



10-7-2015

Community Rights and the Municipal Police Power

Stephen R. Miller

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>

Recommended Citation

Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675 (2015).
Available at: <http://digitalcommons.law.scu.edu/lawreview/vol55/iss3/4>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

COMMUNITY RIGHTS AND THE MUNICIPAL POLICE POWER

Stephen R. Miller*

TABLE OF CONTENTS

Introduction	676
I.A History of the Police Power	679
A. “Police” and the Enlightenment	682
B. The “Police Power” and the Industrial Revolution	686
C. Lochner’s Liberty	691
D. Berman’s Delimitation	694
E. Residual Sovereignty and the Commerce Clause	696
F. In Sum	701
II.The Community Rights Movement.....	702
A. “Community rights” enumerated	702
B. The power to proclaim “community rights” ..	704
1. The Radical Argument: Self-Governance as a Fundamental Right.....	704
2. The Pragmatic Argument: The Police Power and Community Rights	708
III.Problems and Prospects of the Police Power as a Community Rights Doctrine	709
A. The Trouble with “Community”.....	709
1. Neighborhoods’ Rights	710
2. Propinquity and the Multiplicity of Communities	712
3. Communities’ Relationships, Weak and Strong	714
4. Teaching Community as a Value	717

* Associate Professor of Law, University of Idaho College of Law – Boise. A.B. Brown University, M.C.P. University of California, Berkeley, J.D. University of California, Hastings. Earlier versions of this paper were presented at the 2014 Association of American Law Schools’ Annual Meeting in New York City, New York and the 2013 Rocky Mountain Junior Scholars Forum in Provo, Utah. Many thanks to attendees at both events for excellent comments.

5. In Sum	719
B. Legal Complexities of Community Rights	719
C. Potential Benefits of a Community Rights Formulation of the Police Power	722
Concluding Remarks	724

“Does not this show, indeed, that law derives its contents from the needs of the community for which it serves?”¹

“While the rights of private property are sacredly guarded, we must not forget, that the community also have [sic] rights; and that the happiness and well-being of every citizen depends on their faithful preservation.”²

INTRODUCTION

From small New England hamlets to major mid-Atlantic cities to sea-side California counties—in largely unnoticed fashion—at least 150 local governments across the country have adopted ordinances proclaiming “community rights” and a right to self-governance that defy long-established legal norms. Though still nascent, the movement may be one of the most rebellious, and radical, in American local government today. The movement also proposes, in part, to redefine the police power, the very foundation of local government regulatory capacity more often defined as the power to regulate for health, safety, welfare and morals.

A review of several of the ordinances brings the movement into focus. In 2006, Barnstead, New Hampshire passed the first Community Bill of Rights Ordinance to ban corporate water privatization.³ In 2010, Pittsburgh, Pennsylvania, adopted a first-in-the-nation Community Bill of Rights Ordinance banning fracking.⁴ In 2014, Mendocino County, California, voters passed Measure S, the Mendocino County Community Bill of Rights Fracking and Water Use Initiative, which not only established “community rights” but also banned fracking as violation of those rights; banned the extraction or

1. W.G. HASTINGS, THE DEVELOPMENT OF LAW AS ILLUSTRATED BY THE DECISIONS RELATING TO THE POLICE POWER OF THE STATE 555 (1900) (first major treatise on the police power discussing same).

2. *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 422 (1837) (discussing nature of the police power).

3. *Community Rights Papers*, COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND, <http://celdf.org/community-rights-papers> (last visited Jan. 12, 2015).

4. *Id.*

sale of local water for use in fracking anywhere in the state; banned the dumping of toxic frack waste; and further banned the transfer of offshore fracking oil or waste through Mendocino County.⁵

The community rights proclaimed by these ordinances are almost identical, typically invoking rights such as the right to pure water, clean air, peaceful enjoyment of home, a sustainable energy future, and the rights of natural communities.⁶ The radicalism of these ordinances is not so much the proclamation of such rights, but instead is the underlying legal claims they make to support such rights. The ordinances announce that the local governments maintain a fundamental right of local self-governance, which they argue derives from the history of pre-Revolution local government autonomy that was preserved by the Declaration of Independence and the Ninth Amendment of the Constitution.⁷ Further, the ordinances proclaim that this self-governance right trumps established norms of federal supremacy and preemption, as well as established norms of local government subordination to state governments ensconced in Dillon's Rule.⁸ The ordinances also deny corporate personhood, and thus purport to strip corporations of the constitutional rights afforded to them.⁹ Each of these three justifications is as much a provocation as a serious legal argument; absent an upheaval of Supreme Court precedent that restructures state and federal power, as well as the rights of corporations, these rationales will certainly fail in the courts. Indeed, as of this writing, at least one federal district court has struck down a community rights-based ordinance, though the case will likely be appealed.¹⁰

Less provocative in nature, but arguably of more lasting significance, the ordinances also state, in the alternative, that the community rights announced constitute "the highest and best use of the police powers" of the local government. Because

5. *Mendocino County, California Adopts Community Bill of Rights Banning Fracking*, COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND, <http://www.celdf.org/press-release-mendocino-co-ca-adopts-community-bill-of-rights-banning-fracking> (last visited Jan. 12, 2015).

6. See, *infra*, Section II(B)(1).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Swepi, LP v. Mora Cnty., N.M.*, No. CIV 14-0035 JB/SCY, 2015 WL 365923 (D.N.M. Jan. 19, 2015).

the ordinances' provisions are written as severable, the police power stands as an independent means of justifying the enumerated community rights. In this way, the ordinances serve not only as a provocation attacking the foundations of supremacy, preemption, and corporate personhood, but also independently stand at the forefront in potentially redefining the police power as a rights-based doctrine.

Redefining the police power as a rights-based doctrine would be a sea-change, but potentially not a change without historical precedent. The municipal police power, of course, is often referenced as the ability of a local government to regulate to benefit the public health, safety, and welfare of a community.¹¹ But that refrain has not always been the police power's definition; indeed, in the Supreme Court's famous late-nineteenth century case, *Charles River Bridge v. Warren Bridge*, the police power was defined in terms of community rights: "While the rights of private property are sacredly guarded, we must not forget, that the community also have [sic] rights; and that the happiness and well-being of every citizen depends on their faithful preservation."¹² Might the police power, again, be defined as the rights of the community? If so, what might that mean for the scope of police power in the hands of local government? Would it be a good idea?

