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LAWRENCE M. FRIEDMAN

LAW IN AMERICA

A Short History

A MODERN LIBRARY CHRONICLES BOOK

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The earliest state constitutions are earlier than the federal Constitution, and had some influence on it. Since then, the influence has flowed the other way. Each state constitution more or less follows the general *pattern* of the federal Constitution. They all set out the basic scheme of the state government. They all contain a bill of rights. But they are much more brittle than the federal Constitution—and they lack its charisma entirely. Some states have made do with a single constitution; others have molted them from time to time. Louisiana, the champion, has had ten or eleven constitutions, depending on how one counts. The state constitutions are also amended much more frequently than the federal Constitution. Here the champion seems to be the current Georgia constitution, with over 650 amendments.

Note

1. Clifford Lindsey Alderman, *Colonists for Sale: The Story of Indentured Servants in America* (1975), pp. 74–75.

THREE

Economy and Law in the Nineteenth Century

The general idea behind this book is that American law is a reflection of what goes on in American society in general. The reflection may not be exact: it may be like the reflection of a face in a slowly moving river, that is, somewhat refracted and distorted. But it is a reflection nonetheless. In this chapter, we will look at this relationship between law and society in one critical area, law and the economy—that is, law and the business of making a living and distributing goods and services in society.

ECONOMY

Most people think of the nineteenth century as the age of laissez-faire, a period in which government did as little as possible. The economy was left to function on its own. The free market ruled. There is a lot of truth to this, but it is not the truth, the whole truth, and nothing but the truth. In fact, government and law had a critical role in the economy. Some aspects of that role were basic, so basic that people tended to take them for granted. They took for granted, for example, the idea of private property—in land, in commodities of all sorts. They took for granted the institution of *contract*: the right to buy and sell, to make agreements, with the understanding that the force of law stood behind these agreements.

Government intervened in the economy, or supported it, in other ways as well. Of course, when we say "government," we are not thinking of the huge Leviathan of today—a national government that raises billions and billions of dollars and has millions of employees; and state governments that are of enormous size on their own. The budget of a medium-sized city—Wichita, or Milwaukee, or Birmingham—is un-

doubtedly bigger than the whole national budget in the early nineteenth century. It is important to debunk the myth of total laissez-faire; but once this is done, it is equally important to see that the role of law and government in the nineteenth century was very different from what it is today.

Undoubtedly, the early nineteenth century was a boom time. Or, more accurately, boom and bust; but the booms outweighed the busts. The gross national product rose steadily during the period. Agriculture was still the main business of Americans; but manufacturing was already coming on strong in the first half of the century. Population was growing rapidly as well—the three millions of 1790 had grown to 31.4 millions by 1860. Much of this growth was due to immigration: 8,000 people entered the country in 1820, 369,000 in 1850.

What activities of the citizen were subject to legal, state-enforced rules in this period, and which were not? What spheres were "free" and which were not? And, perhaps most important, what did it *feel* like? Did people *feel* free? Freedom is not an absolute; it is something relative, and it is also quite subjective. Consider, for example, that twentieth-century miracle, the automobile. Now that most people have cars, they have opportunities that were denied most people in the past. They can live, work, travel in ways that expand their horizons. In this sense, the automobile makes an enormous contribution to "freedom"; it carries the priceless gift of mobility. It provides a kind of "freedom" that the nineteenth century could hardly dream of. Yet the automobile also generates a tremendous volume of law—a mass of rules about roads, traffic, driver's licenses, all of which regulate and restrict and set limits. You never needed a walker's license to walk, or a rider's license to ride a horse, or to pull a cart. Do these automobile rules mean that people are less free today than they were before the age of the automobile? This ques-

tion is impossible to answer; but one thing is clear, the mere fact that people are subject to more *rules*, more *law*, does not make them less free. In any event, it is hard to compare across centuries. Nobody in 1850 had a telephone; it was not part of the market basket of goods. Nobody in 1900 could travel across the country by airplane. Nobody in 1920 had a computer. But nobody feels the lack of something that doesn't yet exist.

