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The *Slaughter-House* Dissents and the Reconstruction of American Liberalism

PAMELA BRANDWEIN *University of Michigan, United States*

American liberalism has long been divided between early "classic" and modern forms, a transformation associated with the rise of the social welfare state and the New Deal. The long-running critique of Hartzian consensus theory has left intact that division, which is likewise expressed in literature on the Reconstruction Amendments. This article offers a new staged theory of American liberal development in the nineteenth century, accomplished through the prism of public law. Newly elaborating and theorizing the governing frameworks of the antebellum "well-regulated society" and reading judicial disagreement in the Slaughter-House Cases *(1873, 83 U.S. 36) in terms of these institutional frameworks, I show how the dual liberty paradigm of the well-regulated society was rearranged in Bradley's dissent. By elevating a conceptual split between the dissents of Field and Bradley and by tracing in Bradley's dissent the reorganization of police powers jurisprudence, I illuminate the fashioning and rapid diffusion of modern rights individualism.*

INTRODUCTION

American liberalism has long been divided between early "classic" and modern forms, a transformation associated with the Progressive and New Deal eras. Scholars of American governance (Corwin 1948; Wright 1942) made that division before Hartz (1955) posited an essentially static "liberal consensus," and the long-running critique of consensus theory has left intact the two-stage model of liberal development.

Major reassessments of American political culture differently conceive liberalism—as a "governing structure" (Orren 1991; 1996) or a "tradition" composed of "varieties" (Smith 1990; 1993). At the same time, these reassessments converge in viewing nineteenth-century liberalism as one form—a single structure or variety that organized the relationship of citizens to the state.

The events of Reconstruction, importantly, are construed by scholars of American Political Development (APD) as changes along the axes of equality and federalism. Accordingly, Reconstruction-era developments are described as fragmented and disjointed egalitarian shifts met by resistance from a federalism-preserving Court (Orren and Skowronek 2004, 133–43) or as egalitarian reforms reversed by a resurgent "ascriptive" tradition (King and Smith 2005; Smith 1993, 549–66). In these accounts, development pertains not to liberal rights, *per se*, but to their extension on an equality basis and national protection.

An expansive legal-historical literature on the Reconstruction Amendments presents a similar if more detailed picture (Foner 1988; Hyman and Wiecek 1982; Nelson 1988; Zuckert 1992). Scholarly dispute persists over the set of substantive rights that defined national citizenship (cf. Barnett and Bernick 2019; Lash 2019); the breadth of the equality guarantee (cf. Klarman 1995; McConnell 1995); and the character of federal enforcement power (cf. Benedict 1978; Kaczorowski 1985). Portrayed as continuous, however, is a "legal order" (Edwards 2015, 149) comprised of the elements of "early liberalism" (Smith 1990, 3).

Those elements are familiar: atomistic individualism (Orren 1991, 7–8; see also Smith 1990, 45); liberty as a private pursuit expressed in terms of individual and natural rights (Edwards 2015, 106; Zuckert 1992), especially the "fundamental character of the property right" (Corwin 1914, 255; see also Orren 1991, 3); liberty as signifying "restraints under which government… operates" (Corwin 1948, 7; see also Wiecek 1998, 10); and a view of the legislative branch not as the protector of liberty but rather "as the great potential menace to liberty" (Corwin 1948, 8).

"Modern" liberalism (Orren 1991, 3) or the "second republic" (Lowi [1979] 2009, 273) is the successor in conventional models, beginning "in earnest" in the 1930s (Id.). Designated by Corwin as the expression of a "reformist conception of liberty" (Corwin 1948, 6), the second phase is associated with the social welfare state (Skocpol and Finegold 1995) and the "preferred freedoms" paradigm of *United States v. Carolene Products Co* (1938) (McCloskey 2005; Wiecek 1998).

This article advances a new staged theory of liberal development in the nineteenth century, accomplished through the prism of public law. By focusing on the conceptual architecture of the dissenting opinions in the *Slaughter-House Cases* (1873), the Supreme Court's first interpretation of the Fourteenth Amendment, I reconfigure scholarly narratives about the development of liberalism, the development of police powers

Pamela Brandwein, Professor of Political Science, Professor of Law (by courtesy), Department of Political Science, University of Michigan, United States, pbrand@umich.edu.

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jurisprudence, and the relationship between the two phenomena.

More specifically, I argue that while the main dissent of Justice Field (and the majority opinion) used the available police powers framework of the "well-regulated society" (Novak 1996), the dissent of Justice Bradley reorganized that framework, and thereby the liberty paradigm. In that way, modern rights individualism was introduced into public law.

In elaborating that argument, I reposition Novak's study of the "well-regulated society" as it pertains to questions in political science about the development of liberalism. In that study, Novak recovers the antebellum political-legal world in which states had a robust regulatory or "police" power to legislate in the public interest. Derailing myths about possessive individualism and rights in early America—and debunking in Hartz what Orren and Smith leave intact—Novak traces the concepts, including "social and conventional" property rights, which organized and legitimated an expansive police power.

Novak likewise identifies a conceptual shift to the "individualization of subjects" (Novak 1996, 240). Taking an approach pioneered by Lowi ([1979] 2009), in which shifts in foundational legal concepts and their associated governing arrangements mark a change in "regime," Novak argues that *Wynehamer v. People* (1856) was a "complete repudiation of the organizing principles of the well-regulated society" (Novak 1996, 187; see also Novak 2022, 106). Dating the beginning of "The Liberal State" to 1877 (Novak 1996, 238, 240) or to 1866 (Novak 2022, 1), he argues that "[b]etween 1877 [1866] and 1937… American conceptions of state power, individual rights, and the rule of law were fundamentally transformed" (Novak 1996, 247).

My staged theory of liberal development is novel in several respects. First, I map the dual liberty paradigm of the well-regulated society, captured only partially by Novak. According to that dual scheme (Kent 1854, 599), citizenship rights vis-à-vis the state arose from "civil relations" and from a "single, unconnected" condition. Crucially, property rights arising from the former were "social and conventional" and subject to robust police regulation; rights arising from the latter were "absolute" and quite a narrow set. The conception of mankind as "social beings" (Kent 1854, 7) undergirded the dual scheme, which is today foreign.

Scholars of American governance have rendered that dual paradigm in only partial and decontextualized ways. Commonly (Corwin 1914; Ely 1992; Smith 1990), rights arising from a "single" condition are (mis)taken as the whole and liberalism is narrated as atomistic liberty, continuous across the nineteenth century. In contrast, Novak (1996) takes rights arising from "civil relations" ("social and conventional property") as the whole and dates the beginning of American liberalism to the post–Civil War era. Incohesion on "absolute" rights[1] renders partial Novak's account of the antebellum regime, impairing his account of its eclipse.

I join the identification of the dual liberty paradigm with a new theorization of the well-regulated society as a form of liberalism. In turn, I identify Bradley's *Slaughter-House* dissent (not *Wynehamer*) as introducing the individualized subject.

The *Slaughter-House Cases*, of course, is familiar to scholars of American political and constitutional development for its narrow construction of the privileges or immunities clause of the Fourteenth Amendment. The dissents of Field and Bradley, moreover, feature in orthodox and revisionist accounts of *Lochner*-era constitutionalism (cf. Twiss 1942; Gillman 1993), where they are accused and exonerated, respectively, of fathering "laissez-faire constitutionalism."

This article does away with encrusted treatments of the facts in *Slaughter-House* and likewise insists on reading a disagreement between Field and Bradley on its own terms—namely, in terms of the available institutional frameworks of the well-regulated society. By approaching the dissents in that way, I show that the conventional view of that decision as a federalism dispute misses the existence of the dual liberty paradigm and its rearrangement in Bradley's dissent.

