

## Counting Cases About Milk, Our “Most Nearly Perfect” Food, 1860–1940

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At the turn of the 20th century, as more people in the United States started moving to urban areas, the quality of the milk supply became one of the preeminent public health challenges of the day and a centerpiece of the Progressive agenda. Governments passed ordinances and statutes to safeguard the milk supply and sanctioned violators of these laws. This study collects the published cases where judges were asked to enforce these health regulations.

Contrary to the Revisionist reading of Progressive Era constitutional history, these cases demonstrate that enforcement of these health laws became more difficult during the Progressive Era. Parties resisting these laws made broader constitutional challenges to the laws more often. While the number of victories for these parties remained steady, the scope of their victories became broader. The study also throws light on the early use of “regulatory crimes.” Governments were more likely throughout the study period to use a criminal rather than a civil enforcement process. Surprisingly, the use of criminal enforcement did not affect the government’s success rate in these cases.

### Introduction

**M**ilk today seems so benign. But at the turn of the 20th century, safe milk was one of the preeminent public health challenges of the day. As people in the United States moved from the countryside into cities, their milk supply became unhealthy. Milk from cows in the country was transported further and stored at higher temperatures than in the past. Milk produced closer to the cities came from cows kept under crowded and unsanitary conditions. Many city residents, especially children, were getting sick and dying because of contaminated milk.

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These threats to a food with special importance for children—praised as nature’s “most nearly perfect” food (Crumbine & Tobey 1930:17; Wain 1970:250)—spurred governments at all levels into action. Health regulators were confident they could solve the milk problem. Beginning in the northeastern United States in the 1860s, and spreading throughout the nation by the 1900s, governments passed ordinances and statutes to safeguard the health of the milk supply. They pursued and punished—sometimes as criminals—those wrongdoers who distributed unsanitary milk.

As a result of the rising tide of governmental activity between 1860 and 1940, milk health regulation figures in two of the most familiar stories in the canon of legal history. The first of these stories deals with constitutional history. The treatment of milk safety laws in the courts was a key example of attempts, often unsuccessful, to enforce Progressive Era health legislation. The account familiar to students of constitutional history emphasizes the judges’ hostility to health and safety regulation during the Progressive Era. Judges overturned many statutes and rules on constitutional grounds and were slow to accept the legitimacy of many laws defended as health regulations.<sup>1</sup> This judicial hostility to popular health and safety laws created an institutional crisis. By the end of the New Deal period, the backlash from this judicial effort to resist legislation led many judges to change course. They began to defer to legislative decisions about health and economic matters (the so-called “switch in time that saved nine”) (Fried 1998; Murphy 1972:41–167; Tribe 2000:1357–71).

Over the years, the truth of this oft-repeated story has come into question. Revisionists have pointed out that many health and safety statutes did survive constitutional challenges (Friedman 1985:355–58, 457–63; Semonche 1978; Urofsky 1985). Constitutional defeats for these laws did become more common during the Progressive Era, but the number of losses always remained low. Revisionists say that the occasional setbacks should not obscure an overall picture of judicial acceptance of health and safety statutes.<sup>2</sup>

These constitutional debates, however, have proceeded on the basis of surprisingly sketchy information about actual enforcement patterns. Most of the attention has focused on a handful of decisions by the United States Supreme Court and a few of the highest state courts, in areas ranging from worker safety to food and drug regulation. However, these famous cases do not

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<sup>1</sup> Politicians and judges at the time also framed the issue as a problem of obstructive judges (Brandeis 1916; Dodd 1913; Roosevelt 1910, 1912b; Roe 1912).

<sup>2</sup> Constitutional historians have also debated whether the judicial resistance to health and safety laws was consistent with constitutional doctrine as it existed at the time or was instead a major doctrinal change (Gillman 1993:10–15, 125–31; Kens 1991).

capture all the ways that judges blocked the enforcement of safety and health legislation.

Even the simplest questions about the enforcement of health and safety legislation remain unanswered. Did parties trying to enforce health regulations have more difficulty in some years than in others? Did they experience different obstacles in different parts of the country? This article is an effort to add depth to our knowledge about these baseline enforcement patterns in one limited but crucial area: milk safety regulation. Information about enforcement practices helps better inform our understanding of the constitutional law that courts were making at the time.

Milk also figures in a second classic story in the canon of American legal history: the origins of white-collar crimes. Although regulatory crimes date back to colonial times, the growth of the administrative state in the late 19th century saw the creation of many new regulatory crimes. The legislatures and city councils passing these laws were remarkably casual about their choice of enforcement systems. They often used criminal sanctions to take advantage of the existing enforcement bureaucracy: Local investigators and prosecutors were already available to discover violations and to file the court case (Friedman 1993:115–22). At the same time, these lawmakers ignored the usual features of criminal enforcement. They often bypassed the usual requirement of a criminal intent and created “strict liability” crimes: A person could violate these new criminal laws without knowing that he or she was doing wrong. They also chose fines as the typical sanction instead of prison or jail terms (Sayre 1933; Note 1938).

Thus, the distinction between civil and criminal enforcement was difficult to see in these early regulatory crimes. The consensus among legal historians is that the resemblance between regulatory crimes and civil sanctions became even stronger over time. After an early period of pursuing these cases in the criminal courts, government enforcers later pursued their claims about health and safety risks in the civil justice system. The wrongdoers no longer carried the stigma of criminals (Frank 1986; Reiman 1979).

If such a shift did in fact occur, it would offer lessons today. The early history of regulatory crimes might suggest that it is difficult to treat violations of safety and health laws as serious wrongdoing deserving of criminal prosecution through ordinary channels. Regulatory crimes will always resemble civil enforcement more than criminal.

Once again, the familiar account is based on limited sources: surveys of a few statutory codes and a few appellate decisions testing the validity of the new criminal statutes. The account does not trace the overall rate of success for prosecutors under these

criminal statutes, either in different places or in different eras. It does not monitor the use of particular arguments over time. We lack basic information about the ease or difficulty of enforcing criminal laws dealing with food safety.

These two stories—the judicial use of constitutional doctrine to block Progressive legislation and the willingness of legislatures to ignore ordinary constraints on criminal punishments when regulating food safety—illustrate a shortcoming of legal history. Legal history depends too much on the most familiar and accessible texts, sources such as small collections of appellate opinions or statutes. Good legal history must make room for both the grand themes and the enriching and corrective details. It must look beyond the eloquence of a few judges to find an eloquence in patterns of unremarkable decisions. In short, legal history needs a stronger empirical component.

In our view, milk health regulation is an ideal place to pursue this sort of inquiry. Rather than looking to a few notorious judicial decisions across a range of health and safety issues, we examine here a larger sample of ordinary judicial decisions in fewer substantive fields. We have collected and analyzed most of the reported judicial decisions in the United States dealing with the health regulation of milk between 1860 and 1940. The cases, taken together, give a more nuanced picture of enforcement patterns. They show the types of cases that government enforcers tended to bring, and which cases tended to succeed. In particular, these cases lead us to the following conclusions.

### **Increasingly Ambitious Challenges**

Parties who resisted the milk regulations changed their tactics over time. Early during our 80-year period, they were more likely to appear in court in a defensive posture, as a defendant facing criminal charges or a civil fine to be collected by the government. They typically did not raise constitutional challenges to the validity of the laws. Instead, they argued that there was some flaw in the proof in their case. They also argued that criminal statutes should be read to require intentional wrongdoing. Over time, however, parties resisting the enforcement of milk safety laws became more aggressive. They challenged the laws more often as civil plaintiffs rather than waiting to be charged with a crime. They attacked the entire regulatory scheme by raising constitutional claims. They urged courts to interpret the statutes to preclude whole classes of enforcement cases.

### Challenger Success at the Subconstitutional Level

Despite the increased aggressiveness of the challenges to these laws over time, the judges did not oblige by declaring the laws to be unconstitutional. The success rate for parties trying to enforce milk health stayed remarkably constant over most of the 80-year period, remaining in the vicinity of 65% of all reported cases. The success rate for enforcers stayed about the same, despite changes over time in the types of arguments parties raised and the types of arguments courts used to explain their decisions.

However, beneath the surface of this apparent stability over time, some changes were taking place. When enforcers did lose during the earliest years of our survey, the underlying regulation was likely to remain valid. When the government enforcers lost cases during the early years, judges dismissed indictments against criminal defendants because of a failure to present some type of required proof, or a failure to provide some required notice to the criminal defendant in the case at hand.

After the early period, the victories for those challenging milk regulations happened no more often, but they did become broader and more complete. For three decades in particular—from 1900 to 1919 and 1930 to 1939—judges who ruled in favor of parties resisting the milk safety regulations were more likely to invalidate the laws; on a few occasions, this meant a constitutional ruling favorable to the challenger. More often, the judges found non-constitutional methods to invalidate the milk health laws for entire classes of enforcement targets. They interpreted statutes not to reach entire groups of milk producers; they ruled that city councils did not make the proper findings before passing ordinances. The techniques were many, but the common effect was to create barriers to future enforcement for entire classes of cases. Thus, while the challengers of milk laws succeeded at a low and steady rate throughout the 80 years we studied, the *types* of victories they achieved changed over time. In later years, especially for the decades from 1900 to 1919 and 1930 to 1939, their victories became broader.

Some of this change in the types of victories for challengers was a function of new forms of regulation that appeared. In later decades, legislators created more specific processing and storage requirements and more onerous licensing requirements. Judges tended to give dairy parties broader victories when they challenged these innovative regulations; but the new forms of legislation were only part of the story, because judges also granted broader victories during the Progressive Era to dairy parties who challenged the more traditional “adulteration” regulations.

### **Distinctiveness of Regulatory Crimes**

Lawmakers addressing the health of the milk supply did indeed turn to the criminal justice system to enforce the new obligations of producers. From the beginning, criminal enforcement actions showed up more frequently than civil actions in the reported appellate cases. Typically, the local prosecutor filed charges based on a statewide criminal statute; only in the South was it more common to see criminal prosecutions based on local ordinances.

Like other regulatory crimes, these milk laws were different from more traditional crimes. The punishment imposed in these cases was virtually always a criminal fine rather than a prison term or some other restriction on liberty. Many of the laws also dispensed with any proof of bad intent, an omission that many criminal defendants pointed out (to no avail) during the early decades. Over time, the arguments about state-of-mind that dominate so much of criminal law almost disappeared from the milk enforcement cases.

### **Persistence of Regulatory Crimes**

Although the criminal cases enforcing the milk laws resembled civil cases in some ways, the transformation from criminal to civil enforcement was never complete. The enforcers of milk laws continued to rely mostly on criminal actions. Only in New York did government attorneys gradually shift from criminal to civil enforcement. The distinctive blend of civil and criminal features in milk safety laws was apparently acceptable to government attorneys and never provoked any effective movement for change among the targets of the milk regulations.

### **Comparable Success for Civil and Criminal Enforcement**

Although there are real differences between the criminal and civil enforcement processes, the bottom line in the milk cases remained about the same. Throughout the 80-year period, enforcers of the regulations succeeded in litigation at equal rates, whether they filed their cases in criminal court or in civil court. Whatever the advantages or disadvantages of the criminal process, they seem to have canceled one another out.

Overall, the milk cases show stable enforcement of an innovative legal regime. Lawmakers created an enforcement system that relied on the old and the new. Traditional enforcement bureaucracies (local prosecutors) proved their cases to the court under the traditional criminal standard of proof (proof of guilt beyond a reasonable doubt). Yet the pivotal criminal law issue of intent, together with the distinctive criminal sanctions of loss of liberty,

were missing. This hybrid enforcement system appeared early and remained the most common method of enforcement throughout the 80-year period.

The real story in the milk cases is not aggressive judicial use of the Constitution, or judicial hostility to strict liability crimes. It is the amount of stability the judges maintained. The outcomes changed surprisingly little, even in the face of massive changes toward regulation in the legal environment, clear changes in the types of arguments and requests the parties made, and the novelty of the enforcement process at work.

The argument proceeds as follows: Part I explains why milk safety regulation is a critical and representative example of health and safety legislation during this period. As a result, it is appropriate to generalize from what we learn about milk laws. Part II describes the methodology we used to assemble and analyze the judicial opinions in this study. Part III explores what the milk cases say about judicial and litigant hostility to health regulation during the Progressive era. Part IV examines the components of the criminal process at work in these cases, and the effects of choosing a specialized criminal process rather than a civil process.

## I. Why Milk?

The history of milk regulation points to some general conclusions about the enforcement of public health legislation. It is possible to generalize from the milk regulation experience because it was a prominent and typical form of regulation. At first glance, however, milk regulation may seem an odd choice for a case study. Problems of milk sanitation today are not high on the public health agenda in this country. We do not often read in the newspaper about illnesses caused by contaminated milk.

Nevertheless, the “milk question” was among the most important public health issues of the late 19th and early 20th centuries in America. It was also one of the most striking success stories of public health, which helps to explain why it is a less pressing issue today. To understand enforcement of milk health regulation is to take a large step toward understanding the successful enforcement of all health regulation.

Public health reformers and activists of the late 19th century put milk at the top of their agenda. Samuel Crumbine and James Tobey, two public health officials and advocates, considered milk to be “the modern elixir of life. Without dealing in superlatives, it can indeed be said that milk is the most nearly perfect of human foods for it is the only single article of diet which contains practically all of the elements necessary to sustain and nourish the human system” (Crumbine & Tobey 1930:17).

Judges caught some of the enthusiasm of health advocates. As one Missouri judge put it, "Milk is the food of foods. The felicity of the table hinges on milk" (*St. Louis v. Ameln* 1911). An Illinois court described the importance of the question like this: "There is no article of food in more general use than milk; none whose impurity or unwholesomeness may more quickly, more widely, and more seriously affect the health of those who use it" (*Koy v. City of Chicago* 1914).

Urbanization brought milk health problems to the attention of Progressive reformers. Cows producing milk near urban areas lived in small, unsanitary sheds and were fed "swill," a watery by-product of distilleries. In these close quarters, milk was often contaminated with excrement and other sources of disease (Hartley 1842:305–6; Mullaly 1853). Milk produced further from the city had to travel for a longer time and pass through more hands. Because milk is perishable and is an effective medium for the growth of bacteria, it became a special health risk when transporting it long distances. At every step along the way, some producers and distributors allowed the milk to become too warm or left it uncovered. Some stored it in unwashed containers. In an effort to cut costs, some added water or removed cream from the milk. Other times they failed to process all the milk properly (by failing to pasteurize it, for example). Some even added sugar, bicarbonate of soda, chalk, or other substances to hide the smell or taste of spoiling milk (Leavitt 1982:156–63; Okun 1986:9–10, 116–19; Parker 1917:229–30). These practices made the milk supply a matter of regular public concern, discussed in newspapers, medical journals, and public health circles (*New York Times* 1895; Rorer 1902).<sup>3</sup>

Scientific developments of the day combined with urbanization to create momentum for milk regulation. Chemical analysis made it possible to determine, through simple field tests, the composition of milk and the presence of additives (Frederiksen 1919:18). By the 1880s physicians were convinced that milk containing water and other contaminants was a threat to the nutrition and health of urban dwellers. Pediatricians declared that adulterated milk was a major cause of health problems among children (King 1993:110–11; Curtis 1879:293; Harrington 1904:16; Hartshorne 1874:214; Wende 1900).

In the middle of the 19th century, epidemiologists assembled impressive evidence that contaminated milk had caused epidemics of several different diseases. For example, Dr. William Taylor in 1857 traced a typhoid fever epidemic in Penrith, England, to a single case of typhoid in the family of a milk producer. As the technical abilities of the public health authorities

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<sup>3</sup> For an analysis of the increasing coverage of the milk supply question in medical journals between 1870 and 1930, see North 1921. For a typical description of the role of news coverage in provoking public demand for milk regulation, see Leavitt 1982:160–73.



progressed, they discovered more and more cases of such milk-borne epidemics. During the decades following Taylor's discovery, epidemics of scarlet fever and diphtheria, as well as typhoid, were traced to a contaminated milk supply (Rosen 1958:287; Trask 1909). The new science of bacteriology also explored the causal link between impure milk and several deadly diseases (Tobey 1947:180–81; *People ex rel. Ogden v. McGowan* 1921). By the early years of the 20th century, bacteriologists had found a correlation between specific diseases and the level of bacteria found in milk (North 1921:243–53; Wain 1970:250–63).

Health reformers also emphasized milk sanitation because they linked the purity of milk specifically with the health of children. As one court put it, "Milk is not a luxury, it is a necessity. . . . Babies, the tender seed corn of the race, are virtually dependent on it" (*Rigbers v. City of Atlanta* 1910). Many other courts also mentioned the special place of milk in the diet of children (*Commonwealth v. Wheeler* 1910; *Borden's Condensed Milk Co. v. Board of Health of Town of Montclair* 1911).

Early public health reformers considered milk purity to be the key to lowering rates of infant mortality. By the middle of the 19th century, infant mortality became a leading measure of the sanitary conditions of individual cities, and health reformers gauged their success or failure by this measure (King 1993:106).<sup>4</sup> Initially, sanitary reformers tried cleaning up the urban environment with such measures as the proper removal of sewage. The stubbornly high infant mortality rate during the late 19th century, however, convinced reformers that a new approach was needed, and, by the 1870s, their emphasis had shifted toward the importance of proper nutrition (Meckel 1990:66–68; Park 1901). While the benefits of breastfeeding were well known and the practice was highly recommended to mothers, the reformers recognized that many babies were fed with cow's milk. The provision of a safe milk supply became a leading strategy in the drive to reduce infant mortality in the last decades of the 19th century (Meckel 1990:11–39; King 1993:109–17).

Every part of the country eventually passed milk regulations, but urban areas were the first to act. Ordinances appeared early in Boston, New York, and other large cities of the North. Milwaukee in the Midwest and a few cities such as New Orleans in the South and Los Angeles in the West passed ordinances a bit later (Meckel 1990:68; North 1993:285–89). The regulations started appearing in state statutes, as well (Tobey 1936:1–4). State and local law was far more influential than federal law in promoting

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<sup>4</sup> Vital statistics around 1850 demonstrated that the poor sanitary conditions in American towns resulted in shockingly high infant and child mortality rates (Smith 1979:68). One of the distinctive features of mortality in towns was the pronounced increase in infant deaths during the summer months due to diarrheal diseases. These diseases are spread by the ingestion of contaminated food and water.

healthy milk,<sup>5</sup> but the U.S. Public Health Service considered milk health to be such a high priority that it drafted the Model Milk Health Ordinance and promoted it actively for adoption at the local level (U.S. Public Health Service 1939). By 1920, milk regulations had reached every part of the country (Tobey 1924, 1934).

As the milk regulations spread throughout the country, death rates declined dramatically. The control of milk-borne diseases played an important role in the dramatic reduction of mortality in the United States from infectious diseases during the late 19th and early 20th centuries. For example, the annual death rate for infants in New York dropped from 248 per 1,000 births in 1885 to 80 per 1,000 in 1919 (Meyer 1921:11, 17–21, 130). In Chicago, in the 1870s, typhoid fever caused nearly 100 deaths per 100,000 persons every year. By 1920, typhoid had practically disappeared as a killer: The death rate was only 3 per 100,000 persons (Hoffman 1921:111). It is difficult to assess how much of this decline was due to the regulation and pasteurization of milk, since improved water supplies and other public health initiatives also played a part (Gorham 1921:77; Whipple 1921:161). But the rapid decline in summer diarrheal deaths lends support to the importance of clean milk as a cause of this decline, since contaminated milk was a leading cause of diarrhea and such contamination was at its worst in the heat of summer. Further, the cities that pioneered the effective regulation of milk experienced the earliest and most dramatic declines in infant mortality (Spargo 1910:230–33; King 1993:116–17; Leavitt 1982:188–89; Meckel 1990:89–90; Parker 1917:266–67).

