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The Reconstruction of Constitutional Privacy Rights and the New American State

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INTRODUCTION

Scholars have accorded the late nineteenth and early twentieth century a uniquely important place in the annals of American political development. During this period, the nation underwent transformations from a rural and agricultural to an urban and industrial society. Underlying these transformations was a revolution in the nature of the country's political economy, which shifted rapidly from a longstanding proprietary-competitive order to an unwonted corporate-administrative one.[1] This transformation fundamentally altered traditional forms of work and management in the private sector, leading to the preeminence of a wage-labor system, the separation of corporate ownership from control, and the rise of bureaucratized and professionalized business management.[2] At the same time, a "new American state" was formed with its own analogous cadres of governing professionals, professionals who in the new administrative agencies asserted increasingly centralized control over the nation's economy and civil society.[3]

One of the central political questions which faced those living through the instabilities and uncertainties of this roiling developmental era was whether the core principles of the American political tradition would survive the fundamental political-economic transition from the competitive-capitalism of small producers to its new corporate-administrative form. Were the accustomed principles of American life compatible with this apparent progress? Put otherwise, could the American liberal tradition as it had long been understood be reconciled with corporate capitalism?

Perhaps the major route to reconciling the com-

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1. Martin Sklar, *The Corporate Reconstruction of American Capitalism* (New York: Cambridge University Press, 1986), 3. Specifically Sklar defines "proprietary-competitive" as

> capitalist property and market relations in which the dominant type of enterprise was headed by an owner-manager (or owner-managers), or a direct agent thereof, and in which such enterprise was a price-taker, rather than a price-maker, price being determined by conditions of supply and demand beyond the control of the enterprise short of anticompetitive inter-firm collusion.

By the new "corporate-administrative" order, he means a political economy characterized by the

> capitalization of . . . property in the form of negotiable securities relatively widely dispersed in ownership, a corresponding separation of ownership title and management function, and management of the enterprise by bureaucratic-administrative methods involving a division, or a specialization of managerial function, and an integration, or at least a centralization, of financial control.

It is meant to designate "a process occurring not merely in a few notable firms, or in a sector of the economy . . . but pervasively, and hence involving the change in the broader economy from price-competitive to administered, or 'oligopolistic,' markets" (Sklar, *Corporate Reconstruction*, 4 n.1).

2. See Robert H. Wiebe, *The Search for Order, 1877–1920* (New York: Hill and Wang, 1967); Samuel P. Hays, *The Response to Industrialism: 1885–1914* (Chicago: University of Chicago Press, 1957); Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, MA: Belknap Press, 1977).

3. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982).

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mitments of the American liberal tradition, which had sustained (and been sustained by) the proprietary-competitive political economy, with the emerging corporate-administrative order was through the adaptation of the legal order, an adaptation which Martin Sklar has described as "an integral phase of the corporate reconstruction of American capitalism" and "a signal achievement of the Progressive Era."[4] Sklar has argued that the traditional principles of the political system grounded in individual proprietorship and small producers was reconciled with the new political economy via a construction known as "corporate liberalism," and he accorded the law, and, in particular, the debates concerning antitrust law, pride of place in the era's ideological construction of corporate liberalism.[5]

The central argument of this article is that the nation's transition from proprietary-competitive to corporate-administrative capitalism and the attendant construction of a corporate-liberal public philosophy entailed in important part a reconstruction of constitutional protections for privacy. This process of constitutional reconstruction was essential because key provisions of the Bill of Rights protecting the private sphere posed an institutional barrier to the successful advance of the statebuilding project.

The Fourth Amendment's protection against unreasonable searches and seizures and the Fifth Amendment's self-incrimination privilege stood as potentially crippling limitations on the line of sight of the new American state, which needed to render many formerly dark corners of civil society visible in order to control and manipulate them.[6] James Scott has argued that the very essence of effective modern administrative states is their ability to see and read the civil society they seek to order. As such, one of their major tasks is to remake society into legible form – to undertake what Scott calls a "project of legibility."[7] This project is essential to the construction of corporate-administrative states because unseen or uncategorizable people or activities can only be manipulated if they are first observed and then assimilated onto an administrative grid – that is, in Scott's terms, if they are "made legible."[8] "Legibility," Scott writes, "is a condition of manipulation."

> Any substantial state intervention in society – to vaccinate a population, produce goods, mobilize labor, tax people, and their property, conduct literacy campaigns, conscript soldiers, enforce sanitation standards, catch criminals, start universal schooling – requires the invention of units that are visible. The units in question might be citizens, villages, trees, fields, houses, or people grouped according to age, depending on the type of intervention. Whatever the units being manipulated, they must be organized in a manner that permits them to be identified, observed, recorded, counted, aggregated, and monitored. The degree of knowledge required would have to be roughly commensurate with the depth of the intervention. In other words, one might say that the greater the manipulation envisaged, the greater the legibility required to effect it.[9]

The "ongoing project of legibility" which is a prerequisite to statebuilding and statecraft "is largely a product of internal colonization."[10] In this project, illegibility is a source of political autonomy. For that reason, legibility is often strenuously resisted.[11]

In the signal era of American statebuilding, important forces in American society advanced privacy arguments and aggressively wielded the Fourth and Fifth Amendments in staunch resistance to the new American state's project of legibility. In the late nineteenth and early twentieth centuries, in an effort to render legible and, hence regulable, increasingly large

4. Sklar, *Corporate Reconstruction*, 175. William Novak has similarly contended that the process of the transformation of public law at this time was "a font of creative energy—of legal ideas, institutions, and practices—that was absolutely crucial to the creation of [a] new regime of centralized, administrative, regulatory governance in the United States." William Novak, "The Legal Origins of the Modern American State," in *Looking Back at Law's Century: Time, Memory, and Change*, ed. Austin Sarat, Robert Kagan, and Bryant Garth (Ithaca: Cornell University Press, forthcoming).

5. Sklar, *Corporate Reconstruction*, 33–35. Theodore Lowi had earlier traced the beginnings of a regime change in the nation's prevailing "public philosophy" to the slightly later New Deal era, which he saw launching a regime founded upon "interest group liberalism" (Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* [New York: W. W. Norton, 1979]). Donald Brand, in a study that both follows and critiques Lowi (Brand emphasized the pre-New Deal progressive pragmatist roots of the new public philosophy), called the new public philosophy simply "corporatism" (Donald R. Brand, *Corporatism and the Rule of Law: A Study of the National Recovery Administration* [Ithaca, NY: Cornell University Press, 1988], chaps. 1–2). Jeffrey Lustig has also argued that a new public philosophy replaced traditional liberalism at about this time (R. Jeffrey Lustig, *Corporate Liberalism: The Origins of Modern American Political Theory 1890–1920* [Berkeley: University of California Press, 1982]).

6. The Fourth Amendment provides that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In pertinent part, the Fifth Amendment provides that "no person shall . . . be compelled in any criminal case to be a witness against himself. . . ."

7. James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 1998).

8. Scott, *Seeing Like a State*, 24. My main interest in Scott's work here is in his definition and description of state projects of legibility. Since my purpose is primarily descriptive, I do not discuss Scott's normative critique of the interventionist hubris which has sometimes accompanied that process. The normative critique, however, constitutes a major theme of Scott's book.

9. Ibid., 183.

10. Ibid., 80, 82.

11. Ibid., 54, 68.

and politically and economically important economic entities, the federal government undertook a succession of sustained efforts to compel the production of papers and records and to procure from private economic actors testimony regarding business practices. Those actors who faced questions regarding joint ownership, rate structures, and pooling agreements often refused to produce their books and papers and to testify under oath before government officials by claiming that such compelled testimony violated core constitutional protections for privacy as guaranteed them by the Fourth and Fifth Amendments of the U.S. Bill of Rights. In 1886, in the case of *Boyd v. United States,* a case involving government efforts to acquire business records in a customs duty dispute, these constitutional claims were given the authoritative imprimatur of the U.S. Supreme Court, a ruling that strongly protected privacy as claims were asserted on its behalf by businessmen and businesses but seriously menaced the entire statebuilding process.

The successful construction of the new American state required as part of the statebuilding process a vanquishing of the plausible Fourth and Fifth Amendment privacy protections set out in the Supreme Court's decision in *Boyd v. U.S.* The possibility that a progressive constitutional triumph over privacy claims would fail to materialize, one scholar has rightly declared, "posed a greater threat to activist government ... than did substantive due process."[12] Over time, however, an elaborate and "progressive" project of ideological reconstruction took place in which plausible readings of the Fourth and Fifth Amendment were successfully read out of the lexicon of constitutional meaning. A newly serviceable ideological distinction was now drawn between the "economic" and "personal" privacy. The former, now a separate conceptual category, was declared socially counterproductive, a counterfeit privacy. The Fourth and Fifth Amendments, now bled dry of the body of meaning they had acquired in the late nineteenth and early twentieth centuries, were re-invented as part of the mid-twentieth-century Court's antiracist policy program as requiring an elaborate system of procedural protections for those accused of street crimes.[13] The value of "privacy" itself was re-imagined as being protected by the due process clauses of the Fifth and Fourteenth Amendments, which now were held to guarantee a "right to privacy," a right that came to be associated primarily with claims to sexual and reproductive autonomy.[14] This process of ideological reconstruction came complete with a progressive-spirited genealogy which traced the concern with constitutional privacy back to one of the statebuilding era's staunchest proponents of "publicity," Louis D. Brandeis. The beginnings of the solicitude for privacy were thus traced back to the era of the construction of the new American state, and the chief progressive proponents of that state were imagined to be the progenitors of a modern concern for privacy, a concern which was folded into a narrative of cresting progressive solicitude for civil liberties.

An examination of the U.S. Supreme Court's Fourth Amendment search and seizure and Fifth Amendment self-incrimination decisions from the era of central state construction in conjunction with prolegibility, state-friendly progressive thinking from this era by Walter Lippmann, Brandeis, Herbert Croly, and other progressive partisans of the project of legibility serves as a useful illustration that constitutional development concerning civil liberties is not, as the standard developmental model would have it, a simple matter of the abandonment of protections for "economic rights" for "personal rights." Although the claims on behalf of privacy against the call for publicity were mainly asserted by businesses and businessmen, the ultimate defeat of those privacy claims, once institutionalized, had a pervasive effect upon the value of privacy (if not the "right to privacy") under the new order. The progressive triumph over the privacy claims made by economic actors in the late nineteenth and early twentieth centuries gave the government broad oversight powers that both left few limits on the power of government to "see" in the public interest (whether businesses were the target or not) and on the highly invasive discovery process in lawsuits through which (as the Clinton impeachment usefully illustrated) all sorts of noneconomic personal matters are potentially exposed to public view. Understanding the triumph of publicity over privacy in the statebuilding era, moreover, has implications for the way we understand not only privacy, but the broader sweep of constitutional development itself. It also alerts us to the signal role of ideological construction as an indispensable element of constitutional change.

PROLOGUE: FOURTH AND FIFTH AMENDMENT RIGHTS BEFORE THE STATEBUILDING ERA

In resisting the project of legibility with claims on behalf of privacy, late nineteenth-century businessmen and corporations made appeals to what they claimed to be their traditional and, in some instances, ancient, common law and constitutional rights. These

12. William J. Stuntz, "The Substantive Origins of Criminal Procedure," *Yale Law Journal* 105 (1995): 393–447, 482. The defining substantive due process case of the era was *Lochner v. New York,* 198 U.S. 45 (1905), in which the U.S. Supreme Court invalidated a New York State law limiting the working hours of bakers on the grounds that the statute violated the liberty of contract as vouchsafed by the due process clause of the Fourteenth Amendment.

13. See Lucas A. Powe, Jr., *The Warren Court and American Politics* (Cambridge, MA: Belknap Press, 2000), 193–99, 379–444; Stuntz, "Substantive Origins"; William J. Stuntz, "Privacy's Problem and the Law of Criminal Procedure," *Michigan Law Review* 93 (1995): 1016–78.

14. *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Roe v. Wade,* 410 U.S. 113 (1973); *Bowers v. Hardwick,* 478 U.S. 186 (1986).

appeals made strategic sense and were plausible readings of constitutional rights guarantees in a way that served the purpose of preserving, in an altering environment, the longstanding, power-limiting, structural features of the American constitutional order. What is less clear is whether they accurately represented traditional understandings of the Fourth and Fifth Amendments themselves.

In appealing to the Fourth Amendment as a guarantee for privacy, late nineteenth- and early twentieth-century business entities anchored their cases in a constitutional provision that was far from ancient. The Fourth Amendment's proscription against unreasonable searches and seizures arose not out of longstanding English common law rights but rather in reaction to two politically galvanizing eighteenth-century English and colonial searches in seditious libel and tax collection cases, that of John Wilkes in England and that involving the Writs of Assistance in colonial Massachusetts. Both the controversies and the cases they generated involved substantive claims on behalf of the privacy of one's home and personal papers in the face of government regulatory schemes and revenue collection efforts.[15] The Wilkes case considered the propriety of general search warrants the Crown had issued authorizing its agents to ransack houses at will to discover who was churning out incendiary pamphlets sharply criticizing King George III. Through a succession of high-handed searches, Wilkes, a member of Parliament, was unmasked as their author. Rather than sinking quietly in the face of the disgorged evidence, Wilkes fought back against the manner in which his penning of the infamous North Briton No. 45 had been discovered by successfully suing the invading Crown officials for damages. In the process, Wilkes became a folk-hero in the American colonies, polities which themselves were becoming impatient with the high-handed tactics of the Crown.[16] The Writs of Assistance case, which echoed the Wilkes affair, involved the propriety of statutes giving colonial customs officials broad powers to enter any home or business and to search for and to seize forthwith any uncustomed imported goods. By issuing so-called "writs of assistance" colonial customs officers could force either colonial officials or private citizens to "assist" them in the stipulated search. These writs were deployed particularly aggressively in the port of Boston, and in a famous courtroom argument in resistance to a writs of assistance search, James Otis contended that suspicionless searches violated venerable guarantees of English liberty. Otis lost the battle but won the war: His failed courtroom oration found a wide popular following and ascended to rare political prominence. Moreover, it inspired patriot leader John Adams to compose and add a guarantee against unreasonable searches and seizures to the Massachusetts Constitution. It was this provision which served as the model for the U.S. Constitution's Fourth Amendment.

What became of the Fourth Amendment between the time of its ratification as part of the Bill of Rights and the beginning of the onset of the late nineteenth century's project of legibility? Its chief effects were two. First, the Amendment made it all but certain that the issuance of general warrants at both the state and national levels would forever be considered beyond the pale of legitimate governmental practice. And, second, the Amendment institutionalized at both levels of government the guarantee that search warrants be issued only upon a finding of probable cause, supported by a particularized sworn statement.[17] Since this time, these guarantees were rarely flouted in any obvious way.

There existed a *drôle de guerre* concerning the Fourth Amendment between the time of its ratifica-

15. Stuntz, "Substantive Origins." *Entick v. Carrington*, 95 Eng. Rep. (K.B. 1765); *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763); Writs of Assistance, 1761–1772., in *The Founder's Constitution*, 5 vols. ed. Philip B. Kurland and Ralph Lerner (Indianapolis: Liberty Fund, 1987), 5:222–31; 233–35. See Leonard W. Levy, "Origins of the Fourth Amendment," *Political Science Quarterly* 114 (1999): 79–101.

16. Wilkes's hero's status remains well in evidence to this day in the number of American towns that were subsequently named for either Wilkes or Lord Camden, the judge who wrote the opinion finding for Wilkes in his damages action. Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* (New Haven, CT: Yale University Press, 1997), 184–85 n.53; Pauline Maier, "John Wilkes and American Disillusionment with Britain," *William and Mary Quarterly* 20 (1963): 373. See also Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Belknap Press, 1967), 110–12; Levy, "Origins of the Fourth Amendment," 86–90.

