

COMMON LAW, CIVIL LAW, AND THE
ADMINISTRATIVE STATE: FROM COKE TO *LOCHNER*

*Noga Morag-Levine**

In . . . most [states] on the Continent of Europe, the . . . rules . . . stand, to a large extent, in the form of positive statutes, or Codes, enacted by the arbitrary power of the sovereign, or by the authority of the legislative assembly, where such a body exists. . . [codification] is a characteristic feature in those [states] which have a despotic origin, or in which despotic power, absolute or qualified, is, or has been, predominant.

James Coolidge Carter, *The Proposed Codification of the Common Law* (1884)

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental government, is not alien to the code which survived the Roman Empire as the foundation of modern civilization in Europe.

* Associate Professor of Law, Michigan State University. Thanks to Lauren Benton, Adam Candeub, Barry Cushman, Adam Mossoff, Daniel Sharfstein, Glen Staszewski, and David Zaring for helpful comments and suggestions. The article greatly benefited from the in-depth reading and editing of Barbara Bean, Jim Chen, and most of all Jonathan Levine. I am also grateful for the input of participants at presentations delivered at Brooklyn Law School, Chicago Legal History Seminar, and the Workshop on Common Law Legal Transplants, Hebrew University Institute for Advanced Studies. Ema Avsharian, Andrew Barnes, Trevor Broad, and Tauna Szymanski provided much appreciated research assistance across various stages of the project. I began this article while a Fellow at the Program in Law and Public Affairs at Princeton and completed it with the support of a summer stipend from the Michigan State University College of Law. Finally, thanks to the entire library reference staff at the MSU College of Law for their efficient, cheerful and expert help.

Justice Thomas Stanley Matthews, *Hurtado v. California* (1884). Subsequently quoted in Justice Henry Billing Brown's opinion upholding workhour restrictions in smelters and mines, in *Holden v. Hardy* (1898), and in the opinion of Chief Judge Alton B. Parker of the New York Court of Appeals in *People v. Lochner* (1904).

I. INTRODUCTION

The American administrative state emerged over the course of the 19th and early 20th centuries out of protracted conflict over the status of the common law within it. The writings of prominent legal commentators throughout this era attest to this proposition.¹ Yet the meaning and significance of the common law within this historical context is currently ambiguous. For a generation or so following the New Deal, a conventional wisdom on this issue did take hold: viewed through the prism of legal realism,² common law ordering became synonymous with formalist rationalization of legal outcomes that served the interests of economic and political elites.³ Within this narrative, the common law was the handmaiden of "laissez-faire constitutionalism" and became indistinguishable from extreme free-market ideologies.⁴

1. James Kent, Francis Lieber, Thomas Cooley, and Christopher Tiedeman are among the better known 19th century proponents of the common law, see *infra* Sections V and VI. For a discussion of 19th-century writings revolving around the "rule of common law," see WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA* 35-42 (1996).

2. On the role of prominent legal realists within the New Deal administration, see LAURA KALMAN, *LEGAL REALISM AT YALE* 130-36 (1986).

3. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 25 (1995) (stating that legal formalism became aligned with laissez faire through the decisions of *Lochner*-era courts, and that the legal realists sought to attack this "judicial worldview."). On the realists distrust of precedent and their conception of judicial opinions as post-hoc rationalizations, see KALMAN, *supra* note 2, at 21-24 (1986).

4. BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* 34 (1942). Echoes of the argument appear in Cass Sunstein's writings during the late 1980s. See e.g., Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 917 (1987). ("The *Lochner* Court required government neutrality and was skeptical of government 'intervention'; it defined both notions in terms of whether the state had threatened to alter the common law distribution of entitlements and wealth, which was taken to be a part of nature rather than a legal construct."). For a relatively recent restatement of the view equating late 19th century common law reasoning with laissez-faire ideologies, see Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 13-14 (1999) ("The academic formalists were strongly predisposed in favor of 'private' common law If they had a 'science' it was a science of the common law. Their commitment to private common law co-existed, perhaps inevitably, with a commitment to the rights of private property, the freedom and sanctity of contract, the priority of private over public interests, and a resistance to legislative reform. For their part, the formalists on the Supreme

Its putative opposite was nothing more than sensible governmental involvement in society and the economy in pursuit of remedies to the inefficiencies and inequities of the marketplace. Defined in this fashion, the controversy surrounding the common law was a relic of an earlier era that had been resolved once and for all when the New Deal buried laissez-faire constitutionalism. By implication, the conflict had little relevance to contemporary political life.

One cornerstone of this construction was a long-dominant interpretation of *Lochner v. New York*.⁵ For much of the 20th century, the case stood for judicial usurpation of the common law for partisan purposes.⁶ In the 1970s, however, legal historians began to call into question the thesis equating the *Lochner* decision with unvarnished laissez-faire ideologies. The intervening decades have produced a wealth of revisionist scholarship that has challenged, in various ways, the notion that in order to invalidate the workhour restriction at issue in the case, the *Lochner* Court invented a constitutional rationale out of whole cloth.⁷ In the process, this line of research cast serious doubt on previous equations between laissez-faire and common law constitutionalism. One logical implication of this shift is the reopening of what was once seen as a resolved question: What defined the administrative paradigm against which common law ordering was pitted, and what was at stake in the choice between the two during the *Lochner* era?

Court appear to have begun with their commitments to laissez-faire, to the rights of property owners, and, at least occasionally, to the interests of the industries they had served while in private practice.”).

5. 198 U.S. 45 (1905).

6. See discussion in HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 2–4 (1993).

7. The following is a partial list of leading works falling under the umbrella of *Lochner* revisionism: Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of “Laissez-faire” Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970, 971–73 (1975); Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 189–92 (1984); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); Sunstein, *supra* note 4; GILLMAN, *supra* note 6; OWEN M. FISS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910* (1993); BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003). In June 2005 Boston University Law Review published a symposium on the occasion of *Lochner*'s centennial, which engaged the debate on *Lochner* revisionism from a variety of perspectives.

This article argues that continental civil law provided the competing paradigm to that of the common law, and that at the core of these respective regimes stood divergent models of administrative governance.⁸ The civil law model relied on centralized, agency-based, state administration aimed at the implementation of regulatory standards through expert legislators and bureaucrats. The common law model fundamentally distrusted bureaucratic administration, and as a consequence, identified courts as the proper locus for administrative governance. In contrast with the civil law, it gave judges and juries the final say on the necessity of regulatory interventions to protect public health and safety, empowering them to oversee actions by both administrators and legislators. The choice between these models was at the very core of late 19th-century police-power debates.⁹

The use of the term “police power” as a synonym for regulatory authority itself attests to the influence in America of continental models of administration. Police (*polizei* in German) was at its essence a continental concept connoting a family of regulatory institutions in the German cameralist vein.¹⁰ Within that tradition, both the meaning of public interest and the means necessary to protect it were a matter of sovereign prerogative. A countervailing common-law-based view delimited the state’s regulatory authority under the police power to actions the courts would uphold as properly designed to enforce public nuisance law. The latter was defined, in turn, as the authority to protect public health, safety, morals, and sometimes welfare. This formula permitted, at least in theory, a very broad scope of governmental interventions, few of which could not be construed to serve at least one of these goals. Given this broad substantive scope, the primary difference between this common law version

8. On the link between legal procedure and divergent conceptions of state authority under civil and common law, see MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986).

9. To say that civil and common law represented competing visions of administrative governance is in no way to suggest a paucity of civil law influences within 19th-century judicial opinions and legal treatises. Examples of such influence abound. The conflict at issue revolved instead around the propriety of following continental models of administration by placing ultimate regulatory authority in the hands of legislators and administrators rather than judges. On civil law influences during the 19th century, see Mathias Reimann, *Introduction: Patterns of Reception*, in *THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD, 1820-1920*, at 7 (Mathias Reimann ed., 1993). See also R.H. Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, 1990 *DUKE L.J.* 1207, 1221-27 and James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business* 88 *CALIF. L. REV.* 1815 (2000).

10. See discussion *infra* Part IV.

and its continental counterpart was not in the regulatory domain which it defined. Instead the cardinal difference pertained to which institution should be entrusted with ultimate regulatory decision-making authority, and, by implication, the standards that ought to govern regulatory interventions. The continental model provided for regulatory decisions informed by legislative and administrative expertise. The common law gave precedence to the communal norms and lay knowledge that juries could bring to regulatory decisions and the specialized knowledge of legally-trained judges. From this distinction followed important implications regarding the utilization of law as an instrument of social and economic change. The civil law made possible an interventionist and reformist model of administrative government; by contrast, the common law imposed significant barriers before the implementation of state-initiated social and economic reforms. Not coincidentally, reform agendas of this type often made their way to the United States from France, Germany and elsewhere on the continent.

Fear of the influence of radical French immigrants helped spawn the passage of the 1798 Alien and Sedition Acts.¹¹ These attitudes continued into the Jacksonian period with Democrats and Whigs taking opposing views on immigration from the continent and the reformist agendas these immigrants carried with them.¹² The 1848 revolutions in Europe greatly sharpened this divide with the subsequent arrival of hundreds of thousands of refugees from the continent,¹³ among them an influential group of radical reformers who took on transformative agendas across multiple social and political spheres.¹⁴ By the 1870s a new channel for the importation of continental reforms had opened as American students began to attend German universities in growing numbers. Upon their return, these students perceived "an acute sense of a missing 'social' strand in American politics," historian Daniel Rodgers has argued.¹⁵ Subsequent years saw an in-

11. Alien Enemies Act, ch. 66, 1 Stat. 577 (1798); The Naturalization Act, ch. 54, 1 Stat. 566 (1798); Alien Enemies Act, ch. 58, 1 Stat. 570 (1798); Sedition Act, ch. 74, 1 Stat. 596 (1798). See RICHARD BUEL, JR., *SECURING THE REVOLUTION: IDEOLOGY IN AMERICAN POLITICS, 1789-1815*, at 1-7 (1972); CHARLES DOWNER HAZEN, *CONTEMPORARY AMERICAN OPINION OF THE FRENCH REVOLUTION 140-45* (1897); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 309, 311, 354-55 (1993).

12. ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 320-21 (1953).

13. See discussion *infra* Part V.

14. CARL WITTKE, *REFUGEES OF REVOLUTION: THE GERMAN FORTY-EIGHTERS IN AMERICA* 1 (1952).

15. DANIEL RODGERS, *ATLANTIC CROSSINGS* 111 (1998).

flux of imported administrative reform proposals and legislative blueprints into the United States, e.g., workingmen's insurance, urban planning, and cooperative farming.¹⁶ Across these and other reform projects, the driving engine was ideological change brought about through unprecedented exposure to European political sentiments. And, as was the case throughout the 19th century, the agents who carried these continental-inspired reforms confronted a countervailing array of "pitchmen for made-in-America-only ideas and politics."¹⁷

Efforts to stem the various waves of continental influence throughout the 19th century drew on the same central argument: the putative absolutist propensity of continental states. Within this line of argument, the common law was made a cornerstone of Anglo-American liberty; the civil law was the threatening antithesis. Throughout the 19th century, leading jurists repeatedly glorified the common law through direct contrast with the civil law. James Kent did so in 1811 in a leading opinion that invoked the common law's difference from the civil law as justification for the protection of vested rights,¹⁸ and he returned to the theme in his *Commentaries* (published between 1826-1830).¹⁹ In his 1853 treatise *On Civil Liberty and Self-Government in the United States*, Francis Lieber contrasted the benefits of what he termed "Anglican liberty," a system of government founded in common law, with the type of "Gallican liberty" for which leaders of the 1848 revolutions rallied.²⁰ Throughout much of the

16. Similarly to Rodgers, Theda Skocpol recognized the influence of foreign examples on progressive initiatives. In her description, "[p]ioneering American advocates of workingmen's insurance and labor regulations... were reformist professionals who sought to adapt foreign policy precedents to U.S. social needs and governmental conditions." THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS* 161 (1992). The transnational aspect of the progressive story is not central to Skocpol's analysis, however. Her focus, instead, is on the significance of factors specific to the American polity—the impact of Civil War pensions and voluntary women's organizations—in explaining the distinct trajectory of American social policy at the start of the 20th century. *Id.*

17. RODGERS, *supra* note 15, at 4.

18. *Dash v. Van Kleeck*, 7 Johns. 477 (N.Y. 1811). Chancellor Kent's opinion in the case included the following language on the difference between the civil and common law tradition: "Our case is happily very different . . . With us, the power of the lawgiver is limited and defined; the judicial is regarded as a distinct, independent power; private rights have been better understood and more exalted in public estimation as well as secured by provisions dictated by the spirit of freedom, and unknown to the civil law. Our constitutions do not admit the power assumed by the Roman prince; and the principle we are considering is now to be regarded as sacred." *Id.* at 505.

19. The common law, Kent wrote, is "eminently conducive to the growth of civil liberty; and it is in no instance disgraced by such a slavish political maxim as that with which the Institutes of Justinian are introduced." JAMES KENT, *COMMENTARIES ON COMMON LAW*, VOL. I 321-22.

20. FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* (Theodore D.

19th century, opponents countered codification initiatives with warnings about the absolutist tendencies of the civil law. This clash came to a head during the 1880s with the fight over the passage of a proposed Civil Code in New York. James C. Carter's 1884 anti-codification pamphlet, quoted above, epitomized a prevalent view among American lawyers of the time regarding the existence of fundamental and irreconcilable political incompatibilities between the civil law and common law traditions. This same argument—amplified into a constitutional claim—was at the heart of the era's police-power debates.

Among the transplanted legislative reforms of the time, the work-hour restrictions at issue in *Lochner* were particularly controversial.²¹ Continental Europe was not directly mentioned in the case, and perhaps for this reason, the vast scholarship on *Lochner's* meaning and origin has not drawn a connection between the decision and the longstanding debate on the civil law's constitutional status in America. Significantly, however, the civil law's compatibility with due process figured prominently in three key opinions leading up to *Lochner*. The first was *Hurtado v. California* (1884), a criminal procedure case which included an emphatic statement upholding the legitimacy of following civil law institutions, as quoted above. The second was *Holden v. Hardy* (1898), which validated work-hour limits in smelters and mines, and reproduced *Hurtado's* statement on the civil law in support of its own position.²² And the third was the New York Court of Appeals decision in *People v. Lochner*,²³ which again incorporated a substantial segment of the same passage. Across these three opinions, the justices who wrote for the majority took pains to emphasize that the American constitution was compatible with both civil-law and common-law-based regulatory institutions. Justice Rufus Peckham, who wrote for the majority in *Lochner*, rejected that premise, albeit implicitly. His opinion avoided direct reference to the civil law (for reasons that will be discussed below). However, an encoded reference to continental governance can be found in his warning that a police

Woolsey ed., 3d ed. 1877) (1853). On Anglican liberty see chapter 5, beginning with page 51. On Gallican liberty see chapter 24, pages 279–96. For further discussion of Lieber's view of the relationship between common law and liberty see discussion *infra* Part V.

21. On the role of Bismarck's workers' insurance program in stimulating labor legislation, including workhour restrictions, from the 1880s onward, see SKOCPOL, *supra* note 16, at 160.

22. 169 U.S. 366, 388–89 (1898) (quoting *Hurtado v. California*, 110 U.S. 516, 530 (1884)).

