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The Classical American State and the Regulation of Morals

Herbert Hovenkamp*

Introduction

"Welfare" was a word with a much richer, variegated, and less technical meaning during the early nineteenth century than it would acquire in the Victorian Era and later. Classical political economists and moral philosophers as well as American legal writers emphasized the close link between economic wealth and good morals. One nineteenth century vision of the society saw a tiny role for the state in the direct regulation of economic well-being, but a large role in the regulation of morals. But good morals led to increased welfare.

In fact the United States had a strong tradition of regulation at every governmental level that stretched back to the commonwealth ideal of Revolutionary times and grew steadily throughout the nineteenth century.¹ At the same time, regulation also had more than its share of critics. For example, a core principle of Jacksonian democracy was that too much regulation was for the benefit of special interests, mainly wealthier and propertied classes. Equal access entailed that the state must be less involved in regulation of the economy and must also democratize its existing institutions. For example, one of the great triumphs of the Jackson era was the emergence of the democratic general business corporation that was available to almost any group of entrepreneurs with capital, and that did not involve all of the special privileges that had traditionally accompanied corporate status.² But while the general corporation greatly increased the volume of business carried on through corporations, it

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¹ See, e.g., FRANK BOURGIN, *THE GREAT CHALLENGE: THE MYTH OF LAISSEZ-FAIRE IN THE EARLY REPUBLIC* (New York: Harpercollins 1990); OSCAR HANDLIN & MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861* (rev. ed. 1969); JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836-1937* at 171-192 (Cambridge, Ma.: Harv. Univ. Press 1991) WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA* (Chapel Hill: Univ. N.Car.Press 1996); DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATION, NETWORKS AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928* (2001); Michael Les Benedict, *Laissez Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *LAW & HIST. REV.* 293 (1985).

² HOVENKAMP, *ENTERPRISE AND AMERICAN LAW* 11-66.

hardly stemmed the tide of ever increasing regulation. Nor did it quiet the stream of nineteenth century American political economists who railed against it.³

Prior to the Civil War state regulation raised federal issues only infrequently. All powers not granted to the federal government were reserved to the states. The most notable exceptions were state debtor relief legislation that was thought to violate the contract clause or interfere with exclusive federal control over bankruptcy, or cases that preserved the federal commerce power by limiting the rights of states to regulate outside their territory or impede the flow of interstate commerce.⁴ The legacy of Jacksonian democracy was largely to provide a view, sometimes dominant and sometimes dissenting, that state courts should limit the scope of state or local regulation that limited property or contract rights at the behest of some special interest. No general case can be made that this view served to eliminate either the amount or variety of regulation to any significant degree,⁵ but it did give voice to a large number of critics and acquired considerable force in the late nineteenth and early twentieth centuries. Indeed, it does so to this day.

The ratification of the Fourteenth Amendment after the Civil War provided the lever that laissez faire legal writers began to use in the late nineteenth century to make a more coherent federal case against increasing regulation.⁶ How much they actually succeeded has always been subject to very considerable dispute. In fact, only a relatively small portion of regulations were actually struck down by the courts on substantive due process grounds.⁷ But looking at sheer numbers hardly tells the story.

³ Id. at 171-192.

⁴ E.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (prohibiting state from creating monopoly steamboat route that ousted competing steamboat with license to operate interstate line on the same route); *Wilson v. Blackbird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (permitting state to erect dam that obstructed interstate waterway)..

⁵ See, e.g., Matthew J. Lindsay, *In search of "Laissez-Faire Constitutionalism,"* 123 Harv.L.Rev. Forum 55 (2010); Jed H. Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV L. REV. 1061 (2010).

⁶ Principally 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 1868); CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (St. Louis: F.H. Thomas, 1886); JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (New York: James Cockcroft, 1872).

⁷ See, e.g., HOWARD GILLMAN, THE CONSTITUTION BEIEGED 19-60 (1993); Michael Les Benedict, *Laissez Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); Charles Warren, *A Bulwark to the State Police Power--The United States Supreme Court*, 13 COLUM. L. REV. 667 (1913);

The provisions that were struck down went to the heart of emerging class conflicts, particularly capitalist-employee relationships, including laws that established minimum wages or regulated working conditions. In general, if the courts saw a regulation as legitimately addressing a subject of “health, safety or morals” they let it stand. However, if they viewed it as a subject of special interest rent seeking or as representing a material attempt to alter the balance between social classes, they were much more likely to strike it down.

By and large, substantive due process decisions almost always approved traditional assertions of the regulatory power that were well established since the Revolution and even earlier. They increasingly objected, however, to what they saw as new forms of regulation that reflected the growing power of the labor movement or that sought in other ways to readjust the power of economic classes. As a result, looking at the sheer numbers of substantive due process challenges in which acts were sustained disguises the basic question. Very significantly, substantive due process became a set of limitations on the growing power of “class” legislation, and the labor movement in particular.

The 180-Degree Turn

While the amount of regulation during the 1800s was significant, the basic ideology of the attackers shifted 180 degrees over the course of the century. In the 1820s and 1830s the principal beneficiaries of regulation were thought to be the established classes who stood to gain from regulation that protected their investment. The loose affiliation of diverse outsider groups that constituted the Jacksonian movement largely saw freedom from regulation as a device for opening up markets.⁸ Regulation of the traditional areas of health, safety and morals remained relatively uncontroversial. Increasingly after the Gilded Age, War, however, the rhetoric of regulation began to point at American business as the culprit in need of regulation, and laborers and to a lesser extent consumers as regulation’s beneficiaries. As a result the task of defending greater regulation fell to the Progressive coalition, while the more propertied classes tended to oppose it.

From this political movement, classical legal thought either developed or reiterated several principles of economic welfare that eventually came to be associated with substantive due process or related constitutional doctrines. Among these were *first*, that government had a substantive obligation not to interfere in economic markets. Monopoly grants, licensing restrictions or other entry barriers, or regulations of the terms under which

Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913).

⁸ CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846* (1991).

business could be conducted were all suspect. *Second*, taxation was appropriate only if it was for a "public" purpose, which did not include the provision of subsidies or similar incentives to private enterprise.⁹ *Third*, people should have equal access to markets and economic opportunities, and many forms of government intervention benefitted favored groups selectively, at the expense of politically unfavored groups. *Fourth*, the domain of government regulation of the economy should be confined by restrictive readings of the Constitution.

The terms "conservative" and "liberal" have historically identified two views about the appropriate scope of government intervention into both markets and morals. Liberals emphasized freedom from public restraint, and in the eighteenth or nineteenth century the cry to get government off our backs would have come from someone denominated "liberal," such as Englishman John Stuart Mill or American Thomas Jefferson. Mill's 1849 *Political Economy* was more strident than any of his classical predecessors including Adam Smith that government should stay out of markets. This liberalism applied to both economic regulation and regulation of morals, or religious conduct.¹⁰ The Jeffersonian idea of separation of Church and state is a classic example of traditional liberal doctrine as applied to morals: government must not interfere with people attempting to exercise their religious beliefs and may assert no preferences among religions or even for religion over non-religion. Liberalism tends to regard both property rights and liberty rights as more-or-less equally sacred: for the State to regulate one's property without good reason is bad, but to regulate one's right to associate or exercise one's religious beliefs without good reason is at least as bad.

By contrast, conservatives wished to preserve a social order in which the state was more heavily involved in the regulation of moral behavior.¹¹ Historically, conservatives also believed in state economic intervention. For example, the American Federalists were conservatives in their views of moral authority, and continued to support an established Church for some thirty years after the Constitution was ratified.¹² But they also believed

9. E.g., *Loan Assn. v. Topeka*, 87 U.S. (20 Wall.) 655, 659-660 (1875) (striking down tax-financed railroad subsidy as not for a "public purpose").

10. JOHN S. MILL, *PRINCIPLES OF POLITICAL ECONOMY* 589-627 ([1849] rev. ed. 1872 (government non-interference in markets); *id.* at 566-570 (non-interference in most areas of belief and morals).

11. The classic study of conservatism in the United States, focusing on the period between the Civil War and the New Deal, is CLINTON ROSSITER, *CONSERVATISM IN AMERICA* (1955).

12. See 2 WILLIAM G. MCLOUGHLIN, *NEW ENGLAND DISSENT, 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE* 785-786, 1006-1024, 1093-1105 (1971). See also S.H. BEER, *THE REDISCOVERY OF AMERICAN FEDERALISM* 31-65 (1995); and see *Barnes v. First Parrish*, 6 Mass 334 (1810) (upholding state statute collecting taxes for the support of ministers in the Congregational Church).

that the state should be relatively active in economic planning and facilitation of growth.¹³

Nineteenth century classical legal thought came to wield the rhetoric of a liberal economic philosophy with a much more conservative moral philosophy. Classical legal thinkers drew their ideas about markets and economic regulation from the writings of the classical political economists, both English and American. These writers generally regarded markets as "natural" and self-executing, and as needing governmental intervention only rarely. The period from the Jacksonian revolution in the 1820s to the end of the nineteenth century was marked by ideological hostility toward the writers believed was seriously excessive interference in the economy. The rhetoric of classical legal thought was unabashedly laissez faire, urging the government to stay out of private economic decision making as a general matter.¹⁴

During this classical period American political economists believed that government intervention to redistribute wealth was bad on economic grounds: it distorted markets, thereby reducing their efficiency, and destroyed incentives, thereby lowering productivity. Extreme poverty could be relieved, but poor relief generally should be the work of private charity. Classical legal thought generally followed with a narrow conception of the state's role in determining the distribution of wealth.¹⁵

13. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800* at 107-131 (1993); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW: 1836-1937* (1991).

14. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: THE CRISIS OF LEGAL ORTHODOXY* (1992); HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW* 36-41, 171-206.

15. On the economics, see FRANCIS WAYLAND, *THE LIMITATIONS OF HUMAN RESPONSIBILITY* (1838); and 2 JOSEPH DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION, 1606-1865* at 520, 557, 571-572, 592-593, 717, 734-735, 764, 793 (1946). On legal thought see THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 356 (1868) (attacking interference with private property rights); THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TAXATION* 77 (1876) (taxation must be for a "public" purpose); JOHN F. DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA* 196-25 (1894) (attacking legislative interference in individual property rights); CHRISTOPHER TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* vi-viii (1886) (describing his book as an effort to preserve laissez faire from legislative attacks); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) (striking down federal income tax); *Godcharles v. Wigeman*, 113 Pa.St. 431 (1886) (striking down statute preventing payment of wages in script or other forms of paper than lawful money). See also OWEN FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910* at 75-99 (Vol. VIII, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, 1993); R. STANLEY, *DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861-1913* (1993); Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 *YALE L.J.* 2309 (1995).

But these same classicists showed little reluctance about government regulation of markets on *moral* grounds. For example, liberty of contract forbade the state from regulating the hours of labor in an ordinary profession such as baking,¹⁶ but it did not prevent the state from prohibiting marriage contracts between people of different races,¹⁷ from forcing businesses to close their doors on Sunday, from enforcing broad regulation of the sale of alcoholic beverages and even closing breweries that were legal when built without compensation, or preventing lotteries or other forms of gambling.

For example, laissez faire Constitutional theorists such as Thomas M. Cooley were steeped in classical political economy, and were thus opposed to both economic regulation and protective labor legislation. But Cooley supported laws against blasphemy and profanity. The state has the power to condemn language rising to the level of "malicious ridicule of the Author and Founder of the Christian religion," Cooley concluded. "The language which the Christian regards as blasphemous, no man in sound mind can feel under a sense of duty to make use of under any circumstances, and no person is therefore deprived of a right when he is prohibited, under penalties, from uttering it." Likewise, the practice of using "profane and indecent language" ... "is reprobated by right-thinking men of every nation and every religious belief." Statutes condemning public profanity "require no further justification than the natural impulses of every man who believes in a Supreme Being and recognizes his right to the reverence of his creatures."¹⁸

The roots of this dualism lay in the same Jacksonian movement that eventually led to the constitutionalization of classical political economy in the United States. Among its many ideologies the Jacksonian movement represented a reaction of social and economic outsiders to big government. But the big government that existed in the 1810s and 1820s was not the social welfare state. Rather, it was a government that had heavily involved itself in economic development. Good government, it was thought, did not redistribute wealth. Rather, government should facilitate development by identifying areas where more rapid growth was necessary, and then encourage private enterprise through a variety of subsidies. These included corporate status, monopoly grants, tax exemptions or other relief, outright cash subsidies, and a strong, federally managed currency.¹⁹

Although the principle may have been high minded, politics could not overlook the

16. E.g., *Lochner v. New York*, 198 U.S. 45 (1905).

17. *Pace v. Alabama*, 106 U.S. 583 (1883). See also 1 JOEL BISHOP, *NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION* §§680-695 (1891) (describing anti-miscegenation statutes, and noting in §689 that they are constitutional under the Civil War amendments).

18. COOLEY, *CONSTITUTIONAL LIMITATIONS*, note __ (7th ed. 1903), at 671, 672, 674.

19. See HOVENKAMP, *ENTERPRISE*, note __ at 36-41.

opportunities created by such policies. The recipients of the monopoly grants, tax exemptions, and the like, were mainly those who had supported the politicians who were handing them out. Central to the Jacksonian economic agenda was disentangling the state from these corrupt bargains with private enterprise. In the Jacksonian rhetoric, government regulation became little more than a euphemism for government intervention in behalf of the privileged, giving them the advantage of relatively protected markets while political outsiders were left to fight it out on farms or other industries that did not enjoy this enormous largesse.

But the Jacksonian position on welfare and morality stands in sharp contrast to its views on economics. First, the Federalists and Whigs who benefitted most from the proactive economic policies of the early nineteenth century were typically from the more established and elite American Churches. Their religion tended to be rational and relatively orderly, emphasizing intellectual content over piety, and social relations over antiworldliness.

By contrast, the Jacksonians were a diverse coalition of outsiders, many of them quite fervent. Some, including Jackson's Chief Justice Roger B. Taney, were Catholics.²⁰ Others were pro-revival evangelicals reacting against the cool rationalism of the established churches.²¹ Although these groups were themselves quite different from each other, as a collective they hardly stood for the proposition that the State should extricate itself from moral affairs in the same way that it should remove itself from economic affairs. Catholics, for example, came from a long tradition that was hostile to disestablishment and inclined to mingle the Church and the State as regulators of behavior. Many of the Jacksonian Protestant groups became fervent crusaders for state imposed morality.

Nevertheless, the story of Jacksonian religion is complex.²² First of all, a political coalition between Protestant evangelicals and Catholics was no simple thing. Many of the evangelical groups defined their very existence by their hatred of Catholicism, while Catholics for their part saw no salvation outside of the Catholic Church. For this reason

20. On the makeup of the Jacksonian democrats, see GLYNDON G. VAN DUSEN, *THE JACKSONIAN ERA, 1828-1848* (1959) at 92-96 (noting that Jacksonianism was particularly popular among immigrants, especially Irish Catholics).

21. See, e.g., CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815-1846* at 202-236 (1991).

22. For broadly divergent views, see ARTHUR SCHLESINGER, JR., *THE AGE OF JACKSON* 350-360 (1945) (emphasizing evangelical distrust of Jackson's non-denominationalism); JOHN WILLIAM WARD, *ANDREW JACKSON: SYMBOL FOR AN AGE* 101-132 (1953) (emphasizing then popular view that Jackson was a special divine messenger); SELLERS, *MARKET REVOLUTION*, *ibid.*

many mainstream northern Baptists remained Whigs rather than joining the Jacksonians.²³ Second, disestablishment itself was a Jacksonian phenomenon, at least in the more conservative New England states such as Massachusetts and Connecticut.²⁴ Although Jackson himself was Presbyterian, he cultivated non-sectarianism and emphasized the multi-denominational nature of his support. The Jackson era essentially gave us the notion that the United States has a kind of Christian national religion that tolerates but also transcends denominational differences.

One might wonder why a movement emphasizing disestablishment would retain such fervor to use the state to regulate morals. But that is to read a twentieth-century conception of disestablishment into the early nineteenth century. Historically, disestablishment was largely a fiscal and institutional phenomenon rather than a moral phenomenon. The primary issue in the establishment debate was the use of general tax monies to pay the clergy and support church operations. Disestablishment had virtually nothing to do with the state's power to regulate conduct.²⁵ The early nineteenth century controversy over disestablishment in America did not venture into such questions of conduct as Bible reading or prayer in public schools or state regulation of marriage or public morals.²⁶ Indeed, many of the supporters of disestablishment, such as the Catholics, were not in favor of disestablishment on principle at all. Rather, they preferred disestablishment to any regime in which some *other* religious group, such as the dominant Congregationalists, would be established.²⁷

So it is not really ironic that disestablishment increased rather than decreased the role of the State as regulator of moral conduct. This was not a function of disestablishment itself, which pertained mainly to fiscal issues. Rather, the state's growing moral hegemony was a consequence of the splintering of the Christian community that had resulted from the Great Awakening and the Second Awakening -- two broadly supported revival movements that divided the organized Protestant Churches and contributed greatly to the proliferation of denominations we see today.

23. See McLOUGHLIN, note ___.

24. See 2 *id.* at 915-1063, 1189-1262.

25. See, e.g., *id.*, where the debate in virtually every instance was over freedom to organize, freedom to incorporate, or freedom from payment of a tax gather in behalf of the established Church.

26. On the nature of the Jacksonian movement for separation of Church and state, see ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 350-360 (1945).

27. See Perry Miller, *The Contribution of the Protestant Churches to the Religious Liberty in Colonial America*, 4 *CHURCH HISTORY* (Mar. 1935).

The result of these divisions was that individual Protestant denominations substantially lost the power to force specific religious views on anyone. But notwithstanding theological division, the population was relatively united on a broad range of morality questions. As a result, decisive coalitions sponsored statutes regulating conduct on more general principles associated with Christian morality. The great reform movements of the four decades before the Civil War were religiously motivated, heavily Jacksonian or Whig.²⁸ Their goal was the enactment of civil legislation not associated with any denomination in particular, but with Christian values in general. These laws restricted work or business on Sunday, manufacturing or consumption of alcoholic beverages, gambling and lotteries, interracial marriage, eventually abortion,²⁹ and other practices. The revivals thus produce two phenomena: first, the splintering of the Protestant Churches. But second, "reform" movements in which moral authority shifted significantly away from the churches and to the state.

