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The People's Welfare

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were at the center of a dominant early American regulatory tradition quite at odds with modern renderings of legal instrumentalism or liberal constitutionalism. Perhaps Louis Brandeis was simply more attuned to nineteenth-century verities when he dissented from Holmes's opinion in *Penn Coal*, arguing that in a "civilized community" if "the public safety is imperiled, surely neither grant, nor contract, can prevail against the exercise of the police power." Any other conclusion, Brandeis mused echoing Lemuel Shaw, threatened the "paramount rights of the public."[153]

CHAPTER THREE

Public Economy: The Well-Ordered Market

So the markets are regulated.—Thomas M. Cooley

Public safety was a first-order concern of the well-regulated society to which all private rights and interests were subordinated. An examination of fire regulations thus goes far toward demystifying American private property. Property rights in the early nineteenth century were social, relative, and historical, not individual, absolute, and natural. A second aspect of American liberal mythology that stands in need of disenchantment concerns that mysterious and value-laden sociohistorical force known as "the market." Polity and economy have a very special relationship. But despite being at the center of American historical research for over a century, basic assumptions about the American state and the market have remained surprisingly static. First, state regulation and market economics are seen as diametrical opposites. Regulation is a contrived and public interference in a field of invisible economic relations otherwise natural and private.[1] Second, American economic regulation is understood as a relatively recent invention. As Thomas McCraw argued in 1975 (perhaps with the Massachusetts Board of Railroad Commissioners in mind), "regulation is barely a century old."[2]

This chapter takes aim at both of these assumptions. Through a historical reconstruction of nineteenth-century notions of *public* economy and the *well-ordered* market, it establishes the predominance in theory and practice of an approach to economic life in early America antithetical to the classical separation of market and state. The cases, statutes, and ordinances analyzed here

suggest that early Americans understood the economy as simply another part of their well-regulated society, intertwined with public safety, morals, health, and welfare and subject to the same kinds of legal controls. Far from viewing the state and the economy as adversarial, public economy was part of a worldview slow to separate public and private, government and society. It understood commerce, trade, and economics, like health and morals, as fundamentally public in nature, created, shaped, and regulated by the polity via public law.

This chapter also demonstrates the deep roots of economic regulation in America. In contrast to historical depictions of the period from 1776 to 1860 as an era of Americanization, transformation, and modernization heralding the ascendancy of liberal constitutionalism and free-market economics, it documents the pervasiveness of a commitment to a regulated economy in a well-ordered society. Indeed, the deluge of restrictions on economic life passed by state and local authorities in this period suggests that "regulation" might supplant "the market" as a better metaphor for the age. Regulations were not quaint residues of a feudal regime doomed to obsolescence. Rather public economy and the well-regulated society functioned as central, compelling philosophies in early American public law—philosophies busily put into practice through a host of particular rules and prosecutions solicitous of public goods over individual interests.

The market did not burst on the American stage circa 1776 of its own natural self-volition. It was a human, historical, and political creation. Postrevolutionary America was indeed the site of an economic transformation. But it owed more to the visible laws of police than the natural laws of economics. This was a revolution that had more to do with the conspicuous invention of political economy than the invisible hand of the free market.

Market Revolution or Legal-Political Economy?

The first hurdle blocking a reconstruction of the notion of public economy in nineteenth-century America is a twentieth-century perspective that separates public and private and understands economy as an autonomous and natural force in history. One of its most persistent historical themes is the notion of antebellum America as a site for the pivotal transition from colonial mercantilism to laissez-faire capitalism. The publication of Adam Smith's *Wealth of Nations* (1776), the story goes, "inaugurated an economic revolution by emphasizing laissez-faire and individualism in place of the mercantilist emphasis on government intervention and statism."[3] Building on accounts of the ascendancy of a self-regulating market in England, histories of early American economic development continue to rely on a rather narrow and apolitical rendering of the great capitalist transformation. Capitalism is defined as a state of affairs where "most property is privately owned," "economic decisions are determined in a relatively unfettered market," and "profit is the goal." A free market, private property, and self-interested profit maximization set the conditions for an "age of boundlessness" and unprecedented economic growth.[4]

Recently social historians have taken to the phrase "market revolution" to characterize the impact of antebellum industrial and agricultural change on ordinary Americans. They too emphasize the invisible force of "new markets" in land, labor, and produce that eroded artisan handicrafts and subsistence farming, creating a sea change in human relations and American history. As in the case of capitalist transformation, these market changes transcended legal, governmental, or other forms of public action.[5] In both the theses of "market revolution" and "capitalist transformation," the public and political dimensions of change are subordinated (if not made invisible) to the more primary relationships of society and economy. Law and the state appear as separate, external spheres whose ramifications can be captured in a simple, binary assessment of whether they were "in" or "out" of the economy. There is no room in such interpretations for a common law tradition in which state, economy, and society were mutually interwoven in an overarching practice of well-regulated governance.

As one might expect, political and legal histories of the nineteenth century do stress the governmental and institutional contexts of market and capitalist change. Indeed, political history since Oscar and Mary Handlin's *Commonwealth*[6] and legal history since Willard Hurst's *Law and the Conditions of Freedom*[7] have exploded the "myth of laissez-faire" and demonstrated the myriad ways that law and active state governments furnished the necessary *conditions* for early American economic development, from the state promotion of canals and railroads to the transformation of the laws of property and contract. Without downplaying this extraordinarily important insight, however, the commonwealth studies and the new legal histories nonetheless remain predominantly instrumentalist in orientation. The state had an important *role* in early American capitalism, and the law was a crucial *tool* of economic development. But polity and economy, public and private remained separate spheres. The needs of capitalism was still the dominant engine of change in nineteenth-century America. At bottom, the state and the law in these legal-political studies were mere public mechanisms for the advancement of economic individualism and an ultimately private, self-regulating market. As

Arthur Miller observed in a commonly accepted depiction of nineteenth-century law and economy: "The basic emphasis of government . . . may be summed up in the hypothesis that the legal system was used to encourage and protect business enterprise."[8]

In contrast, I would like to rehabilitate a different conception of the relationship between polity and economy that predominated in nineteenth-century America. Law and state were not simply instrumentalities of a fundamentally economic transformation. Rather, they were the central creators of the notion of economy as a special sphere of social activity, a sphere distinctly cognizable as an object of governance. In the early nineteenth century as a product of state policy and legal change, the economy emerged from the shadows of colonial household management into the public sphere as an object of police and statecraft. The basic relations of the American economy were subsequently formed and transformed as a result of the overt policies of government and law *not* the invisible laws of supply and demand. Indeed, one of the most important attributes of this antebellum debut of economics as a distinctly public practice was its accompaniment by extensive police regulation.[9]

First and foremost, the economy was seen in antebellum America as a site for the exercise of public power, that is, for the execution of the ubiquitous rules and restrictions of the well-regulated society. The discourses of governance, police, and political economy grew up together. Vattel captured this confluence when he described as the principal object of government "the business of providing for all the wants of the people, and producing a *happy plenty* of all the necessaries of life, with its conveniences and innocent and laudable enjoyments." In a well-regulated society, the happiness of the nation and the welfare of the people depended upon the public management of economy and market. It was a duty (as well as reason) of state to encourage labor and industry, to provide sufficient working men, to prevent the emigration of useful laborers, to encourage cultivation (e.g., by the establishment of public granaries), to cultivate home trade, to promote public communication and transportation, and to enact and enforce regulations for preventing scarcity.[10] Charles Goodrich, who labeled political economy "only another term for jurisprudence," was quite explicit about this interconnection of police and economy: "The regulation of internal trade is a matter of public concernment, and is regulated by state authority."[11] Regulation was an inseparable and indispensable part of the early American notion of "public economy."

In unpacking this understanding of public economy, it is important to remember that the word "economy" meant something different in the eighteenth and nineteenth centuries. The Latin *oeconomia* had Greek roots and meant "the management of a household." The notion of management or control was inherent in the word, as was its connection to family matters. By the eighteenth century, under the influence of police and cameralist thinking, the word was broadened to include any society ordered after the manner of a family or, similarly, the general administration of the concerns of a community with a view to orderly conduct and productiveness.[12] That was, of course, exactly William Blackstone's meaning when he referred to "Offenses against Public Police or Oeconomy" in his *Commentaries*.[13] Blackstone used the words "public police" and "oeconomy" interchangeably to represent "the due regulation and domestic order of the kingdom."[14]

The nineteenth-century American notion of public economy resonated with the eighteenth-century English "moral economy" implied by Blackstone but more critically described by E. P. Thompson (the historian along with Marx and Weber who best illuminated the legal and political construction of market capitalism). But there was a crucial difference. Thompson argued that English law and legislation quickly capitulated to the overwhelming "intellectual victories" of the "new political economy" of Adam Smith. Thus, enforcement of the precepts of the old moral economy fell to the ultimately futile "extralegal" activities of the English crowd.[15] In contrast, American public economy remained firmly rooted in law and legislation until after the Civil War.[16]

Indeed, despite historical depictions of free trade, "laggard" regulation, and the opening of American society,[17] the early nineteenth century was home to a deluge of formal economic regulations and vigorous defenses of the power of the state over trade and commerce. Regulations of public trade and the *jus publicum* of commerce, like those governing public justice and public peace, were crucial building blocks of the well-regulated society and antebellum public policy. The commerce clause of the United States Constitution, empowering Congress to "regulate commerce," was only the nation's most visible economic police law.[18] In 1823, Nathan Dane (who established the first law chair at Harvard University) outlined a series of economic offenses against "public polity and good order of the government."[19] He enumerated a variety of common law and statutory regulations of "public trade," violations of which "no well-governed state can suffer to exist unpunished." Among these were: cheating, deceits, and frauds; the operation of an inn, tavern, or licensed house without a license; offensive trades; the sale of unwholesome provisions; peddlers and hawkers; forestalling, engrossing monopolies, and regrating; luxury; usury; and illegal weights and measures.[20] Though Dane's list was short, the broad policy concerns represented by each offense stretched across

the spectrum of the antebellum economy and included thousands of particular state economic regulations.

The broad, political understanding of economy as the object of police and regulation dominated thinking about exchange, trade, and commerce well into the nineteenth century. Rather than moving to the whims of an invisible, self-regulating law of supply and demand, early Americans perceived the economy as inseparable from the basic institutions and public concerns of their daily lives. As such, it was held to the same rigorous controls and legal standards that governed all aspects of life. Indeed, ultimately the early American economy is only interpretable through the mass of economic rules, controls, customs, and regulations passed by state and local governments to protect and pursue *salus populi*, the people's welfare.

Product Laws

Under "cheating, deceit, and fraud in trade," Nathan Dane discussed a host of state and common law regulations meant to ensure fair trade and "fair dealing." Nearly all state legislatures in the early nineteenth century passed laws directing "trades to be conducted, and wares and goods to be fabricated, and put up for market in a certain manner."[21] Between 1780 and 1835, the Massachusetts legislature passed regulations that closely specified and controlled the way the following products were manufactured and sold: boards, shingles, clapboards, hoops, and staves (1783); flaxseed, barreled fish, and dried fish (1784); tobacco and onions (1785); pot and pearl ashes (1791); firewood, bark, and coal (1796); beef and pork (1799); boots, half-boots, shoes, pumps, sandals, slippers, and galoshes (1799); butter (1799); bread (1800); nails (1800); chocolate (1803); hops (1806); lime (1806); smoked alewives and herrings (1807); gunpowder (1809); pickled fish (1810); Indian and rye meal (1813); firearms (1814); salt and grain (1817); paper (1818); spruce and pine timber (1822); hay (1825); ale, beer, and cider (1829); sole leather (1831); oils (1833); and beef cattle (1833).[22] Surveys of the statute books of Maryland, South Carolina, Michigan, and Ohio reveal similar stories.[23]

But a mere list of restricted products (even if it contains the staples of the antebellum economy) does not capture how deeply embedded public regulation was in the American economy. That is more apparent in the far-reaching detail of the statutes. A Maryland law regulating the sale, inspection, and export of pickled or salted fish was typical.[24] It employed most of the antebellum strategies for regulating the sale of food products (short of outright price-fixing): strict controls on packaging, weights and measures, and quality and merchantability; branding; inspection and certification; restrictions on exportation; oaths; and, of course, penalties (fines and seizure).

Maryland borrowed liberally from a Massachusetts statute which in turn was based on English Parliamentary Acts dating from the seventeenth century. The Maryland act demanded rigorous packaging standards:

> [A]ll barrels . . . shall be made of sound well seasoned oak, ash or chestnut staves, of rift timber, not less than half an inch thick, with heading of either of the said kinds of wood, not less than five-eighths of an inch thick, and sound and well seasoned, the said heading to be well planed or shaved, the barrels, half barrels and tierces, to be well hooped, with at least three hoops on each bilge, and three hoops on each chine, all of which shall be good hoops of sufficient substance; the barrel staves to be twenty-eight inches in length, and the heads to be seventeen inches between the chines, and to contain not less than twenty-nine or more than thirty-one gallons; and the barrels, half barrels and tierces, shall be made in a good workman-like manner, so as to hold pickle, the tierces to hold not less than forty-five gallons, and the half barrels not less than fifteen gallons.[25]

Owners or importers of any fish in Baltimore were required to arrange for an inspection within forty-eight hours. The state inspector was charged with ensuring that the fish were "well struck with salt or pickle . . . and preserved sweet and free from rust, taint or damage." Those "of a good and fat quality, with sweet pickle in the barrels, and sufficient salt to preserve them" were branded "No. 1." Others were branded "No. 2" or condemned. Fish of a very superior quality were further branded with the owner's name and the word "prime."[26] No fish could be exported from Maryland without certification of inspection and an oath by the ship's master that all fish on board had been properly inspected.[27] Further restrictions were placed on the landing of fish at the public wharf and the storage of more than forty-eight barrels in a warehouse. Penalties were imposed for violating any part of the act or for tampering with stamps or brands.

Similar regulations accompanied the sale and exportation of almost all important commodities. Before being sold, wood had to be measured (conforming to precise dimensions); inspected for sap, shakes, wormholes, rots, knots, splits, and seasonedness; certified; and cut, split, landed, stored, and carted according to the dictates of statute.[28] Legislatures empowered a small army of inspectors, measurers, surveyors, viewers, cullers, weighers, provers, and gaugers, as well as mayors, aldermen, justices of the peace, and private citizens,

to protect the public against the evils of unregulated commerce and trade.[29] The fear was fraud and deceit—the same motivation for laws regulating weights and measures and outlawing cheating.[30] But there was also a ubiquitous concern for quality, merchantability, and fair dealing.[31] In a public economy, the buying and selling of goods was intimately bound up with community identity and social order. Nothing so important could be left to the invisible laws of a marketplace or the private law stricture that a buyer should beware.

Demands for a moral and well-regulated economy did not die with the American Revolution or a subsequent economic one.[32] As late as 1841, the Supreme Court of Alabama unequivocally upheld the assize of bread, suggesting that "whatever doubts have been thrown over the question by the theories of political economists, it would seem that experience has shown that this great end [the urban bread supply] is better secured by licensing a sufficient number of bakers and by an assize of bread, than by leaving it to the voluntary acts of individuals." In *Turner v. Maryland* (1882), the U.S. Supreme Court reviewed state product and inspection laws dating from the late eighteenth century and found them decidedly constitutional.[33]

Licensing

Licensing, another item in Nathan Dane's analysis of public trade, was just as far-reaching and important to the public economy as inspection and product laws. Nineteenth-century legislators used licensing to regulate and control a host of economic activities, trades, callings, and professions. The goals of particular license laws were mixed and sometimes confused, including prohibition, regulation, administration, and revenue. But the overall justification for licensing was the same as the police power generally—the public good and the people's welfare.[34]

To get at the public significance of licensing in the nineteenth century, it is necessary to suspend our twentieth-century conception of licensing as little more than routine public registration. As Thomas Cooley pointed out in 1876, the license (like an early act of incorporation) was understood as a special "privilege granted by the state."[35] Licensing was an exertion of the public prerogative granting permission to do that which was otherwise illegal or against public policy.[36]

So what were some of the activities that were considered special privileges in the early nineteenth century—illegal without public sanction? In some states, one was the basic economic act of *selling for profit.* Beginning in 1827, Maryland put together a series of statutes that established a "license to trade." An act of the legislature made it unlawful for anyone (other than the grower, maker, or manufacturer of goods) to set up any shop or stand "for the purpose of selling by wholesale or retail, or bartering any dry goods, groceries, spirituous or fermented liquor, imported dried fruit, glass, crockery, hardware, drugs or medicines, paints, printed books, stationery, saddlery, gold, silver or plated ware, jewelry, toys, wearing apparel, salted provisions, grain, meal, flour, timber, tobacco, cotton, leather, hides, lime, wrought or cast iron, copper or tin, or any other kind of goods, wares or merchandise, foreign or domestic, without first obtaining a license."[37] By 1832, it was illegal in Maryland to "expose for sale, or sell, any goods, wares or merchandise, with a view to profit in the way of trade" unless one first obtained a state "license to trade."[38] Tennessee, Missouri, Pennsylvania, and California all passed similar statutes around midcentury requiring the licensing of merchants, retailers, and wholesalers. In *French v. Baker* (1856), the Tennessee Supreme Court joined other state courts in holding that the occupation of merchant was a *privilege* sanctioned by government and not a natural right of individuals.[39] That most basic of economic activities—the selling of goods in a shop—was understood as flowing from the state, which retained the right and duty to control, regulate, and tax it for the common good.

But merchants and retailers were not the only economic actors subject to licensing restrictions. By 1868 Alabama required a license for over thirty occupations and businesses, including public race tracks, lottery ticket dealers, gift enterprises, liquor dealers, distillers, brewers, dealers in tobacco or cigars, livery stable keepers, keepers of stud horses, horse and mule dealers, brokers, pawnbrokers, real-estate agents, insurance agents, dentists, physicians and surgeons, lawyers, druggists, commission merchants, peddlers, bowling alleys, billiard tables, gaming tables, theaters, dealers in firearms, auctioneers, and newspapers. The Alabama Supreme Court upheld this statute (and the indictment of a lawyer for practicing without a license) with the observation, "The right to regulate the property and the avocations of its citizens by the State is sovereign."[40] By 1881, a Tennessee legislature declared more than fifty such occupations "privileges" requiring a license.[41]

General licensing statutes were significant in establishing the power of the state over nineteenth-century businesses and occupations. But even more important were statutes that used the license as the first step in a more comprehensive regulatory strategy. This was the case with many antebellum businesses, but especially in the licensing and regulation of three central economic operations: inns and taverns, auctioneers, and public carriers.

