

***Bringing the States Back In: The Police Power and American Politics, 1789-1931***

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Few recent accounts of the “American state” know what to do with the states. One problem is logistical: there are so many of them, and not many scholars have wanted to spend their time researching this subject in the archives of dreary state capitals. The bigger problem is conceptual: European theory has driven studies of the state for most of this subject's history, and that has meant an emphasis on the nature and activities of the central state, understood to be a unitary institution powerfully directed from a political center. The very term we use to discuss the phenomenon being analyzed—“the state”—reveals this reliance on concepts developed for polities that could plausibly be thought to have a unitary institution of this sort. It is obvious that this singular term does not work so well for a polity such as the United States, in which multiple institutions carry out “state” activities. Nevertheless, more often than not, the “states” have fallen out of conversation in discussions about the American state, except among social scientists and legal scholars devoted to the study of federalism. But this latter group, while advancing our understanding of federalism in major ways, has had only intermittent impact on studies and conceptualizations of the American state.

This chapter may be understood as an effort to “bring the states back in” to that broader conversation.<sup>1</sup> It is vital that we do, for the states operated according to a different governing principle than did the central state. This principle was and is known in judicial circles as “the police power.” It is largely unknown outside those circles. A broad portion of the activities of state governments cannot be understood without reference to it. It constituted a second principle of American governance and one that often stood in contradiction to the liberal principles that structured the activities of the central government.

The point of departure must be what students of federalism have always insisted upon: that, from the start, the United States was a federal republic, meaning that it divided authority between the central government and the governments of its constituent parts, the thirteen states. This division was central to the overriding liberal ambition to prevent

any one institution of government from gaining too much power.<sup>2</sup> But America's federal system went beyond a simple division of powers. It organized the two major divisions of government—the central state and the states—around different *theories* of power. A liberal theory, as we have seen (in Chapter One) animated and guided the central government. The fundamental principle of this liberal theory was that citizens had fundamental rights that no government could take away except under the most extraordinary of circumstances. As a result, the powers of the central government had to be limited in clear and effective ways. The Bill of Rights came to embody this aspiration.

The individual states did not operate according to this liberal principle. Instead, their power derived from a different political principle, one that held the public good in higher esteem than private right. This principle called for a polity well-regulated by government in which, as the legal historian William Novak has written, “no individual right, written or unwritten, natural or absolute” could be permitted to “trump the people's safety” or welfare.<sup>3</sup> It resembled in part what scholars of the mid- and late-twentieth century, figures such as J.C.A. Pocock, Quentin Skinner, Gordon Wood, and Mauricio Viroli, have called the ideology of “republicanism.”<sup>4</sup> Like republicanism, this principle of governance put its faith in the ability of responsible, virtuous citizens to determine and agree on the public interest or *salus populi*, the people's welfare. This principle of governance was not indifferent to individual rights. But it insisted that the enjoyment of personal freedom and individual rights depended on the carefully regulated society that government would construct.

This second principle of governance endowed the states with a scope of authority more capacious in many respects than that which inhered in the central government itself. In truth, state governments possessed a staggering freedom of action. They had the power to direct internal transportation improvements; issue controls on capital and labor; build schools, libraries, and other educational facilities; engage in town planning and supervise public health. They organized moral life. Rules governing marriage, drinking, narcotics, gambling, theatre-going and the arts, sexuality, and a community's disposition to the migrant poor were all subject to the control of the states. The states also held jurisdiction over municipalities, in the sense that all city and town governments derived their powers from what the states decided to give to (or take from) them. The powers of the states could be deployed progressively, as, for example, in insisting that capitalist development be subjected to the people's welfare, and regressively, as, for example, in legislating hierarchies grounded in race or sex into law. The vast majority of laws legitimating slavery from 1789 to 1863 were state laws; so, too, after the Civil War were the laws buttressing America's system of racial apartheid, a system formally installed in the 1890s and that governed all the states of the American South until the middle decades of the twentieth century.

Americans like to celebrate the brilliance of their Founding Fathers, but in truth, it must be said, the different theories of governance that came to animate the two levels of government did not result from a grand design. There was, to be sure, an element of design, apparent in the Tenth Amendment, the last of the Bill of Rights, which stated: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are

reserved for the States respectively, or to the people.” Through this Tenth Amendment, state governments acquired what legal scholars would later call “the residual power of government.” There was nothing at all residual about this power, however. The very refusal to name the powers of state governments meant that the potential power to be exercised by these state institutions was great. As James Madison himself wrote in the forty-fifth *Federalist*: “The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”<sup>5</sup> Another *Federalist*, Tench Coxe, laid out in 1788 far more specifically what state governments, under the Constitution, would be able to do:

create corporations civil and religious; prohibit or impose duties on the importation of slaves into their own ports; establish seminaries of learning; erect boroughs, cities, and counties; promote and establish manufactures; open roads; clear rivers; cut canals; regulate descents and marriages; license taverns; alter the criminal law; constitute new courts and offices; establish ferries; erect public buildings; sell, lease, and appropriate the proceeds and rents of their lands, and of every other species of state property; establish poor houses, hospitals, and houses of employment; regulate police; and many other things of the utmost importance to the happiness of their respective citizens.<sup>6</sup>

If part of this system emerged by constitutional design, other parts resulted from messy circumstances and compromises on the one hand and what we might call the Tocquevillian law of revolution on the other. The messy circumstances and compromises arose from the reluctance of the former British colonies now coming together to form the United States to subsume themselves under a new central authority. They had not liked their previous central authority (George III), and powerful groups within each colony-cum-state worried that there were those in the new republic who wanted to erect another authority like it. Moreover, most of these colonies had developed robust sets of governing institutions across the long period during which they had been under British rule, and many of the leaders of these colonies had come to believe that the very robustness of these institutions gave these colonies a claim on sovereignty. Colonial governing institutions had never been sovereign of course—this is why the American War of Independence had broken out in the first place. But the war for independence had, at the very least, raised the possibility that Virginia, New York, Pennsylvania, and South Carolina, among others, could become their own fully independent entities. The rebels in these colonies knew, of course, that they needed each other. No struggle against Britain would have succeeded without such inter-colonial cooperation. But lateral relations among the colonies were historically weak. British rule had bound each colony to the metropole as strongly as it had bound the colonies to each other. And, within each former colony, in the 1780s and 1790s, there was strong support for the notion that each should keep as much sovereignty as it could. This system of rule resulted not so much from a grand theory of politics as it did from the instinctive effort of semi-sovereign entities with long and independent histories to maintain their autonomy.<sup>7</sup>

What would the content of the power being reserved for the states actually look like? Here is where what I am calling the Tocquevillian law of revolution comes into play. Tocqueville's law of revolution is actually a law about the difficulty of effectuating revolution, of successfully turning the world as one knows it upside down. Tocqueville argued that even the most revolutionary societies, such as his own France of the 1790s, had great difficulty starting everything anew. The pre-revolutionary order, the *ancien regime*, therefore, necessarily came to play a far more important role in the new revolutionary society than anyone could have imagined it would. In France's case, Tocqueville argued, the heavy centralization so characteristic of French absolutism immediately and profoundly came to characterize the revolutionary French state.<sup>8</sup> In America's case, I want to argue, an approach to public law that had deeply shaped governance in early modern England and the colonies came to characterize everyday governance in the states of the new American republic.<sup>9</sup>

One can see this continuity particularly clearly in the doctrine of the public police that had long been rooted in the king's prerogative in England and that had worked its way into multiple North American colonial charters and then into the legal codes and jurisprudence of the new American states. Under England's public police doctrine, the king had not only the right but the obligation to bring order and welfare into his kingdom. The doctrine rested on the notion that the kingdom constituted a macro household with the king in the role of *pater-familias*. In 1769, William Blackstone, the premier codifier of eighteenth century English law, defined the "public police" in these terms: "the due regulation and domestic order of the kingdom...whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations." This doctrine, as Blackstone understood it, did not define the police function precisely or delimit its boundaries clearly. A ruler, like a father obliged both to discipline and "raise up" his subjects, had to be invested with authority that was broad and, in good paternalist fashion, versatile.<sup>10</sup>

