

# The Unsustainable American State

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## The Resilient Power of the States across the Long Nineteenth Century

An Inquiry into a Pattern of American Governance

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The classic interpretation of the American state treats the nineteenth century as an era of a weak, or laissez-faire, government and charts the transition, in the twentieth century, to an era of strong, interventionist public rule. Within academic discourse, this transition is usually treated in positive terms, as it is thought to have shifted power in American society away from elite private interests and toward the poor, the disadvantaged, and the public more generally.<sup>1</sup> It is a good bet that a majority of scholars who teach the second half of the American history survey course use this weak-to-strong, private-to-public-interest, interpretation of state behavior as one of their key narrative and analytic themes. I know I do. A version of this interpretation is also popular beyond the academy. Liberals, of course, celebrate the establishment of a large regulatory state in the 1930s and 1940s while conservatives condemn it; but few in either camp seem to doubt that this portentous transformation occurred. Well-regarded scholars are still elaborating new versions of this argument, as Bruce Ackerman has done in *We the People: Transformations*, where he calls the New Deal a “revolution” in public governance, in much the same way that Carl Degler did forty years ago.<sup>2</sup>

Numerous political and social historians in the last twenty years, however, have challenged the accuracy of this classic interpretation. Some, such as Barry D. Karl and Anthony J. Badger, have claimed that the New Deal state, for example, was far slower to implement collective forms of business regulation and much more solicitous of private interests than we had previously thought.<sup>3</sup> Linda Gordon, Alan Dawley, and Alice Kessler-Harris, among others, have argued that the American welfare state, even at its apogee, was weaker and more regarding of liberty and individualism than virtually any other state in the industrialized West, always reluctant to aid the able-bodied,

childless, and non-white poor.<sup>4</sup> And Steve Fraser and Howell Harris have shown how difficult it was for labor to penetrate the citadels of state power and how fleeting were the moments of genuine working-class influence on state policy.<sup>5</sup>

The classic narrative of state transformation, from a weak to a strong institution, has also come under attack from nineteenth-century scholars, especially among those asking important questions about how weak and laissez-faire the nineteenth-century state really was. Stephen Skowronek, for example, discards the notion that the nineteenth century state was weak (or nonexistent), delineating the existence of a state of "courts and parties" that proved remarkably effective in executing the federal government's business.<sup>6</sup> William Novak, meanwhile, has shown how expansive and interventionist state and local governments were prior to the Civil War.<sup>7</sup> Skowronek, Novak, and others have shifted attention away from the legislative and executive branches of the federal state to other governing institutions: the judicial wing of the federal state, political parties, and state and local governments. They have asked us to dispense with the European notion of the state as a unitary institution (and as a centralized and bureaucratic one) without embracing the conclusion that the variety of institutions that we now recognize as comprising the American state caused chronic political fragmentation and weakness.

While the deconstruction of the old narrative of a weak-to-strong state is well advanced, the construction of a new narrative for understanding the American state across two centuries has proceeded more slowly. The more aware we have become about the complexity of the American state, the more difficult it is both to generalize about its institutional and functional character and to chart the course of its change over time. The larger goal of my work on the American state is to write such a history, one that is comprehensive both in its conception of what the American state has been (and how it has exercised power) and in its history of how that state has remained the same and/or changed over time. My technique in writing this history is not to try to encompass everything about this state in a single essay but to write discrete essays on key features of that state across what I call the long nineteenth century—from the 1790s through the 1930s. This chapter concerns the enduring importance of federalism in constituting the American state.

I argue that the powers possessed by state governments throughout the nineteenth and early twentieth centuries were more capacious, influential, and durable than we customarily recognize them to have been. Indeed, until and even into the New Deal, the persistence of the power of the states was an outstanding feature of American governance. This essay first considers the important role played by state governments in nineteenth-century economic development and regulation. It then extends the inquiry beyond the economy to include a consideration of the role of state governments in the

regulation of race, sexuality, and morality. With some notable exceptions, social scientists have generally done less work on these latter subjects than they have on economic regulation, labor relations, and social welfare—the hoary topics of American political development. Historians, meanwhile, have done more work on the cultural and social policies of the state but have been slow to assess the implications of this scholarship for an understanding of state power. One of the aims of this essay is to insert public efforts to regulate private life into the history of state building, in the belief that such an insertion will enrich our understanding of American governance.

The durability of the states as a force in economic, social, and cultural affairs can only be understood by reference to an expansive and constitutionally sanctioned doctrine of police power. Police power endowed state governments (but not the federal government) with broad authority over civil society for at least the first 150 years of the nation's existence. The Civil War had posed a sharp challenge to this doctrine and, for a time, it seemed as though Reconstruction would inter it. But in the late nineteenth century, state legislatures, backed by the federal courts, rehabilitated this doctrine to attack and, in many cases, to reverse, the centralization of power in the federal government that the Civil War had seemingly done so much to advance. Federalism finally did weaken in the 1930s and 1940s, but not until the 1960s and 1970s can we say that the central government had superseded the states as the premier center of political authority in America.

We have long known, even if we have had trouble remembering, that state governments played a pivotal role in nineteenth-century economic development, especially in the years prior to the Civil War. More than fifty years ago, the Social Science Research Council appointed a Committee on Research in Economic History to investigate the history of state government involvement in economic affairs. This work had a political purpose: namely, to demonstrate, at a time when the reforms of the New Deal had yet to be consolidated, that New Deal liberalism, with its emphasis on state intervention in economic affairs, had a distinguished pedigree. This Economic History Committee commissioned some of the most talented young scholars of the rising 1940s generation, including Oscar and Mary Handlin and Louis Hartz, to write histories of "politico-economic thought and action" in various states from the Revolution to the Civil War.<sup>8</sup> The works that the Handlins and Hartz produced on Massachusetts and Pennsylvania, respectively, provided rich evidence of the impressive scope of state government action in economic affairs in those years and inspired others, including Carter Goodrich, Lee Benson, and Harry Scheiber, to test and amplify their findings. The result, by the mid-1960s, was an impressive body of work on the activities of state governments prior to the Civil War.<sup>9</sup>