In light of these questions, this article uses the community rights movement as a means of investigating whether the police power, reconceived through the lens of rights, might be a sufficient rationale for supporting not only those rights enumerated by the community rights movement, but also other aspects of community that have previously been viewed as theoretical. Moreover, this article seeks to investigate the legal complexities that would arise from defining the police power as a rights-based doctrine. The article first proceeds, in Section I, to review the history of the police power. Here, the police power's origins, as well as its formulations as "residual sovereignty" and regulation for "health, safety, and welfare" are explored. In Section II, this article then turns to investigating the rights claimed by the community rights movement, as well as the more radical and pragmatic justifications for claiming those rights. Section III then turns to a more theoretical investigation of the notion of community,

11. See generally 6A McQuillin Mun. Corp. § 24:1 (3d ed. 2015).

12. 36 U.S. 420, 422 (1837).

both in legal history and in theory, for purposes of examining the outer limits of what may constitute the community for which rights may be reserved. This section also investigates legal concerns arising from the community rights approach to the police power. The final section offers concluding remarks and considerations for further investigation.

I. A HISTORY OF THE POLICE POWER

For over a century, legal scholars, and even the high court's justices, have lamented the difficulty in defining the police power. In 1895, one legal scholar would write that "[d]iscussions of what is called the 'police power' are often uninformative . . ."¹³ In 1907, an article in the *Columbia Law Review* entitled "What is the Police Power?" noted that, "No phrase is more frequently used and at the same time less understood" than the police power.¹⁴ In 2007, one hundred years later, an article on the police power proclaimed:

The police power suffers from a surprising problem. Though it has been in constant use for many years and has proved important in the vocabulary of American constitutional law (indeed, it has been said to be "one of the most important concepts in American constitutional history"), it is, or stands for, one of the most misunderstood ideas in constitutional law. The meaning and implications of the term are far from clear.¹⁵

Courts have equally given up on meaningful definition. As the Supreme Court conceded in *Berman v. Parker*: "We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts."¹⁶

Given that the police power is the workhorse of local government—the very enabling power that provides most cities their legal authority to act that is used hundreds, if not thousands, of times a day¹⁷—this centuries-long inability to

13. Santiago Legarre, *The Historical Background of the Police Power*, 9 U. Pa. J. Const. L. 745, 747 (2007) (quoting 1 JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW 693 n.1 (1895)).

14. Walter Wheeler Cook, *What is the Police Power?*, 7 COLUM. L. REV. 322, 322 (1907).

15. Santiago Legarre, *The Historical Background of the Police Power*, 9 U. Pa. J. Const. L. 745, 747 (2007).

16. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

17. See generally 6A McQuillin Mun. Corp. § 24:1 (3d ed.) (discussing the breadth of police power's application).

define the power in any meaningful way is not only remarkable, it may be of singular stature in American law. There is arguably no other aspect of law so ubiquitous and so incapable of definition; moreover, there may be no other area of law where courts and commentators have come to consider this as an acceptable *status quo*.

This section provides a history of the police power as a means of understanding the import of the community rights movement to extend the frontiers of the power in contemporary legal frameworks. Admittedly, this approach differs from the relatively small, but extant, literature on the police power, which tends to fall into one of three categories. The first category of scholarship focuses on reconstructing the historic origins of the police power.¹⁸ Two major treatises were written on the police power at the turn of the twentieth century;¹⁹ however, no major treatise has been published on the police power since Ernst Freund's treatise published in 1904.²⁰ The most authoritative explication of the contemporary state of the police power is in McQuillin's local government treatise, which is essentially a three volume tome of several hundred years of conflicting court decisions.²¹ The second category of scholarship reviews the relationship between the police power and takings. Of these articles, the most famous may be Joseph Sax's *Takings and the Police Power*,²² which launched decades of responding articles trying to parse the police power through the Takings Clause.²³ The third category of scholarship,

18. Walter Wheeler Cook, *What is the Police Power?*, 7 COLUM. L. REV. 322 (1907); Robert Eugene Cushman, *The National Police Power under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289 (1919); Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943 (1927); James A. Tobey, *Public Health and the Police Power*, 4 N.Y.U. L. REV. 126 (1927); Thomas Reed Powell, *Current Conflicts Between the Commerce Clause and State Police Power*, 12 MINN. L. REV. 321 (1928); William A. Garton, *Ecology and the Police Power*, 16 S.D. L. REV. 261 (1971); Alan N. Greenspan, *The Constitutional Exercise of the Federal Police Power: A Functional Approach to Federalism*, 41 VAND L. REV. 1019 (1988); Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004); Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745 (2007).

19. ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904); W.G. HASTINGS, *THE DEVELOPMENT OF LAW AS ILLUSTRATED BY THE DECISIONS RELATING TO THE POLICE POWER OF THE STATE* (1900).

20. *Id.*

21. MCQUILLIN MUN. CORP. §§ 24:1–24:746 (3d ed. 2014).

22. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964).

23. Ross D. Netherton, *Implementation of Land Use Policy: Police Power vs.*

broadly speaking, reviews how the police power has been applied in a particular area of law, such as the regulation of obesity and high fat foods;²⁴ motorcycle helmets;²⁵ contraception;²⁶ gay marriage;²⁷ sodomy;²⁸ school desegregation;²⁹ historic preservation;³⁰ billboards;³¹ and zoning,³² to name but a few. All of that said, the literature on the police power remains considerably smaller than any similarly seminal aspect of American constitutional law, and remains even conspicuously smaller in light of the weight the police power maintains as the very basis of most local government action.

This article proposes five “eras” in police power history to give form to the discussion.³³ These five eras are: the emergence of the concept of “police” in the Enlightenment, the intellectual forbearer of the police power; the rise of the police power as a force in local government during the late nineteenth century’s Industrial Revolution; the *Lochner* court’s use of substantive economic due process to dramatically limit police power regulations; the return of the police power as a broad power for local governments in the New Deal, which reached its zenith, arguably, in the articulation of the police power in

Eminent Domain, 3 LAND & WATER L. REV. 33 (1968); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980); Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1 (1996); D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471 (2004).

24. Lawrence O. Gostin, et al., *Assessing Laws and Legal Authorities for Obesity Prevention and Control*, J. L. MED. & ETHICS 28 (2009); Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS-CONST. L.Q. 511, 530 (2000).

25. Case Comment, *Limiting the State’s Police Power: Judicial Reaction to John Stuart Mill*, 37 U. CHI. L. REV. 605, 614–17 (1970).

26. Michael J. Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976).

27. Raymond Ku, *Swingers: Morality Legislation and the Limits of State Police Power*, 12 ST. THOMAS L. REV. 1 (1999).

28. *Id.*

29. Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1 (2006).

