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# Well-Regulated for Well-Being: Public Health and the Public Good in 19th and Early 20th Century American Caselaw

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# WELL-REGULATED FOR WELL-BEING: PUBLIC HEALTH AND THE PUBLIC GOOD IN 19TH AND EARLY 20TH CENTURY AMERICAN CASELAW

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The occasion for my research is, predictably, our own public health crisis but not really the pandemic, as such. Rather, I have been disappointed by the vast majority of public commentary regarding public health measures both in terms of their purported rationale and contemplation (or lack thereof) of the proper forum and means.

That is to say, it has become apparent to me that we have lost in our public reason the ability to consider and explain the basis and purpose of state action for the common good within our federalist system—the respect for subsidiarity, and balance of the inalienable rights of individuals with the society. There seems to be limited serious talk of either idea in our present context; no recognition that albeit individual persons may possess rights not conventionally granted, said individual persons are inherently sociable and political. Said differently, the moral person is made for the compound moral person. The typical binary presented is usually that of either unmitigated, unthinking acquiescence to nameless, faceless, heartless bureaucrats—*the* experts—or militant resistance to any government action that might encroach upon the proverbial front lawn. It is a conflict between the rights of society and the rights of individuals, a crisis of anthropology. Sorely lacking in both extremes—neither of which do I presume to be held by anyone here today—is robust consideration of the common good, classically understood, and of which I will assume familiarity of, from an audience at a university that champions the venerable motto, "All for the Common Good."

Older American caselaw—from the nineteenth and early twentieth centuries—reflects a different world, of which I will provide a brief survey—even with unlimited space and time, as William Novak has lamented, an exhaustive examination of the cases in view, them being so numerous, is

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impossible. The cases in view are seemingly endless in their number, usually terse, and filled with now foreign assumptions about the nature of man and society—vestiges of participation in a centuries-long conversation that we now seem to have resigned from. By taking a chronological step back and into them, we may, perhaps, chart a course forward or *through* our present consternations.

## I. POLITEIA

The cases in view can be broadly categorized as state police power cases. This is not merely a preliminary matter. It supplies much of the approach to public health by prior courts. The state police power was first fully articulated by the Massachusetts case, *Commonwealth v. Alger* (1851),[1] and by the Supreme Court in *Mugler v. Kansas* (1887)[2], which granted authority to regulate the health, safety, and morals of the populace reserved to the states in the Tenth Amendment.[3] It was considered a preexistent, inherent power of said states, inherited from their colonial status delegated to them by the Crown.[4] When contemplating this power, however, one must heed the Supreme Court's advice in the *Slaughter-House Cases* (1872), *viz.*, that "[t]his power is, and must be from its very nature, incapable of any very exact definition or limitation."[5] The contours of the state police power must be felt out, so to speak, through review of courts considering its use in practice. What can be more definitively said is that "[u]pon it depends the security of social order, the life and health of the citizens."[6]

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[1] Commonwealth v. Alger, 55 Mass. (1 Cush.) 53 (1851).

[2] Mugler v. Kansas, 123 U.S. 623 (1887); Albeit John Marshall coined the phrase in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 444 (1827); *See also id*. at 454 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 208 (1824)).

[3] Even now this is the case. *See* United States v. Lopez, 514 U.S. 549 (1995).

[4] For a fuller history, *see* Santiago Legarre, *The Historical Background of the Police Power*, 9 PENN. J. CONST. L. 745 (2007).

[5] Slaughter-House Cases, 83 U.S. 36, 62 (1872).

[6] *Id*.; MAX M. EDLING, PERFECTING THE UNION: NATIONAL AND STATE AUTHORITY IN THE US CONSTITUTION 81 (OXFORD UNIV. PRESS 2020).

> Although an American doctrine of 'police powers' developed in the second half of the nineteenth century, the principal trait of the concept of police in the eighteenth century is its refusal to be pinned down and defined. Neither eighteenth-century police legislation nor legal commentary ever managed to proceed beyond unsystematic enumerations of police powers.

"Police" and more specifically "*internal* police," in the eighteenth and nineteenth centuries, referred broadly to regulation ("policy" or "policie" were synonyms for police). Only later was it affiliated with constabularies.[7]

Adam Smith, in his *Lectures on Justice, Police, Revenue and Arms* (1763), commented that "police . . . originally derived from the Greek πολιτεία [*politeia*], which properly signified the policy of civil government, but now it only means the regulation of the inferior parts of government, *viz*: —cleanliness, security and cheapness or plenty."[8] *Politeia* itself, of course, enjoys a storied pedigree in western political thought. Its root being *polis*, and its meaning being expansive in the literature stemming from Aristotle Onward. Hence, we might think of *politeia*—literally, the "life of the citizen(s)" and alternatively, something closer to the "well-ordered society"—to reference city or state-making.

The rudiments of ordinary, day-to-day governance was the province of policing in the Anglo-American eighteenth century and the common law tradition with which both sides of the Atlantic operated.[9] That included, Max Edling summarizes,

> a wide and eclectic range of government regulations of health, morals, education, communications, and the economy, covering virtually everything an eighteenth-century government did domestically apart from taxation and the administration of justice. The term could therefore serve as a convenient shorthand for the powers over which American statesmen envisaged the colonies and states would retain full control also after they had delegated their "federative" powers to the union.[10]

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[7] "Police and its alternate policy entered English from the French language and by the middle of the eighteenth century the word had several identifiable meanings, such as the 'regulation and control of a community; the maintenance of law and order, provision of public amenities'; and the 'public regulation or control of trade in a particular product.'" EDLING, *supra* note 7, at 84.

[8] Adam Smith, Lectures on Justice, Police, Revenue and Arms at the University of Glasgow: Part II: Of Police [Division I. Cleanliness and Security] (1763).

[9] "Americans, just like informed Europeans, used the term *police* to designate a range of government activities intended to create a specific socioeconomic outcome: the refined, well-ordered, and opulent society." EDLING, *supra* note 7, at 89.

[10] *Id*. at 39

Edling further notes that in the eighteenth century, internal police covered everything from taxation and poor relief, to the building of public roads and hospitals, to the regulation of markets and printing.[11]

As alluded to already, in the American context, even under the new constitution of *partial* consolidation, internal police or domestic policy came to be associated with the state, distinguished from national government and policy—as in those things *do not have* to do with diplomacy, war, currency, and the like.[12] Albeit, as Justice John Marshall Harlan explained in *The Lottery Case* (1903), the congressional commerce power is properly employed to support and uphold state laws based on police power.[13] Importantly, the reservation of most policy to the states, at least in the eighteenth and nineteenth centuries, was a recognition of the preexisting colonial ways of life upon which the burgeoning nation was established, which was zealously guarded by statesmen of the early republic.[14]

Indeed, Benjamin Franklin and other defenders of the new constitution, like James Wilson, assured apprehensive interlocutors that references to governing for the "general welfare" in the federal preamble and

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[11] EDLING, *supra* note 7, at 82.

[12] Pelatiah Webster, *The Weakness of Brutus Exposed*, N.Y. JOURNAL, Nov. 4, 1787, at 121. Pelatiah Webster (1726-1795) insisted over and against antifederalist objections that:

> the new Constitution leaves all the Thirteen States, complete republics, as it found them, but all confederated under the direction and countroul [sic] of a federal head, for certain defined national purposes only, i.e., it leaves all the dignities, authorities, and internal police of each State in free, full, and perfect condition; unless when national purposes make the controul [sic] of them by the federal head, or authority, necessary to the general benefit.

On Webster's influence on the constitution, see Hannis Taylor, *Pelatiah Webster: The Architect of Our Federal Constitution*, 17 YALE L. J. 73 (1907).

