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The Antiprogressive Origins and Uses of the Right to Privacy in the Federal Courts 1860 – 1937

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A symposium on privacy in the federal courts raises, from the mere statement of its topic, more questions than it could possibly answer. Which privacy—common law, constitutional, statutory, or cultural? Why “in the federal courts”? Is privacy different there? To address the topic comprehensively would take more time and space than even the most elaborate symposium could possibly provide.

It requires a certain historical discipline, foreign to law office history, to view the past through any prism other than that of the present. Contemporary political controversies concerning the right to privacy generally pit liberal and progressive advocates of individual privacy rights against intrusions imposed by conservative legislatures. Thus, the current political posture of this debate tends to obscure the anti-progressive origins and early uses of the right. This article is an attempt to bring those origins back into focus. It explains the idea of privacy as it arose in the late nineteenth and early twentieth centuries. It explains, briefly, the progressive reform movement of that period. It identifies instances in which privacy was in fact the subtext of the due process debate surrounding progressive reform legislation prior to the Supreme Court’s decision in *West Coast Hotel Company v. Parrish*.¹ It then describes some of the more interesting examples of the uses of privacy as a cudgel by federal judges hostile to progressive reform, as well as a reminder of the political backlash.

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1. 300 U.S. 379 (1937).

Like every legal doctrine, privacy is an idea. Its origins as a matter of cultural and legal concern are discussed in detail elsewhere and can only be summarized briefly here.² It is protected in some circumstances by our constitutions, state and federal.³ In other circumstances it is protected by statute.⁴ In still others it is protected by common law.⁵ It is safe to say that the constitutional right to privacy originated in large measure in reaction to the Star Chamber and the writs of assistance. The rejection of Star Chamber procedures gave us the Fifth Amendment version of privacy,⁶ and the rejection of the writs of assistance gave us the Fourth Amendment version of privacy.⁷ By the 1880s the Fourth and Fifth Amendments together were seen as bulwarks against unwarranted intrusions into the physical and mental space occupied by the citizen.⁸ The privacy of

2. The first important articulation of the common law right to privacy was Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); see also ARTHUR R. MILLER, *THE ASSAULT ON PRIVACY* (Univ. of Mich. Press 1971). Professor Miller was the keynote speaker at this Symposium, and has been writing on the subject for many years. For discussion of the cultural and legal origins of the right, see Robert E. Mensel, *Kodakers Lying in Wait: Amateur Photography and the Right of Privacy in New York, 1885-1915*, 43 AM. Q. 24 (1991); ANITA L. ALLEN, *PRIVACY LAW AND SOCIETY* 10-35 (2007); ALAN F. WESTIN, *PRIVACY AND FREEDOM* (1967); ADAM C. BRECKENRIDGE, *THE RIGHT TO PRIVACY* (1970); DON R. PEMBER, *PRIVACY AND THE PRESS: THE LAW, MASS MEDIA, AND THE FIRST AMENDMENT* (1972); JOHN CURTIS RAINES, *ATTACK ON PRIVACY* (1974); John A. Rohr, *Privacy: Law and Values*, 49 THOUGHT 353 (1974); Harry Kalven, Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966); Edward Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

3. See, e.g., CAL. CONST. art. I, § 1; *Roe v. Wade*, 410 U.S. 114 (1973) (finding Texas statutes prohibiting abortion unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down as unconstitutional a statute which prohibited the possession, distribution, or sale of contraceptives to married couples); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (declining to infringe upon the privacy of parents and teachers when determining the course of the child's education).

4. See, e.g., Federal Privacy Act, 5 U.S.C.S. § 552a (2006); N.Y. CIVIL RIGHTS LAW §§ 50-51 (McKinney 1916) (§§ 1-2 of L. 1903 ch. 132).

5. See, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); *De May v. Roberts*, 9 N.W. 146 (Mich. 1881); *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964). For a discussion of the developments that followed, see ALLEN, *supra* note 2, and Prosser, *supra* note 2.

6. John H. Wigmore, *The Privilege Against Self-Crimination; Its History*, 15 HARV. L. REV. 610, 625-37 (1902).

7. *Weeks v. United States*, 232 U.S. 383, 390 (1914); *Boyd v. United States*, 116 U.S. 616, 623-28 (1886). The Writs of Assistance were enabled by Parliament in 1674, 13 & 14 Car. II. c. 11, § 5. See also THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 424-54 (1903).

8. In *Boyd*, Mr. Justice Bradley explained the joint role the Fourth and Fifth Amendments played in protecting privacy by discussing them together:

one's space was thought to be "essential to the maintenance of one's manhood and self-respect."⁹ The confines of the mind were understood by means of an analogy to space, and were protected from the outrage of "any forcible and compulsory extortion of a man's own testimony."¹⁰

The earliest expressions of concern about privacy in federal cases appeared in the 1850s, and arose in cases involving physical space. For example, *Bailey v. The Sonora*¹¹ was an admiralty proceeding brought by passengers against the steamship *Sonora* after a particularly uncomfortable voyage to California. The passengers complained in particular about the allocation of the space provided them in the less expensive accommodations. Judge Ogden Hoffman, a Whig and a former student of Joseph Story,¹² noted "the extreme difficulty of determining with precision the degree of comfort which the owner of a steamer engaged in the transportation of passengers impliedly agrees to afford."¹³ Even so, the judge was confident "that men and women should not have berths or bunks assigned to them promiscuously, without adequate arrangements to secure privacy."¹⁴ He awarded a full refund of the fares paid by the female passengers, and one-half of the fares paid by the male passengers. Women,

The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property—where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

Boyd, 116 U.S. at 630.

9. *United States v. Costanzo*, 13 F.2d 259, 260 (W.D.N.Y. 1926); *United States v. Rembert*, 284 F. 996, 999 (S.D. Tex. 1922).

10. *Boyd*, 116 U.S. at 630.

11. 2 F. Cas. 383 (N.D. Cal. 1859) (No. 746).

12. HAROLD CHASE ET AL., *BIOGRAPHICAL DICTIONARY OF THE FEDERAL JUDICIARY* 125-26 (1976).

13. *Bailey*, 2 F. Cas. at 383.

14. *Id.*

apparently, had greater need of privacy than men.¹⁵

The cultural contours of the early right to privacy appear clearly in *The Devonshire*, another admiralty case involving passenger space.¹⁶ Judge Matthew P. Deady commented, “there is quite as much need that a steerage passenger shall have the ‘space’ and privacy provided in section 2¹⁷ when he lies down to sleep, or is prostrated with sickness, as that he shall have the general moving and breathing space between decks provided in section 1.”¹⁸ But Judge Deady dismissed the libel on a technicality, and further noted,

[I]t may not be amiss to remark that this conclusion is not in conflict with what may be called the justice of the case. These Chinese immigrants [the passengers] are all males, and generally adults, and there is very little need, in their case, in the division of berths as required by said section 2.¹⁹

Taken together, the opinions in *The Sonora* and *The Devonshire*, the one valuing female privacy more than male, and the other discounting the needs of Asians for privacy, are very significant. They reflected a broadly held sense that the interest in privacy was more a cultural than a physical need. Privacy, as a rising social value with some minimal protection afforded by law, reflected prevailing bourgeois understandings of gender and race. Women of European heritage needed it more than men of European heritage, and men of other races needed it least of all. But more importantly for the present purposes, the prevailing distinctions in male and female, and European and Asian needs for spatial privacy, demonstrate that the thinking of federal judges on such matters was not determined by their office. For the most part, they shared the views of their contemporaries.