Citizen Welfare: Political Economy Without Utilitarian Ethics

The key to understanding classical welfare theory is that its speakers vehemently accepted classical political economy but vehemently rejected utilitarian ethics. Utilitarianism was nothing other than the extension into ethics of the same preference-based principles that governed political economy. Twentieth century readers trained in the preference driven ideas of neoclassical economics find it difficult to appreciate the absolute abhorrence that pre-Civil War American political economists and moral philosophers felt for utilitarianism.³⁰

To be sure, this created a tension between the two disciplines. Both economics and ethics were concerned with the same general goal: the maximization of human happiness. But they approached that subject from different ways. Political economy was concerned with the mechanisms by which the individual maximized his own happiness through production and trading. Moral philosophy was concerned with how the individual

28. On religiously motivated reform movements during the years 1820-1860, see ROBERT H. ABZUG, *COSMOS CRUMBLING: AMERICAN REFORM AND THE RELIGIOUS IMAGINATION* (1994).

29. See, e.g., JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY* 119-146 (1978).

30. E.g., FRANCIS WAYLAND, *THE ELEMENTS OF MORAL SCIENCE* 36 (1835) (concluding that utilitarianism could be neither proven nor disproved from studying nature but was disproved by scripture). On the strong aversion of elite American Protestants to utilitarianism, see DANIEL WALKER HOWE, *THE UNITARIAN CONSCIENCE: HARVARD MORAL PHILOSOPHY, 1805-1861* at 65-66 (1970). See also D.H. MEYER, *THE INSTRUCTED CONSCIENCE: THE SHAPING OF THE AMERICAN NATIONAL ETHIC* (1972).

maximized his happiness by determining the ethical course of action. Study of the two disciplines was thought to facilitate common goals. John McVickar, a Columbia University Professor who taught both political economy and moral philosophy, instructed his students in the 1820s that "what religion condemns as contrary to duty and virtue, Political Economy proves to be equally opposed to peace, good order, the permanent prosperity of the community."³¹

Economics was concerned with the welfare of people in their present condition. The problem with utilitarianism was that it threatened to turn ethics, just as economics, into the study of what produces maximum satisfaction in *post-fallen* humanity. But under the Protestant conception of human nature that prevailed among nineteenth century Americans, the Fall clouded every aspect of human judgment. Depending on the hardness of one's Calvinism, human judgments about right and wrong, about policy, about religion and knowledge of God all were corrupted.³²

Classical political economists generally shared these views, but believed that the Fall had little impact for economic doctrine. Economics studied how people maximize their desires *given* their situation. It was "pre-discounted," so to speak, for sin. A theory of society, theology, or even natural science might be irremediably clouded by humanity's fall from grace, and one studying those disciplines always knew that knowledge of God or the Universe would have been much more perfect had mankind itself been perfect. But economics was not concerned about the desires of some ideal or sinless humanity. It considered human nature as it was found, warts and all.

The result of this perspective was strong individualism in economic theory, but communitarianism in moral theory. Each person knew his own wants, and the science of political economy was concerned with maximizing those wants without judging their appropriateness. By contrast, the human being making moral decisions has little about which to be self-assured. He cannot trust his own judgment, for his baser instincts are always likely to take over. He finds his moral compass in stable institutions, orthodoxy, and the community.

31. John McVickar, "Concluding Remarks," in JAMES R. McCULLOCH, *OUTLINES OF POLITICAL ECONOMY* 136-137 (McVickar, ed., 1825).

32. For example, consider WAYLAND, *MORAL SCIENCE*, note ___ at 102:

[T]hough our first parents were endowed with a perfect moral constitution, yet it was necessary that God should make to them a special revelation respecting some portion of his will.... How much more evidently is additional light necessary when it is remembered that the moral constitution of man seems manifestly to be imperfect.... We act according to the impulses of blind, headlong passion, regardless of our own best good and of the welfare of others, in despite of what we know to be the will of our Marker....

This difference emerges strong already in the father of classical political economy: Adam Smith. Smith's economic man, displayed in the *Wealth of Nations* always knows precisely what he wants; it's only a matter of making the trades that will get him to that point.³³ In sharp contrast, the moral actor of Smith's *Theory of Moral Sentiments*, written seventeen years earlier, is always groping in the dark and distinguishing right from wrong by observing the actions of those around him. Smith's moral philosophy was concerned with the absolute nature of things in areas where humanity's fallen powers proved particularly disabling.

Thus economics and politics were both applied sciences concerned with maximizing the welfare of post-fallen humanity. Notwithstanding the fall, the world remained an impressively orderly place. In this sense, Smith was a pure product of his Enlightenment Era. The economic market was for him a work of pure beauty and orderliness just as the chemical tables were for Joseph Priestly, or the ordering of species for Thomas Jefferson.³⁴ The greatest manifestation of God's creative power was that the world did not *need* to be continually corrected or fixed. Smith wrote in *Sentiments*:

In every part of the universe we observe means adjusted with the nicest artifice to the ends which they are intended to produce; and in the mechanism of a plant, or animal body, admire how every thing is contrived for advancing the two great purposes of nature, the support of the individual and the propagation of the species.
...

The wheels of the watch are all admirably adjusted to the end for which it was made, the pointing of the hour. All their various motions conspire in the nicest manner to produce this effect. If they were endowed with a desire and intention to produce it, they could not do it better. Yet we never ascribe any such desire or intention to them, but to the watch-maker, and we know that they are put into motion by a spring, which intends the effect it produces as little as they do. But though, in accounting for the operations of bodies, we never fail to distinguish in this manner the efficient from the final cause, in accounting for those of the mind, we are very apt to confound these two different things with one another.... [As a result,] we are very apt ... to imagine that to be the wisdom of man, which in reality is the wisdom of God.

The study of morals, by contrast, required one to look away from the watch itself

33. E.g., ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776), Bk. I, chs. 1-2 (showing how the division of nature evolved from each individual's continual efforts to maximize his own wants).

34. See, e.g., DANIEL R. BOORSTIN, THE LOST WORLD OF THOMAS JEFFERSON (1948).

and toward the watch maker. Smith thus distinguished the science of morals and the science of economics this way:

The administration of the great system of the universe, however, the care of the universal happiness of all rational and sensible beings, is the business of God and not of man. To man is allotted a much humbler department, but one much more suitable to the weakness of his powers, and to the narrowness of his comprehension; the care of his own happiness, of that of his family....³⁵

For Smith, the science of economics concerned how fallen human beings maximized their actual desires in a fallen world. By contrast, the science of morals required them to transcend their fallen status and objectify their sinful nature. In this task, humanity needed a great deal of help -- from the Bible, from tradition and authority, from history and trial and error. The result is that while Smith's economics is radically individualistic, his moral theory is based on continuous interpersonal comparison. For example, he described the student of morals as an "impartial spectator," writing:

...we either approve or disapprove of our own conduct, according as we feel that, when we place ourselves in the situation of another man, and view it, as it were with his eyes and from his station, we either can or cannot entirely enter into and sympathize with the sentiments and motives which influenced it. We can never survey our own sentiments and motives, we can never form any judgment concerning them, unless we remove ourselves, as it were, from our own natural station, and endeavor to view them as at a certain distance from us. But we can do this in no other way than by endeavoring to view them with the eyes of other people, or as other people are likely to view them. Whatever judgment we can form concerning them, accordingly, must always bear some secret reference, either to what are, or to what, upon a certain condition, would be, or ... ought to be the judgment of others."³⁶

Thus, Smith concluded, someone growing up in absolute isolation would have no reference point for making moral judgments at all. But "bring him into society, and he is immediately provided with the mirror which he wanted before. It is placed in the countenance and behavior of those he lives with.... and it is here that he first views the propriety and impropriety of his own passions, the beauty and deformity of his own mind."³⁷

35. ADAM SMITH, THE THEORY OF THE MORAL SENTIMENTS 168-169, 386 ([1759] Liberty Edition reprint, 1976).

36. SMITH, MORAL SENTIMENTS, id. at 203-204.

37. Id. at 204.

So Smith's economic actor is a radical individualist who knows what he wants and acts accordingly. It is not economics' job to evaluate the quality of human desires, but only to study the most efficacious ways by which they may be attained. In sharp contrast, Smith's moral actor is foundering in a giant, unknown ocean hoping for any glimpse of something that will give him his bearings.

Such individualism in economics and communitarianism in morals dominated orthodox American thought in the nineteenth century and explains how American law could be so preoccupied with "liberty of contract" in economic matters, to the point of condemning numerous regulatory statutes under the Constitution; but then could readily approve serious interferences with liberty of contract when morals were at stake. For example, Brown University's Francis Wayland authored texts in both political economy and moral philosophy. Wayland's economic actor always knows what he wants and then seeks to maximize. By contrast, his moral actor must rely on a fallen conscience, or "moral sense," that is constantly in need of crutches. The moral faculty is constantly impaired, wrote Wayland, when people observe the unpunished wrongful acts of others. Wayland's individual simply has no moral compass -- even when he wishes to please God, he may do it on his own by sacrificing animals or even human beings. The guidance needed to act ethically comes from a continuous blend of mutual restraint and divine revelation.³⁸

Classical Legal Thought and State Regulation of Morals

As noted previously, the Progressive attack on substantive due process was motivated, not by its Jacksonian origin, but rather because this same hostility toward regulation assumed a much different political character when the regulation at issue was not a monopoly grant but rather a wage-and-hour law directed at protecting the working poor. Further, the Progressive literature misrepresented substantive due process by presenting it as reflecting a classical hostility toward all forms of regulation. Nevertheless, anti-regulation fervor, which had been a left-leaning ideology in the 1820s was seen by Progressives as a right-leaning ideology at century's end.³⁹

While Jacksonians were laissez faire in their economics, however, they were also Christians with a strong tendency toward evangelical moralism. Demographically, this is hardly surprising. Included among the Jacksonians was a broad coalition of Catholics and revivalist evangelicals who approached their religion with enthusiasm and showed little

38. FRANCIS WAYLAND, *MORAL SCIENCE*, note ___ at 79-86 (1835); and FRANCIS WAYLAND, *ELEMENTS OF POLITICAL ECONOMY* (1837).

