4

The Shape of the Police Power in the Modern Era

In the last two chapters, we have taken an intensive and mostly longitudinal look at the evolution of the police power from an authority embedded in state constitutions to a whole power for governments to act in order to further the "people's welfare." Through the long period from the founding through the mid-twenty-first century, legislators and administrators created and implemented regulation to meet the constitutional obligations of active governance. To be sure, they did so in the shadow of shifting conceptions of liberty and private property. A capacious police power survived the turbulence of public skepticism about legislators and legislation, economic crises, and the rise and fall of laissez constitutionalism. How this happened is illuminating, not only in order to better understand the history of the police power, but as a framework for understanding how state and local governments developed approaches to good governance and also how the courts fashioned limits on these strategies through doctrinal innovations.

In thinking about the ways the police power evolved to the present time, it is crucial to consider two developments directly relevant to this topic. These are, respectively, the changing approaches to regulatory governance in the roughly the second half of the twentieth and the first couple of decades of the twenty-first century, and key developments in state constitutional reform, developments that implicate the nature and contents of the regulatory power of state and local governments. Both topics are more capacious than can be comprehensively analyzed in part of one chapter, but some observations are useful to set the table for a robust discussion of the modern police power.

MODERN APPROACHES TO REGULATORY GOVERNANCE

The period after World War II was marked by a faith in American ingenuity and a broad confidence in the government to undertake programs and projects that would enhance the general welfare.[1] Among many examples, the interstate highway system[2] and the creation of the national parks[3] were gargantuan projects, and were not only valuable initiatives in their own right, but they also evidenced, as would also

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the space program that would begin in earnest in the 1950s,[4] the relentless commitment of the public sector to aspire to great heights of achievement, and to bear the sacrifices and burdens to see achievements happen.[5]

State-level governance was an important part of this omnibus effort. So far as direct programs funding was concerned, states funneled steadily increasing monies into social welfare initiatives, public works, and, especially, education.[6] California's higher education master plan was just one illustration, and an extraordinary one, of a state making a colossal investment to implement a vision of a world-changing program.[7] Other efforts by state governments, sometimes in conjunction with federal projects and sometimes developed on their own initiative, reflected the confidence at the sub-national level in the government's ability and commitment to further public welfare goals, in this period of American expansion and technological progress.

The attention paid at the local level to perceived failures in the overall urban condition was reflected in the continuing efforts at regulating in order to address the externalities that stemmed from an increasingly busy community life. In Kovacs v. Cooper,[8] a rather obscure 1949 case, the Supreme Court upheld a municipal prohibition on "loud and raucous music" against a charge that this curtailed protected expression under the First Amendment. In doing so, they made clear that the "[p]olice power … extends beyond health, morals, and safety … to protect the well-being, and tranquility, of a community."[9] One year later, in Berman v. Parker, the Court upheld against a takings and police power challenge, regulations that were intended to redress the predicament of so-called urban "blight."[10] The impact of Berman on the regulatory power to deal with property use outside the constraints of eminent domain will be discussed in more detail below. For now, it is important merely to note the Court's very broad rendering of the police power's scope in a case decided smack in the middle of the century. Justice Douglas for a unanimous Court declares: "Public safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power, and do not delimit it."[11]

Growth of state and local regulation was notable as new problems emerged and continuing problems persisted. The increasing urbanization of America generated special pressures to tackle serious public health and safety dilemmas.[12] Simultaneously, the role of the federal government grew massively. The Progressive era, its aftermath, and the New Deal and post-New Deal period illustrated how the federal government addressed through regulation problems that have a nationwide valence. Federal regulation grew in most dimensions and in most domains. The New Deal is especially notable for the creation of myriad new federal agencies, each with substantial jurisdiction over major parts of the economy and social life. With the New Deal, we moved in an era that Sophia Lee calls our "administered constitutionalism."[13] This was a phenomenon of extraordinary consequence, even as the theory of the federal government's role, under ancient paradigms of limited

government and enumerated powers, was stress tested by the needs and wants of a population, a population that demanded, and ultimately came to expect, a robust federal presence. Regulatory expansion, in short, happened on both fronts, expansion in state interventions in most facets of social and economic life and also expansion in federal regulation and the national administrative state.

Public faith in regulation was not, however, a linear story from the end of World War II to the present. In the 1980s, with the election of Ronald Reagan, and continuing through the end of the century and into the next, there was an emerging backlash to federal regulation.[14] American politics embraced a wave of anti-regulation sentiment, a sentiment that was captured to some degree in a skepticism on the part of a large segment of the GOP, of political officials in the executive branch, through the administrations of Reagan, Bush I, and even to some extent Clinton and Bush II as well, and of some courts.[15] Fast forward ahead to the most recent decade, there has been an emerging "anti-administrativism" in the federal courts, including the Supreme Court, that can be sourced at least to some extent in a concern about overbearing regulation and the decoupling of regulatory administration from the rule of law.[16] Moreover, the last four decades or so have witnessed a renaissance in attention to the role and important of private property and, we might say, at the risk of exaggerating the point, a property rights revolution.[17] Public interest organizations, primarily libertarian in origin and focus, worked to protect through legal and political strategies private property from what they viewed as overweening government regulation.[18] They had a number of prominent successes, noteworthy in the modern era in which so-called economic liberties were not viewed as fundamental and so strict constitutional scrutiny was not the a prominent part of our tradition of contemporary judicial review.

State and local regulation transitioned in focus as well, as one might expect in a dynamic society and changing political circumstances, and thus the targets of regulation often shifted. In any event, the general trend line in the period from the end of the Second World War through the next thirty odd years was very much in the direction of widening governmental intervention, including in core matters of public health, safety, and morals. With all that, however, the persistence of state and local regulation under the police power has not seriously abated. To take one important area, whose history was detailed in the previous chapter, municipal zoning, land use regulation by local governments has continued without much interference and without serious retrenchment occasioned by judicial scrutiny. To be sure, "zoning is by no means static.... [c]hanged or changing conditions call for changed plans,"[19] as a New York court note in a case from the early 1950s. However, the utility of zoning as a mechanism for regulating the use of private property in order to accomplish what authorities perceived as worthwhile public aims persisted in the second half of the last century and the first part of the new one.

The interesting story of evolving regulatory governance in the long era herein described – basically the last eighty years – involves the evolution of new regulatory

techniques, as well as the steadily expanding role of the federal government, including into matters that had historically been left to local discretion (thinking here, for example, of education and housing policy). The sheer breadth of constitutional power of state and local governments to regulate, however, under the police power and other fonts of authority, has remained largely undisturbed. That said, the so-called "rights revolution" did bring meaningful limits on police power regulation; and the internal constraints that stem from the requirements in both constitutional law and administrative law that police regulations not be unreasonable or arbitrary. We will discuss these developments in successive chapters in the next Part of this book. For our purposes here, it is crucial to note that the basic underpinnings of the government's power to regulate under the police power in order to protect public health, safety, morals, and the general welfare were established long ago, as we have seen, and have not been seriously disturbed. The objectives of these powers, however, have evolved as new conditions and needs have arisen; more formally, they have evolved in order to meet circumstances of state constitutions as these documents too have evolved in the last many decades.

STATE CONSTITUTIONAL DEVELOPMENTS

While no new states have been admitted since Hawaii and Alaska in the late 1950s, a number of states have either adopted new constitutions or substantially reformed their constitutions in the period from the mid-1950s to present day.[20] "During the twentieth century," Alan Tarr writes, "formal constitutional change in the states has occurred primarily through constitutional amendment."[21] Moreover, "[m]ost states have amended their constitutions far more frequently during the twentieth century than in previous eras."[22] A number of states undertook meaningful reforms. Some adopted new constitutions, while some adopted particular amendments to implement significant new agendas. In all, just about every state adopted amendments to their constitutions during the second half of the twentieth century and first twenty years of the twenty-first century.[23]

By way of summary, one fairly common element in these reforms was the expansion of the public sphere and the development of new obligations on government.[24] Some of these were framed as so-called "positive rights," a phenomenon we will discuss in more depth in a later chapter. However labelled, these provisions put a greater emphasis on progressive social agendas and, with it, a greater onus on government to undertake initiatives to implement objectives viewed by reformers (sometimes including the people themselves, as where state constitutions were amended through popular initiatives) as critical pieces of the overall vision of governing and public policy within states.[25] It is a commonplace to see twentieth- and twenty-first-century constitutional amendments and changes as part of an agenda of modernization and, for that reason, seemingly mechanical. However, even reforms that were deeply in the weeds on the implementation mechanisms of governing are best viewed as means of rethinking broader policy goals.[26] Other notable constitutional

reforms during the twentieth century includes reconfigurations of the overall fiscal systems in states (Hawaii and Colorado's reforms were especially substantial), the overall restructuring of state government (Texas), changes in relations between state and local governments through home rule amendments (Michigan), the expansion of individual rights (New York), major changes in the structure of judicial system (Florida), and creation of new positive rights including natural resource protection and safeguarding the rights of indigenous peoples (Alaska). Moreover, some states adopted entirely new constitutions during the second half of the twentieth century, in response to changes in the state and variegated political pressure.[27]

In writing about the project of state constitutional reform in the modern era, Frank Grad and Robert Williams posit a general view of state constitutional functioning, a view that bears well on the evolution of regulatory power under state constitutions over time: "The least we may demand of our state constitutions is that they interpose no obstacle to the necessary exercise of state powers in response to state residents' real needs and active demands for service."[28] In contemporary constitutional reform, including the substitution of old or new ones, no serious obstacles have been imposed. Rather, and in contrast to a raft of state constitutional reforms in the late nineteenth and early twentieth centuries, at a time of skepticism about legislative power, the shape of constitutional change has been in the direction of improving governmental performance and imposing new obligations emerging from new policy goals.[29] As Jeff Sutton labels it, the project has been one of "[a]mending constitutions to meet changing circumstances."[30]

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Governance strategies evolved, as one might expect, given changing social and economic conditions. And so state and local governments maintain the same level or type of discretion to regulate that existed in prior eras. In particular, state and federal constitutional law has obviously shifted in important ways over these many decades and especially with the expansion of federal governmental authority and the widening scope of individual rights. The impact of the police power has changed in meaningful ways. Nonetheless, we should recognize, as we summarize these developments, the resilience of the police power. At a core constitutional level, the power of the states to regulate health, safety, morals, and the people's welfare persists in a remarkably strong form. We mentioned in the book's introduction how the police power has faded from view. But it has not faded in relevance and impact as an element in the government's regulatory strategies. This formidable power is at the very center of state constitutionalism. Chapter 4 illuminates some key dimensions of this.

MORALS REGULATION

The roots of the government's interest in, and regulatory power over, morals, go back to the origins of the police power in the states of the United States in the

nineteenth century. The essential role and responsibility of the state government to protect the public from immoral activity was well established in early cases involving the police power, and continued as a thread in the nineteenth and into the twentieth centuries. Public morals takes up three long chapters in Ernst Freund's treatise on the police power, and his dense analysis of state cases spans a wide terrain, from games of chance to lotteries to intoxicating liquors to various vices and instances of brutality (including cruelty to animals).[31] No one could doubt that one of the foundational objectives of the police power as it evolved throughout the first and second centuries of the American republic's history was the imperative of protecting society against immoral behavior.

