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The Mind and Heart of Progressive Legal Thought

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**The Mind and Heart
of Progressive
Legal Thought**

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**THE UNIVERSITY OF IOWA
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**The Mind and Heart
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Herbert Hovenkamp

Ben V. and Dorothy Willie Distinguished Professor

The University of Iowa College of Law

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Through the generosity of donors of unrestricted gifts to the University of Iowa Foundation, the Presidential Lecture series provides an opportunity for distinguished members of the faculty to present significant aspects of their work to members of the University community and to the general public. The University has established this annual series to encourage intellectual communication among the many disciplines that constitute the University of Iowa, and to provide a public forum for University scholarship, research, and creative achievement.

**The Mind and Heart
of Progressive
Legal Thought**

Herbert Hovenkamp

Progressive legal thought is a set of ideas and institutions that emerged in the United States during the late nineteenth century and dominated American law until around 1960. Thus Progressive legal thought far outlasted the American Progressives, a political and intellectual movement whose influence was felt mainly before 1920. It also includes liberal intellectuals who lived during the more conservative 1920s, who dominated the New Deal, and became comfortable during the optimistic post-war period of rapid economic growth. Although the intellectual end of Progressive legal thought came around 1960, remnants survive to this day. Many of those in the Democratic Party regard themselves as the heirs of the Progressive legacy. Indeed, to understand why Progressive legal policy lasted as long as it did and why it collapsed may help us understand the present difficulties of so-called political liberalism in the United States.

The greatest achievement of Progressive legal policy is the modern welfare state. What characterized Progressive legal thought is a belief that government regulation often allocates resources better than private markets can. Because the common law is poorly equipped to redistribute wealth or manage the economy, most Progressives were strongly committed to legislation rather than changes in judge made law to facilitate their goals. The Progressives also had a vision of government that was essentially "republican" rather than libertarian, or contractarian. By republican, which is spelled with a small "r," I mean that Progressives believed that government officials should define the best policy by using economics, the social sciences, ethics, or other objective criteria. They did not believe that policy making was an exercise in measuring the preferences of individual citizens by tabulating their votes. Finally, and perhaps most importantly, Progressive legal thought was dedicated to the proposition that total social welfare would be increased if wealth were distributed more evenly across society, and that the state should take an active role in such redistribution.

The beginning and end of Progressive legal thought are difficult to locate, but dates and events help place ideas in context. For the beginning I suggest 1871, or the publication date of Charles Darwin's *The Descent of Man*, which linked the human species to the theory of evolution.¹ For the end the year that comes to mind is 1960, the publication date of Ronald Coase's *The Problem of Social Cost*,² the text that re-invigorated the law's renewed interest in the "unregulated" market. But there are alternative choices: James M. Landis's *Report on Regulatory Agencies to the President Elect* in 1960³ has

become a symbol of our loss of faith in the Progressive vision of government regulation.⁴ The critique of democratic process made by Kenneth Arrow in the late fifties and sixties,⁵ and of James Buchanan and Gordon Tullock in 1962⁶ did much the same for political decision making generally. Although these documents differed substantially from one another, each worked to convince us that government process is unstable or incoherent, or that regulation will not find the public interest, but is more likely to be captured by special interest groups. Each of these critiques represents a sharp turn from the essentially republican vision of government that dominated Progressive legal thought, to a more classical view emphasizing the efficiency and robustness of private markets, and the many imperfections of public processes.

Although many things can be said of Progressive legal thought, in this lecture I intend to focus on the following propositions: *first*, Progressive legal thought originated in a union of two powerful western scientific ideas from the second half of the nineteenth century: the theory of evolution by natural selection and the theory of marginalism in economics. *Second*, notwithstanding its strongly economic origins, Progressive legal thought aligned itself with the emerging social sciences, mainly sociology and psychology. After 1930, it increasingly rejected the prevailing economic doctrine. The result was a separation of legal and economic thought that proved to be more extreme than at any point in American history. *Third*, the durability and political success of the Progressive movement owed much to its historical concern with the distribution of wealth; once the Progressive coalition began to think of government entitlements in terms unrelated to wealth, its ideology became less coherent and more subject to internal division. That was the beginning of the end for Progressive legal theory.

