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CHAPTER FOUR

Public Ways: The Legal Construction of Public Space

Smooth the road and make easy the way.—George Washington

Regulations of public safety and public economy were central to the creation of the early American state in the guise of the well-regulated society. But powerful as was their reach into social and economic life, fire and market regulations alone convey a rather limited picture of *salus populi.* Indeed, the ancient origins of overruling necessity and the regulated market house risk leaving the false impression that early American safety and economic policy was but a continuation of age-old habits of local governance. That would be a mistake. The well-regulated society was not a residual colonial communalism but a new and positive extension of police power over society and economy as part and parcel of the establishment of early republican governance.

The best example of the new, creative, and perfectionist (as opposed to old, negative, and preservationist) dimensions of the well-regulated society was the degree to which the early American polity seized control over the nation's infrastructure—its primary mechanisms of transportation, communication, association, and trade. In the early nineteenth century, public officials working in the *salus populi* tradition radically extended governmental powers over roads, rivers, harbors, bridges, buildings, monuments, commons, parks, and marketplaces. They used the governmental rhetoric and legal tools of the well-regulated society to create and carve out distinctly public properties and public spaces. This positive construction of public rights and powers in common

resources bolstered the authority and expanded the jurisdiction of new state governments. It laid the groundwork for a wider assertion of state power throughout the society and economy. Indeed, the development of public thoroughfares and public squares was routinely followed by regulation—a broad-based policing of the streets.

The American story of the invention of public property and the development of a public infrastructure must be seen in the larger context of the emergence of modern states. Sociologist Michael Mann has identified "infrastructural power"—"the capacity of the state actually to penetrate civil society, and to implement logistically political decisions throughout the realm"—as a defining and indispensable element of modern governance. Central to such logistical permeation of society by state (which included such diverse things as literacy, coinage, and weights and measures) was the efficient and controlled transportation of people, goods, and messages via improved roads, waterways, and means of communication.[1] Pasquale Pasquino has rooted most forms of European police regulation in the first attempts of early modern states to take infrastructural control over lands and spaces outside traditional feudal jurisdictions, for example, squares, markets, roads, bridges, rivers.[2] The public recapturing and regulating of these crucial grids of connection, transport, and assembly was a first object of police and modern statecraft. Well into the twentieth century, roads, rivers, ports, and communication networks remained the "measure of civilization"—the measure of nation-states.

Although the context of state-formation was similar, the American version of this infrastructural transformation waited the postrevolutionary establishment of nationhood. In the early nineteenth century, American officials embarked on a concerted and extensive campaign to improve and expand state power over public ways and to imagine, map, and control new public geographies. Parts of this story are familiar to historians. This is the era of internal improvements and "Transportation Revolution." Commonwealth historians from George Rogers Taylor to Carter Goodrich to Harry Scheiber have explored in marvelous detail the explosion of public interest and investment in great infrastructural works like the Cumberland Road, the Ohio and Erie Canals, and ubiquitous local efforts to encourage turnpike and railroad development.[3] Such studies challenge theories of governmental "drift and default," and demonstrate the importance of a comprehensive system of public improvements to early American economic development.

While social historians have tended to downplay macrolevel changes in economy, transportation, and communications, they have remained quite attuned to the cultural significance of the policing of public space. Elizabeth

Blackmar, Mary Ryan, and David Scobey, for example, have depicted public spaces (e.g., squares, parks, main streets, promenades, riverfronts) as one of the key nineteenth-century terrains for the playing out of the cultural politics of race, class, and gender.[4] The American system of public infrastructural development, in other words, had powerful social-regulatory as well as economic-promotional dimensions. The creation, regulation, and policing of public space and property was central not only to early American state building, but to the general conduct of economic and social life. The relationship between the abridging of distance (whether by technological change or concerted governmental investment) and the formation of national, sectional, and cultural identities was fundamental.

The cultural and morals policing of streets, inns, and theaters will be addressed in the next chapter. For now, I would like to concentrate on the initial problem of the legal construction of publicity—the way public officials as part of a vast American transportation and improvements revolution first established the public's priority and stake in properties of connection, mobility, exchange, and communication.[5] In particular, this chapter will investigate the juridical creation and protection of public rights in some taken-for-granted settings: roads, rivers, ports, and squares. Today public powers and rights in such locales seem self-evident. But the outcome of nineteenth-century policy was more in dispute. There was, after all, nothing *inherently public* about a highway or riverway. "Publicness" had to be constructed and defended in a political and social milieu fraught with conflict and tension. Nineteenth-century towns and populations expanded and moved through spaces and properties that for long periods of time had been considered exclusively private. The process of building public thruways, bridges, wharfs, and even parks involved the public expropriation and extinguishment of preexisting rights, usages, and expectations.[6] The invention of public space was contested terrain in the early nineteenth century, requiring a full deployment of the rhetorics and techniques of the well-regulated society.

Roads, rivers, and ports were singled out early as territory for the extension and elaboration of state powers of police. As bearers of valuable social resources like mobility, communication, and commerce, public "highways"[7] aroused the attention and the passions of the new nation's leading politicians and jurists. In *Federalist* No. 14 James Madison endorsed immediate infrastructural improvement:

> The intercourse throughout the Union will be daily facilitated by new improvements. Roads will everywhere be shortened, and kept in better

order; accommodations for travelers will be multiplied and meliorated; an interior navigation on our eastern side will be opened. . . . The communication between the western and Atlantic districts . . . will be rendered more and more easy, by those numerous canals, with which the beneficence of nature has intersected our country, and which art finds it so little difficult to connect and complete.[8]

Madison's enthusiasm for connection, intersection, communication, navigation, and intercourse as a foundation for union and good government echoed throughout the period. Joseph Angell's pioneering treatise on the *Law of Highways* invoked French police theorist Jean Domat: rivers and ports were gifts of God securing "communication with all the world."[9] They were "gates of the republic" and "facilities to husbandry, commerce, and manufactures" on which the growth and prosperity of a well-regulated society depended.[10] Francis Lieber devoted a full chapter of his founding political textbook to "Communion—Locomotion, Emigration," arguing that connection and communication were "indispensable elements of all advancing humanity."[11] Early American police and civil policy had among their principal objects not only the creation of well-regulated cities and towns, but the establishment of ordered connections between them "by thoroughfares."[12] As Albert Gallatin confessed in 1807, the public significance of roads and rivers was so "universally admitted, as hardly to require any additional proofs."[13]

Such police rhetoric reflected a deeper legal and governmental reality. Nineteenth-century statute books were swollen with legislation regarding highways, internal improvements, and infrastructure. Almost every state that revised its statutes in the 1830s and 1840s provided a separate title for "Highways, Bridges, and Ferries" where they dictated the procedure for laying out public roads, appointed officers for the superintendence of highways and bridges, specified persons liable to work on highways, provided for assessments, and enumerated the regulations and penalties attending the obstruction of public ways.[14] Cities and towns were separately incorporated with elaborate and open-ended powers to "regulate, keep in repair, and alter the streets, highways, bridges, wharves and slips."[15] Nineteenth-century ferry regulations were paradigms for the kind of minute and controlling detail that suffused the well-regulated society. An 1810 New York statute regulating rates on the New York City–Nassau Island ferry was typical:

For every fat ox, steer or bull, twenty-five cents, for all other neat cattle eighteen cents, the ferry-master to find the necessary head ropes to fasten

and secure the cattle in the boats; for every dead calf, hog or sheep, two cents; for every lamb, pig or shote, one cent; for every quarter of beef, three cents; for every firkin of butter, lard or tallow, two cents; for every other package of butter, lard or tallow, per cwt. three cents; for every ham, an half cent; for every bale of cotton or wool, ten cents; for every crate of earthen ware, twelve cents and an half; for every bear skin, dry hide or horse skin, an half cent; for every cask of flax seed, dry beans or peas of seven bushels, seven cents; for every hundred oysters or clams, one cent; for every sheaf of straw, an half cent; for every one horse chaise with standing top, thirty-one cents; for every hundred bricks, six cents; for every full trunk or chest four feet long, six cents; three feet long four cents; for every full trunk or chest two feet long, two cents, all under, one cent; for every empty trunk or chest of the above sizes, half the above rates; for every bookcase or cupboard, twenty-five cents; for every secretary, bookcase or chest of drawers, twenty cents; for every mahogany dining table, eights cents; for every tea or card table, four cents; of other kind of wood, half of the above rates; for every piano forte, twenty cents; for every mahogany bedstead, four cents; of other wood, two cents; for every clock and case, twenty-five cents; for every sideboard, thirty-seven cents and an half; for every mahogany settee, twenty cents; of other wood, six cents; for every feather bed, three cents; for every cat-tail or straw bed, one cent; for every matrass of hair or wool, two cents; for every looking glass the plate six feet long, fifty cents; five feet long or upwards, eight cents; three feet, six cents; two feet, two cents; all under, one cent; for every chaldron of coals, fifty cents; for every cord of nutwood, eighty cents; for every cord of oak or other wood, seventy cents; for every kettle of milk of eight gallons or upwards, two cents; for every empty milk kettle, one cent; for every musket or fowling piece, one cent; for every large or horse boat of household furniture where a single boat is required, one hundred and fifty cents; for every ton of hemp or flax, sixty-two cents and an half; for every ton of cordage, sixty-two cents and an half; for every ream of paper one cent; for every fruit or other tree more than six or less than ten feet long, an half cent; all under, one quarter cent; flowers or shrubs in pots or boxes, an half cent; for every corpse of an adult, twenty-five cents; of children, twelve cents and an half; for every cheese, one quarter cent; for every dog, four cents; for every hundred of pipe staves or heading, fifteen cents; for every hundred of hogshead staves or heading, twelve cents and an half; for every hundred

of barrel staves or heading, eight cents; for every hundred weight of hay, ten cents.[16]