My analysis likewise mounts a challenge to Gillman's (1993) classic study of police powers and *Lochner*-era constitutionalism. Infamous for invalidating a New York maximum hour law, *Lochner v. New York* (1905) has long been perceived as an expression of laissez-faire policy preferences. A revisionist legal-historical literature disputes that interpretation (Benedict 1985; McCurdy 1975), and Gillman's study is canonical for synthesizing and theorizing that literature for a political science audience. Pioneering an interpretive-historical approach to the study of judicial politics, his study challenges the methodological individualism that underwrites the policy-preference interpretation of *Lochner*.

Of relevance here is Gillman's thesis that police powers jurisprudence was a continuous practice or single "form of thought" (198–9). Asserting that a "common method of evaluating exercises of the police power" (12) existed across the nineteenth century, Gillman identifies as its "centerpiece" a "Jacksonian ethos that emphasized equal rights" (7).

Notably, Gillman's thesis encounters trouble on its own terms. It cannot account for the post–Civil War appearance of substantive rights—as opposed to equal rights—as harmed by "partial" or "class" legislation. Diverging from Field's main dissent, Bradley's dissent in *Slaughter-House* emphasized that a law favoring a "few scheming individuals" was invalid because it "infring[ed] on personal liberty" (1873, 120), an "absolute right" of free men (115) he distinguished from the "equality" of privileges (118).

[1] Novak argues in 1996 that "civil liberty" was "never absolute" in the well-regulated society (11; see also 34). He later remarks in passing (2022, 27) that absolute rights in the well-regulated society were "rare," composing during that time "a fairly restricted pantheon of absolute and universal prohibitions in American public and private law."

Later in *Munn v. Illinois* (1877, 124), moreover, the Court identified partial legislation as harmful to "purely and exclusively private rights," not equal rights. In *Lochner*, too, the maximum hour law exceeded the police power because it denied not an equal right but a substantive right of contract, the "right of the individual to his personal liberty" (1905, 56). In short, the appearance of a substantive-rights definition of the harm of "partial" legislation troubles Gillman's thesis on its own terms. A deeper challenge to Gillman's construal of the antebellum "equal laws" principle is brought here, as well.

Across the disciplines, Bradley's dissent is often understood as the source of "substantive due process" (Hyman and Wiecek 1982; Miller 1977), the doctrine used to protect economic liberties in the late nineteenth century and "fundamental rights" in the twentieth century (Brest et al. 2018, 1377–80). The more basic importance of Bradley's dissent, I argue, lies in his redefinition of the harm of "partial" legislation via historical fiction, and thereby the liberty paradigm.[2]

As a general matter, my account eliminates incursions of laissez-faire orthodoxy, which have haunted staged theories of American governance. Lowi ([1979] 2009, 4–5) and Skowronek (1982, 30, 41), in two prominent examples, accepted the laissez-faire thesis as applied to the early American state. While Novak's account of the well-regulated society rules out that thesis (Novak 1996, 3), leaving a sharpened account of the road to the modern state, he accepts the orthodox laissez-faire reading of *Wynehamer* (1856). Laissez-faire orthodoxy thus enters Novak's account as the mechanism of the conceptual shift to rights individualism.

I challenge Novak's reading of *Wynehamer* and similarly exclude Cooley's (1868) *Constitutional Limitations* and Spencer's (1851) *Social Statics* as originating the rights individualism in Bradley's dissent. Long linked to laissez-faire, these predating works are newly distanced from their reputations. My analysis, moreover, does not return us to orthodox accounts (Pound 1909) of Gilded Age rights individualism.

On offer, finally, is a methodological contribution that bridges APD, public law, and political theory. More precisely, I bring to the study of state-building the language-oriented methods of Pocock (2009).

The state-building process has been influentially framed by Skowronek (1982, ix) as "an exercise in reconstructing an already established organization of state power," that is, a process by which existing institutional arrangements mediate changes in governing structures (285–6). Skowronek treats jurisprudential rules/arrangements as organizing state power and thus mediating change. However, we lack a method equipped to resist anachronisms in the specification of that process.

I use Pocock's notions of "text-as-action" and "text-as-event" to identify a process in American state-building: the rearrangement of the dual liberty paradigm of the well-regulated society and the appearance in public law of the individualized subject. Pocock treats texts by institutional actors as couched in a diversity of idioms he calls "languages," each with its own history and each subject to modification, making his methods suitable for tracing the alteration of legal arrangements. These methods, moreover, come with criteria for confidence in claims-making about the existence and alteration of specific institutional idioms.[3]

I treat Bradley's dissent as "action" in Pocock's sense, as it modified the police powers idiom and thereby the liberty paradigm. I treat his dissent as an "event," as there was a rapid institutional diffusion of that modification. Proximate roots are examined but claims in that regard are beyond the scope of this article.

Language-oriented studies, to be sure, have generated concern from scholars of Law and APD (Clayton 1999; Frymer 2008), who worry that a focus on discourse sacrifices explanatory analysis. In exploring a tension among historical institutionalists over the conceptualization of an institution, I explicate those concerns (Brandwein 2011b)[4] and offer theory-building (but no methodology) to assuage such apprehensions. This article provides a methodology, demonstrating how Pocock's methods can obviate the concerns of APD-oriented scholars.

The subsequent discussion is organized as follows: the next section presents the dual liberty paradigm of the well-regulated society. I then turn to the *Slaughter-House Cases*, doing away with encrusted treatments of facts; elevating a conceptual disagreement between Field and Bradley; and tracing Bradley's reconstruction of liberal rights. The institutional diffusion of the modified liberty paradigm is subsequently examined. A Conclusion identifies a fresh set of questions.

THE DUAL LIBERTY PARADIGM OF THE WELL-REGULATED SOCIETY

In *The People's Welfare*, Novak (1996) presents readers with reams of state and local regulations pertaining to public safety; public economy; public space; public morality; and public health. The sheer volume is striking, and these laws and ordinances were

[2] A "transformation in police powers" is identified by Novak (2022, 95), but he is referring to the "public utility" concept in *Munn* (135–45).

[3] For example, confidence that a language existed in the shape asserted increases to the extent that: (1) multiple actors used the same idiom; (2) actors argued with one another using that language; (3) predictions regarding the implications and problematics of that languages are possible; (4) the language is discovered in places unexpected; and (5) languages not available to the actors examined are excluded from consideration (Pocock 2009, 94; see also 113).

[4] The concern is that "discursive analysis risks two things: (a) constant flux, which wipes out the possibility of explanatory or causal analysis, and (b) the collapse of space for evaluation and reflection by historical actors, which eliminates the possibility of agency and normative analysis" (Brandwein 2011b, 193).

enforced. Conveying the "overwhelming presence of regulatory governance" (6) in early America, Novak shows that "[s]elf-government had little to do with possessive individualism or laissez-faire" (11). Novak's study is cited by Orren and Skowronek (2017, 14) for the point that public welfare regulation has long been practiced in America "in one way or another." However, a lot hangs on "one way or another." At stake is a picture of the liberty paradigm in antebellum America.

The goal of this section is to demarcate the dual liberty paradigm that governed the relationship of citizens[5] to the state and to theorize that governing arrangement as a form of liberalism.[6] I call that paradigm *dual*, as citizens' rights vis-à-vis the state were understood to arise from "civil relations" and from an "unconnected" condition (Kent 1854, 599). Rights arising from the former—"social and conventional" property and "common rights"—were governed by the police powers framework. Rights arising from the latter were governed by a related minimalist absolute-rights framework.

These were the institutional frameworks available to the justices in the *Slaughter-House Cases*, and so this section lays the groundwork for the next. Toward that end, this section (1) reorients Novak's history of police powers to address the question of liberal development and (2) critiques his treatment of "absolute rights" and *Wynehamer*.

The Police Powers Framework

A set of interrelated concepts comprised the legal-political worldview that organized and legitimated a robust police power in the well-regulated society. Per Novak (1996, 26–42), these concepts included a view of "man" as relational and social in nature, with racial and gendered variants; a concept of liberty as a social enterprise; a concept of property rights as "social and conventional"; and a view of governance as protecting and improving social life. Two common law axioms, *salus populi*, "the welfare of the people is the supreme law," and *sic utere tuo*, "use your own property so as to not injure others" (9–10, 42–50), provided the basis for that expansive regulatory power.