17. The Fourth Amendment's warrant requirement is separate from its prohibition on unreasonable searches and seizures. For a full explanation of the meaning and implications of this, see Amar, *Constitution and Criminal Procedure*, 1–45. So far as the Fourth Amendment's warrant requirement was concerned, the understanding was that search warrants were to be issued in criminal cases only. In *Constitutional Limitations*, for instance, Thomas Cooley stated that

> they are only to be granted in cases where they are expressly authorized by law, and not until after a showing made before a magistrate, under oath, that a crime has been committed, and that the party complaining has reasonable cause to suspect that the offender or the property which was the subject or the instrument of the crime is concealed in some specified house or place. (Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon The Legislative Power of the State of the American Union* [Boston: Little, Brown, and Co., 1868], 304)

> Search-warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for that matter the maintenance of any mere private right; but their use was confined to cases of public prosecutions instituted and pursued for the suppression of crime, and the detection and the punishment of criminals. (*Robinson v. Richardson* 13 Gray, 456 [J. Merrick], qtd. in Cooley, *Constitutional Limitations*, 307 n.1)

He added: "The warrant is not allowed to obtain evidence of an intended crime; but only after lawful evidence of an offence actually committed" (Cooley, *Constitutional Limitations*, 305).

tion and the onset of the project of legibility. This was all but inevitable given that, prior to the late nineteenth century, the provisions of the Bill of Rights were held to be restrictions on federal and not state conduct.[18] And, in this era, federal activity was relatively limited, with federal criminal investigations few and far between and federal regulatory invasions and data collection efforts distinct rarities. Appeals in courtrooms and elsewhere to state constitutional proscriptions against unreasonable searches and seizures were similarly rare. Compared with contemporary practice, state regulatory regimes were not especially invasive. And while there did develop a notable body of state court cases involving trespass suits against sheriffs for acting pursuant to defective search warrants, since no police forces existed at the time, and searches incident to (typically civilian) arrest were permitted, provisions of state constitutions proscribing unreasonable searches and seizures were rarely invoked by either civil or criminal defendants. Thus, during their first century of existence, the meanings of national and state constitutional search and seizure provisions, remained underdeveloped.[19]

Historically speaking the origins of the Fifth Amendment's self-incrimination provisions run rather deeper than those of the Fourth. As was the case with the Fourth Amendment's search and seizure protections, the roots of the Fifth Amendment's self-incrimination protection are found not in concern for the rights of street criminals but rather in political resistance to matters of substantive regulation. Arguments on behalf of a self-incrimination privilege were first advanced in English law when, in an effort to enforce religious uniformity, government officials insisted upon examining Catholics and Protestant dissenters under oath about both their own religious views and those of their friends and neighbors.[20]

As a nation founded by these dissenters, it was foreordained that, if a Bill of Rights existed, it would contain a self-incrimination privilege of the sort fought for by their much-persecuted progenitors in England. The constitutionally-guaranteed self-incrimination privilege had from the outset one very strong effect that operated at both the national and state level: Criminal defendants in America were never forced onto the witness stand to testify against themselves. Between the time of its ratification and the onset of the project of legibility, there was a *drôle de guerre* concerning the meaning of the self-incrimination provision of the Fifth Amendment that paralleled that of the Fourth. Like the Fourth, the Fifth was widely understood to be a protection against federal and not against state conduct. Moreover, given the absence of police forces, the importance of pretrial questioning (to which the provision was inapplicable), the dearth of lawyers (which made a defendant's voluntary silence akin to an admission of guilt), and the unlikelihood of being examined under oath for regulatory purposes given the undeveloped nature of the state, the self-incrimination privilege was asserted in court only relatively rarely.[21]

That said, though, owing in part to its deeper roots in the English common law tradition, there was somewhat more flesh on the bones of the self-incrimination privilege in advance of the statebuilding era than there was on the relatively new constitutional protection against unreasonable searches and seizures. Between the time of the Fifth Amendment's ratification and the *Boyd* decision of 1886, those American courts that had considered the privilege's scope had repeatedly emphasized that the *constitutional* self-incrimination privilege was invocable only by criminal defendants facing questions in their own criminal trials. During this same time period, however, there did exist a simultaneous *non-constitutional* common law privilege against self-incrimination, known as the "witness privilege," that allowed witnesses in civil proceedings to refuse to answer questions on the grounds that the answers they gave might incriminate them. As part of the resistance to the late nineteenth century

18. See *Barron v. Baltimore*, 32 U.S. 243 (1833).

19. Stuntz, "Substantive Origins," 419–21. See *Walker v. Cruikshank*, 2 Hill 296 (Jan. 1842 [NY]); *Rohan v. Sawin*, 59 Mass. 281 (5 Cush 281; Mar. 1850); *Walker v. Hampton*, 8 Ala. 412 (1845); *Commonwealth v. Dana*, 43 Mass. 329 (2 Met. 329; Mar. 1841); *Stone v. Dana*, 46 Mass. 98 (5 Met. 98; Oct. 1842); *Beaty v. Perkins*, 6 Wend. 382 (N.Y. 1831); *Robertson v. Richardson*, 79 Mass. 454 (13 Gray 454; Sept. 1859); *Thurston v. Adams*, 41 Me. 419 (1856); *Parker v. Certain Lottery Tickets*, 59 Mass. 369 (5 Cust. 369; Mar. 1850); *Fisher v. McGirr*, 67 Mass. 1 (1 Gray 1; Mar. 1854); *Malcom v. Spoor*, 53 Mass. (12 Met.) 279 (1847). The influential nineteenth century treatise writer Thomas Cooley (later, the first head of the Interstate Commerce Commission) described the constitutional proscription against unreasonable searches and seizures as following "that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and the protection, in person, property, and papers even against the process of the law, except in a few specified cases" (Cooley, *Constitutional Limitations*, 299). Prior to the late nineteenth and early twentieth centuries, it was not at all clear whether the legibility imperatives of the new American state would fit into the category of core of the protections or of its admitted exceptions. Joseph Story declared the Fourth Amendment to represent "little more than the affirmance of a great constitutional doctrine of the common law" (Story, *Commentaries on the Constitution of the United States*, Sec. 1902). On this, however, he was mistaken.

20. Stuntz, "Substantive Origins," 411–17. See also Leonard W. Levy, *Origins of the Fifth Amendment* (New York: Macmillan, 1969); John Langbein, "The Historical Origins of the Privilege Against Self-Incrimination at Common Law," *Michigan Law Review* 92 (1994): 1047; Ralph Rossum, "Self-Incrimination: The Original Intent," in *The Bill of Rights: Original Meaning and Understanding*, ed. Eugene W. Hickok, Jr. (Charlottesville: University Press of Virginia, 1991), 273–87.

21. Stuntz, "Substantive Origins," 411–17. We must add that, prior to the 1860s, neither the states nor the federal government allowed criminal defendants (or, for that matter, any person who had an interest in a case's outcome) to testify in courts on the grounds that such testimony was inherently unreliable. Rossum, "Self-Incrimination," 276; Katherine B. Hazlett, "The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination," *American Journal of Legal History*, 42 (1998): n.18.

project of legibility, these two self-incrimination privileges would be fused, constitutionalized, and joined with the search and seizure provision in *Boyd* to provide a zone of privacy against the substantive fact-gathering efforts of the new American state.[22]

PRELUDE: STIRRINGS OF CHANGE FROM THE CENTER

A crucial difference between a common law privilege such as the "witness privilege" and a constitutional privilege is that Congress (or, for that matter, any legislature) is institutionally bound by the latter but has full power to abrogate the former. This difference became crucial to the dynamic of constitutional development concerning the Fifth Amendment, because from about the mid-nineteenth century onward, Congress began, in a series of historically discrete and isolated instances, though at increasingly regular intervals, to feel the imperative of seeing like a state. To enlarge the scope of its vision in these discrete instances, it began to pass a succession of immunity statutes aimed at compelling testimony before them through grants of immunity from prosecution.[23] The first of these immunity statutes, those of 1857 and 1862, were passed in response to a number of congressional corruption scandals.[24] But following the end of the Civil War, Congress began to put its immunity powers to use not simply in isolated and discrete corruption scandals but increasingly in routine service of gathering a regular reading on the facts that seemed essential to a sustained statebuilding project. Unlike the scandal-driven immunity statutes of 1857 and 1862, the post-Civil War congressional immunity statutes of 1868 and 1874 were both passed to aid in efforts at revenue collection, the *sine qua non* of that project.[25] The 1868 statute, while protecting the tax evader under congressional investigation from criminal prosecution, gave national revenue agents the power to compel the production of private books and records that would permit the government to determine the amount of taxes in arrears and, in turn, to then collect those taxes in a civil enforcement proceeding.[26] The 1874 statute also provided for the production of books and papers in civil revenue enforcement proceedings.[27] Unlike the 1868 statute, however, the newer statute, in a highly significant constitutional departure, did not preclude the use of the documents produced in subsequent criminal prosecutions.

Both the 1868 and 1874 statutes were challenged in court by parties resisting the reach of the relatively new national revenue laws and their novel fact-gathering enforcement provisions. It was in these challenges to the 1868 and 1874 immunity statutes that constitutional Fourth and Fifth Amendment claims – which seemed to apply by at least the Fifth Amendment's plain language only to "criminal case[s]" – were first raised by parties in civil proceedings. At this time, and consistent with the traditional understanding of the common law privilege (which Congress had full power to abrogate) and the constitutional privilege (which applied only in criminal matters), the novel assertions of constitutional privilege were summarily dismissed.[28]

The easiest cases so far as federal courts were concerned arose under the earlier statute. By allowing the use of documents that had been produced in civil revenue collection proceedings as evidence in subsequent criminal prosecutions, however, the 1874 statute had upped the legal ante. And the litigation concerning the 1874 statute was significant. In these immunity cases, Fifth Amendment self-incrimination claims were quirks no more: They moved to center stage in the legal argument. In the 1870s, they were still a losing claim, to be sure, but a legal claim that, in the face of a central state that had become more and more aggressive in its fact-gathering efforts, had begun to be taken seriously nonetheless.[29]

22. Hazlett, *Nineteenth Century Origins,"* 235–60. This represents a paradigmatic example of the mediation and promotion of "two antagonistic tendencies—the centralization of power and the individualization of subjects," through the constitutionalization of law" (William Novak, *The People's Welfare: Law and Regulation in Nineteenth Century America* [Chapel Hill: University of North Carolina Press, 1996], 240 [emphasis in original]). See also Novak, "Legal Origins of the Modern American State." It is worth specifying that Hazlett does not make clear that testimony that subjected one to a "penalty" or a "forfeiture" was considered "incriminating" testimony; hence, if such testimony was at issue the witness could claim the privilege. If, however, the testimony was such that it would subject the witness to a debt action or a civil suit, the privilege was not available. The origins of this distinction post-date the ratification of the Fifth Amendment. They are found in the impeachment of Lord Melville in 1805 and a subsequent English court opinion and statute which influenced the development of the privilege under American law. See *Bull v. Loveland,* 27 Mass. 9 (10 Pick. 9; Sept. 1830); *Benjamin and Moore v. Hathaway,* 3 Conn. 528 (June 1821); *Taney v. Kemp,* 4 H & J 348 (June 1818 [MD]); *Planters' Bank v. George,* 6 Mart. (O.S.) 670 (June 1819 [LA]); *Copp v. Upham,* 3 N.H. 159 (Feb. 1825); *Stoddert's Lessee v. Manning,* 2 H & G 147 (June 1828) [MD]).

23. Hazlett, "Nineteenth Century Origins," 242–51. See also Akhil Reed Amar and Renee B. Lettow, "Fifth Amendment First Principles: the Self-Incrimination Clause," *Michigan Law Review* 93 (1995): 857–28, 913–14; Amar, *Constitution and Criminal Procedure,* 46–88. Hazlett does not note that in their original state constitutions, two states, Delaware and Maryland, did expressly extend the self-incrimination privilege to witnesses as well as defendants and beyond criminal trails to civil proceedings. See Levy, *Origins of the Fifth Amendment,* 407, 409, 411; Rossum, "Self-Incrimination," 275, 280.

24. 11 Stat. 155 (1857); 12 Stat. 333 (1862).

25. See Charles Tilly, "Reflections on the History of European State-Making," in *The Formation of National States in Western Europe,* ed. Charles Tilly (Princeton: Princeton University Press, 1975), 3–83. See also Scott, *Seeing Like a State,* 25–45.

26. 15 Stat. 37 (1868).

27. 18 Stat. 186 (1874).

28. See e.g., *In re Strouse,* 23 F. Cas. 261 (D. Nev. 1871; rejecting joint Fourth and Fifth Amendment claims); *United States v. Williams,* 28 F. Cas. 670 (S.D. Ohio, 1872). These cases are cited in Hazlett, "Nineteenth Century Origins."

29. See, e.g., *United States v. Hughes,* 26 F. Cas. 417 (Cir. Ct. S.D.N.Y. 1875). Here, in an important tariff case involving import-

THE PROJECT OF LEGIBILITY: PROGRESS – AND RESISTANCE

The broadening and deepening of the gaze of the central state began as a series of intermittent acts of seeing, a jumbled admixture of state-sustaining revenue collection cases and inquiries into vexed government institutions. In addition to the above-cited revenue cases, Congress simultaneously set up committees to investigate particular high-profile public scandals on a cornucopia of subjects. Joint House-Senate investigatory committees were first set up during the Civil War. In 1871, such a committee was created to investigate the status of the states of the defeated confederacy. In 1874 and 1878, similar committees were set up to consider, respectively, the governance of the District of Columbia and the Indian Bureau.

Following the Civil War, however, the investigation of discrete scandals gradually began to dovetail with what were coming to be perceived as deep and sustained, nondiscrete, political-economic concerns. The lines between scandal, criminality, and regulatory imperatives began to blur in pregnant ways. In 1873, for instance, Congress set up prominent panels to investigate Credit Mobilier and the financing of the Union Pacific Railway and, in 1874, to investigate the corrupt procuring of government subsidies for the Pacific Mail Steamship Company.[30]

At this time, it was far from clear that Congress had a right to collect the information it sought in sorting out these scandals. Certainly, the governmental power to subpeona and compel testimony existed, but these had traditionally been powers reserved to judges, who had exercised them rarely and sparingly, and with a strong institutionally-anchored pro-privacy bias. And judges typically exercised what they understood as part of their judicial role to be extraordinary powers in criminal cases. Whether these scandals were criminal or not was uncertain. If they were not, governmental fact-gathering powers were limited; if they were, then judicially-guarded constitutional protections for searches and witnesses applied. The confusion, in a politically-heated context, was a perfect recipe for the clash of wills concerning constitutional meaning.

In many cases, the legal fireworks proved to be intense. In the face of many of these nationally-conducted investigations, key corporate witnesses defiantly refused to testify about what they claimed to be their private business affairs. A number of corporate witnesses were prominently imprisoned for their refusal.[31] Far from backing down in the face of this resistance, throughout the 1880s and 1890s, both houses of Congress expanded the number and purview of their investigating committees, which moved beyond the unraveling of scandals to the consideration of an increasing array of social and economic problems.[32] Some of the problems, particularly those involving the conduct and organization of railroads and economic trusts, became so serious and persistent that the need for gathering facts, for investigating, for seeing, was deemed by Congress to be permanent. Investigatory powers once asserted by Congress only in response to discrete scandals were now delegated to newly permanent governing institutions. Institutions such as the Interstate Commerce Commission were created which could devote their full efforts to the collection of facts from private economic entities that constituted a powerful sector of civil society.

Initially, the most strenuous resistance to the gaze of the new American state was mounted by small proprietor corporations like E. A. Boyd and Sons, businesses which personified the now disintegrating proprietary-competitive capitalist order. As concerns owned and managed by the same small group of people, these businesses felt the searing new gaze of the state keenly and personally. So too, interestingly enough, did corporations like banks, railroads, and industrial conglomerates which precipitated and became pillars of the emerging corporate-administrative political economy. In the early stages of the nation's late nineteenth-century political-economic transformation, many of these new conglomerates were januses, with faces looking both to the old and the new order. In their reach and structure, they were modern. But many at the same time, and significantly, were still closely associated with a single individual – a J. P. Morgan, a Leland Stanford, an E. H. Harriman, a John D. Rockefeller. The state's project of legibility thus was experienced even by the new corporations as an invasion of the personal privacy of the books, papers, and diaries of these individuals.[33] Only as these corporations and their leaders came to recognize the benefits of a state-administered corporate order did

ed merchandise, the court admitted the books and papers by dint of statutory interpretation by construing the 1874 Act in light of the 1868 Act, without mention of the Constitution. See also *United States v. Three Tons of Coal*, 28 F. Cas. 149 (E.D. Wis. 1875) (rejecting Fourth and Fifth Amendment claims in tax case involving a distillery); and *United States v. Mason*, 26 F. Cas 1189 (N.D. Ill. 1875) (rejecting Fourth and Fifth Amendment claims in tax case involving a distillery).