In 1846, New York synthesized its general canal laws and regulations in a 129-page volume containing some 500 separate provisions.[17] Add the surfeit of charters granted to corporations for the construction of roads, turnpikes, bridges, ferries, and canals, and it should be clear that public property and public highways were major preoccupations of the early American state.

The public and police significance of roads and waterways was not lost on jurists and legal commentators. In William Blackstone's classic description of offenses against "the public order and oeconomical regimen of the state," he went first to "*highways, bridges,* and public *rivers.*"[18] Horace Wood, who perhaps better than anyone in the period understood the importance of public as opposed to private nuisances, devoted much of his treatise to the exploration of public nuisances in highways and navigable streams.[19] After the Civil War, Thomas Cooley and John Dillon continued the legal tradition of beginning discussions of state power in nineteenth-century America with an exploration of public authority over public ways.[20] Indeed, most of the formative legal cases of the nineteenth century involved transportation, infrastructure, or public properties and utilities. Excluding ubiquitous railroad cases, the list still includes *Palmer v. Mulligan* (1805), *Callender v. Marsh* (1823), *Gibbons v. Ogden* (1824), *Willson v. Black-Bird Creek Marsh Company* (1829), *New York v. Miln* (1837), *Charles River Bridge Case* (1837), *Commonwealth v. Tewksbury* (1846), *Passenger Cases* (1849), *Commonwealth v. Alger* (1851), *Cooley v. Board of Wardens* (1851), *Genesee Chief v. Fitzhugh* (1851), *Wheeling Bridge Case* (1852), *Munn v. Illinois* (1877), and *Pensacola Telegraph Co. v. Western Union Telegraph Co.* (1877).[21]

This chapter explores this extensive legal tradition of police regulation in roads, rivers, and other public properties. If the overarching lesson of fire and market regulations concerned the *relative* nature of private rights (especially when in conflict with public safety, economy, and welfare), regulations of public space reflected the *absolute* nature of public rights in the well-regulated society. Indeed, perhaps in no other area of nineteenth-century social and economic life was state power wielded so effectively and unambiguously to define and uphold the rights of the public. By midcentury, courts, legislatures, and common councils made it perfectly clear that private claims to public properties and spaces would always be trumped by the great public objectives of regulated and improved transportation, communication, and assembly. In the process, these legal actions and reasonings poured new content and

meaning into that tortuous and elusive adjective "public" that came to define the early American way.

Roadways

The simplest meaning of "public" is nonprivate. Consequently, the first hurdle confronting the publicization of early American roadways was their original status as private property. At the start of the nineteenth century, the ownership of the land constituting roads (and, by analogy, navigable rivers) remained in the hands of adjacent landowners. As James Kent stated the original common law rule, the "owners of the land on each side go to the centre of the road, and they have exclusive right to the soil."[22] Title to lands making up the highway belonged to bordering property owners as part of their private domain. The public acquired only an "easement" in the road—what Kent described aptly as "charges on one estate for the benefit of another."[23] In this case, the easement was "the right of passage" for the benefit of the public. Horace Wood summed up the system: "At the common law, the only right which the public acquired in highways was that of passage over it, and any interference with the soil, other than that necessary to the full enjoyment of this right, . . . [was] regarded as an interference with the rights of the owner of the fee."[24]

Thus, the establishment of public jurisdiction over streets and roads first necessitated an aggressive use of state power to extinguish private, common law claims and expand the public easement. Invoking the *salus populi* tradition, nineteenth-century jurists did just that. They dissolved vested interests and private property rights and reinvented the roadway as a distinctly public phenomenon, an object of governance and police. By 1857, Joseph Angell expanded the public easement to include "the more general purposes of sewerage, the distribution of light and water, and the furtherance of public morality, health, trade, and convenience."[25] Horace Wood similarly flipped public/private priorities by 1875, arguing that "the public easement is superior to all other rights, and no one has any right to impair it in the slightest degree—not even the owner of the soil."[26] The construction of this strong public tradition in the American rules of the road had three separate components: the initial assertion of publicity, the subsequent policing of newly established public rights, and the expansion of public remedies.

The initial assertion of a highway's publicity was a product of two rather arcane but enormously important jurisprudential developments: the revival of Matthew Hale's concept of public rights in public ways and the simultaneous

expansion of the doctrine of implied dedication. Historians Harry Scheiber and Molly Selvin have demonstrated the power and reach of Matthew Hale's manuscripts "*De Jure Maris*" and "*De Portibus Maris*" in nineteenth-century American law.[27] In those two works on public waterways and highways, Hale basically argued that beyond the private rights (*jus privatum*) of adjacent property owners, there existed public rights (*jus publicum*) in certain rivers, ports, and roads that could not be violated. Public highways had to be "free and open for subjects and foreigners." They were not subject to the private whim of titleholders. Hale entrusted the sovereign with the ultimate "patronage and protection" of such *juris publici* (common highways, common bridges, common rivers, and common ports). It was an obligation of governance to police such public properties, preventing all impediments and nuisances that might "damnify the public."[28]

Hale's ideas manifested themselves in American case law as strong statements of the sovereign's prerogative regarding public ways. Chief Justice Gibson of the Pennsylvania Supreme Court best captured this commonwealth theory of public property in 1851:

> To the Commonwealth here, as to the king in England, belongs the franchise of every highway as a trustee for the public; and streets . . . are as much highways as are rivers, railroads, canals, or public roads laid out by the authority of a municipal corporation. In England a public road is called the king's highway; and though it is not usually called the Commonwealth's highway here, it is so in contemplation of law, for it exists only by force of the Commonwealth's authority. . . . Every highway, toll or free, is licensed, constructed, and regulated by the immediate or delegated action of the sovereign power; and in every Commonwealth the people in the aggregate constitute the sovereign.[29]

Such a theory of sovereign control over highways gave the state "full power to provide all proper regulations of police to govern the actions of persons using them." It took away from all private persons (adjacent property owners as well as passersby) any private interest in the way. As Wood put it, "No person can acquire a private easement in a public highway." Private rights were "in abeyance and subject to the superior rights of the public."[30]

Hale's public rights and Gibson's sovereign prerogative greatly enhanced public powers over existing streets and roads. Indeed, by midcentury they essentially destroyed anything left of private claims to the road and deemed it a fundamentally public property. But such doctrines did not actually bring new properties into the public sphere. For that purpose, another legal technique

was much more effective.[31] The doctrine of implied dedication loosened the requirements for establishing a road's essential publicness in the first place.[32]

Public roads were not built on neutral space; they were carved out through previously private lands, necessitating a public expropriation of private right. The doctrine of implied dedication accomplished this (without the compensation demanded of eminent domain) by holding that when a property owner left his land open to public travel for a certain period of time, the courts could infer an intention to dedicate this land to public use.[33] Simple acquiescence, time, or the selling of lots could be used by judges to create this public priority. Historian Carol Rose has gone so far as to venture that the only thing a landowner could do to prevent an implication of public access and control was to make the way "physically impassable."[34]

Indeed, early nineteenth-century courts defended a presumption that roads had been dedicated to public use. They were extremely reluctant to support assertions of age-old private rights. In *State v. Wilkinson* (1829), for example, Curtis Wilkinson was indicted for erecting a building on a common highway through the public square of the village of St. Albans, Vermont.[35] Wilkinson argued that his ancestor Silas Hathaway had never formally dedicated the land to public use, and that consequently it was his to do with as he wished. The Vermont Supreme Court disagreed finding an implied dedication: "If the way is of public convenience and has been treated by the public without interruption, a presumption arises of their right, and a dedication of it to them by the owner may be inferred."[36] Public use of the property as a highway for thirty years grew into an irreversible and preeminent public right. Throughout the nineteenth-century, similar doubts as to title and dedication were resolved overwhelmingly in favor of public property. The consequences could be enormous. Private ferry-houses, stables, homes, walls, and other buildings constructed on what landowners thought was their own property could be pulled down for violating the public easement and interfering with common right.[37]

The pulling down of private structures signals the second component in the consolidation of public power over public ways—the policing of newly created rights of public access and thoroughfare. An effective infrastructure depended not only on the transformation of private property into public highway, but on the state's subsequent ability to guarantee and defend public transportation and communication from impediments. Public roads had to be kept free of private intrusions, usurpations, and obstructions. That became another important job for the common law of public nuisance.

