6

Constitutional Rights

The focus of this book is on the nature, content, and functions of the state police power. Stripped to its essence, we can think of the police power as the foundation of regulatory authority and public governance in the states of the United States. It is a necessary condition for the government to act in order to protect health, safety, morals, and public welfare. Conceptually, we can understand the state police power as a source of authority distinct from external limits of that power, whether in the form of structural restraints of conditions, such as the separation of powers or individual rights. In the previous chapter, we focused on structural limits, including separation of powers and similar restrictions. In the next chapter, we will discuss internal constraints to the police power's exercise. In this chapter, we discuss what many perhaps associate with the main limits on the state police power, and that is individual rights. This book is not intended as a treatise detailing comprehensively the police power's interpretation in court, and so we will not run through each and every salient constraint in both federal and state constitutional law on the exercise of the power. Rather, we will look at the issue of rights at a higher level of generality in order to better illuminate the nature and substance of the modern police power. We want to look at the way in which rights constrain the police power's exercise so as to better illuminate the underlying logic and function of this power. After all, our preference for a broad or narrow approach to interpreting the police power may well turn on our confidence in the role of rights in regulating the exercise of these powers and, moreover, the willingness of federal and state courts to enforce these rights so as to limit excessive regulations. So we ask this: How does a general assessment of rights fold into our general view about the nature and scope of the state police power?

CONSTITUTIONAL RIGHTS AS TRUMPS

It is an elementary, and essential, point of our American scheme of constitutionalism that the power of government is limited by those rights embodied in the relevant constitution. There may well be other fundamental restrictions – such as, for example, the requirement that the federal government can act only in accordance with its

enumerated powers – but rights constraints are the most conspicuous, and also the most contestable, sources of limits on the exercise of power. Alexander Hamilton viewed the inclusion of a bill of rights as unnecessary,[1] given ubiquitous, structural limits of the exercise of governmental power, but ultimately his faith was viewed as overly optimistic. Madison succeeded in convincing his fellow delegates to include a slate of rights as part of our US Constitution.[2] The rest, as the old saying goes, is history, as individual rights have come to be defined, interpreted, and ultimately expanded in the 200-plus years since the adoption of the document.

In their original form, these rights constrained only federal power.[3] They came to constrain state and local power as well, first through the explicit protections wrought by the Reconstruction amendments and, in the next century, by the steady incorporation of (most of) the bill of rights to the states.[4] While there are very few generalizations we can make about the contours of individual rights under the US Constitution, we can say that the courts have never regarded the police power as in any way a source of authority protected from the commands of the Constitution and its prohibition on unconstitutional action. That the police power may not be permitted to trample on an individual's right is at the core of what it means to say that the constitution is fundamental law.

This generalization is of limited practical consequence, however. The question that looms conspicuously in constitutional adjudication is how interventionist or deferential the courts should be in examining governmental actions where constitutional questions are raised. The answer to this question has evolved over more than a century as various approaches to judicial review have evolved. The nineteenth century was reflective of a time where rights-based review looked fairly unfamiliar and deference was the norm. Invalidation of state statutes and acts of Congress were rare. Without saying so explicitly, the federal courts' approach could be captured well by the views of various legal giants of that era, such as Oliver Wendell Holmes, James Bradley Thayer, Benjamin Cardozo, and Learned Hand, diverse thinkers all, but with views that saw the judiciary's role as quite limited to correcting clear judicial error.[5]

Significantly, the Supreme Court intervened in a number of cases in the twenty-plus years that marked the Lochner era. This efflorescence of judicial activism represented a very new approach to assessing and protecting certain individual rights under the US Constitution. In an earlier chapter, we looked closely at the Lochner era and the experience of the Supreme Court in invoking novel, and ultimately unsuccessful, limits on the state police power. Without repeating here the debates over whether and to what extent Lochner era jurisprudence aspired to invent a brand new species of individual rights – economic liberties, protected through some notion of substantive due process – or else was a conventional rendering of what legal historian Ted White has called "boundary picking,"[6] we saw that the federal courts would persist, even after Lochner's demise, in giving a close look to police regulations to ensure that they were not implicating the Constitution's fundamental rights or targeting what the Court would come to call a "suspect class."[7]

As constitutional rights became, in the 1950s and onward through the Warren and even Burger Courts, much more robust and extensive, the scope of the police power was correspondingly narrowed to meet these new judicial ideas of the balance between authority and liberty, between power and rights.[8]

This expansion of rights and contraction of state police power has been revealed in many different contexts. Some of the most profound in their impact has been in regard to the widening scope of equal protection, including but not limited to decisions involving discrimination on the basis of race. Consider the 1985 case of The City of Cleburne v. Cleburne Living Center.[9] There the Court unanimously struck down a zoning regulation, implemented under the normal police power of the local government to restrict certain land uses, on the grounds that this regulation singled out mentally disabled individuals in a way that could only be seen as arbitrary and irrational and, worse yet, reflective of prejudice.[10] Cleburne is especially intriguing in that the Court reached its conclusion without disrupting in any serious way its developed tiers of judicial scrutiny, and the view that the so-called mentally retarded (to use the vernacular of the time) were not members of a suspect class. Cleburne hearkens back to an approach a century earlier in Yick Wo v. Hopkins,[11] which also involved a law that mistreated without a credible rationale a discernible group of individuals without any reasonable basis; and it presaged more contemporary cases in which the Court was concerned about animus and irrational discrimination, a theme we will return to in the next chapter.

The broad interpretations that courts, and especially the Supreme Court, gave to the First Amendment's guarantee of free expression was especially significant in changing the dynamic relationship between the traditionally broad scope of the police power and rights of individuals to communicate freely.[12] While the Supreme Court has never taken an absolutist position on free speech, it has created a scaffold of doctrine in dozens of cases that impose very heavy burdens on government to demonstrate that their police power restrictions are warranted.[13] The police power's scope has changed in important ways as a result of these First Amendment decisions.

No case involving freedom of expression is entirely typical. Laws dealing with communication and expression, either directly or indirectly, are ubiquitous. State and local governments enact criminal laws and underwrite civil justice rules in the tort, property, and contract realm that arguably have an impact on the freedom of expression. Many of these laws are enacted under the police power, and thus are designed to protect the public safety, morals, or general welfare. For much of our constitutional law history, the First Amendment was simply inapplicable to state and local laws. And even after the incorporation of the First Amendment to the states,[14] seldom were state laws struck down as violating the rights of free expression. This was simply not a preoccupation of the Supreme Court in the first century and a half of the nation's existence.

In the years after the Second World War especially, the Supreme Court expanded the free expression guarantee, putting the First Amendment in a "preferred

position,"[15] one in which free expression interests would frequently trump police power regulations enacted to protect public safety. In one early case, Terminiello v. Chicago,[16] the Court invalidated local laws that purported to protect against "disturbances of the peace," effectively a police power regulation purporting to protect public safety. Although this regulation was not targeted toward expression as such, the impact of the regulation had the effect of limiting the speaker's free speech rights, and without demonstrable evidence that peace necessitated this rule. Likewise, in Texas v. Johnson,[17] the case in which the Court struck down a law prohibiting flag burning, the Court rejected the "breach of peace" rationale, here because this was seen as more in the nature of a law restricting expression that the government objected to (or, though of the same consequence, individuals would likely object to).[18] In both cases, the Court embraced the fact that difficult expression would cause unrest and unease, and in that sense did not deny that there would be a certain disturbance of the peace, at least in the sense of folks that would likely be riled up in anger. But the Court was clearly drawn to a vision of the First Amendment that privileged expressive conduct over public safety considerations. Laws restricting freedom of expression have been struck down in a variety of contexts, even where the government has acted neutrally and with an expressed interest in protecting public safety and the general welfare.

In no way is this vision an absolute one, however, and so, for example, in Virginia v. Black,[19] the Court upheld a statute prohibiting cross burning where such actions reflect an "intent to intimidate," given that there could well be public safety and general welfare considerations that would outweigh the expressive value of certain speech (or conduct). Nonetheless, the general lesson from these cases is that free speech regulations will always get strict scrutiny and will often be a reliable trump over all but the most carefully considered police power regulations.[20] Indeed, this burst of judicial intervention in favor of free speech rights has been one of the single defining features of modern constitutional adjudication.[21]

In a valuable analysis of the origins of the First Amendment right of free expression, Jud Campbell notes that the primacy of free expression rights was accompanied by an erosion in the priority courts had historically given under the police power to the implementation of the public good through morals regulation.[22] Campbell situates the free expression right in a vision of natural law, a vision that has evolved in a direction in which the Court seems most concerned with minimizing the burden laws impose on free expression and the assurance that the laws are operating neutrally.[23] Whatever the foundational source of free expression in the original understanding, the courts have long accommodated public welfare considerations in considering the constitutionality of regulations that would burden individuals' rights to free speech. Consider, for example, the lengths to which the Court has gone over a long time to protect laws forbidding defamation and also obscenity.[24] As to the latter, the cases discussed in Chapter 4 in which the Court has upheld certain restrictions on the time, place, and manner of adult entertainment

also illustrates the courts' willingness to accord some modicum of respect to the underlying public purposes advanced by such regulations. Further, and perhaps more foundationally, the way in which the Court over more than a half century has articulated the values of free expression suggests that it sees this robust protection as safeguarding not only an individual freedom interest – what Professor Martin Redish calls the value of individual self-realization[25] – but also a collective interest in promoting democratic self-government and expressive speech and conduct that enhances the *salus populi*.[26] It would oversimplify matters to say that the Court used to privilege the public good or private freedom and then reversed course. A more synthetic analysis of the caselaw suggests that the Court has long thought the best strategies for protecting the public welfare of free speech lay in the protection of free speech at a level that, rightly or wrongly, it thought would meet the Constitution's objectives of well-ordered liberty.

Such developments have not come without controversy. Conservative justices, beginning most notably with Justice Felix Frankfurter in the early days of free speech jurisprudence, expressed skepticism about the right's preferred position and the Court's activism in this area.[27] These views have been articulated frequently in prominent dissents in free speech cases. Moreover, the sheer breadth of the Court's First Amendment protections has occasioned in the last several years criticism from the political Left as well. Some leading scholars have identified the Court's resolute protections with a sort of "Lochnerization" of free speech doctrine.[28] The idea here is that the insistence on protecting the negative right of individuals to communicate (and also to spend) in a world in which the modalities of expression and opportunities to participate in politics is unevenly distributed is akin to a Lochnerian jurisprudence in which economic inequality is subordinated to individual freedom.

