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Spheres of Regulatory Governance

[An examination] will reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, i.e., capable of development.

Freund, *The Police Power*

Good governing has been used in two senses throughout this book. One sense, reflected largely in the historical exegesis and description of present legal practice in Part I, is that state and local governments have long had, and continue to have, a very wide berth to enact and implement laws that aspire to promote the common good and the public's welfare. Limits on this capacious authority come from various constitutional constraints, including rights sourced in both state constitutions and also the US Constitution. As we explored earlier, these limits are also found in the important, dynamic, yet often neglected, commitment to government action that is neither arbitrary nor discriminatory – what can be captured in the overarching requirement that government actions not be unacceptably unreasonable, arbitrary, the product of animus, or the result of self-dealing. State and local governments are asked to navigate these tensions between governing in the name of the people's welfare and ensuring that property and liberty are adequately protected. The evolving story of the police power in our nearly quarter of a millennium's worth of experience in the American states is that governments aspire to do their best to reconcile these conflicts and pursue meaningfully progressive governance; and where they fail, courts will sometimes intervene, with the larger aim of keeping this balance intact.

Health and safety are enduring elements of police power's objectives; morals, too, albeit in ways that have evolved as we rethink the role of the State in legislating and regulating individual and social morality. If the police power has an essence, it is the key source of government's authority and obligation to promote the general welfare and, under the rubric of state constitutionalism, to help secure the objectives that are intended to be fulfilled by official action on behalf of the people in our respective constitutional republics.

In the final Part of this book, we turn to what are conspicuously normative matters. The basic claim is that to the extent that state constitutions vest massive, if measured, power in state and local institutions to regulate for the common good, we should expect of our legislators and administrators good governing. These expectations stem directly from our ambitious state constitutional project. This is not the usual way we think of constitutional objectives, as constitutional theory in the United States typically focuses on the negative rights aspects of constitutionalism, that is to say on the ways that it constrains governmental power and thereby protects our well-ordered liberty. Moreover, attention among scholars has focused nearly exclusively on the US Constitution. What this misses is the important, and, yes, progressive, sense in which constitutions, including state constitutions, set out ambitions and aspirations for good governing, and it also sets up the mechanisms for realizing these key objectives. As Professors Fishkin and Forbath summarize the objectives of emergent constitutionalism as traction in ambitious regulation developed in the Gilded Age and afterward: "[I]n institutional terms, this vision of the democracy of opportunity came to stand for the primacy of legislation and administrative state-building in meeting the challenges of modern government."[1] The responsibilities that We the People, with the capitalized letters pertinent to the national context and we the people in lower case referring to our common aspirations as state residents, impose on our elected representatives and others who act in the name of federal, state, and local governments are embedded in our constitutional frameworks and in their fundamental principles. Good governing as a general constitutional principle is manifest most importantly in the state's police power.

What the concept means in operational terms will be contestable and ever-evolving; further, the objectives and practices should emerge from conversations that are sustained by participation in our democratic traditions (including new traditions we invent). The contours of these practices will emerge organically and, we might even say, best from the bottom up, not from the top down. Broadly speaking, we want governing that is successful and aspirational, is democratic in a thick sense of that term, and is well designed to implement the public good. The framers of the US Constitution understood this when they spoke in the Constitution's preamble of the promoting the general welfare (among other ambitious goals). And the framers of state constitutions have consistently understood the obligations of subnational officials, be they elected or appointed, to advance the common interest and good of their citizens through diligent protection of the health, safety, and welfare of those within their charge and responsibility.

In this penultimate chapter, we focus on some concrete policy areas that are within the project of governing at the state and local level, and are so precisely because of the evolution of the police power as a constitutionally sourced authority, rooted in not only discretion but *obligation* – for government to act, to decide, and to perform functions. This description of some policy areas is necessarily incomplete; and so

the reader should not view this as, by any measure, a comprehensive list of policy areas for state and local governments to tackle. Rather, it is a description that focuses on some of the more difficult and pressing issues – super wicked problems, as that phrase has been defined[2] – that contemporary governments face in this century. Moreover, this is not intended as a polemic in favor of one or another particular governmental policy or strategy. The main point is to advocate for a more creative and ambitious use of the police power to tackle these issues in meaningful, constructive ways. To put a finer point on it, the police power is fundamentally about good governing, and good governing aspires to a resolute focus by well-intentioned, competent, collaborative, adequately resourced public officials on the major issues of our times.

REGULATING EXTERNALITIES: NEW *SIC UTERE* PRINCIPLES

In our deep dive into the jurisprudence of the police power in Chapters 2 and 3, we saw how the state courts were moving steadily away from the *sic utere* rationale for governmental intervention under the police power and toward a view that William Novak persuasively describes as *salus populi*, that is, focused on promoting the common good, not merely addressing harm.[3] That all said, the courts still look to *sic utere* to nest a particular vision of the police power as a mechanism by which the government can look after individual safety and health needs and interpose themselves between what would otherwise be threats to citizen welfare. The police power, then and now, provides a source of authority of government to redress wrongdoing and harm. We saw as one key example of this the use of the police power to abate nuisances, be they private or public.[4] This continues to be a broad power as the concept of nuisance has evolved. We also discussed this in connection with the government's persistent role in addressing the so-called secondary effects of certain conduct, be it adult entertainment, prostitution, drug dealing, or other social vices. Here we might imagine a set of new and improved *sic utere* principles that can undergird one important aspect of the police power.

One novel *sic utere* principle for a robust modern police power is that the notion of harm should not be limited to demonstrably tangible harms that are past-focused, that is, that have already occurred and can be measured as if in a court dealing with the determination of damages.[5] The harms that the government might aspire to deal with may be prospective,[6] and perhaps even speculative.[7] So, for example, redressing potential harm from environmental damage, as in the puzzle of human contributions to climate change, can often be prospective in nature, but nonetheless fits into models of harm.[8] Police power laws dealing with threats to public health – think of strategies to deal with the harms that befall individuals who are unhoused – can be similarly prospective, yet also based upon the *sic utere* paradigm that the government should address harm.

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This is not primarily a point about the metaphysics of conduct, that is, an acknowledgment that harm that occurs later can still be regarded as harm and therefore we should prepare by suitable regulations. Rather, this is a point about pragmatic public policy. We should be looking at threats to the public welfare that unfold more slowly or uncertainly. Climate change is in many senses a slow moving trainwreck (although, as we are witnessing, perhaps not as slow as we had expected and hoped). The temptation to wait until serious, concrete harms occur should be tempered by our ability to tackle future harms through present actions. We can see the advantages of proactive measures to deal with prospective harms, as such decision-making may succeed in more efficaciously solving wicked problems whose main impact has yet to come. In a related vein, threats that might emerge because of new technologies which we do not yet fully understand, such as deep learning in artificial intelligence, may be addressable more effectively if we have some coherent, evidence-based solutions to potential problems.[9] The classic notion of *sic utere* sits uneasily with these kinds of harms, given that they are unavoidably speculative and with damage that cannot be easily assessed. Hence the need for new *sic utere* principles and sensible, well-informed police power regulations to help confront them.

A second *sic utere* principle is that the damage that is being suffered, whether prospectively or retrospectively, need not be associated with identifiable individuals. Here we want to draw a distinction between the traditional modality of tort law, both conceptually and practically, as the classic *sic utere* mechanism to recognize and redress harm, and the police power under novel *sic utere* principles. Stripped to its essence, tort law relies on our ability to assign duties between individuals and those who would suffer damage from the conduct of a putative tortfeasor.[10] Such duties are important in our ability to assign blame and responsibility; and given the rather uncontroversial duty that individuals owe to their fellow beings to not engage in tortious behavior, it is typically not difficult to ascribe duties in ways that tort law can accommodate. This will be more difficult, however, if we see the conduct as creating risks to the community that are not so easily associated with specific individuals or groups. Take, for example, the sticky problem of nuclear proliferation. This is damaging conduct, associated with particular behaviors and individuals we can point to.[11] However, few would suggest that such conduct is tortious, in the sense that modern tort law suggests. (It could be prohibited or regulated, to be sure, but notice that such efforts will likely go into the *salus populi* box). Such a view, however, may well illustrate the comparatively greater suitability of regulation under the police power to tackle certain issues where duty is elusive versus tort law, law which is quintessentially private law.

Likewise, causation imposes challenges to tort law regulating certain behaviors.[12] The recent Covid pandemic illustrates a conundrum with assigning blame. We could fathom that individuals who are Covid positive and therefore transmitters of the virus should not be exposing individuals to the virus where this could be effectively avoided. However, individuals contract the virus in places and contexts

in which it will be nearly impossible to determine who caused this result. The difficulty in establishing causation has easily defeated most liability lawsuits during Covid, limiting recoveries to those narrow contexts in which courts have been willing to ascribe blame to individuals or businesses solely on the grounds that they have acted with gross negligence or utter indifference (such that they have found blame even where causation cannot be established with meaningful certainty).[13] Even worker's compensation has proved to be a difficult framework for Covid recovery, such that a number of states changed their laws, at least temporarily, to flip the presumption of causation so that individuals could claim credibly that their disease was contracted in the workplace.[14] All of this is to say that tort law has to go through fairly elaborate contortions to get to a place where individuals can recover under the familiar principles of tort law.