As a categorial matter, the framing of the police power around health, safety, morals, and general welfare has been fairly consistent from the beginning of our republic and in the drafting of the early state constitutions.[32] It has been clear since the founding that morals, if not stated explicitly in the constitutions' text, has been a component of general welfare and the common good. While certain morals regulation has been controversial, historically and currently, it is without dispute that the police power does encompass the power of the state, and, where power is delegated, local government, to legislate to protect public morals.[33] Referring to the nineteenth century in particular, but accurate as a general statement of the scope of the police power through American constitutional history, William Novak writes that "[m]orals police remained one of the matter-of-fact obligations of government in a well-regulated society."[34]

Second, and to some degree in tension with this previous point, police power legislation and regulation in the second half of the twentieth and into the twenty-first century was styled less around the objective of preserving traditional morality and, hearkening back to the early days of American history, eradicating sinful behavior, but was more about preserving social order.[35] This reframing helped support government initiatives that, as in the adult entertainment cases discussed below, helped reduce bad secondary effects of certain behaviors. These have become more often than not the stated rationales for these regulations. In this respect, morals regulation becomes part of the same pattern of police power regulation, in the service of the objection of protecting the public's health, safety, and general welfare. Morals regulation designed to improve the human soul becomes subordinate to the goal of improving the social condition – although we are admittedly eliding here the thoughtful efforts, some based upon sustained religious arguments, and others not, that these two rationales are inextricably linked.

William Novak begins his chapter on public morality in *The People's Welfare* by questioning whether morals regulation is so clearly covered by the police power today, saying "[b]y the standards of late twentieth-century law, the public regulation of morality is increasingly suspect."[36] While the contrast between morals regulation in the twentieth (and presumably twenty-first) century and the nineteenth century is, as Novak describes, significant, it does not follow that morals regulation has fallen out of favor as an element of the state's police power. Indeed, most of the

contemporary criminal laws dealing with perceived vices of various forms, not to mention civil laws that impose duties on individuals connected to morals regulation, can be authorized only on the basis that the state has the constitutional power to prohibit certain conduct that the state believes is immoral. The landscape of what regulation is proper and warranted has changed considerably – although entirely in the direction of abandoning efforts to control individual behavior, as the example of laws growing out of the current cultural wars indicates – the constitutional basis of state authority to legislate in this realm has not changed considerably.

At one level, we might see morals regulation as more or less a subspecies of the police power's focus on safety and health. And, indeed, there are illustrative regulations that center the inquiry on the health impacts of certain behavior, and so morality becomes a sort of rhetorical exclamation point, part of what Suzanne Goldberg calls a "composite" basis for regulatory intervention.[37] The famous episode of alcohol prohibition,[38] which arose in several states before the Civil War and, with the temperance movement of the late nineteenth and early twentieth century, in a second state wave prior to the national prohibition through the Eighteenth Amendment, could be seen principally from the perspective of health, not morals.[39] But doing so misses much of the social history of prohibition, as the historical analyses of this episode reveals. In any event, there are simply too many examples of state and local regulations that are focused on acts *contra bonos*, that is, immoral in themselves. A well-ordered society, courts and commentators emphasized, required government regulation of plainly immoral behavior, regardless of any empirical connection to health and safety.[40] As Thomas Cooley summarized the state of the law in his magnum opus on constitutional law in 1905: "Preservation of the public morals is peculiarly subject to legislative supervision."[41]

Morals legislation would come to cover a range of conduct, including consumption of alcohol (whether through absolute prohibition or through regulation), vagrancy, adultery, pornography, obscenity and forms of so-called lewd conduct, prostitution, and gambling.[42] State courts consistently upheld legislative and administrative measures to curtail such conduct, although certainly the trends in regulation evolved in various directions as the legislature worked to gauge the tenor of the times.[43] Some conduct has been persistently viewed by legal edict as immoral, while views on other conduct has evolved, sometimes significantly.

Questions about what sorts of immoral actions should give rise to governmental regulation were persistent throughout the history of our republic, and there was certainly no consensus. John Stuart Mill wrote a famous essay in 1853 laying out what philosophers would come to call the "harm principle," something akin to a *sic utere* idea. This Millian view would cordon off from regulation of immorality as such, on the grounds that efforts by government to promote merely "[one's] own good, either physical or moral, is not a sufficient warrant" for action.[44] Debates over the government's proper role as intervenor in matters of private morals would become pronounced over the course of the next century and a half.[45] Suffice it to say

here that the Millian approach did not in any meaningful way affect the jurisprudence of the police power so far as the scope of legitimate governmental regulation was concerned. The courts from the beginning saw the legislature as containing a nearly limitless power to protect the general welfare by any reasonable means. In Thurlow v. Massachusetts,[46] for example, decided four years before Alger, the Supreme Court said: "There may be some doubt whether the general government or each State possesses the prohibitory power, as to persons or property of certain kinds, from coming into the limits of the State. But it must exist somewhere; and it seems to me rather a police power, belonging to the States, and to be exercised in the manner best suited to the tastes and institutions of each."[47] Not content to leave the matter at the total discretion of the state without comment about the basis of the law, Justice Grier wrote in a concurring opinion:

> It is not necessary for the sake of justifying the State legislation now under consideration to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority.[48]

Exactly four decades later, the Supreme Court in Mugler upheld the power of Kansas to regulate alcohol consumption.[49] As we discussed in a previous chapter, Justice Harlan there took the opportunity to opine that the Kansas view was wise and properly designed to help eradicate the scourge of the demon rum.

Early in the next century, the Court went even further in upholding federal regulation of morals, in the context of lotteries. Champion v. Ames[50] was an important case from the early years of the twentieth century in which the Court embraced a very broad interpretation of the Commerce Clause under the US Constitution to authorize Congress's prohibition of shipping lottery tickets. Having established that the interstate movement of lottery tickets is commerce by the measure of Gibbons, Brown, and Miln, the foundational commerce clause cases, Justice Harlan for the Court responded to the question of whether the liberty of individuals to engage in activity legal in their state interposed a restriction on Congressional regulation. He asks rhetorically, "surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals."[51] Whether the concern with "public morals" emerges from Congress – in which case the four dissenters have a rather good point in decrying the notion tacit in Harlan's opinion that the national government has what is in essence the police power[52] – or emerges from states that prohibit lotteries and therefore have a correlative interest in limiting the importation of lottery tickets remains elusive. And yet the idea that the protection of public morals includes restrictions on gambling is made explicit either way. Likewise, in Marvin v. Trout,[53] decided two years later,

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the Court made clear that nothing in the US Constitution forbids the state from prohibiting gambling "for the purpose of suppressing the evil in the interest of the public morals and welfare."[54]

In addition to alcohol and gambling, morals laws restricting many aspects of sexual and familial conduct, including fornication, sodomy, prostitution, and polygamy, were common in the nineteenth century, and are fairly common even now. Indeed, there have emerged in the latter part of the last decade ordinances restricting certain kinds of sex toys, restrictions that have largely been upheld under the police power.

For a long time, the courts' acquiescence in morals regulation, combined with the nearly non-existence rights jurisprudence of the time, meant that virtually any morals-related regulation would be upheld, just so long as it was properly enacted and reasonably enforced. Ultimately, there was precious little by way of argument that either federal or state courts found credible in these times that morals legislation stretched the police power too far or that there was an individual liberty interest that would protect individual conduct from regulation on the grounds that the morality of the community was compromised. As individuals' liberty to engage in various conduct, whether or not deemed as immoral, was problematic to John Stuart Mill and to devotees to his harm principle, but not especially to courts.

The revolution in individual rights, which we will consider in more depth in a later chapter, changed this landscape considerably. To take just this one example, consider the legal struggle over abortion laws, occasioned by the Supreme Court's 1973 decision Roe v. Wade.[55] Roe ushered in a nearly four-decade foray by the federal courts into questions involving what state level regulation of abortion was or was not proper. The end of Roe came in 2022, with the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization[56] and, with that, the struggle turned to federal and state law (including state constitutional law). Notably, in the increasingly voluminous commentary on the Dobbs decision, much of it by pro-choice advocates focused on the question "Now what?" there is precious little attention paid to the question of whether and to what extent abortion restrictions post-Dobbs can be enacted under the state police power. Before Roe, that was reasonably well settled. Abortion restrictions, in those states that had enacted them prior to 1973, were styled as protection of public morals (interestingly, even more than they were described as protecting human life). One searches largely in vain for state court decisions in the decades before Roe indicating that this rationale stretched the boundaries of the police power too far. After Dobbs, however, the answer to that question is by no means clear.

The relationship between morals regulations and individual liberty was not a topic explored by the courts in any conspicuous way during the first century and a half of the republic's history. This fact alone is a curious one, given the ambient debate about the proper scope of government in facilitating good conduct and morality. While this large debate frames public opinion and governmental strategy, we need not dwell too much on this mystery. Perhaps the difficulty relevant to constitutional

adjudication was the absence of a coherent vocabulary to discuss the nature and scope of individual liberty rights. The kinds of protections that were pushed to the fore of judicial consideration in the first decades of the twentieth century were about a certain kind of liberty, the liberty of contract and the correlative liberty to make a living.[57] These were conjoined with private property rights to make up what came to be described as a form of libertarian constitutionalism that reached its apogee in the Lochner era. But the idea that individuals possessed a general freedom of action – a right to be left alone, as Brandeis and Warren put it in their celebrated article on the right to privacy[58] – derivative from natural rights or from a view of the privileges or immunities of citizenship, a freedom that might trump the government's interest in preserving public morality, was not top of mind to the leading jurists and commentators of the day. The grounding of liberty in a cogent view of autonomy and human flourishing and, likewise, the concern that morals regulation would undermine equality would be a theme that would await the final decades of the twentieth century, in both the scholarly discourse and, ultimately, in the caselaw.

In the past century, leading moral philosophers and many legal scholars have argued extensively over the core question of how much latitude ought government to have in legislating morality and in criminalizing behavior on the grounds that such behavior is immoral.[59] Center stage in the UK during the second half of the twentieth century was the debate between H. L. A. Hart and Lord Devlin over the wisdom of prohibiting homosexual conduct.[60] And prominent philosophers including John Finnis,[61] Ronald Dworkin,[62] Joel Feinberg,[63] George Fletcher,[64] Tony Honore,[65] and Robert George[66] have explored in depth the normative and legal dimensions of morals regulation. While these debates have yielded no consensus on the matter, the strong thrust in much of modern thought is toward skepticism about morals regulation. There had long been vocal critics of particular government regulations of long standing, including critics of the criminalization of relatively minor drug offenses, consensual prostitution, laws prohibiting adultery and bigamy, and intimate matters involving sexual relations including contraception and certain sexual practices. When, for example, the Supreme Court decided Bowers v. Hardwick in 1986,[67] upholding a Georgia anti-sodomy statute, the decision was widely decried as illustrating the overreach by state governments in matters involving morality and intimate sexual conduct.[68] The case became a lightning rod for criticisms of these outdated laws and the lengths to which the Supreme Court, at that time not viewed as especially conservative, would go to defer to these legislative judgments about the morality of individual sexual conduct.[69]

The question of whether the police power authorized morals regulation was, to be sure, a rather abstract one. However, in the practical dimensions of government regulation, laws governing a wealth of activity that could not be easily described as prohibiting actual harm to others – and so came under the rubric of *sic utere* rationales – was commonly subject to state or local criminal law. These included a wide collection of prohibitions, those that would have been familiar to the government

and the general public a century earlier, including drug possession and sale, gambling, prostitution, and even some of the old-time "blue" laws involving alcohol sale that had begun at the time of Prohibition.[70]

Lest one conclude that this has been all business as usual, with morals legislation fitting like a glove under the rubric of the police power given the standard construct, we need to examine two descriptive considerations in order to illuminate the state of morals regulation in present day. First, as to regulations of various forms of sexual expression, including adult entertainment, public nudity, prostitution in a public setting, and even some of the regulations dealing with drug dealing and use, those urging that these laws be upheld against challenges under the police power or individual rights protections have often relied not so much on the moral underpinnings of these laws, but on the secondary effects of this conduct. In a number of the more prominent adult entertainment cases, as we will discuss in more depth below, the Supreme Court based its reasoning in favor of government regulation, despite the impact on otherwise protected free expression, on the grounds that these laws were really designed to protect public safety and promote the public's general interest in a safe, orderly community. Not coincidentally, these laws were often drafted with these arguments in mind, so that certain businesses, for instance, were zoned for certain areas, such as a good distance from schools, parks, and churches.