23. 177 N.Y. 145, 150–51 (1904).

power whose implementation was devoid of judicial oversight would “become another and delusive name for the supreme sovereignty of the state.”²⁴ The statement seems geared at marking a clear distinction between police regulation in its continental incarnation, and within the boundaries of a common law regime. Importantly, in Justice Peckham’s formulation, the core distinction between the two was not in the permitted scope of regulatory action. Instead it pertained, first and foremost, to the *role of courts* in ensuring that “health and safety” were the *true* rationale for regulation, rather than a “mere pretext.”²⁵

The predominant reading of *Lochner* has long construed the case as marking the ascendance of substantive common-law-based constitutional limitations on the ends towards which the state may intervene in the market. “Substantive due process” became the catch phrase for the doctrinal maneuver that the *Lochner* Court was thought to have implemented under this interpretation. Implicit in this term was the suggestion that in *Lochner*, the Court construed the words “due process” in the 14th Amendment to be synonymous with a list of substantive common law limitations. Yet in choosing to defend the work-hour limit as a health law—a common-law-compatible rationale—the state of New York made the existence of substantive limitations tangential to the case. The Court invalidated the law because, *in its judgment*, there was “no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker.”²⁶ The state was entitled to impose “reasonable conditions” on property, liberty, and by extension freedom of contract, under the 14th Amendment. But what was, and was not reasonable, was—the Court ruled in *Lochner*—for the justices to decide.²⁷

In this way, there were two distinct prongs—substantive and procedural—within *Lochner*-era jurisprudence on the police power. Substantively, the question pertained to whether the state might regulate in the interests of social goals beyond the protection of life, liberty and property as defined by common law. The procedural issue was separate, though related. It pertained to the identity of the institution entrusted with evaluating the fit between an alleged regulatory end and a particular inter-

24. *Lochner v. New York*, 198 U.S. 45, 56 (1905).

25. *Id.*

26. *Id.* at 58.

27. *Id.* at 53.

vention. One view assigned this role to legislative and administrative bodies; the other to courts. *Lochner* marked the ascendance of the view that it was up to judges to decide on the reasonableness of regulatory interventions. In other words, it took a direct position only on the procedural prong of due process. *Lochner* scholarship has generally devoted little attention to the decision's procedural prong. Rather, it has organized its inquiry around the substantive question: What constitutional principle, if any, restricted the scope of the police power to the protection of common law rights?²⁸ By contrast, this article aims to show that the scope of judicial oversight over regulatory decision-making was itself the central principle at issue in *Lochner*-era police-power debates. The article further argues that the existence of this authority was understood to be the core distinction separating the civil law and common law regulatory paradigms.

In insisting that it, rather than the New York legislature, had final authority to rule on the reasonableness of regulation, the *Lochner* Court invoked a deeply entrenched principle in the history of common law constitutionalism. Its origins, as discussed in more detail below, date to England of the late 14th and early 15th century.²⁹ The catalyst that sparked this line of constitutional argument was the rise of absolutist government on the continent, and the efforts of English monarchs to institute similar regimes at home. Common law theory distinguished the rights of Englishmen from those of Frenchmen and later Germans, positing a powerful counterclaim to those in England who sought to emulate the centralizing and interventionist regulatory models that were gaining ground on the continent. In contrast with civil law, the common law was said to give courts authority to rule on the reasonableness of state interference with protected rights. In this manner, it barred the exercise of an absolute royal prerogative of the type continental monarchs could claim.

Considered against this backdrop, *Lochner* stands less as a watershed than as signpost in a centuries-long journey in which advocates of continental-styled administration encountered defenders of the common law state. This same battle would reach another high point during the 1930s when prominent leaders of the American Bar Association (ABA) denounced New Deal

28. See *infra* Part VII.

29. See discussion *infra* Section II.

agencies as akin to Soviet-style “administrative absolutism.”³⁰ In this the ABA continued within a longstanding tradition of common law advocacy predating Sir Edward Coke’s conflicts with James I and a royalist cadre of civil lawyers.³¹ Across these and many other examples in England and the U.S., efforts at transplanting regulatory and political institutions from the continent triggered controversy over alternative legal paradigms and models of administrative governance. Importantly, members of the legal profession occupied leading positions on both sides of this divide.³²

The tension between civil and common law models of administration received scant attention within post-New-Deal legal and constitutional history. Instead, the constructed dichotomy between “laissez faire” and “the welfare state” came to replace the common law/civil law axis. In the process, a crucial dimension of 19th-century regulatory history has receded from view. Reconstruction of this partially lost narrative is a legal historical imperative. But the motivations impelling this inquiry are not purely historical. Globalization has intensified and accelerated processes of transnational legal borrowing across both sides of the Atlantic. Consequently, contrasts and similarities between American and European regulatory philosophies and practices (and the degree of legal convergence taking place across both sides of the Atlantic) are currently a topic of significant academic discussion.³³ In constitutional law, strong differences of opinion surround the Supreme Court’s increased propensity to cite the decisions of foreign (often European) courts.³⁴ In these and other areas, the historical conflict between civil and common

30. Report of the Special Committee on Administrative Law, 63 A.B.A. ANNUAL REPORT 331, 334 (1938).

31. See *infra* Part III.

32. See *infra* Parts IV and V.

33. See generally Robert A. Kagan, *Globalization and Legal Change: The ‘Americanization’ of European Law?*, 1 REG. & GOVERNANCE 99 (2007). Daniel R. Keleman, *Suing for Europe: Adversarial Legalism and European Governance*, 39 COMP. POL. STUD. 101 (2006). Cass R. Sunstein, *Risk and the Law: Precaution Against What? The Availability Heuristic and Cross-Cultural Risk Perception*, 57 ALA. L. REV. 75 (2005). Jonathan B. Wiener, *Whose Precaution After All? A Comment on the Comparisons and Evolution of Risk Regulation Systems*, 13 DUKE J. COMP. & INT’L L. 207 (2003). See *infra* Section VII.

34. See Noga Morag-Levine, *Judges, Legislators, and Europe’s Law: Common-Law Constitutionalism and Foreign Precedents*, 65 MD. L. REV. 32 (2006) (arguing that the hold of the view that due process excluded the importation of civil law institutions may, in part, account for why the practice of Supreme Court citation to foreign precedents has triggered more controversy in America than most elsewhere in the world.)

law paradigms is vital to an understanding of current debates regarding the transplantation of law and policy.

The remainder of the article proceeds as follows. Part II follows the emergence of the concept of common law supremacy in early modern England, in response to the Crown's reliance on civil-law-inspired adjudicatory bodies. Within this context, the distinction between natural and artificial (legally-trained) reason came to justify the subordination of governmental decisionmaking to common law. The writings of Roscoe Pound and Edward Corwin during the 1920s attest to the salience, and contested meaning, of this historical chapter within early 20th-century debates on the role of courts in the administrative state. Part III considers the economic and political background against which the idea first took hold that Englishmen were entitled by right to common law adjudication. The rise of mercantilist states was central to this development, as Fortescue's 15th-century writings make evident. Common law limitations on the scope of prerogative authority served in this connection to stem the incursion of economic and social regulation along the absolutist French model. Coke, building on the Fortescue, would lend his authority to the claim that the king may use the prerogative only to prevent dangers, and not to change the law. This argument would serve in time to buttress the existence of nuisance limitations on the scope of the police power. The clash between "police" and common-law-based models of public health regulation in 18th and early 19th centuries England is the topic of Part IV. In this context this section examines the deployment of common-law-based models of administrative governance by opponents of Edwin Chadwick's Public Health Act of 1848. The central charge leveled at Chadwick's program was that it emulated continental models of "medical police" by shifting regulatory authority from judges to boards of health, violating in the process the nuisance-based regulatory principles of common law. The 1848 revolutions lent added force to the view that the common law could deflect radicalizing continental influences. Part V points to the presence of a similar line of argument in the United States during the 1850s through analysis of Francis Lieber's distinction between Anglican and Gallican liberty. With the passage of the 14th Amendment, the choice between continental and common law models of administration acquired new constitutional meaning, as Part VI describes. This part of the article contrasts the Court's treatment of the relationship between due process and common law in the *Slaughterhouse Cases*, *Munn v.*

Illinois, Hurtado, and Holden with its decision in *Lochner*. The discussion highlights the intersection during that era between fear of radical continental influences, opposition to codification, and insistence upon judicial control over health and safety regulation. Finally, Part VII revisits the current debate on *Lochner's* origins and legacy, in light of the above argument.

II. "BOARDS AND COMMISSIONS," CONCILIAR COURTS, AND THE SUPREMACY OF COMMON LAW

Roscoe Pound began *The Spirit of the Common Law* (1921) with an ode to the common law's historical resilience throughout repeated crises "in which it seemed that an alien system might supersede it."³⁵ The external threat varied across the centuries and included the Catholic Church, the Tudor and Stewart rulers of England, and the French sympathizers within the early American republic. But the "alien system" in question was always rooted in the Roman or Civil Law tradition of continental Europe. The early 20th century marked, for Pound, another moment of crisis within this historical chain. The threat this time seemed especially ominous.

Writing against the backdrop of unprecedented growth in federal and state administrative power during the World War I years,³⁶ Pound argued that

the tendency to commit everything to boards and commissions which proceed extrajudicially and are expected to be law unto themselves, the breakdown of our polity of individual initiative in the enforcement of law and substitution of administrative inspection and supervision, and the failure of the popular feeling for justice at all events which the common law postulates appear to threaten a complete change in our attitude toward legal problems.³⁷

Importantly, Pound placed part of the blame for the growing appeal of this form of bureaucratic management on the corruption of historical common law principles during the late 19th century. Extreme individualism, an inflexible aversion to legisla-

35. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 5 (1921).

36. Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court*, 78 B.U. L. Rev. 1489, 1491 (1998) ("Wartime mobilization had actualized hitherto unthinkable forms of state intervention, and the question looming over the dawning decade of the twenties was whether these new possibilities would remain within the potential repertoire of domestic state regulation during times of peace.").

37. POUND, *supra* note 35, at 7.

tion, and a general failure to adapt to the demands of industrial society—positions “out of line with [true] common law”³⁸—had all strengthened the hand of advocates of administrative autonomy from judicial controls. With the hope of spurring internal reform, Pound sought in *The Spirit of the Common Law* to show where and why late 19th-century doctrine deviated from authentic common law principles. He identified three such principles, or institutions: judicial precedent, trial by jury, and “the doctrine of the supremacy of law.”³⁹ The latter he defined as “a doctrine that the sovereign and all the agencies thereof are bound to act upon principles, not according to arbitrary will[;] are obliged to conform to reason, instead of being free to follow caprice.”⁴⁰

For Pound, an encounter in 1608 between James I and Sir Edward Coke marked the moment in which the supremacy of law crystallized as a paramount common law principle. At the heart of that encounter, as Pound explained, was the king’s authority to take cases away from the courts so that he could rule on them himself. James claimed such an authority by saying “I thought law was founded upon reason, and I and others have reason as well as the judges.” To which Coke responded that “causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of the law, which law is an art which required long study and experience before that a man can attain to the cognizance of it.”⁴¹ When James objected that it would be treason to suggest that he was subordinate to the law, Coke offered in final retort that “the king ought not to be under any man but under God and the law.”⁴²

Pound had two purposes in retelling this story. The first was to place the principle of legal supremacy at the very core of common law history and to argue that this principle did not lose its potency with the shift from monarchy to democracy. At the same time, Pound was intent on showing that judicial obstruction of social legislation was neither required by, nor consistent with, the supremacy of law.⁴³ Supremacy of law meant instead the

38. *Id.* at 30.

39. *Id.* at 65.

40. *Id.* at 64.

41. 7 SIR EDWARD COKE, REPORTS 65, quoted in POUND, *supra* note 35, at 61.

42. *Id.*

43. [i]n insisting on the supremacy of law, the common law is not bound of necessity to stand always against the popular will in the interest of the abstract individual. Rather its true position is one of standing for ultimate and more impor-

subordination of administrative processes to judicial review.⁴⁴ His justification for the necessity of judicial review of administration echoed Coke: “Men are not born with intuitions of the principles by which justice may be attained through the public adjudication of controversies. The administration of justice is not an easy task to which every man is competent.”⁴⁵ Pound perceived a direct parallel between the challenge posed by the rise of administrative power during his own time and that of Coke as he explained:

It seemed that judicial justice, administered in courts, was to be superseded by executive justice administered in administrative tribunals or by administrative officers. In other words there was a reaction from justice according to law to justice without law, in this respect entirely parallel to the present movement away from the common-law courts in the United States.⁴⁶

The “administrative tribunals” to which Pound referred in the statement above included several adjudicatory bodies whose common denominator was that they operated outside of the three common law courts: the Court of Common Pleas, the Court of King’s Bench and the Court of Exchequer. The non-common law adjudicatory bodies included the ecclesiastical courts and a variety of prerogative, or conciliar, courts (named after the King’s council). Prominent among these were the Chancery, the Admiralty courts, the Court of Star Chamber, and the Court of Requests.⁴⁷ Antagonism between the competing jurisdictions provided the impetus for James I’s summation of the judges of England in 1608, but predated James’s reign by several centuries, as discussed below.

At least since the reign of Edward I (1272-1307), the king’s council had taken on adjudicative functions in instances where common law remedies were deemed insufficient. The scope of the Council’s judicial activities increased considerably over the course of the 15th century, and under the reign of Henry VIII (1509-1547) it became a full-fledged court, known as the Court

tant social interests as against the more immediately pressing but less weighty interests of the moment.

POUND, *supra* note 35, at 81.

44. *Id.* at 83.

45. *Id.* at 82.

46. *Id.* at 72-73.

47. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 101-09 (2d ed. 1979).

of Star Chamber.⁴⁸ The Court of Requests, another conciliar court, came into being during the 14th century with the goal of serving the causes of poor men. The various alternative courts relied, to varying degrees, on continental legal procedures instead of those of common law. Decision-making authority was concentrated in the hands of judges (rather than juries); judges took active part in the interrogation of witnesses and entertained requests for summary judgment. Indictments proceeded via "informations" brought by state officials. The subsequent popularity of these courts followed from their streamlined and efficient procedure, and their independence from the landed interests that held sway over the common law courts.⁴⁹ At the same time the broad discretion these institutions conferred upon judges opened the door to abuse and arbitrary power.⁵⁰ Under the Stuarts the Court of Star Chamber became notorious for its prosecution of sedition and other political offenses in a process that consisted of indictment by information and summary adjudication without a jury.⁵¹

Sometime during the 14th century, the idea took hold that adjudication under common law procedure (rather than alternative royal institutions) was "an Englishman's birthright."⁵² Chapter 29 of the Magna Carta emerged in this connection as a foundational text. That chapter declared that no free man may suffer interference with his property or freedom "except by the lawful judgment of his peers and by the law of the land."⁵³ Law of the land transformed into "due process" in some later versions of the Magna Carta, and both phrases became synonymous with common law in the view of those who challenged the authority of alternative royal tribunals.⁵⁴ A series of due process statutes were subsequently enacted over the course of the 14th and 15th centuries with the goal of creating "legal restraints on the power of the Crown to erect new courts and jurisdictions."⁵⁵ Coke's

48. See A.R. MYERS, *ENGLAND IN THE LATE MIDDLE AGES* 198 (2d ed. 1963).

49. *Id.* at 198. In particular, the Court of Star Chamber often served as a forum for suing powerful individuals who were likely to escape punishment under common law. Partially for this reason, it was viewed favorably by the general populace throughout most of the 16th century. See DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE* 208 (2d ed. 2004).

50. BRIAN P. LEVACK, *THE CIVIL LAWYERS IN ENGLAND, 1603-1641*, at 156 (1973).

51. BAKER, *supra* note 47, at 103.

52. *Id.* at 82.

53. *Id.* at 4.

54. RODNEY L. MOTT, *DUE PROCESS OF LAW* 4-5 (1926).

55. BAKER, *supra* note 47, at 83.

writings during the 17th century would cement the notion that due process required property rights to be subject exclusively to common law adjudication. Like the 14th-century barons who first advanced this line of argument, Coke sought to secure the common law's domain against incursion by alternative judicial institutions.

