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CONCLUSION

The Invention of American Constitutional Law

> The domestic problems of our country after the Reconstruction period may be said to have revolved in the main around the responsibilities of wealth to commonwealth.
> —Felix Frankfurter

The common law vision of a well-regulated society was a powerful public philosophy. But following Stendhal's observation that "all the truth lies in the details," the real significance of the *salus populi* tradition lay in the minute and ubiquitous regulations shaping the most important public policy concerns of the nineteenth century: public safety, public economy, public property, public morals, and public health. Close investigations of such pervasive and everyday governmental practices are essential to a complete picture of the American legal-political tradition and the elusive meanings of American democracy, liberalism, and republicanism. Indeed, even the partial surveys contained in this volume illuminate an alternative understanding of nineteenth-century conceptions of public practice, state power, and legal right.

The first historical lesson to be drawn from the well-regulated society concerns the overwhelming presence of the state and regulation in nineteenth-century American life. The countless regulations examined in this book reflect the power of a deeply rooted American tradition of police and regulatory governance vital to social and economic development. Armed with a far-reaching conception of law and state serving the people's welfare, public officials defined the safety, health, morals, and commercial concerns of citizens as objects of state policy and governmental regulation. All private interests and rights

were subordinated to these primary public objectives. The consequence was a new and intense regard in the science of government for the policing of society and economy. The nineteenth century was not an era of laissez-faire or statelessness where public inertia and political naiveté just happened to provide the perfect conditions for a burgeoning private market economy and a self-generating civil democracy. On the contrary, the fundamental social and economic relations of the nineteenth century—the market, the city and the countryside, the family, the laborer, the proprietor, the good neighbor, the good citizen—were formed and transformed in this period as the constant objects of governance and regulation. Law and the state were not simply reflectors or instruments or facilitators of natural evolutions in the market or civil society. They were creative and generative forces.

Seeing this public construction of early American society and economy is difficult given a modern liberal mythology that has naturalized and privatized such irreducibly historical and public matters as commerce, property, and contract. Consequently, the arguments of this book perhaps too frequently have had to be phrased in the negative—countering absolutist renderings of private property with the relative rights of social beings, confronting the free market with the regulated marketplace, challenging the neurasthenic state with a vigorous medical police. But this deconstructive strategy of contesting the excessive rhetoric of statelessness, possessive individualism, constitutional limitations, and American exceptionalism with the conspicuous state practices of well-regulated governance also provides a framework for some positive historical reconstructions.

The presence of a powerful legal regulatory apparatus, for example, simply makes more understandable the kinds of social power and economic control that social historians have been documenting in nineteenth-century America for the past twenty-five years. American slavery was not the product of a society hesitant to draw on the coercive powers of the state. The inequitable relationship established between railroad corporation and switchman was not the inadvertent excess of laissez-faire. Patriarchy was not the natural outcome of the unencumbered private choices of men and women. The trail of law, state, and police was over all. Similarly, the explosive changes of the late nineteenth and early twentieth centuries—industrialism, imperialism, progressivism (to name a few)—make more sense in the context of a much longer tradition of political economy, statecraft, and social welfare regulation.

But one must be cautious about substituting one set of anachronisms for another. It would be a serious mistake to read *salus populi* as demonstrating

the existence of a uniform and consistent American police-state tradition, a direct nineteenth-century precursor to the New Deal. For the second historical lesson to be drawn from the well-regulated society has everything to do with its distinctiveness—its deviation from modern understandings of law, the state, regulation, and private rights. Much of that difference is captured in a full appreciation of the well-regulated society as primarily a *common* legal tradition.

