Introduction

The state police power – in essence, the power of the state government to protect the health, safety, morals, and general welfare of its citizens – is a modern constitutional curiosity. As an historical matter, vigorous debates over the existence, nature, and scope of the police power were common in the early years of our republic. The power was mentioned first by the Supreme Court in the 1827 case of Brown v. Maryland,[1] but, even before that, it was a familiar part of state constitutions in the Revolutionary period and in the years following. Indeed, the police power was (and still is) the fulcrum of the state's regulatory authority, and much of ordinary regulation of various objects and situations emerged from the police power, seen as a central element of a sovereign government under the rule of law.

Despite the persistent interest in the police power by courts, state and federal, and also by commentators (no less than three treatises were devoted to the topic in the late nineteenth and early twentieth centuries),[2] the police power steadily faded from interest and attention. A law student in an American law school today will spend no appreciable time looking at the police power, except maybe as part of a discrete historical inquiry into how the Supreme Court used notions of liberty of contract and substantive due process during the Lochner era of the early twentieth century to restrict state regulatory authority over economic matters.[3] It is a concept whose desuetude is rather obvious, but still puzzling. Legal historian Harry Scheiber would describe the police power as "one of the most important concepts in American constitutional history,"[4] but as a matter of deep theory or practical reflection, few would pause to wonder why it is of so little consequence in discussions of contemporary American constitutionalism.

The very obscurity of the police power reveals tendencies in the academic discourse around American constitutionalism that ought to be highlighted in their own right. One is the lack of serious and sustained attention in the American legal academy, including both teaching and scholarship, to matters of state constitutional law.[5] The police power is an essential part of state constitutions and, with a little focus on state constitutions, we might expect that a rich understanding of the power would suffer from the same remoteness from concern. The other reason for

https://doi.org/10.1017/9781009127370.001 Published online by Cambridge University Press

its irrelevance, a bit more complex to unpack, is that issues of constitutional power lose their centrality in a period in which the most concrete issues for constitutional adjudication – whether at the national or state level – are whether and to what extent official power is limited by certain individual rights. Take an ordinary case in which an individual is asserting that a state statute limits her ability to express certain content on the grounds that her expression would disrupt the moral sensibilities of a community. Maybe she wins, maybe she loses; but the court's inquiry will focus less on the status and structure of the government's power to protect the public's morals and more on whether she has a fundamental First Amendment right that is being compromised by the state regulation. You can conjure up a thousand hypotheticals of constitutional conflict and you will find that most of the focus will be on the *right*, not on the *power*.[6] This situation was not nearly as common in much earlier eras, when the courts were less intensely preoccupied with questions of fundamental rights and tiers of review and more on whether the government had the power to act in the first instance. Insofar as the scope of the police power is less central to the structure of constitutional adjudication, attending to this power has declined as a priority in scholarship and also in the caselaw.

Good Governing is an effort to reconsider the police power, and for reasons that are important for understanding state constitutionalism in the United States, as well as the architecture and potential of regulation at the state and local level. The basic argument is that the police power is a core component of the state constitution – that is to say, every state constitution, even acknowledging state-to-state differences – and emerges as a technology to enable the government, acting on behalf of the people as sovereign, to fulfill our most essential constitutional objectives. These objectives can be considered at various granular levels, and so we can speak of the role of law in addressing the imperatives of securing public safety, protecting state citizens from threats to their public health, maintaining good order, protecting individual liberty and private property, and ensuring the education of its citizens and a clean environment (these last two goals part of more modern constitutional understandings, connected to notions of positive rights). At a more global level, we can see as a principal objective of state constitutionalism the empowerment of state and local institutions to engage in what we call here good governing – good governing in a twin sense, of effective regulatory decision-making and of official choices for the public good. The police power, in its standard locution and its interpretation by courts, refers to some specific goals (health, safety, and morals) and a larger, more overarching goal (general welfare, the common good). So long as we take seriously the role and function of state constitutions in our scheme of American governance, we should, too, account for the shape and function of the police power.