Inn and tavern owners were not only licensed but were treated as virtual public officials. Drawing on its own colonial laws and English precedents dating from William III, Massachusetts passed an act for the regulation of "licensed houses" in 1786.[42] It held that no person could be a common victualler, innholder, taverner, or seller of strong liquors by retail without a license. To obtain such a license, tavern owners had first to obtain a certificate from the selectmen of their town recommending them as "persons of sober life and conversation, suitably qualified and provided for the exercise of such an employment." They then had to take an oath bearing allegiance and faith to the commonwealth and post a recognizance of twenty pounds that they would "keep and maintain good order and rule, and shall suffer no disorders nor unlawful games to be used . . . and shall not break any of the laws for the regulation of such houses." Such regulations included requirements for suitable provisions and lodging for all strangers and travelers; pasturing and stable room, hay and provender for horses and cattle; a conspicuous sign; a duty to provide for all travelers; a prohibition on gaming implements, dancing or reveling, excessive drinking, and service to minors or servants. In addition, selectmen posted the names of common drunkards and idlers in all inns and taverns, prohibiting service to such individuals. Tithingmen were appointed to inspect all licensed houses and inform on all disorders or violations of the statute. Substantial fines and forfeiture of a license were the penalties for violating these regulations. Tavern owning was neither a right nor a private economic activity; it was understood as a public responsibility. American statutes echoed English Justice Coleridge's suggestion that "innkeepers are a sort of public servant."[43] Justices of the peace were charged with issuing no more licenses than "necessary for the public good."[44] In South Carolina and Maryland, county courts set prices and rates for food, drink, lodging, and horse care at licensed inns and taverns.[45]

Auctioneers were as much economic officers of the state as tavern keepers. The auction (or vendue) was an ancient institution still integral to nineteenth-century economic exchange. Auctions were strictly regulated public events. The auctioneer was usually appointed by the governor, and the number in any city limited by law.[46] He was required to post bond or recognizance to cover all duties, satisfy any claims against him, and guarantee good and honest public behavior (in Baltimore $30,000 in 1827). License fees could amount to more than $750. Accounts were to be rendered to public officials and duties paid on all items sold every three to six months. Auctioneers were required to take oaths attesting to the accuracy of the accounts. Auctions were restricted to certain times and places, and their commissions were fixed by state law.

If one's business was carting people or hay, firewood, lime, charcoal, or manure in an antebellum city, there was little room for free bargaining. All were licensed and regulated occupations. In early New York City, cartmen were appointed and licensed by the mayor.[47] Each sled or cart in New York at the turn of the century had to be "two feet, five inches wide between the foremost rungs, and two feet, nine inches wide between the hindmost rungs." The iron or tire around the wheels had to be "in breadth not less than three inches, and . . . nails shall not project beyond the surface thereof."[48] The number of the cart's license was to be painted on the side of the cart in red paint. Licensed cartmen had an obligation to serve all customers and had to observe precise limits on loads. Indeed, New York City demanded special carts with special dimensions and load limits for the carting of hay, firewood, lime, charcoal, manure, sand, and clay. Finally, the rates for the carting of people and products to various points in town were closely circumscribed by state and municipal government. As was the case with ferriage, carriage rates often went on for pages in the statute books. New York City rates began:

> For loading, carting, and unloading every common load of European goods, wheat, meal, or flour in bags (twelve bags to the load) and of firewood and other articles not herein after mentioned to any place within this city, not exceeding half a mile, one shilling and six-pence. And for every load of lime, bricks, staves, heading, hoops, hoop-poles, cocoa, bar-iron, pimento, slate, all kinds of dye-wood, every seven barrels of flour, every four tierces of bread, every two bales of cotton, every fifteen bushels of salt, every load of cheese or gammons, every load of sails, every load of white sand, building sand, paving sand or clay, containing twelve bushels, every load of beef, pork, pitch, tar, turpentine, beer, cyder, or other goods or things in tight barrels, allowing five barrels to each load (excepting oil and pot-ash which shall be four barrels to the load) not exceeding half a mile, one shilling and six-pence, and if housed, six-pence more for each load.[49]

Two more pages listed rates, quantities, and mileage for iron pots and kettles, household goods, hay, calves, sheep lambs, shingles, brick, earthen ware, pantiles, coal, fish, hemp or flax, oyster shells, rum, liquor, molasses, wine, strong liquor, sugar, coffee, cocoa, tobacco, rice, flaxseed, cable, and cordage. Baltimore broke up its 1837 rates (from twelve and one-half cents to one dollar) for carting people according to these classifications: "1. From steamboats and rail road depots to any part of the city; 2. To steamboats and rail road depots; 3. Within certain prescribed limits, east, west, north, and south from Calvert

street, the centre of the city; 4. By the hour; 5. Evening and night; 6. Between the Exchange and Fell's Point."[50] The carting of noxious products through city streets, such as offal (the hazardous waste of the nineteenth century), often was prohibited.[51]

The license was used in several other areas to restrict and regulate economic activity. Traveling salesmen, known as "hawkers and peddlers," continuously encountered legislation controlling or prohibiting their activities. In New York, the annual license fee for hawkers in 1813 was $50 if on foot, $80 on horse or boat, and $100 if one was prosperous enough to come by carriage. In 1831 South Carolina required a $1,000 fee and an additional recognizance of $1,000. Hawkers or peddlers without a license were susceptible to a $5,000 fine.[52] Other regulated licensed trades were butchers, bakers, grocers, lawyers, and doctors.[53] The multiplicity of motives behind license laws can be seen in a Maryland act requiring free blacks selling corn, wheat, or tobacco to be specially licensed and a gold-rush California statute demanding a license for "foreign" miners.[54]

Licensing left little in the early American economy untouched. Indeed, it turned several occupations and trades into veritable offshoots of the state or municipality. In all cases, licensing established the predominant public interest in policing the economy. Licensed activities were privileges, not rights, and were subject to police regulation when the public health, safety, and welfare demanded.

Extensive as licensing and inspection statutes were, they still made up only part of the array of regulatory technologies used to control the public economy. As Dane noted, laws against the sale of unwholesome provisions were widespread. In New York, unsound beef, pork, fish, or hides were to be destroyed by municipal officials by "casting them into the streams of the East or Hudson rivers."[55] Though public health (rather than water pollution) was a main concern in these statutes, one must also not overlook a general legislative aversion to what Dane called "luxury." An early Massachusetts provision law was directed at "evilly disposed persons, [who] *from motives of avarice and filthy lucre*, have been induced to sell diseased, corrupted, contagious or unwholesome provisions, to the great nuisance of public health and peace."[56]

The reining-in of avarice and lucre also was one of the goals of laws against regrating, forestalling, and engrossing. As Dane suggested, this trio of offenses against public trade "existed in all countries and ages, and will probably exist as long as men shall be influenced by avarice and a sordid love of gain; as long as many of them prefer living and gaining property by arts and contrivances, to honest and laborious industry."[57] Regrating, forestalling, and engrossing remained a focus of economic regulations into the late nineteenth century. Their objective was to discountenance economic conduct that falsely raised the price of products. Thus buying goods already on the way to market with the intention of selling again at a higher price was prohibited. So too, licensing laws almost always exempted or favored sellers of their own goods over middlemen and retailers. Though profit is supposed to be the central attribute of market capitalism, its simple maximization was not a discernible purpose of the public statute books of the early nineteenth century. On the contrary, profit was continually subsumed by a larger public interest in fair dealing, fair price, honest labor, wholesome provisions, public health, and the orderly exchange of the necessities of life. These were the goals of a public economy. If there was one overarching symbol of the predominance of this well-ordered conception of economic relations in the nineteenth century, it was the urban market house.

The Urban Marketplace

In studying buying and selling, economists and economic historians have been drawn to a methodology that hinges on the workings of an abstract "boundless and timeless" process known as "the market."[58] I would like to focus instead on a more concrete and historical phenomenon. For most antebellum Americans, "the market" was not an invisible set of economic principles but that place near the center of town where farmers, butchers, and householders exchanged necessary provisions. This market bore little resemblance to the market of theory. For one thing, the economic activity that went on there could hardly be called "free." Indeed, the urban marketplace was probably the most visible, potent expression of public control over buying and selling in the antebellum public economy.

The public marketplace had deep roots in the Domesday Book and beyond.[59] Indeed, scholars place its origins in that strange mixture of commerce, magic, and religion that attended ancient religious observances and pilgrimages.[60] Throughout its early history, the market was closely identified with state and municipality (e.g., the notion of "market towns") and was controlled by rigorous public rules and regulations. In England, the establishment of marts and fairs was the exclusive prerogative of the king, to be exercised for the public benefit.[61] They came into being by a legal grant or franchise from the crown. In 1765, Lord Mansfield justified formal market grants on the need for the "preservation of order, and prevention of irregular behavior."[62] As public institutions, markets came with special restrictions: a prohibition of

buying and selling outside the market; prescribed places, times, days, and hours; the use of just weights and measures; the payment of tolls or duties; prohibitions of certain goods, hawking, and peddling; and laws against forestalling, regrating, and engrossing. English markets required a special public official, the clerk, to keep order and enforce rules. Special courts known as piepowders administered market justice.[63]

American colonies duplicated English market ways soon after settlement.[64] Many scholars have suggested that these "feudal" restrictions did not last much beyond the 1820s, as a new "free-trade attitude" and "ideal of open competition," fueled by the natural rights rhetoric of the Revolution, supplanted the notion of "regulated concord."[65] But a close look at state and local laws along with subsequent legal cases across the country tells a different story. Not only were public market restrictions still very much part of economic life at the time of the Civil War, but the state judiciary overwhelmingly upheld a variety of regulations passed in the 1840s, 1850s, and 1860s. By the time John Dillon wrote his definitive treatise on municipal corporation law in 1872, there were ample precedents supporting a municipality's power to build and regulate public markets, thereby restricting alternative methods of buying and selling provisions.[66]

Rationales for public market regulations also proved remarkably resilient. In 1719, Reverend Benjamin Colman supported the establishment of markets in Boston to discourage "hucksters, forestalling, engrossing and buying up the Provisions that come into Town," thus artificially raising prices for townspeople. In 1856, Boston's Committee on Public Buildings sought to reopen the market under Faneuil Hall to combat the increased "cost of the necessaries of life" caused by the proliferation of some 600 private provision and produce stores in the city.[67] American public markets, like their Roman and English predecessors, were created to ensure an adequate supply of wholesome, fairly priced food and provisions accessible to the general population. The health, comfort, convenience, and welfare of the people depended upon such provisions. It was a duty of sovereignty and an obligation of government to act affirmatively. To leave unregulated something as central to the general welfare as the supply of basic foodstuffs was an abdication of public responsibility. Consequently, nineteenth-century states and municipalities used their police powers to construct regulated marketplaces to protect their populations from high prices, unhealthy goods, unsanitary conditions, fraud and cheating, and the adverse effects of simple profiteering by hucksters, forestallers, middlemen, and other second hand sellers. Though across-the-board price controls were rare after the eighteenth century (except in the case of bread and flour), public markets were created to protect the public welfare from the evils of an unregulated market.[68]

Market regulations varied from city to city, but those accompanying the rise of Philadelphia's High Street Market were typical. As with most aspects of Philadelphia government, William Penn was responsible for the city's first marketplace—a shed on High Street where a bell was rung each time a country person arrived with produce for sale.[69] In 1693, the city council enacted a series of rules for the regulation of new market stalls at High and Second Streets.[70] This seventeenth-century regulation contained three crucial elements that remained central to most public markets until the Civil War. First, the council specified that all provisions brought to the town for sale (flesh, fish, fowl, eggs, butter, cheese, herbs, fruits, roots, etc.) could *only* be sold at public market. Provisions sold elsewhere were subject to forfeiture, half going to the poor of Philadelphia.[71] Selling had to be restricted to particular, supervised locations if the townspeople were to be protected against fraud or unhealthy provisions. Second, the council's regulations included the prohibition against hucksters or forestallers buying in or on the way to market with the idea of selling the same product again.[72] Together with the coerced competition created by bringing all sellers together in one place, these were two ways in which markets worked to control and lower prices. Finally, the 1693 ordinance appointed a clerk to collect duties, seal weights and measures, and generally police the market.

Indicative of its *public* status, Philadelphia's first market house was constructed beneath the Court House (following medieval practice) in 1709. Subsequent buildings of long gabled roofs and plastered ceilings held up by brick pillars continued to be added. By 1810 the market stretched five blocks. Half the stalls were reserved for country people and half for butchers.[73] Regulations grew with the market. By 1812, horses, carts, cattle, wheelbarrows and the like were banned during market hours. Special areas were assigned for porter's drays, fish, Jersey produce, American earthen ware, fruit and garden seeds, country produce, meat, roots, herbs and vegetables, meal, and manufactures of America. No one was to slaughter beasts, leave garbage or offal, sell liquor, use steel yards (notoriously deceptive weighing devices) or obstruct passageways in the market. Huckstering (before ten o'clock in the morning) and secondhand selling were prohibited. The clerk of the market was granted powers to seize all "unsound or unwholesome provisions," to "weigh, try and examine all bread, butter, lard, and other articles of provisions sold in loaves or lumps," to "try all scales, weights and measures," to "decide all disputes between buyer and seller," to "examine all persons suspected of selling provisions

as hucksters, at second hand," to "collect rents, and to prevent all persons from selling their goods outside this regulated marketplace."[74]

Philadelphia's public markets were widely recognized for the quantity, quality, and cheapness of the provisions exchanged there. Benjamin Franklin gave up his kitchen garden in 1786, proclaiming that the city's "well-furnished plentiful markets" made it unnecessary.[75] Far from receding to the demands of free-trade, Philadelphia's markets proliferated through the nineteenth century, undergoing a huge expansion after the city consolidated in 1854. Markets capitulated to private, refrigerated groceries and butchershops only in the 1870s and 1880s. Throughout the century, markets remained a constant concern of municipal government. Philadelphia councils passed more than 150 market regulations between 1789 and 1889, eventually establishing a special department of markets in 1854 to focus solely on the problem of food supply.[76]

Charleston, Boston, New Orleans, and New York market regulations of the same period closely mirrored Philadelphia's.[77] Charleston had to account for the peculiar institution of slavery, so its ordinances were full of special white/slave penalty clauses. A white violating market laws was usually fined and had to be prosecuted in a local tribunal. Slaves were put in the stocks and subject to whippings at the discretion of the clerk and commissioners of the market. In 1814, Charleston added a special provision requiring butchers to be "cleanly clad" in a white apron. Boston's laws showed an almost obsessive concern with forestallers or those not selling products of their own farm. They used the threat of expulsion from the market to deter such violations. New Orleans required butchers to saw meat rather than using an ax or cleaver, and added a charming remedy for diseased meat: throw it into the Mississippi. In 1814, New York City passed a comprehensive market ordinance that showed no sign of easing colonial restrictions.

How did such strict regulation of the buying and selling of the basic products of early American life survive in a postrevolutionary legal and political culture supposedly suspicious of state power, jealous of individual liberties and property, and committed to the constitutional protection of rights? How could the basic economic act of retailing small goods and provisions bought from manufacturers and growers be considered "hawking," "huckstering," "forestalling," or "regrating" (all terms of reproach), leaving the seller vulnerable to a range of prohibitions, license fees, restrictions, and penalties? Moreover, how in the 1830s, 1840s, and 1850s—the era of free trade, free labor, and free men—could such market restrictions be adopted in Detroit, Mobile, St. Paul, Cincinnati, St. Louis, Dubuque, Buffalo, and Austin?[78]

Overwhelmingly upholding state and local market regulations, early nineteenth-century state judges left some clues to the answers to these questions. Their opinions suggest that the problem lies not with the presence of market restrictions, but with conventional interpretations of the era and American law into which they do not fit.

Philadelphia's High Street Market was demolished between 1859 and 1860 so that a $1 million public market could be built on new ground. When country farmers brought suit to prevent the destruction, claiming a "vested right" to sell in the market, Chief Justice Black of the Pennsylvania Supreme Court delivered a staunch defense of the market's publicness and the power of local government to control it: "The necessity of a public market, where the producers and consumers of fresh provisions can be brought together at stated times for the sale of those commodities, is very apparent. There is nothing which more imperatively requires the constant supervision of some authority which can regulate it and control it. Such authority is seldom, if ever vested in individuals."[79] Black championed the local community's right to regulate itself: "The daily supply of food to the people of a city is emphatically their own affair." The all-too-visible "laws of a market" were "always made by the persons who reside at the place." Black declared that according to the "common law of Pennsylvania," all cities with powers "to promote the general welfare and preserve the peace" could "fix the time or places of holding public markets for the sale of food, and make such other regulations concerning them as may conduce to the public interest." Black deemed this wide grant of authority over the sale of food the "true rule"—"necessary and proper, in harmony with the sentiments of the people, universally practised by the towns, and universally submitted to the residents of the country."[80]

Justice Black was unequivocal about local power to regulate the urban food market, because his 1859 opinion followed the reasoning of a long line of jurists. Often, more was at stake than the power of a city to replace its market house. Two of the earliest state decisions dealt with the most controversial and potent of municipal market powers: the ability to prohibit all trading and selling of food outside the established public marketplace. The villages of Poughkeepsie and Buffalo, New York, were incorporated with general police powers to make laws respecting markets and the "good government" and "good improvement" of the village.[81] Both villages subsequently established public markets and market regulations prohibiting the "hawking" or "selling by retail" of meat anywhere except the public marketplace. In *Bush v. Seabury* (1811) and *Village of Buffalo v. Webster* (1833), the New York Supreme Court validated local proceedings against two defendants for trading meat outside the market.[82] In *Bush*, the defendant was selling meat out of his wagon in the

streets of Poughkeepsie. In *Buffalo v. Webster*, a farmer was convicted for trading a quarter of lamb for tea in a Buffalo grocery. The *Bush* court was matter of fact: "The fixing the *place* and times at which markets shall be held and kept open, and the prohibition to sell at other places and times, is among the most ordinary regulations of a city or town police."[83] In *Webster*, Chief Justice Savage had to contend with Webster's assertion that the local bylaw was "bad, as unreasonable and improperly restraining trade." Unfortunately for Webster, English common law had sanctioned public market restrictions "from time out of mind." Savage distinguished illegal restraints of trade from legitimate public regulations, observing that "a by-law that no meat should be sold in the village would be bad, being a general restraint; but that meat shall not be sold except in a particular place is good, not being a restraint of the *right to sell* meat, but a *regulation* of that right. . . . Laws relating to public markets must necessarily embrace the power to require all meats to be sold there." Savage cited *Bush* and Lord Mansfield in *Pierce v. Bartrum* (1775) holding the prohibition of all slaughtering in Exeter a regulation and not a restraint of trade.[84]