Rooted in English common law, these axioms were reinterpreted in America. The legal figures associated with the well-regulated society—e.g., Founder James Wilson, Chancellor James Kent of New York, Nathaniel Chipman, and Zechariah Swift—rejected Blackstone's state-of-nature theory, refusing his conception of atomistic individuals and pre-social rights (32–9). The governing framework associated with these figures was thus distinctively American.

Pointing to "diversity within law-of-nature thinking" (28), Novak identifies these figures as building on Scottish Enlightenment thought (36) and drawing on Vattel's notion of man's social nature. "He was not made for independence," stated Chipman, "but for mutual connexion, mutual dependence, and to this everything in his nature is more or less relative" (quoted in Novak 1996, 30).

Relatedly, property was conceived as "social and conventional" and as "deriv[ing] directly or indirectly from the government" (*Commonwealth v. Alger* 1851, 85; quoted in Novak 1996, 20). As such, property was regulated not just to prevent specific harm to others but in pursuit of liberty, understood as an enterprise of the whole and dependent on legislation for the public good. The public good, in that sense, was supreme. As indicated by Kent, "Private interest must be made subservient to the general interest of the community" (quoted in Novak, 1996, 9).

This concept of the public good was not Blackstone's. Writing in the context of English monarchy and conceiving noblemen's landholdings in terms of pre-social, timeless rights, Blackstone (1765, 135) stated, "The public good is in nothing more essentially interested than in the protection of every individual's private rights." In contrast, the public good in the well-regulated society referred to "social and conventional" property rights and liberty as a social enterprise. An open-ended and dynamic regulatory power (Novak 1996, 10, 38) covering enormous areas (16) governed those rights in response to changing needs in a burgeoning society.

Indeed, the improvement of society was viewed as the object of government. As emphasized by Wilson ([1804] 1967, 84, 88), "Property, highly deserving security, is however, not an end, but a means. How miserable, and how contemptible is that man, who inverts the order of nature and makes his property not a means but an end!…To protect and to improve social life is…the end of government and law."[7]

The police power was limited by "common rights" or its synonym, the "rights of the community." That limit is implicit in Novak, appearing in cases he emphasizes such as the capstone decision, *Commonwealth v. Alger* (1851, 94).

Accordingly, legislatures had the power to pass "general laws" that were "equally binding on every member of the community…under similar circumstances" (*Vanzant v. Waddell* 1829, 259, 270). That rule permitted

[5] There was contestation, of course, over who qualified for citizenship. Free Blacks struggled for recognition as "birthright citizens" (Jones 2018), which even when recognized did not insulate them from regulatory power to differentiate citizens by race and other categories (Novak 2022). Questions pertaining to the treatment by states of out-of-state citizens are beyond my scope.

[6] There were multiple governing structures in the well-regulated society, as well as sectional versions. The Southern version had illiberal slave laws. The common law of personal status, existing across sections and governing relationships within the family and workplace, also had an illiberal structure (Orren 1991).

[7] Greenstone's (1993, 6) developmental account of liberalism advanced a "liberal bipolarity" thesis that accepted Hartz's atomistic individualism but distinguished between "humanist" and "reform" liberals. Greenstone, however, misrecognized the "social and relational" vision of mankind in the well-regulated society, thus missing how that vision could be interpreted to support the preferences of humans rather than a deity ("humanist liberals") or to elevate the development of human faculties ("reform" liberals).

police regulations based on "dissimilar" circumstances, thus imposing hierarchies by race, gender, and other designations (Novak 2022, 25–67).

At the same time, the "equal laws" limit worked to invalidate laws in a patterned set of cases pertaining to licenses, debt enforcement, and special bonds—cases identified by Gillman (1993, 50–60), on which more in a moment. The logic of that limit was rooted in the concepts of the well-regulated society. "Partial" laws were "unequal" and void; "were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community…by another" (*Wally's Heirs* 1831, 556). The "principle of legislation" to be upheld (*Commonwealth v. Alger* 1851, 96) was that property "may be so regulated that it shall not be injurious to the equal enjoyment of others [*sic utere tuo*] …nor injurious to the rights of the community [*salus populi*]" (Id., 85, see also 94, 95).

To make clear that logic: legislatures had the power to regulate "social and conventional" property to protect the general welfare. Legislation that was "partial" harmed liberty-as-a-social-enterprise, designated as "common rights" or the "rights of the community." Partial legislation was "unequal" in the sense that it harmed liberty-as-a-social-enterprise, a concept of liberty tied to a relational view of human beings. The designation of partial legislation as "unequal" and harming "common rights" thus expressed an equal-laws concept that is today *foreign.*

Gillman (1993, 50–60) points more clearly than Novak to the "equal laws" limit, directing attention to *Vanzant v. Waddell* (1829), *Wally's Heirs* (1831), and a host of antebellum decisions. However, Gillman frames the "equality ethos" as "democratiz[ing] opportunity for personal liberty, social independence, and self-improvement in the private economy" (35). Characterizing that equality ethos as "the classic bourgeois ideal" and invoking Hofstadter (1948) as illustrative (Id.), he construes the "equal laws" principle as referring to liberty-as-a-private-enterprise pursued by atomistic individuals. But that is a misconstrual.

The Minimalist "Absolute Rights" Framework

Rights arising from "civil relations" were joined in the liberty paradigm by rights arising from an "unconnected" condition. These were "absolute rights," and the specification of the minimalist absolute-rights framework matters for three reasons:

First, Novak's incohesion on absolute rights[8] renders partial his account of the well-regulated society, impairing his account of *Wynehamer* as its repudiation. By outlining the "absolute rights" framework, I identify the liberty paradigm as dual and locate *Wynehamer* within it. Second, the absolute-rights framework is relevant for my theorization of the citizen-state relationship as a form of liberalism. Third, elements of that minimalist framework were grafted by Justice Bradley into the police powers framework as part of the process by which police powers jurisprudence was reorganized. That framework, therefore, must be identified to illuminate the "action" in Bradley's dissent.

In presenting the absolute-rights framework, I take Kent (1854) as a guide. Kent is identified by Novak as a major figure in the well-regulated society and so we may take his *Commentaries* as exemplary. "There cannot, strictly speaking, be any such thing as absolute rights as [Blackstone] has explained them," stated Chipman (1833, 56–7). Kent agreed, and that category in his *Commentaries* was reconceived.

Opening his discussion, Kent rendered the dual paradigm: "The rights of persons in private life are either absolute, being such as belong to individuals in a single, unconnected state; or relative, being those which arise from the civil and domestic[9] relations" (599).

Individuals in an "unconnected state" remained "social beings,"[10] a point that bears emphasis.[11] Rights arising in that state were "the privileges of English freemen" (600) and the "rights and liberties of English subjects" (604) claimed by colonists in America and "published" in state constitutions (Id.), the written-ness of which Kent emphasized (see generally 600–9).

As for the set of these rights, Kent "confine[d] the manual to a few plain and unexceptional principles" (Kent 1854, 607).[12] Four sub-entries for "Absolute rights" (661) appeared in the Index, beginning with "personal security." Referring to a small group of penal protections including the necessity of charges; exemption from double jeopardy; and bars on bills of attainder and *ex post facto* laws (610–2), the entry included "due process of law" for which Kent cited Story: "due process of law…means law in its regular course of administration, through courts of justice" (613–4). Under the heading of personal security was the absolute right of "personal character" (619), which referred to "the preservation of every person's good name from the vile arts of detraction."

The third absolute right, "personal liberty" (631), is noteworthy for its exceptional narrowness, referring only to the "writ of habeas corpus" and the "writ of *homine replegiando*," the remedy at common law for unlawful imprisonment.