The police power need not be tied to these traditional tort law principles. Police regulations may be viewed from one vantage point as the public law analogue to tort law. But we can see that, even where regulation is being used for *sic utere* reasons, police power regulation has a special capacity to account for harm-causing behavior by limiting such behavior. Using the Covid example again, the government might create a scaffold of regulations that oblige businesses to take certain precautions or oblige individuals to report their infectiousness status in order to reduce the likelihood of harm. We can imagine, too, a regime of compensation for such harms, paralleling what we see in the context of other mass injury events, such as 9/11, but this entails regulatory measures that will likely look beyond the police power to certain fiscal strategies.[15] Or the right strategy might be an admixture of regulation and public subsidy. In short, the police power can underwrite a theory of governmental power that aspires to tackle harms that are societally diffuse and not absorbed into traditional ideas of corrective justice and discrete harms.

Steps to address, for example, systemic racism in law enforcement or in zoning or in the provision of public health – to take three examples of profound social problems – are not susceptible to ordinary attribution to particular individuals, either with respect to victims or perpetrators. We know that that systemic racism causes major harm; and we further know that the burdens of this racism fall on the shoulders of communities of color. Without detailing specific policy innovations that might tackle racism in these contexts, it is worth reiterating that such efforts push against the classic model of *sic utere* in the sense of redressing wrongs that can be identified with particular individuals. Such strategies, therefore, rest on a reconfiguration of this classic model (along, of course, with connecting reform in this vein to a *salus populi* conception).

These are just principles, and the devil, of course, lies in the details. The burden of elaborating more exactly how certain police powers might trade on these novel *sic utere* principles is greater in its need for precision than this book can bear. The basic essential takeaway point is that there remains in the progressive account of the police power room for a enduring connection between the *sic utere* ideal that has

long grounded legal obligation to redress harm that results from private activity – think of various forms of noxious discrimination, for example – and an ambitious, creative police power.

One additional point bears mentioning in the context of our discussion of addressing harm. The government's responsibility to address harmful activity comes with it an expectation that it will do so in a way that is balanced and accords with ideas that account responsibly for benefits as well as costs. One traditional view of regulation's domain emphasizes what has been labelled The Precautionary Principle.[16] This principle obliges government to regulate certain harms whenever there is a plausible risk. To the extent that the risk is especially serious, regulation is required even in the face uncertainty, both about the likelihood of harm and the efficacy of government regulation to redress this harm.

The efficacy of this principle is controversial, however. As Cass Sunstein has stated: "The weak versions of the Precautionary Principle state a truism – uncontroversial in principle and necessary in practice only to combat public confusion or the self-interested claims of private groups demanding unambiguous evidence of harm, which no rational society requires."[17] In its stronger iteration, this principle can block innovation and progress. The dilemma for governments is how to implement public health and safety regulations under the police power that ensure a decent assurance of safety without imposing burdens that can reduce innovation and plainly impose high costs that are out of proportion to the goals sought and, indeed, may well be counterproductive. For example, many measures undertaken during the Covid pandemic, including the decisions at the local level to close down schools, have raised hard issues involving the precautionary principle and the attendant dilemma in regulating. In a somewhat similar vein, efforts to regulate certain technologies, as we will discuss below, implicate the precautionary principle, especially insofar as we worry about the potential risks associated with rapidly evolving technology rather than its current use. There is no obvious solution to this dilemma, but developing principles for good governing under the police power should be cognizant of and deliberate about the precautionary principle in regulation, especially with respect to novel problems and technologies.

WHO ARE THE PEOPLE IN THE "PEOPLE'S" WELFARE?

The *salus populi* idea has played a fundamental role in the development and refinement of the police power. Where this idea has special punch is with respect to the goal that typically comes at the end of the conventional rendering of the police power, that is the part described variously as the people's welfare, the public interest, the common good, and the general welfare (among other variations on this same theme).

Yet, who exactly are the people in the configuration of the people's welfare? Although not addressed in detail in our exegesis on the evolution of the police power in the first three chapters, it would be impossible to give a coherent account

of regulatory strategy and purpose during American history without accounting for issues of subordination and inequality,[18] particularly around race and gender.[19] Such matters affect how we think about regulation and regulatory choices over American history and also how we think about the overall concept of the general welfare of the community. First and most obviously, the choices that we were made by government and on behalf of the citizenry in the democratic processes of state legislatures in our nation's first century and deeply into the next were made nearly exclusively by White men.[20] Access to the channels of political and legal power were incredibly slow for the out groups (people of color, women, immigrants, the disabled, the poor), even after the enactment of the Reconstruction amendments.[21] Voting rights were scant, and all the evidence points unmistakably to a series of policymaking decisions through the post-framing, Jacksonian, antebellum,[22] Reconstruction, Progressive and Populist eras that were not meaningfully inclusive, palpably neglectful of the views and interests of out groups, and in many years positively discriminatory. Legal redress was thin, and even later was episodic.[23] As Novak puts it, "despite the aspirations or pretensions to national equality voiced in formal political documents … early American states and localities were in the constant habit of using their local police powers to pass discriminatory laws differentiating their populations along nearly every conceivable social status."[24]

These developments were manifest in political activity – acts and omissions – and also in legal decisions that remain in the pages of federal and state reports. Plessy was a lowlight to be sure, but other cases, especially The Civil Rights Cases of the 1870s,[25] helped write a script of exclusion and subordination.[26] States were well within their constitutional powers to act in more inclusive ways, but the evidence does not suggest that, taken as a whole, states were particularly progressive on matters of race and gender, to take just two of the most important objects of discriminatory actions.

If one wanted to add some positive elements to this dire story of inequality, one could point to some of the important Progressive era reforms that empowered the rural poor and small businesses, including businesses who were serving individuals otherwise excluded and disadvantaged. The Granger movement, for example, the focal point of the Supreme Court's decision in Munn, reflected the political activity of small farmers to gain some measure of equality against monopolistic agriculture.[27] Later, the rise of regulation at the state and federal level to combat unfair trade practices (the Federal Trade Commission being emblematic as a creation designed to tackles these problems) and to address unsafe food and drugs had, if indirectly, a leveling effect on inequality's impacts. Certainly the Reconstruction era, with constitutional amendment and legislation brought through the "second founding" a new structure of citizenship, at least formally.[28] But this "whataboutism" ultimately cannot address coherently or comprehensively the predicament of subordinated groups during, especially, the first century of the republic's history and hence the first century of the police power's existence.

So what do we make of the *salus populi* by this reference point in light of this troubling history? We should be realistic about what the people's welfare meant and did not mean during a big amount of our history. The people's welfare was focused, alas, on the welfare of individuals who counted.[29] This problem, to the extent it was addressed at all, was dealt with mainly through social movements and structural reforms. Naturally, the Nineteenth Amendment's enfranchisement of women was a critical development in the movement toward political power and, with it, a *salus populi* that covered men and women alike.[30] Slow structural process in voting rights for minorities was crucial and so the Voting Rights Act of 1965 was a watershed (even if an incomplete one). Other structural reforms, through legislative, judicial decisions, and administrative action, helped broaden the scope of the people whose welfare was the focus of government action.

To make this point more explicitly normative, we should always be contemplating in our evaluation of the modern police power and its potential for facilitating good governing the breadth and dimension of inclusion (as well as empathy) in the configuration of governance institutions and the assessment of progress. It is hard to see from the evidence that the police power *qua* police power did much work in advancing equality objectives. Legislatures showed little empathy and vision and, where they did, these efforts were at best episodic. Courts seldom helped matters. In looking forward to the ways in which the police power can provide a fulcrum for the exercise of meaningful regulatory power in order to realize the objectives of good governing under state constitutional objectives, we should think about becoming more ambitious in our goals. The common good, should be constructs of meaningful generative potential. That is to say, we ought to measure how effective is government regulation in advancing public welfare and moving toward the common good in part by how inclusive these choices and choice processes are. Even more ambitious would be recognizing that the redressing of deeply embedded systems and schemes of inequality is a coherent and critical component of the modern police power's objectives. This has not been so to any appreciable degree in our history, but there are no clear reasons why it should not be so today.

