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Common Regulation: Legal Origins of State Power in America

by
WILLIAM J. NOVAK*

Introduction

As the lone historian participating in this Symposium, I am obliged to turn attention to historical antecedents and the broader context of modern constitutional adjudication. At an earlier point in our jurisprudential history, such a move would have been superfluous, not anomalous. In the early twentieth century, American constitutional commentary was dominated by historically-minded social thinkers like James Bradley Thayer, Edward S. Corwin, and Thomas Reed Powell. A thorough grounding in constitutional history was a prerequisite to almost all discussions of constitutional law and theory.

Since World War II, however, the role of historical knowledge and method in constitutional thought has deteriorated, replaced by a steady string of distinctly antihistorical perspectives: the legal process of Henry Hart and Albert Sacks, the neutral principles of Herbert Wechsler, the judicial craftsmanship of Alexander Bickel, the original understanding of Robert Bork, the law and economics of Richard Posner, the neo-Kantian rights theories of John Rawls and Ronald Dworkin, and ultimately the "law of rules" of Antonin Scalia, which serves as a backdrop to this Symposium.1 Given some of the disturbing con-

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clusions and policies generated by these "time-less" constitutionalisms (from Bickel's defense of federalism and critique of Brown in an era of civil rights crisis\(^2\) to Posner's similarly ill-timed attack on federal AIDS spending\(^3\)), it is a propitious moment to reconsider the virtues of a historical approach to American constitutional law.\(^4\)


\(^2\) For the most judicious analysis of Bickel's positions on these matters, see Clyde Spillenger, Reading the Judicial Canon: Alexander Bickel and the Book of Brandeis, 79 J. Am. Hist. 125 (1992).


\(^4\) The much-debated "republican revival" and the recent treatises of Cass Sunstein and Bruce Ackerman seem to signal a pending historical turn in constitutional jurisprudence. But both literatures remain problematic from a historian's perspective. As Terry Fisher and Linda Kerber have argued, the "neo-republican" effort to reach back across two hundred years of American history and extract from the Founding a single, coherent ideological template to guide contemporary decision making is reductionist, "anachronistic," and doomed to failure. See William W. Fisher III, Making Sense of Madison: Nedelsky on Private Property, 18 Law & Soc. Inquiry 547 (1993); Linda K. Kerber, Making Republicanism Useful, 97 Yale L.J. 1663 (1988); Frank Michelman, Law's Republic, 97 Yale L.J. 1493 (1988); Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988).


In The Partial Constitution and We The People respectively, Sunstein and Ackerman make a more concerted effort to deal with the sweep of the American constitutional past, but their histories remain decidedly episodic, focussing on four key moments of constitutional contest and change: 1787, Reconstruction, Lochner, and 1937. See Cass R. Sunstein, The Partial Constitution (1993); Bruce Ackerman, We The People: Foundations 37 (1991). Ackerman's principled defense of episodism ("Very few Americans feel the need to recall what happened in 1887, although it is a century closer to us in chronological time [than 1787]. People constantly refer to the Reconstruction amendments, while nobody talks much about the constitutional significance of the Spanish-American War.") is also fraught with the dangers of presentism and anachronism, obscuring the larger contexts and continuities of constitutional debate and struggle. See Ackerman, supra, at 37.

The two pillars of the historical craft are sequence and context. Historians study change over time, and embrace the complex interconnectedness of social developments. As a rule, historians challenge timeless universalisms, ideologies that deny or disguise their contingent and human origins (e.g., the doctrine of natural law). By paying close attention to sequence—by giving ideas, individuals, institutions, and events worldly histories—historians battle reification and transcendence, the tendency of every established order to produce "the naturalization of its own arbitrariness."  

Similarly, historians tend to eschew reductionist and overly determined models for divining essences and filtering out least common denominators (e.g., notions like political or economic man), in favor of a methodology that emphasizes the interrelatedness of economic, political, social, and legal phenomena. As Willard Hurst noted, "The content and energy which patterns of behavior and ideas, feelings, and events impart to men's lives are conditioned by the fact that these elements do not exist as isolated entities. They coexist and interact." For historians, nothing human is timeless or autonomous. Such a perspective is especially useful when approaching something as embedded in history, politics, and social life as American constitutional law.

These anti-foundational and anti-essentialist premises have led some historians to talk about modem historical practice as an inherently destabilizing and subversive enterprise, a counter to the universalism of rationalist forms of apologetics. The classic example of such a critical use of history is C. Vann Woodward's *The Strange Career of Jim Crow*. Through his historical recovery of a relatively flexible moment in post-Reconstruction race relations, Woodward challenged the then-universal tenet that the roots of segregation lay in deep, unalterable Southern mores. Applied to law, Robert Gordon has argued

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My only purpose has been to indicate that things have not always been the same in the South. . . . The policies of proscription, segregation, and disfranchisement that are often described as the immutable "folkways" of the South, impervious alike to legislative reform and armed intervention, are of a more recent origin. The effort to justify them as a consequence of Reconstruction and a necessity of the times is embarrassed by the fact that they did not originate in those times. And the belief that they are immutable and unchangeable is not supported by history.
that historicism, defined as “the recognition of the historical and cultural contingency of law,” is a “perpetual threat” to mainstream legal scholarship and its on-going effort to rationalize, justify, and institutionalize current legal doctrine and practice.9

Other philosophers, social scientists, and legal scholars have taken “the historical turn” less for its intrinsic critical bite than as an alternative to the excessive empiricism, positivism, and scientism of current academic discussions of society and policy. James Kloppenberg has refined the notion of a pragmatic “historical sensibility” that incorporates a more interpretive and hermeneutic approach to knowledge. The patron saint of that perspective is Wilhelm Dilthey who argued, “The development of historical consciousness destroys faith in the universal validity of any philosophy which attempts to express world order cogently through a system of concepts.”10 In place of universal and apodictic philosophies, Dilthey advocated a more skeptical, humanistic, and open-ended approach to the cultural sciences that recognized “meaning and significance arise only in man and his history.”11 Though the focus of an enormous body of theoretical

Woodward, supra, at 47.

More recently, George Chauncey has demonstrated the critical power of revising “taken-for-granted” sequences by deconstructing the received wisdom that the history of homosexuality in America before 1969 was basically a story of isolation and invisibility (i.e., the history of “the closet”). George Chauncey, Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940 (1994).

9. Gordon, Historicism, supra note 4, at 1017. These historians put to good use a central insight of Hegel: “Philosophy aims at knowing what is imperishable, eternal, and absolute. Its aim is truth. But history relates the sort of thing which has existed at one time but at another has perished.” John Patrick Diggins, The Promise of Pragmatism: Modernism and the Crisis of Knowledge and Authority 10 (1994) (quoting Hegel).


11. Wilhelm Dilthey, Pattern and Meaning in History: Thoughts on History and Society 168 (H.P. Rickman ed., 1961). Dilthey concluded this treatise:

The historical consciousness of the finitude of every historical phenomenon, of every human or social condition and of the relativity of every kind of faith, is the last step towards the liberation of man. With it man achieves the sovereignty to enjoy every experience to the full and surrender himself to it unencumbered, as if there were no system of philosophy to tie him down. Life is freed from knowledge through concepts; the mind becomes sovereign over the cobwebs of dogmatic thought. . . . The attempt used to be made to grasp life through the world. But there is only the one road from the interpretation of life to the world and life is only there in experience, understanding and historical apprehension. We do not carry the meaning of the world into life. We are open to the possibility that meaning and significance arise only in man and his history, not in the isolated individual but in man as a historical being. For man is something historical.
literature and an intellectual debate as old as the separation of nomos
and physis, the gist of the historical sensibility is captured in a distinc-
tion Sheldon Wolin drew between political science and political
wisdom:

The antithesis between political wisdom and political science basic-
cally concerns two different forms of knowledge. The scientific
form represents the search for rigorous formulations which are logi-
cally consistent and empirically testable. As a form, it has the quali-
ties of compactness, manipulability, and relative independence of
context. Political wisdom . . . presents a contrast with the scientific
type. Its mode of activity is not so much the style of the search as of
reflection. It is mindful of logic, but more so of the incoherence and
contradictoriness of experience. For the same reason, it is distrust-
ful of rigor. Political life does not yield its significance to terse hy-
potheses, but is elusive, and hence meaningful statements about it
often have to be allusive and intimative. Context becomes su-
premely important, for actions and events occur in no other setting.
Knowledge of this type tends, therefore, to be suggestive and illumi-
native rather than explicit and determinate.12

Fittingly, Wolin recommends the study of history, institutions, law,
and past political theories as central to political wisdom. In this Arti-
cle, I would like to take up Wolin’s recommendation and urge a his-
torical re-turn in American constitutional thought on the premise that
the late twentieth century might be in need of less constitutional sci-
ence and more constitutional wisdom.

