

# The Evolving Police Power: Some Observations for a New Century

BY GLENN H. REYNOLDS\* & DAVID B. KOPEL\*\*

The conventional wisdom about the scope of state police powers goes like this: in the early days of the Republic, state regulation was limited by the common law principle of *sic utere tuo ut alienum non laedas* (you should use what is yours so as not to harm what is others'), implying that legitimate regulation existed only to prevent concrete harm to specified interests. Sometime around the (previous) turn of the century, the story continues, the principle changed from the old *sic utere* to the new principle of *salus populi est suprema lex* (the good of the public is the supreme law), suggesting that states could regulate as they chose so long as they claimed to be working to promote the public safety, welfare, or morality.

Like all such conventional wisdom, this approach is somewhat simplistic.<sup>1</sup> But it captures a large grain of truth. The range of activity that courts, and legal scholars, view as within the scope of legitimate regulation is considerably larger than it was previously. In 1886, for example, influential legal commentator Christopher Tiedeman wrote:

This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State. According to the maxim, *sic utere tuo, ut alienum non laedas*, it being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. Any law which goes

---

\* J. D. Yale Law School (1985); B. A. University of Tennessee (1982). The author is Professor of Law, University of Tennessee.

\*\* J. D. University of Michigan (1985); B. A. Brown University (1982). The author is the Research Director, Independent Institute; an Associate Policy Analyst, Cato Institute; and the Director, Center on Digital Economy, Heartland Institute.

1. See, e.g., WILLIAM J. NOVAK, *SALUS POPULI: THE ROOTS OF REGULATION IN AMERICA, 1787-1873* (1991); William J. Novak, *The Well-ordered Market: Law and Economic Regulation in 19th-Century America*, 18 L. & SOC. INQ. 1, 7-10 (1993); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 336-38 (1998).

beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a governmental usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions.<sup>2</sup>

By 1904, on the other hand, Ernst Freund could write, with some measure of plausibility:

But no community confines its care of the public welfare to the enforcement of the principles of the common law. The state places its corporate and proprietary resources at the disposal of the public by the establishment of improvements and services of different kinds; and it exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are unskillful, careless, or unscrupulous.<sup>3</sup>

In short, then, the traditional view, espoused by Tiedman, was that state power could legitimately be employed to protect individuals from direct harm; the newer view, represented by Freund, was that the state could regulate even to prevent harms that might not occur, or that might not have been considered harms at all by the common law.

For some time, it appeared that Freund's view had won the day, with broad consensus that legislatures could regulate practically anything so long as they were doing so in the public interest.<sup>4</sup> Nor was the question of whether legislation was really *salus populi* something the courts would review: as Justice Douglas famously remarked in *Berman v. Parker*, when the legislature has spoken, the

---

2. CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES, at 4-5, (1886), citing *Thorpe v. Rutland R.R.*, 27 Vt. 140, 149-50 (1854).

3. ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 6 (Arno Press 1976) (1904) (emphasis in original).

4. See *Stokes v. County Clerk*, 264 P.2d 959, 961-62 (Cal. 1953) (holding that requiring disclosure of race and color on application for marriage license is a valid exercise of police power).

public interest has been declared in terms well-nigh conclusive.<sup>5</sup> By the 1980s, in fact, we were arguing over Robert Bork's view that majorities can legitimately do anything not explicitly prohibited by the Constitution: outlaw birth control, for example, based solely on the fact that some people do not like the idea of others having sex for fun.<sup>6</sup> Bork's view was essentially the same as the Blackstonian view that nineteenth-century Americans thought had been repudiated by the American Revolution: "[T]he king is, and ought to be, absolute; that is, so far absolute that there is no legal authority that can either delay or resist him . . . unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary; declaring, that thus far the prerogative shall go and no farther."<sup>7</sup>

But a curious thing has happened. Just as the expansive view of state power seemed to have won, cracks began to appear. As we will demonstrate in the next few pages, courts are now, *pace* Robert Bork, circumscribing the legitimate sphere of state authority in ways that seem more consistent with a *sic utere* than a *salus populi* approach. This not only has obvious implications for the jurisprudence of state police powers, a subject considered dead for most of this century, but also raises some broader questions about the evolution of legal doctrine in general. We will explore both points.

## I. Rights and Powers

The *salus populi* principle that the legislature can do anything it

---

5. 348 U.S. 26, 32 (1954).

6. See ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 254-55 (1990). According to Bork:

Suppose that the lawyer for Connecticut in *Griswold* argued that a majority, or even an intense and politically influential minority, regarded it as morally abhorrent that couples capable of procreation should copulate without the intention, or at least the possibility, of conception. Could the Court demonstrate that this moral view is wrong or that moral abhorrence is not an important and legitimate ground for legislation?

*Id.* at 234. Moreover:

The law prohibiting the use of contraceptives impairs their sexual gratifications. The state can assert, and at one stage in the litigation did assert, that the majority of Connecticut's citizens believes that the use of contraceptives is profoundly immoral. Knowledge that it is taking place and that the state makes no attempt to inhibit it causes those in the majority moral anguish and so impairs their gratifications.

*Id.* at 257-58. For a further discussion of Bork's work in this vein see Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold, and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1096-1103 (1990).

7. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \* 250.

wants, unless expressly forbidden by the Constitution, has always rested upon a somewhat shaky foundation. For a nation founded on the notion that the Constitution is the supreme law, binding even legislatures, the claim that the public good—as determined by the legislature—is in fact the Supreme Law raises troubling questions. Certainly it is a view that the Framers would have regarded as controversial. In the words of Justice Joseph Story:

Whether, indeed, independently of the constitution of the United States, the nature of republican and free governments does not necessarily impose some restraints upon the legislative power, has been much discussed. It seems to be the general opinion, fortified by a strong current of judicial opinion, that since the American revolution no state government can be presumed to possess the transcendent sovereignty to take away vested rights of property; to take the property of A and transfer it to B by a mere legislative act. A government can scarcely be deemed to be free, where the rights of property are left solely dependent upon a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty, and private property should be held sacred. At least, no court of justice, in this country, would be warranted in assuming, that any state legislature possessed a power to violate and disregard them; or that such a power, so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people, in the usual forms of the constitutional delegation of power. The people ought not to be presumed to part with rights, so vital to their security and well-being, without very strong, and positive declarations to that effect.<sup>8</sup>

In other words, courts should not sit idly by when the legislature takes property from A to give it to B. Rather than asking “Does the Constitution expressly forbid such an act?” the courts, according to Justice Story, should ask, “Does the Constitution expressly allow such an act which is contrary to common law principles?”

