2

The Police Power in Our Republic's First Century

The basic insight from the previous chapter is that the nature and scope of the police power is revealed by a coherent account of state constitutionalism, with attention to both the constitutions' ideologies and their practices. To judge whether and to what extent the police power "works" as an instrument of public policy, we must assess its performance in light of what the constitution expects of public authorities acting under this power. Such an assessment includes a deep dive into how courts have thought about the police power when they have considered conflicts raised by individuals objecting to the government's use of the police power.

As we will see in this and subsequent chapters, the police power is made up of an admixture of legal constructs, toggling between judicial interpretations and legislative and administrative practice.[1] Yet at its core is constitutional authority and direction, each drawn from state constitutions' designs and objectives. Insofar as the connection between the police power and state constitutionalism has long been neglected among scholars, a full chapter devoted to that subject was important to set the table. For the remainder of this book, we focus on the development and evolution of the police power and to its potential as a strategy to improve governance in the contemporary United States. This chapter examines the police power from the early republic to the end of Reconstruction.

There are four intersecting ideas that emerge from a close look at the police power over the course of our republic's history, especially in this critical first era. First, the police power reflects a deliberate and fairly consistent commitment to an ambitious approach to governance, one that focuses on the capacity and obligation of public officials to protect and promote the general welfare of the states' citizens.[2] This view is broadly congruent with leading scholarship on the police power, going back to writers of the late nineteenth century including Justice Thoms Cooley, Christopher Tiedemann, and Ernst Freund, each authors of major treatises on the police power, and up to the present, with the seminal historical work of William Novak and Harry Scheiber. It is also congruent, albeit in a more indirect sense, with a wealth of contemporary scholarship on democracy and American constitutionalism.[3] This scholarship emphasizes the deeply and broadly democratic character of constitutionalism

in America, distinguishing this in key ways from the familiar logic of constitutions as fundamentally countermajoritarian, and, *a fortiori*, anti-democratic governance instruments. As we explore the awesome scope of the police power as a fulcrum of American governance, we should orient this conversation around influential depictions of state governance and constitutional development over the expanse of, at first, two centuries. Although this book is not a work of legal history, the historical context is important to understanding what the police power has become and how it has evolved. Second, the police power was originally understood and continues to be understood as a power that is in some constructive tension with the protection of individual rights. These protections form important cornerstones of American constitutionalism and risk being neglected in scholarship that emphasizes the plasticity of these and other negative rights and steady expansion of the government's regulatory powers.[4] We will see, in our focus in this chapter on the republic's first century and in the next chapter covering the critical half century between Reconstruction's end and the end of World War II, the major ways in which the police power developed alongside the evolution and shifting terrain of private property and liberty rights. In contrast to the libertarian idea of property rights as rigid constraints on the power of government to govern, legislatures and courts came to see property rights in a broader social context, one that viewed rights as subject to public exigencies and social imperatives and as critical to the fundamental goal of promoting the people's welfare.

The centrality of property and contract rights to our well-ordered liberty in our American constitutional scheme did not wither away as the imperatives of active governance grew. While the balance shifted in important ways toward broad governmental authority, tensions between the public interest and the prerogatives of individual property owners persisted. Third, although it would be accurate to say about the police power at the end of Reconstruction that it is an essential attribute of the regulatory authority of state governments under state constitutions and an element of popular sovereignty in our American constitutional tradition, this power was never intended to be limitless. Nor truly can it be, if it is to be consistent with our best constitutional understandings. A comprehensive account, therefore, of the police power must account for and explain the reasons for and the character of these limits. Fourth and finally, the police power has proved incredibly adaptive to changing conditions and also to the need to create new implementation mechanisms for regulation, such as administrative agencies and municipal governments. The evolution of the power from a means by which the legislature could assert its plenary authority to govern to a more institutionally dynamic method of governance is a neglected, but important, part of the police power story.

As we discussed in Chapter 2, there is necessarily a strong connection between the police power and American state constitutionalism. This power exists not as some free-floating attribute of governance or as a mechanism deriving its character and contents from the common law, but instead as a power embodied in the state constitutions. Moreover, insofar as it is a power reserved by the states through the US

Constitution's Tenth Amendment, it is part of our American constitutional scheme more generally. With that in mind, we first will situate our discussion within the debate over how and why it matters that the police power is an embedded constitutional power. What specific consequences follow from the fact that the source of the police power is and has always been the constitution, frequently explicit in the document's test, but always central in its overall context and ideology?

THE POLICE POWER AND CONSTITUTIONAL MEANING

The framers of the first state constitutions in the eighteenth and early nineteenth centuries were engaged in two struggles simultaneously, the outcomes of which would define the governance structure of the new nation for the critical first decades. One struggle was how to create effective frameworks of government through these constitutions – this in order to get the people's work properly done. We can characterize this is a struggle, rather than merely an effort, because these framers were developing essentially new ideas about governance, public power, and individual rights as they crafted these documents, all against the backdrop of a persistent fear that they might substitute one tyranny for another. The other struggle was how best to define the sustain the relationship between the national and state governments. A theme prominent in both of these struggles was how to ensure that all spheres of government had power adequate to fulfill the functions of government, to promote the general welfare and secure the blessings of liberty. Likewise, the framers resolved to maintain sufficient protection of individual liberty and property.[5] That this strong commitment was inchoate was not because these values were not prized. Rather, these founders were acting within the conditions and circumstances of their times. They developed strategies before the emergence of a more robust understanding of constitutional rights and the role of the courts in safeguarding these rights and well before the incorporation of the Bill of Rights to the states and before the establishment of rights distinctly held by citizens of the states through the transformative impact of the Fourteenth Amendment of the US Constitution a century after the republic's creation.[6] Moreover, they did so in a time when they had invested great faith in the state legislature as an instrument of democracy and as a protector of certain vested interests.

Essential to the resolution of these questions of authority and its limits was the predicate question of who would be able to wield power in the name of We the People and, in addition, who would govern the governors? "The overriding issue Americans confronted before and after the independence," writes G. Edward White, "was the nature and location of sovereignty in government."[7] The framers' answer, as we discussed in the previous chapter, was popular sovereignty, that is, *rule by the people* and thus the derivation of all governmental power from the people in its choice to assemble constitutions and the appropriate institutions of government to carry out the people's will.[8] Although the framers were not without their doubts and fears about the muscular exercise of public authority by state and local

governments,[9] they ultimately cast their lot with a vision of government in this new republic that embraced strong state power.[10] To put it another way, the framers understood that one of the consequences of reserving power to the states was that the states would possess a broad range of powers. This was not a bug, but a positive feature of the developing American constitutionalism.

The very best example of the framers' commitment to capacious state power was the police power itself. This was the instantiation of the idea that state constitutions were documents of limit, not grant, and that state governments would manage their fair share of duties under our overall scheme of governance.[11] Moreover, the police power, like all other elements of the constitution, sprung from the fundamental function and obligation of the government to protect and promote the public welfare. While the framers were certainly preoccupied with fashioning sufficient checks and balances to limit power, we should see these efforts as ultimately derivative of the effort to create structures of governance that would implement our common good and in the name of the people who consented to this approach to good governing.[12] Government would protect our health, safety, and welfare, and would implement policies to advance the public welfare.

What do we make of the fact that this power was labelled a "police" power rather than, say, a "regulatory" or a "governance" power? Policing was a concept with an ancient lineage, tracking the activities of social control in the Roman and medieval periods. A number of scholars have noted that the concept of the police power comes into English law through the idea of the *patria potestas*, with the King's solemn duty to manage the affairs of the household at its core.[13] In his *Commentaries on the Laws of England*, Blackstone described the function of the public police as "the due regulation and domestic order of the kingdom, whereby the inhabitants of the State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations."[14] While this rendering shared much in common with the conception of government obligation articulated by other rough contemporaries, including Vattel[15] and Adam Smith,[16] we can trace this large description of the constitutional power to ensure "domestic order" and the mechanisms necessary to enable a population to flourish all the way back to Aristotle.[17] The police power was the power to govern well and for the common good.

The revolutionary-era thinkers were surely attentive to these themes and could readily imagine that state governments under state constitutions would have as their critical goal protecting the public welfare as an obligation to look after the "household." However, what they thought of as the household is more associated with the idea of the common good and general welfare as defined by constitutional understandings and objectives of the times, not by monarchs acting through the royal prerogative. Policing may have been associated with powerful mechanisms of control, as it was understood by Blackstone and, if one wants to look deep into the etymology of all this, in the notion of *policizia* or *parens patriae*,[18] but this understanding was

not buttressed by constitutional theory in the early American republic. That the colonists did not expect to be managed and subject to ubiquitous social control was obvious from seeing the lengths to which they went to secure limits on government power and general executive power in particular. To be sure, American constitutional choices were not made in a vacuum and certainly the framers learned much from Blackstone with regard to situating a broad governance power in constitutional frameworks.[19] However, they pushed back hard against the idea that underlay the king's prerogative and the benevolent goal of safeguarding the household. Instead, they wanted bold, broad power tethered to constitutional guardrails.[20] Therefore, paying inordinate attention to Blackstone and related conceptions of the police as a social control mechanism risks confusing the issue of what British constitutionalists expected from the king and what new Americans demanded of those who were exercising power in the people's name. In the end, Blackstone's formulation "serves badly as a guide to constitutional doctrine and governmental realities in the United States in the 1790s or the early nineteenth century."[21]

If organizing our thinking of the police power around antediluvian notions of household management and social control is misleading as a framing of what the founding fathers aspired to achieve in creating this power, what then do we see as these central aspirations and, further, why ought we to care?

Let us start with the big objective: The framers of the revolutionary constitutions and the leaders who would follow in their steps in constructing new constitutions and in reforming the original documents were committed to energetic governance that would realize important public objectives, including the expansion of the economy and widening opportunities for prosperity for their citizens.[22] They also were concerned to reduce harms to citizens, harms that were ubiquitous in an era in which health and safety were at risk from various threats.[23] These goals necessitated ambitious public powers, including a broad police power. At the same time, the framers worried, for reasons we described in Chapter 1 in our larger discussion of constitutional objectives, about the threat by ambitious governments to our individual liberty and private property.

To best understand the solutions at which they arrived, we need to see both parts of the equation: the part that emphasizes, with the revolutionary spirit of state constitution-making, that the authority of state governments would be enormously capacious, this in order to implement key needs and wants of the citizenry of this new nation, but also the part that is concerned with ensuring that elected representatives would not simply reinforce the efforts of the British monarch by using the police power as essentially a king's prerogative.

The issues cut even deeper than concerns with government capaciousness. They were likewise concerned with rapaciousness. The framers' vision of energetic regulatory governance was in tension from the beginning with the objective of protecting liberty and private property, protections necessary to a well-ordered society. In highlighting the ubiquitous commitment of early and later constitution makers

to advancing the public welfare through regulations that would supercharge the economy and address myriad social problems, we should not ignore the tensions that emerged from our strong commitment to protecting liberty and property. Our American public law, constitutional law and administrative law included, insists that the government act with regard to our cherished liberty and property rights in a way that is neither arbitrary nor unreasonable. We have always had limits on the exercise of governmental power; and these limits are built on a dual edifice, the first borne of an informed skepticism about the incentives and temptations of lawmakers, reflected cogently in Madison's views on factions in Federalist No. 10,[24] and the second born of a view that a principal function of the government to which we consent as a people is to protect our liberty and property.[25] It is in the tension between activist government and safeguarding of our liberties, between what would come to be called public rights and our classic and evolving private rights that we can learn much about the development of the police power.

To understand how the framers understood the balance between broad authority to protect the common good and the need to check the government and to protect citizen liberties, we should look at what they viewed as the principal threat. From one important perspective, the principal concern was the anemic quality of the central government under the Articles of Confederation and its inability to control "the centrifugal tendency of the States."[26] They needed to construct a system that would address the myriad threats to this fledgling nation; and so the preoccupation with creating a suitably strong federal government, one whose powers could evolve to meet emerging conditions, made very good sense given the immediate relevant history.[27] They were concerned as well with the various needs of its citizens to prosper and they knew that an active government was essential to meet these current and future needs.[28] Such governance would be critical to securing "the blessings of liberty" and to "promote the general welfare," themes at the heart of the framers' description of, and hopes for, these new constitutions, and also very much on the mind of the various thinkers whose views would play such a central role in the framers' approach to the subject.