Common first implied localism. In contrast to the modern ideal of the state as centralized bureaucracy, the well-regulated society emphasized local control and autonomy. Indeed, the state and federal centralization of public economic, morals, and health authority signaled the decline of well-ordered governance. Second, common embraced a social conception of rights and duties in a well-regulated society. Whereas the modern American state has been quick to recognize new, absolute, and private civil rights and civil liberties, the well-regulated society endorsed a regime of local self-government where all such rights were subordinated to the community's ability to regulate for the good of the whole. Common also denied the clear separation of the private from the public—a hallmark of the modern liberal state. Finally, the superior rule of law in the well-regulated society was common, not constitutional, law. The common law's standards of consent, history, and accommodation embodied a humanistic and hermeneutic approach to the problem of authority and rule inconsistent with modern legal positivism.

The history of governance in America then is neither simple nor linear. Indeed, it is often fraught with paradox and contradiction, especially in the disjunction of rhetoric and reality. As early as 1888, Albert Shaw introduced James Bryce to the conundrum of the American rhetoric of laissez-faire amid a "profusion" of state regulatory legislation. Shaw chalked up this contradiction to an unequaled capacity in the American "for the entertainment of legal fictions and kindred delusions. He lives in one world of theory and in another world of practice." Bryce attempted an atypically feeble explanation, emphasizing American state experimentalism and a "strong moral sentiment, such as that which condemns intemperance."[1] Such explanations are inadequate if provocative. But Shaw and Bryce at least recognized the fundamental tension in the coexistence of a heightened American rhetoric of individual liberty with a constant and historic readiness to employ the coercive state powers of regulation and police. Paradoxical on its face, this crucial relationship of personal freedom and regulatory governance, of liberty and restraint, only makes sense in historical context. American notions of private right and public power do

	COLONIAL RULE	WELL-REGULATED GOVERNANCE	THE LIBERAL STATE
Time Period	17th–18th Century (to 1787)	19th Century (1787–1877)	20th Century (1877 to present)
Locus of Authority	Locality	State and Local Government	Central Government
Preferred Social Unit of Governance	Household	Self-Governed Community	Individual
Preferred Method of Governance	Mediation	Regulation	Administration
Rule of Law	Custom	Common Law	Constitutional Law

Figure 2. American governmental regimes

not hold true to a single and consistent idea or trajectory. They were the product of changing and conflicting everyday practices of governance—practices with distinct and particular histories.

One of the advantages of approaching the problem of government as constitutive public conduct (as opposed to political philosophy or bureaucracy) is that it allows one to chronologize important governmental changes that transcend the short-term give-and-take of electoral politics or presidential syntheses without falling prey to catchall, timeless teleologies like the rise of the modern state or the emergence of liberal politics. The practices of governance have a weightiness and stickiness that allows them to persist through some of the most seismic historical and sociological events. And transformations in governmental practice and logic often entail repercussions just as consequential as wars, elections, ethnocultural conflicts, business cycles, changes in the birthrate, or intellectual paradigm shifts. The well-regulated society embodied a particular set of governmental practices with important ramifications for nineteenth-century social and economic life. Those practices were not a postscript to feudalism or a prelude to the modern state. They also were not merely the residual public and communitarian safeguards of a dominant liberal and individualistic political culture. Rather they occupied their own niche in a larger history of American governmental practice.

In place of singular, linear histories of the evolution of liberalism or the

state, American public life on the whole is better understood in terms of three very distinctive, successive regimes of governmental practice: colonial rule; nineteenth-century well-regulated governance; and the twentieth-century liberal state. Though continuities between the three regimes certainly exist (with rather long and murky transitions), governmental conduct and rationality in 1730, 1830, and 1930 formally and substantively diverged. As ideal types (subject to the usual warnings about oversimplification), colonial rule, well-regulated governance, and the liberal state represent three categorically different, nonfungible ways of practicing and thinking about government. The schema of American governmental conduct presented in Figure 2 suggests the kinds of conceptual, structural, and practical factors that distinguish governmental regimes.