39. See HOVENKAMP, *ENTERPRISE*, note ___, at Chs. 1-6; HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 1-44 (1993).

reluctance about involving the state in "reform," defined by explicitly Christian principles.⁴⁰ The Jacksonian movement bound diverse Catholic, evangelical and other groups into a common cause in a way that enabled the religious among them to set aside theological differences, at least for political purposes.

Jacksonian religion was certainly not calculated to preclude the state from regulating morality, in the way that Jacksonian economics abhorred economic regulation. Indeed, the case for morals regulation became even stronger. The Jacksonians were the first American political party to accept denominational diversity as a fact of life. The proliferation of church divisions that accompanied early nineteenth century revivalism significantly broke down the political authority of any single Church. The state then picked up where the churches left off. The result is that the period 1820-1860 produced great movements for legislative regulation of such vices as gambling, consumption of alcohol, and sabbath breaking.⁴¹ The impetus for reform came not only from Jacksonians, but also from middle class whigs. Aghast at the breakdown of religious uniformity, they began extensive campaigns against such vices as alcohol consumption thought to be particularly prevalent among the lower classes.⁴² The temperance movement itself originated among New England's Whigs and was in large part directed at members of the Jacksonian coalition -- for example, poor European immigrants, who were believed to be heavy drinkers.⁴³ As a result, the regulatory state remained alive and well.

Lotteries

Because it is essentially contractual, the lottery is a striking example of the divergence between economic individualism and moral communitarianism in classical welfare policy. Just as economic classicism and antistatism were becoming triumphant as economic theories, the American position on lotteries was changing from one of government toleration and use to one of hostility and strict regulation.

Lotteries had been common in colonial America among all except Quakers,⁴⁴ and

40. See SELLERS, note ___ at 232-236.

41. See generally Abzug, note ___; N. O. HATCH, *THE DEMOCRATIZATION OF AMERICAN CHRISTIANITY* (1989); GEORGE H. THOMAS, *REVIVALISM AND CULTURAL CHANGE: CHRISTIANITY, NATION BUILDING, AND THE MARKET IN THE NINETEENTH-CENTURY UNITED STATES* (1989); TIMOTHY L. SMITH, *REVIVALISM AND SOCIAL REFORM: AMERICAN PROTESTANTISM ON THE EVE OF THE CIVIL WAR* (1957).

42. See ABZUG, note ___ at 102.

43. See SELLERS, *MARKET REVOLUTION*, note ___ at 261-263.

44. See LESTER G. LINDLEY, *CONTRACT, ECONOMIC CHANGE, AND THE SEARCH FOR ORDER IN*

were commonly used to finance public works,⁴⁵ as part of church building campaigns,⁴⁶ and to support construction of educational facilities.⁴⁷ Indeed, Churches were among the most common users of lotteries.⁴⁸ Alexander Hamilton supported their use to finance public works projects,⁴⁹ and the Continental Congress passed a resolution in 1775 "[t]hat a sum of money be raised by way of lottery for defraying the expense" of the anticipated military campaign.⁵⁰ In 1812 Congress authorized lotteries to raise money for street improvements in Washington, D.C, and by 1820 it had authorized them about seventy times for various public works projects.⁵¹ Consistent with this, lottery contracts were enforceable under the American common law. Although there was some statutory regulation of lotteries in the eighteenth century, it was designed to give states a monopoly rather than to forbid them.⁵²

But early in the nineteenth century evangelicals launched a campaign against lotteries, and anti-lottery legislation became common in the 1820s and 1830s.⁵³ New York

INDUSTRIALIZING AMERICA 29 (1993).

45. See JOHN L. THOMAS, *THE LAW OF LOTTERIES, FRAUDS AND OBSCENITY IN THE MAILS* 4 (1900) (lotteries were used, among other purposes, to finance dredging of the Hudson river, for the construction of orphanages, and building schools). See also JOEL P. BISHOP, *COMMENTARIES ON THE LAW OF STATUTORY CRIMES* 582-587 (1873); and see generally Stephen Siegel, *Joel Bishop's Orthodoxy*, 13 L. & HIST. REV. 215 (1995).

46. See 2 ANSON P. STOKES, *CHURCH AND STATE IN THE UNITED STATES* 26 (1950).

47. See JOHN SAMUEL EZELL, *FORTUNE'S MERRY WHEEL: THE LOTTERY IN AMERICA* 20-25 (1960).

48. See A.R. Spofford, *Lotteries in American History* 177, 1892 *Annual Report*, American Historical Association (1893).

49. See 1 JOSEPH S. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS*, 349, 380-381, 385, 520-521; and see Appendix B, 520-522.

50. 1. J. Cont. Cong. 535 (1775), quoted in Thomas, note __ at 6.

51. THOMAS, *LAW OF LOTTERIES*, note __ at 6-7.

52. *Id.* at 4.

53. The sharp switch in viewpoint was motivated substantially by JOB TYSON, *BRIEF SURVEY OF THE GREAT EXTENT AND EVIL TENDENCIES OF THE LOTTERY SYSTEM, AS EXISTING IN THE UNITED STATES* (1833), which argued that lotteries were conducive to sloth and immorality, and particularly harsh on the poor, who were often seduced by them. Tyson produced evidence from Philadelphia county that lottery ticket purchases were common causes of insolvency, and that they frequently contributed to embezzlement and forgery. See LINDLEY, note __ at 64-68.

adopted a statute in 1821 and a stronger statute in 1833. Connecticut and Virginia followed in 1834.⁵⁴ The first Supreme Court decision upholding a statute forbidding lotteries came in a dispute challenging a prior state policy of encouraging them. In 1829 the Virginia legislature had authorized a corporation to use a lottery to finance a Turnpike, but in 1834 it passed another statute condemning lotteries, but permitting previously approved lotteries to continue until 1837. The Company then challenged the limitation as an impairment of a pre-existing contract. The Court found no impairment,⁵⁵ but in the process indicated how much opinion about lotteries had changed in just a short time. Referring to them, it said:

The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community: it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.⁵⁶

Thirty years later the Supreme Court went much further.⁵⁷ In 1867 the Mississippi legislature had given a twenty-five year charter to the Mississippi Agricultural, Educational, and Manufacturing Aid Society to issue lottery tickets, but then the state amended its constitution a year later to declare that "the legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed...."

Acknowledging that the corporate charter at issue was covered by the contract clause, the Supreme Court held that a state could not repudiate its "police power" to make laws affecting the "public health or the public morals." The Court acknowledged that "formerly, when the sources of public revenue were fewer than now, they [lotteries] were used in some or all of the States, and even the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not infrequently for educational and religious purposes." However, subsequent learning had revealed the dangers of lotteries to public morals: "that they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt." In sum, the regulation of public morals operated as an exception to the contract clause. "No legislature can bargain away the

54. 2 STOKES, note ___ at 26.

55. It held that the legislature could competently place a time limit that had not been express, but must have been implied, in the pre-existing license. *Phalen v. Virginia*, 8 Howard 164, 168 (1850).

56. *Id.* at 168.

57. *Stone v. Mississippi*, 101 U.S. 815 (1880).

public health or the public morals. The people themselves cannot do it, much less their servants."⁵⁸ In the process, the Supreme Court gave about as narrow an interpretation of the contract clause as had ever been applied to a state grant, and completely out of step with the dominant contract clause decisions of the nineteenth century:

Any one . . . who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will.⁵⁹

The next major lottery campaign was against the Louisiana Lottery of the 1870's, which was widely promoted to ticket buyers scattered across the country. That "abuse" became the target of President Benjamin Harrison's reform agenda in the early 1890's, and eventually federal legislation forbidding the sale of lottery tickets in the mail.⁶⁰ That statute was upheld in *Champion v. Ames* as a legitimate exercise of the federal commerce power and not in violation of the Tenth Amendment.⁶¹ After quoting its earlier decisions about the immoralities of lotteries, the Supreme Court concluded:

If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another?⁶²

The Court concluded:

In legislating upon the subject of the traffic in lottery tickets, as carried on through

58. *Id.* at 818-819. In this sense, *Stone* is an important precursor of the public trust doctrine, which prohibited a state from granting away land which it held in a fictional trust for the public. See *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 10-12 (1990).

59. *Id.* at 821. See also *Douglas v. Kentucky*, 168 U.S. 488 (1897), permitting Kentucky to amend its constitution so as to require municipalities to renege on pre-existing lottery contracts. On the contract clause in the early nineteenth century, see HOVENKAMP, *ENTERPRISE*, note __.

