internal improvements came to be recognized as a defense to private suits, some courts extended the notion still further to prevent even public officers from abating public nuisances. Where the state of Pennsylvania had turned over to the officers of the Erie Canal Company the task of building a local connection with the canal, the draining of swamps became necessary in order to raise a reservoir for the waterway. Later, the state indicted the officers of the canal company after one of these reservoirs had become "stagnant, putrid, and noxious, from whence unwholesome damps and smells arise, and the air is greatly corrupted and infected." Nevertheless, the court assumed that "works of internal improvement, erected at the expense and by the officers of the state, for the benefit of the citizens at large, never could be regarded by the law as a nuisance; for the sovereign authority has expressly intended them to advance the prosperity of the community."[100]

Changes in the theory of damages

As courts were transforming the conception of legal liability, legal writers sought to adapt the theory of damages to the needs of a developing society. It was not until the nineteenth century that the measure of damages came to be regarded by orthodox legal thinkers

as "a question of law." I will return to this theme in later chapters and seek to describe how the judiciary took control over rules of damages in contract and commercial cases during the nineteenth century. Not only did this development represent a major shift in power between judge and jury, as well as between commercial and anticommercial interests, but it also reflected the triumph of the precise and calculating mercantile spirit over the rather rough and informal justice characteristic of common law jury determinations.

In tort law as well the nineteenth century represented a clash between past and future. Were damage judgments to continue to reflect the ancient peace keeping and paternalistic underpinnings of tort law or were they to accommodate to the new insistence of entrepreneurial groups that certainty and predictability of legal consequences were essential for economic planning?

In an earlier period in which violations of the tort law were universally regarded as unjustified and antisocial acts, there was little moral pressure to calibrate damage judgments to the precise level of injury, since deterrence and the prevention of "unjust enrichment" were the characteristic goals of the law. Where, however, personal or property injury had begun to be thought of as an inevitable "cost of doing business," legal thinkers were faced with the paradox of imposing damages on activities that, in general, they regarded as socially beneficial. How then to adapt an earlier moralistic and penal conception of damages to a developing economy in which damage judgments were themselves crucial "costs" of development?

In later chapters, I will examine the institutional and procedural responses to these questions, which eventually resulted in bringing all damage questions under the control of judges. At this point, I would like to focus on only one somewhat narrow debate over the theory of damages that particularly concerned tort law—the status of punitive damages.

As early as 1830 Theron Metcalf, later a justice of the Massachusetts Supreme Court, argued that "neither on principle, nor by the preponderance of authority, can damages be estimated by any other standard than the actual injury received—that the extent of the injury is the legal measure of damages."[101] Metcalf attempted to demonstrate that the common law had never allowed for punitive damages in tort and that while the evidence of a malicious intent might be admitted to show the extent of actual damages, it was otherwise irrelevant in determining the measure of damages. "There would seem to be no reason why a plaintiff should receive

greater damages from a defendant who has intentionally injured him, than from one who has injured him accidentally, his loss being the same in both cases." Although, "it better accords . . . with our natural feelings, that the defendant should suffer more in the one case than in the other," he added, ". . . points of mere sensibility and mere casuistry are not allowed to operate in judicial tribunals; and if they were so allowed, still it would be difficult to show that a plaintiff ought to receive a compensation beyond his injury." Nor would it be any less difficult to demonstrate "on principles of law or ethics . . . that a defendant ought to pay more than the plaintiff ought to receive. It is impracticable to make moral duties and legal obligations, or moral and legal liabilities, co-extensive."[102] Thus, Metcalf attempted to divorce tort law from its ancient function of private peace keeping. "Damages are given as a satisfaction for an injury received by the plaintiff, not by the public," he concluded.[103]

In an age when juries were suspected of partiality to small landowners whose property was damaged by the activity of large transportation companies, Metcalf's theory of damages raised the possibility of removing the subjective and thus inherently uncontrollable issue of punitive damages from a jury's consideration, thereby providing judges with a greater measure of control over damage judgments. Moreover, at a time when many injuries to land resulted from a considered engineering decision of a canal or turnpike corporation, any assurance that intentional injury would not give rise to punitive damages was of major economic importance. Yet, beyond the significant fact that this theory would have had a substantial impact on the size of damage judgments, it also expressed a widely shared need in the first half of the nineteenth century to import greater certainty and predictability into the law of damages, so that entrepreneurs could more accurately estimate the costs of economic improvements.

Metcalf's theme was taken up in 1846 by Simon Greenleaf in his impressive *Treatise on the Law of Evidence*. Damages, Greenleaf asserted, "should be precisely commensurate with the injury; neither more, nor less."[104] Yet, one year later his views were challenged by Theodore Sedgwick, who argued in his *Treatise on the Measure of Damages* that "the theory of compensation is not the theory of our law." Contending that "in cases of tort, the suit at law appears to have public as well as private ends in view," Sedgwick could see "no reason why the defendant should not, in a civil suit, be punished for his act of fraud, malice or oppression, nor why the pecuniary mulct, which constitutes that punishment, should not go into the pockets of

the plaintiff, instead of the coffers of the state."[105] In his second edition, published in the next year, Greenleaf, though conceding that Sedgwick's position "may appear to be justified by the general language of some Judges," argued at length that these expressions were mere dicta.[106]

It is tempting to interpret the debate over punitive damages as reflecting a fundamental political cleavage over legal theory. The Jacksonian Sedgwick's insistence on retaining the paternalistic and regulatory functions of tort law stands in sharp contrast to the more orthodox and apolitical Greenleaf's willingness to transform tort law into an amoral system of what amounted to selling licenses to injurers. But there are difficulties with any such interpretation. Despite numerous instances in which nineteenth century legal thinkers were willing to overthrow well-established theories, there were many other occasions on which they regarded the weight of the received legal tradition as just too overwhelming to allow for innovation. And it seems clear that in this debate Sedgwick's basic loyalty was primarily to the established legal tradition itself.

At the most general level of damage theory, there was, in fact, no debate between Greenleaf and Sedgwick. Not only is Sedgwick's *Treatise on the Measure of Damages* the most brilliant and boldly innovative American antebellum legal treatise, but its publication—the first treatise on damages—itself marks a broad shift in legal theory. Sedgwick himself observed with satisfaction that it was only "at comparatively a recent period that the jury has relinquished its control over actions even of contract, and that any approach has been made to a fixed and legal measure of damages." And subject to the exception for punitive damages, he, like Greenleaf, applauded the fact that even with respect to tort damages, "by degrees, the salutary principle has been recognized . . . that the amount of compensation is to be regulated by the direction of the court, and that the jury cannot substitute their vague and arbitrary discretion for the rules which the law lays down."[107] On issues for which the received legal tradition allowed a greater measure of flexibility, then, Sedgwick was among the first to insist that the law of damages be made more certain and predictable. His discussion of consequential damages, for example, was among the earliest to suggest that in principle the measure of damages in tort and contract was the same, the effect of which was to import the precise and calculating spirit of contract law into the unpredictable process by which tort damages traditionally had been measured.[108] More than anything else, his *Treatise* stood prominently for a proposition that was just gaining general as-

sent by the middle of the century: that the question of damages was an issue of law and that judges, if necessary, could set aside jury verdicts that were excessive.

The erosion of trial by jury

Standing beside the numerous changes in legal conceptions was an important institutional innovation that began to appear after 1830—an increasing tendency of state legislatures to eliminate the role of the jury in assessing damages for the taking of land. It was long a commonplace that juries increased the size of damage judgments. As we have seen,[109] the New York legislature in 1798 responded to the pleas of that state's first canal company to take land valuations away from juries. In Massachusetts, juries had awarded landowners only 10 percent more than the proprietors of the Middlesex Canal had offered for land damages.[110] But that modest appreciation had occurred during the first five years of the century, when the enthusiasm for public works was fairly widespread and the proprietors were conscious of the need to offer settlements that would satisfy public opinion. Later, in Pennsylvania, however, use of the jury system for settling damage claims arising out of public works "led to excessive damage awards, especially in those counties which were dissatisfied with the works administration, and in some cases the state was actually compelled to abandon construction plans because of the expense involved."[111] When in 1830 the legislature provided for a board of public works, it "was attacked as a partisan rather than a judicial arm of the state, interested not in justice but in the lowest evaluations of damages, and in truth its harassed members had to admit that they were 'sometimes obliged to act apparently the part of an attorney for the Commonwealth,' discovering on their own initiative facts which favored state interest."[112] Although there were other early instances in which legislatures eliminated the jury's role in assessing damages,[113] it was only in connection with the building of railroads that this movement gained real force. Between 1830 and 1837 such statutes in New Jersey,[114] New York,[115] Ohio,[116] and North Carolina[117] were upheld over the objection that they violated constitutional provisions guaranteeing trial by jury.

As states turned over the task of assessing damages to commissions, many statutes also allowed these commissioners to offset estimated benefits to land against actual damages.[118] The result was that railroad companies were often allowed to take land while pro-

viding little or no compensation. Rejoicing at an Ohio court decision that overturned a commission's damage award for being too small, an Ohio journal advocating constitutional reform proclaimed that " a brighter day seems to be dawning—a day when courts will not aid [corporations] in riding rough shod over individuals. Heretofore when they have wanted the property of individuals to aid them in their splendid schemes of speculation, it had been seized and appropriated under the false and lying pretext that it was for public use, and little or nothing paid for it."[119]

The Triumph of Negligence

At the beginning of the nineteenth century there was a general private law presumption in favor of compensation, expressed by the oft-cited common law maxim *sic utere*.[120] For Blackstone, it was clear that even an otherwise lawful use of one's property that caused injury to the land of another would establish liability in nuisance, "for it is incumbent on him to find some other place to do that act, where it will be less offensive."[121] In 1800, therefore, virtually all injuries were still conceived of as nuisances, thereby invoking a standard of strict liability which tended to ignore the specific character of the defendant's act. By the time of the Civil War, however, many types of injuries had been reclassified under a "negligence" heading, which had the effect of substantially reducing entrepreneurial liability. Thus, the rise of the negligence principle in America overthrew basic eighteenth century private law categories and led to a radical transformation not only in the theory of legal liability but in the underlying conception of property on which it was based.

The origins of the modern negligence doctrine

One is surprised to learn how really late it was in the nineteenth century before the action for negligence became a significant factor in American law. Although judges of the eighteenth century "were familiar with the name and idea of negligence," until it was freed of its associations with bailment and contract it was still "too early to speak boldly of an action of negligence."[122] In the eighteenth century, American courts had applied the negligence concept to hold common carriers or other bailees liable on a theory of contract,[123] and to suits in which doctors or lawyers were charged with breach of a contractual relationship with their patients or clients.[124]

Another, and perhaps the most important, eighteenth century line of cases in which negligence was a factor involved both common law and statutory actions against sheriffs for taking insufficient bond[125] or for allowing imprisoned debtors to escape.[126] American judges had followed Blackstone in distinguishing between voluntary (or collusive) and negligent escapes,[127] and it is clear that by the end of the eighteenth century a distinction between some kinds of intentional and unintentional injuries was already important in America.

Blackstone regarded the duty of the sheriff as part of the "class of contracts, implied by reason and construction of law" by which "every one who undertakes any office, employment, trust or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence and skill."[128] Yet, there is no indication, as is often assumed, that this distinction presupposed any limitation on strict liability. Negligence in this context simply meant the long established right of an individual to sue a public officer for failure to perform a duty imposed by law. Indeed, the same theory explains eighteenth century statutes allowing an action against towns for failure to repair roads and bridges,[129] as well as early nineteenth century cases that imposed liability for neglect on chartered turnpike and canal companies.[130]

We should inquire at the outset to what extent the notion of negligence in these public duty cases had anything in common with the modern negligence doctrine. For example, in the case of the duty of sheriffs to prevent the escape of imprisoned debtors, two important legal consequences flowed from the distinction between "voluntary" and "negligent" escapes. For a voluntary or intentional escape, the sheriff was liable whether or not he subsequently captured the prisoner; for a negligent escape, he was liable only if he failed to recapture the prisoner before trial. In addition, the sheriff was liable for the full amount of the prisoner's debt if the escape was voluntary, while for a negligent escape the jury had discretion over the amount of damages and could discount the likelihood of the debt's ever being collected.[131]

There is no suggestion that carelessness or inadvertence forms the core of the action. The primary meaning of negligence was "nonfeasance" and hence the sheriff was held strictly liable even for a negligent escape. A report of a 1795 New Jersey escape case[132] clearly underlines the prevailing conception:

> The ground of defense adopted by the defendant [sheriff], was to prove that there was no want of attention on his part; that every precaution consistent with humanity, and sometimes even bordering on rigor, had been

adopted with regard to [the escaped debtor]. This was made out by several witnesses, and it was proved that the escape was occasioned by circumstances not to be foreseen, and which could not be prevented by even more than ordinary exertions and caution.

Nevertheless, the Supreme Court approved the instruction of the trial court that, even though there was no evidence of a collusive or voluntary escape, "every escape not happening by the act of God, or the public enemies was, in the eye of the law, considered a negligent escape. The law admits no other excuse."