30. Telford Taylor, *Grand Inquest: The Story of Congressional Investigations* (New York: Simon and Schuster, 1955), 45.

31. See *Stewart v. Blaine* (S.Ct. Dist. Co. 1874); *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

32. Taylor, *Grand Inquest*, 51.

33. See Sklar, *Corporate Reconstruction*, 27–28. See also Charles Francis Adams's characterization of Cornelius Vanderbilt as a man who had "combined the natural power of the individual with the factitious power of the corporation." Adams added, "The famous 'L'état, c'est moi' of Louis XIV represents Vanderbilt's position in regard to his railroads. Unconsciously he had introduced Caesarism into corporate life." Adams, of course, saw this less as a holdover from the old proprietary-competitive order than as a distinctive characteristic of the new corporate capitalism. Charles Francis Adams, Jr., "A Chapter of Erie," in Charles Francis Adams, Jr., and Henry Adams, *Chapters of Erie* (Ithaca, NY: Cornell University Press, 1968), 12.

their Fourth and Fifth Amendment privacy concerns fade. The Supreme Court's late nineteenth- and early twentieth-century Fourth and Fifth Amendment jurisprudence tracked this trajectory of resistance, mediation, and accommodation.

To justify an unprecedented ability to pry facts out of private economic entities, it was essential first to analogize these entities and the people who ran them to criminals. Identified as such, the personal dimension of their privacy claims became considerably less plausible. The investigating of criminals would justify the strongest government evidence-gathering powers.

THE SOCIAL CONSTRUCTION OF THE "CRIMINALOID"

If sweeping fact-gathering governmental investigatory powers were typically justifiable only in criminal matters, then it was natural that those reformers who felt it imperative that these powers be broadly wielded came to see the potential targets of those powers as a new type of criminal. The moralization of economic behavior and the imagination of problematic economic behavior as a new type of criminality became a part of the ideological reconstruction essential to the advance of the progressive reformist program. This reconstruction was an ideological *sine qua non* of the project of legibility.

Signs of the moralization of economic behavior and (later) of regulatory transgressions are famously apparent in the work of the Progressive Era muckrakers. Perhaps most prominent in making the argument that economically undesirable behavior was a moral crime, and that business class-perpetrators were criminals was Edward A. Ross's 1907 book *Sin and Society,* which appeared with a preface from Theodore Roosevelt.[34] In *Sin and Society,* Ross, a pioneering University of Wisconsin sociologist with close ties to Richard Ely and Lester Ward, made the progressive argument that "The sinful heart is ever the same, but sin changes its quality as society develops." "Modern sin," Ross declared, "takes its character from the mutualism of our time." "As society grows complex, it can be harmed in more ways." "A dense population lives in peace by aid of a protecting social order. Those who rack and rend this social order do worse than hurt particular individuals; they wound society itself."[35]

What Ross described as "this webbed social life" presented "sinister opportunities" and occasioned sinister acts that Ross believed caused moral rot and social damage that was fully comparable to the rot and damage that resulted from traditional crime. The progressive professor complained that:

> The man who picks pockets with a railway rebate, murders with an adulterant instead of a bludgeon, burglarizes with a "rake-off" instead of a jimmy, cheats with a company prospectus instead of a deck of cards, or scuttles his town instead of a ship, does not feel on his brow the brand of a malefactor.[36]

But, Ross continued, it is a progressive imperative that we recognize that:

> The stealings and slaying that lurk in the complexities of our social relations are not deeds of the dive, the dark alley, the lonely road, and the midnight hour. They require no nocturnal prowling with muffled step and bated breath, no weapon or offer of violence. Unlike the old-time villain, the latter-day malefactor does not wear a slouch hat and a comforter, breathe forth curses and an odor of gin, go about his nefarious work with clenched teeth and an evil soul. . . . One misses the dramatic setting, the time-honored insignia of turpitude. Fagin, and Bill Sykes and Simon Legree are vanishing types.[37]

People simply

> do not see that boodling is treason, that blackmail is piracy, that embezzlement is theft, that speculation is gambling, that tax-dodging is larceny, that railroad discrimination is treachery, that the factory labor of children is slavery, that deleterious adulteration is murder.[38]

This is partly because these new sins are committed "without personal malice" and because those who commit them have all appearances of being pillars of the community.[39] After all,

> [t]he government clerk who secretly markets advance crop information would hardly steal overcoats. . . . The life insurance presidents who let one another have the use of policy-holders funds at a third of the market rate may still be trusted not to purloin spoons.[40]

"Today," Ross insisted,

> the villain most in need of curbing is the respectable, exemplary, trusted personage who, strategically placed at the focus of a spider-web of fiduciary relations, is able from his office chair to pick a thousand pockets, poison a thousand sick, pollute a thousand minds, or imperil a thousand lives. It is the great-scale, high voltage sinner that needs the shackle.[41]

Ross had a name for this new type of transgressor: "the criminaloid," which he defined as "a class . . . prosper[ing] by flagitious practices which have not yet come under the effective ban of public opinion,"

34. Edward A. Ross, *Sin and Society: An Analysis of Latter-Day Iniquity* (New York: Harper and Row, 1907).
35. Ibid., 3, 6, 36.
36. Ibid., 7.
37. Ibid., 9–10.
38. Ibid., 15.
39. Ibid., 16.
40. Ibid., 27.
41. Ibid., 29–30.

and is hence "quasi-criminal" notwithstanding his "counterfeit[ing] the good citizen."[42]

The hope lay, in Ross's progressive view, in the transformation of public opinion through visibility and light. According to Ross,

> Public opinion is impotent so long as it allows itself to be kept guessing which shell the pea is under, whether the accountability is with the foreman, or the local manager, or the general manager, or the president, or the directors. How easily the general wrath is lost in this maze![43]

He observed, however, hopefully, that

> Each of us emits a faint, compulsive beam, and since the agencies for focusing these into a fierce, withering ray of indignation became every day more perfect, public opinion as regulator of conduct steadily gains on priest and judge, and sheriff.[44]

There is resistance, of course, to these rays of light. "[C]riminaloid philosophy" declares it "'un-American' to pry into 'private arrangements' between shipper and carrier, 'un-American' to fry the truth out of reluctant magnates."[45] This resistance, however, must be vanquished in the name of progress by an enlightened public that understands the true nature of the new political-economic order.

The construction of economic behavior as criminal, the imagination of the "criminaloid," was novel and striking to late nineteenth-century commentators, as, of course, was the policy change it inspired. An extensive 1937 survey of substantive criminal law between 1887 and 1936 published by Harvard Law Professor Livingston Hall consigned street crime issues to a few insignificant late pages and ended up mainly as a survey of the era's massive criminalization of business practices.[46] "One result of this [progressive reform]," Hall observed, "has been to make everyone a criminal." "If the fines and short jail terms for which one was legally liable were actually enforced," he complained, "few would have any net income, or leisure out of jail in which to spend it."[47] Conspiracies in restraint of trade, transgressions of banking, securities, food and drug and tax laws, prohibition, even the then-novel automobile regulation codes, in the preceding half-century, had become the focus of serious thinking at the time about criminal law. To Hall, the new order imported the moral presumptions of traditional criminal law into realms in which they had no place. "[N]o moral constraint dictates obedience to our modern bureaucracies," Hall pleaded. "Such an indiscriminate use of the criminal law weakens its hold as the arbiter of respectable conduct."[48] But Hall the critic was out of step with institutionalized developments. Ross and his allies had won the day.

PRIVACY AND THE RESISTANCE TO THE PROGRESSIVE IMPERATIVE: THE INITIAL DECISIONS OF THE 1880s

The progressive imperative that the state (as Ross had put it) be empowered to see "which shell the pea is under" and that "withering ray[s] of indignation" be trained on undesirable economic behavior acquired a rallying cry in the late nineteenth and early twentieth centuries: That rallying cry was the call for "publicity."

The progressive push for publicity effectuated a subtle transformation in the meaning of the term. So far as matters of governance were concerned, at the outset of the era of the statebuilding era, the word "publicity" referred not to progressive efforts to expose the books and records of private business actors to public scrutiny but rather to the imperative of establishing of an open relationship between government bodies and the press.[49] But as private economic

42. Ibid., 46–48, 61–62. Significantly, in extending Fourth and Fifth Amendment constitutional protections to a business in a civil proceeding in *Boyd*, Justice Bradley also alluded to the "quasi-criminal" nature of the case. *Boyd* at 622. See also Charles Francis Adams, Jr.:

> Pirates are commonly supposed to have been battered and hung out of existence when the Barbary Powers and the Buccaneers of the Spanish Main had been finally dealt with. Yet freebooters are not extinct; they have only transferred their operations to the land, and conducted them in more or less accordance with the forms of law. (Adams, "Chapter of Erie," 1)
>
> The unscrupulous [corporate] director is far less entitled to mercy than the ordinary gambler, combining as he does the character of the traitor with the acts of the thief. (Adams, "Chapter of Erie," 8)
>
> If the five years that succeeded the war have been marked by no exceptional criminal activity, they have witnessed some of the most remarkable examples of organized lawlessness, under the forms of law, which mankind had yet had an opportunity to study. (Charles Francis Adams, Jr., "An Erie Raid," in Adams and Adams, *Chapters of Erie*, 138).

43. Ross, *Sin and Society*, 125.

44. Ibid., 24. One might go so far as to set Ross's vision of the statebuilding process here as amounting to an amalgamation of hundreds of thousands of light-projecting individuals as an interesting variant on the famous frontspiece to Hobbes's *Leviathan*. In the frontspiece, however, the individuals comprising the state face inwards rather than outwards.

45. Ross, *Sin and Society*, 65–66.

46. Livingston Hall, "The Substantive Law of Crimes—1887–1936," *Harvard Law Review* 50 (1937): 616–53. See also Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), 13–14, 273–77, 354–63.

47. Hall, "Substantive Law of Crimes," 622–23.

48. Ibid., 623. See also Walter Lippmann, *Drift and Mastery: An Attempt to Diagnose the Current Unrest* (Madison: University of Wisconsin Press, 1985), 78.

49. So, for example, in his chapter entitled "Publicity" in his treatise *On Civil Liberty and Self Government*, Francis Lieber declared that publicity involved "the perfect freedom with which reporters may publish the transactions of public bodies." "Publicity, in connection with civil liberty," he announced, meant publicity in the transaction of the business of the public, in all branches." Such publicity was essential to making centralized, bureaucratic government free government. Lieber put it this way:

entities gradually came to be understood (and constructed) as having broad-ranging public effects, the word (and the progressive movement on behalf of) "publicity" assumed a new meaning. Now, the push for "publicity" referred to the effort to expose to light – to render visible – the inner workings of private businesses.[50]

In a series of prominent federal cases in the 1880s and 1890s, judges accustomed to the traditional privacy of the old proprietary-competitive order, an order under which "economic" and "personal" privacy were conflated, reacted with alarm to assertions of an imperative of publicity. In *Kilbourn v. Thompson* (1880), a scandal case involving the Jay Cooke real estate pool collapse, the U.S. Supreme Court held that a joint congressional investigating committee's attempt to force the pool's manager, Hallett Kilborn, to fully discuss its operations amounted to a judicial act impermissibly undertaken by a legislative body. Congress has no such power, since no crime had been alleged. And, moreover, in the event that a crime had been alleged, it would be for a court and judge, not a legislature, to compel disclosure. "[W]hat authority," the Court asked, "has the House to enter upon this investigation into the private affairs of individuals who hold no office under the Government."[51]

The U.S. Supreme Court's *Boyd* case followed by a few years its staunchly privacy-protective *Kilbourn* ruling. Like those of *Kilbourn*, the facts of *Boyd*, a tax case, will not strike contemporary civil libertarians as those of a civil liberties landmark, involving, as it does, what we today might call "economic" as opposed to "personal" privacy. In 1882, the supervising architect in charge of constructing new federal buildings in Philadelphia began accepting bids for glass to be used in the new structures. The architect asked those providing glass from abroad to submit bids consistent with the assumption that the glass would be admitted to the country duty-free. E. A. Boyd and Sons won the contract. Because the architect was rushed, however, he asked Boyd to supply him as soon as was practicable with glass on hand, glass on which duty had already been paid. In return, the architect guaranteed Boyd the future right to import an equivalent amount of glass duty-free. Circumstances, however, soon conspired to lead Boyd into trouble. First, to fit his on-hand stock to order, Boyd had to cut, and in the process destroy, a larger quantity of glass than the square footage required for the federal building. Then, to make matters worse, a large amount of the glass that Boyd subsequently imported had shattered in transit. Soon, thirty-five cases of glass being imported by Boyd were seized by the customs inspector in the Port of New York on the grounds that Boyd had allegedly secured a duty-free permit from the U.S. Treasury Secretary by making false statements to the architect that that glass was to replace an equivalent amount used earlier in the construction of the

> Bureaucracy is founded upon writing, liberty on the breathing word. Extensive writing, pervading the minutist branches of the administration, is the most active assistant of modern centralization. . . . [O]rality . . . [is] an important element of our civil liberty. I do not believe that a high degree of liberty can be imagined without widely pervading orality. . . .

Whereas, "[I]n former times secrecy was considered indispensable in public matters," now publicity must be understood as "at all events an alarm-bell, which calls public attention to the spot of danger" Francis Lieber, *On Civil Liberty and Self-Government* [Philadelphia: J.B. Lippincott & Co., 1877] 127, 128, 129, 130). So governmental matters—quintessentially public matters—had to be seen and rendered visible.

50. The pioneering thinking on the imperative of a publicity-oriented seeing state was undertaken by government officials concerned with railroads. Foremost amongst them was Charles Francis Adams, who was from 1869 to 1879 the head of the nation's most significant early railway authority, the Massachusetts Board of Railroad Commissioners (MBRC), an agency that "was set up as a sort of lens by means of which the otherwise scattered rays of public opinion could be concentrated to a focus and brought to bear upon a given point" (Adams, qtd. in Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred A. Kahn* [Cambridge, MA: Belknap Press, 1984], 23). See also Charles Francis Adams, Jr., *Railroads: Their Origins and Problems* (NY: G.P. Putnam's Son's, 1880), 140–41, where he asserts that the MBRC "opened to light all the dark places." He also claims that

> The indisputable fact was recognized that those [railway] corporations are so large and so removed from the owners of their securities, and the community is so deeply concerned in their doings and condition, that the law-making power both has a right and is in duty bound to insist on that publicity as respects their affairs without which abuses cannot be guarded against.

It was Adams who created the nation's first "Sunshine Commission," which sought to regulate business primarily by exposing their "private" affairs to public view, a process Thomas McCraw has referred to as "regulation by publication" (McCraw, *Prophets of Regulation*, 23). Adam's innovations in Massachusetts predate slightly the push for the criminalization of economic behavior. On the immense influence of railroad in setting institutional patterns of government administration, see Chandler, *Visible Hand;* Skowronek, *Building a New American State.* Under Adams's leadership, the MBRC, which had met staunch resistance to more coercive forms of regulation, devised an approach involving the production of information in reports and on forms arranged in a manner that the Commissioners deemed to be most serviceable.

51. *Kilbourn v. Thompson*, 103 U.S. 168, 195 (1880). In a private letter, Justice Miller, the author of the *Kilbourn* opinion, added

> I think the public has been much abused, the time of legislative bodies uselessly consumed and rights of the citizen ruthlessly invaded under the now familiar pretext of legislative investigation and that it is time that it was understood that courts and grand juries are the only inquisitions into crime in this country. I do not recognize the doctrine that Congress is the grand inquest of the nation, or has any such function to perform. . . . As regards needed information on subjects purely legislative no doubt committees can be raised to inquire and report, money can be used to pay for such information and laws may be made to compel reluctant witnesses to give it under proper guaranty of their personal rights. This is sufficient, without subjecting a witness to an unlimited power of a legislative committee or a single branch of a legislative body. (Taylor, *Grand Inquest*, 50)

Philadelphia federal building. In addition to the seizure, the U.S. attorney obtained a court order compelling Boyd to produce invoices for twenty-nine cases of glass previously imported by his company. Boyd was told that if he failed to produce these invoices, the allegations, against him would be taken by the government as confessed. Boyd refused to supply the invoices, and a judgment was entered against him, leading to the permanent forfeiture of the thirty-five cases of glass. Boyd appealed, reasserting the sorts of arguments that had been made but had consistently lost in lower federal courts in the 1870s, namely that the compulsory production of his business records violated his Fourth Amendment right against unreasonable searches and seizures and Fifth Amendment right against being forced to incriminate himself. By the late 1880s, however, when the statebuilding project and its accompanying project of legibility were well under way and when economic actors had begun to be imagined as criminals, the Supreme Court, in an opinion by Justice Bradley, held for Boyd against the claims of the U.S. government.