The framers' commitment to individual liberty in the US Constitution is revealed in expressions and in structural choices, and yet the large claim that the document and its framing history underwrote a liberty-forward vision of American constitutionalism has come under strong criticism as the so-called republican tradition of constitutional historiography has taken strong root over the last four decades.[29] However strong were the framers' commitments to a liberal idea of governance in the US Constitution, the overall structure and ideology of the state constitutions reflected a studied concern with enabling government to exercise wide authority to protect citizen welfare and secure the common good. So far as the states were concerned, "[the police power] underwrote an American theory of governance that was collectivist and majoritarian rather than liberal."[30]

From this, we might conclude that "the states were the original architects of Progressivism, not the federal government, and they drew their justification at least

in part from a reinvigorated conception of the states' police power."[31] However, this dichotomy between the progressive state governments and the libertarian national government proves too much. At the center of our revolutionary constitutional tradition, forged in a struggle against monarchical governance, is the safeguarding of individual liberty and property, while enabling effective governance in the name of We the People. The states may have been the original engines of progressivism, but what progressivism meant in the post-framing period was surely different than what it would come to mean seven decades later, as society and the market economy evolved, the meaning of citizenship was redefined after a bloody war, and we the people enacted transformative constitutional amendments. Ultimately, it would become untenable to maintain, both as a practical and theoretical matter, two competing ideologies of regulatory governance, one aiming at liberty and the other at equality and social welfare. Rather, American constitutionalism has long aspired to mechanisms that reconciled the demands of social welfare governance and individual liberties, of energetic regulation and private property.

Still, the state constitutions had from the beginning of the republic purposes different than the US Constitution, and the framers thus choose constitutional structures that would allocate principal responsibility and prerogative to different levels of government, one illustration of which was the establishment of the police power as a *state*, and not a *federal*, power. This was the central genius of American constitutional federalism.[32] The overarching objective, as we should remember, was to facilitate the abilities of both levels of government to pursue what were ultimately common objectives, that of promoting the general welfare and securing the blessings of liberty to ourselves and to our posterity. The Constitution's preamble declares that this is the fundamental objective of the federal Constitution. But this same surpassing elegance of the overarching goals of governance are contained in state constitutions as well.

MEANING, PURPOSE, AND STRATEGY

The ascription of a coherent constitutional vision to the framers of the state and federal constitutions risks falling into the trap of supposing that there is one true story here, a story revealed in the creation of, and advocacy for, the US Constitution and the various state constitutions adopted at roughly the same time. This framing of these events might support an originalist argument that we should interpret the police power in accordance with the will of the framers to accomplish these two objectives.[33] Such a view, to put it in the right contemporary jargon, is in alignment with the original public meaning of the police power.[34] And yet the original public meaning of the police power remains elusive – or, at the very least, incorrigible, as a basis for interpreting it fruitfully in matters of dispute.

As to the matter of original public meaning, we cannot say beyond extracting some important themes from the statements and actions of the founding fathers

about the shape and scope of regulatory governance what exactly they would have wanted from the police power as it was applied in circumstances that would emerge as the needs of states and the nation evolved in various directions. The history here matters, and much more than a little, even if the framers' intentions and the original public meaning of a phrase so capacious and complex as "the police power" matters less.[35]

We can nonetheless extrapolate from their expressions and their actual tactics, including the structural decisions they made in these constitutional texts, what they aimed for as a matter of strategy. The meaning of this power can be understood by considering the larger context of political strategy and choice in a constitutional republic. Makers of state constitutions created institutions and spheres of power in order to accomplish deliberate goals. As we discussed in the previous chapter, these goals include creating structures to cabin executive influence (which revolutionary constitutionalists equated with the royal prerogative) and, later, to limit the risks of legislative excess. They include mechanisms to facilitate energetic and public welfare-enhancing governance. Further, citizens were also concerned to reduce the likelihood that government would turn away from the general welfare and toward opportunistic methods of expropriation. Hardwiring individual rights into these constitutions, as the framers did with the Bill of Rights in the US Constitution, assisted in reducing these risks and in creating this self-enforcing equilibrium.

Mobilizing their state and local governments to protect the general welfare meant establishing a clear set of powers, powers that were not dependent upon the federal government's choices under the US Constitution. The framers could not forecast the future, of course, but they could well imagine the challenges faced at the time the constitutions were forged and also the need for flexibility and discretion in light of what they surely could see would be changing circumstances and conditions. The quest was for an equilibrium that would ensure stability while accounting for adaptation.

The framers were also concerned about maintaining schemes that would ensure that private property would be adequately protected. A police power without limit would represent a continuing threat to individual liberty and prosperity and would therefore be deeply problematic; it would trigger fear and would sap the new nation of the consent it needed from key constituencies in order to ensure cooperation and acquiescence in important governmental choices. Therefore, proper limits were not merely desirable, but were necessary. The main veins of contemporary police power scholarship emphasizes the incredible breadth of the police power, the "staggering freedom of action" the states possessed.[36] However, a comprehensive account of the power needs to see both sides, to reconcile this awesome power with the concern with the appropriate limits on this power. Constitutions, to be self-enforcing in the sense just described, need to reach an equilibrium, one in which powers and limits are in alignment and in a way that can reassure fearful citizens.

Ultimately, matters of constitutional meaning, purpose, and strategy are inextricably linked. State constitutions were created to be instruments of governance; they

were designed to facilitate the efforts of public officials on behalf of the governed. They were designed not as monuments to the public's fundamental values, but as instruments designed to work. In order to function as effective instruments, the framers needed to have a shrewd sense of the dynamics of state-level politics, not to mention the complexities of federalism, given that these states were embedded in a constitutional system that involved actors at multiple levels of governance. In understanding these dynamics, the framers incorporated views about human nature and the motivations of actors under conditions of constraint and uncertainty.[37] Attention to strategy, and to intended and unintended consequences, was not a new insight, but a manifestation of the new science of politics that took individuals as they found them and understood that both citizens and officials would design institutions and procedures in order to achieve certain purposes.[38] James Madison not only understood this well, but also gave us perhaps the most famous declaration about the nexus between individual behavior and structural solutions in Federalist No. 10 and elsewhere in the Federalist Papers, where he wrote about factions, democracy, and representative government and the ways to address key impediments to representative democracy under a constitutional framework.[39] While these timeless statements were made in the context of the ratification debates over the US Constitution, the overall analysis was important to an understanding of American constitutionalism more generally, and so was pertinent to choices made in state constitutions as well.

The nexus between purpose and strategy is a complicated one and implicates issues broader than what can be captured here; however, the essential point is that constitutions have purposes that we can learn about from a dense and broad inquiry into the text, context, and ideas embedded in these documents and contemporary political practice. Historical exegesis of the sort that has shed important light on our American constitutional tradition has been essential in exposing some of these key purposes, a point central to interpretive methodologies of various stripes, including, but not limited to, originalism. Moreover, we can learn some probative things about political strategy as constitutional designers and other relevant officials thought about such matters at the time. This enables us to understand better the design and performance of certain governmental institutions and how they might facilitate political purposes and objectives. For example, certain executive powers given to the governor can assist interest groups within the political process with protecting against legislative threats that will undermine their interests.[40] This is illustrative of the deliberate, purposive choice of constitutional architects to create mechanisms of power that can effectuate present and future objectives by anticipating responses and tactics from other government officials with different, and occasionally competing, objectives.[41] All of this is to say that there are connections we can draw between constitutional purpose and strategy, and, when we do so, we can get a better picture on the overall framework of constitutions as documents that help citizens and elected representatives accomplish their objectives by setting out the rules of the game and constructing the institutions that will exercise authority

and implement policy. Such information helps us in better understand the police power. We can say, albeit in a fairly abstract way here, that this power helps public officials accomplish certain strategies associated with the people's welfare. At the same time, this power is not free-floating, as some sort of extra-constitutional emergency power in the sense that, say, Carl Schmitt might have imagined,[42] but is embedded in constitutions that have internal and external limits on its use as an instrument of governance.

*

From this framing of the question, we explore next how the police power helped to accomplish key objectives in state constitutionalism. The focus in the remainder of this chapter and the final two chapters in this Part I, is on specific dilemmas and challenges faced by government authorities and also the courts in dealing with the content, scope, and limits of the police power.

NASCENT FEDERALISM: THE POLICE POWER/ COMMERCE POWER PUZZLE

From the adoption of the US Constitution, the overall system of American constitutionalism took on a fundamentally different valence. The question was no longer one of defining and structuring governmental power, as was the principal function of constitution-making in the revolutionary period. Rather, another fundamental question emerged, and that was how to reconcile constitutionally established state power with the power and authority of the national government.[43] This was the core issue of constitutional federalism that preoccupied the framers and later the Supreme Court.[44] A thorough understanding of the framers' purposes and of their achievements with respect to the distribution of powers in the US Constitution remains elusive, even as generations of constitutional historians and legal scholars have analyzed this critical period of American history. One prosaic point is that the contours of federalism were not made explicit in the document and indeed that term was nowhere used in the document explicitly. The appropriate lines between state and federal authority were not self-evident, to say the least. Ultimately, the distribution of authority between the federal government and the states would evolve in light of practice and also key judicial interpretations.

One of the central federalism controversies in the new republic was the relationship between the police power of state governments and the enumerated powers of Congress in Article I. To what extent could a broad state power to protect health, safety, and the general welfare coexist with Congressional power to tackle major issues that, as the framers had quickly discovered in the early years of the nation's history, called for national action? One particular puzzle concerned the interaction between the police power to regulate certain business activity, such as

transportation, and Congress's power in Article I, Section 8 to regulate interstate commerce.[45] The US Constitution accorded Congress an exclusive power to regulate interstate commerce; at the same time, among the reserved powers the states had under the Tenth Amendment was the state constitutional authority to protect health, safety, and welfare. It would not take great imagination to see the potential for these two powers to come into conflict. What would ensure that state governance strategies would not undermine the objectives of our new nation?[46]

Such conflict emerged in the second decade of the nineteenth century, first in the dispute that gave rise to the Court's decision in Gibbons v. Ogden.[47] New York had granted a monopoly for steamboat traffic to Messers. Fulton and Livingston. This was challenged on the grounds that this interfered with interstate commerce and therefore impeded the national government's power under the Commerce Clause.[48]

Chief Justice John Marshall spelled out the basic structure of national governance and state prerogative in circumstances in which the demands of an unobstructed interstate commerce required limiting state control. "The genius and character of the whole government," Marshall writes,

> seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government.[49]

Acknowledging the secure existence, after the adoption of the US Constitution, of the states' taxation and police powers, Marshall's objective is to sort out where the exercise of such powers interfere with the plenary power of Congress to regulate commerce (which, early in the opinion, Marshall explains includes navigation and all the necessary instrumentalities of commerce).[50] To the Marshall Court, the solution to the puzzle of reconciling police power of the states and the commerce power of the federal government was to view these powers as involving two different imperatives, one that was scrupulously connected to local goals and needs and the other that was a structural mechanism to ensure that our nation could function effectively, that is, without balkanization and interference with common purposes.

Importantly, Marshall acknowledged the broad police powers of the states and also that these powers would be used in myriad contexts when the need arose to protect state citizens' public health and safety.[51] Noting "the acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens,"[52] he gives the example of quarantines, an action that surely affected transportation and therefore commerce, as an example of such health-related powers.[53] However, these powers must be exercised consistent with the purpose and logic of Article I of the US Constitution, to ensure that the state was not interfering with the free flow of commerce. According special navigation privileges to Livingston and Fulton was an example of such an interference.

A point largely taken for granted, then and now, was that if and insofar as there was a clash between national and state interests, national interests would undoubtedly prevail.[54] The US Constitution explicitly reserved broad powers to the states, but simultaneously ensured that national objectives would prevail where there were conflicts. This is essentially what they meant by federal supremacy. State and national interests could be symmetrical, but they would occasionally come into conflict. Where so, it would fall to the courts to determine whether the states were, in advancing their interests, acting inconsistently with a power vested in the national government. The police power would only pertain to state decisions made within the proper domain of state authority. This would be made more clear by the Court in McCulloch v. Maryland[55] and other lodestar federalism cases. But there was precious little disagreement on the point that the federal government could constrain the states' exercise of the police power, that is, so long as these powers came into conflict with legitimate federal interests under the Constitution. The Supremacy Clause made crystal clear that the federal government's will would prevail.