The reasons to think about the police power as a vehicle of redress and even rehabilitation are at least two fold. First, and perhaps foremost, such an objective aligns with what is simply the right thing to do as a society. Repairing a broken fabric of citizenship made broken by choices our ancestors made and did not make is a component part of what the nation owes by way of its fundamental ideals. And while we can and will disagree about the best tactics of repair, we should be manifestly committed to this ideal. The US Constitution in its preamble speaks of forming "a more perfect Union." This ideal undergirds the philosophy of state constitutionalism as well, with perfection being an aspiration reached through the decisions made by government on behalf of the people, certainly including the use of the governments' formidable regulatory powers. Second, speaking to the interests and needs of a diverse policy, not omitting our expanding group of stakeholders, we have said helps

attend to a concern raised in this book's first chapter, and that is assuaging the fear of those in the minority that their rights will not be trampled upon by a system that privileges majoritarian decision-making. Successful constitutions, as we described, are ones that reduce the stakes of politics. Finding a balance between majoritarian and countermajoritarian interests, and sustaining this through what is largely a self-enforcing equilibrium, is critical to maintaining constitutional stability.

In sum, scrupulous attention to who is included in the "people" whose welfare is being advanced is an important objective of the police power, insofar as this power is tethered to the larger objectives of American constitutionalism, to protect order and to form a more perfect union.

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In the remainder of this chapter, we look at some specific policy areas that a robust view of the police power will tackle. Whereas the extended discussion of the police power's policy domain in Part I's chapters was largely historical and focused on how courts have interpreted the police power over our two plus centuries of American constitutional law, the focus here is avowedly normative; we can look at the potential of the police power to ameliorate harms and advance societal welfare. And we should be concrete in doing so.

HOUSING ACCESS AND AFFORDABILITY

The jurisprudence of the police power points to an enormously ample authority, as we have discussed in earlier chapters, vested in state and local governments to regulate the use of land. Although Euclid was decided nearly a century ago,[31] the main message of that case, that the government can establish a comprehensive zoning plan to which residential and commercial property owners must comply, remains largely accurate as a description of modern zoning and the police power. At the same time, state and federal courts have frequently described the authorities that government has under the police power as changing in response to new conditions. This is a key point to consider. What could be a proper exercise of the police power at one point in time could be unreasonable at another in time depending upon changed circumstances.

What was long viewed as the progressive underpinnings of zoning as a strategy to fulfill public regarding objectives of land use in the face of more narrow economic self-interest of private property owners has come under scrutiny as evidence reveals some of the deleterious effects of exclusionary zoning. Some of the more baleful land use regulations are those requiring minimum lot sizes, height restrictions, prohibitions on multiple detached units on a lot (affecting so-called "accessory dwelling units" also sometimes called "granny flats"), and restrictions on developing housing on previously open land. Each of these zoning strategies, as leading economists and

land use experts have written, effectively limit the building of more housing, especially housing suitable to folks with more limited means. Zoning power has been occasionally abused,[32] and the general welfare of existing and, especially, potential, community members has been on the whole compromised.[33]

There is an irony in all this, in that the basic strategy of zoning was defended in Euclid and afterward as a quintessential example of the responsible use of the government regulation under the police power to implement public interest objectives, to trade off private property owner's interest in developing their property however they want for a commitment to wider goals. Now it is in the structuring of these putatively public-spirited laws that we see the police power's goals being undermined in the operation of contemporary land use strategy. We briefly describe the predicament and next describe how the police power can be used to help alleviate it.

To frame this discussion, let us consider some of the contemporary debate over the zoning strategies that the government has long used to maintain a certain form of order in their communities. While these strategies are not uniform, there has been a heavy reliance on the strategies mentioned above. In addition to this menu of typically available restrictions, zoning authorities often impose residency limits in multi-family housing, such as apartment buildings. Finally, there remain a handful of municipalities that have adopted residential rent control as an instrument of social equity. When viewed in combination, these land use restrictions have come under criticism for their impact on the availability of affordable housing.

Zoning restrictions present a key source of the problem. First, the existence of restrictions on building dense housing and on smaller lots – what Ellickson calls colorfully the "zoning straightjacket" – predictably limits building options and housing supply.[34] Furthermore, even measured steps to alleviate these severe restrictions carry their own problems, as a recent *Harvard Law Review* note summarizes it: "[W]here zoning laws do permit the construction of higher-density housing, density-reducing regulations – such as height restrictions, minimum lot size requirements, prohibitions on accessory dwelling units (ADUs), or setback requirements – impair affordability by forcing each unit to bear a greater share of the cost of land."[35]

In a blunt assessment of the claims made by modern defenders of restrictive land use regulations, David Schleicher summarizes the critique:

> [L]and use regulations in rich regions from 1980 to 2020 prevented housing growth to match growing housing demand, limiting access to hot job markets. The result is a loss of economic output of staggering proportions, as workers have been unable to move to higher-paying jobs. Further, in the presence of high demand, excessive land use regulations result in high housing costs, causing huge rent burdens, homelessness, and economic inequality through capital appreciation for homeowners.[36]

It is well worth considering whether and to what extent current land use regulations that are intended to promote the general welfare of the community can have the opposite effect. As we discussed in Chapter 4, one of the intriguing dimensions of the

New Jersey court's decision in the Mount Laurel affordable housing lawsuit is the close consideration of whether the implementation of longstanding forms of land-use policy might have as an unintended consequence the reduction in affordable housing.[37] And, if so, whether and what extent, as the court considered in that case, the objective of zoning under the rubric of the police power was being undermined.

The social movements generated by affordable housing advocates, and also the longer-lived efforts by property rights advocates, have made these issues much more prominent in the public's eye and on the government's agenda.[38] The so-called "YIMBY" movement has evolved in parallel with the steadily more powerful post-Kelo property rights movement.[39] Both are important fulcra of legal advocacy and democratic power. (It has made, too, for some rather strange political bedfellows, but that's beside the point here.) In any case, the challenge for policymakers considering reforms that might enhance housing, ranging from basic shelter for the presently unhoused to home ownership at a reasonable cost, and everything in between, is to consider carefully the connection between contemporary zoning regulations and these housing matters.

Two conclusions regarding the police power follow from this critique of modern land use decisions. First, there is a steadily growing case for states intervening to limit local land use authority.[40] This reflects a step away from where zoning has been situated for the nearly 100 years since the Euclid decision. The state is well within its power under its constitutional authority to rein in local prerogatives and local zoning rules. Doing so does not necessarily mangle the idea that local governments have delegated police power to protect the health, safety, and welfare of the citizenry. Responsible land use laws can still be seen as manifestations of just this authority. However, the broad legal authority of local governments to create and enforce land use laws is not inconsistent with the use of state-level authority to preempt local laws or, where warranted in extreme situations, to wrest back control of local land use policies so that the fundamental choices are, going forward, exercised at the state level.[41]

The second conclusion, one more radical than the first, is to look closely at local laws to see whether they meet the tests of the police power. Are they being created and imposed in a reasonable way?[42] The argument that they have not been reasonable grows out of the claim, based upon empirical evidence, that the land use laws are actually undermining the general welfare. As the modern critique reflects, the operative basis for these restrictive land use laws is protectionist, a NIMBY sensibility that sacrifices the interests of individuals seeking affordable housing. In a court of law, this argument would be a hefty lift. Suffice it to say, however, that the underlying logic of the police power points courts to a consideration of whether judges might ask whether certain regulations are inconsistent in objective and in strategy – in other words, do they sacrifice the public's welfare for the interest of incumbent local interests? In this regard, the police power, somewhat incongruously, can be used to limit the exercise of certain instances of local governmental power.

We should approach the question of modern zoning law and the police power with a dose of reality, however. Let us separate two imagined states of the world. Even supposing that the accumulated evidence suggests that the use of various zoning measures (height limits, residency caps, setbacks, etc.) is counterproductive in that it reduces the supply of available, affordable housing, it would be a bold step indeed to hold such measures unconstitutional on the grounds that they undermine public welfare. The historic commitment of courts to permit to the legislature the choice of how best to deal with the regulation of land through zoning, a commitment that is century old, is a big impediment to a constitutional rule that would in fact stand in the way of legislative discretion. The property owners' rights to do what they wish with their land, forever appealing as a libertarian shibboleth, is not going to do the work of restricting state or municipal zoning power in the absence of a compelling argument that the overall structure and strategy of zoning is rotten root and branch. Zoning's modern critics are hard at work making these arguments, but one can remain skeptical that this robust scholarship will translate into a profoundly novel legal principle. Two other possibilities seem more promising: First, the decisions of municipal and (especially) state authorities to reign in certain traditional zoning strategies and to reconfigure in moderately ambitious modern, evidence-based ways can become more common, as the YIMBY movement steadily increases its influence and, moreover, bedfellows from the Right and Left ends of the political spectrum, to say nothing of moderates, become less strange and more common. A revolt in the zoning area is not unimaginable, but it is vastly more likely to come from political decision-makers, at various levels of government, than by activist judges. Second, zoning can become eroded as a sort of death by a thousand cuts. Governance institutions responsible for land use choices include administrators and local boards, the latter either elected or appointed by officials who are themselves elected. Such boards can become captured by groups of common interests, including landowners and social movement activists concerned with zoning's impact on affordability and access. Where zoning decision-making is owned by these local (or even hyper-local institutions), the effect of certain decisions will undergo meaningful change, this without disturbing the overall constitutional power of government to zone.

