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CHAPTER TWO

Public Safety: Fire and the Relative Right of Property

> Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be the first.
> —John Jay, *Federalist*, No. 3

As an abstract theory of man, society, and government, the common law vision of a well-regulated society was an important part of the intellectual environment of nineteenth-century America. But the ideas and perspectives captured by this body of thought were not simply the speculations of theorists, relevant only to those pursuing the minutia of the American mind. The jurisprudential ideas outlined in chapter 1 were especially significant in the way they were woven into the institutional and social fabric of American life. As Pierre Bourdieu pointed out, legal ideas and texts are peculiarly performative, having a special power to produce immediate social effects—to make things happen simply by saying so.[1] The linguistic turns and ideas of the jurists of the well-regulated society were ideas *in action*. They governed the way courts, legislatures, and local officials acted on countless public policy issues involving the state, the economy, property, social order, and the people's welfare. Marvin Meyers was right to caution us that a full picture of political culture means watching politicians' (and jurists') feet as well as their mouths.[2] Accordingly, it is time to turn to the actual practices of nineteenth-century governance—the particular policies by which officials pursued the main objectives of the well-regulated society: public safety, public economy, public mobility, public morality, and public health. Of these, none surpassed the importance of public safety.

Public safety involved the polity's duty to protect the life and limb of the citizenry. Without a people to rule, of course, there was little need for rulers; without subjects there was no state. Before addressing the concerns of order, prosperity, or morality, a government first had to secure and ensure (later insure) the population's existence and longevity. Public safety was the cornerstone of governmental obligation. It had been so for some time.

The long history of governmental preoccupation with public safety is evident in the very evolution of *salus populi* (sometimes translated as "the *safety* of the people"). The ancient Roman version "*Salus Populi Romani*," signifying the overarching public responsibility to the health and safety of the people of Rome, infused religious iconography in the Middle Ages. Blending the secular notion of public safety with pastoral, Christian concern for the people's salvation, icons were used in religious processions to ward off the dangers of invasion or epidemic.[3] But more significant for nineteenth-century governance was the pivotal role of public safety and security in early modern conceptions of police or *Polizei*. Having little to do with modern law enforcement, early modern police encompassed the loftiest ambitions and powers of government—the general pursuit of public good and the people's happiness. Police did so (as demonstrated best in Marc Raeff's detailed examination of German *Landes-* and *Polizeiordnungen*) through the proposed regulation and control of almost every aspect of daily life.[4] As the polity reclaimed jurisdiction over the people's well-being from the church, public safety—securing the population in number and health—returned as a primary reason of state. Even Adam Smith's police theory first acknowledged the dependence of the "peace of the state" on the "security of the people" (thus the necessity of town guards and fire regulations) before taking up the wealth of nations, that is, "the proper means of introducing plenty and abundance."[5]

Despite the historical tendency to contrast police and common-law regimes,[6] the nineteenth-century American vision of a well-regulated society emulated police concern for public safety. The extended life of the republic hinged on a healthy and secure population, on first guaranteeing the "life" of the people. Liberty, happiness, and property (yet alone comfort and wealth) were by definition secondary concerns. Early American jurists often used public safety as a synonym for the "domestic tranquillity" insured by the Constitution's preamble. In the Constitution itself, public safety appeared as the only justification for the suspension of habeas corpus.[7] "Mutual safety," Justice Henry Baldwin observed, was one of the prime motives of society and, consequently, an important obligation of constitutional governance.[8]

Public safety was a central component of early American conceptions of the

people's welfare, triggering the common law directives *sic utere tuo* (use your own so as not to injure another) and *salus populi* (the welfare of the people is the supreme law). All private rights and individual interests were subject and relative to the overriding public concern for the people's survival and security. One could exercise rights of property and liberty, *provided* they did not endanger the public safety. As Supreme Court Justice James Iredell held in 1795, the public safety was that "to which all private rights ought and must forever give way."[9] Public safety was also a source of a more proactive and open-ended legislative regulatory power. New York attorney David B. Ogden argued before the Supreme Court in 1837, "The object of all well-regulated governments is, to promote the public good, and to secure the public safety; and the power of that legislation necessarily extends to all those objects."[10] When the public safety was threatened, public officials could summon the full, creative powers of governance. The common law of nuisance and the law of overruling necessity, legal embodiments of *sic utere tuo* and *salus populi*, figured prominently in cases involving dangers to the people's safety.

Many hazards to public safety existed in nineteenth-century America, but three were particularly threatening to population, social order, and civil government. The first was invasion or insurrection (unfortunately, it would take three more volumes to trace the role of *salus populi* in American foreign policy, American Indian policy, and the coercive structure of American slave law).[11] The second was epidemic, which, as will be seen in chapter 6, galvanized an entire movement for medical police and public health reform. The third overarching public safety concern, and the one most revealing of the underlying assumptions of nineteenth-century American governance, was . . . "Fire!"

The "Giant Terror"[12]

One of the most important lawyer-judge exchanges in the constitutional history of the police power took place in 1827 in *Brown v. Maryland*, which Charles Warren dubbed "one of the great fundamental decisions of American constitutional law."[13] There, the two chief justices who would dominate the U.S. Supreme Court until the Civil War confronted each other over a Maryland statute imposing a license tax on importers and vendors of foreign commodities. Roger Taney, then representing the state of Maryland, defended the state's right to license and regulate all merchants and dealers within its borders. Without such a right, he argued, states would be defenseless against numerous offenses in the name of commerce. Taney offered a pointed example:

if the right to sell was a "vested right" unaffected by state legislation, then a merchant could wantonly "offer for sale large quantities of gunpowder in the heart of a city and thus endanger the lives of the citizens."[14]

John Marshall ruled against his successor to the chief justiceship, finding the Maryland statute in conflict with the commerce clause and the constitutional prohibition against state duties on imports or exports. But Marshall could not ignore Taney's concerns about unregulatable selling or gunpowder. He made it clear that his decision was about the boundaries of American federalism, not the absolute rights of sellers. "The power to direct the removal of gunpowder," Marshall reasoned, "is a branch of the police power, which unquestionably remains, and ought to remain with the States." This police power formed "an express exception" to the prohibitions of the commerce clause.[15] With this short, unelaborate response to Taney's argument, the phrase "police power" for the first time made its way into the constitutional lexicon.

It is neither unimportant nor unusual that "police power" was constitutionally coined amid a discussion of gunpowder. Taney's counterfactual caught Marshall's attention because its ramifications were too important to be dismissed or ignored. Marshall's affirmation was so short because what he said was a fact of everyday life taken for granted in early nineteenth-century society. The specter of a large deposit of gunpowder in the middle of early New York, Boston, or Philadelphia demanded recognition because it evoked one of the central policy concerns of an emerging nation of towns and cities—the threat of fire. Marshall felt no need to elaborate on the police power because it was never doubted in this well-regulated society that something as potentially injurious to the public as gunpowder, whether imported or exported, bought or sold, or considered "commerce," "property," "contract," or a "market transaction," was decidedly regulatable. Nothing in the nascent Constitution or John Marshall's jurisprudence would change that.

Fire emerged early as one of the crucial public safety concerns of the young republic. Fire did not merely endanger the people's health or economy or morality; it threatened their very being, their existence. And like most things in early America identified as inimical or hazardous to the people's welfare, fire became the focus of formidable common law and legislative regulations. The public fight against fires ignited a comprehensive and diverse regulatory effort employing most of the legal technologies and rationales of the well-regulated society. This legal fire fighting nicely illuminates the degree to which early American law and polity were solicitous of the paramount claims of

public safety and *salus populi.* It also demonstrates the nineteenth-century limits on individual rights, especially the relative right of private property.

Though fire remains an important public concern today, a shift in perspective is necessary to capture its significance for nineteenth-century Americans living in cities or towns. To these individuals, fire and epidemic disease made up two of the most constant, catastrophic threats to safety and well-being. In early Philadelphia or Boston, fire's menace was no longer symbolized by the ignition of an isolated barn, but by the general conflagration capable of devouring an entire city. Crowded conditions, wooden buildings and chimneys, narrow streets, the use of open fires and combustibles in daily living, primitive water supplies, and inadequate fire-fighting equipment and organization made the early nineteenth-century city a veritable tinderbox.[16] One person's carelessness or folly could put the public safety and common welfare at immediate and severe risk. But fire was more than a threat or idle anxiety in antebellum America. All too often, fear and concern were products of fatal experience.