Nineteenth-century judges also readily sanctioned the broad powers of the market clerk to enforce weights, regulate stalls, and rein in forestallers and hucksters. The clerk of Boston's Faneuil Hall Market was the focus of two important antiforestalling decisions. In 1830, Clerk Caleb Hayward filed a complaint in Boston's Police Court against Josiah Nightingale of Quincy.[85] Hayward accused Nightingale of occupying a stand in South Market Street at Faneuil Hall for the resale of sheep carcasses (bought months before in the cattle market at Brighton), lambs (bought a week before in Hingham), and other articles not the product of his own Quincy farm. Nightingale refused to obey Hayward's order to leave the market for violating Boston's 1826 market ordinance against the sale of secondhand produce.[86] Judge Thacher of Boston's Municipal Court upheld a Police Court conviction, condemning the evil of forestalling and championing market regulations as a remedy: "From a period coeval with the settlement of this city, there has been established in it a public market. The right to establish a market has not been questioned in this trial; and considering the city as having that right, it follows that they may establish such good and wholesome regulations as shall be found necessary for its good government."[87] On appeal, Justice Wilde of the Shaw Supreme Court agreed. The ordinance giving the market clerk power to eject traders not selling their own produce was simply a valid police law, not unlike the licensing, harbor, and cemetery regulations validated by earlier Massachusetts and New York courts.[88] It was neither a violation of private rights nor an improper restraint of trade. Boston's bylaw was a "wholesome regulation of [trade]."[89]

In 1845, Chief Justice Lemuel Shaw added his own voice to a chorus of judicial opinion supporting urban market regulations. In *Commonwealth v. Rice*, he backed Faneuil Hall Clerk Daniel Rhodes's action against Barnabus Rice for vending poultry he obtained from a farm in New Hampshire.[90] Shaw defended Boston's 1843 market ordinance. The bylaw, he argued, was "founded on the old policy of the law inhibiting forestalling." Its very purpose was "to secure a dealing between the producer and the consumer, without the intervention of any intermediate agent." Shaw denied that restrictions on resale and secondhand goods were "contrary to common right" or "in restraint of trade" as claimed by Rice. He held instead that "the city have, at great expense provided accommodations; and they have a right so to control them, as best to promote the welfare of all citizens." Here, the "public and general benefit" of city and country was secured by a regulated market providing "free and convenient stands for actual producers."[91]

Although particular opprobrium was reserved for forestallers and hucksters (perhaps the preeminent agricultural capitalists), courts also supported market clerks' powers to evict, penalize, and prosecute other market offenders. The authority to demand rents or fees, require public weighing before sale, and even the general discretion to remove sellers and dole out summary justice were ratified by state judges.[92] In *Charleston v. Goldsmith* (1844), some extreme circumstances produced a quite common defense of the powers delegated to market clerks and commissioners.[93] Moses Goldsmith was summarily expelled from the Charleston market in 1842 after he stabbed "one Kennedy" with a butcher's knife (so much for tradesman solidarity). Justice Wardlaw vigorously supported broad, discretionary power in the hands of local officials in rhetoric steeped in the vision of a well-regulated society:

> [W]hen it is considered that in cities, policy necessarily requires many restraints upon individual freedom and that especially in relation to markets—objects of universal interest—numerous minute regulations prevail in all large cities, advantageous to both buyer and seller. Although arbitrary and vexatious, there can remain no doubt that the summary exercise of severe powers here authorized, and committed to the commissioners of the markets, may be required by the public convenience, and is altogether consistent with the rights secured to the citizen.

To deny such powers, Wardlaw argued, would be to deprive a community "the power of preserving order" and "the peace and prosperity of the city."[94] In *Cincinnati v. Buckingham* (1840), Ohio Chief Justice Lane declared that "the prompt and strong enforcement of market regulations" was the rule "from

the days of the court of pie poudre to the present." A system of closely enforced police regulations, "fixing market hours, making provisions for lighting, watching, cleaning, detecting false weights and unwholesome food, and other arrangements calculated to facilitate the intercourse, and insure the honesty, of buyer and seller," was part of Lane's very definition of a municipal market.[95]

Dissent crept into judicial deference to local market regulations only in the years immediately preceding the Civil War. In the late 1850s and 1860s, courts in Georgia, Minnesota, and Illinois temporarily challenged the municipality's right to prohibit trade outside the marketplace.[96] Justice Lumpkin of the Georgia Supreme Court went furthest, challenging the fundamental rationales for a public market and positing a vision of law, state, citizen, and economy in tension with the well-regulated society. At issue in *Bethune v. Hughes* (1859) was a plaintiff's habeas corpus petition to be released from prison for violating an 1858 Columbus city ordinance against selling provisions outside the public marketplace. Lumpkin indulged in a tirade against this "coercive," "excessive," "anti-free-trade," and "class legislation": "Let anything and everything be done rather than restrict commerce, rather than force and imprison tradespeople, to coerce them to submit to all kinds of discomfort and inconvenience, not to say loss, to gratify the selfishness or avarice of a few municipal lords." He recommended that a popular convention be called to impose restraints on the powers of the legislature. He set Bethune free with a testament to the value of a free economy:

> A peaceable citizen, who discharges punctually all his public duties, and respects scrupulously the rights of others, should be left free and untrammeled as the air he breathes in the pursuit of his business and happiness. Fetters are equally galling, whether imposed by one man or by a community; and I am not ashamed to confess that the best sympathies of my heart are, and always will be, interested for one who is, or may be, incarcerated, because, in proud consciousness of a freeman, he claims the right to offer for sale, at any hour of the day, on the highway or in the streets, as interest or inclination may prompt him, any commodity he may possess, the traffic in which is not forbidden by the laws of the land.[97]

Despite his closing qualification (obviously in deference to government's power to prohibit the sale of goods like liquor), Lumpkin's rhetoric certainly contrasted with common law precedent and the ideal of a well-regulated society. His cynicism about local officials' true motives also was something not often seen in earlier market cases.[98]

Economic ideas like those expressed in Judge Lumpkin's opinions were clearly in the air well before the Civil War and became increasingly common in the courts of late nineteenth-century police power jurisprudence. But they failed to hold the day in 1859. Cities continued to build and regulate public markets in the 1850s and 1860s and close down private groceries, stands, and butcher shops in which food products were retailed contrary to law.[99] In 1869, Missouri Justice Bliss dismissed counsel's use of Georgia and Minnesota precedents, calling Judge Lumpkin's broad language "peculiar."[100] Such cases "would establish absolute free trade throughout the city in butcher's meats, and indeed in every other commodity, and would render it impossible to keep up the market system for family supplies in cities of the State—a system believed to be, in the larger towns, for the benefit of both seller and buyer, and conducive to the public order, cleanliness, and health." Instead, Bliss rested his legitimation of St. Louis's 1864 prohibition of meat shops outside market limits on the New York precedents of *Bush* and *Webster*.[101] In 1875, the Georgia Supreme Court itself overrode Lumpkin, claiming: "The right of the legislature to regulate trade . . . has been recognized by this court from the time of its organization." Justice Trippe cited Georgia police ordinances regulating carts and wagons in Augusta, prohibiting the cultivation of rice in Savannah, and the licensing of retail liquors in Covington.[102]

The public economy and the notion of regulated trade were thus still crucial parts of American legal discourse in 1875. This is apparent not only in the long lists of prohibited economic activities, but also, occasionally, in the kinds of things lawmakers found it necessary to positively sanction and allow. In 1866, the Louisiana legislature for the first time explicitly *legalized* "private markets, stores, or stands" in New Orleans "for the sale of meats, game, poultry, vegetables, fruit, and fresh fruit."[103] The idea that the private selling of vegetables in New Orleans had to be established by positive law is a good indicator of just how different nineteenth-century notions of polity and economy were from our own. This law aptly captured the prevalent early American view that selling, trade, and occupations were not natural rights or constitutionally protected "pursuits of happiness." They were privileges subject to the larger demands and concerns of well-regulated communities.

Even after the 1866 act legalizing private stores, New Orleans continued to control the sale of food through licensing and a legislative ban on sales within twelve miles of a market house.[104] In *New Orleans v. Stafford* (1875), the Louisiana Supreme Court upheld an injunction against a previously licensed *private* market on St. Peter and Decatur Streets.[105] In doing so, the court had to overcome a new challenge to market regulation—the defendant's claim

that it "creates an involuntary servitude; that it abridges the privileges and immunities of the citizens; that it deprives them of their property under due process of law." The grocer, of course, was invoking the newly minted language of the Thirteenth and Fourteenth Amendments to the United States Constitution. The court responded to this new attack with an old defense of legislative power to regulate:

> [T]he power arises from the nature of things, and is what is termed a police power. It springs from the great principle '*salus populi suprema est lex.*' There is in the defendant's case no room for any well-grounded complaint of the violation of a vested right, for the privilege, if he really possessed it, of keeping a private market, was acquired subordinately to the right existing in the sovereign to exercise the police power to regulate the peace and good order of the city, and to provide for and maintain its cleanliness, and salubrity.

And what of the defendant's right to earn a living? Justice Taliaferro's opinion suggested that "private benefit would have to yield to the public advantage. It would be a perversion of the principles of organized society and regulated liberty to permit an individual to continue a business or occupation endangering the public health in order that he might derive profit from such occupation."[106]

Public market regulations and the broader notions of public economy that lay behind them were alive and well in 1875. But the free trade rhetoric of Judge Lumpkin and the new constitutionalism evident in the defense's argument in *Stafford* expanded in the late nineteenth century. When free trade and constitutionalism were fused together in the rights-conscious years after Reconstruction, a full-fledged challenge to the well-regulated society was born. Ironically, by the time this challenge rose to prominence, a new positivist and federal definition of regulatory power emerged to greet it. Substantive due process and modern administrative regulatory strategies grew up together.[107]

Prior to the Civil War, public market regulations proliferated—infrequently challenged and almost never declared substantively unconstitutional. They were a strong testament to the power of the visions of a well-regulated society and a public economy. It was simply assumed that the state and community had the inherent power to restrict and even prohibit private individuals and shopkeepers from selling meat and produce. The welfare of the people demanded that this basic economic act be performed according to the public standards of the community rather than the private profit motive of the entrepreneur. In most large cities that meant that sales of food were restricted to certain places and times and subject to innumerable conditions. Hawkers, peddlers, hucksters, forestallers, middlemen, agents, and even honest butchers and grocers (let alone cheats) were prosecuted, fined, and sometimes imprisoned for selling their wares according to the laws of "the market" rather than the regulations of the market house. They were following the dictates of economics but violating the rules of public economy.

A Note on Corporations, Charters, and Contract

The law of the urban marketplace epitomized the nineteenth-century economy's debt to the well-regulated society. But economic regulation was not limited to urban centers or the policing of foodstuffs and necessaries. The laws, ordinances, and regulations of the nineteenth-century polity—what Willard Hurst sometimes emphasized as the "conditions" of freedom—permeated the economy, structuring its basic relationships and controlling its varied activities. The public regulatory histories of commercial, corporation, and contract law are too massive to receive fair treatment in this survey (and are still in search of their historians). Nonetheless, at least a word is necessary to dispel the myth that these economic subjects were primarily matters of private law and interest, beyond the public purview of state police power.

As Patrick Atiyah noted the histories of corporation and contract law are closely linked.[108] Indeed, the legal history of the corporation in the United States begins with the controversial problem of the status of corporate charters. In contemporary "liberal" or "classical" theory, the corporation is simply the normal unit of business—an efficient device for assembling capital. Its legal status and personality is significant only as a convenient juristic mechanism for encouraging commercial and industrial activity.[109] One might expect that this has long been the case, especially in the era of "market revolution." But, as always, it is wise to heed L. P. Hartley's warning: "The past is a foreign country; they do things differently there."[110]

Before the predominance of general incorporation statutes around 1875,[111] most corporations came into being via a special charter from the state legislature. That special, public act signified the corporation's status as a creature of governance. It was as an artificial legal entity dependent upon sovereign authority for existence and power. The right of incorporation as practiced in early America was a special gift (accompanied by special privileges) bestowed by the polity upon select associations as quid pro quo for the performance of special duties and obligations. The essential publicness of this arrangement cannot be denied despite subsequent wranglings over the extent of those privileges and obligations. Indeed, most early American corporate charters were

granted to organizations with a distinct public-utility or community-interest cast. Of the 335 profit-seeking corporations formed before 1800 (317 of which were chartered after 1780), 219 were turnpike, bridge, and canal companies; 67 were banks and insurance companies; and 36 concerned water, fire protection, or harbor facilities.[112] Between 1790 and 1860, 88 percent of Pennsylvania's 2,333 special charters remained in the hands of transport, utility, and financial corporations (only 8 percent went to manufacturing or general business firms).[113] The early American business corporation shared a legal identity and ancestry with such public and quasi-public institutions as municipalities, schools, churches, charities, guilds, and the great trading companies of the sixteenth and seventeenth centuries.

The special charter system was inherently regulatory. Corporations were not citizens possessing natural and absolute rights. They were (in the words of both John Marshall and Roger Taney) "artificial beings" existing only "by force of [state] law" and subject to extensive legislative conditions and restrictions.[114] The early corporate charter was simultaneously a tool of promotion, regulation, and control. An association received important, special benefits of incorporation: (1) a unitary legal personality and concomitant rights to sue and be sued, acquire and liquidate property as a single corporate entity irrespective of changes in ownership; (2) limited liability; and (3) a host of more specific privileges and special-action franchises (e.g., powers of monopoly; eminent domain; rights of way for roads, canals, or railroads; tolltaking). In return, legislatures extracted what Ernst Freund dubbed "an enlarged police power."[115] First, the common law doctrine of *ultra vires* held that corporations (as finite creatures of legislative prerogative) were strictly limited to those powers, objects, and purposes explicitly designated in their charters. Second, legislatures reserved and imposed special statutory conditions regulating general and specific corporate behavior.[116] Finally, and most important, corporations were not immune from the general functioning of state police power—the legislature's ongoing ability to enact regulations for the public safety, morals, health, and welfare.

The basic outlines of this original position of the business corporation in American law are not in dispute.[117] But a string of great constitutional cases—*Dartmouth College* (1819), *Charles River Bridge* (1837), and *Santa Clara* (1886)—has led some legal historians to exaggerate its demise.[118] According to Herbert Hovenkamp, those constitutional developments marked the emergence of the "classical [as in classical economics] corporation."[119] By the 1830s, the corporate regime of special charters, privilege, and regulation is said to have given way to general incorporation, democracy, and laissez faire. The crucial legal achievements of this process were corporate separation from the state and corporate insulation from government regulation—a status befitting the flagship of free-market capitalism.

The classical liberal story begins with the *Dartmouth College Case* which initiated the great transformation of the business corporation from public into private entity. John Marshall's interpretation of the corporate charter as a "contract" constitutionally protected from retrospective state revision (coupled with Joseph Story's clear delineation of private as opposed to public corporations) advanced the cause of privatization and protection by restricting state "discretion to deal with vested property rights."[120] Together with Jacksonian-era general incorporation laws, the *Charles River Bridge Case* then further normalized the business corporation by vitiating the residual privileged and monopolist characteristics favored by John Marshall in *Dartmouth College*. Whether characterized as a shift from static to dynamic property rights, from the protection of property to the release of creative energy, or from special privilege to general utility, the move from *Dartmouth College* to *Charles River Bridge* usually is interpreted in classic political-economic terms as releasing the corporate entrepreneur to compete and lure capital in a freer marketplace.[121] Finally, *Santa Clara v. Southern Pacific Railroad* sealed this legal revolution by declaring corporations "persons" entitled to the constitutional rights and protections guaranteed by the Fourteenth Amendment.[122] With the emergence of "substantive due process," corporations finally achieved their "natural," economic status as ordinary, private, constitutionally protected enterprises rather than as special, public creations of the state.

While there is no doubt that the corporation became a less exclusive legal institution after 1819, this classical portrait of insistent and inevitable liberalization and privatization is problematic. Indeed, hints of an alternative history appear within the key decisions themselves. Joseph Story's concurrence in *Dartmouth College* famously suggested that states could escape contract clause limitations simply by reserving the right to amend or repeal in every corporate charter.[123] *Charles River Bridge* contained some of Roger Taney's strongest defenses of an open-ended state police power: "The object and 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."[124] Despite some important exceptions, special charters with special conditions remained the rule of American incorporation until the Civil War. Finally, prior

to *Santa Clara* (and for a good bit of time afterward), the generally accepted standard on corporate identity was *Bank of Augusta v. Earle* (1839), in which the Taney Court insisted that the corporation was an artificial state creation, not a "citizen" protected by the privileges and immunities clause of the U.S. Constitution.[125]

Such incongruities beg a substantive revision of the legal evolution of the business corporation that is ultimately beyond the scope of this chapter. Still, three public economy cases at least outline the degree to which nineteenth-century interpretations of contract and corporation remained rooted in the assumptions and practices of the well-regulated society.

Brick Presbyterian Church v. Mayor of New York (1826) and *Coates v. Mayor of New York* (1827) grew out of New York's attempt to regulate cemeteries as nuisances to public health.[126] In 1823, the municipal corporation passed an ordinance prohibiting all burials within city limits. The ordinance essentially divested several important private churches of long-held rights—rights secured by explicit covenants from the city and royal grants and corporate patents dating from the seventeenth century. The Corporation of the Brick Presbyterian Church challenged the ordinance, suggesting that it violated the city's original 1766 conveyance of property for church and cemetery, wherein the municipality covenanted for "quiet use" and enjoyment "without any let or hindrance." In *Coates*, the sexton of Trinity Church produced a similar deed from the city as well as a corporate grant from William III.[127]

Certainly after John Marshall's 1819 decision in *Dartmouth College*, such deeds, covenants, and patents would be constitutionally protected as "contracts," the obligations of which states and localities could not impair. But to the contrary, the New York Supreme Court unambiguously sustained the complete disinterment of the churches' vested property and corporate rights. In *Brick Presbyterian Church*, Justice Savage emphasized the public obligations of the municipality to take "care of the public morals and the public health." The city had no power to covenant or contract away legislative powers and duties of police. The church's covenant for quiet enjoyment was trumped by *salus populi*—the threat the cemetery posed to the "health" and "lives" of the "citizens."[128] The *per curiam* opinion in *Coates* was even more emphatic. This health regulation "repealed all covenants entered into by the corporation incompatible with the by-law." Nevertheless, it was legitimate and constitutional. All local police regulations rested on the city's acknowledged power "so to order the use of private property in the city, as to prevent its proving pernicious to the citizens generally. . . . Every right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others."[129] The New York cemetery regulation summarily abolished vested rights, annulled previous covenants, and uprooted established customs and expectations; but it was a "salutary application of police powers," not an unconstitutional "taking" of property without compensation or an unconstitutional impairment of the obligation of contracts.[130]

The post–*Dartmouth College* treatment of conveyances, deeds, and grants in the New York cemetery cases was but a prelude to one of the most definitive statements on police power and corporate rights in nineteenth-century law. In *Thorpe v. Rutland and Burlington Railroad Company* (1855), Chief Justice Isaac Redfield sustained an 1849 Vermont statute requiring railroads to fence their lines and maintain cattle guards at farm crossings or be held strictly liable for all damages to animals.[131] Rutland and Burlington Railroad contested the regulation claiming that their 1843 corporate charter was a contract with the state, containing nothing about a costly obligation to erect cattle guards. Redfield responded by directly challenging the misconception that charters (after *Dartmouth College*) granted corporations "immunity and exemption from legislative control." Rather, citing John Marshall and Roger Taney, Redfield insisted the corporate grants be construed strictly—"in favor of the public"—so as not to abridge legislative power to regulate persons and property and "civil institutions adopted for internal government."[132] This was not a contract case or a property case but a police power case concerning the general "law-making power" of free states residing "perpetually and inalienably in the legislature." Isaac Redfield contributed one of the classic definitions: "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 [a]ccording to the maxim, *Sic utere tuo ut alienum non laedas*. . . . 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."[133] After listing examples of the "thousand things" legislatures could regulate regarding railroad corporations, Redfield concluded unambiguously that state legislatures had the power "as public exigencies may require, to regulate corporations in their franchises, so as to provide for the public safety."[134] According to Redfield, John Marshall on charters and Joseph Story on corporations did not displace the deeply rooted traditions of public economy and *salus populi*.