60. See EZELL, note __ at 263-269; LINDLEY, note __, at 70-75.

61. 188 U.S. 321 (1903).

62. *Champion*, 188 U.S. at 356.

interstate commerce, Congress only supplemented the action of those states--perhaps all of them--which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end.⁶³

The Early Campaigns Against Alcohol

Campaigns for legislation against alcohol consumption began at the same time as the anti-lottery movement. Historically, Americans drank with little sense of moral stigma.⁶⁴ But beginning in the late 1820s, evangelical churches began a campaign against the evils of liquor that continued through the 1920's. Originally, the campaign manifested itself largely in sermons and tracts urging people to avoid alcoholic beverages. But in the 1830s the American Temperance Society, the leading anti-alcohol group, abandoned its previous policy of moral persuasion in favor of legislative prohibition.⁶⁵ By the end of the 1850s many states had passed statutes limiting or prohibiting the consumption of alcoholic beverages.⁶⁶ Numerous mid- and late- nineteenth century Supreme Court decisions involved Constitutional challenges to statutes that closed down breweries or bars, or forbade trade in alcoholic beverages. The Court often upheld these statutes under circumstances where a similar interference would have been struck down -- namely, when the businesses were completely legal when first built and then closed without any compensation to their owners.⁶⁷

Sunday laws

Although Christians had always taken their holy day seriously and Sabbath

63. Id. at 357-358.

64. See ABZUG, note ___ at 82.

65. ABZUG, note ___ at 102; I. TYRRELL, *SOBERING UP: FROM TEMPERANCE TO PROHIBITION IN ANTEBELLUM AMERICA, 1800-1860* (1979) at 159-224.

66. Tyrrell, *ibid.* For a good, brief survey of the law, see ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* 192-219 (1904).

67. See, e.g., *Samuels v. McCurdy*, 267 U.S. 188 (1925 (state may seize liquor in the home that had been lawfully acquired for home consumption, but subsequently forbidden by statute)).

breaking was an offense even in the Colonies, evangelicals pursued it with a new vigor beginning in the 1820s.⁶⁸ In part, this was a consequence of the "market revolution" that put so many people at work in the commercial marketplace rather than home on the farm. Laws that prevented the conducting of business on Sunday -- a seemingly clear invasion of liberty of contract -- were justified with the observation that the citizenry was overwhelmingly Christian, no matter what the sect, and that Christians in general believed that Sunday should be a day of rest. Indeed, many state courts began making common law rules that limited the enforcement of contracts negotiated on Sunday -- even as they were expanding liberty of contract as a general matter.⁶⁹

State Regulation and the Centrality of Moral Science

For Calvinistic Puritans in the seventeenth century, the moral law consisted of God's commands. God was perfect and only he knew and proclaimed the moral, which fallen humanity was unable to know on its own. But by the mid-nineteenth century, mainstream American Protestants and moral philosophers had modified this view and began to see morality as something both discoverable, within limits, and as capable of being rationalized.⁷⁰ Thus, "moral science" existed because humanity was capable of knowing something of the moral simply by studying human actions and desires as well as

68. See Wyatt-Brown, *Prelude to Abolitionism: Sabbatarian Politics and the Rise of the Second Party System*, 58 J.AM.HIS. 316 (Sep. 1971); PAUL JOHNSON, *A SHOPKEEPER'S MILLENNIUM: SOCIETY AND REVIVALS IN ROCHESTER, NEW YORK, 1815-1837* (1978).

69. On expansion of economic liberty of contract in the state courts during this time, see GILLMAN, note __ at 61-100. But the same courts both upheld statutes and cited common law principles that otherwise perfectly lawful contracts became unenforceable if made on Sunday. See, e.g., *Hulett v. Stratton*, 5 Cush. (Mass.) 539 (1850) (contract made on Sunday to sell a horse is unenforceable); *Murphy v. Simpson*, 14 B.Mon. (Ky.) 419 (1854) (same, interpreting a statute); *Lyon v. Strong*, 6 Vt. 219 (1834) (same, interpreting a statute; "No court will lend its aid to a man who founds his cause of action upon an illegal or immoral act.... The contract is bottomed in malum prohibitum of a very serious nature...." Finding authorities "clear and decisive" as to non-enforceability of contracts made on the sabbath. *Id.* at 224-225); *Sayre v. Wheeler*, 31 Iowa 112 (1870) (refusing to enforce promissory note executed on Sunday; applying statute); *Adams v. Hamell*, 2 Doug. (Mich.) 73 (1845) (same); *Pike v. King*, 16 Iowa 49 (1864) (interpreting statute, refusing to enforce contract for sale of property made on Sunday: "... but this occurred on the Lord's day, and a party cannot be heard to allege his own unlawful act."). For numerous additional decisions, see ELISHA GREENHOOD, *THE DOCTRINE OF PUBLIC POLICY IN THE LAW OF CONTRACTS, REDUCED TO RULES* 549-551 (1886).

70. The classic discussion of this transformation is JOSEPH HAROUTUNIAN, *PIETY VERSUS MORALISM: THE PASSING OF THE NEW ENGLAND THEOLOGY* (1932).

the constitution of the universe.⁷¹ Nineteenth century American moral philosophers continued to believe in absolute rights and wrongs, but they were convinced that these absolutes lay within the observable structure of the universe itself, and not merely in God's pronouncements – that is, they were part of an “instructed” conscience.⁷² They could be discerned to some extent from general revelation (nature) and not merely from special revelation (the Bible).

Equally important was the fact that this moral science was "non-denominational," in the sense that the principles it produced did not vary much according to the particular Protestant sect of the writer. Thus, for example, the moral science of a Unitarian such as Harvard's Francis Bowen closely resembles that of a Baptist such as Brown University's Francis Wayland, notwithstanding the bitter antagonism of the two groups in matters of theology.⁷³ From this moral science, American Protestants developed a conception of a "moral law" that was both "natural" and discoverable in much the same way that the natural laws of the physical universe or the basic principles of the common law were thought to be discoverable. From inner feelings of moral obligation one could discern the moral structure of the universe and even the existence of God. As Archibald Alexander, a prominent Presbyterian theologian and moral philosopher put it:

The feeling of moral obligation which accompanies every perception of right and wrong seems to imply that man is under law; for what is moral obligation but a moral law? And if we are under a law there must be a lawgiver, a moral governor, who has incorporated the elements of this law into our very constitution."⁷⁴

The nineteenth century moral scientist thus claimed his discipline was just as scientific as the natural sciences were. Wayland opened his *Elements of Moral Science* by comparing moral law with Newton's laws of physics, the laws of chemistry, and the axioms of mathematics, and finding them to have the same scientific status.⁷⁵

71. For the historical roots of these developments in ethics, see NORMAN FIERING, *MORAL PHILOSOPHY AT SEVENTEENTH CENTURY HARVARD: A DISCIPLINE IN TRANSITION* (1981).

72. See DONALD H. MEYER, *THE INSTRUCTED CONSCIENCE: THE SHAPING OF THE AMERICAN NATIONAL ETHIC* 89-91 (1972).

73. See FRANCIS BOWEN, *LOWELL LECTURES, ON THE APPLICATION OF METAPHYSICAL AND ETHICAL SCIENCE TO THE EVIDENCES OF RELIGION* (1849); WAYLAND, *MORAL SCIENCE*, note __.

74. ARCHIBALD ALEXANDER, *OUTLINES OF MORAL SCIENCE* 209-210 (1852).

75. WAYLAND, *MORAL SCIENCE*, note __ at 17. On the scientific status accorded to moral science, see HERBERT HOVENKAMP, *SCIENCE AND RELIGION IN AMERICA, 1800-1860* at 100-115 (1978).

While political economy was concerned with maximizing individual wealth or comfort given humanity's fallen state, moral science was concerned with maximizing human happiness given the consequences of the fall. The result was radical individualism in the management of economic markets, but complete dependency in the management of morals. As Jacksonian Presbyterian and classical political economist Henry Vethake put in it the 1844 edition of his treatise on political economy, the moral philosopher is concerned with such questions as whether man's desires are appropriate or moral under the circumstances, whether men may want things that will be injurious to themselves, or whether men have a duty to give to others rather than maximizing their own wealth. But none of these concerns is in the province of political economy. Rather, "the political economist regards every thing as useful which is capable of satisfying, in any degree whatever, any of man's *actual* wants and desires." Vethake gave this example:

Thus spirituous liquors are said to be possessed of utility, because they are of a nature to be objects of men's desire; which desire they evince, and afford a measure of, by the sacrifices they are willing to make in order to obtain them; and this utility is ascribed to those articles, notwithstanding that their use may, in most cases, be justly condemned,...

