

capitalization of . . . property in the form of nego-

*in American Business* (Cambridge, MA: Belknap Press, 1977).

uable securities relatively widely dispersed in ownership, a corresponding separation of ownership title and management function, and management of the

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

*of Modern American Political Theory 1890-1920* [Berkeley: University of California Press, 1982]).

6. The Fourth Amendment provides that  
The right of the people to be secure in their persons,  
houses, papers, and effects, against unreasonable  
searches and seizures, shall not be violated, and no

ity. Since my purpose is primarily descriptive, I do not discuss  
Scott's normative critique of the interventionist hubris which has  
sometimes accompanied that process. The normative critique,  
however, constitutes a major theme of Scott's book.

9. *Ibid.*, 183.

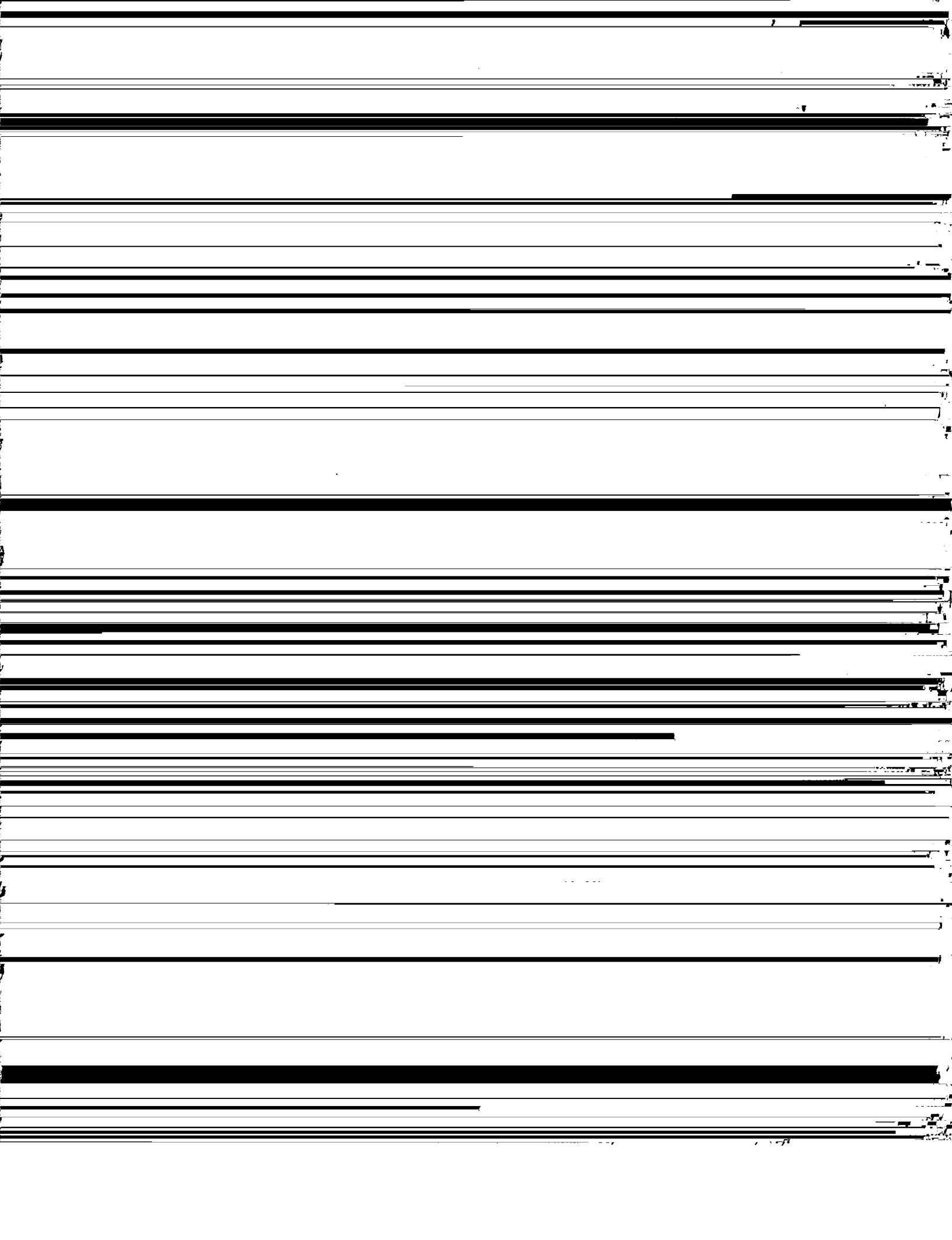
10. *Ibid.*, 80, 82.

grounds that the statute violated the liberty of contract as protected  
safed by the due process clause of the Fourteenth Amendment.