As to the matter of police power and interstate commerce, the Court further elaborated on this conflict and its consequences in Brown v. Maryland.[56] The needs of a commercial republic, the Court in Brown reasoned, required restrictions on the balkanization that would happen if states could make their own decisions for their own purposes.[57] In addition to reinforcing the logic of Gibbons, Brown was interesting in that it was the first instance in which the Supreme Court specifically mentioned the police power.[58] Without defining it comprehensively, the mention of the power made what might have been a wholly abstract idea of state prerogative to govern on behalf of its people into an actual power with a constitutional source, and a power that survived the adoption of the US Constitution.

The case in which the Supreme Court in the early years of the republic worked out most thoroughly the nexus between the police and commerce powers was New York v. Miln.[59] This case involved a statute enacted to protect the public health of the community by requiring that a ship's captain, within twenty-four hours after docking at the port, report in writing the names, ages, and last legal settlement of every person who has been on board the vessel. That this was an exercise of the state's police power, and not the assertion of a power over commerce, was revealed, said Justice Barbour for the Court, by the state's rationale for the law, focusing on the town's purpose, ends, and means of implementation of this law. "It is apparent," wrote Barbour,

> from the whole scope of the law that the object of the legislature was to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries or from any other of the states, and for that purpose a report was required of the names, places of birth, &c., of all passengers, that the necessary steps might be taken by the city authorities to prevent them from becoming chargeable as paupers."[60]

This purpose set this law apart from the laws considered in both Gibbons and Brown. In those cases, the states were asserting power – to regulate commerce – that were exclusively Congress's under the US Constitution. With this clear conflict in view, the Court held in both Gibbons and Brown, that the federal government's power is exclusive and thus the assertion that the states had a police power to regulate was of no consequence. In Miln, by contrast, there is no equivalent federal interest and therefore no power that could be squared with the commerce clause. Given that the Constitution is a document of grant, meaning that the federal government has only those powers enumerated in the document, the state's actions under the police power could not be supplanted by the federal government.

There is no new constitutional law made in Miln, but instead the case nonetheless illuminates the principle from Gibbons and Brown, that where state laws do not impose burdens on commerce, they are not inconsistent with the US Constitution but are, rather, part of the ordinary public health regulations, equivalent to quarantines and the like, that Chief Justice Marshall in Gibbons had said are part of "[t]he completely internal commerce of a state [and therefore] may be considered as reserved for the state itself."[61] While none of these cases provide a good definition of the police power, such a definition was unnecessary to decide the outcomes. What was ultimately at stake in all three cases was what we might call pure federalism. Was there a conflict? Who would prevail in such conflicts under principles of US constitutional law? Tacit in these early decisions in our history of constitutional federalism was it that fell solely to the states to determine what powers they had under their own constitutions. In these early watershed commerce clause cases, the great chief justice acknowledged the police power, but did not endeavor to define it.

Nonetheless, these cases, decided over a decade and a half period, were important in reinforcing the power of the states to act locally and with respect to the "internal commerce" of the states, while also curtailing state actions which interfered with commerce that was external. This key move could not be regarded as inevitable at the time these controversies were brewing. After all, the Court had two other roads available to them. One involved weighing the interests of the federal and state governments and making a determination of whether and when state interests were superior to national interests. A second road was to view the Tenth Amendment as creating a safe harbor for states when it was acting under its police powers, even if state actions interfered with commerce. This would involve drawing a line between state efforts to regulate interstate commerce directly and state actions which were aimed toward other objectives but, at least indirectly, interfered with interstate commerce. The affirmation of exclusive federal power over matters of commerce in these and other key cases, would ultimately settle the matter of whose will would triumph once and for all.[62] It became plausible that the courts would second-guess state legislatures and impose more substantial guardrails on the assertion of state power over economic activity in individuals and firms where it might bump up against national concerns. What we learn from the early commerce power cases is

that the state police power is reserved power and in that regard is undisturbed by the enactment of the US Constitution. However, the power is not unlimited and cannot be exercised in ways that would interfere with the free flow of commerce. It makes sense, therefore, that the state police power would, from the Supreme Court's perspective, remain intact even in the face of the steadily growing imperative of exerting national influence and control over various issues that implicated interests of the United States.[63]

*

There were three developments in the first decades after the republic's creation that shaped the emergence of the police power as a significant force in state governance. The first was the need to conscript the state legislature into the project of helping to solve the problems of interference with individuals and communities' safety and health by others. This was the classic issue of *sic utere*, one that was reflected in our private law of torts as developed and implemented principally through the common law.[64] Governments at both the state and local level began to intervene more actively, through legislation and regulation, in order to address issues that were characteristic of a society with greater risk, economic needs, and more compassion and sense of obligation to the common welfare. The police power was a key element in this enterprise. The second development was the increasing need for infrastructure and public works projects, this to address the important needs of a growing population and ever more interdependent economy. While the national government would play an important role in these efforts, and a profoundly more important role in the twentieth and twenty-first centuries, the fulcrum of these infrastructure efforts was at the state level. The police power functioned here as a mechanism of improving "the people's welfare."[65] Third and finally, just as the legislative power was evolving in distinct ways, so too there emerged new notions of legislating. At the time of the framing and for many years afterward, the common law reigned supreme as a mechanism of addressing conflicts involving property and personal harm and, more broadly, in defining the scope and contents of legal duties and rights. However, as the nineteenth century continued, there were changes in how we thought about the role and functions of common law adjudication and, in addition, how we thought about the province of legislation.[66]

RIGHTING WRONGS, PROTECTING THE GENERAL WELFARE

As the first state constitutions were forged, and for many years thereafter, common law was in the ascendancy, with positive legislation interstitial.[67] Tort law had steadily developed mechanisms to combat harms to the general welfare, in addition to redressing various types of person-to-person wrongdoing (including threats to one's property rights, as with traditional trespass and nuisance actions). And so,

to consider a counterfactual, the police power might have developed as a mere adjunct to the common law of torts and property and the emergent criminal law. For instance, it could have been focused narrowly on abating nuisances, that is, the improper exercise of one's property to cause injury to a neighbor, and about redressing public nuisances and wrongs that represent threats to public health and safety.

Early police power cases suggested that it would play this limited role, essentially a public law version of the *sic utere* principle. After all, the earliest of American police power cases typically involved redress for wrongdoing and, in that sense, legislation (state or local) was more often than not described by the court as a supplement to the common law.[68] However, we will see that the police power expanded considerably over the decades of the nineteenth century, so as to develop a quite different, and considerably bolder, rationale for proper regulation.

Let us first consider what this earlier and more narrow construction of the police power revealed. One of the most elemental concepts in the study of American torts and property law, introduced to law students early their first-year study and drawing upon several centuries of caselaw and commentary, is the notion of *sic utere tuo ut alienum non laedus*, roughly translated into the expressed limit on the ability of one to exercise his liberty or use his property so as to interfere with the rights of his fellow man.

The law of nuisance captures this idea well, albeit in the rather wooly way this body of law has developed over its lifetime. The theory of classical nuisance law encapsulates four basic principles that are important to our understanding of the police power as a mechanism for enforcing the *sic utere* principle. First, there is the idea that individual rights, including property rights, are "relational and qualified."[69] The right to use and enjoy one's property is a fundamental stick in the bundle of the owner's rights, but it is conditional on society's judgment that this use and enjoyment must not interfere with others' freedom and interest.[70] Second, there is the wider view that builds from the *sic utere* notion that individuals should use their property in a peaceful way and in due accord with the society's general welfare.[71] Third, this "should" extends from something akin to the Golden Rule to an obligation imposed by edict of the government, either through the common law of torts and property or through positive law that limits the actions of individuals so as to maintain the peace and common good.[72] Fourth and finally, the task inevitably falls to the judge to make the difficult assessment of whether one's use of property is reasonable or unreasonable; after all, it is not the interference that the law proscribes, it is the unreasonable interference, taking account of the standards that the common law or statutory law delineates in measuring the propriety of the conduct under survey.

Property rights were viewed in these early cases as including the freedom to use. The room for restriction was narrow, principally limited to circumstances involving private or public nuisances. Where such harm-causing activity occurred, however, this matter would warrant public regulation as well as a recovery under traditional principles of tort law. A good illustration of this principle in an early police power

case is Brick Presbyterian Church v. Mayor of New York, decided in 1826.[73] There the plaintiff claimed that a restriction imposed by the city on his ability to use this land as a cemetery would interfere with his use of the property, more specifically, their covenant of quiet enjoyment. The operation of a cemetery in this community would, argued the plaintiff, impose a distinct harm on the public. Accepting such a claim, said the New York high court, would run afoul of the *sic utere* principle. Viewed from a public harm perspective, it is "unreasonable in the extreme to hold that plaintiff should be at liberty to endanger … [the lives] of the citizens generally."[74]

Likewise, in evaluating one year later a municipal regulation limiting a boat owner's right to connect their boat to a dock in a dangerous manner, the court in Vanderbilt v. Adams insisted that this statute was "passed for the preservation of good order in the harbor"[75] and was "essentially necessary for the purpose of protecting the rights of all concerned."[76] The law protects property owners' interests only when the owner can be said to suffer an injury, but under the *sic utere* principle "this is not considered as an injury."[77] After all, the property owner benefits reciprocally, if indirectly, as a member of the general public. A law enacted therefore under the *sic utere* principle is "constitutional and obligatory."[78] "Every public regulation in a city may and does, in some sense, limit and restrict the absolute right that existed previously, but this is not considered an injury. So far from it, the individual, as well as others, is supposed to benefit."[79]

These strong statements of governmental roles and responsibilities under the police power are characteristic of a time in which the public law of government regulation existed alongside the common law as a complementary means to redress private harm.[80] Government regulation supplemented tort law in this regard. Courts could and occasionally did declare a certain act to be a public nuisance.[81] But the duly enacted ordinance or statute accomplished the same objective in declaring (nay, discovering!) that certain threats to the health and safety of the public were properly addressed through positive law.

To the extent that the police power began principally as an instrument to safeguard the *sic utere* principle, this was principally because the kinds of regulations created were designed to limit public nuisances and other sorts of threats to individual well-being. Even within this structure, it is important to understand, as Novak wrote, that nuisance law in this time "was neither trivial nor timid"[82] and "nineteenth-century jurists were quite explicit about both the overarching significance and the public power of the law of nuisance."[83] Ordinary nuisance law focuses on comparing competing private property claims. One's use of property, so the rule goes, should not interfere with the use of property by another. This use might simply mean quiet enjoyment, and that stick in the bundle is protected against interruption or intervention. Courts saw the police power as protecting against public nuisances, nuisances which reflected threats to the general welfare and not merely violations of discrete duties in the classic tort law sense. In essence, the courts were broadening the meaning of what represented a harm worthy of redress.

Did the redressing of wrongs exhaust the basis and content of the police power?[84] Not according to the collection of state cases dealing with the police power, especially as we get later into the century. The courts moved steadily away from the strict *sic utere* idea in considering the scope of its power toward a broader conception of what this power means. While it was easier to capture many of the early safety and health regulations in some sort of "redressing harm" notion, state regulations took on a somewhat different shape as social conditions evolved.[85] The government became focused on implementing regulations that advanced public purposes. This was not lost on the leading treatise writers of the time,[86] or on the leading historian of the police power, William Novak, who, looking closely at these developments, sees the development of a *salus populi* (people's welfare) sensibility in the rendering of the police power in the early period of its development in state and federal jurisprudence.[87] He labels this in a recent essay, "The American law of overruling necessity," and views its principal consequence for constitutional interpretation as "the idea that public right was always supreme, trumping private right."[88] Although we will interrogate in subsequent chapters this depiction of the power in the wider context of state constitutionalism and the promise of good governing, it captures crisply and compellingly the basic point that the police power was understood as a means of realizing wider social aims than the vindication of natural rights and compensating for specific harms.[89]

The shift from redressing wrongs, the classic tort law ideal, to embracing the social good was reflected in the phrase "Good order," a reference to the general welfare of the community, which was a common phrase in the early cases. In an 1835 case from Maine,[90] the court upheld severe restrictions on the construction of wood buildings, declaring that such a regulation "shall be needful to the good order of [the] body politic."[91]

The evolution of the police power toward a more public welfare-enhancing instrument of active governance is revealed well in the case most widely associated as the foundational state police power case, Commonwealth v. Alger.[92] As a preliminary aside, it is striking that Alger is viewed as the central case in the development of the police power given that it was decided in 1851, by which time the state courts had roughly thirty years of experience of deciding police power controversies, and had written literally dozens of decisions on this subject. Nonetheless, Alger is considered iconic for its bringing together of perhaps the greatest antebellum-era state court judge, Lemuel Shaw, with a classic dispute over the reach and scope of governmental power to limit private property.[93] Chief Justice Shaw writes an elaborate opinion excavating the purpose of the police power and in doing so constructs a framework that is at once powerfully supportive of the government's broad ambitions in this area, but frequently misunderstood, as we will see, in its depiction of the police power's true nature and provenance.