Justice Story, of course, was the most important “pro-government” judge and legal scholar of the first half of the nineteenth century, and his Supreme Court decisions created the foundations of constitutional federalism as we know it. To the legal mind who did more than any other to augment government power in the early

---

8. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 510-11 (Ronald D. Rotunda & John E. Nowak eds., 1987). Justice Story’s spelling of “trancendental” is different from modern spelling, but not erroneous. Story was writing before Noah Webster’s dictionary standardized American spelling.

republic, it was obvious that courts could not defer to legislative judgments that the “public good” required taking A’s property to give to B.

Nor was Story the only figure in early American constitutional law to take this view. In a famous opinion in *Calder v. Bull*, the staunch Federalist Justice Salmon Chase made the same point:

I cannot subscribe to the omnipotence of a state Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law of the state. The people of the United States erected their constitutions or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the federal, or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded.<sup>9</sup>

Chase’s colleague, Justice James Iredell, agreed that legislative powers are necessarily finite, and subject to judicial review:

If, then, a government, composed of legislative, executive and judicial departments, were established, by a constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power, could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government any court of justice would possess a

---

9. 3 U.S. (3 Dall.) 386, 387-88 (1798).

power to declare it so . . . .

In order, therefore, to guard against so great an evil, it has been the policy of all the American states, which have, individually, framed their state constitutions, since the revolution, and of the people of the United States, when they framed the federal constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries . . . . There are then two lights, in which the subject can be viewed. 1st. If the legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid.<sup>10</sup>

Or, as Iredell had said earlier, before joining the Court, a constitution is “a declaration of particular powers by the people to their representatives, for particular purposes. It may be considered as a great power of attorney, under which no power can be exercised but what is expressly given.”<sup>11</sup>

Future Justice Oliver Wendell Holmes, in his first major legal work—an annotated version of Chancellor Kent’s *Commentaries* wrote:

[A]cts which can only be justified on the ground that they are police regulations, must be so clearly necessary to the safety, comfort, or well-being of society, or so imperatively required by public necessity, that they must be taken to be impliedly excepted from the words of the constitutional prohibition.<sup>12</sup>

Thomas Cooley, the leading constitutional scholar of the second half of the nineteenth century, explained “the principles . . . which have been settled,”<sup>13</sup> regarding the police power: The police power allowed government to establish rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of corresponding enjoyment by others.<sup>14</sup> In other words, *sic utere*.

And although “These rules seldom raise any question of constitutional authority, it is possible for them to be pushed to an extreme that shall deny just liberty.”<sup>15</sup> Cooley then listed a wide

---

10. *Calder*, 3 U.S. at 398-99.

11. GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, 600 (1969) (quoting Iredell).

12. 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 340 n.2 (12th ed. O.W. Holmes Jr. ed., 1873) (1826).

13. THOMAS M. COOLEY, *GENERAL PRINCIPLES OF CONSTITUTIONAL LAW* iv, 310-327 (1998) (2d ed. 1891).

14. *Id.* at 238.

15. *Id.* at 238-39.

variety of regulations (regarding divorce, employment, and other topics) that were legitimate under the police power, but he also pointed to laws that had been held to be void because they were not a proper exercise of the police power.<sup>16</sup> (Rather than being voided because the laws violated some positive, enumerated constitutional right.)

Notably, even Ernst Freund, the expositor of the broad police power theory that dominated legal thought in the twentieth century, emphasized that judicial review was still essential:

Effective judicial limitations on the police power would be impossible, if the legislature were the sole judge of the necessity of the measures it enacted . . . [T]he maintenance of private rights under the requirements of the public welfare is a question of proportionateness of measures entirely. Liberty and property yield to the police power, but not to the point of destruction . . . .

The question of reasonableness usually resolves itself into this: is regulation carried to the point where it becomes prohibition, destruction, or confiscation?<sup>17</sup>

For example, Freund pointed out that laws regulating the disposal of dead bodies were easily justified as safety and health measures. Yet:

Probably the courts would control legislative discretion were it exercised in an unreasonable manner. Thus, a legislative prohibition of cremation on the ground that it is contrary to good morals, would not be likely to be acquiesced in by the courts; and as a measure to prevent the concealment of crime, it

---

16. See *Ex Parte Kubach*, 85 Cal. 274, 276 (1890) (ordinance made it a crime for a city contractor to require employees to work more than eight hours a day), *cited in* COOLEY, *supra* note 13, at 242 n.5; *Gaines v. Burford*, 1 Dana (Ky.) 479 (1833) & *Violett v. Violett*, 2 Dana (Ky.) 323 (1834) (property owner cannot be compelled to improve his own real estate), *cited in* COOLEY, *supra* note 13, at 248.

17. FREUND, *supra* note 3, at 60-61. Many cases support this proposition. See, e.g., *Wisconsin M. & P. R.R. Co. v. Jacobsen*, 179 U.S. 287, 301 (1900) (holding that statute's legality depends on "whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved."); *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (rejecting argument that upholding Constitutionality of segregation in transportation could lead to arbitrary legislation because "every exercise of the police power must be reasonable."); *Reagan v. Farmer's Loan & Trust Co.*, 154 U.S. 362, 397 (1894) (holding that governments may impose rate regulations on business, but courts must inquire if the regulation "is unjust and unreasonable, and such as to work a practical destruction to rights of property . . ."); *Toledo, W. & W. Ry. Co. v. Jacksonville*, 67 Ill. 37, 41 (1873) (holding that requirement that railroad keep a flagman at every railroad crossing is unreasonable); *Rideout v. Knox*, 148 Mass. 368, 373 (1889) (reasoning that small limitations on property rights are legitimate uses of police power, but that "larger ones could not be, except by the exercise of the right of eminent domain.").

might be held to go beyond the reasonable requirements of that purpose.<sup>18</sup>

Freund recognized that the police power over health and safety could be invoked for almost any possible law. Therefore, courts had to make their own determination if the law in question was in fact a proper use of the police power:

Yet if the passage of a statute were conclusive evidence of the existence of the danger and if the necessity of the remedy, the power of the legislature in the most important field of the police power would be practically unrestricted. Whatever may have been or may be in some cases now, the profession of the courts as to deference to the judgment of the legislature and unquestioning confidence in its good faith, yet as a matter of fact courts do not surrender their control as to the necessity or appropriateness of a safety or health measure. It is been said that "it is for the legislature to determine the exigency (that is, the occasion) for the exercise of the power, but it is clearly within the jurisdiction of the courts to determine what are the subjects upon which the power is to be exercised and the reasonableness of that exercise."<sup>19</sup>

Freund's lengthy treatise, while containing many, many examples of laws which were upheld (properly, in Freund's view) also describes many cases for which Freund applauded the courts for striking "unreasonable" legislation. Though Freund started from the premise that the police power authorized an extremely wide variety of reasonable legislation, even Freund recognized that the power was finite:

[I]t would be unwarranted to conclude that this power can always be set in motion, simply to subserve the convenience of the public. It would be a novel doctrine to assert that the state could describe what kinds of goods a dry goods merchant shall keep, how many salesmen he shall employ, how the goods shall be exhibited to buyers, or how long his store shall be kept open. The public interest of convenience is not as urgent as that of health or safety, and hence does not justify similar interference with private rights.<sup>20</sup>

Such views do not prove, of course, that the *sic utere* approach, in which legitimate legislation and regulation is limited to the protection of existing rights from invasion, is the only justification for state

---

18. FREUND, *supra* note 3, at 118. Courts are more rigorous in reviewing municipal legislation than in review state legislation. *See id.* at 132-33.