"Religious liberty" was fourth (644), explained by Kent as "the free exercise and enjoyment of religious profession and worship." (Speech/expression was not included, shown by Campbell [2022, 870] to be governed at the time according to the "public good.")

The "right to acquire and enjoy property" was included in Kent's summary statement of absolute rights (Kent 1854, 599), but recall that property rights had a dual conceptualization: arising from "civil relations," property rights were "social and

[8] See footnote 1.

[9] "Domestic" relations referred to the common law of personal status, e.g., in the family and workplace.

[10] See Kent 1854, 7 (mankind as "rational and social beings") and Kent 1854, 45 ("laws of our social nature").

[11] Corwin's analysis of this period (1914) associates absolute rights with atomistic individualism (254, 261), an anachronism.

[12] See also Jacobsohn (1984, 27) identifying "minimum standards of justice" at the Founding.

conventional" as examined above; only arising from an "unconnected" state was property "absolute."

The forms of absolute property were not catalogued in Kent's compendium, but the term appeared elsewhere (Kent 1854, 415) as part of a conventional distinction between absolute and qualified property: the former "denot[ing] a full and complete title and dominion over it;[13] qualified property…mean[ing] a temporary or special interest." Absolute title was likewise described as "vesting" under a contract (Kent 1854, 456).[14] In addition, a "principle of universal law" (Kent 1854, 399) was the provision of "just compensation" for takings of private property for public use, expressed in *Gardner v. Newburgh* (1816, 168), where Kent ruled that the "fundamental" character of property required a "just indemnity" for a "taking" under the state's due process clause.

Significantly, the cases cited by Corwin (1914) as (purported) evidence of atomistic liberty as the "basic doctrine" of constitutional law[15] tracked the set of rights arising from an "unconnected" state. Corwin, however, decontextualized these rights, misconstruing the dual liberty/property paradigm.

Kent's compendium likewise provides the context for *Wynehamer v. People* (1856), a New York case involving a temperance law. Novak labels *Wynehamer* a "libertarian, anti-statist" decision (1996, 245) and a "complete repudiation of the organizing principles of the well-regulated society" (187). Its "novelty," he argues (186), "was that protection [of property] was fundamental, absolute, and sacrosanct. Legislative theories of the public welfare or general good did not legitimate interference."

Wynehamer, however, involved an *ex post facto* law that also denied the right to trial. The law made criminal and destroyed liquor acquired legally, and the five-member majority agreed that its retrospective nature made it fatal under the due process clause of the state constitution. Law could not be "ex post facto" (1856, 393). As Judge Comstock elaborated, "a law that punishes a citizen…for an act which, when done was in violation of no existing law" was invalid (390–1; see also 385–6; 388). Importantly, all the judges in the majority agreed that it would be "competent" for a legislature to criminalize and destroy liquor if it were "prospective" in nature (487), a crucial consensus indicating that the power to intervene remained robust, even as they disagreed on the procedure for enforcement.

A right to "trial by jury" (487) was denied by the *ex post facto* law and that too was a flaw. The provision for "trial" (395) was necessary, as "due process of law means law in its regular course of administration through courts of justice" (395). As for Comstock's references to liquor as property in "an absolute and unqualified sense" (384), by that he meant liquor was "seized and sold upon legal process" and bequeathed "like other goods." The "absolute" right was the "*transfer*" and "*disposal*" of property acquired legally (emphasis Comstock's, at 396, citing Kent). Comstock (392) pointed to a failure to provide "just compensation" for a "taking," but that reason was not shared by other members of the majority.

Newly contextualized, *Wynehamer* is intelligible as a blend of Kent's "unexceptional" absolute rights. Reading *Wynehamer* on its own terms (i.e., those of the dual liberty paradigm) eliminates comprehensively its laissez-faire reputation.

The dual liberty paradigm of the well-regulated society was a form of liberalism.[16] Liberalism is generally associated with a "core commitment to liberty" (Courtland, Gaus, and Schmidtz 2022) and the moral worth and freedom of the individual. Typical features are individual rights, equal laws, consent of the governed, and limits on government. As observed by Courtland, Gaus, and Schmidtz, liberal political philosophy "fractures over how to conceive of liberty…and another crucial fault line concerns the moral status of private property" (Id.).

The dual liberty paradigm meets that definition. Title in property (a paradigmatic liberal right) was protected in an "unconnected" state, while "social and conventional" property rights arising in "civil relations" facilitated liberty as a social enterprise. Scottish Enlightenment thinkers who were built upon, such as Hume, are regarded as philosophers of liberalism (Holmes 1993, 188). Moreover, a "Vattel-based constitutional theory of popular consent as the source of limits on legislative power" was contemporaneous (Goldstein 1986, 65).

The notion of republican liberty as "not being subject to the arbitrary power of another" likewise aligns with the liberal prescription for "equal laws." Pointing to Pettit, who distinguishes republican liberty from liberalism, Courtland, Gaus, and Schmidtz (2022) explain that "when republican liberty is seen as a basis for criticizing market liberty and market society, this is plausible. However, when liberalism is understood more expansively, and not so closely tied to either negative liberty or market society, republican liberty becomes indistinguishable from liberalism." The equal laws prescription could be and was recruited as a mechanism of racial and gender hierarchy, while functioning in a patterned way to protect "public liberty" in other contexts.

This form of liberal governance, foreign today, was intact on the eve of the Civil War and supplied the

[13] See also Kent 1854, 276 ["absolute and exclusive" title]. Dominion referred to decisions over title such as selling and bequeathing. The *use* of property was a "social and conventional" right arising from civil relations.

[14] See, e.g., Kent 1854, 502 ["absolute, vested title"]; 376 ["vested a legal title"]; 457 ["vested an indefeasible and irrevocable title"].

[15] E.g., *Calder v. Bull* (1798), *ex post facto*, (Corwin 1914, 248); *Bowman v. Middleton* (1792), trial, (Id., 256); *Gardner v. Newburgh* (1816), "takings," (Id., 263); *Fletcher v.* Peck (1810) "absolute" vested title (Id., 266).

[16] Novak puts the well-regulated society outside the umbrella of liberalism (1996, 238–9; see also 22). He later contrasts the "new liberalism" (2022, 69, 77) of Progressive reformers with "classic" liberalism he associates with "laissez-faire constitutionalism," a descriptor he takes as accurate but narrows in reach (2022, 106).

frameworks available to the justices in the *Slaughter-House Cases.*

THE *SLAUGHTER-HOUSE* DISSENTS

The Litigation and the Literature

Litigation in this complex case sprang from an 1869 law that granted to a newly formed Crescent City Company an exclusive right to build and run a "Grand" slaughterhouse and livestock landing in New Orleans, across the Mississippi River and below the city's water supply pumps. Passed as a public health measure, the law required all butchers to do their landing and slaughtering at the central facility; abide by sanitation measures; and pay fees set by the legislature.

Sparking bitter opposition, the law was challenged in an explosion of cases. Later consolidated, the challenge was headed by John A. Campbell, the former Supreme Court justice who resigned his seat to join the Confederacy. An archfoe of Reconstruction, Campbell argued that the butchers of New Orleans were deprived of their rights of national citizenship under the privileges or immunities clause of the Fourteenth Amendment. The Supreme Court rejected Campbell's argument, 5–4, approving the law as a police regulation but putting its decision on the grounds of the privileges or immunities clause. Condemning the exclusive franchise as an invalid exercise of the police power and a violation of the Fourteenth Amendment were the *Slaughter-House* dissenters.

Scholars often begin their analysis of *Slaughter-House* by impugning the exclusive franchise as a corrupt monopoly (Curtis 1986, 174; Foner 1988, 529; Hyman and Wiecek 1982, 475; see also Lowi 2009, xiii). For rejecting the grant, the dissents receive implied approval. But there is no uniform picture of the dissents. Field's dissent is often tied to economic "conservatism" and fears generated by the Paris Commune (Foner 1988, 530). It is viewed in less activist terms by Nelson (1988, 161) who presents it as "grant [ing] people only one right against governmental infringement, the right to equality."