We also face an enormous crisis of homelessness.[43] The predicament of the unhoused are not solely the result of zoning decisions. Rather, the epidemic of unhoused Americans is the result of intersecting factors, including the erosion of state and local safety nets, including mental health services, the high cost of housing stemming from various reasons, the erosion of purchasing power as a result of inflation and the absence of a living wage, the miasma of veterans' benefit administration, and other factors that lead individuals to the streets. And on these streets individuals, disproportionately people of color and other victims of social discrimination and economic subordination, suffer in various ways.[44] The wicked problem of the unhoused is complicated in both its origins and in its promising strategies. No effort, even a preliminary one, is undertaken here to offer any novel solutions

to this problem. However, we can see at the very least that the ample scope and breadth of the police power creates many pathways to addressing the unhoused epidemic. To be clear, a comprehensive strategy would entail laws not necessarily directed toward the unhoused individuals themselves. Indeed, it may well be that some of the regulations typically used in this context, such as anti-vagrancy, anti-peddling, prohibitions on sleeping in public spaces, etc., are ill-suited to the problems being addressed and should be considered on both compassion and efficacy grounds. Some steps that would address how individuals are rendered safe from both the natural elements and from individuals they encounter, both private persons and law enforcement, are surely advisable. So too are laws that would address the often dire public health issues that plague the unhoused. The police power is governance power and an obligation to good governing means an obligation to help the least unfortunate, those on our safety ladder's bottom rungs. This is where we found America's unhoused, and this ought to be a focal point for government action under the rubric of the awesome police power.

The call for the creative use of the police power to deal with housing availability and affordability is borne of an ambitious and opportunistic vision of the government's role and responsibility as regulator. However, we conclude this section on a cautionary note, one that raises concerns with a strategy that has emerged in the last couple or so decades as at least a rhetorical mechanism to anchor a more ambitious strategy of improving on both affordable housing and on the predicament of the unhoused. This is the creation of a so-called constitutional right to housing.[45]

Insofar as the larger theme of this book is that the police power should be yoked to state constitutional objectives, it is worth looking closely at the demands for constitutional reform that would create a positive right to housing in state constitutions. As tempting as this development would be, there are reasons to believe that in the end, its deficits will likely outweigh its advantages. First, the shape of the right is intrinsically opaque. It is one thing to say that the unhoused should have a right to housing that would generate responsibility, fiscally and logistically, to furnish adequate shelter to individuals. This poses some substantial practical challenges, but we could at least wrap our heads around the concept that every needy individual should be able to access a roof over their head and four walls to provide basic security. It is another thing entirely to view the right to housing as something that would propel government to undertake choices that would create the conditions for anyone to live in housing that they can afford and that, furthermore, meets their needs and even wants. Advocates for a constitutional right to housing are often opaque on this question. Such decisions would involve much more than the eradication of various land use restrictions of the sort described above; it would entail the infusion of enormous sums of money to ensure that individuals would have housing. Would this mean that landlords would be especially subsidized to ensure an adequate supply of affordable housing? Would it mean that the government itself would purchase real estate sufficient to take care of individuals in need? Would there be a subsidy that

would go to individuals to use, as they would, say, food stamps, but only on housing? These are difficult policy questions; and even if they are not impossible to answer, it would seem that a positive constitutional right that does not undertake to address these puzzles but simply declare that there is a housing right, declared by government and ready to be invoked by individuals is highly problematic.

The creative use of the police power to address the relationship between inadequate housing and public safety, health, and welfare is different than yoking this power to a constitutional right to housing. As we explored in our discussion of positive rights in Chapter 6, there are challenges with constructing rights that can be used not principally as trumps but as entitlements, with all that this implies for the relationship to citizens and the government. There are positive rights that are more workable in modern public law and life and others that are much more complicated. The right of housing is of the latter category, and so should be viewed with caution, if not skepticism.

TRANSPORTATION AND CITIZEN SAFETY

American transportation policy has long been built around the paradigm that we are a country on the move. Many policies, national, state, and local, can be understood as promoting, freedom of transport and, as a result of aggregate citizen preferences, automobiles. Such choices have caused impacts to the environment, as is well known.[46] Addressing vehicle pollution through federal, state, and even local regulation has been a prominent objective for more than a half century, and such efforts have made a noticeable difference, as those of us of a certain generation can attest personally and as the scientific facts demonstrate.[47] Choices to favor the automobile have also affected the configuration of urban life, as Jane Jacobs and others have famously described.[48] What has been less conspicuous in the discussion of transportation policies and the favoring of auto transit has been the impact on public safety.

In a recent article on pedestrian safety, Gregory Shill notes in reference to the data from recent years that "[d]eaths of people on foot struck by motor vehicles surged more than 46 percent during that decade, outpacing the increase in all other traffic fatalities by nine to one. There are no signs of improvement this decade."[49] Moreover, these deaths are unequally distributed by race, with Black Americans having a risk of being killed as a pedestrian two-thirds higher than White Americans. The reasons for this overlap, but include the design of city streets, decreasing obedience to traffic regulations, and, as Shill points out, the growing size of the modern automobile. There are steps that the federal regulatory agency tasked with addressing issues of vehicle safety and design could address through attention to the last aspect of the program. The second problem, driver neglect of current rules, can be addressed by more vigorous law enforcement (and perhaps other constructive efforts at improving law-following more generally, not to mention compassion

for the risks imposed on mankind). The first problem, however, can be addressed if at all by sensible police power regulations. In a comprehensive 2021 study entitled "Dangerous by Design," two interest groups involved in municipal planning and street safety, Smart America and the National Complete Streets Coalition, explored at a granular level the matter of pedestrian safety and proposed various design strategies to alleviate these dangers.[50] Few of these common-sense ideas have been implemented, much less those that require a deeper understanding of street engineering.

Viewed overall, local regulation has neglected to an appreciable extent the impact of auto-friendly policies on citizen safety. Particularly vulnerable have been disabled individuals and also cyclists. Impacts cannot be measured solely by injuries and deaths, although this is obviously the most salient measure of consequence. Impacts include choices made by individuals not to walk in areas where their safety could be at risk, and individuals not to ride their bicycles but instead to utilize other modes of transportation, including automobiles, even though this is not their preferred choice and, moreover, this choice has potentially negative consequences on society.

There is a compelling argument, for the reasons we have reviewed elsewhere in this book, that the government has a special obligation to look out for the safety and welfare of citizens in physical spaces and areas which we know to be in harm's way. Extraordinary progress could certainly be made by a scrupulous, data-driven look at the transportation policy and public safety. This could yield various solutions, none of which need to be detailed here but are described and amplified in a burgeoning literature on transportation policy and public safety.[51] Effective strategies for this wicked problem requires collaboration across all levels of government. Certainly local governments have a unique place in all this, given their power and responsibility to make good choices for the structure of the cityscape.

The police power is ideally situated to provide a source of authority to improve individual safety on the roads. There are some challenges inherent in coherent strategies, however, given that the situations involve an admixture of three considerations – the driver, the individual on the road, and the condition of the road itself. To use the police power effectively, local and state authorities must examine closely all three elements and see how best to confront these synergies. Here we see the challenge and ultimately the opportunity that is presented by a reading of the police power that focuses on changing conditions and the need to update what is truly good governing for modern circumstances and the need to address our most wicked problems.

GUNS

In 2021, there were over 48,000 deaths by guns in the United States, a number that had grown by 10,000 since just 2018.[52] The rate has increased steadily in the last 25 years.[53] Moreover, the correlation between the stringency of gun laws in a state and the death rate from guns is very strong. The death rate per 100,00 is highest (between

26 and 34) in Wyoming, Alabama, New Mexico, Louisiana, and Mississippi (from fifth highest to highest) and are lowest (between 3.4 and 5.6) in Rhode Island, New York, New Jersey Hawaii, and Massachusetts. The data is unmistakable: The states with the most lax gun control laws have the highest rates of gun death (which include both homicides and suicides).[54]

The regulation of firearms has been a complex matter of societal disagreement and political struggle for decades. Even while damage wrought by individuals using firearms continues to grow, we have been largely stymied in our efforts at meaningful progress. Our predicament has taken on an added layer of complexity, and a major one, by the Supreme Court's holdings in the last fifteen years that there is a judicially cognizable individual right to keep and bear arms.[55] It would be too simple to say that the Court's gun rights jurisprudence is the reason for the paucity of state and local gun control. We cannot be certain whether is the constitutional law or the state and local politics, or both, that has limited legal efforts. But there is no doubt that the police power's capacity for dealing with the problems of modern gun violence are limited in both practical and legal ways.