[13] Champion v. Ames, 188 U.S. 321 (1903). There is, of course, a perennial debate as to whether such a thing as federal common law exists and whether this would imply a similar but *federal* police power. *See generally* Paul Fuller, *Is There a Federal Police Power?*, 4 COLUMBIA L. REV. 563 (1904); Jay Tidmarsh, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585 (2006).

[14] The perception of encroachment thereon, for a time, threatened national unity long before the Civil War. *See* CHARLES RAYMOND BROWN, THE NORTHERN CONFEDERACY ACCORDING TO THE PLANS OF THE "ESSEX JUNTO" 1796-1814 (Princeton Univ. Press, 1915); Dinay Mayo-Bobee, *Understanding the Essex Junto: Fear, Dissent, and Propaganda in the Early Republic*, 88 NEW ENGLAND QUARTERLY 623 (2015). On colonial socio-political life, at least in New England, *see* MICHAEL ZUCKERMAN, PEACEABLE KINGDOMS: NEW ENGLAND TOWNS IN THE EIGHTEENTH CENTURY (N.Y. Knopf, 1970).

elsewhere were limited to considerations of international commerce, currency, foreign policy, and military operations.[15]

Edling does a superb job in his new book, *Perfecting the Union*, of describing the difference between the *general* powers for the *general* welfare of the union delegated to the federal government (external matters of war, diplomacy, and interstate commerce) and the much broader powers to regulate for the common good reserved to the states (internal matters of, well, everything else).[16] He points to the Declarations and Resolves of the First Continental Congress (1774) as proof of colonial concern for internal sovereignty. The chief complaint against parliament was that it had usurped "regulation of our internal Police" from an intolerable distance.[17] The first grievance listed in the Declaration of Independence two years later was that the royal government had denied assent to laws "most wholesome and necessary for the public good."[18] The earliest drafts of the Articles of Confederation included language that reserved to each state the "sole and exclusive regulation and government of its internal police."[19] To say that early Americans were zealous of the liberty of internal governance is, perhaps, an understatement. It remained the most animating and, likewise, contentious issue going into the constitutional convention and subsequent ratification process.

Importantly, the introduction of a thoroughly federalist national structure altered little on the ground, vis-a-vis domestic legal, political, and moral life. As Edling persuasively argues, the 1787 Constitution was different in extent and distribution of power but not in kind or remit from its predecessor.[20] If this were otherwise, the proposal would have never gotten off the ground.

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[15] EDLING, *supra* note 7, at 39.

[16] This distinction has been the source of my disagreement with my friend Josh Hammer recently on whether the federal preamble supplies any useful jurisprudential substance for judges—the question is one of *which* community when considering *which* power, *which* authority has a duty to care for the common good of said community. Hammer's "common good originalism," predicated on the federal preamble as a *ratio legis* and *telos* for federal judging lacks appropriate federalist considerations imbedded in the same document. *See* Timon Cline, *The Preamble Will Not Save Us*, AM. MIND (Oct. 20, 2021), https://americanmind.org/salvo/the-preamble-will-not-save-us/.

[17] EDLING, *supra* note 7, at 79–80.

[18] Declaration of Independence (U.S. 1776).

[19] EDLING, *supra* note 7, at 81.

[20] EDLING, *supra* note 7, at 23.

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Early legal commentaries and court opinions continued to reiterate an inherited conception of internal regulation constitutionally preserved to the states after 1787-1791. The enthusiasm for maintaining and exercising internal policy at the state level did not die out post-ratification. Rather it reached full bloom.

Thomas Cooley (1824-1898) explained in his book, *Constitutional Limitations*, this power "embraces a whole system of internal regulation by which the state seeks […] to preserve the public order and to prevent offenses against the state."[21] As the Supreme Court put it in 1890, "[t]he police power includes all measures for the protection of the life, the health, the property, and the welfare of the inhabitants, and for the promotion of good order and the public morals."[22] Otherwise known as the pursuit of the common good.

This had been the quintessential function of government qua government irrespective of a nation's particular polity acknowledged (in this country) since the eighteenth century, and well before in the colonial period. The Massachusetts Constitution (1780) makes this abundantly clear: "[Government is] for the common good, for the protection, safety, prosperity and happiness of the people, and not for the profit, honor or private interests of any one man, family or class of men."[23]

This assumption—classical, and deeper than the mere recognition of domestic policy's purview—was still alive and well throughout the antebellum years of the republic and beyond. People expected it from their state representatives and local magistrates. Their general disposition assumed what William Novak calls the "well-regulated society."[24] Government action was not an alien incursion into their lives but an intricate part of it. The notion of self-government was that of participation therein.

Even as the republic expanded, diminishing the importance of local townships and, in many ways, overriding earlier manifestations of subsidiarity, the power of states to regulate for the good order, peace, safety, health, morals, etc. of their citizens was a nearly unchallenged assumption up through the 20th century.

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[21] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Boston: Little, Brown, and Company, 6th ed. 1890).

[22] Leisy v. Hardin, 135 U.S. 100, 128 (1890) (Gray, J. dissenting).

[23] MASS. CONST. Pt. 1, art. 7 (West, Westlaw through Feb. 2022 amendments).

[24] WILLIAM NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH CENTURY AMERICA (1996).

> The promotion of public morals and public health is a chief function of government, to be exercised at all times as occasion may require. The method by which the result may be accomplished depends upon the circumstances of the particular case, and the largest legislative discretion is allowed.[25]

State legislatures—said Justice John Marshall Harlan in *Jacobson v. Massachusetts* (1905)—were to be the primary judges of what constituted the "good and welfare of the commonwealth."[26] It was they who were politically accountable to the people and were, in theory, best situated to assess the common needs and common sentiments of the populace.

They were, accordingly, afforded significant, which is not to say absolute,[27] deference on review—what we would now recognize as rational basis review… or as I like to call it, *review*. So long as a proper interest of the common good could be discerned and the means of its pursuit reasonably fitted to that end, the policy in question would generally be upheld.[28] This reflected Thomas Aquinas' classic definition of law itself: an ordinance of reason for the common good by one with care of the community and promulgated.[29] Present also was the classical law doctrine of determination (*determinatio*)—the application of higher law in human, positive law.[30]

This was not only a *right* of state governments but *necessary* leeway to enable nimble legislative responses to the particular interests of and threats to society in a rapidly changing world, especially as industrialization introduced new technological and sanitary challenges and immigration

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[25] Beer Co. v. Massachusetts, 97 U.S. 25 (1877).

[26] Jacobson v. Massachusetts, 197 U.S. 11, 27 (1905).

[27] *See, e.g.*, State v. Withnell, 91 Neb. 101 (1912).

[28] Arguably, the constitutional limitation on the police power via proto-rational basis review was that "such regulations must have reference to the comfort, safety, or welfare of society." Town of Lake View v. Rose Hill Cemetery, Co., 70 Ill. 191, 195 (1873).

[29] ST. THOMAS AQUINAS, SUMMA THEOLOGICA I-II, 1332, (Fathers of the English Dominican Province trans., Benziger Bros. 1947).