While the principal subject of this book is the police power in the American states, this broad and deep inquiry is situated in a larger inquiry into the nature and theory of American state constitutionalism. It is from the vantage point of a richer understanding of state constitutions that we can gain a nuanced and, in some important

ways, novel understanding of the police power. After all, the power emerges directly from these fifty documents, not from the United States Constitution; it is one of those classic powers reserved to the states via the Tenth Amendment. State constitutions are the foundation of the power, providing it with shape and scope. And yet state constitutions often get a bad rap in discussions of American constitutionalism and its foundations. When they are not neglected in whole or in part, they are often regarded as clumsy, cumbersome vessels for instantiation of current policy fads. James Gardner famously described state constitutional as a "failed discourse,"[7] highlighting, as others have, the jumble of state constitutional provisions and the lack of a tradition of truly independent state constitutional interpretation.

Whatever misgivings scholars and citizens have about the content of particular state constitutions, it remains true that these documents govern official action and wide swaths of political and social life in American life. Their puzzles are, to be sure, close to the surface. Robert Post wrote in a book about constitutional reform in California the following: "State constitutions face a fundamental challenge: They must constitute a polity within a polity. They must establish a distinctive political culture within the confines of the encompassing and transcendent political culture of the nation."[8] However distinctive be these cultures, state constitutions are also instruments of governance that share some common properties, and common goals and should be viewed for some of their cohesive elements in establishing unique (from the US Constitution) methods and theories of governance.[9] In short, we can talk sensibly about American state constitutionalism, without descending into a Tower of Babel where we are talking only about our state constitutions in isolation. That said, we need also attend to the particular institutional context – let us call it the positive political theory of state constitutional design and performance[10] – to understand how instruments of governance are formed and how to enable and impede officials to implement purposive goals. Indeed, we cannot sensibly speak of constitutional objectives without attending to the fact that these constitutions are forged in the crucible of political compromise and strategies. "A written constitution," political scientist Donald Lutz writes, "is a political technology."[11] It is with an eye or two attending to the matters, distinct to individual constitutions in one respect, but a common practice across states in another, that we can unpack and understand the objectives of constitutions. In the end, the police is a principle, but it is also a tactic. This study aims to illuminate its contents and logic from both dimensions.

This is not principally a work of history, but of constitutional theory and normative argument. However, the history of the police power is important, as it provides the frame within which struggles over its identity, its purpose, and ultimately its limits can be understood. The story of the police power begins at the beginning, that is, with the enactment of the first Revolutionary-era constitutions and the early interpretations of those constitutions, along with developments in the common law and legislative interpretation. The Supreme Court's role was important in the

nineteenth century in acknowledging the state police power, when its place in our new constitutional republic might have been precarious, given the creation of a US Constitution and the emergence of a strong federal role in managing and regulating our new nation. Yet even more important to the evolving shape of the police power were key state cases in the nineteenth and early twentieth century, cases which grappled with the state's role as a guardian of the public's welfare and, moreover, with the place of government regulation in a system in which both liberty and private property were important, even if never sacrosanct. Litigation over the police power was part of an admixture of doctrinal developments and controversies involving private property owners (individuals and businesses) and those who made claims on government to redress wrongs and to promote the general welfare. In the critical period beginning in the Jacksonian era, continuing in antebellum America, through the Civil War and Reconstruction, and then into the Progressive era, the courts developed important doctrines, not coincidentally with "public" usually in the title, including public rights, public trust doctrine, public purpose, and public use in eminent domain, that sought to balance property rights with the commands of a government that was active, progressive, and stunningly ambitious. Ultimately, from these legal decisions, both state and federal, there emerged a police power that was capacious, but with constitutional guardrails, and, importantly, not limited to addressing private harm.

There were twists and turns in this story, as could be expected in the long arc of American legal and political history, and the contours of the police power were shaped and reshaped in various ways through the nineteenth century and into the twentieth century, a century that began with the experiment of what has been called "laissez faire constitutionalism." This critical episode in American constitutional history can become a bit overheated in its retelling, but it is nonetheless a focused event that captures important parts of our American constitutional history in a period of grand turbulence. Moreover, it is as much about the evolving conceptions of regulatory power and notions of property and sovereignty as it is about the birth of so-called substantive due process.