There is much to say about the intriguing argument that freedom of speech doctrine should be criticized largely on the same grounds as Lochner, although to do so requires a deeper dive than we can undertake here into the understandings of what the US Constitution and other constitutions expect the lines to be between public and private conduct and the domains of government and the private sector.[29] For our purposes, it is important to stress just one factor that makes the Lochner/free speech analogy problematic. Whereas the classic critique of Lochner focused on the ways in which interventionist judicial decisions undermined the ability of state and local governments through regulation to level the playing field by implementing regulations that were essentially redistributions of economic power (recall Justice Holmes's criticism that the Court was enacting Herbert Spencer's social statics),[30] the critique of modern free speech doctrine reflected in these claims that it has become Lochnerized generally argues not that ordinary police power regulations should be left in place and expressive freedom thereby curtailed. Instead, the essential argument by those who are complaining about the present libertarian slant of the Court's First Amendment jurisprudence is that the courts should intervene by recreating the First Amendment into a positive right, one that would obligate courts

to either insist that legislatures and agencies enact measures that redistribute economic power in a way that facilitates meaningful political freedom and opportunity or create doctrine that has this redistributive effect in and of itself. Lochnerization then becomes synonymous not with Lochner's ill-fated experiment in libertarian constitutional intervention, but with a road not taken. This is a road that views the US and other constitutions as imposing affirmative obligations, as looking to rights in the constitutions that effectively redistribute wealth and power. Constitutional rights become less in the way of trumps and more in the nature of focal points for government obligations that can be satisfied only through edicts directed by courts toward non-judicial governmental entities.

Other constitutional rights have become more recently prominent in battles over the scope and limits of governmental regulation under the police power. Perhaps the most visible contemporary development has been the renewed respect accorded to the Second Amendment. In District of Columbia v. Heller,[31] the Court declared that the Second Amendment guarantees an individual right to keep and bear arms. This decision along with later decisions has limited the ability of state and local governments to restrict the possession of guns under the rationale that there are manifest public safety risks with widespread access to guns.[32] The scope of governmental power to regulate guns is being played out in many cases and will be for years to come, but we knew from Heller and were reminded in New York State Rifle & Pistol Ass'n v. Bruen just recently that the burden faced by the government in showing that a particular regulation is necessary, despite its interference with individuals' right to possess a firearm, is a very high one indeed.[33]

One interesting point of contrast between the Court's extensive jurisprudence under the First Amendment (focusing on speech, but also including its religion clauses) and the Second Amendment is the different lens the Court has, over time, used to view the content and scope of these highly protected individual rights. Free speech and religion doctrine over eighty or so years cannot be easily summarized, but we can say at least that it has been an admixture of dense doctrine, evolving as what scholars might accurately label a sort of constitutional common law,[34] with some attention to policy impacts (as, for example, in the "incitement," obscenity, and natural security cases).[35] By contrast, the focus in the majority opinions has been squarely originalist.[36] From Justice Scalia's seminal opinion in Heller through the Court's 2022 decision in Bruen, the clear talisman for understanding the scope of the Second Amendment right, and also the proper prerogatives of government to limit those rights through legislation, has been the original understanding of the right to keep and bear arms. The Court has waded deeply into this history and we can expect as this body of Second Amendment law continues to evolve, that the focus will remain on the historical origins and original public meaning of the right.

In an interesting research paper prepared for the Brennan Center, legal historian Saul Cornell looks closely at police power cases involving the right to keep and bear arms under the US Constitution and relevant state constitutions, some

from the nineteenth century.[37] He finds compelling evidence from some of these key cases, including State v. Reid in 1840,[38] that courts understood the right as an individual right, consistent then with what the Court would say many years later in Heller, but, significantly, they saw it as subject to purposive state police power regulation – hence the holding that the state could properly regulate an individual in their concealing of a gun.[39] Post-Reconstruction constitutions echoed this same view, and Cornell points to the Idaho and Georgia constitutions, the former providing that "[t]he people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law" and the latter providing that "[t]he right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne."[40] In this wider historical context, it is a strange position indeed for the current Court to point to the strong protections for private gun ownership without acknowledging that the states were especially diligent about yoking these protections to the imperative of state regulation. Moreover, the nineteenth-century interpretations of the police power gave a wide birth to state regulation. "In short," writes Professor Cornell, "reasonableness has always been a defining feature of the right to carry arms in public under American law."[41]

The jurisprudence of the First and Second Amendments is complex and dynamic. We have focused on just two elements – freedom of speech and the right to keep and bear arms – and have neglected other aspects of these amendments, not to mention other parts of the bill of rights that might stand against the assertions of the police power. Moreover, the treatment of those subjects we have focused on has been incomplete, although hopefully not too cursory. That said, we can reach two conclusions that are germane to the issue of constitutional rights as trumps to state police power regulation. First, and at the risk of sounding banal, the rights described here are viewed by the Supreme Court as in a preferred position. Barring change, we know that interferences with these fundamental rights will be scrutinized strictly. Second, there is and will continue to be concerns that the government will neglect these rights and so, for better or worse, we entrust the solemn duty to courts in exercising judicial review to define and enforce these rights against public action. In order for these (and similar) rights to operate as trumps, it is enough to show that the interference by the government through its police power regulations are trampling upon individual rights without a compelling justification and, further, evidence that the regulations are narrowly tailored and use the least restrictive means of accomplishing the government's purposes. Therefore, even neutral, well-configured regulations are of concern, insofar as they intrude on the rights protected by the Constitution. Lest these principles sound formulaic, we should understand that, taking the history of constitutional adjudication as a whole, there has been a sea change in the last three quarters of a century in how the Court seems individual rights and how it requires these rights to be protected against interference at the hands of government.[42] At the same time, the Court appears to be unmoved by the

arguments that the general welfare as we approach the second quarter of the twenty-first century demands more fertile and adaptive regulation to account for the harms of unrestricted speech, especially in an time of changing technology. Likewise its majority is unmoved by largely unregulated gun possession and ownership, in a period of unprecedent gun violence and public fear. Even if the best interpretation of the police power as a broad grant to government to act on behalf of the *salus populi* had stayed more or less the same over the past seventy-five or so years, the practical effect of the police power has undergone a significant change as a result of the rights revolution of this era.

Taken as a whole, federal rights have long been, and continue to be, powerful trumps on the state police power. They ensure that the overall objectives that are intended to be realized through public health, safety, and morals legislation are measured against the impact on individual liberties under the US Constitution and state constitutions. To put this point into a form suitable for a bumper sticker: As rights expand, the police power contracts. But, like any other effort to put dense legal concepts onto a bumper sticker, nuance is sacrificed. When we say that there is a zero-sum tradeoff between the right and the power, we also seem to imagine that the values that undergird the power, in this case the commitment to the ideal of government regulation as furthering the people's welfare, erode in the face of powerful claims of individual freedom and liberty. However, there are alternative ways of thinking about rights as judicially enforceable entitlements, that is, as some things other than trumps.

Returning to the exploration of natural rights and free expression in Jud Campbell's important work, he notes that the framers' understanding of natural rights embedded in a deeply theorized idea of natural law could mean that rights existed alongside public welfare regulation. He writes: "Natural rights thus powerfully shaped the way that the Founders thought about the purposes and structure of government, but they were not legal 'trumps' in the way that we often talk about rights today."[43] Rights-as-trumps, as conventional as this idea is in our modern discourse of constitutional law and politics, needs to be understood as a normative idea, and not as a conceptual requirement of the term's definition. Indeed, a widening group of contemporary constitutional theorists are imagining a certain hollowing out of the traditional Dworkinian notion that rights are essential tools to restrict democracy and that they must operate as trumps.[44] The implications of this movement are intriguing, and while mainly beyond the scope of this chapter, we might say at least that the reimagining of rights might consolidate deep debates about governance strategy and constitutional objectives in a political forum. As Jeremy Waldron has recently noted, consistent with his general critique of judicial review, "[t]o uphold and protect our rights in the future we will need to think about different strategies – a non-judicial politics of rights-protection or at least non-judicial strategies to bolster and complement whatever shreds of judicial respectability are left in this regard."[45] It is perhaps paradoxical that the refashioning of rights as legal protections

embedded in a complex understanding of public good, government obligation, and private interest is appealing to theories of constitutional democracy that are seem as novel and progressive, although, as Campbell reminds us, they have deep roots in natural law thinking.

On the other side of the coin, however, there is the idea that we considered in Chapter 1 in our discussion of constitutions and constitutional frameworks. Suppose we can conceive of rights as something other than trumps. If the overarching commitment to the people's welfare through the police power is accompanied by an ambivalence about the need to protect individual liberty and property against government restriction, then we need to imagine, as a bulwark against constitutional failure and as insurance against citizens' rational fear, other auxiliary precautions. Rights have long been part of our vocabulary in measuring security and official discretion. It is hard to see exactly what takes their place if they are seen as intolerable intrusions on the functions of governance.

THE MATTER OF EQUAL PROTECTION AND DUE PROCESS

In adjudicating controversies involving the police power, the courts have long been considered indispensable to ensure that regulations are being administered fairly. The linchpins of this concern with fairness are both external and internal – that is to say, we see doctrine as defining criteria of fairness that can be implemented by courts to ensure that police power regulations are reasonable and fair ab initio. We also see doctrine as developing rules of fairness that can act as trumps, rendering nugatory regulations that fall short of what these rules demand. In the next chapter, we will focus on considerations that are more internal or structural, by which we mean factors that emerge from the definition of the scope of the power itself. Here we say some more about what equal protection and due process brings in by way of external (that is, individual rights) constraints.

That the police power must be exercised consistent with due process rights was made clear by the Court in Jacobson, even though Justice Harlan's opinion was not very solicitous of the plaintiff's argument that he should not be subject to a general vaccine requirement. This claim in 1905 that the plaintiff's principal recourse lies in the political process and not in courts echoed claims brought during the recent Covid pandemic where individuals and businesses insisted that the governor's sheltering orders, insofar as they were not comprehensive, interfered with both due process and equal protection rights. While the courts at both the state and federal levels usually rejected these arguments, they always did acknowledge that police power regulations, no matter how essential to respond to public health emergencies, must be enacted consistently with due process protections and also must be applied consistent with equal protection.

As to equal protection, the standard form of scrutiny that the Court has long given laws that discriminate on the basis of inappropriate criteria apply in full force to

police power regulations. The Court has explicitly disavowed some of its most noxious cases in which equal protection principles were disregarded, including Plessy and Korematsu.[46] The less memorable cases involving the quarantine laws in San Francisco's Chinatown and the razing of homes and other properties in Hawaii, discussed in a previous chapter, are also illustrations of the foundational principle that police power regulations must be equally imposed. That these cases all involve discrimination on the basis of race and ethnicity is no coincidence, of course. The use of regulation to separate and sort individuals and private behavior on the basis of race and ethnicity, in purpose and/or in effect is a long part of our nation's history, and it should go without saying that all such efforts are unworthy of the government in its exercise of these powers.