So the treatment of liquor as a subject of human desire presented a question of political economy; but its social and more long-lasting implications for physical or moral health presented a question of moral science. Thus the difference between the political economy and moral science is that political economy considers man as he "is," and is not concerned with "the moral improvement of the species," concluded Vethake, while the study of morals considers man as he "ought to be."⁷⁶

Vethake later elaborated on this distinction, in discussing the duty of government. Like most Jacksonians, he abhorred state interference in private markets.⁷⁷ But that raised the problem of goods such as alcohol, whose very consumption might be considered immoral. "There are some articles, to consume which, or to consume which to the extent in which they are actually consumed, has an injurious effect upon society." Conceding the power of the state to condemn such consumption on moral grounds, can the state derive any additional arguments from political economy to justify such regulation. Vethake concluded that the answer must be no. Political economy must treat the human being as it finds him, and if his desire is to consume excessive amounts of liquor, then that

76. HENRY VETHAKE, *THE PRINCIPLES OF POLITICAL ECONOMY* 14 (1844). On Vethake, see JOSEPH DORFMAN AND REXFORD TUGWELL, *EARLY AMERICAN POLICY: SIX COLUMBIA CONTRIBUTORS* 155-204 (1960).

77. See, *Id.* at 322-331 (attacking wealth distribution legislation and unionism); 332-335 (attacking hours legislation as costing workers more in lost wages than they would gain from reduced hours of labor); 343-356 (attacking welfare for the poor and unemployment compensation).

utility must be regarded by the political economist as equivalent to the utility produced by any other good, such as food or clothing. "Politico-economically speaking, all these, being objects of men's desire, are to be regarded as useful objects; and their utility to any individual, in the circumstances in which he is actually placed, must be estimated by the labour, or the products of labour, which he is willing to give in exchange for them...." Thus, "the argument against the use of spirituous liquors, in so far as it applies with greater force to those liquors than to any other article of consumption, is altogether a moral one...."⁷⁸

By and large mainstream American Protestants in the mid-nineteenth century -- Jacksonian, Whig and Republican alike -- embraced self-interest and maximization as economic principles, but abhorred them as ethical principles. Francis Wayland, the anti-Jacksonian President of Brown University, provides a good example. Although he was not a particularly original thinker, he is one of the best mirrors of conservative social thought in America at the middle of the nineteenth century. Wayland fancied himself a kind of American facsimile of Adam Smith. Just as Smith had published his *Theory of the Moral Sentiments* and then his *Wealth of Nations*, so Wayland published his *Elements of Moral Science* in 1835 and his *Elements of Political Economy* in 1837. And just as Smith, Wayland regarded his two books as developing related parts of a single system of social philosophy, one in social ethics and one in political economy.

The principles of political economy, Wayland observed, "are so closely analogous to those of Moral Philosophy, that almost every question in one, may be argued on grounds belonging to the other."⁷⁹ But while Wayland's *Political Economy* was an extended argument for laissez faire, designed to show that self-interest and free trading yields the optimal allocation of economic resources, his *Moral Science* was an extended argument against utilitarian ethics, or the idea that rightness or wrongness of any action should be based on the net value or attractiveness of its consequences. Indeed, Wayland abhorred any notion that morality was related to consequences.

For Wayland, "Right and wrong depend upon the relations under which we are created and the obligations resulting from them, and are in their nature immutable." But this creation was subsequently corrupted by the fall. "[T]hough our first parents were endowed with a perfect moral constitution," he concluded, that constitution had been rendered "imperfect" by the fall, and people thus needed external authority to prevent them from following their baser instincts.⁸⁰

For Wayland, the principal duty of government was to stay out of the economy, but

78. Id. at 306-307.

79. WAYLAND, POLITICAL ECONOMY, note __ at 131.

80. WAYLAND, MORAL SCIENCE, note __ at 100-102.

to intervene where "moral restraint" in the individual left off. Given man's fallen nature, he always had the tendency toward theft, adultery, or other sins, even though God's revelations (through both nature and the Bible) instructed him that these acts were wrong. Government was then needed to supplement moral restraint. As a result, the amount of government a society required depended entirely on the degree of individual moral restraint its members exhibited. If individuals were well behaved, little state force would be needed and the sovereign could maintain order by appealing to conscience. In other situations, however, "[a] people may be *so entirely surrendered to the influence of passion* and so feebly influenced by moral restraint that a government which relied upon moral restraint could not exist for a day."⁸¹ Such a government would have to rely on coercion to ensure its members' moral behavior. "God has rendered the blessing of freedom inseparable from moral restraint in the individual; and hence it is vain for a people to expect to be free unless they are first willing to be virtuous."⁸²

After the Civil War moral philosophy as an academic discipline gradually disappeared from American universities. As American academics began to wrestle with Charles Darwin, ethics became more anthropological, relativistic, and utilitarian.⁸³ But the message of the moral philosophers survived largely intact in the writings of the great Constitutional scholars of the middle and late nineteenth century, and right through the substantive due process era. Their message largely preserved the classical position that on largely individualist principles, the state must stay out of the economy; but on largely communitarian principles, the state should have a relatively free hand in the regulation of morals.

The University of Chicago's Ernst Freund, one of the most astute scholars of state regulatory power, noted this bifurcation in his 1904 treatise on the Police Power. While contracts were the ultimate expression of individual preference, even if idiosyncratic, Freund observed, the maintenance of physical and moral standards "depends upon conditions affecting a considerable number of people alike," and thus justifies the state's role. In fact, this use is the police power in the narrowest sense of the term. "It is a power so vital to the community that it is often conceded to local authorities of limited powers." To this end, economic interests were different than the state's concern with order and morals. To be sure, "Wealth is almost as essential to our civilization as safety, order, and morals; but while these can be secured to a substantial degree by restraint, the acquisition of wealth is based on active efforts; and while systematic restraint proceeds naturally from government, active effort must be chiefly individual." Government restraint in this area

81. Id. at 327 (emphasis in original).

82. Id. at 327.

83. See, e.g., DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991); DONALD MEYER, *INSTRUCTED CONSCIENCE*, note ___ at 123-132.

always operates as either "favoritism or oppression." As a result, "The cultivation of moral, intellectual and aesthetic forces and interests which advance civilization and benefit the community...cannot be a matter of indifference to the state. This domain was formerly left to the church...." Unfortunately, the latter had now lost its authority, and the state had to fill the vacancy.⁸⁴

Freund found three "spheres of activities" subject to the police power. First is a "conceded sphere" involving public safety, order and morals, where the policy power is continually growing. Second is a "debatable sphere" concerning the proper production and distribution of wealth; here, legislation is still in an "experimental stage." Third is an "exempt sphere" of moral, intellectual and political movements where the constitution gives individuals freedom from state control. Importantly, the spheres "may overlap," leading to complex questions. For example, "religion and speech and press are primarily free, but that does not prevent them from being subjected to restraints in the interest of good order or morality." He added that "Very little difficulty has so far been encountered in the mutual adjustment of these interests."⁸⁵

Notwithstanding fundamental similarity in their outlooks, important differences exist between Wayland's position in the 1830s and Freund's at the turn of the century. Freund was much more concerned than Wayland with state infringements that are not well designed to protect the community as a whole, but rather are calculated, paternalistically, to protect the individual from his own self-abuse. Freund noted, for example, that regulation of gambling was lawful as a general proposition, even though it was highly paternalistic, "[P]rotecting the individual from temptation and restraining him from acts, which, while hurtful to him, are not immediately offensive to others, and while of evil example, do not in any way affect any one else's liberty of action."⁸⁶ Freund admitted he would have great difficulty with regulation of liquor consumption if drinking harmed only the drinker himself. But since it was widely known that the damage of drunkenness quickly extends to others and even the entire community, regulation was appropriate.⁸⁷

In sum, from the 1830s to the turn of the century a noticeable shift occurs in the grounds for regulation of morals. In the earlier period a communitarian ethics justified regulation of morals even for vices that produced no obvious victims other than the abuser himself. By the end of the century, however, writers like Freund were noticeably disturbed by state regulation of victimless vices and began to justify such regulation only by finding

84. ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904), quotes from §500 at 537, §10 at 7, §12 at 8, §13 at 9.

⁸⁵ *Id.*, §15 at 11.

86. FREUND, *id.* at §188, at 173.

87. *Id.* at §204, at 192-193.

innocent victims.

Regulation and the Social Contract in Nineteenth Century American Legal Thought

Nineteenth century American moral philosophers wrote about political ideas in a way that later critics regarded as derivative, sanctimonious, or even silly.⁸⁸ Their work is often regarded as a synthesis of unoriginal borrowings from great western political ideas and orthodox biblical proscriptions. The result is that most of what passed for philosophy in the United States before Pragmatism is simply not taken seriously.

Francis Wayland's discussion of the social contract, perhaps the greatest western political idea, provokes just such a reaction. Like most orthodox nineteenth century American thinkers, Wayland's theory of society was contractarian, borrowed mainly from Locke's *Two Treatises of Government* and Puritan covenant theology, which was itself heavily contractarian.⁸⁹

For Wayland as for orthodox moralists generally, however, the vice of the Lockean social contract was the obvious one that it permitted private preferences to define not merely the citizen's rights and obligations in the economic sphere but also in matters of morals. For that reason Wayland regarded the Lockean social contract made by people in a state of nature as naive, and perhaps characteristic only of a "simple society." This original social contract was necessary to facilitate the division of labor essential to prosperity, and to protect property rights. To this point Wayland's social contract was purely economic. But then Wayland noted that modern man was not living in this simple contractarian society, but rather in a more complex "civil society" in which "social contract" was little more than a figure of speech. Although it is sometimes helpful to think of modern civil society as founded on a social contract, said Wayland, in fact it is much more. God himself ordains civil society, and it is founded on his principles. This meant that society was obliged to conform to certain "social laws" notwithstanding that majority vote, or the social contract, might dictate differently.⁹⁰

For orthodox moralists such as Wayland, the most fundamental problem with the

88. See, e.g., HARRY W. SCHNEIDER, *A HISTORY OF AMERICAN PHILOSOPHY* 196 (2d ed. 1963) (placing the period under the general heading of "orthodoxy" and describing most of it as "wormy knowledge."); 1 ELIZABETH FLOWER & MURRAY MURPHEY, *A HISTORY OF PHILOSOPHY IN AMERICA* 203 (1977) ("Whatever the label, this realism is now uniformly regarded as a wasteland of secondhand ideas servicing orthodox Calvinism.")