Professional competition between common-law- and civil-law-trained lawyers contributed to the rising jurisdictional tension at the start of the 17th century. Until the middle of the 13th century, most English lawyers received their education on the continent. Around that time, however, legal education institutions were established in England.⁵⁶ In time two alternative tracks developed for entering England's legal profession. One path required study at Oxford, Cambridge or one of the universities on the continent, culminating in the Doctor in Civil Law degree. The other required apprenticeship in legal inns, after which students were called to the bar.⁵⁷ Graduates of the first track became known as civilians, and graduates of the second were called common lawyers. The common lawyers dominated the ranks of England's legal profession by a large margin.⁵⁸ Nonetheless, civilians occupied positions of significant influence in the royal bureaucracies of both the Tudor and Stewart crowns.⁵⁹ They were the sole practitioners in actions brought before the High Court of Admiralty, the central ecclesiastical courts (whose jurisdiction included probate, matrimonial and estate cases), and the Chivalry courts.⁶⁰ They also served (along with common lawyers) as judges in the Court of Star Chamber, the Court of Requests, the Council of the North and the Chancery.⁶¹ Civil lawyers and common lawyers aligned with opposite sides in the political divisions of early 17th-century England. With very few exceptions, civilians sided with the monarchy and the English Church.⁶² The common lawyers were less unanimous, but on the whole their allegiance was with the Puritans and the Parliament. At the turn of the 17th century, however, they faced a professional crisis marked by shortage of jobs and reduction of

56. NORMAN F. CANTOR, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM* 42 (1997).

57. BAKER, *supra* note 47, at 138–40.

58. Although there were only 200 civilian lawyers in the period between 1603 and 1641, there were close to 2000 common lawyers. LEVACK, *supra* note 50, at 3.

59. COQUILLETE, *supra* note 49, at 218; LEVACK, *supra* note 50, at 124.

60. LEVACK, *supra* note 50, at 219.

61. *Id.* at 124.

62. *Id.* at 3.

fees.⁶³ Although a variety of factors contributed to their decline, the civil lawyers tended to blame the common lawyers' increasing use of prohibitions.⁶⁴

Prohibitions took the form of orders from judges in common law courts to their colleagues on other courts to halt proceedings that the common law judges considered to fall exclusively within their jurisdiction.⁶⁵ A prohibition would put a temporary halt to the proceedings and would be followed by a conference in which the judges within the challenged court could make the case as to why jurisdiction should remain with them. When they failed, the case had to be refiled within a common law court. The turn of the 17th century brought a marked increase in the use of this procedure.⁶⁶ Soon after the inauguration of James I, the civilians petitioned him and the Archbishop of Canterbury to intervene.⁶⁷ They claimed that the authority to adjudicate jurisdictional disputes of this type properly belonged with the king (rather than the common lawyers) on two counts. The first was that courts of common law were equal, rather than superior, to civilian and prerogative courts. The second followed from the king's historical right to settle disputes in person.⁶⁸ James invoked the latter argument in his 1608 meeting with the judges. Coke cast his response in reference to the superiority of legal authority over the personal authority of the king. But the underlying question was not only, or primarily, the law's supremacy over the king as such. At stake instead was the meaning of law in this connection, or, put differently, the subordination of civil law institutions to those of common law.

This debate was central to English jurisprudential thought already during the 15th century, as evidenced by the writings of Sir John Fortescue, England's leading political theorist of the era. He served as Chief Justice of the King's Bench between 1442 and 1461, and followed Henry VI to France when the latter was deposed. While there he authored *De Laudibus Legum Angliae* (*Praises of the Laws of England*).⁶⁹ The book's overarching theme was the distinctive nature and benefits of English law (in contradistinction from civil law). Employing a literary device

63. *Id.* at 50–72.

64. *Id.* at 72.

65. *Id.* at 73.

66. *Id.* at 73.

67. *Id.* at 82.

68. *Id.* at 83.

69. SIR JOHN FORTESCUE, ON THE LAWS AND GOVERNANCE OF ENGLAND (Shelley Lockwood ed., 1997) (1471). On Fortescue's biography, see *id.* at xviii–xix.

common in 15th-century political writings, the book takes the form of a dialogue between a young prince and a chancellor (a character Fortescue employs as a stand-in for himself). To begin with, the chancellor advanced the view that knowledge of law is as important to the prince as knowledge of arms, to which the prince responded with a two-part inquiry. The first expressed concern over the length of time required for him to attain thorough knowledge of the law; the second pertained to whether he ought to devote himself “to the study of the laws of England or of the civil laws which are renowned throughout the world.”⁷⁰

In response to the prince’s second question, Fortescue offered an extensive discussion of the many reasons supporting the common law’s superiority over civil law. The greater antiquity of common law over all other systems leaves no “legitimate doubt but that the customs of the English are not only good but the best.”⁷¹ He offered a series of comparisons between civil law and common law adjudication to illustrate the greater protection common law accorded the liberty of the subject. The civil law admitted proof by witnesses and resorted to torture to obtain confessions.⁷² The common law by contrast relied on juries to ensure that justice be done.⁷³ Persuaded on this point, the prince proceeds to question why, in view of the evident superiority of English law, some of his “ancestors, the kings of England, were little pleased with their laws, and strove to introduce the civil laws into the government of England, and tried to repudiate the laws of the land”?⁷⁴ To this the chancellor responded with the view that the civil law’s appeal to earlier monarchs derived from the intrinsic affinity between the civil law and royal absolutism. Central to this was the civil law’s traditional emphasis on the Justinian maxim, “What pleases the prince has the force of law.” “The laws of England,” by contrast, “do not sanction any such maxim.”⁷⁵ Notwithstanding, some English monarchs did “change laws at their pleasure, make new ones, inflict punishments, and impose burdens on their subjects, and also determine suits of

70. *Id.* at 14.

71. *Id.* at 27. Antiquity served in this context as evidence for the quality of English law under the logic that the longevity of these laws suggests that the various rulers who had occasion to alter them throughout history considered them better than any alternative.

72. *Id.* at 30–34.

73. *Id.* at 41.

74. *Id.* at 49.

75. *Id.* at 48.

parties at their own will and when they wish.”⁷⁶ Elsewhere Fortescue explained the cardinal difference between the authority of English monarchs and that of rulers under civil law through a distinction between royal and political power. Civil law conferred absolute royal power under the Justinian maxim. But “the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only royal but also political.”⁷⁷ Coke would subsequently cite Fortescue’s last point to support the absence of legislative authority to issue new law through prerogative proclamations.⁷⁸

Coke likewise borrowed a page from Fortescue when he offered the difference between natural and artificial reason as grounds for denying the king authority to adjudicate disputes in person. As mentioned, the prince responded to the chancellor’s recommendation that he study law with doubts based on the lengthy time required to acquire thorough legal education. The chancellor answered with a distinction between two categories of legal knowledge: the first appropriate and sufficient for a prince; the second necessary for a professional judge. In one year of study, Fortescue’s chancellor contended, the prince could acquire sufficient familiarity with legal maxims and universal principles of law, which for his purposes should suffice. But, the chancellor agreed with the prince, for “that expertness in laws the which is requisite for judges the studies of twenty years barely suffice.” Neither was this manner of legal expertise of much benefit to the prince, Fortescue went on to say. Unlike professional judges, the prince would have “no occasion . . . to search into the arcana of our laws with such tedious application and study,” since it “was not customary for the Kings of England to sit in court or pronounce judgment themselves.” The latter point, i.e., the impropriety of direct adjudication by the monarch, was the point Fortescue aimed to support through this imagined colloquy. Likely for the same reason Fortescue provided elsewhere in the book a thorough discussion of the structure and thoroughness of the education English lawyers received in the Inns of Chancery and Inns of Court.⁷⁹

In providing an expertise-based rationale for the supremacy of common law, Edward Corwin contended, Fortescue laid the foundation for an Anglo-American tradition of higher law, a

76. *Id.*

77. *Id.* at 17.

78. See discussion *infra* Part III.

79. FORTESCUE, *supra* note 69, at 68–75.

tradition that evolved in opposition to the higher-law tradition associated with the continent.⁸⁰ The roots of both higher-law traditions, Corwin emphasized, can be traced to Aristotelian conceptions of "natural justice." The defining element of natural justice within this conception was its universality: "that which everywhere has the same force and does not exist by people's thinking this or that."⁸¹ Cicero would later build and expound on this idea when he defined "True law" as "right reason, harmonious with nature, diffused among all."⁸² Roman rulers found the concept of universal law of particular value in administering an empire whose rule extended over many local systems of law. Consequently, Corwin notes, Roman jurisprudence came to adopt a distinction between *jus civile* and *jus naturale*. The first is specific to individual nations; the second is "established among all mankind" and "is observed equally by all peoples." This distinction was subsequently incorporated into Justinian's *Institutes* (published in 533).⁸³ From there the concept of natural law entered medieval political discourse where its meaning subsequently transformed from an ideal guiding the lawmaking exercise to an external constraint on the authority of lawmakers. On the continent, where this idea originated, the existence of natural limitations on the exercise of political power was largely theoretical. In England, by contrast, higher-law acquired actual institutional significance beginning with the 16th century.⁸⁴

Key to this divergence was the fact that in England the halo of higher law was conferred on common law institutions of positive law. In this fashion, common law judges became the guardians of higher law in its English incarnation. In tandem, "reason" came to assume a distinct meaning within English theories of higher law. "The right reason to which the maxims of higher law on the continent were addressed was always the right reason invoked by Cicero, it was the right reason of all men."⁸⁵ James I

80. EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 37 (1955) (originally published in 42 HARV. L. REV. 149 (1928-1929)).

81. 7 ARISTOTLE, NICOMACHEAN ETHICS §§ 1-2 (Ross trans., 1925), cited in CORWIN, *supra* note 80, at 7-8, n.15.

82. 6 LACTANTIUS, DIVINAE INSTITUTIONES 8, 370 (Roberts & Donaldson trans., 1871), cited in CORWIN *supra* note 80, at 10 n.22.

83. *Id.* at 17. The *Institutes* was one of the four works comprising Justinian's *Corpus Juris Civilis*.

84. *Id.* at 23.

85. *Id.* at 26. Cicero's description of Law as "a natural force . . . the mind and reason of the intelligent man, the standard by which Justice and Injustice are measured," MARCUS TULLIUS CICERO, DE LEGIBUS 1.6.19, cited in GARY L. MCDOWELL, EQUITY

spoke from within this tradition when he sought to defend his authority to act as a judge with the claim that "the law was founded upon reason, and that he and others had reason as well as the judges." In constructing legal knowledge as a "professional mystery, as the peculiar science of bench and bar," Fortescue provided Coke with a ready-made line of response.⁸⁶ The result was a higher law tradition to which "right reason" was "*judicial* right reason," Corwin wrote.⁸⁷

Corwin made this argument in an essay he published in the 1928-9 issue of the *Harvard Law Review* under the title "The 'Higher Law' Background of American Constitutional Law." Like Pound, he wrote with the intent of shining a historical light on the constitutional controversies of his day. And like Pound, he identified the early 17th century as a decisive moment in the rise of common-law-based notions of judicial supremacy. He differed from Pound in one key respect. For Corwin, common law ideology was a relic of an earlier age and was at odds with the principles of modern American constitutionalism. Whereas the common law justified legal supremacy in reference to its substantive content, modern constitutionalism tied the supremacy of law to its origin in popular sovereignty. With this reframing, Corwin suggested, American constitutionalism moved in the direction of the continental higher law tradition. The Roman maxim regarding the absolute authority of the prince built on the claim that the prince derived his authority from the people. (Whatever has pleased the prince has the force of law, since the Roman people by the *lex regia* enacted concerning his imperium, have yielded up to him all their power and authority.)⁸⁸ As such, Corwin wrote, "[t]he sole difference between the Constitution of the United States and the imperial legislation justified in this famous text is that the former is assumed to have proceeded immediately from the people, while the latter proceeded from a like source only mediately."⁸⁹

In aligning American constitutionalism with continental higher law principles, Corwin departed from Pound's contemporaneous writings on this topic. By the 1930s Corwin would become one of the New Deal's most fervent supporters,⁹⁰ whereas

AND THE CONSTITUTION 20 (1982).

86. CORWIN, *supra* note 80, at 38.

87. *Id.* at 26.

88. Inst. 1. 2. 6 *quoted in* CORWIN, *supra* note 80, at 4 n. 8.

89. *Id.* at 4.

90. In 1937 Corwin testified on behalf of Roosevelt's Court Packing Plan before the

Pound would emerge as a vocal critic of New Deal administrative practices and a strong proponent of judicial review of administrative action.⁹¹ In this he understood himself to be following in the footsteps of Coke, as his writings in *The Spirit of the Common Law* make evident.

From its likely inception in Fortescue's writings in early modern England the distinction between political and legal reasoning took hold within a larger project geared at deflecting continental—at that point primarily French—legal and political influences. Beginning with the teachings of Fortescue and Coke, these doctrines distinguished “judicial reason” as defined by common law from universal conceptions of reason under civil law. Embedded within the respective constitutional frameworks were alternative conceptions of the administrative state. The first was rooted in the centralizing and reformist ambitions of mercantilist governance dating to early modern Europe; the second in countervailing regulatory models that favored both decentralization and limited regulatory intervention in economic relations.

III. COMMON LAW IDEOLOGY AND THE MERCANTILIST STATE

In *The Spirit of the Common Law*, Pound pointed to an important and frequently neglected parallel between those who aligned with James I and the progressives of his time:

[t]hose who thought of the king as the guardian of social interests and wished to give him arbitrary power, that he might use it benevolently in the general interest, were enraged to see the sovereign tied down by antiquated legal bonds discovered by lawyers in such musty and dusty parchments as Magna Carta.⁹²

Across both eras the use of the law as an instrument of social and economic change was at the heart of underlying constitutional divisions.

Senate Judiciary Committee. Mark O'Brien. *Curbing the Court*, PRINCETON ALUMNI WEEKLY, Mar. 8, 2006, available at http://www.princeton.edu/~paw/archive_new/PAW05-06/09-0308/features_court.html.

91. Pound was chair of the ABA Committee on Administrative Law that was mentioned in the introduction. Comm. on Admin. Law, Am. Bar. Ass'n, Report of the Special Committee on Administrative Law, 63 ANN. REP. A.B.A 331, 344 (1938).

92. POUND, *supra* note 35, at 63.

“Common law theory arose, in part,” Gerald J. Postema has written, “in response to the threat of centralized power exercised by those who proposed to *make* law guided by nothing but their own assessments of the demands of justice, expediency, and the common good. Against the spreading ideology of political absolutism and rationalism, Common Law theory reasserted the medieval idea that law is not something made either by king, Parliament, or judges, but rather is the expression of a deeper reality which is merely discovered and publicly declared by them.”⁹³ At least since Fortescue, this claim served to distinguish an English model of administrative government from its counterpart on the continent. But, it is important to emphasize, it was due to the significant influence of the continental model within England itself that an oppositional common law theory rose in the first place.

English monarchs during the early modern period were steeped in the mercantilist world view that dominated political thought during that time. Mercantilism (a term coined by later historians) inherited from its medieval predecessor a commitment to regulation on behalf of the common good. But it substituted a centralizing agenda for the localism that structured regulation in earlier times.⁹⁴ While it aimed to increase its own power and riches, the mercantilist state also took a paternalistic interest in the life of its subjects. The distinction between individual and collective interests was deemed meaningless in this worldview. In the service of state power, mercantilism sought “to make the state’s purposes decisive in a uniform economic sphere.”⁹⁵

Both in France and England royal authorities sought to expand their participation in industrial enterprise by claiming monopolistic power or granting monopolistic privileges to their subjects. In France, the King claimed the right to manage all industry related to national defense (e.g., the production of gunpowder) and to derive revenue from the mining of natural resources such as minerals and metals.⁹⁶ In addition, the French crown conferred special privileges to individual and groups to foster new manufactures and technologies.⁹⁷ Likewise in Eng-

93. GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 3-4 (1986) (emphasis in the original)

94. JOHN U. NEF, *INDUSTRY AND GOVERNMENT IN FRANCE AND ENGLAND, 1540-1640*, at 11-12 (1940).

95. 1 ELI F. HECKSCHER, *MERCANTILISM*, at 22 (1955) (1931).

96. *Id.* at 69.