Alger involved a municipal ordinance that restricted the prerogative of the defendant Mr. Alger to build a wharf on his property. This wharf, according to the city of

Cambridge, interfered with navigation along the Charles River, an imposition properly redressable by the government in its decision to regulate the use of this owner's property. For the court, the question was essentially this: "Are the prohibitions contained in this statute consistent with every right embraced in the grant?"

At a higher level of generality, the court was confronted with the question of whether this law was within the scope of the city's discretion under the police power. The court thus had to decide on what basis the government can interfere with one's use or enjoyment of one's private property as a means of redressing of a distinct harm and violation of a duty. As to the matter of the appellant's property right, this was a somewhat unusual case. Critically, the fact that this is a matter involving property in a seabed and, further, involves navigation makes this an easier case for the government in its exercise of power.[94] "[W]hether this power," writes Shaw, "be traced to the right of property or right of sovereignty as its principal source, it must be regarded as held in trust for the best interest of the public, for commerce and navigation, and for all the legitimate and appropriate uses to which it may be made subservient."[95] Therefore, the government's power to regulate the property's use is not only capacious, it is obligatory.[96] It is part of the government's role in securing the navigation servitude, a public right that predates the advent of all the state constitutions and is sourced in English common law.[97]

What we remember, however, about Alger is not necessarily the holding, which was unremarkable, given the well-established navigation servitude, but what Chief Justice Shaw says more extravagantly about the nature and scope of the government's police power taken as a whole:

> This principle of legislation is of great importance and extensive use, and lies at the foundation of most enactments of positive law, which define and punish *mala prohibita*. Things done may or may not be wrong in themselves, or necessarily injurious and punishable as such at common law; but laws are passed declaring them offences, and making them punishable, because they tend to injurious consequences; but more especially for the sake of having a definite, known and authoritative rule which all can understand and obey. In the case already put, of erecting a powder magazine or slaughterhouse, it would be indictable at common law, and punishable as a nuisance, if in fact erected so near an inhabited village as to be actually dangerous or noxious to life or health. Without a positive law, every body might agree that two hundred feet would be too near, and that two thousand feet would not be too near; but within this wide margin, who shall say, who can know, what distance shall be too near or otherwise? An authoritative rule, carrying with it the character of certainty and precision, is needed.[98]

However certain or precise a particular ordinance or statute is, a duly authorized legislature can (and surely must) develop strategies to protect and promote the public interest through laws that are fashioned ex ante to confront social problems that may emerge ex post. This is an important shift from a conception of positive law as mostly an act of discovery, as embedded in notions of natural right,[99] to a view of legislation

as confronting contemporary social conditions and the needs of a dynamic economy and society. This view would persist largely unabated from the antebellum period in which Alger was decided to the present.

Unfortunately, Alger is occasionally seen as auguring an idea of the police power as an outgrowth of the unlimited monarch, as an exemplar of a conception of governance that sees the police power as mostly tautological, as a restatement of the basic point that the legislature can undertake regulatory strategies for any reason it sees fit. At first glance, perhaps, Chief Justice Shaw's opinion seeks to hold two irreconcilable ideas in its hands at the same time, the idea that it is no more nor less than the full power of the sovereign and is an American iteration of the idea of the royal prerogative and the idea that it is grounded in American state constitutionalism. The conventional way that scholars square the circle is to read the opinion as the font of the basic idea that the police power cannot truly be defined; it is, as this view goes, a statement that the state government's power to regulate in the name of the general welfare is subject to no serious structural limits. And so it can be cabined only in two ways, either by the actions of the federal government under the edicts of the US Constitution or by invoking individual rights from either the national or the state constitutions.

This idea of the police power was reinforced memorably by Chief Justice Taney in The License Cases.[100] There he said:

> [W]hat are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers – that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates, and its authority to make regulations of commerce is as absolute as its power to pass health laws except insofar as it has been restricted by the Constitution of the United States.[101]

In his book on the police power, Marcus Dubber dwells on the connection Shaw draws between the police power and the limitless executive power instantiated in British law. Although Shaw mentions the term "police" just once, Dubber emphasizes the dichotomy critical to Blackstone's formulation between police regulation and the protection of private right through "justice" (here quoting Ernst Freund, author of an influential early twentieth-century treatise on the police power).[102] Dubber sees in Shaw's Alger opinion the insistence that "[p]olice is an executive matter, as opposed to a legislative or judicial one" and, from that, obliterates the obligation of all exercises of governmental power to the state constitution whose design constructs not only official power, but the offices themselves.[103] Dubber collapses the constitutional subject into the royal prerogative, claiming, amazingly, that "there is nothing about the formulation of the police power in the Massachusetts constitution that is inconsistent with the derivation of the power from the king's prerogative."[104]

However, this can only be right if the police power is purely executive by nature or design and, further, if the exercise of executive power cannot be limited in any way by constitutional commands, whether through structure or rights. This cannot be right as a matter of ordinary constitutional construction, even in the 1850s, nor is there any evidence that Justice Shaw thought it so. The source of the power to abate public nuisances through a clear prohibition on wharf building as in this case may well be the *jus publicum*, an idea growing out of the royal prerogative and the government's obligation to look after the general welfare. Shaw articulates well the history of this obligation and its role in creating the navigation servitude (and, later, the public trust doctrine). But in the recounting of the origins of public trust, there is nothing that points to the notion that a necessary component of the executive's obligation is that this power be unlimited. Rather, constitutional government emerges in the American context precisely in order to separate government duty from unalloyed discretion. By mid-century, it simply was not a credible view of constitutionalism in America that the police power is a species of executive prerogative, a power whose "defining characteristic became its very undefinability."[105]

There is another flaw in this account. In minimizing the impact of state constitutions and ideas of constitutionalism emerging with a force in and after the revolutionary era, the view that Shaw's signal contribution was in looking backward to the pre-American sources of police and regulation, we not only risk reifying the increasingly anachronistic dichotomy between private and public law, but also begin to lose the thread of the continuity between common law and new notions of lawmaking. Nineteenth-century lawmakers and legal scholars, following in the footsteps of the revolutionary era constitutionalists, fashioned an approach to lawmaking that was principally prescriptive, not declarative, and was ambitious in creating new structures of public policymaking for society's emerging wicked problems. The common law was not abolished or abandoned, as Shaw and his contemporaries make clear, but nor was it to be maintained as the one true source of law. Blackstone's shadow loomed large in the Jacksonian and antebellum periods to be sure,[106] but not so large that it obscured the emerging approach to legislation characteristic of Americans in the post-framing period, an approach that would continue to be reshaped throughout the nineteenth and twentieth centuries. Ultimately, Shaw's description of the royal prerogative is best understood as a narrow, if shrewd, paean to the navigation servitude and the important notion that much land is imprinted with a public purpose, so sayeth the common law. Shaw noted the continuity of the idea of submerged land being part of the public's birthright and being an exemplar of the public rights that citizens had in ensuring that such land would be maintained to their benefit, even if it inconvenienced private property ideas.[107]

Shaw's brilliance in Alger is in weaving together myriad themes in the police power to come to the conclusion, and that is that our constitutional culture had come to understand by mid-century that public rights undergird "the release of energy" that Willard Hurst memorably wrote about in describing the pragmatic

foundations of state power in that period.[108] At the same time, Shaw acknowledges with remarkable foresight that American constitutionalism requires limits, even judicially imposed ones, and even ones that would need to be crafted in concrete cases through a sort of constitutional common law.[109] Courts would come to shape these limits through their scrutiny of the legislation to ensure that it revealed a public purpose, and not an arbitrary assertion of power.[110]

Alger was not decided in an historical vacuum. By the time of the Massachusetts decision mid-century, state courts had grappled frequently with the question of the police power as a constitutionally grounded authority in government and also with the question of whether it was limited. In 1838, for example, the Chancery Court of New York struck down a law prohibiting the erection of a hay press, holding that, despite the breadth of the police power, "all by-laws must be reasonable."[111] Here the law was clearly unequal in its operation, privileging individuals who had already assembled these contraptions over those who had not yet done so. The concern with arbitrary laws – not just the arbitrary application of laws, something that would come to sound in procedural due process notions emerging later in the nineteenth and into the twentieth century – would persist during the entire history of the police power, from distant past to present, as we will explore in later chapters. For now, the essential point is that the power was not understood either in Alger or in the commentary at the time as a limitless executive power, sprouting directly from Blackstonian notions of policing and the prerogatives that were necessary to maintain the order of the household.

By the time of Alger, *sic utere* was fading as a foundational basis for the establishment and exercise of the police power.[112] While the police power was and would always be limited in its exercise, it was not restricted to the redressing of discrete and identifiable private harms.

We should recall the nexus between rights and social welfare, and the larger connection to the police power in the nineteenth century.[113] Rights were seen as relational from the very beginning of our Republic's existence and for a good while before. "A natural or legal right was not something to be exerted against society, but was intimately connected to the duties and moral obligations incumbent on social beings."[114] Rights and liberties were embedded in social obligations. This is not the same as saying that rights were always defeasible in the case of government regulation. We need to give context to social obligation. After all, we can turn that back around say that an essential social obligation was to protect the rights and liberties of citizens. Two things were true, or at least plausible: First, rights were relative and were connected strongly to public obligations; second, rights, including property rights, occasionally functioned as trumps, in order to limit the government's use of the power of the state to place reasonable constraints on liberty. Note that before there was a *salus populi* conception of the police power, there was the hoary concept of *sic utere*. Our common law, including our tort, contract, and property law, was critical in redressing wrongs to individuals, and we could conceptualize that as part of a project to protect one's liberty to be free from injury.

Early police powers cases occasionally capture in interesting ways this idea that the function of regulation under this power is to protect rights. In Vanderbilt v. Ames, the wharf tying case referred to earlier, the court focused on "protecting the rights of all concerned," going so far as to the say that this law is not only constitution but is "obligatory."[115] In an 1823 Massachusetts case in which the government had prohibited digging, therefore incurring the ire of a property owner, the court insisted that they were protecting the public's rights. A couple of decades later, the court upheld a law on the argument that the legislature was prohibiting "a use of property which would be injurious to the public." One might be tempted to refer to the *sic utere* idea that these (and other) cases were just about prohibiting public harms.[116] However, in invoking the language of rights, the courts were urging upon readers a larger idea, namely that there was an agenda at work in regulatory governance. Protecting the public meant not merely safeguarding individuals' valued personal and economic interests, but the protection of the public's rights, and these were rights to health, safety, and good morals. In short, the emerging use of the police power illustrated by Shaw's analysis in Alger and other nineteenth-century cases underwrote a view of what would later come to be called positive rights, an idea that previewed in no small measure what state constitutions would come to look like in the twentieth century.

A collection of state cases in the early nineteenth century and into the antebellum period brought together the *sic utere* and *salus populi* notions under a broader framework. The shift from one to the other was hardly a sharp one; after all, the common law remained dominant in this period, with state legislation, to say nothing of regulatory administration, often used in a more interstitial than comprehensive way. The expressed rationale in judicial cases upholding the use of the police toggled between these two conceptions, at least until well into the Progressive era. In this early police power framework, the regulatory power of government was seen principally as securing public rights through the responsible use of the police power. Later cases would focus more conspicuously on the matter of public purpose and the common good. In the nation's first century, the courts would look deeply at how the government implemented its obligations to protect citizen interests and rights, while also developing notions of public rights under the rubric of *jus publici* concepts.