In addition to health concerns, milk was an important subject of regulation because of the economic importance of the targeted industry. Milk constituted a surprisingly large portion of the food market, in revenue terms. The value of milk and milk products was 19% of gross farm revenue in 1939, or roughly double the value of wheat, corn, and the other grain crops combined (Thomas et al. 1949:19). Another clue to the importance of milk regulation was the amount of effort that some producers spent in resisting the regulation. Litigation on this subject was common. In fact, the “Key Number” system of West Publishing Company, formulated near the turn of the century as a method to classify reported judicial decisions, included a separate heading for “Milk,” suggesting a regular supply of such cases (West 1902a, 1902b). Many of the most famous Supreme Court cases from the early 20th century dealing with health and economic

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<sup>5</sup> The U.S. Department of Agriculture completed 2,391 prosecutions under the federal Food and Drug Act of 1906 in the 6 years beginning in 1907. By comparison, the Massachusetts State Board of Health completed 1,601 prosecutions of its state Food and Drug Act in the same period (Whipple 1917:118). Thus, a single state generated about two-thirds the prosecutions of the federal government.

regulation were, in fact, milk cases (*Nebbia v. New York* 1934; *United States v. Carolene Products* 1938; *Hannibal & St. Joseph R. Co. v. Husen* 1877; *Kimmish v. Ball* 1889; *Mintz v. Baldwin* 1933).

Another sign of the importance attached to milk purity was the use of criminal sanctions to punish those who threatened the safety of the milk supply. A great many of the early criminal statutes regulating food safety mentioned milk specifically. Even when anti-adulteration food laws were phrased in general terms without mentioning milk, they were drafted with contaminated milk in mind, and the enforcement funding was devoted heavily to inspections of milk (Hooker 1981:212–13; Rosenkrantz 1974:83).<sup>6</sup> Thus, milk “adulteration” joined a few other common threats to the food supply (such as adulteration of meat) to become some of the earliest regulatory crimes. Use of criminal punishments was a straightforward way to signal high enforcement priorities in the newly expanding administrative state early in the 20th century.

Milk sanitation touched on many of the broader themes of reformers in the Progressive movement. Between 1890 and 1920, these men and women worked to use government power to counteract the power of “special interests,” or large private enterprises (Keller 1990; Milkis 1999:6–9; Roosevelt 1912a:809). They had a special concern for the ills of urban dwellers, especially among children and the poor. This commitment led to support for child labor legislation and laws dealing with working conditions for women (Hofstadter 1955:163–212; Hamby 1999:45–47). Progressives framed the “milk question” as part of the same struggle to control the destructive power of “special interests” and their impact on the lives of the poor: In this case, the special interests were dairies and distributors of milk (Knox 1906:493). While milk regulation had some benefits for all city residents, reformers were most concerned about the effect of unsanitary milk on the health of poor children. Regulations to avoid contamination of milk often worked together with “milk depots,” philanthropic organizations that made reliable milk supplies (and education about healthy milk) available to indigent mothers (Straus 1917:75–84; North 1921:277–81).

Milk regulation was also a typical topic of Progressive regulation in its reliance on scientific expertise. Progressive Era reformers were devoted to applying science to public problems. They were convinced that science—and people with scientific expertise, employed in a full-time civil service—could resolve many problems that had lingered too long because of the corrupt political system (Kloppenbergs 1986:270, 385; Wright 1992:494–98). Public health departments all over the country were headed and

<sup>6</sup> All of this regulatory ferment at the local and state level produced the federal Pure Food and Drugs Act in 1906, establishing the Bureau of Chemistry, a predecessor to the Food and Drug Administration.

staffed by physicians and others with scientific expertise. They brought scientific sensibilities to the issue of milk safety (Leavitt 1982:163–69; Meckel 1990:67–74).

In sum, milk safety regulation was both more important and more typical as a subject for regulation between 1880 and 1930 than it might appear from our vantage point today in the early 21st century. Any difficulties in enforcing these high priority regulations would provide some evidence that health legislation more generally was difficult to enforce. Specifying those difficulties is the focus of Part III.

## II. Methodology for This Study

Our window into enforcement patterns is a set of more than 440 reported judicial decisions dealing with legal claims litigated by milk producers or distributors. The cases in the database are listed in Appendix A. The database covers only those legal claims based on threats to health, such as introduction of foreign substances into milk, a failure to follow proper sanitary practices, or removal of milk's nutritional components. The study does not include cases dealing primarily with the economic effects of milk distribution, such as challenges to the prices a distributor charged. Of course, it is not always self-evident whether a particular regulation is designed to protect health or economic conditions in the industry, or both (Walker 1928). In the case of milk, larger producers resisted the new regulations at first, but then cooperated with regulators after recognizing that obeying the health regulations would present larger problems for their smaller competitors (Leavitt 1982:173–74). We have excluded only those cases with the clearest economic motives: those involving improper pricing of products and those barring the use of a particular product that substituted for a dairy product, such as “filled” milk or margarine.<sup>7</sup>

We chose the time frame 1860 to 1940 because the most important innovations in milk sanitation took place during this time. The first health regulations for milk took effect in the 1860s (North 1921:285–86). Scientific advances, such as tracing epidemics to unsanitary milk supplies and creating instruments to measure the chemical composition of milk, took place starting about 1860 and continued into the early 20th century. Pasteurization methods became widely known and accepted by 1910 (North 1921:270–77). By the 1930s, these scientific innovations

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<sup>7</sup> Geoffrey Miller has chronicled the economic motives at work in the regulation of margarine (Miller 1979). The closest borderline case for us involved regulations calling for the labeling of skim milk. Such regulations were justified both as a way to prevent consumer fraud and as a way to promote health. Regulators said they wanted to assure that consumers would not be unwittingly denied the perceived health benefits of milk fat. In light of what we perceived to be mixed motives, we included the skim milk cases.

were an established part of milk regulation all over the country (Tobey 1927). Although milk cases would continue to occupy judicial docket space after 1940, an increasing number of them involved the complex pricing regulations that appeared at the federal and state levels in the 1930s and 1940s.

Our search included all of the states.<sup>8</sup> A combination of electronic and more traditional research in case digests uncovered the cases.<sup>9</sup> After identifying the relevant cases, we recorded designated information about each case in an electronic database.<sup>10</sup> The database includes fields recording basic citation information about the reported decision. It captures information about the litigants, including whether the party trying to enforce the milk laws was a government or a private party, and whether the dairy alleged to have violated the law was a plaintiff, a civil defendant, or a criminal defendant in the litigation. It covers some details about the outcome at trial, such as the winning party and the type of sanction imposed, along with the outcome on appeal. Some of the fields deal with various reasons that the parties and the courts gave, either for or against enforcement of the law. Others related to the subject matter of the milk law in question and the government responsible for passing it. More details about the important variables appear in Appendix B.

The variables that attracted our attention in the cases dealt with the outcomes at trial and on appeal, the procedural posture of the case, the types of parties in the litigation, and the legal sources of the arguments the parties raised (e.g., constitutional, statutory, or factual). Our variables placed far less emphasis on legal content. In this regard, our project carries out a working assumption of Legal Realism: The content of legal arguments is not sufficient to explain legal outcomes.

We do not assume that every refusal by a judge to enforce a milk safety regulation reflects “hostility” to regulation. Some refusals to enforce were surely based on the clear legal merits of

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<sup>8</sup> We chose a nationwide scope both because we were interested in exploring any potential differences among regions and because a national scope was necessary to yield a large enough number of reported cases to reveal meaningful patterns.

<sup>9</sup> When we first began to assemble this database, published decisions of state courts were not available on electronic databases such as LEXIS or WESTLAW for most of the period before 1940. Therefore, we employed a combination of traditional legal research methods to identify the cases. We started with the *Century Digest* and *Decennial Digests* of the West Reporter system, finding most of the relevant entries under headings such as “Milk,” “Food,” and “Adulteration.” We supplemented these cases identified in the digests with others identified in the works of James Tobey, who published several works and articles listing and describing cases involving milk health regulation. As electronic searches became available for earlier periods in the WESTLAW and LEXIS databases, electronic research allowed us to add approximately 15% more cases to the collection.

<sup>10</sup> Students helped with both stages of the process: the identification of cases and the entry of variables into the electronic database. We made the database entries ourselves for 40% of the cases. Independent student coders checked key variables for 40% of the cases that students had originally entered in the database and agreed with the original coding decision in more than 95% of the cases for each of the key variables.

the case. Nevertheless, we do assume that some cases present doubtful legal questions, where the outcome could go either way. In those settings, the judge's general attitude about regulation is likely to make some difference. Thus, we would expect that if judges in one period disfavor regulation more than judges in another period, they will decide more of those doubtful cases against the enforcing party.

Reported decisions (mostly appellate decisions) are—to put it mildly—not an ideal source for studying enforcement. Many enforcement decisions never come to light in an appellate opinion (Khan 1995:72; Priest 1987; Sanders 1998; Wright 2000). For instance, milk inspectors sometimes gave several warnings before trying to impose a penalty. Once the inspector sought a penalty against a processor for maintaining unsanitary conditions in a plant, the processor sometimes paid the fine without a fight (Frank 1986:87–88).<sup>11</sup> Most claims against producers probably never reached court; in criminal cases, the prosecutor might have declined a large number of the cases that inspectors or police officers referred to the office for prosecution. The few cases going to court usually ended with a judgment in a lower court, where the result would usually go unreported (particularly in those cases ending in a pretrial settlement). For these and many other reasons, appellate cases offer a narrow window on the enforcement world.

Nevertheless, reported court decisions create a serviceable historical record. First, a review of all reported decisions still yields a much richer account of enforcement practices than the more ordinary source for legal scholarship, a survey of selected high court decisions. Reported decisions include the highest courts in a state, some opinions from intermediate appellate courts, and some from a few trial courts. Second, appellate court rulings can influence the cases that criminal prosecutors and civil plaintiffs choose to file. When the appellate courts raise the hurdle for success, the trial courts are expected to enforce those rulings. Prosecutors and plaintiffs must account for these appellate rulings if they plan to enforce the law at the trial level. Third, for the historical period at issue here, the courts were more closely involved in formal enforcement activity than they are today. Unlike modern administrators, who can usually impose and collect fines by using their own internal adjudicative machinery, milk inspectors had to obtain judgments in court before they could impose penalties on violators without their consent (N.Y. Agricultural Laws 1893:c. 338, §§ 20–22). Finally, even though reported appellate decisions may not reflect all enforcement activity in the courts, they do represent some of the most important activity.

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<sup>11</sup> As one example of the “attrition” between the amount of enforcement and the number of published cases, note that there were almost 6,000 arrests for violations of health laws in New York City—for the year 1907 alone (Friedman 1993:284)!

They show the innovations in enforcement choices, because the enforcement methods considered innovative will also be most controversial and therefore more likely to be challenged on appeal.<sup>12</sup>

### III. Judicial Hostility to Milk Regulation

Beginning in the 1880s, safety and health legislation suffered some spectacular defeats in state and federal courts. State courts in New Jersey, New York, Ohio, and elsewhere struck down state efforts to license firms entering businesses such as gas sales, ferryboats, and banking (*Vickery v. New London Northern RR Co.* 1914; *Mississippi River Bridge Co. v. Lonergan* 1879; *In re Lowe* 1895; *Bennett v. American Express Co.* 1891; *Davenport v. Kleinschmidt* 1887; *Jersey City Gas Co. v. Dwight* 1878; *Chenango Bridge Co. v. Paige* 1880; *Marmet v. State* 1887; *State v. Scougal* 1892). State courts also invalidated laws limiting working hours for women and other workplace regulations (*Ex parte Kuback* 1890; *In re 8-Hour Bill* 1895; *Ritchie v. People* 1895; *Commonwealth v. Boston & Maine RR Co.* 1915; *State v. Miksicek* 1910; *Low v. Rees Printing Co.* 1894).

In the federal system, the most infamous of the Supreme Court cases invalidating a Progressive-sponsored safety law was *Lochner v. New York*, decided in 1905. The statute at issue in that case set the maximum working hours for bakers. Despite the assertions by the statute's supporters that limited working hours contributed to the health and safety of the bakers, the court declared that these limits went beyond the police power of the state. They violated the liberty of contract protected under the due process clause. *Lochner* was not the only example of a federal case restricting the state's power to regulate business interests. Other federal cases of the time looked to other constitutional doctrines, such as separation of powers or the commerce clause, to limit the regulatory power of the legislatures (Mendelson 1956).

People at the time thought something new was happening in the courts. A consensus formed that these judges were protecting industrialists and thwarting the popular will. Some dissenting judges and political observers of the day condemned these Progressive Era and New Deal judges as "activists" who had used the

<sup>12</sup> One further caveat is in order about the representativeness of reported appellate opinions. Many of the cases in our sample were appeals from criminal convictions. Since the government traditionally could not appeal unfavorable rulings of the trial court after the trial began, the appellate opinions are drawn from the group of cases in which (1) the trial judge dismissed the case before trial, or (2) the government obtained a conviction. This might affect either the issues raised on appeal or the relative strength of the parties' arguments. Presumably, the most doubtful cases brought by the government (those resulting in acquittals) would be underrepresented. This selection bias might also place a disproportionately large number of civil cases in the database. On the question of civil versus criminal enforcement, see Part IV.

Constitution to block legislation that they disfavored on policy grounds (Frankfurter 1937:115–16; Brandeis 1916; Dodd 1913; Roosevelt 1912b). For several decades, legal scholars and historians reached the same judgment (Mason & Beaney 1959:151–66, 217–47; Paul 1960:233, 237; Swisher 1943:520–21; Twiss 1942:132; Mendelson 1956).<sup>13</sup>

Since then, historians have traveled at least two paths from this point of departure. First, some have focused on the motives of these obstructive judges. Why did the judges take an uncooperative posture? The standard answer of the Progressive historians explained these cases as the result of the judges' class sympathies or the product of the political environment. They emphasized the ways that these cases departed from earlier, more flexible readings of the Constitution (McCloskey 1960:105; Miller 1968:58–61; Swindler 1968:18–38; Hovenkamp 1988; Lerner 1933:672; Roche 1963).<sup>14</sup>

Over time, however, historians revised this account to offer more sympathetic portraits of the motives of judges who struck down Progressive legislation. They noted the power of precedent at work and argued that the courts were simply applying traditional legal doctrine to new situations (Gillman 1993:10–15, 125–31; Benedict 1985; McCurdy 1975). An important part of constitutional doctrine of the 19th century was its condemnation of “class” legislation. Under this constitutional regime, legislatures could only pass laws with some general benefit to the public, but could not pass a law that simply protected one group in society at the expense of another (Fiss 1993; Horwitz 1992:3–7; Bernstein 1993). While the “police power” of the state could be used to protect groups against genuine threats to health and safety, any incursion on traditional common law rights of contract or property was presumed to go beyond this police power and to enter the realm of “special interest” legislation. Thus, according to these Motive Revisionists, the judges were not simply using the Constitution to protect the class interests of industrialists. The internal logic of a familiar legal order led these judges to invalidate some popular measures that protected workers or other groups who were disadvantaged in a capitalist system.<sup>15</sup>

Those traveling the second path have shown more interest in results than in motives (thus, we give them the title Results Revisionists). These constitutional historians question whether the famous cases striking down Progressive legislation were typical judicial actions at the time. Were judges truly more obstructive than usual during the first decades of the 20th century?

<sup>13</sup> For more recent assessments still supporting the basic outlines of the Progressive critique, see Ross 1994, Clinton 1994, Kens 1991, and Lasser 2000.

<sup>14</sup> For historiographical overviews of *Lochner* Revisionism, see Rowe 1999.

<sup>15</sup> For a similar Revisionist account of the Supreme Court during the New Deal era, see Cushman 1998.



Several legal historians over the years have reminded readers that the courts *sustained* some safety and health legislation, even when they were striking down some of these laws (Freund 1904; Brown 1927:943, 945). Historians tallied up the results in the U.S. Supreme Court and elsewhere and then drew various lessons from the totals. For some, the overall pattern of cases showed that the courts were less sympathetic to business interests than it might first appear (Warren 1935:740–47; Powell 1924:555; Warren 1913:294–95), while others found in this pattern more reason to believe that judges were obstructing legislation that they disfavored.<sup>16</sup>

More recently, historians have argued more comprehensively that the “obstructionist” or “conservative” label is misplaced, because the famous cases invalidating various regulations were not typical judicial actions. These scholars point to the large number of statutes that survived constitutional challenges and go beyond a tally of the cases to demonstrate the importance of the regulations that survived. Judges upheld the statutes in the face of constitutional challenges far more often than they struck them down (Beth 1971:215–30; Friedman 1985:311–18, 384–402; Semonche 1978; Chomsky 1993; Phillips 1997; Urofsky 1983:70, 1985:64).

Results Revisionists also point out differences among cases, depending on the subject matter. They distinguish between legislation dealing with economic justice issues (such as wages and utility or railroad rates) on one hand and health and safety legislation on the other hand. Judges, they say, were far more likely to enforce the latter (Beth 1971:219–30; Post 1998:1505–29). Health and safety laws were less likely to be viewed as “class” legislation and more likely to be seen as traditional and legitimate exercises of the state’s police power.

A Results Revisionist history that depends on a tally of constitutional rulings from one period misses several important truths. First, the fact that judges upheld more laws than they struck down during a single period does not tell us whether the judges were *more* hostile to social legislation in one period than in another. The historical claim about the obstructive actions of judges in the Progressive period is comparative. A tally from one period does not address the Progressive claim that judges in the period were less deferential to the legislature on some forms of regulation than judges in *other* periods.

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<sup>16</sup> After constructing such a tally of Supreme Court cases, Benjamin Wright (1942:153–55, 158–61) concluded as follows: “[T]here were 159 decisions under the due process and equal protection clauses in which state statutes were held to be unconstitutional, plus 16 in which both the due process and commerce clauses were involved, plus 9 more involving due process and some other clause or clauses. Had the Court adhered to the interpretation of the due process and equal protection clauses stated in the Slaughter House opinion, less than a score of these decisions would have been possible.” See also Frankfurter 1938:97.

Second, judges can show hostility to social legislation through non-constitutional rulings, as well. A judge skeptical about the value or legitimacy of a law would not necessarily rule it unconstitutional. More likely, the judge would disallow the penalty in the case at bar, but allow the regulation to stand. This less sweeping method of resisting health legislation would be in line with general legal presumptions and traditions: Courts should avoid constitutional rulings if more narrow grounds are available, and challenges “as applied” are generally favored over facial challenges to a statute (*Burton v. United States* 1905; Klop-  
penberg 1996).

Non-constitutional losses for enforcers can have effects similar to a constitutional ruling. For instance, if a court reads a statute to require an element of proof that is difficult to obtain, enforcement must slow down or cease until the laborious legislative process can correct the statute. For a regulated party facing possible sanctions, one weapon is almost as good as another. They all can help avoid sanctions. Thus, the relative importance of constitutional and non-constitutional challenges is an important and neglected piece of the story about the willingness of judges to enforce Progressive legislation.

Milk cases are well-situated to address both of these shortcomings in the Revisionist history of Progressive Era judging. A study of milk safety enforcement makes possible a comparative study across time. Milk safety regulations appeared before the Progressive Era and became more widespread and more widely enforced just as the struggle to enforce Progressive legislation was peaking. The milk cases in this survey do suggest that enforcement became more difficult during a few critical periods early in the 20th century.

Second, the milk safety litigation reveals the importance of using non-constitutional arguments as methods of blocking enforcement. Because milk regulations were classic safety regulations and thus were more likely to avoid the constitutional problems that afflicted other “redistributive” laws, such as wage and hour laws, it is surprising to find that some were nevertheless declared unconstitutional. But even more important, milk safety regulators ran into enforcement problems because of the way courts interpreted the proof requirements under the statutes or the way they understood the facts in the case. These problems flourished even here in the field of food safety, where the regulators were theoretically on their strongest ground.

