



## THE INSCRUTABLE (YET IRREPRESSIBLE) STATE POLICE POWER

Daniel B. Rodriguez\*

The central source of state regulatory power under the state constitutional system is the police power. This is the power given to the state legislature to regulate in the service of the health, safety, and welfare of the citizenry. The police power is commonly viewed as an essential power, one that grows out of our constitutional tradition and therefore need not be established through an explicit textual warrant. Indeed, the concept of the police power emerges out of the basic principle that state constitutions as documents of limit, not of grant.<sup>1</sup>

It is no coincidence that the classic exegeses on the police power are from the Progressive era and its environs. Thomas Cooley,<sup>2</sup> Ernst

---

\* Dean and Harold Washington Professor, Northwestern Prtizker School of Law. I am grateful for the participants in the NYU Law conference for their helpful comments. Special thanks to my Northwestern colleague, Steve Calabresi, and to Robert Williams of Rutgers-Camden Law School.

<sup>1</sup> See ROBERT WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 3 (2009).

<sup>2</sup> See THOMAS COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH RESTS UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (7th ed.1908).

Freund,<sup>3</sup> and Charles Tiedeman<sup>4</sup> provide perspectives on state police power that stress the broad themes of ambitious state regulatory power. These normative arguments navigate around a *Lochner* era jurisprudence that aims to limit state power, principally through substantive due process constraints. The “victory,” so called, comes out of the New Deal and while the attention is lavished on the reconfiguration of national legislative power in the post-1930’s period, the end of the *Lochner* era brings with it a doctrinal and (for the most part) normative acknowledgment that state regulatory power is capacious and relentless.<sup>5</sup>

With this acknowledgment, the scholarly literature on state police power has largely withered away. There are precious few deep analyses, either doctrinally or normatively, about the state police power in the past century. The police power is hard-wired into our state constitutional tradition and state legislation enacted under the rubric of the police power is ubiquitous. However, the police power is seldom part of our constitutional conversation. It remains inscrutable, and, in any case, is little scrutinized.<sup>6</sup>

This article is a prolegomenon to a fuller analysis of the police power. My objective here is a modest one: to renew the conversation about the state police power, a conversation best framed, I suggest, around the internal and external limits on state authority, as well as

---

<sup>3</sup> See ERNST FREUND, *THE POLICE POWER, PUBLIC POLICY, AND CONSTITUTIONAL RIGHTS* (1904).

<sup>4</sup> See CHRISTOPHER TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES* (1886).

<sup>5</sup> See generally HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

<sup>6</sup> There are conspicuous exceptions, especially Prof. Randy Barnett’s important 2004 article, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004). However, Barnett is principally focused on the question of whether and to what extent there are federal constitutional limits on the state police power. These analyses, then, are scrupulously focused on federal constitutional law and history.

the regulatory objectives and techniques of state government. While my focus is not specifically on economic liberties, the worthwhile topic of this symposium, the reader should hopefully see the relevance of this analysis of the police power on the content and protection of such liberties. After all, it is the clash between the liberties of state citizens and the asserted authority of the state legislature around which the fundamental normative arguments are framed and evaluated.

Although the concept of the state police power has been well established in state constitutional for the history of our republic, its shape and scope has evolved over the decades. And this evolution has reflected new understandings of the nature and scope of state constitutional power more generally, a topic that has generated new, insightful scrutiny as the attention to state constitutionalism has grown in recent years. The police power is a key element in our state constitutional tradition; it is irreplaceable – maybe even indispensable – in this respect. It deserves careful scrutiny and perhaps even a reframing.

This article has three parts: First, I describe some of the basic structural ideas behind the police power and its limits. Second, I broaden this discussion in order to help us think about more general limiting principles. Finally, I suggest some reframing of the police power – a modern police power for a modern constitutionalism.