97. *Id.* at 83.

land, both Queen Elizabeth and King James invoked national defense to justify a royal monopoly of the manufacture of saltpeter and gunpowder.⁹⁸ Other patents of monopoly granted individuals powers to supervise and inspect particular branches of industry or trade, and still others conferred exclusive privileges to reward innovation, revenue procurement, or service and loyalty to the crown.⁹⁹ The result in both England and France was extensive regulatory effort geared at dictating the terms and conditions of employment and processes of manufacturing industrial goods. In both countries, the Crown took on the regulation of terms of apprenticeship and wages during the later 1500s.¹⁰⁰ Prescriptive regulatory directives specified the materials and processes used in industrial production and determined the prices of particular products.¹⁰¹ The two regimes fundamentally diverged, however, in the structure and efficiency of the enforcement and judicial institutions available to them.

The administrative machinery at the disposal of the English crown was inferior in key respects to its French counterpart. France had a hierarchy of royal officials and a cadre of paid inspectors whose primary or exclusive duty was to implement the King's economic policy. England lacked a paid civil service like France's. Instead, English monarchs had to rely on the services of overburdened and unpaid justices of the peace, whose own economic interests at times cut against strict enforcement of industrial codes.¹⁰² The absence of a reliable civil service gave rise to a system that delegated significant enforcement powers to private citizens through financial incentives of various kinds. Particularly significant in this respect was the role of "common informers" who privately prosecuted violators of penal statutes. Between 1550 and 1624, common informers were "a chief instrument for the enforcement of economic legislation and the

98. *Id.* at 89; E. LIPSON, THE ECONOMIC HISTORY OF ENGLAND, VOL. II THE AGE OF MERCANTILISM, 352 (6th ed. 1964).

99. LIPSON, *supra* note 98, at 354-56.

100. HECKSCHER, *supra* note 95, at 24, 27. Of the many economic statutes passed during that era the most comprehensive was the statute of artificers of 1563. Its provisions included a requirement that all workmen serve an apprenticeship of seven years, as well as regulation of wages and hours of labor. *Id.* at 27. A statute enacted under the reign of James I went as far as to specify minimum wages to be paid. LIPSON, *supra* note 98, at cii.

101. Thus, for example, a French royal edict in 1571 fixed a uniform price for cloth, and another edict in 1626 established a new set of royal officials to maintain the quality of iron wares and to prevent the use of unsuitable iron by certain metal workers. Elsewhere the crown prescribed exact ingredients to be used in dyeing and in the manufacturing of soap and beer. NEF, *supra* note 94, at 21.

102. HECKSCHER, *supra* note 95, at 246-50.

indirect taxation of the kingdom."¹⁰³ The system lent itself to corruption and abuse, and, helps explain the political salience of indictment by information during Coke's time.¹⁰⁴ Apart from their weak enforcement capacity, British monarchs were disadvantaged relative to their French counterparts by the common lawyers' ultimately successful opposition to extending the jurisdiction of the royal courts. In France, by contrast, a large proportion of disputes regarding industrial legislation ended before royal courts with close affinities to the mercantilist goals of the regime.¹⁰⁵

The unconstitutionality of the French mercantilist model in England was the central claim of common law theory, at least since Fortescue. The superiority of England's legal and economic institutions over France's is a recurrent theme in Fortescue's writings. He contrasted the absolute lawmaking authority of French rulers with the limited prerogative of English monarchs: "For the king of England is not able to change the laws of his kingdom at pleasure, for he rules his people with a government not only royal but also political. If he were to rule over them with a power only royal, he would be able to change the laws of the realm. . .this is the sort of dominion which the civil laws indicate when they state that 'What pleased the prince has the force of law.'"¹⁰⁶ From this, he argued, followed a fundamental distinction between economic conditions under the absolute monarchy of France (royal rule), and England's constitutional regime. Invoking the French royal monopoly over salt as an example, Fortescue said that in France "the king does not suffer anyone of his realm to eat salt, unless he buys it from the king himself at a price fixed by his pleasure alone."¹⁰⁷ "In the realm of England," Fortescue wrote, no one is "hindered from providing himself with salt or any goods whatever, at his own pleasure and of any vendor. . .Nor can the king there, by himself or by his ministers, impose tallages, subsidies, or any other burdens whatever on his subjects, nor change their laws, nor make new ones, without the concession or assent of his whole realm expressed in

103. M.W. Beresford, *The Common Informer, The Penal Statutes and Economic Regulation*, 10 *ECON. HIST. REV.* 221, 221 (1957).

104. Coke likened the "swarms of informers" to a comparatively recent plague of Egypt. SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 191 (1644) [hereinafter *COKE, THIRD PART*], cited in Beresford, *supra* note 103, at 222.

105. NEF, *supra* note 94, at 37-38.

106. FORTESCUE, *supra* note 69, at 17.

107. *Id.* at 50.

his parliament."¹⁰⁸ The English monarch, in other words, was precluded from the type of unilateral economic regulation that was being put into effect in France. England's greater prosperity, he argued, followed from this constitutional difference. England's inhabitants abound "in gold and silver and all the necessaries of life."¹⁰⁹ whereas the French "live in no little misery. They drink water daily, tasting no other drink except at solemn feasts, They wear frocks or tabards of canvas like sack-cloth" and "[t]heir women are barefooted except on feast days."¹¹⁰ The distinct constitutional structure of their realm was the English line of defense against the misfortunes that (by Fortescue's account) had befallen the French.

Coke relied on Fortescue when he challenged the King's use of proclamations (issued as an exercise of the royal prerogative) as instruments of economic regulation. An exchange between Coke and the Lord Chancellor on the legality of two royal proclamations illustrates this.¹¹¹ Under these proclamations, the King prohibited the construction of new buildings in London and the processing of wheat starch. The charge against these proclamations was that they lacked "former precedent or authority in law." To this the Lord Chancellor retorted that "every precedent hath a commencement." His advice to the judges was that they should "maintain the power and prerogative of the King" whose actions are "according to his wisdom and for the good of his subjects." Invoking Fortescue, Coke responded that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm." Neither could the King "create any offence by prohibition or proclamation which was not an offence before, for that was to change the law." The King could issue proclamations for one purpose only: "to prevent dangers, which it will be too late to prevent afterwards, he may prohibit them before, which will aggravate the offence if it be afterwards committed." In other words, the preservation of life and property was the only goal justifying the imposition of economic restrictions under the royal prerogative.¹¹²

By the 19th century, this view would find an echo in the claim that the scope of legislative authority was similarly confined to the preservation of life and property under nuisance

108. *Id.* at 52.

109. *Id.*

110. *Id.* at 50.

111. Case of Proclamations, 77 Eng. Rep. 1352, at 1353 (K.B. 1611).

112. *Id.*

law. Writers of the era often invoked as a synonym for nuisance the Latin maxim '*sic utere tuo ut alienum non laedas*,' (use your own without injuring another).¹¹³ Coke cited this maxim in *William Aldred's Case*,¹¹⁴ a landmark nuisance decision that awarded damages to a plaintiff who sued his neighbor over the stench of a pigsty.¹¹⁵ *Sic utere* in the context of *Aldred's Case* provided a positive rationale for legal intervention (where there existed an interference with the rights of others). Nineteenth-century commentators read into it, however, an implicit limitation on the scope of regulatory action (except where injury to others is at stake) that was perhaps foreign to the private-law context of *Aldred's Case*. In the process they implicitly brought Coke's venerable authority to bear on the side of 19th-century laissez-faire ideologies.¹¹⁶

Early 17th-century England provided a crucial point of reference for participants in 19th-century constitutional debates, as the earlier analysis of Pound and Corwin's writings on this topic suggested. This sense of continuity built, in turn, on foundational 18th- and early 19th-century texts through which divisions over the legitimacy of continental models of administration in early modern England were reframed as a choice between continental police and nuisance-focused, common law regimes.

113. See discussion *infra* Part V, VI.

114. *Aldred's Case*, 77 Eng. Rep. 816, at 821 (K.B. 1611).

115. *Aldred's*, 77 Eng. Rep. at 821. The complete maxim cited in the case goes as follows: *Prohibetur ne quis faciat in suo quod nocere possit alieno: et sic (g) utere tuo ut alienum non laedas*. (It is prohibited to do on one's own property that which may injure another's; one should use his own property in such a manner as not to injure another).

116. The degree of commonality between Coke's worldview and that of 19th-century economic liberals is a matter of historical debate. Christopher Hill, building on an article by Donald O. Wagner, attributed to Coke a "bias in favour of economic liberalism." According to this argument, Coke consciously sought to shape the common law to serve the interests of industrial capitalism. CHRISTOPHER HILL, *INTELLECTUAL ORIGINS OF THE ENGLISH REVOLUTION* 233 (1965) ("Where the past offered no rule, as in the case of monopolies, Coke produced one for which his authorities gave no warrant, and declared that monopolies infringed Chapters 29 and 30 of Magna Carta."). See Donald O. Wagner, *Coke and the Rise of Economic Liberalism*, 6 *ECON. HIST. REV.* 37 (1935). Barbara Malament termed their position the "laissez-faire thesis" and challenged it as incompatible with Coke's support in the Commons for "many statutes of 'mercantilist' nature" and his "profound admiration for Tudor legislation." For Coke, Malament concluded, free trade did not entail "a rejection of parliamentary regulation, it meant in fact trade free from arbitrary and exclusive privileges bestowed by the Crown." Barbara Malament, *The "Economic Liberalism" of Sir Edward Coke*, 76 *Yale L.J.* 1321, 1322, 1329-30, 1347 (1967).

IV. CONTINENTAL POLICE AND NUISANCE LAW:
COMPETING MODELS OF PUBLIC HEALTH
REGULATION 18TH AND EARLY 19TH CENTURY
ENGLAND

Published in 1769, Volume 4 of Blackstone's *Commentaries* included a chapter entitled "Of Offences against the public health and the public police or oeconomy." At the start of the chapter, Blackstone divided offences "against the public *health* of the nation" into three categories. The first consisted of various quarantine requirements imposed on individuals exposed to infectious diseases. The second included "offences against public health" through "the selling of *unwholesome provisions*." And the third turned to "offences. . . against the public *police and oeconomy*."¹¹⁷ "By the public police" Blackstone explained, "I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations."¹¹⁸

In the remainder of the chapter, Blackstone outlined the domains subject to regulation under this heading: prohibitions on clandestine marriages and bigamy; the banning of "gypsies" from England,¹¹⁹ and "*Common nuisances*" defined as "a species of offences against the public order and oeconomical regime of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires."¹²⁰ Blackstone distinguished public nuisances from the type of private nuisance dispute with which Coke was concerned in *Aldred's case*. He offered obstruction of

117. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 162 (University of Chicago Press 1979) (1765-1769) (emphasis in the original). Blackstone did not define the term "oeconomy" or explain how it differed from police. L.J. Hume offers the following regarding the meaning of "oeconomy" in 18th century discourse, and its relation to police. "Oeconomy had a shorter history than police and a less well-defined subject-matter. It was concerned more especially with problems of public finance and in general with the domestic economy of the central government. But the boundaries could also be extended, to cover the resources and the obligations of the state (the community) as well as those of the government, especially where. . . questions of public policy and public finance were intermingled. In their wider forms, police and oeconomy overlapped." L.J. HUME, BENTHAM AND BUREAUCRACY 34 (1981).

118. BLACKSTONE, *supra* note 117.

119. *Id.* at 166. Blackstone notes in reference to the laws against gypsies that there exist no modern instances of enforcement "to the honour of our national humanity."

120. *Id.* at 167.

public roadways, the keeping of hogs in a city or market town, and the running of disorderly inns and gaming houses as examples of indictable public nuisances.¹²¹

In providing a personal definition for "public police," Blackstone implicitly acknowledged the presence of an alternative conception of the term's meaning in 18th-century political discourse. Within this discourse, "police" served as a referent, if not a synonym, for the regulatory instruments of continental cameralist regimes. Defined at times as the "German equivalent of mercantilism,"¹²² cameralism identified the prosperity and power of the state with the wellbeing of its citizens. From this followed two related conclusions. First, the state had the duty to provide for the security and wealth of its citizens. Second, it had both reason and authority to regulate the lives of its citizens in great detail.¹²³ Together, these served as a foundation of a cameralist administrative science that German universities began to institutionalize early in the 18th century through chairs in "Oeconomie, Policy und Kammer-Sachen" (oeconomie, police, and cameralism).¹²⁴ Throughout the remainder of the century, cameralism and police appear as closely associated, at times overlapping, concepts.

The term "police" encompassed to begin with "both the condition of public order and tranquility—safety and happiness—and the means to which resort was made to attain and preserve that condition, the 'management of the public weal.'"¹²⁵ The latter meaning assumed prominence during the 18th century when "police" became synonymous with a managerial science of government.¹²⁶ Within this context the term "medical police" (*Medicini Polizey*) came to distinguish regulatory actions geared at a broadly defined public health objectives from police measures geared at criminal activity. Medical police, George Rosen has shown in a monumental body of work on the topic, was at its core a cameralist concept aimed at insuring the state of sufficient

121. *Id.* at 167–68.

122. Hubert C. Johnson, *The Concept of Bureaucracy in Cameralism*, 79 *POL. SCI. Q.* 378, 378 (1964).

123. H.M. Scott, *Introduction: The Problem of Enlightened Absolutism*, in *ENLIGHTENED ABSOLUTISM* 18–19 (1990)

124. The University of Halle established such a chair in 1727 and was soon followed by others. Keith Tribe, *Cameralism and the Science of Government*, 56 *JOURNAL OF MODERN HISTORY* 263, 263–64 (1984).

125. CHRISTOPHER TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 45 (1993).

126. *Id.*

size and strength.¹²⁷ A 1779 treatise on Medical Police offers an illustrative example of the intersection between national defense and public health within this regulatory model.

The internal security of the State is the aim of the general science of police. A very important part thereof is the science that teaches us to handle methodically the health of human beings living in society and of those animals they need to assist them in their labors and for their sustenance. Consequently we must promote the welfare of the population by means which will enable persons cheerfully and for lengthy periods to enjoy the advantages which social life can offer them. . . . Medical police, therefore, like the science of police in general, is a defensive art, is a doctrine whereby human beings and their animal assistants can be protected against the evil consequences of crowding too thickly upon the ground.¹²⁸

In contrast to this state-interest-based rationale for public health regulation, Blackstone organized his own definition of police around the analogy between the state and “a well-governed family.”¹²⁹ Mutual self interest, rather than national defense, is the justification for public health regulation within Blackstone’s framework. By implication, a contrast is drawn between his vision of the scope and purpose of regulatory authority and the cameralist model making its way from the continent, though the text makes no explicit mention of this distinction. In this, Blackstone differed from both Adam Smith and Jeremy Bentham, both of whom were careful to highlight the foreign roots of police in their own writings on the topic, although they differed markedly in the significance they attached to this fact.

Smith delivered during 1762–63 a series of lectures entitled “Juris Prudence or Notes from the Lectures on Justice, Police, Revenue and Arms. . . .” Within this context he argued against “police” as a proper model for wealth maximization, in part based on its foreign—specifically French—origins.¹³⁰ Bentham, writing in 1781, likewise pointed out that the word “police” made its way from France to England where it “still retains its

127. GEORGE ROSEN, *FROM MEDICAL POLICE TO SOCIAL MEDICINE: ESSAYS ON THE HISTORY OF HEALTH CARE* 93 (1974).

128. JOHANN PETER FRANK, *A SYSTEM OF COMPLETE MEDICAL POLICE: SELECTIONS FROM JOHANN PETER FRANK* 12 (Erna Lesky ed., 1976).

129. MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT*, at xii (2005) (quoting 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 162 (1769)).

130. *Id.* at 63–64.

foreign garb."¹³¹ For Bentham, however, the desirability of adopting police-modeled governance was hardly diminished by its French pedigree.