Justice Bradley's interpretation of the Fourth and Fifth Amendments, which had been adumbrated by losing arguments made in federal district courts in the 1870s, represented a departure from settled precedent and, by contemporary standards, was sweeping. The Fifth Amendment's constitutional self-incrimination privilege was traditionally invocable only by criminal defendants called to testify at their own trials. Bradley, apparently taking the reformers at their word that misbehaving economic actors in the new era were akin to criminals, extended the constitutional privilege to them in what he deemed to be "quasi-criminal" investigations.[52] He was able to do this in part by constitutionalizing the common law "witness privilege," which itself had extended the self-incrimination privilege to non-defendants in civil proceedings. Moreover, *Boyd* extended the scope of the right to encompass papers seized in advance of the "quasi-criminal" trial. To do this, Bradley famously fused Fourth Amendment search and seizure limitations with common law and Fifth Amendment self-incrimination privileges. The understanding in *Boyd* of what constitutes a search and seizure was remarkably liberal. It is true," he stated, in characterizing the facts of the *Boyd* case, "that certain aggravating incidents of actual search and seizure, such a forcible entry into a man's house and searching amongst his papers, are wanting [here]." But that is neither here nor there, since the government's assertion of its subpeona power in this case "accomplishes the substantial object . . . in forcing from a party evidence against himself."[53]

In *Boyd*, the Court, in a provocative act of rights-based constitutional resistance to a perceived and actual growth of the invasive "seeing" powers of a rapidly expanding new American state, for the first time upheld the joint rights-based Fourth and Fifth Amendment claims. It did so on the grounds that the civil enforcement proceeding involved in the case was, for all intents and purposes, quasi-criminal and hence that constitutional guarantees typically extended to criminals were appropriate to those whose privacy was invaded by the newly seeing state. In form, the result was a classic civil liberties decision which elevated a common law right, the "witness privilege," and expanded it, by reading it into the self-incrimination privilege of the Fifth Amendment, with a boost from a simultaneous allusion to the Fourth Amendment's protection against unreasonable searches and seizures. The Supreme Court had engaged in a signal juris-generative act, for the first time making grand pronouncements on behalf of constitutional guarantees of personal privacy. This decision ushered in a heightened contemplation of constitutional privacy issues by the High Court – and, significantly, in that era's wider political culture.

A ruling reinforcing the concerns of the landmark *Boyd* decision (and *Kilbourn v. Thompson*) issued from the pen of Justice Field in a Circuit Court opinion one year later. *In Re Pacific Railway Commission* involved the efforts of a commission specially authorized by Congress to investigate the Pacific Railway to compel Leland Stanford to disclose his private papers to the body.[54] In his opinion for the Court, Field rebuffed the commission, citing separation of powers objections to making the federal court, which was called upon by the commission to assert its compulsory process powers, an instrument of legislative or quasi-legislative bodies. To Field, this amounted to a plain misuse of the judiciary. And the issue appeared to him more than one of functional niceties: the separation of powers issues had plain civil liberties impli-

52. *Boyd*, 116 U.S. at 622. Edward A. Ross later declared in *Sin and Society* that "The real weakness in the moral position of Americans is not their attitude toward the plain criminal, but their attitude toward the quasi-criminal" (Ross, *Sin and Society*, 46). Bradley's innovation was to accord quasi-criminals the constitutional protections of quasi-criminals.

53. *Boyd*, 116 U.S. at 622. The opinion was long on history and placed the instant case alongside the famous Wilkes case. Of that case, Bradley declared that

> the principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of the indefeasible right of personal security, personal liberty, and private property. (*Boyd*, 116 U.S. at 630)

The connection between the Fourth Amendment's search and seizure requirement and the Wilkes case and the American Writs of Assistance controversy were a staple of the expositions of the clause in the major nineteenth century legal treatises. See, e.g., Cooley, *Constitutional Limitations*, 299–304.

54. *In Re Pacific Railway Commission*, 32 F. 241 (Circuit Court, N.D. California, 1887).

cations. A judicial hearing, Field asserted, was bound to more solicitous of privacy claims than a decision made by either legislative or administrative fiat.

> It is the forcible intrusion into, and compulsory exposure of, one's private affairs and papers, without judicial process, or in the course of judicial proceedings, which is contrary to the principles of a free government, and is abhorrent to the instincts of Englishmen and Americans.[55]

He wrote,

> [O]f all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely the protection of his person from assault, but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value.[56]

THE LAUNCHING OF A PERMANENT INVESTIGATORY STATE AND CIVIL LIBERTARIAN RESISTANCE

The *Kilbourn* case and Field's *Pacific Railway* opinion threw down the gauntlet on behalf of the prevailing institutional order. And *Boyd* grounded that prevailing order in new criminal process protections. It soon became apparent, however, that these staunch guarantees of privacy and civil liberties set out by Miller, Field, and Bradley represented a civil liberties jurisprudence that was radically at odds with the fact-gathering imperative of the new American state.

The creation of the nation's first independent regulatory commissions, the Interstate Commerce Commission (ICC) in 1887 and the Federal Trade Commission (FTC) in 1913, the passage of the Sherman Act in 1890, the 1894 federal income tax, struck down by the Supreme Court the following year but ultimately prevailing following the 1913 passage of the Sixteenth Amendment, the burgeoning budgets for the Internal Revenue and Customs Services, and, later, the passage of the Eighteenth Amendment and the Volstead Act, all brought important sectors of society into increasingly regular contact with the eyes and arms of the new American state.[57] It was in dialogic response to this state expansion that the Supreme Court fashioned it first sustained jurisprudence of search and seizure and privacy.

In a series of cases involving challenges to the federal government's pioneering administrative body, the ICC, launched a year after the *Boyd* decision, however, the entire Supreme Court set itself the task of reassessing the tenability of that regime given the emergent new political economy. While the Court was attentive to the concerns of Miller, Field, and Bradley, it did not so much defend their staunch commitment to privacy as asserted in the *Boyd* decision as prudently negotiate its dismemberment. Wide-ranging investigatory powers were accorded to the ICC, while, at the same time, newly conceived outer limits were set.[58]

The Supreme Court stuck to its legibility-limiting, privacy-protecting guns in its 1892 decision in *Counselman v. Hitchcock*.[59] In the *Counselman* case, Charles Counselman, a Chicago grain shipper who headed a small company with the assistance of seven employees, was brought before an Illinois grand jury to face questions regarding whether or not the rates he paid for shipping grain on various railroads violated ICC-set tariffs and whether he received rebates, drawbacks, or commissions from the railroads. Counselman was asked these questions directly. He repeatedly refused to answer, asserting (as had Boyd) a Fourth Amendment protection against unreasonable searches and seizures and a Fifth Amendment privilege against self-incrimination. Counselman was taken to jail for contempt and, in a federal habeas action, two federal courts upheld his ongoing imprisonment. In an opinion by Justice Blatchford, however, the U.S. Supreme Court unanimously reversed these decisions, holding that the Interstate Commerce Act could not be consistent with the Fifth Amendment and compel a person to give testimony in a criminal case that subjected him to potential criminal prosecution.[60] The Court

55. Ibid., 251. Charles McCurdy has persuasively argued that Justice Field was not simply a *laissez faire* justice acting in service of business interests but rather a major (and broadly concerned) constitutional theorist working to formulate and institutionalize socially useful and public-spirited legal guidelines concerning the separation of the public and private spheres (Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of 'Laissez-Faire' Constitutionalism, 1863–1897," *Journal of American History* 61 [1975]: 970–1005).

56. *In Re Pacific Railway Commission*, 250.

57. *Pollack v. Farmers' Loan and Trust Co. v. U.S.*, 157 U.S. 429 (1895), 158 U.S. 601 (1895).

58. This behavior involving a Court effort to work out a *modus vivendi* in the following Fourth Amendment legibility cases parallels the approach the Court used in assessing the novel assertion of ICC authority over railroad rates, an approach which was chronicled by Skowronek in *Building a New American State*, chap. 8. Regarding the ICC's new rate-making authority, Skowronek concluded that

> [I]t is more than likely that the Court understood the volatile political nature of the question at hand and the growing precariousness of its own political position. In declaring its determination to refrain from unwarranted exercises of judicial power, the Court seemed to be searching for a new and more secure position before the growing democratic attack on the judiciary got out of hand and caused some real damage to its prerogatives and its prestige (Skowronek, *Building a New American State*, 260)

This era witnessed escalating verbal attacks on the judiciary and proposals for the recall of both judicial decisions and judges themselves. See William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* (Princeton: Princeton University Press, 1994).

59. *Counselman v. Hitchcock*, 142 U.S. 547 (1892).

60. Interestingly, the government unsuccessfully based its ar-

declared that for the information-eliciting provisions of the act to be valid, the absolute immunity against future prosecution for the offense must be granted.

The combined holdings of the Supreme Court in *Boyd* and *Counselman* landed a potentially crippling blow to the fact-gathering powers of the new American state. Two years later, in *ICC v. Brimson* (a decision in which Justice Field did not participate), the Court was more accommodating.[61] *Brimson* involved an informal complaint filed with the agency against the rates and charges of a number of railroads. The gravamen of the complaint was that the Illinois Steel Company was in collusion with certain railroads and thus gained preferential transportation rates. Suspicions were aroused that the steel company and the railroads were owned by the same people and, in an effort to confirm these suspicions, the ICC issued a series of subpoenas in an attempt to compel production of the company's stock books. In a close decision, the *Brimson* Court held that a court could, at the ICC's request, compel production of the desired records. In doing so, the Court emphasized the practical necessity of its holding:

> Any adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the states under national control.[62]

At the same time, however, citing Justice Bradley's and Justice Field's respective opinions in *Boyd* and *Pacific Railway*, Justice John Marshall Harlan emphasized in strongly-worded dicta that "Neither branch of the legislative department, still less any merely administrative body established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen."[63] The counterposing of the early ICC cases of *Counselman* and *Brimson* in the Supreme Court signaled that the process of negotiating a *modus vivendi* between publicity and privacy in the era of the construction of the new American state had begun.

THE CAMPAIGN FOR LEGIBILITY AND PUBLICITY

While the Supreme Court was an active participant in the privacy-publicity battles, signal developments, of course, took place in other branches of the government as well as in the broader public discourse. A crucial sally in state development pertaining to the ongoing project of legibility was Theodore Roosevelt's 1903 establishment of the Bureau of Corporations within the Department of Commerce and Labor. While this Bureau lacked direct regulatory power, it did possess broad authority to collect and publish data on American corporations. It possessed, that is, the power of publicity.[64] The Federal Bureau of Corporations, the first executive branch agency established to monitor industry, sought, as had Charles Francis Adams's Massachusetts Board of Railroad Commissioners before it, to use publicity as its primary regulatory tool. Its goal was to permanently open up corporations to the eye of the new American state, to render them legible so that they could be administered. The Bureau of Corporations vowed to make stock ownership "as public as land titles," thus enabling public officials in Washington to see who within a corporation was making decisions and setting corporate policy.[65] Similarly, it sought to lay bare interlocking directorates and stock transactions so that the country's new regulatory laws could be targeted at real rather than fictitious interests. In service of these ends, it was proposed that national incorporation laws be established for companies operating in interstate commerce, with the privilege of incorporation being contingent upon corporate cooperation with the project of legibility, on the provision to the national government, that is, of facts concerning corporate organization, accounting, and decision-

gument before the High Court on the contention that this was a regulatory rather than a criminal case. They stated specifically that

> An investigation before a grand jury is in no sense 'a criminal case.' The inquiry is for the purpose of finding whether a crime has been committed, and whether any one shall be accused of an offense. The inquiry [is] secret; there is no accuser, no parties, plaintiff or defendant. The whole proceeding is *ex parte*, the testimony being confined to one side, and the evidence adduced is not governed by the rules or the manner or method by which testimony is adduced or admitted on the trial of cases in court. Such an investigation is not a criminal case within the meaning of the Constitution (*Counselman*, 554–55).

61. *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894). R. Erik Lillquist contends that the *Counselman* ruling represented a turning point in which the Court realized that it could not and should not interpose itself as a barrier to the project of legibility, given the massive changes at large in the wider political economy (R. Erik Lillquist, "Constitutional Rights at the Junction: The Emergence of the Privilege Against Self-Incrimination and the Interstate Commerce Act," *Virginia Law Review* 81 [1995]: 1989–2042). In the pages that follow, I, however, highlight what seems to me to be an ongoing process of negotiation concerning state development which took place over the course of the subsequent thirty or so years.

62. *Brimson*, 474.

63. Ibid., 478.

64. Sklar has demonstrated the great coercive effect this power might have had in practice had the Hepburn Bill strengthening the Bureau's publicity powers passed (Sklar, *Corporate Reconstruction*, 228–85). Theodore Roosevelt's commitment to publicity, in both his rhetoric and his substantive public policy proposals, closely tracks that of his advisor Herbert Croly, as well as that of Walter Lippmann (whose views are discussed below). For an account of Roosevelt's rhetoric and commitment to publicity, see Arthur M. Johnson, "Theodore Roosevelt and the Bureau of Corporations," *Mississippi Valley Historical Review* 45 (1959): 571–90. The discussion of the Bureau that follows is drawn from Sklar, *Corporate Reconstruction*, 184–203.

65. Sklar, *Corporate Reconstruction*, 190.

making. In addition, and more radically, it was proposed that a national licensing scheme be established for all corporations operating in interstate commerce, with the disclosure of requested facts a prerequisite to approval of the license.

These various government legibility initiatives, beginning with discrete congressional investigations and developing into the creation of permanent "seeing" institutions, such as the ICC and the Bureau of Corporations, were supported by a broad cadre of progressive public intellectuals who assaulted the claims privacy and vaunted the claims of publicity. In these progressive intellectual campaigns on behalf of the new American state's project of legibility, the visual metaphor used by James Scott in his book on state modernization appears repeatedly.[66] A key progressive talking point, for instance, involved the power of the visible fact. Walter Lippmann, for example, argued in his influential early work that the collection of facts from individuals, from businesses, from unions, represented the first essential step in the creation of a scientific government characterized by mastery rather than drift. Lippmann defined mastery as the ability "to distinguish fact from fancy," a phrase he used repeatedly throughout his book.[67] "You cannot throw yourself blindly against unknown facts," he warned, "and trust to luck that the result will be satisfactory.[68] "Scientific discipline [is] where men ... know fact from fancy."[69] "The scientific spirit," he added, "is the discipline of democracy, the escape from drift, the outlook of a free man. Its direction is to distinguish fact from fancy; its enthusiasm is for the possible; its premise is the shaping of fact to a chastened and honest dream."[70] In the name of progress, Lippmann called upon American society "to live ready, to lighten experience by a knowledge of its alternatives, to let no fact be opaque, but to make what happens transparent with the choices it offers."[71]

In a 1915 paean to publicity, Lippmann declared that:

> The great healing effect of publicity is that by revealing men's motives it civilizes them. If people have to declare publicly what they want and why they want it, they cannot be altogether ruthless.... A special interest frankly avowed is no terror to democracy. It is neutralized by publicity.... The great virtue of democracy – in fact, its supreme virtue – is that it supplies a method for dragging the realities into the light, of summoning our rulers to declare themselves and to submit to judgment.[72]

This implied that, for the sake of progress and democracy, a number of the traditional liberties assumed as part of the old proprietary-competitive order would have to be discarded:

> It is more than likely ... that freedom in corporate accounting will have to be abolished, that all large enterprises will have to submit to publicly instituted systems of bookkeeping, and that their whole financial structure will become as visible as that of a railroad or a municipal corporation. For it is only by making publicly available to everyone the whole position of these enterprises that the relations of capital and labor, of corporation and investor, of industry and consumer can be lifted to a plane where transactions are really free because all the relevant facts are known. To preserve the reality of free contract it will almost surely be necessary to abolish the sham freedom of corporate secrecy.[73]

And the implications of these imperatives of the new corporate-administrative order would seep well beyond the targeted corporations themselves. Lippmann later took an additional step and insisted that, in the interests of adequate regulation, unions too would have to be opened up to public inspection, just as would any other powerful interests with a stake in the new American state.[74]

66. The widespread use of the visual metaphor in the formative years of the new American state serves as a notable parallel to the same era's deployment of the corporate metaphor, and seems to have served a similar naturalizing function vis-à-vis radically new and unfamiliar forms of governance. See Daniel P. Carpenter, "The Corporate Metaphor and Executive Department Centralization in the United States, 1888–1928," *Studies in American Political Development* 12 (1998): 162–203, 166.