The revolutionary generation of Americans repudiated kingship altogether, of course, as they went about creating their republic. But in confronting the problem of bringing order out of revolution, they increasingly drew on the pre-revolutionary public police doctrine that Blackstone had identified to shape governance in their new nation. This continuity is first apparent in nomenclature; by the early nineteenth century, American lawmakers and jurists were drawing on Blackstone's *Commentaries* to elaborate a "police power" doctrine that, they argued, was fundamental to the authority of each of the American states. The continuity is equally apparent in doctrinal substance. Like the public police, the "police power" embodied a breadth of activity that exceeds our modern, commonsense notion of what it is police do. Police power certainly entailed the customary tasks that we associate with policing, and that polities of all sorts must undertake: the protection of life, property, and public order. But in nineteenth century America, as in eighteenth century Britain, the police power embodied much more. In the words of nineteenth century Massachusetts Supreme Court Chief Justice Lemuel Shaw, it was the "power vested in the [state] legislature...to make, ordain and establish all manner of

wholesome and reasonable laws, statutes, and ordinances.... as they shall judge to be for the good and welfare of the commonwealth.”<sup>11</sup>

Shaw’s proximate authority for this understanding of the scope of his own state’s police power was Article IV of the Massachusetts Constitution.<sup>12</sup> But he both knew and acknowledged that this theory of governance had originated in the public police doctrine of eighteenth century England. Many powers associated with “the royal prerogative,” Shaw observed, had been “vested in the commonwealth [of Massachusetts]...together with all other royalties, rights of the crown, and powers of regulation, which had at any time previously been held and exercised by the government of England.”<sup>13</sup> For this theory to have survived the American Revolution, its proponents had had to transfer the sovereign authority formerly vested in the King of England to the people of Massachusetts. Massachusetts government, as a result, thrust together republican and royal doctrines amidst the hopes and chaos unleashed by revolution.<sup>14</sup> The result, overall, was a vastly different political system from what had existed in the mother country. But, in one critical respect, and here we see the Tocquevillian law of revolution at work, eighteenth century English political practice had survived intact: like the authority that inhered in the eighteenth century English king, the powers held by this nineteenth century American commonwealth were broad, capacious, and vague, as befitting an institution charged with bringing order to a polity conceived of as a public household.

The authority that Massachusetts and other states wielded was far-reaching. The “police power” authorized state governments not only to act on problems that posed an immediate and physical hazard to the community—say, a cow carcass rotting in the street that had to be removed, or a ship full of diseased sailors that needed to be quarantined. It also authorized state governments to act against anybody or any institution thought to offend public order or comity, as determined by democratic majorities. Police power allowed state governments to engage in extensive regulation of the economy, society, and morality, in both progressive and regressive fashions. It underwrote an American theory of governance that was collectivist and majoritarian rather than liberal. In this theory, liberal notions of individual rights played only a secondary role. Shaw understood this theory’s illiberal tendencies, acutely observing that it was not easy “to mark” the police power’s “boundaries, or prescribe limits to its exercise.”<sup>15</sup> We might affix the label “republican” to this theory, because of republicanism’s strong inclination to put public interest ahead of private right. But one could just as easily call it a theory without a name. It lacked a name because it emerged less from a grand design than from the messiness of the historical circumstances surrounding America’s political revolution. And it came to be lodged principally not in the central government but in the governments of the states.

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In the early decades of the nineteenth century, state governments deployed their police power across a broad front. In the economic realm, these governments promoted extensive internal economic improvements. Prior to 1860, in fact, state governments’ involvement in economic affairs exceeded that of the federal government, both in terms of total funds expended and the variety of projects undertaken. Antebellum state

governments, for example, spent far more on internal improvements, \$300 million, than did local governments (\$125 million) or the federal government (\$7 million).<sup>16</sup> They were more involved than was the federal government in the organization and direction of internal improvement projects. The outstanding example of this tendency, of course, was the Erie Canal, built by the state government of New York between 1817 and 1825 to connect the Great Lakes to the Hudson River and, by extension, the Midwest to the Atlantic Ocean. With the building of this canal, New York moved from its earlier disposition to support private enterprise with subsidies and other incentives to “direct funding and operation by the state” itself. This remained the model in New York until the early 1840s, by which time the state had constructed more than 600 miles of canals at a cost of more than \$50 million.<sup>17</sup> Pennsylvania had no one project of size and importance to rival the Erie Canal, but it did expend, from the 1820s through the 1840s, more than \$100 million dollars on a comprehensive internal improvement program of railroads, canals, and roads.<sup>18</sup> More common than public enterprise in Pennsylvania were mixed enterprises, in which the state partnered itself with a private bank, transportation company, or manufacturing enterprise, with both partners sitting on a project’s board of directors, equally responsible for investing money, hiring workers, and managing the project. By the early 1840s, Pennsylvania had invested over six million dollars in more than 150 such enterprises.<sup>19</sup>

Until the right of incorporation became generally available in the 1840s and 1850s, state governments also used their chartering rights to direct and control private investment. Entrepreneurs had to petition state governments for the privilege of incorporating themselves, and state governments often attached conditions to the charters it granted: through which cities, for example, a transportation company had to build its railroad; to what private ventures a bank was required to lend or grant its money; what standards manufacturers had to meet in producing their goods.<sup>20</sup> Finally, some state governments passed laws limiting the liabilities and punishment of debtors and regulating the conditions of workers by curtailing child labor and restricting the hours of adult labor. From his comprehensive study of Pennsylvania, Louis Hartz concluded that state government had “assumed the job of shaping decisively the contours of economic life.”<sup>21</sup>

This capacious police power also permitted states to extend their authority beyond economic matters to include education, social welfare, marriage, family life, and morality. Consider this list of the thirty-eight powers that the new city of Chicago, with the approval of the Illinois legislature, arrogated to itself in 1837 for the purpose of achieving a well-regulated society. They included the right to regulate “the place and manner of selling and weighing” commodities traded in the city; the power to compel merchants, manufacturers, and owners of any “unwholesome, nauseous house or place” to clean their workplaces and homes and to dispose of “any unwholesome substance;” the power to “direct the location and management of all slaughterhouses, markets, and houses for storing power;” the right to keep all public ways—streets, rivers, wharves, ports, town squares—free of encumbrances, ranging from boxes, carts, and carriages to loose herds of “cattle, horses, swine, sheep, goats, and geese” and large dogs; the right to regulate or prohibit all games of chance and practices of prostitution in the city; the right to ban any show, circus, or theatrical performance, or even innocent games of “playing at ball, or flying of kites” deemed repugnant to the general welfare; the regulation of all buying and selling of liquor

through licensing; the right to “abate and remove nuisances” and “to restrain and punish vagrants, mendicants, street beggars, common prostitutes;” the power to establish and regulate the city’s water supply; the power to operate a police force, survey the city’s boundaries, license ferries, provide lighting for the city, and “regulate the burial of the dead.”<sup>22</sup>

Impressive about this list is what it reveals about how far the governing powers of states went beyond the economic.<sup>23</sup> State and local governments did not just take it upon themselves to regulate commerce, manufacturing, and labor relations and, in the process to establish a “public economy.” They also made private (and non-economic) behavior—drinking, gambling, theatre-going, prostitution, vagrancy, the flying of kites—matters of public welfare and regulation.<sup>24</sup> The activities of state and local governments could produce positive consequences, in the sense of upholding the public interest over private claims; and they could yield pernicious results, in the sense of suppressing dissent and freedom. In the laws of states and municipalities, those most frequently targeted for surveillance, punishment, and reform were members of suspect groups—single women who lived outside patriarchal families, the poor, blacks, migrants, and immigrants.<sup>25</sup> That the scale of surveillance and punishment seemed to increase as the nineteenth century advanced suggests that it will not do simply to root this social and moral regulation in some Puritan past that was dark but receding. The impetus to regulation did have early modern European roots; that American states enlisted eighteenth century notions of the public police makes that clear. But this tradition was not just a relic or an annex to the main business of government. It was integral to the work of state governments, and its sway seemed to be increasing as the nineteenth century advanced.<sup>26</sup>

In the southern states, the police power doctrine was conscripted to legitimate slavery and to put state governments on the side of the slaveowners and the world they had made. The Constitution itself did not speak with one voice about slavery. That it did not explicitly endorse slavery, and nowhere mentioned it by name, as the Constitution of the Confederate States of America would do more than seven decades later, reveals a discomfort with the institution on the part of a substantial portion of delegates to the Constitutional Convention. Similarly, that these delegates wrote into the Constitution a date, 1808, at which the “importation of persons”—a euphemism for the international slave trade—would cease, suggests a diffuse expectation or hope that “in the flow of time,” as the historian Don E. Fehrenbacher has written, “slavery would disappear.”<sup>27</sup> Yet the Constitution also countenanced the fact that there were groups (“other Persons”) in America who were not free and who would count for less than “free persons” in determining the number of Congressional representatives assigned to each state. More significantly, it set forth no mechanism or timetable for pressuring states with slaves to move these individuals from partial to full personhood, from servitude to freedom.<sup>28</sup>