Those views included a special solicitude for the privacy of the marital relationship. The intimacies of family life received special protection from the courts generally in this period, and federal judges behaved no differently from their state counterparts in this respect. This was, in part, a reflection of stifling Victorian notions about family intimacies, and in part a reflection of traditional common law protections of the home. It was not uncommon for federal judges to

15. *Id.* at 385.

16. *The Devonshire*, 13 F. 39 (D. Or. 1882).

17. 10 Stat. 716 (1855).

18. *Devonshire*, 13 F. at 42 (quoted with approval in *The Strathairly*, 124 U.S. 558, 577 (1888)).

19. *Devonshire*, 13 F. at 43.

wax eloquent and quote Lord Chatham on the sacredness of the home:

The poorest man may in his cottage bid defiance to all the forces of the crown; it may be frail, its roof may shake, the wind may blow through it. The storm may enter; the rain may enter; but the king of England cannot enter. All his forces dare not cross the threshold of the ruined tenement.²⁰

One prominent example of protection for the privacy of family intimacies, in the form of communications between spouses, was *United States v. Guiteau*.²¹ Charles J. Guiteau assassinated President James Garfield.²² At trial, his attorney raised the insanity defense. Guiteau's wife was permitted to testify as to her observations of Guiteau for purposes of deciding his insanity, but was not permitted to testify as to her conversations with him. The court stated:

[W]e think that the exhibition of sanity or insanity is not a communication at all, in the sense of the rule which protects the privacy and confidence of the marriage relation The rule which is supposed to have been violated [by the admission of this testimony] was established in order that the conduct, the voluntary conduct, of married life might rest secure upon a basis of peace and trust, and relates to matters which the parties may elect to disclose or not disclose.²³

The court affirmed Guiteau's conviction. He was hanged.

These decisions illustrate a concern with privacy as a discretionary limitation on government action, but do not recognize it as a legal right, at common law or under the Constitution. Only later did privacy, outside the Fourth and Fifth Amendment contexts, attain the stature of a freestanding right. The common law right to privacy and the earliest statutory right to privacy are cultural artifacts of the Progressive Era.²⁴ These rights arose in large measure as a reaction to

20. The reference appears in many federal American decisions. *See, e.g.*, *Flagg v. United States*, 233 F. 481, 482 (2nd Cir. 1916); *Agnello v. United States*, 290 F. 671, 678 (2nd Cir. 1823), *aff'd in part and rev'd in part*, 269 U.S. 20 (1925); *United States v. Costanzo*, 13 F.2d 259, 260 (W.D.N.Y. 1926); *United States v. Pappadementro*, 6 Alaska 769, 774 (D. Alaska 1922); *Snead v. Central of Ga. Ry Co.*, 151 F. 608, 610 (S.D. Ga. 1907); *Lee v. Kaufman*, 15 F. Cas. 149, 151 (E.D. Va. 1879) (No. 8191); *United States v. Three Tons of Coal*, 28 F. Cas. 149, 151 (E.D. Wis. 1875) (No. 16,515).

21. 12 D.C. (1 Mackey) 498 (1882); *see also* *United States v. Guiteau*, 10 F. 161 (D.D.C. 1882); *see also* CHARLES E. ROSENBERG, *THE TRIAL OF THE ASSASSIN GUILTEAU* (Univ. of Chicago 1968).

22. Rosenberg, *supra* note 21.

23. *Guiteau*, 12 D.C. at 547-48.

24. *See* ALLEN, *supra*, note 2; Warren & Brandeis, *supra* note 2; Mensel, *supra* note

the general inquisitiveness and intrusiveness of middle class society in that period. Their first significant iterations were a direct response to that peculiar species of royalism that expressed itself then as the cult of celebrity.²⁵ That cult was specifically devoted to the acquisition of textual and photographic information about celebrities. Its acolytes were reporters, photographers, and advertisers, and the remedies available against them reflected the boundaries of the rights they violated.²⁶ The right to privacy was, in that context, an expression of the social and cultural conservatism of Beacon Street elites.²⁷

This version of the right to privacy has obscured the other version, a broader notion of privacy not based on information or space, but on prerogative. The broader right was framed only sometimes in the language of privacy and the private, and went beyond Warren and Brandeis's conception of the right.²⁸ It conformed more closely to Judge Thomas Cooley's "right to be let alone."²⁹ Cooley's famous phrase was not a general formula synthesized from specific rights; it was the specific right, and it was susceptible of many particular iterations. It arose from nature,³⁰ or from man's relationship with God.³¹ In one's relationship to the government it included "the right to exemption from any restraint that has in view no beneficial purpose."³² In one's relationship to

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25. WARREN I. SUSMAN, *'Personality' and Twentieth Century Culture, in CULTURE AS HISTORY: THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY* 271-85 (1984); Mensel, *supra* note 2, at 25-27.

26. Warren & Brandeis, *supra* note 2.

27. Mensel, *supra* note 2.

28. Warren & Brandeis, *supra* note 2.

29. THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* 29 (1907).

30. *Zimmermann v. Wilson*, 81 F.2d 847, 849 (3d Cir. 1936) (invoking the "natural law of privacy").

31. *In re Or. Bulletin Printing and Publ'g Co.*, 18 F. Cas. 780, 783 (D. Or. 1875) (No. 10,560) (asserting that there is "no divinity that doth hedge about the affairs of the corporation," and thereby implying that it is not entitled to privacy, and further implying that the "divinity" that "hedge[s] about the affairs" of the individual is a basis of the individual right to privacy). In his order, Judge Deady's understanding of corporate privacy did not ultimately prevail.

32. COOLEY, *supra* note 29, at 33; U.S. *ex rel* Nor. Nitrogen Prods. Co. v. U.S. Tariff Comm'n, 6 F.2d 491, 495 (D.C. App. 1925) ("[B]usiness privacy will be protected, it is true, from mere fishing expeditions in search of evidence and from the prying scrutiny of those who have no higher motive than curiosity, illicit gain, or malice. The disclosure of matters of business privacy may be compelled, however, if such matters be material and relevant evidence for the protection of the public." (citation omitted)).

others it included the “right of complete immunity.”³³ The constitutional right to privacy was no different than the common law right to privacy. It was the same right protected by different doctrinal tools, depending on the source of the threat.

The fundamental conceptual nature of the right to privacy has not evolved since 1880, when Cooley articulated it, but the means by which other individuals, governments, and the community threaten it have evolved.³⁴ Cooley and his disciples understood it broadly. In today’s parlance they might say that people or institutions invade our privacy when they “mess with us,”—when they refuse to leave us alone.