We recognize that modern constitutional law on morals legislation concerning adult entertainment activities is deeply entangled with the evolution of constitutional rights, and especially the First Amendment. These kinds of regulation go back to the beginning of the republic in a fundamental sense, but they have triggered more thorough review as the Supreme Court expanded in the last several decades the protections of the First Amendment and have looked askance of content specific regulations. In a series of cases beginning with Schad v. Mount Ephraim in 1981[71] and continuing through the Court's decision in City of Erie v. Pap's A.M. in 1998,[72] the Court upheld local ordinances that were designed to restrict nudity and adult entertainment. The typical rationale for upholding these laws was that they were not directed toward the content of the behavior, and so were not, strictly speaking, a morals-based regulation at all, but instead were zoning laws that were intended to limit the secondary effects that flowed from these kinds of businesses.[73] As Justice Rehnquist wrote in Renton v. Playtime Theatres, one of these cases, "[t]he ordinance, by its terms, is designed to prevent crime, protect the city's retail trade, maintain property values, and generally protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views.[74] Reducing the issue to "popularity" is a bit of a red herring, after all. The main question is whether front of mind to legislators was the protection of public morals or public safety. To many, the public safety rationale seemed rather dubious, given the long history of nudity bans and the expressed concern with undermining the morals of the citizenry.[75]

Judicial evaluation of adult entertainment regulations has proved tricky in an era in which free expression enjoys preferred protection (a theme we will return to in Chapter 6 in discussing constitutional rights). Let us consider the legal saga in just one state, Pennsylvania, to illuminate these challenges. In 1959, the state high court upheld a ban on sexually explicit dancers fraternizing with the bar's customers, under the general power of the state to regulate establishments that serve alcohol under its police powers.[76] The relevant statute prohibited "lewd, immoral, or improper entertainment" on the premises.[77] As to alcohol control, the court indicated that "[n]o access of state action more plenary than regulation & control of the use & sale of alcoholic beer. The power of prohibition includes the lesser power of regulation."[78] What was somewhat novel was the reference to the greater power of regulating all things involving alcohol with prohibitions relating to the entertainers' behavior viz. the patrons. Is there any limit on what the state could regulate or even prohibit on the salon's premises given that they serve alcohol? The court answered "no" essentially, and upheld this prohibition. The court further upheld this statute as applied to (mostly) nude dancing in a 2002 case, In re Tahiti Bar.[79] By this time, the Supreme Court had decided the adult entertainment cases mentioned above and, in addition, had ruled in 44 Liquormart v. Rhode Island[80] that a ban on advertising the retail price of alcohol was not entitled to a presumption of validity and violated the First Amendment in that it restricted without adequate justification this commercial speech. This decision bolstered the argument that was central to their decision in Tahiti Bar more than four decades earlier, and that is that the fact that this ban was applicable to bars as such was relevant to the constitutional analysis of this content-neutral regulation. As the Pennsylvania court stated: "Although the states may not violate the constitutional rights of their citizens in regulating the alcohol industry, they possess 'ample power' to adopt such measures as they deem reasonable and appropriate to regulate and control the conduct of those who engage in liquor sales and other aspects of the liquor business."[81]

By 2006, however, the US Court of Appeals reversed course. In Conchatta v. Miller,[82] the court acknowledged the consistent findings of the state courts that this law prohibiting "lewd, immoral or improper behavior" was facially constitutional, but objected to its broad scope, noting that what falls under this prohibition has proved "to be a difficult question to answer."[83] That ambiguous scope of the law creates a chilling effect on free speech, especially when considering that it may well apply to entertainment venues in which the serving of alcohol is a rather minor part of the overall enterprise (as, for example, where a theatre showing a play serves booze in the lobby during intermission). This law, therefore, is overbroad, and fails the test for analyzing such police power prohibitions under the First Amendment.[84]

A line running straight through the Supreme Court's adult entertainment cases is that the legislature aspires, according to the courts, to prohibit secondary effects, a rationale that hearkens back to public nuisance and the *sic utere* rationale conspicuous in some of the earlier cases. However, it is difficult to see the history in context

in any other way than about prohibiting certain forms of conduct for reasons related to morals. The framework of these lodestar cases does give the courts a two-pronged hook: First it respects the traditional deference to local land use decisions, and so trades on the very deferential approach to land use regulations that is part of traditional post-Euclid legal tradition, without scrutinizing anew the question whether local governments could use its police power to protect the public against immoral conduct; second, it interprets the purpose of the legislation, rightly or wrongly as a factual matter, as prohibiting bad secondary effects, thus bolstering the legislature's argument for why this is a sound use of the police power under even a narrow reading of that power.[85]

As with the adult entertainment cases, clever lawyers could explain these laws as about public safety rather than morals, in that they are intended to reduce bad secondary effects. Some scholars have indeed explained obscenity laws as part of the government's responsibility to abate nuisances.[86] In fact, the Restatement (Second) of Torts includes the legal concept of a moral nuisance, to illustrate this idea.[87] This is more legal strategy focused on the appellate circumstance, a strategy that sensibly accounts for the doctrinal rubric that is easiest to satisfy. However, the better view of the history of these laws is that they are deeply embedded in the government's strategy to protect society's morals. The Court in its principal decisions on this subject has evaded the question of whether a law based entirely on public morals would be acceptable under the police power. (To be sure, this is a question not only for the Supreme Court, but for state courts faced with the same essential challenges.) The bottom line is that the courts come to the same ultimate conclusion. The nearly unquestioned deference given to state and local officials to prohibit conduct that the government authorities believe are noxious illustrates the enduring logic of the police power as a mechanism to ground the government's interventions to protect public morals as part of the general safety or welfare.

In not all circumstances of morals regulation are secondary effects arguments available, however. The government's authority under the police power to restrict private sexual conduct is a complex and important story in its own right. To begin with, it is notable that for nearly the first two full centuries after the adoption of the Constitution and the Bill of Rights, state regulation of morals in matters pertaining to private familial decisions and sexual conduct inside or outside marriage was quite common.[88] Prosecutions under these laws were, to be sure, episodic, but arguments that such laws interfered with constitutionally protected liberty or privacy interests routinely failed, whether brought under the US Constitution or state constitutions. These were seen as matters to be decided through democratic processes and not typically subject to judicial intervention. In the 1960s and into the 70s, the Court decided a number of blockbuster cases, including Griswold v. Connecticut,[89] Eisenstadt v. Baird,[90] and Roe,[91] in which it announced that privacy rights under the penumbra of the Bill of Rights limited certain types of moral regulation. While these laws arose in the context of state laws regulating private conduct and truly

intimate matters, they did not immediately portend a narrowing of the state police power so as to limit government's ability to regulate morals.

When the Court decided Bowers in 1986, it was clear that the state regulation of sexual conduct is permitted under the state's police power and was not a violation of an individual's civil liberties. Because the Georgia anti-sodomy law did not on its face distinguish between heterosexual and homosexual activity, Bowers did not raise squarely the question of whether the equal protection provisions of the Fourteenth Amendment was a limit on the particular regulation at issue here. Rather, the plaintiff's unsuccessful legal argument was that these laws were of the same species as those laws governing intimate conduct struck down in the cornerstone cases of the sixties and seventies. Although Bowers is considered a due process case, and so distinctly focused on the scope and reach of the Court's protections of liberty and privacy under the rubric of its modern jurisprudence on this subject, it truly reflects a judgment involving the police power and the room given to state governments to regulate activity that it deems immoral, and so a late twentieth-century stamp of approval on this use of the power.

This approval withered, however, in the years following Bowers. Indeed, much of this withering happened well before the 1980s, as more and more states eliminated these laws dealing with sexual conduct. In the mid-1980s, anti-sodomy laws were rare. Moreover, several state courts had already struck down state prohibitions on such conduct.[92]

In Lawrence v. Texas,[93] the Supreme Court expressly overruled Bowers. In that case, the Court, in an opinion by Justice Kennedy, invalidated a Texas law that singled out certain forms of sexual conduct by homosexual for criminal prohibition. They decided this squarely under the rationale from Griswold, Eisenstadt, and Roe, that is, that this conduct is protected by the liberty and privacy foundations of due process under the Fourteenth Amendment. Justice Kennedy incorporates fully Justice Stevens's statement of the issue in his dissent in Bowers.[94] Stevens had written there: "Individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."[95]

That this law was targeted specifically toward same-sex individuals was a feature distinguishing this case from Bowers, and also was inapposite from the Court's key liberty decisions, including Planned Parenthood v. Casey.[96] Somewhat curiously, however, Justice Kennedy did not rest the holding on this fact (as would have Justice O'Connor, who concurred separately, arguing this law was a violation of the equal protection of the laws), but instead wrote more broadly about the rationale and impact of this law as interference in private intimate choices.[97] Reliance on this, rather than on equal protection, raises more directly, as Justice Scalia emphasizes in his dissenting opinion, whether there are substantial new limits on morals

regulation. "Countless judicial decisions," Scalia writes, "and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation."[98] This decision, he goes on, casts doubt on the continuing legality under the Constitution of myriad morals laws.[99] "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision."[100]

Lawrence is a difficult case for understanding the proper scope of the police power in regulating morals. Avoiding the offramp that would have squarely focused on the inequality of this law in its targeting of a class of individuals – homosexuals – for discriminatory treatment means that the Court was wading directly into the question of when the government simply goes too far in regulating sexual conduct. In the end, Justice Scalia was quite right in suggesting that Lawrence raises questions concerning the overall use of the police power by states to regulate morals in other areas, insofar as regulations intrude on private conduct and liberty.[101]

A narrower, and ultimately more plausible, reading of Lawrence is possible, one that does not decree that morals regulation is off limits. The key here is to understand Lawrence as of a piece with Romer v. Evans,[102] decided by the Court in another opinion by Justice Kennedy. Romer involved a Colorado initiative that limited the ability of state and local governments to accord legal protection to LBGTQ individuals, such as prohibitions against discrimination in employment or access to services. The Court struck down this law on equal protection grounds, insisting that it reflected animus toward a traditionally disfavored group and could not be justified under any compelling rationale. "[T]he amendment," writes Kennedy, "imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint."[103] While it is not inconceivable that the government could seek to limit protections from a category of individuals – Justice Scalia in his dissent mentions bans on polygamy; we might also think about denying voting rights to felons – there has to be a legitimate basis for such categorization in order to pass Fourteenth Amendment scrutiny. "A bare … desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[104]

Read through the lens of Romer, we might view Lawrence, despite Justice Kennedy's equivocations in his opinion, as focused principally on the ways in which Texas was essentially singling out homosexuals for disfavored treatment. So viewed, this law is arbitrary in its enforcement of morals, looking with opprobrium on a class of individuals based upon these sexual orientation, not upon the specific conduct prohibited, conduct which would have been legal had it been engaged in by opposite sex couples. Such a reading lays the foundation for what the Court ultimately did nearly two decades later, in striking down prohibitions against same-sex

marriage in Obergefell v. Hodges.[105] On the other hand, this reading limits significantly the import of Lawrence for scrutiny of ordinary morals regulation, regulation that focuses only on the behavior engaged in, without regard to the race, sex, sexual orientation, or any other status of the individual subject to the laws. Could a state, for example, limit any sexual practices between consenting adults? How could such limits be reconciled with Lawrence and Obergefell?