The dominant understanding of negligence at the beginning of the nineteenth century meant neglect or failure fully to perform a preexisting duty, whether imposed by contract, statute, or common law status. To be sure, actions on an implied contract against doctors or bailees often alleged carelessness or unskillfulness. Yet, even here one strongly suspects that carelessness was merely presumed from failure to perform, or, as Roscoe Pound has put it, "The negligence is established by the liability, not the liability by the negligence."[133] For example, a study of Baron Comyns' *Digest of English Law,* one of the most influential English law texts used in America at the end of the eighteenth century, illustrates the extent to which even "misfeasance" was conceived of differently from modern negligence. Not only does Comyns' title dealing with the "Action upon the Case for Negligence" refer almost exclusively to cases of nonfeasance or nonperformance, but, surprisingly, there is hardly a trace of the concept of carelessness in the material listed under the heading "Action upon the Case for Misfeasance." Indeed, Comyns shows no conception of modern negligence when he writes that "an Action lies for Misfeasance, tho' the Damage happen by Misadventure [accident]."[134]

Even granting that there were certain kinds of eighteenth century cases in which lawyers understood negligence more or less as we do today, they surely did not see any general conflict between strict liability and negligence. For it was only in the nineteenth century that carelessness — and the associated problem of establishing a standard of care — became the central allegation in an action for negligence. A glance at the chapter on negligence in Nathan Dane's *Abridgment of American Law* underlines the extent to which the dominant meaning of negligence, even as late as 1824, continued to be that of nonfeasance. The largest number of Dane's illustrations still deal with the failure to perform a public duty. For example, "If the commissioners of a lottery neglect to adjudge a prize to him who draws it, this action [for negligence] lies against them." Or "It is a general

rule of law, that if a man neglects to do what he is bound to do, as to pay toll either by prescription or otherwise, this action lies against him." Most of these cases deal with the failure of a public officer to fulfill his duty. "In every case," Dane concluded, "in which an officer is intrusted by common law, or by statute, to perform a service, and *neglects* it, this action lies against him by the party injured."[135] Yet, although it still remains clearly a subsidiary theme, the common law strand of misfeasance already had begun to assume a larger position in the lawyer's consciousness. Not only does Dane cite English cases for "negligently and carelessly" planting trees[136] and for a surgeon's "gross ignorance and want of skill in his profession,"[137] but he also mentions a handful of American cases involving misfeasance, including a ship collision "through negligence and want of skill"[138] and a fire case in which "what is negligence or misconduct in me or my servants must depend on all the circumstances of the case."[139] In short, the story of the rise of negligence in America involves a process of analyzing the almost imperceptible changes in emphasis by which an older status-oriented conception of failure to perform a duty is gradually laid aside and the distinctively modern emphasis on careless performance begins to take its place.

In America, as in England, "the prime factor in the ultimate transformation of negligence from a principle of liability in Case to an independent tort was the luxuriant crop of 'running down' actions reaped from the commercial prosperity of the late eighteenth and early nineteenth centuries."[140] The earliest running down cases were lawsuits involving collisions between ships or horse-drawn carriages that began to appear at the turn of the century.[141] What was new was that as courts began regularly to enforce legal duties between strangers, they were compelled to see that a theory of liability for negligence could no longer be derived from either a common law status or from a contractual agreement between the parties.[142] Perhaps of still greater importance, the collision cases were the first to involve joint actors, a factor that inevitably led judges and juries beyond the simple inquiry into whether an injury had been committed in order to determine which party had "caused" the injury. The inquiry into causation shifted the attention of courts to the question of carelessness. And as liability for carelessness began to be understood as deriving from an independent social obligation imposed by the state, the search for a standard of care encouraged judges to regard themselves as social engineers and legislators, whose decisions to impose liability were influenced by broader considerations of social policy.

Yet it was some time after the advent of the negligence action that judges realized its potential for affecting the course of social change. It was one thing for courts to recognize an independent action for negligence; it was quite another for them to develop habits of thought which would undermine the basic presumption of compensation for injury that had been erected over several centuries of the common law. And although American judges talked the language of negligence from the beginning of the nineteenth century, it was quite some time before they used the negligence concept in order to mount a general attack on the prevailing standard of strict liability.

The influence of the forms of action

It has become quite commonplace to assume that one of the most important factors restraining the emergence of an independent action for negligence was the elaborate system of common law forms of action. According to conventional wisdom, the importance of the distinction between the common law writs of trespass and trespass on the case (or "case") was that the former was based on strict liability while the latter required an allegation of negligence. Since the action for trespass was limited to direct injuries, so this argument goes, there could be no independent action for negligence until the strict liability–negligence distinction between trespass and case was obliterated. This is regarded as the significance of Chief Justice Shaw's decision in the famous case of *Brown v. Kendall*[143] (1850). But can this version of the development of negligence stand once it is realized that there was no well-developed conception of negligence even for an action on the case before the nineteenth century?

As long as the action of trespass on the case was largely based on an implied contract theory in the eighteenth century, judges had little conceptual difficulty in distinguishing between trespass and case. Given the upsurge of collision cases involving strangers, however, judges were forced to rethink the underlying theory of the actions, and from the end of the eighteenth century English courts began to distinguish between actions in trespass and case on the basis of whether an injury was direct and immediate or indirect and consequential.[144] But there is no evidence that American judges who adopted this pleading distinction ever assumed that an action in trespass was based on strict liability while an action on the case was grounded in an allegation of negligence. Until some judges later found in the writs the modern distinction between intentional and negligent injuries, the basic legal consequence that flowed from the

forms of action related solely to the formalities of good pleading: for an indirect injury the proper plea was in case.

At the end of the eighteenth century, when the conception of negligence revolved around nonfeasance, liability in trespass and case was equally strict and there was little inducement to distinguish between them. Nuisance, which dominated tort actions for injuries, was itself a strict liability doctrine and was, in fact, pleaded in case. When in the course of the first half of the century the idea of misfeasance begins to prevail, it transforms not only the action on the case but that of trespass as well. The result was that some judges came to require that negligence be proven even in trespass, while others distinguished between the actions on the basis of whether the injury was intentional or negligent. But whatever the period studied, there is no indication that American judges, unlike their English brethren,[145] ever regarded the substantive law governing the two writs as turning on a distinction between strict liability and negligence.[146]

In light of this analysis, it should be seen that an exaggerated significance has been assigned to the opinion of Chief Justice Shaw in the case of *Brown v. Kendall*.[147] In that case, the Chief Justice held that in the absence of negligence the defendant was not liable even in trespass for unintentionally hitting another person with a stick swung while trying to part two fighting dogs. Ever since Holmes celebrated Shaw's opinion as a bold and virtually unprecedented effort to subject the trespass action to the test of negligence,[148] we have been told by commentators that the decision "marked [a] departure from the past," and that Shaw "gets most of the credit for the establishment of a consistent theory of liability for unintentionally caused harm."[149] Unfortunately, these commentators have not studied with equal care the dramatic and simultaneous transformation of the action on the case.[150]

As early as 1814 the Massachusetts Supreme Court had indicated impatience with a defendant who attempted to take advantage of the always elusive difference between direct and indirect injuries,[151] and in that same year, the Massachusetts court allowed a plaintiff to amend his declaration from case to trespass, leading Nathan Dane to conclude, that "the distinction" between the actions "is not so important."[152] In 1823 the court upheld a trespass action for "negligently driving" a carriage,[153] but it was not until 1833 that the Massachusetts court held for the first time that as a matter of law there could be no recovery in an action on the case for failure to prove negligence.[154] Moreover, even by 1846 there were only three or four

such reported cases in Massachusetts.[155] Therefore, the decision to subject the trespass action to the test of negligence in *Brown v. Kendall* was merely part of a very recent flowering of the negligence action having nothing to do with any earlier recognition of a substantive distinction between writs.[156]

The developments in Massachusetts merely repeated a process of change that first had taken place in New York and Pennsylvania somewhat earlier. In the 1843 case of *Harvey v. Dunlop*,[157] the New York Supreme Court held that negligence had to be proved in a trespass action, but this decision merely represented the culmination of a uniform course of New York decisions which since 1820 had assumed that carelessness had to be shown in both trespass and case.[158] Indeed, much the same process occurred in Pennsylvania, where in 1839, only six years after the first decision denying recovery for failure to prove negligence,[159] a lower court held that negligence needed to be shown in trespass as well.[160]

There was one other distinction between trespass and case that has misled students into assuming a difference in substantive law governed the two writs. In eighteenth century England, actions against a master for injuries caused by his servant were usually brought in case, since the theory of the action was contractual. Later commentators have been puzzled by Blackstone's statement that "if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant."[161] Because we have come to regard the duty of care as an obligation owed to the world,[162] we have been confused by the fact that Blackstone could have regarded the servant as immune from liability for negligence. Yet, it is clear that he conceived of the sole source of legal obligation as arising from the blacksmith's status in relation to the customer, and consequently, in the absence of any implied contractual relationship, the servant himself was not liable for his own negligence. American lawyers at the beginning of the nineteenth century typically continued to regard both the liability of masters and the allegation of the servant's negligence in similarly contractual terms,[163] so that the allegation of negligence was viewed as performing the limited function of proving a breach of an implied contract.

In 1795, however, we find Zephaniah Swift of Connecticut stating that when a trespass is committed by the servant with the express or implied command of the master "the master shall be deemed guilty of it, as well as the servant."[164] Though Swift had moved beyond a status-oriented theory of implied contract, there was still no thought here that negligence in the servant was essential to establish the mas-

ter's liability to a stranger.[165] However, as strangers started to sue for injuries due to collisions, the allegation of negligence began to appear outside its ancient status-oriented setting. Yet, even here it appears initially to have performed another, quite limited, function in the master-servant context. At the end of the eighteenth century, we find the English courts holding that all master-servant actions must be brought in case, since even a direct injury committed by a servant could not be regarded as the master's trespass.[166] Moreover, English judges held that the master was not liable at all when the act of the servant was willful, for the theory behind the master's liability had gradually shifted to an inquiry into whether he had expressly or impliedly commanded his servant to perform the injurious act.[167] Allegation of the servant's negligence, therefore, merely served the limited purpose of showing that his action was unintentional, which otherwise would have placed it beyond the master's command.[168] As a result, American judges at the beginning of the nineteenth century were still prepared to impose liability on masters in an action on the case even though the injurious act of the servant was "merely fortuitous and accidental."[169] While the negligence principle, when it finally did emerge, was a means of limiting defendants' liability, negligence in the master-servant context originally served the entirely different purpose of negating willfulness and thereby establishing the master's liability. For just as in the sheriff cases, negligence was often equated merely with unintentional behavior. Eventually, however, by almost imperceptible changes in emphasis, the function of negligence in the master-servant area merged into the general stream of negligence liability that was developing in the nineteenth century.

The earliest reported American master-servant case in which failure to prove carelessness in the servant becomes the basis for denying the master's liability appears in a decision of the South Carolina high court in *Snee v. Trice*[170] (1802). The plaintiff sued after a fire set on adjoining land by the defendant's slaves spread and destroyed the plaintiff's house and cornfield. Although the bulk of the court's opinion deals with the question of whether the English law of master and servant was applicable to slaves, the case undoubtedly introduces a modern strand of negligence. Troubled by the fact that slaves represented "a headstrong, stubborn race of people, who had a volition of their own, and the physical power of doing great injuries to their neighbours and others, without the possibility of their masters having any control over them," the court was tempted to restrict the operation of an English rule that "was by no means

applicable to the local situation and circumstances of Carolina, where almost the whole of our servants are slaves."[171] But since the case represented "the first of the kind ever known to have been brought and discussed in this country,"[172] the court hesitated to change the English master-servant doctrine.[173] Instead, it held that the cause of the injury "had more of the appearance of accident than negligence," since "the morning was still, and the fire had burnt down, but towards the middle of the day, the wind arose, and blew up the sleeping embers which communicated the fire to the building."[174]

With the help of an ambiguous passage in Blackstone, the South Carolina court thus seemed to reject the common law doctrine imposing strict liability for fire. The allegation of "negligence" appears in English fire cases as early as 1401,[175] even though there always was strict liability for fire at common law[176] until the rule was changed by statute in England at the beginning of the eighteenth century.[177] In these early cases, negligence meant no more than "neglect" or "failure" to keep the fire on one's own land, having no modern overtones of fault or carelessness.[178] Blackstone also wrote of a master's liability for a servant who "kept his master's fire negligently,"[179] but there is likewise no reason to suppose that he meant anything but this old-fashioned notion of neglect.[180] Nevertheless, by the time the South Carolina court was called upon to infuse these words with meaning in *Snee v. Trice,* there was a strong incentive to limit the scope of liability for the acts of slaves. As a result, we find the first unambiguous recognition in American law of a legally imposed standard of care not arising out of contract.[181]

There is no indication that the South Carolina decision had any influence on the course of American law. Outside South Carolina, the decision was ignored, probably having been regarded as limited to the peculiar problem of slavery. And, in fact, when the next slave case came before the South Carolina court in 1825, the judges suppressed whatever creative impulses they earlier had shown by misreading *Snee v. Trice* to hold that a master was not liable for the negligence of his slave.[182] The result was that the law of negligence remained dormant thereafter in South Carolina for quite some time.

Another problem with the usual interpretation that assumes substantive differences for actions in trespass and case is that it does not explain why plaintiffs should have been so indifferent to the forms of action if trespass represented the better writ because it was based on strict liability. There are many early instances of direct injuries

caused by a principal in which the plaintiff would be expected to sue in trespass and yet brings the action in case.[183] Moreover, after 1817, when the New York Supreme Court allowed plaintiffs to choose between the actions in suits involving direct injuries caused by negligence, they sued in case as often as in trespass.[184] And even in those states which did not permit such an election, it is difficult to suppose that plaintiffs would have so often made the mistake of suing in case if they were aware of the substantive advantages that trespass is supposed to have conferred. After 1833 the English courts also allowed an election between trespass and case,[185] yet the seeming indifference of plaintiffs to the forms of action equally puzzled two distinguished English legal historians, who concluded that there were many secondary advantages that still induced English plaintiffs to sue in case.[186] Whatever may have been so in England, however, it appears that most of the secondary advantages in America also lay with trespass.[187] In short, the failure of plaintiffs consistently to sue in trespass for direct injuries confirms what the statements of American judges and lawyers show directly: that there were never substantive advantages to suing in trespass. Rather, both trespass and case simultaneously responded to the rise of negligence in the nineteenth century.

In New York, Massachusetts, and Pennsylvania the rise of the negligence action was accompanied by the assumption that even for direct injuries the plaintiff must prove negligence. In other states, however, the attempt to preserve the distinction between the actions caused judges to ignore the express language of the English decisions[188] and to attempt to put the difference between trespass and case in terms of whether the defendant had brought about the injury through design or through negligence.[189] A decision of the New Hampshire court in 1826 allowing an election between actions for a direct injury caused by negligence[190] preserves this formulation and marks the beginning of the modern distinction between intentional and unintentional torts. Not only does this case underline the disintegration of the direct-indirect distinction, but, more important, it reveals the inability of American courts to sanction the English doctrine of strict liability in trespass after the negligence doctrine had begun to emerge.