In any event, in the nineteenth century, law-government was much more peripheral than it is today; and government did much less regulating. Its main aim was *promotional*; to enact laws to help the economy grow. This seems banal—today, it seems perfectly clear that this is something a government should do. It has a duty to promote the economy, do something perhaps about unemployment or the business cycle, or the money supply. But it was far from obvious in the past. The feudal kings had no such notion. They were mostly out for themselves. "Promotion," or, in the trenchant phrase of Willard Hurst, a noted legal historian, the "release of energy," is tied closely to the idea of progress—the idea that history is marching in a particular direction; that things are supposed to get better, richer, more modern, more complex.

In any event, regulation, though mostly promotion, was greater than most people imagine. William Novak, in his book *The People's Welfare*, has explored a world largely lost to our view. This is the nineteenth-century world of governmental action—the many rules and regulations about quarantines, safety, use of land, and the like, mostly on the level of the states, during the course of the nineteenth century. And the states were where most of the action was—the states and the cities. The health regulations of New York City in 1860 were numerous enough to fill a whole volume. The Sanitary Code, by 1872, had 181 provisions, dealing with

everything from alcoholic spirits through "yarding cattle."[1] Today we tend to look at government regulation from the lens of Washington, D.C., and the national Congress and president. Washington is the central city of a huge metropolitan area. It is full of huge, imposing buildings of marble and stone, home to the great agencies and departments. But in the nineteenth century Washington was a muddy, humid village. Members of the Supreme Court, for example, never lived there; they came, stayed in boarding houses, did their business, and went home as soon as they could. The bureaucracy was tiny. Nobody expected much out of the central government—or wanted much. The national government was like the brain of a dinosaur: an insignificant mass of neurons inside a gigantic body.

What did government—state and national—do to promote the economy? Some things were completely basic: a functioning court system, protection of property rights. Beyond this, government was concerned above all with creation of *infrastructure:* with those institutions that made economic growth possible. You cannot get goods to market without roads, canals, bridges, ferries, and (later) railroads. You cannot open up new country and settle the west without paths through the wilderness. Then there is the invisible infrastructure: money, credit, banks. How much the government should go into the banking business, or regulate it, was a matter of controversy; especially on issues of national banking. But there was less argument over helping build pathways for people and goods. There was heavy government aid to canals, turnpikes, and the like. The national government had very little in the way of money, but it had land to burn. It used land grants to stimulate the economy—grants to states for educational purposes, cheap land to settlers. The national government also gave away land that was worthless in its present state, to those who would put it to productive use. For example, a law of 1850 granted to the State of Arkansas all the "swamp and overflowed lands" that were "unfit . . . for cultivation." The state was to sell the land and use the proceeds to "construct the necessary levees and drains." The act gave the same privilege to other states with swamp lands.[2] Ultimately, almost 64 million acres were turned over to the states.[3] In general, the vast treasury of land was to be used, not primarily to raise money (though this was certainly not ignored), but to help develop the land, to help get it into the hands of people who would make it productive. The government also used land grants as rewards for service—the very next statute in the federal statute book, after the swamp land act, granted land to widows and children of "deceased . . . officers, musicians, or privates," who served in the War of 1812, or the "Indian wars," or the war with Mexico. For those who served nine months or more, the grant was 160 acres; for those who served less, there were lesser amounts.[4]

But above all, land grants and other subsidies went to build railroads, canals, and turnpikes. State and local governments floated bonds to help in construction; some states actually bought stock in railroads, all states tried in all sorts of ways to stimulate networks of communication. The Panic of 1837, one of the periodic calamities that overtook the economy, was something of a turning point; it soured many states on the whole idea of investing state money in private businesses, or in owning or running railroads. Five states defaulted on interest payments. After 1842, many states, including Ohio and Illinois, passed laws to forbid the state from lending money to enterprises of internal improvement; Michigan, Indiana, Ohio, Iowa prohibited the state from owning stock in companies. Pennsylvania and Tennessee abandoned their programs and sold off their interests in businesses. Experiments with state ownership of railroads came to a screeching halt. The national government, on the other hand, did not give up on

the idea of helping private promoters of railroads; later in the century, it gave out thousands and thousands of acres, to help build up a railroad net. It granted land to promoters who promised to build railroads across the arid, forbidding wastes that separated the middle west from California and Oregon. The idea was that the promoters would sell the land, and use the proceeds to finance the roads.