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

to be their traditional and, in some instances, ancient, common law and constitutional rights. These

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







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

Jr., and Henry Adams, *Chapters of Erie* (Ithaca, NY: Cornell University Press, 1968), 12.

progressive professor complained that:

The man who picks pockets with a railway re-  
bate, murders with an adulterant instead of a

poisoning] by noxious practices which have not  
yet come under the effective ban of public opinion,"

36. Ibid., 7.  
37. Ibid., 9-10.  
38. Ibid., 15.

34. Edward A. Ross, *Sin and Society: An Analysis of Latter-Day In-  
iquity* (New York: Harper and Row, 1907).

39. Ibid., 16.  
40. Ibid., 27.



esting variant on the famous frontpiece to Hobbes's *Leviathan*. In the frontpiece, however, the individuals comprising the state face inwards rather than outwards.

45. Ross, *Sin and Society*, 65–66.

nection with civil liberty," he announced, meant publicity in the transaction of the business of the public, in all branches." Such publicity was essential to making centralized, bureaucratic government free government. Lieber put it this way:

neck, *Building a New American State*. Under Adams's leadership, the

compel reluctant witnesses to give it under proper

ADAMS, which had met staunch resistance to more coercive forms of regulation, devised an approach involving the production of information in reports and on forms arranged in a manner that the Commissioners deemed to be most serviceable.

guaranty of their personal rights. This is sufficient, without subjecting a witness to an unlimited power of a legislative committee or a single branch of a legislative body. (Taylor, *Grand Inquest*, 50)

papers, are wanting [here].” But that is neither here nor there, since the government’s assertion of its sub-

offence; but it is the invasion of the indefeasible right of personal security, personal liberty, and private property. (*Boyd*, 116 U.S. at 630)

The connection between the Fourth Amendment’s search and

*and Society* that “The real weakness in the moral position of Americans is not their attitude toward the plain criminal, but their attitude toward the quasi-criminal” (Ross, *Sin and Society*, 46). Bradley’s innovation was to accord quasi-criminals the constitutional protections of quasi-criminals.

of Assistance controversy were a staple of the expositions of the clause in the major nineteenth century legal treatises. See, e.g., Cooley, *Constitutional Limitations*, 299–304.

