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"The Power to Govern Men and Things"

The Police Power Evolves to Meet New Conditions

As Americans moved from Reconstruction toward the Progressive era, the hunger for a more activist government grew.[1] The demands of a rapidly expanding economy, and one that was integrated in important way, drove regulatory change and expansion, especially with regard to federal initiatives. While a main focus in the academic literature on the Progressive era emphasizes the ways in which the federal government's role expanded,[2] the last quarter of the nineteenth and first quarter of the twentieth centuries was an era in which regulatory activity was focused at the state and local level.[3] As Susan Pearson writes in connection with state regulation: "If we turn our eyes from the arenas usually privileged in stories of statebuilding – social welfare provision and labor regulations – and look to the regulation of morals, sexuality, marriage, and race relations, then the postbellum years appear as an era of expanded government."[4] To be sure, the architecture of constitutional federalism was reconfigured in important ways by the Reconstruction amendments and attendant statutes,[5] and it was further reshaped as the imperatives of a national economy emerged. However, the impact of regulatory power remained state-centered, from the end of Reconstruction into deep into the twentieth century.

We will focus in this chapter on the evolution of the police power in the half century from Reconstruction to the aftermath of the Second World War. During this period, the courts looked more closely – and often skeptically – at the state police power, considering whether and to what extent the scope of government authority should be curtailed. This happened most famously in the twenty-plus years defined as the Lochner era, named after the famous 1905 case, Lochner v. New York.[6] However, we should not neglect what the courts did both before and after Lochner to map out the terrain of the police power. So-called "laissez faire constitutionalism" casts a big light on the subject of governmental authority and property rights during this time and it is generally identified with the period bookended by Lochner and key deal cases, including Nebbia v. New York[7] and West Coast Hotel v. Parrish in 1937.[8] Thus laissez faire constitutionalism is indeed a "thing," a thing whose moment was critical to an understanding of state regulatory power in the first two decades or so of the twentieth century.[9] But a more complete story of how the

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police power was shaped by courts and other governmental actors during the half century between Reconstruction and the 1940s requires a more nuanced appraisal. We should see the ways in which the police power itself – and not just the negative rights that were advanced to curtail the power's scope – took shape as a legal construct and foundational constitutional principle during this long period. Its shape was affected by decisions of legislators and administrators, by the movements in American constitutional development and politics, and, last but not least, through state and federal court decisions.

In this period, we see struggles in the courts and elsewhere over the police power's scope and its limits. One important aspect of this story is the continuing impact of natural law thinking and the way in which such thinking drove forward the idea that individuals have vested rights that were to be safeguarded against overreach by government.[10] However, the main event, as it were, was not natural law and vested rights, nor Lochner and its progeny, although both of these episodes were important to the story. Rather, it was two developments that supported the general cause of defining the police power, developments that came mainly from separate quarters. First, there was the relentless call for more active government, one that would drive economic progress and would also protect safety and health from the threats that emerged from industrialization and the often dangerous modern world and would also protect public morals from threats. At the heart of the Progressive era was a faith, not lost as the country moved into the twenties and thirties and finally into the Depression and World War II, in the capacity of government to govern for the people's welfare. The ways in which government actors developed meaningful regulatory strategies to aspire to a well-ordered society is the principal story of the police power in this period.

Second, courts worried with good reason that this faith in activist government would yield power that could not and would not be effectively checked and channeled. Legislative and administrative activism generated strong efforts at counterbalance. The Reconstruction amendments provided an important part of the toolkit, especially in its establishment of due process and equal protection as protections applicable across the nation. Scholars looking at the rise of administrative governance worried about this emerging approach to governance and advocated for greater control.[11] But it would be a long time into the future until the federal courts gave full force to these mechanisms of control.[12] Meanwhile, while the federal courts experimented with laissez faire constitutionalism, state courts attended to the risks of excessive public power by close interrogations of the police power's excesses. Sometimes this was accomplished through the resort to individual rights, such as liberty of contract and private property, as in Lochner, other times it happened through a close look by judges at the justification for state regulation. Key questions were: Was this a reasonable exercise of the police power? Was it arbitrary? That is, based upon little more than prejudice and without process that is due to individuals who would have had their property confiscated or their liberty restricted?

Moreover, in one important new area of law, regulatory takings, the Court developed requirements that obligated government to pay those who were harmed in discernible ways by decisions involving their property and its use. Takings law was a fairly minor part of the police power and governance story in the half century following Reconstruction, However, starting with Pennsylvania Coal v. Mahon,[13] decided in 1922, and continuing for a century afterward, the federal courts' approach to determining when and to what extent compensation was owed because of ruinous regulation became an increasingly important part of the effort to balance active government with individual rights.

The struggle never disappeared during this period, nor was the puzzle of how to balance activist governance with individual liberty and property ever truly solved. The picture painted in this chapter is one that highlights these tensions and struggles and situates these conflicts in larger debates about governance, property, and liberty.

We should emphasize as well the growing skepticism toward the legislature as an institution managing governance in Reconstruction's aftermath. Anti-legislative thinking did not begin in this era, to be sure. The Jacksonian period saw constitutional reformers and ordinary citizens turning the light on legislatures and fretting about lawmakers' ability to act democratically and responsibly so far as both efficacious governance and protection of liberty were concerned. But the Progressive era was notable in the ways in which reformers adjusted constitutional rules to limit legislative power and, moreover, pushed for regulatory innovations such as greater use of administrative agencies and of municipal governments to implement the police power's objectives.

One important lesson to be drawn from the exercise of the police power in this half century is that the police power was not limited to actions of state legislatures.[14] During this time, we saw meaningful regulation undertaken by administrative agencies, and the emergence of a significant amount of administrative law. Much is written about the rise of national administrative agencies and struggles about their legitimacy and control.[15] However, this development was mirrored, and even presaged, by administrative decision-making on the part of state-level agencies and bureaus. Likewise, regulatory activity under the police power was a common strategy of municipal governments. A good chunk of public policy, including zoning, which we will examine in some detail later in the chapter, was carried out by local governments under the rubric of delegated police power. These phenomena were controversial; they may have troubled the framers of the various early state constitutions, to the extent that matters to the enterprise of figuring out what the police power means. But, in any event, it was a commonplace by the time of the 1920s and 1930s. Any comprehensive treatment of the police power ought to account for these important developments.

The emphasis in the standard literature on judicial intervention during this period has been on Lochner and the emerging libertarian constitutionalism, an approach that drove more searching judicial scrutiny of economic and social

welfare legislation in the name of protecting individual liberty and property rights.[16] The movements that give rise to the fabled Lochner era were part of a growing effort on the part of myriad institutions of government, not limited to the courts, to examine closely the structure and output of legislatures and agencies. The push for progressive legislation grows at the same time that there emerged skepticism about the behavior and conduct of legislatures. To the extent that powerful interest groups and common citizens saw their situation becoming out of balance, efforts at reconciling an expansive police power with individual rights became more prominent. Lochner era cases and other instances of activist judicial review illustrated the countermajoritarian elements of this skepticism, while on the other side was an equivalent concern with maintaining democracy in the face of what was seen as regulatory capture and influence by factions and special interests. Indeed, constitutional reformers were able to express skepticism in both directions, and so forged both majoritarian and countermajoritarian solutions. As a result of these developments, the police power emerged from the era considered in this chapter with a new shape.

PROGRESSIVE LEGISLATION EMERGES

The development of legislation and administrative policy during the Progressive era was largely a consequence of expanding needs of a republic, considered both at the state and at the federal level. Looking back on this period in 1932, Ernst Freund wrote of the extraordinarily widening scope of legislative intervention in the preceding half century, complex but essential, and notable for how it transformed not only regulation as such, but also the role of the state in dealing with more modern exigencies.[17]

As to whether the main contents of legislative regulation were supplied by the national government or the state governments, the answer was both. At the federal level, that was an enormous pressure to respond to the condition of an increasingly integrated economy.[18] Transportation was radically transformed, and something that we now take largely for granted – a railroad system that spans many states in order to efficiently ship goods and transport citizens on the move – was in a precarious position, especially given state political interests that tilted toward protectionism.[19] The federal government was called upon to solve problems created by private businesses operating on their own initiative in the marketplace and by state and local governments looking after their own interests. In the Progressive era, the national government enacted legislature that created a large regulatory infrastructure – and a major federal agency, the Interstate Commerce Commission, to deal with these and related issues.[20]

Likewise, massive public investment, including federal resources and resources collected from the states, was necessary to support a nascent, but then quickly growing, communications infrastructure.[21] The invention and spreading use of the telegraph was one important technology. Afterward, the building of utility poles and their placement throughout the country was a credit to federal government

foresight, and of course it came along with considerable investment. The expansion of communications technologies, the nature of which required support for its use across borders without disruption by individual states or communities, required significant federal intervention.[22] As with transportation, the infrastructure of national regulation was changed. Indeed, with the creation of the Federal Communications Commission in 1934, the central role of the federal government in our cross-state transportation scheme became entrenched.[23]

Some of the consequences of the rapid integration of the economy are dealt with by simultaneous federal and state action. So, for example, the feds stepped into the matter of safety in agriculture by the creation, in 1884, of the Bureau of Animal Industry,[24] tasked with addressing livestock disease, a consequence of the shipment of livestock to distant places – a new development, as previously farmers basically raised their own cows for their personal consumption or for a very nearby market. The states were also active in addressing food safety issues, and had various regulatory rules that dealt with adulterated food products within their borders. Similarly, labor laws were emerging in this era and both the federal and state governments needed to deal with not only the general protection of labor, through, for example, regulation on hours and conditions in the workplace, but also needed to reduce the chances of labor violence.[25] Such violence was not uncommon in this period and, after all, a comprehensive national approach would await the enactment of the National Labor Relations Act in 1935.[26]

The bottom line was that national regulation grew significantly during this period, as the conditions and consequences of a much more integrated market grew. At the same time, state regulation was persistent, and indeed the requirements of state intervention to ensure a modicum of order, including acceptable safety and health, expanded, not contracted, during this period. The steady increase in urban populations, and the attendant health and safety hazards of crowded cities, required new state and local laws. Moreover, an increase in infectious diseases, and occasional epidemics, spurred public health laws, these being almost exclusively the product of state governments. In short, there was plenty for state legislatures and administrators to do during this multi-decade period from the end of Reconstruction to the middle of the next century.

With this significantly augmented role on the part of the state government, the police power was increasingly important as the fulcrum of state authority. As William Novak writes: "The police power increasingly became a more positive public law doctrine that defined modern legislative regulatory power."[27]

PROGRESSIVE LEGISLATION SUSTAINED: THE POLICE POWER AND THE SUPREMES

We often see the rise and fall of Lochner as reaffirming fidelity to a highly deferential approach to reviewing economic regulation, an approach that would come to

be called "rational basis" review.[28] However, the reality is that the judicial evaluation of governmental actions that impacted individuals' contract and property rights was meaningful both before and after Lochner.[29] Before Lochner, courts interrogated state regulations, and even though they deferred to legislative judgments and more often than not upheld these laws against constitutional challenges, there was a meaningful modicum of review of the government's exercise of the police power in the late nineteenth century.[30] Because it was deployed most often in state courts, it has long fallen off the radar screen of constitutional scholars, even many trained and tasked to look closely at the history of the period.[31] And after Lochner, notwithstanding the widespread deference accorded to state government's economic regulation,[32] state courts did scrutinize the reasonableness of government regulation to determine whether the police power had been properly exercised.

Munn v. Illinois, described in the previous chapter, illustrates how the Supreme Court saw the police power at the other end of Reconstruction. The Court there emphasizes that the police power has as its central function a mechanism by which the legislature could promote health, safety, and the general welfare in the face of self-regarding, monopolistic business practices. Property, said the Court in Munn,[33] was subject to public control and was embedded in social welfare considerations. This did not mean that the power of control is unlimited, but that for "businesses affected with a public interest," the legislature has an exceptionally wide berth. Chief Justice Waite writes: "We know that this is a power which may be abused; but there is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."[34] The Court continued to refine its approach to resolving these tensions in later cases, some of which gained prominence at the time, prominence that has persisted as we look to understand this era in our constitutional law.

One such case was Mugler v. Kansas. Peter Mugler was a naturalized citizen who arrived in Kansas in 1872 looking to make his way as a self-supporting new American. In 1877, Mr. Mugler built a brewery, aspiring to make and sell malt liquor. Having no permit to do so, he was arrested and charged with a violation of a Kansas statute which imposed a penalty if he "did unlawfully manufacture, and aid, assist, and abet in the manufacture of vinous, spirituous, malt, fermented, and other intoxicating liquors in violation of the provisions of [this] act."[35] This statute was enacted in order to implement a prohibitionist amendment added to Kansas's constitution in 1880.

Mr. Mugler's challenge came to the Supreme Court in 1887. He complained that these state acts violated his rights under the Fourteenth Amendment. The Court had already considered and rejected, in The License Cases,[36] the argument that these restrictions interfered with the Constitution's assignment exclusively to Congress to regulate interstate commerce. Therefore, the only constitutional objections left available to this defendant was that the state had exceeded its authority under the police power and had violated the privileges or immunities of citizens or had deprived the individual of his life, liberty, or property without due process of law.

In Mugler, Justice John Harlan, writing for the Court, gave voice to one rendering of this regulation. The law, he notes, might be viewed as deliberately singling out the behavior of one individual for opprobrium, an individual who was merely exercising his liberty rights and, in the case of the manufacture of these alcoholic beverages, his rights to use his private property as he wishes.[37] So viewed, he concedes that this approach would be a misuse of the government's power to control private behavior that caused no external harm.[38] However, this misconceives, says Harlan, the nature of the right and the purpose of this regulation.

> [T]he right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows from the very premises stated that society has the power to protect itself by legislation against the injurious consequences of that business.[39]

And so this regulation, very much similar to the regulation on grain elevators upheld ten years earlier in Munn, was a perfectly appropriate use of the police power to protect the community from the actions of an individual.