The states tried to support enterprises in a variety of ways. For example, up until 1830, lotteries were commonly used. There also was a good deal of foreign investment—chiefly French and English. Then there was the law itself. This is a more difficult and subtle proposition—and one on which all scholars do not agree. If a state passes a law giving money to a railroad, that is a fairly obvious way of supporting the enterprise. It is much less obvious if a court shifts a doctrine slightly, or casts an old principle in a new light—and the net result is to tilt the scales a bit more toward the needs or wants of an enterprise. If this happens often enough, it can hardly be random or accidental. On the other hand, it need not be conscious, cold-blooded policy—American law was strongly pro-enterprise, but I suspect that most judges thought they were simply doing the right thing, and even the legal thing. They were men of their times, and they were responding to the norms of their times—to the hidden voices of the zeitgeist.

The early nineteenth century made a sharp distinction—not always explicitly—between property that was put to productive use and property that was lying fallow or was unproductive. People distinguished between "monopolists" and land speculators (who simply bought land and held it waiting for a rise in land values); and the good citizens who cleared land, built houses or stores, planted crops, or in some other way made the land productive. In a way, it is a conception of property "in motion" as opposed to property at rest.

Policy favored *dynamic* property, not static property. English law had had the habit of protecting vested rights—in particular, the rights of those men and women who owned great landed estates. American law took a sharp turn away from this position. The laws strongly favored doers, not holders; the active farmers, merchants, builders of roads and canals, not men who simply owned or held on to property.

One can make a similar point about the development of the law of *negligence*. The law of torts was one of the great growth fields of the nineteenth century. Torts are "civil wrongs," as opposed to criminal wrongs. The state prosecutes people who do criminal wrongs. Private individuals can sue for damages, against a "tortfeasor," that is, someone who has done them a noncriminal wrong. The law of torts is a sort of ragbag—it includes actions for libel and slander, trespass to property, and a number of other (minor) infractions of good order. But the vast majority of tort actions, from the nineteenth century on, were actions for "negligence," actions that came out of accidents, in which the plaintiff complained about some action that injured his body or his property. Actions of this sort are as old as Hammurabi and probably older; but they never amounted to a significant part of the law until the Industrial Revolution. Nothing does a better job of mangling human bodies than machines. Railroad locomotives, belching fire and steam, and racing through the countryside, were a tremendous source of injuries and deaths. They were among the earliest of the truly deadly machines. The steamboat was another. Steamboat boilers caused terrible injuries, as they exploded on board the boats; these calamities burned, scalded, and drowned victims by the hundreds. The explosion on the *Sultana*, a sidewheel steamboat, on April 27, 1865, killed more than 1,700 people—most of them former prisoners of war, on their way home from southern prison camps.[5]

Victims, under nineteenth-century doctrine, could recover

if they could show that the railroad or steamboat company was "negligent." This meant proving, in some way, that the defendant did not live up to the reasonable and normal standard of care. In a way, it seems illogical to force the plaintiff to prove the defendant was negligent. If X does something that breaks Y's bones, the loss is going to fall either on X or on Y. Since, after all, X did whatever it was that caused the loss, why not make him pay, rather than let poor Y bear the burden. This is certainly one possible way of handling the situation—this would be called "absolute liability." It is exactly what the law did in the case of freight. If I shipped packages on a railroad, and the goods were lost in a wreck, the railroad would simply have to pay; and it would be no defense at all for the railroad to argue that it was not "negligent." But if a *person* died in the same wreck, or lost an eye or a leg, that person or his family could not get a cent out of the railroad unless they could show that the railroad was "at fault," or careless in some way. The upshot was to insulate the railroad from liability, except when the passenger could show that some norm of safety had been violated. And there was also in the background the idea that accidents do happen, that enterprises inevitably cause harm—you can't make an omelette without breaking eggs—and that this was the price of progress.