From 1818 to 1856, David Dana reported 425 "large" fires in the thirty principal cities of the United States with estimated losses of over $190 million.[17] Boston suffered serious, general conflagrations in 1653, 1676, 1679, 1682, 1691, 1711, 1753, 1760, 1787, 1794, 1824, 1825, 1850, and 1852. Smaller fires were a way of town and city life, the ringing of fire bells constant, the burning of a home, warehouse, or row of businesses routine. A Cincinnati editor complained in 1807, "We seldom pass a week, without reading some melancholy account of the disasters occasioned by the most destructive of all elements—fire."[18] If the constancy of fires in early America brought with it the danger of numbing familiarity, it was soon snapped by the massive infernos the engulfed Savannah in 1820, New York in 1835 and 1845, Charleston in 1838, Pittsburgh in 1845, St. Louis in 1849, San Francisco in 1851, and Portland in 1866. The Charleston fire consumed 700 densely settled acres.[19] The 1835 New York fire leveled the whole first ward of the city, the central financial and business district.[20] Fires of this magnitude shook society to its core.

Large fires brought the citizenry face-to-face with the apotheosis of unregulated, disordered society. Descriptions of "chaos," "confusion," "uncontrollability," and "panic" dot early nineteenth-century accounts of urban fires. Jeremiads of general social collapse joined doomsday sermons as the two most common forms of social commentary accompanying "great fires."[21] Disorder and the fear of social disintegration manifested themselves in a pervasive paranoia of incendiarism and an obsession with security and police at fires. The

lone, crazed, criminal arsonist—the antithesis of civilized, ordered life—became a focus of antebellum society's effort to explain the uncontrollable, irrational, and antisocial force of fire. Arsonists were vilified in the popular press. One Mississippi editor was particularly vituperative (and alliterative): "Some sneaking, savage, sanguine, scorbutic, scraggy, scrofulous, scurrilous, shameless, sinister, slouchy, slavish, slinking, slovenly, sordid, skulky, soulless, slubberede guillion, set fire to a frame house on Washington Street on Saturday morning last, before day, which, but for its accidental and early discovery would certainly have laid in ruins a large portion of the city."[22] As early as 1796, the mayor of Philadelphia petitioned the Pennsylvania legislature for power to take measures against a "gang of incendiaries" setting fire to the city with a view to plunder.[23] Whether fears of rampant arson were warranted, they usually kindled calls for better security before, during, and after fires. Provisions for the constable's watch and fire prevention emerged simultaneously in South Carolina for the "preservation," "good order," and "peace and good weal" of Charleston.[24] While actual fire-fighting troops were still grossly inadequate, up to 400 "watchmen" were ordered to report to all New York fires in 1826 to prevent looting, burglary, and general disorder.[25] A special guard of 1,300 watchmen, constables, marshals, militia, marines, sailors, and civilians was assembled to restore and preserve the peace for several days after the New York disaster of 1835.[26] Fire was more than an unfortunate occurrence in the early nineteenth century; it was all too often an exercise in social dissolution.

Given common assumptions about statelessness, individualism, and private property, one might assume that the early American governmental response to the peril of fire went no further than the organization of some well-publicized volunteer fire companies. Given the common law vision of a well-regulated society, however, that was unthinkable. Fire posed dire threats to two of the fundamental concerns of the well-regulated society: social order and the people's welfare. Consequently, it met with immediate state action that was restrictive, forceful, and anything but voluntary. Statute and ordinance books offer the first inklings of an alternative "police" story in the case of fire.

While New York City was still known as New Amsterdam, Peter Stuyvesant introduced ordinances prohibiting wooden or plaster chimneys, straw or reed roofs, hayricks or haystacks; requiring each household to have a ladder; appointing fire wardens and inspectors with powers to levy harsh fines (up to 100 guilders); and compelling householders to keep chimneys clean. Fines and taxes went toward the purchase of community fire buckets, hooks, and lad-

ders.[27] After Dutch rule, the colonial legislature supplemented those regulations with a more comprehensive policy that included appointing "firemen"; establishing "fire limits" that required new buildings to be "made of Stone or Brick and Roofed with tile or slate"; restricting the storage of pitch, tar, and turpentine; prohibiting more than six pounds of gunpowder (twenty-eight pounds for retailers—"in four stone jugs or leather bags not more than seven pounds each") to be kept within two miles of City Hall; regulating the transportation of gunpowder on city streets; and limiting the height of buildings. Extensive fines were imposed for violations of these regulations, and buildings erected contrary to explicit provisions were indictable as "public nuisances."[28]

By 1813, when the legislature condensed and revised its municipal regulations, New York City had the beginnings of an ample fire code.[29] Provisions followed the general outlines laid down before the Revolution: fire limits, building regulations, bans and restrictions on dangerous materials, the appointment of administrative officers and fire personnel, inspection, and penalties. In addition to materials of brick or stone, the 1813 code required party or fire walls between structures. Offending buildings were deemed nuisances, which might be "abated and removed," in addition to having the proprietor or builder prosecuted. Gunpowder regulations grew to two pages, adding provisions for a public magazine, restrictions on ships and wharves,[30] public carriage,[31] and concealment. Sulphur, hemp, flax, rosin, and linseed oil joined gunpowder, pitch, tar, and turpentine as prohibited or heavily restricted materials. The firing or discharge of guns, pistols, rockets, crackers, squibs, or any other fireworks in populated areas of the city was prohibited. The statute also included detailed instructions for the behavior of the sheriff, common council, firemen, marshals, and constables during fires. It empowered these officials to *compel* the service of the citizenry (and their buckets) to extinguish fires. The mayor with the consent of two aldermen was given the special power to direct the destruction of buildings to prevent the spread of fire. If these specifics were not enough, the common council was finally granted an omnibus power to pass ordinances as it "may deem proper, for the more effectual prevention and extinguishment of fires," including the power to regulate lights and candles in livery and other stables, "to remove or prevent the construction of any fire-place, hearth, chimney, stove, oven, boiler, kettle or apparatus used in any manufactory or business which may be dangerous in causing or promoting fires," and to direct deposits for ashes.[32] Inspectors were authorized "to enter into and examine all dwelling-houses, lots, yards, inclosures and buildings of every description within the said city, to ex-

amine and discover whether any danger exists therein." Fines grew, as did a range of other penalties like imprisonment, forfeiture, abatement, and seizure.

Fire laws proliferated in almost every major settlement, from the sophisticated fire codes of coastal cities to frontier bans on the firing of woods.[33] As early as 1638, Boston forbade smoking outdoors, imposed curfews on household fires, and enacted penalties for incendiarism. In this fire-plagued city, Carl Bridenbaugh pointed out, "hardly a Town Meeting convened without prolonged discussions" of fire prevention. After devastating experiences with fire in 1679 and 1711, the Massachusetts General Court required brick or stone buildings with slate or tile roofs in the city and empowered fire wardens to order assistance and pull down houses during fires. Quantities of gunpowder over twenty pounds were to be stored at Robert Gibb's warehouse on the outskirts of town.[34] William Penn brought to Pennsylvania a heightened awareness of the dangers of fire inherited from his father's experience in the infamous London conflagration of 1666.[35] Ben Franklin had his volunteer fire department, but Penn deserves credit for making Philadelphia a well-regulated, remarkably fire-resistant city. Philadelphia's fire regulations included prohibitions on wooden buildings, the boiling of pitch or tar, and gunpowder.[36] Chimneys and the manufacture of gunpowder were regularly inspected, and households were required to keep leather buckets solely for extinguishing fires. In South Carolina, eighteen of the twenty-six legislative acts governing Charleston before 1751 dealt with public safety: the watch, fortifications, and the prevention of fires.[37] Rhode Island enacted similar fire regulations for Providence, Newport, Bristol, and Warren.[38]

Legislative penalties and remedies were as diverse and potentially severe as the regulations themselves. Fines could be substantial. In 1811, New Jersey imposed a staggering $2,000 fine for the manufacture of gunpowder within a quarter-mile of any town or house.[39] Imprisonment was also a distinct possibility, especially if the fine was not paid or the nuisance was left unabated. Legislatures also devised some ingenious schemes for enforcement and deterrence. Rhode Island imposed an annual $50 tax on wooden buildings within the fire limits of Providence, accumulating until wood was replaced with brick or stone.[40] Private prosecution accompanied by forfeiture provisions were also commonly used tools, turning every citizen into a potential police officer and prosecutor. In New York, a violation of gunpowder laws could result in a forfeiture of all gunpowder "to any person or persons who will sue and prosecute."[41]