Privacy, as the right to be left alone, was inextricably entangled in the Progressive Era with the substantive version of due process. The Supreme Court did not offer a clear definition of due process during this period.³⁵ Its contours were only imprecisely mapped out. It arose from an idea, articulated by Mr. Justice Bradley and based explicitly upon the Declaration of Independence,³⁶ that “[t]he right to follow any of the common occupations of life is an inalienable right.”³⁷ Mr. Justice Field took the position that the right to pursue one’s own work, “without let or hindrance,”³⁸ was a “natural right,”³⁹ beyond the reach of legislative prohibition. As late as 1936, one federal judge equated privacy with the same “liberty and pursuit of happiness” on which Mr. Justice Bradley had relied in his due process argument.

[W]e regard the search here asserted as a violation of the natural law of privacy in one’s own affairs which exists in liberty loving peoples and nations - no right is more vital to ‘liberty and pursuit of happiness’ than the protection of the citizen’s private affairs, their right to be let alone. . . . If due protection of this natural right be denied him by the courts, his other rights and his citizenship lose

33. COOLEY, *supra* note 29, at 29.

34. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335 (1992); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989).

35. *Miedreich v. Lauenstein*, 232 U.S. 236, 245-46 (1914); *Orient Ins. Co. v. Daggs*, 172 U.S. 557, 563-64 (1899).

36. *Butchers’ Union Slaughter-House Co. v. Crescent City Live-Stock Landing Co.*, 111 U.S. 746, 762 (1884) (Bradley, J., concurring).

37. *Id.* at 762.

38. *Id.* at 757 (Field, J., concurring).

39. *Id.* at 754.

their value.⁴⁰

From a rhetorical perspective, privacy was a subtext in a debate more explicitly about due process. While the links between due process and privacy in the modern era have been explored,⁴¹ the links between pre-*Parrish* due process and the “right to be let alone”⁴² have not been widely considered. It appears that one was due a certain process before one’s right to be left alone could be infringed.

The Progressive Era was a period in which people simply could not leave one another alone. It was characterized by profound intrusions by individuals, the community, and government into the lives and conduct of others.⁴³ One root of its intrusiveness was the tradition of religiously motivated reform movements of the Antebellum Period, but intrusiveness continued even as religious influence waned.⁴⁴ These intrusions increased, and new causes arose from the many complex cultural, technological, and economic developments of the later nineteenth century.⁴⁵ As life became dramatically more complex and the influence of traditional religion waned, bewildered Americans increasingly questioned how one ought to live.⁴⁶ They looked for models by which to guide their own behavior.⁴⁷ The cult of celebrity was one instance of this.⁴⁸

But the intrusiveness of the Progressive Era was not merely a matter of observing and aping one’s betters. It was about making

40. *Zimmermann*, 81 F.2d at 849.

41. See Erwin Chemerinsky, *Washington v. Glucksberg Was Tragically Wrong*, 106 MICH. L. REV. 1501 (2008); See generally Symposium, *Glucksberg and Quill at Ten: Death, Dying, and the Constitution*, 106 MICH. L. REV. 1453 (2008); Jim Harper, *Reforming Fourth Amendment Privacy Doctrine*, 57 AM. U. L. REV. 1381 (2008).

42. COOLEY, *supra* note 29, at 29.

43. See generally JOHN WHITECLAY CHAMBERS II, *THE TYRANNY OF CHANGE* (2000) (1992); Daniel T. Rodgers, *In Search of Progressivism*, 10 REVS. AM. HIS. 113 (1982).

44. See ALICE FELT TYLER, *FREEDOM’S FERMENT: PHASES OF AMERICAN SOCIAL HISTORY TO 1860* (1944); Timothy J. Gilfoyle, *The Moral Origins of Political Surveillance: The Preventive Society in New York City, 1867-1918*, 38 AM. Q. 637 (1986); see also T. J. Jackson Lears, *From Salvation to Self-Realization: Advertising and the Therapeutic Roots of the Consumer Culture, 1880-1930*, in *THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880-1980* 1 (1983) (discussing the decline of religion and the rise of consumer culture in the United States during the later nineteenth century); T. J. JACKSON LEARS, *NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880-1920* (1981).

45. Mensel, *supra* note 2, at 25-27.

46. Mensel, *supra* note 2, at 25-27; see also SUSMAN, *supra* note 25, at 281.

47. Mensel, *supra* note 2, at 25-27.

48. SUSMAN, *supra* note 25, at 281.

one's neighbors better and better off. Its normative element was expressed in its reform movements—each intended to improve society by imposing on individuals and institutions proper standards of behavior. As American capitalism evolved from the earlier competitive model to the modern model of corporate capitalism, the moral reform impulse turned increasingly to the economy.⁴⁹ When moral suasion failed, reformers sought to improve their individual and corporate neighbors by dint of legislation.⁵⁰ Historians have rightly noted that the legislation championed by reform groups led directly to a vast expansion of the bureaucratic regulatory state.⁵¹ More importantly for the present purposes, each item of legislation was an attempt to impose what Mr. Justice Holmes called “right living.”⁵²

Progressive reform, while discernible in retrospect as a historical trend, was not a unified movement. It is difficult to track in retrospect, in part because of its diversity. Its adherents rejected blind fealty to particular political parties⁵³ and instead plighted their loyalty to special interest groups of all sorts, including labor unions, civic leagues, cold water societies, trade associations, societies for the suppression of vice,⁵⁴ woman suffrage groups, bar and medical associations, and other issue-oriented groups.⁵⁵ Although they often supported one another, the agendas of these groups did not always share much substantive content beyond their notions of “paternalism and the organic relation of the citizen to the State”⁵⁶

Beyond that diversity, there is a visceral resistance to the recognition that all the many agitations for change in this period

49. MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS* (1988).

50. Rodgers, *supra* note 43, at 116.

51. See ROBERT WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1966); Louis Galambos, *The Emerging Organizational Synthesis in Modern American History*, 44 *BUS. HIS. REV.* 279 (1970). See generally RICHARD HOFSTADTER, *THE AGE OF REFORM* 214 (1955).

52. *Adkins v. Children's Hosp.*, 261 U.S. 525, 570 (1923) (Holmes, J., dissenting).

53. For example, Theodore Roosevelt, having served as President as a Republican, left the Grand Old Party with thousands of his supporters in 1912 and formed the Progressive Party. That new party was commonly referred to as the Bull Moose Party. See, e.g., ALAN BRINKLEY, *THE UNFINISHED NATION: A CONCISE HISTORY OF THE AMERICAN PEOPLE* 588-90 (2004).

54. See Timothy J. Gilfoyle, *The Moral Origins of Political Surveillance: The Preventive Society in New York City, 1867-1918*, 38 *AM. Q.* 637 (1986) (discussing various societies for the prevention of various vices).