The net effect of the Constitution’s obliqueness on the slavery question was to leave decisions about the institution’s future in the hands of the states themselves. Within a generation of the Constitution’s ratification, states in the North had largely eliminated slavery while southern states deepened their commitment to it. The latter drew on the police power doctrine to justify their social order, arguing that a well-regulated society and

one that served the “people’s” welfare had to be one grounded in the enslavement of resident African populations. Using police power in this way impelled some southerners to strip Africans of their humanity, their personhood, altogether, which then made it possible for them to exclude blacks from the ranks of the “people” and the “people’s welfare.” Alternatively, they could grant Africans a childlike personhood status, one that then obligated them (the slaveowners) to look after their slaves’ needs in a paternalist fashion while withholding from slaves the right to have their own say in the “people’s welfare.” The police power doctrine could be employed in either of these ways to give legal sanction to the southern slave system.<sup>29</sup>

The Constitution did contain one serious, and, perhaps, fatal, challenge to this state-based system of slavery. The ten amendments comprising the Bill of Rights did not reproduce the distinction between “free persons” and “Other persons” laid out in Article I of the Constitution, nor the implicit acceptance of slavery therein implied. These amendments referred several times to the “right of the people,” and to actions that the government could not take against any “persons.” Since the Bill of Rights contained no reference to “Other persons” or some other group to whom its rights would not apply, what was to stop a black slave in America from claiming that he, as a person, had a right to have what the Bill of Rights promised to every individual in the United States: to be secure in his person, and in his life, liberty, and property? And what was to stop him from presenting a petition to this effect in court?<sup>30</sup>

The Supreme Court answered this question in the early nineteenth century in the process of establishing its role as arbiter of last resort of what the Constitution had left unclear. The Court ruled in 1833 that the Bill of Rights applied only to actions that *Congress* could and could not undertake in regards to the people. The First Amendment stipulated that “*Congress* shall make no law...abridging the freedom of speech or of the press,” language that the court interpreted narrowly to mean that it applied exclusively to the actions of Congress itself. Congress could pass no law abridging freedom of speech, press, or religion. Congress could pass no law suspending trial by jury or stripping an alleged lawbreaker of liberty and property without the due process of the law. But the First Amendment and Fifth Amendments said nothing about what *state legislatures* could do or not do in this regard. If Georgia wanted to pass a law abridging the freedom of the press, it could. If Virginia wanted to put into place a slave code stripping blacks of every right guaranteed by the ten amendments, it could. When the illiberalism of the states confronted the liberalism of the Bill of Rights in the antebellum years in the chambers of the Supreme Court, the former, more often than not, came out on top.<sup>31</sup>

By the same token, any state, North or South, was free to make the national Bill of Rights living law within its boundaries, which it could do by passing its own mini Bill of Rights. And every state was free as well to extend those rights to African Americans residing within its borders, which is what some northern states, such as Massachusetts, began to do in the 1820s and 1830s. Whatever law a state chose to pass would take precedence over the freedoms supposedly guaranteed by the national Bill of Rights. And a state would find justification for its actions in the right of the democratically-elected majority in that state to pass legislation “for the good and welfare of the commonwealth.”<sup>32</sup>



Of course, the governing efficacy of states did not always match their authority. By efficacy, I mean the states' ability to deploy their powers effectively, to accomplish in fact what statutorily they had set out to do. Were they successful in raising funds for their economic ventures and in paying back the debts from borrowing they incurred? Were they able to put skilled administrators in place? Did they deliver what they had promised constituents they would? Could they keep corruption in check? Even a cursory survey of state government actions reveals broad variability in efficacy. Variability came in two forms. The first was internal to each state. Some tasks of government were easier to carry out than others. It was simpler, for example, for a state to regulate marriage than it was to build and manage a mammoth canal. Applications for and issuance of marriage licenses were matters that could be administered rather straightforwardly. And, in regards to the surveillance of those already married, a state could easily supplement the work of its own marriage officials with the work of those in civil society who acted as lookouts, spotting those who had cohabited or married illegally or who had violated marriage vows through adultery or some other means.<sup>33</sup> Building a canal hundreds of miles long, on the other hand, involved assembling factors of production on a vast scale, and deploying these large aggregations of capital and labor through skills that few individuals at the time, either in public or private life, possessed. The opportunities for mismanagement and corruption in grand public works projects were substantial, especially in light of America's privatized election campaign system, to be discussed in Chapter Five. As instances of such mismanagement and corruption multiplied in the 1830s and 1840s, ardor for state-run projects of economic development cooled measurably. New York state, for example, ended its program of public works construction in 1842. Such projects were now increasingly seen as stretching the tasks of most state governments beyond their capabilities.<sup>34</sup> Indeed, a new reluctance to have governments take on major public works influenced Congress's decision in the 1860s to hand the task of building the transcontinental railroad to private firms (a subject to be taken up in Chapter Three). But the ardor for policing marriage did not decrease, nor was there ever a sense that this kind of surveillance was beyond the capacity of the states.

The second form of variability was one that manifested itself in differences *between* the states. States could and did pursue diametrically opposed policies: one might allow their citizens to drink while one might outlaw alcoholic trade and consumption; one might authorize divorce while another might prohibit it. One might sanction slavery while another abolished it. That states could make such profound decisions about how their citizens lived revealed the scope of their power. But as long as states made *different* decisions about ways of living, states faced a serious constraint on their power. They could not, after all, control movements into and out of their territory.<sup>35</sup> Only the federal government could control migration across borders, and it patrolled the national borders, not those separating New York from New Jersey or Ohio from Kentucky.

Because states were often in competition with each other for laborers, industry, investment, immigrants, and settlers, some were always seeking to draw the desired people and commodities by instituting what they understood to be attractive laws. New Jersey and Delaware, for example, would seek to draw industry by making public

incorporation easier in their states than in others. A number of states, beginning with Connecticut in the nineteenth century, made it easier than in most other states for unhappy couples to secure a divorce. Trans-Mississippi Western states in the late nineteenth century hoped to draw women by giving them the vote earlier than they gained it elsewhere and also by being among the pioneers in increasing the rights of women within marriage. Those suffering from their state's prohibition laws could choose to live close to another state that allowed them legally to quench their alcoholic thirst. The point should be clear: sometimes Americans could escape the police power regulatory regimes of their states by pulling up stakes.<sup>36</sup> Indeed, it may be that the very patchwork nature of this system of state rule encouraged the high levels of geographical mobility for which Americans have long been famous. It may be, too, that the very toleration by Americans of powerful and intrusive state governments rested on their conviction that an individual could always find a way to escape their clutches. Mobility, voting with one's feet, expressing one's political views through "exit," to use Albert Hirschman's famous phrase, arguably became a way of life in America.<sup>37</sup> If states individually were illiberal polities, one might argue, collectively they sustained an imperfect, but nevertheless recognizably pluralist, order. As long as one could choose one's state, one could live as one wished.

This is a plausible interpretation up to a point, even as we must acknowledge that whatever pluralism a polity of multiple states offered was still limited in profound ways. There was no nineteenth century state that legalized homosexuality, and precious few that gave women substantial rights within marriage. Such a view also underestimates Americans' attachment to place, most often defined by region: New England, the Midwest, the South and the West each developed a specific regional consciousness that anchored its inhabitants in important ways. Nevertheless, it seems true that the reality of open borders among the states, and the freedom to leave one state for another, did constrain the police power regimes in significant ways.

On many issues, states could do nothing about their residents who wanted to live elsewhere. But on one issue, they had to do something. This issue was slavery. Because the Constitution, as we have seen, permitted slavery but did not mandate it, the various states were free to make their own decisions about whether or not to sustain it. Sustaining it required writing the slave system, and mechanisms for enforcing it, into law. By the 1820s, the southern states had done so while the northern states had largely eliminated slavery from their midst. The latter, which would become known as the free states, therefore came to pose a mortal challenge to the slave states, in two ways. First, if the free states came to outnumber the slave states in quantity and population, a strong possibility in light of the large number of states beginning to emerge from the Louisiana Purchase, their representatives in Congress might persuade that sovereign legislative body to weaken slavery to the point of collapse. The slave states thus fought hard, through the Missouri Compromise and subsequent legislation, to maintain a rough balance between slave states and free states, and thus to preserve the slight but decisive advantage they possessed in the U.S. Senate.<sup>38</sup>

The second way in which the free states posed a challenge to the slave states was their function as a destination for runaway slaves. What was to stop massive numbers of

slaves from fleeing north and west? If enough took flight, the edifice of slavery in the South would crumble. Southern slaveowners had always understood the seriousness of this problem, which is why they had won adoption, at the 1787 Constitutional Convention, of a clause, Article IV, Section 2, stipulating that any person “held to Service or Labour in one State, under the Laws thereof, escaping into another,” must be returned to his or her rightful owner. This fugitive slave clause, reinforced by the Fugitive Slave Law of 1793, was meant to solve the problem of open borders between states by making it impossible for slaves to escape their servitude through flight.