[30] *See generally* Adrian Vermuele, *Deference and Determination*, IUS & IUSTITIUM: BLOG (Dec. 2, 2020), https://iusetiustitium.com/deference-and-determination/. *See also* Cline, *supra* 17, at 19–26; BRIAN MCCALL, THE ARCHITECTURE OF LAW: REBUILDING LAW IN THE CLASSICAL TRADITION 211-263 (Univ. Notre Dame Press, 2018).

increased population density and religious diversity. As the Supreme Court said in 1894, "[t]he state may interfere wherever the public interests demand it, and… a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests."[31]

Again, this power was not, nor ever intended to be boundless, though it might strike twenty-first century observers as nothing but boundless. To be sure, the role and function of the police power, the purview of regulation, in the two and a half centuries preceding our own was sweeping. No court expressed this more bluntly than the New York Supreme Court in *Ullmann Realty Co., v. Tamur* (1920)—the late date of which is a testament to the endurance of the rhetoric featured:

> Indisputable must be the observation that the 'raison d'être' for the very existence of a representative government as ours and, in the exercise of its function, is the protection and welfare of the people who form its component parts and who, in fact, constitute the state… This material protection afforded the citizenry is the supreme purpose of all law, and the ultimate endeavor of those in whose hands the security of the public is from time to time placed. The source of said power and the reservoir from which it flows ceaselessly with a 'flexibility and capacity for growth and adaptation'… is what is indefinably known and recognized as the general police power of the government.[32]

After quoting Shaw's *Alger*[33] opinion, the court surmised that,

> It would seem that its [i.e., the police power] scope is boundless, impossible of accurate future limitation, and requiring but one, and one only, foundation. It comprehends every law which in any way concerns the welfare of the public. It matters not whether rights or duties are involved. No distinction is made between relations which may be private or public, nor of rights whether personal or

[31] Lawton v. Steele, 152 U.S. 133, 136 (1894).
[32] Ullmann Realty Co. v. Tamur, 113 Misc. 538, 547 (1920).
[33] Commonwealth v. Cyrus Alger, 61 Massachusetts. 53 (1851).

> pertaining to property. The validity and legitimacy of its exercise is inextricably interwoven in every case with the maxim 'sic utere tuo ut alienum non laedas'; the preservation of the health, welfare and morals of the public its constant aim; every matter thereto essential it includes; to every great public need it extends its arms.[34]

## II. SOCIABILITY

The common good being the chief end of government and all just laws—and given legislative deference—what did this mean for individual interests?

As the Maine Supreme Court wrote in 1876 in route to upholding the forced quarantine of children during a smallpox outbreak: "The maxim *salus populi suprema lex* [the public welfare is the supreme law] is the law of all courts and countries. The individual right sinks in the necessity to provide for the public good."[35]

Cicero's maxim was repeatedly invoked by courts of that period in this way. Courts often deemed it a sufficient explanation for almost any regulation. But others gave us more to chew on. One example: *Mott v. Pennsylvania Railroad Company* (Pennsylvania Supreme Court, 1857):

> As individuals must, in the nature of things, have certain inherent and inalienable rights, in order to be individuals; so society must have its inherent and inalienable rights, in order to be a society… because man is naturally social, and there can be no society without government… Now the right and power of society to demand that each of its members shall contribute his just proportion to the common necessities is a natural and inalienable right, for without it there can be no organized society.[36]

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[34] Ullmann Realty Co. v. Tamur, 113 Misc. 538, 548 (1920) (citing Camfield v. U.S., 167 U.S. 518 (1897)).

[35] Haverty v. Bass, 66 Me. 71 (1876).

[36] Mott v. Pennsylvania R.R., 30 Pa. 9, 23 (1858).

Hence, to quote another court from 1899, "[i]f the purpose to be obtained is for the public health or comfort, or the public weal generally, then the rights of the individual must yield to the common good."[37]

This is what it meant to be a part of society: a collective endeavor and the natural expression of human sociability. Indeed, a social existence was the natural and truest expression of human existence. This conviction still governed law and political theory in the early republic (again, up through the nineteenth century and into the twentieth) as evidenced by the leading commentaries of the period. In classical fashion, Nathaniel Chipman (1752-1843) predicated his entire *Principles of Government* (1833) on the assumption that man is "formed for the social state."[38] Zephaniah Swift (1759-1823), like Chipman, decried a Hobbesian narrative of man's origin and telos. No pure, non-social state of nature ever did exist: "To contrast the social state, to the natural state, as tho [sic] the former was artificial, and the latter natural, is contrary to the truth. No principle of human conduct is more perfectly natural than that which prompts mankind to associate together for mutual benefit."[39] To invoke Chipman again, "[man] was not made for independence, but for mutual connexion [sic], mutual dependence, and to this everything in his nature is more or less relative."[40]

This consideration preceded any talk of rights and liberty which were never to be detached from duty and obligation. Rights and liberties were necessarily "social and conventional," as Lemuel Shaw (1781-1861), chief justice of the Massachusetts Supreme Court, put it in *Commonwealth v.*

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[37] City of Buffalo v. Collins Baking Co., 39 A.D. 432, 434, (App. Div. 1899).

[38] NATHANIEL CHIPMAN, PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS, INCLUDING THE CONSTITUTION OF THE UNITED STATES (1833).

[39] ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 14 (1795) "Man when alone, is a feeble defenceless [sic] being—incapable of asserting his rights, and redressing his wrongs. The Deity has therefore instamped [sic] on his nature the love of his fellow men, invested him with social feelings, and impelled him by the strong principle of self-preservation, to enter into a state of society." *Id*. at 8. And lest anyone suppose Swift is here departing from his Calvinist, Congregationalist roots and Yale learning, and lapsing into Enlightenment, deistic optimism, consider the Puritan clergyman John Wise (1652-1725) and his *A Vindication of the Government of New England Churches* (1717): "[F]rom the principles of sociableness it follows as a fundamental law of nature, that man is not so wedded to his own interest, but that he can make the common good the mark of his aim…" John Wise, *A Vindication of the Government of New England Churches* (1717).

[40] CHIPMAN, PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS 46 (1833).

*Alger*.[41] Even property rights, "like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment…and to such reasonable restraints and regulations…as the legislature…may think necessary and expedient."[42]

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For most of the history of western political thought, the most basic unit of society was the family, not the individual, and within a still basic parliamentary system and a milieu of classical republicanism,[43] self-government meant local (i.e., township and borough) interaction with and representation in state legislatures.[44]

Consequently, American life in the early republic was far more communal than usually appreciated. Barry Allen Shain's deservedly and highly lauded *The Myth of American Individualism* (1994) paints a picture of that distinctly Protestant, classically republican, and communitarian past that challenges predominant and still persistent, more libertarian narratives like those of C. Bradley Thompson's *American's Revolutionary Mind* (2019).[45] Shain demonstrates that intense localism and familism in the early republic was misinterpreted as individualism by foreign observers.[46] So too was commercialism erroneously pitted against communalism.[47]

In fact, within a basically Protestant ethos, "[a]ll corporate bodies, even ones as small as families, stood as barriers to heightened senses of the self and served to control the sinful and irrational wants of individuals."[48] "[T]he self-serving parts of one's being were to be socially controlled, not

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[41] Commonwealth v. Alger*,* 61 Mass. 53, 85 (1851). On Shaw and his period generally, *see* Leonard W. Levy, *Lemuel Shaw: America's "Greatest Magistrate*," 7 VILLANOVA L. REV. 389 (1962).

[42] *Alger,* 61 Mass. at 85.

[43] *See generally* RICHARD GUMMERE, THE AMERICAN COLONIAL MIND AND THE CLASSICAL TRADITION (1963). This was not jettisoned by the advent of modernity at the time of the Reformation. John Eidsmoe, *A Look at Law through Lutheran Lenses*, in HERE WE STAND: A CONFESSIONAL CHRISTIAN STUDY OF WORLDVIEWS 79–125, 86 (2010).

[44] T. N. Srivastava, *Local 'Self' Government and the Constitution*, 37 ECONOMIC & POLITICAL WEEKLY 3190 (2002).