55. See Rodgers, *supra* note 43, at 116.

56. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); see Rodgers, *supra* note 43, at 116.

constituted one discernible movement. This is so because many of the reforms contended for seem regressive and even reprehensible today, while others have become moral mainstays. It is jarring to think that they were part of the same trend. But clearly, the reformers of the era left a mixed legacy. Who could object to pure food laws⁵⁷ after reading *The Jungle*?⁵⁸ On the other hand, eugenics laws⁵⁹ and prohibition⁶⁰ have fared less well in public esteem over time. Antitrust law,⁶¹ worker safety laws,⁶² worker compensation laws,⁶³ labor laws,⁶⁴ and narcotics control laws⁶⁵ were all proposed during this period.

For all of their substantive differences, however, progressive reformers shared a methodology. They operated by means of legislative, rather than judicial reform.⁶⁶ Reformers used pressure-group politics to people the legislatures with their allies, and sought to impose on a benighted society improvements in economic and personal morality.⁶⁷ The legislation they enacted made judicial review inevitable, and sparked a decades-long conflict between the two branches of government.

Both the content of legislative reform and the fact that it came from legislatures sparked resistance from judges and other legal elites. Mr. Justice Peckham noted in his opinion for the Court in *Lochner*,

57. See, e.g., Pure Food and Drug (Wiley) Act, Pub. L. No. 59-384, ch. 3915, 34 Stat. 768 (1906); Meat Inspection Act of 1906, ch. 3913, 34 Stat. 674.

58. UPTON SINCLAIR, *THE JUNGLE* (1906).

59. See, e.g., 1907 Ind. Acts 377-78; 1913 Iowa Acts 209-10; 1911 N.J. Laws 353; 1924 Va. Acts 569, ch.394 (held constitutional in *Buck v. Bell*, 274 U.S. 200 (1927)).

60. See, e.g., National Prohibition (Volstead) Act, ch. 85, 41 Stat. 315 (1919).

61. See, e.g., Sherman Anti-trust Act, ch. 647, 26 Stat. 209 (1890).

62. See *Lochner*, 198 U.S. 45 (declaring unconstitutional New York labor law of 1897 limiting employment in bakeries to sixty-hours a week and ten-hours a day).

63. See, e.g., Compensation (Roseberry) Act, 1911 Cal. Stat. 399; Workmen's Compensation Law of New York, 1913 N.Y. Laws 816 (re-enacted as 1914 N.Y. Laws 41) (upheld as constitutional in *New York Cen. R. Co. v. White*, 243 U.S. 188 (1917)).

64. See, e.g., Commerce and Labor Act, ch. 547, 32 Stat. 825 (1903).

65. See, e.g., Harrison Narcotics (Tax) Act of 1914, ch. 1, 38 Stat. 785; Pure Food and Drug (Wiley) Act, Pub. L. No. 59-384, ch. 3915, 34 Stat. 768 (1906).

66. In this sense the movement was significantly different from the reform movement launched in the courts by the NAACP in later decades. See, e.g., MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

67. Theodore Roosevelt was one of the leading figures in the Progressive Movement. SKLAR, *supra* note 49, at 333-64, especially at 355, note 33. See also the Platform of the National Progressive Party, commonly known as the "Bull Moose Party," under the banner of which Roosevelt ran unsuccessfully for the Presidency in 1912. BRINKLEY, *supra* note 53, at 588-90.

that “[t]his interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase.”⁶⁸ Later in the same opinion, Peckham adverted to what he feared to be the real legislative motive underlying such legislation—it was the fear of mob rule and the destruction of liberty of contract, and by extension, of communism.

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *Sui juris*), in a private business⁶⁹

Roscoe Pound’s concern was more about the effect of the mob rule of legislators over the splendor of the common law, but resembled Peckham’s concern inasmuch as both were intent upon saving the prerogatives of elites. Pound wrote:

So long as . . . our legislative lawmakers, more zealous than well instructed in the work they have to do, continue to justify the words of the chronicler—“the more they spake of law the more they did unlaw”—so long the public will seek refuge in specious projects of reforming the outward machinery of our legal order in the vain hope of curing its inward spirit.⁷⁰

Peckham objected to legislative reform principally because it was reform, while Cardozo objected to it principally because it was legislative. For both, however, the problem began with the poor quality of legislative leadership, and that in turn led to exercises of poor legislative judgment. From that perspective, Mr. Justice Peckham’s rejection of the alleged facts underlying certain reform legislation, such as that at issue in *Lochner*,⁷¹ was perfectly understandable. The judges of the state court could not agree that baking was a dangerous trade, and that was quite enough for Peckham.⁷² Mr. Justice Harlan’s careful, empirical argument in dissent, perhaps an invitation to what came later to be known as the Brandeis brief, was simply irrelevant, based as it was on the unanimity

68. *Lochner*, 198 U.S. at 63.

69. *Id.* at 64.

70. Roscoe Pound, *The Future of Legal Education*, in INDIANA UNIVERSITY, 1820-1920: CENTENNIAL MEMORIAL VOLUME 257, 268 (1921).

71. *Lochner*, 198 U.S. at 58-59.

72. *Id.* at 58.

of sources relied upon by the “lesser *cerebelli*”⁷³ in the legislature. These sources were not sufficient to dislodge Peckham and his brethren from their default presumption that such legislation intruded too deeply into matters as to which people ought to be left alone.

Cardozo, being then still a common law judge, framed his resistance to legislative intrusions in a different form. He complained in 1921 that “[l]egislation, supplanting fiction and equity, has multiplied a thousand fold the power and capacity of the tool [the law], but has taken the use out of our hands and put it in the hands of others.”⁷⁴ Recognizing the inevitability of legislative intervention into areas of law theretofore the bailiwick of judges, Cardozo called for legislative purification of the common law, and rejected the methods of the reformers, despite agreeing in many respects with their goals.⁷⁵

“Legislation is needed,” according to Cardozo, “not to repress the forces through which judge-made law develops, but to stimulate and free them.”⁷⁶ He advocated instead for a spare and general code, similar to the later restatements, that would clear away the detritus of old and obstructive precedent and allow common law judges flexibility to address real issues of justice.⁷⁷ Together with many other judges, Cardozo saw progressive reform legislation as a threat to the institutional competency of the courts and the proper administration of justice in an increasingly complex society.⁷⁸ Cardozo’s concerns about the intrusion of state legislatures into common law jurisdiction were shared by many other legal elites who served with him as

73. I have borrowed this expression from H.L. Mencken, who used in a slightly different context. H.L. MENCKEN, *A MENCKEN CHRESTOMATHY: HIS OWN SELECTION OF HIS CHOICEST WRITINGS* 265, 267 (1949).

74. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113 (1921).

75. *Id.* Cardozo’s extrajudicial writings suggest he was firmly in favor of many reforms. He did not entirely reject notions of liberty of contract, but believed it was only meaningful when the two sides had equal, or approximately equal bargaining power. Absent that, legal intervention was appropriate. Cardozo preferred that such intervention be judicial, rather than legislative. *See, e.g.*, BENJAMIN CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 116-20 (1928); Cardozo, *A Ministry of Justice*, *supra* note 74, at 124. For an example of a legislative reform that Cardozo implicitly endorsed, see *Jones v. SEC*, 298 U.S. 1, 29-30 (1936) (Cardozo, J., dissenting), in which he approved the purpose of the Securities Act of 1933, ch. 38, 48 Stat. 74, under which the Commission acted, while criticizing the Court and reviling the obviously dishonest defendant. Cardozo stated, “Recklessness and deceit do not automatically excuse themselves by notice of repentance.” *Jones*, 298 U.S. at 30.