Finally, buildings and goods held and used contrary to fire law were susceptible to one of the most remarkable remedies of the nineteenth-century legal order: summary *destruction* by public officers and private citizens. In a striking illustration of the powerful ramifications of *sic utere tuo* and *salus populi*, private property used so as to endanger the public welfare by increasing the hazards of fire was condemned by the common law of nuisance and subject to summary removal, abatement, or being simply "pulled down."[42] The demolition and confiscation of private property figured prominently in Charleston, South Carolina's fire-prevention techniques, which included legislative prohibitions on wooden chimneys; wooden buildings; gunpowder; the storage of straw and fodder in houses; the boiling of pitch, tar, rosin, or turpentine; and the keeping of stills and stillhouses. Except for the boiling of pitch and tar, summary destruction was a remedy for every statutory violation.[43] From the perspective of the well-regulated society (with its relative and conditional understanding of private right), such destruction of public safety nuisances was a "necessary" regulation for the people's welfare, not a "taking" of private property entitled to compensation under the Fifth Amendment to the Constitution.[44]

These statutory regulations and remedies supplemented a larger fire policy that included the more familiar tale of emerging fire companies, fire departments, fire insurance, and more effective fire-fighting equipment. Adequate fire protection, after all, was much more than a matter of quenching existing fires. It required a marshaling of social resources and a rigorous ordering of social life—central elements in the ideal of a well-regulated society. The legislative record reflects a society committed to that ideal. From an early date, state legislatures and local governments imposed stringent restrictions on property (building laws), liberty (mandatory assistance in firefighting), and the market (the sale of gunpowder). In the interest of the people's welfare, they enacted regulations governing how an individual built a home or business, how it was heated, how it was lighted, what it had to contain (leather buckets and hooks), the cleanliness of its chimneys, and the goods or activities or trades pursued therein. Additionally, legislatures granted municipalities ample power to regulate even more for "the purposes of a well-ordered police, and for the good government of the city."[45] The statutes and ordinances seemed to regard no behavior, personalty, realty, or set of rights as ultimately beyond the ambit of state and local regulations to prevent fires.

But there are limits to what the legislative record alone can tell us about the character and extent of early American safety regulation. First, the statutes

themselves reveal little about the actual implementation or enforcement of regulation. A small cottage industry has grown up in legal history exploring the gaps between law on the statute books and law in action. A convincing challenge to pervasive myths of lax law enforcement in nineteenth-century America (whether in safety, criminal, market, or morals law) requires a deeper investigation of prosecution, litigation, and local governance.[46] Second, the legislative record is also weak on underlying rationale. Fire regulations were often the product of imitation, at times passed hastily after a particular disaster. Issues of governmental power, constitutionality, precedent, the historical roots of authority, and the like were often assumed rather than made explicit. The New York Assembly, for example, established a fire company in Schenectady with the cursory observation that the need for this legislation was "too obvious to require particular detail."[47] As with the question of implementation, it is necessary to turn elsewhere for a closer examination of the underlying assumptions of early nineteenth-century fire regulation.

American courts were constant and crucial players in nineteenth-century governance and regulation. The cases they heard offer direct evidence of the actual operation and enforcement of fire laws. Moreover, the requirement that appellate courts justify and explicate the legal and constitutional context of their decisions in written opinions provides a more comprehensive picture of the legal-philosophical framework of nineteenth-century public safety regulation. Indeed, two of the central doctrines behind fire laws were the products of courts, not legislatures. The law of nuisance and the law of overruling necessity were two powerful legal technologies that governed public safety issues such as the prohibition of hazardous materials, the regulation of buildings and land use, and the conduct of public officials in actual fires.

Nuisance: Gunpowder and Wooden Buildings

The common law of nuisance was one of the most important public legal doctrines of nineteenth-century regulatory governance. Its object was securing social order according to the maxim of the well-regulated society: *sic utere tuo ut alienum non laedas* (use your own so as not to injure another). Nathan Dane suggested the potential within this "very important and extensive branch of the law," when he observed, "Strictly whatever annoys or damages another is a nuisance." Horace Wood elaborated that nuisances were "that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his own property . . . or personal conduct, working an obstruction of or injury to a right of another or of the public."[48]

Since Blackstone, it has been common to think of nuisance in two categories, private and public. A private nuisance consisted of a trespass- or tort-like invasion of one individual's rights by a neighbor. The classic cases involved either a physical intrusion like the construction of a house so as to overhang adjoining property, or the less corporeal maintenance of a hogsty or drainage system so as to flood a neighbor's hereditament with noxious smells or water. Public nuisances consisted of similarly troublesome behavior or uses of property, but so as to injure the whole community rather than a single individual. Livery stables, slaughterhouses, disorderly inns, bawdy houses, and malarial ponds were all considered public nuisances at common law.[49] Private nuisances were civil offenses; public nuisances made up a category of crimes and misdemeanors. Taken together, the law of private and public nuisance greeted damaging and asocial uses of private property and individual liberty with an impressive array of legal remedies: civil suit, damages, equitable injunction, private destruction, criminal indictment, fine, and summary abatement.

Two historical misconceptions, however, have hindered an accurate appraisal of the role of nuisance in nineteenth-century public policymaking. First is the tendency to see nuisance in modern terms as a "trifling inconvenience" and nuisance law as an archaic technology for addressing the somewhat irritating land-use habits of a not-so-good neighbor. This perspective deems nuisance law's individuated, ex post facto, court-centered mode of resolving petty conflicts as the very antithesis of the preventive legislative measures required of modern regulatory states.[50] Second, the provocative work of historians Joel Brenner and Morton Horwitz has overemphasized the instrumental transformation of *private* nuisance law on behalf of commerce at the expense of the continued regulatory significance of *public* nuisance law. Nuisance law was not simply a site for creative, capital-friendly judges to relax antidevelopmental standards of private liability.[51]

On the contrary, nineteenth-century jurists were quite explicit about both the overarching significance and the public power of the law of nuisance.[52] Horace Wood's formulation of private nuisance encompassed almost the whole of modern tort law. Joel Bishop attributed a significant chunk of nineteenth-century criminal law (from barratry to sepulture) to public nuisance precepts. And James Kent foreshadowed Ernst Freund's notion of nuisance as the common law of the police power, suggesting that the governmental power to "interdict such uses of property as would create nuisances" was the font of general law-making authority.[53] Nuisance law, far from being ineffective or emasculated by a market-minded judiciary, remained a powerful juris-

prudential reference point for nineteenth-century discussions of private and public power.

Nineteenth-century nuisance law was neither trivial nor timid. Along with every unneighborly hogsty or spite fence abated as a nuisance came dozens of ships, hospitals, steam engines, furnaces, dairies, sewers, slaughterhouses, stables, pumping stations, foundries, manufactories, and saloons. Almost every major innovation in transportation and industry at one time or other came within the purview of nuisance law: mills, dams, railroads, smokestacks, and public works. Declaring an activity or establishment a nuisance in the nineteenth century unleashed the full power and authority of the state. Perhaps under no other circumstances (short of martial law) could private property and liberty be so quickly and completely restrained or destroyed.

In sum, nuisance law was not primarily a matter of technical, private law at all. The *sic utere tuo* rationale of nuisance was a public ordering principle of "every civilized community." Sidney and Beatrice Webb pointed out that the heart of nuisance was an all-embracing notion of social obligation, wherein any breach of one's irreducibly public duties to society and to others was deemed an actionable nuisance. The redress of nuisance thus came to include nearly "every conceivable neglect or offence"—a good part of the "framework of law in which the ordinary citizen found himself."[54] *Sic utere tuo*, Horace Wood argued, was but "the legal application of the gospel rule of doing unto others as we would that they should do unto us." Indeed, nuisance law encapsulated the ultimate statement of the relative right of private property in a well-regulated society: "Every person yields a portion of his right of absolute dominion and use of property, in recognition of, and obedience to, the rights of others . . . for the mutual protection and benefit of every member of society." These public principles of nuisance law formed the jurisprudential framework for the regulation of such diverse subjects as noxious trades, adulterated food, obscenity, contagious diseases, theaters, and monopolies.[55] They also decidedly shaped the response of the nineteenth-century American polity to the public safety threat posed by two enormous fire hazards: gunpowder and wooden buildings.