19. *Id.* at 134 (quoting from *In re Morgan*, 26 Colo. 415, 424 (1899)).

20. *Id.* at 416. Freund added that convenience regulations would be appropriate for a monopoly, or for a company which had been granted special privileges. *See id.*

authority. Besides the police power, governments had their tax power, their war power, and so on.<sup>21</sup>

The limitations on the police power do, however, cast considerable doubt on the correctness of the conventional-wisdom interpretation of *salus populi*, in which legislatures are empowered to regulate for the good of the community, and (short of direct collision with explicit constitutional prohibitions) only legislatures have the authority to decide whether that is what they are doing.<sup>22</sup> As we have just demonstrated, the notion that the government can rob A for B's benefit, and conclusively pronounce the robbery to be "for the public good" and therefore beyond judicial review is not the dominant view of nineteenth-century legal thought.

For if Justice Iredell's notion of a "great power of attorney" is to mean anything, it must mean that the power exists only where exercised for appropriate ends.<sup>23</sup> And who normally determines whether a power of attorney has been exceeded? The courts, of course. One might expect, under this theory, to see courts examining a particular legislative enactment by weighing its purposes against the legitimate ends of government (as established, perhaps, by the relevant federal and/or state constitutions, and by what we know about what the Framers of both documents considered to be the legitimate ends of government) and then upholding or striking down the law based on whether it is consistent with those ends or not.

## II. The Modern Cases

Interestingly enough, applying the *sic utere* principle seems to be what courts are doing today, in at least a few categories of cases.

---

21. Freund distinguished the police power from criminal legislation. The latter was directed at "the punishment of acts intrinsically vicious, evil, and condemned by social sentiment; the province of the police power is the enforcement of merely conventional restraints, so that in the absence of positive legislative action, there would be no possible offense." *Id.* at 21-22.

22. Such an approach is also inconsistent with the Tenth Amendment, which provides that "[t]he 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." U.S. CONST. amend. X. This language makes clear that there are some powers of government that are reserved "to the people" and hence not within the legitimate sphere of either federal or state governments. Reading the Tenth Amendment together with the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people," strengthens this view. U.S. CONST. amend. IX.

23. Or, in an alternative formulation, where the legislation is "fit for the ordinary purposes for which laws are passed." See Daniel Farber, *The "Unwritten Constitution" and the U.C.C.*, 6 CONST. COMMENTARY 217, 220 (1989).

What is even more interesting is that the categories have to do with things that—at least in the view of contemporary police power theorists like Bork—should be well within the power of states to regulate: things like sex, marriage, procreation, and parenting. Yet the analysis in these cases seems more consistent with the traditionalist approach than with that of modern state power enthusiasts such as Bork. It would seem that twenty-first century advocates of civil liberty are rediscovering their nineteenth-century roots.

### A. Parenting and Procreation

*Davis v. Davis*<sup>24</sup> was a case of first impression. The immediate question was what rights parents have to frozen embryos. The case has been enormously influential,<sup>25</sup> but its importance to our discussion stems more from its analysis than its outcome.

One part of *Davis*' analysis dealt with the question of how much authority the state could exercise to limit individuals' procreational autonomy. The answer was, not much. According to the Tennessee Supreme Court, the Tennessee Constitution, together with the "fundamental maxims of a free government,"<sup>26</sup> prohibits the passage of laws that are oppressive or interfere with liberty. The Court continued:

Indeed, the notion of individual liberty is so deeply embedded in the Tennessee Constitution that it, alone among American constitutions, gives the people, in the face of governmental oppression and interference with liberty, the right to resist that oppression even to the extent of overthrowing the government. The relevant provisions establishing this distinctive political autonomy appear in the first two sections of Article I of the Tennessee Constitution, its Declaration of Rights:

Section 1. All power inherent in the people—Government under their control.

That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an inalienable and

---

24. 842 S.W.2d 588 (Tenn. 1992).

25. See, e.g., *Kass v. Kass*, 673 N.Y.S.2d 350, 354 (Ct. App. 1998); *Kass v. Kass*, 663 N.Y.S.2d 581, 586 (A.D. 2d Dept. 1997); *Janicki v. Hospital of St. Raphael*, 744 A.2d 963, 970 (Conn. Super. Ct. 1999); *Hecht v. Superior Court*, 16 Cal. App. 4th 836, 846 (1993) (following or discussing *Davis*).

26. STORY, *supra* note 8, at 511; *Davis*, 842 S.W.2d at 599 (quoting *Thiede v. Town of Scandia Valley*, 14 N.W.2d 400, 405 (Minn. 1944)).

indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.

Section 2. Doctrine of nonresistance condemned.

That government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.<sup>27</sup>

Obviously, the drafters of the Tennessee Constitution of 1796 could not have anticipated the need to construe the liberty clauses of that document in terms of the choices flowing from *in vitro* fertilization procedures. But there can be little doubt that they foresaw the need to protect individuals from unwarranted governmental intrusion into matters such as the one now before us, involving intimate questions of personal and family concern.<sup>28</sup>

This passage is striking. The court draws on the first principles of limited government—after all, a state constitution that grants the right to revolt against arbitrary and oppressive power can hardly be construed to grant such power to the government it establishes—as a source of protection for individual rights, despite the absence of any direct textual warrant. Though this opinion is steeped in “original intent,” it is a far cry from the majoritarianism that Robert Bork, and many scholars on the Left routinely champion. It also seems quite inconsistent with the notion that *salus populi est suprema lex*. In the *Davis* court’s approach, the sphere of government is not unlimited, nor are individual rights narrowly delimited islands of affirmative textual protection in an otherwise boundless sea of governmental power. Rather, governmental power is limited within a sea of

---

27. *Davis*, 842 S.W.2d at 599-600 (quoting the Tennessee Constitution).