The progressive legal movement followed a period of legal thought generally called "classical." Classical legal thought was characterized by a rhetoric that viewed the law as coming from a transcendent source, as if it existed apart from the courts and legislatures that formulate its rules. This rhetoric described private legal rights and obligations as self-defining and self-executing: courts had only to apply a body of determinate rules to a private legal dispute, much as an engineer might determine the load that a bridge could bear, or a paleobotanist might determine the age of a tree. In the resolution of a private legal dispute, such as a contract case or a disagreement about ownership of property, the state was regarded not as

“policy maker” but only as arbitrator of pre-existing rights.

Some law was obviously tied to state policy making, however, and even legal classicists could not ignore its political character. Legal classicism borrowed from William Blackstone, the important eighteenth-century writer on the common law, a sharp distinction between private law and public law. In private law the state administered independently established rules, but in public law it *made* the rules. This realm of public law included most criminal law, much of constitutional law, and law explicitly related to taxes or other “macro” elements of policy.

Although the nineteenth century was a period of rapid economic and social change, classical legal thought retained a conception of law as static, or permanent. Rules must be applied to new situations, but they seldom needed to be rewritten. For example, the earliest casebooks for legal students, which began to appear in the 1870s, presented legal rules as absolutely ahistorical. Harvard Law School Dean Christopher Columbus Langdell wrote the first casebook on contracts in 1871. In it he presented contract law as an essentially timeless enterprise. There was no acknowledgement that the law tracked economic or political policy or doctrine; indeed, there was little acknowledgement that the law changed at all over time.

Two intellectual revolutions prompted the end of classical legal thought: Darwinism in the biological and social sciences, and marginalism in economics. Darwinism has received much attention from intellectual and legal historians, and its influence is hard to exaggerate. By contrast, the influence of economic marginalism has often been overlooked. To me, this seems an unjustified imbalance that seriously underestimates the economic content of the Progressive legal revolution. The principal concerns of law have always been economic, and the Progressive legal revolution was, at bottom, a revolution in economic ideas.

Darwinism, or the theory of evolution by natural selection, was Charles Darwin’s attempt to account for the evolution of species. The theory was that nature produces many more offspring than any particular environmental niche can accommodate; further, one species continually preys on another. Individuals that by chance inherit characteristics best suited for survival in their particular environment tend to pass these characteristics on to their own offspring. The others die and their less resilient characteristics vanish.

Darwinism had a powerful influence on emergent social science,⁷ and particularly on American political and legal thought.⁸ Like many great ideas, Darwinism produced both a right wing and a left. On the right were a group of intellectuals and social critics called the "Social Darwinists," whose ideas cluttered the cultural landscape during the late nineteenth and early twentieth centuries. The Social Darwinists were clearly important, although many today think their influence has been exaggerated. Social Darwinists believed that evolution was progressive, in the sense that the surviving species were physically, mentally, and even morally superior to those that did not survive; but they also believed that evolutionary progress could run its course only if the state restrained itself from interfering. State policy designed to provide support for the poor or other inferior members of society was well intended, but its most enduring consequence was to burden society with those that nature would have discarded. As a result, the evolutionary progress of humanity would be thwarted. Social Darwinists objected to such legal institutions as progressive income taxation, workers' protective legislation such as wage-and-hour laws, or poor relief. All of these were thought to undermine the natural evolutionary process.