Why is this reading of Lawrence the better one? Ought there to be direct checks and channels, sourced principally in state constitutional law, on government regulation of morals? Morality evolves and we should constantly ask, as members of a democratic society, whether certain forms of regulation have become anachronistic because they assess behavior based upon discredited or at least highly controversial views of morality. Consider the present state of laws governing the use of cannabis. Federal law prohibits any use, possession, manufacture, or sale of cannabis under the Controlled Substances Act.[106] Support for this act has been steadily eroding as public opinion continues in ever-growing numbers to disapprove of criminal prohibition.[107] The vast majority of states provide the cannabis is legal for approved medical use;[108] twenty-three of the fifty states have approved cannabis for recreational use.[109] Leaving aside what the federal government will or will not do to the legal status of cannabis under federal law in the coming years,[110] are there at present acceptable limits on the state's prohibition of cannabis under the police power? This is an important and difficult question. Laws restricting cannabis seem rather arbitrary when considered alongside the use of substances, natural or chemically manufactured, that are not illegal. This has been a frequent criticism of the way in which Congress distinguished drugs in their schedules in the Controlled Substance Act of 1970.[111] In any event, the balance of social harm versus individual liberty is becoming harder to maintain in an era in which the immorality of marijuana is seriously questioned by a growing number of Americans.

Likewise, the government has been given wide latitude to impose restrictions on the conduct of the drug trade. Much of these efforts are part of the strategies of policing, and often are grounded in formal and even informal guidance, rather than through express legislation or administrative regulation. So, in this respect, we might say that they are part of the police power in a more opaque sense. However, there are many instances of real laws on the books that are explained as efforts to protect public safety and general welfare by imposing barriers to and burdens on the conduct of the drug trade, these running in parallel to specific criminal laws those impose manifest costs through the traditional cluster of penalties.

In a similar vein, there are myriad laws criminalizing sex work, these traditionally justified on both morals and secondary effects grounds. The disproportionate impact on women, on people of color, and on members of the trans community illustrate some of the deleterious costs of this continuing effort to make criminal consensual economic relationships involving sex. A recent report of the Yale Global Health Partnership notes, first, that arrests and even prosecutions for violations of

ordinances prohibiting sex work persist, even as the public opinion on these matters is evolving and, second, the consequences of these laws are dire. These negative consequences include exacerbating socioeconomic hardship, increased stigma and violence, loss of civil rights as a result of criminal records, and various collateral costs to sex workers' families and their communities.[112]

Why does American law continue to criminalize sex work? It is hard to see such persistence as anything other than the manifestation of moral concern. The age in which all, or even most, of sex work is conducted by so-called prostitutes carrying on their business on street corners and in shady areas of time has largely passed, despite the picture painted in films such as Pretty Woman and, earlier, Taxi Driver. Sex work frequently involves transactions and conduct that is more private than public, including various activities on the internet. And so the "secondary effects" rationale is more elusive than it might have been a half century ago. Rather, one can see the criminalization of sex work as morals regulation that takes sides with Lord Devlin in the famous Hart–Devlin debate of the last century. Despite the efforts in England just after the middle of the last century to draw lines between public and private conduct, and the similar debates in the United States over the course of the many decades to move away from legal strategies that are focused principally on punishing and policing "bad" morals, the widespread criminalization of sex work, a species of the prohibition, through the criminal law of what is seen as deviant sexual behavior, whether or not mostly in the public, continues with rare interruption. Any way you slice it, the police power, traditional and modern, undergirds this problematic morals regulation. That is, without the government's constitutional power to regulate public morals, such regulation would be constitutionally improper as a structural matter, regardless of any relevant liberty interests protected by the Bill of Rights.

Other issues where evolving morals meet traditional governmental regulation are well within what has been called our contemporary culture wars. These include a sudden rise in laws limiting trans individuals access to certain bathrooms,[113] prohibiting gender-neutral bathrooms, and prohibitions on drag shows.[114] With respect to drag shows in particular, at this writing, twenty states have enacted or are hard at work at enacting drag show bans.[115] Although often styled as laws directed toward protecting children safety – one law in Montana, for instance, prohibits not the shows but anyone in drag from reading to children at a public library – these laws typically cut broadly, focusing not on limiting access by age, but eliminating entirely what is seen as an immoral circumstance or activity. Similar efforts are underway in enacting legislation that targets the trans community, including criminalization (typically at the felony level) efforts at so-called gender affirming care.[116] In short order, a number of these bills have become law, and others are being shaped in various ways that advocates believe will survive scrutiny.

Litigation currently rages over these laws. However, they are seldom viewed as invalid on the grounds that the government has wrongly legislated morality under its police power. Concerns, instead, involve what are often more "legalistic"

considerations, such as whether the local laws are preempted by state authority or whether they are pretextual efforts to disadvantage certain groups (LBGTQ especially) in order to insist upon a certain view of public morality. How should we assess these matters?

Morals regulation comes up often in the idiosyncratic context of particular states, and their choices to regard certain conduct as immoral. The preceding discussion has emphasized rules and restrictions that are generally seen as emerging from the conservative side of the political spectrum in the contemporary culture wars. However, there are instances of controversial morals legislation that come from the so-called Blue states and communities. For example, cities in California and in some other states have imposed bans that are intended to protect animal welfare. These include prohibitions on the serving of foie gras,[117] coming from the liver of ducks who have often been force-fed in order to yield better-quality food, and also the serving of shark fin soup, because of the ways in which sharks are hunted for their fins.[118] There is not a manifest public health and safety rationale for these laws, at least insofar as humans are concerned. The focus on protecting animal rights has been viewed by state and local legislatures as proper and so these laws have been enacted in response to community public opinion. Where they have been challenged, the usual result is in favor of these laws' legality. Animal welfare laws can raise tricky issues of federal regulatory preemption and also commerce clause constraints where the laws deal with importation or exportation of animal products. But, in the main, governments at the state and local level have been given a wide berth to enact laws that are viewed essentially as taking a strong moral position in favor of animal welfare, even at the cost of consumer choice.

Morals regulation has always been a part of our police power legislation and jurisprudence. The question for our modern era is whether and to what extent it can and should be adapted in light of increasingly contentious struggles over the role of government in protecting against what many argue is licentiousness and attacks on the common good. This is not the place to settle these enduring issues, issues which have long been the subject of debate among not only philosophers who ruminate on matters of what is moral versus immoral conduct, but among those tasked with the responsibility to decide whether and to what extent regulation to safeguard morals, in the *contra bonos* rather than harm-prohibiting sense, is warranted. Nonetheless, what is on offer is an important process suggestion, one broadly congruent with American legal and political history more generally, and the police power in particular. It is that these questions should be addressed and settled in the crucible of democratic debate and, where appropriate, constitutional politics. Just as the contours of the police power are evolving, the subjects of regulatory scrutiny – the very contents of what might be regulated and for what purpose – are likewise evolving. Morals change, and so does the proper role of government in regulating morals. Monitoring and implementing these changes is a critical function of we the people, acting directly and through our elected representatives. And our

system of democratic constitutionalism, as a bevy of creative public law scholars teach us, contemplates and even demands dynamic struggle over the defining of the space in which government can and must step in to protect public morals from erosion. There are, to be sure, easy cases in both directions (maybe laws prohibiting blasphemy and adultery are good examples for limiting government intervention). There are harder cases whose difficulty emerges from persistent disagreements about the scope of individual liberty and the collective welfare. Perhaps the hardest cases so far as morals regulation is concerned are those in which individual rights under the constitution are not in any serious way implicated, but yet the question arises of what business government has in intervening with individual choice to live one's life or do one's work in the way they wish. In such cases, one cannot resort to a first-order principle that victimless morals regulation is or is not acceptable to settle this question, as Mill might have wanted, if only because that ship has surely sailed, but ultimately must contend with questions about the proper objectives of governing and the place for individual choice in a free society. These are constitutional liberty questions, to be sure. Yet these are also police power questions. That constitutional debates in litigation and in academic commentary generally focuses on the former and neglects the latter is a casualty of the police power's invisibility. In the case of morals regulations, perhaps more than in any other area, greater visibility to the police power would enrich debate and further the project of reframing law around questions concerning the proper role and function of government in regulating morality.

THE POLICE POWER AND THE URBAN CONDITION

The idea of the well-ordered society plays a consistently large role in the continuing evolution of the police power.[119] After all, order presupposes a decent level of collective security and public health. Securing and maintaining this level is at the heart of the police power, in its origins, its rationale, and its basic logic. Many of the cases involving the police power and its exercise involve the question of whether and on what terms the government may undertake measures to control certain uses of property in order to protect the interest of the government, presumably derivative of the interest of the community the government serves. We discussed in the last chapter the advent and evolution of zoning as a method of ordering urban life through the management of private property and its use, and we saw state courts and finally the Supreme Court giving their blessing to zoning under the police power. However, the issue of how broad is the government's power to regulate the use of land in order to realize objectives in an ever more urban society did not die down because of the Euclid decision from nearly a century ago. Matters concerning zoning and the police power continue to come to courts, as do the related issues of land use regulation and regulatory takings. Taken together, these twin doctrines show the judiciary and the legislature working together, even if unintentionally, to strengthen

the authority of the government to address problems of modern urban life through the creative use of the police power.

An important case in this regard is Berman v. Parker,[120] a regulatory takings case discussed earlier. Berman involved a comprehensive plan in the District of Columbia, a plans whose purpose was to deal with slums and sub-standard housing in the area, efforts that they believed would alleviate blight and conditions that contributed to crime and general social disorder. To implement this plan, the city required the razing of many existing houses and other major steps toward redevelopment, requirements that they aimed to implement through eminent domain. To the objection that this strategy did not meet the requirement of taking for a public use, because the land would not be necessarily transferred to the ownership of the district, but would transfer to private developers, the Court deferred to the locality's judgment and accepted that the overall plan had a clear public use. This was, in the end, enough to satisfy the constitutional requirements of eminent domain.

Berman illustrates well the intersection between the police power and eminent domain. The fulcrum of both doctrines is the common good, with the police power expressing this in the *salus populi* idea of general welfare and the proper use of the eminent domain to facilitate a public use. In its relatively short and undertheorized opinion, the Court found that the public use rationale was obvious in this case. But there is more to Berman's logic than meets the eye in this respect. The taking in this case was redistributive in the classic sense; that is, the government was taking individual's property and making it available to other property owners as part of an omnibus scheme of urban renewal. The idea emphasized by the Court in the eighteenth-century case of Calder v. Bull that it is unacceptable for the government to, in essence, rob Peter to pay Paul is nowhere mentioned in Berman. Nor is it prominent in a half century's-worth of cases following Berman, including Hawaii Housing Authority v. Midkiff[121] and Kelo v. City of New London,[122] both instances of policies used to redistribute land from one private owner to another. In all of these cases, the public use requirement is easily satisfied by evidence, largely unquestioned by the courts, that this government action was intended to advance a public purpose.