30. Case Comment, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963)

31. Mark Bobrowski, *Scenic Landscape Protection under the Police Power*, 22 B. C. ENVTL. AFF. L. REV. 697 (1995).

32. David M. Becker, *The Police Power and Minimum Lot Size Zoning*, WASH. U. L. Q. 263 (1969)

33. These five eras are based upon a synthesis of case law review and legal scholarship in this area.

Berman v. Parker; and finally, contemporary efforts of the conservative wing of the Court, for the last several decades, to use a “residual sovereignty” formulation of the police power to limit the scope of federal power under the Commerce Clause. Each of these eras will now be considered in turn.

A. “Police” and the Enlightenment

The term “police” emerged during the sixteenth century as a synonym for “policy,”³⁴ a meaning that was obsolete by the nineteenth century.³⁵ The first known official use of the term in English to connote the regulation and control of a community was in Scotland where, in 1714, Queen Anne appointed the “Commissioners of Police” for the general internal administration of the country.³⁶

The term “police” matured as a concept during the Enlightenment, though even then, there was substantial confusion as to what it connoted.³⁷ Many legal scholars of the seventeenth and eighteenth centuries—Pufendorf, Vattel, Smith, and Blackstone among them—included some discussion of police in their summary treatises, though that section was often minor in relation to other matters.³⁸

Typical of the discussion of police in these treatises, and perhaps of greatest influence in English and American legal development, was Blackstone’s *Commentaries*.³⁹ Blackstone discusses the police, or “polity”—another term he used synonymously with police—in several small discussions throughout his multi-volume *Commentaries*.⁴⁰ The most salient reference for the development of the concept of police

34. For a detailed discussion of the etymology of the term “police,” see Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 748–50 (2007) (discussing Greek, Latin, French, and Spanish antecedents).

35. 12 OXFORD ENGLISH DICTIONARY 22 (2d ed. 1989); see also *id.* at 749.

36. *Id.* at 750.

37. *Id.* at 761. A number of articles have previously presented this Enlightenment history, which is offered in a truncated form here. See *id.* at 755 (quoting THE BRITISH MAGAZINE OR MONTHLY REPOSITORY FOR GENTLEMEN & LADIES 542 (1763). (“The word police has made many bold attempts to get a footing. I have seen it more than once strongly recommended in the papers; but as neither the word nor thing itself are much understood in London, I fancy it will require a considerable time to bring it into fashion. . . .”)).

38. *Id.* at 751–61.

39. *Id.* at 757–61; William Blackstone, 4 COMMENTARIES ch. 13, available at http://avalon.law.yale.edu/18th_century/blackstone_bk4ch13.asp.

40. 4 COMMENTARIES, *supra* note 39, at 162.

was Book IV where Blackstone proclaims:

By the public police and oeconomy [sic] I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.⁴¹

However, Blackstone's categorization of police would likely confound contemporary understandings. For instance, Blackstone's discussion of police occurs in his book on "public wrongs"⁴² where other discussions focus on legal concepts like nuisance.⁴³ In his discussion of police, Blackstone confusingly employed both a broad and a narrow definition of the "police," which were different than the broad and narrow meanings of the police power that later emerged.⁴⁴ The broad definition included offenses against the "commonwealth or public polity of the kingdom,"⁴⁵ where "polity" and "police" were synonymous.⁴⁶ At the same time, Blackstone subdivided this category of offenses into offenses against public justice, public trade, public health, and the "public police or oeconomy."⁴⁷ In this narrow formulation, the police power is only some subset of offenses.⁴⁸ What the "police" entailed were not clear at all, even to Blackstone. Further, other Enlightenment legal scholars differed with Blackstone's description of police, and there was considerable fluidity in the concept at the time.⁴⁹

The concept of police was also known in the American colonies and to drafters of the Constitution. For instance, Alexander Hamilton refers to police twice in the *Federalist Papers*, in both instances referring to it as the "mere domestic police" of a state or local government, which he believed were "insignificant" in comparison to federal powers.⁵⁰ On the one

41. *Id.*

42. *Id.*

43. *See generally id.*

44. *Id.*

45. *Id.*

46. 4 COMMENTARIES, *supra* note 39, at 162.

47. *Id.*

48. *Id.*

49. Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 751–59 (2007) (discussing differing interpretations of police by Smith, Vattel, and Pufendorf).

50. THE FEDERALIST NO. 17 (Alexander Hamilton) ("The regulation of the

hand, Hamilton's use of the term police indicates that it was operative within the *milieu* at the time; on the other hand, Hamilton's language exhibits a disinterest in the subject, much less whatever connotations of local power he associated with it. Independent of the term "police," James Madison, also writing in the *Federalist*, referred to the States' "residuary and inviolable sovereignty over all other objects" not enumerated as powers of a federal government.⁵¹ Madison's "residual sovereignty" formulation of the police, however, historically held little sway and was seldom used outside of the *Federalist*.⁵²

After independence was declared, a number of state constitutions—including those of New York, South Carolina, Maryland, Pennsylvania, and Vermont—were drafted with explicit provisions mentioning police, several with a common phrase retaining for the state the "inherent right of governing and regulating the internal police."⁵³ By the time of the Constitutional Convention in 1787, the idea that states retained the right to regulate and govern the police seemed

mere domestic police of a State appears to me to hold out slender allurements to ambition."); THE FEDERALIST NO. 34 (Alexander Hamilton) ("The expenses arising from those institutions which are relative to the mere domestic police of a state, to the support of its legislative, executive, and judicial departments, with their different appendages, and to the encouragement of agriculture and manufactures (which will comprehend almost all the objects of state expenditure), are insignificant in comparison with those which relate to the national defense.").

51. THE FEDERALIST NO. 39 (James Madison).

52. W.G. HASTINGS, THE DEVELOPMENT OF LAW AS ILLUSTRATED BY THE DECISIONS RELATING TO THE POLICE POWER OF THE STATE 363 (1900) ("The remnant of power left in the states, after making room for this federal 'supreme law of the land,' is called by the authors of The Federalist the 'residuary sovereignty,' but that name seems not to have obtained generally, perhaps because it served no one's political needs. It is hard to find it outside of The Federalist. It suited those who wished to magnify the states and who feared the growth of power on the part of the national government to omit the qualifying adjective.").

53. Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 775 (2007) (quoting MD. CONST. OF 1776, DECLARATION OF RIGHTS, art. II; N.C. CONST. OF 1776, DECLARATION OF RIGHTS, art. II). Several states adopted this language with slight variations. See DEL. CONST. OF 1776, DECLARATION OF RIGHTS, art. IV ("That the people of this state have the sole exclusive and inherent right of governing and regulating the internal police of the same."); PA. CONST. OF 1776, DECLARATION OF RIGHTS, art. III ("That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."); VT. CONST. OF 1777, DECLARATION OF RIGHTS, art. IV (using language identical to that in the Pennsylvania Constitution). See *id.* at 775.

generally acknowledged.⁵⁴

The role of the police in relation to the Constitution also appears to have been on the minds of delegates to the Constitutional Convention.⁵⁵ There was no agreement, however, on how explicitly the Constitution should refer to the police. On July 17, 1787, nearly mid-way through the four-month Convention, Roger Sherman of Connecticut proposed an amendment prohibiting the federal government from “interfer[ing] with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned.”⁵⁶ Sherman’s proposal, along with three other attempts to insert amendments explicitly referencing police into the Constitution, was rejected by the Convention.⁵⁷

Instead, the Constitution contains three provisions that arguably address the police power indirectly. The most commonly cited provision reserving the police power to the states is 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.”⁵⁸ Recently, the Supreme Court and scholars have also pointed to two additional provisions in the Constitution that arguably buttress the reservation of the police power to the states. The first of these additional provisions is Article I, Section 8, which articulates that the federal government is one of enumerated powers, beyond which, the *Lopez* Court and its progeny have forcefully noted, lay the State’s police powers.⁵⁹ In addition, libertarian scholar Randy Barnett has further argued that the Ninth Amendment, as well as the Reconstruction-era Fourteenth Amendment, provide an express recognition of unenumerated rights, which limit the police power’s application against individual rights, regardless of whatever powers the Constitution may have otherwise reserved to the states through the Tenth

54. *Id.* at 776.

55. *Id.*

56. *Id.*

57. *Id.* at 776–77.

58. U.S. CONST. amend. X.

59. U.S. CONST. art I, § 8. *See also* U.S. v. *Lopez*, 514 U.S. 549 (1995) (“The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”).

Amendment or Article I of the Constitution.⁶⁰

The common understanding today, however, remains that the police power was delegated to the States through the Tenth Amendment.⁶¹ This purported reservation, though, common as it is today, was of little consequence for almost a century after ratification of the Constitution and Bill of Rights.

B. The “Police Power” and the Industrial Revolution

The first use of the term “police power” in U.S. Supreme Court jurisprudence was Justice John Marshall’s reference in the 1827 case of *Brown v. Maryland*, where he remarked that “[t]he power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States.”⁶² There were prior instances when the Court, and Justice Marshall, in particular, made reference to the police in off-handed ways; however, the “police power” emerged out of *Brown v. Maryland* as a new term reflecting an idea that, in that time, was essentially something like Blackstone’s definition of the term, if otherwise without clear definition.⁶³

The use of the term grew, in fits and starts, throughout the nineteenth century. A turn-of-the-century history of the police power noted that the term was not defined in *Bowvier’s Law Dictionary*, the “standard legal dictionary” of the time, in any of its numerous nineteenth century editions until the police power finally appeared in an 1883 edition.⁶⁴

Five major developments in the police power concept occurred as it came into popular use in the late nineteenth century as cities increasingly utilized regulations to curb the negative effects of the Industrial Revolution.⁶⁵

60. Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 431 (2004).

61. See, e.g., *Hodel v. Virginia Surface Min. and Reclamation Ass’n, Inc.*, 452 U.S. 264, 291 (1981) (“The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States’ exercise of their police powers.”).

62. *Brown v. Maryland*, 25 U.S. 419, 443 (1827).

63. Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 783 (2007).

64. W.G. HASTINGS, *THE DEVELOPMENT OF LAW AS ILLUSTRATED BY THE DECISIONS RELATING TO THE POLICE POWER OF THE STATE* 359–60 (1900).

65. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 8.2.1 (2011) (“Beginning in the 1870s, government regulation significantly increased as industrialization changed the nature of the economy.”).

First, courts came to view the police power as a substitute for two generalized doctrines arising from common law. The first doctrine, *salus populi suprema lex*, derived from Cicero, is typically translated as “let the good of the people be the supreme law.”⁶⁶ For instance, in *Boston Beer Co. v. State of Massachusetts*,⁶⁷ the Supreme Court noted that the police power belongs “to that class of objects which demand the application of the maxim, *salus populi suprema lex*; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise.”⁶⁸ The second maxim, *sic utere tuo ut alienum non laeda*, was noted as inclusive within the police power in the *Slaughter-House Cases*:

‘Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,’ says Chancellor Kent, . . . ‘be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.’ This is called the police power.⁶⁹

While the Court had determined that the police power was inclusive of *salus populi* and *sic utere*, the Court was clearly still working to sketch out the nature of the police power in its entirety. As the Court also noted of the police power in the *Slaughterhouse Cases*, “it is much easier to perceive and realize the existence and sources of [the police power] than to mark its boundaries, or prescribe limits to its exercise.”⁷⁰ That lack of boundaries or limits, however, did not limit the police power’s rise.

Second, the Court flirted with multiple means of signifying the police power. One of those approaches followed the Madisonian intimations of the police power as “residual sovereignty.”⁷¹ For instance, in *Munn v. People of State of Illinois*, the Court could announce that the police powers “are

66. CICERO, DE LEGIBUS, Book III, part III, sub. VIII; see also 6A McQuillin Mun. Corp. § 24:10 (3d ed.)

67. 97 U.S. 25 (1877).

68. *Id.* at 33.

69. 83 U.S. 36, 62 (1872).

70. *Id.*

71. See *supra* notes 51-52 and accompanying text.

nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things.”⁷² At the same time, the invocation of the police power grew to its now-more-familiar formulation arising out of the works like Blackstone’s *Commentaries*, which spoke of—in some combination—public health, safety, welfare, and morals.⁷³ For instance, in the landmark case of *Mugler v. Kansas*, the Court noted:

It belongs to that [legislative branch of government] to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.⁷⁴

While this enumerated formulation became commonplace, it was not initially clear whether this definition was more narrow than the Enlightenment discussions of “residual sovereignty.” However, as the Court was largely deferential when deploying this newly enumerated formulation in the late nineteenth century, the definition was at least broadly conceived even if not viewed as equivalent with sovereignty.

Independent of the extent of the police power under either of these formulations, a third major development in the police power also arose in this time: the Court’s clear exertion of judicial review over the legislative exercise of police power. In *Mugler v. Kansas*,⁷⁵ the Court had to decide whether a state law prohibiting the manufacture or sale of alcohol within the state violated the Fourteenth Amendment. The Court’s decision was the first to announce some substantive component to the Fourteenth Amendment’s Due Process Clause,⁷⁶ and with that decision came the Court’s announcement that it could review police power enactments and mandate a requirement of reasonableness:

The police power cannot go beyond the limit of what is

72. *Munn v. People of State of Illinois*, 94 U.S. 113, 125 (1876).