76. Cardozo, *A Ministry of Justice*, *supra* note 74, at 117.

77. Cardozo, *A Ministry of Justice*, *supra* note 74, at 116.

78. *Id.* at 113.

founders of the American Law Institute.⁷⁹

While the more prominent members of the bench and bar remonstrated against legislative reform in extrajudicial writings or in philosophical dicta, the journeymen of the profession were expressing their resistance more directly. Privacy was invoked in opposition to progressive reform in three ways. First, it was invoked in support of principles then deeply held. It was also invoked as a pretense to protect influential corporations from government interference. Finally, in one particularly interesting context, privacy was invoked as a public right.

In *Adams Express Company v. Kentucky*,⁸⁰ defendant was convicted under a state local option law, a type of prohibition statute, for shipping into a dry county a quantity of whiskey.⁸¹ While Mr. Justice Day's opinion for the Court examined the matter from several perspectives, it is clear that principled concerns about privacy played an important role in the reversal of the conviction. Justice Day relied upon language in an earlier opinion by the state's high court, in which that court spoke vigorously in defense of the principle that individuals have a right to be left alone. This right protected the corporate defendant, whose activities facilitated precisely that individual privacy the local option law was intended to restrict. Justice Day rejected the state's argument: "It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society."⁸² But the technical basis for the Court's decision was that the state statute, as applied in this particular case, regulated purely interstate commerce. The conviction was barred by federal statute,⁸³ and the Court reversed it.⁸⁴

In *Harriman v. Interstate Commerce Commission*,⁸⁵ the question before the Court was whether the Commission had the authority to issue subpoenas in support of investigations initiated "on its own

79. G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 11 (1997).

80. 238 U.S. 190 (1915).

81. *Id.* at 193-94 (explaining that the state high court lacked jurisdiction over the appeal, and a writ of error was filed in the United States Supreme Court).

82. *Id.* at 201 (quoting *Commonwealth v. Campbell*, 117 S.W. 383, 385 (Ky. 1909)).

83. *Id.* (referring to the Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913)).

84. *Adams Express*, 238 U.S. at 202.

85. 211 U.S. 407 (1908).

motion, and not upon complaint.”⁸⁶ The Commission suspected Edward H. Harriman and Otto Kahn, two railroad barons and financiers, of what would now be called insider trading and other violations of the Interstate Commerce Act.⁸⁷

Mr. Justice Holmes invoked some of the most cherished principles of Anglo-American constitutional law in support of the Court’s decision to quash the subpoena. He characterized the authority claimed by the Interstate Commerce Commission in *Harriman* as if it were a writ of assistance.⁸⁸ The Commission was not reacting to a specific complaint brought to its attention, nor was it certain that the matter under investigation could have been the object of a complaint.⁸⁹ In other words, it appeared to Holmes that the matter was not clearly within the Commission’s jurisdiction. This exacerbated the apparent abuse inhering in the subpoena. Holmes worried that such authority would become a license for the Commission to “summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled.”⁹⁰ He held that the Commission’s authority to issue such subpoenas was limited to cases in which a complaint had been made, or which might be the object of a complaint; as such these are “the only cases where the sacrifice of privacy is necessary.”⁹¹

In *United States v. Pape*,⁹² decided in the heat of American involvement in World War I, Judge Louis Fitzhenry, a former member of Congress,⁹³ dismissed an indictment brought against Theodore V. Pape, a prominent attorney in Quincy, Illinois, for violation of the Espionage Act.⁹⁴ One might reasonably object that the Espionage Act was not an example of progressive reform legislation. However, it penalized active resistance to the war that would make the world safe for democracy, and to that extent it enforced a moral position claimed to be superior.

Pape had been visited at his home by members of a “committee

86. *Id.* at 414.

87. *Id.* at 416.

88. *Id.* at 417.

89. *Harriman*, 211 U.S. 407.

90. *Id.*

91. *Id.* at 419-20.

92. 253 F. 270 (S.D. Ill. 1918).

93. Chase, *supra* note 12, at 91-92.

94. Espionage Act, ch. 30, 40 Stat. 217 (1917).

in charge of the patriotic activities in Quincy.”⁹⁵ They had noticed the absence of Pape’s name from the list of subscribers to Liberty Loans, used by the federal government to finance the war.⁹⁶ After being admitted to Pape’s home they demanded that he explain himself. He informed them that he was against the war and did not wish to finance it. The U.S. attorney admitted that Pape had not incited others to adopt his position, and had taken no other action “to interfere with the operation and success of the military.”⁹⁷ Judge Fitzhenry framed the issue as follows:

Can a citizen be prosecuted criminally for giving his reasons for not subscribing for Liberty Loan bonds and thrift stamps and contributing to Red Cross drives, when requested to do so in the privacy of his own home and in the presence of nobody other than the members of a duly authorized committee . . . ?⁹⁸

After waxing ecstatic about the patriotic benefits of Liberty Loans, Judge Fitzhenry nevertheless dismissed the indictment. The determinative fact seemed to be that the defendant’s conduct took place entirely in “the privacy of his own home.”⁹⁹

This solicitousness for the privacy of the home converged with the supremely Victorian concern for female privacy, seen before, well into the next century. In *United States v. Friedberg*,¹⁰⁰ Judge J. Whitaker Thompson ordered returned certain papers taken from the defendant during a search of his home without a warrant.¹⁰¹ The judge was particularly offended that the warrantless search went beyond the defendant’s home office, and included “the entire house, including the bedrooms of the female members of his family.”¹⁰²

The final example, for the present purpose, is a case in which the court drew a curious link between the Espionage Act and the Volstead Act with respect to the right to privacy. In *United States v. Quantity of Extracts, Bottles, Etcetera*¹⁰³ an action to seize distilled spirits as contraband under the under the Volstead Act, Judge Louie Willard Strum decided a motion to quash evidence by reference to

95. *Pape*, 253 F. at 271.

96. *Id.*

97. *Id.* at 271-72.

98. *Id.* at 272.

99. *Id.*

100. 233 F. 313 (E.D. Pa. 1916).

101. *Id.* at 318.

102. *Id.* at 315.

103. 54 F.2d 643 (S.D. Fla. 1931).

rules of construction that he believed governed the Espionage Act.¹⁰⁴ The latter act, despite the political milieu in which it was enacted, was “to be liberally construed in furtherance of the citizen’s privacy.”¹⁰⁵ Judge Strum held that the Volstead Act, an obvious example of progressive reform legislation, was to be construed similarly. He held the warrant defective because it described the goods to be seized merely as, “certain property designed for use in the unlawful manufacture of intoxicating liquor, which is being used as a means of committing a misdemeanor, to-wit, a violation of the National Prohibition Act.”¹⁰⁶ This was insufficiently specific, and therefore intruded excessively into the privacy of the owner of the seized contraband. Judge Strum quashed the warrant.¹⁰⁷

These cases illustrate principled antiprogressive uses of privacy. Whether we today would apply the principles they represented, anticommunism, Fourth and Fifth Amendment freedoms, the sanctity of the home, or the general right to be left alone, in precisely the same manner is not the point. In each such case, privacy stood as a principle to limit government action and as a counterweight to the intrusions of progressive reform legislation.