The left wing Darwinians were called Reform Darwinists. Their distinguishing belief was that human beings are unique in the evolutionary process. While all organisms are evolving, they argued, only humans are aware of that fact and in a position to control, or "manage," the evolutionary process. Unlike the Social Darwinists, who believed in a minimalist state, the Reform Darwinists were statist. That is, they believed that the state should be actively involved in guiding the evolutionary process to produce the best individuals possible, and to seek to improve the lives of those who were not. The Darwinism of Progressive legal thought was entirely Reform Darwinism, not Social Darwinism.

Although Darwinian ideas were very powerful at the turn of the century, they were no more powerful than the concept that revolutionized economic thought during the same years: namely, marginalism, or the idea that preference or willingness to pay was the ultimate determinant of value. Marginalism originated in the writings of the English utilitarians. Already in the 1790s, Jeremy Bentham examined the economic implications of utilitarianism and developed an embryonic theory of marginal utility.⁹ According to Bentham, everyone experiences declining marginal utility for almost any good, including wealth. For example, although a person

experiences increasing total value from additional wealth, the rate of increment declines as a person has more — that is, a person's millionth dollar gives considerably less satisfaction than her first dollar did. In addition, under the theory of marginal deterrence, the state can limit greater wrongs by varying penalties. For example, if theft and murder are both punishable by death, the robber has little incentive not to kill his victim. But if theft is punishable by five years in prison and murder by death, the robber may decide that the former crime is worth the risk but not the latter. This idea of varying the penalties in order to steer behavior applied equally to civil law and criminal law — for example, to the penalties for breaching a contract as much as the penalties for committing a robbery.

Marginalism became a coherent movement within economic theory in the 1870s. In 1871 Englishman William Stanley Jevons wrote his *Theory of Political Economy*,¹⁰ which sought to combine marginal utility theory with classical political economy. Jevons disputed the nearly sacred notion that value is determined by the amount of labor invested in something. Rather, he wrote, "value depends entirely on utility," which is purely subjective and could be totally unrelated to previous investment.¹¹ From the theory of diminishing marginal utility, Jevons developed the concept of equal utilities — that a person applying his money to numerous commodities will purchase an amount of each up to the point that he derives the same marginal utility from all.¹² For example, if a person currently prefers apples to pears, he will purchase more apples until the utility of apples falls to that of pears. At that point he will purchase both unless he receives more utility from something else.

Under marginalism, the economic theory of value became entirely subjective, based on individual preference rather than any characteristic inherent in the good itself. As a result, marginalism forced a shift in the methodology of economics from the measure of *things* to the measure of human behavior. One no longer measured value by looking at the amount of something that was available or the historical cost of producing it but instead would measure individual willingness to pay.¹³ This shift in emphasis affected not only economics, but all of the social sciences.

Marginalism was the most important revolution in Anglo-American economic thought since Adam Smith. Indeed, marginalism seemed to explain nearly every puzzle that had frustrated economists in the past. For example,

economists of the eighteenth and nineteenth centuries had been frustrated by the technical problem of defining and measuring cost, and determining the relationship between the cost of something and its value. Why is water cheap, even though it is essential for survival? Why are diamonds expensive, even though they are non-essential luxuries? Why does someone whose favorite dish is peach ice cream not purchase it to the exclusion of all other foods?

Marginalism's solution to all these problems was that a person's desire for any good diminishes as he has more. Even the person who dearly loves peach ice cream will probably not be willing to pay as much for his second quart as his first, and certainly not as much for his fiftieth quart as his first. By plotting the decline in utility for each individual good, the marginalist could describe the precise mixture of goods that any person or firm would purchase.

Within economics, this simple and rather obvious insight provided a basis for a general theory of consumer demand, a theory of human incentives, a theory of value, a theory about production and consumption, and a theory of costs. All of these could apparently be quantified with great mathematical precision. Marginalism enabled a revitalized economics that became more coherent and rigorous than ever before.