The policing of the manufacture, storage, and sale of gunpowder marked an important episode in the development of the early American regulatory state. Though trade regulations had deep roots in the colonial era, gunpowder was one of several emerging industrial manufactures that met extensive governmental restraints after the Revolution. Powder mills, like the extensive textile manufactories of the Boston Associates, symbolized the dramatic take-off of the early American economy.[56] Gunpowder was grist for early American

capitalism. In addition to its obvious importance for public defense, frontier security, and hunting, gunpowder was increasingly in demand for a host of developmental projects in a labor-scarce economy, including mining, canal building, and road building.[57] Before the Revolution, American gunpowder supply was dependent on a handful of mills, scattered household production, and imports.[58] Five years after hostilities with Britain, Pennsylvania had 21 powder mills producing 625 tons of powder annually. The 1810 United States census listed 200 mills scattered among sixteen states, the most promising being the Du Pont works on the Brandywine River in Delaware.[59] Gunpowder production fast became a central component of early American commerce, industry, and trade. And it just as quickly encountered the force of early American governance in the guise of the law of public nuisance.

Gunpowder's tendency to explode, with dramatic consequences for nearby surroundings, made it particularly susceptible to nuisance law's admonition that one should use property so as not to injure another. As early as 1700, Lord Holt made it clear that "though gunpowder be a necessary thing, and for the defence of the kingdom, yet if it be kept in such a place as it is dangerous to the inhabitants or passengers, it will be a nuisance."[60] The manufacture and storage of gunpowder joined an array of economic activities including brewhouses, glasshouses, limekilns, dyehouses, smelting houses, tan pits, chandler's shops, and swine-sties subject to common law nuisance restrictions on behalf of the people's health and safety.[61]

Early American legislative and municipal enactments regulating gunpowder were extensive, but control over antisocial uses of private property in the early republic did not depend on codification. The regulation of gunpowder through the common law of public nuisance in lieu of statute remained an integral part of the American fight against fires throughout the nineteenth century—this, despite a somewhat inauspicious start. In *People v. Sands* (1806), C. & L. Sands were indicted for maintaining a public nuisance. They were accused of keeping fifty barrels of gunpowder in a Brooklyn house "near the dwellinghouses of divers good citizens of the state, and also, near a certain public street . . . to the great damage, danger, and common nuisance of all the good citizens."[62] Statute law explicitly regulated dangerous caches of powder in New York City, but Brooklyn had no similar written requirement.[63] Though the trial court declared the powderhouse to be a public nuisance, the New York Supreme Court reversed.

None of the justices in *Sands* denied that a gunpowder storehouse could be a common nuisance. Indeed, they all agreed with Lord Holt that if kept in such a place "as it is dangerous" to the public, it would certainly be indictable.

But they refused to accept the district attorney's contention that fifty barrels of gunpowder stored near a dwelling house was a public nuisance per se, as a matter of law. They wanted the circumstances of the nuisance—time, place, manner, and/or evidence of negligence or lack of due care—spelled out in the indictment for a jury's inspection and determination.[64] Indeed, in an outrageous example of judicial notice, Justice Livingston offered that he knew the house in question, identified it as a "powder-house," and personally deemed it "safe." From his own observation, Livingston described the structure as a "brick building, constructed for the storing of powder, and secured by conductors, and every other usual guard against accident." He concluded, "A safer mode of keeping this article than in a building thus constructed, cannot well be devised.... The danger of a magazine's exploding, when properly built and secured is remote indeed."[65] In other words, this was truly a decision about a particular powderhouse rather than a general policy insulating dealers of gunpowder from the regulatory impact of nuisance. In addition to agreeing with Lord Holt's general condemnation of dangerous powderhouses, Livingston advocated legislative interference if the common law should ultimately prove an insufficient safeguard.[66]

Still the justices' refusal in *Sands* to acknowledge a powderhouse in a populated area as ipso facto a common nuisance was significant. If it predominated in American case law, the regulation of gunpowder (in lieu of statute or ordinance) would necessitate a case-by-case judicial evaluation of the peculiar circumstances surrounding each alleged nuisance. Such solicitousness for idiosyncratic facts could severely inhibit public nuisance law's usefulness as a general regulatory instrument.[67] A negligence requirement could disable it altogether.

That was not to be the case, however. Perhaps because the Brooklyn powderhouse at issue in *Sands* exploded six months later (no doubt to Livingston's surprise), future courts were much more willing to find gunpowder stored in populous areas common nuisances as a matter of law.[68] In *Myers v. Malcolm* (1844), after 600 pounds of gunpowder exploded killing and wounding several people, the New York Supreme Court ruled that the keeping of a large quantity of gunpowder in a wooden building near other buildings was indeed a public nuisance.[69] Ending some confusion after *Sands*, Chief Justice Nelson made it clear that negligence was not a part of public nuisance determinations.[70] Tennessee's Supreme Court went even further in *Cheatham v. Shearon* (1851), holding that a powder magazine in a populous part of Nashville was a nuisance per se as a matter of law.[71] Directly challenging the decision in *Sands*, Justice Green ruled that no matter what the circumstances and no matter how

solidly constructed, a large storehouse of gunpowder in the heart of a populous city was in and of itself a public nuisance.[72] Green's argument closely followed the main outlines of the well-regulated society. Citing Blackstone, Green defined common nuisances as "offenses against the public order and economical regimen of the state." Invoking the *sic utere tuo* rationale of nuisance, he suggested that there were "few things one could do that would annoy the community more than the deposit of a large quantity of gunpowder in the midst of a populous city." Concluding with public safety and *salus populi*, Green asked, "Can it be possible that the law shall protect us from the annoyance of a pig-sty, or a slaughterhouse, and yet that it affords no protection from a danger that might be a constant annoyance, and which may, and sometimes does, result in a great destruction of life and property?"[73] He answered and decided, of course, "No."

Although few courts were as explicit as Justice Green in deeming powderhouses nuisances per se, they continued to abate and in some cases enjoin them with reference to little else than the presence of nearby dwellings.[74] In 1873, the Pennsylvania Supreme Court afforded the extraordinary relief of an equity injunction against a partially constructed powderhouse in a "suburban village" of Sharpsburg.[75] Here, the facts deemed so crucial in *Sands* were unavailable—the powderhouse had not yet been built.

The public calculation was not always easy. After all, powderhouses were a "great convenience to the public, and of advantage to the commerce of [a] city."[76] But ultimately, public safety trumped commerce as it trumped the relative property rights of powderhouse owners. Whereas Justice Livingston could argue in *Sands* that "the danger of a magazine's exploding . . . is remote indeed," later justices had to deal with the fact that they were exploding all the time.[77] Once the threat to public safety became apparent, *People v. Sands* was a dead letter.[78]

Early American nuisance restrictions on gunpowder aptly reflected the pull and power of the common law vision of a well-regulated society. Even without legislative action, uses of property and modes of production that endangered the people's welfare were subjected to restraints and penalties. As Lemuel Shaw pointed out, a gunpowder nuisance prosecution involved not only the punishment of the offender, but "the seizure and confiscation of the property, by the removal, sale, or destruction of the noxious articles."[79] Nuisance law was a powerful and punitive technology of public action. The well-regulated society was not insensitive to the claims of commerce and property; it was merely adamant about the superior rights of the public. Property rights were protected, but relatively, not absolutely. Under the common law of nuisance

one did not have a right to accumulate gunpowder in one's tenement. On the contrary, neighboring property owners (and the community as a whole) had a right to be protected from just such dangerous accumulations—*sic utere tuo ut alienum non laedas.*

State statutes and municipal ordinances regulating gunpowder essentially codified the underlying principles of the common law of nuisance.[80] These written laws themselves were rarely challenged in the early nineteenth century and were never struck down by an appellate court. In 1843 the New York Supreme Court upheld the constitutionality of New York City's gunpowder restrictions with the simple observation, "The statute is a mere police regulation—an act to prevent a nuisance to the city."[81] In the *License Cases* (1847), U.S. Supreme Court Justice McLean was unequivocal about written prohibitions on gunpowder: "Now this is an article of commerce, . . . yet, to guard against a contingent injury, a city may prohibit its introduction." McLean defended such regulatory power as "essential to [the] self-preservation" of "every organized community" upon that "acknowledged principle" of ordered society: "Individuals in the enjoyment of their own rights must be careful not to injure the rights of others."[82]

Gunpowder regulation, then, was an easy case. As Roger Taney anticipated in his argument in *Brown v. Maryland*, no one would defend a private right to sell or store gunpowder in the heart of early American cities. Restrictions on gunpowder were so well rooted in the common law of nuisance and the vision of a well-regulated society that they spawned little controversy and required little elaboration. Perhaps because the regulation of wooden buildings entailed a more distinct departure from common law norms, judges handled this kind of fire regulation with fuller discussions of the implications of nuisance, police, regulation, and the people's safety.