This literature's chief accomplishment was to show that 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>10</sup> They were more directly 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 in New York. While Pennsylvania had no one project of comparable size and importance, it did expend, from the 1820s through the 1840s, more than \$100 million on a comprehensive internal improvement program of railroads, canals, and roads.<sup>11</sup> More common than these examples of public enterprise 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 \$6 million in more than 150 such enterprises.<sup>12</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 they 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>13</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 limiting 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>14</sup>

This body of work's chief limitation was that it *underestimated* the true scope of state activity. Because Hartz, Benson, Goodrich, Scheiber, and others were so focused, in the best New Deal tradition, on the economy, they failed to perceive the power that states exercised in non-economic areas such as public health and safety, moral behavior, marriage, and immigration. In truth, state governments possessed a staggering freedom of action when compared to the carefully circumscribed orbit of federal government power. This freedom rested on a doctrine of "police power" that was rooted in both Anglo-American common law and continental European jurisprudence and was reinforced by the Constitution.

The doctrine of police power is so familiar to legal scholars that most simply assume its existence and its role in governance. To non-legal scholars, which includes the vast majority of historians of the United States, the doctrine is virtually unknown. In the words of nineteenth-century Massachusetts Supreme Court Chief Justice Lemuel Shaw, police power was the "power vested in the [state] legislature to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, . . . not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth."<sup>15</sup> The crucial phrase in Shaw's definition is the last, "for the good and welfare of the Commonwealth," which reveals a breadth of definition to police power that exceeds our modern, commonsense notion of what it is that police do. The "good and welfare of the Commonwealth" certainly entailed the customary tasks that we associate with policing: the protection of life, property, and public order. But, in nineteenth-century legal terms, it also included such tasks as: the direction of internal transportation improvements; controls on capital and labor; the building of schools, libraries, and other educational facilities; identification and regulation of proper moral behavior; town planning; and public health. As long as an activity could be associated with the public welfare and did not violate the Constitution, a state legislature could pursue it through social policy.

This view of governance, in the words of William Novak, "championed public good over private interest." It called for a polity well-regulated by government in which "no individual right, written or unwritten, natural or absolute" could be permitted to "trump the people's safety" or welfare.<sup>16</sup> It closely resembled what other scholars have called the ideology of "civic republicanism," and, like republicanism, it put faith in the ability of responsible, virtuous citizens to determine and agree on the public interest and *salus populi*, the people's welfare. From this perspective, the enjoyment of personal freedom and individual rights depended on the carefully regulated society that government would construct.<sup>17</sup>

Legal historians do not agree about the origins of this expansive police power doctrine or on its period of greatest influence. Novak locates its origins in traditions of Anglo-American common law and argues that it was influential throughout the period from 1789 to the Civil War.<sup>18</sup> Christopher Tomlins, on the other hand, asserts that its origins lie in eighteenth-century continental European philosophy, and that it held sway for only a brief moment, the 1770s and 1780s, when the various states established radically democratic governments with wide-ranging powers. Tomlins argues that James Madison, Alexander Hamilton, and other Federalist framers of the Constitution overturned this expansive notion of police power and, in the process, defined the common good in classically liberal terms—as inhering in the rights of individuals rather than in the welfare of the community as a whole.<sup>19</sup>

While Tomlins may be right to argue that the Constitution made classical liberalism the chief doctrine shaping the exercise of *federal* power, he seems to be on weaker ground in asserting that this liberalism determined the exercise of state government power as well. The Constitution used a deliberate language of enumeration and definition to limit the powers it granted to the federal government.

The powers it granted to the states, on the other hand, were vague and virtually unlimited. As the critical Tenth Amendment declared, "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."<sup>20</sup>

Through this Amendment, state governments acquired the power of general government or, as legal scholars would later call it, "the residual power of government." The very refusal to name the powers of state governments meant that the potential power to be exercised by these institutions was vast. State governments could undertake any activity not specifically reserved for the federal government or proscribed by the Constitution. 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>21</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>22</sup>

Thus did the Constitution buttress the wide-ranging doctrine of police power rooted in Anglo-American common law, republican ideology, and the heady experience of forming powerful and democratically controlled state governments in the 1780s. It would be a power that both the state and federal courts, for most of the nineteenth century, would honor as fundamental to the American system of governance.

This capacious police power permitted state governments to promote the extensive internal economic improvements that Hartz, the Handlins, Goodrich, and others described. But, as Coxe had already anticipated in the late eighteenth century, the power of state governments could extend far beyond economic matters to include education, social welfare, marriage,

family life, and morality. In one simple but telling list, Novak enumerates 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 the 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>23</sup>

Impressive about this list, and the analyses that Novak develops from it, is what it reveals about the extent of governance.<sup>24</sup> State and local governments did not just take upon themselves the power to regulate commerce, manufacturing, and labor relations and, in the process, to establish the kind of "public economy" or "commonwealth" that Hartz and the Handlins had discerned in their studies of Pennsylvania and Massachusetts. They also made private (and non-economic) behavior—drinking, gambling, theatergoing, prostitution, vagrancy, the flying of kites—matters of public welfare and regulation.<sup>25</sup> Much of the justification for this moral regulation rested on an old common law "nuisance" doctrine that allowed public authorities to act against anybody who was thought to offend public order or comity. In the early nineteenth century, the concept of nuisance expanded from addressing those problems that virtually anyone would agree presented a hazard to the community—a cow carcass rotting in the street, a ship full of diseased sailors—to acts that depended more on one's interpretation of proper moral behavior: drinking, gambling, theatergoing, prostitution, vagrancy.<sup>26</sup>

Given the role of community opinion in shaping public welfare, it is not surprising that those most frequently targeted for surveillance, punishment, and reform were members of suspect groups—single women who lived outside patriarchal families, the poor, blacks, and immigrants.<sup>27</sup> More surprising, perhaps, is that the scale of surveillance and punishment increased as

the nineteenth century advanced, a development that belies any interpretation that seeks to root this social and moral regulation simply in a dark but receding Puritan past. From the vantage point of the 1840s, the notion of a well-regulated society was modern, not ancient. Oscar and Mary Handlin, the only ones among the "commonwealth" school to grasp how far state government power extended beyond economic issues, 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.<sup>28</sup>

Novak documents this dark side of government power in antebellum America and shows, in good dialectical fashion, how its very force gave rise to an opposition—a campaign, popular and legal, for a recognition of fundamental rights to liberty and property that no commonwealth or government could take away. But Novak is also a republican and communitarian at heart who admires much of what the proponents of the well-regulated society aimed to do, especially in the area of political economy. And, thus, he is sometimes slow to perceive the ways in which individuals could evade this system of community control (by moving from town to town or from state to state) and how large economic interests were sometimes able to cloak their particular aims in the "public interest" and bend commonwealth power to their private ends.<sup>29</sup> Most seriously, he does not reckon sufficiently with slavery as an expression of a well-regulated society.