67. Lippmann, *Drift and Mastery*, 156. Lippmann's book was of great significance because it in many ways captured perfectly the major themes of the "progressive" outlook of his times. It is worth noting, however, that over time Lippmann's views about the possibilities of democracy and democratic governance changed to the point where, after witnessing the rise of Nazi totalitarianism in Europe, Lippmann ended a staunch opponent of New Deal collectivism and a proponent of natural law and *laissez faire* economics. Walter Lippmann, *The Good Society* (Boston: Little, Brown, 1937). See Edward A. Purcell, Jr., *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University Press of Kentucky, 1973), 112–14, 152–54. See also David A. Hollinger, *In the American Province: Studies in the History and Historiography of Ideas* (Baltimore: Johns Hopkins University Press, 1985), 44–55; Ronald Steel, *Walter Lippmann and the American Century* (New York: Vintage Books, 1980), 325–17, 321–26. On the influence of the rise of European totalitarianism on legal (and political) thought more generally, see Richard A. Primus, *The American Language of Rights* (Cambridge: Cambridge University Press, 1999), 177–91.

68. Lippmann, *Drift and Mastery*, 158.

69. Ibid., 150.

70. Ibid., 151.

71. Ibid., 174. I note that the connections between the seeing and hard-fact gathering imperative in the statebuilding project and the era's literary realism and naturalism (in the work of Dreiser and Norris, amongst others), seems strong. It appears that both policymakers and artists believed that strong, even dominant, social forces were at work, forces which they had had very little contact with and understanding of. Factual knowledge was the prerequisite to understanding, and understanding, in turn, the prerequisite to mastery and control. See also Purcell, *Crisis of Democratic Theory*, 15–29.

72. Walter Lippmann, *The Stakes of Diplomacy* in *The Essential Lippman: A Political Philosophy for Liberal Democracy*, ed. Clinton Rossiter and James Lare (New York: Vintage Books, 1965), 226–27.

73. Walter Lippmann, *The Method of Freedom* in Rossiter and Lare, eds., *Essential Lippmann*, 332.

74. Walter Lippmann, "Regulating the Labor Unions," in Rossiter and Lare, eds., *Essential Lippmann*, 352–53. At the time of

Lippmann's friend, the journalist and political theorist Herbert Croly, also made it plain in his 1914 book *Progressive Democracy* that the gathering of facts as part of the ongoing project of legibility might impinge upon rights once taken for granted under the rapidly passing proprietary-competitive political economy. This, for Croly, however, was simply the price of progress. Administrators, he said, have "more inspiring work to do" than to worry about an individual and his rights. "If the prevailing legalism and a repressive moral code are associated with the rule of live-and-let-live," he opined, "the progressive democratic faith finds its consummation rather in the rule of live-and-help-live." "Wherever the lives of other people are frustrated," Croly emphasized, fixed on the imperatives of a progressive statism and hence more or less indifferent to potential civil liberties concerns, "we are responsible for the frustration, just insofar as we have failed to do what we could for their liberation; and we can always do something on behalf of liberty."[75]

Key to the administrative success of the new American state, in Croly's view, was the "acquisition of social knowledge."[76] And the acquisition of that knowledge involved giving administrators the power to see further and deeper into what formerly had been considered purely private affairs. This, for Croly, was a matter beyond dispute. "The one demand made by critics of the traditional system upon its directors and beneficiaries, which the latter should recognizize as being unequivocally helpful," he insisted, "is the demand for publicity." "Any part of the creed or the mechanism of the system which shuns the light," he concluded, "is necessarily a suspect."[77]

What at base was needed, in Croly's estimation, was a radically new conception of justice. He described progressive justice in arresting imagery by reimagining the symbol of justice itself:

> Instead of having her eyes blindfolded, she would wear perched upon her nose a most searching and forbidding pair of spectacles, one which combined the vision of a microscope, a telescope, and a photographic camera. Instead of holding scales in her hand, she might perhaps be figured as possessing a much more homely and serviceable set of tools. She would have a hoe with which to cultivate the social garden, a watering pot with which to refresh it, a barometer with which to measure the pressure of the social air, and the indispensable typewriter and filing cabinet with which to record the behavior of society.[78]

LOUIS D. BRANDEIS: THE PUSH FOR PUBLICITY AND THE "RIGHT TO PRIVACY"

Louis Brandeis is commonly categorized as a different sort of progressive from Croly and Lippmann. Croly and Lippmann were "New Nationalism" progressives who had made their peace with the large corporate conglomerates that characterized the nation's new political economy. They favored the creation of strong central bureaucratic authorities to ensure that the new agglomerations of private power operated ultimately in the public interest. Brandeis, on the other hand, was a "New Freedom" progressive who ostensibly believed that democratic liberty would best be preserved by breaking up concentrations of economic power and keeping the size of the central administration relatively small. When it came to the imperatives of visibility, however, these two commonly distinguished branches of progressivism were cut from the same cloth. Although typically remembered as an early and deep defender of "the right to privacy," Brandeis, like Lippmann and Croly, was also a believer in the salutary power of facts. And the creation of a full factual record on any social problem typically involves prying out information that other people are zealously committed to keeping private. In this regard, Louis Brandeis's commitment to "privacy" is well worth reconsidering. Brandeis plainly fits in well with those public intellectuals who fought for limitations on privacy in the name of publicity.

Conventional wisdom notwithstanding, in many senses Louis Brandeis was never a great defender of the "right to privacy" or of the "right to be let alone." It is worth recalling, at the outset, that Brandeis invented neither phrase: Both were coined by staunch and prominent nineteenth century advocates of limited government operating in the spirit of Justices Field and Bradley. The former phrase was coined by *Nation* editor E. L. Godkin, a classical liberal, in an 1890 article in *Scribner's Magazine*. The latter was coined by Thomas Cooley in his 1888 treatise on torts.[79] Brandeis had been roped into writing the now

the proposal of the Sherman Act amendment involving the publicity powers of the Bureau of Corporations, it was proposed that labor unions would not be compelled to provide as much information to the Bureau as was required from corporations (Sklar, *Corporate Reconstruction*, 232, 242–43).

75. Herbert Croly, *Progressive Democracy* (New Brunswick, NJ: Transaction Publishers, 1998), 368–70, 426–27. Croly's constitutional philosophy is discussed well and succinctly in Brand, *Corporatism and the Rule of Law*, 54–61.

76. Croly, *Progressive Democracy*, 369–70.

77. Ibid., 26.

78. Ibid., 369.

79. E. L., Godkin, "The Rights of the Citizen—To His Own Reputation," *Scribner's Magazine* 8 (1890); 58–67; Thomas M. Cooley, *A Treatise on the Law of Torts: or the Wrongs Which Arise Independent of Contract*, 2d ed. (Chicago: Callaghan and Company, 1888), 29. The lineage is noted (and references to Godkin and Cooley made) in James H. Barron, "Warren and Brandeis, The Right to Privacy, 4 Harvard Law Review 193 (1890): Demystifying a Landmark Citation," *Suffolk Law Review* 13 (1979): 875, which, in conjunction with the other sources listed in the ensuing notes, I draw upon for my discussion for the next few pages. Although Cooley has been frequently classified as a *laissez faire* liberal, particularly in the canonical, post-New Deal studies of *laissez faire* constitutionalism (see, e.g., Benjamin Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* [Princeton: Princeton University Press, 1942]: Sidney Fine, *Laissez Faire and the General Welfare*

famous *Harvard Law Review* article entitled "The Right to Privacy," an article now commonly understood to be the progenitor of constitutional privacy rights, by Samuel Warren, his old friend and law partner, who, like many of his class in the new and unfamiliar age of the late nineteenth-century mass circulation sensationalist press, was outraged about seeing his name in the Boston newspapers.[80] By contemporary standards, Warren had hardly been dragged through the muck of yellow journalism. Instead, Warren had simply been mentioned, and that, infrequently, as a guest at a few Boston society functions.

Warren and Brandeis certainly were straining toward a sort of privacy in penning their famous article, but the civil libertarian implications of that sort of privacy were dubious at best: These implications certainly would be characterized today as profoundly conservative, amounting to a form of press censorship. In their *Harvard Law Review* article, Warren and Brandeis arrayed themselves (to use Rochelle Gurstein's terms) with the "party of reticence" against the "party of exposure." The article essentially advanced the argument that if press strayed from reporting news that was considered legitimate by the governing mugwumpish elites, there were an array of legal means available to reign them in.[81] But it must be said that even this reticence was more Warren's preoccupation than Brandeis's.

The first step in papering over the tension in Brandeis's thought between privacy, with which Brandeis's name is commonly associated in constitutional thought, and publicity, which was a progressive imperative of the statebuilding effort that Brandeis worked tirelessly to advance, is apparent in his and Warren's 1890 article itself. Warren and Brandeis's initial argument for a right to privacy was, we should recall, an argument for a private and not a public right: The authors were advocating, and advocating only, an action in tort for its invasion. There was nothing constitutional about it. The primary defendants in such suits were imagined to be sensationalist newspapers, gossip columnists, and tabloid-style photographers. The article cites only private law cases. As such, and quite significantly, it neither mentions nor imagines that a right to privacy will be used as a shield against the invasion of the right by the government. Only after the Brandeis advocacy of intrusive government interventionism became deeply imbedded in the American political consciousness as part of the nation's governing philosophy under the new American state was it safe for the Warren Court to selectively invoke Brandeis's right to privacy in the service of targeted political constituencies without threatening all of the many intrusions upon privacy which Brandeis and his political heirs actively supported.[82]

Looked at in retrospect, however, Warren and Brandeis were paving the way for a regime-sustaining, post-New Deal ideology concerning the place of privacy (and civil liberty more generally) under the immensely powerful new American state. That ideology decoupled concerns about privacy from what progressives saw as the imperative project of legibility. It is significant that, outside of his *Harvard Law Review* article, only when it came to Prohibition did Justice Brandeis prominently weigh in on the virtues of "privacy," in the *Olmstead* and the *Carroll* cases. And here his record is mixed, and no more civil libertarian than that of "conservative" Justices Bradley and James Clark McReynolds.[83]

Brandeis did not delude himself about his lack of commitment to privacy any more than did progressives Lippmann or Croly, neither of whom had cut a public figure as a protector of privacy rights. In a letter written to his friend Alice Goldmark in 1891, for instance, Brandeis noted:

State: A Study in Conflict in American Thought, 1865–1901 [Ann Arbor: University of Michigan Press, 1956]; Edward Corwin, *Liberty Against Government: The Rise, Flowering, and Decline of a Famous Judicial Concept* [Baton Rouge: Louisiana State University Press, 1948]), Alan Jones and, more recently, Howard Gillman, have argued convincingly that Cooley had no particular solicitude for property and economic rights as more important than other rights such as free press and freedom of religion. They further argue that Cooley's intellectual allegiances were actually derived from Jacksonian egalitarianism, and hence profoundly suspicious of economic and corporate power. As the first head of the ICC, Cooley believed strongly in appropriate regulatory schemes. Alan Jones, "Thomas M. Cooley and 'Laissez Faire Constitutionalism': A Reconsideration," *The Journal of American History* 53 (1967): 751–71; Howard Gillman, *The Constitution Beseiged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham, NC: Duke University Press, 1993), 55–59. That said, however, Cooley remained a firm believer in limited, constitutional governance.

80. For illuminating discussions of the rise of the gossip-laden late nineteenth-century sensationalist press, the way in which this rise was experienced by the middle class and elites like Warren and Brandeis, and the efforts of some to secure privacy protections in the face of the onslaught, see Robert Mensel, "Kodakers Lying in Wait: Amateur Photography and the Right of Privacy in New York, 1885–1915," *American Quarterly* 43 (1991): 25, 32; Rochelle Gurstein, *The Repeal of Reticence: A History of America's Cultural and Legal Struggles Over Free Speech, Obscenity, Sexual Liberation, and Modern Art* (NY: Hill and Wang, 1996), 141–78; Norman Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* (Chapel Hill: University of North Carolina Press, 1986), 184–206.

81. Barron, "Warren and Brandeis," 912.

82. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973).

83. In *Olmstead v. United States*, Justice Brandeis dissented from the Court's holding that an illegal wiretap used to enforce Prohibition laws did not violate the strictures of the Fourth Amendment. *Olmstead v. United States*. 277 U.S. 438 (1972). In *Carroll v. United States*, however, he voted with the majority to uphold an automobile search of motorists suspected of violating Prohibition laws (*Carroll v. United States*, 267 U.S. 132 [1925]). Justices McReynolds and Sutherland dissented in the *Carroll* case. See Philippa Strum, *Louis D. Brandeis: Justice for the People* (Cambridge, MA: Harvard University Press, 1984), 330. For Eileen L. McDonagh, "Prohibition legislation typi[fied] the anti-civil rights state institutionalized in the Progressive Era" (Eileen L. McDonagh, "The 'Welfare Rights State' and the 'Civil Rights State': Policy Paradox and State Building in the Progressive Era," *Studies in American Political Development* 7 (Fall [1993]: 245).

> Lots of things which are worth doing have occurred to me as I sit calmly here. And among others to write an article on "The Duty of Publicity" – a sort of companion piece to the last one that would really interest me more. You know I have talked to you about the wickedness of people shielding wrongdoers and passing them off (or at least allowing them to pass themselves off) as honest men. Some instances of that have presented themselves within a few days which have fired my imagination. If the broad light of day could be let in upon men's actions, it would purify them as the sun disinfects. You see my idea; I leave you to straighten out and complete that sentence.[84]

Brandeis made the same point in a published article many years later advocating the public disclosure of corporate financial arrangements. "Publicity," he stated there, "is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light is the most efficient policeman."[85]

In his advocacy for the creation of the FTC, an agency that would ultimately absorb and expand upon the duties of Theodore Roosevelt's Bureau of Corporations (which itself had been modelled on Charles Francis Adams's "Sunshine Commission"), Brandeis emphasized the need for sweeping bureaucratic investigatory powers to put teeth into the powers of exposure. "In the complicated questions involved in dealing with 'Big Business,'" he wrote in *Harper's Weekly*, "the first requisite is knowledge – comprehensive, accurate, and up to date – of the details of business operations."

> The current collection and prompt publication of . . . information concerning the various branches of business would prove of great value in preserving competition. The methods of destructive competition will not bear the light of day. The mere substitution of knowledge for ignorance – of publicity for secrecy – will go far toward preventing monopoly.[86]

To contemporaries, the conflict between the progressive investigatory vision and the commitment to privacy was clear. Section nine of the Federal Trade Commission Act gave the commission sweeping powers to probe, providing that the commission and its agents shall have "access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against." And Section four defined "documentary evidence" as "all documents, papers and correspondence in existence at and after the passage of this act." When read in combination with the FTC's vague mandate to move against all unfair methods of competition, it was not far from the mark for one railroad lawyer, Edward Jouett, to publicly assert that the Act gave the agency "a roving commission to wander at will through all [of a business's] records and files." The FTC's mandate, Jouett complained, "exposes to outsiders a company's private business methods, trade secrets, and intimate correspondence. This may entail not only annoyance and humiliation but great financial loss."[87] This power was "not only unjust, unnecessary and un-American, but distinctly violative of the Fourth Amendment to the Constitution of the United States, which forbids unreasonable searches and seizure."[88]

This was squarely an issue of personal privacy, for the statute

> lays bare to strangers and competitors not merely the impersonal record of the actual transactions of the company, but also the plans, hopes, fears, policies and opinions of its officials, and their correspondents, together with a great mass of private information as to men and things which a company necessarily receives and gives. . . . Letters necessarily involve the personal privacy of individuals, and this right of privacy is a substantial one which the laws of this free country should, and . . . do protect.[89]

Jouett's comments were part of a broad public policy debate in which concerns about "the microscopic espionage of the federal government" as part of the booming growth of then hotly-contested central regulatory state were much bruited.[90] And, in this debate, it makes as much sense to align the ambivalent Louis Brandeis with those progressives advocating a restrictive view of privacy as with those enjoining government to keep its distance. In this regard, Brandeis was the wave of the future. During the 1920s, men who were to become prominent New Dealers, such as James Landis, Milton Handler, and David Lilienthal,

84. Letter, Louis D. Brandeis to Alice Goldmark (Feb. 26, 1891), in *Letters of Louis D. Brandeis*, ed. Melvin Urofsky and David Levy, Vol. 1 (Albany, NY: State University of New York Press, 1971), 1:100.

85. Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (New York: F. A. Stokes, 1914), 62.

86. Louis D. Brandeis, "The Solution of the Trust Problem," *Harper's Weekly*, Nov. 8, 1913, 18.

87. Edward S. Jouett, "The Inquisitorial Feature of the Federal Trade Commission Act Violates the Federal Constitution," *Virginia Law Review* 2 (1915): 584, 586–87.

88. Jouett, "Inquisitorial Feature," 585.

89. Jouett, "Inquisitorial Feature," 588.

90. Michael F. Gallagher, "The Federal Trade Commission," *Illinois Law Review* 10 (1915): 31, 42; See also J. L. Mechem, "Fishing Expeditions by Commissions," *Michigan Law Review* 22 (1924): 765–76; Randolph, "Inquisitorial Power Conferred by the Trade Commission Bill," *Yale Law Journal* 23 (1914): 672; Needham, "Federal Trade Commission," *Columbia Law Review* 16 (1916): 175; Wickersham, "Government By Commission," (Address before the Pennsylvania Bar Association, 1914). The commissions are defended in E. M. P. "Administrative Law, The Federal Trade Commission, Constitutionality of its Investigatory Powers," *California Law Review* 8 (1920): 241–45; Hankin, "Validity of Federal Trade Commission Act," *Illinois Law Review* 19 (1924): 17; Handler, "The Constitutionality of Investigations by the Federal Trade Commission," *Columbia Law Review* 28 (1928): 905.

wrote articles defending the new fact gathering powers claimed by the federal government. In 1926, the year after he completed his Supreme Court clerkship with Justice Brandeis, Landis, a pioneering scholar of the new administrative state later chosen by Franklin Roosevelt to head the Securities and Exchange Commission, published a lengthy historical justification of an expansive view of congressional investigatory activities in response to charges that such activities made a hash of traditional separation of powers constraints.[91] Milton Handler of Columbia Law School addressed an array of constitutional objections to the sweeping investigatory powers of the FTC, among them, objections that Commission probing violated privacy guarantees of the Bill of Rights. Handler believed that this defense was necessary in light of the Supreme Court's ruling in "the famous *Boyd* case," but argued that only when an administrative agency demanded all of a business's papers, failing to put any bounds on its requests, or when it was unreasonable, did a privacy problem arise.[92] In Handler's view, privacy was not an issue when the government was gathering facts in a matter of public concern. He understood administrative agencies as impartial forces in pursuit of knowledge for the public good. An independent agency like the FTC had "no axe to grind, no incentive to misrepresent or suppress" in its "scientific investigation . . . for the benefit of the entire public rather than for a single group."[93] The Constitution, he concluded, is not "a bar to honest and scientific research. And where the needs of government demand it, it should not be in the power of individuals to block such research."[94]

David Lilienthal, a disciple of Brandeis's protégé Felix Frankfurter and later the head of the New Deal's most serious stab at social and economic planning, the Tennessee Valley Authority, saw a fussy separation of powers traditionalism of the sort articulated by Justice Field in his *Pacific Railway* decision as an unwelcome and antiprogressive brake on the engine of history. As a lawyer, Lilienthal recognized that, traditionally, testimony could only be compelled under extraordinary circumstances by a judicial tribunal. That, however, had to change with changing times – "[a] duty thus limited," he wrote, "met the needs and conformed to the traditions of a simple, predominantly rural and individualistic society."[95] In a regulatory era, "[t]o guide that regulation, to make it effective and intelligent, the regulators needed access to all the pertinent facts."[96] The practice of limiting compulsory disclosure to private disputes now had to "give way to the imperative needs of government regulation."[97] In reaching these conclusions, Lilienthal understood himself to be staking out new territory as a social engineer:

> We know little of the technique of publicity as a method of social control. Its potentialities seem limitless. It may well be that the welfare of the nation, perhaps the very integrity of our economic life, will some day depend upon the power of a public tribunal to secure full, complete, and continuous access to the facts."[98]

NEGOTIATING A SUSTAINABLE LEGAL ORDER FOR THE NEW AMERICAN STATE

By the early twentieth century, the partisans of publicity had begun to gain the upper hand in public debate as in institutional developments. It was at this time that the U.S. Supreme Court began to repeatedly distance itself from the most sweeping readings of its *Boyd* and *Counselman* precedents and to negotiate a rapprochement with the perceived imperatives of the new American state. The Court extended its permissive interpretation of the ICC's investigatory powers in three early twentieth-century decisions, *ICC v. Baird, ICC v. Goodrich Transit Co.*, and *Smith v. ICC*.[99] In *Baird*, a freight-pooling case, the Court parried Fourth, Fifth, and Tenth Amendment claims raised by coal companies resisting the ICC's insistence that they produce their purchase and transportation contracts and give testimony about them, by ruling that under the Interstate Commerce Act, the contracts and testimony fell within the ambit of legitimate ICC inquiry. The *Goodrich* decision made it clear that under its organic statute, the commission could compel regulated businesses to keep their financial records in a certain form – a form, that is, designed to render them legible to the new American state.[100] And the *Smith* decision

91. James M. Landis, "Constitutional Limitations on the Congressional Power of Investigation," *Harvard Law Review* 40 (1926): 153. Thomas McCraw has called Landis's 1938 text, *The Administrative Process*, "the most thoughtful analysis of regulation by an experienced commissioner to appear since Charles Francis Adams' Railroads: Their Origins and Problems (1878)" (McCraw, *Prophets of Regulation*, 153). For a broader profile of Landis, including of his commitment to publicity, see McCraw, *Prophets of Regulation*, 153–209.

92. Milton Handler, "The Constitutionality of Investigations by the Federal Trade Commission: II," *Columbia Law Review* 28 (1928): 905, 911.

93. Handler, "Constitutionality of Investigations," 934–36.

94. Ibid., 935.

95. David E. Lilienthal, "Power of Government Agencies to Compel Testimony," *Harvard Law Review* 39 (1926): 694, 695.

96. Ibid., 696.

97. Ibid., 698. Along the same lines, Herbert Croly had argued that

> [t]he conscientious and competent administrator of an official social program would need and be entitled to the same kind of independence and authority in respect to public opinion as that which has traditionally been granted to a common law judge. (Croly, *Progressive Democracy*, 361)

98. Lilienthal, "Power of Investigations," 721.

99. *Interstate Commerce Commission v. Baird*, 194 U.S. 25 (1904); *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194 (1912); *Smith v. Interstate Commerce Commission*, 245 U.S. 33 (1917).

100. In this regard, it is worth noting that the project of legibility in many cases involves not only securing a state's access to pre-

considered compulsory testimony concerning political contributions by businesses to be a legitimate area of ICC inquiry, when the agency was directed by a Senate resolution to conduct a wide-ranging investigation into anti-competitive and politically corrupt conduct by railroads.

These rulings seemed to embolden the ICC, and in two major cases, *Harriman v. ICC* and *U.S. v. Louisville and Nashville Railroad Co.*, an apparently worried Court rallied to brush back some of the commission's less circumscribed investigations.[101] The *Harriman* case involved ICC orders to the head of the Union Pacific, E. H. Harriman, and his banker, to answer questions concerning Harriman's stock ownership and purchasing arrangements involving other roads. Justice Holmes, who wrote the opinion in *Harriman*, considered the case to be a major civil liberties milestone. Holmes was plainly infuriated by the claims made by the ICC, which he told Harold Laski "made my blood . . . boil and . . . made my heart sick to think that they excited no general revolt."[102]

Holmes, who did not draw the after-constructed distinction between economic and personal privacy, was outraged by the commission's high-handed wielding of its investigatory powers. As he characterized it:

> The contention of the Commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the [Interstate Commerce Act] but to aid it in recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind.[103]

The ICC had the audacity to suggest, Holmes continued, that

> whatever might influence the mind of the Commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any fact, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled[104]

Holmes concluded that fidelity to basic principles of Anglo-American common law dictated that testimony be compelled only when a sacrifice of privacy was necessary, that is, where a specific transgression of the law was being alleged. The decision was made on statutory grounds, but Holmes suggested that had the Court not construed the statute in this way, the commission's conduct would likely have run afoul of constitutional requirements.

The *Louisville and Nashville* decision of 1915 also limited what the Court saw as ICC investigatory overreaching. There, the Commission was seeking to have its agents inspect and examine a wide range of a railroad's internal accounts, records, and memoranda. The railroad balked, asserting a Fourth Amendment defense that all sorts of requested materials – memoranda between department heads and with legal counsel, proposed construction plans, intelligence on rivals, and labor relations – were private papers to which the ICC had no legitimate claim. The Court, in an opinion by Justice Day, upheld on statutory grounds the commission's right to review certain relevant papers. At the same time, however, it concluded that the commission did not have the right to see either the railroad's business correspondence or the correspondence between the railroad and its counsel. By construing the statute in this way, the Court noted, it need not reach the more vexing constitutional issues raised by the more sweeping right to search claims made by the agency.

At the same time it was wrestling with its ICC cases, the Court was also fashioning a search and seizure jurisprudence in antitrust cases. Perhaps the most widely known search and seizure case of the statebuilding era after *Boyd* was *Hale v. Henkel*, a case that involved a Sherman Act prosecution of both the American Tobacco Company (ATC) and the MacAndrews and Forbes Company, the major supplier of licorice (a key ingredient in tobacco products) to the ATC.[105] Hale, the Secretary and Treasurer of MacAndrews and Forbes, was subpoenaed to appear before a grand jury investigating the case. Hale, however, resisted the subpoena. Even after being guaranteed immunity from prosecution, he refused either to testify before the grand jury or to produce corporate documents called for by the subpoena on the grounds that he had a right to assert both the corporation's protection against unreasonable searches and seizures under the Fourth Amendment and against self-incrimination under the Fifth.

In its *Hale* opinion, the Court for the first time held that corporations are protected under the Constitution from unreasonable searches and seizures. It went on to conclude that the scope of the subpoena was too broad to be reasonable. At the same time, though, it decided that Hale could not refuse as a blanket matter to produce any books and documents properly re-

existing facts but the very construction (and then uses) of what constitutes a fact.

101. *Harriman v. Interstate Commerce Commission*, 211 U.S. 407 (1908); *U.S. v. Louisville and Nashville Railroad Co.*, 236 U.S. 318 (1915).

102. Letter, Oliver Wendell Holmes, Jr. to Harold Laski, Sept. 15, 1916, in *Holmes-Laski Letters*, Mark DeWolfe Howe, 2 vols. (New York: Athenaeum, 1963), 1:19.

103. *Harriman*, 211 U.S. at 417. In a letter to Herbert Croly, Holmes explicitly linked the principles enunciated in his *Harriman* opinion to his strenuous opposition to the U.S. Postmaster General's denial of mailing privileges to periodicals allegedly evincing a "seditious tendency" (Letter, Oliver Wendell Holmes to Herbert Croly, May 12, 1919, in *Holmes-Laski Letters*, 152).

104. *Harriman*, 417.

105. *Hale v. Henkel*, 201 U.S. 43 (1906).

quired by the grand jury as part of its investigation.[106] In reaching this conclusion, the Court explicitly cited the imperatives of a functional regulatory regime, saying that a contrary ruling "would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers."[107]

In another prominent decision involving the tobacco trust, Oliver Wendell Holmes wrote a strong opinion for the Court clipping the investigatory presumptions of the FTC, just as he had done to the ICC in the *Harriman* case. In *FTC v. American Tobacco Co.*, the FTC had claimed an unlimited right of access to ATC's papers, citing the possibility that the company had violated key provisions of the Federal Trade Commission Act. Holmes, again failing to draw an economic/personal privacy distinction, wrote,

> The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public. Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe the Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire . . . and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.[108]
>
> The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up.[109]

POSTSCRIPT: CLAWANS, THE DECISIONS OF '46, AND THE TRAJECTORY OF PRIVACY IN THE NEW AMERICAN STATE

A major part of the effort to construct a smoothly functioning new American state involved a triumph over legal resistance to the project of legibility made in the name of rights to privacy. When progressive partisans of the project of legibility sought to advance their cause through a morally charged rhetoric of criminality, partisans of privacy, such as Justice Bradley in the *Boyd* decision, responded by according civil defendants and resisters state constitutional rights that had traditionally been vouchsafed only to criminal defendants. They also, understandably, given their roots in the old proprietary-competitive political-economic order, did not draw a distinction between the economic privacy of businesses and businessmen and a separate form of "personal" privacy.

Bradley's bold civil libertarian step, however, with its broad new protections for privacy rights, proved to be too protective of those rights, given the needs of the newly emergent central state. Too broad a concern for privacy, in short, stood as a serious obstacle to the entire statebuilding project, an obstacle at least as serious as the Court's more often discussed "liberty of contract" jurisprudence. The Court soon recognized this, and, in a series of ICC and antitrust cases,

106. Ibid., 76. Here we see an instance of what Stephen Holmes has argued is a systemmatically underappreciated dynamic in constitutional politics: the way in which rights-creation is commonly deployed as a means of empowering (rather than limiting) the state (Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* [Chicago: University of Chicago Press, 1995], 101–2. Here, at the same time the Court extended unprecedented Bill of Rights protections to corporations, it simultaneously empowered the federal government to gather broad information from them. See also William J. Novak, "The Legal Origins of the Modern Administrative State," in *Looking Back on Law's Century: Time, Memory, and Change,* ed. Austin Sarat, Robert Kagan, and Bryant Garth (Ithaca, NY: Cornell University Press, forthcoming), which mounts a sustained criticism of the thesis that, until the New Deal "breakthrough," law served as a brake on the development of the new American state. Law, in Novak's view, played a central, "juris-generative" role in helping to constitute that state.

107. *Hale,* 74. For the common law doctrine, see *Chitty on Criminal Law* (1816) and Archbold, *Criminal Pleading, Evidence and Practice* (29th Edition, 1934), cited in "Illegally Seized Evidence," *Southern California Law Review* 15 (1941); 65. Interestingly enough, at the same time as corporate ownership is being depersonalized and dispersed, legal doctrine is redefining corporations as "persons" for purposes of constitutional law. *Santa Clara County v. Southern Pacific R.R.,* 118 U.S. 394 (1886). Morton Horwitz has demonstrated that the "natural entity" or "corporate personality" theory of the corporation was not inherent in the *Santa Clara* decision, as is usually supposed, but instead became retrospectively attributed to it in hindsight. He roots the corporate personality theory in the 1906 *Hale v. Henkel* decision, which is a key Supreme Court legibility decision and is discussed at some length below (Morton Horwitz, "Santa Clara Revisited: The Development of Corporate Theory," *West Virginia Law Review* 88 [1985]: 173–224). The importance Horwitz attributes to *Hale v. Henkel* further underscores the significance of the Court's legibility decisions. See also Morton Horwitz, *The Transformation of American Law, 1870–1960* (New York: Oxford University Press, 1992), 65–107. For discussions of similar Fourth and Fifth Amendment issues arising out of antitrust investigations, see "Fourth and Fifth Amendments and Visitorial Power of Congress Over State Corporations," *Columbia Law Review* 30 (1930): 103–8; H. Taft, "The Tobacco Trust Decision," *Columbia Law Review* 6 (1906): 375; "Powers of Federal Trade Commission to Demand Documentary Evidence," *Harvard Law Review* 36 (1923): 340–431; *Federal Trade Commission v. American Tobacco Co.,* 264 U.S. 298 (1924); *Wilson v. United States,* 221 U.S. 361 (1911). For a lower court application of the *Hale* holding to a Fifth Amendment privilege assertion against a Bureau of Corporations demand for information, see *United States v. Armour and Company,* 142 F. 808 (N.D. Illinois, 1906).