I. Liberal Constitutionalism

A fitting place to begin such an enterprise is with a historical cri-
tique of the reigning paradigm of modern constitutional law—liberal
constitutionalism. That paradigm is the source of the current obses-

Id. at 167-68. For a classic discussion, see H. STUART HUGHES, CONSCIOUSNESS AND SOCI-
ETY: THE REORIENTATION OF EUROPEAN SOCIAL THOUGHT, 1890-1930, at 183-248
(1958).

12. Sheldon Wolin, Political Theory as a Vocation, in MACHIAVELLI AND THE NATURE
OF POLITICAL THOUGHT 23, 23-75 (Martin Fleisher ed., 1972). Some leading surveys of the
historical and interpretive turns are RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND
RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1985); INTERPRETIVE SOCIAL SCI-
ENCE: A SECOND LOOK (Paul Rabinow & William M. Sullivan eds., 1987); UNDERSTAND-
ING AND SOCIAL INQUIRY (Fred R. Dallmayr & Thomas A. McCarthy eds., 1977); Donald
the implications of this perspective for legal thought, the best source is Joan Williams's
trilogy of theoretical-historiographical articles. See Joan C. Williams, Rorty, Radicalism,
Romanticism: The Politics of the Gaze, 1992 Wis. L. Rev. 131; Joan C. Williams, Culture
and Certainty: Legal History and the Reconstructive Project, 76 VA. L. REV. 713 (1990);
Joan C. Williams, Critical Legal Studies: The Death of Transcendence and the Rise of the
sion with the public-private distinction and the judicial balancing test that spawned this Symposium. While self-evident to the modern lawyer, Justice Scalia's constitutional proposition that private right and public value might be as incommensurable as the length of a line and the weight of a rock\textsuperscript{13} strikes a historian as novel, problematic, and in need of a healthy dose of historicism.

Scalia's Carrollian metaphor constitutionally enshrines one particular way of breaking up and looking at the world—a way that has come to represent the essence of modern liberal\textsuperscript{14} constitutionalism. That perspective interprets the world in terms of a harsh, overarching separation of the private and the public, the individual and the state.\textsuperscript{15} The dichotomy is total and the two are often conceived of as intrinsically antagonistic, as in Herbert Spencer's \textit{The Man Versus the State}.\textsuperscript{16} Public powers, when confined to their legitimate and proper sphere, are absolute and plenary. Private rights when correctly delineated are inviolate and determinative. Judges obtain their distinctive political authority in the American regime precisely because they are the ultimate arbiters of these fundamental constitutional boundaries. The balancing test—the careful drawing and re-drawing of the line between public values and individual rights—has become the \textit{sine qua non} of the judicial role.\textsuperscript{17} Duncan Kennedy has described it as the

\textsuperscript{13} See Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring). Scalia's musing about rocks and lines is the source of this Symposium's title, "When Is a Line as Long as a Rock Is Heavy?: Reconciling Public Values and Individual Rights in Constitutional Adjudication." The Symposium brochure speculates, "In Wonderland, Alice would not have been at all surprised if she were asked to compare the length of a line with the weight of a rock. Yet, the Constitution may invite just such a comparison if it calls upon the Court to balance public values and individual liberties."


\textsuperscript{16} Herbert Spencer, \textit{The Man Versus The State} (Truxton Beale ed., 1916).

\textsuperscript{17} For the best recent discussions of balancing pro and con, see Frank M. Coffin, \textit{Judicial Balancing: The Protean Scales of Justice}, 63 N.Y.U. L. Rev. 16 (1988); T. Alexander Aleinikoff, \textit{Constitutional Law in the Age of Balancing}, 96 Yale L.J. 943 (1987). For a timely, if banal, example of just how far public and private balancing tests control modern legal thinking and problem-solving, consult some of the arm-chair legal analysis resulting
fundamental legitimating ideology behind the liberal rule of law. To legal scholars these observations have the status of cant. They are taken for granted as matter-of-factly representing the way that constitutional jurisprudence is, should be, and always has been practiced. For those who have passed through the looking-glass of modern legal education, the public-private distinction and judicial balancing are as natural, neutral, and necessary as "We The People . . ." itself.

from the recent assault on figure skater Nancy Kerrigan. In speculating on whether or not rival Tonya Harding would be dropped from the Olympic team, lawyer after lawyer employed the public-private template, suggesting subsequent litigation would turn on balancing the public's expectation and value of a fair, unblemished athletic competition against Harding's private investment in her training and career with the expectation of a financial payoff. CHANNEL 2 NEWS (television broadcast, Jan. 20, 1994).

18. Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 BUFF. L. REV. 209, 382 (1979). Kennedy introduces a wonderful diagram to illustrate the conceptual power of a "rule of law" as mediator between the individual and state (public law), and between clashing individual rights (private law):

![Diagram](image)

In positing a pre-social, highly individualistic concept of the self and a rigid separation of public and private, the liberal world view empowers law (when it can successfully legitimize itself as something other than power or politics) as the ultimate umpire of social relations and an all-powerful border police. In the liberal schema, the "rule of law" becomes the only thing protecting an individual from the violence of others as well as the state. Thus, even a staunch critic of liberalism like E.P. Thompson could conclude that "the notion of the rule of law is itself an unqualified human good." E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 267 (1975). But see Morton Horwitz, The Rule of Law: An Unqualified Human Good?, 86 YALE L.J. 561 (1977) (criticizing the rule of law). The central problem with Kennedy's analysis is his assertion that Blackstone marks the ascendancy of a liberal legalism that by the nineteenth century structured all of Anglo-American law. As suggested below, one could argue that Kennedy's diagram and liberal legalism failed to capture American jurisprudence until the early twentieth century (Kennedy's date for liberalism's "final disintegration"). Kennedy, supra, at 217.

19. Morton Horwitz is the original source of the alliterative "natural, neutral, and necessary" which he uses to stand for the hegemonic and naturalizing tendencies of all mainstream legal thought. See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 6 (1992) [hereinafter HORWITZ,
The historian’s job is to challenge this misconception. Far from being either natural, necessary, or the way things have been from time out of mind, the public-private antinomy and judicial balancing are surprisingly recent and contingent human creations, social constructions of a particular historical moment. Liberal constitutionalism is a modern legal invention, the culmination of a complex and important set of social and political struggles. How we conceptualize the historical emergence of liberal constitutionalism—how we frame its original sequence and context—has enormous consequences for the way we think about judicial power, constitutional interpretation, and the supposed irreconcilability of public values and private rights.

As expected, the dominant, assumed version of American constitutional history is remarkably conducive to the liberal bifurcation of public and private, powers and rights. It offers comfort and legitimacy to the liberal legal order by providing it with deep, consensual roots in the American past. Though examples are legion, the father of this perspective is Edward S. Corwin. In a series of authoritative articles in the early twentieth century, Corwin reduced the essence of American constitutionalism to a triumvirate of sacred doctrines: vested rights, judicial review, and due process. Those doctrines were rooted in a higher law tradition as old as western civilization that happily realized its telos in the hands of the Founders, John Marshall, and Joseph Story. From that tradition flowed the principledness and rightness of American constitutionalism’s “basic doctrine” of shielding private rights from legislative attack via a powerful, independent judiciary. Of course, definitions of private right and legislative power changed significantly from the nineteenth to the twentieth century. Private right grew from a narrow, propertied conception to modern notions of personal liberty and civil rights. The locus of public power

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shifted from the states to the federal government. But for Corwin and his progeny, constitutionalism remained consistently dedicated to drawing and re-drawing the line between public and private, power and right, political sovereignty and fundamental law, protecting the latter from the former. That was the tradition, Carl Swisher noted, "from Demosthenes to Calvin Coolidge and beyond." Justice Scalia is only too clearly implicated in that "beyond."

In the following pages, I argue that this legitimationist view of constitutional history is flawed. In contrast to its linear portrayal of an American constitutionalism, continuously devoted to the judicial delimitation and protection of a vital private sphere, I make the case for discontinuity and diversity. Despite some recent arguments to the contrary, American constitutional history from 1787 to 1937 is not reducible to the elaboration of a single doctrine or principle (e.g., Jennifer Nedelsky's protection of property, Herbert Hovenkamp's advancement of classical economic theory, or Morton Horwitz's aggrandizement of legal and judicial power). There have been several competing constitutionalisms in the American past. The modern, liberal version is only the most recently ascendant. It did not evolve naturally out of eighteenth- and nineteenth-century ideas and practices, but overthrew and displaced them.