At the same time, the Court has maintained a controversial fidelity to cases such as Washington v. Davis in which it has demanded evidence of discriminatory purpose to invalidate laws that could be given a neutral reading. Finding clear intent to discriminate is a high burden for complainants and there is precious little reason to believe that the bar is more easily met in disputes involving the police power. Indeed, one could wonder what function this requirement of discriminatory intent fulfills in a world in which equal protection is understood as eradicating the impact of historical discrimination and of leveling the playing field. Such debates come to the surface in present controversies over the use of racial preferences. In its recent affirmative action decisions, SFAA v. Harvard and SFAA v. U. North Carolina,[47] not exactly a police power case, to be sure, as the policy being reviewed was created by universities in order to pursue its own internal goals, the Court read equal protection to impose a nearly impenetrable requirement of neutrality and color-blindness. Where this all might matter for the police power is in the evaluation of state or local laws which also undertake affirmative action in order to, as the government sees it, advance the general welfare. If the Court's recent decisions in the two university cases is any indication, the courts are likely to weigh in on what they may see as the government's policies that discriminate, in the sense that such policies take account of race, even while justified as mechanisms to ultimately eradicate discrimination.

Taken as a whole, equal protection doctrine has boxed in and out certain kinds of objections to police power regulations. It certainly does not seriously restrict the prerogative of state and local governments to draw lines among individuals, businesses, and even key parts of the economy – as we saw in the Covid era and also in a variety of settings in which property-impacting regulations are imposed. Government policymaking would be impossible without the discretion to discriminate and on various grounds, that is, to permit the government to sort and separate individuals and groups on the basic of meaningful, relevant criteria. What it does is focus like a laser on racial discrimination, somewhat less so on gender discrimination, even less on discrimination based on LGBTQ+ status, and maintains certain standards and argument rubrics that will constrict police power regulations in a very concentrated, and (happily) rare, band of cases.

Due process is a tricky concept to apply as an external constraint to police power regulations. First, let's begin with the easy cases. Where the regulation singles out individuals for special mistreatment – say, a requirement that a particular landlord put safety features into her apartment rental, while requiring nothing of the sort for a similar situated landlord – we can readily invoke due process as a brake on governmental action. But this is a far cry from accepting, as the plaintiff maintained in Jacobson, the argument that the government owed a duty to explain why this general vaccine requirement should be applied to this particular defendant. Leaving aside considerations that are more internal (such as claims of unreasonableness or animus, to be discussed in the next chapter), due process does little work in requiring the government to explain why it did not exempt individuals from generally applicable laws. Nor are such claims usually successful when they rest on the argument that the government should not have configured the category of individuals subject to these regulations in one way rather than another. Take for example a strange little Covid case from 2020 where cannabis dispensaries in Massachusetts who were selling their product for recreational use objected to a shutdown order that applied to their dispensaries but not to dispensaries that were selling cannabis for medical use (both under approved state laws) nor to state liquor stores.[48] The Massachusetts court quickly dispensed (pardon the pun!) with the argument that this line-drawing effected a violation of due process and of equal protection. The judge said that this regulation had a rational basis, in that the closure would help dissuade residents of nearby states where recreational marijuana is illegal to come to Massachusetts to purchase marijuana, thereby increasing the risk of Covid spread. This was typical of the run of Covid shutdown cases, given that these executive orders did typically draw distinctions between certain businesses and gatherings which could remain open and others which could not. To be sure, the Court did in three important instances strike down Covid restrictions on certain modalities of religious worship, but we should take from those cases (which were decided by close majorities) that the Court is very solicitous of religious liberty claims under the First Amendment, not that there is emerging a strong impulse to invoke due process to interfere with the government's efforts at line drawing.

Two famous cases in administrative due process illustrate this principle well. In the 1908 case of Londoner v. Denver,[49] the Supreme Court held that a city council decision to impose a certain assessment for property improvements requires an opportunity on the part of an affected landowner to be heard. This was a legislative action, but functioned effectively as an adjudication, a consideration of a valuable claim by resort to facts and relevant laws.[50] Due process was the appropriate tool for imposing this requirement. By contrast, in BiMettalic v. State Board of Equalization,[51] decided seven years later, the Court rejected the due process claim of a property owner who insisted upon a special exemption from an individual tax. "Where a rule of conduct applies to more than a few people," the Court wrote, "it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require

all public acts to be done in town meeting or in an assembly of the whole."[52] The BiMettalic situation captures in essence what the typical police power regulation entails, that is, a law applicable to "more than a few people" enacted in order to protect public health, safety, morals, or the general welfare. Objections to this law should be made in the ordinary political process (or, if this is an administrative regulation, in the processes provided in the relevant administrative procedure acts), not in court on the grounds that there is a sort of "due process of lawmaking."[53]

PROPERTY RIGHTS REVISITED

The safeguarding of property rights was a persistent priority from the origin of the first state constitutions and over the course of the following decades, disputes arose in which the courts were obliged to define the scope (and occasionally even the existence) of the property right, before proceeding to the analysis of whether and to what extent government regulation under the police power or another font of authority could take precedence over the owner's interests. As we have already noted, the reasoning in much of the first and into the second century of the republic's history was tethered to classical, and often natural law, ideas, ones that had in mind what were very much essentialist notions of property. Is this a thing that is being managed, regulated, confiscated, etc.? We saw beginning after Reconstruction and into the Progressive era a transformation in the conception of property. Echoing the influential voice of Justice Stephen Field, even in his dissenting opinions (as, for example, in Munn), the courts increasingly saw property as a means of exchange – in other words, for what it could be used for profitably by an owner – and not merely as a thing. This transformation would come to be of great importance in takings jurisprudence, as the court measured the imposition of regulation on the economic value of property, not just on whether title had been transferred to the government. However, this transformation was also relevant, even going back so far as the late nineteenth century, to how courts viewed the nature of property rights and, correlatively, the balance between public and private interest.

Two developments in regard to the reconfiguration of property rights animated this longish period from Reconstruction's end to deep into the twentieth century. One, picking up again on Horwitz's famous description, was that the shift to a market value conception of property meant that "the very conception of property became infinitely expandable."[54] Courts heard creative new claims that owners' investment backed expectations and so "[d]uring this period, American courts came as close as they had ever had to saying that one had a property right to an unchanging world."[55] At the same time, notions of general welfare and the *jus publici* nature of property, described in an earlier chapter, cabined some of this creativity. Many regulations met the bar of public justification under the police power, notwithstanding the clear burden on property rights, in the context of use and exchange. While this change accompanied the shift from private to public law, it is perhaps at least as useful to

describe this as a shift from an obsession with property rights to property as a concept intrinsically embedded in objectives of governance and of the common good. Rights do not necessarily dissolve in this governance framework, but it is important to see their contours and contents as defined by the decision-making apparatus and expectations (the latter set by the state constitution, and occasionally the former as well) of democratic governance.

In the twentieth century, debates about the scope and content of property rights continued, as one might expect, given ubiquitous conflicts between owners' interests and the strategies of governments. The idea of property as a bundle of sticks, a hoary concept going back to Blackstone, continued to resonate with courts and commentators, and so rather than the quixotic effort to define property and property rights formally and finally, courts looked in both police power and regulatory takings cases to the nature and magnitude of the imposition on one more sticks in the bundle and, as always, on the government's objectives.

For some period of time beginning in the sixties and continuing for a couple of decades or so, many left-leaning scholars were taken with the notion that, as Charles Reich had explained in 1964, there was emerging a novel conception of new property, one that would encompass a wealth of government created entitlements and services that should become, in their necessity to citizen well-being and human flourishing, protected as property rights in much the same way as tangible, *in rem* rights. This logic bled over to important scholarship calling for constitutional welfare rights.[56] In the main, this effort to identify property rights with the needs of the propertyless would be short-circuited by developments in procedural due process law in the second half of the twentieth century, and especially in the seventies and eighties. To make a very long story short, the Court in Goldberg v. Kelly[57] advanced a strong version of procedural protections applicable to property rights that were far from *in rem*, but were shaped entirely by government-created expectations. And so the welfare beneficiary in Goldberg was given a property right in the continuing stream of benefits such that the government must given him an important measure of procedural protections before it could taken. But just as Goldberg and other cases of that era seemed to move close to the notion that government entitlements represent property that can be protected against interference – perhaps not only in the ending of those rights, but even in the reduction of value – the Supreme Court said that the content of property rights are defined by state law, not by something that is in and of a part of the US Constitution. Moreover, in Matthews v. Eldridge,[58] the Court shifted from a maximalist view of protecting property rights through a bevy of procedural protections to a balancing test, one that would look at the matter of administrative costs and risks of erroneous deprivation (among other factors) to strike the balance between important property rights and government interests.

Where this development left us by the beginning of the 1980s was with the hard question of how best to think about the content of property rights in a world in which states continually shaped and reshaped what property means and the expectations

of individuals under the scheme of rights and privileges defined by state law. In an important article in 1981, Frank Michelman, who, perhaps more than anyone else, advanced a highly sophisticated progressive view of property and its protection through constitutional rules,[59] principles, and theories, argued forcefully for a view of property that, contra the Court's decision in Roth and similar cases, derived directly from the Constitution.[60] He would define constitutional property as essentially "political rights," that is, "what one primarily has a right to is the maintenance of the conditions of one's fair and effective participation in the constituted order."[61] These rights would ideally be protected against both eminent domain and also against government action under the police power, as those rights emerge directly from the US Constitution and would thereby restrict any and all interference by state and local authorities, inter alia.

New and creative conceptions of property rights in the half century or so since the progressive efforts at rethinking property and expanding its scope to address wealth inequality have mostly followed a similar script, although this is not to minimize their innovative qualities.

At the same time, largely thanks to the pathbreaking work of Thomas Merrill and Henry Smith,[62] we are seeing the renaissance of the classical notion of property as a "thing," and the view that property's exclusion rights are at the core of understanding both the origins and the functions of private property. It is not clear from this account, however, how property is better (or worse) protected from government interventions under the police power. Property as exclusion can be enormously helpful in defining the parameters of what is or is not property, but it cannot, on its own, blend well the public law governance ideas and strategies under principles of state constitutionalism into the private law underpinnings of property's definition. It is not that there is any inconsistency in the twin projects of defining property rights' boundaries and in defining the boundaries of legitimate government power. It is just that we need more clarity and understanding on the role and function of government in order to assess how centering the right to exclude bears on the constitutional scope of the police power.

Returning to doctrinal matters, we revisit an issue discussed in Chapter 3, and that is the nexus between eminent domain and the police power. A challenge that has not gone away, despite the depiction by scholars that the doctrine is inscrutable and problematic, is how to sort out when it is appropriate to scrutinize government regulation of the use of property solely under the police power or when it is viewed best as potentially a taking of private property and therefore warranting just compensation. Coming on a century after the Court's decision in Mahon, we seem to be no closer to solving the regulatory takings puzzle. This puzzle is problematic not only in leaving us with uncertainty about the proper scope of the government's takings power, but also because we cannot easily articulate a coherent standard that tells us when the government can act to protect the general welfare without facing a significant economic cost (and therefore disincentive) for this choice.