To the end of his opinion in *Thorpe*, Redfield appended a series of police power cases (a veritable field guide to the well-regulated society circa 1854),

suggesting that there was no end to such illustrations of "the police of the large cities."[135] He dismissed skeptics with a knowledge and confidence befitting his status as a great jurist:

> One in any degree familiar with this subject would never question the right [of police regulation]. . . . To such men any doubt of the right to subject persons and property to such regulations as the public security and health may require, regardless of merely private convenience, looks like mere badinage. They can scarcely regard the objector as altogether serious. And generally, these doubts in regard to the extent of governmental authority come from those who have had small experience.

In 1895, James Bradley Thayer reproduced Redfield's note in its entirety in his pioneering casebook on American constitutional law, perhaps vainly trying to stave off the badinage and ignorance of late nineteenth-century constitutional idealogues.[136]

What *Commonwealth v. Alger* did for property and police power, *Thorpe v. Rutland* did for corporations and contract. *Salus populi* was the supreme law. Corporations and contract were not above or outside of the general powers of states and localities to regulate for the public welfare. The reification of select constitutional language from a few great Supreme Court cases should not blind us to the continuous mass of nineteenth-century law and legislation regulating and controlling corporate behavior. Such regulations continued right through the supposed golden ages of "laissez-faire constitutionalism," "liberty of contract," and "corporate capitalism." Indeed, two reputed idealogues of postbellum constitutionalism had nothing but good things to say about *Thorpe v. Rutland.* Thomas Cooley made Redfield's opinion the linchpin of his discussion of corporations and police power: "All contracts and all rights, it is held, are subject to this power; and all regulations which affect them may not only be established by the State, but must also be subject to change from time to time, with reference to the general well-being of the community. . . . Rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the State with a view to the public protection, health, and safety."[137] Christopher Tiedeman added, "It would be an exceedingly liberal, and hence wrongful, construction of the constitutional protection against the impairment of the obligation of contracts, to place corporations above and beyond the ordinary police power of the state."[138]

By the late nineteenth century, the treatises of Cooley and Tiedeman helped solidify the notion advanced in *Thorpe* and the cemetery cases that police

powers could not be "contracted away."[139] That doctrine became known as the "inalienable police power" and it essentially mooted *Dartmouth College*–style arguments about charters limiting state regulatory power. In *Boston Beer Company v. Massachusetts* (1877), the U.S. Supreme Court held that a brewery charter did not preclude the state from subsequently prohibiting altogether the manufacture of intoxicating liquors. A prohibition on offal had the same, drastic ex post facto consequences for the Northwestern Fertilizing Company. Again the Supreme Court sustained the police regulation over vested charter provisions.[140] But ultimately it makes little sense to discuss these decisions now as purely matters of "corporation" or "economic" or "commercial" law. For they were firmly embedded in the long legal histories of public morals and public health to be taken up in the final two chapters of this book. Still, one late nineteenth-century corporation case does capture the tenuous persistence of earlier notions of public economy and corporate responsibility to the general welfare. In 1898 (four years after conviction of Eugene Debs for his role in the notorious Pullman strike), the Illinois Supreme Court declared that Pullman's Palace Car Company (one of the great ogres of American corporate capitalism) had no authority to own an entire "company" town. Such behavior was an *ultra vires* act of the corporation, contrary to the "good public policy" of the state and "incompatible with the theory and spirit of our institutions."[141] Nineteenth-century American corporations were neither self-generating nor self-regulating. They were creatures of law and governance, subject to the visible hand of regulation in a distinctly public economy.

Conclusion

Roger Taney suggested in his argument before Chief Justice Marshall in *Brown v. Maryland* that there was no such thing in American jurisprudence as a vested right to sell. If there had been, Taney argued, one could not only peddle gunpowder in the heart of New York City, but "he may offer hides, fish, and articles of that description, in places offensive and inconvenient to the public, and dangerous to the health of the citizens; he may hold an auction at his own warehouse, and refuse to pay any tax to the State; he may sell at retail; he may sell as a hawker and pedlar."[142] Taney well knew in this argument reductio ad absurdum that no antebellum jurist could accept such consequences. As surely as the Constitution granted the federal government power to regulate interstate commerce, selling, trading, and exchange within a state were subject to long-held state and local regulations of police.

The Blackstonian notion of "public oeconomy" so apparent in Nathan Dane's offenses against public trade was tenacious and inclusive. But even Dane's list of offenses illuminates only the most obvious controls on the early American economy. Additionally, one-seventh of all potential trading, manufacturing, and dealing was immediately restricted by laws limiting activity on Sundays.[143] Pilot, port, and wharfage laws significantly proscribed freedom of action in the nation's harbors.[144] Public safety, health, and morals laws restricted or prohibited the sale of hazardous, noxious, or immoral goods. In addition, large bodies of regulation circumscribed economic activity in areas that remain unexamined here, including taxation, bankruptcy, mills, railroads, banking, insurance, and labor laws.

These police regulations formed the basic outline of early American public economy. Taken together, they reflect a society devoted to a vision of economic relations subject to the larger dictates of community and social mores. An array of local and public officials supervised and cleared the exchange of primary economic goods. Those same goods had often already passed stringent public requirements regarding manufacturing, packaging, and transport. In some communities and cities, almost all modes of selling anything, and a wide variety of other occupations and trades were considered privileges, specially licensed and sanctioned by government. Many economic activities were prohibited because they conflicted with grander social objectives. No business, occupation, trade, or economic activity was immune from the state's police powers for the protection and promotion of public safety, morals, health, comfort, and welfare.

In theory, the nineteenth-century market was "free." In practice, it was "well-ordered" and "well-regulated." The legal and local regulation of economic life in early America was pervasive. The rules of public economy were extremely detailed and were governed by the overarching legal principle that private interest must be made subservient to the public welfare. As judge after judge put it when such regulations were contested in court, *salus populi suprema est lex*—the welfare of the people is the supreme law.

The relationship of public and private, and law and economy in American capitalism are complicated and crucial historical questions—too important to remain hidden beneath resilient national myths about a golden age of contract, possessive individualism, and free enterprise. The common legal notion of public economy uncovered in nineteenth-century statutes, cases, and legal commentaries bears no resemblance to such shibboleths. It reflects a legal culture resistant to the abstract theories of "the state," "the individual," and "the market" at the heart of such myths and committed to understandings of "property," "rights," and "government" irreducible to the a priori assumptions of neoclassical economics or a negative liberal injunction to leave alone. The form and substance of the early American economy was a product of law and regulation. Capitalism and active governance were not incompatible; they were interdependent. There is nothing natural or private or particularly surprising about the forms of power operating under the aegis of contemporary notions of economics. For the primary relationships of the modern American economy were constructed in the early nineteenth century with the full public powers of police and governance.

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. Expanding public powers over public ways involved the regulation of an increased range of social and economic activities deemed hostile to the people's welfare, including public morality and public health. Policing these things first on public properties paved the way for the public regulation of some of the most private of American spaces.

CHAPTER FIVE

Public Morality: Disorderly Houses and Demon Rum

Morals are regulated by religion or by laws.—John Taylor

By the standards of late twentieth-century law, the public regulation of morality is increasingly suspect. The burgeoning public/private distinction, the jurisprudential separation of law and morality, and the expansion of constitutionally protected rights of expression and privacy have yielded a polity whose legitimacy theoretically rests on its ability to keep out of the private moral affairs of its citizens. As the American Law Institute declared in the 1955 Model Penal Code, "We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor." "Public morality" may soon become an oxymoron.[1]

The relationship between law and morals in the nineteenth century could not have been more different. Of all of the contests over public power in that period, morals regulation was the easy case. That is not surprising. For the regulation of morality and a more general concern for order, ethics, good manners, respectable habits, and standards of decency were principal objects of police. Emmerich de Vattel's influential discussion of "Justice and Police" suggested that police was all about preserving order: "By a wise police, the sovereign accustoms the people to order and obedience, and preserves peace, tranquility, and concord among the citizens."[2] A well-ordered state of society depended upon a due regard for public morals. Historian Gerhard Oestreich has argued that neo-Stoicism—a methodology of moral order and ethical constancy—was an important attribute of the early modern state and its quest

to adjust "the spiritual, moral, and psychological make-up" of citizens, educating them "to a discipline of work and frugality."[3] Regulations in this ordering, disciplining spirit were hardly antagonistic to nineteenth-century economic and social development. Indeed, a new generation of social histories has begun to illuminate the absolute centrality to nineteenth-century culture and economy of legal and regulatory techniques for *policing* the city, the family, labor, and assorted "dangerous classes."[4]

A key technology in morals and cultural policing was the criminal law. The nexus of crime, morality, and police in this period was a close one. Indeed, the substance of nineteenth-century "criminal law" barely resembles the closely bounded legal technicality of modern criminal jurisprudence. Cesare Beccaria, the most influential of criminal law reformers, was also a leading Italian exponent of cameralism and police science.[5] Early criminal law treatises and reporters supplemented conduct guides and ethics tracts as manuals of proper moral instruction. Jacob Wheeler addressed his 1854 New York *Criminal Law Cases* to "every person," suggesting that the rules of criminal jurisprudence "have a direct and positive operation on the sentiments and manners of mankind, in a moral point of view . . . [and] may be considered as the continuation of an extended system of morality." Comparing criminal laws to Gospel strictures, Wheeler extolled the social philosophy of the well-regulated society:

> Man is not only a social, but a reasonable being, not only rational, but moral, and, therefore, accountable. It is in this state we find him, and it is in this state that he is subject to those regulations mankind has adopted for their government. . . . It is here where those salutary principles of criminal law operate with effect, admonishing, restraining, and punishing the foolish, the rash, and the wicked: binding the parts of society together in one bond of equal justice.[6]

The overlapping nature of criminal law, moral reform, and police regulation was also captured in the main categories of Joel Bishop's *Commentaries on the Criminal Law* (1865) where "Protection to Individuals" *followed* (1) "Protection to the Government"; (2) "Protection to the Public Health"; (3) "Protection to the Public Morals, Religion, and Education"; (4) "Protection to the Public Wealth and to Population"; (5) "Protection to the Public Convenience and Safety"; and (6) "Protection to the Public Order and Tranquility." Bishop, the preeminent nineteenth-century commentator on criminal law, defended the confluence of criminal law and morality matter-of-factly, "Morality, religion and education are the three main pillars of the state . . . they should be objects of primary regard by the laws."[7]

In addition to police and criminal law, morals regulation was also deeply rooted in American colonial experience. The biblical injunctions of Massachusetts's *Laws and Liberties* were but the most famous of a surfeit of morals restrictions passed by the "civil and Christian states" and "well-ordered plantations" of colonial America.[8] Statute books were bolstered by sermons like Increase Mather's *An Arrow against Profane and Promiscuous Dancing* and John Barnard's *The Throne Established by Righteousness.* The latter aptly captured the moralistic thrust of Puritan governance: "[S]ince Sin has broke in upon the World . . . there is but so much the more Reason and Necessity for Government among Creatures that are become so very weak, and depraved; to restrain their unruly Lusts, and keep, within due Bounds, the rampant Passions of Men, which else would soon throw humane Society into the last Disorder and Confusion."[9] For Cotton Mather, laws were "important machines, to keep very much evil out of the world."[10] Colonial officials from Boston to Charleston devoted an obsessive amount of attention to such evil, outlawing "carnal wickedness," prostitution, drunkenness, gambling, profanity, blasphemy, profanation of the Lord's day, and countless other debaucheries and improprieties.[11]

But as with other aspects of early modern law, historians have dismissed colonial morals and police regulation as an aberration—as another quirky, unfortunate prelude to "the formative era of American law."[12] William Nelson's thesis of Americanization and modernization goes furthest, suggesting that 1776 ushered in a collapse of morals prosecutions and a "shift in law's basic function . . . from the preservation of morality to the protection of property."[13] Lawrence Friedman argues more persuasively for the constancy of morals concerns in law, but posits a nineteenth-century "Victorian Compromise" whereby only the most "truly evil," open, and notorious morals violations were prosecuted while the "not quite so bad" were tolerated.[14] Certainly Nelson and Friedman are correct to detect an increased attention to violence and theft in early republican criminal law.[15] And the focus of morals police certainly did permutate from pastoral, otherworldly sin to social, thisworldly discipline—authority shifting from minister to magistrate. But as this chapter will make clear, legal support for morals restrictions barely wavered in the nineteenth century. Public morality remained a primary objective of criminal, municipal, and police regulation and a crucial obligation of local and state governments. This close relationship between law and morality was not a holdover from an atypical and austere Puritan heritage or the last vestige of decaying peaceable kingdoms. Rather, a regard for public morals had deep roots in Anglo-American common law and a persistent conception of well-

ordered governance. If there was a transformation in attitudes toward morality around 1776, it lay in the direction of *increased* rather than decreased public attention. The postrevolutionary era witnessed the origins of one of the most concerted and energetic moral reform movements in American history. The movement for the reformation of morals and manners stretched law's responsibility for public morality to unprecedented levels with profound constitutional consequences.

Movement for the Reformation of Morals and Manners

The antebellum benevolence and reform movement was an exceedingly disparate effort.[16] Despite intriguing precedents like Cotton Mather's 1710 call for "reforming societies," the movement was founded in the dramatic increase in religious revivalism known as the Second Great Awakening (1795–1837).[17] Evangelical missionary societies, tract and Bible societies, and Sunday schools spawned a host of voluntaristic moral organizations devoted to cleansing towns and cities of sin and evil. In Connecticut, the Missionary Society set up in the 1790s to spread the gospel westward gave way to Lyman Beecher's Society for the Suppression of Vice and the Promotion of Good Morals, organized in 1812. Beecher's inaugural sermon cataloged the ills to be remedied: "traveling, and worldly labor, and amusement on the Sabbath," "the enormous consumption of ardent spirit," "the neglect of family government and family prayer," "the increase of slander, falsehood, and perjury," and "profane swearing." Viewing "Sabbath-breakers, rum-selling tippling folk, infidels, and ruff-scruff" as portents of a more general breakdown in society, Beecher called for "the guardians of the public morals" to "be vigilant and efficient in the execution of the laws" and "stop the contamination of vice."[18] As if to underscore the interdependence of religion, morality, and law, Beecher was joined in the Good Morals Society by Litchfield parishioner Tapping Reeve and Zephaniah Swift. Reeve founded America's first law school at Litchfield in 1784; Swift was chief justice of the Connecticut Supreme Court from 1806 to 1819.[19]

Beecher's Morals Society was but the most conspicuous of reform organizations that spread rapidly throughout antebellum America.[20] Historian Charles Foster has conservatively listed 158 such organizations formed before 1850.[21] Some like the Andover South Parish Society for the Reformation of Morals remained committed to general moral uplift: "to discountenance immorality, particularly Sabbath-breaking, intemperance and profanity; and to promote industry, order, piety, and good morals."[22] Other societies focused on specific moral evils: the Anti-Duelling Society (1809), the Massachusetts Society for the Suppression of Intemperance (1813), the Massachusetts Peace Society (1815), the Society for the Prevention of Pauperism in the City of New York (1817), the Boston Prison Discipline Society (1825), and the New York Female Moral Reform Society (1834). Arguably, one of the most radical aspects of antebellum reform was its culmination in abolitionism and women's suffrage. But just as consequential was its revolutionary implications for governance.

Despite an early commitment to moral suasion, reform organizations from the beginning proposed new laws and advocated rigorous enforcement of existing legislation. Constant agitation for the suppression of intemperance, the elimination of bawdy houses and gambling dens, and an end to other forms of urban disorder (especially the urban riots that convulsed Jacksonian America) precipitated a reworking of traditional notions of police. On top of the broad, organic conception of "police" as governance for the public welfare, urban reformers pioneered a narrower, instrumental version—police as crime prevention, moral control, and prelude to incarceration. Following the lead of late eighteenth-century British police theorists like Patrick Colquhoun, reformers advanced a vision of police more concerned with security and protection (of property, of person, of middle-class sensibilities) than some overarching pursuit of civic well-being.[23] These were the roots of our modern notion of the function of police and criminal law as the straightforward suppression of crimes and misdemeanors.