Figure 2 is suggestive and experimental rather than comprehensive and certain. Other markers could certainly be added (Theodore Lowi's tripartite division of economic policymaking into distributive, regulatory, and redistributive paradigms comes to mind);[2] and the categorization suggested is subject to endless qualification and contest (colonial rule, for example, raises the unique problem of a monarchical-imperial perspective at odds with the domestic regime represented here). The research in this book only supports the characterization of well-regulated governance. But the point is to identify a coherent matrix of public factors neglected by traditional approaches to politics that have an indubitable significance in history. Where is public power exercised (locally, regionally, centrally)? What form of law predominates? What types of governmental action and policymaking are legitimate (taxation, regulation, redistribution)? What are the appropriate objectives of governance? What mechanisms (judicial, legislative, administrative, actuarial) are available to meet those objectives? These are crucial questions. And when one detects across-the-board changes in the answers to such questions over time, a first-order historical variable if not a governmental paradigm shift has been identified. In the late nineteenth century, American governance underwent just such a shift.

Well into the 1870s, American social and political life continued to be governed by the principles and traditions of the well-regulated society. The American laws of public safety, public economy, public property, public morality, and public health, meticulously carved out by legislatures and courts since the earliest days of the republic, etched their influence deep into the institutional and ideological foundation of American public policy. Consequently, as late as

1877 one can still discern the powerful influence of the ideals and practices of *salus populi*, local self-government, and the common law. As they had since 1787, courts continued to uphold a slew of public regulations of individual liberties, properties, and activities with the general observation that private interests were subservient to the general welfare of society. An overarching public concern with police and well-orderedness trumped legal-political arguments about individual liberties and inalienable rights. Localism and notions of citizenship tied to membership in self-governing communities continued to control much thinking about the underpinnings of democracy and republican governance. In the first decades after the Civil War, Americans remained a remarkably associative people, constructing and defending political and personal identities through participation with others in particular localities, churches, organizations, charities, clubs, political parties, corporations, and unions. Finally, the public and historical sensibilities of a dynamic common law tradition still guided jurists, politicians, and lawyers as they hammered out the rules and maxims regulating American public and private life.

But by the end of Reconstruction, new social and economic forces were eroding the moral and political authority of *salus populi* and the well-regulated society. As early as the 1850s, new political voices and new legal languages challenged public controls on economy, morality, and health. The character of those controls themselves had already moved substantially away from traditional, local, and participatory origins. As Felix Frankfurter noted, the challenges of industrialism (wealth) placed increasing strains on the assumptions of the well-regulated society (commonwealth). By the 1870s trickles of change and discontent became a tidal flood. By century's end a new governmental regime was in place, and traces of the well-regulated society (past as well as contemporaneous) were being aggressively redrawn if not erased.

It will ultimately take another volume to address these transformations adequately, and quick generalizations on postbellum America are a risky enterprise. Nevertheless, a full appreciation of the power, problems, and peculiarity of the well-regulated society requires some concluding account of the reasons for its demise and an introductory sketch of the rough features of its conqueror.

What replaced the well-regulated society as a mode of law and governance was the American liberal state (a regime very much with us today). Its central attribute was the simultaneous pursuit of two seemingly antagonistic tendencies—the *centralization of power* and the *individualization of subjects*. The two would be ultimately mediated (and, again simultaneously, promoted) by the *constitutionalization of law*. By the early decades of the twentieth century,

a society legally and politically oriented around the relationship of individual subjects to a central nation-state had substantially replaced the well-regulated society's preference for articulating the roles of associative citizens in a confederated republic. Power and liberty, formerly interwoven in the notion of self-regulating, common law communities, were now necessary antipodes kept in balance only through the magnetic genius of an ascendant American constitutionalism.

The causes of this transformation were as complex as "modernity" itself and all the elusive accoutrements that historians embarrassedly try to capture under headings like industrialism and urbanization. But one that cannot be minimized was the mid-nineteenth-century crisis of slavery and Civil War. The Civil War played midwife to the American liberal state. It delivered new definitions of individual freedom, state power, nationalism, and constitutionalism.[3] Indeed, the paramount legal-political statement of that conflict—the Emancipation Proclamation—was an archetype of the new regime. Never before had the United States witnessed such a sweeping example of central power and authority: the federal, summary, and uncompensated abolition of vested property rights in other human beings. Never before had the United States witnessed such a sweeping testament to freedom and individual liberty. New powers and new liberties would become the twin pillars of liberal state building.