In the famous Penn Central case of 1978,[63] the Court reviewed New York's landmark law, a quintessential instance of the government's general power to regulate land uses. The Court noted that it had long upheld ordinary zoning laws as consistent with the police power.[64] But where, as here, the government's regulation negative affected an individual's use of property in a way that "caused substantial individualized harm,"[65] considering the regulation under the Takings clause is appropriate. Justice Brennan writing for the Court was concerned to replace the wholly ad hoc character of post-Mahon regulatory takings case with workable criteria for evaluation. In Brennan's formulation, the questions to be considered in cases involving economic loss, but short of a government confiscation are (a) the economic impact of the regulation on the property owner, (b) the extent to which the regulation interferes with the owner's reasonable investment-backed expectations, and (c) the character of the government action. Two parts of this Penn Central test are especially illuminating for our understanding of the police power: First, it is not enough that individual property owners suffer a loss, and even a loss of a magnitude different in kind from other individuals affected by this regulation, but these expectations must be "reasonable."[66] Second, the "character" of the government's action becomes relevant. And the historic preservation laws, as with zoning, that purport to "enhance the quality of life by preserving the character and desirable aesthetic features of a city" are acceptable, even acknowledging that they can come at the expense of an individual's right to use their property, one of the proverbial bundles in the stick of ownership.[67]

The focus on the reasons for the government's decision to regulate was critical to a Supreme Court regulatory takings case decided just two years after Penn Central, Agins v. Tiburon.[68] This case, which has largely fallen out of the pantheon of leading modern takings cases, is especially interesting in shaping the framework, at least for that time, within which the police power is examined in light of the takings clause. The key statement is this: "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."[69] Bringing to the front and center the question of how to balance private property rights and public values in consideration of the threshold question of whether a taking happened at all was novel and refreshing. This approach was short-lived, however. The Court would ultimately move away from this framework, tacitly at first and explicitly in the new century.

In the forty-plus years since Agins, the Court has bolstered regulatory takings and, with it, has brought more skepticism to the reliance on the police power to ground legal efforts to enhance quality of life. The key case in this modern development is Lucas v. South Carolina Coastal Council.[70] In Lucas, the Court summarized its earlier takings cases, including Penn Central and Agins, insisting that the test is an economic one, focusing on the question whether the regulation "denies an owner economically viable use of his land."[71] What is lost entirely in this is attention to

the rationale for the government's regulation and, in particular, the way in which the regulation enhances the general welfare, even while imposing a cost on an individual – something that, upon reflection, is more or less always the case where the police power is exercised, and so too when eminent domain is used to advance a "public use." This theme had been prominent in regulatory takings cases going back to Mahon in 1922.

There have been a plethora of criticisms of Lucas in the years since that case decided.[72] Broadly speaking, commentators stress two essential problems: First, not all advantageous regulations can or ought to be assessed upon an economic basis;[73] and, second, there is little reason to expect that the courts are better at this assessment than are legislators and administrators.[74] These are significant practical concerns, and echo arguments made in Justice Stevens's powerful dissent. Curiously, however, these critiques do not go to the heart of the question raise by Agins: Can certain governmental be evaluated by resort to whether and to what extent there are common benefits, despite the special burden imposed on the individual subject to regulation? If this question sounds familiar, it is because this was pretty much the question asked in the ordinary police power cases throughout the period in which it was viewed through a *salus populi* lens.

By any measure, the operation of contemporary regulatory takings jurisprudence is in serious tension with the use and utility of the police power to regulate private property. All hope is not lost, however, in shaping the police power around the Court's holdings. Let us consider first the impact and next some possible ways through this meandering and maddening tunnel.

What Lucas and its progeny do, among other things, is to shift the focus entirely away from the rationale of the government's action. The "character" of the government's action, as noted in Penn Central,[75] becomes irrelevant to the inquiry. The conventional view is that, in the main, zoning, historic preservation, and even redistributive laws is not disrupted by this refocused analysis. The owner's interest in the ordinary zoning case is real to be sure, but usually the restriction is part of an established plan, a plan which buyers can be expected to know in the first instance. Zoning functions then like a public law version of a running covenant, and the imposition on owner's use, even where meaningful economically, is not an interest that either the federal or state constitution should necessarily protect. The same logic operates in historic preservation, as the Court explained in the Penn Central question described above. In this way of thinking, there is no need for the government to state its rationale for the imposition, save for locating its power in a pertinent statute or regulation.

This neglect is problematic on its own terms. What both the California Supreme Court and the Supreme Court of the US made clear in the Agins litigation is that the government has a burden to explain and justify its promulgation of a regulation that impact property and owner use. This requirement is not divorced from text, as eminent domain clauses typically require a public use (or, as sometimes in state

constitutions, a public purpose). And it makes sense from the vantage point of democratic decision-making and transparency in governance.

In addition, the absence of a focus on the government's interest in the regulatory takings context leaves, ironically, given the paean to private property in Lucas and again in Lingle, property rights generally underprotected, at least when measured against other takings contexts. Consider, for example, the Court's 2021 decision in Cedar Point Nursery v. Haddid.[76] There the Court evaluated a California state law that gave, in essence, an easement (a "right to access") over a farm to labor organizers. The Court found this imposition on the owner's exclusion rights a per se taking, saying simply that the government must pay for what it takes.[77] This per se takings holding is distinguished from other scenarios in which takings claims are used. It is different than the imposition on owners' use rights, and thus distinct from the analysis in Penn Central and other lodestar regulatory takings cases. More precisely, it is also distinguishable from instances, as in the famous Pruneyard Shopping Center case,[78] where the owner has generally opened her property to the public and so limits on the owners' right to exclude can be limited without running afoul of the takings clause. None of these lines, however, are helpful either in defining the nature and scope of the property interest. We know that the concern is with the owner's exclusion rights, but why does this emerge as uniquely sacrosanct? Nor do they undertake in any way to assess either the government's objectives under the police power in regulating the use of this private property or to measure the economic loss or other impact on the owner's property rights. Through one lens, Cedar Point Nursery is a big victory for private property owners, as the farmers get to exclude labor organizers and others who otherwise would have the right to come onto their property to further one or another social or political goal. But through another lens, it is just a reminder of how fierce is this conservative Court in protecting the property owners' exclusion rights from even a temporary intrusion, and how blasé it is in protecting owners' prerogatives when it comes to avoiding severe zoning or historic preservation laws or what Professor Molly Brady has called "damagings" or other interferences of consequence on the property owner's ability to use and to profit over her property.[79]

Many decades ago, the distinguished legal scholar Joseph Sax wrote an important article, "Takings and the Police Power,"[80] that aspired to help solve the difficult puzzle of when to distinguish regulatory takings which demanded compensation from intrusions, oft significant, on property rights under the police power. The essential difference, argued Sax, was between the government acting as a guardian of the public interest and the government acting in a way that could be viewed as proprietary, as self-interested in a pecuniary or self-dealing sense.[81] In Sax's account, we would have more trust as a general matter in the government acting in the former way, as we expect when it acts under the police power, than when it acts in the second way, as will be more frequent in the context of regulatory takings. While

the Court has never really followed this line of analysis, as Penn Central certainly reveals, this analysis captures a larger truth that could conceivably help in disentangling the vexing pieces of the takings/police power puzzle. We are searching in these property rights cases for either a big truth of the matter – as in early days asking, "is or is there not a property right at issue, such that the government needs to be diligent in providing adequate procedures if not eschewing regulation altogether" – or else measuring the degree of government benefit and individual burden. But these are quixotic adventures, especially when we consider that we are asking these functions of courts, in the context of litigation under the rules of the adversary system we cherish. Efforts to define the inquiry by resort to how the government is deciding whether and to what extent to regulate and to interfere with owners' interests and on what bases it is making these judgments, at least focus the attention at the right places. Here again it is important to recall the good road constructed, although ultimately not taken, in Agins. This case, and likewise Pruneyard – both decided by the Court in exactly the same year –, exemplify a group of justices deeply engaged with the right set of issues about how to assess and to weigh competing interests of owners and of the public. That the current Supreme Court, and many state courts echoing the same themes, has too often collapsed into arid formalisms about property rights' essential purpose in protecting against invasion and, maybe worse yet, a set of incommensurable and chaotic set of variables in a stew made of state positive law, common law, and the exogenous views of justices about what property is and isn't is unfortunate.[82]

We end this discussion of regulatory takings with a comment on two cases decided by the Court in 2005, both of which reflect the precarious nature of judicial intervention to measure the public interest when it comes to the regulation of property rights. Lingle v. Chevron[83] involved a somewhat complicated state statute that aimed to reduce concentration in the retail gas station market. The Court, in an opinion by Justice O'Connor, characterized the emphasis in Agins on whether a regulation "substantially advances" a legitimate government purpose as "free standing," and not suitable to the inquiry relevant to assessing whether a law represented a regulatory taking.[84] O'Connor writes that the "'substantially advances' inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners."[85] True enough, but the point of that part of the Agins analysis is not to come to a conclusion, based upon an answer to the question whether the government regulation "substantially advances" a legitimate purpose, that there is no regulatory taking. Rather, it is to help shape the analysis of how to assess the burdens (amount and distribution) of the regulation against the strategy undertaken by the government to realize a stated objective of general welfare. The insistence on a standard that the takings rubric should be fully distinct analytically from the police power rubric is ultimately question begging. These are species of the same genus, that is, an inquiry into whether

the government's actions impose such a burden on private property owners' interests that some constitutional matter is implicated – either that the government has gone too far under the police power, or that the government's actions are acceptable but only so long as compensation is paid.

In that same term, Justice O'Connor was on the losing end of a closely divided course in Kelo v. New London.[86] There the Court goes through a set of takings cases that are focused squarely on the question of whether a government regulation is of a "public use" such that eminent domain is a permissible strategy. These public use cases, going back to Berman v. Parker, ask what is essentially the same question in different ways, that is, does the public benefit from the government's imposition on owners' rights? Is this a law that promotes that the general welfare, or merely, as Justice O'Connor fears, simply a law that would replace any "Motel 6 with a Ritz Carlton" or any "farm with a factory"?[87] The answer the Court gives is yes – perhaps not a resounding yes, as the vibe of the Court's opinion, to say nothing of Justice Kennedy's concurring opinion,[88] is that this is a hard case.

These inquiries in those two cases from several years ago are two sides of the same coin. They look closely at the government's revealed interest, in promoting a public purpose at the expense of property rights, and reach opposite judgments about the legitimacy of that strategy. The incoherence of the Court's approach is rather striking. Or perhaps we should be more generous in seeing these cases as illustrative of the intrinsically vexing character of the regulatory takings project on the whole. Either way, it is hard to square current doctrine with a view of the state and local government's regulatory power as aspiring to reconcile private rights with the public good.

To summarize, the focal point of regulatory takings remains, ever since Lucas, on the magnitude of the deprivation – to put it more generally, on the burden imposed on the property owner. The ordinary police power cases, by contrast, continue to be focused on the government's rationale and, of course, any coherent claims that individual rights are being compromised. Neither purports to assess the costs and benefits of regulation. However, the relentless focus on burdens and costs in the takings context, and not in the police power context, leaves these two doctrines as fundamentally incommensurate. As with any analysis of these and related doctrines, this observation comes at a particular moment in time. The Supreme Court will continue to hear regulatory takings cases and commentators will have their say. Likewise, we will be able to see whether and to what degree the federal courts determination to protect property rights through a harm-focused inquiry will seep into police power cases.[89] For now, we might just reflect for a moment, as merely a thought experiment, what might have happened in Mahon had never been decided, and the question of property regulation under the police power was forever decoupled from the evolving – and, again, deeply vexing – character of regulatory takings jurisprudence over a century's time.