28. *See id.* The “right of revolution” mentioned by the court is not unique to Tennessee as the court thought. The New Hampshire Constitution declares:

Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

N.H. CONST. art. I, 10. It is, however, possible that Tennessee is the only state whose official history speaks approvingly of armed rebellion against the duly constituted authorities. *See A History of Tennessee, in STATE OF TENNESSEE, TENNESSEE BLUE BOOK*, 321, 406-07 (1998) (describing the “Battle of Athens,” in which ex-GIs shot it out with the Sheriff and fifty “deputies” defending the corrupt political machine in McMinn County, Tennessee as the beginning of a statewide cleanup of corrupt politics).

individual rights. It is worth noting, too, that this is a decision of a conservative state court, not one noted for its expansiveness in the creation of new rights.

*Davis*' progeny are similar in approach. Later cases such as *Hawk v. Hawk*<sup>29</sup> and *In Re Askew*<sup>30</sup> go well beyond the right of procreational autonomy to recognize a right on the part of parents to raise children as they see fit, subject to state supervision only in cases where the parents are unfit and there is a risk of substantial harm to the child. In *Hawk*, the court struck down a reasonable-sounding statute that allowed grandparents visitation rights, on the basis that the state is without power to intervene in parenting decisions where there is not a significant risk of substantial harm to the child.<sup>31</sup> As generally positive as grandparent visitation is, the court reasoned, the state is without power to require it.

## B. Sex

More dramatic than the parenting cases are those in which state sodomy laws have been struck down. Again, the emphasis is on inherent limitations on state power that appear inconsistent with a *salus populi* approach.

In *Commonwealth v. Wasson*, the court made an exhaustive inquiry into the power of states to regulate homosexual sodomy.<sup>32</sup> Rejecting the analysis of the United States Supreme Court in *Bowers v. Hardwick*,<sup>33</sup> the Kentucky Supreme Court began its analysis with Section Two of the Kentucky Bill of Rights, which provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."<sup>34</sup>

The purpose of this provision, the court stated, could be found in its legislative history:

---

29. *Hawk v. Hawk*, 855 S.W.2d 573, 581 (Tenn. 1993) (holding that neither courts nor legislatures may properly intervene in parenting decisions absent significant harm to the child from those decisions).

30. *In re Askew*, 993 S.W.2d 1, (Tenn. 1999).

31. *Hawk*, 855 S.W.2d at 581; *see also* *Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996) (basing action on Fla. Const. Art. I, § 23, an explicit right of privacy).

32. 842 S.W.2d 487, 490-97 (Ky. 1993).

33. 478 U.S. 186, 192 (1986). The Kentucky Supreme Court does not merely reject *Bowers*' analysis; it is almost tart in its juxtaposition of the Ninth Amendment's language regarding unenumerated rights with the holding in *Bowers*. *See Wasson*, 842 S.W.2d at 493.

34. *Wasson*, 842 S.W.2d at 491.

The meaning of Sections One and Two as they apply to personal liberty is found in the remarks of J. Proctor Knott of Marion County:

“Those who exercise that power in organized society with any claim of justice, derive it from the people themselves. That with the whole of such power residing in the people, the people as a body rest under the highest of all moral obligations to protect each individual in the rights of life, liberty, and the pursuit of happiness, *provided that he shall in no wise injure his neighbor in so doing.*”<sup>35</sup>

The *Wasson* court also quoted an earlier decision in which it had interpreted the Kentucky right of privacy:

Man in his natural state has the right to do whatever he chooses and has the power to do. When he becomes a member of organized society, under governmental regulation, he surrenders, of necessity, all of his natural right the exercise of which is, or may be, injurious to his fellow citizens. This is the price that he pays for governmental protection, but it is not within the competency of a free government to invade the sanctity of the absolute rights of the citizen any further than the direct protection of society requires . . . . It is *not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned*, or to prohibit him any liberty the exercise of which will not directly injure society.

[L]et a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws . . . .

The theory of our government is to allow the largest liberty to the individual commensurate with the public safety, or as it has been otherwise expressed, that government is best which governs least. Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent, and to make them conform to a standard, not of their own choosing, but the choosing of the lawgiver. . . .

....

[W]e are of the opinion that it never has been within the competency of the Legislature to so restrict the liberty of this citizen, and certainly not since the adoption of the present [1891] Constitution. The Bill of Rights, which declares that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness, and that the absolute and arbitrary power over the lives, liberty, and

---

35. *Id.* at 494 (emphasis added) (citation omitted) (quoting J. Proctor Knott).

property of freemen exists nowhere in a republic, not even in the largest majority, would be but an empty sound if the Legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public.<sup>36</sup>

This lengthy quotation from *Campbell* seems to be the core basis of the *Wasson* opinion. As the *Wasson* court notes, “At the time *Campbell* was decided, the use of alcohol was as much an incendiary moral issue as deviate sexual behavior in private between consenting adults is today.”<sup>37</sup> But, said the Kentucky Supreme Court,

The usual justification for laws against such conduct is that, even though it does not injure any identifiable victim, it contributes to moral deterioration of society. One need not endorse wholesale repeal of all “victimless” crimes in order to recognize that legislating penal sanctions solely to maintain widely held concepts of morality and aesthetics is a costly enterprise. It sacrifices personal liberty, not because the actor’s conduct results in harm to another citizen but only because it is inconsistent with the majoritarian notion of acceptable behavior.<sup>38</sup>

....

The Commonwealth has tried hard to demonstrate a legitimate governmental interest justifying a distinction, but has failed. . . . In the final analysis we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform<sup>39</sup>

....

....

. . . Simply because the majority, speaking through the General Assembly, finds one type of extramarital intercourse more offensive than another, does not provide a rational basis for criminalizing the sexual preference of homosexuals.<sup>40</sup>

One could hardly imagine a more devastating reply to the notion of generally unlimited legislative power than this one. Nor is the Kentucky Supreme Court alone in this regard. Many other state courts, in striking down sodomy laws under their state constitutions,

---

36. *Wasson*, 842 S.W.2d at 494-95 (quoting *Commonwealth v. Campbell*, 117 S.W. 383, 385-87 (Ky. 1909)).

37. *Id.* at 495.

38. *Id.* at 498 (quoting A.L.I., MODEL PENAL CODE AND COMMENTARIES, Part II., 1980 ed., pp. 371-72).

39. *Id.* at 501.

40. *Id.* at 502.

have set a similar tone.