The sub-constitutional barriers to enforcing milk laws reflected (or helped to create) a more general atmosphere of hostility to regulation. That hostility created enforcement problems that are not revealed simply through a tracking of constitutional rulings.

### A. Increasingly Ambitious Challenges

The clearest changes in the milk cases relate to the litigants rather than the courts. Over time, parties challenging the enforcement of milk regulations became more aggressive. In early cases, they were content to argue against liability in their own cases. Later, however, those challenging milk regulations started making arguments with implications far beyond their own cases.

The first indicator of this change in litigating posture shows up in the party status of those challenging the enforcement. In early cases, the parties who wanted to resist the enforcement of milk safety laws simply waited and defended themselves after the state brought criminal charges; they were criminal defendants. As the years went by, however, “dairy parties” (a name we use to describe the party resisting the enforcement of the regulation, whether as a plaintiff or a defendant) became less likely to await criminal charges.<sup>17</sup> Instead, the dairy parties sought civil injunctions against the enforcement of milk regulations. Dairy parties also appeared as civil defendants in lawsuits when either the state or some private party attempted to enforce the terms of the health regulations. The data in Table 1 show this trend.

**Table 1.** Litigation Status of Dairy Party over Time, as a Percentage

Diary Party Status	1860–79	1880–89	1890–99	1900–09	1910–19	1920–29	1930–40	Total
Criminal Defendant	70%	95%	61%	63%	52%	27%	25%	<b>49.5%</b>
Civil Plaintiff	13%	0%	9%	12%	28%	45%	47%	<b>26.7%</b>
Civil Defendant	17%	5%	30%	25%	20%	29%	29%	<b>23.8%</b>
<i>N</i> =	23	37	46	76	99	56	105	442
				$\chi^2 = 94.53$		$df = 12$		$p = 1.1E-13$

The table’s data show the percentage of criminal defendants at its highest during the 1880s, decreasing in every decade after 1900. These decreases are statistically significant.<sup>18</sup>

What became of the dairy parties in later years who might, in an earlier day, have appeared in the cases as criminal defend-

<sup>17</sup> The years 1913 to 1922 created the first ten-year span when the proportion of criminal defendants (47%) fell below the sample-wide average of 49.8%.

<sup>18</sup> We test for statistical significance here and elsewhere in this article to eliminate the possibility that the differences among groups of cases are the products of random variation, given the sometimes small number of cases in a given category. It was necessary in Table 1 to group the earliest cases into periods larger than one decade to produce groups large enough to generate statistically significant differences. We use the same technique in several other tables.

The differences between the observed frequencies and the expected frequencies in Table 1 are statistically significant at the 99% confidence level, using Pearson’s chi-square test for independence. The table shows the values for the observed Pearson  $\chi^2$ , the degrees of freedom, and the value of  $p$  (the probability that the observed differences are the product of random variation). None of the cells in Table 1 have an expected frequency of less than 5; other cross-tabulations in this article will indicate if any cells have an expected frequency below 5. The relationship between the litigating status of the dairy party and the decade of the published case is moderately strong: Cramer’s  $V = 0.327$  (on a scale of  $-1$  to  $1$ ).

ants? Some became civil defendants in the later years: The percentage of civil defendants went from a low of 5% in the 1880s up to 29% in the 1930s. These dairy parties were still in a reactive posture, waiting for some litigant (either the government or a private plaintiff) to enforce the milk regulations.

The larger growth over time appears among the dairy parties who became civil plaintiffs, however. Through 1909, the overall average proportion of civil plaintiffs was 9%. After 1909, the number of dairy parties who were civil plaintiffs went up sharply, averaging 39% between 1910 and 1940. It appears, then, that the dairy parties gradually became more aggressive. After 1910, they did not wait for the regulators to make the first move, but instead sought a preemptive strike against the regulations.

The increased aggressiveness of the dairy parties also appears in the types of arguments they raised. In the early years, constitutional arguments did not often occur to the parties (or at least the reported decisions do not refer often to such arguments by the parties). By the years 1900 to 1909, however, dairy parties were no longer shy about invoking the federal or state Constitution. As the data in Table 2 show, they challenged the constitutionality of regulations in almost half of all the cases argued to appellate courts, and the rate remained that high through 1940.

**Table 2.** Percentage of Party Claims that Milk Laws Violated Constitution, by Decade

Constitutional Claims	1860–89	1890–99	1900–09	1910–19	1920–29	1930–40	Total
Cases	22%	33%	47%	42%	50%	49%	42%
<i>N</i> =	60	46	76	99	56	105	442
				$\chi^2 = 16.1$	$df = 5$	$p = 0.007$	

It is not surprising that there is a strong correlation between the party status of dairy parties and the willingness of parties to raise constitutional arguments. When dairy parties took the initiative to challenge milk regulations in the role of civil plaintiffs, they were far more likely to raise constitutional arguments, as the data in Table 3 show.<sup>19</sup>

Thus, dairy parties became more and more likely to raise constitutional arguments that would invalidate a regulation. They also were more likely to challenge regulations as civil plaintiffs, rather than waiting passively to defend a criminal charge. What explains this shift in the tactics of dairy parties around the turn of the century? Part of the shift could be attributed to the arguments available to parties at various times. The due process

<sup>19</sup> As the value for *p* indicates, the differences between the observed frequencies and the expected frequencies reflected in Table 3 are statistically significant at the 99% confidence level. The relationship between the dairy party's litigating status and the party's reliance on constitutional arguments is moderately strong, with Cramer's *V* = 0.315.

**Table 3.** Proportion of Dairy Parties Using Constitutional Arguments Against Milk Laws, by Party Status

Constitutional Claims	Criminal Defendants	Civil Plaintiffs	Civil Defendants	Total
Cases	40%	64%	21%	41%
<i>N</i> =	219	118	105	442
		$\chi^2 = 43.92$	$df = 2$	$p = 0.003E-7$

doctrines that culminated in the *Lochner* case developed only after 1880 or so (*Lochner v. New York* 1905; Cushman 1998). But was there something more at work, something about the legal environment to suggest to advocates for dairies that the newly available arguments would pay off?

### B. Litigation Success and Failure over Time

Despite the steady increase in the efforts of dairy parties to invalidate milk regulations entirely, courts did not change their enforcement patterns dramatically over time. For long stretches of time between 1860 and 1940, it seems that the dairy parties were wasting their breath. The enforcers of milk regulations always won more cases than they lost.

Nevertheless, there are signs of some difficult periods for enforcement. The willingness of courts to enforce the milk regulations dropped a little below usual levels at the start of the 20th century. More strikingly, when dairy parties did avoid enforcement, their victories became broader during the periods from 1900 to 1920 and from 1930 to 40.

For each of the reported cases in the study, we determined who won: either the party seeking to enforce the health requirements (the “Enforcer”), or the party arguing that the requirements should not result in liability in this case (the “Dairy Party”). We also identified two categories of litigation success for dairy parties. First, there were cases where the court declared that there was no liability in the case at hand, even though the basic validity of the regulation remained intact (“Reg Valid”). One common example would be the failure of government attorneys to prove at trial the particulars of the crime as alleged in the indictment. For instance, in *Commonwealth v. Luscomb* (1880), the indictment in the case alleged that the defendant “added” water to the milk. At trial, however, the government only proved the percentage of water in the milk, without proving how the water got there. Thus, there was a fatal “variance” between the indictment and the proof at trial, and the court reversed the conviction. The ruling was based on the proof in the case at hand and did not increase the proof required for other prosecutions in the future under the statute. Indeed, the statute prohibited the sale of *any* milk containing too few milk solids and too much water (even if the cow produced the milk in that condition); the con-

viction in *Luscomb* was doomed only because the prosecution made an unnecessary allegation in the indictment and then failed to prove it at trial. In all of these “Reg Valid” cases, the courts blocked enforcement without striking down the law or placing any group of regulatory targets beyond the reach of the law.

The second type of litigation success for dairy parties involved cases where the dairy party’s victory made future enforcement of the regulation more difficult or impossible (“Reg Invalid”). This category includes cases in which courts ruled that the statute violated the state or federal Constitution, in which a regulation or ordinance strayed beyond its statutory authority, or in which the court interpreted the provision to exempt an entire category of dairy parties.

For example, in *State v. Squibb* (1908), the Indiana Supreme Court sustained a trial court’s decision to quash an indictment against a dairy owner accused of selling impure milk. The pure milk statute said that “no person either by his servant or agent, or as the servant or agent of another person” shall have in his possession, with intent to sell, impure milk. The court held that this language applied “only to agents and servants and not to the principals themselves.” Because Squibb (the dairy owner) was himself in possession of the impure milk, the indictment could not stand. Although the judges admitted that the coverage of agents but not the principals was nonsensical, they claimed to be powerless to repair the statute: “We cannot make laws, and it is not within our province to supply these omitted words, even though no good reason may appear why they were excluded from the provisions of the statute” (*State v. Squibb* 1908:971). In all these “Reg Invalid” cases, the court created obstacles to enforcement that would reappear in future cases, at least for some types of defendants.

Thus, the outcomes we tracked are “Enforcer Wins,” “Dairy Party Wins, but Reg Valid,” and “Dairy Party Wins, and Reg Invalid.” Data in Table 4 show the changes over time in the percentage of cases reaching each of these three outcomes.<sup>20</sup>

If judges were becoming more reluctant to enforce health regulations during the Progressive Era, we might expect to see a lower rate of “Enforcer Wins” between 1900 and 1920. Data in Table 4 do not show any big decreases in the rate of “Enforcer Wins.” The average percentage of “Enforcer Wins” for the entire 80-year period was 66.1%. The period from 1900 to 1909 dipped below that average, but only by a small amount (down to

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<sup>20</sup> The differences between the observed frequencies and the expected frequencies reflected in Table 4 are statistically significant at the 95% confidence level, using the chi-square test for independence. The critical value of  $\chi^2$  at  $\alpha = 0.05$  is 18.3. The Cramer’s V for this table = 0.154, suggesting a weak correlation between the decade of the decision and the outcome on appeal.

**Table 4.** Types of Outcomes in Reported Cases over Time, as a Percentage

Outcome	1860–89	1890–99	1900–09	1910–19	1920–29	1930–40	Total
Enforcer Wins	63%	65%	62%	74%	66%	64%	66.1%
Dairy Party Wins, Reg Valid	37%	26%	21%	13%	25%	23%	23.0%
Dairy Party Wins, Reg Invalid	0%	9%	17%	13%	9%	13%	10.9%
<i>N</i> =	60	46	76	99	56	103	440
				$\chi^2 = 21.07$	<i>df</i> = 10		<i>p</i> = 0.021

61.8%).<sup>21</sup> However, this small decrease in “Enforcer Wins” disappeared right away. Enforcers fared exceptionally well during the years 1910 to 1919, when the success rate climbed to 74%.

The more important changes in outcomes over time appear in the *types* of losses that Enforcers sustained. In the earliest cases, when dairy parties won, their victories usually did not have wider ramifications. The court’s opinion did not declare the milk law to be unconstitutional, nor did the court announce that an ordinance extended beyond the statutory authority granted to the city’s lawmakers. In these early losses for Enforcers, courts did not interpret the law in a way that would make later enforcement more difficult for classes of cases. In short, “Reg Valid” wins were the most common form of victory for dairy parties.

However, in the periods 1900 to 1909, 1910 to 1919, and 1930 to 1940, the “Reg Invalid” wins for the dairy party stayed above average. The overall average for “Reg Invalid” cases was approximately 11%. The proportion for the years 1900 to 1909 reached its high point of 17%, and the proportion remained higher than ordinary for the next decade, 13% during the years 1910 to 1919. While the “Reg Invalid” rate dropped below average during the years 1920 to 1929 (at 9%), it went back up to 13% for the period from 1930 to 1940.<sup>22</sup>

This change over time in the type of dairy party victories might tell us as much about legislators as it does about judges. State legislators, city council members, and health regulators created more innovative and far-reaching milk regulations in later periods, so it is possible that judges were simply reacting to these new forms of regulation. In the early years, as data in Table 5 show, milk regulations usually prohibited “adulteration”—the introduction of foreign substances into milk or the removal of nutrients (such as fat) from milk.

<sup>21</sup> The differences between the observed frequencies and the expected frequencies for the “Enforcer Wins” category alone for each of the time periods were not statistically significant under the chi-square test.

<sup>22</sup> The differences between the observed frequencies and the expected frequencies for the “Reg Invalid” category alone for each of the time periods were statistically significant (but just barely) under the chi-square test, with  $\alpha = 0.05$ . At *df* = 5, the observed Pearson’s  $\chi^2 = 11.592$ , with an associated significance level of 0.041.

**Table 5.** Types of Regulations Enforced over Time, as a Percentage

Regulation Type	1860–89	1890–99	1900–09	1910–19	1920–29	1930–40	Total
Adulteration	87%	62%	68%	62%	44%	25%	57.0%
Processing and Storage	4%	2%	3%	13%	20%	19%	10.4%
Licenses and Inspections	6%	20%	19%	16%	29%	44%	22.9%
Labeling	4%	16%	11%	9%	7%	12%	9.7%
<i>N</i> =	55	45	75	92	45	81	393
				$\chi^2 = 78.23$	$df = 15$	$p = 0.001$	

As time went on, other strategies started to appear. It became more common to regulate the process rather than the end product. The regulations covered the conditions for processing milk (for example, requiring pasteurization) or the storage of milk (calling for cold temperatures and clean containers). Later regulations also relied more heavily on labeling, licensing, and inspection requirements, rather than simply mandating certain qualities in the final product.

Overall, judges were willing to enforce every form of regulation in most cases; but dairy parties were able to achieve broader victories for some types of regulations than for others. In particular, “Reg Invalid” outcomes were more likely to appear when the regulation in question dealt with processing and storage, or with licenses and inspections. Perhaps judges believed that these regulations contained greater detail and placed a greater burden on dairy parties who were trying to comply with licensing and inspection requirements. The data in Table 6 show the outcomes on appeal for each type of regulation.

**Table 6.** Types of Outcomes for Different Types of Regulations, as a Percentage

Outcome	Adulteration	Processing and Storage	Licensing and Inspection	Labels	Total
Enforcer Wins	68%	66%	69%	55%	66.6%
Dairy Party Wins, Reg Valid	25%	12%	12%	32%	21.4%
Dairy Party Wins, Reg Invalid	7%	22%	19%	13%	12.0%
<i>N</i> =	224	41	89	38	392
			$\chi^2 = 20.63$	$df = 6$	$p = 0.002$

But we cannot conclude that the broader victories for dairy parties during the decades from 1900 to 1919 and 1930 to 1940 were purely the result of more innovative and detailed regulations. For one thing, the types of victories for dairy parties changed over time, even for the “adulteration” regulations, the most traditional type. Although “Reg Invalid” outcomes occurred in approximately 7.1% of the adulteration cases overall, the rate moved up to 13.7% in the decade 1900 to 1909 and remained above average through the 1920s. Moreover, the small numbers



of cases for any given type of regulation in any given decade make it risky to rely heavily on any numbers showing the types of dairy party victories for such cases.<sup>23</sup>

Did the new forms of regulation *cause* a change in the enforcement trends, or did the new forms of regulation get enforced differently because they appeared in an era of greater judicial hostility to regulation? Another statistical approach, the binary logistic regression in Table 7, shows that cases decided during the decades from 1900 to 1919 were different from cases in other decades, even *after* controlling for the type of regulation. While this technique does not tell us whether changing judges or changing regulations were more important, it does suggest that the judicial decisions would have changed to some degree even without the new forms of regulation.

**Table 7.** Binary Logistic Regression for Type of Dairy Party Victory ( $N = 130$ )

Potential Influences	B	Standard Error	Wald	Significance
<b>Decade</b>			9.477	0.050
1900–1909	2.484	1.205	4.251	0.039
1910–1919	2.055	1.207	2.900	0.089
1920–1929	–0.763	1.509	0.255	0.613
1930–1940	1.047	1.198	0.764	0.382
<b>Regulation Type</b>			5.556	0.135
Processing and storage	2.095	1.066	3.859	0.049
Licensing and inspections	1.711	0.817	4.385	0.036
Labels	0.881	0.995	0.783	0.376
<b>Dairy Party Litigant Status</b>			5.204	0.074
Criminal defendant	2.722	1.206	5.096	0.024
Civil plaintiff	2.410	1.192	4.086	0.043
<b>Region</b>			6.910	0.075
South	2.258	0.973	5.385	0.020
East	1.303	0.926	1.980	0.159
West	1.897	0.847	5.016	0.025
<b>Arguments Party Raises</b>				
Conflicts with statute	3.114	0.813	14.662	0.000
Conflicts with constitution	2.125	0.662	10.295	0.001
No intent to adulterate milk	–1.715	1.545	1.232	0.267
Party lacked other intent	–1.200	1.319	0.828	0.363
Constant	–6.911	1.838	14.140	0.000
Nagelkerke $R^2$	0.691			

In Table 7 we examine the ability of various factors to predict the type of dairy party victory.<sup>24</sup> Positive numbers in the “B” column show factors that made it more likely for courts to give a broader “Reg Invalid” victory to the dairy party. Negative numbers in that column show the factors that made it more likely to see a narrower “Reg Valid” victory. The “Nagelkerke  $R^2$ ” figure

<sup>23</sup> We do not report cross-tabulations showing appellate outcomes over time for each of the types of regulation, because none of the table data is statistically significant. The cross-tabulation for “adulteration” regulations was the closest, with a significance level of 0.069.

<sup>24</sup> Because the independent variable (type of dairy party victory) is categorical, with only two possible outcomes, we use binary logistic regression rather than OLC regression.

estimates that the variables in this model capture approximately 69% of the reasons why courts would issue a “Reg Invalid” rather than a “Reg Valid” ruling for the dairy party.

The key column for our purposes is “Significance.” This number gives the probability that the impact of this variable on the type of dairy party victory shown in the table is a product of chance. Any value below 0.010 offers 99% confidence that the estimated impact is genuine.

As one might expect, the arguments that a dairy party raised had a strong influence on the type of victory achieved. Those who asked for more tended to get more. When dairy parties argued that statutes or regulations violated the Constitution, or when they argued that a milk ordinance exceeded the authority granted by statute to the city council, courts were more inclined to invalidate the milk safety law. The significance levels for these variables, at 0.000 and 0.001, are the strongest in the table.

It also comes as no surprise to see that the litigant status of the dairy party had an impact on the scope of victory. Both criminal defendants and civil plaintiffs were more likely than civil defendants to achieve a broader victory. While civil defendants were merely trying to fend off a civil fine in the case at hand, dairy parties who became civil plaintiffs were engaging in a peremptory strike: They hoped to prevent the regulators from enforcing the laws at all. And because a criminal conviction involves a greater threat to a defendant’s liberty and reputation than a civil judgment, the parties might present more ambitious challenges and courts might be more likely to accept broader arguments that would prevent unfairness to defendants in future cases.

In Table 7 we also show that the decade that cases were decided was still significant, even when controlling for the effects of the other variables, including the type of regulation. The decades listed in the table are all compared to the period from 1860 to 1899 (the “indicator” variable).<sup>25</sup> Cases decided from 1900 to 1909 are more likely (given the positive number in column B) than cases decided in 1860 to 1899 to result in a “Reg Invalid” victory for the dairy party. The figures for the years 1900 to 1909 are significant, showing a value of 0.039. The difference between the years 1910 to 1919 and the comparison period (1860 to 1899) is significant if we use a looser confidence level of 90%. Further, the decade variables taken together have a significant impact on the type of dairy party victory, at 0.050.