Bradley's dissent is affiliated with Reconstruction by Foner (1988, 529) for its prioritization of substantive national citizenship rights, and by Aynes (1993) and Curtis (1986) for its inclusion or "incorporation" of the Bill of Rights guarantees in the rights of national citizenship (see also Lowi 2009, xiii and Brettschneider 2018). Amar (1992, 1257) goes so far as to hail Bradley's dissent for providing a "comprehensive" analysis of "unwritten fundamental law." At the same time, criticism of Bradley's dissent as "call[ing] 'substantive due process' into being" (Hyman and Wiecek 1982, 473, 480) continues to circulate, while Nelson's (1988, 160) view of that dissent as advancing mainly an equal-rights argument is rare in Reconstruction scholarship.

Revisionism in the Reconstruction literature has brought illuminating new context but has generated additional incongruities. Ross (2003) establishes in compelling fashion the pro-Reconstruction character of the 1869 law. Health conditions in New Orleans had been abysmal for decades due to the dumping of animal refuse into the streets and the Mississippi River, and the powerful butchers had long obstructed sanitary regulations and exerted informal control over prices. Passed by a biracial Reconstruction legislature, the exclusive franchise protected the water supply; was part of a modernizing trend toward central and compulsory abattoirs; and required equal access to the new facility, thus opening the trade to Blacks who had been informally excluded by the butchers. Regarding the charge of bribery leveled by Democrats antagonistic toward the biracial legislature, the Company apparently paid for firewood to heat the building and for food and drink while the franchise was discussed, but that was it.

Thus aligning the 1869 law and Justice Miller with Reconstruction, Ross interprets Miller's narrow construction of the privileges or immunities clause as a prophylactic against rising economic conservatives (he names Field) who sought a weapon to invalidate economic regulation. Likewise flipping the script on Bradley, who described Reconstruction legislatures as oppressive to "Southern States," Ross presents Bradley as aligned with the racist subterfuge of John A. Campbell, enemy of Reconstruction and main counsel for the plaintiffs, who used the clause as a cudgel against Louisiana's biracial legislature.

Restoring the reputations of Bradley and Field are *Lochner* revisionists (Benedict 1985; McCurdy 1975), who reject the laissez-faire reading of the *Lochner* era and read the *Slaughter-House* dissents as expressing a "Jacksonian" equal-rights ethos (Gillman 1993, 66–7). The *Lochner* revisionism of Bernstein (2011, 17–8) likewise restores the institutional integrity of the dissents, but based on an individualist-natural rights approach he posits as institutionally continuous across the nineteenth century.

Read together, the Reconstruction and *Lochner* literatures on *Slaughter-House* induce cognitive whiplash. Inconsistencies remain unresolved, and even factual elements of the case remain distorted. For example, the case is narrated as a fight between "unemployed butchers" (McCurdy 1975, 976) and the seventeen investors who secured the exclusive franchise. This is simply wrong. The plaintiffs in 1869 resisted moving (not losing) their work. Moreover, the many named plaintiffs in the consolidated cases, Paul Esteban, William Fagan et al., were well-heeled business owners. They lost in the highest state court, won in circuit court (before Bradley), and waited while the Supreme Court held the case over for re-argument.

Then, in 1871, Esteban et al. bought the Crescent City Company. Full stop. They became the "monopoly" they had been raging against, taking their seats as the new Board of Directors and President. It is laid out in the "Motion to Dismiss" (Kurland and Casper 1975). Esteban et al. bought the Crescent City Company and then brought the "Motion to Dismiss,"

claiming there was no longer a controversy. I emphasize that purchase to help clear the ground for a fresh look at this decision.

I likewise identify a major factual distortion in the dissents, pertaining to the geographic area covered by the exclusive franchise. The dissents described that area as totaling "1154 square miles," a very large space about the size today of New York City, Chicago, and Los Angeles combined. According to Field and Bradley, restricting slaughtering to one facility in a territory "nearly twelve hundred square miles" (1873, 112; see also 85) was unlawful.

But it was not remotely the case that those affected were spread over 1154 square miles, a distortion identified here for the first time. Contemporaneous sources (Gazetteers) indicated that nearly all that land was uninhabitable. In 1870, the total population for the three parishes covered by the law was 212,738 with almost all of it (191,418) in Orleans Parish (Steinwehr 1873, 665, 679, 783), and the lower half of Orleans Parish at that, less than 75 square miles.[17] Descriptions of the surface indicate that St. Bernard Parish and Jefferson Parish, which accounted for about one thousand square miles, were overwhelmingly "swampy" and "too wet for cultivation" (Fisher 1858, 745, 333).[18] Defending the 1869 law, Counsel for the State of Louisiana consistently referred to it as pertaining to the "city" of New Orleans (Hunt 1896, 64, 69, 75, 80). Indeed, the movement to central, public, compulsory abattoirs was taking place in cities.[19]

The Majority Opinion: Conceptual Discordance

There were hints in the majority opinion that conceptual change was afoot. Framing the question at hand, Justice Miller asked "whether these exclusive privileges are at the expense of the community in the sense of being a curtailment of fundamental rights" (1873, 60). That framing pops off the page for a reader fluent in the language of the well-regulated society.

The first clause in Miller's framing ("at the expense of the community") invoked the harm of "partial" legislation in conventional terms—harm to "the community" or "common rights." Miller then clarified the conventional limit using a term, *fundamental rights*, which was not a synonym in the police powers idiom but was used in both dissents.

Another discordant juxtaposition differentiated the dissents. Stated Miller, "It is…the [exclusive franchise] which is mainly relied on to justify the charges of gross injustice to the public and invasion of private right" (1873, 61). Those charges were discordant. "Injustice to the public" was the conventional charge against partial legislation, brought by Field. "Invasion of private right" was the charge brought by Bradley.

In what follows, I examine the conceptual architecture of the dissents with reference to the available institutional frameworks. The category, *fundamental rights*, appeared in each dissent, and I show how Field and Bradley used that category to say and do different things.

Field's Dissent: Extending the Police Powers Framework

The main dissent was written by Justice Stephen J. Field, whom Corwin (1909, 653) described as the "pioneer and prophet" of substantive due process (see also Kens 1998, 118). Field became an evangelist of that doctrine, but he was not its pioneer.

According to Field, at issue was "nothing less than the question whether the recent amendments…protect the citizens of the United States against the deprivation of their common rights by State legislation" (1873, 89). He condemned the exclusive grant as "not equal to all" (92; see also 107, 108) and "against common right" (105, 109), utilizing the conventional synonyms for the limit on the police power.

Field's objection was that the exclusive franchise covered an area "1154 square miles" (85; see also 86, 87, 92), an extreme distortion that enabled him to treat butchering as an "ordinary trade" and sidestep the rationale for centralized abattoirs in densely populated cities. "[E]quality of right," he declared, "with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States" (109). For Field, freedom from "unequal enactments" was "fundamental" (106).

Field thus used the term *fundamental right* to extend the conventional police powers framework—to re-source in national citizenship and thus provide federal protection for "common rights," the existing institutional limit on the police power.

Field read *Corfield v. Coryell* (1823) and English monopolies cases (101–105) as securing common/equal rights. After pointing to *Corfield* as securing "equality of privilege" (101) for out-of-state citizens, Field analogized that equality function to the Fourteenth Amendment. Elaborating, he quoted from English monopolies cases that barred grants where "others may be restrained…in any lawful trade" (102); where "clothwork" is "restrained to certain persons" (103); "whereby others could be deprived of any liberty which they previously had" (104). Valid only were "restraints as equally affected all others" (105). Returning to the

[17] Lake Pontchartrain covered the upper half of Orleans Parish, which left about 75 square miles for the population, from which must be subtracted the "swamps" that lay between the city of New Orleans and the Lake (Steinwehr 1873, 679).