73. *See generally* 6A McQuillin Mun. Corp. §§ 24:12, 24:13 (3d ed.) (noting cases discussing object of police power to the safeguarding of the public order, health, safety, and morals).

74. *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

75. *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273, 291 (1887).

76. *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992) (“[F]or at least 105 years, since *Mugler v. Kansas* [citation omitted], the [Fourteenth Amendment’s Due Process Clause] has been understood to contain a substantive component as well, one ‘barring certain government actions regardless of the fairness of the procedures used to implement them.’”).

necessary and reasonable for guarding against the evil which injures or threatens the public welfare in the given case, and the legislature, under the guise of that power, cannot strike down innocent occupations and destroy private property, the destruction of which is not reasonably necessary to accomplish the needed reform; and this, too, although the legislature is the judge in each case of the extent to which the evil is to be regulated or prohibited.⁷⁷

The Court more clearly announced this two-part test of Court review of police power in *Lawton v. Steele*,⁷⁸ providing that the state had to justify the use of the power by showing (1) “that the interests of the public generally, as distinguished from those of a particular class, require such interference”; and (2) “that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.”⁷⁹ As the *Lawton* Court concluded, “what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.”⁸⁰

As a corollary to the reasonableness requirement, a fourth important development as to the extent of the police power also took shape in this era: the relation of the police power to individual rights. On the one hand, the Court announced in *Boston Beer Co. v. State of Massachusetts*, “All rights are held subject to the police power of the State.”⁸¹ In other words, a fundamental component of the police power is that it prioritizes public over private interests.⁸² On the other hand, the Court held in this era, and in numerous decisions thereafter,⁸³ that federal and state constitutionally-protected individual rights form an outer boundary of the police power. Wrestling between these two poles—the police power’s

77. *Mugler v. Kansas*, 123 U.S. 623, 8 S. Ct. 273, 291 (1887).

78. *Lawton v. Steele*, 152 U.S. 133, 136–38 (1894).

79. *Id.* at 138.

80. *Id.*

81. 97 U.S. 25, 32 (1877).

82. See generally 6A McQuillin Mun. Corp. § 24:5 (3d ed.) (citing numerous cases where courts have noted that a “distinguishing characteristic of the police power is that it is a reasonable preference of public over private interests”).

83. See, e.g., *Noble State Bank v. Haskell*, 219 U.S. 104, 112 (1911), *amended*, 219 U.S. 575 (1911) (“With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides.”); *American Federation of Labor v. Swing* 312 U.S. 321, 325–26 (1941) (“That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights.”).

prioritization of community rights and the simultaneous outer reaches of constitutionally protected individual rights has not been an easy task for the Court.

In *Barbier v. Connolly*,⁸⁴ for example, the Court struggled with the proper balance between the police power and individual rights under the Fourteenth Amendment. The *Barbier* Court noted that neither the Fourteenth Amendment, “broad and comprehensive as it is—nor any other amendment, was designed to interfere with the . . . police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.”⁸⁵ This required “[s]pecial burdens” that were “often necessary for general benefits.”⁸⁶ Such burdens, even if “special in their character,” did not “furnish just ground of complaint if they operate[d] alike upon all persons and property under the same circumstances and conditions.”⁸⁷ If the legislation was “carrying out a public purpose,” “limited in its application,” and “within the sphere of its operation it affects alike all persons similarly situated,” it did not violate the Fourteenth Amendment.⁸⁸

Fifth, the relationship between the police power of states and the commerce power of the federal government was clarified. In the *License and Passenger Cases*, the primary concern was whether state police power and federal commerce power overlapped, or whether they defined mutually exclusive spheres of authority.⁸⁹ The answer, which has been drawn into stark relief in our own time, was that states may act upon matters also regulated by the federal government, but only so long as the federal government has not otherwise preempted state action.⁹⁰ For instance, in the *License Cases*, the Court held that “State power, and especially police power, may be exercised upon matters within the jurisdiction and under the control of the United States without incompatibility or repugnance. The protection of life, health, and property

84. 113 U.S. 27, 5 S. Ct. 357 (1887).

85. *Barbier v. Connolly*, 113 U.S. 27, 31-32 (1884).

86. *Id.*

87. *Id.*

88. *Id.*

89. D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 474 (2004).

90. See *infra* Section I(E).

demand it.”⁹¹ The only limitation federalism imposed was that such laws’ exercise could not “defeat[] or subvert[] the power of the United States,” in which case the law would be viewed as “incompatible or repugnant” of federal supremacy.⁹² The proper division between federal commerce power and state police power has, in our own time, come to be a matter of great debate, as discussed later in this article.⁹³

C. *Lochner’s Liberty*

The *Lochner* era is often viewed as the time in which the Court held a broad view of the substantive due process requirements of the Fourteenth Amendment. In particular, the Court found a liberty of contract within those requirements that permitted a means-ends analysis wielded to overturn economic regulation.⁹⁴ Seldom discussed in today’s commentary is that the legislation overturned by the *Lochner*-era Court was premised on the police power. Indeed, one of the legacies of *Lochner* was not only the substantive economic due process line of reasoning, but also the Court’s discussion and re-framing of the police power in those years. This was not lost on those legal scholars writing at the time of *Lochner*, however. A steady stream of scholarship at the time sought to give voice to the changes and, moreover, tried to shore up the police power as a concept on which economic regulation, as well as other community-minded regulations, might stand.⁹⁵

One of the more important questions of the police power during the *Lochner* era was whether the enumerated formulation of the police power—the regulation of public

91. *Thurlow v. Com. of Mass.*, 46 U.S. 504, 527 (1847).

92. *Id.*

93. See *infra* Section I(E).

94. 1 LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1346 (3d ed. 2000).

95. See, e.g., Charles Warren, *A Bulwark to the State Police Power—The United States Supreme Court*, 13 COLUM. L. REV. 667 (1913); Robert Eugene Cushman, *The National Police Power under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289 (1919); Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943 (1927); Thomas Reed Powell, *Current Conflicts Between the Commerce Clause and State Police Power*, 12 MINN. L. REV. 321 (1928). In addition, it is also worth noting that arguably the most comprehensive treatise on the police power ever written was published the year before *Lochner* was decided. See ERNST FREUND, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (1904). Its publication was undoubtedly influenced by the Court’s turn toward a narrow reading of the police power in previous cases. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 8.2 (2011) (discussing earlier cases).

health, safety, welfare, and morals—was broad and similar to the extent of sovereignty, or an intentional narrowing of the concept. For instance, by 1919, in the case of *Dakota Cent. Tel. Co. v. South Dakota ex rel. Payne*, the Court announced that, “[T]he words ‘police power’ [are] susceptible of two significations, a comprehensive one embracing in substance the whole field of state authority and the other a narrower one including only state power to deal with the health, safety and morals of the people.”⁹⁶ But this was somewhat disingenuous, because there were few regulations that used the residual sovereignty formulation, and thus the real question was whether the enumerated formulation should be conceived of as narrow or broad.