In Berman and its progeny, the police power and eminent domain work in synergy with one another to further the objectives of advancing the common welfare, even where such advancement requires a wealth transfer. Blight, says Justice Douglas, is a scourge, impacting the District of Columbia community. And it is very much in the public interest to undertake major land use policies, of which eminent domain is one part in a comprehensive strategy, a strategy that can address blight as an urban problem in need of a solution. Hard cases would continue to arise under eminent domain law and also under police power with respect to zoning and its proper scope. However, Berman is important in setting out the broad parameters of a doctrine that establishes a wide terrain of government action concerning individual sacrifice permitted under the constitution in order to accomplish *salus populi* goals.

As the century wore on, and the new century emerged, local governments became deeply invested in regulating land uses and in undertaking efforts to improve urban life. The strategies of doing so intersected in key ways, so that efforts to combat urban blight went along with emerging crime prevention measures (some enduring, others discredited), and with various safety regulations in housing and other circumstances. Such regulations came in various shapes and sizes. However, we can focus on land use regulations as a good window into governmental choice and the shadow cast by the law and practice of the police power.

Consider the controversial emergence of land use regulations designed to protect the character of the community, whether pertaining to aesthetics or the characteristics of residency, or other subjects of restriction. Village of Belle Terre v. Boraas is a well-known case from the early 1970s in which the Supreme Court upheld a municipal regulation under the police power, one that limited dwelling residents to one family.[123] While it was hard to see this regulation as promoting public health or safety, the Court, in an opinion by Justice Douglas, saw this as within the power of the local government to advance the public good, noting that "boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds."[124] The government could properly seek to ensure for the benefit of the village's citizens "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs."[125]

The Court saw in Belle Terre an instance of ordinary economic and social legislation, one that had long accepted as constitutionally acceptable. Local governments had an interest on behalf of the public in the number of occupants dwelling in a particular residence. As to the claim that the law targeted certain individuals based upon their status – or, more accurately, their non-status as relatives with one another, the Court rejected this argument, insisting that the legislature can properly draw "[l]ines against the charge of violation of the Equal Protection clause if the law be *'reasonable, not arbitrary,' and bears 'a rational relationship to a [permissible] state objective*'."[126]

The half-century line stretching from Euclid to Belle Terre suggests a fairly straight connection from the law's approval of zoning as a means of promoting the common good in its earliest iterations to a reapproval even after the nation had experienced the Warren Court rights revolution.[127] However, to suggest that this line is an unbroken one would be misleading. The scope of the state and local government's general zoning power has continued to be challenged and the courts regularly confront arguments that certain techniques of land use regulations are unreasonable and counterproductive,[128] leaving to one side the separate question of whether they interfere with individual property rights as defined by contemporary law.[129] The critique of contemporary land use as being unsuitable for its stated purposes has been a persistent one for many years. A year before Belle Terre, for example, noted land use expert Professor Robert Ellickson wrote

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an important article in which he questioned the modern state of zoning law, suggesting that the rationale for certain techniques, even some widely accepted, were unreasonable and even counterproductive. His argument presaged a steadily growing body of theoretical and empirical scholarship that questions the nexus between zoning and the public welfare as we will consider as part of the police power's future in Chapter 9.

The argument against zoning from the perspective of the general welfare of the community found a receptive ear in a state court one year after Belle Terre, in the New Jersey supreme court's Town of Mount Laurel decision.[130] There the court held unconstitutional a particular zoning regulation enacted under the state's police power, on the grounds that these regulations had deleterious effects on the conditions of low-income individuals (echoing an argument that Ellickson had made two years earlier[131]) in the state. The court insisted that the state government had not been given a free pass of sorts from constitutional scrutiny under the police power as a result of Euclid and its progeny. "It is elementary theory," Justice Hall wrote, "that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection."[132] This comment echoed the prevailing sentiment of the time, that individual rights as interpreted (often broadly in many state courts and the Supreme Court of this era) could be invoked as brakes on the police power. However, the court said something even more striking with regard to the foundational question of the government's discretion to regulate land use in a certain way under the police power. Such zoning regulations, the court wrote, "must promote public health, safety, and welfare … [a] zoning enactment which is contrary to the general welfare is invalid."[133] This suggests that even in the absence of a cognizable equal protection claim or a substantive due process claim, the court might invalidate the zoning law as inconsistent with the general welfare. Moreover, general welfare itself is an elastic concept. The court must consider after all "whose general welfare must be served or not … in the field of land use regulation."[134] The ordeal that has become the Mount Laurel land use situation in New Jersey has been written about widely.[135] Whether the New Jersey supreme court was ultimately unrealistic in its demands for accountability and specific redress is an enduring question and a difficult one. However, the import of the court's reading of the proper exercise of police power in its effort to control the use of land to full public objectives has remained influential. This is so because the court ultimately asked the right question: Is this use of zoning consistent with the government's responsibility to protect the general welfare of the community?

Beyond zoning, the police power has been a source of ample local authority to address myriad problems that are associated with urban disorder. As we discussed in the previous subsection, some of these laws, for example, drug and anti-prostitution laws, have been tied to traditional views of morality. And yet the rationale invoked in many cases in which they have been challenged as constitutionally suspicious

has been that this conduct has noxious secondary effects. Without revisiting the issue of whether these laws are really truly about morals or are about curtailing bad effects on the community, an issue that seems impossible to settle given that it rests on complex assessments of legislative purpose among other puzzles, we might hope that at the very least, claims of bad community effects should rest on evidence-based analysis. It is easier to proclaim that society is going to rot without regulatory interventions than it is to do the hard work of measuring the effects of certain behaviors on community welfare and, afterward, measuring the effects of regulatory interventions.

One area of robust local regulation designed to implement public society in urban environments is laws protecting tenants from sub-standard housing. Much of this legislation emerged from litigation challenging what had been too-common landlord behavior. The courts developed various doctrines, such as the implied warranty of habitability, in order to protect tenants.[136] Moreover, responding to persistent racial exclusion in the housing market, state and local governments built upon the federal government's federal housing laws of the late 1960s to develop legislative mechanisms to protect people of color from various practices.[137] One of the most substantial efforts was the development by the Uniform Law Commission in the early 1970s of the Uniform Residential Landlord Tenant, a proposed piece of legislation ultimately adopted by many states.[138] While some of these legal developments can be seen as classically anti-discrimination law, it is important to see the laws as part of a pattern of enhancing public safety and the general welfare, both through minimal standards of acceptable conduct on the part of property owners and through protections against unequal treatment.

The police power can and does supporting governmental efforts to address problems of urban life. These problems typically go beyond blight and so to see the essential police power project as being about, to use an old phrase, urban renewal, is myopic. Improving the urban condition for al its residents means improving the conditions of the least fortunate. Such strategies will inevitably be redistributive. They also focus, sometimes specifically and other times at broad relief, on anti-discrimination. Progress in this domain owes much to the active, creative use of the police power to address deficiencies in the urban condition. Even so, much progress remains to be made.

Once area of public policy in which complex issues continue to surface is zoning. On the question of zoning as a mechanism to improve safety and the general welfare, controversy has steadily grown in recent years.[139] There is a serious debate newly underway about the efficacy and desirability of contemporary land use regulation.[140] This debate has brought together some strange bedfellows. Zoning has occasioned continuous objections from libertarians who point to the heavy-handed use of municipal authority to limit owner choice.[141] Economists, not all of them avowedly conservative, have contributed a large body of scholarship showing the negative welfare effects of the current configuration of zoning in many parts of the country.[142]

In particular, they have connected the affordability crisis and dearth of adequate new housing construction to patterns of zoning law.[143] As a result, we are experiencing a surge in the number of challenges to zoning laws.[144] As always, this litigation grows from the efforts of disgruntled landowners to advance their interests in this traditional venue of conflict. Perhaps more surprisingly, the anti-skepticism movement has had some successes at the legislative level, and advocates of various ideological stripes have adopted the colorful moniker "YIMBY" (Yes in My Backyard) in order to push for legislative and administrative solutions to our contemporary housing crisis (one that is double-barreled, in engaging with issues of affordability as well as the predicament of the unhoused).[145]

In one sense, the current debate is not primarily about the scope of governmental power, but about the best use of this power, that is, the wisdom of certain strategies to implement municipal objectives. However, when skepticism about modern zoning does come to center stage, as we will explore in Chapter 9 in our discussion of the modern police power as a means of redressing America's housing crisis, there are some very creative, if controversial, uses of the police power to impede certain laws, this on the theory that the public's welfare is undermined by the imposition of strict land use laws and therefore its use can, under certain conditions, be a violation of the constitution in that the law is outside the scope of the power.

Urban life is increasingly Americans' life, with now 80 percent living in areas defined by the census as urban.[146] Even if this share stays relatively steady in the future, the steady increases to the US population means that the sheer numbers of individuals living in urban American will increase and, with it, the various problems that accompany density, to say nothing of the serious problems of polarization that is plaguing modern society in the US as elsewhere. The police power is not nearly a panacea, but remains as a key component of the strategies of state and local government to respond to social problems in urban settings and also act preemptively to deal with issues that can simmer to a boil. In this author's home city of Chicago, to take just one example, we are struggling with various upheavals to our urban area – having in our head the idea of a well-ordered society – from property damage occasioned by groups of young people congregating in the "fancier" areas of the city, and with motives that are not at all appealing and temptations that are unattractive. One reaction to these not infrequent episodes is to bring traditional law enforcement resources to bear in order to stop or at least disincentivize this bad behavior. Enforcing the public safety laws on the books is a classic police power strategy after all. However, others in our community are suggesting more imaginative policy actions that go to the root causes of the discontent, or even sheer boredom, faced by these groups (largely made up of young people of color, if this was not obvious to the reader). Such steps could obviate the need for command-and-control law enforcement, while addressing the urban disorder that keeps residents on each. This a complicated issue, but the point is that the police power is both ample and supple; it can provide, in the hands of creative municipal governments, the means of addressing

urban problems at their source, without resort to the traditional modalities of criminal law and policing that raises its own set of complications in our fragile polity.

OCCUPATIONAL LICENSING

One important area in which states governments have used the police power as an instrument of consumer protection and control has been in matters of occupational licensing. The licensing of professionals, including in medicine, law, and myriad other settings is nearly entirely a matter of state law. Long ago, state courts rejected claims that state schemes of occupational licensing were improper interferences in the freedom of individuals to practice their trade. Moreover, the federal courts have largely stayed out of these disputes, under its persistent reasoning that such licensing involves economic regulation and is therefore subject to the lowest standard of review.[147] By combination of state and federal caselaw, there has been little room for legal challenges to the contemporary schemes of occupational licensing on the grounds that it exceeds the state's police power.