As to who should determine where and how the line is drawn between general welfare and individual liberty, Harlan says "that power is lodged with the legislative branch of the Government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."[40] Justice Harlan goes further than just rubber-stamping Kansas's judgment, adding the opinion that this restriction on the manufacture of intoxicating liquors is designed to eradicate an "evil," to protect the public health, the public morals, and the public safety, which "may be endangered by the general use of intoxicating drinks" contributing to "idleness, disorder, pauperism, and crime."[41] For Harlan, and presumably the other justices who joined his opinion, the legislature was acting wisely to address a serious social problem.

A critical question in Mugler, as earlier in Munn, was whether the Fourteenth Amendment changes the equation. No, says the Court emphatically. As Howard Gillman notes, "Justice Harlan's statement is not a departure from previous holdings; it is rather, a reassertion of the adjudicative task undertaken by the Supreme Court since Slaughterhouse,[42] and by many state courts before that."[43] This constitutional amendment does not undermine the wide ambit of the police power, that point being a critical element of Mugler and the police power cases considered in the wake of Reconstruction.[44] For, as the Court had said in an earlier case, Barbier v. Connolly,[45] "neither the Amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed 'its police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and

prosperity."[46] This last statement proves to be an important one, as the Court from an early stage avoids one possible implication of the Reconstruction amendments, and that is that the font of regulatory authority, at least with respect to guaranteeing the full rights of citizenship (the "privileges or immunities"), was now shifting from the states to the federal government. While difficult issues of federalism persist after these amendments, the Court's declaration that states maintain their police powers and for important purposes ("wealth and prosperity" and the rest) is left undisturbed.

The Court made clear in Mugler, however, that the police power is not unlimited, and those limits are found in constitutional rules and rights established in the Constitution from the beginning of the republic, as in the Bill of Rights (eminent domain is mentioned explicitly) or from the Fourteenth Amendment, especially the protections of due process.[47] This is not a new proposition, but one that echoes the previous decisions of the Court. In Mugler, Justice Harlan notes that the law is ever diligent in ensuring that the enactment and application of the regulation not be arbitrary, thereby raising a concern of discrimination.[48]

The Mugler case illustrates well the Court's imprimatur on the police power's use by the states as a key mechanism of public governance, including in areas where the animate concern was with protecting the common good. By this time in the second-to-last decade of the nineteenth century, it had become well-established that the concept of general welfare undergirding the police power was much broader than that reflected in the *sic utere* principle, one where the government's role is limited to abating individual harm or public harm that could be measured in the way that classic tort law demands.[49] It also illustrates, as will other cases for the remainder of the nineteenth and the first part of the twentieth century, the point that the Fourteenth Amendment did not shake the foundations of the police power and impose a major set of limits, either from equal protection or from procedural due process. A broad interpretation of the police power would persist throughout the post-Reconstruction and Progressive eras, accompanying the expansion of state capacity and the steadily increasing roles of both the state and federal government.[50] At the same time, Mugler reveals that the police power, however difficult to define precisely, is not unlimited and that the main objective of the courts is to discern whether and to what extent a duly enacted law is arbitrary or capricious in a way that warrants invalidation. To be sure, this standard was not invented in this decision, but it was refined over time and, in its refinement, started a bridge of sorts to early twentieth-century decisions, including Lochner, where courts at both the federal and state levels gave police power regulations a more searching judicial review.

The broad scope of the police power was reinforced in a case that would become especially notorious, although not for a long while, Plessy v. Ferguson, decided in 1896.[51] In this case, the Court examined and upheld the operation by the railroad managers of a segregated train. "The power to assign to a particular coach," wrote Justice Brown for the Court, "obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws

of the particular State, is to be deemed a white and who a colored person."[52] The Court stressed that the police power was not unlimited, and regulations that were mere subterfuges to discriminate against individuals on an arbitrary or unjust basis would be struck down. This statement remains puzzling. It is no clearer a full one hundred and twenty-seven years after this decision how to distinguish the "unjust" discrimination of, say, Chinese launderers in Yick Wo v. Hopkins[53] or other post-Reconstruction cases in which the government was discriminating unconstitutionally. Rather than clarify the standard, what the Court offers instead is a fallacious and fully-discredited argument that Louisiana's train segregation statute is "reasonable" and that any claim by the Black plaintiff that such segregation imposes a "badge of inferiority" it is "not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[54]

Justice Harlan memorably dissented in Plessy. The core insight of his dissent is that the use of the police power to segregate train travel runs squarely against the clear import of the Fourteenth Amendment and its guarantee of the equal protection of the laws. Louisiana simply had no credible reason located in health, welfare, or general welfare for this baldly discriminatory law. The legislature's stated rationale was intentionally discriminatory and so the onus was squarely on the state to describe a reasonable, that is, non-arbitrary, reason for this law, one that could plausibly be grounded in the public's welfare. The unreasonableness inherent in this Louisiana law, Harlan indicates, is found in its intention, in its revealed attitude toward Black citizens, and the manifestation in action of the view that Blacks are inferior to Whites and can constitutionally be subject to unequal treatment. We start, says Harlan, with the equality rights guaranteed to them by the Constitution: "If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each."[55] From there, Justice Harlan examines, and ultimately demolishes, the hypothetical laws that would, if this law were upheld, be *a fortiori* acceptable uses of the police power. He writes

> If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in streetcars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a courtroom and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?[56]

Having dispatched with the argument that this is a reasonable exercise of the police power, in light of the fact that this act functions as a "badge of servitude" placed on Black railroad passengers,[57] Harlan endeavors to thread the needle of judicial deference, noting that nothing in his opinion should be read as giving judges a roving power to evaluate the wisdom of particular public policies. This is a neglected dictum in Harlan's celebrated dissent, but it is important to put into context the ultimately limited role of judicial review in police power controversies. His warning is worth quoting at length, as it is a coherent summary of the Supreme Court's approach to police power controversies in this critical period:

> A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid and yet, upon grounds of public policy, may well be characterized as unreasonable. Mr Sedgwick correctly states the rule when he says that, the legislative intention being clearly ascertained, "the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment." [citation omitted]. There is a dangerous tendency in these latter days to enlarge the functions of the courts by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are coordinate and separate. Each must keep within the limits defined by the Constitution. And the courts best discharge their duty by executing the will of the lawmaking power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly; sometimes liberally, in order to carry out the legislative will. But however construed, the intent of the legislature is to be respected, if the particular statute in question is valid, although the courts, looking at the public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void because unreasonable are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.[58]

With Plessy's prominence as an early case cementing for decades segregation and Jim Crow, Justice Harlan's lone dissent stands out as a powerful declaration of the principle of equality. For the purposes of understanding better the police power, it is also notable for its naming in a most explicit way the fact that the Reconstruction amendments did indeed represent meaningful constraints on the exercise of power at the state level, insofar as they created equal protection and due process limits on government action, limits which were meaningful conditions on the decision of legislatures to impose discriminatory laws and also laws where the connections between means and ends were quite tenuous.

Harlan's dissent is not ultimately in any tension with his opinion for the Court in Mugler. In both cases, Justice Harlan for the Court acknowledged both the broad

scope of the police and the imperative of limiting this power. The essential difference was that the state had, in Mugler, a compelling case for a welfarist-based regulation and no evidence that Mr. Mugler had been singled for discriminatory treatment nor a decent argument that the government was acting in ways arbitrary or capricious. By contrast, invidious discrimination was the *sine qua non* of the government's regulation in Plessy. Here the equal protection of laws was necessary to create a baseline limit on the use of the power to disfavor one group. The fabled assertion by the Plessy majority that this discrimination did not attach a badge of inferiority on African Americans was of course risible, but for Justice Harlan it was enough to say that purpose of the law was to discriminate and not to implement an objective that could plausibly be tied to the police power.

Justice Harlan maintains his place as the leading architect on that era's Supreme Court with respect to defining the scope of the police and its limits in yet another important case of the time, and that is Jacobson v. Massachusetts,[59] decided in 1905, at virtually the same moment as Lochner. Jacobson involved a mandatory vaccination requirement enacted by the public health authorities in Cambridge, Massachusetts during the middle of the smallpox pandemic. The plaintiff challenged this requirement, insisting "a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best."[60] Writing for the Court, Justice Harlan reiterated the point that it was the responsibility of the federal court to examine whether the exercise of the police was in any way arbitrary or unreasonable. If so, the government's regulation would fail, whether this protection is lodged in a notion of equal protection, due process, or individual liberty. Harlan added that the linchpin of the police power is the promotion of the common good. He notes that "it was the duty of the constituted authorities primarily to keep in view the welfare, comfort and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few."[61] In undertaking an analysis of whether this "common good" has been met, the judge should not substitute its judgment for the judgment of the legislature either as to the public health and safety imperative that the regulation is designed to tackle or as to the structural means by which the goal is achieved.[62] In this case, the Court rejected plaintiff's argument that this was not properly delegated to the public health authorities of the state of Massachusetts.

Jacobson is a notable case,[63] especially when we remember that it was decided in the same year as Lochner. The Court accepted what was after all a fairly novel regulation and one that unavoidably intruded on bodily autonomy, stressing the legislature's wide discretion to undertake measures necessary to protect the public health and resisting the argument that an individual's freedom could be sacrificed without any opportunity to show that he specifically should be subject to this compulsion. In its facts and the unequivocal statement of deference and its value, we could see Jacobson as reinforcing the principle that the police power of state governments is vast and the role of the federal courts in interrogating acts under this power quite narrow.

This view is accurate, yet incomplete. We will see as we look at this period that the general welfare ideas underlying the police power that evolved over the nation's first century were quite resilient in the face of libertarian-oriented attacks on energetic state government. Still, skepticism about state legislative policymaking yield important structural reforms. Moreover, courts at the state level were evaluating police power regulations to examine for themselves whether such regulations were arbitrary or unreasonable.

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The critical developments that we described at the outset of the chapter – anxiety about the interference with property and liberty rights given the broad rendering of the police power and skepticism about legislatures making big and bold regulatory choices – should be considered separately, even though they were mutually reinforcing. We can therefore better understand their character and how they matter for a fulsome understanding of the police power in this era.

PROPERTY RIGHTS AND THE COLLECTIVE WELFARE

Property rights continued to evolve after Reconstruction, and with a valence that bore the imprint of a Republican insistence that certain natural rights, including the rights to private property, were important, if not inalienable. The outcome of the Slaughterhouse Cases was a setback to this effort at strong protection, insofar that it blocked one pathway – privileges or immunities – to the destination of a newly robust protection of economic liberties.[64] However, the idea that property and also liberty of contract were important to protect persisted.[65] Moreover, it underwrote an especially strong view of economic liberties that would blossom into a theory of constitutional scrutiny that would later be labelled laissez faire constitutionalism.

The struggle over the scope of the police power in the shadow of this libertarian view of property rights and liberty of contract was captured well by famed jurist and treatise author, Thomas Cooley. He wrote with his concern with the overbearing actions of state authorities and the underprotection of private property and individual liberty of contract under the US and state constitutions.[66] Cooley's devotion to property and contract rights was not centered in classic natural law thinking and so it would be misleading to see him as motivated by a crude libertarianism.[67] Rather, he created a powerful argument, in what was ultimately a vast amount of judicial and extra-judicial writing, for the critical role of constitutions – and especially state constitutions – in constructing a regime of sound governance and the furthering of the public's welfare. He valued property rights and liberty and worried about legislative excess. And so he "sought constitutional limitations to legislative power because they feared arbitrary and unequal legislation, as well as the identification of legislation with the interests of privileged and powerful capitalists."[68]

What made the struggle over defining appropriate limits on government regulation of property even more vexing was the idea prominent in this era, which was that property rights were yoked to natural rights and natural law.[69] The point is not that property rights were viewed as sacrosanct, but that the protection of the natural right to private property was an important "first principle" and created a presumption that these so-called "vested rights" would be protected against the assertion of state power.[70] Looking at property law through these lens of formalism – or what Duncan Kennedy famously labelled "classical legal thought" – supported a view of property rights as vested, and therefore protected against governmental action, at least where the government was not prepared to pay compensation under its eminent domain responsibilities.[71]

In an important recent book on the original meaning of the Fourteenth Amendment, Randy Barnett and Evan Bernick argue that the privileges or immunities of citizens, and the other rights embedded in the Reconstruction amendments and through statutes and the common law of the time, were grounded squarely in natural rights ideas.[72] The higher law origins of the due process of law – framed in terms from the fourteenth-century British parliament as the "law of the land"[73] – was embraced first by Hamilton and other framers,[74] then by early state and federal courts,[75] and also by the framers of the Reconstruction amendments.[76] In essence, the natural law of due process and private property "impos[ed] a duty on both state and federal judges to make good-faith determinations of whether legislation is calculated to achieve constitutionally proper aims."[77] From this argument comes an originalist argument for an approach to interpreting the police power that is more cautious and ultimately more limiting of state authority and regulatory prerogative than we see in cases of that period and cases in modern times.[78]

Professors Barnett and Bernick capture something important about the mode of reasoning influential on courts in the post-Reconstruction era, as does Barnett writing alone when he argues that the framers had a "presumption of liberty" that impacted eighteenth- and nineteenth-century interpretations of the police power where property and liberty of contract were put into jeopardy.[79] This thesis exaggerates somewhat, however, what was actually happening in adjudication in this critical period, the approximately seven decades between Reconstruction and World War II.

The Supreme Court's commitment to natural rights thinking with respect to property rights and governmental power was equivocal, to say the least. Tellingly, neither Munn nor Mugler reveals a Court on a quest to discover and to enforce the natural right of private property against government under either the national or state constitutions. Rather, the essential thrust of both decisions was to articulate the view that states maintained a significant realm of discretion which economic regulation (Munn) and what was essentially morals legislation with a dose of health rationale (Mugler) was well within the scope of the police power. If there was a presumption of liberty at work in these lodestar cases, it was a presumption rather decisively overcome.