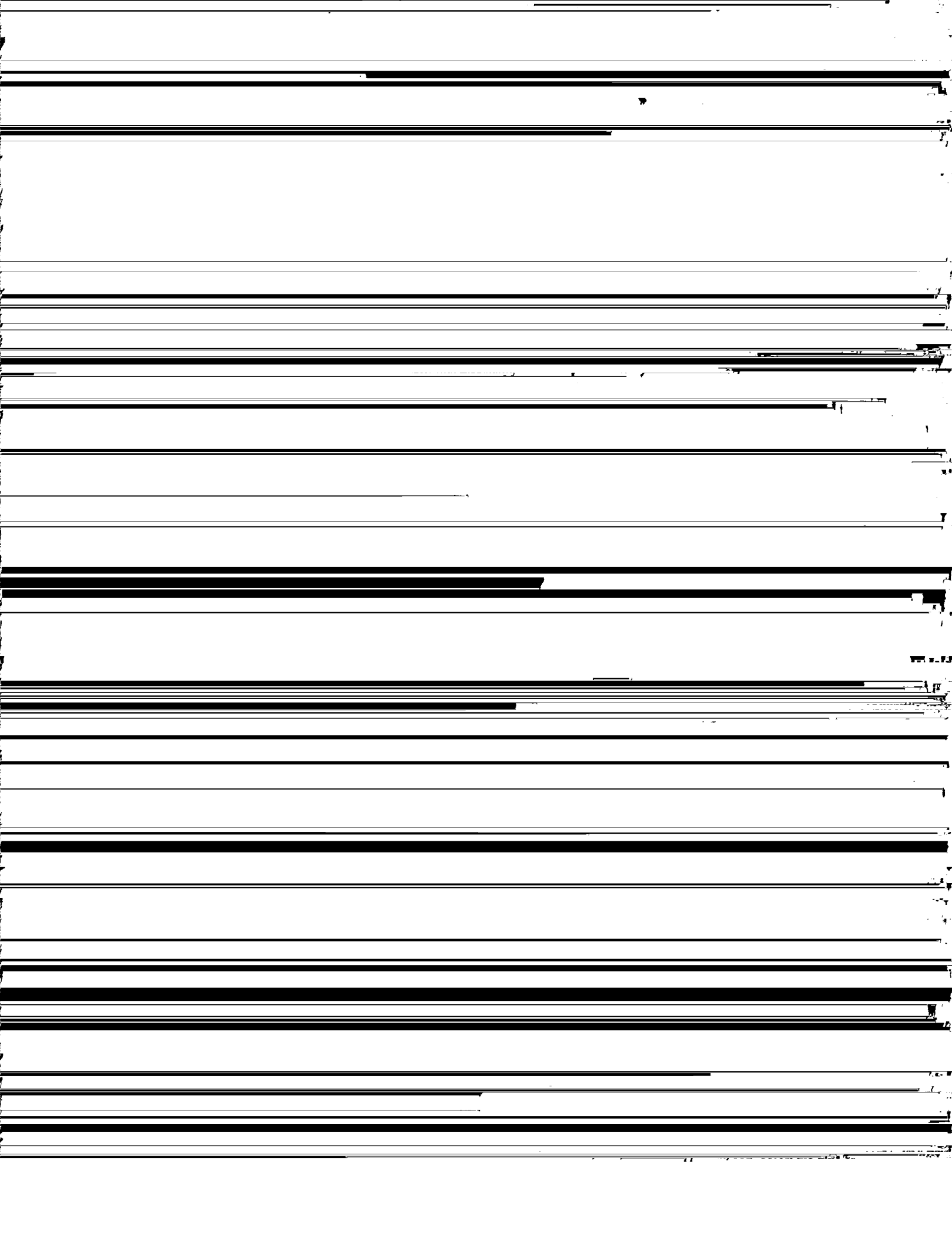
54. *In Re Pacific Railway Commission*, 32 F. 241 (Circuit Court, N.D. California, 1887).

1863-1897," *Journal of American History* 61 [1975]: 970-1005).  
56. *In Re Pacific Railway Commission*, 250.  
57. *Pollack v. Farmers' Loan and Trust Co. v. U.S.*, 157 U.S. 429 (1895), 158 U.S. 601 (1895).

58. See William G. Ross, *The Making of a Populist, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton: Princeton University Press, 1994).  
59. *Counselman v. Hitchcock*, 142 U.S. 547 (1892).  
60. Interestingly, the government unsuccessfully based its ar-

ongoing process of negotiation concerning state development which took place over the course of the subsequent thirty or so years.  
62. *Brimson*, 474.

of the Bureau that follows is drawn from *Sklar, Corporate Reconstruction*, 184-203.  
65. *Sklar, Corporate Reconstruction*, 190.



76. Croly, *Progressive Democracy*, 369–70.  
77. *Ibid.*, 26.

*Laissez Faire Came to the Supreme Court* [Princeton: Princeton University Press, 1942]; Sidney Fine, *Laissez Faire and the General Welfare*





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

Constitutionality of Investigations by the Federal Trade Commission," *Columbia Law Review* 28 (1928): 905.

93. Handler, "Constitutionality of Investigations," 934-36.  
94. *Ibid.*, 935.

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

opinion to his strenuous opposition to the U.S. Postmaster General's denial of mailing privileges to periodicals allegedly evincing a "seditious tendency" (Letter, Oliver Wendell Holmes to Herbert Croly, May 12, 1919, in *Holmes-Lashi Letters*, 152).  
104. *Harriman*, 417.

it decided that Hale could not refuse as a blanket matter to produce any books and documents properly re-

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

142 F. 808 (N.D. Illinois, 1906).

of corporate books and documents, see *Overman v. Lumber Co.*, U.S. 385 (1920).

of Literature on the 1940s," *Political Science Quarterly* 113 [1999]: 689-702).