Not every antiprogressive use of privacy had so much to recommend it. In *Chicago, Milwaukee & St. Paul Railroad v. Wisconsin*,¹⁰⁸ Mr. Justice Lamar’s stated concerns about privacy are difficult to take seriously as a principled basis for voiding a state statute intended to improve ventilation in railroad sleeper cars. The Wisconsin statute required that upper berths be left closed when not occupied, even when the lower berths directly beneath them were occupied. The state produced evidence that air circulated more quickly through berths so configured, and this was thought at the time to improve the healthfulness of the interior environment. The railroads preferred to charge extra for the use of the space if the upper berth were to be left closed, and such charges were implicitly prohibited by the statute. The court held the statute an invalid intrusion on the railroad’s right to:

conduct[] its business so as to secure the privacy of the man or woman occupying the lower berth. It is not necessary to refer to the evidence on that subject because it is a matter of common

104. Espionage Act, ch. 30, 40 Stat. 217 (1917).

105. *Quantity*, 54 F.2d at 644.

106. *Id.*

107. *Id.* at 645.

108. 233 U.S. 491 (1915).

knowledge that to let down the upper berth during the night would necessarily be an intrusion upon the privacy of those occupying lower berths.¹⁰⁹

Justice Lamar held for the Court that the railroad was entitled to manage its affairs so as to protect passenger privacy in this way, and that the statute violated the railroad's right to due process.¹¹⁰ It seems entirely more likely to represent an effort to protect the railroad's profits against the intrusions of legislation attempting to facilitate the wholesome circulation of air.

In another decision the rationale of which defies understanding as anything but pretense, Mr. Justice Sutherland effectively quashed a subpoena of records concerning registration of a public stock offering despite substantial evidence of fraud.¹¹¹ The Securities and Exchange Commission issued the subpoena shortly after the registration statement was filed.¹¹² There was considerable evidence of fraud in the offering, and that evidence caught the eye of S.E.C. regulators. Five days after they issued their subpoena seeking additional information underlying the offering, the registrant withdrew the offering.¹¹³ Over a nearly apoplectic dissent by Mr. Justice Cardozo,¹¹⁴ joined by Justices Brandeis and Stone, the Supreme Court characterized the information sought as a matter of the applicant's "private affairs" into which there was, after withdrawal, no longer any reason to inquire.¹¹⁵ Cardozo characterized the withdrawal of the offering as a tacit admission of guilt, and the quashing of the subpoena as, effectively, a pardon for the obvious fraud. "Recklessness and deceit," he railed, "do not automatically excuse themselves by notice of repentance."¹¹⁶

In one of the most interesting and obviously antiprogressive uses of privacy rights,¹¹⁷ Judge John Milton Killits treated privacy as a right to be enjoyed in public, and enforceable even against claims of freedom of speech. He granted an injunction prohibiting members of a labor union from attempting, in public, to persuade workers at the telephone company to continue their strike. The union argued that its

109. *Id.* at 500-01.

110. *Id.* at 501.

111. *Jones*, 298 U.S. at 28.

112. *Id.* at 12-13.

113. *Id.*

114. *Id.* at 29.

115. *Id.* at 26.

116. *Id.* at 30.

117. *Stephens v. Ohio State Tel. Co.*, 240 F. 759 (N.D. Ohio 1917).

efforts were protected by the Clayton Act, a clear example of progressive reform legislation.¹¹⁸ One stated basis for the judge's ruling was his concern for the privacy rights of workers who might prefer to avoid hearing the union message. He wrote:

The right of free speech does not give anyone the privilege to force his views upon others, to compel others to listen. The right of the others to listen or to decline to listen is as sacred as that of free speech. It is clear that, if one does not desire speech of another, he may as surely have his privacy therefrom as the privacy of his home. It is undeniable that the so-called right of peaceful persuasion may be lawfully exercised only upon those who are willing to listen to the persuasive arguments. . . . Again, he has the right of privacy and freedom from molestation of private persons, hostile or otherwise, at his home, at his lodging, at his place of work; he has the right to walk the streets without annoyance from the unwelcome attentions of others, so long as he is conducting himself in a lawful manner.¹¹⁹

Judge Killits' notion of privacy is only coherent if it is understood as the right to be left alone. Otherwise the right could not extend into the public realm and effectively place a bubble around any worker who did not wish to hear the message of a union member advocating a pro-union position. Such advocacy constituted, in Killits' expansive view, a violation of the right to privacy and an enjoined violation of common law rights outside the protection of the Clayton Act. The right to privacy, understood as the right to be left alone, extended into the public arena.¹²⁰

In a muddled explanation of his ruling, Judge Killits invoked the venerable maxim "*salus populi est suprema lex.*"¹²¹ Initially presenting the conflict as one between the public interest in the continued provision of the utilities' services on the one hand, and the individual rights of the union members on the other, Judge Killits

118. Clayton Act, ch. 323, 38 Stat. 730 (1914).

119. *Stephens*, 240 F. at 773.

120. *Id.* at 774. Portions of the text quoted above were quoted in *Kinloch Telephone Co. v. Local Union No. 2, I.B.E.W.*, 265 F. 312, 317 (E.D. Mo. 1920); *Kayser v. Fitzgerald*, 178 N.Y.S. 130, 135 (Sup. Ct. 1919); *Greenfield v. Cent. Labor Council of Portland and Vicinity*, 207 P. 168, 171 (Or. 1922). See generally *Taliaferro v. United States*, 290 F. 906, 909 (4th Cir. 1923) (citing *Stephens*, 240 F. 759, for the general principle); *Montgomery v. Pac. Elec. Ry. Co.*, 258 F. 382, 391 (9th Cir. 1919) (same); *Duplex Printing Press Co. v. Deering*, 247 F. 192, 195 (S.D.N.Y. 1917) (same).