Negligence as a matter of law

There are three quite different stages in the rise of the negligence doctrine in nineteenth century America. In the first, beginning

early in the century, the important element is the shift in emphasis from an implied contract theory of nonfeasance to a tort conception of misfeasance. In the second stage, after 1820, judges realize, under the influence of the collision cases, that proof of injury and proof of carelessness constitute separate inquiries, and they develop the idea of duties owed to noncontracting strangers with sufficient clarity to deny recovery as a matter of law where there is no proof of carelessness. In the third stage, beginning around 1840, the negligence doctrine breaks out of its rigid confinement to highway and ship collision cases and begins directly to challenge the presumption of compensation for injury in settled areas of the law.

If the collision cases changed the understanding of negligence in an action on the case, they equally challenged the assumption of strict liability in a trespass action. For even where courts continued to insist that trespass was the only proper plea for direct injuries, it was logically impossible, even in trespass, to avoid considering the question of carelessness in a collision case.[191] Whereas the presumption of strict liability had flourished in a society in which the typical tort action involved the suit of an inactive plaintiff who had been injured by an active defendant, the collision cases, which involved joint actors, forced to the surface for the first time the question of who, in fact, had caused the injury. Thus, modern negligence made its first limited appearance as a question of causation or, in contemporary terminology, of contributory negligence.

Even so, there are no American cases in which an independent defense of contributory negligence is made a question of law until after 1823,[192] and even more surprisingly, only one of these cases before 1838 involved a collision.[193] Instead, in this period the typical contributory negligence defense arose under a Massachusetts statute holding towns liable in double damages for neglecting to repair highways under their control.[194] Since the courts regarded the statute as imposing a crushing burden on the towns, judges were willing to allow them to argue that they were not liable because the plaintiff had failed to use due care to guard against the dangerous obstruction. But any assumption that the collision cases failed to leave a clear mark on the developing law of negligence because they did not give rise to a formal contributory negligence doctrine is surely misleading. Since an injury from a carriage or ship collision always involved the simultaneous action of both parties, juries inevitably had to decide who caused the injury by determining which party was at fault. As a result, the problem of negligence was concealed in jury deliberations about who, in fact, was responsible for the injury. The

really lasting influence of the collision cases on the development of American law, therefore, was to obscure the common law assumption that individuals were presumed liable for all injury resulting from risk-creating activity and to direct the law's focus exclusively to the immediate question of which party's carelessness had brought the injury about. While the collision cases were the first consistently to introduce carelessness into the analysis of negligence cases, contributory negligence only arose as an independent question of law when courts were faced with the later highway repair cases. In these cases, since the actions of plaintiff and defendant were separate in time, judges were finally forced to see that the question of causation was not merely a matter of failure to repair the road but also involved the temporally separate issue of whether the plaintiff had driven his vehicle with due care.[195]

Nevertheless, even after contributory negligence arose as an independent question of law, it still was not understood by contemporaries as a fundamental departure from the basic system of strict liability. In most states until 1840 cases involving joint actors remained sufficiently rare to be treated as an isolated category in the law. Courts conceived of the issue of contributory negligence as merely a threshold inquiry about who, in fact, caused an injury, and once a court was satisfied that the plaintiff was not the proximate cause of the injury, it often returned to the traditional language of strict liability.[196] For example, until as late as the middle of the century courts allowed contributory negligence to defeat recovery in trespass or nuisance actions, where, but for the plaintiff's own negligence, they were still prepared to impose liability on the defendant without inquiring whether he had been careless.[197] Conversely, in New York, which had a thriving system of negligence by 1830, a formal doctrine of contributory negligence played no significant role until much later.[198]

It is important to see precisely where the negligence doctrine stood in America as late as 1830. Only in New York was it clear both that negligence would be determined on the basis of a standard of care and that defendants were not liable as a matter of law without proof of carelessness. Massachusetts and Vermont also recognized contributory negligence as a defense to legal liability, but the question was still regarded as a limited and preliminary inquiry into causation. Moreover, as long as the negligence doctrine was associated with causation, its potential for expansion into areas involving inactive plaintiffs, in which causation was undisputed, remained minimal. And it was precisely in this latter area, which often in-

volved railroads, where the great burst of negligence jurisprudence after 1840 took place. In short, there were no cases outside New York before 1833 in which failure to prove negligence became the basis for denying recovery as a matter of law.[199]

In that year, however, the courts of Massachusetts and Pennsylvania rendered decisions recognizing modern negligence principles. In *Sproul v. Hemmingway*[200] Massachusetts Chief Justice Shaw held that the defendant in a ship collision case not involving contributory negligence was immune from liability in the absence of negligence,[201] but it was still more than a decade later before the law of negligence played any important role in that state's jurisprudence.[202] In Pennsylvania the transition was far more dramatic, since there was no existing doctrine of contributory negligence in the commonwealth. In an action for destruction of a bridge caused by flooding due to a break in a dam, Chief Justice Gibson boldly announced that in the absence of carelessness the defendant was not liable.[203] It was only the fourth time[204] — and the first outside New York — that an American court had used the negligence standard as a bar to recovery by an inactive plaintiff. With this case, the courts of both New York and Pennsylvania has already clearly decided that, regardless of causation, injury brought about by risk-producing activity was itself no ground for imposing legal liability. The test of negligence had begun to be regarded as a general limitation on legal liability.

The general triumph of negligence

It is important to emphasize that at the beginning of the nineteenth century the principle of strict liability for injury to property was regarded as just another application of the growing general presumption in favor of compensation for the taking of property. Nor was it crucial that constitutional provisions for just compensation applied only to takings by the state. Chartered transportation companies that committed trespasses or nuisances were equally regarded as agents of the state,[205] and most of the cases involving injuries to person or property after 1840 were brought about by the activity of canals or railroads. Nevertheless, even a charter was not necessarily crucial in imposing a legal obligation in favor of compensation. The mill acts, which suspended common law nuisance remedies for flooding of land in favor of a statutory scheme of compensation, were analyzed on the assumption that any rule of law which denied all forms of compensation to injured property owners would amount to an unconstitutional taking.[206]

The clash between the principle of compensation and the emerging doctrine of negligence did not become apparent until courts were prepared to extend the negligence standard to injuries in which the nuisance standard of strict liability had once dominated. Indeed, the negligence system began to expand beyond the relatively recent and narrow field of collisions at the same time as the abstract principle of just compensation finally triumphed in America. Not only were the expansion of the just compensation principle and the rise of negligence chronologically related, but, in fact, the rise of the negligence doctrine was seen by contemporaries as an attempt to escape from the moral imperative of just compensation.

One of the most dramatic clashes between the old and the new systems of analysis occurred in the Connecticut case of *Hooker v. New-Haven & Northampton Co.*[207] (1841). In a 3-2 decision, the Supreme Court held that the defendant canal company could not justify injury to adjoining land on the ground that it was not caused by negligence. The minority had relied on an earlier case that appeared to hold that in the absence of carelessness a chartered company could escape liability if there were a statutory authorization for its activity. But the majority still referred the legal question to the test of the old morality, holding that the only issue was just compensation.

> An individual may use his own property, without intent to injure his neighbour; but if in so doing, he does him a damage, he must be answerable. For all civil actions, the law doth not so much regard the intent of the actor as the loss and damage of the party suffering; and although a man does a lawful thing, yet if damage do hereby befal another, he shall answer it, if he could have avoided it. [Citing cases] and the reason of all these cases, is, because he that is damaged, ought to be recompensed.[208]

Within the two decades before the Civil War, however, the negligence standard began to invade the general law governing injury to persons and property. One of the most important routes was the idea that a chartered company, being authorized by the legislature, did not exceed its jurisdiction unless it acted carelessly. Another important area concerned the spread of fire. In the first generally recognized American case in which a court denied recovery in the absence of negligence, the New York Supreme Court held in 1811 that a defendant was not liable for an injury resulting from a fire that spread from his land "because it was lawful for him to keep his fire there."[209] The decision not only represented a dramatic departure from the common law rule of strict liability for fire,[210] but since it denied recovery to an inactive plaintiff who had been injured by

an active defendant, it was the first decision in American law completely to separate the question of negligence from the issue of causation. Nevertheless, there are few other reported fire cases before 1840[211] and none that refuses to impose liability for failure to show negligence. The question of spreading fire, however, became generally important in the two decades before the Civil War as railroad locomotives commonly sent sparks onto neighboring land. Indeed, the first reported noncollision negligence case in many states raised this question of liability for fire[212] as courts began to extend the negligence standard to all actions in tort.

The subversion of the expanding public law principle of just compensation by the increasingly ruthless application of the private law negligence principle must be seen as a phenomenon of industrialization. It is not surprising, therefore, that the negligence standard rose earliest in New York, Pennsylvania, and Massachusetts, to challenge the assumption of strict liability,[213] for there was a relatively advanced level of economic development in these states. Indeed, the rise of the negligence principle was only part of a more general attempt to limit the scope of application of the principle of just compensation. This effort in turn was intimately associated with the need to reduce the crushing burden of damage judgments that a system of strict liability (or just compensation) entailed.

As it developed in the course of the nineteenth century, one legal commentator later observed, the American attitude toward legal liability was based on the assumption that the "quiet citizen must keep out of the way of the exuberantly active one."[214] Indeed, the law of negligence became a leading means by which the dynamic and growing forces in American society were able to challenge and eventually overwhelm the weak and relatively powerless segments of the American economy. After 1840 the principle that one could not be held liable for socially useful activity exercised with due care became a commonplace of American law. In the process, the conception of property gradually changed from the eighteenth century view that dominion over land above all conferred the power to prevent others from interfering with one's quiet enjoyment of property to the nineteenth century assumption that the essential attribute of property ownership was the power to develop one's property regardless of the injurious consequences to others.

The Consequences of Legal Subsidization

One of the most striking aspects of legal change during the antebellum period is the extent to which common law doctrines were trans-

formed to create immunities from legal liability and thereby to provide substantial subsidies for those who undertook schemes of economic development. This pattern of subsidization raises several important questions concerning the relationship between legal and economic change in the period. Was legal subsidization socially efficient? Did it encourage investment in areas in which, as the welfare economist would put it, social benefits exceeded social costs even though private costs were greater than private benefits?[215] Or did it in fact promote overinvestment in technology, which might be inferred from the strikingly low contribution to the gross national product that Robert Fogel has claimed railroads, for example, actually made?[216] Because of the difficulties in accurately determining the indirect benefits that flowed from a particular technology, any conclusions about the social efficiency of subsidization must be advanced quite hesitantly.

Perhaps a more basic and manageable question for the historian is the need to explain why there developed so clear a pattern of subsidization through the use not of the tax system but of the legal system. One of the most consistent features of state economic policy during the first several decades of the nineteenth century was the pattern of extraordinarily low state budgetary expenditures. In Massachusetts, for example, where the state budget between 1795 and 1820 remained constant at roughly $133,000, the Handlins have identified a clear pattern of state use of legal instruments such as monopolies and franchises as an alternative to cash outlays.[217] Even states like New York, which amassed an enormous debt in building its canal system, regarded these financial arrangements as involving profitable investments and not as cash subsidies out of the tax system. Indeed, despite a geometrical increase in its debt during the 1820s and 1830s, New York did not impose a general property tax until 1843. "Taxation played a very unimportant role during the first fifty years of the state's existence."[218] Pennsylvania also was "unwilling to embark upon effective taxation" until 1842, when "a vigorous tax program was finally initiated." Investment in canals had simply "supplemented [a] strong anti-tax bias" with "the idea of a positive profit-making state—a state in which taxes were abolished."[219] In short, every bit as significant as overt forms of direct legislative financial encouragement of enterprise were the enormous, but hidden, legal subsidies and resulting redistributions of wealth brought about through changes in common law doctrines.

What factors led antebellum statesmen generally to turn to subsidization through the legal, rather than through the tax, system? One explanation seems fairly clear. Change brought about through

technical legal doctrine can more easily disguise underlying political choices. Subsidy through the tax system, by contrast, inevitably involves greater dangers of political conflict. Beyond these general observations about the consequences of choosing between seemingly nonpolitical as opposed to overtly political forms of subsidization, however, can we in addition say anything about the specific redistributive consequences of the one as opposed to the other? Until we know much more about the potential redistributive effects of state tax systems in this period, it would be dangerous to make any firm comparisons. Nevertheless, it does seem fairly clear that the tendency of subsidy through legal change during this period was dramatically to throw the burden of economic development on the weakest and least active elements in the population. By contrast, it seems plausible to suppose that in a period when the property tax provided the major share of potential state revenue, the burdens of subsidy through taxation would have fallen disproportionately on the wealthier segments of the population.

There is reason to suppose, therefore, that the choice of subsidization through the legal system was not simply an abstract effort to avoid political contention but that it entailed more conscious decisions about who would bear the burdens of economic growth. It does seem likely, moreover, that regardless of the actual distributional effects of resorting to the existing tax system, a more general fear of the redistributional potential of taxation played an important role in determining the view that encouragement of economic growth should occur not through the tax system, but through the legal system. It is, after all, quite striking that a dramatic upsurge of explicit laissez-faire ideology in America can be correlated with a dramatic increase in state taxation during the 1840s.[220] One clear result of this ideological change was that state judges during the 1840s and 1850s began to restrict the scope of redistributive legal doctrines like eminent domain, which formerly had been aggressively used to promote economic development.[221] Thus, whether or not legal subsidies to enterprise were optimally efficient or instead encouraged overinvestment in technology, it does seem quite likely that they did contribute to an increase in inequality by throwing a disproportionate share of the burdens of economic growth on the weakest and least organized groups in American society.