In a larger work-in-progress, I argue that the early nineteenth century was anything but the formative era of modern constitutionalism. Instead, it was home to understandings of public law, individual responsibility, and judicial role decidedly different from our own. A

22. Of course, I am not the first to make such an argument. American legal historians have been wrestling with various aspects of the Corwin thesis since Willard Hurst’s famous distinction between static and dynamic property rights. James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (1956) [hereinafter Hurst, Conditions of Freedom]. I discuss some of these historiographical moves in my Public Economy and the Well-Ordered Market: Law and Economic Regulation in 19th-Century America, 18 Law & Soc. Inquiry 1, 3-7 (1993). For a more complete survey, see Harry N. Scheiber, American Constitutional History and the New Legal History: Complementary Themes in Two Modes, 68 J. Am. Hist. 337 (1981).


classic example of that foreignness is Massachusetts Chief Justice Lemuel Shaw's defense of legislative power in *Commonwealth v. Alger*:

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property . . . holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to those regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.\(^2\)

Shaw's references to "the nature of well ordered civil society," "the rights of the community," and "social and conventional rights" of property clash sharply with common assumptions about the liberal, higher-law core of early American constitutionalism. They suggest instead the outlines of a different vision of law and society that governed public legal discourse and controversy well into the late nineteenth century; a vision that distinctly refused to separate public powers and private rights in favor of an over-arching notion of "well-ordered" and "well-regulated" community, in which liberties and powers, rights and duties were mutually interwoven.\(^2\) Such ideas were dislodged by modern liberal ones only after a veritable constitutional and legal revolution.

A complete contextual and sequential refutation of the supposedly deep roots of liberal constitutionalism is beyond the scope of this Article. Let me narrow the task at hand in three ways. First, the analysis that follows is primarily synchronic. Before one can argue about the reasons for the rise of one regime (liberalism) and the demise of another (the well-regulated society), one must establish the distinctiveness of those regimes in the first place. Thus, my priority here is to illuminate "the well-regulated society" as a coherent, alternative nineteenth-century constitutionalism, not to chart the transition to liberalism.

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Secondly, I narrow the relevant context by paying particular attention to legal doctrine. Legal doctrine is important, and historians have staunchly defended a focus on treatise writers and appellate judges as an appropriate, relatively autonomous unit for legal-historical study. Nonetheless, it is impossible to fully grasp the import of a common-law doctrine like overruling necessity without taking into account the larger social context of early American urban life (e.g., a propensity for catastrophic epidemics and fires). For the sake of brevity, however, such contexts will have to remain implicit.

Finally, and most importantly, the rest of this Article will focus solely on the nature of state power in nineteenth-century America (ignoring for the time-being the equally compelling question of nineteenth-century conceptions of rights). In contrast to liberal assumptions about laissez-faire and the “night-watchman,” or negative state, public power was alive and well in the nineteenth century. And it existed in public law as something more than a pragmatic, judicial counterbalance to individual rights. The phrase “common regulation” is meant to capture both its presence and its distinctiveness. Let me unpack the meaning of this phrase by treating its two halves individually.

II. Regulation

Despite a vast academic literature and constant public usage, “regulation” defies close circumscription. Indeed, it is rarely dealt with as an independent concept. In its most general form—controlling, directing, or governing by rules—“regulation” is almost useless as an analytical tool for deciphering and distinguishing forms of governmental action. It becomes synonymous with anything and every-


thing government does. From that perspective, the Constitution, Northwest Ordinance, Sherman Antitrust Act, and NIRA are equal examples of public regulation. Yet more specific renderings of "regulation" run the risk of anachronistically imposing modern constructions on an unsuspecting and diverse past. Nevertheless, there are at least two models of regulation that serve as useful guides (or foils) in illuminating the character and historiographical significance of nineteenth-century public policymaking.

The first and most unsophisticated model of regulation—the "classical" model—equates regulation with the state and counterposes the state to a free and private market (economic or social). More a general tendency in some scholarship than a clearly expressed position, this model thrives on the juxtaposition of ideal types: laissez-faire and the general welfare state, public and private, and the state and individual. Regulation is the artificial intervention of the state or the public realm in the autonomous happenings of private life (i.e., interference with private property, the free market, or individual rights). The sources of this approach to regulation are diverse, rooted in the dominant paradigms of American politics and economics: self-interested liberalism and the free market. Its fit with liberal constitutionalism should be apparent.

For our purposes, the most important aspect of the classical model is its historical dynamic. It is usually embedded in a narrative wherein the United States moves to regulation only after a nineteenth century characterized by laissez-faire, free enterprise, and a lack of governmental initiatives. Examples of this perspective abound in some of the best recent work on the American state. Stephen Skowronek's much heralded study of public administration posits a "sense of statelessness" that permeated early American political de-

A renaissance of work on the American state focuses almost exclusively on national authority, administrative agencies, and post-1887 development. The implication is that public activity in the states, outside the “fourth branch of government,” or before the Civil War, was insignificant.

Of course, this is not the only model of regulation in America, and its assumptions (historical and conceptual) have not gone unchallenged. First, a vast historical literature, from the “commonwealth studies” of Oscar and Mary Handlin and Louis Hartz to the legal histories of Willard Hurst, Leonard Levy, and Harry Scheiber, has subverted the conception of a nineteenth century devoid of state action. Through detailed investigations of the policies of state legislatures,
courts, and judges, these studies uncover a beehive of public activity before the Civil War, from state promotion of canals and railroads to public lands and eminent domain policies to experiments in mixed and public enterprises. Together, these studies thoroughly demolish the myth of laissez-faire and make it very difficult to insist on the "statelessness" of early America.

The conceptual challenge to the classical model comes from a recognition that not all "state interventions" are equal. A fundamental difference in kind separates the governmental activities of levying property taxes, distributing public lands, and prohibiting the sale of liquor or dangerous materials. Though perhaps always noticed, it took Ernst Freund's pioneering studies of law and legislation to clearly demarcate these distinctions for American lawyers and scholars. Freund divided governmental power into four "manifestations": justice, police, taxation, and management of public property and personnel. Though all four contained residues of "regulation" as rules and controls, Freund identified police as the power chiefly associated with the idea of "regulation." He defined police as the state's power to promote the public welfare through statutes and rules restraining and restricting "the use of liberty and property." Freund labelled this regulatory authority the "police power."

Freund's typology and definition of regulation are much more useful than the intervention-nonintervention model in evaluating public powers. And modern historians and political scientists have been quick to borrow and elaborate his separation of governmental powers.

Eminent Domain and the Concept of Public Purpose in the State Courts, 5 Persp. Am. Hist. 327 (1971).


36. Freund, Legislative Regulation, supra note 35, at 53.

37. Id.

38. Freund, Police Power, supra note 35, at iii.

39. Id. at 21. The police power entailed the imposition of direct and explicit limitations on private behavior not found in taxation or land policies. Furthermore, police restraints and compulsions operated on conventional and legitimate behavior rather than the "intrinsically vicious" or evil acts regulated by criminal justice. As Freund admits, this is perhaps the trickiest distinction in that most police legislation is enforced through criminal penalties and thus is technically a part of the criminal law. Nevertheless, Freund's typology addresses the need to distinguish the criminal sanction against murder from that attending a violation of anti-trust laws. His notion of "intrinsic" criminality versus the more "conventional" restraints of regulatory law is perhaps overdrawn, yet it usefully highlights the more contentious, policy-oriented nature of police legislation.
Theodore Lowi is perhaps the most influential of Freund's embellishers. Like Freund, Lowi advocated a stricter definition of regulation (or police power) as a particular kind of governmental activity involving restraints and restrictions on private conduct. Lowi used this notion to differentiate regulation from distributive and redistributive policies. In contrast to regulation, "distributive" policies entailed the promotion of development by granting or giving away resources and privileges to individuals and groups. Public land policies as well as the fevered grants of corporate charters and franchises, tax exemptions, eminent domain privileges, and other immunities or subsidies in the early nineteenth century were perfect examples of distributive government. Lowi used "redistribution" to stand for the welfare policies of the post-New Deal years whereby resources were transferred on a grand scale from one social group to another.

Unfortunately, despite this closer scrutiny of kinds of governmental policies, the categories and definitions devised by Freund and Lowi did not challenge the periodization or basic story-line of the classical model and the laissez-faire historians. In place of the evolution from laissez-faire to state intervention and regulation, Freund and Lowi simply presented a nineteenth-century policy-making shift from distribution to regulation. Regulation remained a distinct product of the late nineteenth century. Lowi argued for the historical as well as functional distinction between distribution and regulation, distribution "being almost the exclusive type of national domestic policy from 1789 until virtually 1890." In 1904, Freund similarly concluded, "The law of the police power [the essence of his concept of regulation] is practically a growth of the last thirty or forty years."