In *Commonwealth v. Bonadio*, the Pennsylvania Supreme Court took a similar line in striking down that state's sodomy law:

With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct *does not harm others*. Many issues that are considered to be matters of morals are subject to debate, and no sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people, or even a majority. Indeed, what is considered to be "moral" changes with the times and is independent upon societal background. Spiritual leadership, not the government, has the responsibility for striving to improve the morality of individuals. Enactment of the Voluntary Deviate Sexual Intercourse Statute, despite the fact that it provides punishment for what many believe to be abhorrent crimes against nature and perceived sins against God, is not properly in the realm of the temporal police power.<sup>41</sup>

Likewise, in *Campbell v. Sundquist*, a Tennessee appellate court struck down the state's sodomy law on similar grounds. "Even," said the court, "if we assume that the Homosexual Practices Act represents a moral choice of the people of this State, we are unconvinced that the advancement of this moral choice is so compelling as to justify the regulation of private, noncommercial, sexual choices between consenting adults simply because those adults happen to be of the same gender."<sup>42</sup> The court went on to cite *Wasson* (which it characterized as holding "that the will of the majority could not be imposed upon the minority absent some showing of harmful consequences created by the actions of the minority") and *Bonadio* (including a lengthy quotation that included the passage set out above).<sup>43</sup> The *Campbell* court, like the Tennessee Supreme Court in *Davis v. Davis*, also relied heavily on Article I, Sections 1 and 2 of the Tennessee Constitution, which stress the proper ends of government and the right of revolt against government that proves arbitrary and oppressive.<sup>44</sup>

---

41. *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980) (internal quotations and citations omitted).

42. *Campbell v. Sundquist*, 926 S.W.2d 250, 265 (Tenn. App. 1996).

43. *Id.* at 265-66.

44. *Id.* at 261-62. The court also quotes the Prohibition-era *Cravens v. State*, 256 S.W. 431 (1923), for its strong language on the sanctity of the home as against state regulation.

Similarly, in the case of *Powell v. State*, the Supreme Court of Georgia, citing *Wasson*, *Bonadio*, and *Campbell*, struck down Georgia's sodomy law as outside the police power.<sup>45</sup> According to that court:

In [*Pavesich v. New England Life Insurance*] the Court found the right of privacy to be "ancient law," with "its foundation in the instincts of nature[,] derived from "the Roman's conception of justice" and natural law, making it immutable and absolute. The Court described the liberty interest derived from natural law as "embrac[ing] the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common good." "Liberty" includes "the right to live as one will, so long as that will does not interfere with the rights of another or of the public" . . . . Stated succinctly, the Court ringingly endorsed the "right 'to be let alone' so long as [one] was not interfering with the rights of other individuals or of the public."<sup>46</sup>

. . . .

"Police power" is the governing authority's ability to legislate for the protection of the citizens' lives, health, and property, and to preserve good order and public morals. . . . That the legislative body has determined that it is properly exercising its police powers "is not final or conclusive, but is subject to the supervision of the courts." Thus, the suggestion that OCGA § 16-6-2 is a valid exercise of the police power requires us to consider whether it benefits the public generally without unduly oppressing the individual. Since, as determined earlier, the only possible purpose for the statute is to regulate the private conduct of consenting adults, the public gains no benefit, and the individual is unduly oppressed by the invasion of the right to privacy. Consequently, we must conclude that the legislation exceeds the permissible bound of the police power.<sup>47</sup>

A concurring opinion added:

The individual's right to freely exercise his or her liberty is not dependent upon whether the majority believes such exercise to be moral, dishonorable, or wrong. Simply because something is beyond the pale of "majoritarian morality" does not place it beyond the scope of constitutional protection. To allow the moral indignation of a majority (or, even worse, a loud and/or radical minority) to justify criminalizing private consensual conduct would be a strike against freedoms paid for and

---

45. *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

46. *Id.* at 22 (citations omitted) (quoting *Pavesich v. New England Life Ins.*, 50 S.E. 68 (Ga., 1905)).

47. *Id.* at 25 (citing *Commonwealth v. Bonadio*, 415 A.2d 47, 49-50 (Pa. 1980)).

preserved by our forefathers. Majority opinion should never dictate a free society's willingness to battle for the protection of its citizens' liberties. To allow such a thing would, in and of itself, be an immoral and insulting affront to our constitutional democracy.<sup>48</sup>

### C. Marriage

That such reasoning is not limited solely to matters involving sexual freedom is demonstrated by the Vermont Supreme Court's decision in *Baker v. State*,<sup>49</sup> in which Vermont's ban on homosexual marriages was struck down. We will not discuss that opinion at length here, as it will no doubt receive more than enough discussion from other quarters, and as some aspects of the opinion are *sui generis* and furnish only limited authority where other states are concerned. (Vermont, for example, explicitly permits adoptions by same-sex couples, something that most states do not, and something that the Vermont Supreme Court obviously found significant in its analysis.)<sup>50</sup> Nonetheless, the core holding in *Baker* is consistent with the analysis above: majority sentiment, however deeply held, does not constitute a legitimate basis for a statute disadvantaging a minority in the absence of some empirical evidence of harm to others.<sup>51</sup>

In this regard—its holding that legal restrictions and disadvantages are not legitimate if they are merely what one might regard as “takings” of liberty from one class of persons for the gratification or advancement of another class of persons rather than the community as a whole<sup>52</sup>—*Baker* is consistent with our analysis,

---

48. *Id.* at 27 (Sears, J., concurring).

49. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

50. *See id.* at 885.

51. *Id.* *Baker* held that the test is whether “the law bears a reasonable and just relation to the government purpose,” which must be the “common benefit of the community” and not just for the advantage of persons “who are a part only of that community.” *Id.* at 878-79.

The State's remaining claims (e.g., recognition of same-sex unions might foster marriages of convenience or otherwise affect the institution in “unpredictable” ways) may be plausible forecasts as to what the future may hold, but cannot reasonably be construed to provide a reasonable and just basis for the statutory exclusion. The State's conjectures are not, in any event, susceptible to empirical proof before they occur. . . . [T]o the extent that state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for continued unequal application of the law.

*Id.* at 885.

52. *See Reynolds, supra* note 6, at 1096-1103.

and perhaps foreshadows future decisions.

### III. The Implications

#### A. What is the Proper Scope of the Police Power?

The principle established by these cases is straightforward. State legislatures and local governments have a police power to enact laws for the benefit of public safety, health, welfare, and even morality. But those laws are subject to judicial review as to whether the legislation is reasonably related to those purposes. And the purposes, while broad, are not infinite. Even absent specific prohibitions (*e.g.*, free speech), the legislature is without power to regulate entirely private conduct that poses no risk of harm to others. Majoritarian disapproval of the private conduct (Robert Bork's "moral anguish")<sup>53</sup> is not a cognizable form of "harm" for the purposes of this analysis. As Joseph Story put it:

The fundamental maxims of a free government seem to require, that the rights of personal liberty, and private property should be held sacred. At least, no court of justice, in this country, would be warranted in assuming, that any state legislature possessed a power to violate and disregard them; or that such a power, so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people, in the usual forms of the constitutional delegation of power. The people ought not to be presumed to part with rights, so vital to their security and well-being, without very strong, and positive declarations to that effect.<sup>54</sup>

Indeed, Story's language is even quoted in *Davis v. Davis*.<sup>55</sup>

These cases are not the only examples of this kind of reasoning, but are certainly strong evidence of a strain of thought not accounted for by the Borkian view so common in recent decades.<sup>56</sup> Furthermore, the cases come from states and courts generally regarded as conservative, both in politics and in judicial philosophies.