The Influence of Individualism

There were essentially three stages in the development of American law relating to conflicting uses of property. In the first stage, which

continued until roughly 1825, the dominant theme was expressed by the maxim *sic utere*. Dominion over land was defined primarily as the right to prevent others from using their property in an injurious manner, regardless of the social utility of a particular course of conduct. This system began to break down in the second quarter of the nineteenth century as it became clear not only that common law doctrines led to anticompetitive results but that the burdens on economic growth under such a system might prove overwhelming. Through limitations imposed on the scope of the nuisance doctrine, the emergence of the negligence principle, and the riparian doctrine of reasonable use, courts began to strike a balance between competing land uses, freeing many economically desirable but injurious activities from legal liability if they were exercised with due care. Thus, in a second stage which crystalized by the middle of the nineteenth century, property law had come largely to be based on a set of reciprocal rights and duties whose enforcement required courts to perform the social engineering function of balancing the utility of economically productive activity against the harm that would accrue.[222]

In the two decades before the Civil War, however, one detects an increasing tendency by judges to apply the balancing test in such a way as to presume that any productive activity was reasonable regardless of the harm that resulted. And out of this intellectual climate, a third stage began to emerge, which self-confidently announced that there were no legal restraints at all on certain kinds of injurious activities. In a number of new and economically important areas, courts began to hold that there were no reciprocal duties between property owners; that courts would not even attempt to strike a balance between the harm and the utility of particular courses of conduct. While this trend only reached its culmination after the Civil War, its roots were deep in an antebellum change in the conception of property. Dominion over land began to be regarded as an absolute right to engage in any conduct on one's property regardless of its economic value. Judges began to withdraw to some extent from their role of regulating the type and degree of economic activity that could be undertaken. And the mercantilist character of American property law was diluted by an emerging laissez-faire ideology.

From a fairly early period in the nineteenth century, American cases dealing with the right of adjoining landowners to lateral support reflected a strong tendency to encourage competitive improvement of land. As far back as the seventeenth century, English courts

had decided that although adjoining landowners owed a duty of lateral support to land in its natural state, there was no similar duty of support for buildings erected on the land.[223] But when the subject first became of general economic importance in the nineteenth century, the English courts seemed to undermine the vitality of the common law rule by holding that an adjoining landowner was liable for injury to both land and buildings, if the weight of the plaintiff's buildings did not contribute to the injury.[224] By contrast, in a series of cases early in the century, American courts first established the general principle that a landowner owed no duty at all to support buildings on adjoining land.

In the widely influential case of *Thurston v. Hancock*[225] (1815), Massachusetts Chief Justice Parker announced the general principle that "the proprietor of land, unless restrained by convenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it." There was no way "of accounting for the common law principle which gives one neighbour an action against another, for making the same use of his property which he has made of his own," Parker reasoned, unless it were based on the narrow "qualification" of a right acquired by prescription.[226] Without such a right gained by long use, he concluded, there was no basis in law for restraining one's neighbor from doing anything on his own land which one originally could have done oneself.

The decision reflected the same social and economic considerations that were leading to a rejection of the principle of prior appropriation in the area of water rights, as courts began to see the antidevelopmental consequences of allowing the first occupant to determine his neighbor's future course of conduct.[227] Moreover, in rejecting the claim of the first builder to control his neighbor's subsequent development of land, Parker dramatically shifted the idea of dominion over land from its traditional emphasis on the limitations that others could impose on land use.

Thurston v. Hancock, nevertheless, expressed an interesting tension between old and new principles. Although it appeared to contradict his principle of absolute dominion over property, Parker reaffirmed the common law duty of lateral support owed to land in its natural state. While the plaintiff thus could not recover for injury to his buildings, he could still be compensated for the nominal injury to land. Attempting to explain this difference in treatment by a strikingly modern theory of property rights based on fulfillment of individual expectations, Parker maintained that the plaintiff could

not recover for damage to his building because "he who first built his house should have taken care to stipulate with his neighbor, or to foresee the accident and provide against it."[228] On the other hand, he held that land damage was recoverable because "the defendants should have anticipated the consequences of digging so near the line."[229] However circular and contradictory this distinction was, its practical result seemed a throwback to an eighteenth century common law dichotomy between "natural" and "artificial" activity which reflected profoundly agrarian preferences. In English water cases, for example, a similar distinction between "artificial" and "natural" uses of water became an important ideological tool for preferring agrarian over industrial uses of water.[230] As it applied to the rights of landowners, however, this bias ironically had the opposite effect of freeing economic development from the legal restrictions that a rule of priority imposed on competitive land use. For as long as buildings were considered an unworthy artificial use of land, courts were prepared to withhold the extensive protection that rules of priority accorded to land itself.[231]

In spite of its dual outlook, *Thurston v. Hancock* nevertheless marks a radical break with common law tradition and reveals the early impact of individualism on the development of American law. The decision was the first in the nineteenth century to hold that in certain kinds of economic activity there existed no correlative rights and obligations between adjoining landowners. Some of the cases that purported to follow the Massachusetts decision were fitted into a more traditional mold, holding that there was no duty of lateral support for buildings only if the injurious activity was reasonable.[232] But *Thurston v. Hancock* went much further by absolutely refusing to examine the social utility of the actor's conduct.[233]

By the middle of the century, under the influence of Parker's opinion, there were those who were willing to go still further and reject even the last vestige of conventional doctrine in that opinion. Even the duty of lateral support of land, the New York Supreme Court declared in 1850, "would often deprive men of the whole beneficial use of their property. An unimproved lot in the city of Brooklyn would be worth little or nothing to the owner, unless he were allowed to dig for the purpose of building." If a landowner "may not dig because it will remove the natural support of his neighbor's soil," the court concluded, "he has but a nominal right to his property. . . . A city could never be built under such a doctrine."[234] By the middle of the nineteenth century, in short, the meaning of property rights was in the midst of a major transformation—from

the notion that dominion over land entailed the power to prevent all injury by others to the view that many externally imposed limitations on land use were themselves violations of absolute property rights.

One of the most dramatic reversals of legal premises was illustrated by the virtually unanimous refusal of American courts after 1840 to extend the recently developed riparian doctrine of correlative rights to the law governing waters percolating in subterranean channels. Although several early English and American cases had assumed that the riparian doctrine applied equally to subsurface waters,[235] the question only came to the fore after technological innovations created a "minerals-dominant economy" after 1840.[236] In the leading American case of *Greenleaf v. Francis*[237] (1836), the Massachusetts Supreme Court, neglecting even to mention the common law doctrine relating to surface streams, held that every landowner had the right to appropriate the entire flow of a subterranean stream. "Every one has the liberty of doing in his own ground whatever he pleases," the court declared, "even although it should occasion to his neighbor some other sort of inconvenience." The victorious defendant, of course, cited *Thurston v. Hancock*.

Though there were rational distinctions to be drawn between surface and subsurface streams, based on whether landowners could foresee the injurious consequences of their acts,[238] American courts usually preferred to rest their decisions on general conceptions of the nature of property or on a policy of encouraging economic development. In the Pennsylvania case of *Wheatley v. Baugh*[239] (1855), for example, the court insisted that to apply the riparian doctrine of reciprocal rights to percolating streams "would amount to a total abrogation of the right of property." And in *Frazier v. Brown*[240] (1861), the Ohio Supreme Court put a large part of its decision on the ground that an extension of the riparian doctrine to underground percolating waters "would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building and the general progress of improvement in works of embellishment and utility." Indeed, the difference in treatment accorded underground and surface waters can largely be explained by the fact that the first cases directly involving the former arose only after laissez-faire assumptions firmly took hold of the imaginations of American judges.

Most of the reasons advanced for not applying correlative rights to underground streams were equally applicable to surface streams.

If reciprocal rights to subsurface streams were recognized, the New York Supreme Court declared in 1855, "no one will be safe in purchasing land adjoining or near a stream of water, as he may be restrained forever from making some valuable, and frequently, from the progressiveness of the age, necessary improvements." Any restraint, it concluded, would contradict "the rule that a man has a right to the free and absolute use of his property" unless he caused direct injury.[241] In fact, as the New Jersey Supreme Court saw many years later, the rule of no correlative rights could not easily be defended simply on grounds of encouraging economic development.

> It is sometimes said that unless the English rule be adopted, landowners will be hampered in the development of their land because of the uncertainty that would thus be thrown about their rights. It seems to us that this reasoning is wholly faulty. If the English rule is to obtain, a man may discover upon his own lands springs of great value for medicinal purposes or for use in special forms of manufacture, and may invest large sums of money upon their development; yet he is subject at any time to have the normal supply of such springs wholly cut off by a neighboring landowner, who may, with impunity, sink deeper wells and employ more powerful machinery, and thus wholly drain the sub-surface water from the land of the first discoverer.[242]

Under the orthodox rule, the court added, "*might* literally makes *right,* and we are remitted to the simple plan, that they should take who have the power, and they should keep who can."

As the court thus pierced the abstract claims to equality of the noncorrelative rights doctrine, it also saw that the real explanation of its origins was one of power. For whatever the theoretical equality of both large and small landowners to upset the expectations of the first discoverer, the opportunity to do so, the court saw, depended upon the ability to "sink deeper wells and employ more powerful machinery." Mining companies, in short, were the natural beneficiaries of the rule.

Contemporaries actually perceived that the movement to distinguish between the rules governing surface and subsurface streams was essentially an effort to free the law from the regulatory premises of riparian doctrines. Courts, one legal commentator protested, were shaping the law to give preference to enterprises according to "the difference in the magnitude of the interests [involved]. . . . The simple fact, that a man may carry on a very profitable business, by only doing his neighbor a little injury, is no sufficient excuse for the injury done. If there be a great difference in the interests, the

greater may well afford to pay for the damage done to the less."[243]

One result of the increasing tendency to refuse to impose reciprocal rights and obligations on business enterprise was to remove the judiciary entirely from certain forms of economic regulation. Courts, for example, began to refuse even to examine whether particular uses of property were undertaken solely for the motive of injuring a neighboring landowner, an inquiry which, after all, was often indispensable for determining the social utility of harm-producing conduct.[244] To inquire into motives, a New York court declared, "would be highly dangerous to the security of the enjoyment of real property."[245] This tendency, of course, was part of a more general view that had begun to gain ascendancy before the Civil War—that economic development could best be promoted by giving free rein to individual property owners to develop their land.[246] Nevertheless, as courts attempted to overcome the regulatory framework of the common law, the notion of unrestrained dominion over land was often entirely dissociated from its economic foundations to become a functionally autonomous dogma of its own.

As in the case of underground percolating waters, most courts held that the right to rain waters was also the absolute property of the owners of land on which it fell. Unlike subsurface streams, however, surface rain waters were almost never employed for economically useful purposes, and legal controversies thus invariably involved the right of one landowner to drain these waters onto his neighbor's property.[247] Though some courts applied the "reasonable use" test in deciding the extent to which such drainage was allowable,[248] the large majority of American courts, proceeding from a conception of absolute property rights, adopted the "common enemy" rule to hold that each landowner could do all he could to keep the water off his land, even if it harmed his neighbor.[249] In a series of cases before the Civil War, the Massachusetts Supreme Court developed the prevailing doctrine,[250] and Chief Justice Bigelow, in a case immediately following the war,[251] summed up these developments. "*Cujus est solem, ejus est usque ad coelum* [He who possesses land possesses also that which is above it] is a general rule, applicable to the use and enjoyment of property," he wrote, "and the right of a party to the free and unfettered control of his own land above, upon and beneath the surface cannot be interfered with or restrained by any consideration of injury to others."

In the two decades before the Civil War, the ideologies of laissez-faire and rugged individualism had finally established a prominent

beachhead in American property doctrine. Though never entirely able to overthrow the regulatory assumptions behind the earlier law, these new doctrines nevertheless underlined a deep tendency in the application of even conventional doctrine to favor the active and powerful elements in American society.

III. SUBSIDIZATION OF ECONOMIC GROWTH THROUGH THE LEGAL SYSTEM

1. An Act for Highways, Mass. Colonial Statutes (ch. 23, 1693).

2. See, *e.g.*, An Act for the better Clearing Regulating and further Laying out Public High Roads in the City and County of Albany, N.Y. (1742), (3 *Colonial Laws of New York* 262 [1894]).

3. T. Jefferson, *Notes on the State of Virginia* 148 (1853 ed.). When Virginia actually settled on the principle of compensation is difficult to determine. Although a Virginia law passed in 1785 seems to have provided for compensation for land taken for roads, Va. Stat. ch. 75 (1785), it was asserted by a judge of the Virginia high court in 1831 that there was no payment for rights of way "until a very late period." Stokes v. Upper Appomatox Co., 3 Leigh 318, 337 (1831).

4. In Pennsylvania from the time of William Penn there was a consistent policy of giving landowners 6 percent more land than had been purchased so that roads could later be built. For this reason, the Pennsylvania Supreme Court in 1802 held that it was not a violation of the state constitution's "just compensation" clause to transfer land to a turnpike company without providing compensation. M'Clenachan v. Curwin, 3 Yeates 362, 6 Binn. 509 (Pa. 1802). It appears that a new statute was enacted in response to this decision, and two years later the Court interpreted it to require compensation. New Market and Budd Street, 4 Yeates 133 (Pa. 1804). It soon became "usual" for the state to provide compensation in turnpike acts. Stokely v. Robbstown Bridge Co., 5 Watts 546, 547 (Pa. 1836).

In New Jersey, under both the proprietary and state governments, no compensation was made for rights of way on the same theory as in Pennsylvania. "Compensation was first allowed, when companies were incorporated to make roads." Bonaparte v. Camden & Amboy R.R., 3 Fed. Cas. 821, 824 (1830) (argument of defendant's counsel).

5. Grant, "The 'Higher Law' Background of the Law of Eminent Domain," 6 *Wisc. L. Rev.* 67, 70 (1931).

6. 1 W. Blackstone, *Commentaries* 139 (Christian ed., 1855) [hereinafter cited as *Commentaries*].

7. See Van Horne's Lessee v. Dorrance, 2 Dall. 304 (Pa. 1795). C. G. Haines, *The Revival of Natural Law Concepts* (1935); B. F. Wright, *American Interpretations of Natural Law* 7, 50, 237 (1962).