## I. CONCEPT AND CONTENTS

### A. THE POLICE POWER AS AN ELEMENTAL PRINCIPLE OF STATE CONSTITUTIONALISM

Through the police power, state government is given the authority to protect the health, safety, and welfare of its citizens.<sup>7</sup> This is a

---

<sup>7</sup> See FREUND, *supra* note 4, at 3.

general regulatory power and one that is principally lodged in the legislature. The reasons for this broad power are described in more detail below. For now, suffice it to say that the breadth of this power emerges from a key idea in our state constitutional orbit: The state legislature should be the principal instrument for protecting the well-being of its citizens. The scope of these protections should devolve from the basic purposes of government regulation. Accordingly, the police power should be as broad as are the functions and objectives of regulation.<sup>8</sup>

Yet, we should not reduce the police power to just an instantiation of a general theory of governmental power. We might believe that government has a certain sphere of proper authority over individuals, but view one unit of government as empowered to occupy only a part of this sphere. After all, this is a central assumption of our federal constitutional theory, framed famously in the language of the 10<sup>th</sup> Amendment.<sup>9</sup> Government does have a wide authority to regulate, but the federal government is one of limited powers.<sup>10</sup> There-

---

<sup>8</sup> The broad scope of state legislative power is well-established and gains traction as a basic principle of state constitutionalism when, as is frequent, it is juxtaposed with national legislative power under the U.S. Constitution. As Prof. Williams summarizes the point, “the legislative branch is different at the state level from the Congress at the federal level. State legislative power is ‘plenary,’ whereas federal legislative power is enumerated.” WILLIAMS, *supra* note 2, at 249. However, the more intricate question is whether it follows that state legislative power is unrestricted in the absence of explicit textual constraints (leaving aside national supremacy). Whatever the implications of a broader versus narrower perspective on this question, the general point stipulated in the scholarly literature is that state legislatures have constitutional power to regulate in the pursuit of health, safety, and welfare.

<sup>9</sup> U.S. CONST., amend X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People”).

<sup>10</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000).

fore, we need an affirmative argument for why the state *qua* state occupies such a wide amount of terrain of the government's regulatory authority.

This argument, sketched in simple terms, builds on the view of state legislatures as responsible for the core functions of governance. The 10<sup>th</sup> Amendment, by its own terms, reserves to the States or to the People *powers*, not *rights*, and it is a commonplace to view states as the principal locus for the exercise of powers on behalf of citizen well-being.<sup>11</sup> This is true not only as an analytic matter, but also as an empirical description of modern public policymaking. Despite the New Deal and the Great Society, the vast majority of domestic regulation – in education, law enforcement, private property, and so on – is supplied by state and local governments. These governments are principally responsible for handling welfare concerns and considerations involving state citizens.

Standing on its own, this sketch suggests that the police power is of unlimited scope. But, of course, we know this not to be the case. To begin with, there are significant federal limits on state power, these that are manifest in various protections of individual rights in the U.S. Constitution and also, significantly, in the federal government's power to displace state authority under Congress's delegated powers. This principle is as elemental in our American constitutional tradition as is the police power. Underlying this power's breadth requires simultaneously understanding these limits.

No less meaningful, however, are those limits internal to the state constitutions. These are also of two forms: limitations which emerge from the structure of the state constitution and, as well, limits that emerge from individual rights safeguarded by the state constitution.

---

<sup>11</sup> See WILLIAMS, *supra* note 2, at 93 (describing state constitutions as “established tools of lawmaking or policymaking . . . within the legal technology of the states”). See also JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950).

While the national government's restrictions on state regulatory authority gets most of the scholarly ink, it is to the internal limits on state police power that we should look more constructively to understand the police power. And it is to these internal limits that I now turn.

#### B. INTERNAL LIMITS: STRUCTURE

The state's police power is shaped against the background of myriad constitutional limits. Key limits emerge from the structure of the state constitutions. This is not at all a coincidence. Just as the state police power emerged as a strong font of sub-national regulatory authority, so too did state structural limitations on the exercise of such authority.