One of the more interesting illustrations of the judiciary's focus on the matter of individual harm-creating conduct as the fulcrum of the power is a Vermont case from 1855, Thorpe v. the Rutland & Burlington Railroad Co.[117] The state legislature had enacted a statute requiring railroad companies to compensate cattle owners for all cattle killed whenever the company had failed to put up a cattle guard. The state's authority over railroads companies was established by the time of the decision, as the Supreme Court had held in the Dartmouth College case that states had plenary power over corporations, power subject to the usual limits of state constitutions.[118] (Recall that federal constitutional rights were not enforceable against the states at that time.)[119] However, this case did not answer the question of the state's particular

obligation under its police power. As to this, Justice Redfeld notes that breadth of the power to protect harm and do social good: "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state."[120] The regulation of the railroads in this instance, which requires cattle guards and obliges the company to compensate cattle owners if they do not put up guards, is grounded in two elements of the police power: First, "the police of the roads," well suited of course to the conduct of the railroads; and, second, the general police power, by which Redfeld says, extravagantly, "persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state, of the perfect right, in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."[121] Just as this law brings together the matter of compensating for harm-causing conduct with prospective regulation, the formulation of the power in Thorpe and many other cases of this era highlights the police power's concern with both *sic utere* and *salus populi* principles.

The nature of what a public harm entailed or, better yet, a kind of social problem that required governmental intervention, evolved over the first century of the American law and thus so did the contents of the police power. In this subsection, we have explored the critical ways in which the police power undergirded an evolving vision of energetic government, one that was increasingly decoupled from an antediluvian conception of public law as a mere implementation mechanism for private law ideas of harm reduction and righting wrongs. But, in doing so, they connected their objectives to a plausible model of constitutional rights, one that emphasized democracy and the public good over autonomy and private interest.

INFRASTRUCTURE AND PUBLIC WORKS

By the time the country had reached the age of a quarter century, pressures built on the state governments to make important improvements in their infrastructure.[122] As William Novak writes with regard to public rights in roads, rivers, ports, & squares, "Today public powers and rights in such locales seem self-evident. But the outcome of nineteenth-century policy was more in dispute. There was, after all, nothing inherently public about a highway or riverway."[123] Progress in the new nation requires considerable energy and initiative in matters of infrastructure and public works. [Therefore,] "[ro]ads, rivers, and ports were singled out early as territory for the extension and elaboration of state powers of police."[124]

These projects were tied not only to the welfare of the states as states, but also to the larger goal of facilitating commerce and transportation among the states. Madison foresaw this imperative when he wrote in Federalist No. 14:

> [T]he intercourse throughout the Union will be facilitated by new improvements. Roads will everywhere be shortened, and kept in better order; accommodations

> for travelers will be multiplied and meliorated; an interior navigation on our eastern side will be opened throughout, or nearly throughout, the whole extent of the thirteen States. The communication between the Western and Atlantic districts, and between different parts of each, will be rendered more and more easy by those numerous canals with which the beneficence of nature has intersected our country, and which part finds it so little difficult to connect and complete.[125]

The building of the Erie Canals and Ohio, as Harry Scheiber has taught us, was a central part of the strategy of ambitious steps to address infrastructure deficiencies and to expand practically the reach and scope of their economy at a time when such expansion was essential to realizing the citizens' objectives.[126] Other great infrastructure projects followed. However, it is not only the building of public works that was extraordinary; also remarkable was how the law accommodated the choices of legislators and administrators to undertake this big and medium-size projects when to do so was to impact, and in some cases recreate, extant property and contract rights.[127]

The literature on this period in a way begins in the middle of the story, emphasizing the continuity between an ambitious conception of public authority and a welcoming of energetic governance and the confirmation of public power to do what is necessary to advance the well-being of a rapidly industrializing society. Some scholars view this as more or less inevitable, given the imperatives of the times, while some of the critical history views with skepticism the motivations of courts and legislatures and sees these developments in what are ultimately deterministic accounts.[128] Both of those views are illuminating, but they do not begin early enough in the story to help us see the tensions and the consequences.

Governmental strategy to create and implement these projects took place in the shadow of important property rights claims. We need not necessarily call these rights "vested," so as to follow the tradition that would lead to a hypercritical view of the wisdom and ultimately the constitutionality of state and local regulation.[129] But we can at least note that there were established private rights, coming from contract and property law, that were to be protected and could not be interfered without an adequate basis. Indeed, it would be impossible to make any sense of the inclusion of a contract clause and an eminent domain clause in the US Constitution, as well as the inclusion of specific rights provisions dealing with contract and property, if we did not see the framers of these documents as concerned with the basic integrity of liberty and property.[130]

Robust regulatory powers, including police, taxation, and eminent domain powers, emerged out of a need to address these individual rights and to entrust to legislatures, under limits, the discretion to make decisions that would enhance the public interest, even though it inconvenienced individuals or businesses.[131] In a leading case involving the construction of the Contract Clause where a private corporation complained that Massachusetts had extinguished their rights by providing for a new public bridge, the Court remarked that "[t]he object and the end of all Government is to promote the happiness and prosperity of the community by which

it is established, and it can never be assumed that the Government intended to diminish its power of accomplishing the end for which it was created."[132] This strong declaration of the states' power and prerogatives to make infrastructure choices in what they viewed as the public interest was especially important, coming as it did in an era in which states were building and improving with extraordinary energy and resolve.[133] Both the Supreme Court and the state courts were to give a very broad construction to state power and almost no cotton to individual complaints. At the state level, the choice was generally made in favor of state authority.

As public authorities displaced the interests of private property owners and occasionally entire communities in order to accomplish public work projects, courts acknowledged that these choices reflected tradeoffs that represented very bad news for those displaced. Eminent domain would later provide one form of redress in circumstances in which property was taken, but where the impact was destruction not confiscation, property owners would be compelled to endure sacrifice. As a Pittsburgh court wrote in a case involving the cutting down of a valuable tree on church property:

> The constitutional provision for the case of private property *taken* for public use, extends not to the case of property *injured* or *destroyed*; but it follows not that the omission may not be supplied by ordinary legislation. No property was taken in this instance; but the cutting down of the street consequent on the reduction of its grade, left the building useless, and the ground on which it stood worth no more than the expense of sinking the surface of it to the common level. The loss to the congregation is a total one, while the gain to holders of property in the neighborhood, is immense. The legislature that incorporated the city, never dreamt that it was laying the foundation of such injustice; but, as the charter stands, it is unavoidable.[134]

Many of the expressed rationales for sacrificing individual and community interests to government goals, and indeed the reasoning in these cases more generally, were thin and largely unilluminating; they did not furnish anything helpful in understanding where the limits to such governmental choice lie. The frequent references to eminent domain, as we will discuss in more detail in the next chapter, provided guidance with respect to the category of intrusion – taking versus regulation that destroyed or substantially reduced value – but this would not be helpful in shaping any limits on governmental action in this latter category until the Court developed a regulatory takings doctrine.[135] What could be gleaned from these cases at most was an articulation of the increasingly accepted view that choices undertaken to regulate the use of private property must be understood as part of the larger context of government progress and the imperative that state and local governments have ample discretion to make policy choices, especially given the important infrastructure needs of this rapidly growing nation.

What is especially interesting about infrastructure as a category of public policy here in the nineteenth century is that these decisions were not about addressing

distinct public harms, but were about improvements. They were progressive in the literal sense that they were fundamentally about progress. Moreover, the government, in the pursuit of these bold initiatives required of its citizens sacrifice: sacrifice in the form of both economic contribution (taxes) and restricting the use of private property for the public good. In all, the government asked the citizenry to adjust their expectations about the nature of property and the dominion of ownership, and in ways that were vital in providing governments with the versatility to carry out essential infrastructure projects and programs.

NEW NOTIONS OF LEGISLATING

There is a key point underlying the early police power cases, one that might be considered more prosaic than the vision reflected in Shaw's famous opinion in Alger. It is that the state's interest in acting to protect health, safety, and welfare emerged from a distinctive view of the nature and role of state government in implementing public policy through legislation and other forms of regulation. In the nineteenth century lawmakers were working through these new schemes of legislating and the police power helped support a vision of public power that was ambitious, proactive, and centered on improving public welfare.

The police power was shaped in the first decades of the American republic by the evolving character of legislative lawmaking. In the early years of the republic, public officials thought of legislating in ways different than today. In early America, the legislature was seen as an organ acting alongside the courts in developing a common law, one connected to principles of natural law. "Natural law," legal historian Stuart Banner writes, "formed a backdrop against which the legislation was enacted, a set of background principles from which the legislature was presumed not to wish to deviate."[136] Statutory lawmaking was seen as essentially declaratory, much like the constitutional provisions from which the legislature derived its power.[137] It would take many years, and serious shifts in the understanding of the nature of legislating as a form of distinct positive law, for the American legal system to see regulation and legislation for what it was: the product of specific policy choices made by public officials.

As to whether this declaratory view of lawmaking was tied inextricably to natural law concepts and therefore all the legislature was tasked to do was to discover what the law of nature commanded or was nested in a more complex and multifaceted view of the connection between legislation and the common law, remains uncertain. This was the fulcrum of the famous debate between William Blackstone and Jeremy Bentham.[138] So far as the police power is concerned, the question is interesting, but is not ultimately fundamental. After all, the choices of how best to protect the general welfare could emerge from many different views of what good public policy demanded. The common good could be, and many citizens and officials at the time thought it *should* be, embedded in natural law. This would not make any special difference in the efficacy or the authority of the legislation; rather, this was

a matter of determining where courts looked to determine whether the constitution authorized governmental action in the first instance. To be sure, a key questioned loomed as to whether the constitution was fundamental law or else was binding only insofar as it was consistent with natural law precepts.[139] However, by the time that police power controversies came before the state and federal courts, it had long been resolved that the question of power and of rights would be centered by state constitutional analysis and not by natural rights thinking or, in Holmes's reference to the common law, "the brooding omnipresence in the sky."[140]

Still unsettled in the late eighteenth and early nineteenth centuries was the question of what kind of lawmaking was best designed to protect health and safety. And, more generally, what was the purpose of lawmaking by legislatures as the functions and objectives of state government were just beginning to take shape in the early decades of this new republic? From one perspective, the legislature should undertake initiatives through legislation to implement policy that advanced the cause of social welfare and the public interest. Legislation was the manifestation of the lawmakers' goal of good governing. From another perspective, however, the legislature should be concerned principally with methods to address particular or general harms. Legislation was a form of positive law to be sure, but as a species of public law that exists in parallel with the common law, is basically intended to recognize and redress individual wrongs. Just as the state's criminal law exists side by side with tort law as complementary mechanisms to address and punish wrongs, the act of legislating is an act of redressing wrong.

This view of legislating goes along with the *sic utere* principle. Legislating to protect the public health and safety can be seen as essentially declaratory of specific harms or wrongs that have been committed by, say, property owners and, in its declaration, embody the proactive effort to stop these harms before they occur. This perspective gives the power an anchor to the *sic utere* principle. Likewise, it effectively narrows the scope of its coverage.