This is not the place for a comprehensive discussion of Second Amendment jurisprudence. However, there are a few important lessons to draw from the raging legal, political, and social debate over firearm ownership. We should begin with a set of facts concerning the remarkable daylight between the Supreme Court's view about the constitutional limits on certain gun regulations and the public opinion relevant to state and local choices.

Public opinion on gun control matters has fluctuated somewhat over the years in which it has been measured. And different research organizations have come up with different results, sometimes meaningfully different. However, one reputable polling company, Gallup, has data indicating that the percentage of Americans supporting strong gun control measures has been over 50 percent consistently for the past ten years, while the number of Americans who would keep them as it is has been less than 40 percent and when combined with the number who would make them less stringent, hasn't exceeded the "more stringent" group since October of 2014.[56] Pew's data likewise shows that supporters of stricter gun laws have consistently (for the past six years) exceeded the combined total of "need stronger" and "fine the way it is" groups.[57] The plethora and publicity of mass shooting events has not moved the needle massively, but there has been an uptick in support for more stringent laws and law enforcement in the last couple of years.

By contrast, the Supreme Court has been moving in the opposite direction. The Bruen decision has also strengthened the right of private ownership of firearms and will surely impact, in ways still to be seen, the legal ability of state and local governments to impose meaningful limits on gun ownership. One website ("The Trace") specifically devoted to covering issues pertaining to gun violence and regulation has detailed the various responses in the states and local governments to the Court's 2022 decision.[58] This is, to be sure, a very much evolving situation with many lawsuits

pending. We can saw confidently, however, that in this post-Heller era in which the right to carry firearms has been declared to be an individual right, our governments at all levels are limited in important respects from imposing gun control under its police powers, given the protections of the Second Amendment as viewed, albeit controversially, by the modern Supreme Court.

What the Court's declarations in Bruen and earlier cases tell us about the narrow path to acceptable gun control is that the governments aspiring to impose stricter controls must develop not only plausible evidence-based arguments for their policy choices, but need to connect these arguments in a coherent originalist framework, that is, a view that explains how a particular policy is consistent with the original public meaning of the Second Amendment. This burden, while high, need not be insurmountable.[59] Advocates for stronger gun control will need to investigate the history of not only gun ownership in the founding era, but also the history of the police power. That has gone largely neglected in gun litigation, and without prejudging exactly what this history will reveal, it seems at least a promising vehicle for considering on the Court's own terms, how the original public meaning of the Second Amendment was affected by conceptions of regulation, and not merely prerogative and liberty. In any event, the ultimate focus of the government's argument should be on the longstanding responsibility of the government to protect the public safety and welfare of the community. Traditional arguments that sought to locate the Second Amendment right to keep and bear arms in a well-functioning militia are unavailing after Heller. Also unavailing are arguments that are conspicuously non-originalist, in that they rest on a view that is basically this: Such a view, as the Court majority explained in Bruen, conflates a mechanical of original intent with the Court's methodology of choice, original public meaning. Whether persuasive or not, a solid majority of the Court holds that the original understanding of the Second Amendment is that the government would carry a very heavy burden of showing that a gun regulation meets a compelling state interest and is narrowly tailored to the need identified.

Even the most vigorous proponents on the Supreme Court for the protection of gun rights under the Second Amendment have acknowledged that this right is not absolute and that government has some latitude to impose appropriate gun control measures. The police power comes into this frame to the extent that the government can invoke a rationale for why a certain strategy of regulation is very likely to improve public safety and enhance welfare. Some regulations can be expected to fare well under the requirement that a strong safety rationale be demonstrated, and others less well. Nonetheless, there remains, even after Heller, McDonald, and Bruen, a role for the police power to play in the configuration of the constitutional law of gun regulation in this third decade of the twenty-first century and beyond. To believe that the headwinds of a significant rights constraint on government power undoubtedly limits the domain of the police power. But it does not render the police power nugatory; and it ought not to deflect entirely our attention to the police power as an

important legal construct of relevance when we consider the nature and scope of the government's regulatory power to protect health, safety, and the common good.

As to specific regulatory tactics, a recent Rand study indicates that the three most effective strategies for reducing gun deaths, homicide and suicide included, would be the following: Restrict the way in which individuals store guns and ammunition in their homes, restrict who can carry a concealed weapon, and restrict circumstances in which individuals can use deadly force in self-defense outside of their own homes.[60] It would seem that only the second of these strategies implicates the Second Amendment under current precedent. There are other policy steps, some considerably more controversial and legally risky, and so a politically sensible approach under the police power would focus on those strategies that are likely to yield the highest payoff with the lowest risk and cost. This satisficing strategy would save lives, although it does kick down the road somewhat the can of more comprehensive gun control measures, including handgun bans, blanket prohibitions on certain individuals from possessing certain or any firearms, and the banning of entire categories of weapons. Given the combined state of current law and of politics, an incrementalist strategy may be the most plausible and efficacious under all the relevant legal and political circumstances.

ENVIRONMENTAL PROTECTION

As the environmental movement has moved from infancy to maturity in the more than half century after its origins in modern American politics, we have seen arise a series of social movements mobilizing energies and efforts to address these myriad environmental problems.[61] Some of these movements build on the classic playbook of mobilizing political and legal institutions, along with committed citizens, to address continuing environmental problems, such as air and water pollution. Others have focused on comparatively new environmental problems, including climate change. Finally, with the burgeoning environmental justice movement, we are reminded of the impact of significant harms through carcinogens and other toxic substances to citizens in local communities, be they urban or rural, and that the results have had disproportionate impacts on poor people and on citizens of color.[62] This is the predicament of environmental racism, a condition that has festered alongside the general threats to the environment through pollution in its various forms and also the misuse or overuse of substances that can cause impacts on living conditions and on the long-term welfare of our planet.

A large and growing literature has focused on the synergies available through national and state collaboration.[63] Top-down command-and-control regulation now seems somewhat quite anachronistic, and even naïve, given what we have learned about the efficacy of more multi-institutional strategies.[64] Moreover, literature in the so-called "new governance" tradition has illuminated the value and virtues of public/private initiatives, thus interrogating in sensible ways the entire

idea of traditional government regulation as the sole, or even the best, mechanism for addressing environmental problems.[65] It is important to see this emerging call for more imaginative techniques of regulation as stemming not only from capable, interested academics advocating novel strategies, but from the advances in science that has made data-driven, evidence-based approaches more promising. Building bridges between strategies that are conceptually promising and practically possible must be the highest priority, and here is where science, in its various forms, and deep institutional analysis (attentive, too, to local knowledge) make and keep a productive and activist marriage.

What remains less conspicuous in the literature and commentary on environmental protection is the particular role of local governance in tackling environmental problems. To be sure, environmental threats are almost quintessentially cross-border in their effects; the very idea of pollution as externalities, thus implicating collective action dilemmas, suggests that seldom will a geographically defined local government have the tools to tackle these complex problems effectively. But ultimately these familiar ideas which undergird more centralized strategies prove too much. Local governance can and does play an important, and indeed even vital, role in assembling strategies and structures to tackle particular environmental threats.[66] Moreover, as the vexing ordeal of environmental racism illustrates, addressing the often second-order consequences that flow from certain private conduct and governmental responses is essential, and in that domain local governments and democratic local institutions have a comparative advantage.

The experience of the residents of Flint, Michigan during the water contamination disaster of 2014–16 illustrates this dynamic phenomenon.[67] State public officials had made the dangerous decision, without meaningful input, to shift the community's water supply from Lake Huron to the Flint River, the consequences of which for public health were catastrophic. The responses at the regulatory repair level were substantial, and the evidence collected suggested that rapid work had solved the worst of the dangerous conditions. Moreover, state legislation and even a federal statute was enacted in the hopes of ensuring that another crisis of this type and magnitude would not recur. However, the fallout with respect to public trust and local democracy still persists years later. A Politico report in 2020 analyzed the paradox: As the title indicates, "Flint Has Clean Water Now. Why Won't People Drink It?"[68] The answers lie in the political history of the city and the context and conditions within which this crisis unfolded and in which steps were taken or not taken to address public discontent. As one citizen put it: "There would not have been a water crisis if we had democracy in the city."[69] The road out of Flint's persistent problems – a political trust crisis emerging from an environmental crisis – requires engagement and problem-solving at the local level. Michigan can neither enact laws to solve it nor in any meaningful way drive progress beyond its evidence-based public health interventions. Less dramatic versions of this conundrum play out in environmental issues of local salience throughout the country.

Designed in its very origins as a source of authority to protect the health and welfare of citizens, the police power is well suited to tackling important environmental problems. However, where matters can hit legal snags is when the challenge presented to government is whether and to what extent local governments can address directly some of these serious problems without acting under the aegis of particular state or even federal legislation. Can and should municipal governments take a broad view of its role under the police power to address environmental problems that are having special impacts on local citizens? Yes indeed, and we should see the police power as a warrant for robust local initiative and as a promising font of innovation in safeguarding the welfare of the community. Others have written powerfully about the promise of an effective environmental localism.[70] What is required in order to facilitate strategies that promote sound environmental protection strategies at the local level is an acknowledgment that the police power is a source of constitutional authority well suited to local governance and strategic action.