The Constitution permitted slavery, but the decision about the legitimacy of the institution was left for each state to decide for itself. The Southern states were convinced that a well-regulated society and one that served the "people's" welfare had to be one grounded in the enslavement of their resident African populations. Because they had stripped Africans of their humanity, white Southerners had little difficulty excluding them from the ranks of the "people" and the "people's welfare." In their hands, the extraordinary power vested by common law and the Constitution in the hands of state governments became "states' rights": a doctrine that they were willing to—and did—defend with their lives. Despite its limited focus on the issue of slavery, Novak's book actually helps us to understand the power of states' rights, for it was not just a thin rationalization for the practice of slavery (as many historians believe) but a version of the deeply rooted and much cherished tradition of state governance that, as Novak has shown, was powerful throughout the North as well in the antebellum years. This tradition could produce positive consequences, in the sense of upholding the public interest over private claims; and it could yield pernicious results, in the sense of suppressing dissent and freedom. But its power seems undeniable and

helps us to understand why abolishing slavery posed such a serious challenge to prevailing modes of American governance and to popular notions of public vs. private right. The Civil War, the emancipation of the slaves, and Reconstruction posed these challenges in acute form.

The Civil War is often thought to mark a transition in the history of the American state, with the victory of the North ensuring both the triumph of federal over state authority and the transformation in conceptions of the scope and uses of federal power. The Thirteenth and Fourteenth Amendments directly challenged prevailing conceptions of states' rights: the former did so through the emancipation of the slaves, which stripped tens of thousands of white southerners of human property hitherto protected by the laws of their states; the latter did so by transferring the power to grant citizenship and enforce its rights from the states to the federal 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, and the massive 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 more so than in the Freedmen's Bureau, a major 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, a number that, by 1900, would increase sevenfold. This was indeed, as Theda Skocpol claims, the first mass welfare system in the industrializing world.<sup>30</sup> The Freedmen's Bureau and the veterans' "welfare state" set precedents for the kind of work that a powerful federal government could do.<sup>31</sup>

Yet the end of Reconstruction in 1877, the dismantling of the Freedmen's Bureau, and the withdrawal of the federal government from efforts to ensure racial equality should caution us against drawing too straight a line of influence from 1863–1877 to the federal-state centralizing tendencies of the Progressive Era and New Deal, as some historians and social scientists have been inclined to do. Indeed, in what legal scholars regard as one of the key constitutional developments of the late nineteenth century, and what we may want to regard as an American Thermidor, the Supreme Court, in the 1870s and 1880s, *restored* to the states expansive notions of police power that

Reconstruction, and the Thirteenth and Fourteenth Amendments in particular, had taken away. Even those Supreme Court justices, such as Stephen Field and Rufus Peckham, thought to be the architects of a laissez-faire constitutionalism built on the Fourteenth Amendment's guarantees of due process and equal protection, wrote opinions in the 1880s that protected the police powers of the states in remarkably generous terms. As 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>32</sup> Field and his fellow justices only declared a state regulation illegal, in Fourteenth Amendment terms, when they deemed it to be "class" legislation—a law that improperly singled out a particular group (or "class") of people for preferential treatment.<sup>33</sup>

This orientation on the part of the Supreme Court legitimated a late-nineteenth-century surge in the scope and vigor of state governance. The legal definition of police power was as broad, even broader, than it had been in the antebellum years. 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>34</sup> The laws passed by the states were not always effectively enforced, and the quality of the work done by the new agencies varied from state to state. But this expansion in the reach of federalism easily passed constitutional muster.

The determination of the federal courts to protect the rights of states to exercise broad police powers helps us to understand what we have long known and yet have had difficulty assimilating to our analysis of "state" power—the explosion during the post-Reconstruction years of state legislation regulating morality, race, and sexuality 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>35</sup> The federal government participated and encouraged this repression, 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 morals' regulation during this time, 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>36</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>37</sup> 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 Court was supposedly enshrining laissez-faire as the key principle of economic affairs. This court was substantially the same one, after all, that less than ten years after *Plessy* issued the *Lochner* decision 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, possessed the right to interfere with the freedom of workers to enter into employment contracts of their own choosing.<sup>38</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 the all-powerful constitutional principle we have often assumed it to have been.<sup>39</sup> When laissez-faire conflicted with the doctrine of police power in the late nineteenth century, the Court was 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 the 1890s, railroad corporations 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. 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 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 this regulatory regime, not the federal government, and they drew their justification from a reinvigorated conception of the states' police power.<sup>40</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 laissez-faire in personal life. 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 and too many worrisome sexual and marital unions.<sup>41</sup> Nowhere was this reaction more apparent than in the strengthening of state laws outlawing miscegenation. These laws were not new in the second half of the nineteenth century, as colonial and state governments had attempted to regulate interracial unions almost from the time that African slaves had been brought to colonial shores. Emancipation and Reconstruction 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 sexual and marriage as it saw fit.<sup>42</sup>