8. State v. Dawson, 3 Hill 100, 103 (S.C. 1836); Stark v. M'Gowen, 2 Nott & M'Cord 387 (S.C. 1818); Lindsay v. Comm'rs, 2 Bay 38 (S.C. 1796). Compensation, however, was provided by South Carolina for damages in canal building. D. Kohn & B. Glenn, eds., *Internal Improvement in South Carolina, 1817-1828,* 327, 516 (1938).

9. Gardner v. Village of Newburgh, 2 Johns. Ch. 162, 168 (N.Y. 1816). See also Raleigh & Gaston R.R. v. Davis, 2 D & B 451, 459-61 (N.C. 1837).

10. Gardner v. Village of Newburgh, 2 Johns. Ch. at 166. However, in Rogers v. Bradshaw, 20 Johns. 735, 744-45 (Ct. of Err. 1823) and Jerome v. Ross, 7 Johns. Ch. 315 (N.Y. 1823), Kent reversed his earlier position that advance compensation was required. Along with his contemporaries, he was prepared to relax his earlier views for the sake of promoting the Erie Canal. "If there was ever a case," he declared, ". . . in which all petty private interests should be made subservient to the interest of an entire people, this is one." 7 Johns. Ch. at 342. But his last word published in his *Commentaries* held that "the better opinion" was that advance compensation should be required, emphasizing that anything to the contrary in the earlier opinions was mere dictum. 2 J. Kent, *Commentaries* 339 n. (4th ed. 1840). Kent's earlier strict view was applied to a private company in Bonaparte v. Camden & Amboy R.R., 3 Fed. Cas. 821 (1830) and in Bloodgood v. Mohawk & Hudson R.R., 18 Wend. 9 (N.Y. 1837).

11. M'Clenachan v. Curwin, 3 Yeates 362, 6 Binn. 509 (Pa. 1802).

12. Compare "An Act to continue 'An Act for Opening and Better a Mending, and Keeping in Repair, the Public Roads and Highways within this province,' " Pa. Stats. Ch. 1309 (1787), which continues the policy of a 1772 highway law allowing compensation only for improvements with "An Act to appoint commissions to regulate the streets, lanes and alleys in the District of Southwork," Ch. 1310 (1787), which for the first time allows damages (and a jury trial) for the taking of unimproved land.

The first canal incorporation statute establishing the Schuylkill and Susquehanna Navigation Co., Pa. Stat. 1577 (1791), contained an elaborate provision for recovering all damages resulting from eminent domain and became the model for subsequent Pennsylvania canal statutes. By contrast, the first turnpike incorporation statute establishing the Philadelphia and Lancaster Turnpike Co., Ch. 1629 (1792), allowed damages only for improvements. It was this provision that was upheld against constitutional challenge in M'Clenachan v. Curwin, 3 Yeates 362, 6 Binn. 509 (Pa. 1802).

13. Commonwealth v. Fisher, 1 Pen. & W. 462, 465 (Pa. 1830).

14. State v. Dawson, 3 Hill 100, 103 (S.C. 1835); Stark v. M'Gowen, 1 Nott & M'Cord 387 (S.C. 1818); Lindsay v. Comm'rs, 2 Bay 38 (S.C. 1796).

15. Beekman v. Saratoga & Schenectady R.R., 3 Paige 45, 57 (N.Y. 1831) (argument of counsel); Harvey v. Thomas, 10 Watts 63, 66-67 (Pa. 1840) (Gibson, C.J.).

16. Beekman v. Saratoga & Schenectady R.R., 3 Paige 45, 57-58 (N.Y. 1831) (argument of counsel).

17. Harvey v. Thomas, 10 Watts 63, 67 (Pa. 1840).

18. The Case of "The Philadelphia & Trenton R.R.," 6 Wharton 25, 46 (Pa. 1840); "On the Liability of the Grantee of a Franchise To an Action at Law for Consequential Damages, From its Exercise," 1 *Am. L. Mag.* 52 (1843).

19. "Restrictions upon State Power in Relation to Private Property," 1 *U.S. Law Intell.* 4, 5, 4 (1829).

20. Report of the Directors of the Western & Northern Inland Lock

Navigation Cos. to the New York Legislature (1795), U.S. Senate, 10th Congress, Rep. 250 (1808) in Albert Gallatin, "Report on Roads and Canals," *American State Papers* (W. Lowrie & W. Franklin, eds.), Class X, Miscellaneous, I, 724, 770, 772 [1834].

21. Report of the Board of Directors of the Western Inland Lock Navigation Co. to the New York Legislature (1798) in Gallatin, *id.* at 779.

22. 1797 N.Y. Stat. ch. 26.

23. 1798 N.Y. Stat. ch. 101.

24. Steele v. Western Inland Lock Navigation Co., 2 Johns. 283 (N.Y. 1807).

25. Ex Parte Jennings, 6 Cow. 518 (S. Ct., N.Y. 1826) *reversed sub nom* Canal Commissioners v. The People, 5 Wend. 423 (Ct. of Errors 1830); People v. Canal Appraisers, 13 Wend. 355 (S. Ct. 1835) reversed Canal Appraisers v. People, 17 Wend. 571 (Ct. of Errors 1836); Commissioners of the Canal Fund v. Kempshall, 26 Wend. 404 (Ct. of Errors 1841); Starr v. Child, 20 Wend. 149 (S. Ct. 1838) reversed 4 Hill 369 (Ct. of Errors 1842).

26. See Bronson, J., dissenting in Starr v. Child, 20 Wend. 149, 158-59 (N.Y. 1838).

27. Ex Parte Jennings, 6 Cow. 518, 523 (N.Y. 1826) (argument of commissioner's counsel).

28. Note, *id.* at 550.

29. Rogers v. Bradshaw, 20 Johns. 735, 740 (N.Y. 1823).

30. Carson v. Blazer, 2 Binn. 475 (Pa. 1810).

31. Cates v. Wadlington, 1 McCord 580 (S.C. 1822).

32. Canal Appraisers v. The People, 17 Wend. 571 (N.Y. 1836).

33. Commissioners of the Canal Fund v. Kempshall, 26 Wend. 404 (N.Y. 1841).

34. Child v. Starr, 4 Hill 369 (N.Y. 1842).

35. Letter of Charles G. Paleske in Gallatin, *supra* note 20, at 828, 829.

36. Letter of Alexander Wolcott in Gallatin, *supra* note 20, at 869.

37. Gallatin, *supra* note 20, at 828.

38. Stevens v. Proprietors of the Middlesex Canal, 12 Mass. 466, 468 (1815).

39. C. Roberts, *The Middlesex Canal, 1793-1860* 178 (1938). Many years later, in 1860, after the canal itself was relegated to the scrap heap of history without compensation, the Massachusetts legislature proposed to reimburse those property owners who had been deprived of compensation. O. Handlin and M. Handlin, *Commonwealth: Massachusetts 1774-1861* 222 (1947).

40. The Annual Report of the Canal Commissioners of the State of New York 25 (1825); N. Miller, *The Enterprise of a Free People: Aspects of Economic Development in New York State during the Canal Period, 1792-1838* 57-58 (1967).

41. "Consequential Damages," *supra* note 18, at 66, 60.

42. Report of the New York State Assembly, Doc. No. 284 (1841).

43. First Annual Report of the Boston & Maine R.R. Extension Co. 16 (1844) in Mass. Gen. Ct. Comm. on Railways and Canals, *Annual Reports of Railroad Corps. in Mass. for 1844* (1845). Expenditure for land and damages constituted almost 35 percent of the budget of the Old Colony Railroad. First Annual Report of the Old Colony Rail-Road. *Id.* at 86. In other cases, land damages were relatively small, owing to the "liberal desire" of landowners "of promoting so great a public improvement." Boston & Worcester R.R. Corp., Report of the Directors 8 (1832).

44. Eighth Annual Report of the Directors of the Western Railroad Corp. to the Massachusetts Legislature (January, 1844) in Mass. Gen. Ct. Comm. on Railways and Canals, *Annual Rpts. of Railroad Corps. in Mass. for 1843* (1844).

45. Thirteenth Annual Report of the Boston & Worcester Railroad (1844) in Mass. Gen. Ct., *supra* note 43, at 26.

46. "Consequential Damages," *supra* note 18. T. Sedgwick, *A Treatise on the Measure of Damages* 110-11 (1847).

47. See Hay v. Cohoes Co., 2 N.Y. 159 (1849); Tremain v. Cohoes Co., 2 N.Y. 163 (1849); Fish v. Dodge, 4 Denio 311 (N.Y. 1847).

48. Indeed, courts had held that for an intentional trespass, the amount of actual injury was not the limit of damages. "Were it otherwise, a person so disposed might forcibly dispossess another of any article of property at his pleasure, and compel the owner, however unwillingly, to accept of the value in its stead." Edwards v. Beach, 3 Day 447, 450 (Conn. 1809).

49. "Between 1816 and 1840, about $125,000,000 was spent on canal building, and at least three states had so strained their credit as to be brought to the verge of bankruptcy." G. R. Taylor, *The Transportation Revolution, 1815-1860* 52 (1951).

50. L. Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* 159 (1948).

51. Losee v. Buchanan, 51 N.Y. 476, 484 (1873).

52. Palmer v. Mulligan, 3 Caines 307 (N.Y. 1805).

53. Steele v. Western Inland Lock Navigation Co., 2 Johns. 283 (N.Y. 1807). Compare Coleman v. Moody, 4 H & M 1 (Va. 1809), where the court only allows damages actually foreseen as a bar to further damages.

54. Thurston v. Hancock, 12 Mass. 220 (1815); Panton v. Holland, 17 Johns. 92 (N.Y. 1819).

55. 1 Pick. 418 (Mass. 1823).

56. Lansing v. Smith, 8 Cow. 146 (N.Y. 1828). See also Hollister v. Union Co., 9 Conn. 436 (1833).

57. 1 Pick. at 431. This theory, in one form or another, reappears in later cases. See Lexington & Ohio R.R. v. Applegate, 8 Dana 289, 298 (Ky. 1839); Radcliff's Executors v. Mayor, 4 N.Y. 195, 207 (1850).

58. M'Clenachan v. Curwin, 3 Yeates 362, 6 Binn. 509 (Pa. 1802).

59. Lansing v. Smith, 8 Cow. at 149.

60. 2 J. Kent, *Commentaries* 340 n. (4th ed. 1840); Charles River

Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 638 (Story, J., dissenting).

61. See, *e.g.*, Hollister v. Union Co., 9 Conn. 436, 446 (1833).

62. Barron v. Baltimore, 2 *Am. Jur.* 203, 206-07 (Md. 1828), reversed 7 Pet. 243 (1833). [The decision of the Maryland Court of Appeals, reversing the lower court, is unreported, but a summary of that decision based on court records appears in Cumberland v. Willison, 50 Md. 138, 150-55 (1878). The United States Supreme Court then dismissed the appeal from the decision of the Maryland Court of Appeals, holding that it had no jurisdiction, since the "just compensation"clause of the Fifth Amendment applied only to the national government.]

63. See T. Sedgwick, *supra* note 46, at 63-112; "Consequential Damages," *supra* note 18, at 72.

64. Radcliffe v. Mayor of Brooklyn, 4 N.Y. 195, 206 (1850).

65. *Id.* at 207.

66. However, in The Case of "The Philadelphia & Trenton R.R.," 6 Whar. 25, 46 (Pa. 1840), Chief Justice Gibson applied the immunity to a railroad corporation, holding that the constitutional provision requiring just compensation did not extend to consequential damages. The fact that the state had usually provided compensation, he declared, "was of favor, not of right."

67. 3 *Commentaries* 217-18. See Fish v. Dodge, 4 Denio 311 (N.Y. 1847).

68. Henry H. Fuller, "Notes on Lectures of Tapping Reeve and James Gould at the Litchfield Law School" (1812-13) Vol. III, at 465-66 (ms. LMS 2014, Treasure Room, Harvard Law School).

69. 8 Dana 289 (Ky. 1839).

70. *Id.* at 305.

71. *Id.* at 309.

72. Compare Pennsylvania v. Wheeling Bridge Co., 54 U.S. (13 How.) 518, 577 (1851) with 54 U.S. (13 How.) at 602, 605, 608 (Daniel, J., dissenting).

73. St. Helen's Smelting Co. v. Tipping, 11 H.L.C. 642, 11 Eng. Rep. 1485 (1865). Even as late as 1890 the Maryland Court of Appeals, in a widely followed opinion, refused to balance social utilities in a nuisance case. "It may be convenient to the defendant," the court declared, "and it may be convenient to the public, but, in the eye of the law, no place can be convenient for the carrying out of a business which is a nuisance, and which causes substantial injury to the property of another." Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 277 (1890). Only in the twentieth century did official and formal nuisance doctrine incorporate a balancing test. See, *e.g.*, Rose v. Socony-Vacuum Corp., 54 R.I. 411 (1934), though similar results had been reached much earlier under the various technical exceptions that have been discussed.

74. See, *e.g.*, Hudson & Delaware Canal Co. v. N.Y. & Erie R.R., 9 Paige 323 (N.Y. 1841); Lexington & Ohio R.R. v. Applegate, 8 Dana 289, 298 (Ky. 1839).

75. Steele v. Western Inland Lock Navigation Co., 2 Johns. 283 (1807).

76. Van Schoick v. Delaware & Raritan Canal Co., Spencer's Rep. 249, 254 (N.J. 1843).

77. 3 *Commentaries* 219.

78. *Ibid.* See Nichols v. Pixly, 1 Root 129 (Conn. 1789); Harrison v. Sterett, 4 H & McH. 540 (Md. 1774).

79. Lansing v. Smith, 8 Cow. 146, 156-68 (N.Y. 1828) *aff'd* 4 Wend. 9 (1829); Barron v. Baltimore, 2 *Am. Jur.* 203 (Md. 1828), 32 U.S. (7 Pet.) 243, 244 (1833).

80. 8 Cow. at 157-58.