THE FORM AND FUNCTION OF STATE CONSTITUTIONAL RIGHTS

In assessing the place and persistence of rights and rights discourse in considerations of the police power, we have been focusing mostly on the contours and impacts of federal constitutional rights, the topic that gets the lion's share of attention in scholarly discussions of the tension between governmental power and individual liberty. But there is another important layer of constraints on the exercise of state police power and that is the body of *state* constitutional rights under *state* constitutions. What role do these rights play in the understanding and implementation of the state police power?

Because all state authority is subject to federal supplanting under the supremacy clause, we might ask why are state constitutional rights necessary? Could not our basic individual freedoms be safeguarded adequately through the bill of rights and the important additions in the Reconstruction amendments?

To give a negative answer to this question, and therefore to make the affirmative case for state constitutional rights as an independent source of limits on public power returns to us to Chapter 1. State constitutions create the foundational objectives and measures of performance of those who would wield power in the name of individual citizens in our states. The structure of governance under a given state constitution reveals these goals, as does the content of rights embodied in the state constitution. Yes, the federal Constitution does create the bedrock for these objectives by the rights it has created. However, a state may confidently supplement these objectives by adding protections to the federal floor. Moreover, they should construct and interpret these unique rights in ways that are best suited to their internal objectives (while also being cognizant about the nature and scope of external constraints). This may happen at the time of the original creation of the state constitution, or later, during periods of constitutional reform or through episodic amendments. The history of state constitutionalism in the United States shows political officers and ordinary citizens deeply engaged in the enterprise of framing state constitutional objectives, creating appropriate implementation mechanisms, and assessing constitutional quality and performance.

It is telling that before the Bill of Rights was made part of the US Constitution in 1789, the early state constitutions were already including rights of their own. "All of our most celebrated constitutional rights," writes Judge Jeff Sutton, "originated in the state constitutions."[90] Moreover, state constitutions have frequently been amended (sometimes by acts of the collective public directly, in those states that provide such a mechanism) to include new constitutional rights. It is impossible to understand state constitutionalism in all its complexity without understanding the instantiation, and sheer ubiquity, of individual rights.

The prevalence and persistence of state constitutional rights has accompanied the growth in state regulatory power. This makes sense, as we think closely about the matter. Expanding state power has revealed distinct threats to individual liberty.

State courts, as we saw in Chapters 2 through 4, intervened occasionally to limit the exercise of state power. And even where they declined to intervene, they took care to remind us that there were in fact rights-based constraints (in that case, due process and equal protection) on the power deployed by state officials. That states had broad power to act does not mean that they have the power to act without constraint. Reference to constitutional rights, including rights embedded in state constitutions, undergirds this important reminder. Rights in both state constitutions and in the US Constitution work in tandem, sometimes redundantly, often complementarily, to keep governmental power within appropriate guardrails.

State constitutional rights are distinct from constitutional rights in the US Constitution in ways worth noting. Political scientist Alan Tarr, who has written widely on state constitutional development, highlights some of the key differences in the language of state constitutional rights in the early constitutions. Often the provisions used the term "ought" rather than "shall," suggesting that these provisions were more hortatory than binding.[91] Another difference, critical to our analysis of the police power, is the emphasis in state constitutions on the community and the general welfare. With respect to the police power in particular, "[s]everal early constitutions even include the police power within their declaration of rights."[92] This more communitarian focus is broadly congruent with the republican character of state constitutionalism in the founding period, noted by Gordon Wood and others and as discussed at greater length in Chapters 1 and 2.

In framing his highly influential analysis of the state police power in its origins and functions, William Novak emphasizes the connection between the emerging state constitutional rights at the time of the framing and the commitment to the general welfare. "Government and society," he writes, with reference to the late eighteenth-century formulation of American constitutionalism, "were not created to protect preexisting private rights, but to further the welfare of the whole people and community."[93] The connecting of individual rights in the state constitutions to general welfare was more complex than a depiction of state constitutionalism as fundamentally Whiggish or Lockean. Certainly some of the rights embodied in the early state constitutions and included in the constitutions adopted throughout the nineteenth century and into the twentieth included what we can see as restraints on government, and so are classically *negative* rights. Madison struggled with Hamilton and Jefferson over whether rights should constrain state-level actors and in the limiting of the Bill of Rights to the national government. The standard story is that he lost that battle. However, this was rather a long and complex struggle, one in which critics of a legislature with unlimited plenary power successfully included declarations of negative rights into the emerging state constitutions. Therefore, we might agree with historian Gary Gestle, that the framers of the early state constitutions derived their view "from a different political principle – one that held the public good in higher esteem than private right,"[94] but still insist that these constitutions regulated governmental power through, among other devices, the inclusion of individual rights.

Early attention by the state constitutional framers to rights was often articulated in the document's design by explicit text. Moreover, often the arguments mustered in favor of it were pitched in a fairly abstract way. For example, constitutional framers would often opine about the value of private property and liberty. However, the precise ways in which these sacred values should restrain the government in its pursuit of the common welfare remained elusive.[95] Once a right was described as part of the fundamental law and its importance was championed, the question remained unanswered of how it might function to constraint governmental power where there emerged a conflict between the will of government and the contents of the right. A key threshold matter, conspicuous in the late eighteenth- and early nineteenth-century debates, was whether and exactly how the courts would intervene through judicial review to measure and resolve conflicts over government prerogative and individual rights embodied in the state constitutions. These debates, early and later, had an unavoidable impact on the character and contours of the police power.

RIGHTS AND JUDICIAL REVIEW

It is one thing to declare the objective of protecting individual liberties within the structure of state constitutions; it is another to provide for the means to enforce these rights through judicial review. Those skeptical that the framers of the early state constitutions saw rights as anything truly distinct from the progressive ambitions to promote the general welfare, as "depende[nt] on the carefully regulated society that government would construct,"[96] have to grapple with the fact that judicial review quickly emerged from the states as a mechanism for reviewing exercises of state power.[97] Judicial review was developed early in our constitutional history by state courts to limit certain excesses in government action, including, in some instances, the tramping on individual rights. Before the Supreme Court decided Marbury v. Madison,[98] it decided Calder v. Bull.[99] While the claims about judicial supremacy in Calder were largely dicta, the Court was unmistakable in its declaration that judicial review accompanied the basic idea of the constitution as fundamental law. Justice Chase wrote:

> There are acts which the federal or state legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law or to take away that security for personal liberty or private property for the protection whereof of the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority.[100]

The authority of state courts to review legislative acts to make sure that they were consistent with the state constitution was confirmed in a plethora of early cases, so

much so that judicial review under state constitutional law was well established by the time of Marbury.[101]

The emergence of judicial review can best be understood in light of the risks attendant to the awesome authority given to the stage legislature through the police power. Judicial review was a critical check on the exercise of this power, especially necessary given what was emerging in the early nineteenth century (culminating in Barron v. Baltimore[102]) as an unwillingness to rely upon federal constitutional rights to limit state power. It was also important because of a declining faith on Americans' part in the jury as a mechanism to resolve factual and legal issues in connection with constitutional authority.[103] "The country became increasingly comfortable," writes Jeff Sutton, "with empowering judges to resolve constitutional cases and with perceiving them as trustworthy agents of the people."[104] Citizens frequently objected to state legislative decision-making, noting that explicit constitutional procedures were not followed, and that, more seriously, legislators were behaving in ways inconsistent with the common good. Judicial review became a key mechanism for ensuring that the overall objectives of state constitutions were fulfilled. This did not require, for the first several decades at least, any bold effort to expand the contours of the constitutions' rights provisions; it required only that state courts be vigilant in guiding state legislators and other government officials toward a way of good governing that would square the circle of individual liberty and society's general welfare.

Up to now, we have focused on the origins and evolution of judicial review largely as an historical matter. Looked at through more modern eyes, are there reasons to revisit the role and function of judicial review in light of the changing conceptions of the police power? The answer here is a highly qualified "yes." With the understanding of the police power steadily broadened to include the project of what we have been calling good governing, the expectation is that legislatures and agencies will function effectively to create and implement policies that will facilitate health, safety, morals, and the common good. Significantly, there will be meaningful checks on both institutions, the legislature, in the form of some measure of reasonableness review, and agencies, through traditional forms of administrative law. This retains judicial review in exceptional cases, but in a form distinct from what we typically observe as regards evaluation of the content and applicability of individual rights and the compelling interest of state or local officials to administer certain policies.

Another qualification to the general assent in a more circumscribed role of judicial review comes from the imperative that there may be a decent realm for judicial intervention when government officials, motivated as they can be by short-term political considerations, impose serious restrictions on individual liberty or private property with only a tenuous connection to sound public policy. Illustrative of such actions was the decision by the Florida governor during the mid stages of the pandemic to invoke the police power as a rationale for restricting private businesses' choices to require certain mitigation measures, including proof of vaccination, in order to use their services.[105] This followed a strange logic. Mitigation

measures were intended to protect public health; the governor's position was that these measures interfered with personal liberty. However, with the sensible legal advice that the liberty claims would clearly fail in the face of the public health emergency, and the historic deference given to public health officials to act in such emergencies, the governor insisted that it was in the interest of public health to forbid private businesses from undertaking public health measures. This was undertaken in the absence of any single source of evidence that public health would be improved by such steps.

Judicial review is an important tool in this context to restrain nonsensical actions that reflect distorted viewed of the police power and of individual liberty. Such review often an instrument of promoting the public good. Rights need not be envisioned solely or even mostly as the means by which the courts protect someone's desire to be left alone, in the misanthropic sense of the phrase. They may well be part of coherent effort to exercise one's freedom in order to promote the common good. Judicial review can function to separate out the rationale for one's invocation of a right, along with the rationale for the government's imposition of a regulation restraining private conduct.

NATURAL RIGHTS

Early conceptions of rights, as many scholars of the founding period have taught us, were associated with natural rights, sourced in pre-political, rather than positive, law.[106] "A natural right is an animal right," Thomas Paine wrote, "and the power to act it, is supposed, either fully or in part, to be mechanically contained within ourselves as individuals."[107] These natural rights sometimes evolved into distinct textual commitments, embodied in the declaration of rights or, as in the US Constitution, in a separate bill of rights. Sometimes these rights remained unenumerated, and so we get the Ninth Amendment of the US Constitution which provides that "the enumeration … of certain rights, shall not be construed to deny or disparage others retained by the People."[108] And we also get what Anthony Sanders in a recent book has called "baby ninth amendments,"[109] provisions in state constitutions which stand for the existence of unenumerated rights, those viewed mainly as emerging from natural rights.