It is often said that there was a shift from strict liability to a moralistic "fault" principle in the first half of the nineteenth century. There was, in fact, a fault principle, but it was hardly moralistic. It was not a question of morality at all, but a question of where to place risks of loss. And it is not really accurate to talk about a shift from strict liability; rather, there was a shift from *no* liability—from an absence of rules and cases—to a period in which tort cases sprouted like weeds between the cracks of an emerging industrial system. It was no surprise that the law favored railroads and other entrepreneurs.

The defendants in negligence cases—railroads for example—were those who were "in motion," in a manner of speaking, rather than those who were at rest (metaphorically, anyway: railroad passengers were certainly moving pretty fast). The defendants were the entrepreneurs, the doers, the bringers of wealth. And the law tilted toward these people, as opposed to the ordinary citizen. Was this because of the influence of the wealthy and powerful? Possibly; but in this period, quite ordinary people—farmers, for example—were desperately anxious for railroads to get built, and eager for them to prosper. The railroads were their lifeline to the market. They needed some way to move their produce to the cities. The developmental thrust of American law was thus everywhere in the law. It showed itself in the rules that favored railroads. It showed itself in tort law in general. It showed itself in land law, and in attitudes toward the public domain. It was, in short, almost ubiquitous.

In *Farwell v. Boston & Worcester Railroad Co.*, a Massachusetts case from 1842,[6] a railroad employee named Nicholas Farwell suffered a terrible injury on the job. Farwell was a railroad engineer; one day, a switchman allowed a train to run off the track; Farwell was thrown to the ground, and a wheel of the car crushed his hand. He sued the railroad, claiming that the negligence of another worker was the cause of his injury. It was a new kind of case (a case of "first impression") in Massachusetts. But Farwell's lawsuit rested itself on an old, established principle: if an agent (a servant or employee), on the job, does something that harms somebody else, that somebody could sue the principal (the master or employer), because the principal is generally responsible for acts of the agent. As an old maxim put it, what you do through somebody else is as if you did it yourself. The only wrinkle in the *Farwell* case was that *both* the man who did the damage and the man who suffered the harm were employees of a single com-

pany. The judge, Lemuel Shaw (one of the most able judges of the first half of the century and, incidentally, Herman Melville's father-in-law), refused to allow Farwell's claim. There was skimpy precedent—one English case; and a case from South Carolina.[7] But Shaw was not terribly interested in precedent—at least not in this particular instance. He felt that Farwell's agreement with the railroad, his wage contract (at $2 a day), included a kind of premium for dangerous work—otherwise (Shaw felt) the pay would be less. In any event, the case established the so-called fellow servant rule: in essence, that one employee could not sue the employer if the injury was the result of the negligence of a fellow employee (a "fellow servant"). Other states soon climbed on this particular bandwagon. The result was, in effect, to insulate entrepreneurs from injury claims brought by their workers. As for maimed or mangled railroad workers, well, they would have to shift for themselves.

To the modern reader, this seems incredibly callous. Especially so, in that there was no social safety net to speak of: no government programs of relief, unemployment, health insurance, and so on. Private insurance hardly existed; and in any event, men like Nicholas Farwell could not afford it. Public charity was the poorhouse: miserable, stingy, regimented, degrading, and almost as bad as imprisonment. Farwell and his family almost certainly faced a bitter and wretched future, unless family or friends or a church could come to the rescue. But the lack of a social safety net, paradoxically, makes the case less callous than it seems. Life was cruel and capricious—in general. The farmer, the merchant, the laborer—all were at the mercy of chance calamities, crops destroyed by weather, banks that failed, ships that sank, diseases that struck down breadwinners. Noncompensation was the general rule, not the exception. What happened to Farwell was, in Shaw's words, an "accident," that is, a chance event, bad luck, something that simply occurs; and accidents, like the one that befell Nicholas Farwell, were the common fate of thousands of women and men in all societies. Accidents must rest, as Shaw put it, where they first fell. In this case, the accident first fell on poor Nicholas.