Sometimes the confounding question of where is the best place to look for the source of property rights and the meaning of private property were found in cases that did not involve squarely the matter of government regulation under the police power. One fascinating example is the 1918 decision of International News Service v. Associated Press.[80] There the plaintiff claimed that their rights were being interfered with by a company competing with them for gathering and disseminating news in a timely fashion. They claimed a property right in the news gathering (this distinct from a copyright in the actual publishing of this news, a matter not at issue in this case). The Court dispensed with the defendant's argument this news gathering was property by virtue of the defendant's creative activity by declaring that "the news element – the information respecting current events contained in the literary production – is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*. It is merely the history of the day."[81] Two legal giants of this era, Justices Oliver Wendell Holmes and Louis Brandeis, argued over whether this information was property in their respective concurring and dissenting opinions. For Holmes, the focus on effort and energy, which one might see as derivative of a Lockean conception of property,[82] misses the essential point of property. He writes:

> Property, a creation of law, does not arise from value, although exchangeable – a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference and a person is not excluded from using any combination of words merely because someone has used it before, even if it took labor and genius to make it.[83]

That property, an *in rem* right whose essence is its tangibility and the right to exclude, is classic formalism. Without quarreling with the larger argument that Holmes in his career rejected natural law and formalism,[84] this rejection is not evidenced by his rather formulaic dissent in INS. For Brandeis, too, the right to exclude is the central question that separates out property that can be protected from the fruits of one's labor that enjoys no such status.[85] However, how he gets there is by induction, from a view of property as socially constructed and contingent. He explains

> But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is that the noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – became, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it.[86]

Further, Brandeis sees an opening to a legal principle that would see news as a resource which could be commoditized and subject to the classic property rights of exclusion. But, for Brandeis, this is not an appropriate role of the courts, as this is pure public policy. As he writes:

> [W]ith the increasing complexity of society, the public interest tends to become omnipresent, and the problems presented by new demands for justice cease to be simple. Then the creation or recognition by courts of a new private right may work serious injury to the general public unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment, and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency.[87]

Both jurists reject the argument that news-gathering is property, but in explaining their rejection we can see two different modalities of reasoning about property's content in this second decade of the twentieth century. One is formalistic and the other is pragmatic.[88]

The strong implication of the view associated here with Brandeis (which is not to neglect others whose new thinking was critical to this development) is that property rights are nested in the common good and subject to the intrinsic power, and indeed responsibility, of the government to implement public purposes even where individuals might be compromised in their use of their property.[89] Taken to its extreme, this view creates a force field around the police power and suggests that property rights as such will seldom if ever impede official choice that is made on a reasonable basis.[90] More to the point is the functionalist argument that broad governmental power is necessary to advance economic progress and social welfare. Perhaps the leading voice for this position in the latter part of the period we are focused on here was Brandeis himself. "For Brandeis," Fishkin and Forbath observe, "the nation's industrial and economic orders were fraught with constitutional infirmities that only legislation could remedy."[91]

Progressives who focused on the need for and value in governmental regulation to address problems were not anti-private property. Rather, they were against the misuse of private property, especially by corporations, and were more or less confident in the government's ability to channel the use of private property for socially beneficial aims.[92] In this regard, they were the mirror image of judges and scholars who were not so much wedded to a formalistic conception of private property, one that viewed such property as sacrosanct or even essential to human flourishing as they were quite skeptical about the incentives and capabilities of government to regulate in the public interest with trampling on individual rights. These skeptics were heirs to a tradition reflected in Madison and his expressed concern about factions and about the fragility of individual rights.[93]

These competing ideas came to be reconciled if not in deep theory then at least in police power jurisprudence in this era. This reconciliation is seen most clearly in the way in which the state courts dealt with the use of the police power to regulate individuals' private property rights. In a 1911 case in Missouri, for example, the

court considered the constitutionality of a law regulating and controlling signs and billboards.[94] Dissenting from the holding that this was an ordinary safety regulation that met the conditions of the police power under the Missouri constitution, Justice Graves insisted that this law was principally about aesthetics, not public safety, and while the government might have some latitude to enact laws dealing with aesthetic considerations, doing so triggered stricter scrutiny because this law now interfered with the property owner's vested rights.[95] The implication of this dissenting view, which echoes some of the big considerations that would arise in Lochner-era cases of roughly the same period, is that the force of vested property rights grows as the rationale for the exercise of the police power wanes.

In Cleveland Telephone Co. v. City of Cleveland,[96] an Ohio case from 1918, the court considered the question of whether a law fixing rates could be implemented at the local level under the police power. Much of the debate in this opinion involved the question of whether there is some sort of general police power that, with the state's delegation of authority under local government law, widens the scope of governmental discretion.[97] The majority said no, over a vigorous dissent on this exact point.[98] What the court zeroes in on in its holding that this law is an unconstitutional exercise of the police power is the matter of vested rights.[99] The police power should be viewed, the court argues, as distinct from the exercise of a "governmental function."[100] The distinction turns on whether the restrictions are imposed on "personal or property rights of private persons."[101] Decided squarely in the shadow of the laisse faire period constitutionalism, the court declares that, in deciding police power cases, they "have uniformly interfered to restrain the arbitrary and unreasonable exercise of that power to the prejudice of private rights guaranteed by the Court of the State."[102]

It is tempting to see, as some do, the judiciary's approach to the police power as essentially continuous from the earliest Supreme Court decisions – Gibbons, Brown, and Miln, all from the antebellum era, through Munn and Mugler just after Reconstruction and through the beginning of the twentieth century, and through state court cases decided during the Gilded Age and afterward. Yet that narrative sacrifices nuance for a tight theory. On the one hand, the post-Reconstruction era brought us a fundamental shift in our constitutional structure and understanding of equality and citizenship, though it did not, at least as the Supreme Court came to see it, fundamentally reorder the balance between property rights and governmental power. On the other hand, seeing the police power as a continuous thread from the state constitutions' charge to govern with energy to Alger's focus on public rights to the Progressive era's faith in bold governance is to miss some of the tensions revealed both in ideology and in legal decisions of that time. The collective welfare was at the fulcrum of the government's strategy of governing under the police power. And yet this strategy was continuously in tension with evolving and shifting views about the nature and scope of liberty and property. The animating tension between individual property and liberty and the government did not dissolve. Much attention was given through the period from Reconstruction and World War II to how we ought to think

about the concept of property affected by a public interest and how we can construct guardrails of various sorts to maintain an equilibrium between governmental intervention and private freedom.

To summarize: We should not imprint onto the thinking of courts and commentators of this era a fading commitment to natural law thinking as the nineteenth century ended and an emergent belief in the new century (which we will unpack in more detail in Chapter 6) in rights as trumps, as essentially countermajoritarian instruments, vigorously enforced by courts to restrain official power.[103] To take just one representative statement of many, Christopher Tiedman, a notorious critic of an expansive police power, begins his treatise by observing simply that courts "cannot nullify and avoid a law, simply because it conflicts with judicial notions of natural right or morality, or abstract justice."

So how then did courts think about the connection between property and the collective welfare? In the years following the end of Reconstruction and preceding the Progressive era, the courts had emphasized the idea of property as having important *jus publici* elements. In 1882, for example, the Supreme established the so-called "public trust doctrine," in Illinois Central Railroad v. Illinois.[104] This significant ruling applied to navigable waters, and could be seen as progeny from the navigable servitude and ancient water law doctrines. This land is held in public trust for all. "The soil under navigable waters," writes Justice Field, "being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately within the exercise of the police power of the state."[105] But the opinion has come to be seen as having a considerably more wide-ranging import. Its impact is best understood as another powerful statement of the idea resonant in so many of the public rights cases, that certain property was imprinted with a public obligation and therefore the dominion that a private owner would otherwise have was limited to the extent that the general interest required.[106]

This view is echoed in nineteenth-century decisions that conceptualize the key facets of government regulation as part of a project of protecting so-called public rights, a project that Scheiber summarizes as "robustly pragmatic." Indeed, it is no coincidence that the term "public" preceded "trust," "rights," and "purpose" in distinct constitutional doctrines and these ideas motivated courts to accept governmental authority as not only a matter of discretion, but one of duty. This was not seen as part of a project of effacing liberty and property rights, nor as a project of rescuing a compelling view of public policy through positive law from its roots in natural rights thinking (although this is a common depiction of this time and these strategies). Rather, the case for broad governmental authority under the policy rested on a somewhat more basic, albeit not uncontroversial, idea, and that is that regulating private property was necessary to advance the collective welfare. This was not about undermining property rights, but about constructing such rights around an edifice of common interest and the public good. Struggles over how best to strike this

balance between individual liberty and general welfare would naturally continue in ensuing decades, but the rudiments of these ideas were forged during this critical era in which the regulatory power and obligations of state and local governments were taking shape in light of the practical necessities of the time.

THE POLICE POWER AND EMINENT DOMAIN

The *jus publici* notion, in expressing the idea that we are basically all in the same boat together, supported government regulation that limited an owner's prerogatives without necessarily requiring compensation, as eminent domain law would seem to require. Takings law did not exist in any judicially cognizable form until much later in the nineteenth century. Nor did the takings clause apply at all to state regulation until 1897. And it wasn't until 1922, with the Supreme Court's decision in Pennsylvania Coal v. Mahon that there was a serious restriction on government regulation of private property under the police power in the form of a just compensation requirement that emerged from the eminent domain clause of the federal Constitution.

The centrality of the police power in the regulation of private property in this era was, in a sense, a consequence of the Supreme Court's reluctance to turn to the eminent domain power as the main practical option available to state governments who would limit property rights in order to implement the common good. This absence of the takings clause for so long a period – at least up to the Supreme Court's decision in Mahon – is a curious but nonetheless important phenomenon and one that deserves at least some discussion in this account of the police power as the main event in property regulation.

Looking at the issue at a decent amount of relief, eminent domain played a fairly modest role in fights over the use of the government's regulatory power to control the use of private property.[107] One reason hearkens back to the complexity of defining property rights in the decades after the founding period. While commentators and even judges would invoke axioms about the imperative of protecting private property rights, "the society could not easily maintain a legal posture as to property rights entirely free of paradox and contradiction – at least not in an environment of economic growth so tumultuous as that of the United States in the nineteenth century."[108] Moreover, insofar as property rights were viewed in fairly static and even formalistic terms through much of the century, equating regulation of property with the "taking" of property for public use was more pragmatic than the times could easily accommodate. The easier route was the formalistic one. The essential dividing line between a government regulation that would or would not be a taking of private property was whether there was in fact an expropriation or else some sort of physical invasion by the government.[109] Very few of the actions of the government rose to this level, but those that did were considered under the rubric of eminent domain, not the police power.

Key steps in the evolution of the takings versus police power puzzle are found separately in state court decisions during the antebellum period and later decisions by the Supreme Court, especially Munn and Mugler, two cases we have already discussed in the context of the expanding interpretation of the police power. In the state courts, judges wrestled with the question of whether certain governmental interventions destroyed vested rights, whether contract rights, property rights, or both. The 1819 New York case of People v. Platt,[110] illustrates the tensions between government's proper role in abating a nuisance by limiting the owner's right to dam a river, to the detriment of the fish stock, and the owner's vested rights to use his property as he wishes unless the government was prepared to pay compensation.[111] In Platt and other cases from the nineteenth and early twentieth centuries,[112] the courts referred specifically to eminent domain, noting that the government could well pursue its regulatory objectives, but only so long as it was prepared to compensate owners. One important element to keep in mind as one considers these matters of constitutional controversies is that during this era a number of difficult concepts involving property law (e.g., riparian rights, the scope of the navigation servitude, public rights and public trust) were uncertain in content and in application. Courts were therefore juggling issues of private property law with issues of constitutional power. Both concepts were evolving simultaneously. The variations in how different states dealt with these issues in their state courts reveals these complex dynamics.

The turning point in the takings/police power interface came in the famous case of Pennsylvania Coal v. Mahon.[113] Frequently decried and much analyzed,[114] Mahon is the centerpiece of the Court's so-called regulatory takings jurisprudence. It advances for the first time in the Supreme Court the view that a property owner may have an actionable claim for just compensation under the eminent domain clause of the US Constitution even though the federal government does not take title to the property or physically invades it.[115] Eminent domain rules apply, announced Justice Oliver Wendell Holmes for the Court's majority, when a government regulation under the police power reduces to an unacceptable degree the economic value of the property. "One fact for consideration," Holmes writes, "in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[116]

As bold and arresting as this proposition was in 1922, it left unanswered many questions for the next hundred years. What amount of diminished value would trigger a legitimate takings claim? Does this mean that all exercises of the police power that have a negative economic effect on a property owner require just compensation?[117] The answer to this question could not possibly be yes, unless a whole bevy of regulations, old and new, including public trust requirements, historic preservation laws, conservation regulations, exaction fees, and so on, would amount to a compensable taking of private property. But if and insofar as there are limits to Mahon's reach, what are those limits and how does the regulatory takings doctrine square with the police power?

Mahon involved a federal statute, the Kohler Act, a statute that barred coal companies from removing coal when such removal caused subsidence. One company challenged this regulation as a taking that required just compensation, given that the regulation diminished the value of its legitimate property interest. The Court analyzed this regulation and, finding facts that indicated that Mr Mahon had suffered an economic loss by virtue of the government's regulation, held that this loss should be subject to compensation. Holmes's opinion focuses closely on the companies' property rights and the need for their protection by courts. It is therefore tempting to see his analysis as an exercise in formalism, one that bears some family resemblance to Lochner, Adkins, and other "liberty of contract" cases decided in the two decades before Mahon.[118] In this light, we can be puzzled, with others, about how this same Holmes could write a paean to the strong constitutional right of private property and the need of its owners to be properly compensated for their troubles.[119] But Holmes's opinion makes more sense when we see it as truly about the justice's antipathy to wealth redistribution (generally, and here through property restrictions) and his skepticism about the intentions of the legislature in creating these rules.