Another practical road sometimes taken in tackling wicked environmental problems can be sustained by a robust view of the police power as an engine of good governing and that is the development of special-purpose governments. Many states – California is an especially prominent example – have constructed special-purpose governments to address issues that have proved intractable to ordinary general-purpose governments, be they municipal or state-wide. While the challenges raised by such governmental structures from the perspective of democracy and efficacy have been noted by many who have focused on this important phenomenon, the development of this model of governing has given us more imaginative institutional solutions to issues of health and safety protection. In particular, they have enabled the use of novel fiscal strategies and methods of circumventing difficult political obstacles in order to further public interest goals. These advances in good governing are undergirded by a vision of the police power that, as noted in an earlier chapter, sees the state constitution as facilitative of innovative institutions and regulatory strategies. Environmental protection and transportation externalities, as described above, are especially well suited to some of these more innovative techniques. Sometimes new wine calls for new bottles.

INFRASTRUCTURE AND WEALTH INEQUALITY

The multifaceted impact of wealth inequality has been noted by a growing chorus of commentators and social scientists.[71] The issue is enormously complex and the already far-flung analysis in this and the preceding chapter is hardly the place to delve deeply into the causes and consequences of this expanding inequality. However, let us first acknowledge that this is a serious social problem, and that our American constitutional scheme can accommodate, given the will to act, steps and strategies to deal with various aspects of this wealth inequality, short of a reconstruction of our system of capitalism and of the elemental commitments of our republic

to individual liberty and property. In recent years, a number of prominent legal scholars, including professors Fishkin and Forbath, whose important contributions to constitutional theory have been discussed elsewhere in this book, have spoken about our constitution as the fundamental means to protect a vision of democracy-as-opportunity.[72] In his recent exegesis of the project of state-building and democracy in the period from the Progressive era to the New Deal, William Novak gives as one example of "the progressive pursuit of a social democratic state" the imperative of addressing wealth inequality through constitutional means.[73] Not surprisingly, the vast majority of this literature focuses on the capacity and obligation of the federal government acting under the rubric of the US Constitution, using whatever traditional or novel techniques are available to the lawmakers, the judges, and to We the People, to redress these inequalities. Implicit in this is that neither state nor local governments can, should, or will engage in the project of redistribution or in any forms of redress of inequality.

We should not take this is a given. We can see through the twin lenses of our history and normative political theory how state constitutions have supported ambitious social policy, even including regulation that has had discernible and intentional redistributive effects. Indeed, the fact that state constitutions, by contrast to their federal counterpart, address fiscal policy in often quite specific ways indicates that the designers of these constitutions knew and indeed expected that state and local officials would be making policy through regulatory choices that would have redistributive effects. To be sure, such decisions are traditionally made through the tax system, and so it is tempting to say that this entire subject is properly considered under the taxing power, however configured in state constitutions. And yet this is truly a difference without a difference. The prerogatives and obligations of state and local governments to address public welfare through the police power can and should include matters entailing fiscal choices that have effects on relative wealth and thus on equality. The government could act in heavy-handed or in light-handed ways, and we can reasonably disagree on overall strategy or particular tactics. It is enough to say here that the ever-evolving police power undergirds governmental decisions to address in meaningful ways wealth inequality at a statewide or even local level. It is inevitable, of course, that there will be legal challenges to redistributive strategies, insofar as some choices may implicate the freedom of individuals to use their own private property and other resources. This does not mean that the government is not acting under its police power but merely that, as we have discussed throughout this book, that there are limits to the exercise of that power and that the resolution of this controversies will usually require judicial intervention, as has always been the case. The essential point is that the police power is a mechanism available, fully consistent with its origins, its evolution, and its adaption to modern conditions and circumstances, to government to address issues of wealth inequality. The question then is less one of proper authority, but of political will.

There is also the particular infrastructure decision-making that affects wealth inequality, as scholars have identified,[74] and as our current Secretary of Transportation, Pete Buttetieg, has said, further to this point, "there is racism physically built into some of our highways."[75] Infrastructure-related regulations under the police power can aspire at promoting the general welfare through attention to wealth inequality. The challenge faced by public policymakers is to make scrupulous use of evidence, and create transparent opportunities for the furnishing of evidence in the processes of regulatory decision-making, that focuses not only on the dense engineering and fiscal considerations undergirding chooses about building roads, bridges, dams, and other elements of our physical infrastructure, but also the relationship between the building choices made and note made and the impact on patterns of racial and wealth inequality. These are, to be sure, often federal issues, given the federal government's outsized role in American infrastructure. Still, there are a stream of infrastructure investments and projects, sometimes in collaboration with federal officials and sometimes solely decided within the state (think, for example, of building projects at K-12 schools and at public colleges and universities), that are connected to the state police power and the discretion given to promote public safety and the general welfare. It is especially in this domain that questions of wealth inequality could and should be raised.

Another way to think about the connection between infrastructure choice and wealth inequality is through decisions that enhance the access of all members of the public to public goods. Here we might think about open parks and civic spaces. Looking at the government's role in addressing wealth inequality by redistributing resources is important to be sure, but it is also narrowing; it is narrowing in that it supposes that this is the only cogent solution to addressing inequality and poverty is more building. Leaving aside here the profound controversy over whether the government should pull more levers to do exactly that, we can see ways in which regulation can address wealth inequality by reducing the consequences of such inequality for participating in democratic life. Many aspects of our civic culture, along with essential goods and services, including access to good public education, are subject to elements of a market economy, and individuals are therefore subject to the prices assigned to such services. This predicament is deeply embedded and has features that create walls and gates around poorer citizens. The police power can address some of these conditions by taking certain elements of our culture and community and providing access. Responsible limitations on private owner's right to exclude in order to enable access to beaches and open spaces is a step in that direction; so too are conditions that local governments might impose on private entertainment firms that would use public lands, with appropriate permits, to charge fees for access to a concern or a sporting event. Even something as prosaic as requiring a certain allocation of space to individuals of limited means to cultural and educational events would, in enhancing access, not make poorer local citizens wealthier, but would reduce the impacts of being less wealthy, a means of redressing one consequence

of wealth inequality. Other creative solutions we can leave to other fruitful conversations among citizens and policymakers, but the essential point is simply that the objectives of good governing under the police power might include decisions that address wealth inequality in concrete ways, even if that power cannot or will not bear the weight of more radical responses to the conditions of poverty and of subordination in its various forms. Our state constitutional tradition, noting both the broad, enduring ideals of promoting social welfare and also the manifestation of some these ideas through the establishment of positive rights, and the police power itself, can well sustain these concrete means of tackling in some small, but meaningful ways, the wicked problem of wealth inequality.

REIMAGINING PUBLIC SAFETY

While the strategies of safety regulations have evolved in significant ways over the history of our republic, the basic notion that public safety is a core part of the police power has always been prominent. Indeed, as we touched upon in both the Introduction and in Chapter 2, the police power's origins lie in a concern with the basic security of the citizenry. The power, after all, refers explicitly to policing. It is worthwhile, then, to reflect upon how the central ideas of governance and public security have evolved – what does public safety truly mean and what are the best policing strategies for realizing the aims of safety and security? While these questions are enduring ones, the answers have become more creative in recent years.

Barry Friedman has written an ambitious and important recent article that tackles the question of what modern public safety means in a provocative way and, more to the point, in a way that helps us understand better what the police power is becoming in this modern era.[76] Friedman contrasts the classic protection function associated with public safety regulation, one that concentrates on the government's duty to protect individuals from threats to their well-being and to their property rights, with a new idea of safety as the protection of multiple dimensions of social harm.[77] "Just as the notion of the protection function," Friedman writes, "itself will evolve … so too will the understanding of what safety encompasses."[78] Public safety requisites will include harms that emerge from the status and situation of vulnerable individuals, such as the unhoused or the mentally ill. These harms may not be caused by identifiable others in the traditional *sic utere* sense, but they are nonetheless harms that have palpable effects and can be redressed through government interventions.

Contemporary legal doctrine has been reticent to impose affirmative government obligations on government to redress harms that result from situations that the government did not "cause," in the formal sense of the term. DeShaney v. Winnebago County, a 1989 Supreme Court case in which the Court rejected the argument that the government faced liability for its failure to intervene in a social services situation in which a young child was tragically injured, has been held up as an exemplar case for the difficulties in existing doctrine which separates government's legal and moral

obligation in order to keep important notions of state action and state responsibility in certain lanes.[79] Independent of the question of whether DeShaney is correctly or incorrectly decided, there is a wider inquiry in the background of this debate, and that is whether the government has certain public safety responsibilities, and correlative powers, to address circumstances of harm that arise from complex social settings such as that faced by the boy in that case.