With this sanction from on high, twenty states and territories, between the 1880s and the 1920s, strengthened their bans on interracial sex and marriage or added new ones, culminating in a 1924 Virginia statute that Peggy Pascoe has called "the most draconian miscegenation law in American history." These laws appeared not only in Southern states but in Northern and Western ones as well, confirming Desmond King's argument that 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.<sup>43</sup> As the repressive Virginia law was being debated and passed in the 1920s, the Supreme Court, in a series of cases having to do with coercive public school laws, was actually signaling its dissatisfaction with excessive interference by state governments in education and other aspects of family life. Every individual had the right, the Court declared in 1923, "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." But, despite this effort to carve out a sphere of private life that no government could touch, and to include in that sphere the right to marry a person of one's own choosing, the Supreme Court refused, for another forty-four years, to declare that people from different races had the right to marry each other. Until 1967, the right 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 ban contraception and a variety of "unnatural" sexual acts.<sup>44</sup>

As the arc of these decisions suggests, the federal courts eventually did carve out a sphere of individual rights that no government, state or federal, could abrogate. The elaboration of these protections was part of a long "incorporation" process 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 subsequent Amendments. In the process, the federal government diminished the police powers of the states. But what impresses one about this story is how long it took to create that sphere and how resistant state governments and the federal courts were to its claims. As the last section of this essay will show, only the Civil Rights Revolution of the 1960s dislodged the police power doctrine from its exalted perch.

This resistance to recognizing individual rights as primary occurred in a society that has always thought of itself as granting individuals inalienable rights to life, liberty, happiness, and property. 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, and did so for almost two hundred years, from the beginning of the republic until the eve of its bicentennial. They did so even in moments, such as the New Deal era, that we regard as laying the groundwork for the mid-twentieth-century "rights revolution." Thus, during the New Deal, no state government had to worry that its right to sustain Jim Crow or antimiscegenation laws was imperiled. And, as George Chauncey has provocatively argued, the repeal of Prohibition in 1933 actually triggered a strengthening of the police powers of the states in regards to "sexual deviants," whom state agencies began sweeping from city streets, bars, and other public places.<sup>45</sup>

These state regimes of moral regulation did not always work as well in fact as they were designed to on paper, for the simple reason that it was difficult to achieve the kind of uniformity across states that successful enforcement required. From the perspective of the effective enforcement of police power, Hendrik Hartog has observed that state governments often suffered from a key weakness: they could not control the movement of people in and out of their territory. Only the federal government could control movement 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 attract the desired people and commodities by instituting what they understood to be attractive, and liberal, laws. New Jersey and Delaware long sought to draw industry by making public incorporation easier in their states than in any others. A number of states, beginning with Connecticut in the nineteenth century and reaching Nevada in the twentieth, always made it much easier than in most other states for unhappy couples to secure a divorce. Western states 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 to quench legally their alcoholic thirst. Few states sought to attract black migrants fleeing Jim Crow or marrying whites, but many states offered an environment free of official segregation and antimiscegenation law. Today, some homosexual couples wanting to marry think about moving to Vermont, Massachusetts, and other states that have legalized same-sex civil unions and/or marriage. Many other examples could be added to this list. The point should be clear: sometimes Americans could escape the police-power regulatory regimes of their states by pulling up stakes.<sup>46</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 always been famous. It may be, too, that the very toleration by Americans of powerful

and intrusive state governments rested on their conviction that one could always find a way to escape their clutches.

And yet, for all their mobility, tens of millions of Americans have always attached themselves to places they called home and have lived long stretches of their lives in single states and under particular regulatory regimes. For these Americans, the laws passed by their state legislatures to govern economic, social, and private life mattered a great deal. The interracial couple, Richard and Mildred Loving, whose claim against the state of Virginia eventually brought the whole edifice of antimiscegenation law crashing to the ground in 1967, first brought suit against Virginia because they were not content to live in Washington, D.C., where they had been forced to marry and reside. They loved Virginia, the state of their birth and of their families, and wanted to go home.<sup>47</sup>

The durability of robust conceptions of police power in state governments should caution us against making sweeping statements about the transformative effect of any particular moment of federal state innovation, whether that be the Civil War and Reconstruction, World War I, or even the New Deal. To make such a statement is not to deny that moments of important change in federal power did occur. The passage of the Fourteenth Amendment in 1867 did pose a direct challenge to the police powers of the states and to their ability to control economic or moral and cultural life; but it would take more than fifty years in the economic realm and one hundred years in the moral and cultural realm for the full effects of this Amendment to be felt. The New Deal, in turn, through its innovations in agricultural, labor, and social welfare policy, created a new federal state, arguably the first peacetime standing state in American history and one that was ready, even eager, to interfere with the rights of capital and property to achieve its ends. In the process, it secured, through the commerce clause, a surrogate police power that finally allowed it to assume powers to protect the people's welfare that had hitherto been reserved to the states. That Franklin Roosevelt had to threaten a coup, more commonly (and palatably) known to us as his 1937 Court-packing initiative—to ensure that the Supreme Court would declare critical powers of the New Deal state constitutional—testifies to the far-reaching nature of the changes in federal governance that he and his supporters had introduced.

And yet, the New Deal, too, had to adapt to traditional patterns of governance. New Dealers proved solicitous of state governments. In distributing relief and welfare, for example, New Dealers found themselves partnering with the states. The Federal Emergency Relief Administration (FERA), under Harry Hopkins, turned to state agencies to distribute direct grants and established a system of matching grants that required states to put up three dollars for every one dollar of federal relief largesse. This system meant that both the size of federal expenditures in a state and the allocation

of those expenditures would be determined by state government officials. A similar system prevailed in the Social Security Administration. While old age insurance was a purely federal program, unemployment insurance and other so-called "categorical" forms of assistance—subsidies for the needy, aged, blind, and dependent children—were not. States were expected to fund their own unemployment insurance programs in return for federal tax relief. For a method to determine the levels of categorical assistance, the federal government turned, as it had in FERA, to matching grants: one federal dollar for every two state dollars spent on the needy, aged, or blind; another federal dollar for every two state dollars spent on aid to dependent children. This system gave individual states the autonomy to choose the scale and beneficiaries of welfare expenditures in their polities and produced, not surprisingly, many little, disparate welfare states rather than one big, uniform one.