This does not fully explain the puzzle, however, of why Justice Holmes could reach this striking conclusion, one that would augur a new doctrine of substantial force and once that would create persistent tension between takings and police power doctrines. On the surface of things, this holding threatened to upend the then-state of police power authority under the US Constitution. As Morton Horwitz writes: "As the definition of property was expanded to include not only various uses of land, but also stable market values as well as expectations of future income form property, virtually every governmental activity was rendered capable of being regarded as a taking."[120] After all, health, safety, and welfare regulations commonly upheld under the police power, and with his assent in key opinions of the early twentieth century, have distributive effects. Zoning is a prominent example, but there are also various regulations that are designed to abate nuisances and stop other harms. Legal rules that uphold social interests at the expense of owner prerogatives are redistributive not only in the metaphorical sense that the balance is struck in favor of the public and against the private citizen, but they are redistributive in the real economic sense in that they impose costs on discrete individuals in order to fulfill general welfare objectives.

Justice Brandeis makes this point explicit in his Mahon dissent, although there too he focuses more narrowly on the way in which this federal statute was intended to abate public nuisances.[121] He might have written, though he did not, that by the time of the Mahon decision state and federal courts routinely upheld police power regulations even where they could not be yoked to the classic *sic utere* rationale.[122]

Taking Justice Holmes's analysis on its own terms, there are two essential confounds in this important decision: First, as an effort to curtail legislative excess and to ensure against redistributive measures, the invention of a new element of takings jurisprudence is a rather ham-handed way to accomplish this objective. Second, it is

of precious little help in defining the boundaries between what is an ordinary police power regulation, one that does not require any governmental compensation, and what is a regulatory taking. Despite Mahon's centrality in the history of takings law, cited in cases all the way up to contemporary times and therefore part of the essential architecture of eminent domain,[123] it has had a fairly modest impact on other elements of constitutional law in either the federal or state courts that continue to shape the contours of police power regulation. In particular, neither zoning laws nor health and safety regulations have proved especially vulnerable to a takings clause analysis. For example, we will see in the next chapter how the courts in the recent COVID-19 pandemic routinely, and often without any serious energy expended in analysis, rejected takings claims where a business made highly plausible factual arguments that the government's shutdowns caused major economic hardship.

Taking a step away from the doctrinal focus, we can see the 1920s project of establishing a route for establishing a compensation right for regulatory takings under the takings clause as at least clunky, if not ultimately rather ill-fated. One reason was that the state and federal courts were struggling with the instability of property rights notions, a struggle that was embedded in a larger, complex journey from classical modes of legal reasoning toward more modern approaches to understanding the dimensions of private property, to examining issues of government regulation, and understanding whether and how state constitutions limit government. Louis Brandeis was ahead of this curve in adumbrating the social context and empirical bases of property and regulation, but even his prescience in this domain was a product of its time and was not a fully worked theory that commanded consensus among jurists and commentators in this era. Brandeis was a maverick and was viewed by contemporaries as such. Moreover, there is also a realpolitik in all this as well. Regulation and constitutional review went through enormous change as the Supreme Court's membership changed in the New Deal era.[124] At the Supreme Court level, it fell to the Hughes Court to work out what we might call a "political accommodation" that would secure significant governmental prerogative and discretion while also attending to property rights and other aspects of private right, albeit through a more conspicuously process-oriented approach.[125]

As to eminent domain law in particular, its ambiguities and complexities made it difficult to assist the enterprise of configuring the metes and bounds between reasonable and unreasonable government regulation of private property. Viewed generously, it at least set out the terms of the bargain in a way that sought to accommodate private and public interest by, recalling the famous Calabresi and Melamed formulation,[126] by insisting on a liability rule that would enable the government to cost out its regulatory interventions. Good governing is all fine and well, but it comes at a price.

As for determining the scope and shape of the by then well-established police power, the advent and evolution of regulatory takings doctrine meant that the issue of balancing public interest and private right remained in the quagmire. Should

the government be able to supplant an individual's private property right in order to protect health, safety, or the common good, and on what terms? Is the ever-present risk of a property owner losing one or more sticks in the property rights bundle merely a condition for living in society? In the period following key Supreme Court cases such as Munn and Mugler, state governments could see the space created by the Court's acknowledgment that the common good did warrant interventions to protect health, safety, and morals. However, such interventions were not then, nor would they ever become, unconditional. The struggle that manifest itself in the Progressive and Populist eras, represented by not only police power controversies, but also eminent domain and due process, was how best to set and enforce those conditions through judicial review.

LEGISLATIVE SKEPTICISM ABORNING

In the book's first two chapters, we noted the ways in which American political culture revealed from the republic's beginning an enormous deference to elected legislatures. This was largely a reflection of our distinct science of politics emerging in the pre-founding period, one cemented by the framers of the US Constitution, and reflected in the idea that state constitutions were documents of limit and sources of the principle that legislative power is plenary. Skepticism about the prominence of the legislature began as early as the Jacksonian era, although deference to legislative judgment persisted.

The period after Reconstruction, however, brought with it a notably greater anxiety about the tendencies of the legislature to act in ways that were seen as undemocratic and overly intrusive into the realm of private freedom. As the Alabama Governor Emmett O'Neal commented in 1913: "We have come to believe that the legislature, like a strong man inflamed by violent passion and dominated by wicked influences, was likely to 'run amuck' trampling down the interests of the just and the unjust alike."[127]

Legislators were increasingly viewed as captured by special interests and dominated by factions external to the legislature.[128] This, of course, was a concern raised famously by James Madison in Federalist No. 10, and some of the "auxiliary precautions" he wrote about included measures to cabin such factionalism.[129] However, the main device he offered – expanding the scope of the republic so as to make a democratically elected legislature harder to control, and also federalism – were less promising as devices to limit excesses in state legislatures. Such legislatures were comparatively smaller, and some were small by any measure. Moreover, the breadth of legislative power meant that interest-group influence would be more impactful on public policy generally. This risk went with the territory, as it were. Madison's original worries therefore were echoed in late nineteenth-century commentary on the state of American constitutionalism.

Concerns that state legislatures were becoming unwieldy, unworkable, and overbearing pushed citizens and officials in states to amend their constitutions (or, in

rare instances, to replace these constitutions entirely) in ways that would reduce legislative power. Rather than see the many legislative checks created by state constitutional reforms as destructive of legislative power and as the scaling down of the sphere of politics, it is better to see them as, to use some economic jargon, introducing legislative transaction costs. Legislatures could still engage in active governance, but there would be mechanisms that created burdens, and occasionally barriers, to such actions. In all, legislators would need to forge compromises (often with executive branch officers) and innovate in lawmaking in order to do the people's business.

If we unpack the reasons and rationales for this emerging skepticism, we can see that it does not present itself as primarily an anti-government movement; it does not necessarily undergird the so-called libertarian constitutionalism so commonly associated with the Lochner era and, for some commentators, even the years before that notorious case. Citizens were concerned that legislators were not advancing the people's welfare. They could point to examples of overbearing laws interfering with personal liberty and private property as illustrative. As Edwin Godkin wrote in 1897: "One of the faults most commonly found in the legislatures is the fault of doing too much."[130] At the same time, they could (and did) point to examples of their elected officials not doing enough to reign in rapacious corporations and to redistribute opportunities to those more in need. Indeed, the leading academic accounts of the Progressive and Populist eras focus rightly on the concerns with caste legislation and private regarding legislation.[131] Taking account of those who objected that government did too much and those who objected that they did too little or did what they did incoherently, there was building a robust group of disgruntled citizens, citizens who could capture the attention of those in real or potential positions of power. And so, not surprisingly, the period between the end of Reconstruction and the Second World War was a time of active reform in the wheels of governance, including state constitutions.

Among these reforms were structural mechanisms that were intended to limit the scope of legislative power. These included the imposition of public purpose requirements and of prohibitions on special legislation, balanced budget requirements, and enhancement of the governor's fiscal powers. The development of initiative lawmaking, a manifestation of the view that direct citizen democracy had a role to play in public policymaking, was also illustrative of this legislative skepticism and the need for checks and balances.[132] In addition, there were significant amendments of the US Constitution, including the Seventeenth Amendment (which took the function of electing senators out of the state legislatures and gave it to the people) and the Nineteenth Amendment (women's suffrage), which could be tied, even if indirectly, to concerns about legislative supremacy and its actions in the tenor of the times.

This legislative skepticism led to a fork in the road. Should the courts continue their deferential posture or should they respond to concerns with legislative performance by taking a more skeptical tack? State and federal courts could well have responded to intense concerns with legislative malfeasance by bolstering judicial

review of legislative actions. They had the tools to do so through due process especially, and through other measures and mechanisms. Lochner showed one such avenue, as we will discuss next. But note that insofar as skepticism emerged in earlier years, the fact that state courts maintained a largely deferential posture toward police power regulation and also imprinted upon private property doctrines of *jus publici* of various sorts, was strong evidence that the police power of Justice Lemuel Shaw and of less celebrated judges who had approved regulatory interventions to preserve health, safety, morals, and the people's welfare was alive and well. That all said, the Lochner era would test this faith.

LAISSEZ FAIRE CONSTITUTIONALISM AND THE POLICE POWER RENEWED

With the Court's decision in Lochner in 1905 and subsequent decisions in a similar vein,[133] the Court insisted on a much tighter justification for state legislation that infringed on what they described as the liberty of contract. This also pertained to impositions on private property and, while the emergence of a truly robust takings jurisprudence for regulatory takings would await the 1920s, the effect of the Lochner era line of cases was to limit in a significant way the sphere of authority state and local governments exercised in the name of health, safety, and general welfare.

In Lochner v. New York,[134] the Court considered a maximum hours law for bakers in New York. Acknowledging that this law fell under the traditional rubric of the police power, the Court said that this "is a question of which of two powers or rights shall prevail – the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid."[135] The Court makes two essential claims, each addressing the standard of review of police power legislation: First, "[t]he act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."[136] The first claim reflects a more searching review of the reasonableness of the legislation than was typical in previous cases before the Court, including Jacobson, decided just before Lochner. The second, and even more arresting, claim is that there exists a right to contract that stands against the legislature's efforts to regulate for the public good. Ultimately, the Court dismisses the state's argument that this is a valid health law and, accordingly, holds that this legislation is outside the scope of the police power and, moreover, are "meddlesome interferences with the rights of the individual."[137] Justice Harlan dissented, joined by two other justices, in which he pointed out the many state cases which had upheld public health and safety regulations similar, he suggests, to New York's.[138] Moreover, he detailed the health-related considerations associated with heavy duty employment

as a baker. Justice Holmes wrote a celebrated dissent wherein he accused the majority of enacting its own economic theory into constitutional law through a novel reading of the Fourteenth Amendment.[139]

In the standard story, the Court invented substantive due process in this era to protect economic liberties that had long been vulnerable to regulation under the rubric of public interest and general welfare rationales.[140] This rationale, it was said, came out of nowhere, was an indefensible edict – an ipse dixit – that individuals had vested rights against government regulation, and threatened to undermine the basic structure of regulation that enables markets to operate and protected individuals from injury and unfair economic treatment. This was, as Professor Laurence Tribe puts it, "a misguided understanding of what liberty actually required in the industrial age."[141] In this account, Lochner was surprising at the time, deeply mistaken as a decision then, and rightly repudiated two decades later by key New Deal cases which formally overturned the holdings of Lochner and other cases representing similar themes and discredited its essential logic.[142]

This standard story has met resistance by a wide cadre of legal scholars over the past few decades. No one doubts that the Court provided in Lochner and its progeny a more muscular approach to restrictions on property and liberty and was looking with more skepticism at government regulations that had passed muster under older state court cases and Munn and Mugler in the Supreme Court. Revisionist scholars question, however, whether the Court's approach was truly a significant departure from the jurisprudence of an earlier era or was, instead, broadly congruent with the anti-caste philosophy that had long undergirded the courts' view of state legislatures and the expected wisdom of state legislation or the lack thereof.[143] "A consensus is emerging," David Bernstein writes in his provocative book, *Rehabilitating Lochner*, "that the liberty of contract doctrine arose from a combination of hostility to 'class legislation' and a desire to protect natural rights deemed fundamental to the development of American liberty."[144]

One window into the Court's approach in the Lochner era is provided by scholars who see in this era's cases a commitment to laissez faire constitutionalism properly actualized through classical modes of legal thought, and modes that used natural law and natural rights reasoning to reach results and to ground their ratio decidendi.[145] These modes were familiar, having anchored common law adjudication for a significant time, yet in the Lochner era, these methods were mobilized in the service of a new, and in many ways radical, conception of vested rights and the circumscribed role of the government in intervening in the economy and in private choices. The pre-political character of rights and the deontology of constitutional law during the period leading up to the Legal Realism movement helped forge a strong attack on government regulation that threatened private ordering and the neutral market.[146]

For some other scholars looking closer at Lochner and its progeny, the basic approach of the Court majority was, while characteristic of then-*au courant* methods

of reasoning, unremarkable. Legal historian Ted White, for example, insists that the formation of a distinct judicial approach to police power, due process, and private rights was neither more nor less than a sensibly wrought "guardian review," one that foregrounded a reasonably searching judicial review by the federal courts (which is White's sole focus) and presumably also by the states. Sometimes the states won, other times they lost; in either event, the Court's focus was on what White calls "boundary pricking," which is to say that they examined the reasons for the state's assertion of power and balanced it against the individual liberty interests.[147] Barry Cushman likewise views the principal Supreme Court decisions in the era demarcated by Lochner and the summative decisions of the New Deal as broadly congruent with relevant precedent, albeit not suggesting that they were correctly decided, but suggesting that the renewal of expansive legislative power in cases such as Nebbia v. New York and Muller v. Oregon was not a radical departure from standard constitutional law. Rather, neither the methods of reasoning nor the interpretation of previous decisions suggested that the Court had taken a radical turn, one steeped solely or even mostly in the commitments to free market libertarianism.