The story of the police power's evolution has no ending point, of course, and the period after the end of the New Deal, despite the fact that the police power faded into almost complete obscurity as the century wore on, is an important, if neglected, part of the story. In the second half of the twentieth century especially, constitutional rights emerged as significant constraints on official power, including power wielded by state and local governments under their respective constitutions. And while the focus, as mentioned above, was on the content of the rights, the basic logic of the police power was nonetheless a key part of the mix. Courts, and especially state courts, cared to consider whether and to what extent state and local regulation was arbitrary, the product of animus or self-dealing, and so in some broad sense unreasonable. These were components of police power doctrine in an earlier era, as the treatise writers taught us, but they persisted, albeit in ways somewhat

more latent (and for that reason somewhat confusing) and complex. In the time of the Covid-19 pandemic, courts were asked to consider anew challenges to the assertion of authority by governors, legislatures, and agencies to regulate, in often draconian ways, in order to protect public health and safety. Questions involving the police power remerged, but often without a coherent vocabulary to resolve intense, and powerfully partisan, controversies. An earlier essay on the topic by this author describes the police power as simultaneously inscrutable and irrepressible.[12] It is also indispensable, and the development of constitutional adjudication involving some of the major issues of American public policy illustrate these elements.

Beyond the historical perspective on the police power, there are some key structural issues about the operation of this power, issues that help illuminate broad themes in both state constitutional performance and in regulatory strategy at both the state and local level. Whereas the police power was seen in its origins as strictly a legislative power – an implication of the legislature's plenary power established under state constitutions from the beginning of our republic – it evolved into a power exercised by other governmental institutions, including municipalities, special purpose governments, and administrative agencies. In short, it shape-shifted just as American regulatory institutions did over the expanse of our history. Yet the police power was no *deus ex machina*. Its use and utility, and the institutions who deployed it, were the product of intentional political choices and strategies. Moreover, these choices often generated controversies, some rising to the level of constitutional conflicts. Recurring to the Covid pandemic again, we saw in 2020 and 2021 complaints that state constitutions were being stretched too far in giving governors and agencies power to limit freedom and the use of property. The nondelegation doctrine in state constitutional law, unlike its cousin in the federal constitutional context, is alive and well, as are other doctrines unique to state constitutional law, and so state courts struggled with these issues. The configuration of the police power is ultimately not just about drawing boundaries around what power is or is not too much; it is, as well, about the sensible design of institutions, rules, and procedures that enable it to function and to not be used. Indeed, very much the same could be said about constitutions writ large. How we think about the police power is how we think about constitutional structure and performance. That is a prime theme in this book's analysis of the police power.

The effort to rescue the police power from its obscurity is warranted by its capacity as an idea and a doctrine that illuminates wide themes in the study regulation and constitutional governance. We might say, albeit with some equivocation, that a closer look at the history, logic, and function of the police power might contribute to better interpretations of that power in instances of conflict. Equivocal because to a great degree this depends upon one's favored method of constitutional interpretation. In the focus on the content of rights and on the dimensions of power, method matters. And so commentators may and do urge on courts that they approach these issues in, say, an originalist or "living constitutionalist" manner. Whatever method

one favors, however, it will be fruitful to consider, as courts have for decades, perhaps even centuries, the basis of the regulation – that is, the constitutional power from which it emanates and its rationale. So, for example, when a state court considers whether a regulation violates equal protection principles, it will typically look at whether the statute is a reasonable exercise of governmental power and, with that, whether the law is arbitrary or irrational. Occasionally such an inquiry will lead to further questions of whether the law truly is grounded in general welfare rather than, say, animus or corruption. The doctrine evolves to be sure, but the century inquiry has long been: "Is this law permissible? Is it a rational (or, when the scrutiny standard is strict, compelling) exercise of governmental power?" In this respect, the police power's logic remains an important, often ambient, legal construct, one that provides an important window into the nature and structure of state constitutional law.