[45] ALLEN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT 86–95 (1994); C. BRADLEY THOMPSON, AMERICAN'S REVOLUTIONARY MIND (2019).

[46] SHAIN, *supra* note 47, at 86-95 (1994).

[47] *Id*. at 73-83.

[48] *Id*. at 96.

accommodated."[49] Socially controlled, that is, by the family, village, township, county, and state. Within this hierarchy, all things were subordinate to the good of the whole—a fulfillment rather than derogation of the parts—or the common good in ascending order.

Even the family, as the most basic and natural societal unit was submitted to the public interest. John Adams wrote to Mercy Warren in 1776 that good citizens were dutybound to subdue private interests since "all Things must give Way to the public."[50] In this way, Shain reflects, the family "was not the haven of bourgeois privacy" that it later became; it too, as the basic social and, therefore, public unit, was "inferior to the public good."[51] "Usually even the parent-child relationship was subject to communal intervention," to ensure the formation of good citizens by fostering self-denial unto the public interest.[52] As Gordon Wood provocatively puts it, "republicanism obliterated the individual" in favor of the whole.[53] Radical individualism could not flourish amongst such demands for public spiritedness. The early republic was "not yet a world, then, of individualism or glorification of the autonomous individual."[54]

The point here is that Shain's narrative, as well as Novak's, provides explanations of continuity between the antebellum and postbellum periods vis-a-vis regulation. Far from an aberration and intrusion, the state police powers cases in view here were a continuation, in imperfectly so, of American governance. When commenting on Missouri's Constitution in 1882, the state's court of appeals qualified the document's guarantee of natural rights to "life, liberty, and the enjoyment of the gains of their own industry" by refusing to absolutize them and held that "[e]ach of these enumerated rights is held in subordination to the rights of society," the court was not frustrating an American tradition of rights but properly situating it in traditional fashion. For instance,

> A person has a natural right to the gains of his own industry; and yet it is well understood and universally conceded, that in a state of civil society [as opposed to a hypothetical state

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[49] *Id*.

[50] Adams, "Letter to Mercy Warren (16 April 1776)," 1 WARREN-ADAMS LETTERS 222–23 (1925).

[51] SHAIN, *supra* note 47, at 97-98.

[52] SHAIN, *supra* note 47, at 99.

[53] GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, 60–61 (1969).

[54] SHAIN, *supra* note 47, at 109.

> of pure nature], there is no such thing as an absolute right of property [because] all property is held in subordination to certain paramount rights of the state and of the people.[55]

The claims of the individual could never be allowed to unilaterally override the decisions of the community to which he belonged. Community sovereignty almost always trumped individual sovereignty. There being no atomized state of nature, there was no real conception of the individual apart from the community; his fulfillment as a fundamentally sociable creature was gained through participation in the community for its good over his own. Hence, *Cole v. Shannon*, an 1829 case from the Kentucky Supreme Court, stated,

> The public convenience must be consulted. And the common will, represented by the county court, must prevail, over individual advantages and wishes. The advantages which any one derives from a highway, are adventitious. The duration of their enjoyment, depends on the continuance, or discontinuance of the road, and this depends, not on the will or interest of an individual; but on the common good, and public sentiment.[56]

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Accordingly, even in the postbellum period, the Fourteenth Amendment and related challenges to state regulations were generally unacceptable to courts. Jacobson's bodily integrity argument—today we might say, *my body, my choice*—was barely entertained by Harlan in 1905. Of course, Harlan was writing prior to First Amendment incorporation and the like which radically altered the constitutional calculus and levels of scrutiny applied thereto.[57]

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[55] State v. Addington, 12 Mo. App. 214, 218, aff'd, Mo. 110 (1882).

[56] Cole v. Shannon, 24 Ky. 218, 221–22 (1829).

[57] Lately, some enthusiasm from the bench for revisiting these questions is detectable. *See, e.g.*, Espinoza v. Montana Dep't of Revenue, 591 U.S. __ (2020) (Thomas, J., concurring). On the original understanding of the establishment clause, *see* Vincent Philip Munoz, *The Original Meaning of the Establishment Clause and Its Impossibility of Incorporation*, 8 PENN. J. CONST. L. 587 (2006). *C.f.* Mark Storslee, *Church Taxes and the Original Understanding of the Establishment Clause*, 169 PENN. L. REV. 111 (2020).

The Supreme Court in *Barbier v. Connolly* (1884) addressed the supposed tension between the Fourteenth Amendment and state police power.[58] Although decided prior to the introduction of contemporary levels of scrutiny and tests like those in *Employment Division v. Smith* (1990), Justice Field, writing for the majority in *Barbier*, nevertheless contemplated something close to later standards in route to preserving broad leeway for the states under their inherent powers.[59] Whilst the Fourteenth Amendment protected the "life, liberty, or property" with due process and equal protection guarantees against "arbitrary deprivation," Field said, proper exercise of the police powers did not violate said guarantees.[60]

> The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights.[61]

This, however, did not entail, clarified the court, that the amendment was,

> designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had […] Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting district, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with

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[58] Barbier v. Connolly, 113 U.S. 27 (1884).
[59] *Id.*; Emp. Div. Dep't of Hum. Res. Of Oregon v. Smith, 494 U.S. 872 (1990).
[60] *Barbier*, 113 U.S. at 31 (1884).
[61] *Id.*

> more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote […] the general good.[62]

The least restrictive means factor of later standards is already discernable here, as is the seed of rational basis review. As an Ohio court put it later in 1908,

> The fourteenth amendment of the constitution of the United States was not designed to interfere with the power of the state to exercise its police powers to prescribe regulations to promote the health, peace, morals, education and good order of the people.[63]

So, when push came to shove, it was *not* individual autonomy or "liberty" as now predominantly conceived that filled the gaps but rather the interest of the common good discerned by duly elected officials and those to whom they further delegated their authority.

Doubtless today the libertarian, American ethos would chafe at nineteenth-century levels of government involvement and regulation—it would feel to us now like every breath we take is policed. That being said, libertine sentiments may prove to have a short half-life. Within the burgeoning so-called post-liberal discussion on the new right, bygone policy emphases like national industrial policy, and stereotypically European ones like family planning, have garnered enthusiasm.[64] Senator Marco Rubio (R-FL) now talks of "common good capitalism."[65] What is more, the pandemic has had a reset effect, so to speak. Those not previously willing to entertain

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[62] *Id*. at 31–32. To the point raised above that most nineteenth century police powers cases are short, Justice Field's opinion in *Barbier* is only a little over two pages long. Field's follow up opinion in Soon Hing v. Crowley, 113 U.S. 703 (1885), was barely a full page longer.

[63] Bd. of Educ. of Akron v. Sawyer, 19 Ohio Dec. 1, 5 (Ohio Com. Pl. 1908).

[64] *E.g.*, Keith B. Belton, *The Emerging American Industrial Policy*, 5 AM. AFF'S 3 (Fall 2021), https://americanaffairsjournal.org/2021/08/the-emerging-american-industrial-policy/; Gladden Pappin & Maria Molla, *Affirming the American Family*, 3 AM. AFF'S 3 (Fall 2019), https://americanaffairsjournal.org/2019/08/affirming-the-american-family/.