Two of the Regulation Type variables produce significantly more impact on the outcome than the comparison point, Adul-

<sup>25</sup> The indicator variable for the Region variables is New York; for litigant status it is Civil Defendant; for Regulation Type it is Labels. These variables do not appear on the table, because they provide the point of comparison for measuring the relative impact of the other dummy variables in the same group.

teration Regulations. Thus, the data in Table 7 point us to the sensible conclusion that *both* the legislators and the judges contributed to the change in the type of dairy party victories early in the 20th century.

One surprising finding in Table 7 involved the region where the cases arose. We divided the cases into four regions.<sup>26</sup> While region was not a significant factor in most cases, courts in the South and West were more likely to invalidate regulations than courts in the comparison group, New York.

### C. Constitutional Rulings in Milk Cases

In most of the “Reg Invalid” cases, courts rested their decisions on non-constitutional grounds. For instance, some interpreted the statute not to apply to an entire class of dairy parties (*State v. Langlade County Creamery Co.* 1927; *State v. Squibb* 1908); some declared that the city did not have statutory authority to pass the milk ordinance, either because the city ordinance exceeded the limits of a state milk health statute (*State v. Elofson* 1901; *City of St. Louis v. Klausmeier* 1908), or because it exceeded the more general legal boundaries on the city’s power to pass ordinances (*State v. Smith* 1896; *People ex rel. Larrabee v. Mulholland* 1880; *Pierce v. Aurora* 1899).

Even though the dairy parties raised constitutional arguments more frequently over the years, the courts mostly rejected such challenges. For instance, in *City of St. Louis v. Liessing* (1905), the City Milk Inspector took a sample of milk from the defendant’s milk wagon. The City Chemist tested the milk and discovered that it contained too little “ash” (the nonorganic mineral component of milk), an indication that the milk was improperly diluted. The defendant raised many different constitutional objections to the milk ordinance, but the court declared that the city “obviously” had constitutional authority, under the “police power,” to regulate trades that could be “injurious and dangerous to the community.” The Missouri Supreme Court also placed itself in the legal mainstream on this question: “Perhaps on no one subject has this police power been affirmed as often as the right to inspect and regulate the sale of milk and cream.”

Remarkably, however, there were a few cases declaring a milk health regulation unconstitutional. Health and safety laws (un-

<sup>26</sup> The South region included Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Missouri, North Carolina, Puerto Rico, South Carolina, Tennessee, and Virginia ( $N = 24$ ). The East region included Connecticut, Delaware, District of Columbia, Maryland, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island, and Vermont ( $N = 34$ ). The West region included Arizona, California, Colorado, Idaho, Indiana, Illinois, Iowa, Kansas, Michigan, Minnesota, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wisconsin ( $N = 45$ ). New York occupied its own region because of the large number of cases ( $N = 47$ ) and served as the reference category for this indicator variable.

like labor conditions legislation) were safe from constitutional challenges based on the federal due process clause. However, there were other constitutional threats to milk regulations. On rare occasions, courts used these other constitutional weapons. Over the years, less than 5% of the reported decisions invalidated milk laws and mentioned constitutional arguments as one reason for overturning them.<sup>27</sup>

For instance, in *Jewett Bros. & Jewett v. Smail* (1905) the South Dakota Supreme Court struck down a statute that required labeling of milk and other food products to indicate the name and location of the producer. Because the regulation applied to “wholesome food,” it was an improper interference with interstate commerce and therefore a violation of the federal Constitution. In other cases, the courts invalidated milk laws because they violated state constitutional provisions that required the legislature to pass laws dealing with only one subject, or to place an accurate description of the statute’s subject in the title of the bill (*City of St. Louis v. Wortman* 1908; *City of Hudson v. Flemming* 1910; *State v. Maitrejean* 1939; Friedman 1985:355–58).

In a few of these cases, the exact origin of the constitutional problem was more vague, although the courts were probably looking to the due process clause. For example, *People v. Beisecker* (1901) struck down a New York statute limiting the types of preservatives that could be used in butter or cheese. The statute prohibited the use of some “harmless” and “wholesome” preservatives such as sugar and liquor; thus, it extended beyond the legitimate police power. Without ever mentioning due process as such, the court said that a regulation “to be valid must be within reasonable limits and not of such a character as to practically prohibit the manufacture or sale of that which as a matter of common knowledge is good and wholesome.”

The earliest of these constitutional rulings appeared just after the turn of the century.<sup>28</sup> The fact that dairy parties starting winning even a few of these cases at this time shows how newly crafted constitutional arguments were bearing some limited fruit. This small group of constitutional rulings, together with the larger pattern of increased “Reg Invalid” rulings, portray for us a legal culture that was becoming more hostile to milk regulation, and perhaps to health regulation more generally. In the reported judicial decisions, victories for the dairy parties became broader and more debilitating for public health officials. We can reasonably assume that the precedential effects of these broader rulings hampered the work of milk inspectors in more routine

<sup>27</sup> Fewer than 20 of the 440 cases in the database meet this description.

<sup>28</sup> The decades from 1900 to 1909 and 1930 to 1940 saw the highest proportional number of cases with the courts mentioning constitutional issues as a reason not to enforce the regulation. However, given the small number of cases involved, the differences during these decades were not statistically significant.

(and unlitigated) cases. If these difficulties were present in one of the easiest areas to justify—regulation of a staple food for children—then it is easy to imagine that this hostile legal environment also affected other areas of regulation.

The story that emerges from the milk cases holds two lessons for constitutional history. The first lesson concerns the danger of clause-centered constitutional history; that is, a history tracing the judicial interpretation of a particular constitutional clause, such as the due process clause of the federal Constitution. There are very few milk health cases that strike down a statute or ordinance because of a conflict with the due process clause. A reader interested only in due process cases would conclude that appellate courts created no constitutional problems for enforcers of milk health laws. But that would be a mistake.

As we have seen, a few courts ignored or turned aside the dairy parties' due process arguments but held the laws invalid on another constitutional basis, such as the interstate commerce clause of the federal Constitution or the "one law one subject" clause of the state Constitution. A few others struck down the statutes without stating explicitly which constitutional clause was the basis for the ruling. When taken together, these scattered rulings on different constitutional grounds start to look more important. They also remind us, as scholars have shown in other contexts (Cushman 1998), that courts of the day did not find it necessary to identify a particular constitutional clause at stake. The judges saw a few central themes in constitutional law as a whole, and many particular constitutional texts (both federal and state) sounded those themes. Separate tracking of each constitutional clause is useful for some purposes, but a focus on any single clause understates the cumulative effect of constitutional rulings.

The second lesson of the milk cases points to the functional similarity between constitutional arguments and other ambitious (but non-constitutional) legal challenges. Some court decisions gave dairy parties a victory in the case at hand but left the enforcers of the law with the tools needed to win in future cases. Other victories for the dairy parties—some based on constitutional reasoning and others based on statutory interpretation or other legal grounds—compromised the power of the government or other parties to enforce the milk laws in the future. The rulings within this latter group were in some ways interchangeable. All created obstacles to enforcement in whole classes of cases. Whether the ruling was constitutional or not, the government's best hope to repair the damage was to start from scratch and redraft the law.

Not every constitutional ruling resembles an ambitious non-constitutional holding. Constitutional rulings might be framed so broadly that governments could not redraft their laws to re-

pair the problem. In these settings, there is real truth in the old bromide that non-constitutional rulings are easier to overturn in the legislature than constitutional rulings. But dairy parties virtually never asked for this sort of complete and permanent constitutional victory. More often, their constitutional complaints about the vagueness of the statute or its different impact on various economic groups could be remedied in a new statute.

Thus, our efforts to reconstruct the legal environment of another time cannot rely simply on a survey of “constitutional” versus “non-constitutional” arguments. We must instead recreate the continuum of legal difficulties that dairy parties could create when they were resisting enforcement of the law.

In the case of milk health laws, the range of legal difficulties got broader over time. Courts in milk cases created serious legal obstacles a little more often in the 20th century than they did earlier. Nevertheless, the courts did not change their behavior nearly so much as the parties did. It is possible that the success of antiregulation arguments in other areas (such as labor conditions laws, where constitutional challenges were theoretically more likely to succeed) spilled over into the milk cases. Attorneys for the dairy parties might have responded to changes in the overall environment for regulation as they framed their arguments. The judges in milk cases, however, changed more modestly than the parties.

#### **IV. Milk Adulteration as a Regulatory Crime**

Early in the 20th century, legal scholars began to notice something new happening in the criminal law. New criminal statutes called on judges to punish those who sold impure food, violated the liquor laws, practiced professions without a license, or took other actions to create social danger (Warner & Cabot 1937). Criminologist Edwin Sutherland, who coined the phrase “white collar crime” in 1939, called for even more emphasis on the wrongdoing of people who owned and operated businesses.<sup>29</sup>

One remarkable feature of these new crimes was their lack of an intent element. As Francis Sayre put it in 1933, a “growing stream” of these “public welfare offenses” made it possible to punish individuals “without regard to the mind or intent of the actor” (1933:52). This was a major shift from the traditional view of criminal law, which emphasized that a crime requires (in the words of Blackstone) both an “unlawful act” and a “vicious will” (1769:21). For regulatory crimes, the criminal law seemed to be

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<sup>29</sup> Sutherland’s 1939 address to the American Sociological Association became the basis for an influential book (Sutherland 1949). Sutherland was not describing a new trend in the criminal law; instead, he was calling for wholesale changes in the definitions of crimes to include more harmful and wrongful conduct by the operators and owners of businesses.

“shifting from a basis of individual guilt to one of social danger” (Sayre 1933:52).

The sale of impure food (especially milk and meat) was the quintessential example of a regulatory crime. Those who followed the new trend in the criminal law listed food cases prominently to document the trend (Ball & Friedman 1965:197). Some of the earliest examples of cases allowing a conviction without a showing of intent were food cases (*Commonwealth v. Waite* 1865; *Commonwealth v. Nichols* 1865; *Commonwealth v. Farren* 1864; *People v. Cipperly* 1886; *State v. Smith* 1872). Food and drug crimes were also among the first regulatory crimes to receive attention at the federal level (Sutherland 1949).

The observers of this trend in the criminal law focused on statutory language, on the *possibility* of a strict liability criminal prosecution. What were the actual enforcement patterns? Were these crimes merely symbolic, invoked only rarely? And if criminal sanctions were sought less often than civil fines, was there some rhyme or reason to the use of the criminal versus the civil process? Were the criminal charges reserved for the “worst” cases?

Contemporary observers and legal historians have offered some tentative answers to questions such as these about enforcement patterns. The consensus view makes a few related claims about enforcement.

First, enforcement was local. Lawmakers who passed the earliest of these statutes turned to criminal law to take advantage of the existing local enforcement machinery (Friedman 1993:115–18; Sayre 1933:68–69). Local boards of health were slowly spreading through the country late in the 19th century, and some of those boards employed inspectors who could uncover milk violations (Rosenkrantz 1974). Not many local boards of health had enough inspectors for the job, however, and the existence of these boards was still the exception rather than the rule for much of the 80 years comprising this study. So while not every jurisdiction had access to health inspectors, every local government already employed a sheriff or a police force. A disgruntled customer of a milk producer (either the ultimate consumer of milk, or a producer of cheese or other dairy products) could always report the miscreant to the sheriff (*State v. Field* 1921). Furthermore, every jurisdiction already employed a district attorney (or “city attorney” or “state’s attorney”) to prosecute crimes. This public official could file any cases involving milk violations. The judges in the criminal courts were accustomed to hearing the claims of the public at large against those who threatened the social order. Local criminal enforcement was a natural choice.

Second, the enforcers recognized the distinctiveness of these regulatory crimes and gave them special treatment. While the usual rules of the criminal process still applied (such as the high

standard of proof, showing guilt beyond a reasonable doubt), the sentences in these cases were unusual. More than in most crimes, judges in regulatory crime cases imposed monetary fines rather than jail terms or other restrictions on physical liberty (Packer 1968:354–63). And as we have seen, the statutes defining regulatory crimes allowed for strict liability, another atypical feature of these crimes.

The third feature of the consensus deals with the use of criminal versus civil enforcement over time. The traditional claim here is that criminal sanctions dominated the enforcement efforts soon after the creation of the regulatory crimes (even in places where an analogous civil sanction was available at the time). The criminal provisions were not window dressing, but were the primary method of enforcement. But then, the consensus argument says, civil sanctions became more important over time. After a while, most of the enforcement effort shifted out of the criminal courts and into the civil courts (Frank 1986:1–16; Ball & Friedman 1965).

Why did this shift happen? Some point out that criminal defendants in regulatory crime cases were more wealthy and politically influential than more ordinary criminal defendants. Over time, the theory goes, they used that influence to decriminalize their conduct (Sutherland 1949). Another possible explanation focuses on prosecutors and judges. Because of the higher procedural hurdles the government must clear in the criminal process, along with discomfort with the strict liability innovation, the “regulars” in the criminal system—prosecutors and judges—moved decisively away from criminal enforcement. Government attorneys believed they would win more cases through the civil system (Ball & Friedman 1965).

Here, we will use the milk cases to test each of the components of this story about enforcement patterns in regulatory crimes. We look first at local versus statewide enforcement patterns and the amount of reliance on specialized enforcers, such as state boards of health. We also review the evidence that the milk cases were indeed “atypical” criminal cases, with heavy use of monetary fines and widespread (but not universal) availability of strict liability.

The milk cases confirm some parts of the consensus on enforcement practices. However, they also create some doubt about any shift from criminal to civil enforcement. The milk cases show no shift to civil enforcement in most places. Instead, they show primary reliance on criminal enforcement all the way through the 80-year period. The criminal sanctions were not an empty threat or a symbol; they remained the ordinary enforcement technique. This stability of enforcement patterns might be explained by the results the government obtained: Despite all the differences between civil and criminal processes, the success rate



of enforcers remained virtually the same for criminal and civil cases in every time period.

### A. Dependence on Local and Criminal Enforcement

According to most accounts of regulatory crimes, enforcement began at the local level. Local ordinances defined the crimes, local police officers or sheriffs investigated them, and district attorneys prosecuted the cases. This was a convenient arrangement for lawmakers entering a new field: They did not need to create a new bureaucracy from the ground up.

The milk cases confirm that public officials at the local level were most responsible for enforcing the rules about milk health and safety. To begin with, it is clear that *public* enforcement was much more important than actions brought by private parties with an interest in maintaining the quality of milk. Granted, private parties sometimes filed civil suits against the providers of milk. Consumers filed some claims against dairies that sold unhealthy milk, and producers of dairy products such as cheese sometimes sued (or were sued by) their milk suppliers. Nevertheless, these lawsuits involving private “enforcers” and dairy parties only accounted for 14% of the cases of the database; in the remaining 86% of the cases, government officials served as enforcers of the regulation. The enforcers in most milk cases (both private and public) used statutes or regulations as the basis for their claims. Common law causes of action for breach of contract, fraud, or negligence in the processing of milk were always possible, but even parties relying on a common law theory usually pointed to violation of a milk regulation to support their claims (*McKenzie v. Royal Dairy* 1904).

Which public officials carried the load? The government attorney responsible for litigating the case was usually the local criminal prosecutor, as opposed to a health department attorney (*State v. Field* 1921). Most of the cases do not explicitly identify the investigators who gathered the evidence in the case. When they do identify the government official who discovered the violation, the cases mostly mention inspectors from the local health department (*Arden Farms Co. v. Seattle* 1939; *Brielman v. Monroe* 1938; *Walker v. City of Birmingham* 1927; *State v. Smith* 1912), with an occasional reference to inspectors from the state health department (*State v. Maitrejean* 1939; *Commonwealth v. Rapoza* 1931; *People v. Corcoran* 1920). While these cases suggest that local investigators were usually responsible for assembling the case, the number of cases that leave the investigator’s identity a mystery make it hard to say anything more specific on the question.

As for the source of the laws that governed the health of milk, government enforcers relied more heavily on state statutes than on local ordinances or local health department regulations. The

statewide laws account for 64% of the cases filed by governments, while local ordinances and local health department regulations created the relevant legal standard in 28% of the cases.<sup>30</sup>

The use of local ordinances as opposed to statewide statutes was much heavier in the South than in the rest of the country. Table 8 sorts cases into four distinct regions,<sup>31</sup> with New York occupying its own category because of the large number of cases it produced.

**Table 8.** State Versus Local Source of Law in Cases Filed by Government, by Region

Source of Law	South	East	West	New York	Total
State	29%	90%	73%	83%	71%
Local	71%	10%	27%	17%	29%
<i>N</i> =	52	70	60	64	246
			$\chi^2 = 61.82$	<i>df</i> = 3	<i>p</i> = 2.4E-13

Perhaps the heavier use of ordinances in the South resulted, ironically, from its rural character. Concerns about milk safety in urban areas would have been a problem for only a few places in the South. Many cities in Ohio, large and small, might encounter similar problems with milk, so that a statewide solution might seem plausible. But a problem with unhealthy milk in New Orleans or Birmingham might have been viewed as *sui generis* within those mostly rural states, and state officials would not presume to address the local problem (*Fuqua v. City of Birmingham* 1919; *City of New Orleans v. Charouleau* 1908). On the other hand, the low level of urbanization does not explain well why the South differed so much from the West, which was also mostly rural. Perhaps the heavy use of ordinances in the South reflects a political culture that was wary of centralized regulatory power.

The milk cases also reveal something about the interaction between criminal and civil enforcement over time. As we have seen, most histories of regulatory crime postulate that enforcement began in criminal court, but shifted gradually to civil sanctions. The published milk cases do not reveal such a trend in most places. Only in New York does the hypothesis hold true.

We saw earlier that the proportion of criminal defendants dropped steadily over time. The data in Table 1 show that 95% of the dairy parties between the years 1880 to 1889 were criminal defendants; by the years 1930 to 1940, only 25% of the dairy parties were criminal defendants. Those figures, however, distort the changes in governmental enforcement, because most of the changing mix of parties is explained by the growing number of

<sup>30</sup> The remaining cases involved efforts to enforce legal standards contained in both state and local laws.

<sup>31</sup> The jurisdictions in the South, East, and West regions are the same here as in Table 7.

dairy parties who became civil plaintiffs. Table 9 looks only at cases filed by state and local government enforcers.<sup>32</sup>

**Table 9.** Percentage of Criminal Versus Civil Cases Filed by State and Local Governments, over Time

Type Filed	1860–89	1890–99	1900–09	1910–19	1920–29	1930–40	Total
Criminal	98%	76%	75%	75%	67%	75%	78.9%
Civil	2%	24%	25%	25%	33%	25%	21.1%
<i>N</i> =	52	37	64	64	21	28	266
					$\chi^2 = 15.06$	<i>df</i> = 5	<i>p</i> = 0.01

It appears that governments filed criminal charges in virtually all cases before 1890, but only in about three-fourths of the cases in every decade after that. At first blush, then, the pattern of cases over time confirms the notion that governments shifted from criminal to civil sanctions.

However, regional differences explain much of the variation in Table 9. Most of the early cases came from Massachusetts and New York, where the first statutes and ordinances were passed. Massachusetts statutes and Boston ordinances from the 1850s and 1860s were the subject of much litigation; the same was true of New York statutes and New York City ordinances from the 1860s and 1870s (*Commonwealth v. Flannelly* 1860; *Polinsky v. People* 1878). Milk laws from other jurisdictions did not generate many reported cases until the late 1880s. By the end of 1940, however, the cases were coming from all around the country: The cases represent 43 different jurisdictions.

The reported cases in New York involved criminal sanctions far less often than the cases from other parts of the country. In Table 10 we sort the cases again into four regions.