This is problematic, in that the way in which occupational licensing has unfolded over many decades has been both provincial and protectionist.[148] In the case of medicine, it made it more difficult for many years for individuals to seek public health providers, given how the marketplace was structured to advantage physicians and certain segments of the overall health profession.[149] In the case of law, severe restrictions on legal advice and representation has fueled an access to justice crisis, limiting access to the civil justice system to only those wealthy enough to afford services and savvy enough to know where to look for support.[150]

Occupational licensing illustrates some of key difficulties with the police power as a fulcrum of state specific regulatory authority. To begin with, the reliance on state authority means that the entire system is deeply balkanized.[151] This is troubling in a world in which transactions and human activity often take place across borders. States have different admissions, ethics, and malpractice rules for both lawyers and doctors. The federal government's role is fairly interstitial; and the longstanding efforts to develop and implement coherent model rules so that states could converge on best practices has been a political rollercoaster.[152] Second, the regulatory choices made, including the critical choice of who to license to practice in one or another occupation, are typically made by incumbents.[153] The incentive to pull up the drawbridge on individuals who would enter into the marketplace and potentially take business away from incumbent providers is great. Therefore, we see in the overall structure of regulation rules that seem manifestly in the collective interest of those already in the tent, and not necessarily in the best interests of consumers.[154] Third and relatedly, there is precious little mechanism for citizen input. Occupational licensing decisions are not in the main made in a democratic process. Rules governing lawyers, for example, are forged by state supreme courts and bar authorities to whom courts delegate great power.[155] They are largely

cordoned off from the democratic legislature by the tradition of self-regulation, which means as it says that lawyers and judges will be the gatekeepers of the profession. They seldom carry out their work in a way that anyone would responsibility view as transparent. Finally, state courts are quite reticent to get involved in disputes involving occupational licensing. In law, it is these same courts that are doing the regulating, so the conflict of interest – or at least the cultural bias – makes such scrutiny unlikely. Outside of law, courts are understandably reticent to intervene in matters which they have little expertise and in which the wholesale and retail choices are being made by field experts.

Despite the largely hands-off approach to occupational licensing under traditional police power principles, there have been some salutary changes in how the law has responded to difficulties and distress in the areas in which licensing operates. In the medical field, for example, the Covid pandemic accelerated the use of telemedicine and created mechanisms to break down barriers and restrictions in order to get to individuals sensible health measures.[156] In law, there has been some attention paid to state experiments that widen access to legal services by removing protectionist rules and other obstacles. The advent of the so-called Uniform Bar Exam is a promising modern development toward greater access, as is the acceptance by a few (and hopefully growing number of) states to allow lawyers unlicensed in those states to assist with providing necessary legal services after, say, a natural disaster. Moreover, the federal government may well intervene in more ambitious ways, through the targeted use of antitrust laws and, via litigation, through First Amendment claims. There are cases pending involving the latter,[157] and some activity with regard to the former.[158] All of this suggests that the matter of occupational licensing is becoming turbulent in a way that has not been common in the past.

What is important for our discussion in these debates over occupational licensing and its deficits is to explore how explicit is the connection between the status quo and consumer protection. And if and when the state government acts through legislation to reform contemporary practices, it will be within the general framework of the police power, establishing regulations (we can hope) that are in fact serving the public's welfare. Evidence-based efforts by scholars and others to examine more closely the connection between current schemes of occupational licensing and the general welfare of the public are critical to this inquiry. They will help us to develop a strategy of regulation under police power that is truly modern and constructive.

PUBLIC HEALTH REGULATION IN THE COVID-19 ERA

The Covid pandemic from 2020 to 22 brought into the sharp relief questions over how proactive the state and local governments could be in enacting emergency measures under the police power. In this period, states were imposing draconian restrictions on individual and business behavior, including lockdowns distancing requirements, and restrictions on travel. Even as these rules began to recede,

litigation over these and emerging restrictions brought to the fore questions of how far the government could go to restrict individual liberty in the time of a pandemic.

We have discussed Jacobson at different junctures, as illustrative of the Court's deferential view of police power regulations, including when public health regulations were at issue. Jacobson followed earlier cases,[159] and presaged later cases, in which the Supreme Court made clear that public health laws were well within the scope of the state government's constitutional authority. This deference to public health measures was echoed in important state cases dealing with public health pandemics. For example, in People v. Adams, a 1992 Illinois case,[160] the court upheld a law requiring individuals convicted of prostitution-related offenses to undergo medical testing for HIV. "Like other measures intended to enhance public health and community well-being," the court wrote, "governmental action designed to control the spread of disease falls within the scope of the State's police power."[161]

Jacobson emerged from some amount of obscurity (outside of public health law circles at least) to become a central source of authority (and also inscrutability) as courts during the recent Covid pandemic worked through difficult questions of the police power's scope.[162]

One of the earliest cases in which Covid shutdown measures were scrutinized under the state and US constitutions was a case out of New Hampshire, Binford v. Sununu.[163] There the Superior Court upheld the governor's executive orders limiting gathering and imposing shelter-in-place regulations, finding that the facts "establish a strong need for immediate intervention" and detailing the statutory and constitutional support for the decision to suspend certain constitutional protections in order to implement emergency measures. The court did not refer in any place to the police power or to Jacobson, but implicit in its opinion was the view that the statute which gave the governor this regulatory authority was consistent with the state constitution. Likewise, in Friends of Danny DeVito v. Wolf,[164] (no, not THAT Danny DeVito), the Pennsylvania supreme court rejected the plaintiff's takings claim, noting that this effort "to protect the lives and health of millions of Pennsylvania citizens undoubtedly constitutes a classic example of the use of the police power to 'protect the lives, health, morals, comfort, and general welfare of the people'."[165]

A 2020 case out of Texas, which ultimately came before the 5th circuit, illustrated an interesting twist on the matter of governmental authority under the police power. In re Abbott involved a Texas restriction on non-essential surgeries, including elective abortions, during the early crisis period of Covid.[166] The court was asked to decide whether such a restriction was consistent with the plaintiff's abortion rights and, as a key threshold matter, whether the governor in the first instance had the authority under the police power to impose this regulation. Judge Duncan for the 5th circuit upheld the restriction, arguing that it was plainly legal under the Court's holding in Jacobson and its progeny. In so doing, he did not suggest that the rule is that constitutional rights "disappear during a public health

crisis," but he noted that the Jacobson Court "plainly stated that rights could be reasonably restricted during those times."[167] Having decided that such restrictions were warranted under these circumstances, Judge Duncan resolved the issue of abortion rights by indicating that "nothing in the Supreme Court's abortion cases suggests that abortion rights are somehow exempt from the *Jacobson* framework."[168]

Cases involving Covid shutdowns and other restrictions regularly rejected arguments that such laws were beyond the scope of the police power. Likewise, courts rejected repeatedly arguments that they interfered with property rights (for instance, were takings of private property without just compensation), free speech rights, and due process.[169] They also rejected claims that turned on the government's distinctions between one kind of activity (or business) and other, for the purposes of a health-related restriction.[170] There was some debate, in the legal literature and occasionally in the cases, about whether the courts, state and federal, were supposed to apply something like ordinary judicial review or something extraordinary, given the emergency nature of the decision.[171] This line between ordinary and extraordinary review proved to be of minimal practical impact and, frankly, of less interesting theoretical import than would meet the eye at first glance. After all, neither the Jacobson Court in 1905 nor courts applying the rationale of that decision in the decades following had ever said that there was an emergency exception to judicial review, that the courts should adjure their authority to look closely at the government's purported power to act and at the rights that would be affected, if any, by the exercise of this power. Even under ordinary review, the fundamental question is whether the state constitution permits the government to act in order to protect the public health, safety, and welfare and whether, under all the circumstances properly taken into account, there are individual rights that are at risk from the imposition of these measures.

In our more extended discussion of rights in Chapter 6, we will return to the Covid controversies to see the ways in which the Supreme Court used the First Amendment's protection of religious liberty to overturn particular police power regulations dealing with Covid. This was an important reckoning about public health restrictions and freedom of religion in the United States, as it was carried out in a handful of opinions, each with passionate opinions on both sides of the issue. And yet in none of these cases did the Supreme Court overturn Jacobson; indeed, in no case did the Court seriously interrogate the matter of whether the police power should be viewed more narrowly in light of strong objections to the scope and impact of these highly intrusive public health measures (including shutdowns, gathering restrictions, and vaccine mandates) and claims that the lines being drawn by the government were dubious.

Looking back at this Covid constitutional litigation, it is hard to disentangle the legal reasoning and precedential impact from the profoundly polarized way in which these legal objections were made and these issues resolved. However, it is important to draw out the appropriate legal lessons, for the question of how

far the government can go under its public health police power authority is one of present and future relevance. In this light, we can build out from the decided cases, federal and state, and say the following: First, Jacobson survives as the lodestar case for the government's use of public health measures, and even draconian ones, in times of crisis. Second, Jacobson is best understood not as approving a suspension of the Constitution in emergency times, but as a holding that reconciles the matter of official power and constitutional rights (especially due process, which was the most prominent claim in that particular case) under what we might call ordinary constitutional review. Third, and accepting that such review is ordinary, there is nothing static about our constitutional rights jurisprudence. As we will see in Chapter 6, the evolution of constitutional rights in the twelve decades since Jacobson means that the practical import of that holding has been affected in that individuals might meet the legislature's claim of public health exigencies with an assertion that a fundamental right, such as their religious liberty right, has been affected without adequate justification. Fourth, and turning more directly to the practical effects of this Covid episode on public health restrictions, it is hard to predict with any confidence how courts will see the government's proper role in times of emergencies. The polarization of these issues can hardly be overstated; nor can we be confident that this polarization will not seep into judicial decision-making. Certainly the lines between conservative and liberal justices on the US Supreme Court and also on the state courts in which there have been discernible partisan differences can be easily connected to Covid-related public health decisions. Conservatives have been highly skeptical of mandates and the power of the government to issue them, and liberals have been more solicitous of these measures.

Fifth, many of the Covid restriction arguments in litigation had become entangled in debates, often only legal in a tangential sense, over the role of science and scientific expertise. Where the issues were framed around whether a particular mandate made good sense – which is how the conversation in the political process and the media focused upon, understandably – then the court found itself often ahead of its skis. The considerations moved away from Jacobson and the constitutional authority of legislatures, governors, and public health officials to act to contain the virus's effects, toward the question of whether the government's actions were warranted, based upon the reasons given for the decision and the evidence upon which they relied, and the traditional deference given to experts in matters of public health. The tacit assumption of power to evaluate the merits of these public health decisions from other institutions in government was arguably one of the casualties of the Covid public law litigation saga.[172] It would be worrisome if this trend continued in the next major public health crisis or in the enterprise of evaluating episodic public health regulations more generally.

Sixth, and finally, the majority of issues prominent in government responses to public health emergencies do not involve the first-order constitutional

considerations that we saw in Jacobson and the few Covid cases we have discussed in this subsection and the religious liberty cases that we will examine in Chapter 6. Rather, public health strategies ordinarily involve regulatory policymaking and detailed implementation strategies undertaken by agencies and administrators. The broad authority is set by statute, of course, and so we can assume that all matters of administrative execution are derivative of statutory authority that is, in turn, compliant with state constitutional authority, including the police power. But the point here is that the devil is usually found in the details. And so the important questions of how best to tackle public health emergencies consistent with the police power are usually to be answered by dense engagement with these matters by those administrators who will deal with these issues as the experts, as the front-line regulators and implementors. Their legal instructions and scope of discretion will generally be constructed by a statutory infrastructure and aided by state (and often also federal) administrative law. The police power considerations will loom fairly far in the background – until, that is, major constitutional controversies of the sort that we saw in the first two years of the Covid pandemic come forth with alacrity and passion.[173]

SUMMARY

We have taken a long tour in this Part of the police power as it evolved from the time of the founding, and he development of the first state constitutions, through the antebellum period, Reconstruction, the Progressive era, and deep into the twenty-first century. In this Chapter, we have seen how some key, persistently controversial issues have been framed around the police power's contents and its purposes. If there is one overarching lesson it is that the police power has proven adaptive to changes in the needs, wants, and conditions in contemporary public policy. (How further adaptive it might be is the subject of Chapter 9.)