Broad regulatory power emerged in the late 19<sup>th</sup> century as a mechanism for implementing social policy – for promoting the health, safety, and welfare of its citizens.<sup>12</sup> However, alongside this emboldening of state power came Progressive Era concerns with state legislatures and their susceptibility to corruption and self-dealing.<sup>13</sup> The bargain struck was this: State legislatures would be given wide latitude to regulate and there would be various structural limits baked into state constitutions designed to cabin legislative excess. These limits include public purpose requirements, prohibitions on special legislation, and provisions which fragment policymaking such as the line item veto and initiative lawmaking.<sup>14</sup>

---

<sup>12</sup> *Id.*

<sup>13</sup> See generally JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006).

<sup>14</sup> See WILLIAMS, *supra* note 2, at 257-80.

One should not miss the fact that these limits were usually made explicit in the text of the respective constitutions. The worry expressed by Progressive Era reformers is that state legislatures would run roughshod over interests of the public. These structural limits are designed to cabin and channel the police power in order to strike a balance between regulatory energy on the one hand and public interest on the other.

Two other consequences of these structural limits on the state's police power deserve mention here: First, the restrictions on state legislative power have often empowered the executive branch within state constitutions. This was certainly intentional; this redistribution of power solidified the checks and balances in state governance. One of the consequences of this enhanced executive is a limit on the domain of public policy within the states. To be sure, the executive's power increases with these structural limits on legislatures and, in this sense, the augmented checks and balances serves functions to the analogous institutional relations at the national level. However, there are two key differences. First, the state executive lacks real foreign affairs powers and thus the threats to individual liberty by a strong chief executive at the state level are less than with the President. Second, the chief executive is part of a plural executive scheme in most of our state constitutions that results in a fragmentation of executive power, which reduces the threat to individual liberty.

A second consequence emerges from the structural relationship between state and local governments in the state constitutional system. A centerpiece of the Progressive Era reform movement was the emergence of broad home rule authority for municipalities. The idea behind home rule was to augment local power by creating a dele-

gated authority to act without express state legislative authorization.<sup>15</sup> More controversially, this home rule authority in many states was intended to provide some immunity from state regulation where the municipality was acting in an area of exclusive “local concerns.” Whatever the myriad motivations behind the emergence of this local authority, the effect was to fragment regulatory power by creating another important locus of authority.

These structural limits – the political history, the pattern of adjudication, the impact on the relationship between the legislature, the chief executive, and local governments – impacted the contours of the state police power at least indirectly, and perhaps, as the history suggests, intentionally so. More to the point of this section, police powers have become more limited over the course of a century by these internal limits and the fragmentation of political power within state government. These limits dovetailed with individual rights under state constitutions, the topic I turn to next.

### C. INTERNAL LIMITS: RIGHTS

Traditional analyses of state constitutional rights are often described in fairly blackletter fashion. Many of these rights are equivalent to those found in the Bill of Rights of the U.S. Constitution, including free speech, equal protection, and various criminal justice guarantees. Others are more unique. Taken as a whole, these rights reflect a serious constraint on the scope of the state police power. Yet, they do so in intriguingly different ways.

---

<sup>15</sup> See Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1338 (2009).

### 1. Negative Liberties

Negative liberties in state constitutions are ubiquitous. While on the face of it these rights seem equivalent in scope to federal constitutional rights, they are often interpreted in a more expansive way.<sup>16</sup> Many courts, for example, interpret the state action requirement more liberally, thereby according a broader protection of individual rights of expression. The effect of these individual rights is as one might expect: State legislatures can regulate health, safety, and welfare, but only insofar as these regulations steer clear of the rights and liberties of the citizens.

Worth mentioning in this context as well are the unenumerated rights contained in the state constitutions, including the so-called substantive due process rights that cabin legislative action.<sup>17</sup> The story of the rise and fall of substantive due process at the national constitutional level is a famous one.<sup>18</sup> Considerably less famous in the constitutional conversation is the persistence of substantive due process in the state constitutional context. There are many modern examples of the state courts' invocation of substantive due process, or a doctrine that resembles this in important respects, to limit governmental power. And the principal casualty of this doctrine is the state police power, in that the doctrine is invoked to circumscribe the otherwise broad regulatory power of the state government.