108. *Federal Trade Commission v. American Tobacco Co.,* 264 U.S. 298, 305–6 (1924).

109. *American Tobacco,* 306. In a letter to Harold Laski, Holmes pithily described the case as involving a "right claimed by the Trade Commission to go through all the books, correspondence, and papers of a corporation engaged in interstate commerce to see if they couldn't find out something to its disadvantage" (Letter, Oliver Wendell Holmes, Jr., to Harold Laski, Mar. 16, 1924, in *Holmes-Laski Letters,* 418). For another vigorous Holmes opinion concerning the Fourth Amendment, this involving the recklessly improper seizure of corporate books and documents, see *Silverthorne Lumber Co., v. United States,* 251 U.S. 385 (1920).

gradually negotiated away its earlier-proclaimed Bill of Rights privacy protections. This narrowing of the scope of privacy rights, it should be emphasized, was a *progressive* and not a conservative project. And this whittling down of Fourth and Fifth Amendment protections, it is worth noting, was thought necessary despite the fact that many of the new regulatory violations were now, thanks to the legislative successes of the progressive program, no longer quasi-criminal but were *actually* criminal and, as such, potentially subjected violators to both large fines and lengthy spells in state or federal prisons.[110]

Only by appreciating this developmental dynamic can we understand why following the New Deal constitutional revolution, which marked the beginning of the institutionalization of corporate liberalism as the prevailing public philosophy of what Karen Orren has called the new positivist state, some of the Supreme Court justices now most strongly identified as civil libertarians such as Louis Brandeis and William O. Douglas turned out to be the justices least concerned with the constitutional rights of criminal defendants in regulatory cases. Under the new corporate-administrative order, dispatch and efficiency were a signal progressive imperative and economic privacy was, for all intents and purposes, privacy no more.[111]

The Supreme Court's 1937 decision in *District of Columbia v. Clawans*, the Court's "switch-in-time" term, was a case in point. *Clawans* involved the trials of a man in police court without a jury for the sale of merchandise without the required license.[112] The punishment for this regulatory violation was hardly insignificant: a fine of $300 or 90 days in jail. In a seven-to-two opinion joined by Justice Brandeis, the Court (despite the plain-language strictures of the Sixth and Seventh Amendments) found no constitutional violation. The reason? The case involved regulation in the public interest. In contrast, justices who today are considered "anti-civil libertarian," James McReynolds and Pierce Butler, dissented in *Clawans*, calling the Court's decision a "grave danger to liberty." In their view, even if the regulatory case were classified as civil rather than criminal, since the case concerned well over twenty dollars, the right to a jury trial could not be denied. The *Clawans* decision was an early indication that the new constitutional order had implications that would sweep beyond the large corporations it was initially designed to straddle and administer.

Three important 1946 decisions anchored the new order. In *Davis v. United States* and *Zap v. United States*, two Fourth Amendment opinions penned by William O. Douglas, the Court shunted aside the constitutional claims made by defendants who ran afoul of regulatory regimes.[113] *Davis*, in fact, held that, if the place to be searched was a publicly regulated business or if the things to be seized are either publicly-required property or records, the Court's constitutional scrutiny of ostensibly unreasonable searches and seizures would be significantly reduced.

Davis was an Office of Price Administration case that arose during World War II. It involved the owner of a filling station in New York City who apparently sold gas to undercover federal agents without the required coupons and at an illegally inflated price. After the sale took place, the agents began to try to determine if the total amount of receipts on hand at the station matched the measurements there for the amount of gas sold. At some point, the owner of the station alleged that he had the full complement of receipts in a locked storage room on the premises, a room to which he refused admission to the agents. The testimony is disputed about whether the agents then threatened to break the door to the storage room down or whether the station owner was coerced by them in other ways, but at some point he relented and let the agents into the room. Counterfeit coupons were found. And the filling station owner alleged an unconstitutional search and seizure that violated the Fourth Amendment.

Justice Douglas's opinion for the Court rejected the station owner's claim. It asserted that, for two reasons, the facts justified a lower level of Fourth Amendment scrutiny. The first, Douglas argued, was that the search and seizure involved not private but public papers and documents.[114] And the second was that the

110. See Livingston Hall, "Substantive Law of Crime"; Packer, *Limits of the Criminal Sanction*, 13–14, 273–77, 354–63.

111. Interestingly enough, Justice Douglas's opinion for the Court in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), striking down a law providing for the sterilization of habitual criminals is often cited (as is Brandeis's 1890 law review article) as seminal in the development of the "right to privacy." This is the case even though the *Skinner* opinion makes no mention of "privacy" and is decided squarely on equal protection grounds. On the new positivist state, see Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (Cambridge: Cambridge University Press, 1991); Stephen Skowronek, *Building a New American State*. According to Lustig

> [M]odern developments [change] the form of law, what fundamentally is. Rather than a settled framework of activity, rooted in precedent, known to citizens, and focused on the judicial individual, "law" becomes equated with changing policies and social purposes as defined by powerful groups. It also becomes oriented toward future goals. Administrative law, rather than contract law, becomes the paradigmatic form of law in the modern state. (Lustig, *Corporate Liberalism*, 25)

See also Lustig, *Corporate Liberalism*, chap. 7. The institutionalization of this dispatch and efficiency in criminal regulatory cases constituted an important part of what Orren and Skowronek have called "the settlement of the 1940s" (Orren and Skowronek, "Regime and Regime Building in American Government: A Review of Literature on the 1940s," *Political Science Quarterly* 113 [1999]: 689–702).

112. *District of Columbia v. Clawans*, 300 U.S. 617 (1937).

113. *David v. United States*, 382 U.S. 582 (1946); *Zap v. United States*, 382 U.S. 624 (1946).

114. By statute, the gasoline coupons remained the property of the Office of Price Administration and were subject to inspection by it at all times (*Davis*, 328 U.S. at 588).

filling station was not a private residence but a place of business, a business that, moreover, was searched during the course of regular business hours.[115] In other words, the case involved the core of the regulatory process.

Justice Frankfurter's dissent in the case (which was joined by Justices Murphy and Rutledge) was of a different tenor. Plainly irate, Frankfurter declared the *Davis* case to be "directly related to one of the great chapters in the historic process whereby civil liberty was achieved and constitutionally protected against future inroads," and insisted that, in his opinion for the Court, Justice Douglas had made a "travesty" of the Fourth Amendment.[116] Answering Douglas's argument, Frankfurter admitted that there were relevant distinctions between private and public papers. Private papers, he contended, could not be seized even through legal process because such a seizure would violate the Fifth Amendment provision regarding self-incrimination. Public papers, on the other hand, could be seized, but only through a properly safeguarded search.

As for Douglas's distinction between the relative protections accorded to places of business and private residences, Frankfurter contended:

> If this is an indirect way of saying that the Fourth Amendment only secures homes against unreasonable searches and seizures but not offices – private offices of physicians and lawyers, of trade unions and other organizations, of business and scientific enterprises – then indeed it would constitute a sudden and drastic break with the whole history of the Fourth Amendment and its applications by this Court.[117]

Frankfurter, in a pungent reversal of the invocation used by post-Warren era civil libertarians to defend according full constitutional protections to street criminals and political radicals, argued,

> It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.[118]

If it begins with the businessmen just because they are unpopular, Frankfurter in effect asks, where will it all end?

Justice Frankfurter had some inkling. The *Davis* decision, he asserted, "opens an alarming vista of inroads upon the right of privacy." As he pointed out, most businesses in the country were in possession of Office of Price Administration documents. And if one considered all documents that federal and state governments require be kept – an ever-expanding category – the prospect for government intrusion into privacy would be all but unlimited.[119]

For reasons similar to those he set out in *Davis*, Frankfurter also dissented from Justice Douglas's opinion for the Court in *Zap v. United States*, which was decided the same day. In that case, which involved procurement fraud by a Navy contractor, the defendant had given the government the right to inspect his accounts and records as part of the deal to secure the government contract. One such inspection turned up a fraudulent check. Both the majority and the dissenters in *Zap* agreed that here the search was lawful. The check, however, was seized from the contractor under a defective warrant. In allowing the check to be admitted as evidence against the defendant at trial, Justice Douglas made much of the fact that it was discovered and taken at a business during business hours without coercion. And, besides, he added, a valid warrant could have been issued. In Justice Frankfurter's estimation (again joined by Justices Murphy and Rutledge), "the fact that this evidence might have been secured by a lawful warrant seems a strange basis for approving a seizure without a warrant." The Fourth Amendment," he concluded, "stands in the way."[120]

The narrowing of Fourth Amendment privacy protections in the service of a smoothly functioning fact-fortified new American state assumed hat-trick status in 1946 in *Oklahoma Press v. Walling*.[121] The *Oklahoma Press* case involved the constitutional propriety of the *pro forma* judicial enforcement of a subpoena issued to the paper by the Department of Labor under the Fair Labor Standards Act (FLSA) – a statute which, it is worth noting, had copied its enforcement provisions verbatim from Wilson and Brandeis's Federal Trade Commission Act. Under the FLSA, the administrator was authorized to

> enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this act.[122]

The Labor Department had sought information from the newspaper company in an effort to discover whether or not it was violating the act. No allegations of illegality against the Oklahoma Press Company were pending. The paper resisted a federal court's *pro forma* enforcement of the subpoena, countering with a traditional Fourth Amendment argument of the sort Justice Field had made in his 1887 *Pacific Railway*

115. Ibid., 592.
116. Ibid., 594–95.
117. Ibid., 596.
118. Ibid., 597.
119. Ibid., 602.
120. *Zap*, 328 U.S. at 633.
121. *Oklahoma Press v. Walling*, 327 (U.S. 186 (1946).
122. FSLA, Sec. 11(a).

opinion. It asserted that a court had to fully adjudicate the issue before such a subpoena could be enforced. This time, however, with only Justice Murphy dissenting, the Court declared that Oklahoma Press's argument "raise[d] the ghost of controversy long since settled adversely to their claim."[123] The Court intoned dismissively,

> What petitioners seek is not to prevent an unlawful search and seizure. It is rather a total immunity to the Act's provisions, applicable to all others similarly situated, requiring them to submit their pertinent records for the Administrator's inspection.[124]

"It is not necessary," the Court added, "that a specific charge or complaint of violation of law be pending. . . . It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." "This has been ruled most often . . . in relation to grand jury investigations," the Court noted, citing *Hale v. Henkel* and *Wilson v. United States,* "but also frequently in respect to general or statistical investigations authorized by Congress."[125] The Court then characterized in circular fashion the Fourth Amendment doctrinal "compromise [that] has been worked out" to support the new American state: The modern understanding of the Fourth Amendment "secure[s] the public interest and at the same time [guards] the private ones affected against the only abuses from which protection rightfully may be claimed." These are "the interests of men to be free from officious intermeddling." Any other construction of the Fourth Amendment, the Court concluded, "would stop much if not all of investigation in the public interest at the threshold of inquiry." Besides, the Court noted, its fact-gathering rules went no further than the discovery rules of the Federal Rules of Civil Procedure (FRCP).[126]

The lone dissenter, Justice Murphy, declared that "[i]t is not without difficulty that I dissent from a procedure the constitutionality of which has been established for many years." "But," he stated, "I am unable to approve the use of non-judicial subpoenas issued by administrative agents." Murphy followed the now lonely task of tilting to the civil liberties commitments made by the Court in the waning days of the old proprietary-competitive order:

> Perhaps we are too far removed from the experiences of the past to appreciate fully the consequences that may result from an irresponsible though well-meaning use of the subpoena power. To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is to open invitation to abuse of that power.[127]

"Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty. . . . Liberty is too priceless," he ended, "to be forfeited through the zeal of an administrative agent."[128]

INSTITUTIONALIZING THE REMOVAL OF THE JUDGE AS GUARDIAN OF PRIVACY IN A LIMITED STATE

As one prominent legal scholar has recently declared given the statebuilding developments surveyed in this article, "by about 1950, Fourth and Fifth Amendment law was almost an empty shell."[129] As it happened, by the 1940s, the appeal to the traditional protections of the preprogressive order was more quixotic than even Justice Murphy may, as a lone dissenter in *Oklahoma Press,* have suspected. Murphy apparently failed to recognize that the role of judges under the new regime had been redefined in ways that moved them away from the mindset of traditional common law judges solicitous of individualist due process protections and toward the mindset of the administrators that Murphy had so fervently – and anachronistically – hoped they would control. Crucial, and noted as justificatory in the *Oklahoma Press* opinion, were the New Deal amendments to the discovery rules of the Federal Rules of Civil Procedure, rules that were soon copied by the states and thus came to pervade the entirety of American law.[130]

123. For this proposition, the Court cited Milton Handler on the constitutionality of Federal Trade Commission investigations and the entire array of ICC and antitrust cases discussed earlier at length: *Hale v. Henkel, Wilson v. U.S., ICC v. Brimson, ICC v. Baird, ICC v. Goodrich Transport, Smith v. ICC, Harriman v. ICC,* and others. *Oklahoma Press,* 327 U.S. at 204, n. 31, 32.

124. *Oklahoma Press,* 327 U.S. at 196.

125. *Oklahoma Press,* 208–9, citing the late nineteenth- and early twentieth-century ICC cases and Handler.

126. *Oklahoma Press,* 186, 216, n.55.

127. *Oklahoma Press,* 218–19.

128. *Oklahoma Press,* 219.

129. Stuntz "Substantive Origins of Criminal Procedure," 434.

130. The significance of FRCP amendments for contemporary privacy is emphasized by Waler K. Olson in *the Litigation Explosion: What Happened When America Unleashed the Lawsuit* (New York: Dutton, 1991), which I draw from (and supplement) in the following discussion. I note that Justice Murphy himself (an FDR appointee, after all) was apparently unaware of the relation which, with benefit of historical perspective, I am about to draw. In *Hickman v. Taylor,* Murphy boldly asserted that

> The deposition discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expeditions" serve to preclude a party from inquiry into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. (*Hickman v. Taylor,* 329 U.S. 495, 501 [1947])

See also *Lloyd v. Cessna Aircraft,* 74 F.R.D. 518 (E.D. Tenn., 1977) (accepting 'fishing expedition' under contemporary discovery rules); *United States v. AT&T,* 461 F.Supp,. 1314 (D.D.C., 1978; noting that in complex antitrust litigation, discovery will inevitably, and acceptably, amount to a fishing expedition). These cases are cited in *Moore's Federal Practice,* (New York: Matthew Bender, 1996), Vol. 4, Sec. 26.07[1]n.12.

Prior to the 1938 amendments to the federal rules, the scope of discovery was severely limited, and, where it was allowed, judges were charged with keeping the discovery process, the process of fact-gathering backed by the coercive power of the state, on a tight leash. Only facts legally relevant to the cases, with relevance strictly construed, could be elicited. Moreover, lawyers could only request information relevant to their own case, not the case of the opponents, a limitation known as the "own-case-only" rule.[131] To secure a fuller discovery, parties had to apply for a special "bill of discovery" that amounted to a relatively rare exception to the general rule.[132]

At the time of the triumph of the project of legibility, however, the discovery rules were altered to mimic the new constitutional power given to the public-spirited fact-gathering powers of the administrators of the new American state. Under the new FRCP 26(b), the own-case-only rule was jettisoned, as were the strictures confining inquiry to facts relevant to the issues in the case. Lawyers now had a right to inquire into any facts that might lead them to other facts which might be of use in a trial.[133] Any inquiry relevant to the (ill-defined and broadly-construed) "subject matter" of the litigation was fair game, with relevancy very broadly construed.[134] As a contemporary federal procedure manual described it, under FRCP 26,

> The requirement of relevancy must be construed liberally with common sense rather than measured by precise issues framed by the pleadings or limited by other concepts of narrow legalisms. . . . [D]iscovery should ordinarily be allowed *unless it is clear that the information sought can have no possible bearing upon the subject matter of the action.* . . . A request for discovery should be considered relevant *if there is any possibility* that the information sought may be relevant to the subject matter of the action.[135]

The fact-gathering needs of the new American state had not simply moved the judge and his wonted doctrines out of the way of modern administrators, they had also transformed the very nature of judicial power itself. The result is not only a new, powerfully seeing state, but also the contemporary lawsuit which, empowered by the new, administratively-derived disposition toward discovery, gazes deeply into the private lives of individuals, permitting all manner of "fishing expeditions" by now unconstrained lawyers in a strategic effort to gain advantage. In the heady days of the new regime, a 1945 note in the *Columbia Law Review* stated frankly that "the [new discovery] rules . . . permit 'fishing' for evidence *as they should.*"[136] Under this regime, Walter Olson quotes one California attorney as saying, "Attorneys must inquire into everything and prepare for everything, because no court will tell them where to stop or permit them to stop an adversary."[137] This new role as pretrial investigator, one commentator has suggested, is behind the transformation of people who used to be known as "trial lawyers" into "litigators."[138] Every attorney has assumed the authority of a progressive administrator. The result has been an explosion in the time and expense of lawsuit, and an unprecedented assault on what even we today would call "privacy." These uncabined New Deal discovery rules have affected the low and high.[139] Thus the fate of privacy under the fact-gathering ethic of the progressive legal order begat in significant part the fate or privacy in the contemporary one.[140]

131. Moore's *Federal Practice,* sec. 26.03.

132. See *Bruch Machine Tool Co. v. Aluminum Co. of America,* 63 F.2d 778 (2nd Cir., 1933; bill of discovery granted in Clayton Act antitrust case).