The surprising resilience of state governments during the New Deal can be explained by several factors: the lack of bureaucratic and administrative capacity at the federal level and the impossibility, given the imperative of responding quickly to the economic crisis, of waiting patiently for it to develop; the New Dealers' need to win, in Congress, the support of those who feared establishing too centralized and bureaucratic a federal state, including a power bloc of Southern Democrats who believed that too strong a federal state would eviscerate states' rights and the racial regimes that states' rights were meant to protect; and the desire to write legislation that would stand a good chance of passing constitutional muster.

The national welfare and relief legislation enacted by New Dealers in the 1930s, then, diminished but did not extinguish the power of state governments; the tradition of state governance was simply too old, too honored, and too strong. As Stephen Skowronek concluded in *Building the New American State*, a new governing system could not be built from scratch, at least not in a polity averse to revolution and committed to progressing through deliberation and negotiation. Rather, a new system had to be built on the structure of the old, which often led to patterns so apparent in the New Deal and beyond: political compromises and governing arrangements that sometimes tied the federal government up in knots and made efficacious social policy difficult to deliver.<sup>18</sup>

A comprehensive analysis of the structure and history of the American state across the long nineteenth century needs to extend well beyond a consideration of federalism. But no analysis can afford to ignore federalism or the expansive doctrine of police power that federalism gave to the states, a power that stands at such odds with the still durable conception of nineteenth-century America as a society that maximized individual freedom and minimized the ability of the government to constrain individual choice.

The federal government acquired new constitutional powers as a result of the Civil War and the defeat of the South, but the meaning and strength of those powers would come to depend on Court interpretations of them in the thirty-year period after the war had ended. In many areas of governance, those interpretations limited the power of the new federal leviathan. Just as the late-nineteenth-century Supreme Court interpreted the Civil Rights Amendments in ways that permitted white supremacy to thrive, so, too, did it interpret these Amendments in a manner that allowed a reinvigorated conception of states' police power to flourish. The motivations of the Supreme Court justices and of the federal courts in general for infusing the police power doctrine with new life deserve more consideration than they have received in this essay. But there can be little doubt that federalism as a doctrine and practice gained new strength in the late nineteenth century, and entered the twentieth with considerable wind in its sails.

Only in the 1960s did political protest and central government pressure enduringly break this formidable pattern—and the concept of states' police powers that lay at its core. The civil rights movement triggered this change. The association between white supremacy and federalism, or "states' rights," ran so deep that a frontal assault on one was bound to generate an assault on the other. This is what happened in the 1960s when the combination of insurgent social movements and liberalism, suddenly aghast at its complicity in white supremacy, mounted a campaign to challenge the racial foundations of the Republic unlike anything that had been seen in the United States since the era of Emancipation and Reconstruction. It quickly became clear that dismantling Jim Crow in the South was going to require the central government to assert its power over that of the states. Specifically, this meant that the central government had to insist on its constitutional obligation to ensure that every American be able to exercise his or her inalienable rights, even if that meant nullifying the police powers long exercised by the various states.

Thus, in the 1960s the federal government crossed lines in its relations with the states that it had refused to traverse in any other era of liberal reform. Title VI of the 1964 Civil Rights Act made that act the first federal law specifically to prohibit the use by states of racially discriminatory criteria in distributing federal grants-in-aid monies. The 1965 Voting Rights Act gave the federal government authority to reform electoral rules that had long been regarded as the exclusive domain of state and local governments. The 1965 Medicaid program expanded the power of the federal government by requiring individual states to provide certain kinds of medical assistance to the poor; unlike the welfare programs of the 1930s, Medicaid's provisions prohibited states from deciding on their own whether or not they wanted to participate in this federal program. By the late 1960s, too, the federal

government was determining eligibility requirements for Aid to Families with Dependent Children (AFDC) to an unprecedented degree. In undertaking these actions, the federal government was curtailing the autonomy of the states to determine the kind of public welfare that would exist within the latter's boundaries.<sup>49</sup>

The federal courts participated in this assault on federalism, not only by upholding the constitutionality of legislation discussed above but through "judicial legislation" that they fashioned out of lawsuits that individual Americans were bringing before the federal bench. *Baker v Carr* (1962) asserted the federal government's power to oversee electoral redistricting, a process always regarded as belonging to the states alone. *Miranda v Arizona* (1965), which insisted that individuals being arrested possessed rights that law enforcement had to respect, placed local police under the strictest federal scrutiny they had ever known. *Loving v Virginia*, as we have seen, inserted the Constitution into another area of law—marriage—long regarded as the province of the states.<sup>50</sup>

The willingness of the Supreme Court to go to such lengths in revising relations between the central government and the states was informed by the justices' conviction that federalism had made possible an unjust racial order that they could no longer defend or even tolerate. Reflecting on the "fundamental shift" in "federal-state" relations that the Warren Court oversaw in the 1960s, Associate Justice John Marshall Harlan noted in 1969 that the federal judiciary had come to "distrust in the capabilities of the federal system to meet the needs of American society in these fast-moving times," and to believe that it had to "spearhead reform" even if that meant sacrificing "circumspect regard for the constitutional limitations upon the manner of its accomplishment." Harlan, himself, was ambivalent about this judicially mediated change. "To those who see our free society as dependent primarily upon a broadening of the constitutional protections afforded to the individual," he observed, "these developments are no doubt considered to be healthy. To those who regard the federal system as one of the mainsprings of our political liberties, this increasing erosion of state authority cannot but be viewed with apprehension."<sup>51</sup>

The comprehensive shift in power from the states to the federal government occasioned by the assault on Jim Crow made possible the greatest advances in racial equality in a century. It also triggered a "rights revolution," as individuals of all kinds now came forward to insist on fundamental constitutional rights that no government in America could touch. These included the right to marry a person of one's own choosing; the right to privacy; the right to an abortion; and the right to equal opportunity irrespective of one's gender, sexuality, religion, or race. The weakening of federalism made possible this egalitarian advance.