---

<sup>16</sup> See, e.g., James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985 (1993).

<sup>17</sup> See the discussion in Steven Calabresi, *The U.S. and the State Constitutions: An Unnoticed Dialogue*, 9 N.Y.U. J. L. & LIBERTY 706, 708 (2015).

<sup>18</sup> See GILLMAN, *supra* note 6. For a classic critique of this "fall," see BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1981).

## 2. *Economic liberties*

Another species of rights, really a subset of the category of negative liberties described above, are economic liberties. Economic liberties are important, albeit controversial, protections against government interference with individuals' ability to pursue their economic interests.<sup>19</sup> Though largely unknown (or at least unheeded) at the federal level, these liberties have long been part of our state constitutional tradition. Moreover, as other contributors to this symposium point out, they are newly emerging as important limitations on the state government's regulatory initiatives.

While this cluster of rights bears in important ways on the scope of state regulatory power, they do not bear in clear ways on the nature of that power. In other words, the question of how far state legislatures or administrative authorities can go under their respective state constitutions to restrict private activity is a matter of constitutional interpretation of the rights at stake, whether economic or otherwise.

## 3. *Positive Rights*

Especially impactful on state police power are positive rights. These are rights which create responsibilities on the part of state government to implement particular social goals.<sup>20</sup> These positive rights are diverse, but they usually include such key matters as education, housing, and environmental protection. The existence of these rights ensures that the state's police power will be not only limited, but significantly mobilized in the service of ensuring that these positive

---

<sup>19</sup> See generally RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 303-66 (2014); SIEGAN, *supra* note 19.

<sup>20</sup> See generally EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (2013).

rights are enforced.<sup>21</sup> We might look at the relationship between state police power and positive rights in two ways. In one sense, these positive rights can be seen as restricting the domain and discretion of the state legislature. Positive rights are, quite simply, more substantially far-reaching as constraints on the scope of the state's police power. A second, and I would argue, better way to view the matter is to see positive rights as representing a part of the fundamental shape of the state police power. In the basic formulation, the police power is conceived as a source of *authority*, but not as in any sense a *responsibility*. However, positive rights represent a constitutional obligation imposed on the state government. This obligation reconceives the state police power as both an authority to safeguard the health, safety, and welfare of its citizens, but as a responsibility to do so. The contours of the positive rights, in this account, essentially shape the contours of the state police power.

To summarize, the rights embedded in state constitutions represent key limitations on state police power. This is not a new development or a new insight. The nature and scope of the police power has always been best understood within the context of these rights (as well as with the structural limits described earlier). However, this brief sketch above of the different types of rights points to a more nuanced picture of the police power. The content of these rights help shape the contours of the police power. Moreover, as I will return to in Part III of this paper, the fact that there are a plethora of meaningful constitutional rights at the state level, including positive rights, reveals a different police power than the classic pro-regulatory vision

---

<sup>21</sup> See Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002); *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989).

associated with the theory of legislative power in our state constitutional tradition.

#### D. FEDERALISM AND FEDERAL LIMITS

An enormous literature on American federalism explores the relationship between federal and state regulatory authority. The state's police power is conventionally viewed as rather outside the scope of these examinations. This is a plausible way of seeing the matter, as there would seem to be nothing about the concept and contents of the police power that would bear meaningfully on the reach of the federal authority over states or, more generally, on the core principles of federal supremacy under the U.S. Constitution. When we dig more deeply into the foundations of American federalism, however, we can see some unexplored issues and tensions.

In one of the more important recent scholarly contributions to the wide federalism literature, Professor Heather Gerken of Yale offers a creative new depiction of the role and function of state (and local) governments under our system of federalism. In the Foreword to the Supreme Court issue of the *Harvard Law Review* from five years ago,<sup>22</sup> Professor Gerken lays out the normative case for what she calls "federalism all the way down." This is a robust federalism that protects the power of sub-national governments as a means of poking and provoking national political institutions and officials into making more socially just decisions. The power of the servant is the power to dissent, to exercise, as she puts it, "'voice' in an exceedingly muscular form."<sup>23</sup> These dissenters, acting within the authorized governance frameworks of the state and local governments, can stir

---

<sup>22</sup> See Heather Gerken, *Foreword: Federalism all the Way Down*, 124 HARV. L. REV. 4 (2010).