The Freund-Lowi model of regulation remains the dominant interpretive paradigm of American political and constitutional history. The commonwealth studies, together with some of the new initiatives of legal historians, portray an early nineteenth century bustling with government activity but devoid of truly "regulatory" state action. Rather, the emphasis of policy after the Revolution is on the "opening up" of opportunities and the releasing of creative economic energies

42. Lowi, supra note 40, at 689.
43. Freund, Police Power, supra note 35, at v.
through policies best understood as “distributive.”\textsuperscript{44} Though these studies ably critique the laissez-faire theory of nineteenth-century government, they cling to the notion that regulation was rare before the Gilded Age. Richard L. McCormick has summed up a consensus about public power in the nineteenth century: “Forever giving things away, governments were laggard in regulating the economic activities they subsidized. . . . ‘Policy’ was little more than the accumulation of isolated, individual choices, usually of a distributive nature.”\textsuperscript{45}

The concept of “common regulation” challenges this notion of a young America, free of serious regulatory effort. In contrast to liberal mythology, the early American Constitution was devoted to much more than the protection and distribution of natural rights and private privileges. Despite the gradual loosening of some feudal vestiges, like primogeniture and imprisonment for debt, public regulatory power remained an omnipresent factor in early nineteenth-century economic, political, and social life. Indeed, the portrait of a stateless America, characterized by patronage, bargain basement giveaways of natural and man-made (\textit{i.e.}, charters, monopoly privileges, limited liability, etc.) resources, a “paucity of planning,” and little restrictive regulation or oversight, is seriously challenged by a deluge of state and local legislation regulating economic and social life. Between 1781 and 1801, for example, the New York legislature passed special laws regulating lotteries; hawkers and peddlers; the firing of guns; usury; frauds; the buying and selling of offices; beggars and disorderly persons; rents and leases; firing woods; the destruction of deer; stray cattle and sheep; mines; ferries; apprentices and servants; bastards; idiots and lunatics; counsellors, attorneys and solicitors; travel, labor, or play on Sunday; cursing and swearing; drunkenness; the exportation of flaxseed; gaming; the inspection of lumber; dogs; the culling of staves and heading; debtors and creditors; the quarantining of ships; sales by public auction; stock jobbing; fisheries; the inspection of flour and meal; the practice of physic and surgery; the packing and inspection of beef and pork; sole leather; strong liquors, inns, and taverns; pot and pearl ashes; poor relief; highways; and quit rents.\textsuperscript{46} Most of these regulations were passed while the legislature was also busy re-formulating the basic institutions and infrastructure of state government: elections, legislative sessions, courts, towns, sheriffs, the militia, basic

\textsuperscript{44} Robert H. Wiebe, \textit{The Opening of American Society: From the Adoption of the Constitution to the Eve of Disunion} (1984); Bright, \textit{supra} note 33, at 121-23.

\textsuperscript{45} McCormick, \textit{supra} note 41, at 284-85.

\textsuperscript{46} \textit{See} \textit{Laws of New York, 1781-1801} (1802).
criminal laws, weights and measures, land laws, banks, turnpikes, and bridges.

This regulatory pattern continued well into the nineteenth century. Like many states, Michigan revised its statutes in the late 1830s. Under familiar titles and headings, the state organized its regulations of (a) highways, bridges, and ferries; (b) trade (including the inspection and regulation of beef, pork, butter, fish, flour and meal, leather, pot and pearl ashes, beer and ale, and staves and heading; the licensing and regulation of auctions; and weights and measures); (c) public health (including regulations for quarantines, the removal of nuisances, offensive trades, contaminated vessels, homes or buildings, the burial of the dead, travellers, boards of health, medi-

47. See Revised Statutes of Michigan (1838). Similar provisions can be found in The Revised Statutes of the Commonwealth of Massachusetts (1836).

48. The requirements for each of these products mirror the detail of the regulation of beef (though the antebellum buyer of beef should still beware, this hardly looks like caveat emptor to me):

All barrels in which beef or pork shall be packed, shall be made of good seasoned white oak or white ash staves and heading, free from every defect; and each barrel shall contain two hundred pounds of beef or pork. Such barrels shall measure seventeen and a half inches between the chimes, and be twenty-nine inches long, and hooped with twelve good hickory, white oak, or other substantial hoops; if the barrel be made of ash staves, it shall be hooped with at least fourteen hoops; the staves and heads shall be made a proper thickness, and the hoops shall be well set and driven together; and the barrels shall be branded on the bilge with at least the initial letters of the cooper's name. . . . No beef shall be packed in barrels or half barrels, for sale or exportation, unless it be of fat cattle not under three years old; and all such beef shall be cut into pieces, as nearly square as may be, and of not more than twelve, nor less than four pounds in weight. All beef which an inspector shall find on examination to have been killed at a proper age, and to be fat and merchantable, shall be sorted and divided for packing or repacking, in barrels and half barrels, into three different sorts, to be denominated 'mess,' 'prime,' and 'cargo' beef. Mess beef shall consist of the choice pieces of such beef as are large and well fatted, without hocks, shanks, clods or necks, and may or may not contain two choice rounds out of the same cattle, not exceeding ten pounds each; and each barrel or half barrel containing beef of this description, shall be branded on one of the heads with the words 'mess beef.' [Similar descriptions for prime and cargo beef follow.] Every barrel of beef shall be well salted with seventy-five pounds of good Turks Island salt, or a sufficient quantity of other salt to be equal thereto, exclusive of a strong new pickle; and to each barrel shall be added four ounces of saltpetre. On the head of every barrel and half barrel of merchantable beef and pork, inspected and packed, shall be distinctly branded the weight it contains, with the first letter of the christian name, and the surname at full length, of the inspector or deputy who shall have inspected the same, the word 'MICHIGAN,' and the name of the county and the year in which the same was inspected and branded.

Revised Statutes of Michigan, supra note 47, at 136-38. Extensive penalties are then listed for fraud, neglect, unlawful brands, intermixing, or offering for sale beef contrary to the provisions of this law. See id.
cal societies, physic, and surgery); (d) the internal police of the state (including regulations for paupers and the poor, disorderly persons,49 taverns and other licensed houses, illegitimate children, Sunday observance, the law of the road and public carriages, the firing of woods and prairies, timber on water and land, lost goods and stray beasts, theatrical exhibitions and public shows, gunpowder, and unauthorized banking); and (e) corporations. In addition, separate criminal provisions helped restrain such conduct as obstructing highways, railroads or rivers; duelling, defrauding or cheating at common law; unlawfully assembling or rioting; the importing and selling of obscene books or prints; exciting disturbance at public meetings or elections; and selling corrupt or unwholesome provisions.50

In addition to these state regulations, municipalities were usually incorporated with ample powers to pass regulations of their own. A perfect example are the extensive “police” powers granted to the city of Albany by the New York legislature. An 1826 statute haphazardly lumps together some of the regulatory powers of the common council for the “more effectual suppression of vice and immorality” and “for preserving peace and good order.”51 Included are hundreds of regulatable offenses, actions, professions, and economic interests: forestalling; regrating; disorderly and gaming houses; billiard tables; combustible and dangerous materials; the use of lights and candles in livery or other stables; the construction of fireplaces, hearths, chimneys, stoves, and any other apparatus capable of causing fires; the gauging of all casks of liquids and liquors; the place and manner of selling hay, pickled and other fish; the forestalling of poultry, butter,

49. Again, the detail of these regulations is crucial. Regulated under the heading of “disorderly persons” are:

All persons who threaten to run away and leave their wives and children a burden on the public; all persons pretending to tell fortunes, or where lost or stolen goods may be found; all common prostitutes, all keepers of bawdy houses, or houses for the resort of prostitutes; all drunkards, tipplers, gamesters or other disorderly persons; all persons who have no visible profession or calling to maintain themselves by, but who do for the most part support themselves by gaming; all jugglers, common showmen and mountebanks, who exhibit or perform for profit and puppet-show, wire or rope dancing, or other idle shows, arts or feats; all persons who keep in any public highway, or in any place where spirituous liquors are sold, any keno table, wheel of fortune, thimbler, or other table, box, machine or device for the purpose of gaming; all persons who go about with such table, wheel, or other machine or device, exhibiting tricks or gaming therewith; all persons who play in the public streets or highways, with cards, dice, or any instrument or device for gaming; shall be deemed disorderly persons.

Id. at 199.