81. Hart v. Mayor of Albany, 9 Wend. 571 (N.Y. 1832).

82. Smith v. Boston, 7 Cush. 254, 255 (Mass. 1851).

83. Blood v. Nashua & Lowell R.R., 2 Gray 137 (Mass. 1854); Brightman v. Fairhaven, 7 Gray 271 (Mass. 1856).

84. Governor & Co. of the British Cast Plate Manuf. v. Meredith, 4 T.R. 794, 100 Eng. Rep. 1306 (1792); Sutton v. Clarke, 6 Taunt 29, 128 Eng. Rep. 942 (1815).

85. Steele v. Western Inland Lock Navigation Co., 2 Johns. 283 (N.Y. 1807); Callender v. Marsh, 1 Pick. 418 (Mass. 1823); Lansing v. Smith, 8 Cow. 146 (N.Y. 1828). See also J. Angell, *Watercourses* 66 (1st ed. 1824).

86. One of the first cases openly to recognize an immunity limited to public officials was Sayre v. Northwestern Turnpike Rd., 10 Leigh 454 (Va. 1839). But by this time the doctrine already had been extended to cover private companies as well.

87. Bloodgood v. Mohawk & Hudson R.R., 18 Wend. 9, 30 (N.Y. 1837); Barron v. Baltimore, 2 *Am. Jur.* 203, 212-13 (Md. 1828).

88. Shrunk v. President of the Schuylkill Navigation Co., 14 Serg. & Rawl. 71, 83 (Pa. 1826).

89. L. Hartz, *supra* note 50, at 85.

90. Spring v. Russell, 7 Greenl. 273, 289-90 (Me. 1831).

91. "Consequential Damages," *supra* note 18, at 66.

92. T. Sedgwick, *supra* note 46, at 110. In the same year, even Joseph Angell accepted this doctrine, although his earlier, more conservative work on *Watercourses* had conceded only the limited immunity conferred on public officials. Compare *Treatise on Tidewaters* 93-97 (2d ed. 1847) with *Watercourses* 108-09 (2d ed. 1833).

93. The one clear exception is Hollister v. Union Co., 9 Conn. 436, 445-46 (1833).

94. Ten Eyck v. Delaware & Raritan Canal Co., 3 Harr. 200 (N.J. 1841); Hooker v. New-Haven & Northampton Co., 14 Conn. 146 (1841) (3-2 decision).

95. People v. Kerr, 27 N.Y. 188, 190 (1863).

96. Bellinger v. N.Y. Central R.R., 23 N.Y. 42 (1861).

97. See Scott v. Bay, 3 Md. 431 (1853); Fish v. Dodge, 4 Denio 311 (N.Y. 1847).

98. By this time, incidentally, English railroads already had been made liable by statute for activity which "injuriously affected" land, I.

Redfield, *Law of Railways* 116 (2d ed. 1858), a factor undoubtedly contributing to "the immense cost in the construction of English railroads . . . mainly derived from the extravagant prices which are demanded, and have to be paid at the outset for the land." H. M. Flint, *The Railroads of the United States* 26 (1868).

99. See pp. 98-99 *infra*.

100. Commonwealth v. Reed, 34 Pa. 275, 281-82 (1859).

101. "A Reading On Damages in Actions Ex Delicto," 3 *Am. Jur.* 287, 288 (1830). Although the piece was unsigned, authorship is attributed to Metcalf in T. Sedgwick, *supra* note 46, at 45n.

102. *Id.* at 292.

103. *Id.* at 305.

104. 2 *Treatise on the Law of Evidence* 209 (1st ed. 1846). Greenleaf's views were also presented in "The Rule of Damages in Actions Ex Delicto," 9 *Law Rep.* 529 (1847). This unsigned piece is attributed to Greenleaf in 10 *Law Rep.* 49 (1847).

105. T. Sedgwick, *supra* note 46, at 46n. See also *id.* at 38-44. Sedgwick's views were also presented in "The Rules of Damages in Actions Ex Delicto," 10 *Law Rep.* 49 (1847). The article is signed "T.S."

106. 2 *Treatise on the Law of Evidence* 242 n.2 (2d ed. 1848).

107. Sedgwick, *supra* note 46 at 214.

108. *Id.* at 63-112.

109. See p. 67 *infra*.

110. C. Roberts, *supra* note 39, at 177.

111. L. Hartz, *supra* note 50 at 159.

112. *Id.* at 160.

113. See Beekman v. Saratoga & Schenectady R.R., 3 Paige 45, 68-69 (N.Y. 1831) (Argument of Counsel).

114. Bonaparte v. Camden & Amboy R.R. 3 Fed. Cas. 821 (1830).

115. Beekman v. Saratoga & Schenectady R.R., 3 Paige 45 (N.Y. 1831).

116. Willyard v. Hamilton, 7 Ohio 111 (pt. 2) (1836).

117. Raleigh & Gaston R.R. v. Davis, 2 D & B 451 (N.C. 1837).

118. See Bonaparte v. Camden & Amboy R.R., 3 Fed. Cas. 821 (1830). One of the earliest of such statutes was passed in New York in connection with the Erie Canal. 1817 Stat. ch. 262, sec. 3. But the canal commissioners had been in the habit of offsetting benefits as early as 1810. See W. W. Campbell, *Life and Writings of DeWitt Clinton* 54 (1849). In 1829 Massachusetts amended its mill act to allow for consideration of benefits from flooding. *Gen. Laws* 1829, ch. 122.

119. *The New Constitution* 167 (1849).

120. *Sic utere tuo, ut alienum non laedas* (Use your own [property] so as not to harm another's).

121. 3 *Commentaries* 217-18.

122. C. H. S. Fifoot, *History and Sources of the Common Law* 164 (1949).

123. Scovel v. Chapman, 2 Root 315 (Conn. 1795); — v. Jackson, 2 N.C. 14 (1792); M'Clures v. Hammond, 1 Bay 99 (S.C. 1790). For two early eighteenth century carrier cases in which negligence was alleged, see Gassarett v. Bogardus (1701) and Smith v. Bill (1710-11) in R. B. Morris, ed., *Select Cases of the Mayor's Court of New York City, 1674-1784* 361, 395 (1935).

124. Stephens v. White, 2 Wash. 203 (Va. 1796); Cross v. Guthery, 2 Root 90 (Conn. 1794); Coker v. Wickes (R.I. 1742), reported in Chafee, *Records of the Rhode Island Court of Equity, 1741-1743,* 35 *Publications of the Colonial Society of Mass.* 91, 105-07 (1944).

125. Sparhawk v. Bartlet, 2 Mass. 188 (1806); Brown v. Lord, Kirby's Rep. 209 (Conn. 1787).

126. Jones v. Abbee, 1 Root 106 (Conn. 1787); Staphorse v. New Haven, 1 Root 126 (Conn. 1789); Abel v. Bennet, 1 Root 127 (Conn. 1789). See also 2 *Dane Abr.* 649-57.

127. 3 *Commentaries* 415-16.

128. *Id.* at 165.

129. Lobdell v. New Bedford, 1 Mass. 153 (1804); Bill v. Lyme, 2 Root 213 (Conn. 1795); Swift v. Berry, 1 Root 448 (Conn. 1792); Harris v. Moore, 1 Coxe 44 (N.J. 1790).

130. Lord v. Fifth Mass. Turnpike Corp., 16 Mass. 106 (1819); Riddle v. Prop. of Locks, 7 Mass. 169 (1810); Townsend v. Susquehannah Turnpike Rd., 6 Johns. 90 (N.Y. 1809).

131. 3 W. Blackstone, *Commentaries* 415-16. See also Lansing v. Fleet, 2 Johns. Cas. 3, 5 (N.Y. 1800).

132. Patten v. Halsted, 1 Coxe 277, 279 (N.J. 1795).

133. R. Pound, *An Introduction to the Philosophy of Law* 91 (rev. ed. 1954). In Johnson v. Macon, 1 Wash. 4 (Va. 1790), for example, the Virginia high court held that the lower court erred in requiring proof of negligence in order to hold a sheriff liable for an escape. Though the statute expressly required that negligence be shown, the court declared that it "ought to be presumed." *Id.* at 5.

134. 1 J. Comyns, *Digest of English Law* 202 (1785 ed.).

135. All the above quotations appear in 3 *Dane Abr.* 31-33.

136. *Id.* at 33.

137. *Id.* at 35.

138. Bussy v. Donaldson, 4 Dall. 206 (Pa. 1800), cited *id.* at 35.

139. Clark v. Foot, 8 Johns. 421 (N.Y. 1811), cited in *ibid.*

140. Fifoot, *supra* note 122 at 164.

141. See, *e.g.,* Bussy v. Donaldson, 4 Dall. 206 (Pa. 1800); Waldron v. Hopper, 1 Coxe 339 (N.J. 1795); Van Cott v. Negus, 2 Caines 235 (N.Y. 1804). Cases involving injury to pedestrians did not appear until after 1825. See M'Allister v. Hammond, 6 Cow. 342 (N.Y. 1826); Lane v. Crombie, 12 Pick. 177 (Mass. 1831). The earliest American collision case of which I am aware is Waterman v. Gillings (1770) (unpublished records of Plymouth, Mass. Court of Common Pleas). This case, involving a ship collision, is

founded on an allegation of negligence. It is apparently the source of the one declaration for collision that appears in Theophilus Parsons' "Precedents" (1775) (ms. LMS 1118, Treasure Room, Harvard Law School) under the heading "Case for Carelessly Managing a Vessel" p. 53. "Cases of [ship] collision were relatively infrequent [during the colonial period]. . . . The seas were wide and sinkings at sea were rare. Collision was more common in harbors and channels, and because the damage was slight the cases did not get into the courts." C. M. Andrews, "Introduction" to *Records of the Vice-Admiralty Court of Rhode Island, 1716-1752* 31 (D. Towle, ed. 1936). Professor Andrews does, however, cite two instances of collisions in colonial admiralty court records. *Ibid.* In a study of colonial Massachusetts admiralty records, Professor Wroth also found that "actions for collisions were unaccountably few." Wroth, "The Massachusetts Vice Admiralty Court" in G. Billias, ed., *Law and Authority in Colonial America* 32, 42 (1965).

142. For a surprisingly and atypically late example of the unwillingness of common law judges to enforce legal duties between strangers, see the English case of Heaven v. Pender, 11 Q.B.D. 503 (1883).

143. C. Gregory, "Trespass to Nuisance to Absolute Liability," 37 *Va. L. Rev.* 359, 365-70 (1951).

144. See Leame v. Bray, 3 East. 593, 102 Eng. Rep. 724 (1803); Scott v. Shepherd, 2 W. Blackstone 892, 96 Eng. Rep. 525 (1773) (opinion of Blackstone, J.); Reynolds v. Clarke, 2 Ld. Raymond 1399, 92 Eng. Rep. 410 (1726). For an excellent discussion of these cases, see E.F. Roberts, "Negligence: Blackstone to Shaw to ?" 50 *Cornell L. Rev.* 191 (1965).

145. See Winfield and Goodhart, "Trespass and Negligence," 49 *L.Q.R.* 359 (1933).

146. An examination of a number of nineteenth century cases bears this out.

In Taylor v. Rainbow, 2 H&M 423 (Va. 1808) we find the court reporter observing of the difference between trespass and case that "the *law* says there is a nice distinction, but the *reason* . . . is often difficult to discover." *Id.* at 423. And the defendant's counsel, in arguing that the plaintiff brought the wrong action, declared: "It is unnecessary to *reason* on the propriety of keeping up the boundaries of action: it is a *settled rule of law* that they *must* be preserved." *Id.* at 430. Of the three judges who wrote opinions in the case, none puts the distinction on substantive law. Judge Fleming, for example, emphasized that he saw no substantive difference between the two writs, since the ends of justice would be served by either, yet he felt "tied down, and bound by precedents" establishing the direct-indirect distinction. *Id.* at 444.

Likewise, in Purdy v. Delavan, 1 Caines 304, 312 (N.Y. 1803), there was an elaborate argument concerning the distinction between trespass and case, which nevertheless failed to mention any distinction in the level of liability between the writs. One judge simply concluded that "the boundary between case and trespass is faintly delineated, and not easily discerned."

Id. at 322. In Gates v. Miles, 3 Conn. 64, 67 (1819), the Connecticut Supreme Court also spelled out only procedural reasons for preserving the difference between the actions: "As no suit can be maintained for trespass *vi et armis* after three years, and as in trespass on the case there is no limitation, it becomes highly important to preserve the established boundaries between these actions."

An 1817 case in New York, Foot v. Wiswall, 14 Johns. 304, marks a significant turning point because it emphasizes how late it was before lawyers came to regard even the allegation of negligence in an action on the case as limiting liability. In a ship collision case, the plaintiff's counsel still argued the strict liability doctrine that the defendant had "acted at his peril." The action was brought in case, he pointed out, only because that form of action was required when a servant brought about an injury. "If the defendant had been at the helm of his boat at the time," he concluded, "there is no doubt that the plaintiffs could have recovered in an action of *trespass*; and there is no reason why they should not be equally entitled to recover in an action of *trespass on the case*, or for negligence; the distinction between the two actions being purely technical." *Id.* at 306. Nevertheless, the New York Supreme Court upheld the verdict for the defendant, clearly indicating for the first time it was for the plaintiff to prove and for the jury to determine whether the defendant had violated some standard of care. Three years later the court also upheld a trespass action for a collision only after minutely examining the evidence for proof of carelessness. Percival v. Hickey, 18 Johns. 257, 289-90 (1820). Thus, it is not surprising that by 1826, when the New York court elaborately explained why "it is still important to preserve the distinction between the actions" it failed to discuss any differences in substantive law, mentioning only technical differences in costs and pleadings. M'Allister v. Hammond, 6 Cow. 342, 344 (N.Y. 1826). For within a few short years, actions in both trespass and case had been simultaneously put to the test of negligence.

Outside New York, Benjamin L. Oliver, Jr., of Massachusetts was the first clearly to state that "without any negligence or fault whatever, it seems no action can be maintained" in either trespass or case. B. Oliver, *Forms of Practice; or American Precedents* 619 (1828).

147. 6 Cush. 292 (Mass. 1850).