<sup>23</sup> *Id.* at 14.

up trouble and engage in conflict, as well as collaboration and conflict on behalf of dissenting minorities. The power to move their agendas forward, into the consciousness of national authorities and the broad general public comes from their insider status. “States and local officials administering federal law,” Gerken writes, “can edit the law they lack the power to authorize precisely because they are inside the system, not outside of it.”<sup>24</sup> So, for example, the decision by San Francisco mayor Gavin Newsom in 2004 to issue marriage licenses to same-sex couples, despite any reasonable basis in existing state constitutional law for this decision, had the beneficial effect of engaging the national debate in a constructive way. But what of the fact that this political move by the mayor was beaten back by the California Supreme Court? According to Gerken, “While local resistance surely has its costs, minority rule at the local level generates a dynamic form of contestation, the democratic churn necessary for an ossified national system to change.”<sup>25</sup>

Let us be clear on the underlying normative agenda at work here. Hers is a national project. Indeed, she situates this argument in a growing literature which she labels “federalism as the new nationalism.”<sup>26</sup> What federalism all-the-way-down aspires to do is to help the project of building good *national* policy. This is true not only of the functions of state governments to *implement federal law*, but also in the circumstances in which state governments are *enacting state law*. So, this is a really remarkable twist: Even purely state law should be seen as a means of advancing national interests. As her Yale colleague, Abbe Gluck, puts it succinctly: “Congress has asked the states to enact their own state laws, create new state institutions, and pass new

---

<sup>24</sup> *Id.* at 38.

<sup>25</sup> *Id.* at 47

<sup>26</sup> Heather Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014).

state administrative regulations – in other words, to exercise their sovereign powers in service of the national statutory project.”<sup>27</sup>

Federalism, in sum, creates the space for democratic contestation by citizens exercising voice at the sub-national level and in ways that national authorities are obliged to respect. This will counteract the power of majorities to use federal institutions to dampen dissent and disable minorities. Loyal opposition by sub-national governments enables minorities to speak truth to power.

Professor Gerken’s federalism analysis points in potentially opposite directions so far as the police power is concerned. From one direction, we can see this view of federalism-all-the-way-down as supporting a more robust state legislative power against the federal government. States’ broad exercise of power as a dissenting enclave, as a minority unit in a majoritarian system, is necessary to combat national oppression. State police power, in this account, is a necessary salve for a governance scheme in which states are fundamentally at risk. To be sure, Gerken frames this in classic federalism terms as the state’s autonomy from federal control. But note how the logic of her analysis points to a strong state regulatory presence, this in order to enable these sub-national governmental units to fight fire with fire.

## II. FROM LIMITS TO LIMITING PRINCIPLES

Perhaps the most sensible way to think about the modern police power is as a broad, and rather banal, expression of the idea that state government has wide latitude to regulate, along with a blackletter collection of structural and rights limits on such authority. But are there more ambitious theoretical ways to think about the police power? Can we sketch a coherent narrative?

---

<sup>27</sup> Abbe Gluck, *Our National Federalism*, 123 YALE L.J. 1996, 2007 (2014).

Such a narrative, if one can be constructed, must be lodged in an understanding of state regulatory power, both with respect to regulatory objectives and techniques.

#### A. REGULATORY OBJECTIVES

The shape of the state police power does not emerge inexorably from some abstract theory of governmental power, something, as it were, about the very nature of the relationship between government and the governed. Rather, it emerges from a clear-eyed conception of regulation and its proper functions.

We return to the welfarist ideology behind the police power. State legislative power is designed to serve the objective of promoting well-being – health, safety, and welfare – within the state. Why is the state legislature the proper venue for such action, given alternative, and potentially competing governmental arrangements, such as the executive branch, the bureaucracy, or local governments?