---

53. *See id.*

54. STORY, *supra* note 8, at 511.

55. 842 S.W.2d at 599.

56. *See, e.g.*, Schmitt v. State, 590 So. 2d 404, 410 (Fla. 1991) (holding that harmless and discreet acts are never "lascivious" merely because they are unorthodox; rather, they must substantially intrude upon the rights of third parties); People v. Onofre, 51 N.Y.2d 476, 485-86 (1980) (striking down New York sodomy statute on grounds of equal protection); Williams v. Pryor 41 F. Supp. 2d 1257, 1274 (N.D. Ala., 1999) (Alabama anti-vibrator statute lacked rational basis).

And they are, in fact, conservative decisions far more consistent with the views of the Framers and early commentators than are the views of many self-described modern conservatives who espouse a doctrine of legislative supremacy outside narrowly interpreted bill of rights protections. Interestingly, these decisions are often rooted in rather mature sources: the *Wasson* case cites an 1891 provision of the Kentucky constitution and a 1909 case interpreting it; the *Powell* case cites a 1905 Georgia decision; and the *Campbell* case quotes a 1923 Tennessee case on the sanctity of the home.

Perhaps the renaissance of this analysis represents the arrival of a new cycle in constitutional philosophy. Certainly much scholarly literature in recent years has suggested that such cycles are a natural and inevitable consequence of common-law style adjudication.<sup>57</sup> There is even reason to think that they may be beneficial, by reinvigorating ossified political positions and reducing the ability of special interest groups to block change.<sup>58</sup>

The next question is whether the reasoning in these cases will find application outside the context of parenting, procreation, and sodomy laws. Certainly the logic of these cases, that the police power may not be invoked simply for moral disapproval of purely private conduct where there is no harm to third parties, would seem applicable in all sorts of other contexts. One example being the home cultivation of small quantities of marijuana for personal consumption.<sup>59</sup> Another being laws against obscenity, where it is

---

57. See, e.g., Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993 (1990); Glenn Harlan Reynolds, *Is Democracy Like Sex?* 48 VAND. L. REV. 1635 (1995); Glenn Harlan Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110 (1991); J.B. Ruhl, *The Arrow of the Law in Modern Administrative States*, 30 U.C. DAVIS L. REV. 405 (1997); J.B. Ruhl, *Complexity Theory as a Paradigm for the Dynamical Law-and-Society System*, 45 DUKE L.J. 849 (1996);

58. See Reynolds, *Chaos and the Court*, *supra* note 57, at 116; Reynolds, *Is Democracy Like Sex?*, *supra* note 57, at 1660.

59. Such an approach would certainly be consistent with the *Campbell* opinion quoted in *Wasson*, 842 S.W.3d at 494-95 (holding no legitimate legislative interest in private liquor consumption). See also *Ravin v. State*, 537 P.2d 494 (Alaska, 1975) (holding that ban on smoking marijuana in own home is beyond legislative power); *but cf.* *Laird v. State*, 342 So. 2d 962 (Fla. 1977). As for the medical use of marijuana, Freund observed, in connection with liquor:

All prohibitory laws make an exception in favor of sales for medical purposes. This is not a legislative indulgence but a constitutional necessity, since the state could not validly prohibit the use of valuable curative agencies on account of remote possibility of abuse. "[T]he power of the legislature to prohibit the prescription and sale of liquor to be used as medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of its sale

viewed in one's own home and where no innocents are harmed in its production or otherwise exposed to it.<sup>60</sup> Or perhaps laws even against obesity and high-fat foods, currently foreshadowed by legislative efforts to declare that an individual's fatness is a "disease" that harms "public health."<sup>61</sup> Certainly the general principle set out by Story *et al.* above would seem to apply to all sorts of activities.

It should be emphasized that a proper judicial role in enforcing the limits of the police power is not limited to "hot-button" issues of personal autonomy such as raising children, consuming marijuana or high-fat food, or having sex. Even in contexts for which the police power, generally speaking, is unquestioned—such as fire protection—courts have stricken fire safety rules after finding that rules in question do not actually contribute to public safety, health, or welfare.<sup>62</sup>

These cases do not suggest that "morality" is *never* a legitimate basis for exercise of the police power. In Samuel Williston's classic formulation, the police power may be used for "safety, health, morals and the general welfare of the public."<sup>63</sup> For example, posting the Ten Commandments in a public park may be intended to promote morality, but religious establishment concerns aside, it is not necessarily inconsistent with proper use of the police power.<sup>64</sup> Thus, conduct that might be outlawed in public spaces (to protect the morality of "the public") cannot necessarily come within the scope of the police power when the conduct takes place in a private home, from which "the public" is excluded. Protecting *public* morality is not

for religious purposes. . . ."

The right to an adequate supply of medicines cannot be cut off by the legislature, and when legal provisions would have such effect they must that extent be inoperative.

FREUND, *supra* note 3, at 210-11 (quoting *Sarrls v. Commonwealth*, 83 Ky. 327, 332-33 (1885)).

60. See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (declaring ban on simple possession of obscenity unconstitutional). *But see* *United States v. Thomas*, 74 F.3d 701, 710 (6th Cir. 1996) (finding that downloading of Internet pornography not protected under *Stanley* if the defendants transported pornography for commercial purposes).

61. S.B. 34, 62d General Assembly, 2d Reg. Sess. (CO 2000).

62. See *Colorado Springs v. Grueskin*, 422 P.2d 384, 388 (CO 1967) (*en banc*) (striking down gasoline delivery regulations after expert testimony showed that the regulations did not protect public safety).

63. Samuel Williston, *Freedom of Contract*, 6 CORNELL L. Q. 365, 375-76 (1921).

64. If there is a problem with posting the Ten Commandments, the problem arises from the First Amendment's establishment clause, and not from the police power. Should a city council vote to post "Ten Secular Standards of Good Moral Conduct," the act would be within the police power.

synonymous with imposing criminal sanctions on *private* actions.<sup>65</sup>

## B. Judicial Activism?

While more and more courts are taking their duty to police the boundaries of the police power seriously, the fear of being charged with “judicial activism” may steer some courts toward a narrow, positivistic interpretation of rights against government (though seldom toward such a narrow interpretation of government *powers*). Yet policing the boundaries of government power, determining the extent of Justice Iredell’s “great power of attorney,” is part of the judicial role. Ensuring that legislatures do not overstep the bounds established for government power in “free and republican” governments is not judicial activism, but judicial fidelity.