148. *The Common Law* 84-85 (Howe ed. 1968).

149. Gregory, *supra* note 143, at 365.

150. See note 146 *supra*.

151. Cole v. Fisher, 11 Mass. 137 (1814). The court stated that if the parties agreed on the damages "a contest about the form of action will be of little avail to the defendant." For even if the defendant were successful in invoking the direct-indirect distinction to show that the plaintiff had brought the wrong action, "the expenses of [the first action] might be properly urged as a ground for further damages" in a second action. *Id.* at 139. More important, the court's impatience is associated with the beginning of the disintegration of strict liability under the pressure of the negligence

idea. The defendant had stepped out of his shop in order to discharge a gun for the purpose of drying it. The shot caused a horse standing across the highway to flee in fright and thereby to destroy a carriage to which it was harnessed. In an action in trespass, the court's analysis of whether the plaintiff had brought the proper writ already shows the transformation of the direct-indirect distinction. For the purpose of determining whether the injury was sufficiently immediate to allow trespass to lie, the court looked to whether "the horse and chaise were in plain sight, and near enough to be supposed to excite any attention or caution on the part of the defendant." *Id.* at 138. In short, the court had unconsciously shifted the criterion of "directness" to the negligence test of whether the defendant had adverted to the danger. It was groping for the modern distinction between intentional and negligent injuries.

152. Agry v. Young, 11 Mass 220 (1814). 2 *Dane Abr.* 487. The report of the case says nothing about amendment. Dane presumably learned of the procedure from one of the lawyers in the case.

153. Fales v. Dearborn, 1 Pick. 344 (Mass. 1823). See also Parsons v. Holbrook (1816) (unpublished records of Norfolk, Mass. Court of Common Pleas), in which plaintiff alleges in a trespass action that defendant "with force and arms negligently caused a carriage collision," suggesting the simultaneous conversion of the writ of trespass to a negligence standard.

154. Sproul v. Hemmingway, 14 Pick. 1 (Mass. 1833).

155. See note 202 *infra*.

156. On the basis of a diametrically opposed major premise, Professor E. F. Roberts has also argued that the significance of *Brown v. Kendall* had been exaggerated. "In fact," he maintains, "*Brown v. Kendall* did not remove strict liability from the law: it was not then there." Roberts, *supra* note 144, at 204. First, Roberts places too much emphasis on the tort excuse of "inevitable accident," finding in it a much earlier defense of no negligence. *Id.* at 203. Compare note 176 *infra*. There is no indication that in America "inevitable accident" was an earlier surrogate for the negligence principle. Second, Roberts simply "assume[s] that English and American tort law were pretty much parallel in their development" through the first half of the nineteenth century. *Id.* at 201. In fact, they were substantially different. See note 146 *supra*, note 177 *infra*.

In his *Elements of Law* (1835), Francis Hilliard, the Boston lawyer who was later to write the first Anglo-American treatise on the law of torts, shows no trace of recognition of a modern action for negligence. His only extended discussion of negligence is in connection with bailment. *Id.* at 101-02. He makes no distinction between actions in trespass and case in terms of whether negligence need be alleged, *id.* at 242-43, and his conception of negligence in the master-servant area is limited to the eighteenth century contractual notion of neglect. *Id.* at 30.

157. Hill & Denio 193 (N.Y. 1843) [Lalor supp. 1857]. Although Holmes acknowledged this case in *The Common Law* (1881), the romantic

role that has been assigned to *Brown v. Kendall* has fostered a tendency to ignore the significance of prior cases. It is true, however, that because of a changeover in court reporters, *Harvey v. Dunlop* was not published until 1857, seven years after Shaw's decision. In any event, that decision was every bit as self-confident as the Shaw opinion, and, more important, study of the prior New York cases underlines how this doctrine was merely the conclusion of a twenty-five year trend directed toward triumph of the negligence doctrine in that state.

158. See note 146 *supra*.

159. Lehigh Bridge v. Lehigh Coal & Navig. Co., 4 Rawle 8 (Pa. 1833).

160. Sullivan v. Murphy, 2 *Law Rep.* 247 (1839).

161. 1 *Commentaries* 431. Compare *id.* at 431 n.24 (Christian ed., New York 1832).

162. See note 142 *supra*.

163. In his lectures at the Litchfield Law School Judge Tapping Reeve elaborated upon Blackstone's example. "If the servant of a Blacksmith, while shoeing a horse, designedly lame the horse, both master and servant are liable. If he had lamed the horse, thro carelessness or want of skill, the master only would be liable. But in each of these cases if the master had done the act himself he would have been liable, and ought therefore to be liable when it is done by the servant. The Blacksmith is liable on the ground of an implied contract which he, and all other mechanics are under to perform the business of their trade in a workmanlike manner" (citing cases) Vol. I., p. 146 (ms. 2013, Treasure Room, Harvard Law School) (18??).

164. 1 *Laws of Connecticut* 223 (1795). *Cf.* M'Manus v. Crickett, 1 East. 106, 102 Eng. Rep. 43 (1800).

165. The only cases in which Swift writes of the "negligence" or "misconduct" of the servant are cases in which there is a status or contractual relationship between the master and the plaintiff. *Id.* at 223-24.

166. M'Manus v. Crickett, 1 East. 106, 102 Eng. Rep. 43 (1800); Morley v. Gaisford, 2 H. Bl. 441, 126 Eng. Rep. 639. But see Grinnell v. Phillips, 1 Mass. 530 (1805).

167. See J. Wigmore, "Responsibility for Tortious Acts: Its History II," 7 *Harv. L. Rev.* 382 (1894), 3 *Select Essays in Anglo-American Legal History* 520-33 (1909). 2 *Dane Abr.* 511-13. *Cf.* R. Morris, *Studies in the History of American Law* 238-39 (1963).

168. Surprisingly, this limited function of negligence reappears as late as 1848 in Simon Greenleaf's *Evidence*. The defendant is liable for a trespass, he wrote, "if it appear that the act was done by his direction or command, or by his *servant* in the course of his master's business, or while executing his orders with ordinary care" II, 579 (2d ed.). Writing in 1835, Francis Hilliard uses negligence in the master-servant context interchangeably with "neglect" or unintentional activity, not with carelessness. *Supra* note 156, at 30.

169. Bussy v. Donaldson, 4 Dall, 206, 208 (Opinion of Smith, J.) (Pa. 1800). See also Snell v. Rich, 1 Johns. 305 (N.Y. 1806).

170. 2 Bay 345, 1 Brev. 178 (S.C. 1802).

171. 2 Bay at 350.

172. 1 Brev. at 179-80.

173. Although both reporters were judges at the time, the two reports of the case have somewhat different emphases. The report of Bay suggests that the court slightly changed (or believed it was changing) the English rule, so that the master would not be liable "for any unauthorized or casual act committed without the knowledge or approbation of the master." 2 Bay at 350-51. The shorter report of Brevard does not indicate that there was any change in the English rule. 1 Brev. at 180.

174. 2 Bay at 350.

175. Beaulieu v. Fingham, Y.B. 2 H. IV, fo. 18, pl. 6 (1401). The plaintiff declared that the servant had "so negligently cared for his fire."

176. Tubervil v. Stamp, 1 Salk. 13, 91 Eng. Rep. 13 (1698); Beaulieu v. Fingham, Y.B. 2 H. IV. fo. 18, pl. 6 (1401). A. Ogus, "Vagaries in Liability for the Escape of Fire," 1969 *Cambr. L. Jo.* 104, 105-06. Compare J. Wigmore, "Responsibility for Tortious Acts: Its History III," 7 *Harv. L. Rev.* 441, 448-49 (1894); 3 *Select Essays* 511-12 (1909), and 11 W. Holdsworth, *A History of English Law* 606 (1938) with P. Winfield, "The Myth of Absolute Liability," 42 *L.Q.R.* 37, 46-50 (1926).

177. For a discussion of the extent to which the statute, 6 Anne c. 31, R.C. c. 58 (1707), affected the common law in England, see 11 Holdsworth *supra* note 176 at 607-08. St. George Tucker stated that the statute had no force in Virginia, 1 W. Blackstone, *Commentaries* 431 n.15 (Tucker ed. 1803) and I have been able to find no evidence that it was received in any state. For the colonial rule of absolute liability for fire, see R. Morris, *supra* note 167, at 242-44. For a nineteenth century American reiteration of the common law rule of strict liability, see Opinion of Atty. Gen. William Wirt, "Claim For Damage by Fire" (1819) in *Opinions of Attorneys General* 163-64 (1851).

178. See Wigmore, *supra* note 176.

179. 1 *Commentaries* 431.

180. 8 W. Holdsworth, *A History of English Law* 469 n.3 (1926).

181. The case can be read as merely applying one of the narrow excuses available under the old common law rule. Even in Turbervil v. Stamp, 1 Salk 13, 91 Eng. Rep. 13 (1698), the court stated that it would take evidence that the fire spread because of a sudden wind. On the other hand, the court in Snee v. Trice not only distinguishes between "accident" and "negligence" and seems clearly to be thinking in terms of a standard of care, but plaintiff's counsel argued primarily in terms of whether the slaves had adverted to the risk of danger. 2 Bay at 346-47.

182. Wingis v. Smith, 3 McCord 400 (S.C. 1825).

183. See, *e.g.*, Jewett v. Brown (Mass. 1797) (unpublished records of Essex Mass. Common Pleas); Washburn v. Tracy, 2 Chip. 128 (Vt. 1824).

184. Blin v. Campbell, 14 Johns. 432 (N.Y. 1817); M'Allister v. Hammond, 6 Cow. 342 (N.Y. 1826); Wilson v. Smith, 10 Wend. 324 (N.Y. 1833); Hartfield v. Roper, 21 Wend. 615 (N.Y. 1839).

185. Williams v. Holland, 10 Bing. 112, 131 Eng. Rep. 848 (1833).

186. Winfield & Goodhart, *supra* note 145, at 359.

187. I have found only one difference that may have made an action on the case more attractive to plaintiffs than trespass. In Connecticut, there was a three year limitation on bringing trespass actions, but no limitation for case, Gates v. Miles, 3 Conn. 64 (1819), but I have found no other decision in any state that indicates this was a general advantage. Another difference might also have made case more attractive, if it had been followed. In *Adams v. Hemmenway,* 1 Mass. 145 (1804), the court held that case and not trespass lay against a defendant who fired at and wounded the plaintiff's ship master, so that the vessel was forced to turn back from its voyage. The plaintiffs sued for the expected value of the voyage. Even though there was also direct injury, the court held that the plaintiffs could not recover in trespass for the consequential injuries. However, there is no indication that this rule was ever observed, even in Massachusetts. 2 *Dane Abr.* 487-89. I have been able to find no other American case in which the doctrine of *Adams v. Hemmenway* was applied, and it was often rejected. See, *e.g.,* Johnson v. Courts, 3 H & McH. 510 (Md. 1796); Wilson v. Smith, 10 Wend. 324, 328 (N.Y. 1833). See also Taylor v. Rainbow, 2 H & M 423, 428, 441-43 (Va. 1808), in which the court rejects the argument by plaintiff's counsel that he should be allowed to sue in case for a direct injury because otherwise the plaintiff could not recover for consequential damages in trespass. Accord Riddle v. Prop. of Locks, 7 Mass. 169, 172 (1810). In the only other case I have been able to find that resembles *Adams v. Hemmenway,* the court, while nonsuiting the plaintiff for suing in trespass for consequential injury arising from a direct injury, stated that the defect would have been cured if the plaintiff had made a special plea for consequential damages. Robinson v. Stokely, 3 Watts 270 (Pa. 1834). On the other hand, there were definite secondary advantages for plaintiffs who sued in trespass. They gained certain pleading advantages in trespass, since the defendant often was required to answer with a special plea. Indeed, the books are filled with cases of defendants who stumbled amid the mysteries of special pleading to a declaration in trespass. See M'Allister v. Hammond, 6 Cow. 342, 346 (N.Y. 1826), which concluded that the action on the case "is altogether the most favorable to the defendant." A second advantage is that the plaintiff often needed a smaller damage recovery in trespass to receive an award of the costs of litigation than if he sued in case. *Ibid.* Another difference is that some courts required proof of actual damage in case, while they allowed the jury to estimate the damage in trespass. Cole v. Fisher, 11 Mass. 137, 139 (1814).

188. Leame v. Bray, 3 East. 593, 102 Eng. Rep. 724 (1803); Scott v. Shepherd, 2 W. Blackstone 892, 96 Eng. Rep. 525 (1773) (Opinion of Blackstone, J.).

189. See, *e.g.,* Taylor v. Rainbow, 2 H & M 423, 440 (Va. 1808) (Opinion of Tucker, J.); Gates v. Miles, 3 Conn. 64, 75 (dissenting opinion).

190. Dalton v. Favour, 3 N.H. 465 (1826).

191. Formally, the "not guilty" plea to a trespass action only denied that the trespass had occurred. Yet, it seems obvious that the real issue for the jury in virtually all cases was not whether the defendant had actually collided with the plaintiff, but whether, in fact, the collision was due to the defendant's carelessness. Thus, for example, in Barber v. Backus (1824) (unpublished records of Berkshire (Mass.) Court of Common Pleas), the defendant pleaded to a trespass action that "if any hurt or damage happened to . . . [plaintiff] or his wagon, the same was occasioned by the wrongful act of [the plaintiff]." And the jury found that the "defendant is not guilty of the trespass alleged," even though he quite obviously had admitted that a collision had occurred. See also Oomen v. Wellington (1828) (unpublished records of Suffolk, Mass. Court of Common Pleas); Dunn v. Bernard (Sept. 1823) (unpublished records of Norfolk, Mass. Court of Common Pleas) and Wilbore v. Pickins (March 1816) (unpublished records of Bristol, Mass. Common Pleas.), in which it seems equally unlikely that the jury merely found that no collision had taken place. Thus, it is no surprise that in 1823, the Massachusetts Supreme Court should casually refer to a trespass action for "negligently driving" a carriage. Fales v. Dearborn, 1 Pick. 344 (Mass. 1823). Similarly, in Percival v. Hickey, 18 Johns. 257 (N.Y. 1820), the New York court took it for granted that proof of carelessness was necessary if the plaintiff was to prevail in a ship collision case. In short, the negligence standard had already developed an "underground" existence. The first legal writer to recognize the underground consensus that had developed concerning negligence was Benjamin Oliver, Jr., who wrote, in 1828: "It seems reasonable, that, if two vessels run foul of each other in a dark night, one can maintain no action against the other; for, if otherwise, then if both were injured, each might maintain an action against the other; which would be absurd; and so for the same reason, if both parties are to blame, neither should be allowed to bring an action against the other." B. Oliver, *supra* note 146, at 619.