Smith's objective in writing about "police" was to establish the superiority of a countervailing "system of natural liberty," or market ordering.¹³² As Chris Tomlin notes, "[t]he market order which Smith theorized, in contrast to police. . . depended upon a conception of unqualified property right which was itself totally dependent upon the institution of government for maintenance and protection; that is, it depended on *police*, now redefined as security."¹³³ Tomlins finds early evidence for this manner of redefinition in Blackstone's emphasis on "aspects of human activity likely to be disruptive to the moral or social tenor of public life" within the list of offenses he outlines under the heading of "public police."¹³⁴ In seeking to confine police in this fashion, Blackstone accorded with the position of leading elites in England who posited "law" as a superior regulatory paradigm to that of "police."¹³⁵ Law in this connection meant common law, with police taking the place occupied by continental civil law in earlier iterations of this conflict. As such, 18th century defenders of the common law, Blackstone first among them, conceived of themselves as the direct heirs of Fortescue and Coke in a centuries'-long struggle against the incursion of continental regulatory institutions.

The *Commentaries* emerged out of a series of lectures that Blackstone delivered during the 1750s at Oxford subsequent to his appointment as the first teacher of common law in any of England's universities, where up to that point only the Civil Law had been taught.¹³⁶ Consequently, Blackstone devoted the opening chapter (based on his 1858 inaugural lecture as Vinerian Professor) to the reasons that make knowledge of the common law a

131. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 198 (J.H. Burns & H.L.A. Hart eds., 1970). See discussion in DUBBER, *supra* note 129, at 68-70.

132. CHRIS TOMLINS, LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 76 (1993) (quoting MICHAEL IGNATIEFF AND ISTVAN HONT, *Needs and Justice in the Wealth of Nations: An Introductory Essay*, in WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT 20 (1983)).

133. *Id.* at 78 (emphasis in the original).

134. *Id.*

135. *Id.* at 46. Tomlins points to the existence of parallel rights discourse as a critique of police on the continent during that time, but notes "In England the ascendancy of the law paradigm was more complete than elsewhere in Europe, built as it was on a common law constitutionalism which taught suspicion of government. . ." *Id.*

136. DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED 32 (1989).

crucial component of university education in England. He offered three such reasons. The first were the benefits that familiarity with one's own legal obligations conferred on the ability of individuals to conduct their affairs. The second was the likelihood that English gentlemen would be called upon to serve on juries and as justices of the peace. And the third, and most important, was the importance of a foundation in common law for those university graduates who would assume the responsibility of writing legislation as members of England's parliament.¹³⁷

Indeed, as David Lieberman reminds us, Blackstone's primary objective in the *Commentaries* was to instruct English parliamentarians in the "science of legislation."¹³⁸ Knowledge of the common law was essential to that science, because armed with this knowledge, legislators would think twice before engaging in various ill-advised reforms. By the same token, Blackstone suggested, legislators' ignorance of common law may help explain "[t]he mischiefs that have arisen to the public from inconsiderate alterations in our laws."¹³⁹ In support, he cited Coke's lamentation of "the confusion introduced by ill-judging and unlearned legislators" and went on to add that "if this inconvenience was so heavily felt in the reign of queen Elizabeth, you may judge how the evil is increased in later times, when the statute book is swelled to ten times a larger bulk; unless it should be found that the penners of our modern statutes have proportionably better informed themselves in the knowlege of the common law."¹⁴⁰ The formal validity of legislative derogation from common law was not at issue for Blackstone. Parliament was sovereign and ultimately free to legislate at will.¹⁴¹ His hope, however, was that greater acquaintance with common law would engender internal constraints on legislators' proclivity to tamper with the law.

In his innate suspicion of legal change Blackstone followed closely in Coke's footsteps.¹⁴² To Blackstone, however, develop-

137. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 6-10 (University of Chicago Press 1979) (1765-1769).

138. LIEBERMAN, *supra* note 136, at 63.

139. BLACKSTONE, *supra* note 137, at 10.

140. *Id.* at 10-11.

141. LIEBERMAN, *supra* note 136, at 52-53.

142. "For any fundamental point of the ancient common laws and customs of the realm, it is a maxim in policy, and a trial by experience, that the alteration of any of them is most dangerous: for that which hath been refined and perfected by all the wisest men in former succession of ages, and proved and approved by continual experience to be good and profitable for the commonwealth, cannot without great danger and hazard be altered or changed." SIR EDWARD COKE, *REPORTS* v-vi (1615), *cited in* JAMES R. STONER, JR., *COMMON LAW AND LIBERAL THEORY* 38-39 (1992). Stoner cites four dif-

ments since Coke's time have only accentuated the need for legislative restraint. Writing against unprecedented growth in parliamentary legislation, Blackstone was one of the two most prominent members of a large and diverse group of critics who took issue with the substance and/or style of this legislative output in mid and late 18th century England.¹⁴³ The other was Jeremy Bentham. Whereas Blackstone conceived of the remedy to the legislative evils of his day in a more accessible and systematic common law foundation for legislation, Bentham ultimately despaired of the possibility of common-law-based legal reform. The alternative to which he devoted most of his career was the creation of a systematic code in the style of civil law.¹⁴⁴

The common law's reactivity, i.e. its *ex post facto* mode of intervention, was a central target of Bentham's critique. The appeal of codes lay in their capacity to provide detailed guidelines capable of shaping conduct in advance in accordance with abstract principles.¹⁴⁵ As such codes served as the mechanism through which proactive conceptions of continental police could be put into place. The distinction between "justice" and "police," Bentham explained in 1781, was that of the difference between remedial and preventive intervention: "Justice regards in particular offences already committed; her power does not display itself till after the discovery of some act hostile to the security of the citizens. Police applies itself to the prevention both of offences and calamities; its expedients are, not punishments, but precautions; it foresees evils, and provides against wants."¹⁴⁶ Police, in other words, is an instrument of social change and potential redistribution, whereas justice served to defend existing rights and institutions. The compatibility of this proactive regulatory model with common law constitutional principles would become a central bone of contention in the debates surrounding the implementation of Edwin Chadwick's efforts to implement in England a continental-inspired program of sanitary reform.

A disciple of Bentham, Chadwick borrowed various aspects of his public health reform from European examples.¹⁴⁷ Conti-

ferent passages in Coke's writings that are suggestive of similar skepticism regarding legislation in contravention of common law. *Id.* at 241 n.34.

143. LIEBERMAN, *supra* note 136, at 14-9.

144. See generally POSTEMA, *supra* note 93 and LIEBERMAN, *supra* note 136, at 219-76.

145. LIEBERMAN, *supra* note 136, at 238.

146. JEREMY BENTHAM, THE THEORY OF LEGISLATION 242 (C.K. Ogden ed., 1931). Cited and discussed in DUBBER, *supra* note 129, at 68-69.

147. In his Sanitary Report, Chadwick demonstrated close familiarity with Euro-

mental writings on public health played an important role in the development of Chadwick's ideas, and he cites them throughout his 1842 *Report on the Sanitary Condition of the Labouring Population of Great Britain*.¹⁴⁸ But as Chadwick understood, successfully implementing similar reforms in England required that they be cast as continuous with the common law, rather than transplanted from the continent. Chadwick quoted a noted German authority who said that to the extent that public health reform had taken place outside of Germany, it had followed in the wake of German medical police. But Chadwick explicitly refuted the notion that British sanitary reform belonged within the same German tradition.¹⁴⁹ Medical police, Chadwick took pains to emphasize, "is scarcely applicable to the substantive English law, or to the early constitutional arrangements in which are found extensive and useful provisions, and complete principles for the protection of the public health."¹⁵⁰ The challenge Chadwick faced in this respect followed from the need to reconcile the bureaucratic and centralized enforcement process that he envisioned with the common law's historical insistence on administration through the judiciary. His answer relied on the longstanding parliamentary legislation aimed at nuisance abatement.¹⁵¹ But his effort proved insufficient to the task.

The Public Health Act that Parliament enacted in 1848 was weaker than the one Chadwick hoped to have passed. Its target was the flowing sewage and uncollected refuse that pervaded the neighborhoods of many industrial workers. The Act's primary novelty was in its definition of such environmental concerns as a national matter, and in the creation of an administrative enforcement machinery in the form of boards of health. Boards of health were made compulsory in locales where the death rate exceeded 27 per 1000 (over a period of seven years). Otherwise, a petition signed by ten percent of the ratepayers was necessary to bring about a local board. The Act conferred on these boards power to appoint medical officers and to initiate various sanitary projects, but it imposed no obligation to this effect.¹⁵² In addition,

pean, especially French, sanitary practices. M. W. Flinn, *Introduction to EDWIN CHADWICK, REPORT ON THE SANITARY CONDITION OF THE LABOURING POPULATION OF GREAT BRITAIN* 52, 71 (M.W. Flinn ed., 1964).

148. *Id.* at 52.

149. *Id.* at 348.

150. *Id.*

151. *Id.* at 34--49.

152. The one compulsory provision that all boards of health were required to implement was the provision of adequate means of sewage disposal in all newly constructed

the Act established a national board of health with relatively minor oversight functions. Edwin Chadwick headed the national board between 1848 and 1854. In the face of intense opposition in Parliament, Chadwick resigned his position in 1854.¹⁵³

Edwin Chadwick's main nemesis was Joshua Toulmin Smith. A vocal opponent of the 1848 Public Health Act, Smith led an ultimately successful campaign to derail Chadwick and his National Board of Health. Under the banner of "anti-centralization," Smith orchestrated public meetings and mass petitions, and published pamphlets and lengthier works expounding on the principles driving his opposition to the Act.¹⁵⁴ His book *Local Government and Centralization* was the capstone of these efforts.¹⁵⁵ Local government, for Smith, meant more than simple local control over decision-making authority in matters of local concern. Rather, it entailed a particular method—judicial rather than bureaucratic—of regulatory administration. Local self-government, in short, meant placing decision-making authority in the hand of juries, when either the liberty or property of individuals was at stake.¹⁵⁶

In delegating decision-making authority to boards of health, Smith argued, the Public Health Act of 1848 had dealt a "fatal blow" to the "Principles and Practice of Local Self-Government."¹⁵⁷ Mincing no words, Smith said that the Act's impact was to "reduce all places into a state of abject subjection and subserviency; to impose upon them enormous and lasting burthens which shall completely tie up their hands; to fasten a horde of functionaries upon the land; and to loosen all the foundations of Law and Property."¹⁵⁸ English liberty itself was under attack from "a foreign centralized system of police."¹⁵⁹ Defending against it required a return to a judicialized administration under nuisance law.

housing within each board's jurisdiction. *Id.* at 71.

153. ANTHONY BRUNDAGE, ENGLAND'S "PRUSSIAN MINISTER" 153–56 (1988).

154. 1 JOSEPH REDLICH, LOCAL GOVERNMENT IN ENGLAND 144–46 (F.W. Hirts ed., 1903).

155. J. TOULMIN SMITH, LOCAL SELF-GOVERNMENT AND CENTRALIZATION 204 (1851).

156. In direct reference to the relationship between juries and self-government, Smith wrote: "The institution of *Trial by Jury* forms one, but a highly important, practical application of the system of Local Self-Government: that by which law is *administered by the people*." *Id.* at 22 (emphasis in the original).

157. *Id.* at 21.

158. *Id.* at 207.

159. *Id.* at 204 (1851).

Nuisance acquired for Smith the status of a constitutional principle because it conformed with a bedrock principle of the English Constitution: "*All Law must spring from the people and be administered by the people.*"¹⁶⁰ As he explained elsewhere in the text, "*Common Law is that Law which SPRINGS immediately from the Folk and People themselves, and which is also ADMINISTERED immediately by the Folk and People themselves.*"¹⁶¹ Trial by jury was what he meant by administration by the people. And it was because bureaucracy took over the administrative function of courts that it and "individual despotism" showed "no difference in principle."¹⁶²

For Smith, the key to nuisance law's capacity to defend against despotism followed from the evidentiary burdens it imposed on the state. Under nuisance law, in the exercise of one's trade or any other activity, one may not create an "annoyance or injury to his neighbours"—a principle expansive enough, Smith argued, to cover "every question connected with the Public Health."¹⁶³ As he pointed out, however, the distinguishing characteristic of this common law mode of regulation followed from its allocation of the burden of proof. The common law, Smith wrote, "throws it upon those who allege any particular thing or course of proceeding to be inconsistent with the health of any neighbourhood, or its welfare in any respect, to bring forward the proof, before the people themselves, that it is as alleged."¹⁶⁴ This serves as a check against those who, under the guise of protecting the public welfare, seek to "gain some interested object, or to enforce some crude individual notions."¹⁶⁵ Because it fails to impose a similarly rigorous screening, centralization finds favor, Smith argued, "in the eyes of interested schemers." The common law distinctly guaranteed that there would be no impingement on the use of property rights, except in response to evident proof that use of such property caused harm to others. In allowing "boards and commissions" rather than judges and juries to determine what the public health demands, the 1848 Act, for Smith, violated a core constitutional principle.¹⁶⁶

160. *Id.* at 21 (emphasis in the original).

161. *Id.* at 112 (emphasis in the original).

162. *Id.* at 28–29.

163. *Id.* at 112.

164. *Id.*

165. *Id.*

166. Importantly, in putting forth the argument that bureaucratic government infringed on the British constitution, Smith was not advocating for the judiciary to invalidate the Public Health Act. He was, indeed, a firm opponent of judicial review. Instead he targeted his

For Smith, like Fortescue and Coke before him, the English constitution served as a bulwark against continental despotism. Placing himself squarely within this historical tradition, Smith quoted from the writings of Sir Roger Twysden, a 17th-century political figure and author on constitutional history who offered the following on the distinction between civil and common law:

And this I take to be the difference between the Civil Laws and the laws of this nation: for the maxim there is,- "what pleases the prince has the force of law;" whereas this is, -that the kingdom shall be governed by no other laws than "those which the folk and people have made and chosen."¹⁶⁷

Smith then concluded: "It is thus the peculiar happiness of Englishmen that they have not now to strive to achieve for themselves the attainment of freedom, but that they can claim it as their inheritance from the earliest times."¹⁶⁸ Encoded in this statement was an oblique reference to the 1848 revolutions that had swept through the continent, sparing England. European socialism was the ultimate threat that Smith's brand of common law constitutionalism seemed intended to deflect.¹⁶⁹ Within the decade, the same concern would trigger the rise of analogous constitutional arguments in the United States.

V. "ANGLICAN LIBERTY," "GALLICAN LIBERTY," AND 1848

Within two years of the publication of Smith's *Local Self-Government and Centralization*, Francis Lieber published *On Civil Liberty and Self-Government* in the United States.¹⁷⁰ Lieber, who immigrated to the United States from Germany during the

comments at parliament and the public opinion to which parliament answered. In this he differed from American counterparts who later in the century would find in a similar line of constitutional argument grounds for overturning legislation. *Id.* at 126.

167. *Id.* at 15. Smith identifies the quote from Twysden only by the name of the author and a page number, 82.

168. *Id.*

169. In an earlier book on much the same topics published in 1849, Smith makes the alleged connection between continental governance and the revolutions more explicitly. In reference to the use of inspectors by bureaucracies of various kinds, Smith wrote:

This device of Inspectors is, like the other parts of the centralizing system, not original. It is borrowed from those continental nations whose system has so long been the especial admiration of the authors and friends of Commissions: and the prevalence of which system directly led to those scenes which the past year witnessed.

J. TOULMIN SMITH, *GOVERNMENT BY COMMISSIONS ILLEGAL AND PERNICIOUS* 295 (1849).

170. LIEBER. *supra* note 20.

1830s, is considered among the founding fathers of American political science.¹⁷¹ The influence of English constitutionalism on Lieber's writings is evident throughout *On Civil Liberty and Self-Government*, whose themes echo those of Toulmin Smith's *Local Self-Government and Centralization* in significant respects.