When we come to judge the case, we should also remember that most people, at the time, were not landless workers, workers in factories and railroads, like Nicholas Farwell. Most people were farmers or lived on farms, or in small towns, and they desperately wanted railroads to be built, as we said. At the time of the *Farwell* case, it was most definitely in the interests of farmers, small merchants, and almost everybody to stimulate enterprise, and particularly railroads. Once the investments were made, and there was a fully functioning railroad net, the situation altered, and attitudes changed dramatically. The railroads, in one short generation, became villains, the octopus, the dreaded monopoly that held the farmer and the small merchant in its iron grip. But that story lay in the future.

The *Farwell* case, and others like it, tilted the scales of the law toward enterprise—toward railroads, in particular. What lay behind this decision? Were Shaw and the other judges simply following "the law"? Was their decision based on traditional legal principles and logic? It is hard to make this argument. For one thing, as Shaw himself admitted, it was a new case, one that had never come up before in Massachusetts. Was his decision a conscious attempt to help out the railroads? Shaw was, after all, a shrewd judge, supremely intelligent, and aware of the consequences of his acts. Did he set out, deliberately, to "subsidize" the railroads with rules slanted in their direction? This sounds, on the whole, too calculating. Of course, it is impossible to read a judge's mind. And legal opinions are much too formal, too opaque to tell us what goes on underneath the surface. What does seem clear is

that the prevailing ethos of the times favored rapid growth, enterprise, the release of creative (economic) energy;[8] and judges, who are human beings of their times, pushed consciously or unconsciously in the policy direction that the spirit of the age made them comfortable with. Whatever Shaw had in his conscious or subconscious mind, the decision was in line with the flow of doctrine in the first half of the century: it favored enterprise, especially the railroads, and gave them what Shaw must have felt was some sort of protection from the dangers of accident litigation.

The period between the Revolution and the Civil War was a period of tremendous growth in business, commerce, industry. Agriculture was still king. But between the end of the Revolution and 1801, the states issued charters to some three hundred corporations. Most of these were infrastructure corporations: turnpikes, toll bridges, ferries, railroads; some were banks and insurance companies. Some were water supply companies. Transportation definitely came to dominate the business of chartering corporations. In Pennsylvania, there were 2,333 business corporations chartered by special act between 1790 and 1860; almost two thirds of them were transportation companies; the rest were in insurance and banking, gas and water companies; only 7.7 percent were manufacturing companies; but this was of course the wave of the future.

The corporation of the early nineteenth century was in many ways different from the corporation of today. Today, forming a corporation means very little more than filling out some forms and mailing a fee to the state capital. But at one time corporations were chartered one by one; each charter was a separate act of the legislature. Charters were custom-crafted. Not all of them had limited liability; not all of them gave perpetual life. They often contained quite precise specifications. For example, a charter to build a railroad might set out, in great detail, where the railroad would begin and end. The Georgia legislature, in 1857, issued a charter to the "Ocmulgee and Altamaha Steam Navigation Company," and "empowered" the company to carry passengers and freight "between the cities of Savannah and Macon, or on any of navigable waters in the State of Georgia, or between said city of Savannah and any Atlantic port."[9] The corporate charter of today is broad and sweeping; it basically authorizes the company to do whatever it wishes, whenever it wishes, in whatever business it wishes. A pizza parlor, incorporated, can decide to close the restaurant and open a shop selling Christmas tree decorations; or start a software business. But the Ocmulgee steamship company had to stick to exactly what the legislature specified; anything else would be "ultra vires," that is, beyond its powers. Any change would have to come from the legislature.