Charles Christian's *Treatise on the Police of New York City* (1812) was an extraordinary early statement in this reorientation. Christian argued, "When the population of a city becomes so numerous that the citizens are not all known to each other, then may depredators merge in the mass, and spoliate in secret and safety, and then is the precise time for the organization of a vigilant Police to develope."[24] Christian's treatise was essentially a tract on morals regulation championing increased police authority over dangerous classes: prostitutes, brothel keepers, gamblers, vagabonds, drunkards, and rum sellers. His vision of urban police as "the Cerberus of society, guarding from danger every man's door" made consistent gains through the antebellum years, reaching its apotheosis in the professional police and prison reforms of midcentury.[25]

Historians have attributed this explosion of moral and police reform to a variety of causes. Growing class antagonisms and disparities have headed the list since Daniel DeFoe's *Poor Man's Plea*.[26] The impact of religious zeal has been continuously documented.[27] The status frustrations and anxieties of old leadership groups in uncertain times certainly illuminate temperance and other reform alignments.[28] And there can be little doubt that nascent capitalists had a lot to gain from an effort to instill habits of restraint, self-control,

temperance, industry, and order in laboring classes.[29] More recently, historians have examined race and ethnicity in the categorization of new urban "others" as "dangerous classes" to be reformed or policed. The central role of women as reformers and reformed has also focused attention on the "ideology of domesticity" and the gender/sexual politics of benevolence.[30]

All of these factors are crucial to a comprehensive historical explanation of antebellum reform. But in the pages that follow, I would like to take a different tack and stress the public framework for reform, that is, the institutions and inherited assumptions about state power, local government, and the nature of a well-ordered community that shaped this extraordinary response to social and economic change. For, at bottom, the movement for the reformation of morals and manners was still a legal and political movement. It was an attempt to reorder communities by deploying established public languages and the diverse public technologies of the nineteenth-century state. It can only be fully understood by taking these languages and technologies seriously and on their own terms. Moreover, the ability of particular groups to master these languages and control these technologies had real and important *consequences.* Despite impressive tales of personal agency and everyday resistance, morals police was not simply a malleable arena for social-cultural struggle and definition. The legal structure of reform distinctly empowered certain definitions of public morality and silenced others. As Robert Cover eloquently argued, for all of law's supple normative capacity to embrace shifting social and personal narratives of justice and right, its hallmark remains an irreducible element of force and violence.[31]

One of the more important aspects of this public backdrop to reform was the deeply held legal-political assumption that community life should be well ordered and well regulated. Morality in this tradition was not a private, individual, or discretionary matter. Rather, it was a responsibility of government and a quid pro quo of community membership. When Lyman Beecher, Ward Stafford, and others extolled the virtues of "the well-regulated village" and "domestic discipline," they were drawing on well-established beliefs about the organization of community life—beliefs embedded in the institutional fabric of early American governance.[32] The Massachusetts Declaration of Rights (1780) codified Blackstonian notions of "public police" and "good neighbourhood": "A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government."[33] By invoking the "well-regulated society," moral reformers were calling public officials to arms.

They were mustering a public tradition ensconced in a score of local and legal institutions, practices, and doctrines.

Nineteenth-century criminal law was replete with morals restrictions. Joel Bishop's commentaries surveyed a host of common law[34] and statutory offenses respecting sexuality and chastity (adultery, fornication, solicitation, incest, bigamy, polygamy, bestiality, and sodomy—"the horrible crime not to be named among Christians"), obscenity and lewdness (keeping bawdy houses, publishing obscene prints and writings, obscene speech, indecent exposure, and all acts of "gross and open lewdness"), Christianity (Sabbath-breaking, profane swearing, blasphemy, and corpse stealing and dissection), and public houses and shows (common gaming houses, disorderly alehouses or inns, mountebank stages, cockfighting, and "every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals").[35] State criminal codes mirrored Bishop's categories. Connecticut's codification of 1830 contained the usual crimes against "chastity," "decency," and "public policy," while adding special provisions for "lascivious carriage and behavior," drunkenness, unauthorized and foreign lotteries, horse racing and wagering, billiard tables, playing cards (or selling them) for money, circuses, horse and animal shows, theatrical exhibitions, and other indecent public displays: "games, tricks, plays, shows, tumbling, rope dancing, puppet shows, or feats of uncommon dexterity or agility of body."[36]

But the public regulation of morality did not begin and end with penal codes in the nineteenth century. As Joel Bishop suggested, "The criminal and civil departments of the law somewhat blend in each other." A decentralized, loosely structured state coupled with strong traditions of private prosecution and local police regulation allowed for a stunning degree of diversity, experimentation, and discretion in dealing with threats to a community's moral standards.[37] States enacted separate police regulations ranging from the licensing of inns and taverns to the outright prohibition (and confiscation) of gambling implements. State legislatures delegated open-ended authority to municipalities to deal with moral hazards.[38] Local justices of the peace and town and county officers continued to exercise common law jurisdiction over morals nuisances like illegal saloons and brothels.[39] Even the poor law came into play as commissioners and overseers arbitrarily seized vagrants, idlers, prostitutes, and other "morals offenders" for the workhouse without any legal process whatsoever.[40] The typical technologies of the criminal law—fine and imprisonment—were only the most visible aspects of a morals regulatory apparatus, which included licensing, inspection, prohibition, search and seizure, summary abatement of morals nuisances, private abatement, private

prosecution, a pioneering use of the equity injunction, informal community sanctions,[41] and even extralegal crowd actions and riots. Like threats to public safety, property, and economy, morals dangers roused the full spectrum of nineteenth-century public powers. In 1868, Thomas Cooley devoted little attention to limitations on governmental powers over morality, suggesting instead, "The preservation of public morals is *peculiarly* subject to legislative supervision."[42]

Early American judges upheld such morals regulations as part and parcel of the well-regulated society. In 1817 New Hampshire Chief Justice Richardson defended a prosecution for traveling on Sunday with common *salus populi* rhetoric: "All society is founded upon the principle, that each individual shall submit to the will of the whole. . . . We agree to conform our actions to the rules prescribed by the whole, and we agree to pay the forfeiture which the general will may impose upon the violation of those rules, whether it be the loss of property, of liberty, or of life."[43] Like peace, order, and safety, morality belonged to that group of public concerns that defined the essence of nineteenth-century governmental obligation. As an Illinois jurist mused in 1852, "A government that did not possess the power to protect itself" from moral evils like liquor, lotteries, and gambling "would scarcely be worth preserving."[44] Such a perspective justified aggressive public action against perceived morals nuisances. Maine Chief Justice Shepley closed down a bowling alley, asserting that "bad habits are in such places often introduced or confirmed. The moral sense, the correct principles, the temperate, regular and industrious habits, which are the basis of a prosperous and happy community, are frequently impaired or destroyed."[45] Similar legal-moral reasonings accompanied prohibitions on a wide range of "immoral" conduct from indecent exposure to singing a ribald song, from exhibiting a stud horse to a magician's sleight of hand.[46]

The rest of this chapter is devoted to unpacking and analyzing this public tradition of morals regulation, especially in the areas of morals nuisances (disorderly houses) and antiliquor legislation. After examining safety, economic, and public property regulations, these restrictions should hardly be startling. Indeed only after twentieth-century constitutional innovations like privacy and civil liberties could one expect anything remotely approaching laissez-faire or caveat emptor in morals. As Lawrence Friedman suggested, "Free enterprise in liquor, lottery tickets, gambling and sex never appealed much to nineteenth century judges."[47] What is surprising and revealing, however, is how far reformers, legislators, and judges were willing to go to secure a public morality commensurate with the well-regulated society. In an unprecedented

campaign to secure traditional social values, these groups and individuals succeeded ultimately in transforming American government and revolutionizing American constitutionalism.

"A House Is Not a Home"

One of the most sacred and enduring myths in Anglo-American constitutionalism is Edward Coke's adage "a man's house is his castle." The notion of a house as fortress, refuge, and "little commonwealth" where private patriarchs ruled absolutely without fear of interference was best captured by William Pitt: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter; all his force dares not cross the threshold of that ruined tenement!"[48]

Despite such sentimental attachment to houses as quintessentially private spheres, public realities intruded all the time. As the New York fire cases made clear, all the king's men could not only cross a tenement's threshold, they could tear it down. Still, this line between rhetoric and reality warrants closer scrutiny. What were the specific conditions under which a house as a supposedly impregnable private domain gave way to the public powers of state? Answers to that question help illuminate the slippery and overlapping nature of nineteenth-century conceptions of public and private.

One of the most important keys unlocking early American houses to public access was the legal designation "*disorderly*." As an integral part of antebellum moral reform, mayors, aldermen, constables, and private citizens joined judges and lawyers in an almost constant construction and application of that designation. Once a home or business became a "disorderly house," little stood in the way of the full force of early American public power. Why?

Once again the main legal rationalizations followed the outlines of *salus populi* (the welfare of the people is the supreme law), *sic utere tuo* (use your own so as not to injure another), and the common law of nuisance. First, disorder was the antithesis of the well-regulated society; it marked a temporary disintegration of civil society, threatening the very existence of fragile antebellum communities. The *salus populi* tradition acknowledged the right of communities to defend themselves aggressively by imposing stringent requirements of orderliness on all spaces and activities. As Chief Justice Booth of Delaware insisted, "Every man is responsible for the good government of his house or store, so far as the public is concerned."[49] In addition to this broad argument from "overruling public necessity," judges and commentators also

utilized the more consequentialist *sic utere tuo* rationale to attack immoral and disorderly houses. Alleged deleterious effects on neighbors and the community brought these houses into the regulated public sphere. Justice Yeates of Pennsylvania made the case explicitly, "Although a man has the exclusive right of governing his own house as he thinks proper, which I hope never to see invaded, yet he must do so in subservience to the laws and rights of others. *Sic utere tuo, ut alienum non laedas.*" Disorderly houses, according to Yeates, violated that principle as "great temptations to idleness, . . . apt to draw together a great number of disorderly persons, which cannot but be very inconvenient to the neighborhood."[50]

Such characterizations triggered the common law of public nuisance. As shown in chapter 2, public nuisance law was one of the most potent regulatory weapons in the common law arsenal, subjecting an offender to bold public remedies. According to Coke, Hawkins, Blackstone, Dane, and Kent, the disorderly house was a paradigmatic case of nuisance.[51] Horace Wood in the definitive American treatise deemed disorderly houses of an "immoral" or "indecent" nature nuisances per se, that is, nuisances irrespective of results, injury, or location. Although judges sometimes differed in their characterizations of "immorality" and their standards of proof, they overwhelmingly agreed with Wood's conclusion: "The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result . . . is universally regarded and condemned by it as a public nuisance."[52]

The common law rationales of *salus populi, sic utere tuo,* and nuisance help explain why disorderly houses were susceptible to legal regulation and prohibition, but the question remains, What was a disorderly house? Beyond the tantalizing hints of Horace Wood and Justice Yeates, what tangible conditions systematically branded structures or activities as immoral, indecent, and disorderly?

One key ingredient (though by no means a requirement) of disorder was publicity. The more public the behavior, the more likely courts were to impose constraints. The common law nuisance offense of indecent exposure, for example, obviously hinged on performance in public.[53] Owners of *public* houses (licensed inns and taverns) were held to higher standards of orderliness. In *Alfred S. Pell's Case* (1818), the keeper of a public garden was obliged to establish rules and regulations "calculated to prevent acts of disorder and licentiousness," including requiring a light for each couple present in the garden after dark.[54] In *Barker v. Commonwealth* (1852), proximity to public highways helped to convict a defendant "speaking and uttering wicked, scandalous, and infamous words, representing men and women in obscene and indecent positions, with design to debase and corrupt the morals of the youth."[55] Ill-governed houses in sparsely populated rural areas, at a distance from neighbors and roads, were far more likely to be tolerated than their more visible, more public, urban counterparts.[56]

Another common characteristic of disorderly house prosecutions was a sense of dissimilitude. Disorderly houses were different. They subverted established social practices and violated expectations about the way houses and businesses were governed. In an almost carnivalesque way, disorderly houses mixed, flipped, and ignored the customary hierarchies and social rules that defined antebellum orderliness. This oppositional quality has led Timothy Gilfoyle to describe New York City brothels as part of an extended, erotic "sub-culture."[57] An awareness of this "otherness" and the dangers posed by such inversions pervaded indictments, which routinely described disorderly houses as frequented by persons "old and young, male and female, black and white, by night and day."[58] The inclusion of "night and day" suggested such places disregarded even the natural regularities of time itself.

But though publicity and alterity did characterize a good number of disorderly house prosecutions, they were not determinative. "Disorderly house" was stamped on buildings and businesses of great diversity. No structure was immune from the prescriptions of nuisance law. Even a facade of respectability, privacy, and orderliness did not immunize an "immoral" establishment. As the New Jersey Supreme Court explained, "Although they may be quiet and orderly places, . . . although the most scrupulous cleanliness may be observed, and they may be magnificent in ornament, and luxurious in their provisions for mere sensual gratifications, they are notable nuisances at common law, . . . [when] injurious to the public health, public quiet, or public morals."[59] As a catchall offense against "ill-governed" gatherings of "evil-disposed" persons, the "disorderly house" charge was wielded against everything from private dwellings to swank hotels. Sailors' boardinghouses with their "drunken, bawdy songs," "frolicksome gambols," and "jovial hilarity" seemed particularly vulnerable to the charge.[60] But authorities were also willing to close down Amos Broad's riot-prone Baptist Church in New York City as an "ill-governed house."[61]

As a general rule, however, disorderly houses did tend to fall into one of the following categories: (1) gambling or gaming houses (i.e., houses harboring cards, faro banks, roulette wheels, illegal lottery tickets, shuffle board, billiard tables, bowling alleys, and/or cockfights);[62] (2) theaters, dancehalls, and shows; (3) bawdy houses (i.e., brothels, houses of prostitution, houses of ill fame,

houses of assignation); and (4) inns and taverns. Each of these social evils brought its own set of moral concerns and justifications for public action.

The regulation of gaming and gambling houses drew on a long legal and moralistic tradition. Blackstone incorporated Tacitus's indictment of gambling "addicts" into his own attack on gaming, "an offence of the most alarming nature; tending by necessary consequence to promote public idleness, theft, and debauchery." In 1812 Charles Christian infused this old complaint with new urgency demanding forcible police removal of New York gambling dens: "No pains should be spared to uproot them; in them are to be found sharpers, leading to ruin unsuspecting players, and the habitual idlers, that have dissipated in low excesses, the property left them by industrious parents."[63] The association of gaming and gambling with idleness, cheating, intemperance, vagabondage, gangs, penury, and volatile social descent was constant in nineteenth-century cases and commentary. Judges articulated a widespread social fear about the power of such places to lure the hardworking and upright into indolence and immorality. Gambling houses were dangerous to the neighborhood and disorderly nuisances, according to Justice Harrington of Delaware, because of their power to draw "the sober and industrious into habits of idleness and vice, corrupting the young and unwary."[64] Accordingly, gaming and gambling houses were routinely prosecuted as public nuisances at common law; and most states added special statutory regulations.[65] South Carolina made void all notes and securities won by gaming, allowed losers and third parties to sue winners, outlawed cheating, prohibited gaming at taverns, inns, retail stores, or other public places, and specially protected a ten-mile zone around South Carolina College.[66] Billiard tables like bowling alleys were routinely suppressed despite traditionally low stakes, such as playing for drinks or "for the rub."[67] Gambling implements and tables were subject to summary searches, seizures, and destructions.[68] Particular outrage was reserved for that most odious of games, the cockfight, where "dissolute persons of ill name, fame and dishonest conversation" bet on which bird would kill the other. Testimony of mysterious temptations, outrageous losses, and familial ruin prodded Lemuel Shaw to invoke a common law and constitutional duty to "inculcate principles of humanity." He reckoned cockfighting (like prizefighting and bearbaiting) a public nuisance and an unlawful sport, "being barbarous and cruel, leading to disorder and danger, and tending to deaden the feeling of humanity."[69]

Gaming and gambling were manifest evils in nineteenth-century society; but in a well-regulated community, all public displays and common exhibitions (e.g., pageants, performances, parades, circuses, minstrel shows, magic acts) were subjected to moral strictures, official supervision, and Shaw's "principles of humanity." As arenas of public discourse and producers of public culture, such events exacted constant monitoring and moral policing. The nineteenth-century American "public sphere" (popular as well as bourgeois) was not autonomous from state powers of police and morals regulation.[70] Matthew Hale set the tone and English precedent in 1671 enjoining the erection of a stage at Charing-Cross for ropedancing.[71] American judges and treatise writers generalized Hale's fear of rogues and broils suggesting, "A public exhibition of any kind that tends to the corruption of morals, to a disturbance of the peace, or the general good order and welfare of society, is a public nuisance."[72] Magicians, minstrels, monster displays, and ethnic effigies were easy prey for antebellum authorities, but the low culture/high culture distinction was muted somewhat when theaters and opera houses fell victim to the law of disorderly nuisance.[73] In 1822, allegations of boisterous noise, profane language, mixed dressing rooms, prostitution, and nakedness brought a disorderly house prosecution down on the City Theatre in New York's Warren Street. The court observed, "The good of the community was a paramount object; . . . when [the theater] became a scene of disorder and riot—when the original design of those institutions was so far lost sight of as to allow indecent and immoral conduct, to the disturbance of the neighborhood, it then became a nuisance, and punishable as such." In 1878, the Society for the Prevention of Crime successfully prosecuted the Columbia Opera House for exhibiting "Mock Modesty" and "Silken Meshes," productions showing men and women "in various impudent, lascivious, lewd, wicked, scandalous and obscene groupings, dancings, movements, attitudes, positions, postures and songs, to the manifest corruption of morals."[74] The policing of public performance drew on a rich Anglo-American legal tradition. Through the nineteenth century, the public surveillance and regulation of "disorderly" meetings, halls, and theaters was constant.[75]

If liquor, gaming, and lewd theatrics prefigured a judicial finding of "disorderliness," the addition of race often helped assure conviction. Race often found its way into the primary legal statement of disorder—an indictment describing a house of men and women, young and old, white and black. Just as the "firewater myth" legitimated extensive governmental control over the sale of liquor to Indians, allegations of "drunken negroes" triggered disorderly house prosecutions, especially in lower courts, especially in the South.[76] The case *Smith v. Commonwealth* (Kentucky, 1845) made the color line explicit.

There the indictment of a grocery owner who sold and served liquor to slaves and free persons of color was quashed for not specifying the race of the customers. Chief Justice Ewing elaborated, "The keeping of a grocery, at which *that class* of the community are habitually allowed to assemble and buy whiskey and tipple and drink at pleasure, is calculated to corrupt their morals, to tempt them to petty larcenies, . . . to lead them to dissipation, insubordination and vice, and obstruct the good government, well-being and harmony of society."[77] Race determined whether such a grocery was an illegal, disorderly nuisance. Ewing went on, "The peaceable and habitual assembling of white persons, in the same or any other number, at the grocery for the same purposes, and who even indulged in the same practices as those proven against the slaves, it is believed would not constitute the house a public nuisance, as such assemblies and indulgences would not be of the same evil consequences to the public." Had there been cursing, swearing, noise, or the disturbance of neighbors, whites would have been as guilty of "disorder" as blacks. But when the behavior consisted solely of drinking and congregating, race alone turned the peaceable into the dangerous, the legal into the illegal, and the grocery into a "disorderly house."[78]

When race and slavery were involved, the line between public and private, civility and disorder grew exceedingly thin. On Christmas night 1846, a North Carolina slave patrol invaded a "common, ill governed and disorderly house" brimming with "evil practices." The house was the private plantation of Jacob Boyce where his family, his slaves and some of their relations from neighboring plantations had gathered to celebrate the holiday with conversation, music, and dance.[79] Despite neighbors' testimony that they heard nothing and that Boyce's household was "orderly, peaceable, and quiet," a jury convicted on judicial instructions that if Boyce had "suffered white persons and negroes, of both sexes, to meet together at his house and fiddle and dance together, and get drunk and make noise," they should find Boyce guilty. As Chief Justice Ruffin noted on appeal, the criminality seemed to inhere in "the mingling of the two colors together in the same house and dance."[80]

Race and class hierarchies powerfully shaped, and in some cases determined, antebellum conceptions of immorality and disorder. But nineteenth-century morals regulation was also shot through with gender. The notion of well-governed households at the heart of the moral, well-ordered society was one that clearly demarcated and regulated the roles of men and women, particularly in their sexuality. Nowhere did such assumptions operate more baldly than in the attempted suppression of that most notorious of disorderly houses, the bawdy house.