**Table 10.** Civil Versus Criminal Cases Filed by Government, by Region

Type Filed	South	East	West	New York	Total
Criminal	92%	93%	90%	48%	78.9%
Civil	8%	7%	10%	52%	21.1%
<i>N</i> =	53	71	62	79	265
			$\chi^2 = 64.08$	<i>df</i> = 3	<i>p</i> = 0.009E-9

New York shifted from criminal to civil process fairly decisively and early (by 1890), while other states displayed much more modest changes. Table 11 shows the shift from criminal to civil filings in New York, along with the more stable rates of civil and criminal filings in the rest of the country.<sup>33</sup>

<sup>32</sup> One of the expected frequencies in Table 9 is less than 5. The Cramer's V for this table = 0.235, suggesting a weak correlation between the decade of the decision and the criminal or civil nature of the government enforcement.

<sup>33</sup> As the values for *p* in Table 11 indicate, the differences over time in Other Regions are not significant, while the differences in New York are. One of the cells in the cross-tabulation for Other Regions has an expected frequency of less than 5.

**Table 11.** Percentage of Civil Versus Criminal Cases Filed by Governments: New York and Other Regions, over Time

Region	Type Field	1860–1889	1890–1910	1911–1940
New York	Criminal	100%	45%	28%
	Civil	0%	55%	72%
	N =	12	42	25
		$\chi^2 = 17.13$ $df = 2$ $p = 0.0004$		
Other Regions	Criminal	97%	90%	91%
	Civil	3%	10%	9%
	N =	40	69	78
		$\chi^2 = 2.17$ $df = 2$ $p = 0.338$		

Why did New York file civil cases so much more often? The difference was not related to the number of years of experience with milk cases in New York. Massachusetts enforced milk safety laws for even more years than did New York, but never shied away from criminal enforcement.<sup>34</sup> More generally, states were just as likely to file criminal charges after many years of experience with their own milk safety laws as they were during the earliest enforcement cases in the state. As a rough measure of the length of enforcement experience within a single state, we calculated the number of years elapsed between the first enforcement case in the state and later cases. Thus, if the first enforcement case in Louisiana was decided in 1887, then a case decided in Louisiana in 1907 would receive a “years elapsed” score of 20. Table 12 divides the cases into quartiles based on the number of enforcement years elapsed in that state.

**Table 12.** Civil Versus Criminal Cases Filed by Government: Years Elapsed Since First Enforcement Case, New York and Other Regions

		0–7 yr	8–21 yr	22–34 yr	35–78 yr
New York	Criminal	100%	100%	46%	29%
	Civil	0%	0%	54%	71%
	N =	3	12	26	38
		$\chi^2 = 21.8$ $df = 3$ $p = 0.0001$			
Other Regions	Criminal	97%	87%	90%	92%
	Civil	3%	13%	10%	8%
	N =	68	54	40	25
		$\chi^2 = 4.38$ $df = 3$ $p = 0.223$			

Again, outside of New York, the level of criminal filings did not change significantly.<sup>35</sup> The amount of enforcement experience

<sup>34</sup> Of the 43 reported milk cases filed by governments in Massachusetts, only one (decided in 1938) was a civil case.

<sup>35</sup> Again, as the *p* values for Table 12 indicate, the differences between the expected frequencies and the observed frequencies is significant for New York but not for Other Regions. The tables for New York and for Other Regions both have two cells with expected frequencies of less than 5.

in a state (at least when measured in years) did not shift government enforcement efforts from criminal to civil.

Although the amount of time elapsed since the appearance of milk regulations does not explain why New York depended more heavily on civil enforcement, perhaps the sheer volume of enforcement experience (regardless of the number of years elapsed) explains the difference. New York had more published cases than any other jurisdiction, and it is reasonable to guess that New York handled more milk health litigation (published or unpublished) than any other state, particularly since New York boasted one of the most well-funded and active health departments in the country.

Perhaps civil enforcement is better suited to high-volume processing of claims. In theory, if some civil enforcement costs (such as establishing a new network of health inspectors instead of relying on the existing police force) are fixed, then a larger system might have lower average enforcement costs because the fixed costs are spread over more cases. While many potential explanations have some appeal, it is not possible—given the limited information available in published cases—to pin down which of the differences between New York and other jurisdictions truly explain why civil enforcement was so much more attractive in New York.

## B. Distinctive Sanctions and Intent Requirements

Regulatory crimes, it is said, are a different animal. Unlike the sentences for ordinary crimes, the sentences for regulatory crimes use fines rather than imprisonment. Also, unlike ordinary crimes, regulatory crimes often do not require the government to prove some intent on the part of the defendant. Both of these distinctive features showed up in the milk cases.

Fines were the overwhelming choice of sanctions in the criminal cases. Among the 177 milk cases in which a punishment was imposed at trial after a criminal conviction, a fine was the only sanction in all but five cases. Not many of the cases contained information about the size of the fine imposed. In the few cases that included this information, the fines ranged from \$10 to \$500, with \$25 as the most common amount. Fines were also the most common *authorized* punishment under the criminal laws discussed in these cases.<sup>36</sup>

As for intent, there is no straightforward way to determine whether a jurisdiction required the government to prove the de-

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<sup>36</sup> The cases describe about 240 different laws that imposed criminal sanctions (although this probably overstates the number of laws actually at issue in the cases, because some laws might have been counted twice if the opinions in two or more cases referred to the same law by different names or citations). Only a few of the cases specify the types of punishments authorized under the law in question. The opinions mentioned 80 laws that authorized criminal fines, while 32 of those 80 also authorized prison terms.

fendant's intent at a particular moment in time. One could consult the text of every law in question, but it would be difficult to assemble the material for every state and local government.<sup>37</sup> Moreover, the effort would not be worthwhile because there was only a loose connection between the precise language of a statute or ordinance and the government's need in a particular criminal trial to present evidence of criminal intent. Even where the statutory language and the courts allowed the government to proceed without proving an intent element, juries might have required proof of intent before they would in fact convict. Prosecutors might have hesitated to bring such cases without some proof that the defendant was aware that he or she was doing wrong. Thus, the legal system in operation may have required proof of intent for this regulatory crime even though the statutory language did not.

A review of some sample cases addressing the intent question shows how imperfectly the legislative language predicted the type of proof actually required. First, it was possible for a statute to include language that clearly required proof of intent. A 1905 statute in Indiana offered one example: Whoever "shall *knowingly* sell milk, the product of a sick or diseased or injured animal or animals, or any milk produced from any cow fed upon the refuse of any distillery or brewery, . . . shall, on conviction, be fined not less than fifty dollars nor more than five hundred dollars" (*State v. Squibb* 1908). Courts would interpret language like this to require proof that the defendant knew how the milk being sold became substandard (*Isenhour v. State* 1901; *City of New Orleans v. Villere* 1910). The presence of "intent" words in the statute or ordinance did not remove all the difficult interpretive questions, however. The courts had to decide *which* precise actions or conditions the actor had to desire or know.

A second possibility was for the statute to remain silent on the question of intent. In this context, once again there were several routes open to the courts. Some courts faced with a statute that did not use explicit intent language nevertheless interpreted the statute to require some proof of intent. For instance, a 13-year-old Texas boy selling milk from his mother's cows obtained a reversal of his conviction by showing that he did not know that the milk he was selling was substandard despite the lack of explicit statutory language on intent (*Sanchez v. State* 1889).

Other courts declared that statutes without any express requirement of *mens rea* did indeed create strict liability offenses. Dairy parties commonly challenged their convictions because they did not know that the milk was adulterated or otherwise be-

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<sup>37</sup> Few of the judicial opinions provide the full text of the law in question. Given that virtually all of the statutes were revised or repealed long ago, and many of the cases dealt with ordinances or local regulations (most not available in electronic databases), it would take a massive effort to assemble all the legal texts.

low standards. The courts, despite the novelty of the strict liability concept, usually rejected these arguments. For instance, in *Commonwealth v. Wheeler* (1910:416), the Massachusetts court disposed of this intent argument quickly:

The defendants offered to prove that they did not know and had no reason to know that the milk contained less than the prescribed quantity of milk solids. This was immaterial. It has often been decided that, in the public interest, the burden of ascertaining at his peril whether an article that he sells is within the prohibition of a criminal statute may be put upon the seller.

Since the precise language of the statutes and ordinances does not reliably tell us whether proof of intent was necessary to enforce the regulation, we can turn to the outcomes in milk cases for additional clues about strict liability enforcement patterns. It is possible to track how often the parties raised the issue of lack of criminal intent and how often courts used this argument to help resolve the case.

Not surprisingly, parties raised intent arguments in criminal cases far more often than courts accepted them. Dairy parties argued that the failure to prove some knowledge or intent on their part was a reason not to enforce the milk health law in 46 of 219 criminal cases (21%). Courts pointed to lack of intent or knowledge as a reason not to enforce a milk law in only 11 criminal cases (5%).

Dairy parties raised their intent arguments much more frequently in the early years than they did later, as the data in Table 13 show.<sup>38</sup>

**Table 13.** Percentage of Criminal Cases in Which Parties Raised Issue of Lack of Intent or Knowledge

Cases	1860–79	1880–89	1890–99	1900–09	1910–19	1920–29	1930–40	Total
	63%	35%	14%	15%	16%	13%	11%	21%
<i>N</i> =	16	34	28	47	51	16	27	219
						$\chi^2 = 25.77$	<i>df</i> = 6	<i>p</i> = 0.000

Between 1860 and 1879, when the milk laws first began to appear in the northeast, a majority of criminal defendants (63%) raised an argument about their lack of intent or knowledge. By the 1880s, the number had dropped to 35%, and by the 1890s, the number had leveled off at 14%.

Why did parties raise the intent argument less frequently in later years? The cases do not answer this question. It could be that legislatures amended the laws to require a showing of intent (although this is not very likely, since the cases rarely mention

<sup>38</sup> In the  $7 \times 2$  version of Table 13 (containing both the percentage of cases where the argument was raised and the percentage of cases where it was not), 2 cells (14.3%) have expected counts of less than 5.

this). Or, as mentioned previously, prosecutors might have produced evidence of bad intent even though the law did not technically require it. Some contemporary accounts suggested that prosecutors pursued repeat offenders, where intent would be easier to prove (Frank 1986). On the other hand, it is also possible that the number of strict liability cases remained steady, but defendants stopped raising the argument so much because it was not very fruitful. Perhaps what began as a promising argument in the 1860s was not worth raising so often by the 1890s. By then, the legal culture had accepted what was once a novelty: the use of strict liability in criminal cases.

### **C. An Equilibrium Hypothesis**

We have now reviewed two features of government enforcement cases for milk regulation. First, government litigants in the United States depended mostly on the criminal courts (along with the threat of taking a potential case to criminal court) to enforce the milk safety laws. The enforcement was mostly criminal from the start, and remained that way, except in New York, through 1940. Second, we confirmed that milk safety cases were distinctive crimes, both in allowing strict liability and in the use of monetary fines as a sanction. It is possible that these two observations are related.

In theory, a criminal case should be more difficult for the government to win than a civil case, because in a criminal case the government has a higher standard of proof. The distinctive features of regulatory crimes, however, appear to make the prosecutor's job easier. With strict liability crimes, a major element of proof in the typical criminal case is no longer necessary: There is no need to demonstrate that the defendant had a bad intent. Also, the fact that only monetary fines are at stake could make judges less determined to resolve doubts in favor of the defendant.<sup>39</sup> Defendants might also defend cases less aggressively with the lesser sanction involved.

We hypothesize that governments continued to rely on criminal sanctions over the long run because there was no great disadvantage in using the criminal rather than the civil process for milk cases. The "payoff" for the government in criminal or civil proceedings would be about the same (monetary sanctions in both instances). Thus, the odds of winning the case would need to be about as strong in criminal proceedings as in civil proceedings, or else the government would start to prefer the civil route.

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<sup>39</sup> It is also possible that the standard of proof simply does not matter very often. While proof "beyond a reasonable doubt" might lead to a defense verdict in marginal cases, the accounts of most criminal courtrooms suggest that such marginal cases are uncommon; most are clear-cut cases favoring the government (Mather 1973).



This suggests that governments would win about the same number of cases whether using civil or criminal courts.

Table 14 partially supports the hypothesis of an equilibrium between civil and criminal success.

**Table 14.** Percentage of Various Outcome on Appeal for Government-Filed Cases, with Dairy Party as Civil and Criminal Defendant

Dairy Party Outcomes	As Criminal Defendant	As Civil Defendant
Loses	65%	69%
Wins, but Reg Valid	23%	28%
Wins, and Reg Invalid	12%	3%
<i>N</i> =	211	58
	$\chi^2 = 4.00$	<i>df</i> = 2
		<i>p</i> = 0.135

No matter whether the government filed its case in civil or in criminal court, its chances of success on appeal stayed the same. The table includes cases originally filed at the trial level by the government, and then appealed by either party.

This pattern of outcomes—based mostly on appellate cases—tells only part of the story about the success of civil versus criminal enforcement. We can say very little about the government's victory rate in the trial court. The cases in our database might not reflect the outcomes at the trial level, since the parties in many milk enforcement cases did not appeal the final judgment entered at the trial court.

The government's rate of success in criminal cases could have been lower at trial than on appeal because of asymmetrical appeal rules. The defendant was allowed to appeal *any* criminal conviction, but the government could only appeal in criminal matters if the legal question arose before trial. Under these appeal rules, criminal cases in our sample would be skewed toward cases that the government won at the trial level. This would create an exceptionally strong pool of cases for the government to argue on appeal. The data suggest that this selection bias might be at work. Among the criminal cases appearing in our published appellate opinions, the government won 83% of them at trial. Among the civil cases progressing to the appellate stage, the government won 50% at trial.

Given the selection bias in the criminal cases reaching the appeals stage, the government's victory rate at trial in *all* criminal cases might have been lower than the rate in appealed criminal cases. We cannot say whether the difference between the trial and appellate levels would be large or small. Modern rates of conviction in federal regulatory offenses average approximately 60% to 65% of all cases tried (Bureau of Justice Statistics 2001:11), which matches fairly closely the government's success rate on appeal in criminal matters as shown in Table 14. Nevertheless, the government could have been losing more often at

the trial level in criminal matters than in civil matters, and our appellate cases could have missed some of that difference.

A similar problem crops up when we consider the initial selection of cases for litigation. When government attorneys chose milk cases to pursue in the trial court, they might have declined more potential cases on the criminal side than they did in civil litigation. Perhaps they required stronger evidence in criminal matters. Again, our appellate cases do not help us picture the government's decision to file or not to file a case at the trial level.

Nevertheless, our appellate cases do suggest some things worth knowing about the relative merits of criminal versus civil enforcement. The government won just as many criminal cases on appeal as civil cases. This remained true throughout the 80 years covered in our study. The equal success rates are probably not only a function of the cases selected for appeal. The government chose less than 20% of the criminal cases for appellate review, while criminal defendants chose most of the criminal appeals. On the civil side, the government and the civil defendants each selected half of the civil matters to appeal. Yet the appellate courts enforced milk safety regulations at similar rates in the criminal and civil pools—even though different parties asked for the appeal, and even though the weakest criminal cases never reach the appeals court.

In this setting, it would be difficult for government attorneys to see any advantage at the appellate level for filing civil cases. Success rates in the appeals courts offered no strong reason for governments to shift from criminal to civil enforcement. The equivalent success rate on appeal combined with the similarities between the civil and criminal processes at the trial level, such as the similar remedies (monetary fines) available through both processes. The two enforcement techniques stood in equilibrium at the appellate level; there are reasons to believe the same was true at the trial level. Thus, it is not surprising that the earliest and most straightforward enforcement technique (the criminal case) remained the most common for the entire 80-year period of our study.

## **V. Conclusion**

The government enjoyed great success over the years as it enforced the milk safety laws. But some types of cases were harder than others to enforce, and some periods of time were easier for the government than others.

These enforcement difficulties were not an outgrowth of the decision to use the criminal courts. The government labeled these threats to the social order as crimes, but that did not inspire more vigorous and effective defenses. Nor did the use of criminal charges lead judges to resolve more doubts in favor of

defendants. In the area of milk health, criminal proceedings resembled civil proceedings, including the government's chances of winning or losing. There was no inherent advantage for the government in civil enforcement. Lawmakers never treated the choice of criminal versus civil sanctions as a momentous one, and neither did the enforcers during the long years of litigation that followed.

Governments had the most trouble enforcing the milk health laws in times when the dairy parties asked for dramatically more, and the courts gave them slightly more. The courts increased the scope of the dairy party victories in a few cases, even though the number of dairy party victories remained about the same. These are signs—not definitive, but surely suggestive—of a change in the legal environment, showing hostility to regulation during a few decades at the start of the 20th century.

Although the judges did respond to some degree to the dairy parties' more ambitious claims, the cases show stability on the part of judges. There was no widespread aggressive use of federal or state constitutions and no judicial effort to block the strict liability crimes, however much those crimes conflicted with traditional principles of criminal law. Taken as a group, the judges acted conservatively—in the sense of slowing and moderating legal change.

This judicial behavior becomes visible when we step away from the favorite raw material of legal history: the text of a few prominent appellate opinions or treatises that discuss issues of constitutional law in detail. To be sure, ideas matter. Ideas about constitutional due process and about the proper reach of the criminal law have occupied lawyers and judges as regulation has grown in American life. But patterns in the outcomes, the parties, and the dates and places of enforcement tell us as much as the ideas themselves.

## References

- Ball, Harry V., & Lawrence M. Friedman (1965) "The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View," 17 *Stanford Law Rev.* 197–223.
- Benedict, Michael Les (1985) "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," 3 *Law & History Rev.* 293–331.
- Bernstein, David E. (1993) "Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation," 43 *American Univ. Law Rev.* 85–138.
- Beth, Loren P. (1971) *The Development of the American Constitution*. New York: Harper & Row.
- Blackstone, William [1769] (1844) *Commentaries on the Laws of England*. vol. 4. Dublin: Hodges and Smith.
- Brandeis, Louis D. (1916) "The Living Law," 10 *Illinois Law Rev.* 461–71.

- Brown, Ray A. (1927) "Due Process of Law, Police Power, and the Supreme Court," 40 *Harvard Law Rev.* 943–68.
- Bureau of Justice Statistics, U.S. Dept. of Justice, Ofc. of Justice Programs (2001) *Federal Criminal Case Processing, 1999, with Trends 1982–99*. Washington, DC: U.S. GPO.
- Chomsky, Carol (1993) "Progressive Judges in a Progressive Age: Regulatory Legislation in the Minnesota Supreme Court, 1880–1925," 11 *Law & History Rev.* 383–440.
- Clinton, Robert Lowry (1994) "Judicial Review, Nationalism, and the Commerce Clause: Contrasting Antebellum and Postbellum Supreme Court Decision Making," 47 *Political Research Q.* 857–76.
- Crumbine, Samuel J., & James A. Tobey (1930) *The Most Nearly Perfect Food: The Story of Milk*. Baltimore: Williams & Wilkins.
- Curtis, James (1879) "Infant Hygiene," in A. H. Buck, ed., *A Treatise on Hygiene and Public Health*. New York: William Wood.
- Cushman, Barry (1998) *Rethinking the New Deal Court: The Structure of a Constitutional Revolution*. New York: Oxford Univ. Press.
- Dodd, William F. (1913) "Social Legislation and the Courts," 28 *Political Science Q.* 1–17.
- Fiss, Owen M. (1993) *Troubled Beginnings of the Modern State, 1888–1910*. New York: Macmillan.
- Frank, Nancy (1986) *From Criminal Law to Regulation: A Historical Analysis of Health and Safety Law*. New York: Garland Publishing.
- Frankfurter, Felix (1937) *The Commerce Clause Under Marshall, Taney, and Waite*. Chapel Hill: Univ. of North Carolina Press.
- (1938) *Mr. Justice Holmes and the Supreme Court*. Cambridge, MA: Harvard Univ. Press.
- Frederiksen, Johan D. (1919) *The Story of Milk*. New York: Macmillan.
- Freund, Ernst (1904) *The Police Power, Public Policy, and Constitutional Rights*. Chicago: Callaghan & Co.
- Fried, Barbara (1998) *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement*. Cambridge, MA: Harvard Univ. Press.
- Friedman, Lawrence M. (1985) *A History of American Law*. 2d ed., New York: Simon & Schuster.
- (1993) *Crime and Punishment in American History*. New York: Basic Books.
- Gillman, Howard (1993) *The Constitution Besieged: The Rise and Demise of Lochmer-Era Police Powers Jurisprudence*. Durham, NC: Duke Univ. Press.
- Gorham, Frederick P. (1921) "The History of Bacteriology and Its Contribution to Public Health Work," in M. P. Ravenel, ed., *A Half Century of Public Health*. New York: American Public Health Association.
- Hamby, Alonzo L. (1999) "Progressivism: A Century of Change and Rebirth," in S. M. Milkis & J. M. Mileur, eds., *Progressivism and the New Democracy*. Amherst: Univ. of Massachusetts Press.
- Harrington, Charles (1904) "The Practical Side of the Question of Milk Supply," 16 *Pediatrics* 208–14.
- Hartley, Robert M. (1842) *An Historical, Scientific, and Practical Essay on Milk as an Article of Human Sustenance*. New York: J. Leavitt.
- Hartshorne, Henry (1874) "Infant Mortality in the Cities," 2 *Public Health* 211–16.
- Hoffman, Frederick L. (1921) "American Mortality Progress During the Last Half Century," in M. P. Ravenel, ed., *A Half Century of Public Health*. New York: American Public Health Association.
- Hofstadter, Richard (1955) *The Age of Reform, from Bryan to F.D.R.* New York: Knopf.
- Hooker, Richard J. (1981) *Food and Drink in America: A History*. Indianapolis: Bobbs-Merrill.