Finally, it is no objection to meaningful judicial review of the police power to point out that courts will sometimes draw the line differently from where a critic might have drawn it. Any form of judicial line-drawing—of the scope of the First Amendment, or of the Interstate Commerce Clause, or of common law concepts such as “duress” or “detrimental reliance” necessarily involves human judgment in which judges may differ. This article’s recitation of the various nineteenth and twentieth century cases imposing limits on the police power does not mean that we think every listed case was correctly decided.<sup>66</sup> The point of this article is not to specify *what* judges should decide about the exact limits of the police power; the point is that judges, quite properly, are once again recognizing that there *are* limits.

Almost any time that courts perform their duty of judicial review—especially in a context that requires judgment rather than mechanically following a statute—allegations are raised that judges are using judicial review as a pretext for imposing their own policy preferences. While the risks of judicial policy-making cannot be eliminated, there is no reason why judicial review of the exercise of the police power should be avoided, any more than judicial review of any other common law principle. Proper use of the traditional police

---

65. Freund suggested that the proper question was whether the immoral act was taking place in public—such as soliciting a streetwalker, or selling obscenity as a matter of business, or was beyond the notice of “a non-consenting party”—such as “purely private correspondence though of an immoral character (arranging for an assignation, etc.)” FREUND, *supra* note 3, at 483 n.31. Likewise, laws against the sale of liquor were reasonable, but laws against private consumption would not be. *See id.* at 484-85.

66. For example, Kopel does not agree with the Vermont court’s decision in the gay marriage case.

power standards, in fact, helps guide judges so as to avoid inserting personal preferences, as illustrated in *State v. Brennan*, a recent Louisiana case.<sup>67</sup>

In *Brennan*, the state legislature had completely barred the sale of “obscene devices” for “genital stimulation” (vibrators, dildos, and the like).<sup>68</sup> The state’s asserted interest was preventing the sale of these products to minors, and preventing non-consenting adults from being offended by seeing the devices on sale.<sup>69</sup> Without needing to reach privacy issues, a three-judge panel of the Louisiana Court of Appeals unanimously declared the statute void.<sup>70</sup> The opinion explained that the police power includes “only those laws which are reasonably related to the promotion of a public good such as health, safety, or welfare.”<sup>71</sup> Protection of minors and non-consenting adults was a public good, the court explained, but a complete prohibition on sales was not “reasonable.”<sup>72</sup> Minors could be protected by a law requiring proof of age to buy the products, and non-consenting adults could be protected by laws regulating the display of the products.<sup>73</sup> Hence, the complete ban on sales was not a proper exercise of the police powers.<sup>74</sup>

Robert Bork often criticizes judges who hand down such decisions as being libertines who are imposing their own values on more conservative communities. Not so in the *Brennan* case; two of the three judges added a special concurring opinion whose first paragraph stated, “We personally find the items seized to be shameful, reprehensible, and disgusting.”<sup>75</sup> But because the statute exceeded the police power, it was void.

These cases also illustrate an important way in which state constitutions matter. The national focus of legal education and scholarship tends to center our attention on the federal Constitution, sometimes to the point that we forget that it is only one of fifty-one constitutions in the United States. We are used to thinking of the states as laboratories for policy experimentation but less commonly as laboratories for constitutional experimentation. Of course, they are

---

67. 739 So. 2d 368, 374 (La. App. 1st Cir. 1999).

68. *Id.* at 372.

69. *See id.*

70. *See id.* at 372-73.

71. *Id.* at 371.

72. *Id.* at 372.

73. *See id.*

74. *See id.*

75. *Id.* at 373 (Carter, C.J. and Whipple, J., concurring).

both.

### C. The Police Power's Intersection with Federal Constitutional Adjudication

Thus far, our discussion has dealt entirely with state court cases. This is because state governments have a police power, and the federal government does not. Indeed, the first case on congressional powers in most modern constitutional law textbooks is the leading case that explicitly affirms that congressional authority “[t]o regulate Commerce . . . among the several States, and with the Indian Tribes” is not equivalent to a police power.<sup>76</sup>

Nevertheless, the intellectual currents moving through the state courts are also visible in the U.S. Supreme Court. First of all, the Court has firmly rejected the notion that the federal legislature has the final power to judge the legality of the exercise of the federal legislature's powers.<sup>77</sup>

Second, even with regard to state legislation, the Court is making it clear that legislative powers are finite. Instead of saying that a particular act of a state government “exceeds the police power,” the Court finds that the particular act fails the Fourteenth Amendment's “rational basis” test. Rejecting the view that any possible justification for a law is sufficient for a “rational basis” to exist, the Court has used “rational basis” with bite to strike down zoning law, state residency law, and anti-gay rights law.<sup>78</sup> That the Court says “Fourteenth Amendment limits” instead of “police power limits” does not really change the underlying process of judicial review, for “[t]he textual

---

76. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting U.S. CONST. art I, §8).

77. *See* *Printz v. United States*, 521 U.S. 898, 922 (1997); *Lopez*, 514 U.S. at 566.

78. *See* *Romer v. Evans*, 517 U.S.620 (1996) (holding that anti-gay rights ballot measure fails rational basis test); *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (finding zoning regulations irrational because they do not achieve their asserted, legitimate goals); *Williams v. Vermont*, 472 U.S. 14 (1985) (holding that tax credit for purchasers of out-of-state cars that only state residents could receive violated the Equal Protection Clause; decision was not based on the right to interstate travel); *Hooper v. Barnalillo County Assessor*, 472 U.S. 612 (1985) (rejecting tax exemptions for person who is a resident before a particular date); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985) (eliminating statute that gave tax preference to domestic insurance industries); *Zobel v. Williams*, 457 U.S. 55 (1982) (finding that payment of benefits to state residents based on length of residence violated Equal Protection Clause; right to travel not invoked); *Mathews v. De Castro*, 429 U.S. 181, 185 (1976) (finding a reasonable basis existed to provide married women with Social Security benefits not available to divorced women); *cf.* *Mathews v. Lucas*, 427 U.S. 495, 510 (1976) (finding a reasonable basis existed to permit Congress to differentiate between legitimate and illegitimate children for Social Security benefits).

pegs in the Fourteenth Amendment . . . did not *create* the prohibition on class legislation; rather, they merely *reflected* the scope of the police power[.]”<sup>79</sup>