[65] Sen. Marco Rubio, *Common Good Capitalism and the Dignity of Work*, PUB. DISCOURSE (Nov. 5, 2019), https://www.thepublicdiscourse.com/2019/11/58194/.

such policies—the antithesis of Reagan-era fusionism—have now been *mugged by reality*, to employ the neo-conservative quip. What is being recovered, hopefully, is not gimmicky, reactionary proposals, but a renewed recognition that law is not simply—not primarily even—a shield from government encroachment upon individual rights. It is a sword, not only to punish evils and reward goods, but to form society for the common good, mutual flourishing unto a substantive vision of the good (i.e., man's chief end) and through a more comprehensive grasp of what Johannes Althusius (1563-1638) in his *Politica Methodice Digesta* (1603) called *symbiotics*.[66] That is, politics: the art of living together.

## III. TASTEFUL POLICING

The range of regulation in the nineteenth century is difficult to summarize, in part because of the definitional difficulty surrounding the police power noted earlier. One court rattled off "[q]uarantine laws, inspections laws, laws regulating the storage of gunpowder, the use of steam-boilers, the carrying of fire-arms, the suppressing of gambling and bawdyhouses, and the sale of intoxicating drinks" as "all familiar illustrations of this power."[67] Novak helpfully categorizes police powers cases into safety, economy, transportation, morality, and health. Those categories and accompanying regulatory rationales were often blurred, however, as we shall see,[68] courts did not always deem it necessary to specify exactly what public need (i.e., morals, health, safety, economy, etc.) was in view. Sometimes, all the above were invoked in the same case. And within each category is a plethora of issues—the nineteenth century was quite hazardous, especially as industrialization, urbanization, and immigration ramped up to a breakneck pace.

Again, the authority to exercise the power implied, though not without limits, the discretion to determine the proper time, object, and scope

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[66] Johannes Althusius, *Politica Methodice Digesta* (1603).

[67] State v. Addington, 12 Mo. App. 214, 221, aff'd 77 Mo. 110 (1882).

[68] For instance, reviewing various nineteenth and early twentieth century police powers cases on regulation of business hours of operation and curfews (*i.e.*, general closing laws), the New Jersey Superior Court in noted that all kinds of businesses, from laundries to ice cream vendors, were subject to such laws; and further that the justification for such laws "of the cases both in our State and in other jurisdictions which have upheld such ordinances" was "public health or safety or both." Fasino v. Mayor and Members of Borough Council of Borough of Montvale, 122 N.J. Super. 304, 309 A.2d 195 (Law Div. 1973).

of its exercise. Judicial deference to the legislature—including its delegation of power to other bodies—was high. *State v. Addington* called it a "very grave responsibility" when courts consider the constitutionality of a legislative act.[69] Accordingly, "a statute will never be held void unless it plainly appears that the legislature has transcended its power in passing it. Whenever there is a doubt, it will be resolved in favor of the validity of the enactment."[70] Indeed,

> from its very nature, the police power is a power to be exercised within wide limits of legislative discretion; and if a statute appears to be within the apparent scope of this power, it would be a usurpation of jurisdiction for the judicial courts to inquire into its wisdom and policy, or to undertake to substitute their discretion for that of the legislature.[71]

From these premises, *Addington* goes on to consider the question of whether the defendant violated a state statute by selling oleomargarine marketed as unadulterated butter; and further, whether it was a just and reasonable exercise of the police power to ban such substances when the substance sold by the defendant was substantially and elementally the same as butter and "said compound sold by the defendant is, in all respects, as healthful and nutritious as pure butter."[72]

The court refused to concede that just because the oleomargarine was "wholesome or harmless"—indeed, only marginally different from butter in quality and taste—it was therefore outside of legislative purview unto regulation.[73]

> Laws, in order to be wholesome, must not only conform to the real needs of the people, but must also respect their tastes, their prejudices, and even their superstitions. Hence it is conceded by jurists and publicists, that laws which in one

[69] State v. Addington, 12 Mo. App. 214, 220 (1882).
[70] *Id*. at 214.
[71] *Id.* at 221.
[72] *Id.* at 216.
[73] *Id*. at 222.

> age or nation are wholesome and beneficial, in another rage or nation may be unwholesome, injurious, or oppressive.[74]

Accordingly, "[t]he test of the reasonableness of a police regulation prohibiting the making and vending of a particular article of food, is not alone whether it is in fact [scientifically] unwholesome or injurious."[75] It also included, as the court said, an assessment of local prejudices of the community.[76]

The prohibition of an imposture food, so to speak, that was widely disliked was a perfectly reasonable exercise of the police power. There might have been nothing wrong, in fact, with oleomargarine, but if the relevant populace preferred butter and were, unbeknownst to them, being sold a butter substitute, why could the legislature not ban said substitute? This, said the *Addington* court, was the entire logic of trademarks, and, ultimately, a question of communal discrimination or prejudice, so to speak—the right of the community, and the individuals comprising it, to say, "*this* and not *that*."[77]

> The fact that, in the present state of [*literally*] the public taste, the public judgment, or the public prejudice with respect to it, it cannot be sold, except by cheating the ultimate purchasers into the belief that it is real butter, and defrauding their judgments and their freedom of choosing what they will eat and what they will not eat, stamps with fraud the entire business of making and vending it, and furnishes a justification to a police regulation prohibiting the making and vending of it altogether.[78]

To illustrate the point further, the court adopted a rather absurd and humorous example to demonstrate the absurdity (in their view) of the defendant's position:

> Abundance of scientific evidence could, no doubt, be produced to show that the flesh of horses, dogs, cats, and rats

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[74] *Id*. at 222–23.
[75] State v. Addington, 12 Mo. App. 214, 220 (1882).
[76] *Id*. at 222.
[77] *Id*.
[78] *Id*. at 224.

> is not unwholesome. But a universal popular prejudice—in some cases even religious feelings—prohibits the eating of the flesh of such animals. If the flesh of such animals could be prepared so as not to be distinguished from the flesh of animals whose flesh is deemed wholesome—if butchers were known in some instances to be engaged in the business of so preparing and selling it in fraud of the judgment and choice of their customers—would anyone say that a statute prohibiting, in general terms, the selling of the flesh of horses, dogs, cats, and rats, would transcend the police power of the legislature? Upon what principle could a judicial tribunal undertake to say that a statute less sweeping in its terms would be effective to protect the public from such an imposition?[79]

It was obvious to the court that the entire matter amounted to a question of defrauding the dietary choice of the community. The legislature had, taking notice of local preferences, passed a law to "nip the practice in the bud." The resolution was simple: "[t]he courts must uphold and administer this act as a valid exercise of the police power of the state."[80]

## IV. PUBLIC HEALTH IS PUBLIC WEALTH

Referenced already are cases dealing with public health, *Jacobson* being the most notorious.[81] But we should examine some of these cases now more directly keeping in mind the theoretical, conceptual, and social groundwork laid above.

What was a matter of public health for which the police power could be exercised in the name of the common good? This question is not as simple as might be expected. The reason for that is, again, because nineteenth and twentieth-century police power cases can be relatively terse and, often, discuss the police power only generally, outlining its fuzzy confines, before summarily declaring a challenged regulation lawful and within said confines; as if all reasonable, learned readers would require no more explanation to

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[79] *Id.* at 224–25.

[80] *Id*.

[81] For a more focused assessment of Jacobson, *see* Timon Cline, *Common Good Constitutionalism and Vaccine Mandates: A Review of Jacobson v. Massachusetts in Light of COVID-19*, 21 APPALACHIAN J. L. 1 (2022).

assent to the court's decision. Indeed, judges and commentators alike from the eighteenth and nineteenth centuries presumed much of their audience and profession—then much more learned.[82]

Many cases lumped seemingly all domestic policy problems into "nuisance" which a New York court defined in 1907 as "an act which annoys, injures, or endangers the comfort, repose, health, or safety of any considerable number of persons, or offends public decency."[83] Obstructing highways or navigable streams, wantonly spreading infectious diseases, or selling contaminated food were all common or public nuisances per se.[84] These general nuisance cases tell us little about how questions of public health as such were distinguished from other considerations within the purview of the police power (an underappreciated facet of this same inquiry is a more holistic understanding of public health within the broader categories of common good or public welfare, et cetera—to this we will return shortly).