Importantly for legal policy, just as Darwinism almost immediately stretched beyond the biological sciences, so too marginalism reached beyond economic science. Marginalism promised a theory of individual behavior and human rationality. It purported to explain both how human incentives could be controlled, and how human welfare could be improved. These perspectives lay at the heart of the Progressive revolution in legal thought.

Progressive legal thought was thus inspired by a mixture of Darwinism and marginalism, which produced this combination of ideas:

- (1) human beings, like other biological organisms, are evolving creatures;
- (2) human beings differ from other organisms in that they are capable of "managing," or steering, the evolutionary process to suit their purposes;
- (3) individuals have needs and desires for goods, but the intensity of these needs and desires diminishes as one accumulates more;

(4) humans respond to incentives by comparing utilities “at the margin” — that is, for any contemplated action, we compare the incremental gains against the incremental losses;

(5) legal policy can control conduct by metering rewards or penalties accordingly; and

(6) homogeneity among individuals dictated by the evolutionary process makes it possible to compare utilities across persons.

The result of this collection of ideas was a rather complete and coherent theory of human choice and public policy. Economic marginalism and Reform Darwinism were closely intertwined as policy ideas. Darwinism provided the biological foundations for the view that human beings are basically the same, with similar needs. Marginalism, by contrast, provided a mechanism for evaluating individual preferences that could be quite diverse.

Increasingly after 1930, however, Progressive legal theory and marginalist economic theory began to diverge. While Progressives tended to emphasize the implications of marginalism for social welfare, economics became increasingly dominated by marginalist inquiries into individual value and incentives, and increasingly skeptical about the claimed relationships between marginalist economic theory and social welfare.

For the Progressives, the schedule of an individual’s wants or needs was entirely a product of evolution. Indeed, human utility, or value, was nothing other than the instinct for survival. Since humans are of a single species, their welfare needs were thus similar to one another. This, to use the language of economics and philosophy, made interpersonal comparisons of utility possible and desirable. Progressives believed that the principle of diminishing marginal utility implied that the state could make the world a better place by equalizing wealth. If wealth was subject to diminishing marginal utility, then it would seem that the poor person valued his last dollar by much more than the wealthy person. The state could increase total welfare by equalizing wealth — by taking a few dollars from the wealthy person, for whom they produced little incremental satisfaction, and giving them to the poor person, for whom they promised basic survival needs. For example, Progressive Edwin R.A. Seligman’s defense of the progressive income tax, charging a higher rate to people with higher incomes, was that the State would convert one person’s excess luxuries into another person’s necessities.¹⁴ Consistent

with this theory the Progressives favored not only a progressive income tax, but also workers' compensation laws that automatically gave pensions to workers disabled by on the job injuries; minimum wage and maximum hour legislation; and legislation encouraging the formation and activities of labor unions. All of these were thought to make the laboring classes better off at the expense of the entrepreneurial wealthy.

Increasingly, however, economists became deeply skeptical about any state policy of re-adjusting fortunes in this way. For them, marginalism was a theory of individual desire and behavior but not a theory about the best distribution of wealth. In an effort to add mathematical rigor to their discipline, most economists found it necessary to divorce the concept of the human utility from the Darwinian instinct for survival. Utility, or preference, was thought to be entirely unique to each individual and not scientifically comparable from one person or another. For example, although one person might make her own ranking in which she preferred an apple to a pear, she could never be sure that her own preference for an apple was stronger or weaker than someone else's preference. As a result, one could not use economics to show that transfers of wealth from the rich to the poor would increase total economic welfare.¹⁵

Increasingly after the 1930s academic economics took the view that the distribution of wealth was not part of the scientific concern of economics. Progressive legal thinkers, by contrast, clung tenaciously to a form of welfare liberalism which regarded the value of interpersonal utility comparisons as virtually beyond dispute. The result was the nearly complete separation of law and economics — a separation which was to continue until the 1960s, when the modern law and economics movement inspired a much more market-oriented view of law that was completely inconsistent with Progressive legal thinking.