These constitutional and legislative sanctions did not put federal authorities directly on the trail of fugitive slaves; instead they compelled state magistrates in a free state, when petitioned by slave catchers who had seized fugitives, to permit these catchers to leave the state with their “bounty.”<sup>39</sup> Thus, for example, judges in Ohio would be obligated by federal law to allow slave catchers from Kentucky to leave Ohio with the slaves they had seized and return them to the bluegrass state plantations from which they had fled.

This system worked for a time, but broke down in the 1830s and 1840s. Increasingly, abolition-minded northern magistrates refused to approve the removal of captured slaves, even when proper legal procedures had been followed. Alarmed by such refusals, southerners pushed through Congress a new fugitive slave law, as part of the Compromise of 1850, which dramatically increased the power of the central government in the rendition process, taking it out of the hands of northern state magistrates, and putting it in hands of a federal commissioner, his deputies, and federal circuit judges.<sup>40</sup>

Most southerners regarded the new fugitive slave law as a triumph. The deeper thinkers in their ranks, however, understood that it posed a problem for their conception of states rights. After all, relying on the federal government for enforcement revealed that the southern states, on their own, could not protect an institution that they held dear. The *Dred Scott* decision of 1857 further underscored this weakness. On the surface, this decision, too, seemed like a major victory for slaveowners. It declared that the Constitution had barred blacks from ever becoming citizens of the United States, which meant they would never have access to the rights of citizenship, including the right to marry, to vote, to sit on juries, to enter contracts, and to sue for breach of contract. But in making this ruling, the Supreme Court had created a category of national citizenship separate from state citizenship and over which the states had no control. Thus, even as it declared slavery to be perfectly compatible with the federal Constitution, the Court had adopted a jurisprudence that, over the long term, threatened to weaken the power of the states to shape membership of the national community of which they were, so they claimed, the primary parts.<sup>41</sup>

The repeated recourse by the southern states to the federal government—securing the passage of fugitive slave laws from Congress and persuading the Supreme Court that African Americans could never be citizens of the United States—also reveals, of course, the central state’s complicity in maintaining the institution of slavery. In light of this complicity, one might be tempted to argue that the notion of different theories of power inhering in the central government and the states loses its significance as a tool for explaining political

development in the United States. Why not argue that the two levels of government were moving in the same direction, their movement shaped not by political theory, liberal or republican, but by raw power, here understood as the influence exercised in national as well as in state politics by the slaveowners?

John C. Calhoun, one of the antebellum South's leading politicians and thinkers, thought a great deal about this question and came up with this answer: if the South itself ignored the distinction between the power that inhered in the federal government and the power that inhered in the states, it would place the survival of slavery at peril. Calhoun conceded that the vital interests of the South required that it use its raw power to bend the federal government to its will. But he insisted that this be done in ways that made federal intervention efficacious without granting the national government authority, in the form of a federal police power, that it might someday use to destroy the police powers of the states and the slave regimes that those powers authorized and protected.

Calhoun articulated this position in the 1830s, as part of a debate among southerners about what to do about the antislavery literature from the North that was inundating the South in the wake of Nat Turner's rebellion. An angry Andrew Jackson wanted to ban such mailings outright, viewing them as a deliberate strategy among abolitionists in the North to stir up further insurrection in the South. But Calhoun feared that a national censorship law of that sort would amplify the federal government's authority to regulate interstate commerce, and that such expanded authority might one day be used to regulate—and perhaps to ban—the interstate slave trade. Calhoun's sentiments, buoyed by First Amendment concerns, carried the day, and Congress declined to pass a federal censorship law. The substitute law seemed to be a victory for abolitionists (and Bill of Rights advocates), for it required southern post offices to accept all mail, even abolitionist mail, carried to them by northern mail carriers. But, in the hands of Amos Kendall, President Jackson's postmaster general, accepting the mail did not mean southern postmasters had to place it in the hands of those to whom it had been addressed. These postmasters could just lock this abolitionist literature away in a vault or a basement, its contents never to reach the eyes of any literate Southerner. Censorship would thus succeed without having to rely on the passage of a new federal law.<sup>42</sup>

Calhoun believed that this mail strategy offered an example of how the South could draw on federal power without increasing federal authority. This strategy was inherently unstable, of course; the election of a Whig or later, a Republican, president might lead to the appointment of a postmaster general who would not abide by the "Kendall rule." Thus it was incumbent upon southerners to look for other strategies for making the federal government, in the words of Don Fehrenbacher, "an agent of state sovereignty and not its master."<sup>43</sup> The Taney Court thought that its *Dred Scott* decision could serve southern interests in this way. That intervention was clumsy, however. Jurisprudentially, it failed to protect states rights; politically, it deepened divisions over slavery in the country as a whole and hastened the rush toward war, and then toward the destruction of the slave system that Taney hoped his decision in *Dred Scott* would protect. But even as the *Dred Scott* decision failed to accomplish its aim, the Calhoun strategy of conscripting an agency of the federal government, in this case the Supreme Court, to support the distinctive theory

of governance that inhered in the state stayed alive. Indeed, as we shall see, the strategy of turning to an institution of the central state, the Supreme Court in particular, to preserve the powers of the states would give the police power doctrine close to another century of life.<sup>44</sup>

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The American Civil War is often thought to mark a transition in the history of governance in America, with the victory of the North ensuring both the triumph of central over state authority and the transformation in conceptions of the scope and uses of central government power. The Thirteenth and Fourteenth Amendments to the Constitution directly challenged prevailing conceptions of states' rights, not only by rendering all state laws protecting slavery unconstitutional but also by transferring the power to grant citizenship and enforce its rights from the states to the central government. Moreover, the exigencies of war impelled the Union to take on tasks that it had previously considered to be beyond the scope of the national government's power: employing millions in its army, centralizing banking functions, and directing manufacturers and merchants to serve the government's need for food, ammunition, uniforms, artillery, guns, and munitions. One can also discern this centralization and expansion of federal power in the wartime introduction of national systems of taxation and paper currency, expenditures on scientific research and public universities, the building of the transcontinental railroad, and the distribution of federal lands to ordinary agricultural settlers through the Homestead Act of 1862. This growth in federal government power carried over into Reconstruction, nowhere moreso than in the Freedman's Bureau, a federal initiative to integrate emancipated slaves into the South's economic, social, and political life on terms of equality with whites. Also, Congress in the 1860s put into place a generous pension system for disabled veterans and the widows of dead soldiers that, by 1875, was paying benefits to more than 100,000 claimants. Though this pension system was temporary, in the sense that it would expire when the last of the Civil War veterans and their widows died, it nevertheless can be construed to have been, as Theda Skocpol has claimed, the first mass welfare system in the industrializing world.<sup>45</sup> The Freedmen's Bureau and the veterans' "welfare state" appeared to demonstrate the kind of work that a powerful federal government could do.

We must be careful, however, not to assume that the powers and activities assumed by the central government during war and reconstruction simply continued into the post-reconstruction period. In some areas, especially laws pertaining to corporations, the power of the central government continued to grow. But in other areas, such as laws governing marriage, sexuality, morals, race, free speech and social welfare, the power of the central state was rolled back and the authority of the states decisively restored. In delineating the new dividing lines between the central government and the states, the Supreme Court would once again play a decisive role.

Nowhere was the display of post-Reconstruction central government power more impressive than in affirmative steps taken to free private corporations from government regulation. Much of the control that governments had exercised over corporations across the first seven decades of American history had come from the individual states using the expansive police power doctrine at their disposal. The Supreme Court now set out to limit

that control, and later, to eliminate it altogether. The doctrine that it used to accomplish this aim came to be known as *laissez-faire* constitutionalism.