This reading, which framed the enumerated formulation as narrow as against a purportedly broad residual sovereignty formulation, eliminated a third obvious option that had been common in the late nineteenth and early twentieth century: that the enumerated formulation itself might also be a broad grant of power. This narrow reading of the enumerated formulation was aided by *Lochner v. New York* itself. *Lochner* tested whether a New York law limited the hours worked by bakers interfered with the “right of contract” that the Court then found to be “part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.”⁹⁷ New York’s law restricting bakers’ hours had been premised on the police power. *Lochner*’s statement of that power finds itself reduced, and pilloried, for its lack of definition. For instance, the *Lochner* Court notes that “There are . . . certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts.”⁹⁸ The new skeptical tone is followed by a restatement of the police powers as existing “without, at present, any attempt at a more specific limitation related to the safety, health, morals, and general welfare of the public.”⁹⁹ The *Lochner* Court continues, “[b]oth property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers,

96. *Dakota Cent. Tel. Co. v. South Dakota ex rel. Payne*, 250 U.S. 163, 185–86 (1919).

97. *Lochner v. New York*, 198 U.S. 45, 53 (1905).

98. *Id.*

99. *Id.*

and with such conditions the 14th Amendment was not designed to interfere.”¹⁰⁰

The *Lochner* Court further announced that previous cases of the Court have “recognized the existence and upheld the exercise of the police powers of the states in many cases which might fairly be considered as border ones.”¹⁰¹ The “right of contract” of both employers and employees was framed against the “the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state.”¹⁰² In this way, the *Lochner* Court evinced several rationale that, in its era, created a narrow scope of police power. *Lochner* reasoned, in part, that the limitation on baker’s hours was not a “health law,” but instead an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best.¹⁰³

The implication from this line of reasoning is that the enumerated formulation of the police power—health, safety, welfare, and morals—is not merely illustrative of powers or a legal term of art for something akin to sovereignty. Instead, the *Lochner* Court takes that enumerated formulation to mean, precisely, that the regulation of “health” means, in fact, only health, and so on with the other enumerated terms. This narrow formulation is buttressed by language at the end of *Lochner*, which notes that: “It is impossible for us to shut our eyes to the fact that many of the laws . . . passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.”¹⁰⁴ This clearly indicates that, in the eyes of the *Lochner* Court, the police power is nowhere near equivalent to sovereignty, but instead narrowly limited to enumerated powers that, in *Lochner*’s reasoning, are paltry and sham when compared to the well-articulated individual rights found by the Court in the Fourteenth Amendment.

The impact of this hobbled formulation of the police power over the subsequent years of the *Lochner* Court was evocatively illustrated by a 1927 *Harvard Law Review* article, which quantified the Court’s review of state and local

100. *Id.*

101. *Id.* at 54.

102. *Id.*

103. *Lochner v. New York*, 198 U.S. 45, 61 (1905).

104. *Id.* at 64.

legislation approved pursuant to the police power.¹⁰⁵ Between 1868 and 1912, only six percent of police power-enabled legislation reviewed by the Court was held unconstitutional.¹⁰⁶ Between 1913 and 1920, the figures did not change much: just seven percent of police-power enabled legislation was held unconstitutional.¹⁰⁷ However, between 1921 and 1927, twenty eight percent of police-power enabled legislation that was reviewed by the Court was held unconstitutional.¹⁰⁸ In other words, by the Twenties, the police power had become weak, overruled over a quarter of the time in the high court, because of the *Lochner* Court's narrow reading of the enumerated formulation.

D. Berman's Delimitation

The *Lochner* era ended with a series of New Deal-era decisions that affected the police power in perhaps unexpected ways. Namely, the enumerated formulation of the police power—the public health, safety, welfare and morals formulation that *Lochner* had read strictly as limited to those stated purposes—was again given broad interpretation and broad powers.

*Nebbia v. People of New York*¹⁰⁹ was among the New Deal cases that reinvigorated the broad reach of the police power. Its formulation of the police power will sound familiar: “[W]hat are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions.”¹¹⁰ This represented the return to a broad reach of the police power.¹¹¹

105. Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943 (1927).

106. *Id.* at 945.

107. *Id.*

108. *Id.*

109. 291 U.S. 502 (1934).

110. *Id.* at 524–25.

111. *Id.* (“Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution the United States possesses the power, as do the states in their sovereign capacity touching all subjects jurisdiction of which is not surrendered to the federal government These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which

The formulation is, in fact, almost identical to that broad conception of the police power that was evidenced by decisions of the late nineteenth century. By mid-century, the broad interpretation of the enumerated formulation would reach its zenith in *Berman v. Parker*, in which the Court upheld an urban renewal plan to tear down a blighted section of Washington D.C. while announcing:

We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation¹¹²

The *Berman* Court continued:

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it The concept of the public welfare is broad and inclusive The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.¹¹³

The police power that emerges out of *Berman*¹¹⁴ is about as far as the Court could get from *Lochner* while still speaking of the enumerated formulation. Not only is the enumerated formulation of the police power not “delimited” by its enumerated formulation, as *Berman* puts it, but the police power’s breadth goes beyond mere state craft to encompass

will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.”).

112. *Berman v. Parker*, 348 U.S. 26, 31–32 (1954).

113. *Id.* at 32–33 (1954).

114. *Compare* *Kelo v. City of New London, Conn.*, 545 U.S. 469, 519 (2005) (O’Connor, J., dissenting) (“More fundamentally, *Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States.”).

aspirations of aesthetics, beauty, cleanliness, spirit and “balance.”¹¹⁵

In addition to this broad scope, *Berman* also exhibits a profound deference: the legislative act is “well-nigh conclusive” after *Berman*. Indeed, in the world of land use regulation, *Berman* became the bulwark of a whole bevy of new regulations that were buttressed by the scope of its soaring rhetoric, deference to legislative determinations, and seeming annoyance with “fruitless” parsing of police power doctrine.¹¹⁶ After *Berman*, the police power became the *de facto* authority to justify almost every local governmental action. When local governments act, other authorities may be cited, but the police power is always there, as well.