Not all legal intellectuals were enamored of the Progressive legal ideology. Oliver Wendell Holmes, Jr., was as thoroughly marginalist as any Progressive. But like the economists, he emphasized the impact of marginalism on individual incentives and behavior, and discounted its relevance to wealth redistribution. Holmes's great work, *The Common Law* (1881) was devoted mainly to studying the common law's system of incentives. For example, he argued that a penalty for breaching a contract is nothing more than the price of the breach. No moral stigma attaches to it. The firm or individual

must simply decide which course is best by comparing the cost of performing a contract with the cost of breaking it. The same principal explained tort law, Holmes explained: we continually compare the cost of taking precautions with the costs of anticipated losses that more careful behavior might have prevented. Holmes virtually rewrote the common law's system of individual incentives along marginalist lines.¹⁶ But throughout his life Holmes remained extraordinarily skeptical about state programs designed to improve the lives of the poor and laboring classes.

The separation of law and economics in Progressive legal thought was hastened by the Progressives' growing disenchantment with the unregulated market. Progressives doubted the efficacy of markets in a way that no group of American legal thinkers ever had. During their lifetimes they had witnessed technological innovations and a mania for mergers that appeared to transform American industry from one of hundreds of competitive producers to tight oligopolies of a few giant firms.¹⁷ They had also witnessed the dramatic rise of the family fortunes of the masters of this new wealth, such as the Morgans and the Rockefellers, just as they saw the equally dramatic rise of large scale urban poverty. For the Progressives, the market was at fault on both counts. First, it produced noncompetitive business structures. Second, it transferred wealth, although in the wrong direction — to those who already had a great deal, and away from those who were already impoverished.

One of the most durable and controversial contributions of Progressive legal thought was its distrust of the market, and its faith that the government agency, whose salaried officials did not profit from their decisions, could regulate the economy better. In two stages, first during the Progressive Era and later during the New Deal, Progressive policy makers erected the modern administrative state which removed great parts of the economy from free market control and subordinated concerns for the efficient use of resources to other values that were much more difficult to articulate. Even in areas such as business regulation and antitrust, where one would expect traditional economic concerns to dominate, the articulated concern became one of leveling the playing field as between big and little firms, often at the expense of substantial inefficiencies in production and distribution and higher consumer prices.¹⁸

The political culmination of Progressive legal thought was the Great Society of the Lyndon Johnson era in the mid-1960s. But intellectuals had already

begun to doubt. They began to argue that regulatory agencies are costly to operate and often prone to error, even under the best of circumstances. Further, the best of circumstances rarely obtained. Political scientists and others in related disciplines began to emphasize the power of special interests, other serious imperfections in the political process, and the inability of majority voting to produce stable results that could be said to maximize the social welfare.¹⁹

The dramatic expansion of civil rights that accompanied the Great Society of the 1960s really marks the end rather than the beginning of an era. Intellectually, Progressive legal policy had already run out of gas and a new regime had turned the study of government back to the premises of individual preference and the social contract.²⁰ The study of legal conflict turned its focus back to private bargaining in unregulated markets.²¹

Why did the Progressive political coalition last as long as it did, and why did it finally fall apart? Unlike the welfare liberalism of the Democratic Party since the 1960s, Progressive legal thought was dominated by a single agenda item: maldistribution of wealth and the resulting inequities and suffering visited mainly on low income workers and the unemployed. Both the Progressive coalition of the turn of the century and the New Deal coalition of the 1930s and 1940s were relatively cohesive because their principal political concerns were economic and were generally addressed to the wage earner, the unemployed, the underemployed poor, or the elderly poor. In a political system where each person gets one vote and wealth is inequitably distributed those earning less than the average can form a powerful political coalition. That is, if the median voter has less than the average amount of wealth, the resulting political coalition will tend to favor those who have less.