Constructing a police power for modern times is not something that can or should happen *tabula rasa*, and this is exactly how it should be. This police power has evolved, as have state constitutions, too. Moreover, and as inevitable, larger legal and political developments have shaped the scope and direction of this power, The police power's evolution has accompanied evolution in strategies and conceptual understandings of regulatory governance. Governance, as we discussed at some length in our discussion of morals regulation, involves not only tactical considerations of how best to regulate, but fundamental questions of whether regulation is warranted. There is no one big answer, of course. In the case of regulation of morals, we might see that the government has gone too far, and risks subordinating individual freedom for dynamic judgments about social morality – something that can be sucked into the vortex of the culture wars. In the case of occupational licensing, the essential problem may be that the government has shied away from tackling a wicked problem with proper regulatory interventions.

In short, deep thinking about the police power invites us to think about more than techniques of governance, but also about the rationales for regulating in a complex modern society.

We should see the police power as resilient and robust as a constitutional power in our states, even if it has eluded attention in contemporary constitutional discourse. It has a logic embedded in *salus populi*, that is, it aims to advance the general welfare, a commitment congruent with the overall objectives of our state constitutions, whether considered individually or collectively. At the same time, questions have arisen in modern times about how exactly it can be used to alleviate various problems, including the compromising of public morals, urban disorder, occupational licensing, and public heath crises. Likewise, we can see ways in which the police power can be misused in the pursuit of addressing these problems (or even in the defining of certain conduct as problematic).

In Part III, we rejoin this discussion by looking at the ways in which the police power might be used more sensibly to tackle wicked problems, and where the stressors are where these problems are adumbrated and regulatory solutions proffered.

The historical exegesis in this Part was important in illuminating the evolution of the police power over our republic's history. In the next Part, we consider further the structure and functions of the police power and also how it is interpreted in circumstances of conflict and controversy.

NOTES

1. Pew Research reports that faith in government in 1958, which was the first year they studied this, was extremely high, with nearly three-quarters of all Americans expressing faith in government, compared to less than 20 percent currently. https://pewrsr.ch/3U1kYkL.
2. See generally Dan McNichol, *The Roads That Built America: The Incredible Story of the U.S. Interstate System* (2006).
3. See generally Dwight F. Rettie, *Our National Park System* (1995).
4. See generally, Douglas Brinkley, *American Moonshot: John F. Kennedy and the Great Space Race* (2020); Tom Wolfe, *The Right Stuff* (1979).
5. Of the big works on the scale of significance of highways, national parks, and space exploration, perhaps the most meaningful modern examples, each illustrating the remarkable magnitude of human ingenuity combined with federal power and investment, would be the creation of the internet and the development important vaccines for infectious diseases, including the COVID-19 vaccine in late 2020. Obviously, and not coincidentally, these were public-private initiatives, not unlike the inventions of the earlier years.
6. See Marvin Lazerson, "The Disappointments of Success: Higher Education after World War II," 559, *Ann. Am. Acad. Pol. Soc, Sci.* 64 (1998).
7. See generally John Aubrey Douglass, *The California Idea and American Higher Education: 1860 to the 1960 Master Plan* (2000).
8. 336 U.S. 77 (1949).
9. Ibid., at 84.
10. 348 U.S., at 35.

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11. Ibid. "[W]hen the legislature has spoken, the public interest has been declared in terms well nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation."
12. See David Vlahov and Sandro Garcia, "Urbanization, Urbanicity, and Health," 79 *J. Urban Health* 51 (2002).
13. See Sophia Z. Lee, "Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present," 167 *U. Penn. L. Rev.* 1699 (2019).
14. See, e.g., Thomas O. Garrity, "Regulatory Reform in the Reagan Era," 45 *Mich. L. Rev.* 253 (1986).
15. See Sharece Thrower, "Regulatory Delay across Administrations," Research Report, Brookings Center on Regulation and Markets (July 2019); Robert J. Duffy, "Regulatory Oversight in the Clinton Administration," 27 *Presidential Studies Q.* 71 (1990).
16. See generally Gillian E. Metzger, "Foreword–1930's Redux: The Administrative State Under Siege," 131 *Harv. L. Rev.* 1 (2017); Aaron Nielson, "Confessions of an 'Anti-Administrativist," 131 *Harv L. Rev. F.* 1 (2017).
17. See generally Bruce Yandle, *Land Rights: The 1990s' Property Rights Rebellion* (1995); Henry M. Jacobs & Kurt Paulsen, "Property Rights: The Neglected Theme of 20th-Century American Planning," 75 *J. Amer. Planning Ass'n* 134 (2009).
18. See Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of Law* (2009).
19. Rodgers v. Village of Tarrytown, 96 N.E. 2d 731 (1951).
20. See generally Robert E. Williams & Lawrence Friedman, *The Law of American State Constitutions* 405–41 (2d. 2023) (summarizing state constitutional reform in the twentieth and twenty-first century).
21. G. Alan Tarr, *Understanding State Constitutions* 1390 (1998).
22. Ibid. See also Mila Versteeg & Emily Zackin," "American Constitutional Exceptionalism Revisited," 81 *U. Chi. L. Rev.* 1641, 1644 (2014) ("Americans have participated in extensive and ongoing constitution making at the state level").
23. On the politics of state constitutional reform in the twentieth century, see Tarr, *Understanding State Constitutions*, at 136–72.
24. See Amy Bridges, "Managing the Periphery in the Gilded Age: Writing Constitutions for the Western States," 22 *Studies in Amer. Pol. Devo.* 32 (Spring 2008).
25. See, e.g., Justin R. Long, "Guns, Gays, and Ganja," 69 *Ark. L. Rev.* 453, 453–54 (2016) ("[T]here law reform moments … have treated state constitutional changes as a tool for advancing their national policy aims"); Justin Long, "State Constitutions as Interactive Expressions of Fundamental Values," 74 *Alb. L. Rev.* 1739 (2010/11).
26. See generally John Dinan, *State Constitutional Politics: Governing by Amendment in the American States* (2018).
27. These states included Florida, South Carolina, Montana, North Dakota, New Hampshire, Louisiana, and Georgia.
28. Frank P. Grad & Robert P. Williams, 2 *State Constitutions for the Twenty-First Century: Drafting State Constiutions, Revisions, and Amendments* 7 (2006).
29. The focus here is specifically on formal change of the document through processes of constitutional amendment or replacement. As Jonathan Marshfield reminds us, however, change can and does happen in various informal ways, as, for example, through judicial decisions. See Jonathan L. Marshfield, "Courts and Informal Constitutional Change in the States," 51 *New Eng. L. Rev.* 453 (2017).
30. Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 331 (2022).

31. Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* 172–241 (1904).
32. The term "morals" is used frequently in state constitutions, albeit usually in ways undefined.
33. See generally David H. Flaherty, "Law and the Enforcement of Morals in Early America," *Perspectives In American History, Vol. V: Law in American History* 203 (D. Fleming & B. Bailyn eds., 1971).
34. William J. Novak, *The People's Welfare*.
35. See generally James A. Monroe, *Hellfire Nation: The Politics of Sin in American History* (2003).
36. Novak, *People's Welfare*, at 149.
37. Suzanne B. Goldberg, "Morals-Based Justifications for Lawmaking: Before and after Lawrence v. Texas," *Minn. L. Rev.* 1233, 1245 (2004).
38. See generally Daniel Okrent, *Last Call: The Rise and Fall of Prohibition* (2011).
39. See, e.g., Jack S. Blocher, Jr., "Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation," 96 *Am. J. Public Health* 233 (February 2006)
40. See Monroe, *Hellfire Nation*.
41. Thomas J. Cooley, *A Treatise on the Constitutional Limitations Which Rest on the Legislative Power of the States of the American Union* 596 (1871).
42. Martin Shapiro, writing in 1961, gives an even longer list: "The following have been uniformly held to show failure to meet the character requirements: perversion, forgery, arson, smuggling, murder, burglary, extortion, narcotics peddling, abandonment, nonsupport of legitimate and illegitimate children, pimping, bribing officials, and obtaining relief on false pretenses. But persons guilty of desertion, divorce (granted on grounds of cruelty), multiple traffic violations, drunk driving, rape, keeping a house of ill fame, indecent exposure, perjury, petty larceny, embezzlement, drunkenness, fighting, multiple minor arrests, giving false information to officials, assault, wife beating, and violation of Sunday laws." Martin Shapiro, "Morals and the Courts: The Reluctant Crusaders" 45 *Minn. L. Rev.* 897, 908 (1961).
43. See John Stuart Mill, *On Liberty* (1859).
44. Ibid., at 63.
45. See Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (1985).
46. 46 U.S. 504 (1847).
47. Ibid., at 630 (emphasis added). See also Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).
48. 46 U.S. at 632 (Grier, J., concurring).
49. In doing so, recall from Chapter 2 Justice Harlan's own commentary there on the evils of the demon rum.
50. 188 U.S. 321 (1903).
51. Ibid., at 357.
52. See ibid., at 364–65 (Fuller J, dissenting).
53. 199 U.S. 212 (1905).
54. Ibid., at 225.
55. S410 U.S. 113 (1973).
56. 597 U.S. __ (2022).
57. See Roscoe Pound, "Liberty of Contract," 18 *Yale L. J.* 454 (1909).
58. Samuel D. Warren & Louis D. Brandeis, "The Right to Privacy," 4 Harv. L. Rev. 193 (1890).
59. See, e.g., Andrew Reath, "Legislating the Moral Law," 28 *Noûs* 435 (Dec. 1994); Jerome E. Bickenbach, "Law and Morality," 8 *L. & Phil* 291 (1989).
60. See Peter Cane, "Taking Law Seriously: Starting Points of the Hart/Devlin Debate," 10 *J. Ethics* 21 (Jan. 2006).
61. See John Finnis, *Natural Law and Natural Rights* (1980). See also John Keown & Robert George eds., *Reason, Morality, and Law: The Philosophy of John Finnis* (2013).

62. See Ronald Dworkin, *Law's Empire* (1988). See also David Lyons, "The Connect between Law and Morality: Comments on Dworkin," 36 *J. Legal Ed.* 485 (Dec. 1986).
63. See Feinberg, *Moral Limits*.
64. See George Fletcher, "Law and Morality: A Kantian Perspective," 87 *Colum. L. Rev.* 533 (1987).
65. See Tony Honore, "The Necessary Connection between Law and Morality," 22 *Oxford J. Leg. Stud.* 489 (Autumn 2002).
66. See Robert George, *Making Men Moral: Civil Liberties and Public Morality* (1995).
67. 478 U.S. 186 (1986).
68. See, e.g., Laurence Tribe, *American Constitutional Law* 1425–29 (2nd ed., 1988); Caroline Wells Ferree, "Bowers v. Hardwick: The Supreme Court Closes the Door on the Right to Privacy and Opens the Door to the Bedroom," 64 *Denv. U. L. Rev.* 599 (1988); Ruth Conkle, "The Second Death of Sexual Privacy," 62 *Ind. L. J.* 215 (1987).
69. Indeed, long before it was officially overruled seventeen years later, Justice Lewis Powell expressed remorse about his decision in that case. See Kenji Yoshino, "Can the Supreme Court Changes Its Mind?" *The New York Times* (December 5, 2002).
70. See generally David Labard & Deborah Henry Heinbach, *Blue Laws: The History, Economics, and Politics of Sunday Closing Laws* (1987). See also McGowan v. Maryland, 366 U.S. 420, 431 (1961) (blue laws "go far back into American history, having been brought to the colonies with a background of English legislating dating to the thirteenth century").
71. 452 U.S. 61 (1981).
72. 520 U.S. 277 (2000).
73. See Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). See also Barnes v. Glen Theatre, 501 U.S. 560 (1990)
74. Renton v. Playtime Theatres, Inc, 475 U.S. 41, 48 (1996).
75. Indeed, Chief Justice Burger said very much the same in Barnes, writing: "This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation … Thus, the public indecency statute furthers a substantial government interest in protecting order and morality." 501 U.S. at 569.
76. In re Tahiti Bar Liquor License Case, 345 Pa. 355 (Pa. 1959).
77. Ibid., at 359.
78. Ibid., at 360
79. Purple Orchid Inc. v. Pennsylvania State Police, 813 A.2d 801 (2002).
80. 517 U.S. 484 (1996).
81. 813 A.2d, at 811.
82. 458 F.3d 258 (2006).
83. Ibid., at 268.
84. Ibid.
85. See generally Robert C. Ellickson, "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning," 105 *Yale L. J.* 1165 (1996).
86. See, e.g., Steven T. Catlett, "Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine," 84 *Colum. L. Rev.* 1616 (1984); Doug R. Rendleman, "Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute," 44 *U. Chi. L. Rev.* 509 (1977).
87. See Restatement (2d) Tort, #821 (c)(1).
88. See generally Deborah L. Rhode, *Adultery: Infidelity and the Law* (2016).