Lieber framed the argument in his book around the contrast between two conceptions of liberty, the first Anglican, the second Gallican. He defined Anglican liberty as the "guarantees which our race has elaborated, as guarantees of those rights which experience has shown to be most exposed to the danger of attack by the strongest power in the state."¹⁷² Gallic liberty was "the idea of equality founded upon or acting through universal suffrage, or, as it is frequently called by the French, 'the undivided sovereignty of the people' with an uncompromising centralism. As it is necessarily felt by many, that the rule of universal suffrage can, practically, mean only the rule of the majority, liberty is believed in France, as has been said, to consist in the absolute rule of the majority."¹⁷³ Like Smith, Lieber saw self-government in terms of local rather than centralized political power. And, as for Smith, bureaucracy was the antithesis of self-government: "Self-government . . . does not create or tolerate a vast hierarchy of officers, forming a class of mandarins for themselves, and acting as though they formed and were the state."¹⁷⁴

The common law was at the foundation of Anglican liberty. "[T]hough we should have brought from England all else, our liberty, had we adopted the civil law, would have had a very precarious existence," Lieber wrote.¹⁷⁵ He summed up his assessment of the respective advantages of the civil and common law systems in the following words:

The civil law excels the common law in some points. Where the relations of property are concerned, it reasons clearly and its language is admirable; but as to personal rights, the freedom of the citizen, the trial, the independence of the law, the principles of self-government, and the supremacy of the law, the common law is incomparably superior.¹⁷⁶

171. Along with a number of other educated liberals, Lieber left Germany during a period of political persecution aimed at crushing liberal ideas spread in the wake of the French Revolution. WITTKE, *supra* note 14, at 10.

172. LIEBER, *supra* note 20, at 53.

173. *Id.* at 281.

174. *Id.* at 249.

175. *Id.* at 211.

176. *Id.* at 210.

As this list suggests, Lieber associated criminal procedure with the virtues of the common law. He contrasted the deficiencies of continental inquisitorial procedure with the benefits of common law methods of trial, which he termed "accusatorial." Among the protections that the accusatorial procedure offered, Lieber noted the demand that decisions regarding indictments be placed in the hands of grand juries, rather than the executive.¹⁷⁷

The contrast between Anglican and Gallic liberties was Lieber's way of making sense of England's exemption from the revolutions of 1848-49. Theodore Woolsey noted in the introduction to the third edition of *Civil Liberty and Self Government* (published in 1874) that the book "cannot be read profitably without taking into view the events of 1848 and the new empire of Napoleon III."¹⁷⁸ Napoleon III was Prince Louis Napoleon Bonaparte who, after being elected president of the Second French Republic, declared himself emperor in an 1851 *coup d'etat*. The event symbolized the larger failure of a revolutionary movement that spread from Paris to much of continental Europe in 1848.

This diffusion was in keeping with the revolution's universal message and international ideology. Drawing their inspiration from the French Revolution and enlightenment philosophy, the revolution's leaders "championed a cosmopolitan humanitarianism based on natural law and the inalienable rights of man which transcended all national and racial boundaries."¹⁷⁹ In Germany the revolution took hold against economic and social disruptions brought on by the industrial revolution that reached the German states during the second third of the 19th century. As a result, the German revolutionary movement included a substantial radical communist element. Fissures in the coalition between

177. *Id.* at 219. The significance that Lieber attributed to grand jury indictments is evident in earlier correspondence between Lieber and the King of Prussia. In a letter Lieber wrote in 1845, he reported to an acquaintance on the content of his letter earlier that year to the King of Prussia:

In a letter written from Hamburg I freely poured out my heart to the King of Prussia on the subject of the administration of justice, and trial by jury, saying that I should consider it fortunate if the time had already come for the introduction of trial by jury in Prussia, but that a public and oral indictment of the accused was unconditionally and absolutely required.

THE LIFE AND LETTERS OF FRANCIS LIEBER 193 (Thomas Sergeant Perry ed., 1882) [hereinafter LETTERS OF LIEBER].

178. Theodore D. Woolsey, *Introduction*, in LETTERS OF LIEBER, *supra* note 177, at 9 (3d ed. 1874).

179. WITKE, *supra* note 14, at 18.

radical and bourgeois elements in the German revolutionary movement ultimately contributed to its undoing.¹⁸⁰

With the revolution's failure, a wave of German and other European immigrants arrived in the United States. By one account, the number of Germans arriving annually during the latter 1840s neared 60,000; in the early 1860s it surpassed 130,000.¹⁸¹ Their influence, however, far exceeded their numbers because of their geographical settlement and occupational distribution patterns. The Germans concentrated in principle industrial and commercial centers in the mid-Atlantic states and in the Midwest, where they acquired disproportionate political and economic weight.¹⁸² In New York, where a large and established German community existed, Germans dominated the wood-working, clothing and baking occupations by the early 1850s.¹⁸³

The Forty-Eighters, as they came to be called, included people from diverse economic backgrounds and political views. Among them was an influential group of radical reformers who took on transformative agendas across multiple social and political spheres.¹⁸⁴ In 1854 one such German group (under the banner of the "Louisville Platform") called for the abolition of the presidency and the senate, which would be replaced by a European-styled parliamentary system unifying the executive and legislative functions in one body. Their goal was to create the political institutions necessary to eliminate all racial and class privileges. Other less well-known German groups pursued similar constitutional reform agendas in 1851.¹⁸⁵ It seems Lieber had in mind their efforts, or others like them, when he noted that the "unicameral system must be mentioned here as a feature of Gallican liberty, because it is held by all those persons who seem to be the most distinct enunciators of this species of liberty." Linking the call for unicameralism with a desire to substitute centralized government for American federalism (an agenda that at least one German immigrant leader came to advocate), Lieber wrote: "The partiality for a legislature of one house is a necessary consequence of the French idea of unity in the government

180. *Id.* at 25–26.

181. These numbers do not include immigrants who arrived in the country illegally and were consequently not included in the official records. BRUCE LEVINE, *THE SPIRIT OF 1848*, at 15 (1992).

182. *Id.* at 57–58.

183. SEAN WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY & THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850*, at 353 (1984).

184. WITTKÉ, *supra* note 14, at 1.

185. *Id.* at 160–61.

or the unity of the state, and actual abhorrence of confederacies."¹⁸⁶

"The coming of the German Forty-Eighters," John Higham has written, rekindled American anti-radical nativism dating back to the aftermath of the French revolution:

These refugees from revolution, among them the founders of a Marxist movement in America, brought a whole grab-bag of unorthodox ideas. Especially in the South, where German opposition to slavery caused alarm, and in the Midwest, where German settlement concentrated, the xenophobia of the 1850's included anxiety over the threat of immigrant radicals to American institutions.¹⁸⁷

Echoes of this nativist sentiment are evident in Lieber's distinction between Anglican and Gallican liberty, and in the role he ascribes to the "Anglican race, which carries Anglican principles and liberty over the globe, because wherever it moves, liberal institutions and a common law full of manly rights and instinct with the principle of an expansive life, accompany it."¹⁸⁸ Conversely, it was up to that race to stop the incursion of Gallican liberty into the United States. As the next section explains, it is at this very juncture that common law limitations on the scope of the police power assume the status of constitutional argument.

VI. CIVIL LAW, COMMON LAW AND DUE PROCESS UNDER THE 14TH AMENDMENT: THE ROAD TO *LOCHNER*

In tandem with the ratification of the 14th Amendment, Thomas M. Cooley published in 1868 *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Powers of the States of the American Union*.¹⁸⁹ The core thesis echoed central themes of British constitutionalism. Cooley titled the central chapter of his treatise "Protection to Property by the Law of the Land." Due process implicitly entailed a historical set of property rights that has been an element of Anglo-American heritage since the Magna Carta.¹⁹⁰ Regarding the scope of legislative authority under the police power, Cooley wrote that such power

186. LETTERS OF LIEBER. *supra* note 177, at 288.

187. JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925*, at 8 (1965).

188. LIEBER. *supra* note 177, at 20.

189. THOMAS M. COOLEY, *CONSTITUTIONAL LIMITATIONS* (1st ed. 1868).

190. *Id.*

was “calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.”¹⁹¹ In other words, Cooley explained, the state’s regulatory authority in matters of public health was limited to the abatement of nuisance under the maxim “sic utere tuo ut alienum non laedas.”¹⁹² The state, as such, was well within its powers when it restricted the use of property in the interest of public safety and health. It was up to the courts, however, to ensure that the state was not using the public interest as “pretense.”¹⁹³

A. *SLAUGHTERHOUSE TO MUNN*

In the *Slaughterhouse Cases*,¹⁹⁴ the Supreme Court first encountered the claim that legislation was unconstitutional when passed under the pretext of public health.¹⁹⁵ Perhaps not coincidentally, Louisiana, where the case arose, was a civil law jurisdiction. Similarly relevant may be the fact that compulsory centralized butchering was a long-established institution on the continent. This was especially true in France, where five facilities established in 1807 by Napoleonic decree were consolidated into one in 1867, the year the Louisiana legislature first debated the consolidation of New Orleans slaughterhouses.¹⁹⁶ Finding the legislation a valid exercise of the police power, Justice Miller upheld the law for the Court. Justice Field, who wrote the lead dissent, distinguished between the provisions of the act that pertained to inspection, landing and slaughtering, and those that awarded exclusive privileges to one company. The latter were invalid, he argued, because they contravened the common law’s established proscription against monopolies. In this he followed in the footsteps of Cooley, who by the early 1850s had already condemned monopolies in ordinary trades as the use of public

191. *Id.* at 572.

192. *Id.* at 573.

193. *Id.* at 363, 577.

194. 83 U.S. (16 Wall.) 36 (1873).

195. *Id.* at 36. *Slaughterhouse* concerned an 1869 Louisiana statute that centralized and otherwise regulated slaughtering. In their brief to the Supreme Court, the plaintiffs challenged the state’s claim that the law was enacted as a sanitary measure, and instead alluded to “legislative caprice, partiality, ignorance or corruption.” Brief for Plaintiffs, *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873), cited in 6 *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES* 537 (Philip B. Kurland & Gerhard Casper eds., 1975).

196. RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES* 41–42 (2003).

power for the advancement of private ends.¹⁹⁷ On why the same prohibition applied irrespective of Louisiana's roots in civil law, Field offered two reasons. The first was that the civil law itself adopted the anti-monopoly principle prior to Louisiana becoming a state. But the second, and more important reason, was that the Fourteenth Amendment imposed similar common-law-based limitations on the scope of legislative power in all of the states.¹⁹⁸

Justice Field was again in the minority when the Court decided *Munn v. Illinois*¹⁹⁹ in 1877. The case concerned a state law that imposed a maximum charge for storing grain in a particular category of elevator in Chicago warehouses. Field would have invalidated the law under the argument that rate regulation could not be justified as necessary intervention under the *sic utere* doctrine. But a majority of the justices, in an opinion written by Chief Justice Waite, upheld the law.²⁰⁰ In justification, he relied on the authority of Lord Chief Justice, Matthew Hale, a preeminent late 17th-century common lawyer. Hale distinguished between the scope of the state's regulatory authority with respect to two categories of property: the first was property devoted exclusively to private use (*juris private*); the second "property . . . affected with public interest."²⁰¹ Unlike purely private property, where the public interest was at stake the king was entitled to exercise his prerogative "for the protection of the people and the promotion of the general welfare."²⁰²

In the context of late 19th-century police power debates, Hale's canonical texts provided a powerful counterargument to those who sought to equate common law theory with the authority of Coke and the limited police power with which his name has become associated. A common lawyer himself, Hale was well versed in civil law, and his approach to legal history was distinctly comparative.²⁰³ Significantly, his distinction between vari-

197. Alan Jones, *Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration*, 53 J. AM. HIST. 751 (1967).

198. *Slaughterhouse*, 83 U.S. (16 Wall.) at 105-06.

199. 94 U.S. 113 (1877).

200. The regulation was likewise challenged on equal protection and interstate commerce grounds, but the bulk of the Court's opinion focused on the due process claim.

201. *Munn*, 94 U.S. at 126.

202. *Id.* On the place of Hale's "concept of 'public interest'" in American jurisprudence during the 19th century see Harry Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in *LAW IN AMERICAN HISTORY* 329, 335 (Donald Fleming & Bernard Bailyn eds. 1971).

203. D.E.C. Yale, *Hale as a Legal Historian*, in *THE SELDEN SOCIETY LECTURES: 1952-2001*, at 461-76, 465, 468 (2003). Notwithstanding his intellectual attraction to civil law, some of Hale's writings reveal significant resistance to the incorporation of civil law

ous categories of property (and attendant public interest) reveals the influence of civil law writings on rights in coastal areas going back to Justinian's *Institutes*.²⁰⁴ Neither the majority nor the dissent in *Munn* addressed the connection between the civil law and the doctrine of property affected with public interest. Their explicit disagreement focused instead on whether the doctrine ought to qualify as a general common law principle, or should be restricted to a narrow set of circumstances. Waite claimed that Hale's distinction above has for over two hundred years been "accepted without objection as an essential element in the law of property."²⁰⁵ Field responded that the majority's reading of Hale's text extended the concept of property "affected with public interest" well beyond the narrow set of circumstances that Hale had in mind.²⁰⁶ To conclude otherwise, Field warned, would be to empty the right to property of all constitutional protections and to relegate "all property and all business in the State" to "the mercy of a majority of its legislature."²⁰⁷ Three decades later, Justice Peckham, in *Lochner*, echoed Field's language when he asked (rhetorically) whether "we [are] all . . . at the mercy of legislative majorities?"²⁰⁸ The imperative of defending against this eventuality was the *Lochner* Court's rationale for the existence of common law limits on the police power—the very position which the Court earlier rejected in *Munn*.

The potential for abuse of legislative power, Chief Justice Waite wrote, "is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."²⁰⁹ As to the relationship between common law and legislation (and the status of the civil law, by implication) Waite offered the following:

A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of con-

doctrines into the common law. See Daniel R. Coquillette, *Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law*, 67 B.U. L. REV. 877, 931 (1987). HOWARD NENNER, BY COLOUR OF LAW, 6-8 (1977).

204. For the relevant quote from the *Institutes* and a discussion of Roman law property categorizations see Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 23-25 (1976).

205. *Munn*, 94 U.S. at 126.

206. *Id.* at 139.

207. *Id.* at 140.

208. *Lochner v. New York*, 198 U.S. 45, 59 (1905).

209. *Munn*, 94 U.S. at 134.

duct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.²¹⁰

Seven years later Justice Mathews quoted this statement in *Hurtado* against the argument that due process encoded a reference to grand jury indictments as these historically existed in common law.²¹¹

B. *HURTADO TO HOLDEN*

In *Hurtado v. California*²¹² the Court upheld the constitutionality of indictment by information in a murder trial against the claim that the 14th Amendment's due process clause guaranteed grand jury indictments in capital cases.²¹³ As noted, indictment by information was a central bone of contention under the Stuarts. Constitutional challenges against indictment by information at the end of the 19th century built directly on Coke's common-law-based interpretation of due process under the Magna Carta. The Court in *Hurtado* rejected this view in the following passage (partially quoted and briefly discussed in the introduction):

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*sum cuique tribuere*. There is nothing in the Magna Charta, rightly construed as a broad charge of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the

210. *Id.*

211. *Hurtado*, 110 U.S. at 532 (quoting *Munn*, 94 U.S. at 134).

212. 110 U.S. 516 (1884).