The public power to remove and abate nuisances and encroachments on highways was a crucial instrument of sovereignty and an important develop-

ment in early American law. Indeed, the legal power to abate highway nuisances complemented (and, in some of its ramifications, surpassed) the state power of eminent domain. While the law of eminent domain held that the state could expropriate private property with adequate compensation, the encroachment doctrine held that the inverse case was not possible. A private individual could not expropriate the public (and, therefore, preeminent) domain. Public rights in roads and waterways were inviolable. Moreover, there was nothing particularly trivial or obscure about highway "encroachments" or "obstructions" in the early nineteenth century. Though fines for common nuisances were sometimes small, the abatement and destruction of costly buildings and wharves entailed public sanctions of the highest order.[38]

The leading early American case of an obstructive nuisance to a public road was *People v. Cunningham* (1845).[39] Cunningham was the owner of a Brooklyn distillery that since 1810 had been delivering excess slops to farmers via a peculiar but efficient technology. Iron pipes ran out of the distillery ("at a sufficient elevation to be above the heads of persons passing on the sidewalk") and into the street, where slops were discharged into casks in waiting carts and wagons.[40] The state asserted that the long lines of wagons obstructing Front Street from early morning to late evening amounted to a public nuisance. The expansive "obstruction to streets" rationale reached all kinds of noxious conduct. Evidence was admitted on the noisome effects of this whole process of delivering slops, the "great quantities of offensive filth in the street" and the "offensive smells and stenches." The whole disordered scene clashed with the vision of a well-regulated society: "From an early hour in the morning until late in the evening every day the street at this point was thronged with teams of 'swill-drivers,' waiting to be served by the defendants, the drivers of which indulged in coarse and obscene language and crowded and fought for priority, and travel upon the street was constantly and greatly impeded."[41] Obstructing the right of way was important, but Cunningham was also guilty of offending a range of community sensibilities from order and morality to health and aesthetics.

Despite the private rights involved, despite the efficiency and convenience of this mode of delivering slops, despite the fact that the distillery had been operating this way for thirty-five years, and despite the fact that it would greatly injure the defendant's business and dependent trades and commerce, the New York court ordered the public nuisance abated. Justice Jewett reasoned, "The citizens in general have a right of passage in the street or highway . . . to its utmost extent unobstructed by any impediments."[42] The court admitted that this "mode of delivery was decidedly preferable, as well for pri-

vate as public convenience," and that "this business [could] not be carried on in any other manner at that place so advantageously either to individuals or the public." Still, in legally absolutist rather than economically instrumental fashion, it held the defendant "could not legally carry on any part of his business in the public street."[43] One could not "eke out the inconvenience of his own premises by taking the public highway."[44] Jewett concluded with Kent's open-ended endorsement of the well-regulated society: "Private interest must be made subservient to the general interest of the community."[45]

Cunningham was a clear victory for state police power over public highways, defending several important principles of publicity. First, public rights of passage and convenience were absolute. Time, habit, or even formal municipal acquiescence did not legitimate private intrusions on public rights. The fact that Cunningham had been doing business like this for thirty-five years with the explicit sanction of the Brooklyn city council did not weaken the public's claim to the highway.[46] Cunningham's customary right was expropriated, for there could be no such thing as a vested right to obstruct public roads. The displacement of Cunningham's customary private rights by an absolute rendering of public rights was followed up with a broad-based defense of public power to police the streets. Was Cunningham prosecuted simply for blocking a public way? More likely it was the general character of this public inconvenience—the filth, the stench, the general disorderliness. The prosecution of public property nuisances and the power to remove highway encroachments were effective mechanisms of broader social and cultural regulation. The policing of the streets was but prelude to a general extension of police powers throughout American economy and society.

People v. Cunningham did not stand alone. In *State v. Morris and Essex Railroad Company* (1852) and *Morton v. Moore* (1860), a railroad and a sawmill bore the brunt of the courts' hostility to private obstructions on public ways.[47] In *Morris and Essex Railroad*, the court ordered a building torn down and several railroad cars removed, warning that a railroad's corporate identity brought no special privileges to intrude on the public domain. It required no great ingenuity, the court declared, to show that "a company, as such," was guilty of a public nuisance when it annoyed or impaired "the common rights of the community."[48] In *Morton*, the court denounced the sawmill's sixty-year practice of abusing the *jus publicum*, arguing that "the right of the public in a common highway is paramount and controlling."[49] Even milldams, by all accounts a most favored form of property in statute law and private adjudication, did not fare well when public rights were at stake.[50] In *Dygert v. Schenk* (1840), the defendant allowed a bridge covering his millrace that crossed the

public road to fall into disrepair.[51] The court ruled that he "came short of his obligation to the public. . . . Any act of an individual done to a highway, though performed on his own soil, if it detract from the safety of travelers, is a nuisance." The court excoriated the defendant's selfishness: "Things began and ended in himself; the land, the mill, the water, the raceway, the profit, and therefore the bridge. The public [derived] nothing but mischief."[52] In *Dimmett v. Eskridge* (1819), the Virginia court upheld the right of a private citizen to cut down a milldam obstructing both the Great Cacepehon River and a public road "to the great damage and *common nuisance* of the Citizens of [the] Commonwealth."[53]

In a host of similar cases, early American state courts defended the principles of public rights in public property. The Michigan Supreme Court refused to interpret an 1807 act of the state legislature giving property owners ten feet for the erection of steps, porches, and awnings as vesting rights in proprietors. The court cited forty years of English and American jurisprudence against making public rights "subservient to the convenience or cupidity of individuals."[54] In Massachusetts and Maine, judges resisted attempts to limit public rights solely to the traveled part of the road: "obligation to the public . . . required the full and entire use of the whole located highway."[55] Chief Justice Shaw extended these doctrines to turnpikes.[56] Similar judicial reasonings accompanied defenses of public rights against lesser obstructions like stones, logs, steps, ditches, and fences.[57]

This body of case law vigorously defended the well-regulated society's interests in a publicly controlled infrastructure. Throughout the period, courts refused to allow private businesses, be they millowners, distillery owners, railroads, or auctioneers, to encroach on the commonwealth's highways. The arguments were unequivocal. Private individuals would not be allowed to benefit by appropriating what belonged to the public. In *Commonwealth v. Passmore*, the Pennsylvania court urged that one's private "emoluments or inconvenience can have no weight, when they come in competition with the established rights of the community at large." It endorsed instead the higher social obligations of *sic utere tuo*: "He is bound to exercise the duties of his station without injuring the rights of others."[58] A New York court opted for the even stronger public admonition of Lord Denman to rebut a railroad's arguments from utility: "In the infinite variety of active operations always going forward in this industrious community, no greater evil can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights from motives of personal interest."[59] Such pervasive regard for public rights and hostility to private intrusions cannot be reconciled with

purely instrumentalist or vested rights theories of early American law. Rather, they were part of a police and regulatory tradition fundamental to economic development, social regulation, and the emergence of an early American state.

The third and final component anchoring this potent public property regime was a willingness to expand available procedures and legal remedies to defend public rights and powers in public highways. Traditional indictments and abatements were powerful weapons against private intrusions on public ways. But early nineteenth-century courts also developed two alternative technologies to promote and protect community prerogative: the use of the equity injunction and the doctrine *damnum absque injuria* (an injury without a remedy). Though matters of somewhat complicated and technical doctrinal development, these two legal inventions had a huge impact on the early American creation of public properties. They also illustrated just how far early nineteenth century courts were prepared to go to protect new public rights and powers in the new nation's transportation and communications network.

The equity injunction was one of the most powerful legal remedies available in the early republic. Indeed equity's summary, juryless mode of justice placed so much remedial discretion in the hands of chancellors that it supposedly relinquished its criminal jurisdiction with the abolition of the infamous English Court of Star Chamber in 1641. Nonetheless, early American jurists enlisted criminal equity and its potent injunctive remedies in their fight against private encroachments on public ways.[60] Judges cleared the way for this public equity revival by building on the somewhat improbable legal notion of purpresture, lending credence to Mr. Dooley's observation that in the hands of a lawyer, the brick wall can indeed become a triumphal arch.