89. On contractarianism in American Puritan theology, see PERRY MILLER, *THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY* 365-462 (Beacon Press ed. 1961).

90. WAYLAND, *MORAL SCIENCE*, note ___ at 306, 313-314.

social contract is that it gave the community a moral sense only a little greater than that of the individual members. To be sure, the social contract itself served to increase morality somewhat. For example, each person individually would prefer to steal the property of others, but he would also prefer not to have his property stolen, so he enters into a social contract that protects property rights and agrees to have rules imposed upon himself that serve to constrain his own baser instincts.⁹¹ But this in itself was not enough. Since God ordained society, it had to be formed in conformity to his will, and such a society would not come about simply by the mutual bargaining of society's members. This entailed that political leadership be guided, not merely by the voice of the people, but also by moral law and divine revelation.

Thus Wayland's social contract theory "socializes" issues of morality at two different levels. First, the basic principle of self interest that governs all contracting forces participants to insist on community moral standards. In economics, they want free bargaining; but in morality, they want assurance that others will be restrained from exercising the same depraved instincts they feel in themselves. As a result, even the purely economic, self-interested individual bargains for a higher level of state enforced morality than he would exercise himself if given his absolute freedom.

But second, even this higher level of morality is not enough. That society must also be in conformity to God's will. At this point, Wayland strains the contractarian analogy to its limits. Why would self-interested individuals bargain for a society in conformity with God's will? The answer was the same one that Pascal reached in his famous wager.⁹² If the bargainers are all believing Christians who fear the eternal consequences of a god-forsaking society, they will also bargain for a society that lives according to Christian principles. Further, however, although these people would bargain for a moral society governed under Christian principles, they would also realize that their understanding of these principles is imperfect. That would create a further social obligation to study God's revelation and to develop specific social principles in accordance with it.⁹³

For Wayland as for other classical moralists, this perspective on government led, somewhat unpredictably, to innovative and democratic theories of civic responsibility and education. In the early nineteenth century higher education in the United States was still based largely on the "classical" model as offered in the great English Universities, Oxford and Cambridge. Under this system higher education was available only to the elite, and its focus was on the classical languages and theology. But during the nineteenth century America higher education was greatly expanded and made available to a much larger

91. *Id.* at 318.

92. See BLAISE PASCAL, *PENSEES* 233, 418 [c. 1662] (W.F.Trotter, trans. 1958).

93. *Id.* at 322-323.

percentage of people. Further, the curriculum changed away from the classical languages and toward practical knowledge such as science, together with a very strong dose of moral philosophy, civic virtue and social responsibility.⁹⁴

Moral Regulation in the Substantive Due Process Treatise Tradition

Even as they defended liberty of contract and railed against state economic regulation, the classical law treatise writers generally acknowledged that the state's "police power," or general regulatory power,⁹⁵ permitted regulation of those aspects of conduct that were sufficiently "common" that they could not be said to embody the views of any particular sect -- provided, at least, that the sect was Christian. When the apparent purpose of a regulation was moral, state incursions that clearly would have been justified otherwise -- such as the taking of property without compensation -- were approved and even applauded.

Perhaps no legal intellectual symbolizes classical legal thought from Reconstruction to the Gilded Age more than Thomas M. Cooley. His treatises on *Constitutional Limitations* (1868)⁹⁶ and *Taxation* (1876),⁹⁷ and his edition of Blackstone's *Commentaries* (1871),⁹⁸ are three of the Gilded Age's most influential legal texts.

While Cooley's treatise on taxation argued that the sovereign could tax only for

94. See, e.g., FRANCIS WAYLAND, *THOUGHTS ON THE PRESENT COLLEGIATE SYSTEM IN THE UNITED STATES* 115 (1842) (arguing that the central goal of higher education is not learning but building of character). See also HOWARD MILLER, *THE REVOLUTIONARY COLLEGE: AMERICAN PRESBYTERIAN HIGHER EDUCATION, 1707-1837* (1976); and MEYER, *INSTRUCTED CONSCIENCE*, note __.

95. For various contemporary definitions of the "police power" see *Manigault v. Springs*, 199 U.S. 473, 480 (1905) (Brown, J.); COOLEY, *CONSTITUTIONAL LIMITATIONS*, note __ at Ch. 16, esp. at 704-705. And see FREUND, *THE POLICE POWER*, note __ at §8, p. 6, defining the police power as laws that are "not confined to the prohibition of wrongful acts," and justified by the proposition "that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskillful, careless or unscrupulous."

96. COOLEY, *CONSTITUTIONAL LIMITATIONS* (1868).

97. THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS* (1876; 2d ed. 1883).

98. See WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (T. M. Cooley, ed. 1871).

"public purposes," which then must be narrowly defined,⁹⁹ his *Constitutional Limitations* first formalized the strictures on state regulatory power -- or the "police power" -- that we have now come to identify with substantive due process. Cooley's genius was to describe the state's police power as if it were broad, all the while interpreting it very narrowly. Under Cooley's definition, the police power

embraces [the state's] whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others.¹⁰⁰

Like the moral philosophers, Cooley distinguished state regulation of the economy from state regulation of morals. While the former was most generally suspicious, at least if property or contract rights were impaired, the latter was almost always appropriate. For example, although the Constitution's contract clause prevented a state from impairing the obligation of a pre-existing contract on economic grounds, it could do so on other grounds where the good order of the community so required.¹⁰¹

Indeed, Cooley went so far as to approve of temperance statutes that closed down distilleries that were legal when they were built, and without compensation to owners, Cooley conceded:

Perhaps there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful and the capital employed in it being fully protected by law, the legislature then steps in, and by an enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that, for the purposes of sale, becomes a criminal offence; and, without any change whatever in his own conduct or employment, the merchant of yesterday becomes the criminal of to-day, and the very building in which he lives and conducts the business which to that moment was lawful becomes the subject of legal proceedings, if the statute shall so declare, and liable to be proceeded against for a

99. See HOVENKAMP, ENTERPRISE, note ___ at 38-39.

100. COOLEY, CONSTITUTIONAL LIMITATIONS, note ___ at 704 (6th ed.).

101. Id. at 708.

forfeiture.¹⁰²

Such statutes were valid, Cooley believed, notwithstanding his more general position that state protection of private property was a "sacred right" recognized by the Fourteenth Amendment.¹⁰³

Cooley's brief discussion approving Sunday closing laws offers a good insight into his position on economic and moral regulation. On the one hand, Sunday closing laws regulate the hours of labor, just as the ten hour law struck down in *Lochner v. New York*,¹⁰⁴ a decision that Cooley would undoubtedly have approved. On the other hand, unlike the *Lochner* statute, Sunday closing laws are substantially motivated by religious belief. Cooley noted that two sets of arguments had been offered for such laws. The first was that Sunday closing benefits the individual alone in that "one day's rest in seven is needful to recuperate the exhausted energies of body and mind."¹⁰⁵ A second argument was that such laws "require the proper deference and regard which those not accepting the common belief may justly be required to pay to the public conscience."¹⁰⁶ Cooley found the second argument persuasive but not the first.¹⁰⁷ People had liberty to contract for their own hours of labor, and each individual could protect himself from excessive job demands, including Sunday work. But recognition of a public conscience could be achieved only by forcing deference, and this alone was sufficient to sustain Sunday closing laws, just as it was sufficient to justify blasphemy statutes.

Ernst Freund expressed the same conclusions in more secular terms. Freund noted that the "day of rest" argument "implies a recognition of the legislative power over periods of work and of rest in general -- a power which many courts would perhaps be unwilling to concede."¹⁰⁸ However, Sunday closing laws were perfectly justifiable

102. Id. at 719-720.

103. Id. at 436.

104. 198 U.S. 45 (1905).

105. COOLEY, CONSTITUTIONAL LIMITATIONS, note __ at 584.

106. Ibid.

107. However, Cooley also recognized that the argument involved a certain amount of discrimination against those not holding Sunday sacred. For example, "...the Jew who is forced to respect the first day of the week, when his conscience requires of him the observance of the seventh also, may plausibly urge that the law discriminates against his religion...." Id. at 584.

108. FREUND, THE POLICE POWER, note __ at 169.

as an established social institution . . . for the protection of the good order and comfort of the community established and recognized by common custom and convention. As under natural conditions public order has a different meaning in the night time and in the day time, so it has under social conventions a different meaning on Sundays and weekdays.¹⁰⁹

For Freund, however, this raised a problem respecting "business not soliciting public patronage." If the machine shop makes no sales on Sunday but uses its workers to assemble, it is hardly interfering with the peace of the community. In that case, forced Sunday closure can be explained only as protection for workers who are competent to protect themselves, and must be regarded as an "extreme measure."¹¹⁰

Christopher G. Tiedeman was second only to Cooley as an architect of Substantive Due Process in the federal courts. Few legal scholars wrote more forcefully about the need for self-determination and the vice of state interference in liberty of contract.¹¹¹ But where morals were concerned, self-determination quickly evaporated and gave way to communitarian value and a broad concept of externalities.