213. For discussion of the significance of indictment by information during the 17th century see *infra* at 115, 124.

characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.²¹⁴

Both common law and civil law procedures and principles were as such consistent with due process under the 14th Amendment, the *Hurtado* Court announced. The immediate holding pertained to criminal procedure. But the case must be read against the raging codification and labor controversies that took place in New York and elsewhere in America in 1884. At the start of the opinion Justice Matthews left no doubt regarding the connection between the criminal procedure question at issue and the larger controversies of the day.²¹⁵

Prior to *Hurtado*, at least two state Supreme Courts, Wisconsin's and California's, upheld the constitutionality of indictment by information in felony cases against 14th Amendment challenges.²¹⁶ "[T]he words 'due process of law,'" the Wisconsin Court explained, "do not mean and have not the effect to limit the powers of State governments to prosecutions for crime by indictment."²¹⁷ Rather, these words connote only "law in its regular course of administration, according to prescribed forms, and in accordance with the general rules for the protection of individual rights."²¹⁸ Change in forms of legal procedure was inevitable in the face of "the advancement of legal science and the progress of society."²¹⁹ And, the Wisconsin Supreme Court emphatically concluded, nothing in the language of the 14th Amendment pointed to the contrary.²²⁰ The Supreme Court of California responded likewise when the issue first came before it in *Kalloch v. Superior Court*²²¹ and again in *Hurtado*.²²²

214. *Holden v. Hardy*, 169 U.S. at 388-89 (quoting *Hurtado*, 110 U.S. at 530).

215. Justice Matthew highlighted the decision's significance beyond the realm of criminal procedure at the start of the opinion: "The question is one of grave and serious import, affecting both private and public rights and interests of great magnitude, and involves a consideration of what additional restrictions upon the legislative policy of the States has been imposed by the Fourteenth Amendment to the Constitution of the United States." *Hurtado*, 110 U.S. at 520.

216. *Rowan v. State*, 30 Wis. 129 (1872); *Kalloch v. Superior Court*, 56 Cal. 229 (1880).

217. *Rowan*, 30 Wis. at 149.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Kalloch*, 56 Cal. at 241.

Notwithstanding, the appellant in *Hurtado* had impressive legal authority on his side: an 1857 opinion by Lemuel Shaw, Chief Justice of the Supreme Judicial Court Massachusetts.²²³ The case predated the 14th Amendment and considered the constitutionality of indictment by information in “high offenses” under the Massachusetts Bill of Rights. But Justice Shaw’s reasoning provided ample support for the claim that the 14th Amendment demanded grand jury indictments in felony cases. Shaw considered indictment by grand jury to be “one of the ancient immunities and privileges of English liberty.”²²⁴ For evidence he relied in large measure on Coke’s specific reference to “indictment or presentment of good and lawful men” in his commentary on the meaning of “law of the land” under the Magna Carta.²²⁵ In lieu of pursuing the more radical option of severing due process from both the Magna Carta and Lord Coke, Justice Matthews suggested, rather unpersuasively, that Justice Shaw misread Lord Coke’s writing on this point.²²⁶

In similar fashion, Matthews disposed of dicta suggestive of common-law-based restrictions on due process in the Supreme Court’s opinion in *Murray’s Lessee v. Hoboken Land and Improvement Co.*²²⁷ In that case, Justice Curtis posed the question: “To what principles, then, are we to resort to ascertain whether [a particular] process, enacted by congress, is due process?” To which he responded with a twofold answer:

We must examine the constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political

222. 110 U.S. at 519, 537–38.

223. *Jones v. Robbins*, 74 Mass. (8 Gray) 329 (1857).

224. *Id.* at 344.

225. *Id.* at 343.

226. Justice Matthews’ reasoning as to why Coke ought not to be read as requiring grand jury indictments in felonies followed from the absence of distinction among levels of offenses in the pertinent text. A literal reading of Coke would thus make grand jury “essential to due process of law in all cases of imprisonment for crime” and not only for felonies. Since this is not generally taken to be the implication of Coke’s language, it followed, Matthews concluded, that Coke mentioned grand jury indictments merely “as an example and illustration of due process of law” and not an “essential” element of that idea. *Hurtado*, 110 U.S. at 522–23. This reading is difficult to reconcile with Coke’s language. see SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45 (Professional Books Ltd. 1986) (1817) [hereinafter COKE, SECOND PART].

227. 59 U.S. (18 How.) 272, 276–77, 280 (1856).

condition by having been acted on by them after the settlement of this country.²²⁸

In *Hurtado*, Justice Matthews refused to find in this passage insistence on ancient British pedigree as a condition for due process, and argued that such a reading would divorce Justice Curtis's words from their context. "Settled usage" was sufficient to establish that a contested procedure was indeed consistent with due process, but was not a necessary requirement for compliance with due process under *Murray's Lessee*. "To hold that such a characteristic is essential to due process of law," Matthews wrote, "would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."²²⁹ The "flexibility and capacity for growth and adaptation," he went on to assert, "is the peculiar boast and excellence of the common law."²³⁰ The passage that *Holden and State v. Lochner* would later quote followed shortly thereafter.

Having rejected the existence of common law limitations on due process, Justice Matthews next offered a positive definition of the category of restrictions that due process under the 14th Amendment imposed on "the actions of government":

Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government.²³¹

The passage is understood by some as endorsing a substantive, rather than a procedural, model of due process.²³² Read in this fashion, *Hurtado* stands as an element in the Court's pro-

228. *Hurtado v. California*, 110 U.S. 516, 528 (1884) (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 277).

229. *Id.* at 529.

230. *Id.* at 530.

231. *Id.* at 536.

232. PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 106 (1992).

gression towards *Lochnerian* substantive due process. Under this view, Justice Matthews's intent was to emphasize that the Court's deference on matters of criminal procedure such as indictment by information, suggested no similar deference where substantive rights are at stake.

In its emphasis on the importance of judicial protection for substantive rights, *Hurtado* did not specify the particular content of those rights. Due process in America, Justice Matthews wrote, was not a "guarantee [of] particular forms of procedure, but the very substance of individual rights to life, liberty, and property."²³³ Notably absent in the abstract reference to property is any mention of nuisance doctrine or the common law. On the contrary, the opinion's broad statements regarding the compatibility of due process with civil law—particularly when considered in light of its immediate political context—strongly suggest otherwise.

C. BETWEEN CODIFICATION AND THE POLICE POWER: THE 1880S

Hurtado was handed down in 1884 against the backdrop of an intense political dispute over the passage of a proposed civil code in New York. Twice before, the code had passed both houses of the New York legislature, only to be vetoed by the governor. Following the election of a new governor with apparent sympathy for the code, its supporters reintroduced it in the state legislature in 1884. James C. Carter, on behalf of the New York Bar Association, led the opposition. Due in part to his efforts, the code met its final defeat in the legislature in 1885.²³⁴ An important piece of the anti-codification campaign was an 1884 essay in which Carter outlined his reasons for opposing the code.²³⁵ The civil law's inherent propensity toward absolutism was a central component of his argument. Codes, Carter asserted, are characteristic of "states which have a despotic origin, or in which the despotic power, absolute or qualified, is, or has been, predominant."²³⁶ This correlation did not occur by accident, Carter further explained:

233. *Hurtado*, 110 U.S. at 532.

234. Mathias Reimann, *The Historical School Against Codification: Savigny, Carter, and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95, 100-01 (1989).

235. James C. Carter, *The Proposed Codification of Our Common Law*, NEW YORK EVENING POST (1884).

236. *Id.* at 6.

It followed necessarily from the fundamental difference in the political character of the two classes of States. In free, popular States, the law springs from, and is made by, the people; and as the process of building it up consists in applying, from time to time, to human actions the popular ideal or standard of justice, justice is the only interest consulted in the work. In despotic countries, however, even in those where a legislative body exists, the interests of the reigning dynasty are supreme; and no reigning dynasty could long be maintained in the exercise of anything like absolute power, if the making of the laws and the building up of the jurisprudence were intrusted, in any form, to the popular will.²³⁷

Carter offered no further instruction on the criteria by which to distinguish polities in which “law springs from, and is made by, the people” beyond making clear that a populist democratic pedigree would not suffice. The similarity between his phrasing and that of an earlier-quoted statement by Toulmin Smith provides an important clue, however. For Smith, it was nuisance law that stood as the paradigmatic example of law that both sprang from and was administered by the people.²³⁸ While there is no evidence to suggest that Carter built directly upon Smith’s writings, the parallel terminology points to the link between the era’s police power and codification debates: the core question cutting across both was the constitutionality of continental administrative paradigms.

Within two years of both the *Hurtado* decision and Carter’s anti-codification manifesto, Christopher Tiedeman published a treatise entitled *Limitations of Police Power in the United States*.²³⁹ In the introduction, he alluded to the threat posed by continental socialism: “the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority.”²⁴⁰ Against this threat, however, American constitutionalism offered a powerful antidote through its bounded police power. In fact, he argued, “democratic absolutism is impossible in this country” as long as courts ensure that legislators protect minority rights by confining the police power “to the detailed enforcement of the legal maxim, *sic utere tuo, ut*

237. *Id.* at 6.

238. See discussion *infra* at 135.

239. CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886) [hereinafter TIEDEMAN, LIMITATIONS ON POLICE POWER].

240. *Id.* at vii.

alienum non laedas."²⁴¹ In 1900, Tiedeman published a revised edition of his treatise.²⁴² In the intervening decade and a half, dozens of judicial opinions quoted Tiedeman's 1886 treatise with approval. As Tiedeman acknowledged at the introduction to the 1900 edition, some courts rejected his views.²⁴³ For both sides in this debate, however, it was Tiedeman's writings that framed the cardinal constitutional question of the moment: the presence or absence of nuisance-derived limitations on the scope of the police power.

Like Toulmin Smith before him, Tiedeman conceived of nuisance as the cornerstone of a judicialized model of administration, although Tiedeman seemed to put more emphasis on the role of judges, rather than juries. Perhaps more than any other author, however, Tiedeman was explicit about the mechanisms through which nuisance limitations subordinated administrative processes to courts. This subordination began with the premise that "[w]hat is a nuisance [is] a judicial question."²⁴⁴ The legislature may duly prohibit behavior that threatens an injury to others. But establishing the presence or absence of intervention-justifying injury in any particular instance was properly the province of courts.²⁴⁵ Only through rigorous judicial oversight could there be a check on legislative interference into markets that invoked as its pretext health and safety rationales. By implication, administrative agencies such as boards of health were constitutionally prevented from taking enforcement action on their own. On this matter, Tiedeman quoted at length from a New Jersey Supreme Court opinion that addressed the authority of a municipal sanitary board:

The authority to decide when a nuisance exists, is an authority to find facts, to estimate their force, and to apply rules of law to the case thus made. This is a judicial function, and it is a function applicable to a numerous class of important interests. . . . The finding of a sanitary committee, or of a municipal

241. *Id.*

242. 1 CHRISTOPHER TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES (1900) [hereinafter 1 TIEDEMAN, STATE AND FEDERAL CONTROL].

243. *Id.* at ix.

244. 2 CHRISTOPHER TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES 732 (1900) [hereinafter 2 TIEDEMAN, STATE AND FEDERAL CONTROL].

245. "If the harmful or innocent character of the prohibited use of lands furnishes the test for determining the constitutionality of the legislative prohibition, it is clearly a judicial question, and is certainly not within the legislative discretion, whether the prohibited act or acts work an injury to others." *Id.* at 732-33.

council, or of any other body of a similar kind, can have no effect whatever, for any purpose, upon the ultimate disposition of a matter of this kind.²⁴⁶

Sanitary regulation was ultimately marginal to the political controversies of Tiedeman's age. Instead, Tiedeman's work spoke first and foremost to the use of nuisance as means of uprooting labor laws. A staunch opponent of paternalistic legislation, Tiedeman firmly opposed workhour legislation. He made no distinction between workhour limits in ordinary and dangerous occupations.²⁴⁷ The scope of the danger that various occupations posed was irrelevant where the protection of workers was deemed an unconstitutional regulatory rationale. Similarly, he opposed laws that excluded women from dangerous occupations altogether (though he made an exception for pregnant women because of the likelihood of certain employment "to prove injurious to the unborn child.")²⁴⁸ He also seemed to make an exception where workmens' health and safety regulations were concerned. He offered no clear justification for this beyond the statement that "[t]he safety and health of a large body of workmen, gathered together in one place, a mine, factory or workshop, are peculiarly endangered, if proper precautions are not taken by the employer against the sources of danger."²⁴⁹ Perhaps he reconciled workplace-safety rules with *sic utere* through the implicit argument that these rules prevented workers from inflicting injury on each other. More likely, he felt compelled to bend the principle in the face of the era's staggering industrial accident rates and the seeming judicial consensus on the constitutionality of workplace safety laws. The Supreme Court did not rule on the constitutionality of workhour limits until 1898 in *Holden v. Hardy*.²⁵⁰ And in that case the Court implicitly rejected Tiedeman's authority.

D. FROM *HOLDEN* TO *LOCHNER*

At issue in *Holden* was an 1896 Utah statute that limited the period of employment in underground mines and smelters to eight hours per day. In an opinion signed by seven of the justices, the United States Supreme Court affirmed the lower court's de-

246. *Hutton v. City of Camden*, 39 N.J.L. 122, 129-31 (1876), quoted in 2 TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 244, at 734-35.

247. 1 TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 242, at 337.

248. TIEDEMAN, LIMITATIONS ON POLICE POWER, *supra* note 239, at 199-200.

249. 1 TIEDEMAN, STATE AND FEDERAL CONTROL, *supra* note 242, at 339.

250. 169 U.S. 366, 386 (1897).

cision, finding the law to be “a valid exercise of the police power of the state.”²⁵¹ In his opinion, Justice Brown reviewed a host of previous Supreme Court interpretations of the 14th Amendment’s Due Process clause. He summarized this body of law with the following statement: “[I]n passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science”²⁵² In other words, as he explained, the due process was not meant to entrench a set of historical common law institutions for all time. Rather, “from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency.”²⁵³ In support he offered Justice Matthews’s language in *Hurtado* on the Constitution’s compatibility with “the best ideas of all systems and of every age.”

“Recognizing the difficulty in defining, with exactness, the phrase ‘due process of law,’” Justice Brown went on to note that it “is certain that these words imply a conformity with natural and inherent principles of justice.”²⁵⁴ As examples he offered the principles that property may not be taken without compensation and that no person “shall be condemned in his person or property without an opportunity of being heard.”²⁵⁵ In this he appeared to impute to due process a universal meaning more in line with the continental higher-law tradition than the particularistic precepts of common law.

Moving closer to the issue at hand, Justice Brown acknowledged the Court’s recent decision in *Allgeyer v. Louisiana* (1897)²⁵⁶ in which a statute prohibiting out-of-state insurance contracts was deemed in violation of the 14th Amendment. In finding a substantive right to contract in the 14th Amendment, *Allgeyer* built on common law formulations of due process, and this approach was difficult to reconcile with Brown’s conception of the clause as embodying natural justice principles. Rather than addressing this tension Brown went on to emphasize that “[t]he right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its

251. *Id.* at 398.

252. *Id.* at 385.

253. *Id.* at 387.

254. *Id.* at 390.

255. *Id.* at 389–91.

256. 165 U.S. 578, 591 (1897).

police powers."²⁵⁷ And while "the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals or the abatement of public nuisances. . . ." After quoting his own opinion in *Lawton v. Steele* (1894), he added the following crucial language: "and a large discretion 'is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.'"²⁵⁸

Consequently Justice Brown upheld the workhour limits in question but added language that narrowed the decision's import to workhour limits in smelters and mines, leaving the question open on whether a general restriction on the hours of labor would be entitled to similar deference.²⁵⁹ In the case at hand, he argued, there clearly existed reasonable grounds for the Utah legislature's conclusion that lengthy hours of underground labor threatened workers' health, and as such "its decision upon this subject cannot be reviewed by the Federal courts."²⁶⁰ Justice Brown concluded with the following formulation of the judicial test applicable in this and other police power cases: "The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class."²⁶¹ Standing alone, this statement suggests an expansive conception of the court's oversight authority. But this interpretation is difficult to reconcile with the opinion's prevailing emphasis upon deference, the necessity of legal change in the face of social transformations, and the independence of due process from common law institutions. Read within this context, Justice Brown's reference to class legislation is better seen as an attempt to sever class legislation tests from nuisance law, and to reserve judicial invalidation of legislation to circumstances evincing clear discriminatory or oppressive intent. This interpretation gains support from the fact that the Court's most conservative justices, Brewer and Peckham, chose to dissent. It is also consistent with the perception of leading progressives that with the Court's decision in *Holden*, decades of uncer-

257. *Holden v. Hardy*, 169 U.S. 366, 391 (1897).