A NOTABLE INSTANCE: THE CASE OF THE CHARLES RIVER BRIDGE

In 1785, the state of Massachusetts issued a charter authorizing a group of businessmen in Cambridge, Massachusetts, to build a toll bridge over the Charles River. The bridge was built, and went into operation; in fact, it was enormously profitable. But in 1828, the Massachusetts legislature chartered another company to build another bridge, quite close to the toll bridge; *this* bridge was supposed to charge tolls for only six years; after that, the bridge would become a free bridge, and the property of the state. The owners of the Charles River Bridge, naturally, protested; the free bridge was bound to destroy the value of their investment. They brought

a lawsuit to stop the bridge, and after a long journey, winding its way through the courts, the case ended up before the United States Supreme Court.[10]

There, too, it had a rather lengthy history. The case was first argued in March 1831. The Court was unable to agree; and ordered the case continued. A motion for reargument was accepted by the Court in 1833. In July 1835, Chief Justice John Marshall died; another justice also died, and still another resigned. The case was finally reargued and decided in 1837, under the new chief justice, Roger Brooke Taney. By this time, the second bridge had become a free bridge; and the old Charles River Bridge had become essentially worthless.

Chief Justice Taney wrote the main opinion, turning down the claims of the Charles River Bridge company.[11] There was also a dissent, written by Justice Joseph Story. Taney's opinion, in majestic and sweeping prose, rejected the arguments advanced by the owners of the Charles River Bridge. Their key point was this: essentially, by giving them the right to build the bridge, the legislature promised not to charter another bridge that would wipe out the value of their investment. No, said Taney, the first charter said nothing *explicitly* about any such promise; and he refused to read the promise into the charter. At the end of his opinion, he delivered himself of a long paean of praise to progress, science, modernity. Old ways, old franchises, had to give way to the new.

Story, for his part, argued that, indeed, a promise not to build a competing bridge was necessarily *implied* in the charter. Why would anybody invest in bridges or any other risky enterprise, under a charter, if the legislature could make the charter worthless? Interestingly, Taney and Story shared many values and assumptions. Both believed in progress, in fostering and encouraging enterprise. The dispute was over means, not ends. Once more we see that the sacredness

of property has to be taken with a grain of salt. Once again, the new, progressive, dynamic property—the new bridge—trumped the rights of the old bridge. And attitudes toward "enterprise" were not the same as attitudes toward *corporations* or other entities that held franchises, which were in effect little monopolies. These, like the old bridge, were less favored than forward-looking enterprise.

The old bridge, with its bothersome tolls, stood in the way of progress. But opposition to *this* kind of monopoly is not the same as the opposition to the "trusts" and giant corporations of the later nineteenth century. The problem of the old bridge was not that it crushed the little guy, but that it stifled growth. This was the same charge leveled, for example, against land speculators. These speculators never, of course, intended to keep the land for themselves—they were not intent on building up great "estates." Their crime was that they kept land fallow, waiting for a higher market; and that they frustrated the passions of the settlers who pressed forward inexorably toward the west.

Technically, the Charles River Bridge case turned on the meaning of the so-called contracts clause of the Constitution. The federal Constitution provides that no state can pass any law "impairing the obligation of a contract." Exactly what this meant was not always clear; but at core, the clause was probably intended to make it impossible for states to interfere too much with the rights of creditors. The clause was extremely important in constitutional litigation in the first half of the nineteenth century; it was especially invoked when state governments, during the periodic downturns in the business cycle, the panics and crashes that plagued the economy, tried to help out people in debt. It was a clause about the relationship of government and the economy, particularly in times of great financial uncertainty. A number of crucial cases, in

the United States Supreme Court, turned on whether or not states could pass insolvency laws, and of what sort; or about debtor relief laws of various types.[12]

Fletcher v. Peck (1810)[13] was a landmark case on the meaning of the contracts clause. In 1794, the Georgia legislature sold an enormous chunk of land (about 35 million acres) to a group of land companies, for a bargain price. The companies had smoothed the way for the deal by bribing almost every member of the Georgia legislature. In the next election, the rascals were thrown out, and a new set of legislators came into office; they promptly repudiated the deal. Meanwhile, not surprisingly, the land companies had resold millions of their ill-gotten acres, to buyers who were supposedly innocent. The Supreme Court held that the new Georgia legislature lacked the power to undo the land sale—despite the fraud. The grant of land, said the Court, amounted to a contract between the state and the grantees; and the legislature had no right to "impair" this contract. In *Dartmouth College v. Woodward* (1819)[14] the Supreme Court went a step further. Dartmouth College had been chartered in 1769. In 1816, the legislature passed laws that revised the charter, and changed the way the college was to be run. This was done for political reasons—mainly to get rid of the old trustees. The old trustees protested, on behalf of the college, and John Marshall's Supreme Court agreed with them. The original charter was a kind of "contract" between the state and the college, and later legislatures had no power to change it.