Of course, states did not disappear. They never will. The American polity continues to be comprised of tens of thousands of distinct jurisdictional units—more than 89,000 in 2008—including not just the states themselves but all the counties, towns, special districts, and schools that fall under state control.<sup>52</sup> Employment in state and local government grew enormously in the Great Society years and beyond. For the federal government to impose its will on this densely populated government landscape was not an easy thing to do; the possibility for federal policy failure or co-optation due to jurisdictional fragmentation, incompetence, or self-interestedness was ever present; it still is. The persistent size and sprawl of local and state governments into the 1960s and beyond have led some commentators to suggest that federalism remained intact during this time, and that the changes of the 1960s were but one more set of adjustments that federal-state relations have periodically undergone without changing the federalist system's fundamentals.<sup>53</sup> But this interpretation underestimates the degree to which the changes of the 1960s eviscerated the foundation on which states had built and accumulated their authority: the police power doctrine.

That the 1960s period of change was different from earlier periods comes into sharper relief if we compare it to the shift in federal-state relations that occurred during the Civil War and Reconstruction. Both periods witnessed basic shifts of power from the states to the central government. Both periods were followed by concerted efforts to restore to the states the powers that had been taken away. Already in the Nixon administration, Republican conservatives rolled out a "New Federalism" to restore states' rights. This became a central ambition of Supreme Court Justice William Rehnquist and the conservatives who sat on his court from 1986 to 2005. Rehnquist achieved some notable successes in restoring rights to the states, especially during cases decided in the late 1990s.<sup>54</sup> But, overall, the achievements of this conservative federalist resurgence have been rather modest in comparison to what the Supreme Court of the 1880s and 1890s accomplished. Rehnquist long believed that the Supreme Court's decision in *Brown v Board* was wrong and that the Court should have used the opportunity presented by *Brown* to reaffirm its 1896 *Plessy v Ferguson* ruling (to allow states to decide whether or not to enact segregationist policies).<sup>55</sup> But Rehnquist never dared, in his long tenure as Chief Justice, to associate his name with a case of *Plessy*-like content and magnitude that would have done for our *fin de siècle* what *Plessy* did for states' rights a century ago. The 1960s shift in power from the states to the federal government turns out to have been far deeper and more enduring than the 1860s shift had been.

The weakening of federalism went hand in hand with the central government's determination to make itself the guarantor of the individual rights of all Americans—black and white, minority and majority, female and male,

homosexual and heterosexual. In this respect, federalism's decline made possible egalitarianism's advance. The relationship of federalism's attenuation to the pursuit of economic or class equality in America is a more complex matter to analyze. We can find many cases in American history of state and local elites using federalist structures to enrich and empower themselves, impoverishing and immobilizing poorer Americans in the process. One of the best studies of this phenomenon is Grant McConnell's 1966 work, *Private Power and American Democracy*, which shows how private elites operating within states or regions appropriated government power that formally belonged to the central New Deal state to advance their own interests.<sup>56</sup> This appropriation, McConnell argued, was facilitated by federalist structures and the fragmentation of public power that inevitably flowed from them. Even in cases in which Congress established a national agency to regulate an economic sector, McConnell claimed, federalist imperatives compelled policy makers to decentralize that agency's power, in effect handing over large chunks of it to state and local governments. It was precisely these municipal and state governments that were most susceptible to the influence of local elites and local oligarchies; this is where the private conquest of public power, according to McConnell, had advanced the furthest and had done the most damage. In such ways did central government programs meant to advance the common good strengthen the power of local and regional elites.

McConnell's account is empirically sound and politically sobering. But he is wrong to single out state and local governments as the only portals through which private power influenced American democracy—and to expect, as McConnell did, writing at the moment when the hopes for the Great Society were at their most expansive, that the mere strengthening of the central government would have sufficed to inject egalitarian principles into our economic life. Anyone who has looked carefully at economic-government relations in the last quarter of the twentieth century cannot help but notice that private interests are capable of penetrating central governing institutions as thoroughly as they have done this work at the state and local levels. The susceptibility of public institutions to private influence is a subject I take up elsewhere.

McConnell's account also ignores the long and rich history of efforts made by state governments to use their police powers to corral private economic power for the public good. This they attempted to do through a variety of means. In the antebellum years, state governments often inserted public obligations into the charters that they granted private corporations. In the Gilded Age, states passed a blizzard of laws to regulate corporate behavior in the public interest. In the Progressive era, the states were the "laboratories of reform," positioning themselves at the cutting edge of efforts to assert the priority of the "people" over the "interests." They passed laws to regulate workplaces, to provide welfare for citizens unable to care for themselves, to

limit the influence of corrupt private interests on politics, and to increase the direct influence of people on politics by embracing the initiative, referendum, and recall.

Post-Progressive Era scholars have often criticized these efforts as doomed to failure, for the simple reason that the power of corporations had grown too great for any one state to control. From this perspective, only the central government was thought to possess the necessary muscle to subdue corporate power. This criticism is fair, but not complete (and the argument about scale has gotten more complicated in light of the fact that corporations are now global and have extended their reach beyond the point where central governments can enforce their sovereign power). State-level efforts failed as well because the federal courts increasingly exempted corporations from the control of state legislatures. One of the strangest stories of American history is how nineteenth-century courts began to identify corporations as "individuals" whose constitutional rights no government could touch. (The strangeness of this story lies both in the willingness of the courts to transmute corporate bodies into individuals and in the fact that the courts extended these rights to virtually no other group of individuals until the 1960s.) Treating corporations in this way allowed the federal courts to protect incorporated institutions from the police power of the states in which they did business. As we have seen in *Plessy*, the strength of the police power doctrine was such that it took time for the courts to establish the inviolability of this corporate immunity doctrine; but the Supreme Court's 1905 ruling in the *Lochner* case reveals that it was gaining traction. By the time of the New Deal, it was axiomatic in reform circles that the states could not regulate corporations and that only a dramatic expansion in the power of the national government could accomplish this task.