The well-regulated society was a belated casualty of the Civil War. But that conflict only brought to a boil some broader legal, political, social, and economic pressures simmering since the 1850s—pressures not released by the compromises of 1877. Those pressures ultimately undercut antebellum traditions of local self-government, *salus populi*, and common law and precipitated substantially revised understandings of state power, individual rights, and constitutional law.

State Power

Max Weber defined the modern state as the monopoly of the use of force—as the "system of order" claiming binding authority "not only over the members of the state, the citizens, . . . but also to a very large extent over all action taking place in the area of its jurisdiction."[4] Strictly construed, historians are perhaps justified for failing to find this kind of "state" in early nineteenth-century America. After the Civil War, however, Max Weber's creeping leviathan made its presence felt. A decidedly upward shift in decision-making power[5] characterized late nineteenth-century American police and regulatory policies. The legal and political autonomy of local, regional, and sectional entities

repeatedly lost out as federal and state governments centralized and consolidated their authority. Authorities unable to trace their legitimacy to explicit central delegations of power became inherently suspect.[6] Although the peculiarities of American federalism continued to confound any unitary sovereignty, power consistently flowed upward and outward. The roots of a positivist administrative and bureaucratic state insistently totalizing its reach into American social and economic life were clearly discernible in this period.[7] That state increasingly replaced well-ordered communities as the primary locus of legal-political power and public moral-ethical legitimacy.

The Civil War and its aftermath were fine proving grounds for experiments in state power. In addition to inspiring a wave of insurgent nationalism, the wartime presidency of Abraham Lincoln was awash in novel exertions of centralized governmental power, the suspension of habeas corpus and the first national income tax. The Reconstruction Amendments, securing the individual rights of newly freed men and women, also wrote into the Constitution new definitions of national citizenship and the supremacy of the federal government. This dramatic intrusion of centralized power into the local and "domestic" affairs of states would have been unimaginable to James Wilson or Zephaniah Swift, despite their aversion to slavery. Indeed, after the Civil War the common law philosophy of Wilson and Swift quickly succumbed to a founding political science interest in "The State."

In 1835, Alexis de Tocqueville began his classic inquiry into the political culture of the United States with a cautionary chapter five on the "Necessity of Examining the Condition of the States before That of the Union at Large." James Bryce, Tocqueville's late nineteenth-century counterpart, unapologetically began his investigation of the *American Commonwealth* with "The National Government."[8] Bryce was typical of a wave of postbellum reflections on government that moved quickly away from debates on the "nature of Union" to prescriptive analyses of the nature of the modern state.[9] Building on European theories of public law and state formation, particularly the work and lectures of German scholars like Johann Bluntschli and Rudolf von Gneist, American political theorists built a new discipline and a new political philosophy on the backs of state theories like Woodrow Wilson's *The State* (1889) and W. W. Willoughby's, *An Examination of the Nature of the State* (1896).[10] The emphasis was no longer on common law, localism, and confederation, but on the positive constitutional powers of a central state. The authoritative sphere of this new sovereignty, Theodore Woolsey revealed, "may reach as far as the nature and needs of man and of men may reach."[11]

But the consolidation of power and sovereignty was not simply a product of

political theorizing. Rather, the centralization of order-maintenance and accompanying prohibitions on private, local, and sectional uses of force were the consequence of hard-fought changes in legal and public policy. State prohibition statutes and the nationalization of public health initiatives were perfect examples of the kinds of policies that spearheaded transformations in conceptions of legitimate state power. State health and police measures essentially disfranchised localities (as well as private citizens) of common law powers to define and abate public nuisances. Morals regulations of liquor and lotteries prompted judicial invocations of an "inalienable police power" defined increasingly in terms of sovereignty and command rather than consent and common law precedent. State police regulation did not die after the Civil War. In fact, it proliferated as never before. But as the newly positivized and constitutionalized police power it ceased to encompass the same aspirations and consequences for governance. It traded in a local, historical, and popular orientation for a new status as a category of constitutional law demarcating the "bidding and forbidding power of the State."[12]