Not many people cared very much about the fate of this small college in New Hampshire. This was, on the surface, a strictly local affair. But Dartmouth College was a corporation—to be sure, a nonprofit corporation—and it had a charter. The logic of the case applied to all corporations, including banks and business corporations, since they all had charters from the state. The decision meant, then, that charters were sacred:

once granted, the state had no power to "impair" them. In practice, it proved rather easy to get around the Dartmouth College doctrine: legislatures simply inserted, into *new* charters, the right to alter or amend them; this right then became part of the "contract." Still, there was an important principle and issue in the case—it was, in a way, a sister issue to the issue in the Charles River Bridge case. The issue was how far the state could go in interfering with property rights; and how far it *should* go in guaranteeing a favorable climate for enterprise.

Thus, as we saw, the law in action reflected the general culture; and that general culture was a culture of enterprise, of growth, of progress. But where there is enterprise, there is also risk, where there is risk, there is failure; and failure was epidemic in the nineteenth century. There was, as we noted, no social safety net; yet there *was* a social demand, especially during hard times, for relief, for security, for help for those who faltered. The whole point of the "contracts clause" was to prevent states from going too far in helping out debtors. All states passed laws that protected at least *some* basic items from the clutch of creditors. During most of the century, there was no general bankruptcy law; but there were state insolvency laws, and schemes of one sort or another to save the victims of the volcanic eruptions of the business cycle.

The basic problem was both cultural and economic. There was a shortage of hard money in the country, no real banking system in the modern sense; yet the whole structure of enterprise floated on a sea of credit. Businesses sold on credit and bought on credit. Merchants borrowed money from banks, or from their suppliers; they sold to customers, who in turn owed them money to pay for what they bought. When one link in the chain began to weaken, there was trouble up and down the line. When the customer failed to pay, the merchant was hard-pressed to pay his suppliers; and this squeezed them

as well. Credit problems were the economic side of the problem. But the need for credit was so very great because of a culture of risk-taking and optimism; a culture that encouraged men (and mostly men) to go into business, to be their own bosses, so that thousands of "farmboys, clerks, and young mechanics" leaped impetuously "into the commercial fray on their own financial responsibility."[15] A few of these entrepreneurs struck it rich; most either barely survived—or sank underneath a load of debt. It was also a culture of second chances. Imprisonment for debt was abolished. In its place came laws that wiped the slate clean, and let a failed businessman start over, if he could.

Notes

1. William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1996), pp. 198–200.
2. 9 Stat. 519 (act of Sept. 28, 1850).
3. Benjamin Horace Hibbard, *A History of the Public Land Policies* (1965), p. 275.
4. 9 Stat. 520 (act of Sept. 28, 1850).
5. Gene Eric Salecker, *Disaster on the Mississippi: The Sultana Explosion, April 27, 1865* (1996).
6. 45 Mass. (4 Metc.) 49 (1842).
7. The English case, quite famous, was *Priestley v. Fowler*, 3 M. & W. 1 (Ex. 1837); the South Carolina case was *Murray v. South Carolina Railroad*, 36 So. Car. L. (1 McMul.) 385 (1841).
8. The phrase, as we noted before, comes from James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956), especially chapter one, "The Release of Energy."
9. Laws Ga. 1857, pp. 81–82.
10. The case is discussed in Stanley I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (1971).

11. *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 11 Pet. 420 (1837).
12. *Sturges v. Crowninshield*, 4 Wheat. (17 U.S.) 122 (1819); *Ogden v. Saunders*, 12 Wheat. (25 U.S.) 213 (1827).
13. 6 Cranch (10 U.S.) 87 (1810).
14. 4 Wheat. (17 U.S.) 518 (1819).
15. Edward J. Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (2001), p. 50.