Sometimes, the meaning of and means to attain "public health" was straightforward and demonstrated in a way easily recognizable to us. For instance, *City of Rochester v. Collins* reviewed an ordinance that authorized the city council:

> [T]o abate all nuisances of every description which are or may be injurious to the public health in any way… and pass all ordinances which they shall deem necessary or expedient for the preservation of health and *the suppression of disease in the city*, and to carry into effect and execute the powers hereby granted.[85]

Similarly, *State v. Smith* gave examples of public health threats: "unwholesome food, or poisoning the atmosphere [i.e., air], or introducing infectious diseases..."[86] Another case simply referred to "impending

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[82] *See generally* Anton-Hermann Chroust, *Legal Profession in Colonial America*, 34 NOTRE DAME L. REV. 44 (1958); Stanley N. Katz, *Looking Backward: The Early History of American Law*, 33 UNIV. CHI. L. REV. 867 (1966); John D. Eusden, Puritans, LAWYERS, AND POLITICS IN EARLY SEVENTEENTH-CENTURY ENGLAND (1958).

[83] People v. Hoffman, 118 A.D. 862, 864, 103 N.Y.S. 1000, 1001 (App. Div.), aff'd, 189 N.Y. 561, 82 N.E. 1130 (1907).

[84] Rogers v. Barker, 31 Barb. 447 (N.Y. Gen. Term. 1860).

[85] City of Rochester v. Collins, 1850 WL 5248, 561 (N.Y. Gen. Term. 1850).

[86] State v. Smith, 10 N.C. 378, 380 (1824).

pestilence."[87] "[F]or [sake of] public health, convenience, and comfort," the city of Newbern, North Carolina had the singular authority to "regulate burials, as by establishing cemeteries."[88] Many cases considered public sewage, drainage, disposal of waste, and the like under the rubric of public health. But regularly, something we would recognize as a matter of public health was spoken of in terms of public safety or security. Consider that an 1887 Ohio case referred to negligence in "keeping, handling, and disposing of such [poisonous or dangerous] drugs" as a consideration of "public safety and security."[89]

Other times, courts did *not* make explicit whether it was health, safety, or morals that were in view. *Conley v. City of Buffalo* upheld a regulation on public dancing schools—no intoxicating liquors served and only persons of good character attend—for the sake of "the preservation of peace and good, the suppression of vice, the benefit of trade and commerce, and the preservation of health."[90] But still other times, the health of the public was conceived, as I said, more holistically, sometimes intertwined with the highest common good of all men—then still believed to be true religion.

Public morals and health (or even sanitation) were not so distinct. *Well-being* was multifaceted because the *whole* man, body, *and* soul, as a sociable creature was still acknowledged—this surely speaks to the endurance of classical metaphysics and the social context surveyed earlier. This anthropology can be found throughout leading legal commentaries of the period, especially that of Chancellor James Kent (1763-1847) and Nathaniel Chipman, the latter already mentioned. As Novak argues, in the antebellum era, moral philosophy still served as the starting block for all other inquiries, including law and policy.[91]

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[87] Schneider v. Blades, 65 N.W. 559, 560 (1895).

[88] Smith v. City of Newbern, 70 N.C. 14, 19 (1874).

[89] Davis v. Guarnieri, 45 Ohio St. 470, 492 (1887).

[90] Conley v. City of Buffalo, 119 N.Y.S. 87, 88 (N.Y. Sup. Ct. 1909); *see* Bartemeyer v. Iowa, 85 U.S. 129 (1873) (Bradley, J. concurring) (upholding an Iowa law banning the sale of intoxicating liquors as law for the "public health and public order").

[91] NOVAK, *supra* note 25, at 26–32 ("Moral philosophy, after all, was the common intellectual framework for all the human sciences in antebellum America, providing the necessary bridge between Protestant theology and more naturalistic forms of inquiry.").

The connection between physical health and moral health—a holistic *well-being*—crops up most notably in the Sabbatarian caselaw, among other places.[92]

## V. KEEPING THE SABBATH TO KEEP WELL-BEING

These cases usually justified the Sabbath on moral grounds—leaning on Sir Matthew Hale's maxim from *Taylor's Case* that Christianity was part of the common law, and that it was then, in fact, the common religion of the people.[93] But they also almost always reference the collective health benefits, to put it crudely of Sabbath observance.[94] Consider the rather humorous opening line from a Tennessee case in 1878, "[p]laintiffs were convicted of violating the Sabbath, by hunting and shooting through the woods and fields with guns and pistols, for squirrels and other game, 'to the manifest corruption of the public morals, to the evil example and common nuisance of all good citizens,' etc."[95]

This violation of the state Sabbath law (against hunting and fishing) was an "indictable" offense because it "disturb[ed] the worship of others" via the performance of "secular labor on a Sunday", and this was "prejudicial" to the "morals and health of the community."[96] The explanation of Sabbath laws, their purpose, in many cases, was something like "the ordinary business of life shall be suspended on Sunday, in order that thereby the physical and moral well-being of the people may be advanced."[97] This "[a]ccording to the

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[92] The recent article, *Blasphemy and the Original Meaning of the First Amendment*, 135 HARV. L. REV. 689 (2021), presents an excellent survey of early American blasphemy laws.

[93] *Taylor's Case* (1676); *see also* Stuart Banner, *When Christianity Was Part of the Common Law*, 16 LAW & HIST. REV. 27 (1998).

[94] Coincidentally, there has lately been renewed interest in Sabbath laws. *See, e.g.*, Sohrab Ahmari, *What We've Lost in Rejecting the Sabbath*, WSJ (May 27, 2021), https://www.wsj.com/articles/what-weve-lost-in-rejecting-the-sabbath-11620399624. Noteworthy is that the last state-wide blue laws were not abolished until 2014 in North Dakota, and communities like Bergen County, New Jersey still maintain them in some form. They are as much an ode to the state police power as they are a vestige of so-called cultural Christianity. *See also* Sohrab Ahmari, Gladden Pappin, & Chad Pecknold, *In Defense of Cultural Christianity*, AMER. CONSERVATIVE (Nov. 9, 2021), https://www.theamericanconservative.com/articles/in-defense-of-cultural-christianity/.

[95] Gunter v. State, 69 Tenn. 129 (1878).

[96] *Id*. at 130.

[97] People v. Havnor, 43 N.E. 541, 543 (1896).

common judgment of civilized man [i.e., natural law], public economy requires, for sanitary reasons, a day of general rest from labor," said the same court.[98] The Sabbath, then, was decidedly in the state interest:

> It is to the interest of the state to have strong, robust, healthy citizens… Laws to effect [sic] this purpose, by protecting the citizen from overwork, and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare.[99]

Again, another court cited "the moral and physical well-being of the people, and the peace, quiet, and good order of society," as justification for Sabbath laws.[100] In other words, it was a matter of public health as much as it was a matter of moral and religious enrichment—or, perhaps, there was not as strict of a difference as we would now insist. The day of rest was healthy and good even for those who did not observe it or keep it holy by attending Christian services.[101]

## VI. COMMON GOOD AND COMMON BELIEF

At this point, the contemporary reader might wonder if nineteenth-century judges were so embedded in their own context and concomitant assumptions to lack a rationale for governmental authority in morality and religion even if certain morals legislation was also justified on alternative, more recognizably (to us) *civil*, grounds. Was it driven by hubris or genuine, reasoned concern for something else? It is no question that Sabbath laws, as a form of morals legislation, sat squarely within the state police power at the time. This did not mean, however, that their legitimacy went unchallenged even in the nineteenth century.