A note on constitutional interpretation and interpretive method: a sophisticated view of the police power necessitates a close look at its origins, its history, but it need not rely on the ability of a judge to discern the original public meaning of this phrase or state constitutions generally. This book will be unlikely to warm the heart of a committed constitutional originalist. Not only is the evidence of the meaning that the framers of the US Constitution and these myriad documents, enacted over a long time period, gave to the police power elusive, but this author is skeptical about the originalist project on the whole, and sustained attention to the history of this power has not eroded this skepticism.

Beyond constitutional theory, the police power is important for deeply practical reasons. We live in a world in which many of our most difficult problems as experienced at a state or even local level and in which the capacity and resolve of the government is frequently in question. Issues involving housing affordability, gun violence, pedestrian safety, environmental quality and equity, and threats from emerging technologies require creative government intervention. They require the right institutions and openness to imaginative agendas; and yet, as a constitutional matter, they also require the right amount of regulatory power. The police power can be a necessary (even if in no way sufficient) condition for well-intentioned governments to develop strategies and techniques to solve some of our most wicked problems. The connection between problem-solving and governmental power is hardly a new insight. Indeed, the police power in its original contents was intended to be a means by which the government could promote the general welfare. What is new is the increasing severity of the puzzling problems which plague us. This book has a practical mission, along with its analytical one, and that is to describe how the police power might be a vehicle for good governing, for enabling actions to improve the quality of life for all.

To this point, the reader might be expecting what amounts to long encomium to this vital power in the hands of a well-intentioned government. A celebration of the police power's tradition and potential of improving our life and welfare. Not so

fast. Official decision-making through the police power over the complex expanse of American legal history has included some of the most troubling episodes of overweening public power. The law upheld by the Supreme Court in Plessy v. Ferguson was a police power law.[13] In that same spirit, so were a large number of laws characteristic of the Jim Crow South. In more modern times, zoning regulations that had the effect and perhaps also the purpose of segregating America, in all regions of the USA, were enacted under the police power. And the history of morals regulation, laws proscribing many aspects of social behavior and interfering in some of the most intimate matters of human behavior, is a history of the police power and its use to regulate in the name of what the government in this time considered good moral order. Nor do we need to see this as all behind us. Regulatory efforts are emerging as part of our current culture wars that would roll back commitments to equality by limiting access and opportunity for communities of color and the LBGTQ+ community – these, again, enacted under the rubric of the modern police power. The story of the police power is a normatively complicated one, and so the effort here is not necessarily laudatory, but analytical. As with all such powers, it can be used and misused.

In a similar vein, scholars who did not get the memo about the avowed irrelevance of the police power have highlighted the ways in which the police power is attached to notions of government power as a means of *policing*, of exercising social control in a way that can be, if not totalitarian, then overbearing and threatening. Markus Dubber and Chris Tomlins, in particular, have written thoughtfully in this century about the connections between the police power and highly contestable conceptions of legal autonomy and limitless public power.[14] Social thinkers such as Michel Foucault lurk closely in the background of these interesting perspectives, perspectives that can be viewed also as warnings about the ominous origins and careless use of the police as a mechanism of control rather than opportunity. While this account risks looking through a glass, darkly, at the police power, it is nonetheless important in reminding us that the awesome character of the police power should encourage close examination and thoughtful interrogation.