In English common law, purpresture denoted a very special kind of public nuisance—an encroachment upon the king and his demesne lands. Since the king was considered the owner of public lands, an encroacher upon public property in England essentially violated two different kinds of rights—the private rights of the Crown (as property owner) as well as public rights of travel and passage (a public obligation of sovereignty). Loath to deny the king a legal remedy available to all other property owners, English courts began to carve out purpresture as a special exception to the usual prohibition on the equity injunction in criminal cases. From 1795 English courts began to uphold the power of the attorney general acting on behalf of the Crown to enjoin encroachments and obstructions on public ways.[61]

In importing and expanding this doctrine, American jurists had to overcome the fact that private encroachments on highways, rivers, and harbors in the United States entailed no similar violation of a regent's personal right.

Jurists resolved this problem by ignoring it, decidedly shifting the basis for equity jurisdiction away from property (albeit royal property) concerns and toward a more general protection of the people's welfare. Public power over public property became matters of policy and sovereignty, not title, charter rights, or the state's capacity as landowner.[62]

Following Joseph Story's endorsement of equity's "more complete and perfect" remedies, American judges invoked the injunctive remedy to restrain all kinds of encroachments on public lands and ways.[63] In *Commonwealth v. Rush* a perpetual injunction was granted to prevent the erection of a house on the public's square.[64] Justice Hepburn of the Pennsylvania Supreme Court based equity jurisdiction on the irreparable mischief threatened by the appropriation of "the property of the public to private use."[65] Alabama and Georgia used the injunction to prohibit the building of elaborate market houses and other structures across old rights of way in Mobile and Columbus.[66] And the injunction was applied with equal vigor against encroachments on public rivers, where even much needed milldams were enjoined when they interfered with public navigation and welfare.[67] Once again, utility was not the measure of public rights. Mills, market houses, aqueducts, railroads, and other important commercial enterprises met "the strong arm of the Court" when they encroached on public ways. Though some legal historians have argued that public nuisance doctrine was primarily a vehicle for protecting private capital,[68] the forceful use of the equity injunction against highway obstructions suggests an alternative objective: the creation and protection of public rights and state interests in an emerging national infrastructure. Though private rights were clearly placed at greater risk through the adoption of equity's summary processes, courts invoked *salus populi*—the "political maxim . . . that individual interests must yield to that of the many."[69] Potent remedies were needed "to compel persons so to use their own property as not to injure others."[70]

Another legal weapon employed in the fight to protect public rights from private interference was the common law doctrine *damnum absque injuria* (an injury without a remedy). In an important and intriguing turn in the public law of the road, courts made it exceedingly difficult to collect private damages as a consequence of the ubiquitous public works projects of the early nineteenth century. When public officials interfered with private rights in repairing or altering highways, courts increasingly refused to grant private property owners damages or compensation, arguing that such private injuries warranted no public remedies. *Damnum absque injuria* and the complementary notion of "consequential injury" insulated the public sector from a slew of

private damage claims and helped establish the jurisprudential distinctiveness and priority of public powers—an important ingredient in early American state building.

The proximate common law origin of *damnum absque injuria* was the English case *Governor v. Meredith* (1792).[71] There English pavers changed the grade of a street, forcing the plaintiffs to heighten an arch admitting wagons to their warehouses. Chief Justice Kenyon denied an action for damages, warning that it would jeopardize every turnpike act, paving act, and navigation act in the kingdom. Justice Buller issued a famous concurrence: "There are many cases in which individuals sustain an injury, for which the law gives no action; for instance, pulling down houses or raising bulwarks for the preservation and defence of the kingdom against the king's enemies. . . . This is one of those cases to which the maxim applies, *salus populi suprema est lex.*"[72] *Meredith* held that the common law would tolerate without remedy extensive interferences with private rights when the public welfare demanded.

The early American transportation revolution involved some radical interferences with just such private rights. In the influential case *Callender v. Marsh* (1823), the regrading of a Boston street laid bare the foundation of a private dwelling house forcing a costly rebuilding.[73] Nonetheless, Chief Justice Parker found the surveyor's actions authorized by statute and well within the "right use of property already belonging to the public."[74] The damage sustained by the homeowner was not a "taking" of private property deserving compensation under Article 10 of the Massachusetts Constitution, for that article had "ever been confined . . . to the case of property actually taken and appropriated by government." Rather, the government was merely making "right use" of property already belonging to the public, which included the power to "repair and amend the street . . . to make the passage safe and convenient." The injury sustained by the plaintiff in the process was "indirect," "consequential," and *damnum absque injuria.*[75] As in the New York fire cases, sometimes the forceful promotion of the public welfare entailed private, uncompensated costs. The road to a national public infrastructure would not be held hostage to private damage claims.

Although much has been made of some famous dissents to the rule in *Callender v. Marsh* (most importantly Chancellor Kent's opinion in *Gardner v. Newburgh*), it remained the dominant doctrine into the late nineteenth century.[76] Courts continued to evaluate cases of private damage from public works not from the perspective of property rights and eminent domain, but in terms of the police powers and sovereign prerogatives belonging to the state to

promote the people's welfare through well-regulated public thruways. In *Radcliff's Executors v. Mayor of Brooklyn,* Chief Justice Bronson summed up the rule of *damnum absque injuria* in public works cases:

> If any one will take the trouble to reflect, he will find it a very common case, that the property of individuals suffers an indirect injury from the constructing of public works; and yet I find but a single instance of providing for the payment of damages in such a case. . . . The construction of the Erie Canal destroyed the business of hundreds of tavern-keepers and common carriers between Albany and Buffalo, and greatly depreciated the value of their property, and yet they got no compensation. . . . Railroads destroy the business of stage proprietors, and yet no one has ever thought a railroad charter unconstitutional, because it gave no damages to stage owners. The Hudson river railroad will soon drive many fine steamboats from the river; but no one will think the charter void because it does not provide for the payment of damages to the boat owners. A fort, jail, workshop, fever hospital, or lunatic asylum, erected by the government, may have the effect of reducing the value of a dwelling house in the immediate neighborhood; and yet no provision for compensating the owner of the house has ever been made in such a case.[77]

Other grand statements in this *damnum absque injuria* tradition included *Charles River Bridge* (1837) and *Barron v. Baltimore* (1833). In the former, Chief Justice Taney refused to compensate the proprietors of the Charles River Bridge when they were disfranchised by the new, improved, and free Warren Bridge arguing that if all private injuries suffered on account of new public works were compensated, "we shall be thrown back to the improvements of the last century, and obliged to stand still, . . . [unable] to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world." In the latter, Chief Justice Marshall refused compensation to a wharf owner left high and dry by a Baltimore harbor project lowering water levels. Marshall argued famously that the Fifth Amendment's takings provision applied only to the general government and not to the states.[78]

Like *Callendar* and *Radcliff,* these classic cases were not simply about takings or limited liability or the creative and instrumental destruction of vested property rights. Rather, these cases were argued and decided squarely within a vibrant and expansive tradition of state power and police. A key part of that tradition was the refusal of courts to restrict themselves to a private jurispru-

dence of Right—Injury—Compensation. Instead of reasoning upward from private rights and particular injuries, these decisions reasoned downward from autonomous conceptions of state powers, public rights, and the general welfare of the society. If some private individuals were injured as a consequence of public-spirited improvements, early American judges were comfortable leaving them without a remedy. *Damnum absque injuria* was not a hole in their jurisprudence, it was a solution.[79] In the creation of a powerful tradition of regulated public space and public property, this solution meshed perfectly with concomitant changes in the laws of dedication, purpresture, and public nuisance. Private rights were relative; public rights were absolute. Such doctrines were crucial to the emergence of an early American state tradition that went well beyond the common law negotiation of private conflicts and economic transactions.

Riverways

Given the condition of most early American roads (one Ohio maintenance statute required that stumps be cut to within one foot of the road surface),[80] rivers assumed even greater importance in early American economy and society. Indeed, it is almost impossible to overestimate the significance of rivers in the settlement of towns and cities, the marketing of crops, and the migration of populations. In 1818, two thirds of the market crops in South Carolina were harvested within five miles of a river.[81] Before 1820, most of the population of Ohio huddled around the Ohio River and its tributaries.[82] As Joseph Angell awkwardly rhapsodized, to rivers "has the public at large been extensively indebted for the easy and convenient communication by them afforded, between the maritime cities and the rapidly growing productive regions of the interior. They have imparted energy to the enterprising genius of the people, and been the means of transforming deserts and forests into cultivated and fruitful fields, flourishing settlements, and opulent cities."[83]

Consequently, rivers, like roads, became a key site for the exertion of state power over grids of transportation and communication. Once again, the first step to asserting state regulatory power over rights in rivers hinged on the legal declaration of a river as public highway. This was a trickier enterprise with waterways than with roadways. Without denying the variety encountered on American roads, it was relatively easy to categorize them legally as either public or private. In contrast, waterways ran the gamut from majestic seaports hosting the largest international vessels to trickling streams and brooks

navigated only by crayfish and salamanders. Drawing lines and allocating public and private rights was a more difficult and variegated business.