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

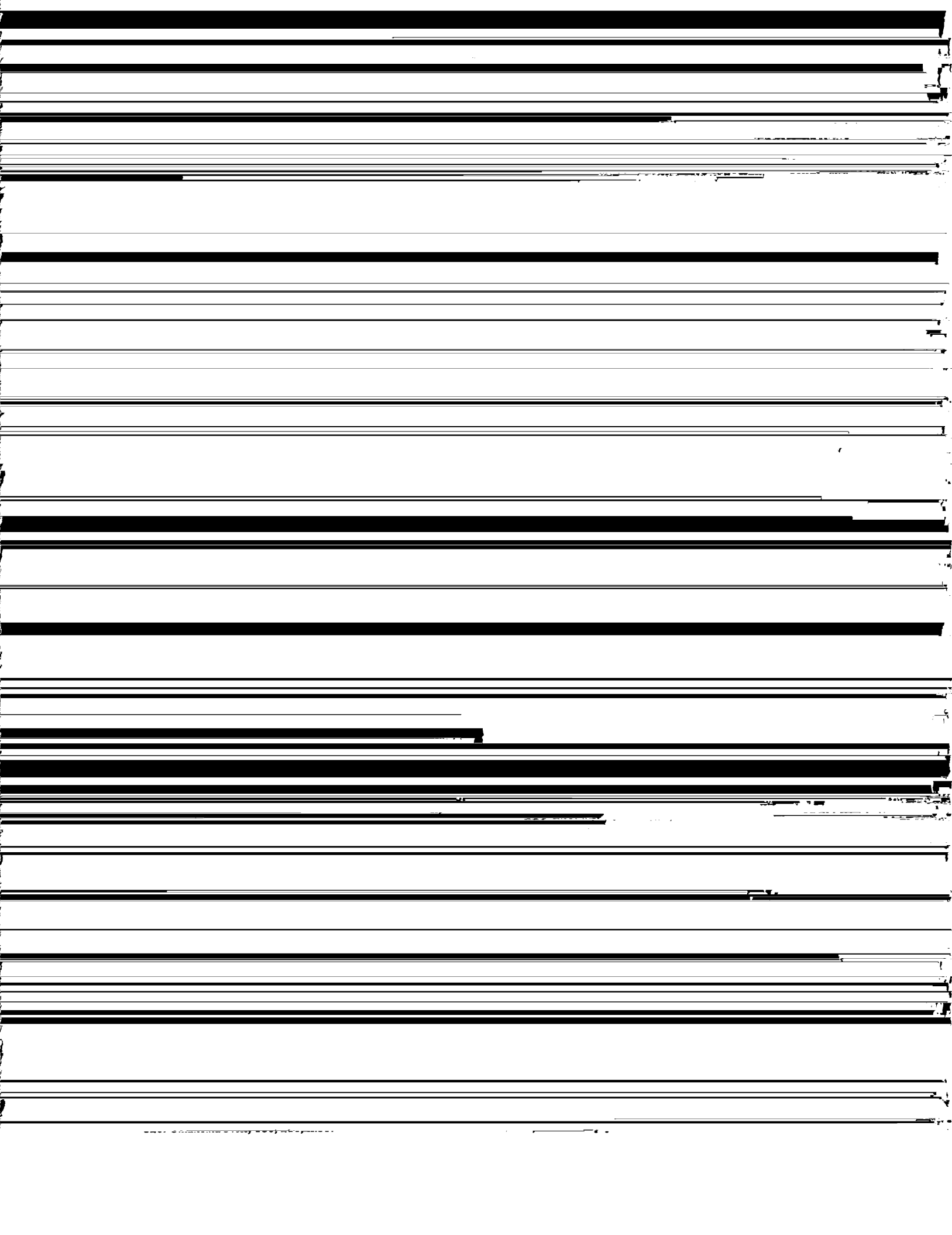
114. By statute, the gasoline coupons remained the property of the Office of Price Administration and were subject to inspection by it at all times (*Davis*, 328 U.S. at 588).

most businesses in the country were in possession of

- 115. *Ibid.*, 592.
- 116. *Ibid.*, 594-95.
- 117. *Ibid.*, 596.
- 118. *Ibid.*, 597.

a traditional Fourth Amendment argument of the sort Justice Field had made in his 1887 *Pacific Railway*

- 119. *Ibid.*, 602.
- 120. *Zap*, 328 U.S. at 633.
- 121. *Oklahoma Press v. Walling*, 327 (U.S. 186 (1946)).
- 122. FSLA, Sec. 11(a).