But the Progressive coalition eventually became a victim of its own success. The economic difficulties of the Depression and the costs of World War Two were followed by the relative comfort and security of the late forties and the 1950s. Political pressures began to shift, and the Progressive concern moved away from wealth and toward other indicia of hardship, such as race, extreme political, social or religious views, indigent criminal defendants, alienage, and eventually gender, affectional preference and disabilities. Although *Brown v. Board of Education* and the Civil Rights movement were essential steps to fairness, they came at a very high price: the new Progressive concerns tended to divide rather than unite the coalition. Since the 1960s welfare

liberals have increasingly played the game of recognizing new groups as disadvantaged, while risking the allegiance of others. At its best, the Democratic coalition has been barely held together by its fear of the political alternative. At its worse, it has been a set of bickering groups struggling for recognition as disadvantaged so that its members can also become the beneficiaries of government largesse. Meanwhile, government entitlement programs such as social security and Medicare began to move up the social scale until their principal beneficiaries became, not the poor and unemployed, but the employed and relatively affluent middle class.²²

The kind of “boutique” liberalism that has characterized the 1970s and particularly the 1980s has found political unity almost impossible to maintain. Each new group brought into the coalition is marginally less attractive to those already in than the previous group had been. For example, bringing in abortion rights and gays came at a heavy price in terms of loss of support from the Catholic and evangelical working classes — indeed, the political losses were almost certainly greater than the gains.

The result has been a disjointed, fragmented governmental policy that has had an extraordinarily difficult time presenting a coherent ideology. Against this background, the classical vision of the market looks pretty good, particularly to those who see themselves as the financial contributors rather than the beneficiaries of this unfocused Progressive largesse.

Today, the legacy of Progressive legal thought is important but no less controversial than it was a half century ago. For more than thirty years Progressivism’s critics have railed on its distrust of markets, and the naivete of its faith in government. Ronald R. Coase’s famous article on “The Problem of Social Cost,” published in 1960, was thought to describe a common law system that inevitably produced efficient results. But the last ten years has seen substantial scholarship challenging the robustness of the Coase Theorem and limiting its domain. As a result, our once-firm belief in “deregulation” is gradually giving way to a belief that faith in unregulated markets can be carried too far, and that there *are* numerous areas where carefully designed government intervention can make things better. The concern for equal treatment to people of every race has perhaps suffered from a period of neglect, but concerns for equal treatment for others continues to carry political momentum. Legal Progressivism continues to produce its greatest successes, however, when it focuses on bread and butter issues related to wages,

employment and economic equality and security. In the final analysis, it seems, escaping the legacy of Progressive legal thought is much more easily said than done.

- 1 Charles Darwin, *The Descent of Man, or Selection in Relation to Sex* (1871).
- 2 3 *Journal of Law & Economics* 1 (1960).
- 3 G.P.O. 1960.
- 4 See Thomas K. McCraw, *Prophets of Regulation* 210, 215, 219-220, 234-235 (1984); Stewart, *The Reformation of American Administrative Law*, 88 *Harvard Law Review* 1667 (1975). Landis had been the author in 1938 of the much more optimistic *The Administrative Process* (1938).
- 5 Kenneth J. Arrow, *Social Choice and Individual Value* (2d ed 1963).
- 6 James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (1962).
- 7 See Dorothy Ross, *The Origins of American Social Science* (1991); Mary Furner, *Advocacy and Objectivity: A Crisis in the Professionalization of American Social Science, 1865-1905* (1975).
- 8 See Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 *Texas Law Review* 645 (1985).
- 9 J. Bentham, *An Introduction to the Principles of Morals and Legislation* [1789] (J.H. Burns & H.L.A. Hart eds 1970); Bentham, *The Theory of Legislation* [posthumous] (R. Hildreth transl. 1864). Bentham did not come close to developing the theory of marginal cost or theories of value based on marginalism.
- 10 A.S. Jevons, *The Theory of Political Economy* (1871; 3d ed. 1888). Alfred Marshall also deserves part of the credit. See 1 *The Early Economic Writings of Alfred Marshall* 2 (J.K. Whitaker, ed. 1975). John Bates Clark in the United States probably came to his marginalism independently. See J. Clark, *The Philosophy of Wealth*, chs. 4-5 (1886); J. Schumpeter, *History of Economic Analysis* 870 (1954).
See also Carl Menger's *Principles of Economics* (1871). Menger's work was less influential in the United States than Jevons' work, since Menger stood outside the British classical tradition. However, a large group of American graduate students in political economy who went abroad for graduate study in the late nineteenth century ended up on the Continent, especially in Germany, and many of them studied Menger. On the influence of German historicism on Progressive Era economics, see Hovenkamp, *The First Great Law & Economics Movement*, 42 *Stanford Law Review* 993, 996-997 (1990); Dorothy Ross, *supra* note 7 at 104-105; Mary Furner, *supra* note 7 at 50-57.
- 11 Jevons, *id.*, 3d ed. at 1.