In this exegesis on the police power, and particularly the interrogation of the history, the author has benefited enormously from the seminal work of two leading American legal historians. William J. Novak has authored the single most important book on the history and function of the police power, *The People's Welfare: Law and Regulation in Nineteenth-Century America*.[15] He has written widely and powerfully on this subject in other writings and in a recent book, a magnum opus by any measure, he draws upon the police power and other key legal doctrines and ideas from the Progressive era especially to support a broad and bold thesis about the emergence and sustenance of truly progressive vision of democracy and governance in America.[16] In these various works, Novak describes how the police power was forged from evolving views among courts and commentators in the nineteenth and early twentieth centuries concerning questions of what constitutes a well-ordered society and how the government can regulate in order to promote these objectives.[17] The point made frequently in *The People's Welfare*

is that the police power emerged from a *sic utere* (harm-reducing) conception of the role of government in enacting prescriptive legislation to become steadily transformed into a strategy for promoting the *salus populi* (public welfare). Further, he makes the connection between broad regulatory power, initially at the state level and later including the federal government, in implementing an "overruling necessity" and the rule of law.[18] He thus reveals through this dense historical analysis an idea of the police power that is distinct from, and in many ways contradictory to, the Schmittian idea of a rights-suspending, emergency constitution, and also inconsistent with the message that the police power is a limitless mechanism for establishing control.

The analysis here is likewise indebted to the great legal historian, Harry Scheiber, who has impacted the thinking of all who are interested in the development of American public law and regulatory governance during the nineteenth and twentieth centuries. His insights on property rights, governance, and the police power are influential generally and on the themes of this book in particular. Focusing mainly on the period leading up to and including the Progressive era, Scheiber illuminates the key patterns of legal doctrine involving regulation and property rights and how scrupulous attention by lawyers and courts to the general welfare is a basis not only for specific judicial doctrines but for a wider interrogation of the formalist underpinnings of property and contract.[19] Scheiber, following some of the pathbreaking work of J. Willard Hurst[20] and others working in this broad tradition of American legal history, describes how private property was long situated in a well-established and widely recognized conception of public rights and the public interest. He illustrates how long before the decision in the leading case of Munn v. Illinois (decided just after Reconstruction) myriad legal doctrines already recognized the power of the government to limit individual and social harm and, more meaningfully, implement important welfare goals, including the imperatives of infrastructure and public works. Therefore, there are deep connections among hoary legal doctrines including the public purpose requirement in state constitutional law, the public use requirement in eminent domain, public trust doctrine, public rights, and, finally, the police power.

For both Novak and Scheiber, the creation and persistence of the police power is fundamentally transformative; transformative in that it underwrites an exceptionally broad use of public power to implement ambitious goals of governance. Although their emphases and objectives as legal historians are distinct in many ways from the focus in this book, their shared view that the police power is tied ineluctably to the emergence of progressive regulatory governance in the United States influences meaningfully much of what follows here.

An overview of the argument herein: In the classical rendering of the police power, measured by how judges and early American legal scholars viewed the concept, what kept the power from becoming a hopelessly open-ended and unconditional grant of power to the state (or local) government to act for whatever reason and for whatever purposes was the notion that the safeguarding of the general welfare

was essentially congruent with the protection of individuals from the misuse of one's property or some other actions that were violative of the social fabric. The formal division between public and private law captured, if sometimes clumsily, the idea that the government can protect against encroachments on private interests through the creation and enforcement of liability law, such as through actions in trespass or in nuisance. *Sic utere tuo ut alienum non laedes*, translated basically as "use your own property in such a way that you do not injure that of another." Where, for whatever reason, private law was inaccessible or adequate to secure these protections, the government could and should step in and enact positive law that would address private harms and ensure adequate compensation. And so far as impositions on the interests of a wider group of citizens, it was a fairly straightforward step to redressing harms through the law of public nuisance (the private law strategy) or through positive law that regulated certain conduct – again, under the *sic utere* principle.

In short, much of the police power, in its conception and in its operation, could be captured in this early period by ideas familiar to classic legal theory as explicated in the great engineers of the common law, Blackstone and others. A key step in the direction of widening governmental power while protecting the basic architecture of private property rights as they were defined in classic common law, including in its natural law underpinnings, was the development of the idea of the *jus publicum*, the notion that certain rights were given to the public and that the *in rem* rights so embedded in the very idea of ownership and the bundle of sticks in traditional private rights were qualified by the obligations of property owners and others to respect the *jus publicum*.