Liberals and the courts at this time acted on this axiom—and responded to the crisis caused by the collapse of American capitalism—by elevating the Constitution's commerce clause into a surrogate policy power doctrine that empowered the federal government to regulate the private economy in the public interest and thus to enable it to succeed where the states had failed. A dramatic growth in the size and effectiveness of the central regulatory state ensued across the next forty years. But in addressing the legacy of New Deal, we have to ask whether the egalitarian gains of the centralized regulatory state and of substituting a national police power doctrine for that of the states' were truly enduring. It is remarkable that the Second Gilded Age of the late twentieth century (1970s–1990s) generated so little collective protest about economic inequality, especially when compared to the scale and intensity of these sorts of protest that erupted during the First Gilded Age of the late nineteenth century. Is it possible that the weakening of federalism that began in the 1930s and that was dramatically accelerated by the rights

revolution of the 1960s stripped Americans of one of their most important languages for asserting, as Theodore Roosevelt did in 1910, that "every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it?"<sup>57</sup> What if the concept of police power as deployed at the federal level cannot be (except at moments of grave emergency, such as economic cataclysm and war) a robust vehicle for asserting the priority of the commonwealth over private interests? What if the rights revolution of the 1960s has so prioritized individual equality that collective equality has become much harder to attain?

If the Obama administration is successful in reviving the spirit and substance of the New Deal, we may soon be answering each of these questions in the negative. But if the answers to any of them turn out to be yes, then we may come to regard the decline of federalism as a mixed blessing for politics and government in twenty-first-century America.

#### NOTES

1. A classic work is Sidney Fine, *Laissez-Faire and the General-Welfare State: A Study of Conflict in American Thought, 1865-1901* (Ann Arbor, MI: University of Michigan Press, 1956).
2. Bruce Ackerman, *We the People: Transformations* (Cambridge, MA: Harvard University Press, 1998), 343; Carl Degler, "The Third American Revolution," in Degler, *Out of Our Past: The Forces That Shaped Modern America* (1970; New York: Harper and Row, 1959), 379-413.
3. Barry D. Karl, *The Uneasy State: The United States from 1915 to 1945* (Chicago: University of Chicago Press, 1983); Anthony J. Badger, *The New Deal: The Depression Years, 1933-1940* (New York: Hill and Wang, 1989).
4. Alan Dawley, *Struggles for Justice: Social Responsibility and the Liberal State* (Cambridge, MA: Harvard University Press, 1991); Linda Gordon, *Pitied but Not Entitled: Single Mothers and the History of Welfare, 1890-1935* (Cambridge, MA: Harvard University Press, 1994); Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (New York: Oxford University Press, 2001).
5. Steve Fraser, *Labor Will Rule: Sidney Hillman and the Rise of American Labor* (New York: Free Press, 1991); Howell John Harris, *The Right to Manage: Industrial Relations Policies of American Business in the 1940s* (Madison: University of Wisconsin Press, 1982).
6. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982).
7. William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).
8. Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1900* (Cambridge, MA: Harvard University Press, 1948), xii; Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774-1861* (New York: New York University Press, 1947); Arthur H.

Cole, "The Committee on Research in Economic History: An Historical Sketch," *Journal of Economic History* 30 (1970): 723-41; Harry N. Scheiber, "Government and Economy: Studies of the 'Commonwealth' Policy in Nineteenth-Century America," *Journal of Interdisciplinary History* 3 (Summer 1972): 135-51.

9. In addition to the works by Hartz and the Handlins, see, for example, 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: University of Wisconsin Press, 1956); Carter Goodrich, *Government Promotion of American Canals and Railroads, 1800-1890* (New York: Columbia University Press, 1960); 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).

10. Goodrich, *Government Promotion of American Canals and Railroads*, 268. The \$7 million figure somewhat underestimates federal contributions, for 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.

11. Hartz, *Economic Policy and Democratic Thought*, 149.

12. *Ibid.*, 89, 290.

13. *Ibid.*, 46-7, 291; Handlin and Handlin, *Commonwealth*, 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.

14. Hartz, *Economic Policy and Democratic Thought*, 292, 289.

15. *Commonwealth v. Alger*, 7 Cush. 53 (Mass., 1851), 85.

16. Novak, *The People's Welfare*, 46, 80.

17. On republicanism, see Sean Wilentz, *Chants Democratic: New York City and the Rise of the American Working Class, 1788-1850* (New York: Oxford University Press, 1984).

18. Novak, *The People's Welfare*, passim. So does Harry N. Scheiber. See Scheiber, "Economic Liberty and the Modern State," in *The State and Freedom of Contract*, ed. Scheiber (Palo Alto, CA: Stanford University Press, 1998), 134.

19. Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993), esp. 41-3. On the continental roots of this doctrine, see also Michel Foucault, "Governmentality," in *The Foucault Effect: Studies in Governmentality*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991), 90. Tomlins's interest in labor relations may incline him to locate the decline of the expansive definition of police powers from an early date, for, in the nineteenth century, the interests of labor were treated with considerably less sympathy than were those of other groups making claims on the commonweal.

20. *The Constitution of the United States of America*, Amendment X.

21. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Mentor, 1961), 292-3.

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

23. Novak, *The People's Welfare*, 3–6.
24. 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.
25. Robert C. Allen, *Horrible Prettiness: Burlesque and American Culture* (Chapel Hill: 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).
26. And 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.
27. Kunal M. Parker, "Citizenship and Immigration Law, 1800-1924: Resolutions of Membership and Territory," in *The Cambridge History of Law in America*, Volume 2, ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 168–203.
28. Handlin and Handlin, *Commonwealth*, 218.
29. Novak's discussion of the battles over rights to waterways offers one example of how he underestimates how private interests sometimes advanced their own ends through the cloak of public interest. See Novak, *The People's Welfare*, 135–6; in these instances, Morton Horwitz's work offers important insights. See Horwitz, *The Transformation of American Law 1780-1860*, (Cambridge, MA: Harvard University Press, 1977), passim.
30. Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Harvard University Press, 1992), 105–15.
31. On the changes in federal governance stimulated by the Civil War, see Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper and Row, 1988); Richard Franklin Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (New York: Cambridge University Press, 1990); Ackerman, *We the People: Transformations*, 99–252; Ira Berlin et al., *Slaves No More: Three Essays on Emancipation and the Civil War* (New York: Cambridge University Press, 1992).
32. Opinion written for *Barbier v. Connolly*, 113 U.S. 27 (1885). On efforts of courts to roll back federal power in these years, see Charles Lane, *The Day Freedom Died: The Colfax Massacre, The Supreme Court, and the Betrayal of Reconstruction* (New York: Henry Holt, 2008); and Jack Beatty, *Age of Betrayal: The Triumph of Money in America, 1865-1900* (New York: Knopf, 2007).
33. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Cambridge, MA: Harvard University Press, 1988), 148–96. Charles McCurdy encourages us to see this "class" loophole as a political device to strip states of the ability to protect certain groups, such as labor, from market inequities. Charles McCurdy, "The 'Liberty of Contract' Regime in American Law," in *The State and Freedom of Contract*, ed. Scheiber, 161–97. For a contrary point of view, see William R. Brock, *Investigation*