The Bawdy House

Of all the alleged disorderly houses in nineteenth-century America, the one that powerfully captured the attention and imagination of judges, commentators, and reformers was the bawdy house. Dubbed "The House of Death" by the pulp fiction of the time, the house of prostitution was the most vilified of antebellum morals nuisances.[81] In an attack on brothel keepers, Charles Christian captured the vitriol reserved for this offense:

> This corrupt, and contagious class of persons, whose tartarean depravity spares not even their own children, seize on the earliest opportunity to expose them to sale and prostitution, are fit subjects of the unremitting vengeance of the law, a neighbourhood of them may be truly termed, "hell upon earth." . . . The amount of mischief they do in this way, in what is termed the lower orders of society, is great and calamitous. The breaking up of families—dispersion of children—the ruin of husbands—and the public prostitution of wives, are often the consequences of their vile industry.[82]

Christian's prescription for such rampant moral corruption, police reform and a female penitentiary, also reflected the intimate relationship between changing notions of morality, sexuality, womanhood, and the role of the state.

As a prodigious historical literature has made clear, Christian was joined in his antiprostitution crusade by a bevy of moral reformers ranging from Reverend John R. McDowall, who inspired the New York Magdalen Society, to Dr. William Sanger, author of the most influential sociomedical study of New York prostitution in 1858.[83] But law and its exposition by law writers and courts remained at the center of the moral reform campaign. The New York *City-Hall Recorder* was compiled and published by Daniel Rogers as a complete register of the principal business of the local court of sessions between 1816 and 1820. This record was not meant for esoteric study by professional practitioners. Rather, according to Rogers, the goal of the trial reports was "To illustrate and enforce . . . the genuine principles of morality; and to convey to the public, in language clear and perspicuous, legal principles, important to be understood and known by every citizen."[84] Like the execution sermons of an earlier generation, the local legal record was printed to provide moral lessons—to instruct the public in the expectations and obligations of well-ordered citizenship.[85]

One of first cases in the *City-Hall Recorder* was *Mary Rothbone's Case*, a bawdy house prosecution of paradigmatic proportions.[86] Rogers began with

an epigram: "Ye generous fair, attend while I disclose; The mournful story of a mother's woes." Like many disorderly house cases, Mary Rothbone was *privately* prosecuted (before the mayor and two aldermen) by a mother on behalf of her fallen daughter of nineteen years. Rogers's description of parent and child encapsulated the whole morality tale:

> This mother, a respectable matron, who had once seen happier days, had a settled melancholy gloom of sorrow on her countenance, and her eyes were red with weeping. The daughter, once the hope and expectation of the fond parent, was no longer what she had once been under the fostering influence of a tender mother. The roses of modesty had fled from her cheeks; no longer her eyes beamed with the expressive mildness of virtue, and the sweet enchanting graces of innocence, which inspire even the libertine with a holy reverence. She had been led astray—seduced—debauched—and that guardian genius which was once her attendant, and protected her innocence had fled forever. But with the wild and impudent glance, the vacant, inexpressive stare, which, in the female countenance, so strongly indicates familiarity with vice, you might nevertheless discover some faint traces, not wholly effaced, which might induce the indulgent beholder, in the language of poetry, to pronounce her not "Less than Archangel ruined."[87]

Such maudlin invocations of feminine virtue defiled worked not to console a mother or exculpate a daughter but to convince a jury—a male jury—to let the state act. The prosecution acknowledged the gendered character of public power when issues of sexual morality were at stake by appealing almost literally to *parens patriae*, the notion of the state as parent/father: "Gentlemen. I speak to you on this occasion as fathers, as brothers, nay, as the guardians of the public morals of this community. Will you, by your verdict, sanction vice and corruption? . . . Will you permit women of this description to seduce and lead astray your daughters, your sisters, your female servants, with impunity?"[88]

The argument drew on a deeply rooted ideology about young women's proper place in early American society, beside their mothers or helping their husbands. This particular tragedy was resolved when the daughter was, as counsel put it, "reclaimed, and returned to the domestic fireside." But, though redomesticated, the daughter remained "polluted indeed," the natural progression from daughter to wife fatally interrupted. Those responsible for such meddling with the order of things—those "authors of public infamy" and "destroyers of female innocence"—were accountable to the state.[89]

By the end of this melodrama, Mary Rothbone, the bawdy house operator, did not stand a chance. The jury "immediately" found her guilty. She was sentenced to one year in the city prison. The evidence turned almost exclusively on her "general reputation" for keeping a disorderly house for the purposes of prostitution.[90]

This tale was repeated endlessly in the nineteenth century as authorities battled prostitution. Madams and landlords routinely appeared before magistrates and police juries. Findings of guilty "without leaving the box" fill the criminal reports. Brothels were nuisances at common law and violated a host of supplementary criminal statutes and municipal ordinances. State and local judges had no trouble upholding the broad use of public power against the house of prostitution.[91]

When the landlord of a bawdy house challenged Nashville's power to regulate and suppress it, the city responded with a typical defense of its powers of police, "One of the highest duties of a municipal corporation is to promote the morals, health, and comfort of its inhabitants. It may prevent or regulate any thing that tends to conflict with . . . these great interests." A house of prostitution was an obvious morals nuisance. The Tennessee Supreme Court agreed: "It not only tends to corrupt the public morals by an open profession of prostitution, but it likewise endangers public peace and good order, by drawing together profligate and disorderly persons."[92] Prostitution remained a clear-cut morals offense throughout the century. Its social intractability (in the words of a Kentucky jurist, "The bawd we have always had with us,") did not imply a lenient, individualistic political culture or an ineffectual American state.[93]

Nineteenth-century jurists boasted about the enforcement and deterrent effect of existing morals laws. Jacob Wheeler noted in his *Criminal Cases*, "Prosecutions for disorderly houses are very common, there is scarcely a term but one or more cases are tried; and . . . in almost every case, a conviction is had."[94] New York Chief Justice Nelson took pride in antibrothel remedies ranging from common law and statutory indictment to the voidability of leases and contracts aiding and abetting prostitution, concluding, "The public are pretty well guarded against the offence of keeping houses of ill fame."[95] Nelson balked at adding to New York's regulatory arsenal criminal proceedings against brothel landlords. But other judges and jurisdictions eagerly adopted this and other radical legal measures to weed out immoral establishments.[96] In *Hamilton v. Whitridge* (1857), a Maryland court pioneered the use of the equity injunction against Margaret Hamilton's brothel—a potent legal

innovation that ultimately sealed the fate of many urban red-light districts in the Progressive Era.[97] Historical depictions of the early nineteenth-century as an era of lax enforcement, toleration, or officially sanctioned sexual revolution are misleading. They ignore formidable innovations in equity and nuisance law and marginalize one of the most extensive moral reform and police movements in American history. They also obscure the very real costs (and victims) of nineteenth-century morals prosecutions.[98] After being sentenced to one year in the penitentiary for keeping a disorderly house, Mary Ann Clark relinquished a young child to local officials, and was then accompanied to her house for the quick disposal of her goods.[99]

The fate of Mary Ann Clark and Margaret Hamilton hints at the special vulnerability of certain kinds of people to antiprostitution measures. Without question, women rather than men were the focus of these morals regulations. Prostitution was by legal definition "a sexual vice peculiar to women."[100] Though the "frequenting" of houses of ill-fame was also a public nuisance (and was responsible for the same litany of social evils), it was not regularly prosecuted in the nineteenth century.[101] But even more suggestive of the female centeredness of this regulation was the treatment of married brothel keepers. Though the law of coverture supposedly immunized wives from criminal prosecution, bawdy houses were an express exception. As judges and commentators were fond of pointing out, a wife might not have a property interest in a brothel, but she surely shared in the "government" of the household, especially in matters "usually managed by the intrigues of her sex." In *People v. John Brougham and Bridget His Wife* (1822), the court reached the common conclusion that "the husband was not so much to blame as his wife."[102]

Given the expectations and status hierarchies of antebellum America, unattached, single women were even more susceptible to morals policing. Indeed, in many bawdy house and prostitution prosecutions, it is difficult to determine if the defendant is a prostitute or just a single woman with too many male companions. In many nineteenth-century communities, the distinction was perhaps irrelevant. In *State v. Evans* (1845), Augusta Ann Evans, a "spinster" abandoned by her husband for over a year, was found guilty of keeping an "ill-governed" and disorderly bawdy house.[103] The evidence consisted solely of neighbors' testimony of the early evening visits of a few different men. The Superior Court judge charged the jury that "while one or two acts of adulterous intercourse" do not a bawdy house make, "yet if this had become habitual and common . . . she would be guilty of the offense."[104]

The vulnerability of single women to such morals prosecutions was only

heightened by extraordinarily loose standards of evidence and proof. Evidence like that in *Evans*—the opinion and observation of neighbors—was usually dispositive. Bawdy house prosecutions were one of the few areas of the criminal law where hearsay evidence of one's "general reputation" was enough to convict. In 1838, for example, Margaret M'Dowell and five others were convicted as "notorious" prostitutes and bawdy house keepers without the aid of any facts except public opinion. Justice O'Neall of South Carolina defended the practice: "When it shown that their houses were notorious—that is, known to the whole community—as common bawdy houses, it is the same thing as if it was proved that over the door of each house was written . . . 'bawdy within.'"[105] Though an untolerated anachronism in the commercial law of 1838, O'Neall sought support in the maxim, "What every body says must be true." Only in morals regulation were due process concerns this lax and local voices this determinative. O'Neall assuaged fears of abuse: "To say that there is any danger of a virtuous woman being convicted on such testimony, is utterly absurd. She cannot even be suspected until she has lost her character. . . . [I]f such a charge should ever be made against a virtuous woman, her character will be her shield."[106] This emphasis on character and reputation reflects a morals law still devoted as much to reinforcing local status relationships as to punishing criminal actions. Antebellum judges did not obsess about the line separating "unvirtuous" womanhood from the crime of prostitution.[107]

A reliance on ill-defined offenses such as vagrancy, criminal idleness, "known thief," and "suspicious person" further illustrates the extraordinary degree of informality and discretion at the heart of early American morals regulation. Soon after independence, most states passed laws for the punishment of "rogues, vagabonds, common beggars, and other idle, disorderly and lewd persons."[108] Modeled on English precedent, these statutes began with open-ended enumerations of classes of people deemed vagrants. Massachusetts included

> all rogues, vagabonds and idle persons, going about in any town or place in the county, begging; or persons using any subtle craft, juggling or unlawful games or plays, or feigning themselves to have knowledge in physiognomy, palmistry, or pretending that they can tell destinies or fortunes, or discover where lost or stolen goods may be found; common pipers, fiddlers, runaways, stubborn servants or children, common drunkards, common night-walkers, pilferers, wanton and lascivious persons in

speech, conduct or behavior; common railers or brawlers, such as neglect their callings or employment, mispend what they earn, and do not provide for themselves or the support of their families.[109]

The adjective "common" before "drunkards," "night-walkers," and "railers" implied that one need not commit specific illegal acts to be guilty of vagrancy. A bad reputation and a tainted character were enough. As the Ohio Supreme Court remarked, "The offense does not consist in particular acts but in the mode of life, the habits and practices of the accused in respect to the character or traits" deemed "prejudicial to public welfare."[110] In addition to open-ended definitions and proofs of criminality, vagrancy statutes also advocated summary judicial procedures patterned after the latitude granted English justices of the peace over the poor and "not of good fame."[111] In Massachusetts any justice of the peace could summarily commit "idlers" and "lewd persons" to the house of correction.[112]

Such local power and discretion did not bode well for unattached women accused of moral failing. Portland, Maine, made a habit out of bypassing criminal and judicial processes altogether in dealing with its alleged morals offenders. In 1853 Betsey Brown and her daughter Almedia (again abandoned by husband and father) were indefinitely committed to the Portland workhouse by edict of town overseers George Pearson and Benjamin Larrabee. The charge? They were deemed paupers "living a dissolute, vagrant life" whose house was "reputed to be a house of ill-fame."[113] There was no trial, no jury, no lawyer, no rights of the accused, no evidence beyond the "notoriety" of their Green Street home. The Browns were arrested by a constable and placed in the workhouse solely on the word and at the discretion of overseers of the poor. A legal record exists only because Portland later sued Bangor (the Browns's legal settlement) for the costs of commitment and support. Those costs were halved when Almedia Brown died a year later at age twenty-two.[114]

The Brown case was not anomalous or an exceptional incident of local abuse. Nineteen years earlier, Adeline G. Nott tried unsuccessfully to challenge Portland's practice after being similarly committed to the workhouse as a prostitute.[115] Nott's lawyer argued before the Maine Supreme Court that such process (or the lack thereof) was "unconstitutional and void," violating the "absolute and natural right" of a citizen to a trial or hearing before a judge. The court responded with an unwavering defense of a community's superior, paternal power to police immorality and to protect itself from indigence:

> [Nott's] health and strength constitutes a fund, of which [the town] have a right reasonably to avail themselves, to contribute to her maintenance. She is prostrating both by dissolute habits. . . . What has been done [in this case], is to preserve her health and strength, and to render it productive. For whose benefit? For her own. That she may thence draw an honest livelihood. That she may be removed from temptation, and compelled to cultivate habits of industry, to be again restored to society, as a useful member, as soon as may be. It is, under the circumstances a measure calculated for her own good. . . . [S]he will regard the interposition as parental; as calculated to save instead of punishing.[116]

In *Shafer v. Mumma* (1861), Maryland Chief Justice LeGrand similarly defended the discretionary, ministerial authority of mayors to imprison "lewd women." He described such morals policing as separate from the criminal law and the judicial power and immune from traditional constitutional protections. "It has always been understood," LeGrand argued, "that under the police power, persons disturbing the public peace, persons guilty of a nuisance, or obstructing the public highways, and the like offenses, may be summarily arrested and fined, without any infraction of that part of the Constitution which apportions the administration of the judicial power."[117]

The power of summary procedures, local discretion, and "character" evidence in nineteenth-century morals regulation reflects the tenacity of traditional conceptions of public power and community order. This regulatory regime embraced notions of criminality, constitutional right, and the relationship of public and private radically different from those of twentieth-century liberal constitutionalism. Status and the concomitant moralistic judgments of a local populace continued to matter more than hard evidence of specific criminal acts in punishing morals offenders. Individual due process was routinely subordinated to the local police powers necessary to secure the moral fiber and general welfare of a community. The kinds of conduct and types of people permitted in "private" houses were everybody's business. The well-ordered society depended on well-ordered families and households. The ultimate guardian of "order" was community sentiment and public opinion. Courts reinforced the role of public scrutiny in morals policing with legal conclusions like, "A man careful of the *reputation* of his house and regulating it upon correct principles, is not accustomed to have found there women *notoriously* charged with the offence of prostitution."[118] So much for a man's castle.

From a twentieth-century perspective, these ideas and practices seem arbitrary and even scary. The fate of women like Almedia Brown should certainly give one pause. But these notions were the essence of nineteenth-century

conceptions of local self-government.[119] They were part of the same vision of society that held market imperatives subject to the larger dictates of community well-being and that staunchly defended the publicness of roads and rivers. The "well-regulated society" presumed a correspondence between legal rules and community standards. In morals cases, law was primarily expected to enforce local codes of proper moral behavior, not to protect a private sphere of individual right from overzealous majoritarianism.

But as demonstrated here, antebellum notions of "proper moral behavior" were not neutral or consensual; they were shot through with tilted assumptions about race, gender, and ethnicity. Although disorderly house prosecutions did befall "respectable" citizens and establishments,[120] the status of single women and people of color made them inherently suspect and especially vulnerable. The tags "immoral" and "disorderly" were key terms unlocking the extensive, summary powers of the early American state. Once linked in the public imagination with particular segments of the population, they allowed for a powerful nexus between social bias and state police power.

The local and discretionary nature of early American morals regulation was directly challenged only in the late nineteenth century. The attack came from the same two forces that ultimately dislodged the common law vision of a well-regulated society: the centralization and constitutionalization of state power, and the rights revolution precipitated by the Civil War and Reconstruction. The Browns and Adeline Nott were finally vindicated in 1876 when the Maine Supreme Court struck down the Portland pauper law for violating the new Fourteenth Amendment. Justice Walton argued, "That article declares that no state shall deprive any person of life, *liberty*, or property, without due process of law; and while it may not be easy to determine in advance what will in every case constitute due process of law, it needs no argument to prove that an *ex parte* determination of two overseers of the poor is not such a process."[121] Assessing the constitutional implications of a world without slavery or servitudes, Walton elaborated, "If white men and women may be thus summarily disposed of at the north, of course black ones may be disposed of in the same way at the south; and thus the very evil which it was particularly the object of the fourteenth amendment to eradicate will still exist." He thus also vindicated Justice Rice who argued in dissent in the Browns' case that Portland's treatment of paupers was "but little removed from that of chattel slavery."[122] The end of slavery marked the beginning of a broad-based constitutional revolution in private rights.[123]

The most definitive statement of the new constitutional limits on moral reform came in the famous Illinois decision *People v. Turner* (1870).[124] There the

acts establishing the Chicago Reform School for vagrant children (those "destitute of proper parental care" or "growing up in mendicancy, ignorance, idleness, or vice") were declared unconstitutional, in conflict with the Bill of Rights. Justice Thornton overrode reformers' claims that the law was "for the moral welfare and intellectual improvement of the minor" with a powerful defense of natural liberty, judicial procedure, and fundamental rights like habeas corpus: "If, without crime, without the conviction of any offence, the children of the state are to be thus confined, for 'the good of society,' then society had better be reduced to its original elements, and free government acknowledged a failure."[125] In an influential comment in the *American Law Register*, Isaac Redfield similarly denounced *parens patriae* (the open-ended power of the state to act as parent) with analogies to slavery and an endorsement of the "rules of the great English charter of the liberty of the subject" over the strong, compulsory arm of the civil law.[126] The opinions of Thornton and Redfield reflected the heightened judicial concern with due process (procedural and substantive) that would ultimately transform legal conceptions of legitimate morals regulation. *People v. Turner* became a cornerstone in Christopher Tiedeman's effort to rebuild an American constitutionalism around limitations (written and unwritten) on state police power.[127]

These were the beginnings of a new constitutional regulatory regime. But they were not the end of attempts to regulate public morality.[128] By the end of the century, even unwavering advocates of regulatory power contributed biting critiques of ancient legal notions like criminal character, reputation, known thieves, and vagrancy.[129] Simultaneously, progressive reformers devised new legislative and administrative schemes to guard the public morals from modern threats like immigration, urbanization, and increasingly heterogeneous communities. A crucial prelude to this redefinition of the American state, individual rights, and morals police was a bitter nineteenth-century legal struggle over alcoholic beverages. The "liquor question" produced a public discussion of the principles and practices of early American governance second only to that other great constitutional crisis of the nineteenth century—slavery and Civil War.