12 "[W]hen the person remains satisfied with the distribution he has made, it follows that . . . an increment of commodity would yield exactly as much utility in one use as in another *Id.*, 3d ed. at 59-60.

13 The great marginalist economist Alfred Marshall knew that the whole notion of subjective preference meant nothing at all unless preference could be measured behaviorally. Thus one could speak meaningfully of consumer demand only "as represented by the schedule of the prices at which he is willing to buy different amounts of" something. A. Marshall, *Principles of Economics* 158 (1890). In his highly influential eighth edition, Marshall wrote:

If then we wish to compare . . . physical gratifications, we must do it not directly, but indirectly by the incentives which they afford to action. If the desire to secure either of two pleasures will induce people in similar circumstances each to do just an hour's extra work, or induce men in the same rank of life and with the same means each to pay a shilling for it; we then can say that those pleasures are equal for our purposes, because the desires for them are equally strong incentives to action for persons under similar conditions.

A. Marshall, *Principles of Economics* 15-16 (8th ed 1920).

14 Edwin R.A. Seligman, *Progressive Taxation in Theory and Practice*, 9 Publications of the American Economic Association 1, 132-133 (1894); Edwin R.A. Seligman, *The Theory of Progressive Taxation*, 8 Publications of the American Economic Association 52 (1893). See Herbert Hovenkamp, *The First Great Law & Economics Movement*, supra note 10, at 1002-1005.

15 See Lionel Charles Robbins, *An Essay on the Nature and Significance of Economic Science* (1932; 2d ed. 1935); and see Herbert Hovenkamp, *The First Great Law & Economics Movement*, supra note 10, at 1033-1047.

16 See Herbert Hovenkamp, *The Marginalist Revolution in Legal Thought*, 46 *Vanderbilt Law Review* 305 (1993).

17 See Herbert Hovenkamp, *Enterprise and American Law: 1836-1937* at chs. 20-22 (1991).

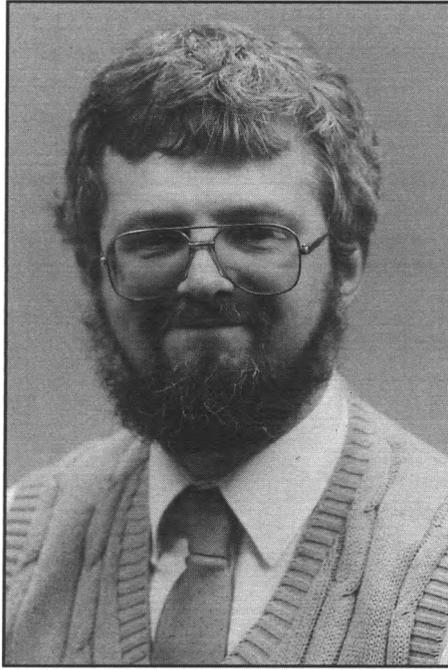
18 See, e.g., the 1950 Celler-Kefauver amendments to the anti-merger statute, 15 U.S.C. §18. See H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949) (discussing goals of merger policy as protecting smaller firms from larger, lower cost rivals). The new merger policy, designed to prevent small high cost firms from being "gobbled up" by larger, more efficient firms was hailed as a triumph of law and economics. See Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 *Harvard Law Review* 226 (1960); and see Herbert Hovenkamp, *Derek Bok and the Merger of Law and Economics*, 21 *Journal of Law Reform* 515 (1988).