For most American jurists, the starting point for sorting out the tangled relationship of public and private in rivers was the English common law. Though English experience was diverse, most acknowledged that the test of a river's publicness in England was "navigability," which the common law equated with the ebb and flow of the tide.[84] Waters that moved with the tide were regarded as "navigable"—distinctly public and under the control and regulations of the Crown. Waters resisting the fluctuations of the tide were "nonnavigable" and under local or private control. Given England's island status, this legal equation of navigability, tidewater, and publicness had a reasonable basis in reality and policy. Most rivers capable of useful, public navigation by boats were more than likely affected by the tide. But from an American perspective the common law rule equating navigability with tidewater made little sense (especially as settlement moved westward). If strictly construed, the tidewater rule immunized America's great inland rivers—the Mississippi, Ohio, Susquehanna, and Hudson—from public regulation. Almost immediately, American courts, legislatures, and commentators began searching for a way around the stringent requirements of the common law rule.

Once again, Matthew Hale came to their assistance. In "*De Jure Maris*," Hale portrayed an English common law experience in ports and rivers much more diverse, flexible, and public than implied by the natural rule of tidewaters.[85] Hale admitted that riparian owners had property interests in nontidewater streams, but he refused to see such rivers as insulated from public use and regulation: "There be other rivers, as well fresh as salt, that are of common or publick use for the carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris*, common highways for man or goods or both from one inland town to another."[86] Hale made it clear that the common law equation of navigability and tidewater did not mean that other rivers and streams were unburdened by a public easement of passage and special restrictions for the public safety and convenience.

Early American jurists and public officials took their cue from Hale's expansive conception of public waterways, applying to riverways the same range of public remedies, powers, and rights applied to early American roadways.[87] Hale offered a way around "the absurdity of applying the supposed Common Law to our great rivers, measuring their navigability [and publicness] by the ebb and flow of the tide."[88] Invoking Hale, American courts and legislators

moved steadily toward making most American rivers, navigable *in fact*, susceptible to public jurisdiction and state power.[89] In some jurisdictions, mere "floatability"—the ability of a stream to carry logs or other products—became the measure for public easements and regulatory claims.[90] The result was a complete repudiation of the limited common law definition of navigability. Like roads, most American rivers came to be seen as public rather than private property, serving common rather than individual interests. This fundamental, redistributive shift in the definition of early American public waterways was accomplished without paying compensation to riparian owners. In the well-regulated society, important lines of communication, prosperity, mobility, and intercourse were to be controlled by the state, not private decision makers.

When looking at early nineteenth-century riparian law, legal historians have made much of courts' instrumentalist tendency to favor large and efficient, private developmental interests in the release of capitalist energies.[91] According to this interpretation, when private interests clashed, as they did in the paradigmatic water rights case *Palmer v. Mulligan* (1805), courts usually sided with the newer and larger developmental enterprise. The problem with such a private and economic determinist interpretation of riparian law, however, is that it ignores the larger public law context of the well-regulated society. In the early nineteenth century, private riparian disputes took place on a terrain increasingly being redefined as the exclusive province of public prerogative and police power.

Palmer v. Mulligan involved a private law dispute between millowners on New York's Hudson River.[92] The plaintiff charged that the defendant's newer and larger upstream dam obstructed his flow of water and damaged his forty-year-old sluiceway and mill. The New York Supreme Court's denial of relief to the old downstream millowner usually has been interpreted as a key episode in the liberalization of the common law rules of priority and natural use in the interest of private, economic development—"one of the best instances of the emerging [instrumentalist] legal mentality."[93] Things look a bit different, however, in the context of New York's burgeoning state powers over the all-important Hudson River.

After delineating the Hudson River's definitive status as a "public highway," Justice Spencer declared: "The erection of both dams are nuisances, and it is questionable whether the plaintiffs can . . . complain that the defendant's nuisance is injurious to their nuisance."[94] Spencer wrestled with the problem of weighing private rights on an increasingly public river. But in the end, he

refused to grant private damages to a mill equally intrusive on a public waterway. Justice Livingston concurred with this public perspective: "Whatever [the plaintiffs'] pretensions to build a dam and mills adjoining their own land may have been, it must be conceded that, *as far as the public are concerned*, the defendants had the same right opposite their ground, provided it could be done without injury to the navigation of the river."[95] Assertions of exclusive private rights on free and public ways were inherently suspect. Spencer and Livingston refused to treat *Palmer v. Mulligan* simply as another private dispute entailing a judicial calculation of damages. Rather, consulting the "public advantage," they ruled that one private enterprise could not benefit from the use of public waters to the exclusion of all others. And, of course, if any one private interest made use of the public river so as to obstruct navigation, it became a public nuisance subject to the sternest penalties of early American law.

In remarkably similar language, later courts continued to rebuff private claims made on public rivers and to order the abatement of obstructions and encroachments. New York City's East River was the site of a private dispute over a popular nineteenth-century river obstruction, a floating dock.[96] In *Hecker v. New York Balance Dock Company*, the New York court found such a floating obstruction a straightforward public nuisance: "To place a floating dock in the river, . . . although beneficial in repairing ships, is a common nuisance."[97] In a strikingly antimonopolistic opinion, the court challenged the exclusive, private appropriation of public waterways: "The business of the defendants, although highly beneficial to the commerce of the port, is, in fact and in its very nature, a monopoly. It is an exclusive appropriation to the few of the rights belonging equally to the many."[98] The river was a "common highway" not subject to such private claims and obstructions. Even the local dockmaster had no power to dole out public rights-of-way to private interests.[99]

In *Veazie v. Dwinel* (1862) the Maine Supreme Court ended a prolonged dispute between private milldam owners by again appealing to the superior rights of the public.[100] Citing Hale's "De Jure Maris" as well as *People v. Cunningham*, Justice Rice established the publicity of the entire Penobscot River and defended the public's right to unobstructed navigation and floatage.[101] He summarized a range of similar cases:

> The authorities, ancient and modern, are all consistent, and point in one direction. Highways whether on land or water, are designed for the accommodation of the public, for travel and transportation, and any unauthorized or unreasonable obstruction thereof is a public nuisance in

judgment of the law. They cannot be made the receptacles of waste materials, filth or trash, nor the depositaries of valuable property even, so as to obstruct their use as public highways.[102]

Massachusetts and Maine had long-standing policies to encourage the construction and maintenance of mills; still, the court put greater emphasis on the competing demands of public property. The distinct privileges of the millowner had to be "so exercised as not to interfere with the substantial rights of the public in the stream, as a highway."[103]

Private disputes on public rivers, then, were more than mere private disputes. Early nineteenth century courts consistently recognized the common interests and rights in the highway when deciding such cases. Mills, docks, and dams, no matter how central to economic development, were checked when they interfered with or obstructed public rights. As the Illinois Supreme Court put it in 1848, "A private citizen may not take the public welfare into his own hands, and justify himself for such a violation of its rights, under a plea of general benefit."[104] The courts refused to acknowledge arguments from either absolute property rights or general utility. Instead, they clung to a notion of the public interest inherent in the common law doctrines that protected against obstructions and encroachments on public ways.

When dam owners attempted to claim immunity from such common law restrictions under state mill acts, they met responses like that of Chief Justice Gibson of Pennsylvania: "The legislature never consented to part with a particle of the public franchise for purposes of merely private convenience."[105] Corporate charters also failed to provide an exemption from public nuisance law. Most state legislatures included a provision in their bridge and dock company charters requiring them to conduct their businesses without obstructing or injuring public navigation. Any ambiguity in such charters operated "against the adventurers and in favor of the public."[106] Even winter did not inhibit public responsibility. In *French v. Camp* (1841), the Penobscot was held to be a public highway whether fluid or "congealed."[107] To cut a hole in the ice near a well-known passageway was "a direct violation of that great principle of social duty, by which each one of us is required to use his own rights, as not to injure the rights of others."[108]

With few exceptions, state appellate courts in this period expanded the definition of a public river, widening the applicability of public nuisance restrictions on the private use of riparian property.[109] At the same time, they ignored a range of justifications for infringements of public rights from private property to charter privileges to ice. These legal changes limited public

liability, immunized public works projects from private compensation demands, and creatively destroyed previously enjoyed private rights and usages of property. But their ultimate objective went beyond the legal subsidization of particular industries or an inherent preference for dynamic (as opposed to static) uses of property and economy. These cases reflected the overwhelming force of an emergent state power over public space, public ways, and natural resources. Building on a powerful common law tradition that viewed private rights as subservient to a larger common good,[110] judges in these cases disenfranchised private riparian owners of previous rights and expectations in order to assert the preeminence of public powers in newly established public spaces. In a well-ordered society, public rights and public powers of police were the main legal reference points regulating and redistributing rights-of-way on American rivers.