This initiative required some clever constitutional alchemy, most evident in the Court's declaration in 1886 that corporations were "persons" whose rights were to be protected by the Fourteenth Amendment, which declared that: "No state shall make or enforce any law which shall... deprive any person of life, liberty, or property, without due process of law." That magic was required to make this transmutation of a corporation into a person did not especially trouble the Supreme Court jurists, intent on increasing the scope of America's classically liberal regime. That the jurists had to engage in such sleight of hand maneuvering suggests that a political struggle was going on. Indeed one was. In the late nineteenth century, individual states were using the police power long granted them to encase the new private corporations mushrooming everywhere in public regulatory apparatuses. The states drew on their traditional police power for justification: they were elevating the people's welfare over that of powerful economic interests. And indeed, "the people," as we shall see in subsequent chapters—workers, farmers, and other plebeian groups—were the primary movers and shakers in this democratic movement. The new *laissez faire* jurisprudence sought to undercut this movement, "freeing" private corporations from democratic or commonwealth control.<sup>46</sup>

The advent of *laissez-faire* jurisprudence, as important as it was, should not cause us to presume that its triumph in American economic life was, by the 1880s, complete; nor should it cause us to overlook important policy areas where the shift in power to the central government set in motion by the Civil War either weakened after Reconstruction or was reversed altogether. In their rush to proclaim the triumph of a central state in postbellum America, scholars have often ignored the states. And thus many have allowed to go unnoticed an important development: the resurgence of the states after 1877. State legislatures passed thousands of laws during this time to regulate all kinds of economic and social activities, from conditions at the workplaces and in tenement houses to drinking, gambling, and other "vices." They established a wide variety of public institutions, ranging from labor bureaus, fish commissions, and liquor licensing agencies to public universities, public charities, and public health boards, few of which had existed prior to the Civil War. This institutional expansion also triggered rises in state employment and the professionalization of skilled occupations, such as statisticians, inspectors, and pharmacists, on which state governance had come to depend.<sup>47</sup> The laws passed by the states were not always effectively enforced, and the quality of the work done by the new agencies varied greatly from state to state. But this should not cause us to overlook the breadth and intensity of the campaign to rehabilitate the states.

Supreme Court justices legitimated this late nineteenth century surge in the scope and vigor of state governance by reinvigorating the police power doctrine for a postbellum age. Even those Supreme Court justices thought to be the advocates of *laissez-faire* constitutionalism wrote opinions in the 1880s that protected the police powers of the states in remarkably generous terms. As *laissez-faire*'s key architect, Associate Justice Stephen Field, argued in 1885: "Neither the [fourteenth] amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the

power of a State, sometimes termed its ‘police power,’ to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.”<sup>48</sup>

Indeed, as the legal historian Christopher Tomlins has noted, Field construed his advocacy of laissez-faire as “a very narrow path of inquiry,” confined to matters of economic freedom and regulation, and one that eschewed “critique of the state’s powers of moral-criminal police.”<sup>49</sup> Even within the field of economic regulation, Field was willing to acknowledge that the police power doctrine could still hold sway, and he looked favorably on states that passed legislation to limit the maximum hours of work and to offer compensation to those workers engaged in hazardous jobs.<sup>50</sup> In the Supreme Court’s willingness to rehabilitate the states’ police power doctrine in the 1880s and 1890s, we can discern the role that Calhoun had envisioned for an agency of the federal government in the 1830s: namely, that the federal government would become an agent of state sovereignty without becoming its master. To an impressive extent, the Court succeeded in restoring the boundary between federal and state power that the Civil War had temporarily obliterated, and in protecting the authority exercised by the states, and the police power doctrine thought to underlie it.

The Courts’ determination to restore considerable power to the states helps us to understand what we have long known and yet have had difficulty assimilating into our analysis of the history of government power in America—the explosion in the late nineteenth century of *state* legislation regulating race, sexuality, and morality in a society supposedly consecrated to laissez-faire and individual freedom. From the late nineteenth century through the first quarter of the twentieth—the supposed high point of America’s laissez-faire regime—many states exercised what in other societies would be regarded as sweeping forms of control over individual behavior: prohibition of the sale and consumption of alcohol; forced separation of the colored and white populations; and the banning of interracial marriage, polygamy, prostitution, and contraception.<sup>51</sup> The federal government participated in and encouraged this regulatory regime, outlawing polygamy in 1862, banning birth control materials from the U.S. mail in 1873, and prohibiting the transport of women across state lines for sexual purposes in 1911. But even as the federal government expanded its power to regulate morality during this time (a subject that the next chapter will take up), the power to legislate moral life remained largely within the province of the states, part of the authority they derived from their police powers. And the Supreme Court repeatedly upheld the states in their rights to exercise their police powers in this way.<sup>52</sup>

Segregation offers one of the most interesting examples of the Supreme Court’s decision to uphold an expansive conception of police power. Virtually every student of American history regards *Plessy v. Ferguson* (1896) as a landmark constitutional decision, one that legitimated a system of racial apartheid in the southern states for more than fifty years.<sup>53</sup> There will be no dissent from that point of view here. What remains unclear about this case is how the Supreme Court justified its decision to circumscribe the movement of African Americans and their ability to interact with whites at a time when the high court

was supposedly enshrining laissez-faire as the key principle of economic affairs. Less than ten years after *Plessy*, the court issued another landmark decision, *Lochner*, declaring that New York state had no right to pass a law limiting the number of hours that employees in bakeries could work per day. No state, the court insisted in *Lochner*, possessed the right to interfere with the freedom of workers to enter into employment contracts of their own choosing.<sup>54</sup> If this “freedom of contract” philosophy was so important to the court, how could it have denied this very freedom to African Americans living in conditions of segregation? Was not one of the principles of *Plessy* that state governments possessed the right to deny African Americans freedom of assembly, movement, and contract?

The explanation for this apparent contradiction is that the principle of laissez-faire was not yet, in the 1890s, an all-powerful constitutional principle.<sup>55</sup> When laissez-faire conflicted with the doctrine of police power in the late nineteenth century, the Court was still sometimes willing to set laissez-faire aside. In a series of civil rights cases culminating in *Plessy*, the Court not only ruled that states could deny African Americans freedom of movement, but also that states could deny corporations the freedom to do business as they pleased. The segregationist transportation laws passed by states such as Louisiana in the 1880s and 1890s were directed as much at regulating corporate behavior as at separating the races. These laws not only stipulated that the black and white races had to be separated on all railroad passenger cars. They also required railroad corporations to provide separate carriages on every train running through the states in question.

Prior to *Plessy*, railroad corporations had determined for themselves whether or not to offer separate railroad coaches for blacks and whites. The Interstate Commerce Commission (ICC) had begun ruling in the 1880s that if railroads chose to segregate black and white passengers, they had to provide the former with car accommodations that were substantially equal to those they were offering whites. But the ICC did not require railroads to segregate passengers by car. Thus, the racial riding policies adopted by railroads varied depending on the train route, the numbers of white and black travelers using a particular train, and other business considerations. On routes traveled by few black passengers, for example, railroads did not provide separate cars, preferring to accommodate an African-American individual here and there through informal segregationist arrangements within single cars. State segregationist ordinances in Louisiana and elsewhere in the 1890s deprived railroad corporations of this flexibility in regard to racial seating schemes. The freedom of corporations to make decisions that were in their own profit-maximizing interests had succumbed to what legal historian Barbara Young Welke has called the “expanded police power of the state to legislate on behalf of the health, safety, and welfare of its citizens.” This impulse to put the “people’s welfare” ahead of corporate privilege was the same one, Welke argues, that would soon animate progressivism. Significantly, the states were the original architects of Progressivism, not the federal government, and they drew their justification from a reinvigorated conception of the states’ police power.<sup>56</sup>

The persistence of the states’ police power can be discerned equally well in matters pertaining to interracial marriage. The regulation of marriage had always been regarded as lying within the authority of the states. In the early to mid-nineteenth century, movements



arose to enhance the freedom of individuals to choose their marriage partners, which meant treating marriage as a contract freely undertaken by two individuals and not as a civic act in which government, on behalf of the people of that state, took an interest. This tendency marked the increasing sway of liberal, Bill of Rights, principles in personal life. It is not accidental that this tendency became more pronounced as the federal government sought to increase its power *vis a vis* the states during the period of the Civil War and Reconstruction. But a reaction against this liberal approach gathered force in the last third of the nineteenth century amidst growing fears that emancipation, urbanization, and immigration were creating general social disorder, too many worrisome sexual and marital unions, and too many mixed blood offspring.<sup>57</sup>

Nowhere was this reaction more apparent than in the strengthening of state laws outlawing interracial marriage. These laws were not new in the second half of the nineteenth century, as colonial and state governments had been regulating interracial unions almost from the time that African slaves first had been brought to North American shores. Emancipation and Reconstruction had temporarily created a more favorable climate for legalizing interracial romance and marriage. But, by 1882, the U.S. Supreme Court declared that “the higher interests of society and government” permitted a state to exercise its police power to regulate both sexuality and marriage as it saw fit.<sup>58</sup>

With this sanction from on high, more than twenty states and territories, between the 1880s and the 1920s, strengthened their bans on interracial sex and marriage or added new ones. The most comprehensive and repressive such law came in 1924, in Virginia, a statute that one historian has labeled “the most draconian miscegenation law in American history.”<sup>59</sup> These laws appeared not only in Southern states but in Northern and Western ones as well, meaning that elements of the segregationist order should be seen as national not simply sectional. Many states extended the prohibition on intermarriage from whites and blacks to whites and Asians and whites and Native Americans. This is what the 1924 Virginia law had done.