We can bridge in some ways these competing stories by emphasizing the skepticism toward legislatures and legislative regulation that animates these and other decisions in the early decades of the twentieth century. For some scholars, the turn toward greater scrutiny was not a cataclysmic change for conceptions of governmental power and its responsibility to act for the general welfare. Instead, they see Lochner and its progeny as focused on pathologies in the legislative process.[148] The idea here is that the judiciary's approach to the police power has always concentrated on the legislative process and the fundamental fairness of this process, especially from those whose interests could be compromised by interest group influence and self-dealing. Joey Fishkin and William Forbath see this effort as part of an enduring, if unstable, commitment to democracy-as-opportunity, and to an "anti-oligarchic constitution."[149] While themselves skeptical of the motives and techniques of justices in the first two decades of the twentieth century who saw the legislature as a threat to liberty of contract and private property, the basic idea that the courts would interrogate legislation to ensure that it was not arbitrary or in another way unreasonable was well in line with the objective of protecting democracy-of-opportunity. In a similar vein, Howard Gillman sees this skepticism of legislative lawmaking echoing in the Jacksonian democracy and explains Lochner and the epoch of libertarian constitutionalism as an outgrowth of a view steadily growing into the Progressive era that "legislating special privileges for particular groups and classes" stretched beyond what the police power authorized and that the approach that become prominent after the enactment of the Fourteenth Amendment, albeit for a few decades, was one in which the Court "organized its police powers jurisprudence primarily around a distinction between legitimate general welfare legislation and illegitimate factional politics."[150] In this rendering, cases that on first glance look like evidence of a strong commitment to private property and liberty as such are actually best viewed

as interrogations into the self-dealing of state legislatures and, relatedly, the inequitable disadvantages on certain individuals and groups meted out by these legislative enactments.[151]

This revisionist argument about Lochner's lack of special novelty is incomplete. This focus supposes that the Court had a rather purposive commitment to redressing flaws in the legislative process and redistributing power to the have-nots., at least as an explanation of the evolution of the police power in the period between the end of Reconstruction and the end of World War II. Much of the debate over the origins and impact of the Lochner era focuses on the question of whether and to what extent the Court developed and implemented a scheme of substantive due process in order to create liberty and property-based constraints on the exercise of power. However, the more fundamental issue for the framing of the police power is how the courts, state and federal, came to view the tactics and strategies that state and local governments pursued in this era to protect health, safety, and welfare. Reading through these Lochner era cases in the Supreme Court, alongside the many less prominent decisions rendered by state judges, an important theme is the overall robustness of the courts' scrutiny of legislative strategy. Was the legislature pursuing a reasonable set of objectives and, even if so, were they using mechanisms that accomplished these ends in ways that were neither arbitrary nor in any other way inconsistent with the general welfare? Lochner-era histories generally focus in on the questions of how solicitous were courts with regard to individual rights, ones mostly unenumerated and, to many, historically underprotected.[152] However, during the two decades demarcating the Lochner era, government at the state and local level developed novel techniques for protecting public welfare (we will consider one of the most important ones in the next subsection of this chapter) and in which the meaning of property and liberty continued to evolve. Moreover, state constitutional changes made more salient the connections between political tactics and societal objectives, objectives realized through evidence-based governmental action. Plucking Lochner from these complex developments risks positing an incomplete, if not distorted picture, of the history of regulation and the ever-evolving police power.

With the end of Lochner and the beginning of the New Deal, the Supreme Court moved sharply away from a skeptical approach to reviewing police power regulations. Summarizing the caselaw of the period between Nebbia and Parrish and the mid-1960s, when modern substantive due process emerged as a means of creating and protecting unenumerated rights against official restriction, liberty of contract quickly faded as a basis for scrutiny and invalidation. Taking its place was a fairly "minimalist, procedural" due process, one in which "due process meant fair process; that was all."[153] The courts largely abandoned the approach of scrutinizing the means-end fit of legislation in order to ensure that the law passes muster under the police power. As we will see in our examination of zoning later in this chapter and in the next, the Court made clear that it was not within the proper role of the courts to scrutinize the wisdom of legislation and, more to the point of the police power,

the degree and extent to which a certain regulatory strategy in fact furthered general welfare as it could credibly be measured. The much-heralded Brandeis brief, a shrewd tactic of describing the factual basis and logic of a legislature's approach to regulation in a particular instance, faded not because skillful lawyers could not engage deeply with evidence- and data-driven analysis, but because the courts were no longer interested in taking such a deep dive into the legislature's rationales and regulatory strategies.[154] At bottom, the Supreme Court was largely solicitous of the capability of state and local governments to pursue the people's welfare through a judicious but energetic use of the constitutional police power.

One last point here, not especially profound as an account of Lochnerian jurisprudence, but of consequence for the general argument in this book: Most of the accounts of the Lochner era, whether standard or revisionist or something less well defined, focus like a laser on a handful of Supreme Court cases and do not look closely at what was going in in the state courts. Much more often than not, regulations that were challenged during the Lochner era period were upheld under the police power.[155] This was certainly true of morals regulations, but also true of many regulations of private property and liberty of contract. Indeed, as we discussed earlier with regard to regulatory takings, it was largely from the frustration with the unwillingness of the courts to stop or slow the train of regulations which reduced the value of owners' property that the Court developed an important safety value – regulatory takings. Public health regulations were commonly upheld, especially notable in this era of increasing density and infectious diseases; so too were safety-oriented regulations, a development that was particularly important before tort law would develop doctrines such as enterprise liability and worker's compensation, in order to deal with the uptick of industrially-related injuries.[156] In short, the police power did not wither away during the Lochner period. On the contrary, state legislatures came out of the New Deal period with great powers and with robust capacity and resolve to tackle matters of health, safety, and welfare.

ASSESSING REASONABLENESS IN THIS PERIOD

Out of the progeny of Munn and Mugler in the first years after Reconstruction and, later, in the post-Lochner era, there emerged a better view of the police power and its limits. The standard of reasonableness was invoked in various cases, especially at the state level, and proved to be a moderately formidable restriction on legislative power.[157] This reasonableness standard was hard on its face to separate from an inquiry into the wisdom and means-end fit of legislation; and courts were disinclined, especially as the period of laissez faire constitutionalism passed, to look closely at the reasonableness of legislation. In constitutional review generally, intrusions on so-called economic liberties were subject to rational basis review,[158] a standard that did not really change in the many decades since its emergence as an adjudicatory standard. And while impositions on property rights are not always

identical to violations of economic liberties, the courts applied what amounted to the same standard, with one exception which we will touch on here and explore in more detail in the next chapter.

In Chapter 7, we will explore in more depth the courts' myriad approaches to judging reasonableness and improper governmental regulation under the police power in the contemporary US. The discussion there will be more normative than descriptive. Here we want to use judging and assessment in a wholly different sense. The inquiry is not principally into how courts evaluate police power regulations under these standards, except insofar as what one or another court says can illuminate the critical issues. Rather, we want to look at how reasonableness was understood in the key era between Reconstruction and the New Deal as a measure of proper governmental power and the resilience of individual liberty and property interests.

What emerged in the Progressive era and its aftermath was an important new sense about the capacity and ingenuity of government in regulation. As the administrative state emerged as a key mechanism for the exercise of governmental power, attention was drawn to how the government might deploy expertise in the pursuit of good governing. Quite simply, our normative expectations for government performance increased even while concern about how government actually behaved grew. At different junctures, we have seen how structural constitutional reforms were created to limit government power. But this is only part of the story. State constitutional reform and, alongside it, state constitutional adjudication were the fora for the examination of such central questions as: What were the best means of effectuating the salutary aims of government? What were the best structures to ensure that the state and local governments would reach the best balance between safeguarding individual liberties and property rights on the one hand and the "overruling necessity" of government to implement the common good?[159] Novak and other legal historians looking at this period find a nearly unbroken line from distrust of government in implementing new regulatory strategies to the securing of broad and resilient governmental power (with one hiccup in the Lochner era). These broad and dense analyses capture important truths about this period. However, when we look at the treatment of government regulation alongside struggles involving state constitutional architecture and reform, we see that this period was as much about tension as about reflexive confirmation of authority, about how to balance liberty with regulation, and, critically, how law could be designed and used to effectuate a strategy of good governing. This means more than just ensuring that democracy and the rule of law would be observed. It means also that governmental officials would perform well and that regulatory means would reach their desired ends. The principal way in which this would be ensured, as commentators and courts of the time viewed it, is by close attention to reasonableness and rationality in lawmaking.

State and federal courts had long been focused on the question of whether the government's actions were arbitrary or discriminatory. That they less often found arbitrariness in official action than otherwise is not the measure of the jurisprudence

of constitutional review in police power cases. Notably, most of the key cases predated Lochner, and they did not rest on the considerations urged by contemporary scholars such as Tiedeman and Cooley and on the principles that would become prominent after the Court's decision in Lochner and for several years thereafter.

For example, in Lawton v. Steele,[160] decided by the Supreme Court in 1894, the Court considered and held unconstitutional a New York law that instructed law enforcement authorities to confiscate or destroy fishing nets in order to protect the fish. The Court delineated the scope of the limits on the exercise of a police power to impose a general regulation:

> To justify the state in thus interposing its authority in behalf of the public, it must appear first that the interests of the public generally, as distinguished from those of a particular class, require such interference, and second that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.[161]

Concern with protecting against arbitrary imposition of regulation, especially where this disrupts the freedom of individuals to pursue their trade and conduct their business, was conspicuous in key state cases in this period as well. A case from California involved an ordinance that imposed various restrictions on building structures for hospitals for the insane. The plaintiff complained that these ordinances were created after his building, and the substantial investment pertaining to said building, had been completed.

Courts protected against arbitrary regulations in a number of important public health-related decisions in the late nineteenth and early twentieth century, as the government struggled to contain infection diseases through quarantines and other measures. In Jew Ho v. Williamson,[162] the court considered the imposition of a quarantine in turn-of-the-century San Francisco, a quarantine designed to control an outbreak of the bubonic plague. This law had the effect of limiting individual travel and the conduct of business of those of "Chinese race and nationality only."[163] While accepting the power of the local public health authority to impose this regulation, the district court held that this was created in a palpably discriminatory way and so exceeded the scope of the local government under the police power. Moreover, the court illuminated evidence that suggested that this quarantine was likely to be wholly ineffective at controlling the spread of this disease. "[T]he court must hold that this quarantine is not a reasonable regulation to accomplish the purposes sought. It is not in harmony with the declared purpose of the board of health or the board of supervisors."[164]

That reasonableness was thought promising earlier in American legal history as a more muscular standard of review was evidenced in some of the more influential

summaries of the police power. In his 1904 treatise, Ernst Freud has an entire section devoted to "the principle of reasonableness."[165] Municipal police regulations "must be reasonable in order to be lawful."[166] The courts, says Freund, were "emphatic in their assertion that they have nothing to do with the wisdom or expediency of legislative measures."[167] Yet still there was a requirement, he argued, a requirement of "moderation and proportionateness of means to ends."[168]

In any event, judicial inquiry into the reasonableness of legislation under the police power in the early decades of the twentieth century was neither recognizable as a precursor to rational basis review as formulated in early Supreme Court cases, nor as a dense interrogation into the efficacy or coherence of the legislature's work product. Remembering Justice Harlan's opinion in Jacobson, the Court's inquiry into what is reasonable, anything more searching than the deferential look the Court gave to the public health agency's policy "would usurp the functions of another branch of government," for "[i]t is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain."[169]

That the Court's approach was highly deferential did not mean that it would not engage in discussion of the rationale of the government's action. In Muller, for example, the Court departed from Lochner in a fairly explicit way, upholding a law that limited the working hours of women. In a short and otherwise rather perfunctory opinion, Justice Brewer, for an unanimous court, opined at some length about the physical "disadvantage" of women and their "dependen[ce] upon man."[170] It was upon this rationale that the Court distinguished the case from Lochner. And yet the Court's choices about when and how to interrogate a state's reasons for its laws remained unclear, and at times even baffling. In Buchanan v. Warley,[171] a case brought by a White plaintiff challenging a racially restrictive covenant, the Court eschewed relying upon, or even really referring to, an avalanche of arguments made in the form of a "Brandeis brief" against racial mixing, instead insisting, per Lochner, that such covenants restricted the liberty of contract, Q.E.D. Ten years later, in the notorious case of Buck v. Bell,[172] Justice Holmes for the Court reflected upon the reasonableness of a Virginia law which authorized mandatory sterilization. Noting that "three generations are imbeciles are enough,"[173] curiously, Holmes invoked Jacobson as authority for the holding. However, here, unlike in Jacobson, the Court freely interrogated the legislature's purposes and strategy, in order to arrive at the conclusion that the law was unreasonable under the police power.

In the period we are focused on in this chapter, the federal courts grappled with issues of discrimination and arbitrariness, in evaluation the constitutionality of government action. As in the quarantine cases in San Francisco discussed above, the gravamen of the complaint was not with the fact that the government was undertaking to regulating a business affected with a public interest or was limiting

property rights, but that it did so in a palpably discriminatory way. When, by contrast, the government was drawing lines between proper and improper conduct in an area in which a property owner on the wrong side of the line would bear a particular burden, the Court made clear, as in Lindsley v. Natural Carbonic Gas. Co.,[174] that "it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."[175]

It would be too pat, therefore, to see the Lochner era's experiment with laissez faire constitutionalism as an abandonment of meaningful judicial review in police power cases. In the next chapter, we will look broadly at the development of the police power, including judicial interpretation, from the mid-century up to the present, and so we will see how the courts approached these issues in broad outline. But it is nonetheless important for the purposes of our evaluation of police power in the critical half-century between Reconstruction's end and the end of World War II to see how the state and federal courts reshaped police power doctrine from a formalistic, natural law-based interrogation into vested rights, and one that began with a studied skepticism about legislative motivation, to an approach that aspired to some degree at least to be a check on legislative malfeasance and arbitrariness and one that, more ambitiously, was concerned with public welfare as a rationale and as an objective of the exercise of the power. As we said at the end of Chapter 2, there emerged in the second century of the republic new ways of exercising police power, including the use of administrative regulation to implement health, safety, and welfare policy. In so doing, the regulation of the police power shifted from standard constitutional review of rights versus power to a more eclectic review structure, one that was found in the internal structure of administrative law and process.