The police power, as we will delve into in more detail in the early chapters of this book, evolved considerably from this classic *sic utere* notion. In key interpretations by state courts,[21] the police power moved away from the formalistic, private law grounded idea of *sic utere*, with the government acting as more or less the trustee of individuals whose rights were being trampled, including individuals who made up the general public and so could trust that the government would proscribe public nuisances. It developed into an idea reflected in creative doctrine over a century's period that was much more (again, crediting Novak for the best explication of this development) in the spirit of *salus populi*.[22] We could and should expect our government to look after the public welfare, with mechanisms and for reasons quite separate from the more narrow obligation to redress discrete wrongs and to bring, for instance, an owner and her neighbor into balance through injunctive and compensatory relief. It evolved as well into a means of realizing goals and objectives that can be traced to the origins and foundations of state constitutions in the United States, in the founding period and afterward. In expanding the charge to state and local governments to protect health, safety, and the general welfare, the police power was a legal construct that would create the conditions (and, even more ambitiously, the obligations) of public officials for good governing. Our state constitutions are instruments of governance that reflect our high expectations of

our governments and the officials who act on the appropriate authority (likewise the US Constitution, although this is not the focal point of our topic here). The police power, as it evolved, albeit unsteadily, over the expanse of our republic's history, was a key tool in the pursuit of these objectives.

A good part of the analysis of the police power, including especially the historical exegesis in the first four chapters, builds on the rich tradition of police power scholarship that was long ago in vogue, gradually faded, but has become more prominent as scholars have urged a reconsideration of our progressive legal traditions.[23] Though seldom pointing to the police power, they argue cogently for a more robust approach to constitutional interpretation, but also change and even fundamental reform to our institutions, and maybe the documents themselves.[24] The focus on themes of democratic constitutionalism reflects a movement, perhaps competing for influence with public meaning originalism as an approach to constitutional understanding in a divided polity. While it would a stretch to describe the effort in *Good Governing* as a work of democratic constitutionalism, it has as a more modest mission the bringing into the picture of constitutional theory and praxis the pertinent, if often peculiar, features of this neglected instrument of ambitious governance, the state police power.

Viewed from 10,000 feet, the story of the police power – not just the historical story, but our normative picture as well – is a steady, if not entirely linear, march from common law and constitutional formalism that kept the government's role in a discernible lane to a purposive expansion of the government's power to regulate individual behavior, private property, and businesses affected with a public interest. To be sure, this expansion accompanied an extraordinary growth in federal authority, a story in and of itself important, and frequently told. But this is not to take away from the persistent use by state and local governments, in various forms and fashions, of regulation through the police power on behalf of the *salus populi*.

To get to a complete understanding of the police power, we need to explore its nature as a concept defined by the widening of authority to govern, limited by constitutional rights at the federal and state level and also by its internal structure. But we also need to explore some of the very specific uses of this regulatory power, and so we look at such matters as zoning, morals regulation in various forms, occupational licensing, gun control, environmental protection, and other policy settings in which the police power matters. As to the matter of legal control, we look not only at the rules of the road that are conventionally seen as constitutional in origin and structure, but also the important set of legal constraints that emerge from administrative law, a source of law whose relevance can be matched only by its seeming neglect when the subject of constitutional powers and rights are under the spotlight.

It is in the struggle of defining an ample, ambitious power to govern and also setting guardrails around that power that we see the police power's dialectic. And in this study we can see anew the challenges embedded in configuring schemes and systems of regulation, of governing, that is progressive in its pursuit of the common

good and the needs and wants of a complex society with many problems, but also respects individual liberty and private property.