[18] For additional evidence from the Gazetteers supporting my claim of a factual distortion, see Supplementary material.

[19] A "Grand" public and compulsory abattoir opened in Paris in 1867. On the modernization of slaughtering, including the establishment of centralized, public, and compulsory abattoirs across Europe and Scotland in the 1840s and 1850s, see Lee (2008). Chicago's was invalidated in *City of Chicago v. Rumpff* (1867, 95) on a technicality (the ordinance "did not declare slaughter houses or the business of slaughtering animals in the city a nuisance"). Milwaukee's was approved in *City of Milwaukee v. Gross* (1866).

Fourteenth Amendment, Field explained it secured "to all citizens in that State against any abridgment of their common rights, as in other States" (105). He footnoted Adam Smith (110) to support yet another "equality of right" (110) statement.

In extending the police powers framework, Field followed John A. Campbell, main counsel for the plaintiffs. At all stages of the litigation, Campbell put his claim on the ground of "common right" (Kurland and Casper 1975, 557, 575, 582, 649, 660, 661), which expressed the "principle of equality of right" (563). "We claim in behalf of the community," Campbell stated in his Brief for Plaintiffs, "that common right to prosecute a lawful avocation…and that grants of the sole and exclusive privilege to conduct and carry on such a business shall not be allowed to impair or to destroy this common right" (575; see also 570). "Our case is that of a whole community of persons" (570) denied by the exclusive privilege the "equality of right" in their occupation (549, 560, 646 664, 679). He reiterated on Re-argument: "The abused persons are the community, who are deprived of what was a common right" (649). "Equality should be the basis of legislation" (681) and the exclusive grant was a violation of "common right" (557, 582, 690). Kens (1998, 104) presents Campbell and Field as advancing an "individual liberty" argument, but that is a misreading.

Bradley's Circuit Opinion and Dissent: Text-as-Action

Newly appointed to the Supreme Court, and new to the bench, Justice Joseph P. Bradley took his seat on March 21, 1870. Dispatched to "circuit riding" duties in New Orleans, he issued the circuit opinion in *Live Stock Dealers and Butchers Association v. Crescent City Company* on June 10, 1870, less than three months later.

Bradley's circuit opinion ruled for the challengers to the 1869 law but did not use Campbell's argument. Rather, Bradley pressed an "absolute rights" argument. Repeatedly invoking an absolute-equal distinction (1870, 650, 652, 653, 654), he argued that the Fourteenth Amendment "was intended to protect the citizens of the United States in some fundamental privileges and immunities of an absolute and not merely of a relative character" (653). The "sacred right of labor" (652) was among these "absolute" rights.

Emphasizing an "absolute right" to labor held by free men, Bradley pronounced the exclusive franchise "void at common law" (653). This was a departure, as common/equal rights served as the limit on regulation at common law. An absolute right to labor, Bradley claimed, was "not inconsistent with any of those wholesome regulations which have been found to be beneficial and necessary in every state" (652) nor was it "inconsistent with that large class of cases in which the laws require a license" (653). But it was inconsistent.

For the absolute-equal distinction and for the rule against regulation of free men's absolute "right to labor," Bradley's circuit opinion cited no sources—no references, no cases.[20] It is, perhaps, no wonder the Court dragged its feet in producing a decision.

Scholars conventionally attribute to some Republican framers an "absolute rights" view of the Fourteenth Amendment in which substantive common law rights of property and contract were guaranteed national protection (Nelson 1988, 117–23, 163). Importantly, scholars treat that position as a *transfer*—the transfer to national protection of a pre-existing scheme of rights at the state level. However, that position should not be treated as a transfer.

Recall that rights had a dual conceptualization in the well-regulated society. Only as they arose from an "unconnected state" were rights "absolute" against the government, and narrowly so. Recall, too, that "personal liberty" was limited to *habeas corpus.* The *transfer* framing—which presumes property and contract rights to have a unitary, absolute conceptualization before the war—mischaracterizes the scheme by which these rights were conceived and protected against state infringement in the antebellum era.

Bradley's 1873 dissent arrived bulked up with citations. He dug in, nodding to "equality of rights" but issuing a substantive-rights argument that contrasted sharply with Field's "common rights" argument. His dissent was joined only by Justice Noah Swayne, another new addition to the bench.

The process by which Bradley redefined the harm of "partial" legislation—replacing harm to "common rights" with harm to pre-social, absolute rights—involved grafting into the police powers framework: (1) an element of the (governing) minimalist absolute rights framework—the "rights of Englishmen" terminology used by Kent in his compendium and (2) Blackstone's (non-governing) conception of absolute rights in atomistic, state-of-nature terms.

Crucially, Bradley's dissent featured a story about the unbroken lineage of free men's pre-social "absolute rights" as limiting the state's police power but without federal oversight. (Recall that Field's story of unbroken lineage pertained to equal/common rights.) The two grafts provided the basis for that story. Moreover, that story rested on the factual distortion Bradley shared with Field, namely, the exclusive grant as covering "nearly twelve hundred square miles" (1873, 112, 119).

Notably, Bradley maintained the conventional distinction between general and partial laws, characterizing the exclusive franchise as "made in the interest of a few scheming individuals" (1873, 120), a familiar reference to partial legislation. He likewise stated (114), "The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one."

Bradley launched his story of unbroken lineage by asserting "fundamental rights which this right of

[20] The circuit opinion cited only two cases, an American case (*Conner v. Elliot* 1855) for the observation that "the Supreme Court, on one occasion, thought it unwise to [define the privileges of U.S. citizens]" (1870, 652); and one English case, "the great case of monopolies" (1870, 653, cited but left unnamed).

regulation cannot infringe" (1873, 114). He stated, "The people of this country brought with them to its shores the rights of Englishmen, the rights which had been wrested from English sovereigns at various periods of the nation's history" (114). Here was the first graft—language from Kent's compendium. He added the second, Blackstone's absolute rights, in specifying the "fundamental rights" that regulation could not infringe: "Blackstone classifies these fundamental rights under three heads, as the absolute rights of individuals, to-wit: the right of personal security, the right of personal liberty, and the right of private property" (115). Bradley distinguished these rights from "equality" guarantees (118).

Recall, however, that Blackstone's atomistic, state-of-nature concept of absolute rights (1765, 123) had been rejected by legal figures of the well-regulated society.

The two "grafts" in Bradley's story—one from an existing framework and one from a non-governing and repudiated framework—were the mechanisms by which Bradley redefined the harm of "partial" legislation in substantive-rights terms. These grafts substituted Blackstone for Kent.

Bradley added the term *fundamental* in rendering Blackstone, who did not use that term. Bradley took it from *Corfield v. Coryell* (1823), which he quoted (1873, 116–7). In *Corfield*, Justice Washington used that term to refer to the rights owed by states to out-of-state citizens. "[T]hese fundamental privileges," Washington stated (1823, 552) "may be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind…" Seizing on the term *fundamental* in that passage, Bradley assimilated it to Blackstone's pre-social "absolute rights." (Recall that Field cited *Corfield* for the contention that "equality of right" was the distinguishing privilege of national citizenship.).

Bradley thus used the term *fundamental rights* to meld the Blackstone "graft" to *Corfield*, thereby completing his story of unbroken lineage. By construing the absolute right of "personal liberty" to include "the right to choose one's calling" (116) and by casting that right as the historical basis for barring "mere monopolies" (121), he pronounced the 1869 exclusive grant invalid under the Fourteenth Amendment as an "infringement of personal liberty" (120).

In short, Bradley used the term *fundamental rights* to reorganize police powers jurisprudence and thereby redefine liberty as a purely private enterprise. His story of new national authority was, in fact, a reconstruction of the legal subject in purely individualist terms. Gone were "social and conventional" property rights and the dual liberty paradigm.