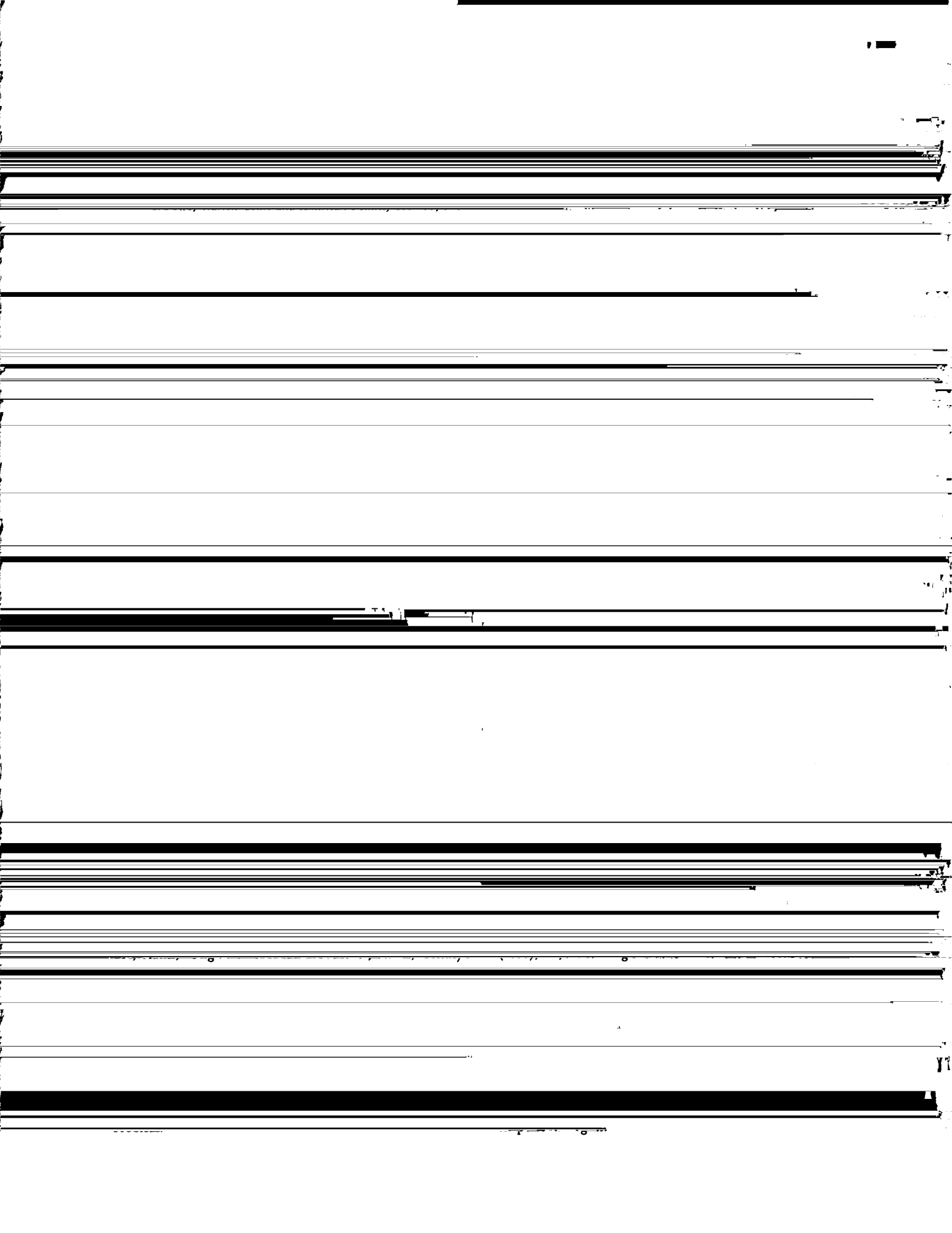
17000, sec. 2001 [7], see also sec. 2001 [6] and sec. 2001 [7] (Committee Note of 1946 to Amended subdivision (b) stating purpose of the Amendment to "allow a broad search for facts").

134. FRCP 26(b)(1) allows discovery of any nonprivileged

as legacies of progressive reforms undertaken as part of the effort in the late nineteenth and early twentieth centuries to create a new American state.

140. William Stuntz declares that, today, "subpoenas are sub-





(Berkeley: University of California Press, 1991).

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

lateral damage to the former and that, moreover, that such progressively-inclined reformers as Louis Bran-

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

Private Distinction," in *Public and Private in Thought and Practice: Per-*

*sonal and Social* (Oxford University Press, 1977).