The Supreme Court showed a similar deference to state police powers in the case of the First Amendment, and its guarantees regarding freedom of speech. The federal government could not curtail this freedom, except in the most extreme and temporary of circumstances, usually as defined by war. But states could, and, when they did, the Supreme Court did not object. Indeed, as the political historian William Leuchtenberg has observed, during the years when the Court was developing its “liberty of contract” jurisprudence, “it did not perceive free expression to be an aspect of ‘liberty.’” Those justices who were willing to dissent from this view, such as John Marshall Harlan, were in a small minority. A few others, such as Oliver Wendell Holmes, were beginning to express discomfort with the states’ disregard of First Amendment rights. But though one can discern in this discomfort the genesis of a free speech position for which Holmes would later become celebrated, he was still two decades away from asserting this position vigorously in court debates. Thus, Holmes voted with a large Supreme Court majority in 1907 to uphold the sentence of a Denver editor who had been convicted of contempt in state court for his editorials criticizing the rulings of Colorado’s judiciary. Harlan issued a sharp dissent, defending the freedom of the press as fundamental and burnishing his

reputation as the Court's leading civil libertarian before that term was even being used. But his was a lonely position on the early twentieth-century Court.<sup>60</sup>

Only in the 1920s did the Supreme Court begin to get serious about drawing limits on the interference by state governments with the rights of American citizens to free speech and to carve out a sphere of private life that no government could touch. A new regard for the individual and for his (and her) integrity had been slowly taking shape in a long brewing cultural revolt against Victorianism. And the indiscriminate violation of personal liberties that defined World War I for America on its homefront (a subject that Chapter Four will take up) likewise triggered, in the 1920s, a profound rethinking of the relationship of the individual to his or her governments. This was the moment when the American Civil Liberties Union was born, and when the phrase "civil liberties" gained prominence in American politics.

This cultural and sea change penetrated the walls of the America's premier hall of justice and began to influence the justices' deliberations.<sup>61</sup> That change was in the air first became apparent in a 1923 case in which the Court articulated its deep commitment to the principle of individual rights. Every individual, the Court declared in this decision, should have the right "to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, [and] to worship God according to the dictates of his own conscience."<sup>62</sup> In 1925 the Court declared in another case before it that "freedom of speech and of the press—which are protected by the first Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."<sup>63</sup>

This 1925 declaration that the states could not "impair" the Fourteenth Amendment did not much help the man, Benjamin Gitlow, whose case the Supreme Court was then reviewing. Gitlow was a left wing socialist imprisoned in 1920 for writing a revolutionary manifesto calling for the destruction of the "parliamentary state." Even as the Supreme Court went on record supporting the freedom of speech as fundamental right, it declined to reverse Gitlow's conviction (five to ten years in jail). But historic change did come in 1931, when the Court overturned two convictions in state courts, one of a left wing camp counselor in California who had her charges singing the praises of communism while raising the Soviet flag every morning and another of a right wing Minnesota newspaper editor who filled his paper with anti-semitic diatribes. No matter how offensive other Americans might find these examples of speech to be, these two individuals, declared the Court, could not be punished by state censorship laws. "It is no longer open to doubt," wrote the new chief justice, Charles Evan Hughes, "that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the fourteenth amendment."<sup>64</sup>

Even this 1931 victory was partial, however, for the Court was not yet ready to put aspects of personal life other than speech under the protection of the Bill of Rights and Fourteenth Amendment. Thus, for another thirty six years after this 1931 ruling, the Supreme Court upheld state laws banning racial intermarriage, thereby refusing to

implement its 1923 declaration that the freedom to marry a spouse of one's own choosing was a fundamental right that no state government could abrogate. Until 1967, the power to ban racial intermarriage was deemed to lie well within the police power of state governments to regulate society in the people's interest. Until that almost exact same moment as well, this police power was interpreted by the courts to mean, too, that state governments possessed the right to control women's bodies and reproduction by banning contraception and abortion.<sup>65</sup> State legislatures likewise possessed the right to criminalize homosexuality and a variety of other so-called "unnatural" sexual acts. If the Supreme Court had bestowed a fundamental charter of liberties on artificial persons—the corporations—in the late nineteenth century, it still granted no such charter of freedoms to actual living and breathing individuals. In the most personal decisions regarding how to live one's life—for example, whom to choose as a marriage partner—real individuals remained subject to the police power doctrine of the states for a hundred years after the Civil War's conclusion.

Despite the Court's foot dragging, it is nevertheless plausible to argue that the two 1931 free speech decisions inaugurated a critical transition extending through the 1960s during which the courts unevenly, hesitatingly, but steadily carved out a sphere of individual rights that no government, state or federal, could touch. Legal scholars refer to this longer process of change and adaptation as one of "incorporation" through which the federal government compelled the states to recognize the primacy of individual rights set forth in the Constitution, the Bill of Rights, and the Fourteenth Amendment. In the process, the central government diminished, and then largely vanquished, the police powers of the states. Indeed, we can say—and a future chapter will make this argument—that events in the 1960s decisively broke the states' police power.<sup>66</sup> But what impresses one about this story is how long it took to create a sphere of inviolate rights and autonomy and how resistant state governments and the federal courts long were to its claims. It took the Supreme Court 142 years (1789-1931) after the ratification of the Constitution to put its full power behind what were arguably the two most important rights in the Bill of Rights—freedom of speech and the press. And it took this court 178 years to declare that individuals could not be barred for reasons of race from marrying individuals of their own choosing.

Legal scholars have tended to be nonchalant about how agonizingly slow the process of incorporation really was. This posture is discernible even in scholars who have written incisively about the process of incorporation. Thus William Leuchtenberg refers to the freedoms secured for individual Americans in the 1960s as America's Second Bill of Rights.<sup>67</sup> No. This 1960s moment was not about a Second Bill of Rights. Rather, this moment was about securing America's first Bill of Rights, more than 170 years after it had supposedly become the law of the land.<sup>68</sup>

Possessing inalienable rights was supposed to mean that no government could take those rights away. But under the police power doctrine, it turns out, state governments could regulate, even obliterate, many of these rights, for much of American history, from the beginning of the nation until the eve of its bicentennial. The liberal doctrine of governance enshrined in the national Bill of Rights eventually, as we shall see, did defeat

the illiberal doctrine that animated politics in the states. But for three quarters of American history it mostly did not. Until that moment of conquest, America was neither liberal or illiberal. Rather, and paradoxically, it was both: a polity that promised individuals great freedom while it also encased these individuals in systems of extensive control. An examination of the states, and their police power, helps us to understand how this paradox became institutionalized in law and jurisprudence across three quarters of American history.

## Notes (incomplete)

<sup>1</sup> This is, of course, a play on the famous phrase and book authored by Theda Skocpol and her colleagues. See Theda Skocpol, Dietrich Reuschmeyer, and Peter B. Evans, *Bringing the State Back In* (New York: Cambridge University Press, 1985).

<sup>2</sup> See, for example, Daniel J. Elazar, *American Federalism: A View from the States*, 2<sup>nd</sup> ed. (New York: Crowell, 1972); Morton Grodzins, *The American System: A New View of Government in the United States*, ed. Daniel J. Elazar (Chicago: Rand McNally, 1966).

<sup>3</sup> William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill, NC: University of North Carolina Press, 1996), 46, 80.

<sup>4</sup> J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975); Quentin Skinner; Gordon Wood, *Creation of the American Republic, 1776-1787* (Chapel Hill, NC: University of North Carolina Press, 1969). The literature on republicanism is vast. For reviews and syntheses, see Robert Shalhope, "The Emergence of an Understanding of Republicanism in Early American Historiography," *William and Mary Quarterly* 29 (1972), 49-80; Daniel T. Rodgers, "Republicanism: The Career of a Concept," *Journal of American History* 79 (1992), 11-38; Ira Katznelson and Andreas Kalyvas, *Liberal Beginnings: Making a Republic for the Moderns*, (New York: Cambridge University Press, 2008).

<sup>5</sup> Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: New American Library, 1961), 292-293.

<sup>6</sup> Quoted in Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996), 192.

<sup>7</sup> sources on the experience of colonies as governing entities reluctant to give up their power will be added.

<sup>8</sup> Alexis de Tocqueville, *The Ancien Regime and the French Revolution*, translated and edited by Gerald Bevan (London: Penguin Books, 2008).