The natural rights origins of the Bill of Rights in the US Constitution have been a topic of significant debate in the literature on American constitutional history.[110] Moreover, it did emerge in controversies in the nineteenth century over the meaning of privileges or immunities of citizenship or due process under the Fourteenth Amendment.[111] However, it remains largely of historical interest, as the federal courts have shown little attention to the actual discerning of these natural rights and their enforcement in cases in which these rights have been invoked. While it may be that natural rights thinking will have its moment, as an originalist majority on the Supreme Court looks to the natural rights underpinnings of certain protections,

such as those found in the first two amendments in the Bill of Rights and also the Constitution's guarantees of privileges and immunities and due process, it is unlikely that natural rights will be distinctly identified by the Court, sourced in the Ninth Amendment, and enforced against governmental action.

By contrast, natural rights thinking persists in state courts, and it is worthwhile to consider how the discovery and enforcement of these rights can be used to limit the actions of state and local governments under the police power. A recent case from Indiana is illustrative of these conflicts. In Members of the Medical Licensing Board of Indiana, et al. v. Planned Parenthood Great Northwest,[112] the Indiana Supreme Court considered constitutional challenges to the newly enacted abortion law, a law that proscribes abortion except in the case of rape, incest, or life or health risk to the mother. This was a law similar to those enacted in several other states, all passed in the wake of the 2022 Dobbs decision by the Supreme Court.[113]

The court considered, and ultimately rejected, the claim that this law interfered with the plaintiffs' liberty rights as contained in Article I, Section I of the Indiana Constitution.[114] Yet, in doing so, the court took great lengths to explain that these protections of inalienable rights of life, liberty, and happiness are "standard in state constitutions" and are "generally understood as constitutionalizing the social contract theory of the English political philosopher John Locke."[115] The police power functions, the court explains, in order to protect "peace, safety, and public good" (the quotation coming directly from Locke), and is the residuum of government power left after ensuring that their freedom not delegated to the government has been safeguarded.[116] The court acknowledges that the document contains a number of specific rights guarantees.[117] However, it sees these rights (hearkening to the original debates about the Bill of Rights among the framers) as just illustrative of the natural rights of every state citizen, rights which can be and often are unenumerated.[118]

The claims expressed by the high court in Indiana are unremarkable as a matter of constitutional history and ideology, at least when viewed at a decent level of generality. That the framers of state constitutions, like the federal constitution, were deeply and broadly influenced by natural rights thinking is well known by scholars, and is an important part of our understanding of the underpinnings of American constitutionalism.[119] What is more notable, and potentially more problematic, is the willingness of the court to develop and implement a jurisprudence of constitutional rights in 2023 that rests on the view that there are Lockean natural rights that infuse contemporary constitutional law. Moreover, in the right case, they can help define the scope of the police power (insofar as they restrict this "general welfare" power to circumstances in which citizens' rights have not been reserved in order to preserve their natural rights to life, liberty, and the pursue of happiness) and can thus do work in limiting the reach of government action. Yet, even the more robust versions of libertarian constitutional theory have been cautious about this view of constitutional rights and the role of the court in locating and enforcing unenumerated provisions.

Is there a place for Lockean natural rights thinking in a modern view of the police power? Mostly no, for the following reasons: First, the expressions of generalized interests in life, liberty, and happiness, while part of the Declaration of Independence's compelling rhetoric, give us, both back then and now, little by way of a discernible constitutional rule or rubric to enforce rights as trumps against government action. Instead, and as the weight of scholarly commentary on both the Declaration and the expressions of the goals of constitutional government has indicated, these expressions of natural rights thinking are helpful in articulating the general ambitions of public welfare and governance. They are hortatory, but no less valuable for that. They can help us better understand, for example, the great objectives of due process in both its original and contemporary valence; it can likewise help frame the enduring inquiry into what we mean when we think of the welfare of We the People, at both the national and state level. But, like the preamble of the US Constitution, the grand articulated goals of, say, promoting the general welfare and securing the blessings of liberty, the content of life, liberty, and the pursuit of happiness cannot do the hard work of defining a sphere of private autonomy and freedom that is unreachable by government regulation. Indeed, if things were otherwise, the development of the police power in the early decades of our republic would have looked much different.

Second, and relatedly, the effort to define the police power by reference to the natural rights of citizens is more than a category error, but risks serious confusion in articulating the fundamental nature of a government power by reference to what natural rights have not been delegated to the government. The Indiana court's opinion in the abortion case is confusing in this respect, positing the relationship between the natural rights of life, liberty, and happiness and the police power. The court proclaims:

> There is symmetry here. While the State worries judicial enforcement of unenumerated rights may overreach, most of the State's police powers are unenumerated too, so there should be equal concern that the State might view its own powers too generously. After all, our Constitution's language in delegating authority to the State for promoting the "peace, safety, and well-being" of Hoosiers is no less capacious than its language guaranteeing Hoosiers' rights to "life, liberty, and the pursuit of happiness." Ind. Const. art. 1, § 1. So, Article 1, Section 1 strikes a balance: it allows the State broad authority to promote the peace, safety, and wellbeing of Hoosiers, but that authority goes no farther than reasonably necessary to advance the police power, and not at the expense of alienating what Hoosiers have commonly understood to be certain fundamental rights.[120]

With this supposed symmetry, the state government will constantly be challenged to show how their regulations under the police power advance the life, liberty, and happiness of its citizens. This becomes simultaneously the rationale for the use of the police power (framed further, in Lockean terms, as peace, safety, and

well-being) and also the constraint on this power. The difficulty in deciding when rights function as trumps to power is, of course, a ubiquitous one, and not at all limited to the matter of Lockean natural rights thinking. However, bringing to the fore the enforceability of unenumerated and ill-defined natural rights provides, as here in the abortion case and other matters involving modern culture wars, a tactic made readily available to attack government regulation.

We equivocated above with the term "mostly" preceding "no." Where natural rights thinking can assist in helping us to puzzle through the matter of mediating, even if not solving, the police power/rights conundrum is by better understanding how the articulating of rights against government was the product not of existential dread that the government would crush private initiative and interfere with the citizens' right to be left alone,[121] but, instead, was part of a robust view of the government's obligation to look after the welfare of the community. Part of the end of essential liberty of citizens is the preservation of civil society.[122] This is the standard wisdom of the social compact theory central to Lockean thinking.[123] As the Indiana Supreme Court puts it: "[W]e left the state of nature and entered a civil society, giving up some of our natural rights in exchange for better protection of the remaining natural rights and for the enjoyment of new positive rights."[124] Such thinking, refracted of course through the evolution over 240 years and counting of what is distinctly American in our American constitutional tradition, can help us better understand the scope of governmental power under the police power and also its limits.

And yet ultimately this Lockean natural rights jurisprudence is unhelpful in settling matters involving abortion and other matters where the government's prohibitory power is put alongside rights that are not only unenumerated but are, as the Court majority expressed at great length in its Dobbs decision, profoundly controversial and difficult to administer. This is not the place to investigate in detail whether and to what extent abortion can be limited under the police power, although flagging this issue as an important one for the state courts in the coming years is necessary as there will be frequent litigation involving state constitutions in the post-Dobbs era. Let us say at least that this controversy is not easily solved by resort to natural rights thinking flowing from Lockean social compact theory. If the Supreme Court's mode of reasoning in Dobbs is any bellwether, then state courts are likely to immerse themselves in the now ascendant originalist methodology in order to determine how far state government can and cannot go in restricting abortion rights, and rights that bear on similar bodily autonomy issues (assisted suicide, access to contraception, etc).

THE PUZZLE OF POSITIVE RIGHTS

A marked development in state constitutionalism in the twentieth century, often implemented by direct democracy and enabled by the relative ease of amendment of state constitutions, was creation of new rights that functioned as affirmative

obligations on government. These so-called positive rights were distinctive in remarkable ways from what we have long understood as the nature and function of constitution rights under the US Constitution.[125] Whereas these latter rights reflected protections of negative liberties, that is, edicts not to act, so as to violate individual freedom and liberty, positive rights insisted upon government acting to protect the welfare of individuals through access to services and resources.[126] As Emily Zackin writes in her book on positive rights in American state constitutions: "The advocates of protective constitutional provisions consistently argued that, for a certain segment of the population, intrusive government and the risks such government posed to private property and individual liberty were not the most salient or urgent threats to the well-being of every citizen."[127]

The content of these rights differ among the states, but common are rights to educational equity and quality, environmental protection, bail, and housing. The effective protection of these rights required government action in the form of findings that the present provision of these social goods was suboptimal and, in addition, the furnishing of adequate resources – if not by the court itself then indirectly by commands directed toward other state governmental institutions. The history of judicial treatment of positive rights is an interesting topic in its own right, and largely beyond the scope of this book.[128] However, we should say a bit more about how the phenomenon of positive rights, looked at as a whole, implicates our thinking about the police power.

Positive rights present us with a real puzzle. On the one hand, the progressive ideal which has framed the analysis here and elsewhere about the origins and functions of the police power maintains that the responsibility to implement policies that would further the common good, by protecting health, safety, morals, and the general welfare is vested in the legislature, administrative agencies, and other officials with the authority to enact public policy. The state constitution sets out the objectives and the contents of the power, but the responsibility for the implementation of these goals lies outside the four corners of the constitution. What role would positive rights play in this picture other than as a sort of "and we mean business" principle?

On the other hand, we might see positive rights as the *yin* to the police power *yang*; that is, the description of general welfare ambitions in the language of rights encapsulates elements of the public welfare objectives that are incorporated into the wide mission of good governing under the police power. More practically, positive rights give citizens the ability to bring government actors before courts, so as to make sure that they are carrying out their duties under the police power. In this ambitious rendering, the police power is the basis of governmental action, the font of governmental authority; whereas positive rights reflect some of the most central foundations of its obligation. Both are sources of real law; both are judicially enforceable.

A close look at the role and function of the police power suggests that the solution to this puzzle lies somewhere in between these two competing views. The reader might be disappointed in the brute pragmatism of this resolution, but hopefully she

will be persuaded that such an accommodation to these competing views reflects a fruitful way of thinking about what is a truly difficult issue, at the level both of history and of tactics.

Positive rights are in and of themselves principally hortatory, at least when measured by the usual yardstick of "How can I get affirmative relief in court?" Seldom have courts used these rights to invalidate governmental actions as inconsistent with the social welfare requirements embedded in the right. "Seldom" does not mean "never," however, and it is principally in the area of educational equity and finance that we see an elaborate and largely sustained effort by state courts to implement a right to educational quality.[129] This has been a highly complex area, and it is hard to measure the overall success of the endeavor without breaking the story in the state-specific stories.[130]

The right to education is rightly viewed as an example – maybe the most compelling example – of a judicially enforceable positive right. However, it relates to the larger solar system of the police power in a more attenuated way. A successful educational system is of course part of a well-functioning society, and so there is an obvious and important connection between educational quality and the general welfare. Nonetheless, the way that state courts have understood, broadly speaking, their charge to enforce the right to education is a responsibility of government to provide educational equity through targeted fiscal strategies. It is not the aspiration to have the best possible schools within a county or a state, however worthy that is as an objective of our state and local government. Rather, the legal construct is one of equity in finance. The overarching goal is to ensure that individuals in district A are being treated in no essential way different than those in district B. Quality differentials, at least as best can be measured by courts, are the problem; and disparities in finance, which will predictably be reflected in test scores and other relatively objective measures, can be examined and adjudicated, with the aim of fixing these disparities through judicial edicts and some supervision of legislative and administrative action.