This struggle has a very practical valence in the present day. The last several years has brought a renewed attention – for some, this comes with grave concern, for others optimism – to the responsibility of administrators and courts to protect private property and liberty rights against a threatening government. Many doctrinal examples abound. In the relatively few years between the Supreme Court's Kelo decision,[25] in which a narrowly divided court gave a broad interpretation of "public use" in takings cases, and the Cedar Park Nursery decision from two years ago,[26] the federal courts have been more receptive to property rights arguments that would not be unfamiliar to courts in the pre-New Deal area. Scholars have called some contemporary First Amendment decision-making an exercise in "First Amendment Lochnerism."[27] And as we saw in the spate of cases involving government restrictions during the Covid pandemic, there is a considerable amount of skepticism, often rather close to the surface, about the government's authority under the police power to restrict individual liberty by various mitigation measures. While no claim is being made here that we are on the verge of returning to Lochner, it is worth noting that the jurisprudential world is, when viewed on the whole, turning in a direction that demands a more measured response than saying with force and feeling that the New Deal and Great Society solved once and for all the question of how far the government can go to protect health, safety, and the general welfare. In these times, it is especially important to look at the conceptual and doctrinal components of the police power as a struggle among various forces, often opposing, rather than as an illustration of the fundamentally and impenetrably progressive nature of our modern system of constitutional government.

This book is in three Parts. Part I begins by situating the police power in the broad project of state constitutionalism. Three chapters follow, each looking at the police power in distinct historical periods, the first from the republic's beginning through the end of Reconstruction, the second from Reconstruction through the end of World War II, and the third up to the present time. In Part II, we look at important structural issues involving the police power. Chapter 5 looks specifically at the institutional architecture of the police power's use, including the separation of powers, local governance, and the emergence of administrative agencies as agents of the government's myriad authorities, including the police power. Chapters 6 and 7 look at the role of rights in police power controversies and at the internal structural limits that emerge from notions of reasonableness in constraining the police power. A final chapter in this Part explores the police power and American federalism. The final Part is more avowedly normative, looking at the potential of the police power as an engine for problem-solving, focusing on specific problems which are susceptible to innovative government regulation. The last chapter follows on this subject-matter analysis to look at specific, and in some cases quite novel, regulatory techniques, each more or less capable of addressing our wicked problems.

NOTES

1. 25 U.S. 419 (1827).
2. Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (1904); Christopher Tiedeman, *A Treatise on the Limitations of the Police Power in the United States* (1886); Thomas J. Cooley, *A Treatise on the Constitutional Limitations Which Rest on the Legislative Power of the States of the American Union* (1871).
3. See generally Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (1998); Howard Gilman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Power Jurisprudence* (1993).
4. Harry Scheiber, "The Police Power," in 4 *Ency. of American Constitution* 1744 (Leonard Levy et al. eds., 1986).
5. As hard as it is to provide a citation for a negative proposition, this neglect of attention to state constitutional has been noticed. See, e.g., Jeffrey S. Sutton, 51 *Imperfect Solutions: States and the Making of American Constitutional Law* 191–202 (2020) (describing the lack of attention in the legal academy on state constitutional law and proposing ideas that remedy this imbalance). The call for a renaissance of interest in state constitutional law has been associated with two lions of the bench, William Brennan and Hans Linde, both of which wrote about the importance of state constitutional law in American constitutionalism. See, e.g., Hans A. Linde, "E Pluribus – Constitutional Theory and State Courts," 18 *Ga. L. Rev.* 165 (1984); William J. Brennan, Jr., "State Constitutions and the Protection of Individual Rights," 90 *Harv. L. Rev.* 489 (1977). Despite the continuing neglect when viewed holistically, there are many scholars working productively on state constitutional law issues, more than at any time in the recent past, and throughout this book there is discussion of, and citation to, this important, and often new, work.
6. The exercise is isolating issues of constitutions rights from powers remains elusive, at least judging from both the constitutional law canon and also from scholarly commentary. A good essay that sheds valuable light on these issues from a comparative constitutional perspective is Stephen A. Gardbaum, "The Comparative Structure and Scope of Constitutional Rights," in *Research Handbook in Comparative Constitutional Law* (Rosalind Dixon et al. eds., 2011).
7. See James A. Gardner, "The Failed Discourse of State Constitutionalism," 90 *Mich. L. Rev.* 761 (1982).
8. Robert C. Post, "The Challenge of State Constitutions," in *Constitutional Reform in California: Making State Government More Effective and Responsive* 45, 46 (Bruce E. Cain & Roger G. Noll eds., 1995).
9. Se Daniel B. Rodriguez, "State Constitutional Theory and Its Prospects," 28 *N. M. L. Rev.* 271 (1998).
10. In a valuable essay on state constitutionalism, James Rossi describes well the positive political theory approach to studying state constitutionalism, an approach that is reflected in this study. See James Rossi, "Assessing the State of the State Constitutionalism," 109 *Mich. L. Rev.* 1145, 1158–60 (2011). On positive political theory more generally, see William H. Riker & Peter C. Ordeshook, *An Introduction to Positive Political Theory* (1973); John Ferejohn, "Law, Legislation and Positive Political Theory," in *Modern Political Economy* (Jeffrey S. Banks & Eric A. Hanushek eds., 1995).
11. See Donald Lutz, "The Purposes of American State Constitutions," 12 *Publius: J. Federalism* 27, 31 (1982). On this metaphor of constitutions as technology, Adrian Vermeule has an appealing description: "A successful constitution must not only be the