All the clauses of the Fourteenth Amendment, according to Bradley, protected these "absolute rights" to "life, liberty, and property" (116). These were the rights of national citizenship;[21] the rights "inviolable except by due process of law" (115, 116); and guaranteed "equal protection"[22] (113).

Here was the way in which modern rights individualism entered public law. Here, too, was the origin of the Fourteenth Amendment doctrine of "substantive due process," which I identify with the eclipse of the dual liberty paradigm.[23]

Cooley (1868) did not originate that rearrangement. The possibility that he did is raised by his association with "laissez-faire constitutionalism" (Corwin 1948, 117–8; Novak 1996, 246; Skowronek 1982, 153; Twiss 1942, 18). Gillman (1993, 7, 55–9) separates Cooley from laissez-faire, presenting him as expounding the "Jacksonian" equal-rights ethos. But neither reputation is supported by Cooley's text.

Cooley expressed the police powers framework of the well-regulated society, stating clearly (1868, 202) that the harm of "partial" legislation was to "common right."[24] He described property rights as "social and conventional," citing *Alger* (572–573), and likewise utilized the "public rights" synonym for common rights in cautioning that "the public do not acquire a right" in all cases; the "interests of the community" must be involved (90). Citing *Wally's Heirs v. Kennedy* (1831), Cooley (392), identified "the whole community" as adversely affected by partial laws. "Equality of rights" (393) referred to that scheme.

Cooley likewise treated *Wynehamer* in the terms of Kent's compendium.[25] Graham (1968, 121) was typical in calling *Constitutional Limitations* "provocative," and yet the pages cited as evidence (Cooley 1868, 356, 357) referred to the rights in Kent's manual, e.g., due process barring government "interference with title" (356) and

[21] Included were rights "enumerated" in the original Constitution and "early amendments" (1873, 118), some of which—minus speech—were listed and conceived in Kent's compendium as arising from an "unconnected state;" "absolute" in that sense; and protected in state constitutions.

[22] By redefining the harm of "partial" legislation in substantive-rights terms, Bradley's dissent functioned to displace the construct of "common rights," installing private rights as the new referent for "equal rights." A private-rights referent was used in endorsements of the 1866 Civil Rights Act in *Cruikshank* and the *Civil Rights Cases* (see Brandwein 2011a, 101–4, 161–70). While Novak (2022, 25–67) points to the extension of rights on an equality basis, I am identifying a reconceptualization of "equal rights."

[23] Bork (1990, 30) points to *Dred Scott v. Sandford* (1857) as the origin of substantive due process. In contrast, Miller (1977, 15) identifies Taney's Fifth Amendment argument as "exclusively historical" and thus in line with other "substantive" due process interpretations of the antebellum era. I would add that Taney's identification (1857, 450) of "forfeit" as the rights denial was consistent with the dual liberty paradigm. Miller (1977, 18) points to Bradley's due process interpretation as breaking from the "confines" of history but does not identify the faux-historical grafting process by which Bradley's joint due process/privileges or immunities interpretation rearranged the liberty paradigm.

[24] "A by-law of a town, which, under pretense of regulating the fishery of clams and oysters within its limits, prohibits all persons except inhabitants of the town from taking shell-fish in a navigable river, is void in contravention of common right" (Cooley 1868, 202; see also 395 and 530).

[25] Cooley cited *Wynehamer* for the right to trial (1868, 364; see also 356) and the rule that courts were "not at liberty" to declare statutes void based on higher law principles but only on the "express words of a written constitution" (169, 171; see also 172).

requiring "pecuniary compensation" for takings (357). Read in relation to Kent, these rights were unexceptional.

Spencer (1851) can similarly be excluded as originating the rights individualism in Bradley's dissent. Justice Holmes famously accused the *Lochner* majority of "enact[ing] Mr. Herbert Spencer's *Social Statics*" (1905, 75), a source long linked to laissez-faire and regarded as "fairly represent[ing]" capitalist ideology in America (Lowi 2009 [1979], 5). However, there is a sharp divergence between the original (1851) and revised (1892) editions.

A British polymath (and not a professor), Spencer wrote *Social Statics* as "an attack on Benthamism" (Hofstadter 1955, 40). Provoked by Bentham's "utility" doctrine, which Spencer derided as "infinitely variable" and unworkable (1851, 3; see also 11, 13), *Social Statics* claimed to deduce a single set of laws unifying the natural and social worlds and producing the "perfect society" (409).

Deducing the "Law of Equal Freedom,"[26] Spencer argued that it "forbids private property in land" (125). "[T]he assumption that land can be held as property involves that the whole globe may become the private domain of a part of its inhabitants" (115). That would entail, he deduced, existence "by sufferance only" (114).

Supporting land nationalization, he argued, "The public…shall retain in their own hands" (131) the land of the nation, held in "joint-stock ownership" (123). Spencer endorsed a "right to property," but this was the right to "become the tenant" (129).[27] There was likewise "title to that surplus which remains after the rent has been paid" (129), a right to the "extra worth which…labor has imparted" (119), but that was "quite different…from a right to the land itself" (Id.) (see generally Taylor 1992, 246–53).

Spencer quoted Locke to disagree with him and reject property in land (1851, 126–7), declaring, "no amount of labor, bestowed by an individual upon a part of the earth's surface, can nullify the title of society to that part" (126). Spencer likewise rejected the "error" of deriving rights by "referring back to an imaginary state" (126), impugning state-of-nature theory as flawed and justifying the method of "referring forward [as he did] to an ideal civilization" (126). Spencer embraced, furthermore, a "right to ignore the state" (206–16). Advanced as a corollary to the law of equal freedom, this "passive" withdrawal permitted a refusal to pay taxes (211).

This was not Bradley's rights individualism. Indeed, the "chief document" of Spencer's individualism (Taylor 1992, 4) was *The Man Versus the State* (1885), a response to "ever multiplying coercive measures" by the British social welfare state (1885, 13). The abridged and revised *Social Statics*—which abandoned land nationalization and "the right to ignore the state"—was published in 1892 in a single volume with *The Man Versus the State* (Spencer 1892), a sequence that put the revised version at considerable distance from the original.

With Cooley (1868) and the early Spencer (1851) newly separated from their reputations, I turn to explore proximate roots of the conceptual shift to modern rights individualism. Novak (1996, 241) identifies "the crisis of slavery" as a source of that shift, indicating that "[a]bolitionism, emancipation and radical Republicanism renewed interest in the inherent, natural and absolute rights of individuals" (244). However, such a link must be carefully drawn, as there is no automatic link between antislavery and atomistic individualism.

First, C. J. Salmon P. Chase, an antislavery Republican who defended fugitive slaves and led the precursor Liberty Party in Ohio, joined the dissent of Field. Chase had fallen ill in 1870 but had returned to the Court in 1871, long enough to consider Bradley's circuit opinion and make a choice in 1873. The dissent he chose was Field's.

More broadly, Republicans split on whether the Fourteenth Amendment protected "absolute" common law rights and Bill of Rights guarantees or protected all these rights on an "equal" basis (Nelson 1988, 117–23).[28]

Indeed, an understanding of absolute "title" in self-ownership was available—a new absolute right arising in an "unconnected" condition—that otherwise maintained the dual liberty paradigm. Race equality under law, with attendant disputes about its reach, could have been instituted within the terms of the dual paradigm.

Writing in 1851, Frederick Douglass rooted the necessity of civil government in "man [as] a social as well as an individual being…endowed by his Creator with faculties and powers suited to his individuality and to society." He stated, "[i]ndividual isolation is unnatural, unprogressive and against the highest interests of man" (Foner 1975, 208). Expressing tenets of the well-regulated society, Douglass's view cautions against the equation of abolitionism with atomistic individualism.

Regarding "free labor ideology" (Foner 1970) as a source of rising individualism, Republican ideology might be examined in terms of a question—the relationship between class formation and antislavery politics—which Foner (1980, 76) suggests did not "appl[y] to America." Foner (1970) locates Republicans in the world of the "small producer," rendering the social mobility gospel of free labor/non-extension ("go west!") as true to life.