The answer lies in the comparative advantage of state central authority in overcoming collective action problems and providing a suitable mix of public goods. Broad legislative authority via a muscular police power is designed to solve the usual range of problems which occasion regulatory intervention in the first instance. I deliberately equivocate here on the question of whether and to what extent regulatory intervention at one or another level is warranted. Rather, my point here is that there is a coherent connection between the (mostly) received wisdom of regulatory intervention to solve collective action problems and to redress social inequalities and a broad police power.

Still and all, the connection is incomplete. We need to dig deeper into the configuration of the state regulatory apparatus to see how the police power succeeds or fails to meet our regulatory objectives.

I described earlier the idea that state legislatures have a comparative advantage in the regulation of private conduct. But to whom are the stage legislatures are being compared? Initially, we should ignore the state versus federal comparison. This is simply beside the

point of the police power inquiry. In other words, there is no reason to believe that the evaluation of the superiority or inferiority of the federal government in regulation bears on the scope of state's police power. By contrast, there is a real question about whether the state legislature is superior as a regulator than other institutions in state government, local governments, or private ordering. This is not the place to get at these complex issues, but it is worth noting that the shape of the police power is formed in no small part by the best assessment of the state legislature's comparative advantage.

Health and safety are two of the three pillars of the regulatory objects of the state police power. The other is welfare. This category is especially complex given its opacity. Welfare can include a wealth of social policy goals and, in that sense, can conceivably be limitless. Would it not include matters that are quintessentially, or at least historically, local, such as zoning and education? It is hard to see such matters as not about citizen welfare. A plausible account of this welfare power would view the state as endeavoring to solve certain problems which would elude regulation at other levels of government.

Would this include wealth redistribution? While there are other sources of state authority to redistribute wealth, including the taxing power,<sup>28</sup> it is not clear whether such regulatory authority is properly encompassed under the state's police power. This is a hard question, the answer to which is beyond the scope of this paper. However, here, too, I would suggest that we be clear to ask the right question and that is how the police power serves the regulatory objectives of modern state government.

Surely the assignment of the state police power to the legislature is no accident. State legislatures are viewed as possessing plenary powers; they are noted by the framers and post-founding theorists

---

<sup>28</sup> U.S. CONST. art. I, § 8, cl. 1.

and judges as the principal locus for republic governance. And given the narrow ambit of foreign policy activity at the state level, it makes eminent sense to see the legislature as the fulcrum of policymaking power and prerogative in our constitutional framework.

If we disaggregate certain regulatory objectives, we might have reasons to view with more skepticism the idea that it is principally to the state legislature we look for locating regulatory power. In regards to the capacious notion of welfare, what if the issue on the table is the distribution of public monies collected through a general scheme of taxation? Or, to make matters more complicated, suppose that the issue entails state borrowing, so as to impact deliberately the credit balance of the state? One of the key internal structural limits on state police power is the state debt limits expressly provided for under most state constitutions. However, below the ceiling set by a state constitutional rule there may be levels which would impact deleteriously the economic well-being of the state. To the extent that we distrust state legislatures because, the standard economic analysis suggests, they may invest in logrolling and other forms of rent-seeking behavior in a way that generates sub-optimal debt or credit decisions, we might well want to read the police power more narrowly. The principal basis for this narrow reading would be that the regulatory objectives at issue – expanding state debt – are ill-suited for state legislative choice. It is not that we would disable the state legislature from exercising policy discretion, but it is that we would be wary of giving them unfettered authority to do so. We come back to the point that the scope of the police power should be viewed in the context of the larger regulatory objectives of the state government and, correlatively, our assessment of state legislative incentives and performance.

#### B. REGULATORY TECHNIQUES

It is most convenient to think about the state police power as a delineated sphere of regulatory power – how much can the state legislature regulate? In the previous section, I suggested that we should

think about this, at least in part, from the vantage point of the state's regulatory objectives. In addition, as I will describe in this section, we should think about the available, useful techniques of regulation. After all, the value of a police power is connected to the utility of certain regulatory strategies.