E. Residual Sovereignty and the Commerce Clause

In the contemporary Court, both conservative and liberal justices still generally refer to the police power through its enumerated formulation of health, safety, welfare, and morals; it is also still common that the Court views those police powers broadly.¹¹⁷ Nonetheless, in cases where the Court has sought to limit the scope of the Commerce Clause, the Court has chosen to refer to the police powers in a manner that is in line with the Madisonian residual sovereignty formulation and does not mention the enumerated formulation—broadly or narrowly conceived—at all.

U.S. v. Lopez,¹¹⁸ in which the Court overturned a gun control law enacted upon the U.S. Constitution’s Commerce Clause, was the first of these contemporary cases to use the police power as a limitation on the federal commerce power. The form of the residual sovereignty argument is simple, even if three of the five justices in the *Lopez* majority found there to be sufficient reason to file concurring opinions to the majority

115. See *supra* note 113 and accompanying text.

116. See *supra* note 112 and accompanying text.

117. Several recent cases are illustrative. See, e.g., *Mut. Pharm. Co., Inc. v. Bartlett*, 133 S. Ct. 2466, 2483 (2013) (“we start from the ‘assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.’”); *U.S. v. Kebodeaux*, 133 S. Ct. 2496, 2507 (2013) (Roberts, C.J., concurring) (“I write separately to stress not only that a federal police power is immaterial to the result in this case, but also that such a power could not be material to the result in this case—because it does not exist.”).

118. *U.S. v. Lopez*, 514 U.S. 549 (1995).

opinion.¹¹⁹ Writing for the majority in *Lopez*, Justice Rehnquist begins by noting that the federal government is one of enumerated powers.¹²⁰ To rule for the government in this case, he argued, would require the Court “to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”¹²¹ For purposes here, it is sufficient to note simply that the outer bounds of the federal commerce power, as Rehnquist frames it, is the State’s police power.

This line of reasoning was also picked up in *Lopez*’s concurring opinions. Justice Thomas, in a lengthy concurrence focused heavily upon the police power, noted that,

Although we have supposedly applied the substantial effects test for the past 60 years, we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power. . . . Indeed, on this crucial point, the majority and Justice BREYER agree in principle: The Federal Government has nothing approaching a police power.¹²²

Indeed, it is Justice Thomas, in this concurrence, who most forcefully invokes the police power not only as a limit of the federal commerce power, but also as a statement of what

119. *Id.*

120. *Id.* at 566 (citing *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819) (“Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.”); *Gibbons v. Ogden*, 9 Wheat., at 195 (“The enumeration presupposes something not enumerated”); U.S. Const., art. I, § 8). *McCulloch*, *Gibbons*, and Article I of the Constitution became the trilogy of sources that resound throughout this line of cases.

121. *Id.* at 567–68. See also *U.S. v. Lopez*, 514 U.S. 549, 599–600 (1995) (Thomas, J., concurring) (“Apart from its recent vintage and its corresponding lack of any grounding in the original understanding of the Constitution, the substantial effects test suffers from the further flaw that it appears to grant Congress a police power over the Nation. When asked at oral argument if there were any limits to the Commerce Clause, the Government was at a loss for words.”); *id.* at 602 (1995) (“If we wish to be true to a Constitution that does not cede a police power to the Federal Government, our Commerce Clause’s boundaries simply cannot be “defined” as being “‘commensurate with the national needs’ “ or self-consciously intended to let the Federal Government “ ‘defend itself against economic forces that Congress decrees inimical or destructive of the national economy.’”).

122. *Id.* at 600.

federal power is not.

Justice Souter's dissent in *Lopez* illustrates the novelty of Justice Thomas' turn of phrase. Justice Souter notes, "it was really the passage of the Interstate Commerce Act of 1887 that opened a new age of congressional reliance on the Commerce Clause for authority to exercise general police powers at the national level."¹²³ In other words, at the time of *Lopez*, at least one justice held no compunction of discussing "police powers" as existing at the federal level. For Souter, "police power" was indicative of a type of power that might be exercised, perhaps even in overlapping spheres, by federal and state agents.

Nonetheless, the *Lopez* majority's line of analysis was furthered in the next major decision that rebuffed the federal commerce power, *U.S. v. Morrison*,¹²⁴ which overturned the Violence Against Women Act that had similarly been enacted based upon the U.S. Constitution's Commerce Clause. In *Morrison*, the Court again used the police power as an outer bounds of the Commerce Clause. The Court noted, "[t]he Constitution requires a distinction between what is truly national and what is truly local, and there is no better example of the police power, which the Founders undeniably left reposed in the States and denied the central Government. . . ."¹²⁵

The Court also made clear that it was establishing a line of reasoning with *Lopez* and *Morrison*, citing extensively from their previous discussions of the police power's limitations on the Commerce Clause.¹²⁶ Justice Thomas, in his concurrence in *Morrison*, furthered the cause: "Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise

123. *Id.* at 604–05 (Souter, J., dissenting).

124. *U.S. v. Morrison*, 529 U.S. 598 (2000).

125. *Id.* at 599.

126. *Id.* at 618–19 ("Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims. *See, e.g., Lopez*, 514 U.S. at 566 ("The Constitution . . . withhold[s] from Congress a plenary police power."); *id.* at 584–85 (Thomas, J., concurring) ("[W]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power"), 596–597, 597 n.6 (noting that the first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause).")

of regulating commerce.”¹²⁷

More recently, this line of police power reasoning has made its mark on arguably the most important Commerce Clause decision of a generation: the Court’s decision, in *National Federation of Independent Business v. Sebelius*,¹²⁸ which held that provisions of the Affordable Care Act were not supported by the federal commerce power on which the law was, in part, enacted. The Court’s reasoning, again, deploys the residual sovereignty formulation of the police power. The Court’s analysis followed the analysis previously displayed by *Lopez* and *Morrison*, citing the precedents of *Gibbons v. Ogden*, *McCulloch v. Maryland*, and the reference to the enumeration of federal powers in Article I of the Constitution.¹²⁹ However, the Court then offers an analysis of state’s rights, which culminates in the importance of the police power, again, as the limit against which the federal Commerce Clause must not go further:

The Constitution may restrict state governments—as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization to act. The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution’s text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the “police power.”¹³⁰

Unlike in *Lopez* and *Morrison*, however, where the Court felt it sufficient to simply name the police power as the outside limit of federal commerce power, the Court goes further in *Sebelius*:

State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” *New York v. United States*, 505 U.S. 144, 181, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (internal quotation marks omitted). Because the

127. *Id.* at 627 (Thomas, J., concurring).