<sup>9</sup> For a history particularly sensitive to the balance of change and continuity across the revolutionary divide, see John L. Brooke, *Columbia Rising: Civil Life on the Upper Hudson from the Revolution to the Age of Jackson* (Chapel Hill, North Carolina: University of North Carolina Press, 2010).

<sup>10</sup> William Blackstone, *Commentaries on the Laws of England* (Dublin: Printed for John Exshaw, Boulter Grierson, Henry Saunders, Samuel Watson, Elizabeth Lynch, and James Williams, 1769), pp. ... More generally see Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005); Santiago Legarre, "The Historical Background of the Police Power in America," *Journal of Constitutional Law* 9 (2007), 745-96; Michael J. Braddick, *State Formation in Early Modern England, c. 1550-1700* (New York: Cambridge University Press, 2000); Gordon J. Schochet, *Patriarchalism in Political Thought: The Authoritarian Family and Political Speculation and Attitudes Especially in Seventeenth Century England* (New York: Oxford University Press, 1975); Steve Hindle, *The State and Social Change in Early Modern England, 1550-1640* (New York: St. Martin's Press, 2000); Marc Raeff, "The Well-Ordered Police State and the Development of Modernity in Seventeenth- and Eighteenth-Century Europe: An Attempt at a Comparative Approach," *American Historical Review* 80 (1975), 1221-43; John L. Brooke, "Patriarchal Magistrates, Associated Improvers, and Monitoring Militias: Visions of Self-Government in the Early American Republic, 1760-1840," in Peter Thompson and Peter S. Onuf, eds., *State and Citizen: British America and the Early United States* (Charlottesville: University of Virginia Press, 2013), 178-217.

<sup>11</sup> *Commonwealth v. Alger*, 7 Cush. 53 (Mass., 1851), 85.

<sup>12</sup> Cite Mass Constitution.

<sup>13</sup> Ibid., 93.

<sup>14</sup> That royal doctrines partially underlay the powers possessed by the states helps us to understand what recent critics of the republican tradition have pointed out: how stalwart nineteenth century advocates of republicanism seemed to have little trouble reinscribing hierarchy into their governing practices. Thus, in the early nineteenth century, many republican stalwarts had little difficulty justifying slavery or arguing for women's servile status. The "people" whom republicanism most clearly empowered were white men who either were, or could look forward to becoming, heads of household. With power went responsibility. And just as the King of England was obligated to look after his kingdom, so, too were America's white men required to look after their little kingdoms. See Linda Kerber, *Women of the Republic: Intellect & Ideology in Revolutionary America* (Chapel Hill, NC: University of North Carolina Press, 1980). On republicanism and slavery, see David Roediger, *Wages of Whiteness, rev. ed.*, (New York: Verso, 1999). See, also, Laura Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-revolutionary South* (Chapel Hill, NC: University of North Carolina Press, 2009).

<sup>15</sup> *Commonwealth v. Alger*, 7 Cush. 53 (Mass., 1851), 85.

<sup>16</sup> Goodrich, *Government Promotion of American Canals and Railroads* (New York: Columbia University Press, 1960), 268. The \$7 million figure somewhat underestimates federal contributions because it does not count federal land or federal budget surpluses distributed to the states. But even if these transfers are included, the total federal government contribution would still not approximate the cumulative expenditures of the states.

<sup>17</sup> L. Ray Gunn, *The Decline of Authority: Public Economic Policy and Political Development in New York, 1800-1860* (Ithaca, NY: Cornell University Press), 37, 14.

<sup>18</sup> Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* (Cambridge, MA, Harvard University Press, 1948), 14.

<sup>19</sup> Ibid., 89, 290.

<sup>20</sup> Ibid., 46-47, 291; Oscar and Mary Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861* (New York: New York University Press, 1947), 53-193. In Massachusetts, according to the Handlins, the move away from charters as privileges to charters as a basic right available to all applicants had begun somewhat earlier than it did in Pennsylvania, in the 1820s.

<sup>21</sup> Reference something on corruption here? Hartz, *Economic Policy and Democratic Thought*, 292, 289. In addition to the works already cited, see, also, Harry N. Scheiber, "Government and Economy: Studies of the 'Commonwealth' Policy in Nineteenth-Century America," *Journal of Interdisciplinary History* 3 (Summer 1972), 135-51; Milton Heath, *Constructive Liberalism: The Role of the State in the Economic Development of Georgia to 1860* (Cambridge, MA: Harvard University Press, 1954); James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, WI: University of Wisconsin Press, 1956); Goodrich, *Government Promotion of American Canals and Railroads*; Harry N. Scheiber, *Ohio Canal Era: A Case Study of Government and Economy, 1820-1861* (Athens, OH: Ohio University Press, 1969); Lee Benson, *Merchants, Farmers, and Railroads: Railroad Regulation and New York Politics, 1850-1887*. (Cambridge, MA: Harvard University Press, 1955).

<sup>22</sup> This list is drawn from Novak, *The People's Welfare*, 3-6.

<sup>23</sup> In many instances it was local governments that passed these kinds of laws. But, legally, local governments (as the example of Chicago demonstrates), received their power to regulate the people's welfare from the state governments, which were authorized to charter and oversee them.

<sup>24</sup> Robert C. Allen, *Horrible Prettiness: Burlesque and American Culture* (Chapel Hill, NC: University of North Carolina Press, 1991), and Paul Johnson, *A Shopkeeper's Millenium: Society and Revivals in Rochester, New York, 1815-1837* (New York: Hill and Wang, 1978).

<sup>25</sup> The power of communities was felt not just in the regulation of these activities but in the manner in which offenders were punished. In 1853, the overseers of the poor in Portland, Maine, placed two single women, a mother and a daughter, in a workhouse because they were alleged paupers "living a dissolute, vagrant life' whose house was 'reputed to be a house of ill-fame.'" The accused women received no opportunity to defend themselves; they had no lawyer and were given no trial. They were simply arrested and committed indefinitely. Novak, *The People's Welfare*, 168. See, also, Kunal M. Parker, "Citizenship and Immigration Law, 1800-1924: Resolutions of Membership and Territory," in Michael Grossberg and Christopher Tomlins, eds., *The Cambridge History of Law in America*, Vol. II, *The Long Nineteenth Century (1789-1920)* (New York: Cambridge University Press, 2008), 168-203.

- <sup>26</sup> Oscar and Mary Handlin introduced the phrase, “humanitarian police state,” to describe the moral surveillance undertaken by Massachusetts local and state authorities in the 1840s and 1850s. The Handlins did not explain why they chose this seemingly anachronistic phrase to describe the scope of state rule, but perhaps they were trying to stress the state’s modern character. Handlin and Handlin, *Commonwealth*, 218.
- <sup>27</sup> Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government’s Relations to Slavery*, completed and edited by Ward M. McAfee (New York: Oxford University Press, 2001), 29.
- <sup>28</sup> *U.S. Constitution*, add specific articles and sections. Fehrenbacher, *Slaveholding Republic*, passim.
- <sup>29</sup> Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill, NC: University of North Carolina Press, 1981). Add other sources on use of police power to legitimate slavery.
- <sup>30</sup> *U.S. Constitution. Amends. I-X*.
- <sup>31</sup> *Barron v. Baltimore*, [32 U.S. \(7 Pet.\) 243](#). See, also, William E. Leuchtenberg, “The Birth of America’s Second Bill of Rights,” in Leuchtenberg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995), 237-258.
- <sup>32</sup> On extension of rights to free blacks in Massachusetts, see Stephen Kantrowitz, *More than Freedom: Fighting for Black Citizenship in a White Republic, 1829-1889* (Penguin Press, 2012).
- <sup>33</sup> In some places of course, marrying couples could escape the eye of the state, or win a community’s tacit approval of a marriage, say across the color line, formally barred by law. See, Daniel J. Sharfstein, *The Invisible Line: Three American Families and the Secret Journey from Black to White* (New York: Penguin Press, 2011); Edwards, *The People and Their Peace*. For a comprehensive history of marriage law and practices and how they were changing across the nineteenth century, see Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* (Chapel Hill, NC: University of North Carolina Press, 1985.)
- <sup>34</sup> Gunn, *Decline of Authority*, 169; John Joseph Wallis, “Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842-1852,” *Journal of Economic History* 65 (2005), 211-56. On the scarcity of skills to manage large scale enterprises in the early nineteenth century, see Sidney Pollard...
- <sup>35</sup> Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, MA: Harvard University Press, 2000).
- <sup>36</sup> *Ibid.*, especially chapter 1.
- <sup>37</sup> Albert Hirschman, *Exit, Voice, Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970).
- <sup>38</sup> Adam Rothman, “The ‘Slave Power’ in the United States, 1783-1865,” in Steve Fraser and Gary Gerstle, eds., *Ruling America: A History of Wealth and Power in a Democracy* (Cambridge, MA: Harvard University Press, 2005), 64-91.
- <sup>39</sup> Fehrenbacher, *Slaveholding Republic*, chapters 2 and 7.
- <sup>40</sup> *Ibid.*, chapters 7-8.
- <sup>41</sup> *Ibid.*, chapter 9; Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978); Paul Finkelman, *Dred Scott v. Sandford: A Brief History with Documents* (Boston: Bedford St. Martin’s, 1997).
- <sup>42</sup> Richard K. Cralle, ed., *Reports and Public Letters of John C. Calhoun*, Vol. V (New York: D. Appleton and Co., 1888), 200-202; Fehrenbacher, *Slaveholding Republic*, chapter 10;
- <sup>43</sup> Fehrenbacher, *Slaveholding Republic*, 302.
- <sup>44</sup> Finkelman, *Dred Scott*; Harold W. Thatcher, “Calhoun and Federal Reinforcement of State Laws,” *American Political Science Review* 36 (1942), 773-80.
- <sup>45</sup> Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Harvard University Press, 1992), 105-115.
- <sup>46</sup> *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 356 (1886); *Wabash, St. Louis, and Pacific Railway Company vs. Illinois*, 118 U.S. 557 (1886); *Chicago Milwaukee and St. Paul Railway Co. v. Minnesota*, 134 U.S. 418 (1890); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). See, also, Edward S. Corwin, “The Supreme Court and the Fourteenth Amendment,” *Michigan Law Review* 7 (1908-1909), 643-772; Charles W. McCurdy, “Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897,” *Journal of American History* 61 (March 1975), 970-1005; Christopher Tomlins, “To Improve the State and Condition of Man: The Power to Police and the History of American Governance,” *Buffalo Law Review* 53 (2005-2006), 1215-1271; Howard J. Graham, *Everyman’s Constitution: Historical Essays on the Fourteenth Amendment, the ‘Conspiracy Theory,’ and American Constitutionalism* (Madison, WI: University of Wisconsin Press, 1968); Jack Beatty, *Age of Betrayal: The Triumph of Money in America, 1865-1900* (New York: Knopf, 2007), chapter 6; Sidney Fine, *Laissez Faire and the General Welfare State: A Study in*