The fundamental issue, as Friedman frames this, is how we ought best to think about public safety in modern America. Safety is not just about the direct harm-causing behavior, be it real or potential; it is also about the situations that vulnerable citizens face by being where they are in the community. The mechanical way to think about this is to juxtapose benefits they have not received with harm that the private individuals or governmental officials have caused. Thus described, the conversation usually turns to whether and to what extent the government should be obliged to furnish benefits to those in need. This is a worthwhile question, to be sure, whose answer requires a complex set of assessments, theoretical and practical, philosophical and economic. However, a reframing of this question would look at what are rather clear threats to public safety by the absence of certain conditions that the government could address with regulation. Friedman sees this as implicating a constitutional imperative, one that is cognizable in both political and legal settings. And so he says that "What constitutionalizing accomplishes is to fulfill dialogue – or maybe just a power struggle – that goes to courts into the game of demanding that government do better."[80] Even if we stop short, at least until further consideration, of viewing this as an affirmative government obligation, as a positive right, we can still see the police power as a mechanism for promoting public safety as public safety is reimagined.

Supposing that we come to a common understanding that the government has positive obligations to furnish us with safety, in situations like the young boy in DeShaney faced and those in similar predicaments, we might still be stuck on the question of what safety means. Friedman's account boldly lists what he views as the essential elements of safety and security, those including basic subsistence, housing, health and well-being, and opportunity. These are, naturally, in addition to the obligations long viewed as central to the government's role, that is, the protection of the citizenry from harm to their person or property. That is, as Bentham wrote, "the paramount object" of government,[81] an object that was in fact encoded in many of the early state constitutions, such as Virginia's, which says that "government is, or ought to be, instituted for the common benefit, protection and security of the people."[82] What Friedman's effort at reframing the answer to the question "what is public safety" accomplishes, whether or not his particular set of objectives are compelling (much less achievable) is the critical agenda of making more modern, and thus much more relevant, the notion of public safety that underlies the police power's mission. The point, as he says, "is simply that there are many things that threaten us in similar ways, and with the same ultimate effects, as physical violence." Insofar as

we credit these various threats as actual impositions on the public's safety, we should likewise rethink the present contents of our constitutional objectives and, with it, rethink the fundamental purposes of the police power.

Beyond reimagining public safety, modern approaches to the police power must account for the imperative of addressing crime through sensible prohibitions, fairly applied and oriented toward deterring and punishing violations of the social order – in short, the police power is at the heart of a rational scheme of criminal law. As we revisit and perhaps rethink the foundations of criminal law, we will inevitably rethink the core mechanisms for the implementation of this law through regulation, and usually prohibition, and that includes the police power.

Insofar as the police power authorizes ex ante regulation, we generally conceive of the implementation of this regulation as entailing other considerations, so essentially involving matters of strategy and tactics rather than the scope of power. This distinction proves too much, however. In thinking about the public safety objectives of the regulation, we ought to think about how our policies will be implemented.

Bringing this closer to the ground, there is vigorous debate about the proper role and functions of policing in the contemporary United States. Many advocate for new models of law enforcement; others insist that the basic models work, so long as there are adequate supports; and still others would defund the police. This is an active debate (often among activists) in which one big challenge is to keep it under more light than heat. Within the wide space for disagreement about what, if any, change is needed, we might still be able to converge on some general matters, matters that are at least shaded, if not directly shaped, by our modern police power.

Without digging too deeply into the component parts of this continuing conversation about police tactics, one interesting feature in some of the current thinking is that more attention is focused on mechanisms of law enforcement that necessarily will involve more ambitious use of technology and also public-private partnerships that challenge the traditional models of policing that rely mainly on human agency and the one-two punch of defining the rules of the road, setting the range of penalties, and tasking police officers to find criminals and hopefully stop crime. One prediction from early 2023 about "what's next" in modern policing is the rise of so-called "precision policing." Claiming that such policing "is rapidly becoming the foundational model that modern policing strategies are build around … [t]he key to implementing precision policing tactics is the availability of real-time intelligence on in-progress situations. This is a fundamentally technology-driven strategy."[83] Precision policing has garnered adherents from major police forces and from various commentators who see it as an efficient and efficaciousness method of managing big data and harnessing new technologies to the complex issues involved in surveillance, apprehension, and even crime prediction.[84] Such models (part of what has often been labelled, if somewhat opaquely, the "new policing") have encountered heavy criticism from commentators who have pointed at ways that it departs from socio-legal research that has emphasized the benefits of community

policing and human scale engagement in order to address the causes of crime, and not only its episodes.[85] Debates thus joined, the question that lurks in the background is how we ought best to think about the constitutional power of state and local governments in creating the right mechanisms of law enforcement to promote public safety. Must the regulators ultimately choose sides in this difficult debate? And, if so, what, in addition to evidence and careful empirical analysis, ought governments use to make educated assessments of what are truly the best strategies to protect citizen safety?

PUBLIC HEALTH AND PANDEMIC LESSONS

We have considered at different junctures the connection between the police power and public health, a matter that goes back to the very beginning of the republic. After all, it was as early as Gibbons v. Ogden, when Chief Justice Marshall used the example of a quarantine for public health purposes, as an exemplar of the government's broad police power.[86] Public health would be mentioned again by the Court in these early cases, and there would, too, be occasions for the courts to look specifically at state public health measures, as in Jacobson in 1905, and the roots of the police power as a strong source of authority for safeguard the health of our citizens. In short, public health has always been a foundational instance, indeed perhaps the modal case, for state and local governments to have awesome power to act, robustly and rapidly. Moreover, public health regulation has lent itself to the sort of administrative regulation that, as we have discussed, has transitioned in some degree the police power to something that can only be exercised by elected legislatures to something that is part and parcel of our administrative state.

With the recent pandemic, we have learned new lessons. These lessons are illuminating as we consider legal strategies and the puzzles of dispute resolution in litigation when the next major public health emergency emerges. One lesson is that individual rights, and especially religious liberty, are viewed by the current Supreme Court as important constraints on the exercise of the government's police power. The warning that public health emergencies do not mean that constitutional rights are suspended, an obvious truth, drives a good chunk of the Court's thinking in the recent cases concerning religious liberty and the First Amendment. Chief Justices say in the Roman Diocese case that "even in a pandemic, the Constitution cannot be put away and forgotten."[87] And Justice Gorsuch, says, even more colorfully, "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."[88] Until the Court's decisions of 2020 and 2021, the Court had almost never waded into controversies over the use of regulation to combat novel viruses and other threats to public health and the impact on religious liberty. It was not as though there were never religious or other civil liberty objections raised to certain measures. State and federal courts had given rather short shrift to First Amendment arguments against mandatory vaccines for children enrolling in public

schools. Nor, looking beyond religious liberty, had courts shown much sympathy to civil liberties claims brought against public health measures during the height of the HIV/AIDs crisis in the US during the 1980s. But these COVID cases have suggested that there is a new sensitivity to these kinds of liberty claims. Moreover, there is an impatience, often close to the surface in the opinions of conservative judges at both the federal and state level, with state and local officials undertaking what they see as intrusive public health measures to address these long-lasting public health emergencies. While it is hard to have a discussion of these legal issues without bringing in the polarized politics of the COVID period, we can say at least that the pandemic has shifted somewhat the structure of the police power jurisprudence in the direction of a somewhat greater solicitude to civil liberties claims, especially pertaining to religious liberty.

A second lesson from the pandemic, and a hopefully less polarizing one, is that the efforts of state and local governments to create and enforce public health measures has revealed some of the most difficult and vexing matters of American federalism. What Justice Brandeis celebrated as the value of the laboratories of experimentation through regulatory innovations can be seen in light of COVID strategies as an often confounding series of truly experimental strategies, undertaken without consistent national administrative guidance and often with strong evidence of path dependence. To take one obvious example, the initial spate of sheltering orders in March and April of 2020 were nearly identical to one another, despite the variegated needs and conditions of states and local governments. This is understandable, as our governments were scrambling under unimaginably stressful conditions, with the rapidly expanding (and evolving) coronavirus and the imperative to act immediately and decisively. However, this cookie-cutter approach became less obviously sensible as time passed and as governments presumably gathered more fine-grained information and local knowledge. What we saw in the pandemic was that the police power as a necessary constitutional power for action gave little if no practical guidance to government officials in how best to protect the public health, nor did it in any way incentivize these officials to work collaboratively across borders to implement strategies that would be more comprehensive in effect and benefit from more collective wisdom.