258. *Id.* at 392 (quoting *Lawton v. Steele*, 152 U.S. 133, 136 (1894)).

259. *Id.* at 395-96.

260. *Id.* at 395.

261. *Id.* at 398.

tainty regarding the constitutionality of statutory limits on work-hours came to an end.

Holden was a "decision of the greatest national importance," social reformer Frances Kelley declared in an article published a few months after the case came down. Once the Court had finally taken a position on the issue, Kelly believed, there would be no turning back. "Once and for all," she wrote, "it is convincingly laid down by this decision that state legislation restricting the hours of labor of employèes in occupations injurious to the health will not be annulled by the federal supreme court on grounds of conflict with the fourteenth amendment to the constitution of the United States."²⁶² She, along with much of the era's reform movement, would be in for a shock when, seven years later, the Court reversed course in *Lochner*—ending *Holden*'s brief tenure as a landmark case.

Signs of trouble were evident within a year when the Colorado Supreme Court—notwithstanding *Holden*—invalidated a state law limiting workhours in smelters and mines. Invoking Tiedeman's authority Chief Justice Campbell wrote for that court:

How can one be said injuriously to affect others, or interfere with these great objects, by doing an act which confessedly visits its consequences on himself alone? . . . The maxim does not read: So use your own right or property as not to injure yourself or your own property.²⁶³

The *sic utere* maxim got no mention in *Lochner*. Furthermore, the Court took no issue with the claim that protection of workers' health (and not only the public at large) was a legitimate regulatory end. But, Justice Peckham emphasized: "The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, *as a means to an end* . . ." ²⁶⁴ The scrutiny implicit to this test bore little resemblance to the deference the *Holden* Court seemed willing to extend. Instead it followed Tiedeman's precept that "what is nuisance is a judicial question." In other words, the Court conceived of its role in reference to longstanding models of common law administration. Under these models, what reason dictated

262. Florence Kelley, *The States Supreme Court and the Utah Eight-Hours' Law*, 4 AM. J. OF SOC. 21, 27 (1898).

263. *In re Morgan*, 26 Colo. 415, 426–27 (1899).

264. *Lochner*, 198 U.S. at 57 (emphasis added).

was ultimately a judicial—not a legislative or administrative—decision. Applying that test to the issue at hand, Justice Peckham declared: “There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.”²⁶⁵ In an oblique reference to countervailing theories of medical police, Peckham dismissed the cameralist notion by which the interest of the state in a “strong and robust” population sufficed to justify a broadly defined authority to regulate in the interest of health.²⁶⁶

This was the closest that the *Lochner* opinion came to acknowledging the presence of a competing, continental-inspired, administrative model. The relationship between civil law and due process had occupied the Court from *Slaughterhouse*, through *Munn*, *Hurtado*, *Holden* and up to the Court of Appeals in *Lochner*. Yet the Supreme Court in *Lochner* avoided explicit mention of this debate: the Magna Carta, Justinian, sic utere, Tiedeman, and other primary building blocks of the jurisprudential rhetoric of the time are absent from the opinion.

The *Lochner* Court was careful to distinguish the circumstances in *Holden* from the one at hand (highlighting *Holden*’s discussion of the specific dangers inherent to employment in smelters and mines, and especially the existence of an emergency exemption under the Utah statutes).²⁶⁷ A strategic decision to obscure the shift in the Court’s position may have been at play. In addition to the desire to mollify criticism from the outside, the imperative of securing Justice Brown’s crucial fifth vote may have provided important motivation in this regard. Justice Brown’s reasons for going along are difficult to surmise. A potential explanation might come from the fact that Brown’s career was marked by inconsistency earlier on.²⁶⁸ Irrespective, his switch helped to obscure the discontinuity between the two cases, lumping *Holden* in the process into the “*Lochner* era.” The phrase connotes an imagined cohesion on the constitutional questions of the day. In reality, however, the era was marked by deep divi-

265. *Id.*

266. *Id.* at 60.

267. *Id.* at 54.

268. At the start of his tenure on the Court, he tended to vote with the conservative block, most significantly perhaps in *Budd v. New York*, 143 U.S. 517 (1892); see discussion in Robert Jerome Glennon, Jr., *Justice Henry Billings Brown: Values in Tension*, 44 U. COLO. L. REV. 553, 558 (1973). Later, he was inclined to uphold state legislation, at times in the face of rigorous dissents from his former allies. *Id.* at 567. Consequently, a change of heart in *Lochner* would not have been out of character.

sions consistent with those that have framed the evolution of common law history from the start.

Justice Peckham was accurate when he wrote in *Lochner* that no controversy surrounded the proposition that "there is a limit to the valid exercise of the police power."²⁶⁹ But his framing of the issue was rather disingenuous. Whereas the existence of a higher-law limitation on the state's regulatory authority enjoyed a broad consensus, disagreement on whether these limitations were better consistent with common law or continental conceptions of reason was at the core of the era's constitutional crisis.

VII. *LOCHNER'S* LEGACY?

With the perspective offered by an intervening century, *Lochner* is beginning to look like an accidental villain. Blanket dismissals of the opinion as the work of reactionary laissez-faire ideologues gave way decades ago to more nuanced and ultimately less partisan legal-historical accounts. Even during its own era, the case seems to have had only a modest impact on the strategies of social reformers,²⁷⁰ and was soon followed by a decision that upheld workhour restrictions for women.²⁷¹ These insights tend to strip *Lochner* of its status as an aberrant chapter in American constitutional history, prompting the question: "Is there anything remaining of *Lochner* that raises especially interesting questions for American constitutional theory?"²⁷² Paradoxically, it may be that the imperative of getting *Lochner* right only increases with the case's normalization. If the case does not constitute a radical departure from U.S. constitutionalism, it is, at a minimum, a tributary to the historical mainstream. Specifically for this reason, the case may illuminate the origins and meaning of contemporary disagreements over the proper spheres and instruments of regulatory governance.

Lochner revisionism offered an array of constitutional theories in lieu of earlier assertions that the Court's opinion had lacked a principled justification. Scholars writing under the broad umbrella of the revisionist school trace *Lochner* to a range of principles and offer divergent conclusions regarding the case's doctrinal progeny and contemporary relevance. The writings of

269. *Lochner*, 198 U.S. at 56.

270. Howard Gilman, *De-Lochnerizing Lochner* 85 B.U. L. REV. 859, 860 (2005).

271. *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (upholding a statute limiting working hours of women in laundries).

272. Posed by Gilman, *supra* note 270, at 865.

Cass Sunstein, Howard Gillman and David Bernstein offer three prominent examples in this respect. Sunstein's relevant argument builds on the premise that due process, for the *Lochner* judges, commanded neutrality.²⁷³ Because neutrality, in turn, was equated with "[m]arket ordering under common law"²⁷⁴ the scope of the police power was to be "limited to the redress of harms recognized at common law."²⁷⁵ Similarly to Sunstein, Gillman finds the origins of late 19th -century police power jurisprudence in a "master principle of neutrality."²⁷⁶ Neutrality, within this context, demanded "that government should show no favoritism or hostility toward market competitors, but should exercise power only to advance a true public purpose."²⁷⁷ Laws that deviated from this principle by advancing special or partial interests were deemed "class legislation" and invalidated as such.²⁷⁸ Bernstein has challenged the class legislation thesis and argues instead that "the basic motivation for *Lochnerian* jurisprudence was the Justices' belief that Americans had fundamental unenumerated constitutional rights, and that the Fourteenth Amendment's Due Process Clause protected those rights."²⁷⁹

Each of these constructs is associated, in turn, with a different reading of *Lochner's* legacy, to borrow Cass Sunstein's evocative term. Sunstein locates *Lochner's* legacy in a host of contemporary doctrinal contexts where common law baselines have been taken as prepolitical and, as such, neutral.²⁸⁰ Gillman's class legislation thesis, by contrast with Sunstein's argument, points toward *Lochner's* disjuncture from contemporary constitutional norms. *Lochner*, within his analysis, is continuous with constitutional principles dating to the founding of the American republic. But he argues that the Court's turnaround during the New Deal marked a revolutionary rejection of these earlier prin-

273. Sunstein, *supra* note 4, at 878.

274. *Id.* at 874.

275. *Id.* at 877.

276. GILLMAN, *supra* note 6, at 61.

277. *Id.* at 20.

278. *Id.* at 10.

279. *Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12 (2003).

280. Examples of this mode of reasoning, he argues, include the invalidation of campaign finance regulations on first amendment grounds; failure to put government-created benefits on equal footing to "natural," common-law-based ones; and the subordination of "[w]hether rights are treated as 'negative' or 'positive'... [to] antecedent assumptions about baselines—the natural or desirable functions of government." Sunstein, *supra* note 4, at 883–89. Sunstein relies on the alleged continuity between *Lochner* and the latter doctrines as a basis for a normative argument critiquing what he views as a misguided conception of neutrality in contemporary constitutional law.

ciples. He sees the Court's decisions in *West Coast Hotel* and *Carolene Products* as indicative of a "substantive redirection of the Court's role in the political system."²⁸¹ Finally, Bernstein's "fundamental rights" thesis conceives of *Lochner* itself as the pertinent moment of transition. Concurring with Gillman on the significance of class legislation within 19th-century constitutional jurisprudence, Bernstein argues that the Court in *Lochner* abandoned class-legislation concerns in favor of fundamental rights analysis. Thus, whereas Gillman sees contemporary fundamental rights litigation as antithetical to *Lochner's* ethos, Bernstein understands *Lochner* as the progenitor of *Griswold v. Connecticut*, *Roe v. Wade*, and *Lawrence v. Texas*.²⁸²

Their disagreement on the principle at stake and its contemporary implication notwithstanding, all three of the *Lochner* revisionist perspectives described above converge on the following point: valid police regulation was that which would qualify as nuisance-based intervention under common law.²⁸³ Put differently, where judges upheld laws as appropriate health and safety measures the laws were valid irrespective of the choice among the above three starting points. Within this framework, judicial oversight over regulatory interventions derived from the existence of substantive limitations on the scope of regulatory authority under the due process clause. The oversight function of courts followed by default.

In placing the question of judicial oversight at the very heart of *Lochner*-era debates, this study turns the prevailing *Lochner* revisionist argument on its head. Within the perspective offered here, the question of whether due process demanded judicial oversight over regulation was itself at the core. The choice was

281. GILLMAN, *supra* note 6, at 204.

282. Bernstein, *supra* note 7, at 12–13. As he writes, "For better or for worse, *Griswold* and *Roe's* protection of the unenumerated right to privacy raises many of the same issues as *Lochner's* protection of the unenumerated right to liberty of contract." *Id.* at 56.

283. Sunstein distinguishes between two steps in the *Lochner* Court's reasoning. The first entails substantive "limitation of the category of permissible governmental ends." The second step entails judicial "scrutiny of means-ends connections [that] 'operates to 'flush out' impermissible ends.'" The latter step is representative of the nuisance paradigm. Sunstein, *supra* note 4, at 877–78. As Gillman discusses, nuisance delimited the circumstances under which "government could impose special burdens and benefits." GILLMAN, *supra* note 6, at 125. It served this purpose through the nuisance-framed demand for legal proof that "special treatment would advance public health, safety, or morality." *Id.* The argument from fundamental rights indirectly accords to nuisance a similar function to that which the class legislation thesis does. Freedom of contract (like prohibition against class legislation) was not an absolute right, as Bernstein highlights. Rather "liberty of contract was consistently limited by the invocation of common law doctrines that restricted individual freedom for the perceived social good." Bernstein, *supra* note 7, at 46.

between judge-based and bureaucracy-based models of administrative governance. The latter put its trust in government as an agent of the body politic acting for the common good; the former—wary of according the state a role in shaping and improving society—gave judges and juries ultimate veto power over the administrative state.

The justifications supporting decision-making by juries and judges were not one and the same. Juries represented local communal norms and as such provided a counterforce to centralization (as Toulmin Smith, among others, discussed); judges were said to acquire specialized reasoning ability through study of common law. But in combination, juries and judges represented an alternative to decision-making by expert bureaucrats, and specialized administrative courts, along the continental model. The rivalry between the English and continental models shaped the evolution of common law history across many centuries. Across much of this history the following question recurred: Did the Magna Carta guarantee the common law's supremacy—or was due process compatible as well with the regulatory institutions of civil law? Influential segments of the American public could be found on both sides of this question throughout the 19th century.

Lochner marked the victory of a constitutional theory that only a minority of the justices had embraced up to that point. It stood for the identification of constitutional due process with a closed set of permanent common law procedures and norms. Because this view had failed to garner a majority on the Court up until that time, *Lochner* signified an important transformation. But the difference was more a product of circumstances than an outright revolution. It derived in the final analysis from a change in the composition of the Court, and a shift in the position of one judge. The underlying division in American political ideology, and attendant constitutional theory, remained in place—as would soon become evident in the context of New Deal battles over judicial review of administrative action.²⁸⁴ The compromises

284. In 1938, James M. Landis, a leading New Deal advocate, wrote:

Droit administratif, being the system of law and courts that dealt with the claims of the individual against government, to the English mind bespoke bureaucracy. The term administrative law had thus the same emphasis. From bureaucracy to autocracy to dictatorship is a simple transition. And that transition has frequently been made in the literature of the administrative process. That literature abounds with fulmination. It treats the administrative process as if it were an antonym of that supposedly immemorial and sacred right of every Englishman, the legal palladium of "the rule of law."

spawned by these battles shaped the contemporary American administrative state.

Viewed in this fashion, *Lochner's* legacy is perhaps best evident in the realm of environmental law, where the regulatory regime that came into being during the 1970s granted significant supervision functions to courts, thus distinguishing it from the environmental regimes that rose in parallel on the continent.²⁸⁵ Over time, this divergence has given rise to growing tensions as the United States and Europe have sought to forge common environmental and trade regimes. The common law positions judicial assessment of evidence of harm as the test of regulatory legitimacy; this fact assigns a particular legal meaning to scientific uncertainty. Though the United States has supplanted its traditional common law approach to environmental regulation with one largely based in statute, the potential for regulation in the face of such uncertainty has been the subject of significant transatlantic controversy. Disputes often involve Europe advocating the incorporation of the precautionary principle into international environmental treaties, frequently against objections from the United States.²⁸⁶ Here and elsewhere, the imprint of common law ideology may help explain cross-national differences in regulatory culture and practice. This is not to say that the common law was the sole source of American regulation; rather, the contested status of that ideology throughout Anglo-American history points to the significance of competing and countervailing continental influences. Beyond its capacity to illuminate the source of cross-national differences, this historical clash between the common law and civil law paradigms can enhance our understanding of the origin and meaning of domestic divisions over the proper role of courts in the administrative state.

JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 4 (1938).

285. RONALD BRICKMAN, SHEILA JASANOFF & THOMAS ILGEN, *CONTROLLING CHEMICALS* 39-46 (1985). See also NOGA MORAG-LEVINE, *CHASING THE WIND: REGULATING AIR POLLUTION IN THE COMMON LAW STATE* (2003). See in particular the discussion in chapter two of the parallels between *Lochner* and the Supreme Court's decision in *Industrial Union Dep't, AFL-CIO v. American Petroleum (Benzene Case)*, 448 U.S. 607 (1980). MORAG-LEVINE, *supra* at 32-38.

286. Robert V. Percival, *The North American Symposium on the Judiciary in Environmental Law: Who's Afraid of the Precautionary Principle?*, 23 PACE ENVTL L. REV. 21, 26 (2006). See also John D. Graham, *The Perils of the Precautionary Principle: Lessons from the American and European Experience*, Address before the Heritage Foundation (Oct. 20, 2003), in HERITAGE LECTURES, January 15, 2004, at 1-2, available at <http://www.heritage.org/Research/Regulation/hl818.cfm>.