*Conflict in American Thought, 1865-1901* (Ann Arbor, MI: University of Michigan Press, 1956); Morton Keller, multiple works; Richard Franklin Bensel, *The Political Economy of American Industrialization, 1877-1900* (New York: Cambridge University Press, 2000).

<sup>47</sup> William R. Brock, *Investigation and Responsibility: Public Responsibility in the United States, 1865-1900* (New York: Cambridge University Press, 1984). Another astute English observer, James Bryce, had noted the scope and vitality of late nineteenth century state governments almost 100 years earlier. See Bryce, *The American Commonwealth*, 3rd ed., Vol. II (London: Macmillan, 1908), 535-548.

<sup>48</sup> Opinion written for *Barbier v. Connolly*, 1885.

<sup>49</sup> Tomlins, "To Improve the State and Condition of Man," 1248-49.

<sup>50</sup> These regulations were necessary, Field once conceded, to help the "under fellow" gain "a show in this life." McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations," 979.

<sup>51</sup> Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000); Grossberg, *Governing the Hearth*; Laura Edwards, "Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth Century South," *American Historical Review*, 112 (2007): 365-393; Rachel Moran, *Interracial Intimacy: The Regulation of Race and Romance* (Chicago: University of Chicago Press, 2001); Martha Hodes, *White Women, Black Men: Illicit Sex in the Nineteenth-Century South* (New Haven, CT: Yale University Press, 1997); Paul S. Boyer, *Urban Masses and Moral Order in America, 1820-1920* (Cambridge, MA: Harvard University Press, 1978).

<sup>52</sup> Jill Elaine Hasday argues otherwise in "Federalism and the Family Reconstructed," *UCLA Law Review* 45 (1997-1998), 1297-1400. But the evidence in her article can be read to mean that after a surge in federal control during Reconstruction, the states reasserted their predominant control in the late nineteenth century.

<sup>53</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896). For a history of the case in the context of judicial interpretations, see Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910* (New York: Maxwell Macmillan International, 1993). See, also, Brook Thomas, "Introduction: The Legal Background," in Thomas, ed., *Plessy v. Ferguson: A Brief History with Documents* (Boston: Bedford Books, 1997), 1-38.

<sup>54</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>55</sup> For a trenchant analysis of the contradictoriness of liberal thought in America and the resulting entanglement of liberal and illiberal principles (and policies), see Desmond King, *In the Name of Liberalism: Illiberal Social Policy in the United States and Britain* (New York: Oxford University Press, 1999).

<sup>56</sup> Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920* (New York: Cambridge University Press, 2001), 351.

Another solution to the puzzle of how the same Supreme Court could have issued both the *Plessy* and *Lochner* rulings has come from the libertarian "law and economics" group led by Richard Epstein at the University of Chicago. Convinced that the true jurisprudence of the Supreme Court since the days of Marshall has been a laissez faire one, the law and economics scholars view *Plessy* as a "tragic misstep" that *Lochner* and other subsequent rulings began to remedy. They blame this misstep on the Court's infatuation with "sociological jurisprudence," a new approach to legal interpretation associated with Progressivism's rise, that relied not on felicity to constitutional principles but on the need to adapt law to public opinion and desires, or what the 1896 Supreme Court *Plessy* majority called the "established usages, customs, and traditions of the people." Because, as David E. Bernstein has argued, the court had "assimilated the contemporary social science notion that blacks and whites, as members of distinct races, were instinctively hostile to each other," it ruled that a state government endeavoring to keep the two races apart was acting well within the boundaries of its police power.

Many who read Bernstein, along with Epstein and other members of the law and economics group, will be rightfully skeptical of their claim that Progressivism is to blame for *Plessy* and that the problems of racial inequality would have been substantially solved had the Court only adhered to the superior constitutional regime of property, contracts, and personal liberty. Moreover, a careful reading of their writings on the place of *Plessy* the history of constitutional law reveals that Bernstein and Epstein themselves understand how much *Plessy* rested not on a new doctrine of sociological jurisprudence but on the Court's respect for the old doctrine of police power that inhered in state governments; indeed, their writings, unwittingly perhaps, draw our attention to the vitality of the police power doctrine in the late nineteenth century, and to how decisions such as *Plessy* ensured its centrality to conceptions of American governance for much of the twentieth century as well. See David E. Bernstein, "Philip Sober Controlling Philip Drunk: *Buchanan v. Warley* in Historical Perspective," *Vanderbilt Law Review* 51 (1997-1998), 797-879. Richard J.

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Epstein, "Lest We Forget: *Buchanan v. Warley* and the Constitutional Jurisprudence of the 'Progressive Era,'" *Ibid.*, 787-96.

<sup>57</sup> Grossberg, *Governing the Hearth*, 75-182; Cott, *Public Vows*; Edwards, "Status Without Rights."

<sup>58</sup> Quoted in Moran, *Interracial Intimacy*, 79.

<sup>59</sup> Peggy Pascoe, "Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America," *Journal of American History* 83 (June 1996), 49, 59; and Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (New York: Oxford University Press, 2009).

<sup>60</sup> Leuchtenberg, "America's Second Bill of Rights," 243.

<sup>61</sup> Footnote on changes challenging Victorianism.

<sup>62</sup> The 1923 ruling was *Meyer v. Nebraska*, 262 U.S. 390; quote is from p. 399. See, also, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Farrington v. Tokushige*, 273 U.S. 284 (1927).

<sup>63</sup> *Gitlow v. New York*, 268 U.S. 652 (1925), 666.

<sup>64</sup> *Near v. Minnesota*, 283 U.S. 697 (1931), 707.

<sup>65</sup> The decision overturning bans on miscegenation was *Loving v. Virginia*, 388 U.S. 1 (1967); the one overturning bans on contraception was *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>66</sup> Martha Derthick, "Crossing the Thresholds: Federalism in the 1960s," in Derthick, *Keeping the Compound Republic: Essays on American Federalism* (Washington, D.C.: Brookings Institution Press, 2001), 138-52; Corwin, "The Passing of Dual Federalism," *Virginia Law Review* 36 (1950): 1-24.

<sup>67</sup> Leuchtenburg, "America's Second Bill of Rights."

<sup>68</sup> Dubber is an important exception to this complacency, and representative of a new school of "police power" studies who have sought to move this discussion to the center of discussions of American law. Dubber, *The Police Power*.