50. See id. at 619-51.

and eggs; the purchase of wheat, corn, every kind of grain, and other articles of country produce, by "runners"; the running of dogs; weights and measures; buildings; chimneys and chimney sweeps; roads; wharves and docks; the weighing and measuring of hay, fish, iron, cord wood, coal, grain, lime, and salt; markets; cartmen and porters; fires; highways and bridges; roof guards and railings; the selling of cakes and fruit; the paving or flagging of sidewalks; the assize and quality of bread; the running-at-large of horses, cows, or cattle; and vagrants, common mendicants, or street beggars. In addition, the legislature authorized Albany's common council "to make all rules, by-laws, and regulations for the good order and government of the said city."52

Lists such as these could be multiplied a hundredfold across the various jurisdictions of nineteenth-century America. Moreover, each item listed is more than likely the focus of scores of more particular regulations and specifications.53 I have risked tiring the reader with

52. Id. at 193.

53. A telling example is the regulation of ferriage rates. An 1810 New York statute regulation the New York City-Nassau Island ferry is typical:
For every fat ox, steer or bull, twenty-five cents, for all other near cattle eighteen cents, the ferry-master to find the necessary head ropes to fasten and secure the cattle in the boats; for every dead calf, hog or sheep, two cents; for every lamb, pig or shote, one cent; for every quarter of beef, three cents; for every firkin of butter, lard or tallow, two cents; for every other package of butter, lard or tallow, per cwt. three cents; for every ham, an half cent; for every bale of cotton or wool, ten cents; for every crate of earthen ware, twelve cents and an half; for every bear skin, dry hide or horse skin, an half cent; for every cask of flax seed, dry beans or pease of seven bushels, seven cents; for every hundred oysters or clams, one cent; for every sheaf of straw, an half cent; for every one horse chaise with standing top, thirty-one cents; for every hundred bricks, six cents; for every full trunk or chest four feet long, six cents; three feet long four cents; for every full trunk or chest two feet long, two cents, all under, one cent; for every empty trunk or chest of the above sizes, half the above rates; for every bookcase or cupboard, twenty-five cents; for every secretary, bookcase or chest of drawers, twenty cents; for every mahogany dining table, eights cents; for every tea or card table, four cents; of other kind of wood, half of the above rates; for every piano forte, twenty cents; for every mahogany bedstead, four cents; of other wood, two cents; for every clock and case, twenty-five cents; for every sideboard, thirty-seven cents and an half; for every mahogany settle, twenty cents; of other wood, six cents; for every feather bed, three cents; for every cat-tail or straw bed, one cent; for every mat-rass of hair or wool, two cents; for every looking glass the plate six feet long, fifty cents; five feet long or upwards, eight cents; three feet, six cents; two feet, two cents; all under, one cent; for every chaldron of coals, fifty cents; for every cord of nutwood, eighty cents; for every cord of oak or other wood, seventy cents; for every kettle of mild of eight gallons or upwards, two cents; for every empty milk kettle, one cent; for every musket or fowling piece, one cent; for every large or horse boat of household furniture where a single boat is required, one hundred and fifty cents; for every ton of hemp or flax, sixty-two cents and an half; for every ton of cordage, sixty-two cents and an half; for every ream of paper one cent; for
extensive excerpts and inventories to physically confront regulation's absence in our historiography with the sheer weight of its presence in nineteenth-century law. My first theme is simple and unoriginal, but nonetheless important: Regulation was certainly there in the early nineteenth century.

### III. Common

If the "regulation" in "common regulation" draws us to the familiar in early nineteenth-century public policy, "common" represents my attempt to emphasize its distinctive, foreign, and perhaps unrepresentable features. It is part of an effort to tell the tale of nineteenth-century constitutionalism from the inside out, from the past forward, emphasizing the concerns, ambitions, and technologies of public action central to nineteenth- rather than twentieth-century Americans. This would seem to be an obvious historicist point, were not histories of public regulation in America plagued with an overwhelming tendency to read history backwards, with one eye ever cast on the forthcoming New Deal and welfare state. Such a presentist

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**PUBLIC LAWS OF THE STATE OF NEW YORK chs. 119 & 37 (1810).**


55. The New Deal has plagued especially one of the most remarkable efforts in American public history, the "commonwealth studies." Without question the work of the Committee on Research in Economic History was directly influenced by the New Deal (as noted by Oscar and Mary Flug Handlin in the 1968 revised edition of COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861 viii-xii (rev. ed. 1969)). This perspective led them to privilege highly visible examples of government-business cooperation, TVA-like efforts at public ownership and development, and the state's orientation towards general economic management and direction. Those efforts that resonated most with New Deal initiatives received greatest attention, while more subtle (but perhaps more historically lucrative) examples of state power (e.g., the common law of nuisance, the police power, municipal regulatory ordinances) were neglected. The result is a conception of state government in the early nineteenth century that FDR's "Brain Trust" would not find completely alien. Accusations of presentism, in other words, were not altogether undeserved. On the other hand, dismissive attitudes have resulted in the neglect of some of the greatest substantive discoveries of this body of work. For a listing of the commonwealth literature and commentary, see supra note 34.
orientation results in the neglect of the unfamiliar and the forcing of the familiar into anachronistic categories and frameworks. Indeed, a prime reason why historians have had trouble recognizing or dealing with public power in the early republic is that it refuses to conform to modern expectations or understandings.

My second theme, then, is no more complex than the first: Though certainly there, early nineteenth-century regulation was different. It did not carry with it the same assumptions and intellectual baggage that energize contemporary regulatory policy. To get at this difference, we must hold our own conceptions of regulation, rights, and law at bay while sympathetically searching for the period's endemic definitions and orderings. By "common regulation," I hope to capture some of the special meanings and glosses that lay beneath early American efforts to regulate economy and society, and identify the peculiar vision that sets those efforts apart from modern liberal renderings.

The modern law of regulation revolves around a distinctly constitutional construction of the state police power. The police power is envisioned as a judicially constructed balancing or "reasonableness" test for determining when a regulatory statute passed by an otherwise sovereign legislature conflicts with the specific requirements of the Constitution. The exercise becomes a mixture of logomachy, logic, statutory construction, comparative institutional choice, and modern constitutional "science." The modern approach is positivist (regulation is viewed simply as the will of a sovereign state) and instrumental.

56. The best representation of this historiographical problem is John Gough's discussion of how modern English historians, long-tutored in Parliamentary sovereignty, have had considerable difficulty coming to terms with Sir Edward Coke and the idea that at some point in history Parliament could be conceived of as limited. J.W. Gough, Fundamental Law in English Constitutional History (1955).

57. The phrase "common regulation" itself was rarely used in the antebellum era. I have found it only twice in the nineteenth-century federal courts. See Wight v. Curtis, 29 F. Cas. 1170, 1172 (C.C.S.D.N.Y. 1845) (No. 17,628); Sparf v. United States, 156 U.S. 51, 143 (1895). Indeed, the word "regulation" was rarely qualified in this period. A Westlaw search of federal cases between the years 1813-1845 reveals that "regulation" was used by itself nearly 80% of the time. When qualified, "regulation" was usually combined with a relatively innocuous adjective like "municipal," "internal," or "general." Usages of "police regulation" and "public regulation" were also extremely rare, appearing in only 60 of 2027 federal cases using the term "regulation" before 1870. Thus, in naming antebellum regulation, I am forced to rely on a designation not really natural to the period. "Police regulation" or "republican regulation" would have been useful tags if "police" and "republican" were not mired in such deep historiographical and definitional quagmires. Even with long clarifications as to what I would mean by "police" and "republican" these words would drag along more baggage and confusion than enlightenment.
(the police power is viewed as a tool for promoting and reconciling the external goals of politics, power, and policy). The modern state police power is not seen as containing in and of itself any compelling aspirational, cultural, historical, or moral imperatives.

Common regulation is the product of a much different view of law and society. Traces of this larger perspective are evident in the very word "common." "Common" was a constant ingredient in nineteenth-century political and legal discourse. Though still a rich word today, it was especially layered with meanings then. It was a synonym for "public," used to identify objects, goals, and traits of a general nature, belonging to the whole. It stressed those things shared rather than individually possessed, binding society and mankind together rather than pulling it apart. "Common" rippled with larger notions of "community," "ordinariness" (as in the Third Estate), "intercourse" (as in "communication" or "communion"), and "public goods" (as in "the commons"). Even alone it resonated with hints of the ideas associated with some of its more famous couplings: "common good," "common rights," "common people," and "common weal." It was the central component of the English translation ("commonwealth") of the Latin res publica—the source of our own "republic." By "common regulation" I hope not only to draw upon those potent sentiments swirling about the word "common," but to call particular attention to two distinct features of early American regulatory policy: its roots in the common-law and its vision of a commonwealth.

Common regulation was a product of the common-law vision of a well-regulated society. The regulations listed above were not simply

58. Though there are many modern formulations of the police power, the rendition in the first edition of the Encyclopaedia of the Social Sciences best captures the "empty," ex post facto quality of contemporary constitutional discourse:

Police power is an idiom of apologetics which belongs to the vocabulary of constitutional law. In American government the validity of any regulatory statute may, in a genuine case in controversy, be tested by judicial review. If the act is sustained, the police power is usually invoked as the sanction; if it is declared null and void, some such phrase as "lack of jurisdiction" or "want of due process" lies at the base of rationalization.


expressions of a plenary state power limited by and played off against written constitutional provisions. They were part and parcel of an older social vision that took seriously the historical sensibility of the common law and the aspirations of an ordered commonwealth. Regulation, like law, in the early republic was more than a reflection or instrument of power and interests (economic, political, social, or technological). A crucial element of common regulation was an intellectual persuasion that envisioned regulation (like law) as a moral exercise for the promotion of public happiness in the good society. Central to this perspective were (1) an adherence to the common law as an experiential yet flexible source of value and guidance; (2) an overriding concern with common, rather than private goods and interests; and (3) a commitment to the commonwealth as the guarantor of public happiness and the general welfare. Unlike the modern police power, the essence of common regulation lay in common-law obligations rather than constitutional limitations.