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[98] *Id*. at 544.

[99] *Id*.

[100] People v. Moses, 35 N.E. 499, 500 (1893).

[101] On Sabbath laws in America, *see generally* Bethany Rupert, *The Sunday Rest Bill and the Battle to Keep the Civil Sabbath*, 39 SETON HALL LEG. J. 285 (2015); Benjamin Kline Hunnicutt, *The Jewish Sabbath Movement in the Early Twentieth Century*, 69 AMER. JEWISH HIST. 196 (1979).

As I have shown elsewhere,[102] the recognition of the Christian Sabbath and related legal protections for, or privileging of, (specifically *Protestant*) Christian activity (e.g., blasphemy laws) by courts was a recognition of the common law's function as "common usage or reason," and preference, therefore, for common beliefs and widespread religious practices.[103] The common law was to be a preserver of the common peace. As the court in *State v. Chandler* reasoned, "every court in a civilized country is bound to notice in the same way, what is the prevailing religion of the people."[104] Delaware (and the United States of America) being demonstrably Christian, in the general sense that *Updegraph v. Commonwealth* described[105] it to be a disruption of the common peace and order to openly revile Christianity or propagate blasphemy. This was the same logic of *People v. Ruggles*.[106] "If in Delaware the people should adopt the Jewish or Mahometan religion," continued *Chandler*, "as they have an unquestionable right to do if they prefer it, this court is bound to notice it as their religion, and to respect it accordingly."[107] Just as "[the common law of England] took cognizance of, and gave faith and credit to the religion of Christ, as the religion of the common people,"[108] so too should American courts.[109]

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[102] Timon Cline, *Common Good and Common Belief in the Common Law*, ANCHORING TRUTHS (Nov. 30, 2021), https://www.anchoringtruths.org/common-good-and-common-belief-in-the-common-law/.

[103] Timon Cline, *If Americans are Christian, Is America Christian?*, AMER. REFORMER (Jan. 11, 2022), https://americanreformer.org/if-americans-are-christian-is-america-christian/.

[104] State v. Chandler, 2 Del. 553, 562 (Del. Gen. Sess. 1837).

[105] Updegraph v. Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824).

[106] People v. Ruggles*,* 8 Johns. 290 (N.Y. 1811).

[107] State v. Chandler, *supra* note 104, at 562–63.

[108] *Id*.

[109] *See generally*, City Council of Charleston v. Benjamin, 33 S.C.L. 508 (1846); Vidal v. Girard, 43 U.S. (2 How.) 127 (1844); Zeisweiss v. James, 63 Pa. 465, 471 (1870) ("It is in entire consistency with this sacred guarantee of the rights of conscience and religious liberty to hold that, even if Christianity is no part of the law of the land, it is the popular religion of the country, an insult to which would be indictable as directly tending to disturb the public peace."); Specht v. Commonwealth, 8 Barr. 312, 325 (Pa. 1848) ("In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that they should have received the legislative sanction."); Shover v. State, 10 Ark. 259 (1850); Richmond v. Moore, 107 Ill. 429, 435 (1883) ("When the great body of the people are Christians… our laws and institutions must necessarily be based upon and embody the teachings of the Redeemer of mankind. It is impossible that it should be otherwise… our civilization

Likewise, the Pennsylvania case *Mohney v. Cook* (1855), upholding Sabbath laws, maintained that Christian institutions were entitled to respect because Christianity was "involved in our social nature" so much so that even non-Christians could not "reject those sentiments, customs, and principles which it has spread among the people… like the air we breathe, they have become the common stock of the whole country."[110] It was absurd to think that a predominantly Christian people would not seek out ways to honor their customary day of rest: "[t]hat sentiment that sustains it must fund expression through those who are elected to represent the will of their constituents."[111]

The common religious belief and common moral sentiment was intricate to the maintenance of the common peace and tranquility of society, values classically conceived, along with justice and truth, as a common good (i.e., goods not diminished by shared participation).[112] This conception is part and parcel of the common law. Kent defended his *Ruggles* decision in this way: "[t]he common law… is the application of common reason and natural justice to the security of the peace and good order of society."[113] When prior

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and institutions are emphatically Christian..."); Adams v. Gay, 19 Utah 365 (1847); Lindenmuller v. The People, 33 Barb. 548 (N.Y. 1861); Church of the Holy Trinity v. United States, 143 U.S. 457, 465 (1892); United States v. Macintosh, 282 U.S. 605, 625 (1931); Snavely v. Booth, 36 Del. 378, 388 (1935) ("Christian religion… is part of our common law."); Commonwealth v. American Baseball Club, 290 Pa. 136, 138 (1927) ("Christianity is part of the common law of Pennsylvania, and its people are Christian people."); *c.f.* Bloom v. Richards, 2 Ohio St. 387 (1863) (the first state supreme court in America to deny that Christianity is part of the common law); State v. Bott, 31 La. Ann. 663 (1879); Board of Educ. Of Cincinnati v. Minor, 23 Ohio St. 211, 246-47 (1872) (presenting a negative treatment of the Christianity as common law maxim but nevertheless admitting that "[t]he only foundation—rather, the only excuse—for the proposition, that Christianity is part of the law of this country, is the fact that it is a Christian country, and that its constitutions and laws are made by a Christian people."); *see also* Ex Parte Newman, 9 Cal. 502 (1858), *rev'd sub nom*. Ex Parte Andrews, 18 Cal. 679 (1861). *But see* State v. Hallock, 16 Nev. 373 (1882); Zorach v. Clauson, 343 U.S. 306, 313 (1952) (by the mid-twentieth century, the court could only bring itself to say that "we are a religious people.").

[110] Mohney v. Cook*,* 26 Pa. 342, 347 (1855).

[111] *Id.* at 348.

[112] *See generally*, Edmund Waldstein, *The Good, the Highest Good, and the Common Good*, THE JOSIAS (Feb. 3, 2015), https://thejosias.com/2015/02/03/the-good-the-highest-good-and-the-common-good/ (channeling the thought of Charles De Koninck, Duane Berquist, and Marcus Berquist).

[113] Jayson L. Spiegel, *Christianity as Part of the Common Law*, 14 N.C. CENT. L. REV. 494, 506 (1984) (quoting Kent at the New York State Constitutional Convention of 1821).

courts invoked common sentiment or common belief they were, by extension, invoking the public or common reason. It was good lawmaking.

Brian McCall has pointed out in his magisterial work on the classical legal tradition, the determination (or application) of the natural law to concrete circumstances is not a process of moving from one abstraction to the next ad infinitum. Rather, the customs and context of an actual people have a place in the process. "Deduction and determination of human law must always be done in light of the particularities of the community to which it will apply."[114] McCall is doing no more than channeling Thomas Aquinas who discerned that the "common good comprises many things" and should, therefore, with necessity, "take account of many things, as to persons, as to matters, and as to times," ultimately for the sake of the community's longevity.[115] This requires prudential adaptation of law to existing and emerging circumstances, which, in turn, implies some degree of contingency in all policy.[116] "Life, and hence law, is radically more contingent than a game. Law is applied to contingent matters, which vary greatly across time and space."[117] The particulars of each community—their history, traditions, customs, norms, expectations, and compacts—as well as the circumstances themselves must be examined closely when attempting to legislate (and judge) for the common good. Cognizance of the common sentiments, moral, religious, and otherwise, of the populace is intricate to that process.