Ports: New Orleans, Albany, New York, and Boston

The vigorous public property tradition hammered out in early American road and river cases played a substantial role in the histories of some diverse and distinguished riparian real estate. It would be hard to identify bodies of water more important to nineteenth-century development than the port of New Orleans, Albany's Hudson River–Erie Canal Basin, and the harbors of New York City and Boston. It also would be difficult to find bodies of water with more diverse legal and social histories. Yet despite rather drastic cultural, legal, political, and geographical differences, Louisiana, New York, and Massachusetts courts and legislatures came to remarkably similar conclusions about the limits of private rights and the priority of public powers on these all-important waterways.

Louisiana's French civil law heritage guaranteed New Orleans a distinctive approach to the negotiation of public and private claims on the Mississippi waterfront at New Orleans.[111] The extensive regard for public rights in the civil law tradition was reflected in Louisiana's Civil Code of 1808. The code formally defined "public things" as "the property of which belongs to a whole nation, and the use of which is allowed to all the members of the nation." It included under that designation navigable rivers, seaports, roads, harbors, and highways.[112] Private individuals exercised no rights of property in such "public things." The Louisiana code also made special provision for riverbanks. Banks and shores remained in the hands of private owners, but *use* of them was open to the public: "Every one has a right freely to bring his ships to land

there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like."[113] In 1825, the code specified levees as part of the "banks" of the Mississippi.[114] And in Louisiana, there was never any question that the Mississippi itself was a decidedly public river.[115]

But civil law and codification did not preclude legal conflict on the Mississippi at New Orleans. One of the most famous disputes was the New Orleans Batture controversy.[116] That legal-political struggle centered on Edward Livingston's claim under a Spanish land grant to a major part of the New Orleans alluvion known as the Batture St. Mary. French civil law deemed alluvion (the accretion of land due to river deposits) to be public property.[117] Livingston, a former New Yorker and well-known law reformer, began to make "improvements" to the land in 1807, outraging a citizenry that had come to see the Batture as a distinctly public space. The federal government at the behest of Thomas Jefferson evicted Livingston from the property in 1808. The subsequent maze of litigation ended in 1836 when a Louisiana court upheld Livingston's Spanish claim to title but, consistent with Louisiana Code, subjected the property to inalienable public rights of usage. This was a repeated pattern in Louisiana water law. Courts regularly defended public rights in the alluvion—rights of use, passage, and mooring—and upheld the power of state and city to regulate and police such property in the public interest.

The classic case was *Hanson v. City Council of Lafayette* (1841). Like many early nineteenth-century regulatory cases, *Hanson* was a hybrid phenomenon—part police power, part public nuisance law, part *damnum absque injuria*, and part public works.[118] It emerged from the decision of the neighboring cities of Lafayette and New Orleans to construct a new levee on the Mississippi. The old levee was worn out by travel, neglect, and various destructive acts.[119] With the demise of the old levee, an assortment of houses, stores, and buildings immediately sprung up on the adjoining batture.[120] To remedy the situation, the Lafayette City Council passed an ordinance ordering the banks of the river cleared and the removal and destruction of all buildings obstructing new levee construction. After a number of houses were demolished, a group of thirteen riparian owners sued for an injunction to prevent the council from obliterating $300,000 worth of their property without compensation. The Louisiana Supreme Court refused the injunction and ratified the City Council's strong public prerogative.

"The subject of roads and levees," the court began, "has repeatedly occupied the attention of the Legislature. . . . No subject is more important." No highway was more important to the state of Louisiana than the Mississippi

River. Public rights in that river and its banks were "well established" by code and statute. On the Mississippi, levees were banks. This was "a servitude" or easement, "established for the public or common utility, and all that relates to it, is regulated by particular laws."[121] In antimonopoly, antiprivilege rhetoric similar to the New York court in *Hecker v. New York Balance Dock Company*, Justice Garland argued that in constructing their buildings on the old levee the plaintiffs exceeded their individual private property rights and violated the rights of the public. No provision of law was clearer, Garland contended, than that "no man has a right to take exclusive possession of the banks of a navigable river, and appropriate them to his own use, and particularly the banks of the Mississippi." The proprietors of adjacent lands, though the right of property be in them, had no right to obstruct the free use of the banks by the public.[122] Though these thirteen plaintiffs built directly on their own land, though their buildings had been there for two to fifteen years, and though these personal and commercial properties were valued at $300,000, Justice Garland held that the property owners were unlawfully obstructing and impeding superior rights of the public expressly delimited in code and statute. Such unlawful private acts and interests would not be allowed to trump "the safety of the whole community."[123]

As unequivocally as the Louisiana court rejected the plaintiffs' private property claims, it ratified the city council's powers of regulation and self-government. The safety of the cities of Lafayette and New Orleans demanded a new and more substantial levee. The power to make all "necessary and needful regulations respecting streets, levees, roads, ditches, bridges, etc.; and to repair old levees, and lay out and construct new ones" was inherited by the city council from the "police jury" of the parish of Jefferson. The city charter and subsequent legislative acts expressly gave the council "the power of pulling down and removing all buildings and other incumbrances, that may obstruct the levee or the space between the levee and the river . . . at the expense of those who have erected them."[124] The Louisiana Code itself authorized "the destruction of any works built on the banks of rivers at the expense of those who claim them, and the owner of those works cannot prevent their being destroyed under any pretext of prescription or possession, even if immemorial."[125] The court held that this series of unambiguous state acts clearly endowed the council with ample regulatory and police authority to construct the new levee and remove anything on the old levee obstructing the public way.

The *Hanson* case was a testament to Louisiana's strong tradition of public rights in rivers and other public properties. In that tradition, the banks of the

Mississippi (though title remained in private hands) were subject to a broad and inalienable public easement. The state legislature and delegated localities were armed with strong powers to police and maintain that easement. Private property violating the public easement, jeopardizing public safety or interests, was subject to the most summary and severe of public remedies.[126] Louisiana law consistently deferred to the public importance and public status of its chief means of transportation, communication, and commerce.

The city of Albany had no state code defining "public things," and it had no levees (though a history of devastating floods indicated they might have been useful). Nor was New York law particularly solicitous of the rights of the public in the banks or batture of the Hudson River. Albany had a common law rather than a civil law heritage. But despite the conservative and individualistic glosses frequently imposed on New York State's jurisprudence, the common law vision of a well-regulated society could be just as intolerant as the French civil law of the private appropriation of public ways and just as aggressive in the assertion of public rights to ports and harbors.

Albany also had the Albany Basin, constructed in 1825 and billed as "one of the greatest works connected with the [Erie] canal."[127] The basin was essentially an artificial harbor built at the point where the Hudson met the completed Erie Canal. The state constructed a 4,000-foot pier, accommodating a road, plenty of warehouses, and dry dock facilities, to separate the river from the harbor. The pier was 250 feet from the shore, thereby enclosing a basin of thirty-two acres. The basin offered moorings for 1,000 canal boats and 50 steamboats. The space was needed: in the canal's first year an estimated 12,000 boats passed through the basin. By 1852 well over a million tons of property moved up and down the canal annually, and Albany's population quadrupled.[128]

Albany was also the beneficiary of extensive regulatory powers granted by the New York state legislature. As in Louisiana, New York legislated extensively on the use of its public roads and rivers. The Erie Canal alone was the focus of eighty special acts from 1810 to 1857.[129] The Albany Basin was constructed according to a special act of the legislature with extensive provisions for building specifications, financing, improvements, wharfage, and tolls.[130] New York State was careful to expressly grant its major municipal corporations general police power "to regulate, keep in repair, and alter the streets, highways, bridges, wharves and slips, and . . . to prevent all obstructions in the river near or opposite to such wharves, docks, or slips."[131] These were not idle regulatory statutes. They were enforced by the New York courts with a vigor befitting their public-oriented, civil law counterparts in Louisiana.