Policy areas that can be seen as more at the core of the police power, for example, adequate public health, safety from harmful behavior (crime) or substances (drugs), or some general deterioration in the conditions or urban life, are rarely the subject of positive rights. To be sure, some talk eloquently about the right to adequate health care;[131] others will talk about the freedom of movement, enabled only by the provision of various services to aid what is called "instrastate travel."[132] But these have not been translated into positive rights, and so do not really connect coherently to the police power.

Lest we abandon entirely the use and utility of positive rights in our quest to connect rights to the police power, we should think creatively about how the positive rights experiment does help us shape a vision of government as a matrix of institutions that come along with a social obligation. The fact of a police power, and nested in a wide theory of good governing that has permeated this book, suggests that the

government has a special obligation under our state constitutional structure to act to promote the "people's welfare." Obligations to govern go beyond the minimalist state and also beyond the *sic utere* idea that government steps in to redress private harm and certain forms of social disorder that make up public law in a narrow sense. The police power is illustrative of these obligations. Likewise, the inclusion of positive rights in state constitutions are emblematic of this same vision of the government as a progressive force for protection of the public interest and facilitator of the social good. We can see positive rights as expressing, at the very least, a symbolic form of this commitment and, critically, a form that is hard-wired into the state constitution, and not merely floating freely as an academic idea. Positive rights, as Zackin reminds us in her important study, were the result of distinct social movements;[133] we saw in the 1960s and 1970s in particular (and even as recently as the past decade with regard to the issue of housing and homelessness) the mobilization of citizens to push for progressive social policy and to use the mechanisms of constitutional change to augur this development. Even with mixed success at the level of judicial intervention the fact of this citizen movement has become an important element of our social change and of the use of constitutional reform to implement such change. Positive rights are a novel mechanism for such change, and can be viewed in partnership with the ancient edifice of the police power as a conventional and vitally important element of ambitious social policy in the service of the common good.

DEFINING AND CONTESTING RIGHTS IN A GOOD GOVERNING FRAMEWORK

Jud Campbell, who we have discussed previously in this chapter in connection with insights about free speech and natural rights thinking, provides a useful way of thinking about the transformation in rights thinking more generally, one that bears on our discussion of rights and the police power. He explains:

> Until the mid-twentieth century, fundamental rights were bimodal. First, courts employed an ostensibly deferential ends-means test to ensure that any legislation restricting natural rights was within the police powers – that is, that the legislature was aiming to promote the public good. These "rights" were not antiregulatory at all, and they did not exclude particular reasons for restricting rights, so long as those reasons were public regarding. Second, courts applied a set of more determinate limits on legislative power that included fundamental common-law rules. In this latter sense, rights were "trumps." Natural rights and common-law rights were thus the twin pillars of American rights jurisprudence.[134] (citations omitted).

In this account, we could glean much from our examination of the proper scope of governance under state constitutions and the US constitution regarding the meaning of individual rights. It oversimplifies this just a bit to say that the rights at issue

were subservient to the government's overall interest in protecting and promoting the general welfare. However, this conception of rights explains well the courts' simultaneous regard for private property as a fundamental constitutional value and its willingness to accept ambitious governmental regulation that would limit the discretion owners had over their property's use where such limits were necessary to protect the common welfare. Rights are adapted to the circumstances of constitutional governance rather than the other way around.

But time brought change. Campbell writes:

> The modern notion of constitutional rights, by contrast, reflects a transmogrified synthesis of these earlier ideas. In terms of scope, modern rights privilege certain realms of freedom, like communicative activity, rather than specific, historically defined limits on governmental power or general protection for liberty. Nor do modern rights carry the same implications for governmental authority…. The very idea of rights, then, limits the reasons why the government can restrict them.[135] (citations omitted).

He is examining mostly the free speech protections of the First Amendment to illustrate this point, but the lessons could be applied as well to property rights and other economic liberties. This transmogrification requires the government to tread with much more care when it made a choice that is ultimately redistributive, that is, sacrifices individual dominion over one's property to the public interest. Takings law, for example, makes this caution explicit, imposing a liability rule that ensures that the value of the restriction will be capitalized into the decision to restrict the property owner's rights. In the regular instance of regulation over private property under the police power, however, the mechanism by which the caution is imposed on governmental choice is a strong enforcement of an individual right. We see this also with respect to the Second Amendment. We might have imagined that the "right to keep and bear arms" was part of an overarching goal of maintain public safety. But in the hands of the current Court, it is an individual right that, in Campbell's words, "limits the reasons why the government can restrict them." In so doing, it manages the efface the very rationale for the right.

The transition to this modern view of rights has two major implications for our understanding of the police power. First, the preference for certain individual freedoms means that the government's commitment to public safety, health, and morals will need to be calibrated so that the realm of freedom in these highly protected areas is not too disturbed. In the free speech context, this has important implications, as we have discussed, for morals regulation. Communicative freedom has a privileged place and the government will face a high burden when it restricts such freedom and a nearly impossibly high burden when it does so in any non-neutral way. Gun rights seem also quite privileged and, to the chagrin of a solid majority of Americans, restrictions that are designed to keep us safe and to protect the public from gun violence will be viewed skeptically, with the government carrying a rather

high burden in showing that such restrictions are warranted. Second, not only will rights outside of this preferred contexts emerge as trumps restricting government action (leaving here to one side regulatory takings as a somewhat special case), but they will also not be viewed within a framework which otherwise might help us figure out how best to balance governance strategies that are public regarding and motivated by police power's underlying logic and purpose with the concern and interests of individuals who want to be assured that their property and liberty will be protected in a constitutional republic that values freedom and individual choice.

We will see as we turn to further considerations regarding the interpretation of the police power in the next chapter that there are other mechanisms available to courts in navigating these difficult issues and resolving conflicts. What this chapter has illuminated is the way in which the evolving jurisprudence of rights, in both US and state constitutional law interfaces with the police power and the quest for good governing where rights might come into conflict.

NOTES

1. See Federalist No. 84 (A. Hamilton) ("The truth is, after all the declamation we have heard, that the constitution is itself in every rational sense, and to every useful purpose, A BILL OF RIGHTS").
2. Michael P. Zuckert, "Madison's Consistency on the Bill of Rights," *National Affairs*. https://bit.ly/3vtH8lm.
3. See Barron v. City of Baltimore, 32 U.S. 243 (1833).
4. See generally Bryan H. Wildenthal, "The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment," 61 *Ohio St. L. J.* 1051 (2000). See also Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998).
5. See Oliver Wendell Holmes, *The Common Law* (1881); James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (1893); Benjamin Cardozo, *The Nature of the Judicial Process* (1921); Learned Hand, *The Spirit of Liberty* (1952).
6. See G. Edward White, *Law in American History Volume II: From Reconstruction Through the 1920s* (2016), at 400.
7. "Suspect classes" originates with the Supreme Court's opinion in Carolene Products. See also Marcy Strauss, "Reevaluating Suspect Classifications," 35 *Seattle U. L. Rev.* 135 (2011).
8. See generally White, *Law in American History Volume II*, at 379–423.
9. 473 U.S. 432 (1985).
10. Ibid., at 450.
11. 118 U.S. 356 (1886).
12. See generally Robert Post, "Participatory Democracy and Free Speech," 97 *Va. L. Rev.* 477 (2011).
13. See Janus v. AFSCME, 138 S. Ct. 2448, 2487 (2018) (Kagan, J., dissenting).
14. The free speech clause of the First Amendment was incorporated to the states in Gitlow v. New York, 268 U.S. 652 (1925).
15. See, e.g. Murdock v. Pennsylvania (1943) expressly stated: "freedom of press, freedom of speech, freedom of religion are in a preferred position." https://bit.ly/47wcLYN.

16. 337 U.S. 1 (1949).
17. 491 U.S. 397 (1989).
18. Ibid., at 414.
19. Ibid., at 416.
20. Also illustrative of this strong free speech orientation is the Court's decision in City of Chicago v. Morales, 527 U.S. 41 (1999). Here the Court considered an anti-loitering ordinance, once designed to protect public safety, as the city explained it.
21. See, e.g., Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Buckley v. Valeo, "424 U.S. 1 (1976).
22. See Jud Campbell, "Natural Rights and the First Amendment," 127 *Yale L. J.* 246 (2017).
23. Ibid., at 268.
24. Ibid., at 277.
25. See Martin H. Redish, "The Value of Free Speech," 130 *U. Penn. L. Rev.* 591 (1982).
26. See Post, "Participatory Democracy"; Toni M. Massaro & Helen Norton, "Free Speech and Democracy: A Primer for Twenty-First Century Reformers," 54 *UC Davis L. Rev.* 1631 (2021); Frederick Schauer, "Free Speech and the Argument from Democracy," 25 *Nomos: Liberal Democracy* 241 (1983).
27. See, e.g., Dennis v. United States, 341 U.S. 494, 525 (1951); (Frankfurter, J., concurring); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940). See generally Melvin Urofsky, "The Failure of Felix Frankfurter," 26 *U. Rich. L. Rev.* 115 (1991).
28. See Genevieve Lakier, "The First Amendment's Real Lochner Problem," 87 *U. Chi. L. Rev.* 1241 (2020).
29. See, e.g., Minow, *Saving the News*, Chapter 4; Owen Fiss, *The Theory of Free Speech* (1998); Cass R. Sunstein, "Lochner's Legacy," 87 *Colum. L. Rev.* 873 (1987).
30. See Lochner, 198 U.S. at 75 (Holmes J., dissenting).
31. 554 U.S. 570 (2008).
32. See New York State Rifle &Pistol Ass'n, Inc. v. Bruen, 597 U.S. __ (2022); McDonald v. City of Chicago, 561 U.S. 742 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008).
33. 597 U.S. __ (2022).
34. See generally David Strauss, "Foreword: Does the Constitution Mean What it Says?" 129 *Harv. L. Rev.* 1 (2015).
35. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969). See generally Geoffrey R. Stone, "Free Speech and National Security," 84 *Ind. L. J.* 939 (2009).
36. See Reva Siegel, "Dead or Alive: Originalism as Popular Constitutionalism in Heller," 122 *Harv. L. Rev.* 191 (2008). See also Heller, 128 U.S. at 2821 (Scalia, J., dissenting) ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad").
37. See Cornell, S. *The Police Power and the Authority to Regulate Firearms in Early America* (New York: Brennan Center for Justice, 2021), pp. 1–2. https://bit.ly/3TTLnkz.
38. 1 Ala. 612 (1840). Discussed in Cornell, *Firearms*, at 7–8.
39. Cornell, *Firearms*, at 7–9.
40. See Idaho Const. of 1889, art. I, #11. Ga. Const., art. I, #1, para. VIII. See also Fla Const., art. I, #8.
41. Ibid., at 8. See also Jud Campbell, "Natural Rights, Positive Rights, and the Right to Keep and Bear Arms," 32 *L. & Contemp. Probs.* 31 (2020); Saul Cornell & Nathan DeDino, "A Well Regulated Right: The Early American Origins of Gun Control," 73 *Fordham L. Rev.* 487 (2004).