Perhaps this was the role of the federal government, as the consolidating, if not, strictly speaking, centralizing, force in this vital national effort. And yet this illustrates a third lesson from the pandemic, and that a consequence of the absence of a national police power is that the federal government has a limited menu of regulatory options to confront the pandemic's impact. Within these limits, to be sure, are a significant number of important interventions, including financial support and creative mechanisms for facilitating collaboration across the states. Moreover, within the federal government are key agencies, such as the FDA and the CDC, whose role in combating a health emergency are vital. Still, decisions to limit freedom of movement and behavior, such as business shutdowns, certain mitigation measures

including social distancing and masking, and mandatory vaccinations, are largely within the purview of the states and decisions made by state (and local governments) under the police power. Public health emergencies do put in sharp relief the respective roles of national and state governments under our constitutional systems of government, while also reminding us that coherent strategies to tackle problems that cross borders and impose burdens on citizens across the nation require collaboration and purposive collective action.

GOVERNANCE AND CONTROL: SHALL WE WORRY?

Michel Foucault long ago warned us about the risk of authoritarianism immanent in the use of the police to control behavior deemed anti-social. He connected this to a general theory of social power, noting that the "[p]olice power must bear over everything …. It is the dust of events, actions, behavior, opinions – everything that happens; the police are concerned with those things of every moment."[89]

The connection between the police power, in its origins and its underlying logic, and the maintenance of social order through appropriate use of the criminal law is a critical piece of the puzzle. Indeed, as we saw earlier in our discussion of the work of some leading scholars on the police power, including Markus Dubber and Christopher Tomlins, the police power comes into early American law through a deeply embedded notion of regulatory power as a means of social control. The all-encompassing quality of police power regulations – and the attendant work of actual policing – is a fearsome mechanism by which public authorities monitor citizen behavior, remove bad elements, and exercise supervisory control. As Vattel described it, government under the police power acts a "teacher and a wise father."

The analysis throughout this book paints a picture of the police power that ameliorates some of the more totalizing elements of this power, and shows how governments, including the courts in adjudication, viewed the police power as a coherent mechanism for protecting the people's welfare. Thus a mechanism would look after individuals' interest in having their liberty and property rights protected while also looking to further objectives of health and safety, objectives in which all citizens have a stake. At first glance, this conception seems rather benign. Who, after all, could be against good governing? However, the implications of a robust police power for regulatory policy can be vast; they can be creative in addressing wicked problems, as have considered in this chapter; and they can even be transformative, insofar as they rehabilitate an old, but still pertinent, view of state constitutions as embodiments of the people's will and objectives while supercharging the police power to frame and help implement these objectives through progressive legislation and administrative regulation. That all said, the police power is not all-encompassing; it is not all of the legal architecture of governance. It is connected in largely themes of American constitutionalism and legal culture, the content of which we have considered in uneven detail throughout this book.

This is not to say that the authoritarian use of the police power is unimaginable. We are experiencing in the current United States the reshaping and deploying of familiar mechanisms and institutions to do damage in our democracy. There is no intrinsic reason why the police power could be dragooned into these anti-democratic strategies. And so there is a broader sense of the police power that animates the concerns raised especially by Dubber in his extensive, thoughtful writings about the police power. This is one that ties the police power to the power of policing, and through the journey from Italy through British common law and natural concepts and finally into American regulatory policy, brings forth a template for more overarching control. This is the police power feared by Foucault. It is, as styled in this account, fearsome, in that it can authorize an overbearing state that, through its *polizia*, through its attention to managing the household, be totalizing, if not totalitarian, in its function.

What is the best response to this ominous concern? First, we should emphasize that the authoritarian account is flatly inconsistent with the vision painted in this book. So far as governments would redeploy the police power to authoritarian or even totalitarian ends, let them articulate their own vision of the police power. Skeptics about the police power and its provenance as a supposedly lawless source of authority to manage our collective "household" do not do so, but instead merely illuminate risks. Second, there are institutional and legal guardrails in the form of democratic legislatures and courts to protect against these risks. Third and finally, the embedding of the police power in theories and traditions of constitutional governance creates a special kind of safeguard.

Still and all, what do we do with the fact that the police power is framed around policing as a strategy for regulating behavior and managing conduct? The answers to these difficult questions, here incomplete, lie in the ways in which we develop checks and channels for government's exercise of its powers. Where Dubber and others are right to remind us of the risks attendant to a capacious police power is in the context is in two important contexts: First, in matters of morals regulation, where the risk is that the government will be pushed toward interfering with individual liberty and private choice (including in intimate matters) in the name of maintaining some version of the well-ordered community and Judaeo-Christian ethics, and will do so under their police power. This is a real risk, in our present era where the desire among Right-wing conservatives to "own the libs" and to fight the culture wars through establishing ever more directive, and even cruel, policies is animate. The police power will inevitably be used to control conduct – it is a regulatory tool, after all – but government ought not to draw from its historic mission of protecting public morals through regulatory intervention authority to engage in perfectionist agendas, ones that sacrifice liberty and also endanger the public's safety and health (mental and physical). A second fear is that the reliance on the criminal law to implement police power objectives fuels government actions that are worrisome on two levels, at the level of law enforcement, given our worry about contemporary policing and the progress still to be made in

rooting out racist and other sinister practices in our police departments, and at the level of penalties. Violating a police power regulation may well come with consequences that range from incarceration to probation and the attendant limits on liberty to financial penalties and other collateral consequences. These results may well be warranted, and we entrust our elected representatives to make these difficult choices. But the ambient worry – our own priors may guide us to whether we find this an objection or merely a concern – is that the police power is used as a mechanism of interfering more actively in private conduct and behavior through the heavy hand of the criminal law. This is not the place to explore in any meaningful depth the matter of alternative penalties and punishments. It is enough to say only that the police power can and should be thought of principally as a means of governing in the direction of general welfare and the well-being of the community; it need not be a fulcrum of a society focused on instantiating opprobrium through the criminal law and meting out punishment that is focused more on suffering than on the commonweal's repair.

As to the matter of crime and criminal justice in particular, we should think about the sources and impact of crime in a responsibly empirical way in order to ground legal solutions and strategies. It is difficult, but yet imperative, to separate the contagious fear of crime in the community from the facts of the matter.[90] Insofar as the police power aspires to reasonable regulation, albeit with proper deference to governmental decision-making, it will be important that public officials undertake strategies that deal with actual crime, not just perceptions, occasionally hyperbolic, of a lawless society. Moreover, it is imperative that government actions involving both criminalization of conduct and the processes of enforcement, from arrest to sentencing, be implemented in a non-discriminatory way. This is, in and of itself, a wicked problem. Our criminal justice system is infused with structural discrimination, persistent and ubiquitous, and with squalid consequences for a society, viewed nationally or locally, that aspires toward fairness and equality.[91] Attention to crime and punishment requires an agile and constructive use of the police power, yet this use must be consistently attentive to the discriminatory underpinnings of our criminal justice system. Taking account of this predicament requires focus on all aspects of the system, beginning with how crime is defined to how the police behave to how the system operates after arraignment and throughout the trial and sentencing problem.

From one vantage point, we might be tempted to say that the concern with anti-discrimination is built into the process through constitutional rights protections, especially the Fourth through Eighth Amendments of the US Constitution. However important are these rights, that cannot fulfill the ultimate objectives of fair criminal justice, including reasonable police behavior, without looking with equal energy at how government sources and operationalizes the police power they have to carry out their responsibilities of combating crime and imposing proper punishment. Finally, a modern police power should look with fresh eyes on alternatives

to the traditional mechanisms of punishment, mechanisms which rely on incarceration, civil fines, and various other punitive measures which are often lumped in as the "collateral consequences" of conviction.[92] The difficulties with traditional models are myriad, and they include concerns with discrimination, as noted above, but there are also structural considerations, for example, the overreliance on plea bargaining and economic incentives for private prisons, that permeate the system across the board. It is worth considering, in our effort to think creatively about a well-suited police power for today's wicked problems, how we might think about the present modalities of punishment.[93] The question we ask that is tied directly to choices about the police power is this: How do present or alternative modalities of punishment for criminal offenses effectively promote public safety and general welfare? Are there less onerous means of accomplishing the same goals and, if so, might the police power's commitment to balancing individual liberty with general community goals counsel a greater use of these less onerous means?

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This discussion, as noted above, does not purport to survey the wide range of policy areas that state and local governments confront. Nor is it intended to rank order the problems by a measure of seriousness. Rather, the aim is to draw upon the analysis of the police power in previous chapters to illuminate the contexts in which governments can and maybe should act under the rubric of their state constitutions and relevant legal authority (thinking, for instance, of the home rule power of cities) to address significant social and economic problems and to respond to emergencies. Much of the discussion of the police power in the literature has been historical; moreover, the focal point has been the nineteenth and early twentieth century, when the police power was taking shape and the scope of national and sub-national authority was being scrutinized by courts and contested in the policy arena. To go back to the very beginning of this book's introduction, the police power has largely faded as a subject of serious scrutiny by constitutional scholars. In this neglect, we have failed to consider the dynamic and relevant role of this extraordinary power, a power that enables and even obliges government to govern, and to do so on behalf of the general welfare of the public.

NOTES

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31. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).
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