- Horwitz, Morton J. (1992) *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*. New York: Oxford Univ. Press.
- Hovenkamp, Herbert (1988) "The Political Economy of Substantive Due Process," 40 *Stanford Law Rev.* 379-447.
- Keller, Morton (1990) *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933*. Cambridge, MA: Harvard Univ. Press.
- Kens, Paul (1991) "The Source of a Myth: Police Powers of the States and Laissez-Faire Constitutionalism, 1900-1937," 35 *American J. of Legal History* 70-98.
- Khan, Zorina (1995) "Property Rights and Patent Litigation in Early 19th Century America," 55 *J. of Economic History* 58-97.
- King, Charles R. (1993) *Children's Health in America: A History*. New York: Twayne Publishers.
- Kloppenber, James T. (1986) *Uncertain Victory: Social Democracy and Progressivism in European and American Thought, 1870-1920*. New York: Oxford Univ. Press.
- Kloppenber, Lisa A. (1996) "Measured Constitutional Steps," 71 *Indiana Law J.* 297-354.
- Knox, J. H. Mason (1906) "The Claims of the Baby in the Discussion of the Milk Question," 16 *Charities and the Commons* 492-95.
- Lasser, William (2000) "Justice Roberts and the Constitutional Revolution of 1937—Was There a 'Switch in Time'?" 78 *Texas Law Rev.* 1347-76.
- Leavitt, Judith Walzer (1982) *The Healthiest City: Milwaukee and the Politics of Health Reform*. Princeton, NJ: Princeton Univ. Press.
- Lerner, Max (1933) "The Supreme Court and American Capitalism," 42 *Yale Law J.* 668-701.
- Mason, Alpheus Thomas, & William M. Beaney (1959) *The Supreme Court in a Free Society*. Englewood Cliffs, NJ: Prentice-Hall.
- Mather, Lynn A. (1973) "Some Determinants of the Method of Case Disposition: Decision-Making by Public Defenders in Los Angeles," 8 *Law & Society Rev.* 187-216.
- McCloskey, Robert (1960) *The American Supreme Court*. Chicago: Univ. of Chicago Press.
- McCurdy, Charles W. (1975) "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897," 61 *J. of American History* 970-1005.
- Meckel, Richard A. (1990) *Save the Babies: American Public Health Reform and the Prevention of Infant Mortality 1850-1929*, Baltimore: Johns Hopkins Univ. Press.
- Mendelson, Wallace (1956) "A Missing Link in the Evolution of Due Process," 10 *Vanderbilt Law Rev.* 125-37.
- Meyer, Ernst (1921) *Infant Mortality in New York City: A Study of the Results Accomplished by Infant Life-Saving Agencies*. New York: Rockefeller Foundation, International Health Board.
- Milkis, Sidney M. (1999) "Introduction: Progressivism, Then and Now," in S. M. Milkis & J. M. Mileur, eds., *Progressivism and the New Democracy*. Amherst: Univ. of Massachusetts Press.
- Miller, Arthur S. (1968) *The Supreme Court and American Capitalism*. New York: Free Press.
- Miller, Geoffrey P. (1979) "Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine," 77 *California Law Rev.* 83-131.
- Mullaly, John (1853) *The Milk Trade in New York and Vicinity*. New York: Fowlers & Wells.
- Murphy, Paul L. (1972) *The Constitution in Crisis Times, 1918-1969*. New York: Harper & Row.
- New York Times* (1895) "Epidemics Due to Careless Sanitary Methods," 1 July p. 4.

- North, Charles E. (1921) "Milk and Its Relation to Public Health," in M. P. Ravenel, ed., *A Half Century of Public Health*. New York: American Public Health Association.
- Note (1938) "Statutory Penalties—A Legal Hybrid," 51 *Harvard Law Rev.* 1092–101.
- Okun, Mitchell (1986) *Fair Play in the Market Place: The First Battle for Pure Food and Drugs*. Dekalb, IL: Northern Illinois Univ. Press.
- Packer, Herbert L. (1968) *The Limits of the Criminal Sanction*. Stanford, CA: Stanford Univ. Press.
- Park, William H. (1901) "The Great Bacterial Contamination of the Milk in Cities: Can It Be Lessened by the Action of Health Authorities?" 1 *J. Hygiene* 391–406.
- Parker, Horatio Newton (1917) *City Milk Supply*. New York: McGraw-Hill.
- Paul, Arnold M. (1960) *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887–1895*. Ithaca, NY: Cornell Univ. Press.
- Phillips, Michael J. (1997) "How Many Times Was Lochner-Era Substantive Due Process Effective?" 48 *Mercer Law Rev.* 1049–90.
- Post, Robert C. (1998) "Defending the Lifeworld: Substantive Due Process in the Taft Court Era," 78 *Boston Univ. Law Rev.* 1489–1545.
- Powell, Thomas Reed (1924) "The Judiciality of Minimum-Wage Legislation," 37 *Harvard Law Rev.* 545–73.
- Priest, George L. (1987) "Measuring Legal Change," 3 *J. of Law, Economics & Organization* 193–225.
- Reiman, Jeffrey (1979) *The Rich Get Richer and the Poor Get Prison*. New York: Macmillan.
- Roche, John P. (1963) "Entrepreneurial Liberty and the Commerce Power: Expansion, Contraction, and Casuistry in the Age of Enterprise," 30 *Univ. Chicago Law Rev.* 680–703.
- Roe, Gilbert (1912) *Our Judicial Oligarchy*. New York: B.W. Huebsch.
- Roosevelt, Theodore (1910) "Criticism of the Courts," *Outlook*, 24 Sept., p. 149.
- (1912a) "Who Is a Progressive?" *Outlook*, 13 April, p. 809.
- (1912b) "Judges and Progress," *Outlook*, 6 Jan., p. 40.
- Rorer, S. T. (1902) "Lessons on Milk," *Ladies' Home Journal* 26.
- Rosen, George (1958) *A History of Public Health*. New York: M.D. Publications.
- Rosenkrantz, Barbara Gutmann (1974) *Public Health and the State: Changing Views in Massachusetts, 1842–1936*. Cambridge, MA: Harvard Univ. Press.
- Ross, William G. (1994) *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937*. Princeton, NJ: Princeton Univ. Press.
- Rowe, Gary D. (1999) "Lochner Revisionism Revisited," 24 *Law & Social Inquiry* 221–52.
- Sanders, Joseph (1998) *Bendictin on Trial: A Study of Mass Tort Litigation*. Ann Arbor: Univ. of Michigan Press.
- Sayre, Francis Bowes (1933) "Public Welfare Offenses," 33 *Columbia Law Rev.* 55–88.
- Semonche, John E. (1978) *Charting the Future: The Supreme Court Responds to a Changing Society, 1890–1920*. Westport, CT: Greenwood Press.
- Smith, Francis B. (1979) *The People's Health, 1830–1910*. New York: Holmes & Meier.
- Spargo, John (1910) *The Common Sense of the Milk Question*. New York: Macmillan.
- Straus, Lina Gutherz (1917) *Disease in Milk, the Remedy Pasteurization: The Life Work of Nathan Straus*. New York: Dutton.
- Sutherland, Edwin H. (1949) *White Collar Crime*. New York: Dryden Press.
- Swindler, William F. (1968) *Court and Constitution in the Twentieth Century: The Old Legality, 1889–1932*. Indianapolis: Bobbs-Merrill.
- Swisher, Carl Brent (1943) *American Constitutional Development*. Boston: Houghton-Mifflin.

- Thomas, Roy H., Paul M. Reaves, & C. W. Pegram (1949) *Dairy Farming in the South*. 2d ed., Danville, IL: Interstate.
- Tobey, James A. (1924) "The Legal Aspects of Milk Control," 39 *Public Health Reports* 1739 (18 July).
- (1927) "Court Decisions on Pasteurization," 42 *Public Health Reports* 1756 (1 July).
- (1934) "Recent Court Decisions on Milk Control," 49 *Public Health Reports* 993 (24 Aug.).
- (1936) *Legal Aspects of Milk Sanitation*. Chicago: International Association of Milk Dealers.
- (1947) *Public Health Law*. 3d ed., New York: Commonwealth Fund.
- Trask, John W. (1909) "Milk as a Cause of Epidemics of Typhoid Fever, Scarlet Fever, and Diptheria," in M. J. Roseneau, ed., *Milk and Its Relation to Public Health*. Washington, DC: GPO.
- Tribe, Laurence (2000) *American Constitutional Law*. 3d ed., Mineola, NY: Foundation Press.
- Twiss, Benjamin R. (1942) *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court*. New York: Russell & Russell.
- Urofsky, Melvin I. (1983) "Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era," 1983 *Supreme Court Historical Society Year Book* 53–72.
- (1985) "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," 72 *J. American History* 63–91.
- U.S. Public Health Service (1939) *Milk Ordinance and Code: Recommended by the United States Public Health Service*. Public Health Bulletin No. 220. Washington, DC.
- Wain, Harry (1970) *A History of Preventive Medicine*. Springfield, IL: Thomas.
- Walker, Harvey (1928) "Regulating the Production, Handling, and Distribution of Milk," 43 *Public Health Reports* 2095–112.
- Warner, Sam B., & Henry B. Cabot (1937) "Changes in the Administration of Criminal Justice During the Past Fifty Years," 50 *Harvard Law Rev.* 583–615.
- Warren, Charles (1913) "The Progressiveness of the United States Supreme Court," 13 *Columbia Law Rev.* 294–313.
- (1935) *The Supreme Court in United States History*. rev. ed., vol. 4, Boston: Little, Brown & Co.
- Wende, Ernest (1900) "City Milk Routes and Their Relation to Infectious Diseases," 34 *J. of the American Medical Association* 150.
- West Publishing (1902a) "Milk," 34 *American Digest Century Edition* 2912. St. Paul: West Publishing.
- (1902b) "Food," 23 *American Digest Century Edition* 1227. St. Paul: West Publishing.
- Whipple, George C. (1917) *State Sanitation: A Review of the Work of the Massachusetts State Board of Health*. Cambridge, MA: Harvard Univ. Press.
- (1921) "Fifty Years of Water Purification," in M. P. Ravenel, ed., *A Half Century of Public Health*. New York: American Public Health Association.
- Wright, Benjamin F. (1942) *The Growth of American Constitutional Law*. New York: Henry Holt.
- Wright, Ronald F. (1992) "Why Not Administrative Grand Juries?" 44 *Administrative Law Rev.* 465–521.
- (2000) "The Abruptness of Acton," 36 *Criminal Law Bulletin* 401–31.

## Cases Cited

- Arden Farms Co. v. City of Seattle*, 99 P.2d 415 (Wash. 1939).
- Bennett v. American Express Co.*, 22 A. 159 (Md. 1891).
- Borden's Condensed Milk Co. v Board of Health of Town of Montclair*, 80 A. 30 (N.J. 1911).

- Brielman v. Monroe*, 17 N.E.2d 187 (Mass. 1938).  
*Burton v. United States*, 196 U.S. 283, 295 (1905).  
*Chenango Bridge Co. v. Paige*, 38 Am. Rep. 407 (N.Y. 1880).  
*City of Hudson v. Flemming*, 123 N.Y.S. 1065 (N.Y. App. Div. 1910).  
*City of New Orleans v. Charouleau*, 46 So. 911 (La. 1908).  
*City of New Orleans v. Villere*, 52 So. 682 (La. 1910).  
*City of St. Louis v. Klausmeier*, 112 S.W. 516 (Mo. 1908).  
*City of St. Louis v. Liessing*, 89 S.W. 611 (Mo. 1905).  
*City of St. Louis v. Schuler*, 89 S.W. 621 (Mo. 1905 ).  
*City of St. Louis v. Wortman*, 112 S.W. 520 (Mo. 1908).  
*Commonwealth v. Boston & Maine RR Co.*, 110 N.E. 264 (Mass. 1915).  
*Commonwealth v. Farren*, 91 Mass. 489 (1864).  
*Commonwealth v. Flannelly*, 81 Mass. 195 (1860).  
*Commonwealth v. Luscomb*, 130 Mass. 42 (1880).  
*Commonwealth v. Nichols*, 92 Mass. 199 (1865).  
*Commonwealth v. Rapoza*, 178 N.E. 530 (Mass. 1931).  
*Commonwealth v. Waite*, 93 Mass. 264 (1865).  
*Commonwealth v. Wheeler*, 91 N.E. 415 (Mass. 1910).  
*Davenport v. Kleinschmidt*, 13 P. 249 (Mon. 1887).  
*Ex parte Kuback*, 85 Cal. 274 (1890).  
*Fuqua v. City of Birmingham*, 82 So. 626 (Ala. 1919).  
*Hannibal & St. Joseph R. Co. v. Husen*, 95 U.S. 465 (1877).  
*In re 8-Hour Bill*, 21 Colo. 29 (1895).  
*In re Lowe*, 39 P. 710 (Kan. 1895).  
*Isenhour v. State*, 62 N.E. 40 (Ind. 1901).  
*Jersey City Gas Co. v. Dwight*, 29 N.J. Eq. 242 (1878).  
*Jewett Bros. & Jewett v. Smail*, 105 N.W. 738 (S.D. 1905).  
*Kimmish v. Ball*, 129 U.S. 217 (1889).  
*Koy v. City of Chicago*, 104 N.E. 1104 (Ill. 1914).  
*Lansing v. State*, 102 N.W. 254 (Neb. 1905).  
*Lochner v. New York*, 198 U.S. 45 (1905).  
*Low v. Rees Printing Co.*, 41 Neb. 127 (1894).  
*Marmet v. State*, 12 N.E. 463 (Ohio 1887).  
*McKenzie v. Royal Dairy*, 77 P. 680 (Wash. 1904).  
*Mintz v. Baldwin*, 289 U.S. 346 (1933).  
*Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508 (1879).  
*Nebbia v. New York*, 291 U.S. 502 (1934).  
*People ex rel. Larrabee v. Mulholland*, 82 N.Y. 324 (1880).  
*People ex. rel. Ogden v. McGowan*, 195 N.Y.S. 286 (N.Y. Sup. Ct. 1921).  
*People v. Beisecker*, 61 N.E. 990 (N.Y. 1901).  
*People v. Cipperly*, 101 N.Y. 634 (1886).  
*People v. Corcoran*, 186 N.Y.S. 366 (N.Y. 1920).  
*Pierce v. Aurora*, 81 Ill. App. 670 (1899).  
*Polinsky v. People*, 1878 WL 12539 (N.Y. 1878).  
*Righers v. City of Atlanta*, 66 S.E. 991 (Ga. App. 1910).  
*Ritchie v. People*, 155 Ill. 98 (1895).  
*St. Louis v. Ameln*, 139 S.W. 429 (Mo. 1911).  
*Sanchez v. State*, 10 S.W. 756 (Tex. Ct. App. 1889).  
*State v. Elofson*, 90 N.W. 309 (Minn. 1901).  
*State v. Field*, 115 A. 296 (Vt. 1921).  
*State v. Langlade County Creamery Co.*, 213 N.W. 664 (Wis. 1927).  
*State v. Maitrejean*, 192 So. 361 (La. 1939).  
*State v. Miksicek*, 125 S.W. 507 (Mo. 1910).  
*State v. Scougal*, 51 N.W. 858 (S.D. 1892).  
*State v. Smith*, 57 So. 426 (Fla. 1912).  
*State v. Smith*, 35 A. 506 (Conn. 1896).  
*State v. Smith*, 10 R.I. 258 (1872).



*State v. Squibb*, 84 N.E. 969 (Ind. 1908).

*United States v. Carolene Products*, 304 U.S. 144 (1938).

*Vickery v. New London Northern RR Co.*, 89 A. 277 (Conn. 1914).

*Walker v. City of Birmingham*, 112 So. 823 (Ala. 1927).