State legislatures enact public policy through a variety of techniques, each emerging from political considerations and also judgments by government officials acting under myriad conditions and constraints. I would expect that state legislatures are subject to kinds of interest group influence described in the modern public choice literature.<sup>29</sup> One meaningful implication of this conventional description of legislative policymaking for the police power is that state legislatures will take maximum advantage of a broad police power to choose among a menu of regulatory techniques. But the interesting question is whether we should care. Or, to put it another way around, should we endeavor to limit state legislatures to a certain list of regulatory tactics?

The arguments against doing so are formidable. Part and parcel of authorizing state legislatures to regulate in the name of health, safety, and welfare is the correlative authority to decide how best to regulate. Surely the legislature knows better about how to carry out their regulatory strategies than does a court or another governmental institution. Moreover, the complexity of public policy necessitates flexibility in regulatory choice. State legislatures are presumably well suited to make broad and narrow regulatory choices, with comparatively greater access to information and the capacity to consider regulatory costs and tradeoffs.

---

<sup>29</sup> See generally DANIEL FARBER & PHILIP FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

On the other hand, we can be skeptical about state legislative practice. Legislators act in ways that are short-sighted and self-interested. Legislative rent-seeking is omnipresent and the very reason for the plethora of internal structural limits was to restrain not only the scope of state legislative power, but also the manners in which state legislatures imposed their will upon citizens and firms.

Consider this: Should the state legislature be able to delegate its authority to protect public safety to administrative agencies? How about to special purpose governments? How about quasi-governmental entities? Finally, what about to mostly private entities? These questions have been pursued in state constitutional litigation – although not to a certain, trans-state resolution – but, to the best of my knowledge, they have not been connected to the state police power. Rather, the general view has been that the broad scope of state regulatory power goes hand-in-hand with broad discretion to choose among different techniques of regulation, including the choice to delegate this police power to other units of governance.

### III. REFRAMING THE POLICE POWER

In the previous two Parts, I have sketched in a preliminary fashion some considerations that ought to bear on the proper conception of the police power. As discussed in Part I, the scope of internal limits and also the relationship between national and state power will help us orient our view of the police power. And, in Part II, I discussed, again just briefly, the connection between the police power and regulatory objectives and techniques. My aim in this final part is to tie together these observations into some broad themes that provide some foundational ideas worthy of further research and analysis..

First, the fact of a police power emerges from key themes in American federalism. The division of authority between the state and federal governments under the Constitution tracks the fundamental difference between the national Constitution as a document of grant – that is, one in which the national government has only those powers delegated to it, with all the remainder of governmental power

“reserved to the states respectively or to the People” – and the state constitutions as documents of limit. In this vein, state regulatory power is best viewed broadly precisely because the national government’s power is circumscribed. The tacit premise underlying the Supreme Court’s modern decisions restricting state power and resisting the idea that the national government has a police power is that states can and do exercise substantial regulatory authority. The discussion of federalism in a previous section of this paper suggests that the theory, if not the doctrine, of federalism bears on the subject of the police power.<sup>30</sup> While a fuller connection between federalism and the police power is beyond the scope of this paper, the basic elements of this connection have been sketched above.

Second, the nature of the police power can be understood only when we understand fully the sources and contours of the limitations of this power. To be clear about the point I am making here, I suggest that it is not only the scope of the power that is shaped by these limits – that, of course, would be circular – but it is also the nature of this power that is so shaped. We should view the matter of positive rights (what, when, and how) through the prism of the police power. After all, the ways in which we fashion the responsibilities of the state government to implement these highly aspirational positive rights is tethered to the scope of the state’s police power. So, for example, the right to housing is inextricably linked to the authority of the state legislature to enact statutes under their welfare authority. Indeed, it would make little sense to fashion a positive right in any meaningful sense without undergirding legislative authority with a broad police power. The power goes along with the responsibility, and vice versa.<sup>31</sup>

---

<sup>30</sup> See *supra* text accompanying note 7.