Recent studies on the development of American capitalism (Gilje 2006; Meyer 2003), however, indicate that capitalist development was more advanced than

[26] "Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man" (1851, 103). This was a "natural privilege" (93).

[27] "The right of property obtains a legitimate foundation…[when] an individual may lease from society a given surface of soil, but agreeing to pay in return a stated amount of the produce he obtains from that soil." (1851, 128)

[28] See, e.g., Cong. Globe, 39th Cong., 1st sess., 322, 476 (1866) [Trumbull; equal rights] and 1118 [Wilson; absolute rights], debating the precursor Civil Rights Act of 1866.

previously imagined and that the realities of commercial farming were already cleaving the countryside. If that's the case, then rising individualism associated with free labor ideology must be re-examined in relation to class formation, a major undertaking. Relevant in this regard, perhaps, is the transition to individual responsibility in private common law (involving railroads) of the 1850s (Schweber 2004) and the effort by conservative lawyers to contain the "potent" antebellum police power (Wiecek 1998, 52).

What is clear, returning to Bradley's dissent, is that a one-dimensional scheme of pre-social, absolute common law rights did not exist as a limit on state power in the antebellum era, and so that scheme could not "gain" national protection.

Justice Miller's majority opinion expressed concern for "the main features of the general system" (1873, 82), which scholars have maligned (Curtis 1986, 175–6; Foner 1988, 529–30). However, there was a basis for that concern. Bradley's dissent had reorganized the liberty paradigm—via fiction.

THE INSTITUTIONAL DIFFUSION OF THE NEW LIBERTY PARADIGM

Justice Bradley, of course, was on the losing side in *Slaughter-House.* However, he tied his reorganization of police powers to all the clauses in Section One, including the due process clause. The new police powers model was established in *Munn v. Illinois* (1877), housed in the architecture of due process.

Munn involved Granger legislation—a law fixing the maximum rates charged by grain elevator firms in the Chicago area. The firm of Munn & Scott challenged the Illinois law, claiming it deprived them of private property under the due process clause. The Court, 7–2, denied the claim and upheld the law.

According to Gillman (1993, 68), *Munn* nationalized an antebellum police powers methodology that entailed "distinguishing public from private legislation." He cites as evidence the judicial agreement in *Munn* that legislatures could regulate the prices charged by a "public" business. The dissent "merely disagreed" (69) with the majority's judgment that Chicago's grain elevators were public in character.

As I have emphasized, however, the antebellum methodology entailed more than distinguishing public from partial legislation. The harm of partial legislation to "common rights" was a key part of the framework.

In *Munn*, all the justices treated substantive rights, not "common rights," as the limit of the police power. Writing for the majority, and borrowing heavily from a Bradley memo, C.J. Waite stated, "When property is affected with a public interest, it ceases to be *juris privati* only" (1877, 126; also 127, 129, 132). The power to regulate, he added, "does not confer power upon the whole people to control rights which are purely and exclusively private" (124). Here was the new substantive-rights limit on exercises of the police power: the infringement of purely private rights. No substantive right was violated, however, because the grain elevators were deemed "affected with a public interest."

Illustrative is the contrast with the Illinois Supreme Court in *Munn v. People* (1873). The Illinois court ruled against Munn & Scott, but on the ground there was "no taking" (93). "Possess[ion]…remains to them untouched" (90). The rate regulation could proceed because title remained unimpaired, an approach consistent with Kent's compendium and permitting broad regulation. The *Munn* majority did not take that approach.

As for the construct, a "business affected with a public interest" (Scheiber 1971), it appeared in tandem with the establishment of the new "purely private" rights limit on the police power. For Novak (2022, 109, 138–45), *Munn's* significance lies in the democracy-enforcing dimension of the "public business/utility" construct, which significantly limited the economic reach of cases in the "laissez-faire canon" (106–7). With the spread of the public utility and the new "purely private" rights limit on the police power traced here—with its *Slaughter-House* lineage at far remove from Pound's (1909, 457) "causes" of liberty-of-contract doctrine[29]—a new understanding of Gilded Age rights individualism and its scope are within reach.

Dissenting vigorously, Justice Field converted to the individualist police powers model, becoming its evangelist. Calling the rate regulation partial (1877, 140) and assimilating the "use" of property to title/ownership, Field argued that if the majority opinion were sound law, there was no protection "against invasion of private rights" (140). Institutionally diffused and used for different purposes, Bradley's reorganization of police powers was now an "event" in Pocock's (2009) sense.

The diffusion of Bradley's model continued, for example, in *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota* (1890). A Minnesota statute gave the state railway commission ultimate decision-making power over rates, and in a 6–3 ruling, the Court invalidated the law. This time, Field was in the majority.

According to the Court, the statute was not "general legislation" (1890, 455). The "lawful use" of property included a due process right to "reasonable profits" (457) and therefore the assessment of railroad rates was a "judicial function" (Id.). All the justices treated substantive rights as the limit on police power, with Bradley protesting the majority's expansion of the "private rights" category. The railroad company was "chartered as an agent of the state," stated Bradley (461), and so rates were a public "prerogative." No private right, therefore, was at issue in this instance.

In *Lochner*, the Court invalidated as partial legislation a maximum hour law for bakers because it denied

[29] Pound characterized Gilded Age individualism as deduction from "conceptions" that were "dead" (1909, 457, 462); supported by purely private "constitutional models" dating from the Founding (460) and "common law antipathy to legislation (462); and having its "fountain head" in Field's 1873 dissent (470). All of this is inaccurate, starting with the newness of Bradley's "absolute rights" concept; the eclipse of the dual liberty paradigm; and the use/diffusion of the individualist model for divergent purposes.

the substantive "right of the individual to his personal liberty" (1905, 56). This was the telltale sign that the decision expressed not the police powers framework of the antebellum era but the framework as reworked by Bradley. At the same time, *contra* Bernstein (2011), the individualist/natural rights elements in *Lochner* were but a post-war development.

By 1923, the new model had extended its reach. In *Meyer v. Nebraska* (1923, 399), the Court provided a list of substantive "liberty" rights protected under the due process clause, including parental rights, citing a string of decisions beginning with *Slaughter-House* (Id.). The new individualist paradigm survived the fall of *Lochner*, in modified form, as the New Deal Court re-sourced substantive liberty rights from natural law to positive law, inaugurating a new stage of development in liberal rights.

CONCLUSION

The relationship between citizens and the state in the well-regulated society was governed by a dual liberty paradigm—foreign today—that was transformed in Bradley's dissent into a highly individualized liberalism. My account of that transformation is not a return to orthodox accounts of Gilded Age jurisprudence, as indicated above.

My analysis generates new questions. The rise of the well-regulated society needs investigation, and providing resources in that regard is Goldstein's (1986) popular-sovereignty theorization of a shift in the basis of judicial review from natural rights to written law between 1776 and 1803. How popular rule developed in conjunction with the dual liberty paradigm requires study.

An important implication of my analysis is that the dual liberty paradigm provided the governing context for antislavery politics, Republican Party formation, and the Reconstruction debates. Each has been studied with the presumption that the atomistic subject was already institutionalized. These crucial developments must be newly examined for their role in the institutional shift to modern rights individualism.

Readers might wonder, finally, if Bradley knew he was substituting Blackstone for Kent. The answer is unclear. Bradley was a committed Lincoln Republican who railed against Calhoun, but he had not been a judge. Before joining the bench in 1870, Bradley was counsel for New Jersey's Camden and Amboy Railroad. Regardless, the reconstruction of American liberalism must be understood at the institutional level, as must its rapid diffusion.

SUPPLEMENTARY MATERIAL

To view supplementary material for this article, please visit https://doi.org/10.1017/S0003055423000710.

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CONFLICT OF INTERESTS

The author declares no ethical issues or conflicts of interest in this research.

ETHICAL STANDARDS

The author affirms this research did not involve human subjects.

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