19 E.g., James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (1962); Kenneth J. Arrow, *Social Choice and Individual Value* (2d ed 1963).

20 E.g., Arrow, note 5; Buchanan & Tullock, note 6.

21 E.g., Coase, *The Problem of Social Cost*, note 2.

22 See Gordon Tullock, *Economics of Income Redistribution*, esp. at 111-150 (1983); Gordon Tullock, *The Economics of Special Privilege and Rent Seeking* (1989).



Herbert Hovenkamp joined The University of Iowa faculty in 1986 as the Ben V. and Dorothy Willie Distinguished Professor in the College of Law. He received his B.A. from Calvin College in Grand Rapids, Michigan, and earned his M.A. in American Literature, his Ph.D. in American Civilization, and his J.D. degree from the University of Texas. After a postdoctoral fellowship at the Harvard Law School, Professor Hovenkamp began his teaching career at the University of California in the Hastings College of the Law (1980-85); he has also taught in the American Studies program of the University of Texas and in the University of Michigan Law School. His teaching and scholarly interests embrace American legal history, law and economics, and antitrust law, fields to which he has contributed ten books and almost 100 articles, reviews, and shorter pieces. Professor Hovenkamp has been honored by a University of Iowa Faculty Scholars Award (1988), a Regents Award for Distinguished Faculty Scholars (1990), and a UI Outstanding Teachers Award (1993). His pathbreaking study of the legal regulation of economic development, *Enterprise and American Law: 1836-1937*, was recognized by the American Historical Association's 1992 Littleton-Griswold Prize as the year's best book in legal history. With Phillip Areeda, Donald Turner, and John Solow, Professor Hovenkamp is co-author of an ongoing multi-volume work on American antitrust law, and he is currently working on a book-length study of Progressive Legal Thought in the United States. He lives in Iowa City with his wife Beverly and sons Arie and Erik.

The University of Iowa Presidential Lecturers 1984-1994

Sherman Paul, English, "The Onward Way," 1984.

Antonio R. Damasio, M.D., Neurology, "What's in a Brain That Ink May Character?" 1985.

June Helm, Anthropology, "Horde, Band, and Tribe: Northern Approaches," 1986.

Linda K. Kerber, History, " 'History Will Do It No Justice': Women's Lives in Revolutionary America," 1987.

Beaumont Glass, Music, "Genius on the Opera Stage: The Life and Art of Lotte Lehmann," 1988.

George Wolfgang Forell, Religion, "The Sacred and the Secular: Religion in the State University," 1989.

John E. Donelson, Biochemistry, "Molecular Biology of Parasites Causing Tropical Diseases," 1990.

Jorie Graham, Writers' Workshop, "A Poetry Reading," 1991.

James A. Van Allen, Physics and Astronomy, "The Modern Saga of Planetary Exploration," 1992.

Nancy C. Andreasen, M.D., Psychiatry, "O Brave New World! Exploring the Mind and Brain in Health and Disease," 1993.

Michael J. Welsh, M.D., Internal Medicine, "The Pathway of Discovery in Pursuit of a Genetic Disease," 1994.

Although Professor Welsh's 1994 slide presentation was not printed as a brochure, published texts of most of these lecturers are available upon request from the Office of the President (335-3549).

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