Certainly, the lion's share of nineteenth-century judges themselves were committed Christians. John Marshall Harlan famously wrote for theological journals and taught Sunday School at his Presbyterian church in Washington D.C. while he was on the bench.[118] Their sympathies were likely with the majority of the population at the time. This, however, does not diminish the principle vis a vis public stability, tranquility, safety, health, and morality. Though, of course, the latter is not merely reflected by the law but perpetuated and formed by it. No society is so neutral as to lack a unifying, animating cult that guides both law's presuppositions, procedure, and

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[114] BRIAN MCCALL, ARCHITECTURE: REBUILDING LAW IN THE CLASSICAL TRADITION 311 (2018).

[115] *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA I-II, Q. 90–97, (Fathers of the English Dominican Province trans., Benziger Bros. 1947).

[116] *Id*. at Q.96, a. 1-a. 2.

[117] MCCALL, *supra* 115 at 315–16.

[118] James W. Gordon, *Religion and the First Justice Harlan: A Case Study in Late Nineteenth Century Presbyterian Constitutionalism*, 85 MARQ. L. REV. 317 (2001).

judgment.[119] This is as it should be, and intricate to a holistic approach to public well-being, the common good. The seventeenth-century barrister and provocateur, William Prynne (1600-1669), went so far as to argue that even if the moral object is mistaken—as Aquinas taught, all sin is a deprivation of the good—the formal enforcement of public religion dictates of some deity or other and properly flows from the natural law.[120] Every society needs it and, in fact, does it. Threats thereto directly threaten not only stability but, perhaps, public health itself. Heretics, blasphemers, and the rest were usually punished on the basis that they threatened the well-being of society and the health of men's souls, families, and (in the ancient world) livelihoods by the introduction of strange doctrines. At least that is how people used to think about it. This is not to say that punishments for blasphemy, heresy, or Sabbath-breaking should be reintroduced, per se. It is not at all clear that they ever could be in this country, nor that they would be particularly practicable or desirable. It simply points to an older, more comprehensive approach to public health, one that bound the spiritual to the physical to the societal more explicitly. Every era includes its own extremes and overemphasis but the extreme enforcement of one period can expose the extreme neglect of another.

## VII. CONCLUSION

Recalling the robust, expansive approach to public health by past courts, we could surely admit that our own pandemic response to Covid-19 could have been improved by a more holistic consideration of *well-being*—balancing interests of eliminating contagion with that of economic and, yes, spiritual health; the documented increase in suicides, abuse, and drug use during the past year, especially in densely populated areas surely speaks to that fact.

Prior courts were deadly serious about deadly diseases. The sometimes-brutal enforcement of public health orders attests to that. But they were equally deadly serious about other threats to the common good,

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[119] Thomas Pink, *Integralism, Political Philosophy, and the State*, PUB. DISCOURSE (May 9, 2020), https://www.thepublicdiscourse.com/2020/05/63226/.

[120] William Prynne, *The Sword of Christian Magistracy Supported: OR A FULL VINDICATION OF Christian Kings and Magistrates Authority Under the GOSPELL, To punish Idolatry, Apostacy, Heresie, Blasphemy, and obstinate Schism, with Corporall, and in some Cases with Capital punishments, from many late Cavils and exceptions against the same* (1653).

invisible threats beyond airborne parthenogens. The contemporary applications of that disposition are many and extend beyond contagions. For instance, multiple states have in the past few years passed resolutions recognizing internet pornography as a public health crisis.[121] Obscenity and public or open prostitution used to be regularly punished on moral, health, and sanitation grounds as public "nuisances" by American courts,[122] and not so long ago either.[123] Similarly, courts also used to more freely uphold regulations against addictive, intoxicating substances; they also tried to legislatively limit the opportunity for adolescents to get into mischief (e.g., curfews).[124] Fit it all together and you have a perfectly tenable formula, on police powers grounds, to regulate or ban internet pornography—albeit, that pesky free speech problem was not so bothersome to past judiciaries who held to a basically Blackstonian understanding of the idea prior to it being stretched beyond all recognition and sense in the late twentieth century.[125]

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[121] Mattie Quinn, *Is Porn a Public Health Crisis? 16 States Say Yes*, GOVERNING (July 17, 2019), https://www.governing.com/archive/gov-pornography-public-health-crisis-states.html; *see also* Penny Nance, *Pornography is a public health crisis — Treat it like one*, THE HILL (Apr. 7, 2018), https://thehill.com/opinion/civil-rights/382067-pornography-is-a-public-health-crisis-treat-it-like-one.

[122] "Nuisance" then being "anything that works hurt, inconvenience, or damage to another; and the fact that the act may otherwise be lawful does not keep it from being a nuisance." City of Selma v. Jones, 202 Ala. 82, 83 (1918).

[123] The definitions of obscenity of indecency need not be overcomplicated either. The New York Court of Appeals in *People v. Muller* rightly stated that "the question of obscenity or indecency is one falling within the range of ordinary intelligence and so does not require an expert in literature or art to determine." People v. Muller, 96 N.Y. 408 (1884); A Missouri court of appeals sensibly defined obscenity as any representation (print, photograph, etc.) that is "immodest, or calculated to excite impure desires." State v. Pfenninger, 76 Mo. App. 313, 317 (1898); Indecency was basically public nudity or representations of the same. *See, e.g.*, Moffit v. State, 43 Tex. 346 (1875); A harrowing reminder of other societal ills that went largely unaddressed in the country during most of the nineteenth century (i.e., slavery), but nevertheless an interesting indecency case: in Britain v. State, 22 Tenn. 203 (1842), the Supreme Court of Tennessee upheld misdemeanors and fines against a man who did not provide modest and sufficient clothing for his slaves on the basis of public indecency.

[124] Regina M. Ward, *Constitutional Law - Police Power - Municipal Ordinance - Philadelphia Curfew Law*, 1 VILL. L. REV. 52 (1956).

[125] Surely this statute, upheld by the Supreme Court of Tennessee in *State v. Pennington*, would apply well as a limitation (at least for children) on internet pornography: "[i]f any person print, publish, import, sell or distribute any… printed paper containing obscene language or obscene prints, pictures or descriptions, manifestly tending to corrupt the public morals; or introduce the same into any

That is one potential application of a holistic, more complete rationale for public health.

In any case, a revitalization of public health as a public good—which it always and everywhere is—requires a recovery of a classical view of human nature (and that nature's natural end)—a political "Party of Nature" is needed[126]—and, in turn, a broader view of public well-being, of human flourishing, of the common good. The Declaration of Independence still reflected the classical understanding of this: life, liberty, and the pursuit of happiness. This does not properly translate to a licentious, atomized, soulless existence. Rather, those three goods imply due cultivation often by regulation for the common good. Therein, life can be aligned with public health—a necessary precondition for the rest. Liberty corresponds to the art of living together with duties and obligations necessarily overriding much choice for the good of the whole. And the pursuit of happiness, even to Jefferson, is the pursuit of virtue and moral well-being. Each of these intersects in a relationship of mutual dependence. It is an acknowledgment of the multifaceted nature of societal well-being. No piece can long be ignored without detrimental effects to the others. Query whether pandemic policies over the past two years have not proven it.

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family, school or place of education… he shall be guilty of a misdemeanor." State v. Pennington, 73 Tenn. 506 (1880).

[126] Adrian Vermeule, *The Party of Nature*, POSTLIBERAL ORDER (Dec. 7, 2021), https://postliberalorder.substack.com/p/the-party-of-nature.