192. The first English contributory negligence case is Butterfield v. Forrester, 11 East. 60, 103 Eng. Rep. 926 (1809). The first American case that might be described as involving contributory negligence as a matter of law is Bush v. Brainard, 1 Cow. 78 (N.Y. 1823), but the most influential decision is Smith v. Smith, 2 Pick. 621 Mass. 1824). There is a dictum recognizing a doctrine of contributory negligence in Farnum v. Concord, 2 N.H. 392 (1821). There is also language suggestive of contributory negligence in Wood v. Waterville, 4 Mass. 422 (1808) and Gorden v. Butts, 1 Penn. 334 (N.J. 1807), but I believe these cases can best be understood in other terms. There was a defense of contributory negligence in Bindon v. Robinson, 1 Johns. 516 (N.Y. 1806), but the case was decided on a technicality of pleading.

193. Washburn v. Tracy, 2 Chip. 128 (Vt. 1824). Lane v. Crombie, 12 Pick. 177 (Mass. 1831) involved the running down of a pedestrian.

194. Smith v. Smith, 2 Pick. 621 (Mass. 1824); Thompson v. Bridgewater, 7 Pick. 188 (Mass. 1829); Howard v. N. Bridgewater, 16 Pick. 189

(Mass. 1834); Adams v. Carlisle, 21 Pick. 146 (Mass. 1838). For other states, see Farnum v. Concord, 2 N.H. 392, 393 (1821) (dictum); Harlow v. Humiston, 6 Cow. 189 (N.Y. 1826).

195. Not only did the overwhelming number of early American contributory negligence cases arise out of highway obstructions, but so did the first English contributory negligence decision, Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809).

196. This explains why the burden of proving the absence of contributory negligence was originally placed on the plaintiff. Smith v. Smith, 2 Pick. 621 (Mass. 1824); Lane v. Crombie, 12 Pick. 177 (Mass. 1831). It was regarded as an essential part of a good cause of action that the plaintiff show he had not caused the injury.

197. 2 S. Greenleaf, *Treatise on the Law of Evidence* 451-52, 580, 583 (2d ed., 1848); T. Sedgwick, *supra* note 46, at 146.

198. W. Malone, "The Formative Era of Contributory Negligence," 41 *Ill. L. Rev.* 151 (1946).

199. The one possible exception is the South Carolina fire case, *Snee v. Trice,* discussed pp. 92-93 *supra*. Since that case stands so completely alone, however, it is perhaps more sensible to view it as limited to the special problem of liability of masters for the injuries of their slaves.

200. 14 Pick. 1 (Mass. 1833).

201. The primary question in the case was whether a nonnegligent defendant was liable for a ship collision caused by the negligence of a steamboat he had hired to bring him into shore. Although the problem of contributory negligence of the plaintiff was absent, the court was still able to view the problem of determining carelessness as involving only a question of causation. Hence, the decision is hardly a ringing statement of modern negligence principles.

202. See Worster v. Prop. of Canal Bridge, 16 Pick. 541 (Mass. 1835) (one count for negligence not founded on a statute); Barnard v. Poor, 21 Pick. 378 (Mass. 1838); Howland v. Vincent, 10 Met. 371 (Mass. 1845); Tourtellot v. Rosebrook, 11 Met. 460 (Mass. 1846). Note the time lag between these decisions and Benjamin Oliver's 1828 statement insisting that proof of negligence need be shown. B. Oliver, *supra* note 146, at 619.

203. Lehigh Bridge v. Lehigh Coal & Navig. Co., 4 Rawle 8 (Pa. 1833).

204. The earlier cases, all in New York, were Clark v. Foot, 8 Johns. 421 (1811); Panton v. Holland, 17 Johns. 92 (1819); Livingston v. Adams, 8 Cow. 175 (1828).

205. Ten Eyck v. Delaware & Raritan Canal Co., 3 Harr. 200, 203 (N.J. 1841); Beekman v. Saratoga & Schenectady R.R., 3 Paige 45 (N.Y. 1831).

206. Stowell v. Flagg, 11 Mass. 364 (1814). See also Varick v. Smith, 5 Paige 137, 143-47 (N.Y. 1835).

207. 14 Conn. 146.

208. *Id.* at 156-57.

209. Clark v. Foot, 8 Johns. 421, 422 (1811). I have put to one side Snee v. Trice, 2 Bay 345 (S.C. 1802) as primarily involving the liability of mas-

ters for acts of their slaves. In any case, it had little influence on the course of development of American law.

210. See p. 93 *supra*.

211. Barnard v. Poor, 21 Pick. 378 (Mass. 1838), is a decision on the measure of damages for injury from fire, although all parties seem to agree that the defendant's carelessness must be shown for him to be liable. Wilson v. Peverly, 2 N.H. 548 (1823) also assumes that a servant's negligence is necessary to establish the master's liability for fire, although the case denies recovery on the basis of a very narrow construction of the master's liability.

212. Jordan v. Wyatt, 4 Gratt. 151 (Va. 1847); Tourtellot v. Rosebrook, 11 Met. 460 (Mass. 1846); Ellis v. Portsmouth & Roanoke R.R., 24 N.C. 138 (1841).

213. The only possible exception is Vermont, which established contributory negligence as a bar to recovery in 1824, Washburn v. Tracy, 2 Chip. 128 (1824), and denied recovery in trespass for personal injuries caused without negligence in 1835, Vincent v. Stinehour, 7 Vt. 62 (1835). Yet, neither of these cases involved economically important events, and the subject did not become of economic significance until Claflin v. Wilcox, 18 Vt. 605 (1846).

214. 1 Beven, *Principles of the Law of Negligence* 679 (2d ed. 1895).

215. A. Hirschman, *The Strategy of Economic Development* 71 (1958). For an excellent discussion of the application of welfare economics to economic history, see H. Scheiber, *The Ohio Canal Era: A Case Study of Government and Economy 1820-1861* 391-97 (1969).

216. R. Fogel, *Railroads and American Economic Growth* 208-24 (1964). Fogel's conclusions have been questioned in A. Fishlow, *American Railroads and the Transformation of the Ante-Bellum Economy* 57-62 (1965).

217. O. Handlin and M. Handlin, *supra* note 39, at 65, 81-85.

218. D. Sowers, *The Financial History of New York State from 1789 to 1912* 114 (1914). Between 1815 and 1826 a small property tax was enacted to pay off the state debt. *Id.* at 115. The general property tax was instituted in 1843, *id.* at 123, and it accounted for $1.26 million dollars or 40 percent of the state budget in 1854. *Id.* at 326-27. For a discussion of an aborted plan to impose a property tax in areas to be benefited by the Erie Canal, see N. Miller, *supra* note 40, at 68-70.

219. L. Hartz, *supra* note 50, at 17-18, 299. The revived interest in the history of state intervention by New Deal historians such as the Handlins, Hartz, and George Rogers Taylor has skewed the literature of antebellum economic history. These writers tended indiscriminately to lump together all forms of governmental financing of enterprise, since they do illustrate the legitimacy of state intervention. But they did not give equal attention to the effects that different forms of financing had upon the distribution of wealth. See, *e.g.*, G. Taylor, *supra* note 49, at 48-52, 376.

220. For the general increase in taxation, see G. Taylor, *supra* note 49, at 375-76.

221. The better-known attack on state financial aid to enterprise is discussed by L. Hartz, *supra* note 50, at 113-26.

222. The one partial exception is the law of nuisance, which even in the twentieth century has continued to be infused with strict liability conceptions. See W. Prosser, "Nuisance Without Fault," 20 *Tex. L. Rev.* 399 (1942). But see P. Keeton, "Trespass, Nuisance, and Strict Liability," 59 *Col. L. Rev.* 457 (1959). The vitality of the strict liability tradition in nuisance explains the blasting cases that began to appear around 1850. In Hays v. Cohoes, 2 N.Y. 159 (1849), the New York Supreme Court held that the defendant was liable even in the absence of negligence for a blasting operation on his own land which caused damage by throwing stone and debris onto an adjoining building. The court did not rely on the fact that the action involved a physical invasion of the plaintiff's land, and I think it a mistake to place any emphasis on the trespass. See C. Gregory, "Trespass to Negligence to Absolute Liability," 37 *Va. L. Rev.* 359, 370-72 (1951). All the cases the court cited involved nuisance actions. Indeed, only four years later the Maryland high court also held a defendant liable in a blasting case in which there was direct injury, and the express theory was that he had committed a nuisance. Scott v. Bay, 3 Md. 431 (1853).

223. Wilde v. Minsterly, 2 *Rolle Abr.* 564 (1639) overruling Slingsby v. Barnard, 1 Rolle Rep. 430, 81 Eng. Rep. 586 (1617).

224. Brown v. Robins, 4 H & N 186, 157 Eng. Rep. 809 (1859); Stroyan v. Knowles, 6 H & N 454, 158 Eng. Rep. 186 (1861).

225. 12 Mass. 220, 224 (1815).

226. *Id.* at 224-25.

227. See Lasala v. Holbrook, 4 Paige 169 (N.Y. 1833).

228. 12 Mass. at 228.

229. *Id.* at 230.

230. F. Bohlen, "The Rule in Rylands v. Fletcher," 59 *U. Pa. L. Rev.* 298, 373, 423 (1911). For an American water case reflecting these views, see Evans v. Merriweather, 4 Ill. 492 (1842).

231. See Lasala v. Holbrook, 4 Paige 169, 171 (N.Y. 1833), where the distinction between "natural" and "artificial" activity is made explicit.

232. Panton v. Holland, 17 Johns 92 (N.Y. 1819); Lasala v. Holbrook, 4 Paige 169 (N.Y. 1833).

233. Not only was this extreme view later reaffirmed in Massachusetts, Foley v. Wyeth, 2 Allen 131 (1861), but the case was understood by contemporaries as going this distance. In his note to *Thurston v. Hancock*, first published in 1833, Benjamin Rand criticized the decision for denying liability even for unreasonable activity. "Why might not the plaintiff as lawfully build on the confines of his own lands in a populous and crowded city, as the defendant could dig on the confines of his land?" he asked. "If the plaintiff, then, had lawfully erected a building on his own lands, on a safe and proper foundation, so as not to require any extraordinary support from the adjoining soil, and to allow the defendant without prejudice to use his lands for ordinary purposes, was it lawful for the defendant, by digging a pit in an unusual manner, and to an extraordinary depth, and for

no ordinary purpose, in his own soil, to undermine or loosen the foundation of the building erected by the plaintiff? It is said, the defendants had a right to make what advantage they could of their own property. Had not the plaintiff the same right? Having exercised this right in a reasonable way, had the defendants any right to use their property in an unusual manner, so as to injure him?". 12 Mass. at 228 n. (1865 ed.).

234. Radcliff's Executors v. Mayor of Brooklyn, 4 N.Y. 195, 203 (1850).

235. Balston v. Bensted, 1 Camp. 463, 170 Eng. Rep. 1022 (1808); Dexter v. Providence Aqueduct Co., 1 Story 387 (U.S.C.C.A. 1832); Smith v. Adams, 6 Paige 435 (N.Y. 1837).

236. The term is used by Perloff and Wingo, "Natural Resource Endowment and Regional Economic Growth" in J. Friedmann and Alonso, eds., *Regional Development and Planning* 215, 239 (1964).

237. 18 Pick. 117, 121 (Mass. 1836) quoting 1 Domat's *Civ. Law* Tit. 12 §2.

238. See the brilliant discussion in the leading English case of Acton v. Blundell, 12 M & W 324, 152 Eng. Rep. 1223 (1843).

239. 25 Penn. St. 528, 532 (1855).

240. 12 Ohio St. 294, 311 (1861).

241. Ellis v. Duncan, 21 Barb. 230, 235 (N.Y. 1855).

242. Meeker v. East Orange, 77 N.J.L. 623, 637-38 (1909) (emphasis in original).

243. "The Rights and Obligations of Riparian Proprietors," 7 *Am L. Reg.* 705, 716 (1859).

244. See Pickard v. Collins, 23 Barb. 444, 459 (N.Y. 1856); Chatfield v. Wilson, 28 Vt. 49, 56-58 (1856).

245. Pickard v. Collins, 23 Barb. 444, 459 (N.Y. 1856).

246. J. W. Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States*, 7-10 (1956).

247. Haar and Gordon, "Legislative Change of Water Law in Massachusetts" in D. Haber and S. Bergen, eds., *The Law of Water Allocation in the Eastern United States* 1, 25 (1958); Ellis, "Some Legal Aspects of Water Use in North Carolina," *id.* at 189, 292; Arens, "Michigan Law of Water Allocation," *id.* at 377, 393.

248. See, *e.g.*, Martin v. Riddle, 26 Penn. St. 415 n. (1848); Kauffman v. Griesemer, 26 Penn. St. 407 (1856); Butler v. Peck, 16 Ohio St. 334 (1865).

249. See, *e.g.*, Buffum v. Harris, 5 R.I. 243 (1858); Goodale v. Tuttle, 29 N.Y. 459 (1864).

250. Luther v. Winnisimmet, 9 Cush. 171 (Mass. 1851); Flagg v. Worcester, 13 Gray 601 (Mass. 1859).

251. Gannon v. Hargadon, 10 Allen 106, 109 (Mass. 1865).

IV. COMPETITION AND ECONOMIC DEVELOPMENT

1. Penn. Stat. ch. 980 (1781) *repealing* Penn. stat. ch. 472 (1761).