One of the culminating legal decisions of the well-regulated society was *United States v. DeWitt* (1870), where the U.S. Supreme Court ruled that there was no such thing as a "federal" police power—that is, a general, open-ended power in the *national* government to regulate liberty and property to protect the public safety, morals, health, comfort, and welfare.[13] Legal and political developments between 1877 and 1937 made that federal police power—an essential attribute of modern, centralized states—a practical if not a technical reality.

But centralization was not a linear or inevitable or inherently progressive process. Henry Adams warned as early as 1876: "From the moment the small state became merged in a great nation, the personal activity of the mass of free men in politics became impossible."[14] Adams's pessimistic and decidedly anti-Whiggish perspective allowed him to identify disintegration as a necessary and indispensable part of consolidation. One of the key accompaniments of the aggrandizement of state power was the dissolution of intermediate citizen loyalties and local authorities en route to a one-to-one relationship between the state and the individual.

Individual Rights

Otto von Gierke argued that one of the "universal tendencies" of modern history was the pursuit of an "absolute individuality" as a complement to the "absolute state." Such a constructive project was simultaneously destructive, requiring the "dissipation of all local communities and fellowships" so as to

leave "no intermediate links of any kind between the supreme universality of the all-caring state and the sum total of single individuals, comprising the people."[15]

The well-regulated society was all about the legal and political cultivation of just such intermediate links between the state and the individual. Power was diffused and flowed from the bottom up. General powers of social and economic police were situated and exercised primarily in towns, counties, and municipalities. The power of self-governing communities and associations to police themselves through the enactment of bylaws and ordinances regulating safety, economy, property, morals, and health were reviewed only irregularly by higher authorities and seldom were overturned. The ability of individuals to contest local controls on hawkers or peddlers, vagrants or prostitutes, noisome trades or disorderly houses, wooden buildings or unhealthy premises was severely circumscribed. Indeed, the whole idea of an individual *qua* citizen of a nation-state exercising rights through legal challenges to such police regulations was incongruent with the very concepts of self-government and *salus populi.* Soon after the Civil War, such challenges became the norm—both catalyst and product of the invention of a more liberal, constitutional law. In sum, the well-regulated society was built precisely on those local institutions and associational sympathies increasingly vulnerable in the late nineteenth century to the double-edged sword of statism and individualism.

One of the oddest things about the legal centralization of state power in late nineteenth-century America was that it was accompanied not by the expected enhancement of *salus populi,* common good rhetoric, but by its repudiation, and an offering in its stead of a heightened regard for *individual* right and liberty. The Civil War wrought the first changes in constitutional language since 1804 (just as its constitutional prologue brought the first judicial nullification of an act of Congress since *Marbury v. Madison*).[16] But the Thirteenth, Fourteenth, and Fifteenth Amendments were no simple textual revisions. Much like the *sic utere tuo* and *salus populi* maxims they ultimately replaced, the constitutional clauses "involuntary servitude," "privileges or immunities," "due process," "equal protection," and "right of citizens of the United States" embodied a wholly new political philosophy. The heart of that philosophy was a radical reconstruction of individual rights. Abolitionism, emancipation, and radical Republicanism renewed interest in the inherent, natural, and absolute rights of individuals, dethroning a public-spirited common law as the source of American fundamental law.[17] In contrast to the law of *salus populi,* this new "higher" constitutionalism emphasized individual freedoms and personal autonomy rather than the duties incumbent upon members of organized and

regulated communities. These were the roots of distinctly modern notions of individual civil rights and civil liberties.