Hart v. Mayor of Albany (1832) was the premier public nuisance case in the Albany Basin.[132] It was to the Hudson River what *Hanson* was to the Mississippi, and it was to navigable rivers generally what *People v. Cunningham* was to public roads. The facts of *Hart* were remarkably similar to *Hecker v. New York Balance Dock Company.* The plaintiffs, merchants engaged in trade on the Hudson from New York to Albany, rented two lots with stores on the 4,000-foot pier that created the Albany Basin. To expedite the loading and unloading of merchandise, they constructed and moored in the basin opposite their lots a $3,000 floating dock (120 foot by 42 foot). In response to this monstrosity, the mayor and alderman of Albany passed a special ordinance directing the dockmaster to fix a notice to any nonnavigating vessel in the Hudson requiring removal within ten days. If not so removed, the ordinance authorized the dockmaster to remove and sell the obstruction at auction. In this case, removal entailed destruction of the float. As in *Hecker*, the plaintiffs appealed to the chancellor for an injunction restraining the city from destroying their property.

When Chancellor Walworth denied the plaintiffs an injunction, they took their case to the New York Court of Errors prompting an extensive discussion of police, nuisance, and public and private rights in public ways.[133] Voting twenty-one to two against an injunction, the Court of Errors attacked the plaintiff's selfish appropriation of a way designed for the convenience of all, and upheld the city's suppression of the public nuisance as a legitimate police regulation.[134]

The court denounced the plaintiff's claim in the strongest terms as "not merely doubtful, but . . . clearly and obviously unfounded."[135] The Albany Basin was a great public highway. As such, it was for the "common, free, and uninterrupted use" of all vessels that might enter it. "No individual," Justice Sutherland argued, "can appropriate a portion of it to his own exclusive use and shield himself from responsibility to the public by saying that enough is still left for the accommodation of others."[136] Senator Edmunds concurred, "It is sufficient to know that [the plaintiffs] have without right appropriated to their own use a portion of that which was designed for the benefit of all; that they have obstructed the free navigation of this public basin, which was the primary object of its construction, and have adopted a practice which, if sanctioned, would result in the entire destruction of public and common benefits."[137] The plaintiffs' actions were anchored solely in private, material considerations—a floating dock saved them the cost of storing their goods on shore. Such selfish motivations betrayed the great public purposes underlying the construction of the basin and the public rights inherent in navigable waters.

As strongly as the New York court derided the plaintiffs' private assault on common rights, it supported the municipality's right to take action against it. First, this floating dock was a common nuisance—an unauthorized obstruction of a public highway. As such, it was abatable by any person.[138] This was an unlawful act injurious to the whole community; all had a right to abate it. To the plaintiffs' objection that this amounted to a destruction of property without the benefit of a trial by jury, Senator Edmunds contended, "Nothing is clearer or better settled than the right to exercise this power in a summary manner," especially where the whole community was affected. The right to abate a common nuisance, obstructing or annoying things of daily convenience and use, was "a right necessary to the good order of society."[139] The entire common law of public nuisances from Blackstone onward stood behind the summary destruction of public "inconveniences" of this sort.

But the court did not rest its decision on the common law alone. In opinions that aptly reveal the links between the common law of nuisance and the police power, Justice Sutherland and Senators Allen and Edmunds validated Albany's actions as part of its statutory authority "to regulate the police of the city; to be commissioners of highways in and for the city, and generally to make all such rules, by-laws, and regulations for the order and good government of the city."[140] The court broadly construed these statutory powers as expressly authorizing the removal of "the evil complained of" as an obstruction to navigation or a common nuisance. The object of this statute was "to produce the greatest amount of public good."[141] No judicial construction could allow such a law to "advance a private interest to the destruction of that of the public."[142]

Albany had no code declaring the Hudson a "public thing" and requiring the demolition of private intrusions, but the common law of public nuisances and police regulations passed by the state legislature were ample sources of strong public rights and broad public powers. Common law rules of statutory construction only provided further protections for the public good. The result was a defense of public rights in the Albany Basin as clear-cut as anything coming out of the Mississippi Delta. Once again, a northeastern court staunchly guarded public claims against potent arguments from vested rights, private property, *and* general utility. Despite the fact that this floating warehouse might have greatly facilitated the transhipment of goods up and down the Hudson, the order and good government of the city and the right of the public to freely navigate an unobstructed basin required the uncompensated public destruction of another piece of valuable antebellum private property.[143]

If the moral of the *Hart* case was that private rights could not intrude on public rights, *Lansing v. Smith* (1829) made it clear that public rights in the Albany Basin were so crucial they could impair the private rights of individuals without compensation.[144] *Lansing* was a classic public *damnum absque injuria* case. The plaintiff claimed that, in building the basin, the state of New York cut off his wharf's direct access to the Hudson and diverted his natural flow of water. He claimed that the 1823 statute authorizing the construction of the basin was unconstitutional, violating the implicit contract and property rights guaranteed by his waterlot grant.

Chancellor Walworth, who first dissolved the injunction in *Hart*, upheld the constitutionality of the statute in the strongest public rights terms. He likened the state's power over navigable waters to the king's sovereign prerogative. The right to navigate the public waters of the state were public rights belonging to the people at large not "the private inalienable rights of each individual." The legislature, as the representative of the public, had the right to "restrict and regulate the exercise of those rights in such a manner as may be deemed most beneficial to the public at large."[145] Charter, contract, and property rights were not inalienable in a well-regulated society; they were subject to general regulations on behalf of the public. In Walworth's words, "[I]t would be directly in opposition to the spirit of the law to give a construction to this grant which would deprive the state of the power to regulate the wharves, ports, harbors, and navigable waters within its boundaries."[146] Though the plaintiff may have suffered a real injury or a loss of business or convenience due to the construction of the basin, the state was pursuing a distinctly constitutional public improvement. The private injury was without remedy—*damnum absque injuria.* Waterlot grants did not endow proprietors with immunity from legislative regulation, legislative change, or legislative improvements.[147]

The Albany experience, then like New Orleans's regulation of life on the Mississippi, reflected deeply rooted notions about public rights on public ways, be they on land or water. Those rights were not abstract phenomena. They were encased in particular rules of statutory construction, the common law of nuisance, notions of the sovereign prerogative, and state police power. Private rights that conflicted with common rights of navigation in the Albany Basin were summarily denied or destroyed. In short, the Albany Basin was held to the standards of the well-regulated society. Neither the static vested rights of previous owners, nor the dynamic hand of the market was allowed to dictate the course of development in these waters. The state, as guarantor and

promoter of the public interest, was given the *duty* of constructing the basin and keeping it clear, free, and in the service of the people's welfare.

Of course, for anyone living in New York City or Boston in the early nineteenth century, there were really only two bodies of water worth their salt—the great harbors on which those two cities were built. And, indeed, those harbors yielded some of the most influential statements of the common law vision of a well-regulated society. But the sweeping rhetoric of Lemuel Shaw in *Commonwealth v. Alger* and Justice Woodworth in *Vanderbilt v. Adams* that led off chapter 1 did not spring from the individual genius of two exceptional jurists or from a peculiar commonwealth or New York view of the world. Rather, they were part of a broad, well-understood tradition of public rights and public powers in American roads, rivers, and ports that cut across diverse legal jurisdictions and cultures. In many ways, the New York and Boston harbor cases were merely the most powerful articulations of legal and political ideas that governed public properties and spaces from the streets of Brooklyn to the waterfront of New Orleans.

Justice Woodworth's opinion in *Vanderbilt v. Adams* (1827) was one of the most complete discussions of police regulation before Shaw.[148] The case turned on an 1819 New York statute bestowing on the harbor master of the port of New York the power to make room on private wharves for incoming vessels.[149] The harbor master ordered the defendant to move his steamboat, the *Thistle*, stationed at a private wharf in the North River, to make room for the newly arriving *Legislator*. The defendant refused and was fined. In the ensuing action to collect, the defendant challenged the constitutionality of the statute regulating his ship while on private property.[150] Such a power, he argued, impaired the obligation of contracts.

Woodworth had little trouble defending this police power over private property and contract, asserting that government and society brought distinct limits on individual rights. Property did not exempt one from regulatory power. As Woodworth explained, when city officials "convey a lot of land, or waterlot, their sovereignty, as to the subject matter, is not gone. They possess the same power, for the common benefit, as they possessed prior to the grant." This particular statute was passed "for the preservation of good order in the harbor." It was a necessary police regulation, and not void, even though it interfered with individual rights.[151] Such legislative power was "incident to every well regulated society; and without which it could not well exist." The sovereign power in a community to prescribe the manner of exercising individual rights over property rested upon "the implied right and duty of the

supreme power to protect all by statutory regulations, so that, on the whole, the benefit of all is promoted."[152] The restriction of individual rights that always accompanied police regulations did not amount to an injury that required either remedy or compensation.