But common regulation is distinguished from modern regulation as much by its physical as its metaphysical characteristics. Whereas modern regulation can more or less succinctly point to the constitutional definition of the state police power as a source of legitimacy and authority, the roots of common regulation were more diverse. Far from flowing from one doctrine or some primitive equivalent of the police power, common regulation was really an amalgam of several different and sometimes competing traditions, doctrines, and practices.

A. Colonial Experience

One of the more important of these traditions was perhaps tradition itself. Though this Article concerns itself with public policy after the Constitution was adopted, one of its goals is to dilute the customary historian's watershed marked by the years 1776-1787. Without question, early modern habits, customs, and rules influenced public policy well into the nineteenth century. And by all accounts, colonial American society was a well-regulated one.\(^6\) Market regulations

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against forestalling, engrossing, and regrating passed undisturbed by Adam Smith, the Constitution, the Federalist Papers, and John Marshall from colonial statute books to the commentaries of Nathan Dane to the incorporation of Albany in the early nineteenth century. Other patterns and practices of colonial regulation from sumptuary laws to mercantilist restrictions on commerce continued to find a place in nineteenth-century policymaking. One need only reflect on the long and varied history of "Sabbath," "Sunday," or "blue" laws to make the case for the influence of tradition on regulatory policy.

B. Police

Other influences are less obvious and more specific. Not to be underestimated was the broad European conception of "police" that began to emerge in the seventeenth and eighteenth centuries. Marc Raeff has recently probed the links between this notion and the rise of absolutism and the interventionist and regulatory Polizeistaat in Western and Central Europe. "Police" in this sense stood for something much grander than a municipal security force. It referred to the growing sense that the state had an obligation not merely to maintain order and administer justice, but to aggressively foster "the productive energies of society and provid[e] the appropriate institutional framework for it." Other historians have found this strong notion of police animating public regulatory policy in Scotland and France.

VER STEEG, THE FORMATIVE YEARS, 1607-1763, at 195 (1964). The continuity of regulation problematizes but does not undermine the issues at stake in that staple (or red herring) of colonial historiography—the "community-society" debate. David Konig and Bruce Mann are the best representatives of this perspective in colonial legal history. DAVID THOMAS KONIG, LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692 (1979); BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT (1987).

62. See MICHAEL G. KAMMEN, COLONIAL NEW YORK: A HISTORY 56-57 (1975); SYDNEY V. JAMES, COLONIAL RHODE ISLAND: A HISTORY 157 (Milton M. Klein & Jacob E. Cooke eds., 1975); 4 WILLIAM BLACKSTONE, COMMENTARIES *158; 7 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW, WITH OCCASIONAL NOTES AND COMMENTS 33-40 (1824); LAWS OF THE STATE OF NEW YORK chs. 185 & 191 (1826).

63. See WILLIAM ADDISON BLAKELY, AMERICAN STATE PAPERS BEARING ON SUNDAY LEGISLATION (1911).


65. RAEFF, WELL-ORDERED POLICE STATE, supra note 64, at 1226.

66. See W.G. CARSON, POLICING THE PERIPHERY: THE DEVELOPMENT OF SCOTTISH POLICING 1795-1900, PART I, 17 AUSTL. & N.Z. J. CRIMINOLOGY 207 (1984); 1 STEVEN L. KAPLAN,
In America, "police" stood for new efforts on behalf of a dynamic state to marshal resources and promote a well-ordered community devoted to the public happiness and public good. As Christopher Tomlins has definitively demonstrated, American lawyers and theorists were well-acquainted with Continental developments in the science of government. When Thomas Jefferson established the first law chair in North America at William and Mary, he dubbed it a chair of "Law and Police."\(^6\) The whole concept of a well-regulated society articulated by a host of early American legal scholars meshed wonderfully with the larger goals and objectives underlying Continental understandings of "police." The "police power" itself owes its etymology, if not its substantive applications, to notions of Polizei. But regulation in America also had more direct sources and vital traditions to draw on, not least of these the peculiar practices associated with regulatory law in England.

### C. Sovereign Prerogative

Closely linked to "police" on the continent was the notion of the sovereign prerogative in England. The "lex prerogativa" stood for that complex and varied set of rights, powers, and privileges belonging to the Crown as sovereign. Included in this bundle of prerogatives were powers (and obligations) to regulate and promote the domestic life of the kingdom.\(^6\) Ernst Freund characterized this plenary sovereign power as the "royal police power"—the power lodged in the King (with council in Star Chamber) to control the internal police of

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\(^6\) Matthew Hale describes the prerogative as that which asserts, maintains, and with all imaginable Care provides for the Safety of the King's Royal Person, his Crown and Dignity, and all his just Rights, Revenues, Powers, Prerogatives, and Government, as the great Foundation (under God) of the Peace, Happiness, Honour and Justice, of this Kingdom; and this Law is also, that which declares and asserts the Rights and Liberties, and the Properties of the Subject; and is the just, known, and common Rule of Justice and Right between Man and Man, within this Kingdom.

the realm. Even after 1688 and the rise of Parliamentary sovereignty, Blackstone could still envision a royal prerogative whereby the King was charged with an overarching, flexible responsibility for administering justice, conserving the peace, erecting corporations, and "arbitrating" commerce. Behind this prerogative lurked not only specific powers to regulate public markets or set up courts, but a residual sovereign power to do what was necessary to ensure the advantage of the public. Part of this is captured in Blackstone's conception of the kingdom as a "well-governed family" with the King as master. But as Joseph Chitty stressed in his 1820 treatise on the subject, "The splendour, rights, and powers of the Crown were attached to it for the benefit of the people and not for the private gratification of the sovereign." In theory at least, the royal prerogative stemmed from a public philosophy in which the object of government and law was the welfare of the people. In Chitty's words, "The prerogative is not the iron tie of unbridled power: it holds the subject in the silken chain of mild subjection, for the general and permanent welfare of society."

The sovereign prerogative in England has a long, complicated career that is essentially the story of English constitutional and parliamentary history. I can only suggest here the degree to which the notion of the sovereign as the locus of inherent and open-ended "police powers" guaranteeing the common welfare remained a theme of American regulatory law well into the nineteenth century. On the constitutional level especially, conceptions of state sovereignty and state regulatory power moved hand-in-hand. In The License Cases, Chief Justice Roger Taney defined the states' police power as "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions." New York Justice Andrews

70. See 1 Blackstone, supra note 62, at ch. VII (commentary entitled Of the King's Prerogative); Daniel J. Boorstin, The Mysterious Science of the Law 101 (1941).
71. 1 Blackstone, supra note 62, at *274; 4 id. at *162.
74. Chitty, supra note 72, at iii.
75. 46 U.S. (5 How.) 540 (1847).
76. Id. at 583 (opinion of Taney, C.J.). The best discussion of the police power's relationship to conceptions of state sovereignty is W.G. Hastings, The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State, 39 Proc. Am. Phil. Soc'y 359 (1900). See also Prentice, supra note 73, at 4-10.
echoed in 1889 that the police power "is but another name for that authority which resides in every sovereignty to pass all laws, for the internal regulation and government of the state, necessary for the public welfare."  

But the English tradition of royal prerogative had a much greater effect than merely influencing American discussions of "sovereignty." Over and over again, the very entities controlled by royal prerogative became the focus of early American regulation. Matthew Hale's and Joseph Chitty's digests of seventeenth-century kingly powers look like compendiums of the major public policies of the early nineteenth century. These included public lands, franchises (corporations, game and forests, parks, fisheries, mines, fairs and markets), ports, monopolies, patents, marts and fairs, weights and measures, money, parens patriae, taxation, staples, prices, and highways. Well into the late nineteenth century, American regulation in these areas continued to be directly influenced by the rationales and explanations supporting the notion of prerogative.

D. Legislative Authority

Just as crucial, yet ultimately as obscure as the relationship between sovereignty and regulation in the nineteenth century, is the complex link between regulation and changing conceptions of legislation. Sovereignty and legislation, of course, are closely related in American law. As Justice Andrews pointed out, the "governmental powers vested in the sovereign in England have since our Revolution

77. People v. Budd, 22 N.E. 670, 674 (N.Y. 1889). The continued hold of notions of sovereignty over the definition of the state police power is indicated by Thomas J. Pitts's definition in 1937:

It is not a power reserved but a right inherent in the State as sovereign and while the power may be regulated and limited by the Constitution, it exists independently of it, as a necessary attribute of sovereignty. . . . The sovereign State has no existence apart from and independent of the police power.


78. See Chitty, supra note 72, at 107-242; Hale, supra note 68, at 201-321. Especially intriguing is the extensive note each gives to prerogatives regarding trade and commerce.