On the whole, legal prohibitions on wooden buildings in early American cities closely followed the evolution of gunpowder restrictions. Both were security and safety measures, passed to protect the public from the dangers of fire; and both relied heavily on the common law of nuisance for remedies as well as underlying rationale. But bans on wooden buildings involved a somewhat different species of public regulation. Unlike gunpowder, there was nothing inherently dangerous or hazardous about a wooden structure. In and of itself it was largely benign vis-à-vis adjoining property owners and the community at large. Unlike traditional public nuisances (slaughterhouses, pigsties, tanneries), no physical characteristics made a wooden building particularly noxious, offensive, or threatening to the surrounding public. It became a nuisance solely because the legislature or municipality drew an

arbitrary line (analogous to the wharf line in *Commonwealth v. Alger*) known as a "fire limit" around a community declaring otherwise innocent conduct within that boundary "offensive" as a matter of law.

Fire limits, then, were hardly a timid or primitive form of public regulation. They were prospective and preventative (rather than merely remedial), and they operated on behavior not inherently evil or pernicious. They represented a distinct effort to prevent urban development from becoming simply a function of a free market of private decision-makers to the detriment of public safety. Fire limits involved the kind of foresight, public planning, and mandated social ordering that many claim is an exclusive product of the twentieth century.[83] Indeed, in the fire-limit ordinances of the early nineteenth century we see a form of urban land-use regulation different only in degree from the comprehensive zoning ordinances of the Progressive Era.

One of the first American discussions of the legal and constitutional legitimacy of fire limits occurred in 1799. Philip Urbin Duquet was indicted for maintaining a "common and most dangerous nuisance"—a wooden house erected contrary to a 1796 Philadelphia ordinance prohibiting wooden structures (houses, shops, warehouses, stores, or stables) on pain of $500 fine.[84] Jared Ingersoll argued the case for the Commonwealth in *Respublica v. Duquet.* Citing English Chief Justice Lord Holt, Ingersoll defended Philadelphia as a "great community that have a legislative power intrusted to them for their better government" to "make laws to *bind the property* of those that live within."[85] He rooted Philadelphia's overarching regulatory power in its incorporation statute authorizing it to make laws "as shall be necessary or convenient for the government and welfare" of the city. And he invoked a 1795 state act explicitly empowering Philadelphia to establish fire limits.[86] "We have no unfavorable precedents against us," Ingersoll declared, noting similar fire and safety regulations in New York City and Charleston.[87]

In a very short opinion, Chief Justice Shippen simply cited the two state statutes and matter-of-factly upheld the constitutionality of the fire-limit ordinance. The only question in this case was whether legislative authority was properly delegated to the municipal corporation. Neither the judge nor the defendant's attorneys thought to question the legislature's ultimate authority to restrict and restrain private property by banning the use of wood in buildings. As was suggested in the very statute creating the "Corporation of the City of Philadelphia," the intention of civil government was to "provide for the order, safety and happiness of the people."[88] The power of government to "bind" property in pursuit of these larger ends—to protect against fire—hardly was contestable.

Respublica v. Duquet quickly emerged as the leading American case on the constitutionality of municipal fire limits.[89] But the court's spartan opinion did not really offer a compelling explanation for the legal legitimacy of fire ordinances. We can only infer that public power to regulate private property to protect against fire was so apparent and assumed by the Pennsylvania court that close scrutiny was unnecessary. Thirty-six years after *Duquet* in *Wadleigh v. Gilman*, the Maine Supreme Court fleshed out some of the common assumptions left implicit by Chief Justice Shippen.[90]

Like Philadelphia, New York, Boston, and Charleston, Bangor, Maine, had a fire-limit ordinance in the early nineteenth century prohibiting new wooden buildings (existing buildings were exempt). The penalty for violation of the ordinance was $50. When Wadleigh moved a preexisting wooden building from one part of Bangor to another, it was deemed new construction and, in a twist reflective of the swiftness and power of nuisance law, was summarily demolished by the street commissioner and city marshal. Wadleigh brought an action of trespass against the municipal officers for breaking and entering his close. The defendants justified their action as merely the enforcement of Bangor's fire regulation. In a short but comprehensive opinion, Chief Justice Weston exonerated the municipal officials.[91]

Wadleigh is notable for several reasons. First, it illustrates the extent to which some communities were willing to go to enforce their police regulations. At issue in *Wadleigh* was a quite common, but striking, nineteenth-century remedy for antisocial uses of private property—the physical destruction and removal of offensive structures. As we shall see in later chapters, demolition was used throughout this period to deal with noxious milldams, disorderly houses, saloons, hospitals and infectious buildings, as well as the accoutrements of the illegal liquor trade.[92] In *Wadleigh*, the plaintiff's wooden building was torn down by public officials despite the fact that the municipal ordinance only authorized a $50 fine. Chief Justice Weston had no trouble amplifying the public remedy. "Is this all they can do?" he questioned, "After exacting the penalty, must [the city] submit to the continuance of a mass of combustible matter, erected in defiance of their ordinance, in the heart of the city?" He found otherwise: "If it was lawful for them to forbid the erection, we hold it lawful for them to cause it to be removed."[93] Such incidents of the actual *destruction* of private property without compensation (in the interests of public safety, morals, health, and welfare) indicate just how different nineteenth-century common law assumptions about public regulation could be from twentieth-century constitutional hairsplitting over what constitutes a

"taking" of private property. In the early nineteenth century, a taking was not contingent on how much private property rights were impaired (after all, property could be confiscated or destroyed). And a police regulation by definition was not a "taking."[94] Maine's chief justice found the complete leveling of Wadleigh's building simply the carrying out of "a salutary and lawful regulation."[95]

Just as notable as the particular remedy in this case was Chief Justice Weston's carefully reasoned defense of fire-limit regulations. Like Lemuel Shaw, Weston attempted to make clear what had been left implicit and assumed in *Duquet* and so many other regulatory cases before the Civil War—the exact nature and relationship of public police regulations and private property in a well-regulated community. Unlike Philadelphia, Bangor enacted its wooden building prohibition without explicit legislative authorization. Nevertheless, Weston found that the mere incorporation of Bangor with power to make laws "as shall be needful to the good order of said body politic" was sufficient to allow it to pass fire regulations.[96] This general grant of power (found in some form in almost all municipal charters) entitled Bangor to make "all necessary police regulations" essential to "the well ordering of the body politic." For Weston, fire limits were simply a legitimate form of police regulation. He noted, "It is an object, in the highest degree worthy of the attention of the city authorities, to take such measures, as may be practicable, to lessen the hazard and danger of fire. No city, compactly built, can be said to be *well ordered or well regulated*, which neglects precautions of this sort."[97]

With such language, Weston plugged into an established discourse on the role of law and regulation in a well-ordered society. The goal of police regulations was to "forbid such a use, and such modifications, of private property, as would prove injurious to the citizens generally." To be protected from such noxious private behavior was "one of the benefits which men derive from associating in communities." Though restrictions on private conduct "may sometimes occasion an inconvenience to an individual," compensation comes from "participating in the general advantage." Police regulations, so defined, were "unquestionably within the scope of the legislative power, without impairing any constitutional provision." A police regulation, like the fire limit at issue here, was not a "taking" or an appropriation of property requiring compensation—it merely regulated such property's enjoyment.[98]

In Weston's view, people associated in communities for general advantages and benefits, superior to the interests of any single individual. To protect and preserve the common good and welfare, the well-ordered community had the

power to enact regulations that restricted private rights and property. This was a power with deep roots in the common law (especially the law of nuisance)—a common law not abrogated by the specific strictures of constitutionalism.

But by 1835, Chief Justice Weston did not need to rely simply on the vision and persuasiveness of an abstract intellectual-jurisprudential tradition. By 1835, the powerful sentiments that James Wilson and his peers divined in the common law had begun to congeal into a coherent mass of American case law on police regulation. At the behest of the Bangor city solicitor, Weston placed the legitimacy of this fire regulation squarely in that emerging American legal tradition. He cited *Vanderbilt v. Adams* (1827), *Stuyvesant v. Mayor of New York* (1827), *Baker v. Boston* (1831), and *Village of Buffalo v. Webster* (1833) as unequivocally establishing the constitutionality of municipal and state police regulations restricting individual liberty and private property in the interest of public safety, morality, health, and welfare.[99] These precedents along with later decisions like *Commonwealth v. Alger* would eventually become staples of early American police power citation. For Weston, they embodied the legal legitimacy of police statutes and ordinances regulating harbors (*Vanderbilt*), cemeteries (*Stuyvesant*), the use of water by milldams (*Baker*), and public markets (*Webster*).