Where notions of lawmaking start to shift later in the century, so too does the framework of the police power. The classic debate between William Blackstone and Jeremy Bentham played out principally in the context of British political thought. However, the themes in this contest illuminated emerging American notions of lawmaking in the federal state context. Under classic views of the law, judges were oracles whose comparative advantage was in discovering legal principles and applying them to concrete cases. The province of legislation remained to be determined as the contours of the police power were likewise being constructed through statutes and judicial decisions. We should see these developments as in a parallel orbit.[141]

JUDICIAL REVIEW, INDIVIDUAL RIGHTS, AND THE SUPREME COURT

The police power in the nation's first century was embodied in a vision of active governance, an idea of legislatures acting on behalf of the *salus populi*, and the cases

in the state court cases in the antebellum period and continuing through the Civil War and in its aftermath reflected this commitment to progressive public policy. The challenge was to configure appropriate limits to the exercise of these powers. State courts met those challenges through mainly close interrogations of the rationale for the exercise of these powers, looking also to the security of individual liberties and private property rights protected through the common law and through the state constitutions. Judicial review was well established in the states, and so a close review of the many state cases involving the police power in the period from the enactment of the original constitutions through the antebellum period indicates that state courts were reasonably comfortable with examining state actions to assess whether they were consistent with the fundamental law of the state. That said, the methods of judicial review shifted over this period. Early cases looked like explorations typical of common law reasoning. As the century continued, courts took more seriously the ideas that it was a constitution they were interpreting, and adjusted their approaches to judicial review accordingly.[142]

Individual rights played a limited role in the period before Reconstruction. In Barron v. Baltimore, the Supreme Court held that the bill of rights did not apply to the states.[143] To a significant degree, this made the matter of judicial review simpler in practice, as neither federal or state courts would be troubled to consider whether the exercise of the state's police power trampled on the rights delineated in the Bill of Rights.[144] Despite Barron, the Court did have occasions to consider constitutional matters involving the exercise of state regulatory power and possible constitutional limits on this power. In Calder v. Bull,[145] decided a half decade before Marbury v. Madison and so before the Court's foundational judicial review decision, the Court's justices engaged in an interesting discussion in dicta about whether or not a state law could be rendered nugatory because it conflicts with the constitutional authority of the state to act. Chief Justice Chase offers the example of "a law that takes property from A. and gives it to B," insisting that "It is against all reason and justice for a people to entrust a legislature with such powers, and therefore it cannot be presumed that it has done it. The genius, the nature, and the spirit of our state governments amount to a prohibition of such acts of legislation, and the general principles of law and reason forbid them."[146] In Fletcher v. Peck,[147] the Court read the Contract Clause of the Constitution to limit the ability of a state to redefine contractual obligations so as to escape what would have been a breach under the standards set at the time. This rule would effectively shape the police power in a small, but not inconsequential fashion, in that it created a limit on the state's prerogative to define contract rights in a way that obviated any guardrail on state power. The full-throated notion of vested rights and its impact on the police power would come to the fore later in the century, but Fletcher did indeed preview the idea that contract and property rights were insured by the Constitution against destruction. It "began a long line of cases in which the Court used the Contracts Clause to prevent stage legislatures from interfering with 'vested' property rights."[148] It would be much later

before the eminent domain power would be read in a similar fashion to constrict the maneuvering room of the state.

In Charles River Bridge v. Proprietors of Warren Bridge,[149] the Court upheld a Massachusetts decision to grant a second franchise to build a bridge over the river, despite a contractual agreement with the corporation operating the Charles River bridge that their franchise would be exclusive. Chief Justice Roger Taney, writing for all but one of the justices, described how the property rights of the incumbent bridge builder were subject to modification as an ordinary part of the evolution of such rights. "While the rights of private property are sacredly guarded," he wrote, "we must not forget that the people also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation."[150] This broad paean to the *salus populi* notion of the police power would be echoed by Taney in his opinion in The License Cases referred to above.[151] In that case upholding a restriction on who may be a liquor distributor in the state, Taney wrote:

> But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers – that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates, and its authority to make regulations of commerce is as absolute as its power to pass health laws except insofar as it has been restricted by the Constitution of the United States.[152]

The enactment of the Fourteenth Amendment signaled a new era in the Constitution's development as a check on official action, or at least that was the basic idea.[153] It would seem that individuals would now enjoy the privileges or immunities of citizenship and this would presumably include the equal protection and due process of law. However, the Court's decision in The Slaughterhouse Cases[154] reduced significantly the role of the Constitution in limiting state action under the police power. Here the Court declined to hold against Louisiana's butcher monopoly, essentially rejecting in whole cloth the normative arguments propounded over hundreds of pages by Thomas Cooley just a few years earlier. Justice Miller addressed the issue of whether and to what extent the privileges or immunities of citizens clause of the newly enacted Fourteenth Amendment provides a meaningful constraint on the exercise of the police power, writing that citizens within the states "must rest for their security and protection where they have heretofore rested," and therefore the Fourteenth Amendment adds nothing by way of new protections.[155] This basic approach to understanding the Fourteenth Amendment, including not only privileges or immunities, but also due process – what one scholar labelled a "minimalist interpretation,"[156] under the Fourteenth Amendment – approach would go unmodified throughout the remainder of Reconstruction and thereafter. Indeed, not until

the next century would the federal courts look to notions of due process as an independent constraint on the exercise of the police power.[157]

The main focus of scholars who have written about the *Slaughter-House Cases* has been on what the Court did not do, with respect especially to the privileges or immunities clause of the Fourteenth Amendment, and also with the equal protection and due process clauses. However, what the Court did do was to reinforce "the enduring power of the antebellum map of federal and state powers, with its emphasis on the primacy of states to define and to limit the civil rights of their citizens."[158] This meant that the onus remained on state constitutions to define and, through judicial review, implement constraints on the exercise of the police power, whether through state-level due process protections or other mechanisms.

Questions nonetheless persisted during the Reconstruction period over how the US Constitution limited the states' use of the police power. Some of these issues grew out of the felt urgency, in Southern states and elsewhere, to enact measures to limit the rights of freedmen. This effort would culminate in Plessy v. Ferguson,[159] considered more fully in the next chapter, and would be echoed in other federal, and some state, cases. The more global question concerned whether and to what extent certain regulatory measures that impacted the prerogatives of businesses and their use of their property would be limited by the Constitution.

The principal decision during this era was Munn v. Illinois, decided by the Supreme Court in 1877.[160] Munn gave the Court the opportunity to examine the so-called Granger laws, and specifically the constitutionality of maximum rates for grain warehouses and elevators. With the Fourteenth Amendment establishing the rights to equal protection and due process of the laws, an establishment that the Court had narrowly limited four years earlier in the Slaughter-house Cases, and also in other key cases involving civil rights at or around that same time, the Court in Munn was not writing on a blank slate. On the contrary, this was an occasion to revisit in a controversial policy setting the question of whether and to what extent a state's regulatory powers over business conduct would be newly limited by this major constitutional amendment.

Chief Justice Waite, writing for the Court, acknowledged early in his opinion the broad reach of the police power, noting that "the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good,"[161] and as to the history of constitutional limitations on such powers, Waite observed that "statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."[162] Having dispensed rather quickly with the claim that the Fourteenth Amendment's guarantees of equal protection and due process limit the police power, the Court returns to the familiar issue of whether the state has properly acted within the scope of its police power. Here the Court repairs to classic common law notions of public property, invoking Lord Chief Justice Hale in his seventeenth-century treatise, *De*

Mortibus Maris.[163] For businesses whose private property is "affected with a public interest," the power – and indeed the obligation – exists in the legislature to create all regulations appropriate to safeguard the public's interest by restricting the owner's use over such property.

The "affected with a public interest" rationale has been much maligned, with Oliver Wendell Holmes calling it "little more than a fiction" and Felix Frankfurter "an empty formula,"[164] but the ultimate rationale, as Harry Scheiber has explained at length,[165] is unremarkable once you see the connection drawn by Chief Justice Waite to notions of public rights well entrenched in English common law and described by no less than authority than Lord Hale.[166] Moreover, the secret sauce in Munn is not only this framing of the property as public rather than private, but in its exploration of the economic conditions in this industry, conditions that protected, said the Court, Munn's monopoly over grain warehouses and elevators in this region of the country. The Court explained that the legislature was owed enormous deference in enacting regulations designed to limit the ability of this company to take advantage of their monopoly rents.[167] An important fact in Munn is that Illinois had, just seven years earlier, specifically amended its constitution "to make it the duty of the general assembly to pass laws for the protection of producers, shippers, and receivers of grain and produce"[168] and to carry out further actions to tackle this monopoly situation. For this reason, the legislature would enjoy enormous discretion. Notwithstanding the risk that the legislature would abuse this discretion, the Court concludes that on the equal protection and due process matters, for "protection against abuses by legislatures, the people must resort to the polls, not to the courts."[169]

Munn makes clear that the wide berth states enjoy in enacting police power regulations is largely undisturbed by the enactment of the Fourteenth Amendment. We should say "largely" and not "totally" because neither this case nor other cases decided in the federal courts in the first years after the enactment of this amendment declare that state regulations enjoy some sort of constitutional safe harbor by virtue of the fact that they are enacted under the police power. The skepticism about the states' invocation of the police power to restrict private property rights would be expressed loudly by Justice Cooley in his treatise,[170] and by other commentators. Moreover, we would see the emergence a quarter century later of a vigorous doctrinal adventure by the Court to restrict significantly the scope and reach of state government under its police powers. And so Munn's blow to the emerging constitutional protections of individual liberty and private property augured by the Fourteenth Amendment was an important one, but it was hardly the last word.

THE POLICE POWER AT THE END OF RECONSTRUCTION

The combination of Supreme Court jurisprudence with regard to state police power and individual rights and the voluminous body of state court cases decided by the time that our republic came close to its hundredth birthday revealed a police power

that was broad in scope, decoupled from a narrow objective of redressing private harms, and responsive to key considerations involving our rapidly growing and changing economy. The power, like state constitutions generally, was ambitious and progressive. At the same time, skepticism about governmental motives and strategies persisted. Such skepticism was famously animate during the Jacksonian period, and various reforms to the system, including important constitutional reforms, were illustrative of these democratic, and even anti-legislative, impulses.[171] While the Jacksonian period morphed into the antebellum period which ended in conflict, dissolution, and a terrible civil war, there were continuing controversies over the proper scope of state regulation, both in its agendas and in its impact on civil liberties and especially private property rights. As courts dealt with these controversies, the awesome police power of the states was reinforced and, where necessary, redeemed.

Concern with the extent to which the police power was undermining individual rights would become most prominent in the early twentieth century, as the Supreme Court began to intervene with a vengeance in controversies involving the police power and contract and property rights. But this concern existed long before this movement and we should account for the difficult position that the courts were in the antebellum period and throughout the Civil War and Reconstruction. Two important considerations motivated these concerns. One was the persistence of natural law and natural rights as an influence on judicial thinking in constitutional adjudication. "Natural law," notes Stuart Banner, "loomed large in discussions of property. Lawyers often spoke of 'property as a natural right – as a right derived from the law of nature.'"[172] Such thinking proved remarkably resilient throughout the nineteenth century, and, even after the Reconstruction era legislative debates and the enactment of the Reconstruction amendments, natural law reasoning could commonly be seen in cases involving property and liberty rights.

These modes of reasoning created obstacles to a more progressive approach to regulating, where such regulation implicated established rights, established not only through positive law (which, would have rendered them more amenable to change with legislative action) but through natural law refracted through the lens of classical legal thinking.[173]

Another important consideration was the growing skepticism about legislatures and legislative lawmaking. This skepticism began, early after the framing period and caught fire during the Jacksonian era. Legislatures were viewed as feckless and even corrupt. The critique came from distinct directions. For progressives, state legislatures frequently acted in ways that reflected preference for certain factions or castes. The critique that the public interest was often subordinated to private interest continued to have resonance through much of the nineteenth century. Indeed, state constitutions were reformed in important ways during the Progressive era, most notably to restructure legislative power by narrowing its latitude to act. Legislative skeptics were not content, however, with these structural reforms. They insisted as well on judicial intervention to implement significant checks on the legislature.

From a very different perspective came the state governments of the old South, led by officials who, as Reconstruction proceeded and as Southern states were readmitted to the Union with their new constitutions, worried with good reason that Congress would encourage the states' use of the police power and would fashion new civil rights in order to impose desegregation, equality safeguards, and other unwelcome restrictions on their way of life. To be sure, the Court's Plessy decision would ultimately give them reassurance on that score, but that case wouldn't come until nearly the end of the century. So there would be a quarter century between Munn and Plessy in which White Southerners fretted about the prospects that the police power would facilitate radical change.

Finally, the many individuals and small businesses whose property was at risk from government regulation – remembering that at this time eminent domain was not yet much of a bulwark against property regulation – were skeptical about the legislatures' commitment to protecting their property and liberty. Even those who could and would concede that property rights needed to be balanced against social need had concerns that state legislators determined to make their mark as agents of major change in urbanizing communities and in states reeling from economic disruptions, such as the panics of 1873 and 1893, would not strike the right balance. Legislatures acting in the shadow of their constitutional frameworks had a rational fear of government intrusion.