- and Responsibility: *Public Responsibility in the United States, 1865-1900* (New York: Cambridge University Press, 1984). McCurdy's point of view needs to be carefully considered, given the anti-labor bias of the courts, a topic that will be taken up in another essay of mine on the American state.
34. Brock, *Investigation and Responsibility*. Another acute 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. (New York: Macmillan, 1908), Vol. II, 535–48.
35. Nancy Cott, *Public Vows: History of Marriage and the Nation* (Cambridge, MA: Harvard University Press, 2000); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985); Laura Edwards, "Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth Century U.S. South," *American Historical Review*, (April 2007): 365–93. 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).
36. Jill Elaine Hasday argues otherwise in her "Federalism and the Family Reconstructed" essay, *UCLA Law Review* 45 (1997–1998): 1297–400. 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 nineteenth century.
37. *Plessy v. Ferguson*, 163 U.S. 537. 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: Macmillan, 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.
38. *Lochner v. New York*, 198 U.S. 45.
39. 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).
40. Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920* (New York: Cambridge University Press, 2001); quote is from p. 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 fortunately 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* in 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; and Richard J. Epstein, "Lest We Forget: *Buchanan v. Warley* and the Constitutional Jurisprudence of the 'Progressive Era,'" *Ibid.*, 787-96.

41. Grossberg, *Governing the Hearth*, 75-152; Cott, *Public Vows*; Edwards, "Status Without Rights."

42. Quoted in Rachel Moran, *Interracial Intimacy: The Regulation of Race and Romance*, 79; see, also, Grossberg, *Governing the Hearth*, 136-40.

43. Moran, *Interracial Intimacy*, 79-81; Peggy Pascoe, "Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America," *Journal of American History* 83 (June 1996): 49, 59; King, *In the Name of Liberalism*.

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

45. George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (New York: Basic Books, 1994), 331-54.

46. Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, MA: Harvard University Press, 2000), especially chapter 1.

47. Moran, *Interracial Intimacy*, 95-9.

48. Skowronek, *Building a New American State*. Other important works that help us to understand the way in which the New Deal state had to be built on existing governing structures include: James T. Patterson, *The New Deal and the States: Federalism in Transition* (Princeton, NJ: Princeton University Press, 1969); James T. Patterson, *Congressional Conservatism and the New Deal: The Growth of the Conservative Coalition in Congress, 1933-1939* (Lexington: University of Kentucky Press, 1967); Kimberly S. Johnson, *Governing the American State: Congress and the New Federalism, 1877-1929* (Princeton, NJ: Princeton University Press, 2007); Alan Brinkley, *The End of Reform: New Deal Liberalism in Depression and War* (New York: Knopf, 1995); Barry Karl, *The Uneasy State*; Theda Skocpol and Kenneth Feingold, "State Capacity and Economic Intervention in the Early New Deal," *Political Science Quarterly* 97 (1982): 255-79;

Theda Skocpol and John Ikenberry, "Expanding Social Benefits: The Role of Social Security," *Political Science Quarterly* 102 (1987): 389-416; John A. Braeman, Robert H. Bremner, and David Brody, eds., *The New Deal, Volume II: The State and Local Levels* (Columbus, OH: Ohio State University Press, 1975); Gordon, *Pitied but Not Entitled*; Kessler-Harris, *In Pursuit of Equity*; Suzanne Mettler, *Dividing Citizens: Gender and Federalism in New Deal Public Policy* (Ithaca, NY: Cornell University Press, 1998); King, *In the Name of Liberalism*; Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* (Cambridge, MA: Harvard University Press, 1998); Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (New York: W. W. Norton, 2005); Martha Derthick, "Roosevelt as Madison: Social Security and American Federalism," in Derthick, *Keeping the Compound Republic: Essays on American Federalism* (Washington, DC: Brookings Institution Press, 2001), 123-37.

49. Martha Derthick, "Crossing the Thresholds: Federalism in the 1960s," in Derthick, *Keeping the Compound Republic*, 138-52.

50. *Baker v. Carr*, 369 U.S. 186 (1962); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Loving v. Virginia*, 388 U.S. 1 (1967).

51. Charles S. Desmond et al., *Mr. Justice Jackson: Four Lectures in His Honor* (New York: Columbia University Press, 1969), 60.

52. William J. Novak, "The Myth of the 'Weak' American State," *American Historical Review* 113 (June 2008): 766.

53. See Daniel J. Elazar, *American Federalism: A View from the States* (New York: Crowell, 1972), 2nd ed.; and Morton Grodzins, *The American System: A New View of Government in the United States*, ed. Daniel J. Elazar (Chicago: Rand McNally, 1966). One of the ways in which federalism does persist is through the Electoral College, whose structure ensures that states rather than individuals ultimately determine the outcome of presidential elections.

54. See, for example, *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000).

55. Bernard Schwartz, "Chief Justice Rehnquist, Justice Jackson, and the 'Brown' Case," *Supreme Court Review* (1988): 245-67. Senate Hearings 99-1067, *Hearings Before the Senate Committee on the Judiciary on the Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States* (July 29, 30, 31, and August 1, 1986). See, also, Jeffrey Rosen, "Rehnquist the Great?" *Atlantic Monthly* (April 2005), 79-90.

56. Grant McConnell, *Private Power and American Democracy* (New York: Knopf, 1966).

57. Theodore Roosevelt, "The New Nationalism," in Roosevelt, *The New Nationalism* (New York: The Outlook Company, 1910), 23-4.