Some forms of the new individualistic credo were distinctly oppositional vis-à-vis the expansion and centralization of state power—for example, the social Darwinism of William Graham Sumner and the constitutional libertarianism of Christopher Tiedeman. But, on the whole, the law and language of individual rights were not antagonistic to state building. For every postbellum equivalent of Justice Comstock in *Wynehamer v. People* articulating a libertarian, antistatist version of substantive due process, there was a Justice Shaw in *Fisher v. McGirr*, demarcating the procedural rights and individual protections the state should observe while expanding the scale and scope of its reach into American social, cultural, and economic life. After all, though the well-regulated society receded after 1877, the police power exploded. The sovereign power of the late nineteenth-century American state was ultimately enhanced by an individualism increasingly defined by national citizenship and directed against the intermediary pulls of locality, section, and association.

But this uneasy alliance of state and individual, power and liberty was not without fundamental tensions. Indeed, the central question of the late nineteenth-century polity was what would hold it all together. The answer came in the guise of a new American constitutionalism. The muddy jurisprudential waters of Anglo-American common law were not conducive to the bright political lines demanded of law by a new liberal ideology. The common law's emphasis on historic communities, local customs, and self-government clashed with both the needs of a centralized state and the resurgence of individualism. Like the reception of Roman law in early modern Europe, the invention of American constitutional law clinched the establishment of a modern nation-state.

Constitutional Law

Oliver Wendell Holmes's *The Common Law* (1881) was the perfect epitaph for a customary, historical, and experiential approach to law quickly being surpassed by new modes of private legal science and public constitutionalism. Prominent postwar battles between power and liberty exposed weaknesses in the common law and shifted the mantle of American fundamental law and governing tradition to a new liberal constitutionalism. Liberal constitutionalism thrived on (and reinforced) the separation of public from private, state power from individual right. Indeed, its identity and strength hinged on its role as the principal guardian of the sacrosanct boundaries between power

and liberty. The invention of this constitutional law entailed fundamentally new rationalities of regulation, social governance, and public order.

As early as the 1830s fights over codification exposed a rift in American conceptions of the rule of law.[18] Codifiers challenged the common law's consensual and apolitical claims, arguing that a less arbitrary, more democratic legalism required the clear, written commands of the sovereign. The grand legislative experiments of the 1840s and 1850s—prohibition, police reform, married women's property acts, Field codes, and general incorporation laws—also undermined a vision of law and legislation as the incremental adjustment of past principle to present need. Such statutes were not minor common law revisions but wholesale shake-ups in established legal relations via the written precepts of sovereign legislatures. As the gaps between law and legislation and law and politics widened, midcentury jurists reworked traditional notions of legislative and judicial roles. Theodore Sedgwick's 1857 treatise on statutory interpretation was an opening salvo in a redefinition of law's primary role as a check on positivist state legislative power.[19] Sedgwick opened the door for both modern judicial review and a thoroughgoing postbellum constitutionalization of American law and regulation.

A cult of constitutionalism greeted the end of the Civil War.[20] Unlike the Eleventh and Twelfth Amendments, the Reconstruction Amendments became the focus of an entirely new constitutional and political philosophy. Treatises by Thomas Cooley and Christopher Tiedeman moved constitutionalism from the periphery to the center of American jurisprudence as the definitive oracle on governmental power and individual liberty, public aspirations and private freedoms.[21] The substance of that constitutionalism was increasingly defined in terms of substantive due process and constitutional limitations on the one hand, and inalienable (eventually federal) police power on the other. Despite the *Dred Scott* debacle, the American judiciary quickly regained power as the ultimate mediator of modern liberal demands for more state power *and* more individual rights.