Indeed, it is hard to believe that there was only one Tiedeman. He wrote in his 1886 *Treatise on the Limitations of the Police Power in the United States*:

A vice . . . consists in an inordinate, and hence immoral, gratification of one's passions and desires. The primary damage is to one's self. When we contemplate the nature of a vice, we are not conscious of a trespass upon the rights of others.... An intimate acquaintance with sociology reveals the universal interdependence of individuals in the social state; *no man liveth unto himself*, and no man can be addicted to vices, even of the most trivial character, without doing damage to the material interests of society, and affecting each individual of the community to a greater or less degree.¹¹²

Nevertheless, Tiedeman argued, "The object of police power is the prevention of crime,

109. Ibid.

110. Id. at 170.

111. CHRISTOPHER TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES* (1886). On Tiedeman generally, see David N. Mayer, *The Jurisprudence of Christopher G. Tiedeman*, 55 *MIS. L. REV.* 95 (1990).

112. TIEDEMAN, *POLICE POWER*, note ___ at 149. See also CHRISTOPHER TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* (1890).

the protection of rights against the assaults of others.... It cannot be called into play in order to save one from the evil consequences of his own vices, for the violation of a right by the action of another must exist or be threatened, in order to justify the interference of law."¹¹³ Although Tiedeman saw difficult philosophical problems in state regulation of vices that caused no injury to others, he did not believe that these problems rose to constitutional status. The legislature must have discretion to decide when a vice was sufficiently harmful to warrant legal regulation.¹¹⁴

Conclusion: Health, Safety, and Morals

Unlike the legal classicists, the Progressives who followed them were statist and regulators. Imbued in the neoclassical economics of the day, they believed that state intervention often made economic markets work better, and that forced redistribution of wealth would increase total social welfare.¹¹⁵ By and large, they were also active regulators of morals, often on grounds that were explicitly Christian.¹¹⁶ Indeed, one of the reasons that Progressives had such increased enthusiasm about economic regulation is that they began to see the distribution of wealth as a moral problem as well as an economic one. Progressive economists such as Richard T. Ely and economist-sociologists such as Edward Alsworth Ross painted vivid pictures of the wealthy as thieves who were robbing society in a much more damaging fashion than the more explicit kind of robber.¹¹⁷

But the Progressive Era Supreme Court continued to be dominated by Justices who for reasons both ideological and political were firmly opposed to most of the Progressive revolution. Nevertheless, even they would approve economic regulation if the

113. TIEDEMAN, POLICE POWER, note ___ at 150.

114. *Id.* at 153.

115. See Herbert Hovenkamp, *The First Great Law & Economics Movement*, 42 STAN. L. REV. 993 (1990).

116. See, e.g., ROBERT M. CRUNDEN, *MINISTERS OF REFORM: THE PROGRESSIVES' ACHIEVEMENT IN AMERICAN CIVILIZATION, 1889-1920* (1982); RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955).

117. See, e.g., EDWARD A. ROSS, *SIN AND SOCIETY: AN ANALYSIS OF LATTER-DAY INIQUITY* (1907), esp. ch. 2, pp. 21-42 (1907), arguing that wealthy entrepreneurs and corporations should be counted as more immoral than the common criminals who injure their victims one at a time. Cf. James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908) (arguing that the common law became increasingly ethical as society became more sophisticated); and RATIONAL BASIS OF LEGAL INSTITUTIONS (John H. Wigmore & Albert Kocourek, eds. 1923).

market at hand were found to be "affected with the public interest." This meant that the Court had identified a qualifying "externality" -- or harmful effect on parties that were not part of the underlying bargaining process. For example, in *Lochner v. New York*¹¹⁸ Justice Peckham considered whether long hours for bakers might have an impact on the "healthful quality of the bread" that they produced. Since bread consumers were not a party to the bakers' wage and hour bargain, regulation might be needed to protect their interests. But finding no such impact, Justice Peckham concluded that the full weight of long working hours fell upon the parties to the labor bargain themselves, and these were adults with constitutionally protected contractual capacity. By contrast, the Supreme Court upheld comprehensive land use planning statutes -- clear and broad infringements of liberty of contract -- because unregulated urban development had numerous harmful effects on persons who could not be included in the bargaining process.¹¹⁹

Under a distinct but overlapping rationale, regulation was also permissible if it pertained to the "health, safety, or morals" of the community. That triumvirate of terms was used dozens of times by Supreme Court majority's to justify relatively substantial encroachments on liberty of contract, or by dissenters to complain that a particular statute should not have been condemned.¹²⁰

118. *Lochner v. New York*, 198 U.S. 45, 57, 62 (1905).

119. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391-394 (1926). On the substantive due process Court's use of externalities to permit regulation, see HOVENKAMP, ENTERPRISE, note ___ at 199-205.

120. Among the numerous decisions in the Supreme Court, see, e.g., *Treigle v. Acme Homestead Assn.*, 297 U.S. 189, 194 (1936); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 304 (1932) (Brandeis, J., dissenting, statute should have been upheld on public welfare grounds other than health, safety, or morals); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (Butler, J., dissenting, police power should be limited to statutes that appropriately regulate health, safety or morals); *Nectow v. Cambridge*, 277 U.S. 183, 187 (1928) (requiring that regulation have a "substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense"); *Adams v. Tanner*, 244 U.S. 590, 593 (1917) ("there is nothing in the nature of the [regulated] business ... that in any way threatens or endangers the public health, safety, or morals."); *Rast v. Van Deman*, 240 U.S. 342, 348 (1915); *Tanner v. Little*, 240 U.S. 369, 372 (1915); *Coppage v. Kansas*, 236 U.S. 1, 16 (1915) (striking down statute forbidding employers from requiring employees to sign promises that they would not join unions; finding no relationship between the act and the "public health, safety, morals, or general welfare."); *Austin v. Tennessee*, 179 U.S. 343, 349 (1900) (upholding a statute restricting cigarette sales as bona fide regulation of health, safety or morals, or the abatement of a public nuisance); *Lochner v. New York*, 198 U.S. 45 (1905) (concluding that bakers' hours' statute could not be sustained "as a valid exercise of the police power to protect the public health, safety, morals, or general welfare."). See also *Holden v. Hardy*, 169 U.S. 366, 391 (1898) (reviewing older decisions); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting) (objecting that regulatory statute cannot constitute a taking under

In *Muller v Oregon*,¹²¹ then attorney Louis Brandeis had the daunting task of convincing the Supreme Court to approve a ten hour statute for women laundry employees only three terms after it had struck down a similar provision for men in *Lochner*. Brandeis and Josephine Goldmark accomplished this with their famous "Brandeis Brief" of social science evidence justifying such regulation and available to the legislature at the time it acted.¹²²

First, Brandeis showed how women's position as mother and principal care taker of children justified increased state solicitude. Since "like begets like," tired and physically wasted mothers would burden society with the increased obligations and reduced benefits of weak and mentally inferior offspring.¹²³

But Brandeis also argued that the women's hour regulation really belonged in the category of regulation of morals rather than mere economic regulation. The table of contents of the Brandeis Brief went straight through the established litany, with separate sections on the general "Bad Effect of Long Hours on Health," on Safety, and on Morals.¹²⁴ Then followed a separate section, with the same three divisions, on the particular effect that employment in laundries had on health safety and morals.¹²⁵ On morals Goldmark and Brandeis wrote that "When the working day is so long that no time whatever is left for a minimum of leisure or home-life, relief from the strain of work is sought in alcoholic stimulants and other excesses." They then quoted from a Massachusetts legislative report and a U.S. Senate Committee report to the effect that long working hours led to alcohol abuse, which in turn led to unhealthy and undisciplined children.¹²⁶

Fourteenth and Fifth Amendment if it is designed "to protect the public health, safety or morals from dangers threatened").

121. 208 U.S. 412 (1908).

122. Louis D. Brandeis, *Brief for Defendant in Error, Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), reprinted in 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 63 (P. Kurland & G. Casper eds. 1975). See also David P. Bryden, *Brandeis's Facts*, 1 CONST. COMM. 281 (1984). Goldmark was a labor activist and Brandeis' sister-in-law. She was very likely the actual author of the Brandeis Brief.

123. BRANDEIS BRIEF, note ___ at 50-51.

124. *Id.* at 28-42, 42-44, 44-46.

125. *Id.* at 28 (health), 42 (safety), and 44 (morals).

126. *Id.* at 44.

Brandeis' brief illustrates how different the Progressive view of economics and morals was from the classical view. For the classicist, the world of economics and the world of morals were sharply divided, one dealing with post-fallen mankind's own wishes, and the other with obligations to the maker. By contrast, the Progressives secularized both morals and economics and found the gap between the two to be both exaggerated and bridgeable. Morality itself became identified with its economic consequences. Further, and decisively for the Progressive, both markets and morals became essentially communitarian rather than individualistic institutions, and the State appropriately had a hand in both.