121. *Stephens*, 240 F. at 775 ("the welfare of the people is the supreme law"). For an enlightening discussion of the real importance in American history of the ideas underlying that maxim, see WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA* 1-50 (1996).

appeared to deny the individual and exalt the community interest. But at least inasmuch as his reasoning includes considerations of privacy, it is clear he was in fact balancing the interests of the union and its members against the interests of the individual workers whom the union wished to influence. To that extent he exalted the individual over a portion of the larger community, and in that posture his analysis was unmistakably antiprogressive.¹²²

Of course, there were dissenting voices. Privacy interests did not always prevail in the federal courts during the Progressive Era. Though valued by members of the federal bench, it was nevertheless treated like any other value that might be overcome by superseding interests. For example, with respect to invasions of privacy interests arising from the growth of twentieth century cities, federal courts did not use the right to push back against development. In *McCoy v. Union Elevated Railroad*,¹²³ Mr. Justice McReynolds discounted privacy concerns raised by the owners of a hotel, the interior of which became more visible to outsiders when an elevated railroad platform was built adjacent to the hotel building. The property owners had argued that the railroad reduced the value of their property, and that the state court's refusal to order the railroad to pay compensation for, among other grievances, a reduction of plaintiffs' privacy, constituted a violation of the Due Process Clause of the Fourteenth Amendment. The state courts had held that the value of the benefit conferred by the railroad's presence could be set off against all the losses the plaintiffs alleged, leaving plaintiffs with no recovery. The Supreme Court affirmed.¹²⁴

It is no coincidence that the most cogent judicial dissent to the regime of due process and privacy should have come from the pen of Justice Oliver Wendell Holmes, Jr. Appointed to the United States Supreme Court by President Theodore Roosevelt in 1902, Holmes came to the bench with a reputation for supporting progressive

122. As the historian Daniel Rodgers has observed, there is the sense that progressive reform was "an assault on the idea of individualism itself." Rodgers, *supra* note 43, at 124.

123. 247 U.S. 354 (1918).

124. *Id.* at 366. The municipal courts of the District of Columbia similarly declined to protect privacy interests from the intrusions imposed by the development of cities. *See, e.g., Schafer v. Baker*, No. 945, 1900 WL 129729, at *4 (App. D.C. May 7, 1900). The District's high court held that no action could be maintained "for overlooking one's privacy" from the windows of an adjacent house. *Id.* at *5; *see also Hutchins v. Munn*, 22 App. D.C. 88, 101 (1903).

causes.¹²⁵ Much of this reputation was based on his dissent in *Vegeahn v. Guntner*,¹²⁶ in which he argued against enjoining peaceful picketing by a labor union. He wrote:

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if battle is to be carried on in a fair and equal way.¹²⁷

Such language pleased Roosevelt every bit as much as it worried Roosevelt's conservative political opponents.¹²⁸ It contributed in no small part to Roosevelt's decision to elevate Holmes from the Chief Justiceship of the Supreme Judicial Court of Massachusetts to the junior seat on the United States Supreme Court.¹²⁹ After a rift arising in 1904 from Holmes' dissent in *Northern Securities Company v. United States*¹³⁰, Roosevelt the Bull Moose progressive again embraced Holmes' progressivism.¹³¹

Holmes did not share his yokefellows' overarching concern for liberty of contract and so generally did not join them in their condemnation of economic reform legislation. He rejected their now-discredited versions of due process and liberty of contract and their view that to violate the latter was to deny the former.¹³² He put his old historian's hat back on to challenge their claim that these notions were ancient and even sacred.¹³³ In fact, they were not ideas of long or distinguished pedigree. Writing of Fourteenth Amendment due process, Holmes observed:

The earlier decisions upon the same words [due process] in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded

125. G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 301-07 (1993).

126. 44 N.E. 1077 (Mass. 1896).

127. *Id.* at 1081.

128. White, *supra* note 125, at 301-07.

129. *Id.*

130. 193 U.S. 197 (1904).

131. See *infra* note 142 and text accompanying note 150.

132. See, e.g., *Adkins*, 261 U.S. 525; *Lochner*, 198 U.S. at 74-75.

133. See generally OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881) (discussing a study of the origins of then-prevailing common law rules and analytic methods).

into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.¹³⁴

Holmes's "doing what you want" in this, or any context, is merely the converse of Cooley's right to be left alone.¹³⁵ Holmes's view of liberty of contract and due process naturally led to his broad acceptance of reform legislation. He saw it as nothing more than an exercise of the state police power:

It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce.¹³⁶

The Supreme Court's hostility to legislative reform did not settle the issue. State legislatures and Congress persisted in enacting reform legislation. Some state courts, deeming themselves bound by antiprogressive decisions such as *Lochner*¹³⁷ and *Adkins*,¹³⁸ continued to invalidate such legislation.¹³⁹ Other state courts strained to distinguish adverse federal precedent and upheld progressive state legislation.¹⁴⁰ The United States Supreme Court persisted in declaring such legislation unconstitutional.

The political opposition to the Supreme Court's antiprogressive jurisprudence response was vigorous. Theodore Roosevelt was its unquestioned leader, and his rhetoric soared to its most radical during his campaign to unseat President William Howard Taft. Beginning in

134. *Adkins*, 261 U.S. at 568.

135. See COOLEY, *supra* note 30, and accompanying text.

136. *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911) (Holmes, J.) (internal citation omitted).

137. 198 U.S. at 63-64.

138. 261 U.S. at 562.

139. See, e.g., *People ex rel. Tipaldo v. Morehead*, 200 N.E. 799, 800 (N.Y. 1936), *aff'd*, 298 U.S. 587 (1936) (likening the Minimum Wage Law for Women to the Minimum Wage Act of Sept. 19, 1918).

140. See, e.g., *Simpson v. O'Hara*, 141 P. 158, 158 (Or. 1916) (en banc); *Spokane Hotel Co. v. Younger*, 194 P. 595, 598 (Wash. 1920).

1910 with a speech given at Osawatomie, Kansas, Roosevelt took up a progressive agenda of People Over Property. He ended his famous speech with his claim that “our public men must be genuinely progressive.”¹⁴¹ Roosevelt complained that:

We are to-day suffering from the tyranny of minorities. It is a small minority that is grabbing our coal deposits, our water powers, and our harbor fronts. A small minority is battenning on the sale of adulterated foods and drugs. It is a small minority that lies behind monopolies and trusts. It is a small minority that stands behind the present law of master and servant, the sweatshops and the whole calendar of social and industrial injustice.¹⁴²

Turning Peckham and Pound on their heads, Roosevelt cleaved to the beliefs of the majority of the electorate and rejected the elitism of the courts.¹⁴³ He championed the tools of direct democracy, the initiative,¹⁴⁴ the referendum,¹⁴⁵ and the recall,¹⁴⁶ as the most threatening political response to obstructionist judicial rulings. He sought to deploy these instruments of direct democracy as, in effect, the second thrust in the “thrust, parry, thrust” dueling match between the judiciary and the two democratically elected branches. His failure was one of the critical turning points in our history.

Of these three, the recall movement received the most attention at the time. It might better be described as two separate movements – first, for the recall of public officials, and second, for the recall of unpopular judicial decisions. The recall of public officials, and in particular judges, was somewhat less threatening to traditional interests, and was not unprecedented. Not surprisingly, elites overwhelmingly rejected it insofar as it might apply to state judges,¹⁴⁷

141. Theodore Roosevelt, The New Nationalism (August 31, 1910) in THEODORE ROOSEVELT AND REFORM POLITICS 23, 31 (Richard H. Collin ed., 1972).

142. Theodore Roosevelt, speech in New York City (March 20, 1912), in *Roosevelt Hits At Taft Again*, N.Y. TIMES, Mar. 21, 1912, at 1.

143. *Id.*

144. BLACK'S LAW DICTIONARY 799 (8th ed. 2004) (“An electoral process by which a percentage of voters can propose legislation and compel a vote on it by the legislature or by the full electorate.”).