The courts' invocation of the principle that government regulation cannot be arbitrary to pass legal muster would do work in various constitutional law contexts outside the realm of property rights and liberty of contract. While there was little in the constitutional law jurisprudence of the first half of the twentieth century that illustrated a searching review of legislation for arbitrariness or unreasonableness in a more robust sense. However, such approaches would become one of the linchpins of the courts' evolving equal protection doctrine later in the twentieth century and would also factor into the consideration of content and viewpoint neutrality in the consideration of free speech and free exercise controversies. More recently, as we will discuss in Chapter 7, the Court has undertaken to review state and federal laws that, it has been urged, show evidence of animus and should be evaluated under new sorts of equal protection principles, ones that inquire more deeply into legislative and administrative motive.[176] While motivation-centered constitutional review had fallen out of favor, especially after Lochner's demise, this approach to review made a roaring comeback in key cases

involving discrimination against LGBTQ+ individuals and also in recent cases involving executive decisions from the Trump administration.[177]

Beyond constitutional law, the concern about arbitrariness would become critically important in the development of administrative law in the late nineteenth and early twentieth centuries. What would ultimately answer A. W. Dicey and other influential critics of the administrative state (not completely satisfactorily, then or even now, to be sure) is that the courts would maintain guardrails to ensure that administrator were exercising discretion sensibly.[178] They did so by requiring that agency decisions, to use the language codified into the federal Administrative Procedure Act of the 1940s,[179] were neither arbitrary nor capricious.[180] This requirement was likewise central to state administrative law, from truly the beginning of our expanding use of regulatory agencies at the state and federal level and the practice of administrative discretion.[181] We will see later how various bodies of law, especially administrative law and constitutional law, could work together to limit the risks of arbitrary government action and could, more ambitiously, facilitate good governing. For now, we should just see that what came from the end of the Progressive era and by then nearly a century and a half of experience with the police power was both a robust and resilient power to govern, even where private property rights and other freedoms were affected, and also a framework for ensuring that the government did not abuse its power by undertaking actions that were arbitrary or discriminatory.

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In the Progressive era and deep into the twentieth century, the police power was evolving from, first, an outgrowth of the *sic utere* principle and a means of protecting against public nuisances and other similar public harms and, second, a wider mechanism for protecting the common good through salutary regulation of health, safety, and welfare, to an ever more significant means for implementing more modern forms of regulation to promote the general welfare in an increasingly complex society. To best understand the trajectory of the evolving police power, we should understand both how it became more capacious in its scope, thanks to actual legislative practice and also the imprimatur given by the courts, and also how it morphed from a power exercised mainly through state legislation to one that was a key arrow in the quiver of administrative agencies and municipalities. Perhaps the best policy area available to illuminate these developments is zoning, the topic we turn to next. Emerging in earnest in the second decade of twentieth century, zoning presents an especially tricky set of issues for government policymakers and also for courts, the former involved in constructing new techniques of regulation for a rapidly changing urban environment and the latter struggling to develop appropriate limits on the exercise of this awesome power by state and local governments.

MANAGING PROPERTY THROUGH ZONING

What makes zoning important is not only its ubiquity in modern American urban life, but the fact that the case for zoning power cannot be so easily tied to considerations of health and safety.[182] To be sure, some land use regulations have been yoked to health and safety rationales, thinking of government efforts to reduce blight and the problems of poverty and crime that are associated with certain patterns of property use and residential life.[183] However, the courts have approved zoning laws under the police power without requiring the sort of means-end connection to health and safety that one might have thought were necessary.[184] The approval of zoning reflects a triumph of a particular approach to interpreting the police power, long ago and persisting for decades afterward, and so we should look closely at how these developments came to pass.[185]

Zoning is commonplace now, but it was not always so. Local governments' early efforts beginning in the 1920s to regulate land use by comprehensive zoning regulations were challenged in court by property owners, to no one's surprise, and the courts worked to accommodate these novel regulations within existing police power doctrine. An important early case was Miller v. Board of Public Works of Los Angeles.[186] The California Supreme Court there responded to the argument that this zoning law effaces the traditional constitutional limits on the government's regulatory power, both because there was not a nuisance and therefore the *sic utere* principle didn't apply and because this imposed discrete burdens on particular property owners in order to advance public purposes. Land use regulation under the police power is not limited to abating nuisances, said the court. This form of regulation emerged not as a redundant mechanism for protecting private rights from interference by others, but as a novel means of responding to changing conditions, especially in big urban areas such as Los Angeles. It is understandable and acceptable that the police power would change with it, for

> the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern like and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race.[187]

This power is not unlimited to be sure, and the court noted that some municipalities have "under the guise of zoning, sought to enact and enforce unreasonable and discriminatory ordinances."[188] The courts' role, therefore, is, as in other police power controversies, to investigate whether these regulations are proper or improper exercises of this regulatory power. Miller is important in clarifying that it is not enough merely to say that this is a zoning regulation, as though this will automatically trigger added scrutiny. The government's role in protecting the *salus populi* having become well established, zoning was viewed by these courts as the kind of

practical instrument that government has designed to ensure that owners' use of their private property is consistent with the common good.[189]

The biggest and boldest step in the constitutional law of zoning was the Supreme Court's decision in Ambler Realty Co. v. Village of Euclid,[190] decided just a year after Miller. This decision was both momentous and rather unexpected, given that it was decided by the Supreme Court in the midst of the Lochner era. Moreover, its holding was squarely in favor of local government power, in both its decision to limit significantly a key stick in the bundle of private property rights, and without any compensation, and also the approval of the decision by state governments to permit a general-purpose local government to make this choice.

The property owners in the Euclid case cleverly styled the case as not just about a moderate intrusion on certain property rights as a result of this novel land use regulation, but as an existential threat to individual liberty and, especially, the market economy. "The ordinance," argued the lawyers for the plaintiffs, "constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial and residential development thereof to other and less favorable locations."[191]

One of the lawyers arguing for the town, reflecting upon the Euclid decision nearly three decades after the decision, captures colorfully zoning's logic: "Housekeeping for municipalities is, under zoning, finding an orderliness. Zoning is merely keeping the kitchen stove out of the parlor, the bookcase out of the pantry and the dinner table out of the bedroom. It provides that houses shall be built among houses, apartments in apartment zones, stores in store zones, and industry in zones set aside for industry."[192] Importantly, Euclid's lawyers met the objections to the use of this novel land use regulation head on, not relying solely on the argument that restrictions on private property are typically permitted under a long line of police power precedents, but explaining to the Court what zoning was about, how it was tied to old notions of regulating to proscribe owners' property uses that would harm individuals and members of the general public, and painting a picture that would illustrate how this scheme would help bring order to cities and eliminate the chaos that existed before New York authorities created this new scheme of scientific management.[193]

Euclid was styled by its conservative author as a narrow ruling, and one that he grounded in existing law. And yet the import of Euclid was anything but modest. Most cities eventually adopted some version of zoning regulations, versions which had much in common with one another.[194]

The Euclid decision represents a convergence of a number of developments from the first quarter of the twentieth century that impacts the nature and scope of the modern police power. First, it is a reminder made explicit of the fact that under our constitutional traditions the use of property is subject to the requirements of society and the common welfare. Zoning is a modal example of the need to balance individual property rights with the public good.[195] Second, it pushes past the *sic utere* idea that property regulation is warranted only to abate a nuisance, even if

the property owners played no particular role in the conditions that give rise to the decision of the local authorities to create a structure of zoning – indeed, what has become known as "Euclidean zoning."[196] Land use restrictions typical of these zoning arrangements included separation of commercial from residential uses, height restrictions, lot sizes, density rules, setbacks (distance between buildings and property lines), and development rules of various configurations.[197] The idea of *salus populi* as a principle undergirding the police power appears prominently in the arguments made on behalf of the city's zoning policy in the state and ultimately the Supreme Court. It is explored, if a bit more opaquely, in the Court's decision. This decision largely embraces these arguments, even if the precise rationale for its decisions remains somewhat opaque. Third and finally, Euclid represents a commitment to expertise and administrative government in accord with principles of scientific management.[198] Zoning again captures this principle well; and the approval of the municipality's decision reaffirms this movement in regulatory governance.

Zoning law would of course become very prominent for the century (and counting) after the Euclid decision. However, the constitutionality of zoning laws would fade almost entirely from the federal constitutional agenda and mainly from state constitutional law, except in the latter circumstances in which concerns regarding due process in the implementation of certain zoning decisions arose. Viewed through the lens of constitutional adjudication, the Euclid decision nearly completely effaces the security of private property against governmental management of its use through zoning regulations. While the Court might have limited zoning to a narrow *sic utere* rationale, or somewhat more generously limited it to circumstances where the government could show that land use restrictions were necessary to improve health and safety, they did neither of these things, nor did other courts in later cases.

Often neglected in the story of Euclid and the establishment of a fairly safe harbor for federal constitutional purposes around zoning regulations is the jurisprudence of zoning and police power in the state courts in the years following Euclid, especially with regard to non-constitutional principles. One of the more interesting post-Euclid cases was Mansfield & Swett v. Town of W. Orange,[199] a New Jersey case from 1938. The state supreme court began by drawing an interesting, if underdeveloped, distinction between land use planning and zoning. By contrast to the more mechanical method of restricting certain uses through zoning (much of which came to be called Euclidean zoning, after the Supreme Court case), planning "is a term of broader significance. It connotes a systematic development, contrived to promote the common interest in matters that have from the earliest times been considered as embraced within the police power."[200] Moreover, planning is entwined with municipal power and choices made at the local level to manage and control the use of private property. "Planning confined to the common need," wrote the court, "is inherent in the authority to create the municipality itself."[201] But how should this authority be so confined?

In the New Jersey case, the court continues in this vein, describing how the emergence of land use planning in industrializing America pushed open, properly, the

boundaries of what were appropriate objects of regulation under the police power. Such power should be concerned not only with public health, public morals, or public safety, but "embraces regulations designed to promote the public convenience or the general prosperity."[202] In so doing, no expectation of compensation was necessary (echoing a key point of the Court in Euclid, and that zoning is not a taking, and so does not fall under the requirements of eminent domain, either public use or just compensation).[203] Nor would planning regulations need to be static and neglecting of "changing conditions" to pass constitutional muster.[204] The only limit is the ordinary one, and that is that the "circumstances and character of the regulation" are neither arbitrary nor unreasonable, the latter being defined by reference to whether the law in fact accomplishes "a legitimate public purpose."[205] Other zoning decisions from the 1930s through the next several decades were largely congruent with the logic and emphasis of this New Jersey case.

Up to now, we have focused on the relentless march of the law toward Euclid and also with state court decisions before and after Euclid, toward upholding zoning under the police power. This development is especially important to see, in that the kind of regulation undertaken through this emerging project of land use planning was truly novel and did push up against the boundaries of what was tied to public health, safety, and morals. Ultimately, it is hard to square Euclid with the traditional police power categories unless we embrace the idea that "general welfare" in fact has meaningful content as a basis for regulation in the service of the common good. The imprimatur the courts put on zoning is an important confirmation of the broad view, manifest most dramatically in the Progressive era, that the police power is about the project of good governing, and that both the state and federal constitutions support that project even as new needs for, and methods of, regulation emerge.

In a strongly critical account of Euclid and the emergence of Euclidean zoning, land use scholar Eric Claeys rightly notes that zoning traces the shift from a classically exclusion based idea of property rights to a governance conception.[206] He writes:

> Euclidean zoning thus transformed the orientation of property rights. It transformed what used to be a negative liberty into a positive entitlement. Once Euclidean zoning had taken over, each zoned lot came with a security – a legal guarantee that neighbors would use their lots consistently with tastes, standards and economic goals set by the control group in the local community.[207]

This is a fairly accurate depiction of not only zoning as it emerges from the Euclid decision, but a transformation conspicuous during and after the Progressive era toward an unsteady, but essential, marriage between owners' bundle of property rights and the public's interest in managing owners' interests in property in order to accomplish public welfare goals. What Claeys misses as a descriptive matter is that this transformation was well underway by the time of Euclid. This so-called negative liberty had long been tied to the necessities of public purpose and the common good. The approval without serious limit of Euclidean zoning no doubt

confirmed this emphasis and therefore advanced the transition from vested rights to governance as the best way to think about property rights and their protection in the Progressive era and its aftermath. However, zoning was not a cause of the same. Ultimately, Euclid is best understood as a product of a twentieth-century conception of property rights and regulation rather than a font of these principles and approaches.

There is another important dimension to the rise of zoning in the early part of the twentieth century and the courts' examination of this form of regulation under the constitutions. This concerns the matter of who is doing the regulating. Zoning has been and continues to be almost entirely a matter of municipal law. Sometimes the institution responsible for establishing the basic zoning rules is a general-purpose local government and, where this is so, it is exercising official power under the structure of state law ultimately, with matters becoming more complicated under home rule provisions. Other times the basic decisions are being made by an administrative agency. This was the case in the Town of West Orange case we examined above; and this would become a commonplace in the exercise of zoning power – both in the configuration of the rules and in the implementation of the standards through various zoning boards or whatever they were and are precisely called.

While this fact may seem unremarkable when viewed through our present prism, the question whether the police power could be exercised by an administrative agency on essentially the same terms and conditions as a state legislature was not without consequence. Outside of zoning law, we can find a smattering of state police power cases in which the courts looked askance at legislative delegations of authority. In Thomas v. Smith,[208] a Virginia case from 1930, for example, the court considered whether a revocation of a driver's permit by an administrative official, exercised in accordance with a duly enacted state law, was proper under the police power. Given the "right of a citizen to travel upon the public highways [as] a common right which he has under his right to enjoy life and liberty,"[209] a legislative body can limit this right "by legislative enactment and not by administrative edict."[210]

In upholding zoning laws under the police power, the courts were embracing a new approach to lawmaking, one that was centered on bureaucratic decision-making and administrative discretion. While this embrace was seldom made explicit, we can see the logic of these cases as exemplifying another way of viewing the reality and potential of ambitious public administration in this new era of widespread regulation. This view pushes back against the traditional idea that only the legislature could exercise police power authority because, after all, only the legislature could engage in good governing. Zoning illustrates a distinctly managerial model of the police power.[211] The management happens through a partnership between the legislature and administrative agencies. It is forward-looking, and, in that, it reflects a significant departure from the *sic utere* model of the police power.