79. See Munn v. Illinois, 94 U.S. 113 (1876); Budd, 22 N.E. at 670; O'Connor v. Pittsburgh, 18 Pa. 187 (1851). Julius Goebel suggested that judicial doctrines surrounding the king's prerogative are almost the exclusive source of public law and political theory in medieval England. Thus, its continued hold over early American public law should not be surprising. See Julius Goebel, Jr., Constitutional History and Constitutional Law, 38 Colum. L. Rev. 555, 561 (1938).
devolved on the legislatures of the states.  
Roger Taney's discussion of sovereignty and police in *The License Cases* revolved exclusively around his conception of legislative authority. But though the "police power" refers to a distinctly legislative power, the cross-fertilization between legislation and regulation is anything but straightforward. "What is legislation?" remains the great underlying, unresolved problem of nineteenth-century jurisprudence. Though some historians have argued that post-Revolutionary state legislatures simply operated as modern, positivist and plenary law-making authorities (limited only by express constitutional limitations), I would like to make the case for a more problematic, ambiguous approach to legislation in early America. In particular, I would contend that the years before the Civil War marked a pre-positivist legislative moment where most jurists and political thinkers continued to resist a notion of law as simply the command or will of a sovereign legislature. Instead, they remained wedded to a more organic, fundamental legal tradition wherein even legislative power was conceived of and interpreted within a common-law framework.

Like its more famous anti-positivist neighbors constitutionalism and natural law, the common-law approach to legislation is to some extent rooted in the ancient English notion of "fundamental law."
In the fundamental law tradition, Parliament (like the early Massachusetts legislature) was viewed as a "high" or "general" court, not so much enacting its will as pronouncing judgments "declaratory of the moral principles of the law." Law and politics were suffused with ethics and religion. Public authority was not legitimate unless it conformed to principles of right and justice removed from simple questions of utility, power, or expediency. As Saint Augustine suggested, "Without justice, what were kingdoms but great robberies."

Though this might sound like natural law (especially if one had to decipher divine rules or reify a Lockean social contract), the nineteenth-century American version was more historical and naturalistic. It fit roughly with the "third way" charted between the extremes of positivism and natural law by theorists of a dynamic ancient constitutionalism in seventeenth-century England and the historical jurisprudence of nineteenth-century Germany. American commentators perceived legislation as derivative of, and secondary to, the higher objects of society; it had no meaning or authority outside of the "plan by which the nation resolved to endeavor to obtain happiness."


84. WOOD, supra note 83, at 263.
85. As quoted in GOUGH, supra note 56, at 22.
86. See POCOCK, supra note 83; PETER STEIN, LEGAL EVOLUTION: THE STORY OF AN IDEA (1980); JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE (1990); STEVE PINCUS, SHADWELL'S DRAMATIC TRIMMING (forthcoming 1995).
87. SMITH, supra note 82, at 246. Indeed, if read closely, the "natural-law" theorists most cited by early Americans (Grotius, Vattel, and Rutherford) are far more historicist, realistic, and public-minded in their thinking than the caricature of "natural law" bequeathed to us by Corwin, Haines, and Wright.
constitution, or a hypothesized state of nature, or an absolute entity like private property. Guidance on the many dimensions of this fundamental law was available only in the open-ended, living, experiential lessons of the common law. Though constitutions provided concrete limitations and express grants of authority, the common law remained the overarching interpretive schema through which jurists and legislators decided what, how, and why things could be done via statute.

Though this relationship between statute and common law may seem rather fuzzy, two things suggest that a common-law conception of legislation continued to predominate in the nineteenth century. First, a host of non-constitutional theoretical equivocations about legislative power suffused discussions of regulation, codification, judicial review, and statutory interpretation. Well into the late nineteenth century, commentators and theorists refused to accept a simple and closed definition of “statutory law” as the command of the supreme power of the state. They continuously cited “the will of the people,” “constitutional conformity,” and subsequent interpretations by “courts of justice” as definitional attributes of “statute law.” Rather than seeing legislation as positivist, presentist “will,” Joel Bishop argued in 1873, “Every statute operates to modify something in the law which existed before. No statute is written, so to speak, upon a blank in the institutions of society. No such blank exists or can exist.” Consequently, “no statute can be understood except by him who understands the prior law.”

Secondly, the whole story of legislative regulation well into the late nineteenth century is replete with common-law methods, forms, strategies, and traditions. Had legislation simply been a matter of legislative will and constitutional limitations, there would have been no

88. JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION 4 (1882); see also ENDLICH, supra note 82, at 2. Such themes are the basis for almost every treatise on statutory construction in the nineteenth century. See JOHN NORTON POMEROY, AN INTRODUCTION TO MUNICIPAL LAW 28-56 (1883); SMITH, supra note 82 (especially ch. 7). Perhaps the most famous nineteenth-century text on statutory construction is THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW (1857). The entire treatise is devoted not to arguing in a plenary, positivist mode that legislatures can do anything not explicitly constitutional, but that legislatures “can do no act which is not law.” Id. at 676. The notion reverberates with John Adams’s “a government of laws, and not of men,” as well as Bishop’s conception of legislation as part of a continuous process of applying law. MASS. CONST. art. 30 (1780); see BISHOP, supra.
need for all this talk about sovereign prerogative, overruling necessity, *salus populi*, *sic utere tuo*, and the common law of nuisance. But legislation and regulation were not simply matters of will in the nineteenth century. They were pieces of a lingering common-law mind-set that pursued the public good and happiness not as a function of utility, expediency, gain, interest, or power, but in accordance with an organic fundamental law and morality embedded in common experience, reflected however imperfectly in the maxims, principles, and practices of the common law.

E. *Salus Populi*, Overruling Necessity, *Parens Patriae*, and *Sic Uttere Tuo*

Besides being the general source for early American notions of police, sovereignty, legislation, and law, the common law contained specific doctrines that greatly influenced judicial constructions of common regulation. The most important of these was the maxim *salus populi suprema lex est* (the welfare of the people is the supreme law). If one were forced to reduce the idea of a fundamental common law to a single doctrine, most likely it would be *salus populi*. Whereas the Lockean social contract yielded fundamental natural private rights, the common-law notion of *salus populi* held that those rights were “conventional,” subject to the “higher law” of the common welfare.

*Salus populi* had many sources and expressions. The most abstract forms emanated from civil-law writers like Emmerich de Vattel, who based the legitimacy of all society and government on its ability to promote the general happiness of mankind. American versions most often took the shape of Chancellor Kent’s declaration that “private interest must be made subservient to the general interest of the community.” Kent used this rationale to uphold governmental regulations of unwholesome trades, slaughter houses, gunpowder, cemeteries, and the like. As Justice Holmes accurately noted later, this

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89. *Salus populi* (translated as “regard for the public welfare is the highest law”) is the first maxim discussed in HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 1 (9th ed. 1924). For a more instrumentalist interpretation of *salus populi* role in seventeenth-century English political debate, see J.A.W. GUNN, POLITICALS AND THE PUBLIC INTEREST IN THE SEVENTEENTH CENTURY (1969).

90. Indeed, in some ways the common-law renditions of police, sovereignty, legislation, and law discussed above flow directly out of the general notion that common law must conform to the common welfare. *Salus populi* is the “natural law” of the common law. For a suggestive discussion, see Gough, supra note 56, at 99-102.

doctrine was the foundation for the state police power. Indeed, the *salus populi* maxim is most often encountered in appellate cases justifying state regulations that restrict private rights in the common interest.

The doctrine of overruling necessity flowed directly from the assumptions of *salus populi* and sovereign prerogative. If the common welfare and safety of society were the highest law, it followed that when the preservation of that society was at stake lesser rules and conventions gave way. In its most basic form, the law of overruling necessity was a social version of the law of self-defense. American courts and commentators consistently referred to a line of English cases making it "well settled at common law" that in cases of calamity (e.g., fire, pestilence, or war) individual interests, rights, or injuries would not inhibit the preservation of the common weal. Thus, private houses could be pulled down or bulwarks raised on private property *without compensation* when the safety and security of the many depended upon it. As Thomas Cooley later reasoned, "Here the in-

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94. See, e.g., *Maleverer v. Spinke*, 73 Eng. Rep. 79, 81 (K.B. 1538); *Case of the King's Prerogative in Saltpetre*, 77 Eng. Rep. 1294, 1294 (K.B. 1607); *Mouse's Case*, 77 Eng. Rep. 1341, 1342 (K.B. 1609); *British Cast Plate Mfrs. v. Meredith*, 100 Eng. Rep. 1306, 1307 (K.B. 1792). In *Saltpetre*, Coke argues that for the commonwealth, a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire: and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action. *Saltpetre*, 77 Eng. Rep. at 1295. Justice Buller in *Meredith* echoes,

There are many cases in which individuals sustain an injury, for which the law gives no action; for instance, pulling down houses, or raising bulwarks, for the preservation and defence of the Kingdom against the King's enemies. . . . This is one of those cases to which the maxim applies, "*Salus populi suprema est lex.*"