But these cases were more than examples of particular regulations. They were also explicit manifestations of the well-regulated society in American case law. *Salus populi* accented government's affirmative duties and the necessity of pursuing a distinctly *public* good. From *Baker v. Boston*: The municipality is "fully empowered to adopt measures of police, for the purpose of preserving the health, and promoting the comfort, convenience and general welfare of the inhabitants within the city." *Sic utere tuo* recognized the social, relative nature of rights. From *Stuyvesant v. Mayor of New York*: "Every right from an absolute ownership of property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others." The well-regulated society held that the people's welfare was best realized in an ordered society that regulated the noxious, threatening behaviors and properties of private individuals. From *Vanderbilt v. Adams*: "The sovereign power in a community . . . ought to prescribe the manner of exercising individual rights over property. . . . The powers rest on 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. . . . [S]uch a power is incident to every well regulated society; and without which it could not well exist."[100] In *Wadleigh v. Gilman*, the people's welfare and safety dictated that a municipality had the power to restrict wooden buildings. As Weston reasoned, "Where

the owner of a city lot intends to build of wood, he holds it to be clearly within the competency of the constituted authorities, to say to him, 'you must not exercise that right, it is dangerous to all. You may build of brick or stone; because the safety of all is, in this way, promoted.'"[101]

The decisions of the Michigan and Louisiana supreme courts in *Brady v. Northwestern Insurance Co.* (1863) and *Mayor of Monroe v. Hoffman* (1877) ratified the earlier decisions in *Duquet* and *Wadleigh.*[102] Justice Marr of Louisiana may well have been speaking about gunpowder restrictions as well when he upheld the power of municipal corporations "to restrict the right of property" as within their "police power." As Marr suggested, the common law maxim *sic utere tuo* forbade "the owner so to use his property as to imperil that of his neighbors, or to endanger their lives or their health." Consequently, states and cities could "prohibit the erection of works and factories, and the pursuit of industries within the corporate limits, which would be injurious to the public health and destructive of the comfort of the inhabitants."[103] Gunpowder and wooden building laws were particularly conspicuous examples of legislatures and municipalities doing just that, and state courts upholding their power to do so. They were illustrations of "a police power necessary to the safety" of the people.[104] They reflected the extent to which private behavior and property could be restricted in this well-regulated society when the public's safety and security were at stake. But even these strong fire-prevention statutes do not fully capture how prepared nineteenth-century legal culture was to sacrifice individual and private interest to the people's welfare. That is better reflected in the way public officials could and did behave in cases of necessity, cases of actual catastrophic fire.

Necessity: New York City's Great Fire of 1835

Prohibitions on gunpowder and wooden buildings demonstrate the regulatory power of public nuisance law and the *sic utere tuo* philosophy of the well-regulated society. Nuisance law clearly entailed much more than a set of civil constraints on private irritations and trespasses. It restrained a whole range of noninvasive uses of property that threatened public safety. Moreover, authorities did not have to wait for gunpowder to explode or wooden buildings to catch fire to respond. They were able to identify, abate, and sometimes destroy potentially dangerous nuisances as part of a comprehensive and preventative regulatory strategy.

But the well-regulated society and state were not confined to *sic utere tuo*, policing the relative rights of private property and individual liberty. *Salus*

populi embraced an even more affirmative and expansive vision of public power positively pursuing the common good—doing whatever was *necessary* to secure the people's happiness and safety. The legal doctrine of overruling necessity was a direct manifestation of this open-ended, perfectionist impulse. Indeed, two treatise writers rooted the entire nineteenth-century police power in "the law of overruling necessity."[105]

The doctrine of overruling necessity flowed directly from the assumptions of *salus populi.* If the people's welfare and safety were the highest law, it followed that when the preservation of society was at stake lesser rules and conventions gave way. In its most basic form, the law of overruling necessity was a social version of the law of self-defense.[106] American courts and commentators consistently referred to a long line of English cases making it "well settled at common law" that in cases of calamity, such as fire, pestilence, or war, individual interests and rights would not inhibit the preservation of the common weal. Thus private houses could be pulled down or bulwarks raised on private property *without compensation* when the safety and security of the many depended on it.[107] As Thomas Cooley later reasoned, "Here the individual is in no degree in fault, but his interest must yield to that 'necessity' which 'knows no law.'" The injury to the individual was *damnum absque injuria* (an injury without a remedy) under the reasoning that "a private mischief shall be endured, rather than a public inconvenience." The higher prerogatives of the common law often made it necessary for individual injuries to go unredressed in the common interest.[108]

But overruling necessity was more than a social self-defense mechanism. Early on, natural law writers suggested the wider potential of the law of necessity. Thomas Rutherford argued that "necessity sets property aside"—things necessary "continue in common." Like Grotius and Pufendorf, Rutherford contended that an extreme want of food or clothing justified theft. Property was relational, dependent on the common consent of all. No one could be assumed to have consented away the right to use another's property when self or social preservation were in jeopardy.[109] Necessity revived a "community of goods," where all things were available to common use for common benefit. Although, as Blackstone made clear, civil law ideas on theft never made their way into English common law, the broader conceptions of consent, conventional and relational property rights, the community of goods, and public necessity trumping private interest did.[110] These notions provided a more open-ended backdrop for defending municipal, legislative, and sovereign prerogatives in cases of pressing public need. Just such a case engulfed the city of New York in 1835.

A few minutes after nine o'clock on the evening of December 16, 1835, Comstock and Andrews's dry goods house on Merchant Street in New York City caught fire—hardly a rare occurrence in a city reporting 500 conflagrations that year.[111] This fire, however, was destined to be unique. A subzero temperature, a strong southerly wind, frozen rivers and hydrants, and a fire department and water supply exhausted from a large fire two nights earlier combined to produce a devastating conflagration. The fire's glow was soon noticed as far away as Poughkeepsie. By noon the next day, the entire first ward of the city—fifty-two acres—was in ruins. This was a very special fifty-two acres. It comprised the city's central commercial and mercantile district. From Wall Street and Broad Street to Coenties Slip and South Street, the city's grandest financial, business, and merchant houses—674 buildings in all—surrendered to the flames. The fabulous stores and buildings of Exchange Place and Merchant Street, including the Merchant's Exchange, the U.S. Post Office, and a newly dedicated statue of Alexander Hamilton, were destroyed. Estimated losses approached $20 million. As James Gordon Bennett of the New York Herald lamented, "[I]n one night we have lost the whole amount for which the nation is ready to go to war with France!"[112] New York had twenty-five prosperous insurance companies capitalized at $8 million before the fire. Afterward, fourteen were insolvent and the rest in trouble after paying out $7 million for insured losses. A fire this size and this destructive had never occurred in America, and was comparable only with the burning of Moscow in 1812 and the Great Fire of London in 1666.[113]

For our purposes, one of the most important aspects of the Great Fire of 1835 was the way it ended. At approximately three o'clock in the morning, with the Merchant's Exchange in ruins and water congealing soon after it left hose or hydrant, Mayor Cornelius W. Lawrence in consultation with Chief Engineer James Gulick decided to resort to gunpowder. The plan drew on an age-old method of fighting fire in congested areas—the creation of an artificial firebreak by pulling down or otherwise destroying buildings in the path of the fire.