sum of its various functions, but should be understood as a complex piece of machinery in which the parts should work effectively in tandem." Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (2007).

12. Daniel B. Rodriguez, "The Inscrutable (Yet Irrepressible) State Police Power," 9 *N.Y.U. J. L. & Lib.* 662 (2015).
13. 167 U.S. 537 (1896).
14. See Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005); Christopher Tomlins, "The Supreme Sovereignty of the State: A Genealogy of Police in American Constitutional Law, from the Founding Era to Lochner," in *Police and the Liberal State* (M. Dubber & M. Valverde eds., 2008); C. Tomlins, "To Improve the State and Conditions of Man: The Power to Police and the History of American Governance," 53 *Buff. L. Rev.* 1215 (2005).
15. Published by University of North Carolina Press in 1996.
16. William J. Novak, *New Democracy: The Creation of the Modern American State* (2022).
17. See, e.g., William J. Novak, "The American Law of Overruling Necessity: The Exceptional Origins of State Police Power," in *States of Exception in American History* 95 (G. Gerstle & J. Isaac eds., 2020); William J. Novak, "Police Power and the Hidden Transformation of the American State," in *Police and the Liberal State*, at 54.
18. See Novak, "Overriding Necessity".
19. Most of the citations to Prof. Scheiber's large body of work are in the later chapters.
20. See, e.g., J. Willard Hurst, *Law and the Conditions of Freedom in Nineteenth-Century America* (1956).
21. One judicial decision looms especially large, Commonwealth v. Alger, 7 Cush. 53 (Mass. 1851). This case, much analyzed by everyone who writes about the police power, will be discussed in depth in Chapter 2.
22. The full phrase, attributed to Cicero: "Salus populi suprema lex euro." Meaning that the welfare of the people is the supreme law.
23. See, e.g., Robert C. Post & Reva B. Siegel, "Democratic Constitutionalism," in *The Constitution in 2020* 25 (J. Balkin & R. Siegel eds., 2009). For an interesting and ambitious recent book squarely in this tradition, see Joseph Fishkin & William E. Forbath, *The Anti-Oligarchic Constitution: Reconstructing the Economic Foundations of American Democracy* (2022).
24. See, e.g., Sanford Levinson, *Framed: America's 51 Constitutions and the Crisis of Governance* (2012).
25. In Kelo v. City of New London, 545 U.S. 469 (2005), a narrowly-divided Court upheld the use of eminent domain to transfer a piece of land to a private company as an acceptable "public use" under the takings clause. See generally Ilya Somin, *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain* (2016).
26. 594 U.S. __ (2021). In that decision, the Court held that a law that entitled union organizers to come onto a landowner's property to engage in certain union-related activities was a physical invasion and therefore a taking under the eminent domain clause of the Constitution.
27. See Jeremy K. Kessler, "The Early Years of First Amendment Lochnerism," 116 *Colum. L. Rev.* 1915 (2016).