89. 381 U.S. 479 (1965).
90. 405 U.S. 438 (1972).
91. 410 U.S. 163 (1973)
92. See, e.g., Jegley v. Picado, 349 Ark. 600, 80 S.W.3d 332 (2002); Gryczan v. State, 283 Mont. 433, 942 P.2d 112 (1997); Campbell v. Sundquist, 926 S.W. 2d 250 (Tenn. App. 1996); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).
93. 539 U.S. 558 (2003).
94. "Justice Stevens's analysis, in our view, should have been controlling and should control here." Ibid., at 570. See 478 U.S. at 580 (Stevens, J., dissenting).
95. Ibid., at 574.
96. 505 U.S. 833 (1992).
97. Lawrence, 539 U.S. at 579 (O'Connor, concurring).
98. Ibid., at 589 (Scalia, dissenting).
99. Ibid., at 590.
100. Ibid.
101. In his recent book on substantive due process, James Fleming faces directly the anxiety of Lawrence's basis and limits and argues for a robust substantive due process that would protect intimate conduct of various types and would, without destroying the government's power to protect morals, eliminate a significant amount of regulation of certain types as inconsistent with the Constitution. See James E. Fleming, *Constructing Basic Liberties: A Defense of Substantive Due Process* (2022).
102. 517 U.S. 620 (1996).
103. Ibid.
104. Ibid.
105. 576 U.S. 644 (2015).
106. Controlled Substances Act, P.L. 91–513.
107. "Americans Overwhelmingly Say Marijuana Should Be Legal for Medical or Recreational Use, Ted Van Green," Pew Research Report (11/22/22).
108. Thirty-eight states as of summer 2023. State Medical Cannabis Laws, Nat'l Conference of State Legislatures (updated 6/22/23).
109. "Fact box: U.S. States where Recreational Marijuana is Legal," *Reuters* (6/1/23).
110. "Why National Cannabis Legislation is Still a Decade Away," *Forbes* (6/30/23).
111. See Joseph Hartenian, "Getting Back on Schedule: Fixing the Controlled Substances Act," 12 *Albany Gov't L. Rev.* 199 (2019); Alex Kreit, "Controlled Substances, Uncontrolled Law," 6 *Albany Gov't L. Rev.* 332 (2013).
112. See https://bit.ly/3HX5bMM.
113. "More States Consider Bills Limiting Which Bathroom Trans People Can Use," *PBA* (3/29/23).
114. See "Why Proposed Laws Targeting Drag Shows are Proliferating in America," *The Economist* (2/12/2023).
115. Chamlee, V. (2023). "Anti-drag legislation is sweeping the nation: Here's where each state stands on drag bans." *People* article. https://bit.ly/3vsHlp9.
116. Trans Legislation Tracker (2023). Website. https://translegislation.com/.
117. Gresko, J. and Associated Press (2023). "California foie gras fans are out of luck after ban on the sale of the delicacy avoids a Supreme Court review." *Fortune* article. https://bit.ly/3TPFu7V.
118. Oceana (2011). "California bans the sale of shark fins – Completes West Coast sweep of shark conservation." Press release. https://bit.ly/3TV3zds.

119. On the concept of a well-ordered society more generally, philosophers usually associate this with the writings of John Rawls in his famous book, *A Theory of Justice* (1971). See, e.g., Brian Kogelmann, "Justice, Diversity, and the Well-Ordered Society," 67 *The Philosophical Quarterly* 663 (2017).
120. 348 U.S. 26 (1954).
121. 467 U.S. 229 (1984).
122. 545 U.S. 469 (2005).
123. 416 U.S. 1 (1974).
124. Ibid., at 9.
125. Ibid.
126. 416 U.S. at 8 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) and Reed v. Reed, 404 U.S. 71, 76 (1971)).
127. See Geoffrey R. Stone & David A. Strauss, *Democracy and Equality: The Enduring Constitutional Vision of the Warren Court* (2020); Morton J. Horwitz, "The Warren Court And The Pursuit of Justice," 50 *Wash. & Lee. L. Rev.* 5 (1993).
128. See generally Sterk, et al., *Land Use Regulation*, at 136–60.
129. For a consideration of contemporary zoning from a strong property rights perspective, see, e.g., Richard Epstein, "A Conceptual Approach to Zoning: What's Wrong with Euclid," 5 *NYU Env. L. J.* 277 (1996).
130. So. Burl. County NAACP v. Tp. of Mount Laurel, 67 N.J. 151 (NY 1975).
131. See Robert E. Ellickson, "Alternatives to Zoning," 40 *U. Chi. L. Rev.* 681 (1973).
132. Ibid., at 174.
133. Ibid., at 175.
134. Ibid., at 177.
135. See, e.g., Douglas S. Massey, et al., *Climbing Mount Laurel: The Struggle for Affordable Housing and Social Mobility in an American Suburb* (2013); David Kirp, et al., *Our Town: Race, Housing, and the Soul of Suburbia* (1997).
136. The foundational case here was Javins v. First Nat'l Realty, 428 F.2d 1021 (D.C. Cir. 1970).
137. See generally Roger A. Cunningham, "The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status," 14 *Urban L. Annual* 3 (1979).
138. https://bit.ly/48ggmKS.
139. See, e.g., Robert C. Ellickson, *America's Frozen Neighborhoods: The Abuse of Zoning* (2022); M. Nolan Gray, *Arbitrary Lines: How Zoning Broke the American City and How to Fix It* 29 (2022).
140. www.brookings.edu/articles/the-double-edged-sword-of-upzoning/.
141. See Epstein, "Zoning."
142. See Ellickson, *Frozen Neighborhoods*, at 150–55.
143. Vicki Been, Ingrid Gould Ellen, and Katherine O'Regan. *Supply Skepticism: Housing Supply and Affordability* (New York: NYU Furman Center, 2018). https://bit.ly/4aZOMnN.
144. See generally William A. Fischel, *Zoning Rules! The Economics of Land Use Regulation* 69–128 (2015).
145. We will consider these issues in more depth in Chapter 9.
146. The regular Census provides the relevant data.
147. See Lee Optical (describing rational basis review in the content of occupational licensing.
148. See Aaron Edlin & Rebecca Haw, "Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?" 162 *U. Pa. L. Rev.* 1093 (2014).

149. Ibid., at 1126–44.
150. See generally Rebecca Sandefur, "Access to What?" *Daedalus* 49–55 (Winter 2019); R. L. Sandefur, "What We Know and Need to Know about the Legal Needs of the Public," 67 *S.C. L. Rev.* 447 (2016).
151. See generally David Engstrom & Daniel B. Rodriguez, "Rethinking Our Bar Federalism" (ms. 2024).
152. See the discussion in Renee Knake Jefferson, *Law Democratized: A Blueprint for Solving the Justice Crisis* 119–46 (2024).
153. See generally Gillian K. Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* 219–45 (2017).
154. See Joan Howarth, *Shaping Up the Bar* (2022).
155. See Benjamin H. Barton, *The Lawyer-Judge Bias in the American Legal System* (2011).
156. See Elham Monaghesh & Alireza Hajizadeh, "The Role of Telehealth during COVID-19 Oubreak: A Systematic Review Based on Current Evidence," 20 *BMC Public Health* 1193 (2020).
157. On the Upsolve litigation, currently ongoing, see Nora Freeman Engstrom, "UPL, Upsolve, and the Community Provision of Legal Advice," *SLS Blog* (January 27, 2022). See also Jefferson, *Law Democratized*, at 114–16.
158. See Letter from Maggie Goodlander, Deputy Assistant Attorney General, to North Carolina General Assembly (February 14, 2023) (on file with author).
159. See, e.g., Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U.S. 380 (1902) (upholding a ban on the arrival of immigrants into an area in which infectious disease was rampant); Dent v. West Virginia, 129 U.S. 114 (1889) (upholding a law requiring a license to practice medicine).
160. 149 Ill. 2d 331 (1992).
161. Ibid., at 339. A somewhat more problematic instance of the court deferring to state public health police power regulations was City of Legal Rock v. Smith, 204 Ark. 692 (Ark. 1942). Here the Arkansas court upheld a law detaining individuals convicted of prostitution in order that they be inspected for sexually transmissible diseases and, upon discovery of such diseases, quarantined in a hospital or another location without condition or deadline, or any other due process.
162. See generally Wendy E. Parmet, *Constitutional Contagion: Covid, the Courts and Public Health* (2023).
163. No. 217–2020-CV-00152 (N.H. Super. Ct. Mar. 25, 2020) (mem.)
164. 658 Pa. 165 (Penn. 2020).
165. Ibid., at 204 (quoting Manigault v. Springs, 199 U.S. 473, 480) (U.S. 1905).
166. In re Abbott 954 F.3d 772 (5th Cir. 2020).
167. Ibid., at 784 (citations omitted).
168. Ibid., at 785.
169. See Parmet, *Constitutional Contagion*, at 166.
170. See ibid.
171. See Stephen I. Vladeck & Lindsay F. Wiley, "Coronavirus, Civil Liberties, and the Courts: The Case Against 'Suspending' Judicial Review," 133 *Harv. L. Rev. F.* 179 (2020).
172. See Nat'l Fed. Of Indep. Business v. Dep't of Labor, Occupational Safety and Health Administration, 595 U.S. __ 2020).
173. In a recent book on the litigation over Covid and general lessons, public health law expert, Wendy Parmet stresses the ways in which the rule from Jacobson ebbed considerably afterward and that by the time of Covid, there wasn't a strong tradition of deference to public health authorities. See Parmet, *Constitutional Contagion*. This view is hard to

square with the cases, however. There were precious few instances in which legitimate public health measures were struck down by either state courts or the federal courts as exceeding the police power or, for that matter, as violating individual rights. An alternative way to read Prof Parmet's mostly pessimistic rendering of the post-Jacobson landscape is to see her as critical about the courts' failure to articulate and promote a positive rights view of public health. This depiction seems entirely accurate at the federal court level. State courts remain free, however, to enforce whatever positive rights, including public health rights, their respective state constitutions protect.

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