As early as 1653, houses were pulled down in an unsuccessful effort to squelch the first of many Boston fires.[114] Early fire statutes almost always directly empowered local officials to "order assistance" and "pull down houses" to extinguish fires.[115] As essential to early fire fighting as leather buckets and ladders was a strong iron hook connected to a long rope or pole. The hook was attached to the roof or upper wall of a building and yanked until the structure fell apart.[116] Gunpowder was later found to be a quicker and more effective means of creating a firebreak. The destruction of buildings to stop

fire was so common in this period, it acquired a special place in "great fire" folklore. Equal to Nero's fabled fiddling was the folly of London's Mayor Bludworth, who in 1666 refused to order the pulling down of buildings for fear of lawsuits. In consequence, the story goes, "half that great city was burned."[117]

Cornelius Lawrence was determined to avoid such infamy. But despite his relatively quick decision to resort to gunpowder, delay was not avoidable. Ironically, well-enforced powder regulations had successfully banned large stores of gunpowder from the vicinity of New York and Brooklyn. Powder arrived from Governor's Island only at dawn. By eleven o'clock on December 17, the blowing-up of buildings in the path of the fire effectively contained the flames. Cornelius Lawrence saved New York. His triumph was short-lived, however. Within months, Mayor Lawrence ran smack into Mayor Bludworth's worst fears—lawsuits—with over thirty-three filed in New Jersey alone. For almost two decades, Lawrence fought off compensation demands for private losses suffered in his city-saving efforts. This litigation produced an unusually rich discussion of the lengths to which public authorities could go when public necessity and public safety demanded action.

At issue in the subsequent legal actions against the mayor of New York was the doctrine of overruling necessity. A sentiment expressed early in the Year Books of Henry VIII soon became embedded in American common law: "The commonwealth shall be preferred before private wealth; for on behalf of the commonwealth one shall suffer damage, as when a house is plucked down if the next house is burning, and suburbs of cities shall be plucked down in time of war, because that is for the common wealth."[118] The idea that in times of great necessity, like fire, private property could be destroyed to protect the public good and safety was consistently ratified by English courts. *Maleverer v. Spinke* (1538), *The Case of the King's Prerogative in Salt-peter* (1607), and *Mouse's Case* (1609), held that such "private damages" endured "*pro bono publico*" (for the public good) were not actionable.[119] Justice Buller summed up these early English statements of the law of necessity in 1792: "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. . . . This is one of those cases to which the maxim applies, *salus populi suprema est lex.*"[120]

Within a year of the Constitutional Convention, Chief Justice M'Kean of the Pennsylvania Supreme Court made it clear that "rights of necessity" formed a part of "our law." In *Respublica v. Sparhawk* (1788), he drew on a host of common law decisions establishing that "it is better to suffer a private

mischief, than a public inconvenience" and that "the safety of the people is a law above all others." In particular, M'Kean argued, "Houses may be razed to prevent the spreading of fire, because for the public good."[121] Chancellor Kent only solidified the standing of necessity in American law when, citing *Maleverer* and *Sparhawk*, he delivered his ultimate statement on public rights:

> [T]here are many cases in which the rights of property must be made subservient to the public welfare. The maxim of law is, that a private mischief is to be endured rather than a public inconvenience. On this ground rest the rights of public necessity. If a common highway be out of repair, a passenger may lawfully go through an adjoining private enclosure. So, it is lawful to raze houses to the ground to prevent the spreading of a conflagration.[122]

None of these common law precedents required compensation for "necessary" public destructions.

One would think that with such undisputed authority New York jurists would have little trouble laying to rest the numerous cases generated by Mayor Lawrence's order to "raze houses to the ground." Two things, however, muddied the jurisprudential waters. First, article 7 of New York's 1821 constitution, like the federal Constitution's Fifth Amendment, declared that "private property [shall not] be taken for public use without just compensation." Second, New York's legislature passed a statute governing the mayor's conduct in cases of fire. The 1813 law explicitly authorized the mayor and two aldermen "to direct and order . . . any other building which they may deem hazardous, and likely to take fire, or to convey the fire to other buildings, to be pulled down or destroyed."[123] But the statute also specified that owners of buildings so pulled down and "all persons having any estate or interest therein" were entitled to "damages" to be determined and assessed in proceedings like those to award compensation for property *taken* for public use.[124] The statute thus amended the common law rule of necessity in New York City, allowing damages for buildings destroyed in the path of fire. But though the statute was clear on the issue of damages to owners and tenants of buildings, it was silent on what was to be done for the owners of goods without an "interest or estate" in those buildings. The fire of 1835 struck the heart of the mercantile district chocked full of warehouses piled high with imported and traded goods. Though one would not want to be to cynical about the parochialism of the New York legislature, it might have been more than an oversight that the owners and tenants of buildings (likely to be New Yorkers) were compensated, while the mere

owners of goods (more likely to be out-of-staters) were not.[125] In any event, this statutory situation produced a host of civil cases in New York, and, not surprisingly, in New Jersey.

In 1837, the first cases against the mayor and corporation of New York reached the appellate courts.[126] In *Mayor v. Lord* (I), the city contested a jury award of $163,000 made to Rufus and David Lord in compensation for the destruction of their building and goods by municipal officials. As the structure's owner, Rufus Lord received $7,168.50. David Lord, as tenant and owner of the goods in the building, received $156,274.80.[127] Chief Justice Nelson dismissed the city's argument that damages should only be awarded for the building and liberally construed the 1813 statute to authorize "the assessment of damages for the loss of merchandize and other personal property" by owners, landlords, and tenants.[128] Citing *King's Prerogative* and *Mouse's Case*, Nelson had no doubt that it was "well-settled" at common law that buildings might be pulled down in cases of necessity without redress. "For the commonwealth, a man shall suffer damage," he quoted.[129] But given the statutory remedy specified, he treated this case as falling within the purview of the "great fundamental principle" codified in the New York constitution that "private property shall not be taken for public use, without just compensation."[130] Although even Nelson was unwilling to hold that article seven compelled the legislature to provide compensation, once it did so, he felt the statute should be broadly construed to include all damages actually sustained.

The city appealed Nelson's judgment to the New York Court of Errors, a unique judicial body composed of the president of the Senate, the chancellor, and select state senators. The outcome was the same. In a sixteen-to-six decision, the Court of Errors upheld the damage award made to the Lords. Once again the court had no trouble with the common law of necessity:

> The principle appears to be well settled, that in a case of actual necessity, to prevent the spreading of a fire, the ravages of pestilence, the advance of a hostile army, or any other great public calamity, the private property of an individual may be lawfully taken and used or destroyed, for the relief, protection or safety of the many, without subjecting those whose duty it is to protect the public interests, by whom, or under whose direction such private property was taken or destroyed, to personal liability for the damage which the owner has thereby sustained.[131]

But, Chancellor Walworth suggested, once the statute was passed, remedying the common law's lack of compensation, it should be construed equitably. Those who benefited from the sacrifice "ought in equity and justice to make

good the loss which the individual has sustained for the common benefit of all."[132]

In *Stone v. Mayor of New York* (1840) and *Russell v. Mayor of New York* (1845) the Court of Errors drew back from the far-reaching dicta of *Mayor v. Lord* (I & II) and began to cut off the city's responsibility for private damages.[133] *Stone* and *Russell* originated in claims that the city was liable for *all* property destroyed by the mayor's order (not merely the property of those with an "interest or estate" in the building as provided by statute) under the "just compensation" requirement of the New York constitution. Such arguments forced the court to clearly define the character of the mayor's action. Was the demolition of buildings, irrespective of statute, a "taking"—an act of eminent domain? If so, article 7 of the New York constitution required that *all* property "taken" for public use be compensated. The court in *Stone* and *Russell* refused to accept that constitutional argument. The mayor's action was not a "taking" of private property, but an act of public necessity covered alternatively by the common law and statute. The statute did not abrogate the common law, but merely specified a separate remedy pursuable by those explicitly designated—those with "interests" in the building. The statute made no reference to goods or personal property.[134]

Stone and *Russell* reaffirmed the principles of the law of necessity. As Senator Edwards put it, "There are many cases in which the maxim, *salus populi suprema lex*, applies; and I know not but this case may with propriety be considered one of them. . . . [P]rivate mischief is to be endured rather than public inconvenience."[135] In *Russell* Senator Sherman even more vigorously attacked the "fallacy" that Mayor Lawrence was exercising eminent domain powers: "The destruction of this property was authorized by the law of overruling necessity. . . . [I]n a case of actual necessity, to prevent the spreading of a fire, the ravages of a pestilence, or any other great public calamity, *the private property of any individual may be lawfully destroyed for the relief, protection, or safety of the many*, without subjecting the actors to personal responsibility for the damages which the owner has sustained."[136] The statute of 1813 was simply a police law designed to regulate the implementation of the law of overruling necessity in New York. It was not an exercise of the sovereign right of eminent domain.[137] Nor did article 7 of the state constitution suspend the common law rule of necessity. Justice Porter reasoned, "[Necessity] is founded upon principles which are above or beyond the reach of constitutional restriction."[138] In simple terms, the New York Court of Errors held that nothing in the federal or state constitutions kept governmental officials from blowing up valuable private property without compensation when the "public interest" necessitated it.