Like so many other aspects of American public law and governance strategies in the initial decades of the republic, judges, legislators, and executive officials engaged in experiments. The problems identified above, the principal one being how to balance a broad police power with individual rights, began to be solved in two distinct ways. First, courts, and especially state courts, developed new approaches to deciding cases, relocating private property rights in a wider social mission. The objective was not to diminish them, but to configure them as part of the common good, with a social purpose. Novak summarizes the earlier cases as having "laid the groundwork for a wider assertion of state power throughout the society and economy."[174] This wider assertion reflected not only a mechanical broadening of power, but "new, creative, and perfectionist (as opposed to old, negative, and preservationist) dimensions of the well-regulated society."[175]

Second, states amended their constitutions (or, in the case of the later-admitted states, deliberately drafted their constitutions) to create new structural rules and arrangements to channel governmental power in a way that they viewed as sensible for this era. They imposed significant checks on legislation action through balanced budget requirements and debt limits. They empowered governors and also municipalities, in order to counteract legislative hegemony. These reforms did not do so much to weaken the regulatory power of state governments as to disperse power through these imaginative checks and balances.

A third aspect of the courts' approach to the police power as viewed from the vantage point of Reconstruction's end is worth noting as we look in subsequent

chapters. This is the development and evolution of the notion of public property rights, the correlative idea of public purpose, and the burden of showing that the regulation is reasonable. These doctrines reflected a sort of alchemy of good governing, available to courts of the time to examine with an accommodating eye the use of broad and bold governmental power to implement social policies even where private rights would be compromised.

Finally, we should note as one of the central features of the police power during our first century that it was part of the legal underpinnings of a vast deployment of regulatory actions and activity. It is one thing to point to a constitutional authority to act boldly. It is another to describe the many ways in which state and local governments put this authority to work in decisions to protect health and safety through creative regulatory strategies and to facilitate the common good through targeted and general strategies. The progressive era of the late nineteenth century is generally associated with expansive governance and regulatory ingenuity, as also is the New Deal. However, we should not neglect the widespread and sustained use of the police power at the state level during the decades prior to the Progressive era. The result of these efforts was a tangible increase in various health and safety measures, increased regulations of public morals, and extraordinary progress on matters of infrastructure. New predicaments emerged as governments tackled long-simmering problems. But the ledger of regulatory activity reveals an active government pursuing pragmatic goals, availing themselves of the opportunities that the police power provided, and doing so as part of the omnibus project of constitutional governance.

NOTES

1. See Gary Gerstle, *Liberty and Coercion: The Paradox of American Government* 61 (2015) ("Police power allowed state governments to engage in extensive regulation of the economy, society, and morality"). See also Max M. Edling, *Perfecting the Union: National and State Authority in the U.S. Constitution* 89 (2021) ("[I]nformed Americans … used the term police to designate a range of government activities intended to create a specific socioeconomic outcome: the rational, well-ordered, and opulent society"); Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* 56 (1993) ("'internal police' appears [to the framers] to comprehend governmental power to regulate in the pursuit of peace, order, and justice in the community … and the constitutional structures through which the concerns of the community gained articulation and were translated into action").
2. See generally Robert C. Palmer, "Liberties as Constitutional Provisions 1776–1791," in *Liberty and Community: Constitutional Rights in the Early American Republic* 61 (William E. Nelson & Robert C. Palmer eds., 1987).
3. On democratic constitutionalism, see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004); Mark Tushnet, *Taking the Constitution Away from the Courts* (1999); Robert C. Post & Reva B. Siegel, "Democratic Constitutionalism," in *The Constitution in 2020* 25 (J. Balkin & R. Siegel eds., 2009).
4. See, e.g., William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* 6 (2000) ("Changes in the meaning of liberalism in American history

are much more complicated and compelling than the one-dimensional tale of a shift from negative to positive definitions of liberty and freedom").

5. See generally James W. Ely, Jr., *Guardian of Every Other Right: A Constitutional History of Property Rights* (3rd ed. 2007).
6. See generally Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986).
7. G. Edward White, *Law in American History, Volume 1: From the Colonial Years through the Civil War* 187 (2012).
8. See Donald Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* 17–19 (1980).
9. Colonialist Benjamin Austin would write "[i]t has become absolutely necessary, that the 'majority of persons' should be cautioned against acquiescing in the sentiment of placing implicit confidence in their Representatives." Quoted in Gordon S. Wood, *The Creation of the American Republic, 1776–1787* 257 (1998).
10. See generally Gerstle, *Liberty and Coercion*, at 21 ("The Constitution established a federal system in which a great deal of authority was left to the states").
11. See Daniel B. Rodriguez, "The Inscrutable (But Irrepressible) State Police Power," *NYU J. L. & Liberty* 662 (2015).
12. "More than the central government, state governments were thought of as embodiments of the people, and from this it followed that the people would not ordinarily require protection against themselves." Gerstle, *Liberty and Coercion*, at 67.
13. Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* 47–62 (2005). See also William J. Novak, "The American Law of Overruling Necessity: The Exceptional Origins of State Police Power," in *States of Exception in American History* 109–10 (G. Gerstle & J. Isaac eds., 2020). Novak's observation that "[t]he American police power flows directly from these early legal conceptions of overruling necessity," with particular reference to Blackstone, is somewhat in tension with his analysis of the police power's origin in his The People's Welfare. While noting there "the substantive roots of state regulatory power in early modern notions of police or Polizei," Novak observes, rightly in my view, that "police power has little do with our modern notion of a municipal police force. the triumph of this particular legal terminology was part of a late nineteenth-century effort to reign in, constitutionalize, and centralize the disparate powers of states and localities." Ibid., at 13.
14. William Blackstone, *1 Commentaries on the Laws of England*, at 64.
15. See Emerich de Vattel, *Le droit des gens. Ou principes de la loi naturelle*, 1740–1750, reprinted in *The Classics of International Law* (J. Brown Scott ed., 1916).
16. Adam Smith, *Lectures on Jurisprudence* 5 (R. Meek et al. eds., 1978 (1896)).
17. See 3 Aristotle, *Politics* 1280B 10–11 (T. J. Sanders ed. 1981). See generally Santiago Legarre, "The Historical Background of the Police Power," 9 *J. Con. Law.* 745 (2007).
18. See Legarre, "Historical Background," at 764.
19. See Albert Alschuler, "Rediscovering Blackstone," 145 *U. Penn. L. Rev.* 1 (1996); Dennis Nolan, "Sir William Blackstone and the American Republic: A Study of Intellectual Impact," 51 *NYU L. Rev.* 731 (1976).
20. Wood, *Creation*, at 56.
21. Harry Scheiber, "The Police Power," in 4 *Ency. of American Constitution* 1744 (Leonard Levy et al eds., 1986).
22. See, e. g. Calvin C. Jillson, *Constitution-Making: Conflict and Consensus in the Federal Convention of 1787* (1988); Charles Beard, *An Economic Interpretation of the Constitution* (1913).

23. John Fabian Witt, *American Contagion: Epidemics and the Law from Smallpox to Covid* 19 (2020).
24. The Federalist No. 10. Not to mention a legion of pre-revolutionary thinkers going back at least to Hobbes. On the connection between Hobbes view of politics and the framers, see Gary L. McDowell, "Private Conscience & Public Order: Hobbes and 'the Federalist'," 25 *Polity* 421 (1993).
25. It is hard to know exactly what to make of legal historian Ted White's observation that "the ideas of liberty and property were not central concerns to the framers of the Constitution; they served more as background ideas that helped underscore the vital importance of sovereignty issue." White, *Law in American History*, *Volume 1*. This is an oversimplification of a more complex history. See, e.g., Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (1989).
26. See Forest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776–1876* (2000).
27. See generally Edling, *Perfecting the Union*, at 35–74.
28. Gerstle, *Liberty and Coercion*, at 61.
29. See, e.g., Gordon Wood, *The Radicalism of the American Revolution* (1991). See also J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1973). See also Robert Shallope, "Toward a Republican Synthesis: The Emergence of a Understanding of Republicanism in American Historiography," 29 *Wm. & Mary Q.* 49 (1972).
30. Gerstle, *Liberty and Coercion*, at 61.
31. Ibid., at 81.
32. See Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the U.S. Constitution* 161–202 (1996).
33. On originalism, see, e.g., Lawrence B. Solum, "Originalism and Constitutional Construction," 82 *Fordham L. Rev.* 453, 510 (2013).
34. "Original public meaning asserts that the meaning sought is that revealed by the text as reasonably understood by a well-informed reader at the time of the provision's enactment." John O. McGinnis & Michael Rappaport, "Unifying Original Intent and Original Public Meaning," 113 *Northw. U. L. Rev.* 1371 (2019). See also See, e.g., Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 92 (Updated ed. 2014) ("'[O]riginal [public] meaning' originalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.").
35. For an originalist explanation of the police power, see Randy Barnett, "The Proper Scope of the Police Power," 79 *Notre Dame L. Rev.* 429 (2004). See also Barnett, *Restoring the Lost Constitution*, at 322–37. Barnett looks at the original meaning of the Ninth Amendment and the Fourteenth Amendment, both constructed in the shadow of a strong devotion to natural rights, and suggests that the framers of these two amendments, separated of course by several generations in time, intended to limit the exercise of the police power through the inclusion of due process, equal protection, and privileges or immunities. What remains missing in this well analyzed originalist account is what exactly the framers of both the US constitution and the various state constitutions intended to achieve by giving state legislatures such broad powers to regulate health, safety, and welfare in the first instance. Focusing on the origins of the limits without accounting for the wide expanse of regulatory power leaves the analysis, taken on its own originalist terms, out of balance.
36. See Gerstle, *Liberty and Coercion*.
37. See generally Robert Cooter, *The Strategic Constitution* 103–25 (2000); William H. Riker, *Federalism: Origin, Operation, Significance* (1964).

38. See generally David Epstein, *The Political Theory of the Federalist* (1984).
39. Federalist No. 51.
40. See Kanol Direnc, "Interest Groups and Lobbying in Political Executives," in *The Oxford Handbook of Political Executive* 608 (2020).
41. See McDonald, *States' Rights and the Union*, at 1–25 (2000) (describing the problem of divided sovereignty and the framers' solution).
42. On Schmitt, see Michael Head, *Emergency Power in Theory and Practice: The Long Shadow of Carl Schmitt* (2016).
43. See generally Edling, *Perfecting the Union*.
44. See Rakove, *Original Meanings*, at 161–202. See also McCulloch v. Maryland, 17 U.S. 316 (1819).
45. U.S. Const. Art. I, Sec. 8.
46. See Christopher Tomlins, "To Improve the State and Condition of Man: The Power to Police and the History of American Governance," 53 *Buffalo L. Rev.* 1215, 1236 ("[T]he Commerce Clause became the decisive arbiter of which government got to exercise a de facto police").
47. 22 U.S. (19 Wheat.) 1 (1824).
48. For a thorough description of the case, its context and its resolution, see White, *Law in American History Volume I*, at 237–40.
49. 22 U.S. at 195.
50. Ibid., at 190.
51. Ibid., at 203.
52. Ibid., at 208.
53. Ibid., at 205 ("quarantine and health laws … are considered as flowing from the acknowledged power of a State to provide for the health of its citizens").
54. But see White, *Law in American History Volume I*, at 239 ("[Marshall] seems to be conceding, without acknowledging it, that the states had some power to regulate activities that had some effects on interstate commerce").
55. 17 U.S. (4 Wheat.) 316 (1819).
56. 25 U.S. 419 (1827).
57. Ibid., at 448.
58. "The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains and ought to remain with the states." Ibid., at 443.
59. 36 U.S. (11 Pet.) 102 (1837).
60. Ibid., at 133.
61. 22 U.S. at 195.
62. See White, *Law in American History Volume I*, at 193–244.
63. See generally Alison L. LaCroix, *The Ideological Origins of American Federalism* (2011).
64. See, e.g., William A. McRae, "The Development of Nuisance in the Early Common Law," 1 *U. Fla. L. Rev.* 27 (1948).
65. See Novak, *People's Welfare*.
66. See David Lieberman, *The Province of Legislation Determined* (1988).
67. See Novak, *People's Welfare*, at 38 ("The common law rather than natural law, positivism, or constitutionalism was the foundation for the well-regulated society").
68. See generally Robert G. Bone, "Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920," 59 *So. Cal. L. Rev.* 1101 (1986).
69. See Novak, *People's Welfare*, at 34. "A natural or legal right was not something to be exerted against society, but was intimately connected to the duties and moral obligations incumbent on social beings"). Ibid., at 33.