133. The scope of discovery in the federal courts is broad and requires nearly total mutual disclosure of each party's evidence prior to trial. The discovery rules are to be accorded broad and liberal treatment. . . . The information sought need not be admissible at the trial if the information appears reasonably calculated to lead to the discovery of admissible evidence. The purpose of discovery is to allow a broad search for facts. . . . FRCP 26(b) envisions generally unrestricted access to sources of information. (10 Fed. Proc. L. Ed. sec. 26:64)

Section 26.68 states "It is, in fact, a matter of no significance that broad discovery will disclose large quantities of material which would be completely inadmissible in evidence." See *Report of the Advisory Committee on Rules for Civil Procedure Appointed by the Supreme Court of the United States Containing Proposed Rules of Civil Procedure for the District Courts of the United States* (Apr. 1937); *Final Report of the Advisory Committee on Rules for Civil Procedure Appointed by the Supreme Court of the United States* (Nov. 1937); *Notes to the Rules of Civil Procedure for the District Courts of the United States* (Mar. 1938). It is worth noting that in 1946—the same year as what I have called the Supreme Court's "Decision of '46,"—FRCP 26(b) was amended to remove inadmissibility at trial as grounds for objection during a deposition where "the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence" (Moore's *Federal Practice,* Sec. 26.01[2]). See also sec. 26.01[6] and sec. 26.01[7] (Committee Note of 1946 to Amended subdivision (b) stating purpose of the Amendment to "allow a broad search for facts").

134. FRCP 26(b)(1) allows discovery of any nonprivileged matter "which is relevant to the subject matter of the pending matter."

135. 10 Fed. Proc. L. Ed. sec. 26:67, emphasis added.

136. Note, *Columbia Law Review* 45 (1945) 482, emphasis added. See also *Hickman v. Taylor,* 329 U.S. 495 (1947) 117.

137. Olson, *Litigation Explosion,* 114.

138. Maurice Rosenberg, "Federal Rules of Civil Procedure in Action: Assessing Their Impact," *University of Pennsylvania Law Review* 137 (1989): 2197, 2203.

139. See Jeffrey Rosen, *Unwanted Gaze.* Rosen focuses on recent changes in the discovery rules in sexual harassment cases. Walter Olson demonstrates, however, that invasions of privacy have become routine features of discovery in a wide variety of cases, not just those involving sexual harassment (Olson, *Litigation Explosion,* chap. 6). These developments, I insist here, are direct institutional legacies of progressive reforms undertaken as part of the effort in the late nineteenth and early twentieth centuries to create a new American state.

140. William Stuntz declares that, today, "subpeonas are subject to only the weakest of legal constraints" (Stuntz, "Substantive Origins of Criminal procedure," n.161). They are

These developments, under which both the government asserting a claim of public interest and private lawyers acting on behalf of private clients both have sweeping and unprecedented, state-supported powers to gather facts, while clearly raising anxieties about the value of privacy, no longer raise serious questions under the Fourth and Fifth Amendments or under what the Supreme Court has declared (under the Fifth and Fourteenth Amendment due process clauses) to be "the right to privacy." Given this trajectory of constitutional development, the Fourth and Fifth Amendments and the "right to privacy" were free to carry wholly new meanings and policy agendas. In the years after the New Deal – and culminating in the Warren years – the Fourth and Fifth Amendments were drafted into service as part of the Supreme Court's antiracist criminal process revolution, where their meaning is perpetually refined in a seeming endless succession of street crime cases.[141] "The Right to Privacy" has been developed mainly in cases involving sexual autonomy, beginning with birth control, moving to abortion, and halting (for the moment) just before gay rights. The distinction between "personal" privacy and "economic" privacy is strongly institutionalized in legal doctrine. The Fourth and Fifth Amendments and "the right to privacy" are taken very seriously. The fate of the value itself, however, remains ambiguous.

CONCLUSION

In the late nineteenth and early twentieth centuries, the United States underwent a profound transformation from a rural and agricultural to an urban and industrial society. This transformation was underlain by a shift from a proprietary-competitive political economy to a corporate-administrative one. These political-economic changes, in turn, were met and managed by an unprecedented course of American statebuilding culminating, ultimately, in the construction of the new American state.

The status of constitutional civil liberties in the statebuilding era has long been understudied. And, until recently, when that status has been considered, the inquiry has commonly, if often unwittingly, been tailored to meet the ideological requirements of a hegemonic, regime-sustaining progressive narrative of constitutional development. That narrative, first, makes a sharp distinction between "economic rights" and "civil liberties," and then, sequentially, conceptualizes the developmental trajectory as involving, first, the vanquishing of arguments on behalf of the former and, second, the gradual construction of a constitutional solicitude for the latter. Key civil libertarians, such as Louis Brandeis, have been characterized as the cast of heroes in this linear developmental process.

William Novak has rightly observed that this familiar model of constitutional development has tended to borrow from the progressive historians such as Charles Beard and Vernon Parrington what Novak calls "the classic progressive trope: law as obstruction."[142] According to this model, in the late nineteenth and early twentieth centuries, either a preexisting commitment to conservative public policies on the part of the judiciary, or an institutional preference for stability rooted in adherence to outdated common law doctrines, or (in more recent influential scholarship) an institutionalized judicial adherence to outdated *progressive* doctrines, positioned law and judges in this era primarily as barriers to state development.[143] These barriers were eventually overcome, following considerable legal and political struggle, with the constitutional breakthrough at the time of the New Deal.[144] Civil liberties, or "personal rights," were what judges began protecting after they got out of the business of protecting "economic rights."[145]

Only relatively recently have political development scholars begun to undermine the conventional "progressive" understanding of the relationship between the development of the new American state and con-

> practically unregulated; as long as the request is relevant to some legitimate investigation and compliance is not too burdensome [a limit, as Olson suggests, very rarely found], the target of the subpeona must hand over the goods (or papers).... [T]his bottom line is nonsense in privacy terms. Subpeonas can and do require disclosure of material that is much more private than the sorts of things police officers find in car searches, yet the subpeonas are much less heavily regulated than the searches. On the other hand, given the reliance of administrative agencies on the subpeona power, any other decision would pose real problems for much of the government outside the real of ordinary criminal procedure. (Stuntz, "Substantive Origins of Criminal Procedure," 444–45).

For a detailed historical account of the profound changes wrought by the 1938 discovery rules, see Stephen N. Subrin, "Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules," *Boston College Law Review* 39 (1998): 691–745. Subrin's chronicle of the contours of the discussion surrounding the adoption of these rules illustrates that that discussion—in its metaphors, imagery, hopes, and fears—tracked to a striking degree the contours of the debate concerning the project of legibility undertaken during the earlier statebuilding era.

141. Powe, *Warren Court and American Politics*, 193–99, 379–444; Stuntz, "Origins of Criminal Procedure"; Stuntz, "Privacy's Problem."

142. Novak, "Legal Origins of the Modern American State."

143. Gillman, *The Constitution Besieged*. The seminal statement of legal doctrine as a constraining institution is Rogers M. Smith, "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law," *American Political Science Review* 82 (1988): 90.

144. The broad outlines of this developmental model has been perhaps plainest in political development approaches to labor law. See Orren, *Belated Feudalism;* William Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA: Harvard University Press, 1991). See also Gillman, *The Constitution Besieged*.

145. The classic agenda-setting statement for the post-New Deal Court was found in *U.S. v. Carolene Products*, 304 U.S. 144 (1938), n.4, articulating the switch in solicitude from "economic" to "personal" rights.

stitutional development concerning civil rights and civil liberties. Eileen McDonagh, for one, has mounted a sustained criticism of what she has called the "unidimensional premise" regarding the status of civil rights in the Progressive Era (McDonagh includes what we would call "civil liberties" under the rubric of "civil rights"). This premise arrays

> women's suffrage [, the rights of immigrants and ethnic minorities,] and "African-American political, social, and cultural movements" on the same check sheet of progressive policies as those regulatory measures checking the excesses of market capitalism, as if they represent a cohesive reform orientation characterizing the period as a whole.[146]

McDonagh demonstrates that, in fact, a "positive welfare rights" program was joined programmatically with 'negative' civil right policies' to such an integral extent that she dubs the new American state initiated by progressives "the anti-civil rights state."[147] Pathbreaking studies of the freedom of speech by Mark Graber and David Rabban have emphasized in a similar spirit not how free speech "came first," in the gradual fulfillment of a civil libertarian progressive program, but rather the ways in which twentieth-century progressive or civil libertarian understandings of free speech actually amounted to *limitations* of earlier latitudinarian nineteenth-century "conservative libertarian" (Graber) or "libertarian radical" (Rabban) thought.[148] This important work has complicated our understanding of the relationship between civil liberties and the new American state.

Howard Gillman's recent work on civil liberties represents one of the rare (albeit prominent) efforts to consider in a development-conscious way the relationship between contemporary civil liberties and the new American state.[149] Gillman contends that two distinct constitutional traditions emerged from progressive efforts to create an enhanced regulatory state, a restraintist tradition associated in its origins with Felix Frankfurter, which was characterized by a willingness to defer to the perceived developmental imperatives of corporate liberalism, and a preferred freedoms tradition associated in its origins with Louis Brandeis, which was characterized by a favorable disposition toward the modern administrative state but, seared by its experience with the World War I era surveillance state at home and by the rise of fascism and totalitarianism abroad, sought to reinvent the older civil libertarian tradition for the modern era. The latter, Gillman argues, succeeded in replacing the old, preprogressive libertarian tradition of a constitutionalism of limited powers and residual freedoms with the now familiar model of a constitutionalism of general governmental powers limited by a slate of judically-defined preferred freedoms.

This model does not call into question the traditional "law as obstruction" progressive model of constitutional development but amounts instead to a sophisticated refinement of it. In contrast, this article's reconsideration of the battle over privacy and publicity in the late nineteenth and early twentieth centuries suggests that, while it adds important specifications to the wonted model, Gillman's account continues to systematically overestimate the success of the project of reconciling freedom with the perceived corporate-administrative imperatives. While Gillman is doubtlessly correct that, in light of their searing experiences with the Great War and the rise of racism and totalitarianism, "preferred freedoms" civil libertarians like Brandeis *sought* to reconcile a modern administrative state with an array of important freedoms, he does not explore the ways in which part of their efforts involved the delimitation of those freedoms through creative projects of ideological reconstruction. Appreciating the scope and depth of such projects of ideological reconstruction, of what Kahn has called the "constitutive" nature of constitutional development, is essential to understanding the fate of freedom under the modern American corporate-administrative state.[150]

At the time of the construction of the new American state, businesses and businessmen confronted with the unwonted fact-gathering claims of a newly-seeing state, resisted with appeals to their rights to "privacy," a resistance in which no distinction was made between what we today might call "economic" and "personal" privacy. This made sense, as, at a moment in which the country was in the thick of a political-economic transition from a proprietary-competitive to a corporate-administrative order, businesses were still closely identified with their (personal) proprietors and economic rights were considered the anchor of civil liberty. Part of the ideological reconstruction necessary to the successful accomplishment of the project of legibility involved constructing the "economic" privacy claims made by businesses and businessmen as distinct from the sort of "personal" privacy claims made in cases like *Roe v. Wade.* The next step was to imagine that the first sort of privacy could be largely neglected without serious collateral damage to the former and that, moreover, that such progressively-inclined reformers as Louis Bran-

146. McDonagh, "'Welfare Rights State' and 'Civil Rights State,'" 226–27.

147. Ibid., 228, 245.

148. David M. Rabban, *Free Speech in its Forgotten Years* (Cambridge: Cambridge University Press, 1997); Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley: University of California Press, 1991).

149. Howard Gillman, "Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence," *Political Research Quarterly* 47 (1994): 623–53. See also Paul L. Murphy, *World War I and the Origin of Civil Liberties in the United States* (New York: W.W. Norton, 1979).

150. Ronald Kahn, *The Supreme Court and Constitutional Theory, 1953–1993* (Lawrence, KS: University Press of Kansas, 1994).

deis had invented a right to privacy where none had previously existed. This, I have argued, has decidedly not been the case.

So far as privacy is concerned, given the widepread acceptance of the thesis that the transition from proprietary-competitive to corporate-administrative capitalism involved to a significant extent the "blurring" of the public/private distinction or a "fusion" of the public and private, it is odd for our grand outlines of civil liberties scholarship to continue to buy into a story of the new order as one involving the *beginning* of a solicitude for constitutional privacy.[151]

Contemporary anxieties about a loss of personal privacy have many sources. Technological change has certainly been one of those sources. So too, though, is the progressive realization of the new American state. During the twentieth century, constitutional progress did not coincide simply with apotheosis of constitutional privacy. Publicity – the power of the state to expose misdeeds and fortify itself with facts – has been a progressive imperative from the latter half of the nineteenth century to the present day. Part of that state's ongoing project of legibility involved serving the public interest and, for that matter, justice herself through (as Herbert Croly put it) the "most searching and forbidding pair of spectacles, one which combined the vision of a microscope, a telescope, and a photographic camera."

Political theorist Jeff Weintraub has noted that distinctions between public and private are often made in two different senses which are not clearly distinguished. One sense in which the public is distinguished from the private is that what is public is visible, whereas what is private is hidden. The second sense in which the public is distinguished from the private is that what is public is collective and under community control (*res publica,* that is) whereas what is private is identified with the individual.[152] The Supreme Court's late nineteenth- and early twentieth-century Fourth and Fifth Amendment jurisprudence underscores the close relationship between these two apparently different dimensions of the public/private distinction. The efforts of the central state authority to assert collective control over corporations and businesses generally necessarily involved a prerequisite effort to render what was formerly private or hidden visible. To use Scott's terms, it involved a project of legibility. It is no wonder that common recourse was made to visual metaphors by progressive advocates of the new American state. And it is similarly no wonder that those resisting this project of legibility felt that they were newly naked and that their privacy was being laid bare. It was an article of the progressive faith of the era that these claims to privacy be resoundingly defeated.

Constitutional change involving the Fourth and Fifth Amendments in the late nineteenth and early twentieth centuries redefined traditional protections of privacy in the interest of progress, of the construction of the modern American liberal state. In the interest of the public good it made the hidden public. To see the reconstruction of privacy in a way serviceable to the new American state as a matter affecting only business interests is shortsighted. The triumph of the project of legibility, which was targeted in the statebuilding era at business interests, altered institutional protections in a way that had much broader consequences, consequences that we are still discovering in the present day. In a regime which emphasizes interconnection without end, everything and everyone is subject to disrobing.[153] If all things are potentially *res publica,* then nothing is properly hidden. Such was the problem of privacy then; so it remains the problem of privacy today.

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151. See Lowi, *End of Liberalism;* Lustig, *Corporate Liberalism;* Grant McConnell, *Private Power and American Democracy* (New York: Alfred A. Knopf, 1967); Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998).

152. Jeff Weintraub, "The Theory and Politics of the Public/Private Distinction," in *Public and Private in Thought and Practice: Perspectives on a Grand Dichotomy,* ed. Jeff Weintraub and Krishan Kuman (Chicago: University of Chicago Press, 1997).

153. See Theodore J. Lowi, "The Welfare State: Ethical Foundations and Constitutional Remedies," *Political Science Quarterly* 101 (1986): 197–220; Thomas L. Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth Century Crisis of Authority* (Urbana: University of Illinois Press, 1977).