## Appendix A: Reported Milk Health Cases Listed Chronologically

- Commonwealth v. Flannelly*, 81 Mass. 195 (1860)  
*Miller v. Post*, 83 Mass. 434 (1861)  
*Commonwealth v. O'Donnell*, 83 Mass. 593 (1861)  
*Commonwealth v. McCarron*, 84 Mass. 157 (1861)  
*Commonwealth v. Murdock*, 84 Mass. 157 (1861)  
*Commonwealth v. McDevitt*, 84 Mass. 157 (1861)  
*Commonwealth v. Farren*, 91 Mass. 489 (1864)  
*Commonwealth v. Nichols*, 92 Mass. 199 (1865)  
*Commonwealth v. Waite*, 93 Mass. 264 (1865)  
*Commonwealth v. Smith*, 103 Mass. 444 (1871)  
*Commonwealth v. Haynes*, 107 Mass. 194 (1871)  
*Flander v. People*, 4 Alb. L.J. 316 (N.Y. 1871)  
*Phelps v. Smith*, 22 Ohio St. 189 (1871)  
*State v. Smith*, 10 R.I. 258 (1872)  
*Verona Central Cheese Co. v. Murtaugh*, 50 N.Y. 314 (1872)  
*Stearns v. Ingraham*, 1 T.& C. 218 (N.Y. App. Div. 1873)  
*Ritchie v. Boynton*, 114 Mass. 431 (1874)  
*Bainbridge v. State*, 30 Ohio St. 264 (1876)  
*Blazier v. Miller*, 10 Hun. 435 (N.Y. 1877)  
*Polinsky v. People*, 1878 WL 12539 (N.Y. 1878)  
*Lammond v. Volans*, 14 Hun. 263 (N.Y. 1878)  
*Polinsky v. People*, 73 N.Y. 65 (1878)  
*Dilley v. People*, 1879 WL 8729 (Ill. 1879)  
*People ex rel. Larrabee v. Mulholland*, 82 N.Y. 324 (1880)  
*Commonwealth v. Luscomb*, 130 Mass. 42 (1880)  
*City of Chicago v. Bartee*, 100 Ill. 57 (1881)  
*Commonwealth v. Carter*, 132 Mass. 12 (1882)  
*Commonwealth v. Evans*, 132 Mass. 11 (1882)  
*Palmer v. State*, 39 Ohio St. 236 (1883)  
*State v. Smyth*, 14 R.I. 100 (1883)  
*Shivers v. Newton*, 1883 WL 8120 (N.J. 1883)  
*Commonwealth v. Keenan*, 29 N.E. 477 (Mass. 1885)  
*State v. Groves*, 2 A. 384 (R.I. 1885)  
*Commonwealth v. Keenan*, 5 N.E. 477 (Mass. 1886)  
*Commonwealth v. Bowers*, 5 N.E. 469 (Mass. 1886)  
*People v. Cipperly*, 4 N.E. 107 (N.Y. 1886)  
*Commonwealth v. Smith*, 6 N.E. 89 (Mass. 1886)  
*Commonwealth v. Tobias*, 6 N.E. 2117 (Mass. 1886)  
*People v. Schaeffer*, 41 Hun. 23 (N.Y. 1886)  
*Powell v. Commonwealth*, 7 A. 913 (Pa. 1887)  
*Commonwealth v. Smith*, 9 N.E. 631 (Mass. 1887)  
*Commonwealth v. Spear*, 9 N.E. 632 (Mass. 1887)  
*Commonwealth v. Kenneson*, 9 N.E. 761 (Mass. 1887)  
*Commonwealth v. Lockhardt*, 10 N.E. 511 (Mass. 1887)  
*Commonwealth v. Kendall*, 11 N.E. 425 (Mass. 1887)  
*State v. Labatut*, 2 So. 550 (La. 1887)  
*People v. West*, 12 N.E. 610 (N.Y. 1887)  
*People v. Kibler*, 12 N.E. 795 (N.Y. 1887)  
*Commonwealth v. Holt*, 14 N.E. 930 (Mass. 1888)

- Commonwealth v. Rowell*, 15 N.E. 154 (Mass. 1888)
- State v. Campbell*, 13 A. 585 (N.H. 1888)
- Commonwealth v. Schaffner*, 16 N.E. 280 (Mass. 1888)
- People v. Austin*, 3 N.Y.S. 578 (N.Y. Gen. Term 1888)
- Sanchez v. State*, 10 S.W. 756 (Tex. 1889)
- Cantee v. State*, 10 S.W. 757 (Tex. 1889)
- Commonwealth v. Smith*, 20 N.E. 161 (Mass. 1889)
- People v. Burns*, 6 N.Y.S. 611 (N.Y. Gen. Term 1889)
- People v. DuBois*, 6 N.Y.S. 956 (N.Y. Gen. Term 1889)
- People v. Harris*, 7 N.Y.S. 773 (N.Y. Gen. Term 1889)
- Michigan Condensed Milk Co. v. Wilcox*, 44 N.W. 281 (Mich. 1889)
- Kansas City v. Cook*, 38 Mo. 660 (1890)
- People v. Harris*, 25 N.E. 317 (N.Y. 1890)
- Commonwealth v. Wetherbee*, 26 N.E. 414 (Mass. 1891)
- People v. Eddy*, 12 N.Y.S. 628 (N.Y. Gen. Term 1891)
- State v. Mahner*, 9 So. 480 (La. 1891)
- People v. Thompson*, 14 N.Y.S. 819 (N.Y. Gen. Term 1891)
- Commonwealth v. Vieth*, 29 N.E. 577 (Mass. 1892)
- Commonwealth v. Hough*, 1 Dist. 51 (Pa. 1892)
- Cornwell v. Cogwin*, 17 N.Y.S. 299 (N.Y. Gen. Term 1892)
- Monroe Dairy Ass'n v. Stanley*, 20 N.Y.S. 19 (N.Y. Gen. Term 1892)
- Commonwealth v. Coleman*, 32 N.E. 662 (Mass. 1892)
- State v. Callac*, 12 So. 119 (La. 1892)
- Commonwealth v. Gordon*, 33 N.E. 709 (Mass. 1893)
- People v. Hodnett*, 22 N.Y.S. 809 (N.Y. Sup. Ct. 1893)
- State v. Fourcade*, 13 So. 187 (La. 1893)
- People v. Candion*, 34 N.E. 759 (N.Y. 1893)
- State ex rel. Duffard v. Whitaker*, 14 So. 66 (La. 1893)
- State v. Stone*, 15 So. 11 (La. 1894)
- Commonwealth v. Warren*, 36 N.E. 308 (Mass. 1894)
- State v. Dupaquier*, 15 So. 502 (La. 1894)
- Littlefield v. State*, 60 N.W. 724 (Neb. 1894)
- People v. Hodnet*, 30 N.Y.S. 735 (N.Y. Sup. Ct. 1894)
- Deems v. Baltimore*, 30 A. 648 (Md. 1894)
- People v. Lamb*, 32 N.Y.S. 584 (N.Y. Gen. Term 1895)
- Bilgrien v. Dowe*, 64 N.W. 1025 (Wis. 1895)
- Commonwealth v. Proctor*, 42 N.E. 335 (Mass. 1895)
- Gray v. Mayor of City of Wilmington*, 43 A. 94 (Del. 1896)
- People v. Salisbury*, 37 N.Y.S. 420 (N.Y. App. Div. 1896)
- State v. Smith*, 35 A. 506 (Conn. 1896)
- Heider v. State*, 1896 WL 661 (Ohio App. 1896)
- Mayor of Wilmington v. Wicks*, 43 A. 173 (Del. 1896)
- State v. Nelson*, 68 N.W. 1066 (Minn. 1896)
- Stranahan Bros. Catering Co. v. Coit*, 45 N.E. 634 (Ohio 1896)
- People v. Wright*, 43 N.Y.S. 290 (N.Y. App. Div. 1897)
- People v. Piat*, 43 N.Y.S. 231 (N.Y. App. Div. 1897)
- People v. Koch*, 44 N.Y.S. 387 (N.Y. App. Term 1897)
- People v. Spees*, 46 N.Y.S. 995 (N.Y. App. Div. 1897)
- Houston v. State*, 74 N.W. 111 (Wis. 1898)
- People v. Kellina*, 50 N.Y.S. 653 (N.Y. App. Term 1898)
- Commonwealth v. Hufnal*, 39 A. 1052 (Pa. 1898)
- State v. Luther*, 40 A. 9 (R.I. 1898)

- Sloggy v. Crescent Creamery Co.*, 75 N.W. 225 (Minn. 1898)  
*State v. Snell*, 42 A. 869 (R.I. 1899)  
*Pierce v. City of Aurora*, 81 Ill. 670 (1899)  
*State v. Broadbelt*, 43 A. 771 (Md. 1899)  
*State v. Bd. of Health, Hoboken*, 44 A. 847 (N.J. 1899)  
*City of St. Paul v. Peck*, 81 N.W. 389 (Minn. 1900)  
*State v. Gallagher*, 45 A. 430 (Conn. 1900)  
*People v. Rickard*, 63 N.Y.S. 165 (N.Y. App. Div. 1900)  
*People v. Woodbeck*, 67 N.Y.S. 38 (N.Y. App. Div. 1900)  
*State v. Tyrrell*, 47 A. 686 (Conn. 1900)  
*State v. Schenkler*, 84 N.W. 698 (Ia. 1900)  
*Vandegrift v. Miehle*, 49 A. 16 (N.J. 1901)  
*People v. Wiard*, 69 N.Y.S. 1142 (N.Y. App. Div. 1901)  
*State v. Crescent Creamery Co.*, 86 N.W. 107 (Minn. 1901)  
*City of Gloversville v. Enos*, 72 N.Y.S. 398 (N.Y. Co. Ct. 1901)  
*People v. Hills*, 72 N.Y.S. 340 (N.Y. App. Div. 1901)  
*People v. Beisecker*, 61 N.E. 990 (N.Y. 1901)  
*Isenhour v. State*, 62 N.E. 40 (Ind. 1901)  
*City of Gloversville v. Enos*, 75 N.Y.S. 245 (N.Y. 1902)  
*State v. Eldfson*, 90 N.W. 309 (Minn. 1902)  
*People v. McDermott-Bunger Dairy Co.*, 77 N.Y.S. 888 (N.Y. 1902)  
*People v. Gilitor*, 77 N.Y.S. 273 (N.Y. App. Div. 1902)  
*People v. Laesser*, 79 N.Y.S. 470 (N.Y. App. Div. 1903)  
*Hecht v. Wright*, 72 P. 48 (Colo. 1903)  
*People v. Timmerman*, 80 N.Y.S. 285 (N.Y. App. Div. 1903)  
*City of Norfolk v. Flynn*, 44 S.E. 717 (Va. 1903)  
*People ex rel. Lieberman v. Vandecarr*, 67 N.E. 913 (N.Y. 1903)  
*People v. Buell*, 83 N.Y.S. 143 (N.Y. App. Div. 1903)  
*Copeland v. Boston Dairy Co.*, 68 N.E. 218 (Mass. 1903)  
*Horwich v. Walker-Gordon Laboratory Co.*, 68 N.E. 938 (Ill. 1903)  
*State ex rel. Smith v. Smith*, 68 N.E. 1044 (Ohio 1903)  
*Weigand v. District of Columbia*, 22 App. D.C. 559 (D.C. 1903)  
*Sanders v. Commonwealth*, 77 S.W. 358 (Ky. 1903)  
*Lowe v. Conroy*, 97 N.W. 942 (Wis. 1904)  
*State v. McKinney*, 74 P. 1095 (Mont. 1904)  
*Fischer v. St. Louis*, 194 U.S. 361 (1904)  
*McKenzie v. Royal Dairy*, 77 P. 680 (Wash. 1904)  
*Lansing v. State*, 102 N.W. 254 (Neb. 1905)  
*People v. Beaman*, 92 N.Y.S. 295 (N.Y. App. Div. 1905)  
*People v. Bowen*, 74 N.E. 489 (N.Y. 1905)  
*City of St. Louis v. Polinsky*, 89 S.W. 625 (Mo. 1905)  
*Commonwealth v. McCance*, 57 N.E. 603 (Mass. 1905)  
*City of St. Louis v. Liessing*, 89 S.W. 611 (Mo. 1905)  
*City of St. Louis v. Grafeman Dairy Co.*, 89 S.W. 617 (Mo. 1905)  
*City of St. Louis v. Schuler*, 89 S.W. 621 (Mo. 1905)  
*City of St. Louis v. Grafeman Dairy Co.*, 89 S.W. 627 (Mo. 1905)  
*City of St. Louis v. Reuter*, 89 S.W. 628 (Mo. 1905)  
*Copeland v. Boston Dairy Co.*, 75 N.E. 704 (Mass. 1905)  
*Jewett Bros. & Jewett v. Smail*, 105 N.W. 738 (S.D. 1905)  
*People v. Van de Carr*, 199 U.S. 552 (1905)  
*St. John v. New York*, 201 U.S. 633 (1906)

- People ex rel. Lodes v. Dept. of Health of City of New York*, 100 N.Y.S. 788 (N.Y. Sup. Ct. 1906)
- State v. Tetu*, 107 N.W. 953 (Minn. 1906)
- People v. Weaver*, 101 N.Y.S. 961 (N.Y. App. Div. 1906)
- City of St. Louis v. Bippen*, 100 S.W. 1048 (Mo. 1907)
- City of St. Louis v. Schottell*, 100 S.W. 1049 (Mo. 1907)
- Birmingham v. Goldstein*, 44 So. 113 (Ala. 1907)
- City of Covington v. Dalheim*, 102 S.W. 829 (Ky. 1907)
- Read v. Graham*, 102 S.W. 860 (Ky. 1907)
- People v. Dept. of Health, City of New York*, 82 N.E. 187 (N.Y. 1907)
- City of New Orleans v. Murat*, 44 So. 898 (La. 1907)
- People v. Koster*, 106 N.Y.S. 793 (N.Y. App. Div. 1907)
- City of Chicago v. Bowman Dairy*, 84 N.E. 913 (Ill. 1908)
- State v. Squibb*, 84 N.E. 969 (Ind. 1908)
- In re Desanta*, 96 P. 1027 (Cal. 1908)
- People v. Terwilliger*, 110 N.Y.S. 1034 (N.Y. Sup. Ct. 1908)
- City of St. Louis v. Klausmeier*, 112 S.W. 516 (Mo. 1908)
- City of St. Louis v. Wortman*, 112 S.W. 520 (Mo. 1908)
- City of St. Louis v. Union Dairy Co.*, 112 S.W. 525 (Mo. 1908)
- City of New Orleans v. Charouleau*, 46 So. 911 (La. 1908)
- People v. Briggs*, 86 N.E. 522 (N.Y. 1908)
- People v. Bosch*, 114 N.Y.S. 65 (N.Y. App. Div. 1908)
- Ex parte Hoffman*, 99 P. 517 (Cal. 1909)
- Reiter v. State*, 71 A. 975 (Md. 1909)
- Mantel v. State*, 117 S.W. 855 (Tex. 1909)
- Board of Health of State of N. J. v. Vandruens*, 72 A. 125 (N.J. 1909)
- People ex rel. Shelter v. Owen*, 116 N.Y.S. 502 (N.Y. Sup. Ct. 1909)
- State v. City of Milwaukee*, 121 N.W. 658 (Wis. 1909)
- Splinter v. State*, 123 N.W. 97 (Wis. 1909)
- City of Seattle v. Erickson*, 104 P. 1128 (Wash. 1909)
- People v. Bailey*, 120 N.Y.S. 618 (N.Y. 1909)
- Reading City v. Miller*, 45 Pa. Sup. 28 (1910)
- Salt Lake City v. Howe*, 106 P. 705 (Utah 1910)
- City of Hudson v. Flemming*, 123 N.Y.S. 1065 (N.Y. App. Div. 1910)
- Rigbers v. City of Atlanta*, 66 S.E. 991 (Ga. 1910)
- People v. Abramson*, 122 N.Y.S. 115 (N.Y. App. Div. 1910)
- Commonwealth v. Wheeler*, 91 N.E. 415 (Mass. 1910)
- People v. McDermott Dairy Co.*, 122 N.Y.S. 294 (N.Y. App. Term 1910)
- People v. Tsitsera*, 122 N.Y.S. 915 (N.Y. App. Div. 1910)
- Bear v. City of Cedar Rapids*, 126 N.W. 324 (Ia. 1910)
- City of New Orleans v. Villere*, 52 So. 682 (La. 1910)
- Nelson v. City of Minneapolis*, 127 N.W. 445 (Minn. 1910)
- People v. Butler*, 125 N.Y.S. 556 (N.Y. App. Div. 1910)
- Adams v. City of Milwaukee*, 129 N.W. 519 (Wis. 1911)
- People v. Wiggins*, 94 N.E. 610 (N.Y. 1911)
- Genesee Valley Milk Products Co. v. J.H. Jones Corp.*, 128 N.Y.S. 190 (N.Y. Sup. Ct. 1911)
- Commonwealth v. Drew*, 94 N.E. 682 (Mass. 1911)
- Boston Dairy Co. v. J.H. Jones Corp.*, 129 N.Y.S. 70 (N.Y. App. Term 1911)
- Commonwealth v. Boston White Cross Milk Co.*, 95 N.E. 85 (Mass. 1911)
- Commonwealth v. Graustein*, 95 N.E. 97 (Mass. 1911)

- Borden's Condensed Milk Co. v. Board of Health of Montclair*, 80 A. 30 (N.J. 1911)
- City of St. Louis v. Ameln*, 139 S.W. 429 (Mo. 1911)
- City of St. Louis v. Scheer*, 139 S.W. 434 (Mo. 1911)
- City of St. Louis v. Meyer*, 139 S.W. 438 (Mo. 1911)
- City of St. Louis v. Jud*, 139 S.W. 441 (Mo. 1911)
- City of St. Louis v. Kellmann*, 139 S.W. 443 (Mo. 1911)
- City of St. Louis v. Kruempeler*, 139 S.W. 446 (Mo. 1911)
- City of St. Louis v. Schulte*, 139 S.W. 449 (Mo. 1911)
- City of St. Louis v. Niehaus*, 139 S.W. 450 (Mo. 1911)
- Karlen v. Hadinger*, 132 N.W. 591 (Wis. 1911)
- Commonwealth v. Phelps*, 96 N.E. 69 (Mass. 1911)
- District of Columbia v. Thompson*, 37 App. D.C. 420 (1911)
- People v. Abramson*, 131 N.Y.S. 798 (N.Y. App. Div. 1911)
- Carpenter v. City of Little Rock*, 142 S.W. 162 (Ark. 1911)
- People v. McDermott Dairy Co.*, 132 N.Y.S. 329 (N.Y. App. Term 1911)
- State v. Smith*, 57 So. 426 (Fla. 1912)
- Hill v. Fetherolf*, 84 A. 677 (Pa. 1912)
- People v. Russell*, 134 N.Y.S. 1068 (N.Y. App. Term 1912)
- State v. Elam*, 136 N.W. 59 (Neb. 1912)
- State v. Miller*, 124 P. 361 (Kan. 1912)
- State v. Goodhue*, 126 P. 986 (Ore. 1912)
- Syracuse Ice Cream Co. v. City of Cortland*, 138 N.Y.S. 338 (N.Y. App. Div. 1912)
- State v. Closser*, 99 N.E. 1057 (Ind. 1912)
- State v. Burnam*, 128 P. 218 (Wash. 1912)
- Ridgeway v. City of Bessemer*, 64 So. 189 (Ala. 1913)
- Bellows v. Raynor*, 101 N.E. 181 (N.Y. 1913)
- Dade v. United States*, 40 App. D.C. 94 (1913)
- Alston v. Ball*, 77 S.E. 727 (S.C. 1913)
- People v. Abramson*, 101 N.E. 849 (N.Y. 1913)
- Weyman v. City of Newport*, 156 S.W. 109 (Ky. 1913)
- Adams v. Milwaukee*, 228 U.S. 572 (1913)
- Revis v. Superior Court*, 134 P. 1159 (Cal. 1913)
- State v. Thorp*, 143 N.W. 202 (Neb. 1913)
- People v. Frudenberg*, 103 N.E. 166 (N.Y. 1913)
- Libby, McNeil, & Libby v. United States*, 210 F. 148 (4<sup>th</sup> Cir. 1913)
- Bd. of Health of Covington v. Kollman*, 160 S.W. 1052 (Ky. 1913)
- City of Asheville v. Nettles*, 80 S.E. 236 (N.C. 1913)
- Koy v. City of Chicago*, 104 N.E. 1104 (Ill. 1914)
- State v. Hutchinson Ice Cream Co.*, 147 N.W. 195 (Ia. 1914)
- Whitcomb v. Boston Dairy Co.*, 105 N.E. 554 (Mass. 1914)
- Commonwealth v. Croul*, 91 A. 922 (Pa. 1914)
- People v. McDermott Dairy Co.*, 149 N.Y.S. 906 (N.Y. App. Term 1914)
- People v. Martin*, 151 N.Y.S. 69 (N.Y. App. Term 1915)
- State v. Meyer*, 146 P. 1007 (Kan. 1915)
- Commonwealth v. Elm Farm Milk Co.*, 108 N.E. 911 (Mass. 1915)
- Merle v. Beifeld*, 194 Ill. 364 (1915)
- Cory v. Graybill*, 149 P. 417 (Kan. 1915)
- People v. Blajian*, 154 N.Y.S. 123 (N.Y. App. Term 1915)
- Kansas City v. Henre*, 153 P. 548 (Kan. 1915)