Perhaps the renaissance of police power jurisprudence in the state courts will help the United States Supreme Court give meaningful content to the Federal Constitution’s Privileges and Immunities Clause, which the Court has recently rediscovered.<sup>80</sup> Given that that clause is binding on both the states and the Federal government, state courts might play an important role in fleshing out its meaning by asking whether particular government actions fall within the legitimate sphere of state power. That is, does an action have the role of protecting third parties from harm, or is it rather intended to exert “that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent, and to make them conform to a standard, not of their own choosing, but the choosing of the lawgiver?”<sup>81</sup>

Finally, it should be noted judicial recognition that the police

79. Jeffrey Rosen, *Class Legislation, Public Choice, and the Structural Constitution*, 21 HARV. J. L. & PUB. POL’Y. 181, 187 (1997) (emphasis in original). As Freund explained:

It is an elementary principle of equal justice, that where the public welfare requires something to be given or done, the burden be imposed or distributed upon some rational basis. This principle lies at the foundation of the law of taxation, and applies equally to the police power. With reference to the latter it may be expressed by saying that to justify the imposition of a burden there must be some connection of causation or responsibility between the person selected or the right impaired and the danger to public welfare or the public burden which is sought to be avoided or relieved.

FREUND, *supra* note 3, at 635. That the principle is not the novel creation of the Fourteenth Amendment is underscored by the first case Freund used for illustration: an 1855 Illinois decision striking down a railroad liability law. Freund specifies:

[R]ailroads were liable to pay the expenses of a coroner’s inquest and burial not only if a person should be killed by its cars or machinery or any accident thereto, but also if any person should die on any of its cars. If a person happens to die on a railroad car from illness, there is evidently not the slightest causal connection between the business of the railroad company and the public inconvenience and loss for which the statute seeks to make the railroad company responsible.

*Id.* (citing *Ohio & Mississippi Ry. Co. v. Lackey*, 78 Ill. 55, 57 (1875)).

80. See *Saenz v. Roe*, 526 U.S. 489, 501 (1999) (rooting right to travel in “privileges and immunities” clause of 14th Amendment to Federal Constitution). Cf. Laurence Tribe, *Saenz sans Prophecy: Does the Privileges or Immunities Revival Portend the Future - or Reveal the Structure of the Present?* 113 Harv. L. Rev. 110, 112 (1999) (“certain rights . . . partake simultaneously of personal self-government and of the system of definitions and relations that describe the form of state and federal self-government that the original Constitution as modified by the Fourteenth Amendment brought about.”).

81. *Wasson*, 842 S.W.2d at 494-95.

power is not infinite helps protect a variety of federal and state constitutional rights. The 1990s cases obviously have important implications for privacy and associational rights, and (derivatively) for protection from searches and seizures in homes and other personal spaces. And as Richard Epstein points out, a police power that is allowed to grow out of control quickly turns into a way for the government to evade the Fifth Amendment's Takings Clause.<sup>82</sup>

### Conclusion

In several recent decisions such as *United States v. Lopez*, *Seminole Tribe*, *Printz*, and *City of Boerne v. Flores*, the United States Supreme Court has begun to emphasize the importance of limited government at the federal level. The cases we have discussed here likewise appear to represent the beginnings of the rediscovery of limited government at the state level.

In a way, this should come as no surprise. The Framers, after all, show no signs of having been enthusiasts for *unlimited* government at any level. As Dan Farber has pointed out:

Although the boundaries of that common understanding may be unclear, it does seem reasonable to assume that the framers took for granted the concept of limited government. In giving the federal government the power to govern the District of Columbia, for example, the framers probably did not believe that they were granting despotic authority over the residents (even though the Bill of Rights did not yet exist). Rather, they probably had in mind commonly accepted limitations on government.<sup>83</sup>

Such limitations, courts appear to be rediscovering, are implied in the grant of governmental power contained in both state and federal constitutions.<sup>84</sup> The implication isn't new—it was regarded as uncontroversial by Justices as divergent in views as Story, Iredell, and Chase almost two centuries ago—but its rediscovery is.

This rediscovery has important consequences for the affirmative statements of rights contained in both federal and state constitutions as well. In the absence of general limitations on government power, courts confronted with unjust laws have been forced either to contort

---

82. RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD*, 128-148 (1995).

83. Daniel Farber, *The "Unwritten Constitution" and the U.C.C.*, 6 CONST. COMMENTARY 217, 220 (1989).

84. Cf. Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. \_\_\_\_ (forthcoming) (discussing the renewed enforcement, by state courts, of substantive limitations on the form that legislation may take).

affirmative rights protections to allow such laws to be struck down, or to allow manifestly unjust laws to stand because they could not find a way to bring them within the ambit of affirmative rights. The result has been a jurisprudence of rights that is both overexpansive and confused, because it attempts to compensate for a jurisprudence of government power that is itself overexpansive and confused.

Focusing on the legitimacy of government power—whether a particular power claimed by the government can properly be considered part of Iredell’s “great power of attorney,” or Story’s “general delegation”—avoids many of these problems. As the cases discussed in this essay illustrate, it will seldom be difficult for courts to identify laws that are passed for improper reasons. Measuring the fit between a statute and “legitimate governmental purposes” is likely to be both less difficult and less controversial than determinations of whether or not to “discover” a new positive right. Indeed, it is noticeable that the many gay-rights decisions mentioned above did not create any significant backlash in their states, even though those states are often generally regarded as conservative. Perhaps this is because language about limited governmental power suits Americans, and American political culture, more often than does language about new positive rights.

Perhaps this last point should come as no surprise either, at this moment in history. The twentieth century was the century of governmental power expanded to a maximum. It is perhaps no coincidence that it was also the century that saw more war, and more government-sponsored genocide and slaughter, than any other in memory. As Assistant Secretary of State for Human Rights John Shattuck notes, in the twentieth century, “the number of people killed by their own governments under authoritarian regimes is four times the number killed in all this century’s wars combined.”<sup>85</sup> As Neal Stephenson reminds us, the twentieth century was one in which limits on state power were removed in order to let

the intellectuals run with the ball, and they screwed everything up and turned the century into an abattoir. . . . We Americans are the only ones who didn’t get creamed at some point during all of this. We are free and prosperous because we have inherited political and value systems fabricated by a particular set of eighteenth-century intellectuals who happened to get it

---

85. Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 *YALE L.J.* 995, 1025-26 n.141 (1995) (quoting Shattuck).

right. But we have lost touch with those intellectuals.<sup>86</sup>

Given the dreadful record of the twentieth century's experiment with government power unleashed in the name of public good, a renewed appreciation for government power of a more modest sort might be a good thing. In rediscovering the Framers' conception of limited government, these cases may serve to point the way.

---

86. NEAL STEPHENSON, *IN THE BEGINNING . . . WAS THE COMMAND LINE* 53 (1999).