With avenues to satisfaction blocked in New York, litigators opted for the next best option—they went to New Jersey. Over thirty cases were filed there seeking damages from Mayor Lawrence for goods destroyed and not compensated under New York statute law.[139] After some initial success convincing judges that the mayor was exercising eminent domain powers, the New Jersey Supreme Court ultimately resisted the temptation to reinterpret New York law. In *American Print Works v. Lawrence* (1851), the court ruled that the "common law doctrine of necessity is one that is now too firmly established to be drawn in question." "The necessity which arises from the danger of conflagration in a great city . . . and which rests for its exercise upon the subservience of private rights to the public good" legitimated Mayor Lawrence's destruction of private goods for the safety of the common weal.[140]

The New York fire cases exemplify the power and persistence of the common law vision of a well-regulated society dedicated to the *salus populi*. The first thing to note about them is that no one challenged the statute itself. The power of the legislature to authorize the demolition of private buildings in conflagrations was not questioned. The 1813 statute was simply assumed to be a legitimate police regulation. Second, the mayor's behavior in these cases diverged somewhat from a typical act of regulation. Like the wooden building in *Wadleigh v. Gilman*, property was actually destroyed. But unlike *Wadleigh*, the property at issue did not violate any prescribed restrictions, written or unwritten. These goods were simply in the wrong place at the wrong time. The fire cases show that public power over private property in the early nineteenth century was not restricted to passing prospective rules or limitations. In cases of necessity, it could act swiftly and expediently, without notice, to protect the people's welfare.

The New York fire cases also reveal the tenacity of common law standards (especially those protecting public prerogatives) in nineteenth-century America. Here, two potent rivals had ample chance to stifle the common law of necessity. The 1813 statute provided judges sufficient room to compensate all sufferers. Furthermore, article 7 provided New York with a clear constitutional mandate to compensate takings of private property for public use. It would be hard to imagine a better scenario for a takings clause to trump police power than in cases of the summary destruction of perfectly harmless private properties. Nonetheless, the common law rule of necessity persevered through statute and constitution. The New York and New Jersey courts ultimately refused to interpret Mayor Lawrence's action as within the constitutionally protected realm of eminent domain. Though buildings were certainly compensable via statute, this was simply a legislative bonus or "bounty."[141] All other

property losses were *damnum absque injuria* (injuries without remedies) according to the principle that the people's welfare was the supreme law.

But could it be that the New York fire cases were simply flukes, an unusual and strange climax to a rare occurrence? Or were New York judges simply relying on ancient precedents to shrewdly cut off liability to New Jersey merchants? Such explanations would certainly curtail the usefulness of these cases for drawing general conclusions about early American law. But the New York fire cases did not stand alone. In addition to becoming precedential tinder for a host of general regulatory cases, the New York and New Jersey decisions were ratified in fire cases in California, Indiana, Massachusetts, and Minnesota.[142] In *Bowditch v. Boston* (1880), the United States Supreme Court gave its sanction to the common law of necessity.[143] By 1881, John Dillon could cite a slew of American decisions for the proposition:

> The rights of private property, sacred as the law regards them, are yet subordinate to the higher demands of the public welfare. *Salus populi suprema est lex.* Upon this principle, *in cases of imminent and urgent public necessity, an individual or municipal officer may raze or demolish houses and other combustible structures* in a city or compact town, to prevent the spreading of an existing conflagration. This he may do independently of statute, and without responsibility to the owner for damages he thereby sustains.[144]

The New York fire of 1835 vividly demonstrated just how interconnected people's lives were in early American cities. Individual uses of private property could have staggering effects on the well-being of the whole. The well-regulated society was designed to guard against such unfortunate consequences. The lesson of the fire of 1835 in court was that the common law could be aggressively responsive to the people's safety even at the expense of private interests. In these cases, property—supposedly that most sacrosanct of American institutions—was not merely restricted, taxed, or appropriated to public use with compensation. It was blown up by public officials to save New York City. Early American judges, often perceived as the conservative bulwark of such property interests, found nothing in early American common, statute, or constitutional law to stand in the way.

Conclusion

By the late nineteenth century most American cities vigorously regulated combustibles, buildings, and behavior to guard against the dire public safety

threat posed by fire. Elaborate building codes presaged comprehensive zoning laws in an effort to create fire-proof cities. In turn-of-the-century Philadelphia, for example, a theater owner had to comply with 87 special provisions governing everything from radiators to proscenium curtains in addition to the 158 restrictions applicable to buildings in general.[145] Invariably the constitutionality of these fire regulations was upheld by late nineteenth-century courts.[146]

Indeed, by the late nineteenth century, fire regulations became a paradigm for constitutional exertions of state police power. Treatise writers as diverse as Christopher Tiedeman and Ernst Freund accepted the patent constitutionality of police power prohibitions on gunpowder and wooden structures in urban areas.[147] Thomas Cooley and John Dillon both used fire regulations to epitomize police power limitations on private property. Cooley observed that fire limits might look like the "destruction of private property," but they were merely "a just restraint of an injurious use of property"[148] Dillon added that the power of public officials to raze private buildings to prevent the spread of fire was the classic example of private property deferring to "the higher demands of the public welfare"—"*salus populi suprema est lex.*"[149]

Such statements testify to the power and persistence of the well-regulated society. Fire regulations embodied the concerns for public welfare, local self-government, common law, and the relative nature of property at the heart of that vision of social governance. In a society dedicated to the people's welfare, no right was fixed or absolute unto itself, no matter how innocent its exercise might appear on the surface. Rights existed relative to surrounding others. The maintenance of a cache of gunpowder in Brooklyn or a wooden building on the outskirts of Philadelphia could be perfectly legitimate for decades. But once conditions and populations fluctuated so as to make such conduct harmful in relation to the surrounding community, the right to store gunpowder or build of wood evaporated. Rights did not sprout magically from the land, nor did they inhere in title. Rights were social creations, products of continual change and regulation. The well-regulated society recognized no individual right, written or unwritten, natural or absolute, that trumped the people's safety. Indeed, when that safety was threatened, public officials could summon a powerful array of legal technologies, from nuisance indictment to equity injunction to summary destruction, in response. A swarm of local officials (mayors, aldermen, constables, sheriffs, justices of the peace, fire commissioners, fire wardens, and night watchmen) as well as private citizens readily enforced the underlying principles of the police power, the common

law of nuisance, and the law of overruling necessity: *sic utere tuo* and *salus populi.*[150]

As clearly as fire regulation speaks to the presence of the well-regulated society in nineteenth-century law, it speaks to the absence of one of the staples of liberal constitutionalism—an absolutist protection of private right, especially the right of property. In case after case, judges comfortably defended a far-reaching state power to enact fire regulations and control private property rights for the public safety. Constitutional standards like the commerce clause, state takings requirements, and anything resembling substantive due process protections for individual rights were consistently trumped by the *sic utere tuo* and *salus populi* prerogatives of nonconstitutional public law. Houses, goods, occupations, trades, industries, manufactures, sales, exchanges, land uses, and the like were all subject to regular and harsh public limitations when the safety of the people was threatened by fire.

But though the well-regulated society persisted through Cooley, Dillon, and Tiedeman, change was imminent. At issue in *United States v. Dewitt* (1869) was a section of the *federal* Internal Revenue Act of 1867 that prohibited the dangerous mixing of naphtha and other illuminating oils. Such national police and safety legislation conflicted with the principles of localism, federalism, and self-government at the heart of the well-regulated society.[151] Indeed, a new legal and governmental regime had displaced the *salus populi* tradition by the time Oliver Wendell Holmes Jr. issued his famous opinion in *Pennsylvania Coal v. Mahon* (1922), holding that "though property may be regulated . . . if regulation goes too far it will be recognized as a taking." In imposing a new constitutional limitation on exercises of police power, Holmes felt obligated to respond to the seemingly unlimited power behind nineteenth-century fire regulations. But by 1922, the common law assumptions and principles that made sense of those regulations had all but evaporated. The turn-of-the-century paradigm shift to liberal constitutionalism left Holmes with only an indecipherable anomaly: "It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle."[152]

But like *Commonwealth v. Alger*, of course, gunpowder prohibitions, *Wadleigh v. Gilman*, and the public safety measures of Cornelius Lawrence were *not* anomalies. The nineteenth-century fire cases almost instantly became precedents and reference points for the whole spectrum of nineteenth-century public policymaking, from public economy to public health. They

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