Lemuel Shaw amplified Justice Woodworth's police claims in *Commonwealth v. Tewksbury* (1846) and *Commonwealth v. Alger* (1851)—the culmination of a half century of American jurisprudence creating and defending public rights and public powers in American public spaces. In *Commonwealth v. Tewksbury*, William Tewksbury was indicted for removing sand and gravel from his own beach contrary to a Massachusetts statute preserving the natural embankments of Boston harbor.[153] Tewksbury argued that any statute prohibiting a private property owner from removing soil from his own property amounted to an unconstitutional public taking of private property without compensation. For Chief Justice Shaw, however, this was merely another example of a government's power to issue police regulations restricting uses of property hostile to the people's welfare. The Massachusetts statute was a "just and legitimate exercise of the power of the legislature to regulate and restrain such particular use of property as would be inconsistent with, or injurious to, the rights of the public." "All property," Shaw elaborated, was "held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community; under the maxim of the common law, *sic utere tuo ut alienum non laedas.*"[154] When public rights were violated, the common law of public nuisance provided for punishment by indictment and abatement. But Shaw was unwilling to rely solely on the common law to protect the safety, health, and comfort of the community. In situations like this, with the natural boundaries of a great harbor at stake, the legislature could also intervene to *prevent* nuisances through "positive enactment" prohibiting uses of property injurious to the public.[155] In strong civil law fashion, Shaw held that the beaches and embankments of public ports and harbors were "of great public importance," subject to extensive public regulation.[156]

But Shaw's opinion in *Commonwealth v. Alger* remained his ultimate statement on police regulation and private property.[157] In *Alger*, Shaw defended the wharf lines of Boston harbor established by the legislature to prevent the kinds of obstructions and encroachments described throughout this chapter. Shaw upheld the statute as a legitimate exertion of the commonwealth's police power: "the power vested in the legislature by the constitution, 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."[158] But far from pioneering a new brand of state power, Shaw's opinion in *Alger* ratified, consolidated, and applied to Boston harbor a growing body of legal rules and political practices governing public highways throughout the antebellum era.

Indeed, many of the grander claims Shaw made in *Alger* were already well-established when he appeared as counsel for the commonwealth before the Municipal Court of Boston in 1829 in another wharf case, *Commonwealth v. Wright and Dame.* There Shaw argued for the indictment and abatement of the defendant's 100-foot wharf protruding beyond the low-water mark in Boston harbor to the detriment of public navigation.[159] Though it is unclear exactly how many of the jury instructions in this case were owed to Shaw (Judge Thacher admitted "noticing" Shaw's points in his opinion), much of *Tewksbury* and *Alger* was presaged here. The public significance of harbor and highway did not escape Judge Thacher, nor did the obligations of government therein. He told the jury, "It is the right and duty of the government, to preserve the highways from obstruction both by land and water; since both are of the highest moment, the one for the navigation of boats and vessels, the other for land carriage." Destroy the free and public harbor with private impediments and nuisances, "and you will soon make the city desolate."[160] Thacher left little question as to the relative weight of public and private rights in the harbor: "If a citizen . . . shall infringe upon the right of all the other citizens, by extending his wharf beyond the line of low water, and into the channel, to the common detriment . . . he has offended against a principle of law, which is as ancient as it is reasonable, and as well known as any other principle in our code."[161] In such cases, it was not only a constitutional power, but a moral duty for the sovereign, as trustee for the public rights, to "keep the sea shore free from encroachment, and not to suffer any individual . . . to intrude on it."[162] On these instructions, the jury found William Wright and Abraham A. Dame guilty of a public nuisance. They were fined $20 each. Their wharf "with all the piers and timbers under, and the materials belonging to the same," was ordered to "be dug up, demolished and abated" at their own expense.[163] Shaw won his case. But more significantly, he became well acquainted with the limits of private rights in public spaces and the legal-political ramifications of the well-regulated society.

Conclusion: Whose "Public" Square?

The cases documented in this chapter reflected the overwhelming assertion of state power over public spaces and properties in the early nineteenth-century

United States. The extensive public works projects of the early republic, accompanied by the redefinition of public rights in roads, rivers, and harbors, marked the emergence of a nascent American state and the power of the well-regulated society. By the Civil War, legislators and courts successfully secured formal public authority and control over the nation's most important communication and transportation thoroughfares. This development was as significant as any transformation in American private law.

But was that all American courts meant by their defenses of public rights in these cases—the simple vindication of the formal powers of law-making bodies? Some cases already examined suggest otherwise. In *Hecker v. New York Balance Dock Company*, the official permission of a public dockmaster did not legitimate the maintenance of a public nuisance. State mill acts and corporate charters—the products of state legislatures—also brought no exemption from a more general duty to regard the people's welfare. When the Albany Basin itself became polluted, "the people" brought suit against the mayor and aldermen for maintaining a public nuisance "injurious to the health of persons living in the vicinity."[164]

But the best example of the judicial notice of a disjunction between public authority and public welfare came in a series of odd cases involving the sale of public squares by financially strapped municipalities. In 1849, for example, the mayor and council of Allegheny decided to sell the public square to private citizens to pay off public debts from the construction of new city waterworks. Edmund Wesley Grier purchased one of the lots and built a house. The state attorney general brought suit defending public rights in public space against such new, private obstructions.[165] In ruling in favor of the "public," Justice Hepburn of Pennsylvania argued that the public square could be appropriated "to no private use." The square was not the council's or the mayor's to sell or dispose of as they saw fit. Rather, it was the public's square, "and any private erection upon it, even by authority of the city council, [was] an offense against the public, and indictable as a common nuisance."[166] Public interest and public rights did not necessarily follow the positive enactments of municipal governments.

In *State v. Woodward* (1850), the Vermont Supreme Court similarly refused to authorize the sale of public property to private individuals. A dedication to "public purpose" was "irrevocable."[167] The public rights could not be traded, bought, sold, or bargained away to private interests, no matter what the alleged benefits. In language mirroring eminent domain law, the Vermont court held that the "taking of property dedicated to the use of the public, and appropriating it to private use, thereby wholly excluding the public from the en-

joyment of it" was not to be tolerated.[168] The public good was not to be made subservient to private convenience.

"Public rights" in the early nineteenth century did not simply mean the actions of formally constituted public authorities. Indeed, the legal renderings of "public" in the public square cases seem equally removed from legal positivism, majoritarianism, and instrumental calculations of utility. In *Commonwealth v. Bowman and Duncan* (1846), Pennsylvania Chief Justice Gibson condemned county commissioners for constructing an office building on the public's square, declaring that they had "no inherent right to property . . . dedicated not to its use, but to the use of all the citizens of the Commonwealth."[169] No matter how necessary a multiplicity of county buildings, no matter how many people voted for their construction, and no matter how many municipal ordinances were passed, the public square was a common highway belonging to the whole public. Public officials had no more right to obstruct public ways and invade public rights than private individuals. The legal construction of public space in early America was so successful that public officials were sometimes caught in their own creations.[170]

This powerful, relatively autonomous legal conception of public rights in public spaces had immense ramifications for the American state and its powers of regulation and police. The law of public highways was a concern of the highest order in the early nineteenth century, prompting discourses on public and private that reached to the very roots of the social and economic order. Cases such as *People v. Cunningham, Callender v. Marsh, Vanderbilt v. Adams,* and *Commonwealth v. Alger* were the jurisprudential foundation for more general nineteenth-century American elaborations of *salus populi* and state police power. The swiftness and completeness with which early American courts and legislators successfully secured a public tradition of policing public space had implications for the well-regulated society well beyond the confines of public ways.

Barker v. Commonwealth (1852) involved an indictment for the obstruction of a Pittsburgh street.[171] Barker's offense was "causing to assemble and remain therein for a long space of time, great numbers of men and boys . . . and idle, dissolute, and disorderly people." He was accused of "openly and publicly speaking with a loud voice, in the hearing of the citizens, &c., wicked, scandalous, and infamous words, representing men and women in obscene and indecent positions and attitudes."[172] Asserting that "common highways were designed for no such purpose," the court upheld the defendant's conviction. The manifest tendency of this obstruction "to debauch and corrupt the public morals" made the offense complete.[173] As streets and highways became

increasingly *public*, the regulatory powers of the state were enhanced. State control of streets, rivers, ports, and other public places involved not only the power to keep them free and open to public access but a more general duty to police them. Expanding public powers over public ways involved the regulation of an increased range of social and economic activities deemed hostile to the people's welfare, including public morality and public health. Policing these things first on public properties paved the way for the public regulation of some of the most private of American spaces.