The police power has since the beginning of our republic been associated with the legislature and statutory lawmaking. Many statements made this condition explicit, noting that the police power emerged from the idea of plenary legislative power. This was not simply for mechanical reasons, that is, because the legislature is the institution that enacts statutes; it was because the legislature was the institution most connected to the people and most reflective of our constitutional commitment to popular sovereignty.[212] Yet, as the country grew after Reconstruction and into the Gilded Age, the exigencies of the economy meant the regulatory policy was often implemented and occasionally manufactured by sub-state officials and by administrative agencies.[213]

In the context of zoning, which we considered earlier as an illustration of the ubiquitous use of the police power after the Progressive era and into the twentieth century, the typical institutional mechanism for the practice of zoning has been a general-purpose local government, often a charter city operating under its home rule powers, developing the zoning rules under a state enabling act. The implementation of those rules has long been entrusted to boards and bureaus operating under the authority of the local zoning ordinances. These agencies will always be making difficult choices, and the issues of accountability and efficacy have arisen since the advent of comprehensive zoning. Perhaps we can draw a line between the assertion of authority to promulgate the actual zoning regulations and the responsibility to implement these rules. However, this line will be understandably unstable. We can sensibly say that zoning is embedded in state and local schemes of administrative regulation, and is very much an illustration of the police power's evolution from something that pertains solely to legislative lawmaking to mechanisms that involve a confluence of institutions and complex spheres of accountability.

One additional note about the changing role of the police power as it became more embedded in the administrative state. This development also frayed, if not broke entirely, the line connecting police power regulations to the common law. Recall that one of the important themes of the cases, and this is a theme that animates William Novak's framing of nineteenth-century police power, is that the focal point of the state courts' interpretations of the police power, in its purpose and its limits, was the common law, especially as it pertained to evolving ideas of torts and harm and private property.[214] As governments turned more to administrative regulation, they also moved away from reliance on common law understandings of public power, in its nature and in its scope. As Morton Horwitz writes:

> The emergence of industrial society thus meant not only that redistributive motives would inevitably be activated by the reality of an increasingly unequal society. It also meant that the relatively fixed common law categories on which police power doctrines had been erected would fall apart, as any categorical distinction between the health of a worker and the conditions of industrial life became ever more difficult to maintain.[215]

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In sum, the police power evolved to meet conditions appropriate to a more industrial and economically ambitious era, and the constitutional law involving the police power and its limit likewise evolved to confront these conditions. Accepting that the main restrictions on the exercise of the power would be structural and internal to the legislature was a key part of the jurisprudence of these times. However, the courts would maintain their necessary role in ensuring that the legislature not undertake health and safety regulations for reasons that are arbitrary or discriminatory or else a clear violation of individual rights. Balancing public and private interests would remain the quest of reviewing courts. As Tiedeman would write in his treatise: "Fundamental principles of natural right and justice cannot, in themselves, furnish any legal restrictions upon the governmental exercise of police power. Yet they play an important part in determining the exact scope and extent of the constitutional limitations."[216]

NOTES

1. See generally Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities 1877–1920* (1982); Morton Keller, *The Affairs of State: Public Life in Late Nineteenth Century* (1977); Robert H. Wiebe, *The Search for Order 1877–1920* (1967). For a recent analysis of how this era connected with broader themes of American constitutionalism, see Joseph Fishkin & William E. Forbath, *The Anti-Oligarchic Constitution: Reconstructing the Economic Foundations of American Democracy* (2022), at 138–250.
2. See William J. Novak, "The American Law of Overruling Necessity: The Exceptional Origins of State Police Power," in *States of Exception in American History* 95, 114 (G. Gerstle & J. Isaac eds., 2020).
3. See generally Morton Keller, *The Affairs of State: Public Life in Late Nineteenth Century* (1977); William J. Novak, "Public Economy and the Well-Ordered Market: Law & Economic Regulation in the 19th Century America," 18 *L. & Soc. Inq.* 1 (1993).
4. Susan J. Pearson, "A New Birth of Regulation: The State of the State After the Civil War," 5 *J. Civil War Era* 422 (2015).
5. On Reconstruction generally, see Eric Foner, *Reconstruction* (1988). On Reconstruction and the key legal issues raised, see Masur, *Until Justice Be Done* 303–341 (2021); G. Edward White, *Law in American History Volume II*, at 6–49; Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (2015).
6. Lochner v. New York, 198 U.S. 45 (1905).
7. 291 U.S. 502 (1934).
8. 300 U.S. 379 (1937).
9. See generally Bruce Ackerman, *We the People: Foundations* 279–34 (1998); Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (1998).
10. See Morton J. Horwitz, *The Transformation of American Law, 1870–1960* (1992).
11. See generally Blake Emerson, *The Public's Law: Origins and Architecture of Progressive Democracy* (2019).
12. See generally Christopher F. Edley, Jr., *Administrative Law: Rethinking Judicial Control of Bureaucracy* (1990).

13. 260 U.S. 393 (1922).
14. See generally J. Willard Hurst, *Law and the Conditions of Freedom in Nineteenth-Century America* 35–41 (1956).
15. See, e.g., Cass R. Sunstein & Adrian Vermeule, *Law & Leviathan: Redeeming the Administrative State* (2020); Adrian Vermeule, *Law's Abnegation* (2016); Philip Hamburger, *Is Administrative Law Unlawful?* (2014); Skowronek, *Building a New American State*.
16. But see David N. Mayer, "The Myth of Laissez-Faire Constitutionalism: Liberty of Contract during the Lochner Era," 36 *Hastings Const. L. Q.* 217 (2009).
17. Ernst Freund, *Legislative Regulation* (Commonwealth Fund, 1932).
18. See Daniel B. Rodriguez & Barry R. Weingast, "Lochner and Lochnerism" (ms. 2023).
19. See Henry S. Haines, *Problems in Railway Regulation* (1911).
20. See John Young, "Interstate Commerce Act of 1887," Center for the Study of Federalism (2006).
21. See generally Tim Wu, "A Brief History of American Telecommunications Regulation," in *Oxford International Encyclopedia of Legal History*, *Vol. 5*, 95 (2009).
22. See ibid.
23. See generally Hugh R. Slotten, *Radio and Television Regulation: Broadcast Technology in the United States, 1920–60* (2000).
24. See Rodriguez & Weingast, "Lochnerism," at 13.
25. See generally J. Warren Madden, "Origins and Early Years of the National Labor Relations Act," 18 *Hastings L. J.* 571 (1967).
26. On labor violence, see Margaret Levi, et al., "Open Access, Ending the Violence Trap: Labor, Business, Government and the National Labor Relations Act," in *Organizations, Civil Society, and the Roots of Development* (N. Lamoreaux & J. Wallis eds., 2017).
27. William J. Novak, *The People's Welfare*.
28. See generally Thomas B. Nachbar, "The Rationality of Rational Basis Review," 102 *Va. L. Rev.* 1627 (2016).
29. To be sure, the arguments, principally by libertarian legal scholars, for a more robust review of regulation that restricted so-called economic liberties persisted without much interruption well after Lochner. See, e.g., Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Updated ed. 2013); Dana Berliner, "The Federal Rational Basis Test – Fact and Fiction," 14 *Geo. J. L. & Pub. Pol'y* 373 (2016).
30. The leading treatises of the time summarized these cases. See Thomas J. Cooley, A *Treatise on the Constitutional Limitations Which Rest on the Legislative Power of the States of the American Union* (1871), Christopher Tiedeman, A *Treatise on the Limitations of the Police Power in the United States* (1886), and Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (1904).
31. Two of the leading analyses of the jurisprudence of this period focus almost exclusively on federal decisions. The focus by Owen Fiss in his Oliver Wendell Holmes Devise book on the period between 1888 and 1910 understandably focuses on Supreme Court decisions involving the police power. Nonetheless, the absence of attention to what was happening with state constitutional law in this critical era leaves us with a misleading picture. See also White, *Law in American History Volume II*, at 379–423 (dense analysis of Court's police power jurisprudence during the Progressive era, while omitting state court cases entirely).
32. A deferential approach exemplified by cases such as United States v. Carolene Products, Inc., 304 U.S. 144 (1938) and Williamson v. Lee Optical, 348 U.S. 483 (1955).

33. Munn, 94 U.S. 113, 124 (1876).
34. Ibid.
35. Ibid., at 656.
36. 46 U.S. 504 (1847).
37. 123 U.S. at 671–72.
38. Ibid., at 659.
39. Ibid., at 660.
40. Ibid., at 661.
41. Ibid., at 662.
42. Referring here to The Slaughterhouse Cases, 83 U.S. 36 (1872).
43. See Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 73 (1993).
44. A somewhat different reading of Mugler than the usual one is given in Randy E. Barnett & Evan D. Bernick, *The Original Meaning of the 14th Amendment: Its Letter & Spirit* 282 (2021) (comparing Harlan's reasoning to Chief Justice Marshall's 'pretext' formulation in McCulloch v. Maryland). "No justice in Mugler," Barnett & Bernick write, "doubted that purported exercises of the police power … needed to be evaluated for pretext if they deprived people of life, liberty, or property." Ibid. True enough, but there are precious few cases prior to Lochner in which the federal courts found any such pretext. See Nathan S. Chapman & Michael W. McConnell, "Due Process as Separation of Powers," 121 *Yale L. J.* 1672 (2012). Nor is it clear what pretext would exactly mean in this context.
45. 113 U.S. 27 (1885).
46. As Professor Gillman writes, "Harlan's statement is not a departure from previous holdings; it is, rather, a reassertion of the adjudicative task undertake by the Supreme Court since Slaughterhouse, and by many state courts before that"). Gillman, *Constitution Besieged*, at 73. At the same time, this raises the larger question about how impactful was the Court's decision in the Slaughterhouse cases. A full description and analysis of these cases, and others that are central to a comprehensive understanding of Reconstruction era constitutionalism would take us on a tangent. The main lesson for our purposes of these cases is that the Court limited significantly the scope of the Fourteenth Amendment (both equal protection and due process) as a font of civil rights protections, including liberty and property, that might have upended the Court's cases involving the police power. See White, *Law in American History Volume II*, at 32–38 ("[The Court] advanced a minimalist interpretation of the Fourteenth Amendment's Due Process Clause"); ibid., at 37 (minimalist interpretation of privileges or immunities clause). See also Barnett & Bernick, *Original Meaning*, at 176–77.
47. See Barnett & Bernick, *Original Meaning*, at 272–78 ("the idea that legislative power was inherently limited came to be understood as forbidding not only enactments that were not generally applicable or prospective but enactments that were not good-faith efforts to promote constitutionally proper governmental ends"); ibid., at 275 ("[T]he nature of the social compact barred any presumption that the people had consented to be governed by a legislature with arbitrary power").
48. See Mugler, 123 U.S. at 661.
49. This was so, despite Tiedeman, an author of one of the leading treatises on the police, insisting that the *sic utere* principle persisted, and undergirded the police power through the period he reviewed. This view is echoed in Horwitz, *Transformation II*, at 28 ("For judges deciding police power cases in the 1870s, the law of nuisance provided the categories for determining when it was legitimate for the state to regulate on behalf of the health, safety, and morals of its citizens"). However, Novak's depiction of the turn

toward a *salus populi* account of the police power, which goes back at least to Alger in 1851 and arguably before that, is ultimately more compelling. "Police power was basically the crucial site for the expansion of public authority beyond the ancient bounds and jurisdictions of local and municipal self-governance toward a more capacious, centralized and generalized conception of state regulatory and governing power." Novak, "Overruling Necessity," at 103.

50. See Hurst, *Law and Social Order*.
51. 163 U.S. 537.
52. Ibid., at 550.
53. 118 U.S. 356 (1886).
54. I63 U.S. 537.
55. Ibid., at 557 (Harlan J., dissenting).
56. Ibid., at 557–58 (Harlan, J., dissenting).
57. Ibid., at 562.
58. Ibid., at 558–59.
59. 197 U.S. 11 (1905).
60. Ibid., at 26.
61. Ibid., at 29.
62. Ibid., at 28.
63. See Wendy Parmet, "Rediscovering Jacobson in an Era of COVID-19," 100 *B. U. L. Rev. Online* 117 (2020).
64. See Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* 175–77 (1986).
65. See Cooley, *Constitutional Limitations*.
66. See ibid.
67. See generally Alan Jones, "Thomas M. Cooley and 'Laissez-Faire Constitutionalism': A Reconsideration" 53 *J. Am. Hist.* 751 (1967).
68. See ibid., at 755. As to the value he placed on property rights in particular, scholars differ. Says Jones: "Cooley had no special concern for the protection of property rights. He certainly believed in the rights of private property, but he never considered them absolute or even paramount." Ibid., at 760 This inquiry is ultimately less interesting than whether he saw such rights as interfering appreciably with the government's power to protect health, safety, morals, and the general welfare under the police power. Here the best conclusion is that he accepted unequivocally a very broad police power, but conditional on what were essentially due process constraints that would protect against arbitrary and unreasonable action.
69. See Banner, *Natural Law*.
70. See Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* 6 (1989). As Nedelsky summarizes late eighteenth-century framers' thinking, "[P]roperty was not just an abstract symbol. It was a right whose security was essential to the economic and political success of the new republic. If property could not be protected, not only prosperity, but liberty, justice, and the international strength of the nation would ultimately be destroyed."
71. See generally Duncan Kennedy, *The Rise and Fall of Classic Legal Thought* (1975).
72. Barnett & Bernick, *Original Meaning*.
73. Magna Carta, ch. 39 (1215), reprinted in Ralph V. Turner, *Magna Carta Through the Ages* at 231 (2003).
74. Barnett & Bernick, *Original Meaning*, at 267–68 (citing to contemporaneous statements by Hamilton).