70. See Joseph W. Singer, *Entitlement: The Paradoxes of Property* (2000).
71. See Gregory Alexander, *Property and Human Flourishing* (2018); Laura Underkuffler, "On Property: An Essay," 100 *Yale L. J.* 127 (1990).
72. See Jeremy Waldron, *The Right to Property* (1988).
73. 5 Cow. 538 (NY 1826).
74. Ibid., at 542.
75. Vanderbilt v. Adams, 7 Cow. 349, 350 (NY 1827)
76. Ibid., at 351.
77. Ibid., at 352.
78. Ibid.
79. Ibid. See Novak, *People's Welfare*, at 143–44.
80. See generally Harry N. Scheiber, "Public Rights and the Rule of Law in American Legal History," 72 *Cal. L. Rev.* 217 (1984).
81. See Horace C. Wood, *A Practical Treatise on the Law of Nuisances* (2nd ed., 1883).
82. Novak, *People's Welfare*, at 62.
83. Ibid., at 61.
84. "For judges deciding police power cases in the 1870s, the law of nuisance provided the categories for determining when it was legitimate for the state to regulate on behalf of the health, safety, and morals of its citizens." Morton J. Horwitz, *The Transformation of American Law 1870–1960* 28 (1992).
85. See Novak, *People's Welfare*, at 60–71 ("Nineteenth-century jurists were quite explicit about both the overarching significance and the public power of the law of nuisance").
86. See Christopher Tiedeman, *A Treatise on the Limitations of the Police Power in the United States* (1886); Thomas J. Cooley, *A Treatise on the Constitutional Limitations Which Rest on the Legislative Power of the States of the American Union* (1871).
87. See Novak, *People's Welfare*.
88. Novak, "Overruling Necessity," at 96, 98.
89. One good example of this is the regulation of streets. "The public power to remove and abate nuisances and encroachments on highways as a crucial instrument of sovereignty and an important development in early American law." Novak, *People's Welfare*, at 123–24. "The policing of the streets was but a prelude to a general extension of police powers throughout American economy and society." Ibid., at 125. He concludes: "As streets and highways became increasingly public, the regulatory powers of the state were enhanced. State control of streets, rivers, ports, and other public places involved not only the power to keep them free and open to public access but a more general duty to police them." Ibid., at 147–48. Maureen Brady has a somewhat different account of the situation, focusing on the street grading cases from this same early period. See Maureen Brady, "Property's Ceiling: State Courts and the Expansion of Takings Property," 102 Va. L. Rev. 1167 (2015).
90. Wadleigh v. Gilan, 12 Me. 403 (Maine 1835).
91. Ibid.
92. 61 Mass. (7 Cush) 53 (1851). "The most influential American discussions of the police power appeared in judicial opinions written by state judges … And Alger was the most influential of the lot." Dubber, *The Police Power*, at 104.
93. Alger is covered extensively in all of the major analyses of the police power, modern and older. See Dubber, *The Police Power*, at 104–14; Novak, *People's Welfare*, at 19–25; Tomlins, "The Supreme Sovereignty of the State: A Genealogy of Police in American Constitutional Law, from the Founding Era to Lochner," in *Police and the Liberal State*, 36–38 (Markus D. Dubber and Mariana Valverde eds., 2008). "Perhaps the most

important step in the practical evolution of police regulation came in the 1851 case Commonwealth v. Alger, which analytically linked the common law doctrines that formed the basis of early American police regulations to the broad conception of government power reflected in the term "police power" as defined by the Supreme Court.'" Benjamin Barros, "The Police Power and the Takings Clause," 58 *U. Miami L. Rev.* 471 (2004). On Justice Shaw and Alger, see Leonard Levy, *The Law of the Commonwealth and Chief Justice Shaw* 229, 241–54 (1997).

94. See Scheiber, "Public Rights," at 222 ("In Alger, Shaw derived from the common's law riparian doctrines a set of long-accepted, well-demarcated distinctions as to the character of property rights in lands under navigable waters as bordering such waters").
95. 61 Mass. at 83.
96. Ibid., at 85.
97. On Hale, see 1 *Collection of Tracts Relative to the Law of England* (F. Hargrave ed. 1787).
98. 61 Mass. at 96.
99. See Gerald J. Postema, *Bentham and the Common Law Tradition* 4 (2d ed. 2019) ("Common Law theory reasserted the medieval idea that law is not something made either by king, Parliament, or judges, but rather is the expression of a deeper reality which is merely discovered and publicly declared by them").
100. 46 U.S. 504 (1847).
101. Ibid., at 583.
102. See Dubber, *The Police Power*, at 110.
103. See ibid., at 113.
104. See ibid., at 106.
105. Dubber, *The Police Power*, at 120.
106. See, e.g., Alschuler, "Rediscovering Blackstone."
107. Legal historian Christopher Tomlins seemingly effaces the nexus between constitutional structure and this legislature power with respect to the police power's origins, noting that "Alger underscored the essential irrelevance of the sovereign popular claim to a constitutional point of origin when it came to the police power." This statement could have two distinct meanings. It could mean that the police power comes to the United States as a species of the royal prerogative, before becoming domesticated by constitutional structure. Or it could mean that the police power has no foundation in constitutional authority, but was and is a form of constitutional exceptionalism. This is less plausible, and not in serious accord with Tomlins's other writings on the police power.
108. See James Willard Hurst, *Law and Social Order in the United States* (1977).
109. Alger, 61 Mass. at 83–85
110. Ibid.
111. Mayor of Hudson v. Thorne, 7 Paige ch. 261 (NY 1838).
112. See Novak, *People's Welfare*, at 30.
113. Ibid., at 32–35.
114. Ibid., at 33.
115. 7 Cow. at 352.
116. In other exercises of this power, the connection between harm and general welfare was more attenuated. In Forbes' Case, for example, the New York court considered the constitutionality of a state statute prohibiting vagrancy. This was held as appropriate within the police power, as part of the government's will to advance the general welfare of the community. It could be styled as an effort to head off discernible threats to public safety

by identifiable persons, but there is no indication in this or similar cases that this was a constitutional requisite.

117. 27 Vt. 140 (1855).
118. Dartmouth College v. Woodward, 4 Wheat. 518 (U.S. 1819).
119. Mayor of Hudson v. Thorne, 7 Paige ch. 261 (NY 1838).
120. Ibid.
121. Ibid.
122. See generally Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Era* 117 (1998) ("Growing at every edge, cities were eager for technological improvement and expanded services").
123. Novak, *People's Welfare*, at 117.
124. Ibid.
125. The Federalist No. 14.
126. See Harry Scheiber, *Ohio Canal Era: A Case Study of Government and the Economy, 1820–1861* (1969).
127. See Scheiber, "Public Rights"; Harry Scheiber, "The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts," in *Perspectives in American History, Volume V: Law in American History* 329 (D. Fleming & B. Bailyn eds., 1971).
128. See generally Morton Horwitz, "The Emergence of an Instrumental Conception of Law, 1780–20" in *Perspectives in American History, Volume V: Law in American History* 287 (D. Fleming & B. Bailyn eds., 1971).
129. On the idea of vested rights, see Edward Corwin, "The Basic Doctrine of American Constitutional Law," 12 *Mich. L. Rev.* 247 (1914).
130. See generally William Treanor, "The Original Understanding of the Takings Clause and the Political Process," 95 *Colum. L. Rev.* 782 (1995).
131. See Calder v. Bull, 3 U.S. 386 (1798).
132. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).
133. See J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century* (1986); Morton Keller, *The Affairs of State: Public Life in Late Nineteenth Century* (1977).
134. O'Connor v. Pittsburgh, 18 Pa. St. Rep. 187, 190 (1851).
135. Nor would it persist after the Supreme Court developed a regulatory takings doctrine in the late 1920s.
136. Stuart Banner, *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped* 18 (2021). As Morton Horwitz describes natural rights in this regard: "[N]atural rights discourse structured legal argument by suggesting starting points, background assumptions, presumptions, or first principles in the law." Morton J. Horwitz, *The Transformation of American Law, 1870–1960* 158 (1992).
137. See Postema, *Bentham*, at 14–17 (describing declaratory basis of statutory law under the common law tradition).
138. See Postema, *Bentham*, at 262–94.
139. Ibid.
140. Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).
141. See Lieberman, *Legislation Determined*.
142. See Daniel B. Rodriguez, "State Constitutional Common Law" (ms. 2024).
143. Barron v. Baltimore, 32 U.S. 243 (1833).
144. Whether and to what extent judicial review would supply an important check on the exercise the state police power in the early years after the adoption of the state constitutions and into the antebellum period was unclear for a long while. None of the original

thirteen constitutions spoke to this issue explicitly; nor does it appear that the matter of judicial review was a major part of the debate in the constitution-making process. Although judicial review was not referenced in Article III of the US Constitution nor in the Bill of Rights, the framers understood that issues of judicial scrutiny would become prominent.

145. 3 U.S. 386 (1798).
146. Ibid., at 388.
147. 10 U.S. 87 (1810). See also Tony A. Freyer, *Producers v. Capitalists: Constitutional Conflict in Antebellum America* 17 (1994) ("The overall trend of decision making under both the Marshall and Taney Courts was toward constitutional interpretations that generally sanctioned a broad police power").
148. White, *Law in American History Volume I*, at 229. One of the most important cases in this line was Trustees of Dartmouth College v. Woodward 17 U.S. 518 (1819). There the Court held that the chartering of a private corporation created a contract that was vested and thereby subject to the Contracts Clause. This was consequential in that corporations control and use private property in myriad ways and the states would need to be cognizant in undertaking regulations that impaired certain contract rights and restricted the use of property that it was not modifying the contract in a way that would run afoul of the Contract Clause.
149. 36 U.S. 420 (1837).
150. Ibid., at 470.
151. 46 U.S. 504 (1847).
152. Ibid., at 583.
153. See generally Kate Masur, *Until Justice Be Done: America's First Civil Rights Movement, from the Revolution to Reconstruction* 303–41 (2021) (describing the origins of the Fourteenth Amendment).
154. 83 U.S. 36 (1873).
155. Ibid., at 75.
156. See G. Edward White, *Law in American History Volume II: From Reconstruction through the 1920s* 37 (2016).
157. See Freyer, *Capitalists*, at 32.
158. White, *Law in American History Volume II*, at 38.
159. 163 U.S. 537 (1896).
160. 94 U.S. 113 (1877).
161. Ibid., at 125.
162. Ibid.
163. Ibid., at 126–28
164. Ibid., at 129.
165. See Scheiber, "The Road to Munn."
166. 94 U.S. at 126–28.
167. Ibid., at 128–30.
168. Ill. Const. Art. 13, Sec. 7.
169. 94 U.S. at 134.
170. Cooley, *Constitutional Limitations*.
171. See generally John Dinan, *State Constitutional Politics: Governing by Amendment in the American States* (2018).
172. Banner, *Natural Law*, at 44. (quoting from "Property and its Origin," United States Jurist 2 (1872): 324). Professor Banner reminds us that this natural law thinking was not limited to judicial decisionmaking, but was found in large measure in the text and context of the

state constitutions. He notes the language of the New Hampshire Constitution of 1784, in providing that "all men have certain natural, essential, and inherent rights [including the] acquiring, possessing and protecting property …." Banner, *Natural Law*, at 73 (quoting N.H. Const. 1784, Part, I, arts. II, V).

173. On classical legal thought and its connection to emerging American constitutionalism, see William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937* 24–27 (1998). On its connection to the police power in particular, see Horwitz, *Transformation II*, at 27–31. On the classical legal thought generally, see Duncan Kennedy, *The Rise and Fall of Classic Legal Thought* (1975).
174. Novak, *People's Welfare*, at 116.
175. Ibid., at 115.