<sup>31</sup> Note that this insight provides a partial explanation to why positive rights cannot be adequately squared with Congressional power under the U.S. Constitution. To be sure, we could, as a conceptual matter, envision a national constitution having positive

Third, the matter of economic liberties presents an intriguing puzzle so far as the police power is concerned. Significant constraints upon the state government's authority to interfere with the economic liberties of its citizens are difficult to square with the broad regulatory authority entailed by the police power. This is especially notable in connection with governmental redistribution. Does the state have, as part of its police power, the authority to engage in highly confiscatory land use regulation? Although these issues have generally been analyzed through state eminent domain provisions, there will be circumstances in which these provisions will be inapplicable or, at least, insufficiently illuminating on the precise regulatory matter in issue. If so, we will be led back to the fundamental question of whether and to what extent the state legislature can interfere with economic liberties through a police power. Others have ably canvassed the history of economic liberties under American state constitutions. This historical analysis points to a plausible rendering of the police power in which there are embedded constraints on government regulation. At the same time, the history of the police power – also, a proper object of scholarly inquiry – suggests that the late 19<sup>th</sup> century expansion of state regulatory power as delineated in key cases, did effectively limit the scope of economic liberties under the state constitutions. It remains open to consider whether the reemergence of economic liberties will bear upon the scope of the state police power. Given the ubiquity of state regulation, many of which impacts on individuals' economic choices, I am pessimistic that important constraints on state police power will emerge out of the libertarian constitutional revival.

Fourth, there is ample room for reimagining the state police power around regulatory strategies. Our state constitutional law is

---

rights – indeed, many foreign constitutions do exactly this. Yet it would be difficult to design such a constitution without providing to the national government what is essentially a police power.

not agnostic about regulatory tactics and institutional choice. There are limits on the scope of regulatory delegation, on the devolution of power to local governments, on the choice to “privatize” certain subjects, and so on. These limits emerge more often than not from judicial constructions of the structural provisions of state constitutions, including the separation of powers. When contrasted with federal constitutional law, these limits are much more fulsome and impactful. From one perspective, this seems ironic, given the broad latitude accorded to state legislatures under the police power. However, there is more sense to this than meets the eye I would argue, as the broad scope of the state police power can be accommodated under our system of divided, limited government only insofar as there are some intelligible limits on the choices of the state legislature about how best to regulate.

This insight suggests a more general theme about the proper interpretation of the police power: The main safeguards of individual liberty in light of this state police power are structural. Moreover, they are internal to the state constitution and not derivative of national constraints, be they through authorized federal power or through constitutional rights.

Ought we to be content in leaving the main safeguards to the internal structures of state constitutions? My tentative answer is yes, and this for the following reasons: First, our system of federalism gestures strongly toward state constitutions as the principal levers of state governance and also the main constraints on the exercise of state power. Federal legislative supervision, while obviously meaningful, should be interstitial. Second, these structures have proved reasonably resilient in cabining state legislative excess. Third, and relatedly, the fact that state constitutions are comparatively easier to amend gives us some important protections in the case in which state legislative power goes off the rails.

#### IV. CONCLUSION

In this paper, I have aspired principally to raise some pertinent questions about the proper understanding and scope of the police power. To be sure, I have perhaps raised more questions than I have provided answers. But this is due in no small part to the fact that the police power is, while a fulcrum of state constitutionalism, left largely to one side of the constitutional road. With ubiquitous constitutional limits, both from external and internal sources, there seems little reason to plumb the depths of the power itself. But this inattention is a mistake. As a general matter of constitutional analysis, we should be wary of decoupling constitutional rights from constitutional powers. Moreover, as attention returns anew to particular types of constitutional rights and liberties – including economic liberties – perspectives on state regulatory power are meaningful and valuable. Finally, we are in the midst of a renaissance in state constitutional law and theory. Within this renaissance, there is ample room for careful analyses of the basic structural principle of state governmental power, that is, the police power. This power, persistent, inscrutable, and indispensable, warrants serious attention from serious constitutional scholars.