Liquor and Constitution

Nineteenth-century antiliquor agitation assumed a bewildering variety of forms.[130] One thing is clear. Movements for restricting the manufacture, sale, and/or consumption of alcoholic beverages were at the center of the larger antebellum effort to reform and redeem American morals and manners. The

same fears, concerns, and anxieties that fueled police reform and antiprostitution measures (e.g., immigration, urban disorder, increasing ethnic and class differentiation) prompted some reformers to locate a first cause (and a utopian solution) in strong drink. From temperance to Washingtonianism to prohibition, liquor reform was suffused with the rhetoric of social order, moral uplift, and public welfare. As Thomas Grimké of the Charleston Temperance Society described the objectives of temperance reformation, "Health, order, industry and happiness, in a word, the good of the people, are the objects of its labors and the rewards of its victory." For the omnipresent Dr. Benjamin Rush, the temperance cause meshed perfectly with larger social, penal, and health reform agendas: "Poverty and misery, crimes and infamy, diseases and death, are all the natural and usual consequences of the intemperate use of ardent spirits."[131]

But though liquor control received new impetus from the evangelical fervor of the moral reform movement, the legal roots of regulation ran deep. Public control was the rule from the municipal and manorial restrictions of fourteenth-century England. Constituted as "licensed houses" since the First English Licensing Act (1552), inns and taverns remained subject to high public expectations of orderliness.[132] Their visibility, their function as meeting places and forums for public discourse, and their reputation as breeding grounds for sedition made licensed houses peculiarly susceptible to charges of disorderliness and formal regulation.[133] American colonies readily adopted this administrative licensing regime wherein local officials (usually justices of the peace) wielded discretionary authority to license select operators of inns, taverns, and alehouses. Unselected, unlicensed purveyors were subject to prosecution.

Despite periods of inertia and laxity, the early American licensing system was capable of surprising rigor. The liquor license brought with it no vested rights, no private properties, and no sanction for licentiousness. Rather, it sealed a public trust between community and "common calling" that brought serious consequences if violated.[134] Joel Bishop made it clear that a license brought no immunity to "make disturbances, or commit acts of immorality, or in any manner to violate public decency and decorum." The keeper of an inn, tavern, or house of entertainment who encouraged such immoral congregations, he concluded, "most powerfully tends to disrobe the body politic of her virtue."[135]

Licensing gave public officials three potent regulatory tools: powers of selection, condition, and withdrawal. In antebellum Massachusetts (which will serve as a reference point throughout this discussion),[136] admission to the rank of victualler, innholder, or taverner required certification by town selectmen of "sober life and conversation," an oath of "faith and allegiance" to the commonwealth, and an all-important twenty-pound recognizance with two additional sureties of ten pounds each. The aspiring tavern keeper thus had to clear a maze of official hurdles and tests of community respectability simply to be eligible for a license—at which point the justice of the peace had complete discretion to decide that no more taverns were "necessary for the public good."[137] Powers of condition were similarly broad as licensed houses were subjected to (1) regulations on furnishings, provisions, refreshments, and entertainments; (2) prohibitions on gambling, dancing, reveling, and sales to minors, idlers, and drunkards; and (3) regular inspections and patrollings by tythingmen. License withdrawal or nonrenewal accompanied allegations of misrule and disorder. Enforcement was enhanced by granting private informers one-half of the proceeds from prosecution (six pounds for selling without a license, forty shillings for allowing gambling). A survey of the Plymouth County Court Record from 1816 to 1850 suggests that prosecutions for the unlicensed sale of alcoholic beverages were a constant feature of local law enforcement.[138]

Local ordinances, criminal codes, and the common law of nuisance supplemented state licensing statutes in policing the sale and consumption of alcohol. Common drunkards, like rogues and vagrants, were vulnerable to swift and summary legal process. Sunday laws imposed an additional set of constraints. Inns and taverns were *public* houses with special duties and high standards of decorum and orderliness. The ability to sell and consume alcoholic beverages was not a natural right in early America but a privilege subject to regulation by self-governing communities. The latitude given justices of the peace and county courts, the informal procedures, the reliance on private prosecutors and informers, and the degree of community involvement in licensing and enforcement reflected the well-regulated society in action.[139]

Early temperance advocates first built directly on this common and local legal tradition. In 1832 Massachusetts reformers flexed their local autonomy, urging town selectmen simply not to recommend anyone to receive liquor licenses from county commissioners (who replaced justices of the peace). By 1835 county commissioners were being elected almost exclusively on the liquor issue. Dry commissioners immediately used their discretionary powers to assert that "the public good required no licenses."[140] In 1836 Essex County decided not to renew or grant *any* liquor licenses, essentially creating a local zone of prohibition. Such de facto local-option, no-license strategies made a good portion of the state legally dry. When Massachusetts was spared the ravages of cholera in the early 1830s, Governor Levi Lincoln attributed it to

traditions of self-government and liquor regulation: "[We have been] taught lessons of precaution in the wholesome ordinances of well regulated Communities, [and been] given better assurance of individual security in sober and virtuous lives. If, in the unregulated pursuits of business, or the authorized indulgencies of society, there are to be found inducing causes to a disease, . . . does it not demand the serious consideration of the Lawgiver and Magistrate?"[141] As the governor called for additional liquor legislation, a first wave of legal challenges to local license restriction made its way through the courts. In Massachusetts, the contest produced an unsurpassed discussion of the legal and political underpinnings of the well-regulated society.[142]

Oliver Blackington was a licensed retailer of spirituous liquors in Essex County in 1835. When the county commissioners decided to issue no licenses in 1836, Blackington was indicted for continuing to sell without a license. After being found guilty in Common Pleas, he challenged the constitutionality of the Massachusetts Licensing Act in *Commonwealth v. Blackington* (1837).[143] Robert Rantoul, Blackington's attorney and a well-known Jacksonian law reformer, invoked the natural rights, liberties, and property provisions of the Massachusetts Declaration of Rights: "Article 1. All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." Attorney General Austin riposted with chapter 1 of the state constitution granting the legislature power "to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances . . . as they shall judge to be for the good and welfare of this commonwealth."[144] A classic jurisprudential/philosophical battle was joined—doctrines of natural rights and property on one side, the plenary law-making authority of the legislature on the other. Chief Justice Shaw played Solomon.

Shaw began by registering surprise at Blackington's challenge to the ancient liquor license system. In the sixty years since the state constitution was adopted, Shaw suggested, countless unlicensed liquor sellers had been prosecuted with nary a hint of constitutional objection. Moreover, the 1832 licensing statute followed the general pattern of liquor laws "commenced soon after the Colony of Massachusetts was first founded."[145] Shaw made it clear that Rantoul's constitutional construction and not the liquor license system marked the radical departure. He attacked Rantoul's new brand of constitutionalism and defended the vitality of the common law tradition:

> This declaration of rights, and frame of government, composing together the constitution, was not first prepared and drawn up by and for a people who were then, for the first time, establishing political and civil institutions, for their security and government; it was rather a slight remodelling of a social system, by a people who had long enjoyed the protection of law, and the security of social order, under a government, nearly as free, and practically nearly as popular, as this lot of humanity would admit. *The constitution itself recognizes this condition of law and social order.* . . . Each particular clause and provision in the constitution therefore, and especially in the declaration of rights, is to be expounded under the broad light thrown upon it by this constant reference, tacit or express, to established laws and institutions, and to the principles and maxims of civil liberty, secured and regulated by mild, equal and efficient laws.[146]

Shaw established that the state constitution and declaration of rights were not the sum total of Massachusetts law and governance.[147] They were not to be construed narrowly or absolutely but in context, with reference to the ongoing practices, customs, and traditions of the common law polity. How to reconcile the constitution's panegyrics to natural rights and property with the power of the legislature to make regulations for the public welfare? Before the invention of liberal constitutionalism, that feat required no superhuman logistics, only the social and historical sensibilities of a Lemuel Shaw:

> The preamble of the constitution announces one of its objects to be, to secure to individuals the power of enjoying in safety and tranquility their natural rights, one of the most important of which is, that of acquiring, possessing and protecting property. This is one of those general truths, which both legislators and people should keep constantly in view, and therefore properly finds its place in a declaration of rights. But it is by no means repugnant to any salutary laws, designed to regulate the means of acquiring property. . . . Indeed such laws are necessary to define, secure and give practical efficacy to the right itself. . . . *To hold that it is not subject to regulation, by law, would be a departure from the whole policy of government, from the first settlement of the country.* All the inspection laws, providing for the inspecting and marking of the principal products of our agriculture and manufactures, with a view to benefit our commerce in those articles, at home and abroad; all laws made with a view to revenue, to health, to peace and good morals, are of this description. So in regard to all those pursuits, occupations and trades, in the skillful and

faithful performance of which the public have an interest, such as surgeons, physicians, attorneys, pilots, ferrymen, masters and conductors of steamboats, railroads, and very many others, especially in cities and populous towns. Such laws, though they impose salutary regulations upon trade, have never been deemed unconstitutional.[148]

With this précis of the well-regulated society, Shaw dismissed the contention that liquor licensing violated natural rights of liberty and property. Such public regulations for "the peace and security, morals and good order of the community," in fact, *defined* the roles of liberty and property in social life. For Shaw, the Massachusetts liquor statute was a simple and legitimate exercise of economic and morals police in accordance with the common and established practice of well-ordered societies regulating for "the public good."[149]

In *Commonwealth v. Kimball* (1837), Robert Rantoul upped the constitutional ante, arguing that Massachusetts licensing violated the commerce clause of the United States Constitution in the grand Marshall court tradition of *Gibbons v. Ogden* and *Brown v. Maryland*.[150] Lemuel Shaw rebutted by simply applying the arguments of *Blackington* to federal constitutional law. First, Shaw argued that the basic object of the national constitution was "to select a few great and important subjects of administration" in which all the people had a common interest and "to confide them to the general government." All other powers, Shaw resolutely declared—"the powers of sovereign government, necessary and proper, to provide for the peace, safety, health, morals and general welfare of the community"—remained entirely under the control of state governments. The power to regulate the sale of spirituous liquors, "in such manner as to guard against abuses, and to prevent the evils of disorderly houses, breaches of the peace, riot, immorality and pauperism," was part of the governing responsibility of states and localities long before the emergence of the United States Constitution.[151] The commerce clause of that document precipitated no legal-economic revolution. Citing Chief Justice Marshall in *Gibbons*, Shaw held that the power to regulate the mode of selling within a state remained unquestionably within the purview of police power—"that immense mass of legislation which embraces every thing within the territory of a state." Liquor regulation was a matter of police, not interstate commerce, its goal being the promotion of the "peace, order, and security of the community."[152]

When the last of these Essex County cases was appealed, the U.S. Supreme Court had the opportunity to review Shaw's jurisprudence. The *License Cases* (1847) unequivocally upheld the constitutionality of state liquor licensing laws.[153] In nine separate opinions on three cases, the justices echoed Shaw that liquor licensing was a case of police power and not a violation of the commerce clause of the Constitution. Chief Justice Roger Taney reached for a broader and novel equation of police power and positive state sovereignty, but ultimately liquor licensing required no constitutional innovation.[154] State police power was potent and extensive enough, leading often to "the destruction of property." Justice McLean introduced the familiar regulatory defense:

> A nuisance may be abated. Every thing prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and in extreme cases, it may be thrown into the sea. This comes into direct conflict with the regulation of commerce, and yet no one doubts the local power. It is a power essential to self-preservation, and exists, necessarily, in every organized community.[155]

On the last page of the sprawling, 128-page disquisition, Justice Grier summated that the police power included "every law for the restraint and punishment of crime, for the preservation of public peace, health, and morals." Such laws were "of primary importance," lying at "the foundation of social existence . . . *salus populi suprema lex*."[156]

Thus the first attempts of temperance reformers to tighten local liquor regulations met little in the way of sustained constitutional opposition.[157] Robert Rantoul reified the Massachusetts Declaration of Rights and Daniel Webster[158] waxed eloquently about the commerce clause of the Constitution, but local liquor regulation (even if it resulted in de facto prohibition) was too well ensconced in traditions of self-government and the common law vision of a well-regulated society. Even a Supreme Court torn by the impending crises of slavery and sectionalism (in which constitutional interpretations of "natural rights," "property," and "commerce" figured prominently) concluded unanimously that liquor licensing was an appropriate exercise of state police power. State licensing and nonlicensing conflicted with neither property rights, guarantees of contract,[159] or the commerce clause of the Constitution. No-license and local-option reforms certainly triggered social conflict, local resistance, and litigation. But they ultimately posed no fundamental problems for and forced no lasting reassessment of early American government. Indeed, those contests provided a forum for some of the most forceful defenses of well-regulated governance.[160]

All that changed suddenly when temperance reformers ratcheted up the polity for a new wave of legislative experimentation—state prohibition.

Prohibition marked a stunning departure in the legal and legislative history of morals and liquor regulation. Power and discretion were summarily taken out of the hands of communities and local officials and replaced with blanket state-wide legislative bans on a remarkably profitable activity (De Bow's reported 1,217 distilleries and breweries capitalized at over $8 million in 1850)[161] that previously enjoyed the sanction of law. Thomas Cooley reflected on the momentous consequences: "The trade in alcoholic drinks being lawful, and the capital employed in it fully protected by law, the legislature then steps in, and, by enactment based on general reasons of public utility, annihilates the traffic, destroyes altogether the employment, and reduces to a nominal value the property on hand." He added, "The merchant of yesterday becomes the criminal of to-day, and the very building in which he lives becomes perhaps a nuisance."[162] The radical implications of American state prohibition even elicited the attention of John Stuart Mill in *On Liberty* (1859).[163] For good reason. Together with other legislative revolutions in this era (e.g., police reform, Married Women's Property Acts, general incorporation laws, and Field codes), prohibition and its legal/political repercussions transformed traditional understandings of the scope of legislation, the nature of rights, and the locus of public power.[164]

A product of a gradual shift in the temperance movement toward total abstinence and public coercion, prohibition repudiated the local, piecemeal, regulatory regime of the license system. Despite the success of no-license organizing (including no-license in 728 of 856 New York towns in 1846, an Ohio no-license constitutional amendment in 1851, and success in every county of Massachusetts by 1851),[165] reformers still bristled at the formal legality of the liquor trade and the capriciousness and inconsistencies attending "half-way" police measures. The "License System" became increasingly viewed as part of the problem, "barter[ing] away the peace and morals of society," offering legal comfort to the enemy, and branding good temperance men and women as fanatical zealots opposed to the "law of the land."[166] Reformers demanded more vigorous and complete legal solutions. As a Massachusetts district attorney put it, "Legal and moral agencies should be combined. They are like the soul and body, and in the present state of existence can not well act separately."[167]

After a brief experiment in Massachusetts in 1838, prohibition burst on the national scene with the Maine Law crusade of Neal Dow, mayor of Portland and the "Napoleon of Temperance," in 1850. A committed prohibitionist frustrated by the spotty enforcement and low penalties of Portland's no-license system, Dow and the Maine Temperance Union pressured the state legislature into a far-reaching revision of its liquor laws. The resultant "Act for the Suppression of Drinking Houses and Tippling Shops" (1851) included a series of revolutionary provisions:[168]

1. A complete statewide ban on the manufacture and sale of spirituous or intoxicating liquors (except by special municipal agents for medicinal and mechanical purposes).
2. Broad powers of search, seizure, and forfeiture that placed a burden of positive proof on the owner of confiscated liquors.[169]
3. Substantial penalties (including a loss of certain jury privileges), heavy fines, and stiff jail sentences for repeat offenders.
4. Additional provisions to deter appeals (by requiring additional bonds, guarantees, and double fines), to expedite prosecution (including a duty to prosecute when informed), and to restrict the discretion of judges.

The Maine Law triggered an unprecedented chain reaction of prohibitionist activity and imitative state legislation. Between 1851 and 1855, twelve more states enacted prohibition statutes modeled on Maine's initiative: Connecticut, Delaware, Illinois, Indiana, Iowa, Massachusetts, Michigan, Nebraska, New Hampshire, New York, Rhode Island, and Vermont.[170]

State prohibition was initially received with testimonials and great expectations. Some of them were engraved on a pitcher presented to Neal Dow by the citizens of Portland. The background depicted a tenantless jail and the prosperous commerce of ships under full sail. In the foreground, police officials administered the Maine law by emptying numerous casks of confiscated liquor onto the ground.[171] The former squared nicely with the aspirations of a well-regulated society. Courts and jurists were left to work out the legal and constitutional implications of the latter.