75. See, e.g., Calder v. Bull, 3 U.S. (3 Dall.) 386, 386–87 (1798); North Carolina v. Foy, 5 N.C. (1 Mur.) 58 (1805). See generally Barnett & Bernick, *Original Meaning*, at 270–72.
76. Barnett & Bernick, *Original Meaning*, at 272–76.
77. Ibid., at 262.
78. Ibid., at 289–315 (detailing this argument in a chapter entitled "The Proper Ends of Legislative Power")
79. See generally Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004).
80. 248 U.S. 215 (1918).
81. Ibid., at 234.
82. Ibid., at 246 (Holmes, J., dissenting).
83. Ibid. (Holmes, J., dissenting).
84. Ibid., at 250 (Brandeis, J., dissenting).
85. Ibid. (Brandeis, J., dissenting).
86. Ibid.
87. Ibid., at 262–63.
88. Melvin Urofsky has a different take on the difference, saying that "[b]oth men believed in judicial restraint, but Holmes voiced as he did out of skepticism, not believing in the reforms or, other than as an intellectual matter, in the rights either." By contrast, Brandeis "believed fervently that the people should make policy through their elected representatives … Above all, Brandeis cherished facts, while Holmes hated them." Melvin Urorfsky, *Louis D. Brandeis: A Life* 566 (2009). This is not inconsistent with viewing Holmes as beholden to more essentialist ways of thinking, whether or not yoked to natural law. For an illuminating essay challenging the conventional view that Holmes rejected natural law, see Robert P. George, "Holmes on Natural Law," 48 *Vill. L. Rev.* 1 (2003).
89. See Novak, *People's Welfare*, at 49–50. Novak, in his discussion of the imperative of the "well-ordered society," quotes Chancellor Kent: "Every individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order and reciprocal rights of others."
90. See Melvin I. Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," 72 *J. Amer. Hist.* 63 (1985).
91. Fishkin & Forbath, *Anti-Oligarchic Constitution*, at 195.
92. An exemplar of this theme in the American Progressive era is Herbert Croly, *Progressive Democracy* (1914). See generally William E. Forbath, "The Long Life of Liberal America: Law and State-Building in the U.S. and England," 24 *Law & Hist. Rev.* 179 (2006).
93. See Nedelsky, *Private Property*, at 163.
94. St. Louis Gunning Adv. v. City of St. Louis, 233 Mo. 99 (Mo. 1911).
95. Ibid., at 109 (Graves, J., dissenting).
96. 98 Ohio St. 358 (1918).
97. Ibid., at 361.
98. Ibid., at 387.
99. Ibid.
100. Ibid., at 378.
101. Ibid.
102. Ibid., at 363.
103. In his analysis of property law's transformation in the Progressive Era, Morton Horwitz emphasizes the ways in which vested rights doctrine destabilized property by expanding greatly the category of interests that should and would be considered property. "[S]ince

the vested rights doctrine itself was founded by analogy to the vesting of landed property by way of title, it became increasingly difficult to decide whether other, more abstract and intangible property interests had also been vested." Horwitz, *Transformation II*, at 150. Horwitz proceeds to show how the "collapse of a physicalist definition of property after 1870" was "ultimately the source of [vested rights theory's] undoing." Ibid., at 151–56.

104. 146 U.S. 389 (1892).
105. Ibid., at 459.
106. Ibid., at 461.
107. "It was well recognized that the state or its agents were legally immune from paying compensation for many of the forms of interference with land for a which a private person would unquestionably have been required to pay." Horwitz, *Transformation II*, at 146.
108. Harry Scheiber, "The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts," in *Perspectives in American History, Volume V: Law in American History* 331 (D. Fleming & B. Bailyn eds., 1971).
109. See generally William Treanor, "Original Understanding," at 792 ("In antebellum America, state courts usually required compensation only when the government physically took property or, at most, when governmental actions involved the physical invasion of property"). See also Harry N. Scheiber, "Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910," 33 *J. Econ. Hist.* 232, 236 (1973).
110. 17 Johns. 195 (N.Y. Sup. Ct. 1819).
111. Scheiber, "The Road to Munn," at 337–38.
112. See, e.g., Chicago & Pacific RR v. Francis, 70 Ill. 258 (1973); City of Pekin v. Winkel, 77 Ill. 56 (1875); Rigney v. City of Chicago, 103 Ill. 64 (1882)
113. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
114. See generally Treanor, "Original Understanding"; Richard A. Epstein, "Takings: Descent and Resurrection," 1987 *Sup. Ct. Rev.* 1, 12 (1987).
115. As the Court said in Murr v. Wisconsin, 582 U.S. – (2017): A"[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), it was generally thought that the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession," like the permanent flooding of property. *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1014 (1992) (citation, brackets, and internal quotation marks omitted); accord, *Horne* v. *Department of Agriculture*, 576 U. S. ___, ___ (2015) (slip op., at 7); see also *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 427 (1982).
116. 260 U.S. at 413.
117. See Treanor, "Original Understanding," at 803 ("[T]he Pennsylvania Coal inquiry into when regulation 'goes too far' is open-ended and unconstrained").
118. See, e.g., Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915).
119. See, e.g., G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 402 (1993).
120. See Horwitz, *Transformation II*, at 15.
121. See Mahon, 260 U.S. at 417 (Brandeis, J., dissenting).
122. See Novak, *People's Welfare*, at 133–38.
123. The Takings Clause reads: "[N]or shall private property be taken for public use, without just compensation." *U.S. Const. Am. V.*

124. See generally Laura Kalman, *FDR's Gambit: The Court Packing Fight and the Rise of Legal Liberalism* (2022); Cushman, *New Deal Court*, at 9–32.
125. Cf. Daniel B. Rodriguez & Barry R. Weingast, "Engineering the Modern Administrative State: Political Accommodation and Legal Strategy in the New Deal Era," 46 *BYU L. Rev.* 147 (2020).
126. See Guido Calabresi & Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral," 85 *Harv. L. R.* 1089 (1972).
127. Quoted in Jon C. Teaford, *The Rise of the States: Evolution of American State Government* 13 (2002).
128. See Gillman, *Constitution Besieged*, at 180.
129. The Federalist No. 51.
130. Teaford, *The States*, at 13
131. See Fiskin & Forbath, *The Anti-Oligarchic Constitution*.
132. See generally Thomas Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (1989).
133. See, e.g., Adkins v. Children's Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915).
134. 198 U.S. 45 (1905).
135. Ibid., at 57.
136. Ibid., at 57.
137. Ibid., at 61.
138. Ibid., at 65 (Harlan, J., dissenting)
139. Ibid., at 75 (Holmes, J., dissenting).
140. See generally William E. Leuchtenburg, *The Supreme Court Reborn: Constitutional Revolution in the Age of Roosevelt* (1995); Robert G. McCloskey, "Economic Due Process and the Supreme Court: An Exhumation and Reburial," 1962 *Sup. Ct. Rev.* 34.
141. See Laurence Tribe, *American Constitutional Law* 769 (2nd ed., 1988).
142. See, e.g., Barry Friedman, "The History of the Counter-Majoritarian Difficulty, Part Three: The Lesson of Lochner," 76 *NYU L. Rev.* 1383 (2001).
143. See, e.g., Cushman, *New Deal Court*.
144. See, e.g., David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* 121 (2011).
145. See ibid., at 120–28.
146. Cass R. Sunstein, "Lochner's Legacy," 67 *L. Rev.* 873 (1987).
147. See White, *Law in American History Volume II*, at 400.
148. See Gillman, *Constitution Besieged*, at 8–18.
149. See Fishkin & Forbath, *Anti-Oligarchic Constitution*.
150. Gillman, *Constitution Besieged*, at 7–8.
151. Lochner-era jurisprudence reflected in what Howard Gillman labels the "anticaste principle." Ibid., at 8.
152. See White, *Law in American History Volume II*, at 379–423.
153. See ibid.
154. Muller v. Oregon, a case in which the Supreme Court upheld a regulation limiting working hours for women, was a hard and somewhat surprising case in the midst of the Lochner era; it would have been a very easy case by the 1940s or 1950s.
155. See, e.g., Victoria Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights," 97 *Cal. L. Rev.* 751 (2009). For an early account expressing skepticism about Lochner's impact on progressive social

legislation, see Charles Warren, "The Progressiveness of the United States Supreme Court," 13 *Colum. L. Rev.* 294 (1913).
156. See John Fabian Witt, *American Contagion: Epidemics and the Law from Smallpox to Covid* 19 (2020).
157. See, e.g., Freund, *The Police Power*.
158. See Williamson v. Lee Optical, 348 U.S. 483 (1955); Carolene Products v. United States, 304 U.S. 144 (1938).
159. See Novak, "Overruling Necessity," at 95–122.
160. 152 U.S. 133 (1894).
161. Ibid., at 137.
162. 123 F. 10 (1900).
163. Ibid., at 15.
164. Ibid., at 23 (emphasis added).
165. See Freund, *The Police Power*, at 57–61.
166. Ibid., at 57.
167. Ibid., at 59
168. Ibid., at 60.
169. Jacobson v. Massachusetts, 197 U.S. 11 (1905).
170. Muller v. Oregon, 208 U.S. 412 (1908).
171. 245 U.S. 60 (1917).
172. 274 U.S. 200 (1927).
173. Ibid., at 206.
174. 220 U.S. 61 (1911).
175. Ibid., at 82.
176. See A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 107–22 (8th ed., 1915).
177. Romer v. Evans, 517 U.S. 620 (1996).
178. See, e.g., James Landis, *The Administrative Process* (1938).
179. Administrative Procedure Act, $551.
180. Ibid., at $706.
181. See generally Jed Stiglitz, *The Reasoning State* (2022).
182. See generally Sonia A. Hirt, *Zoned in the USA: The Origins and Implications of American Land-use Regulation* (2014).
183. See, e.g., Berman v. Parker, 348 U.S. 26 (1954).
184. See Hirt, *Zoned*; William A. Fischel, *Zoning Rules! The Economics of Land Use Regulation* 27–68 (2015) (describing the structure and administration of zoning laws).
185. For a valuable analysis of early zoning law and conceptions of property, see Nadav Shoked, "The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Theory of Property," 28 *Yale J. Reg.* 91 (2011).
186. Miller v. Bd. of Public Works of Los Angeles, 195 Cal. 477 (Cal. 1925).
187. Ibid., at 456
188. Ibid., at 450.
189. Miller was not the only word from the states regarding zoning and constitutional authority. The Mississippi supreme court, two years earlier, struck down a zoning regulation as an "arbitrary interference with the individual use of private property by the owner thereof." Fitzhugh v. City of Jackson, 132 Miss. 585 (1923).
190. 272 U.S. 365 (1926).
191. See generally Michael Allan Wolf, *The Zoning of America: Euclid v. Ambler* 50–56 (2008) (detailing lawyers' objections to zoning in Euclid case).

192. James Metzenbaum, "The History of Zoning – A Thumbnail Sketch," 9 W. *Rsrv. L. Rev.* 36 (1957).
193. See Wolf, *Zoning of America*, at 99.
194. See M. Nolan Gray, *Arbitrary Lines: How Zoning Broke the American City and How to Fix It* 29 (2022) ("The decision in Euclid proved to be decisive … By 1930, thirty-five of the then forty-eight states had adopted some form o zoning-enabling legislation").
195. See generally Stewert Sterk, Eduardo Penalver, & Sara C. Bronin, *Land Use Regulation* 184 (3rd ed., 2020).
196. A concept generally associated with Harold Bartholomew, famous city planner of the early twentieth century.
197. See generally Nicole Steele Garnett, *Ordering the City: Land Use, Policing, and the Restoration of Urban America* (2010).
198. See John Infranca, "Singling Out Single-Family Zoning," 111 *Geo. L. J.* 659 (2023).
199. 198 A. 225 (N.J. 1938).
200. Ibid., at 228.
201. Ibid., at 229.
202. Ibid., at 231.
203. Ibid.
204. Ibid.
205. Ibid.
206. Eric R. Claeys, "Euclid Lives? The Uneasy Legacy of Progressivism in Zoning," 73 *Fordham L. Rev.* 731 (2004).
207. Ibid., at 741.
208. Thompson v. Smith, 155 Va. 367 (1930).
209. Ibid., at 377.
210. Ibid.
211. See Shoked, "Ownership," 28 *Yale J. Reg.* at 106.
212. See Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (1998).
213. A good illustration of the Court's grappling with the tension over legislative delegations of authority in this earlier period was the Minnesota Rate Case of 1890. This case, one in a long line of cases involving disputes over the scope and exercise of ratemaking authority by administrative agencies (first in states, later at the federal level), involved a claim that the agency was setting a rate that was unreasonable under the statute. The specific question that came ultimately to the Supreme Court was whether the federal courts could review this agency judgment, made under the aegis of a legislative delegation, to make sure that it complied with the requirements of due process under the Constitution. The Court answered this question with a resounding yes, Justice Blackford writing: "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." The Court thus rejected the decision of the Minnesota court to refuse to consider a claim by the railroad under the due process clause. There was a powerful dissent by three justices from this holding, with Justice Bradley writing that "it practically overrul[es] Munn." For these dissenting justices, the "governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative, and not a judicial one." This 1890 case illustrates the difficulty faced by the Court looking to reconcile its broad holding in Munn and Mugler that these businesses could be subject to regulation in the public interest, with due deference given to the legislature's choice about how best to regulate, with the responsibility of ensuring that this discretion could

not be used to ride roughshod on regulated industries' due process rights. What makes the holding less momentous than these earlier cases, and also later cases in which the tension between private property rights and legislative discretion was conspicuous, is that the legislature here had in fact imposed a reasonableness requirement into the statute, and so the question could be viewed more narrowly of whether this requirement could and should be enforced in a state court.

214. See Novak, *People's Welfare*, at 66.
215. See Horwitz, *Transformation II*, at 30.
216. Tiedeman, *Limitations of Police Power*, at 10–11.