42. See the interesting discussion in Jamal Greene, *How Rights Went Wrong: Why Our Obsession with Rights is Tearing America Apart* 58–90 (2021) (describing the problems with "rightism").
43. See Campbell, "Natural Rights and the First Amendment," at 66.
44. See generally Ronald Dworkin, *Taking Rights Seriously* (1978). See also Dworkin, *Law's Empire*.
45. Jeremy Waldron, "Denouncing Dobbs and Opposing Judicial Review" (ms. May 2022). See also Waldron, "The Core of the Case."
46. Chief Justice Roberts wrote in Trump v. Hawaii: "The dissent's reference to Korematsu … affords this Court the opportunity to make express what is already obvious: Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – 'has no place in law under the Constitution'." 138 S. Ct. 2392, 2423 (2018), at 38.
47. 600 U.S. __ (2023).
48. Coronavirus: Medical marijuana dispensaries are called essential in Mass., but recreational pot shops must close under governor's order. MassLive (2020) https://bit.ly/3RT7btQ. A superior court judge upheld this order. https://wbur.fm/3SHopId.
49. 210 U.S. 373 (1908).
50. Cf. Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. 1959) (noting that due process is required in instances involving "conflicting private claims to a valuable privilege").
51. 239 U.S. 441 (1915).
52. Ibid., at 449.
53. Ibid.
54. Horwitz, *Transformations II*, at 263.
55. Ibid., at 270.
56. See generally William E. Forbath, "Constitutional Welfare Rights: A History, Critique, and Reconstruction," 69 *Fordham L. Rev.* 1821 (2001). See also Cass R. Sunstein, *The Partial Constitution* (1993).
57. 357 U.S. 254 (1970).
58. 424 U.S. 319 (1976).
59. See, e.g., Frank Michelman, "The Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice," 121 *U. Pa. L. Rev.* 962 (1973); Frank Michelman, "1968 Term – Foreword: On Protecting the Poor Through the Fourteenth Amendment," 83 *Harv. L. Rev.* 7 (1969).
60. Frank Michelman, "Property as a Constitutional Right," 38 *Wash. & Lee L. Rev* 1097 (1981).
61. Ibid., at 1123.
62. See, e.g., Thomas W. Merrill & Henry E. Smith, *The Oxford Introductions to U.S. Law: Property* (2010); Thomas W. Merrill & Henry E. Smith, "The Morality of Property," 48 *Wm. & Mary L. Rev.* 1849 (2007).
63. Penn Central Transportation v. New York City, 438 U.S. 105 (1978).
64. Ibid., at 125: "in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized real property interests" (citing Nectow v. Cambridge, 277 U.S. 188 (1928)).
65. 438 U.S. at 125.
66. Ibid.

67. Ibid., at 129.
68. 447 U.S. 255 (1980).
69. Ibid., at 260.
70. 505 U.S. 1003 (1992).
71. Ibid., at 1010 (citing Agins 447 U.S. at 260).
72. See, e.g., Joseph Sax, "Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council," 45 *Stan. L. Rev.* 1433 (1993).
73. Ibid., at 1453.
74. Ibid., at 1455.
75. Penn Central, 438 U.S. 105.
76. 594 U.S. __ (2021); 1415 S. Ct. 2063.
77. 1415 S. Ct. at 2071 (citing Tahoe-Sierra Preservation Council, Inc v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 (2002)).
78. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).
79. See Maureen E. Brady, "The Damaging Clauses," 104 *Va. L. Rev.* 341 (2018).
80. Joseph Sax, "Takings and the Police Power," 74 *Yale L. J.* 36 (1964).
81. Ibid., at 50.
82. See Murr v. Wisconsin, 582 U.S. 383 (2017). See generally Maureen E. Brady, "Penn Central Squared: What the Many Factors of Murr v. Wisconsin Mean for Property Federalism," 106 *U. Pa. L. Rev.* Online (2017).
83. 544 U.S. 528 (2005).
84. Ibid., at 531.
85. Ibid., at 533.
86. 545 U.S. 469 (2005).
87. Kelo, 545 U.S. at 503 (O'Connor, J., dissenting).
88. Ibid., at 490 (Kennedy, J., concurring).
89. See Murr, 137 S. Ct. at 1938.
90. Sutton, *Imperfect Solutions*, at 8. See also Tarr, *Understanding State Constitutions*, at 75–76.
91. See Tarr, *Understanding State Constitutions*, at 77.
92. See ibid., at 78. See, e.g., Pennsylvania Constitution of 1776, Bill of Rights, art. 3; Delaware Constitution of 1776, Declaration of Rights, art. 4.
93. William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* 9 (2000).
94. Gestle, *Liberty and Coercion*, at 36.
95. Jud Campbell writes: "[A]ssessing the public good – generally understood as the welfare of the entire society – was almost entirely a legislative task, leaving very little room for judicial involvement." Campbell, "Natural Rights and the First Amendment," at 253. He writes this as a general summary of the view of the framers of the proper role of government. And indeed this view is broadly congruent with the highly deferential approach to the government's assessment of public welfare in its police power functions. However, it still does not paint an adequate picture of how they thought about the relationship between rights and judicial intervention.
96. Gestle, *Liberty and Coercion*, at 37.
97. See Sutton, *Imperfect Solutions*, at 13 ("The first use of the power [of judicial review] occurred in the state courts and arose under the state constitutions"). See generally Saikrishna B. Prakash & John C. Yoo, "The Origins of Judicial Review," 70 *U. Chi. L. Rev.* 887 (2003).
98. 5 U.S. 137 (1803).

99. 3 U.S. 386 (1798).
100. Ibid., at 388.
101. See Sutton, *Who Decides?* at 30.
102. 32 U.S. 243 (1833).
103. See Jack N. Rakove, "The Origins of Judicial Review: A Plea for New Contexts," 49 *Stan. L. Rev.* 1031, 1034–35 (1997).
104. Sutton, *Who Decides?* at 39. See ibid., at 52 ("Once people accept the idea of a hierarchy of laws, it's a small but consequential step to accept that constitutions amount to superior laws").
105. https://bit.ly/3UFUMwy.
106. See generally Barnett, *Restoring the Lost Constitution*.
107. Common Sense [Thomas Paine], Candid and Critical Remarks on Letter 1, Signed Ludlow, Pa. J. & Wkly. Advertiser, June 4, 1777, at 1; see also Thomas Rutherford, *Institutes of Natural Law* 36 (Cambridge, J. Bentham 1754) ("Another division of our rights is into natural and adventitious. Those are called natural rights, which belong to a man … originally, without the intervention of any human act.").
108. U.S. Const. Ninth Amendment.
109. Anthony Sanders, *Baby Ninth Amendments* (2023).
110. See, e.g., Steven G. Calabresi & Sofia M. Vickery, "On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees," 93 *Tex. L. Rev.* 1299 (2015); Michael W. McConnell, "Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?" 5 *N.Y. U. L. & Liberty* 1 (2010).
111. See Barnett & Bernick, *Original Meaning*.
112. No. 53C06-2208-PL-1756.
113. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2021).
114. MLB of Indiana, at p. 17.
115. Ibid., at 19–22.
116. The court stresses the following: "Roughly forty state constitutions now contain Lockean Natural Rights Guarantees, and courts in most of those states have concluded the clauses are judicially enforceable." Joseph R. Grodin, Rediscovering the State Constitutional Right to Happiness and Safety, 25 *Hastings Const. L. Q.* 1, 1, 22 (1997). Several state supreme courts have recently analyzed their analogous provisions in addressing claims like the one before us today, and they all concluded those provisions are judicially enforceable. Okla. Call for Reprod. Just., 526 P.3d 1123, 1130 (Okla. 2023); Wrigley v. Romanick, 988 N.W.2d 231, 240 (N.D. 2023); Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1167–95 (Idaho 2023); Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 471 (Kan. 2019). We reach the same conclusion based on our review of Section's 1 text, "illuminated by history and by the purpose and structure of our constitution and the case law surrounding it." Price, 622 N.E.2d at 957. MLB of Indiana, at 17.
117. Ibid.
118. Ibid.
119. See Banner, *Natural Law*.
120. MLB of Indiana, at 19.
121. See Warren & Brandeis, "The Right to Privacy, *Harv. L. Rev.* See also Erwin N. Grisworld, "The Right to be Let Alone," 53 *Northw. L. Rev.* 216 (1960–61).
122. On ordered liberty, see Palko v. Connecticut, 302 U.S. 319 (1937).
123. See generally Joshua Foa Dienstag, "Between History and Nature: Social Contract Theory in Locke and the Founders," 58 *J. Pol.* 985 (1996).

124. See MLB of Indiana, at 26.
125. See generally Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* 11 (2013); Helen Hershoff, "Just Words: Common Law and the Enforcement of State Constitutional Social and Economic Rights," 62 *Stan. L. Rev.* 1521 (2010); Helen Hershoff, "Positive Rights and State Constitutions: The Limits of Federal Rationality Review," 112 *Harv. L. Rev.* 1131 (1999).
126. Although not focusing on positive rights specifically, William Novak connects the evolution of the police power in the late nineteenth and twentieth century to the critique of classical liberalism and the emergence of "a new conception of positive liberty – a conception that intersected with simultaneous calls for a more positive law and more positive state." William J. Novak, *New Democracy: The Creation of the Modern American State* 79 (2022). The shift to a more positive liberty conception, a prominent theme in Progressive era ideology had limited impact on American constitutional in this era on the whole, although, as Novak, Scheiber, and others observe, there was a growing recognition of the idea that private property is imprinted with a public purpose.
127. See Zackin, *Looking for Rights*.
128. See Hershoff, "State Constitutions."
129. See generally Sutton, *Who Decides?* at 22–41. See also Goodwin Liu, "Interstate Inequality in Educational Opportunity," 81 *NYU L. Rev.* 2044 (2006); Molly McUsic, "The Use of Education Clauses in School Finance Reform," 28 *Harv. J. on Legis.* 307 (1991).
130. In addition to the sources cited in n. 141, see Goodwin Liu, "Education, Equality, and National Citizenship," 116 *Yale L. J.* 350 (2006).
131. See, e.g., Elizabeth Weeks Leonard, "State Constitutionalism and the Right to Health Care," 12 *U. Penn. J. Con. Law* 1325 (2010).
132. See, e.g., Kathryn E. Wilhelm, "Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel," 90 *B. U. L. Rev.* 2461 (2010).
133. Zackin, *Looking for Rights*, at 190.
134. Jud Campbell, "The Emergence of Neutrality," 131 *Yale L. J.* 861 (2022).
135. Ibid., at 945–46.