In *State v. Gurney* (1853), the Maine Supreme Court proclaimed the constitutionality of Dow's legislation: "The Legislature [has] a right to regulate by law the sale of any article, the use of which would be detrimental to the morals of the people."[172] Overall, that was the response of most of the country's state judiciary.[173] The U.S. Supreme Court's favorable review of restrictive licensing (especially Roger Taney's capacious rendering of state sovereignty), together with the high political and economic stakes of prohibition, emboldened juridical defenses of state police power. Justice Bennett upheld Vermont's version in *Lincoln v. Smith* (1855) declaring, "The law in question falls within that large class of powers, which are essential to the regulation, promotion, and preservation of morals, health and the general well being and prosperity of the people of this state; and it may in an eminent degree be regarded as a police regulation."[174] Such regulations, added Justice Storrs of Connecticut in *State*

v. Wheeler (1856), "[had] been passed in almost all civilized communities, and in ours from the earliest settlement of our state, . . . based on the power possessed by every sovereign state, to provide . . . for the health, morals, peace and general welfare of the state."[175] Liquor and intemperance, these jurists agreed, harmed public health, produced "pauperism and crime," and inflicted a great "moral injury upon society." "If a public evil of this character, and of this magnitude cannot be suppressed," Michigan Justice Johnson concluded emphatically in *People v. Gallagher* (1856), then "it may well be said that there is an end to all legislative power."[176]

These jurists supplemented staunch defenses of state legislative power with equally strong repudiations of the property and rights claims of defendants. In doing so, they drew explicitly on the social and relational philosophy of rights so much a part of the well-regulated society. In *State v. Allmond* (1856), Delaware Chief Justice Harrington made the classic case: "The Legislature may by general laws regulate and restrict the use of property which it deems dangerous to the existence, peace or welfare of society, and may prevent the acquisition of such kinds of property as it considers as to require such prohibition. The Legislature of this State has done so from the beginning, . . . regulating not only property itself but the personal industry and enterprise through which property is acquired." Examples? Harrington listed a litany of long-standing property and trade regulations: the statute of wills, intestate laws, license laws, weights and measures, and laws regarding physicians, surgeons, attorneys, millers, ferries, fisheries, and innkeepers.[177] But what of the speedy seizure, forfeiture, and destruction of liquor that accompanied Maine-style prohibition? Harrington's colleague in Vermont rejoined with the deep roots of summary abatement at common law:

> Nuisances may be abated in the most summary manner; dogs found chasing sheep may be shot down; bucks running at large . . . may become the property of the captor; and race horses may be declared forfeited; gambling implements may be destroyed; lottery tickets and obscene prints may be prohibited, and under the quarantine laws, the health officer of a city, to prevent the spread of infection or contagion, may destroy bedding or clothing, or any part of the cargo of a vessel, subject to quarantine, and which "he may deem infected." Gunpowder kept in improper places, may be seized and confiscated; and the exercise of these powers, is a power of prevention, highly conservative in its character, and essential to the well being of the body politic, and ought not to be characterized as arbitrary or despotic.[178]

As Mill and Cooley recognized, prohibition obliterated established property and economic rights in the liquor trade. But according to these state jurists, such destruction was simply an extension of the principles and practices of well-regulated governance serving public morality. As Justice Storrs concluded, "The subjection of private property in the mode of its enjoyment to the public good . . . is a principle lying at the foundation of government. It is a condition of the social state; the price of its enjoyment."[179]

But despite the heroic efforts of state judges to reconcile Maine laws with the well-regulated society, there was no escaping the fact that something about prohibition was new and different. In *Fisher v. McGirr* (1854), Lemuel Shaw began to elucidate that distinctiveness. The facts of *Fisher* also provide an opportunity to see a prohibition law in action (in this case the 1852 Massachusetts version).[180]

The critical events of the case all took place within a single day, August 4, 1852. Isaac Keith, Francis Kern, and William Chipman, all citizens and voters of the town of Sandwich, brought a complaint before the Barnstable County justice of the peace charging Theodore Fisher with keeping intoxicating liquors in his dwelling house contrary to the state's new prohibition law. Justice of the Peace Lothrop Davis promptly ordered the constable of Sandwich Patrick McGirr to forcibly enter Fisher's dwelling house during the day, make a careful search, and seize and keep all liquors he found. As Neal Dow once declared, all that was needed to make prohibition work was three good temperance men, a loyal constable, and an efficient magistrate.[181] The constable was further instructed to summon Fisher to appear before Davis and show cause why such liquors should not be forfeited and destroyed (the burden of proof was statutorily placed on the defendant). Constable McGirr found liquor: one-half barrel of cherry brandy, one demijohn and one bottle of brandy, one jug and one bottle of New England rum, and one bottle of gin. When Fisher failed to prove that such liquors were "legally kept" (i.e., of foreign origin in original packaging), Davis ordered the intoxicants destroyed and fined Fisher an additional twenty dollars and costs. Fisher challenged the constitutionality of these prohibition proceedings and sued to recover the value of his lost property.[182]

In a spate of liquor cases over the next twenty years, the Massachusetts Supreme Judicial Court never seriously questioned the overall constitutionality of the legislature's power to prohibit the manufacturing, selling, and keeping of intoxicating liquors.[183] In *Fisher v. McGirr*, however, Lemuel Shaw began subjecting particular components of the prohibition regime to close constitutional scrutiny, especially its formidable search, seizure, and forfeiture

provisions. Shaw was too well schooled in the well-ordered society to deny the *substantive* police power to ban, search, and destroy private properties deemed hostile to the general welfare.[184] So instead, he zeroed in on the *process* of prohibition. First, Shaw challenged the sweeping search and seizure powers enforcing the liquor law. The search of Fisher's dwelling, Shaw concluded, was "unreasonable" and "unconstitutional" because of the overly broad mandate given Constable McGirr. This search was not limited to specifically described properties or particular owners, nor did it safeguard imported/exported liquors. This was an express violation of the Declaration of Rights (article 14) protection against "general warrants and unreasonable searches."[185] Second, and even more significant, Shaw decried the utter lack of any proceedings remotely resembling a trial or "due process of law." The ex parte complaint of "three good temperance men" provided no opportunity to confront accusers, no examinations, no day in court, and no personal notice. The seizure of liquor amounted to a prima facie case against the defendant. Shaw railed that "No provision is made by the statute for a trial, for a determination by judicial proofs of the facts, upon the truth of which alone the property can be justly confiscated and destroyed." Such a trial was the requirement of article 12 of the Declaration of Rights, declaring "that no subject shall be arrested, or deprived of his property, immunities or privileges, or his life, liberty or estate, but by the judgement of his peers, or the law of the land."[186] This judgment of Theodore Fisher passed without trial, without proof, and consequently, according to Shaw, without constitutional muster.

Shaw's constitutional objections in *Fisher* forced the Massachusetts legislature to pass a revised 1855 prohibition statute *sans* the problematic enforcement procedures of section 14.[187] But the implications of Shaw's decision went beyond mere statutory revision. In *Fisher*, Shaw explicitly and powerfully elevated "procedural due process of law" into a regular and formal check on legislative exertions of state police power. Shaw defended the general legislative power to prohibit liquor as a nuisance. But he also served notice that such sweeping, unprecedented legislative endeavors would be accompanied by increased judicial solicitude for those "precautions and safeguards for the security of persons and property, and the most valuable rights of the subject, so sedulously required and insisted on . . . in our Declaration of Rights"—the right to a trial by jury, the right to be free of unreasonable searches and seizures, the right to common processes of law.[188] Though a regard for procedural due process had common law origins through Magna Charta, it now became an automatic and axiomatic part of the judicial review of police regulation.[189] Consequently, the Supreme Judicial Court for the first time declared a substantial portion of a general Massachusetts statute unconstitutional.[190]

This was a new development in the story of the well-regulated society. And the crucial question is, why? After all, Shaw was only too aware of the prominent and historic role played by summary destructions, confiscations, ex parte proceedings, and local discretion in the administration of justice in well-ordered communities. He knew all about the pulling down of houses during fires, the summary removal of obstructions to public ways, the seizure of unwholesome meats by market clerks, the quick penalties inflicted on prostitutes and common drunkards. Why were identical processes deemed nefarious when appended to a prohibition statute in the 1850s? Shaw left one clue near the end of his opinion in *Fisher*:

> In a law directing a series of measures, which in their operation are in danger of encroaching upon private rights; vesting in sub officers large powers, which when most carefully guarded, are liable to be mistaken or abused, and which are to direct, limit and regulate the judicial conduct of a large class of magistrates; it is highly important that the powers conferred, and the practical directions given, be so clear and well defined, that they may serve as safe guides to all such officers and magistrates, in their respective duties; and in these respects, the statute itself must, on its face, be conformable to the constitution.[191]

Prohibition was not analogous to local fire or market regulations. It was a comprehensive statutory revocation of preexisting liberties, properties, and rights. It replaced local, discretionary liquor licensing with a formal, centralized, and uniform system of rules guiding the administrative and judicial conduct of law enforcement officials throughout the state. Such newly delineated "public" powers were met by careful defenses of more closely designated "private" rights.[192]

Shaw was not the only jurist to notice the transformative nature of prohibition laws. Indeed, Shaw's reaction was tame compared with the vitriolic rhetoric and constitutional creativity it inspired in other jurists. In Michigan and Vermont, prohibition was sustained only over vigorous dissents. In *People v. Gallagher*, dissenting Justice Pratt marshaled wide-ranging defenses of wine and property (from the Decalogue and Hume to Kent, Story, and Webster) to battle "the despotic and highly penal act"—"a bold and daring invasion of private property."[193] When Chief Justice Redfield failed to convince his colleagues to follow Shaw's example and insist upon ordinary modes of trial and

proof in the enforcement of Vermont prohibition, he left them with a dire warning:

> In regard to the mode of trial, if it can be applied to one offence it may be applied to all, and in times of tyranny and oppression, no mode of resort has been more common, than to treat an accusation, by public officers, as evidence of guilt and to demand of the accused proof of innocence. . . . In all abuses of authority there is no return, *nulla vestigia retrorsum*, and it always begins in a good cause, in defence of religion, or morality, or public decorum, or order, or decency.[194]

Such sentiments did not always remain in the minority. In a rare burst of aggressive judicial review, justices in Indiana and New York threw down the gauntlet and declared prohibition an unconstitutional exercise of legislative power.[195] In the process they developed an uncompromising critique of the *salus populi* tradition and pioneered a conception of "due process of law" well beyond Lemuel Shaw's concerns about procedure.

Central to the invention of a new legal-constitutional tradition was the dismantling of the old. In *Beebe v. State* and *Herman v. State* (1855), Justice Perkins of Indiana put together the most thoroughgoing assault on the principles of the well-regulated society found in antebellum law.[196] The question at hand: Could the state legislature enact a prohibitory liquor law? The state of Indiana, of course, argued affirmatively, defending a broad, legislative power under the mandate "the safety of the people is the supreme law." In *Beebe* Justice Perkins launched a devastating attack with a classic delegitimating argument: that might be "*European*" jurisprudence, but it was not "*American*" law.[197] Perkins argued that the roots of *salus populi* lay in "*European* writers on natural, public, and civil law" who were "dangerous, indeed utterly blind guides to follow in our free and limited government." The whole European tradition was corrupt. Perkins noted, it was the product of governments that were "paternal" in character:

> All power was in them by divine right, and, hence, absolute; the people of a country had no rights except what the government of that country graciously saw fit to confer upon them; and it was its duty, like as a father towards his children to command whatever it deemed expedient for the public good. . . . [Such governments] could prescribe what the people should eat and drink, what political, moral and religious creeds they should believe in, and punish heresy by burning at the stake, all for the public good.[198]

Justice Perkins asserted unambiguously in 1855 that the maxim *salus populi suprema lex est*, as applied to American legislative power, was foreign and "without meaning."[199]

In *Herman v. State*, Perkins did the same to the other key maxim of the well-regulated society, *sic utere tuo ut alienum non laedas*. The state of Indiana argued that the regulation of liquor was justified by the legislature's duty to make sure that all used their own so as not to injure others. Perkins retorted that prohibition implied "that a man shall not use at all for enjoyment what his neighbor may abuse." Such a doctrine, if given the sanction of law, would "annihilate society, make eunuchs of all men, or drive them into the cells of the monks, and bring the human race to an end, or continue it under the direction of licensed county agents."[200] Perkins invoked Genesis and John Milton's *Areopagitica* (1644). Prohibition based upon *sic utere tuo* was not the way the Almighty governed his world:

> [God] made man a free agent, to give him an opportunity to exercise his will, to be virtuous or vicious as he should choose, he placed evil as well as good before him, he put the apple into the garden of Eden, and left upon man the responsibility of his choice, made it a moral question, and left it so. He enacted as to that, a moral, not a physical prohibition. *He could have easily enacted a physical prohibitory law by declaring the fatal apple a nuisance and removing it.* He did not. His purpose was otherwise, and he has since declared that the tares and wheat shall grow together to the end of the world.[201]

Prohibition laws, Perkins dramatically concluded, robbed man of "free agency."

Two principles replaced *salus populi* and *sic utere tuo* in the "*American*" governmental tradition being created by Justice Perkins and colleagues: "the great doctrine of rights in the people as *against* the government"; and the notion of fundamental constitutional limitations on legislative power—limitations enforced by a vigilant judiciary. As Perkins summarized, "Over the people of this state hangs the shield of written constitutions, which are the supreme law, . . . which grant a restricted legislative power, within which the legislators must limit their action for the public welfare, and whose barriers they can not overleap under any pretext of supposed safety of the people." The rights of citizens to liberty, property, and pursuits of happiness were among the most important of those constitutional limitations against government. And since *Marbury v. Madison*, according to Perkins, the principal mechanism for "securing to the people safety from legislative aggression" was judicial review.[202] The "safety of

the people" ostensibly remained the law of the land. But suddenly it became the responsibility of an active judiciary policing state legislatures with potent new renderings of constitutional limitations and the substantive rights of individual citizens.

Wynehamer v. People (1856) was the first complete, positive statement of this new constitutionalism. It was a watershed in the history of American public law.[203] There the New York Court of Appeals transformed the due process clause of the state constitution into a *substantive* and determinative restraint on legislative prerogative. Substantive due process superseded *salus populi* as the American rule of law. It befell a new justice George F. Comstock to explicate this transformation. The only question before the court was whether New York's 1855 prohibition statute "for the prevention of intemperance, pauperism, and crime" was valid and constitutional. Comstock began by presenting New York's two chief constitutional limitations on legislative power:

> Article 1, section 1. No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.
>
> Article 1, section 6. No persons shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Next Comstock established that rights in liquor and its accoutrements were indeed forms of private property worthy of constitutional protection. Property was "an institution of law, and not a result of speculations in science, in morals, or economy." In New York law, alcoholic beverages "were bought and sold like other property" since settlement. The chief legal characteristic of all property for Comstock was "inviolability": "All property is equally sacred in the constitution, and therefore speculations as to its chemical or scientific qualities, or the mischief engendered by its abuse, have very little do with the inquiry."[204] So much for *sic utere tuo*. Liquor was protected *qua* property. And the remarkable novelty of *Wynehamer* was that this protection was fundamental, absolute, and sacrosanct. Legislative theories of the public welfare or general good did not legitimate interference. Comstock was unequivocal: "In a government like ours, theories of public good or public necessity may be so plausible, or even so truthful, as to command popular majorities. But whether truthful or plausible merely, and by whatever numbers they are assented to, there are some *absolute private rights beyond their reach, and among these the constitution places the right of property.*"[205] That was the *substantive* guarantee

attending the storied constitutional phrases "the law of the land" and "due process of law." These were not merely the procedural protections outlined by Lemuel Shaw in *Fisher v. McGirr*, requiring proper legal form and process before the legislative or administrative extinguishment of rights in property (e.g., trial by jury, notice, hearing, limited search and seizure). Rather, the "true interpretation" of these constitutional phrases, according to Comstock, was that "where rights are acquired by the citizen under the existing law, there is no power in any branch of government to take them away. . . . Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer."[206] This was a powerful and revolutionary inauguration of a new constitutional creed. Comstock was saying that *any* law judicially interpreted to "annihilate the value of property" or "strip it of its attributes" was on its face a denial of due process and, consequently, an unconstitutional abuse of legislative authority.

Wynehamer v. People was a complete repudiation of the organizing principles of the well-regulated society. As in the Indiana decisions, it derided legal theories of public good and *salus populi*. It similarly left *sic utere tuo* in tatters. Property rights, according to *Wynehamer*, were absolute and inviolable. They were not subject to novel legislative schemes and regulations to keep one from using property so as not to injure another or the community at large. The social and relational understanding of rights and property that pervaded American public jurisprudence from James Wilson to Lemuel Shaw was not a part of the reasoning of the New York Court of Appeals in striking down prohibition. Public spirit, local self-government, and regulated liberty were replaced in Comstock's rule of law by a new (and, by twentieth-century standards, familiar) formula composed of absolute individual rights, strict judicial review of police regulation, and explicit[207] constitutional limitations upon legislative power. *Wynehamer* was the origin of a narrow, but remarkably popular and resilient, strand of American liberal constitutionalism that would later count among its jurisprudential triumphs such politically disparate cases as *Lochner v. New York* (1905) and *Roe v. Wade* (1973).

For the time being, however, *Wynehamer* and *Beebe* remained anomalous. Most state courts sustained the constitutionality of prohibition with vigorous defenses of state police power. And despite continued haggling over revenue laws and foreign and interstate commerce, the U.S. Supreme Court unambiguously declared in 1877 that, "as a measure of police regulation looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to the Constitution of the United States"—"*salus populi suprema lex.*"[208]

But the die of a new constitutional regime was cast. The terms of debate had decisively shifted. On one side, a new constitutional language of private rights, limited government, and substantive (as well as procedural) due process of law began to displace the moral and common law philosophy of well-regulated governance in the public interest. This new private rights orientation was not self-generating. It was a direct response to an equally dramatic change in the exercise of public powers. State prohibition involved a distinctively upward shift in the locus of public decision-making power in the American polity. Morals police, including controls on intoxicating liquors, had been the prerogative of local self-regulating communities for centuries. With a simple fiat, state legislatures dissolved this tradition and a whole set of time-honored expectations. It replaced a local, customary, and discretionary regime with a centralized, rule-based, and stream-lined enforcement apparatus. Even as state jurists attempted to reconcile these powers with the language of *salus populi* and *sic utere tuo*, defenses of prohibition redefined the nature and extent of state power. "Sovereignty" increasingly replaced "police" as the key word[209] in regulatory apologetics. And the local-historical sensibility of the common law tradition was supplanted by straightforward renderings of interest and power. In *Beer Company v. Massachusetts* (1877), the U.S. Supreme Court upheld Massachusetts prohibition with a defense of an inalienable police power allowing the discontinuance of any manufacture or traffic "the public safety or the public morals require."[210] Even in *Wynehamer*, Justice Hubbard managed this description of state power:

> The sovereign power of the state in all matters pertaining to the public good, the health, good order and morals of the people, is omnipotent. . . . The police power is, of necessity, despotic in its character commensurate with the sovereignty of the state; and individual rights of property, beyond the express constitutional limits, must yield to its exercise. And in emergencies, it may be exercised to the destruction of property, without compensation to the owner, and even without the formality of a legal investigation. . . . I know of no limits of self-preservation to the body politic.[211]

Increasingly differentiated conceptions of public powers and private rights expanded concurrently at midcentury—a prelude to the creation of a liberal state *simultaneously* individualizing and totalizing in its manifestations.

Postbellum American constitutionalism traditionally has been interpreted as the strange harvest of America's slave past and industrial future. Without downplaying the crucial significance of race and economy in late nineteenth-century law, the question remains, why liquor? Why do we find the earliest, definitive statements of both substantive due process and the inalienable police power in cases involving intoxicants?[212] This chapter has suggested an answer in the powerful, persistent, and contested role of morals policing in the nineteenth-century American polity. Morals regulation did not recede in the nineteenth century. It exploded. Public morals were the focus of an unprecedented burst of reform activity and radical legal and legislative initiatives with important ramifications for American statecraft and political thought. Despite historical talk of tolerance, cities of eros, Victorian compromises, or a wholesale paradigm shift from morals to property, the regulation of public morality continued to play an absolutely central role in nineteenth-century American life. Morals police remained one of the matter-of-fact obligations of government in a well-regulated society. Our linear, liberal histories of constitutional rights and liberties obscure the degree to which new ideas about privacy and personal freedom grew up in cooperation with rather than in isolation from competing ideals of social order and public power.