- Durand v. Dyson*, 111 N.E. 143 (Ill. 1915)
- State v. Entwistle*, 95 A. 306 (R.I. 1916)
- Luchini v. Roux*, 157 P. 554 (Cal. 1916)
- City of Newport v. French Bros. Bauer*, 183 S.W. 532 (Ky. 1916)
- State v. Stokes*, 98 A. 294 (Conn. 1916)
- City of Chicago v. Chicago & N.W. Ry. Co.*, 113 N.E. 849 (Ill. 1916)
- Crowl v. Commonwealth*, 242 U.S. 153 (1916)
- Hutchinson Ice Cream Co. v. Iowa*, 242 U.S. 153 (1916)
- City of Owensboro v. Evans*, 189 S.W. 1153 (Ky. 1916)
- City of New Orleans v. Toca*, 75 So. 238 (La. 1917)
- Mannix v. Frost*, 164 N.Y.S. 1050 (N.Y. Sup. Ct. 1917)
- People ex rel. Levy Dairy v. Wilson*, 166 N.Y.S. 211 (N.Y. App. Div. 1917)
- Hebe Co. v. Calvert*, 246 F. 711 (S.D. Ohio 1917)
- Bartollotti v. Police Court of Los Angeles*, 170 P. 161 (Cal. 1917)
- Rosenbusch v. Ambrosia Milk Corp.*, 168 N.Y.S. 505 (N.Y. App. Div. 1917)
- Commonwealth v. Titcomb*, 118 N.E. 328 (Mass. 1918)
- Race v. Kruit*, 118 N.E. 853 (N.Y. 1918)
- People v. Beakes Dairy Co.*, 119 N.E. 115 (N.Y. 1918)
- Union Dairy Co. v. United States*, 250 F. 231 (7<sup>th</sup> Cir. 1918)
- Creaghan v. Mayor, etc. of Baltimore*, 104 A. 180 (Md. 1918)
- Quarternick v. State*, 204 S.W. 328 (Tex. 1918)
- Zenkel v. Oneida Cty. Creameries Co.*, 171 N.Y.S. 676 (N.Y. Sup. Ct. 1918)
- Cofman v. Ousterhous*, 168 N.W. 826 (N.D. 1918)
- Hebe v. Shaw*, 248 U.S. 297 (1919)
- People v. Steinbeck*, 173 N.Y.S. 791 (N.Y. App. Div. 1919)
- Mayor and Alderman of Jersey City v. Hennessy*, 106 A. 405 (N.J. 1919)
- Fuga v. City of Birmingham*, 82 So. 626 (Ala. 1919)
- People v. Kuperschmid*, 176 N.Y.S. 828 (N.Y. App. Term 1919)
- People v. Hamilton*, 177 N.Y.S. 222 (N.Y. App. Div. 1919)
- People v. Eaton*, 215 S.W. 100 (Tex. 1919)
- City of Lawrence v. Kagi*, 185 P. 60 (Kan. 1919)
- Rost v. Key and Chapell Dairy Co.*, 216 Ill. 497 (1920)
- People v. Hart*, 181 N.Y.S. 796 (N.Y. Sup. Ct. 1920)
- State v. Kirkpatrick*, 103 S.E. 65 (N.C. 1920)
- Pfeffer v. City of Milwaukee*, 177 N.W. 850 (Wis. 1920)
- People v. Corcoran*, 186 N.Y.S. 366 (N.Y. Co. Ct. 1920)
- Albright v. Douglas County*, 194 P. 913 (Kan. 1921)
- People ex rel. Ogden v. McGowan*, 195 N.Y.S. 286 (N.Y. Sup. Ct. 1921)
- State v. Field*, 115 A. 296 (Vt. 1921)
- City of Dallas v. Cluck & Murphy*, 234 S.W. 582 (Tex. 1921)
- Bitner v. State*, 134 N.E. 451 (Ohio 1921)
- Liebermain v. Sheffield Farms-Stawson-Decker Co.*, 191 N.Y.S. 593 (N.Y. App. Term 1921)
- Knox County v. Kreis*, 236 S.W. 1 (Tenn. 1922)
- Moll v. City of Lockport*, 194 N.Y.S. 250 (N.Y. Sup. Ct. 1922)
- City of St. Louis v. Kellmann*, 243 S.W. 134 (Mo. 1922)
- State v. Emery*, 189 N.W. 564 (Wis. 1922)
- City of New Orleans v. Vinci*, 96 So. 110 (La. 1922)
- Gardenhire v. State*, 221 P. 228 (Ariz. 1923)

- State v. Edwards*, 121 S.E. 444 (N.C. 1924)
- Commonwealth v. Brandon Farms Milk Co.*, 144 N.E. 381 (Mass. 1924)
- Herkimer v. Potter*, 207 N.Y.S. 35 (N.Y. Sup. Ct. 1924)
- Schulte v. Fitch*, 202 N.W. 719 (Minn. 1925)
- J. Aron Co. v. Sills*, 148 N.E. 717 (N.Y. 1925)
- Knese v. Kinsey*, 282 S.W. 437 (Mo. 1926)
- Fevold v. Bd. of Supervisors of Webster City*, 210 N.W. 139 (Iowa 1926)
- Jefferson Dairy Co. v. Williams*, 112 So. 125 (Ala. 1927)
- Redmond v. Borden Farm Products Co., Inc.*, 157 N.E. 838 (N.Y. 1927)
- Walker v. City of Birmingham*, 112 So. 823 (Ala. 1927)
- State v. Heldt*, 213 N.W. 578 (Neb. 1927)
- State v. Langlade County Creamery Co.*, 213 N.W. 664 (Wis. 1927)
- Leontas v. Savannah*, 138 S.E. 154 (Ga. 1927)
- Hoar v. City of Lancaster*, 137 A. 664 (Pa. 1927)
- Fantroy v. Schirmer*, 296 S.W. 235 (Mo. 1927)
- Ritchie v. Sheffield Farms Co., Inc.*, 222 N.Y.S. 724 (N.Y. Mun. Ct. 1927)
- Lausen v. Board of Supervisors of Harrison City*, 214 N.Y. 682 (Ia. 1927)
- Ryder v. Pyrke*, 224 N.Y.S. 289 (N.Y. Sup. Ct. 1927)
- Korth v. City of Portland*, 261 P. 895 (Ore. 1927)
- Phelps v. Thornburg*, 221 N.W. 835 (Ia. 1928)
- City of Milwaukee v. Childs Co.*, 217 N.W. 703 (Wis. 1928)
- Carlson v. Turner Centre System*, 161 N.E. 245 (Mass. 1928)
- Leontas v. Walker*, 142 S.E. 891 (Ga. 1928)
- Gustafson v. Trocke Cafeteria Co.*, 219 N.W. 159 (Minn. 1928)
- State v. Waldo*, 5 S.W.2d 653 (Mo. 1928)
- Root v. Mizel*, 117 So. 380 (Fla. 1928)
- State v. Jones*, 220 N.W. 373 (Wis. 1928)
- People v. Teuscher*, 162 N.E. 484 (N.Y. 1928)
- State v. Wallace*, 221 N.W. 712 (Neb. 1928)
- Peeverill v. Bd. of Supervisors of Black Hawk County*, 222 N.W. 535 (Ia. 1928)
- Streff v. Gold Medal Creamery Co.*, 273 P. 831 (Cal. 1928)
- State v. Commissioners of Miami County*, 165 N.E. 502 (Ohio 1929)
- Witt v. Klimm*, 274 P. 1039 (Cal. 1929)
- Kroplin v. Truax*, 165 N.E. 498 (Ohio 1929)
- State v. Edwards*, 146 A. 382 (Conn. 1929)
- Lang's Creamery, Inc. v. City of Niagara Falls*, 167 N.E. 464 (N.Y. 1929)
- Black v. Powell*, 226 N.W. 910 (Mich. 1929)
- People v. Stimer*, 226 N.W. 899 (Mich. 1929)
- State v. Kistler*, 227 N.W. 319 (Neb. 1929)
- Noble v. Carlton*, 36 F.2d 967 (S.D. Fla. 1930)
- People v. Shoemaker*, 239 N.Y.S. 71 (N.Y. App. Div. 1930)
- Grider v. City of Ardmore*, 287 P. 776 (Okla. 1930)
- State v. Splittberger*, 229 N.W. 332 (Neb. 1930)
- People v. Perretta*, 171 N.E. 72 (N.Y. 1930)
- Patrick v. Riley*, 287 P. 455 (Cal. 1930)
- Denver Milk Bottle, Case, & Can Exchange v. McKinzie*, 287 P. 868 (Colo. 1930)
- Shelton v. City of Shelton*, 150 A. 811 (Conn. 1930)



- People v. Ryan*, 243 N.Y.S. 644 (N.Y. App. Div. 1930)
- Loftus v. Department of Agriculture*, 232 N.W. 412 (Ia. 1930)
- McAteer v. Sheffield Farms Co., Inc.*, 152 A. 469 (N.J. 1930)
- Martinez v. People of Porto Rico*, 46 F.2d 427 (1<sup>st</sup> Cir. 1931)
- Whipp v. United States*, 47 F.2d 496 (6<sup>th</sup> Cir. 1931)
- Belzung v. State*, 36 S.W.2d 397 (Ark. 1931)
- State v. Knudtsen*, 236 N.W. 696 (Neb. 1931)
- First National Stores v. Lewis*, 155 A. 534 (R.I. 1931)
- Stephens v. Oklahoma City*, 1 P.2d 367 (Okla. 1931)
- Whitney v. Watson*, 157 A. 78 (N.H. 1931)
- Commonwealth v. Rapoza*, 178 N.E. 530 (Mass. 1931)
- Leaman v. District of Columbia*, 60 App. D.C. 395 (1932)
- Pacific Coast Dairy v. Police Court of City and County of San Francisco*, 8 P.2d 140 (Cal. 1932)
- Hacker v. Barnes*, 7 P.2d 607 (Wash. 1932)
- City of Frankfort v. Commonwealth*, 49 S.W.2d 548 (Ky. 1932)
- State v. Board of Commissioners of Pine County*, 243 N.W. 851 (Minn. 1932)
- Peverill v. Dept. of Agriculture*, 245 N.W. 334 (Ia. 1932)
- Milk Bottlers' Federation v. Muncy, Inc.*, 261 N.Y.S. 514 (N.Y. App. Div. 1932)
- City and County of Denver v. Gibson*, 24 P.2d 751 (Colo. 1933)
- McAllister v. Stevens and Sanford, Inc.*, 265 N.Y.S. 142 (N.Y. Mun. Ct. 1933)
- Minte v. Baldwin*, 289 U.S. 346 (1933)
- Logan v. Alfieri*, 148 So. 872 (Fla. 1933)
- State ex rel. Hanna v. Spittler*, 190 N.E. 584 (Ohio 1933)
- Crowley v. Idaho Industrial Training School*, 26 P.2d 180 (Id. 1933)
- State ex rel. Larson v. City of Minneapolis*. 251 N.W. 121 (Minn. 1933)
- Grandview Dairy, Inc. v. Baldwin*, 269 N.Y.S. 116 (N.Y. App. Div. 1934)
- People v. Anderson*, 189 N.E. 338 (Ill. 1934)
- People v. Huls*, 189 N.E. 347 (Ill. 1934)
- Witte v. McLaughlin*, 189 N.E. 350 (Ill. 1934)
- Chevy Chase Dairy v. Mullineaux*, 63 App. D.C. 259 (1934)
- City of Des Moines v. Fowler*, 255 N.W. 880 (Ia. 1934)
- Great Atlantic and Pacific Tea Co. v. Gwilliams*, 76 S.W.2d 65 (Ark. 1934)
- Henry Morris, Inc. v. Department of Health*, 254 N.Y.S. 90 (N.Y. App. Div. 1934)
- People v. Bratowsky*, 276 N.Y.S. 418 (N.Y. Mag. Ct. 1934)
- F.W. Woolworth Co. v. Wilson*, 74 F.2d 439 (5<sup>th</sup> Cir. 1934)
- City of Quincy v. Burgdorf*, 235 Ill. 560 (1934)
- Sheffield Farms v. Seamen*, 177 A. 372 (N.J. 1935)
- People v. Linden Farms Milk & Cream Co., Inc.*, 280 N.Y.S. 144 (N.Y. App. Div. 1935)
- Bourcheix v. Willow Brook Dairy*, 196 N.E. 617 (N.Y. 1935)
- Grant v. Leavell*, 82 S.W.2d 283 (Ky. 1935)
- Miller v. Williams*, 12 F. Supp. 236 (D. Md. 1935)
- Coelho v. Truckell*, 48 P.2d 697 (Cal. 1935)
- Coleman v. City of Little Rock*, 88 S.W.2d 58 (Ark. 1935)
- Anderson v. City of Tampa*, 164 So. 546 (Fla. 1935)
- State v. Brockwell*, 183 S.E. 378 (N.C. 1936)
- Hickman v. St. Louis Dairy Co.*, 90 S.W.2d 177 (Mo. 1936)
- Associated Dairies of Wichita v. Fletcher*, 56 P.2d 106 (Kan. 1936)

- Swift & Co. v. Blackwell*, 84 F.2d 130 (4<sup>th</sup> Cir. 1936)
- Colonna v. Rosedale Dairy Co.*, 186 S.E. 95 (Va. 1936)
- Anderson v. Russell*, 268 N.W. 386 (S.D. 1936)
- Wichita Natural Milk Producers v. Capp*, 59 P.2d 29 (Kan. 1936)
- Wright v. Richmond County Dept. of Health*, 186 S.E. 815 (Ga. 1936)
- Tennessee Dairies, Inc. v. Seibenhausen*, 99 S.W.2d 323 (Tex. 1936)
- Urban v. Taylor*, 188 A. 232 (N.J. 1936)
- Crowley v. Lane Drug Stores*, 189 S.E. 380 (Ga. 1936)
- Menaker v. Supplee-Wills-Jones Milk Co.*, 189 A. 714 (Pa. 1937)
- La Franchi v. City of Stanta Rosa*, 65 P.2d 1301 (Cal. 1937)
- Stanislaus County Dairymen's Protective Assoc. v. Stanislaus Count*, 65 P.2d 1305 (Cal. 1937)
- Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937)
- Gilchrist Drug Co. v. City of Birmingham*, 174 So. 609 (Ala. 1937)
- People v. Soiefer Farms, Inc.*, 295 N.Y.S. 177 (N.Y. App. Div. 1937)
- Robertson v. Commonwealth*, 191 S.E. 773 (Va. 1937)
- Milk Control Bd. of Indiana v. Phend*, 9 N.E.2d 121 (Ind. 1937)
- City of Rockford v. Hey*, 9 N.E.2d 317 (Ill. 1937)
- People v. Powell*, 274 N.W. 372 (Mich. 1937)
- Kelly v. Ouachith Dairy Dealers Cooperative Association, Inc.*, 175 So. 499 (La. 1937)
- City of Phoenix v. Breuninger*, 72 P.2d 580 (Ariz. 1937)
- John E. Rosasco Creameries, Inc. v. Cohen*, 11 N.E.2d 908 (N.Y. 1937)
- Silverman v. Department of Health of New York City*, 300 N.Y.S. 979 (N.Y. App. Div. 1937)
- McKenna v. City of Galveston*, 113 S.W.2d 606 (Tex. 1938)
- State v. McCosh*, 279 N.W. 775 (Neb. 1938)
- Steinberg v. Bloom*, 5 N.Y.S.2d 774 (N.Y. App. Term 1938)
- Buhler v. Dept. of Agriculture*, 280 N.W. 367 (Wis. 1938)
- People v. Eichen*, 5 N.Y.S.2d 817 (N.Y. Sp. Sess. 1938)
- Aguiar and Bello v. Brock*, 24 F. Supp. 692 (S.D. Cal. 1938)
- Smith v. McClary*, 82 P.2d 712 (Cal. 1938)
- McKinney v. State*, 199 S.E. 115 (Ga. 1938)
- Brielman v. Monroe*, 17 N.E.2d 187 (Mass. 1938)
- Affonso Brothers v. Brock*, 84 P.2d 515 (Cal. 1938)
- Poole and Creber Market Co. v. Breslhears*, 125 S.W.2d 23 (Mo. 1938)
- Pure Milk Producers & Distributors Assoc. v. Morton*, 125 S.W.2d 216 (Ky. 1939)
- Economy Dairy v. Kerner*, 20 N.E.2d 568 (Ill. 1939)
- Holcombe v. Georgia Milk Producers Confederation*, 3 S.E.2d 705 (Ga. 1939)
- State v. McLeod*, 190 So. 596 (Fla. 1939)
- Arden Farms Co. v. City of Seattle*, 99 P.2d 415 (Wash. 1939)
- State v. Maitrejean*, 192 So. 361 (La. 1939)
- Gray v. Pet Milk Co.*, 108 F.2d 974 (7<sup>th</sup> Cir. 1940)
- Economy Dairy v. Kerner*, 25 N.E.2d 108 (Ill. 1940)
- Commonwealth v. Licini*, 10 A.2d 923 (Pa. 1940)
- Rossman v. City of Moultrie*, 7 S.E.2d 270 (Ga. 1940)
- Conforto v. Cloverland Dairy Products*, 194 So. 43 (La. 1940)
- S.H. Kress v. Dept. of Health of City of New York*, 27 N.E.2d 431 (N.Y. 1940)
- Carter v. St. Louis Dairy Co.*, 139 S.W.2d 1025 (Mo. 1940)
- Nelson v. West Coast Dairy*, 105 P.2d 76 (Wash. 1940)
- Stickley v. Givens*, 11 S.E.2d 631 (Va. 1940)

*Dusinberre v. Noyes*, 31 N.E.2d 34  
(N.Y. 1940)

*Milk Commission v. Dade County  
Dairies, Inc.*, 200 So. 83 (Fla.  
1940)

## Appendix B: Key Variables Tracked

**Date Decided:** the date of the reported judicial decision. When the month and date were unknown, coders entered January 1.

**Enforcer:** the type of party enforcing the milk health regulation, whether as prosecutor, civil plaintiff, or civil defendant. Possibilities included state health regulator, local health regulator, local police, state and local officials working together, private party, federal officials, and unknown.

**Dairy Party Litigation Status:** the litigation status of the dairy party. Possibilities include criminal defendant, civil plaintiff, and civil defendant. For civil forfeiture actions, dairy parties are coded as civil defendants. For habeas corpus cases, dairy parties are coded as criminal defendants.

**Disposition at Trial:** the outcomes at trial could be (1) in favor of the dairy party, (2) in favor of the enforcer but no sanction imposed (as when the dairy party was the plaintiff), and (3) in favor of the enforcer with some sanction imposed on the dairy party.

**Sanction Type:** the type of sanction imposed at trial, civil or criminal. For criminal sanctions, the coders determined whether the sanction was a fine or incarceration, and noted the amount of fine or length of incarceration when the case mentioned this fact.

**Appeal Disposition:** outcome in the reported case. Options included (1) enforcer wins, (2) dairy party wins but regulation remains valid for future enforcement, and (3) dairy party wins and enforcement of this regulation is blocked for some category of cases in the future.

**Party Reasons Against Enforcement:** the coders noted the reasons that parties raised to convince the court not to enforce the milk regulation. Reasons included (1) regulation contrary to or beyond statutory authority, (2) regulation in conflict with Constitution, (3) lack of notice to dairy party as required by law, (4) no proof of dairy party's intent to adulterate milk, (5) no proof of other knowledge or purpose, (6) improper state conduct during investigation, and (7) other.

**Party Reasons Favoring Enforcement:** the coders noted the reasons that parties gave in favor of enforcing the milk regulation, including (1) consistent with statutory authority, (2)

consistent with Constitution, (3) effectiveness in improving health of milk supply, (4) proper exercise of police power, and (5) other.

**Court Reasons:** the coders noted the reasons that the court relied upon in enforcing or refusing to enforce the regulation. The types of reasons were the same as those tracked for parties.

**Law Level:** the level of government responsible for passing the regulation at issue. Possibilities included state statute, state regulation, city ordinance, local regulation, federal law, common law, and others.

**Date of Passage:** date of passage of statute or regulation at issue.

**Regulation Type:** the dairy practices regulated and tests required under the law. Possibilities include milk from uninspected or diseased cows, operating without license, improper pasteurization, failure to pasteurize, adulteration of milk with water, adulteration of milk with other substances, sale without proper labels, storage at improper temperature, storage in unsealed or unsanitary containers.

**Sanctions authorized:** the types of sanctions authorized under the statute or regulation at issue.