The consequence for the police power and social and economic regulation was a decisive constitutionalization. After the Civil War, the police power became a constitutional doctrine. Its roots in amorphous English common law and continental police traditions regarding well-regulated communities were obscured by its new status as a formal subheading of American constitutional law. Age-old regulatory issues were reexamined and redecided in a distinctly constitutional framework in the great police power cases of the late nineteenth-century: *Munn v. Illinois* (1877), *Mugler v. Kansas* (1887), *Powell v. Pennsylva-*

nia (1888), *Budd v. New York* (1892), and *Lawton v. Steele* (1894).[22] Lemuel Shaw–like arguments about well-ordered society and civil liberty in self-governing communities became increasingly rare. Indeed, they were ultimately written out of the American constitutional tradition in exchange for the more usable, victorious past of John Marshall's commercialism, Daniel Webster's individualism, Joseph Story's constitutionalism, and Abraham Lincoln's nationalism.

But liberal constitutionalism was not the only jurisprudential consequence attending the decline of the common law vision of the well-regulated society. Although historians have spent much time debating the shift from legal instrumentalism to legal formalism, it is clear that the rationality of late nineteenth-century private and public law was both more formalist and more instrumental than the customary and historical jurisprudence of the common law tradition. Late nineteenth-century law was simultaneously more committed to the logic and precision of legal form, category, and rule and more attuned to law's effectiveness as a tool for advancing external societal goals like economic efficiency. Less present in American law after 1877 was toleration for the unwieldy, ambiguous mess of substantive human and historical values (ethical, religious, political, communitarian, aesthetic) present in the experiential accretions of common law. Modern jurisprudence tended toward positive formulations of power and interest, constitutional delineations of individual right, scientific applications of legal rules, and economic calculations of general welfare and utility. None of these things were conducive to the old common law tradition. It was discarded, and a new law was invented. By the twentieth century, American constitutional law assumed its necessary place next to American individualism and the American state.

Between 1877 and 1937, then, American conceptions of state power, individual rights, and the rule of law were fundamentally transformed. The invention of American constitutional law was the final linchpin in a new governmental regime that radically separated private right and public power in simultaneous pursuit of a centralized state and an individualized subject. The result was modern American liberalism—the way we currently tend to break up and analyze the legal-political world. The conventions and mythologies of this twentieth-century American liberalism have made it only that much harder to reconstruct and interpret the nineteenth-century well-regulated society. Modern notions of public power and private right displaced social theories of rights and traditions of local self-government, and they continue to obscure historical understandings of the people's welfare.

All of these changes in state power, individual right, and constitutional law were evolutionary historical tendencies rather than final and complete transformations. No doubt one can still detect traces of the well-regulated society in contemporary law and society. But overall, a new legal-governmental regime displaced the one described in this book by the beginning of the twentieth century. Its repercussions bombard us today in the form of an increasingly centralized, bureaucratized sovereign state; a sociocultural politics centered around an ever more thinly defined conception of the self; and a formal and instrumental approach to law and governance that privileges realistic and radically presentist formulations of interest and power over idealistic and historical visions of *salus populi.*

A modern liberal perspective on these changes emphasizes progress. And, indeed, the demise of the well-regulated society gave rise to two of the most compelling achievements of twentieth-century politics and society: the creation of an American welfare state and the emancipatory movements for civil liberties and civil rights. Clearly we cannot go back. Despite nostalgia for community values and social order, one would not want to revive a legal-governmental system that coexisted so comfortably with slavery and patriarchy. Nonetheless, heeding the warnings of critical theorists about the dangers of instrumental rationality, atomized individualism, and authoritarian governance, one cannot help but feel uneasy about some of these tendencies. One cannot help but wonder about the prospects for new despotisms within the ostensibly liberating agenda of constitutional law, individual rights, and central state power. One worries for a late twentieth-century polity that continues to reject fundamental aspects of the American democratic-republican experiment—an autonomous conception of the public good, a commitment to self-government and participatory citizenship, and a vision of law and governance "shook from sublimer powers than those of self." *Salus populi suprema lex est* consisted of an unbreakable bond between its constituent parts. There was no people's welfare without a rule of law, and there was no rule of law without a due regard for the common good. When *res publica* (the public things) and *salus populi* (the people's welfare) become mere functions of individual interests, economic formulas, and political expediency, we have only laws of men, not government.