100 Eng. Rep. at 1307-08 (emphasis added).

dividual is in no degree in fault, but his interest must yield to that 'necessity' which 'knows no law.' The injury to the individual was *damnum absque injuria* (an injury without a remedy) under the reasoning that "a private mischief shall be endured, rather than a public inconvenience."96

But overruling necessity was more than a social self-defense mechanism. Early on, natural-law writers suggested the wider potential of the law of necessity. Thomas Rutherford argued that "necessity sets property aside"—things necessary "continue in common."97 Like Grotius and Pufendorf, Rutherford contended that an extreme want of food or clothing justified theft. Property was relational, dependent on the common consent of all. No one could be assumed to have consented away the right to use another's property when self-preservation or social preservation were in jeopardy. Necessity revived a "community of goods," where all things were available to common use for common benefit. Though, as Blackstone made clear, civil-law ideas on theft never made their way into English common law, the broader conceptions of consent, conventional and relational property rights, the community of goods, and public necessity trumping private interest did.98 These notions provided a more open-ended backdrop for defending legislative and sovereign prerogatives in cases of public need, beyond extreme cases of calamity. At least two commentators rooted the entire police power in "the law of overruling necessity."99

Though perhaps best known for its role in state regulation of the family and child custody, the *parens patriae* doctrine also affected American regulatory law across the spectrum.100 *Parens patriae* was rooted in the sovereign prerogative. As Chitty put it:

(discussing fire). For more on these later necessity cases, see generally Rodney L. Mott, *Due Process of Law* 344-60 (1926); Reznick, *supra* note 93, at 51-54.

96. Cooley, *supra* note 93, at 594-95; see also 2 Kent, *supra* note 92, at 338. *Damnum absque injuria* is itself a key common-law maxim in nineteenth-century regulatory law. The common law was not presumed to provide a remedy for every actual injury. The higher prerogatives of the common law often made it necessary for individual injuries to go unredressed in the common interest. See Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. Rev. 975.

97. 1 Thomas Rutherford, *Institutes of Natural Law* 93-96 (1799).

98. 4 Blackstone, *supra* note 62, at *31-32.


The king is in legal contemplation the guardian of his people, and in that amiable capacity is entitled . . . to take care of his subjects as are legally unable, on account of mental incapacity, whether it proceed from first nonage: second, idiocy: or third, lunacy: to take proper care of themselves and their property.101

Essentially, *parens patriae* conceived of the king or sovereign as parent.102 But in addition to equipping the sovereign with specific powers to regulate and protect special classes of persons and institutions (e.g., children, incompetents, charities), *parens patriae* operated metaphorically on common regulation in general.

The classic statement on the links between state and family is, of course, Robert Filmer's *Patriarcha*.103 Despite John Locke's famous critique, paternalism remained a compelling framework for jurists to elaborate theories of kingly or state power. Matthew Hale recognized only two types of government: natural and civil. Natural government entailed the relationship between parent and child from which civil (political and economic) government drew its model.105 Blackstone was just as fond of the analogy. He defined "public police and economy" as "the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound in their general behaviour to conform to the rules of propriety, good neighbourhood, and good manners." The king or sovereign was the head of this political family, with discretionary power to "dispose," "order," and regulate it.106 This metaphorical equation of sovereignty and parenthood (or fatherhood, in this distinctly patriarchal society), rooted in the common law, was a pervasive factor in early nineteenth-century attempts to assess the boundaries of public power.

Finally, one of the most powerful doctrines shaping early American conceptions of public authority was the maxim *sic utere tuo ut_

(tracing the evolution of *parens patriae* and the juvenile court through the nineteenth century). For a discussion of *parens patriae*'s role in the regulation of public nuisances, see John C. Bagwell, *The Criminal Jurisdiction of Equity—Purporses and Other Public Nuisances Affecting Health and Safety*, 20 Ky. L.J. 163 (1932).

106. 4 Blackstone, *supra* note 62, at *161-62; 1 id. at *264.
alienum non laedas (use your own so as not to injure another) of the common-law of nuisance. Ernst Freund captured the strong public potential of nuisance law when he dubbed it "the common law of the police power, striking at all gross violations of health, safety, order, and morals." Public nuisance law provided the common-law foundation for common regulation. And "nuisance" was hardly the timid regulatory instrument implied by some legal historians. Declaring an activity or establishment a nuisance in the early nineteenth century unleashed the full power and authority of the early American state. Perhaps under no other circumstances could private property and liberty be as quickly and completely restrained or destroyed without a hint of compensation.

More importantly, by nineteenth-century standards, nuisance was not primarily a matter of technical, private law at all. Rather, the underlying sic utere tuo rationale of nuisance was a fundamental, public ordering principle of society. Horace Wood declared as late as 1875 that sic utere tuo was a "well-established, and exceedingly comprehensive rule of the common law . . . which is the legal application of the gospel rule of doing unto others as we would that they should do unto us." Wood elaborated in terms echoing those of Chief Justice Shaw in Commonwealth v. Alger:

No man is at liberty to use his own without any reference to the health, comfort or reasonable enjoyment of like public or private rights by others. Every man gives up something of this absolute right of dominion and use of his own, to be regulated or restrained by law, so that others may not be hurt or hindered in the use or enjoyment of their property. This is the fundamental principle of all regulated civil communities, and without it society could hardly exist, except by the law of the strongest.

Clearly there is more to nineteenth-century conceptions of public power than implied by liberal constitutionalism and its theorists and historians.

110. Id.
Conclusion

These are just some of the traditions and doctrines that informed nineteenth-century conceptions of state regulatory power. Many more can be unearthed. But even this preliminary sketch suggests how different nineteenth-century assumptions about state power, public values, and private rights were from the taken-for-granted definitions and sequences of twentieth-century constitutionalism.

On the simplest level, the presence of extensive regulatory statutes and rationales like *salus populi* call into question the received historical wisdom bolstering liberal constitutionalism. In contrast to the classical, Corwin thesis, American constitutionalism has not been uniformly wedded to a single founding doctrine solicitous of private rights over public goods. The early republic, far from being the formative era of an on-going tradition of vested rights, due process, and judicial review, gave rise to potent constitutional renderings of the public powers of the state. When public welfare, happiness, and values were threatened, nineteenth-century jurists could summon powerful public legal doctrines and technologies to their defense. The nineteenth century was anything but the "golden age" of individual right and laissez-faire celebrated by conservative jurists from the Progressive era to the present.

But the idea of common regulation implies more than the need to merely adjust our constitutional timeline, "bringing the state back into" nineteenth-century public law. For such a revision could be easily tamed and absorbed into the master narrative of American constitutionalism, the emergence of liberalism and capitalism. Indeed, such a revision could be used to argue that full-blown judicial balancing of plenary public powers and absolute individual rights was coincident with the birth of the republic. Such a conclusion would be erroneous. For common regulation was predicated precisely on an unwillingness to separate out private from public interests, individual rights from larger social obligations. The notion of common regulation was based on a vision of a "well-regulated" society, overtly hostile to the nominalistic conceptions of self-interest, possessive individualism, and competition at the heart of the liberal-capitalist version of our constitutional heritage. It represents a genuine historical alternative—"a world we have lost."

The retrieval and reconstruction of this other American constitutionalism provides a contextual and critical perspective from which to assess contemporary constitutional doctrine. For one troubled by modern jurists' musings on the irreconcilability of public values and
private rights in American constitutional law, it is helpful to know that theirs has not been the only way of breaking up, categorizing, and understanding American law and society. The legal-intellectual constructs of modern liberal constitutionalism are neither timeless nor autonomous. They are contingent and historical creations.

Similarly, the attempt to historicize and situate (sequentially and contextually) American constitutional law poses a sharp challenge to the presentist and teleological enterprise of tracing (or assuming) the roots of liberal jurisprudence through the deep recesses of the past to the wellsprings of Western civilization. For what this quick survey of nineteenth-century evidence suggests is that liberal legalism is primarily a twentieth-century convention not a pre-determined end of history. Consequently, it is perhaps time for constitutional scholars to abandon the endless post-war quest for a trans-historical Archimedean point (economic law or original position) on which to build a final, apolitical jurisprudentia liberalis and revive instead Justice Holmes's often-quoted (and more often ignored) legal-historical insight, "The life of the law has not been logic: it has been experience." In place of hubristic attempts to devise and implement a more perfect, scientific jurisprudence, we should look anew at the potential for constitutional wisdom attending historical perspectives on the relationship of American law, economy, and society. For despite the intricate constitutional logic, science, and theory that overflows this Symposium and other law reviews, we still have a remarkably "thin" understanding of the basic social and political struggles that led to the ascendancy of liberal constitutionalism and the decline of competitors like common regulation. Ideally, such understanding would be the first step in any reasonable assessment of the significance and persistence of the public-private distinction, the balancing test, and "rights talk" in late twentieth-century American jurisprudence.

111. Oliver Wendell Holmes, Jr., The Common Law 1 (1881).