145. *Id.* at 1307 (“The process of referring a state legislative act, a state constitutional amendment, or an important public issue to the people for final approval by popular vote.”).

146. *Id.* at 1295 (“Removal of a public official from office by popular vote.”).

147. See *Political Scientists Afraid of Recall*, N.Y. TIMES, Oct. 27, 1912, at 11 (reporting on conference of Academy of Political Science during which Roosevelt plans were criticized); *Roosevelt Assailed in House by Gardner*, N.Y. TIMES, Apr. 5, 1912, at 2 (reporting criticism of both the recall of judges and of judicial independence); *Taft Shows Peril in Roosevelt Policy*, N.Y. TIMES, Mar. 9, 1912, at 1 (reporting Taft's view that recall of

and it was obvious that, absent constitutional amendment, it could not have been used against federal judges.¹⁴⁸ Popular opinion was similarly skeptical. As Mr. Dooley, generally an acute observer of political and legal affairs, explained to Mr. Hennessey:

Ye can bet that th' first law recallin' th' judges will be pronounced unconstitutional be th' entire joodiciary iv th' counthry be a risin' vote an' with three hearty cheers. If I was a judge I wud know that a law throwin' me out iv a job was unconstitutional at wanst, ex post facto, ex propria vigore, an' de juribus non dispytandum, as Hogan says. An' I wudden't have to get th' constitution out iv th' safe to decide it ayether. I'd decide it accordin to me grocery bill.¹⁴⁹

The recall of state judicial decisions posed a more radical intervention into the body politic. Roosevelt described the proposal as follows:

[I]n a certain class of cases involving the police power, when a state court has set aside as unconstitutional a law passed by the Legislature for the general welfare, the question of the validity of the law, which should depend, as Justice Holmes so well phrases it, upon the prevailing morality or preponderant opinion, be submitted for final determination to a vote of the people, taken after due time for consideration.¹⁵⁰

He repeated his proposal in speeches throughout the country.¹⁵¹ It is noteworthy that Roosevelt's plan did not apply to federal judicial decisions. Although it found support among some members of the bench and bar, including William Draper Lewis, the Dean of the University of Pennsylvania School of Law and future president of the American Law Institute, it failed along with TR's candidacy.¹⁵²

Perhaps Roosevelt's plan failed, not because it was too radical, but because it posed no threat to the members of the nation's highest and most influential court. His proposal did not include any limitations on the jurisdiction of the United States Supreme Court,

judges would threaten judicial independence).

148. U.S. CONST. art. III, § 1 ("The Judges . . . shall hold their Offices during good Behaviour.").

149. Finley Peter Dunne, *Mr. Dooley Discusses the Referendum and the Recall; He is Not in Favor of Either of these Glorious Principles or Any Other Issues That He Can't Pronounce*, N.Y. TIMES, Apr. 14, 1912, at SM7, reprinted in MR. DOOLEY ON THE CHOICE OF LAW 174 (Edward J. Bander, ed., 1963).

150. *Roosevelt Hits at Taft Again*, *supra* note 142, at 1.

151. Stephen Stagner, *The Recall of Judicial Decisions and the Due Process Debate*, 24 AM. J. LEGAL HIST. 257-58 (1980).

152. *Id.* at 260.

one of the great antiprogressive sinners in the minds of Roosevelt and his disciples. In fact, his Progressive Party Platform proposed to expand that court's jurisdiction over state court decisions, perhaps anticipating a round of Roosevelt appointments.¹⁵³ In any event, it remained for another Roosevelt to succeed where "Uncle Teddy" had failed. The Supreme Court continued to resist progressive reform, with few exceptions,¹⁵⁴ until the famous switch in time that saved the nine-member Court from President Franklin Roosevelt's expansion plan.¹⁵⁵

The long battle between progressive legislatures and conservative courts over the extent to which the law might intervene in matters thought before to have been private ended with a sudden change in the judiciary. Finally the Court recognized that changing times create new imperatives for the public welfare, and permitted legislatures a broader prerogative. Due process was redefined, and the right to be left alone was radically reduced.

CONCLUSION

The right to privacy in its broadest sense was defined by Judge Cooley, as "the right to be let alone." It arose, in part, as a conservative and antiprogressive backlash against the intrusiveness of Progressive Era culture and legislation. In its common law iteration it protected people from the intrusive curiosity of other people. It was crafted, mostly by state court judges, to protect the prominent from the cult of celebrity and to protect others from the prying eyes of promiscuous crowds.¹⁵⁶ It protected persons, not property. The federal courts had little to do with its development, and generally followed state law when such issues were presented to them. In its constitutional iteration, privacy as the right to be left alone was a subtext in the rhetoric surrounding due process during the Progressive Era. While it was not then invoked as a free-standing constitutional

153. Theodore Roosevelt, *The Progressive Party Platform of 1912*, reprinted in *THE PROGRESSIVE MOVEMENT 1900-1915*, 130 (Richard Hofstadter, ed., 1963).

154. The most common exceptions were that statutes of the following types would generally be held to be within the legitimate police power of the states: statutes fixing rates charged by businesses impressed with a public interest; statutes relating to contracts for the performance of public work; statutes prescribing the methods and time for payment of wages; and statutes fixing the labor hours for children and for adults in certain hazardous occupations. *Adkins*, 261 U.S. at 546-48.

155. *Parrish*, 300 U.S. at 398-99.

156. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905).

right, it was clearly a value underlying judicial resistance to the intrusions of progressive reform legislation. The judiciary, including the federal judiciary, resisted legislative reforms, in part because their substantive content interfered excessively with private prerogative, and in part because their provenance interfered excessively with judicial prerogative. The federal courts used due process and liberty of contract as their principal tools against reform, but the rhetoric of privacy appeared frequently, and explains in part the judges' thinking in many of the due process cases.

Legislative persistence in adopting laws that intruded into areas of life previously regulated only, and minimally, by the judiciary, drew adverse comment from the United States Supreme Court along with repeated rulings that such legislation violated due process. The lower federal courts invoked notions of privacy to resist reform legislation in other ways, not limited to due process violations. One court went so far as to create a right to be left alone in public that trumped the First Amendment rights of labor organizers.

The exalted notions of liberty of contract on which many federal due process decisions were based were rejected even then by Mr. Justice Holmes and reviled by such progressive leaders as Theodore Roosevelt. Roosevelt attempted to push back against the judiciary during his long campaign for the presidency, which he effectively began in 1910 and continued to the 1912 election. His principal tool was direct democracy, especially limited procedures for recall of judges and judicial decisions, as well as the initiative and referendum. These proposals unnerved the elite supporters of the status quo, as well as some of Roosevelt's natural political allies. Ultimately, however, they failed along with Roosevelt's candidacy. They had little effect on the authority of the courts. Only later, when TR's Democratic kinsman leveled a direct political assault on the United States Supreme Court itself did the Court abandon the link between due process and the right to be left alone and enforce a presumption of legitimacy in favor of intrusive economic legislation. The rhetoric of due process and privacy coalesced again later, in the context of new debates unimagined during the Progressive Era.