128. 132 S. Ct. 2566, 2576–78 (2012).

129. *Id.* at 2577.

130. *Id.* See, e.g., *United States v. Morrison*, 529 U.S. 598, 618–619, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. The Federalist No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."¹³¹

On the one hand, it could be argued the use of the police power as the foil against which to reign in the federal commerce power, does not tell us much about how the Court now views the nature of the police power itself. The police power could simply be viewed as a convenient tool by which to achieve the Court's true objective: reigning in the federal commerce power. On the other hand, recognizing that the police power has become the rhetorical tool against which to limit federal power provides several insights. First, it assists in understanding that the Court is using a broad formulation of state and local power for purposes of reigning in federal power. Second, it is worth noting that the rhetorical formulation for achieving this end is not the police power's enumerated formulation—health, safety, welfare, and morals—which is the formulation the Court typically uses when otherwise validating police power regulations by the Court. Instead, in these cases, the Court turns to the Madisonian residual sovereignty formulation of the police power. Recognizing this helps to bring to light how the police power's lack of definition, much less its rhetorical fluidity, enables both liberal courts—as in *Berman*—and conservative courts—as in *Lopez*, *Morrison*, and *Sebelius*—to apply the same power to different ends under different rhetorical guises.

An awareness of this rhetorical move of the conservative wing of the Court facilitates understanding of how the Court has utilized the residual sovereignty formulation of the police power to reign in a broad federal Commerce Clause power.

131. *Bond v. United States*, 564 U.S. —, —, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011).

Prior to these decisions, it was not uncommon for both the Commerce Clause and the police power to be interpreted broadly—*Berman*'s precedent ran co-terminous with the most broadly decided of federal commerce power cases, such as *Nebbia* and its progeny, for much of the middle twentieth century—and no conflict of powers was found over decades of expanding federal, state, and local regulation. The insistence on a stark divide between sovereigns may be the legacy of how the police power has been presented in its contemporary residual sovereignty formulation here.

F. In Sum

This history has traced the evolution of the police power from its obscurity in late modern thought, through the Enlightenment and American Revolution and into Supreme Court precedent, finally resting with the police power's ubiquitous use in city halls today. This history provides a context for the three definitions of the police power that emerge over time. The first definition is the "residual sovereignty" concept of Madison, which also retained use in the late nineteenth century and has been revived by the contemporary conservative wing of the Court to oppose federal Commerce Clause power; the second definition is the narrow *Lochner* interpretation of the police power as limited to the enumerated formulation of public health, safety, welfare, and morals; and the third definition is the broad interpretation of the enumerated formulation, which was at times almost synonymous with residual sovereignty in the late nineteenth century and, after *Berman*, was again broadly conceived—no longer "delimited"—by its enumerated terms and still grants a high degree of deference to this day.¹³²

While many aspects of the police power are not discussed here, such as the affirmative obligations of the power,¹³³ this

132. Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 793 (2007).

133. See, e.g., Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 52 (2006) ("On the other hand, the lion's share of attention to the police power has been negative, with debate over the limits that the rights of property place on the scope of exercise of the police power. Little, if any, attention has been paid to the other dimension of the police power: what inherent affirmative obligations does the exercise of the police power impose on those who would wield its mighty sword? In particular, what are the inherent obligations that municipalities, to whom the police power has devolved, have in the exercise

section demonstrates that the police power remains a fluid concept with great import for the powers of local governments. Moreover, the extent of those powers is often waged through rhetorical formulations of the power. The importance of such rhetorical formulations in framing the police power is what makes the community rights movement, even if still nascent, of considerable interest to the future of the police power. How might a community rights formulation of the police power strengthen, or weaken, the powers of state and local governments in general, or as against the federal government?

II. THE COMMUNITY RIGHTS MOVEMENT

The community rights movement has largely been spurred on and orchestrated through the work of the Community Environmental Legal Defense Fund (CELDF),¹³⁴ a left-leaning advocacy group with interests in environmental causes that, nonetheless, maintain positions remarkably similar to some far-right libertarian groups that prioritize local control. While CELDF is the intellectual center of the movement, the concepts they espouse have clearly hit a stride with community leaders across the country, as over 150 local governments have adopted a version of CELDF's Community Bill of Rights Ordinance template with relatively minor modifications. In some local governments, the ordinances have been passed into law through ballot initiatives, indicating that the community rights mantle is popular in some local communities. This section proceeds by first investigating the "community rights" that the ordinances typically provide. Then, the section looks at some of the more radical legal claims the ordinances propose and their rationales. Finally, the section investigates whether such community rights may be supported by the ordinances' police power rationales.

A. "Community rights" enumerated

Although the community rights ordinances evince some variation, most are similar to those announced by Baldwin, Pennsylvania (Baldwin Ordinance), which includes the right to "pure water," "clean air," "peaceful enjoyment of home," a "sustainable energy future," the "rights of natural

of the police power? In other words, what is the general welfare?")

134. COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND, <http://www.celdf.org/> (last visited Jan. 12, 2015).

communities,” and the “right to self government.”¹³⁵ The Baldwin Ordinance was chosen for review from over 150 community rights ordinances not because it has any especially unique language but because it is largely in accordance with and representative of the majority of the community rights ordinances.

The Baldwin Ordinance enumerates several “community rights,” all of which focus on environmental concerns. The first such community right announced is the “right to pure water.” The provision states:

All residents, natural communities and ecosystems in Baldwin Borough possess a fundamental and inalienable right to sustainably access, use, consume, and preserve water drawn from natural water cycles that provide water necessary to sustain life within the Borough.¹³⁶

This community right is provocative in several ways. First, it grants a fundamental right related to water not only to residents, but also to non-person subjects—“natural communities” and “ecosystems”—within the local government’s jurisdiction. CELDF has since used language provisions such as this to assert legal standing for ecosystems.¹³⁷ The rights of natural communities provision states:

Natural communities and ecosystems, including, but not limited to, wetlands, streams, rivers, aquifers, and other water systems possess inalienable and fundamental rights to exist and flourish within Baldwin Borough. Residents of the Borough, along with the Municipality, shall possess legal standing to enforce those rights on behalf of those natural communities and ecosystems.¹³⁸

This provision specifically provides for legal standing of natural communities and ecosystems implicit within prior provisions. Moreover, this provision asserts a right to “exist,” perhaps most associated with a sustainability approach to

135. Borough of Baldwin, Penn., Ordinance No. 838, Banning the Commercial Extraction of Natural Gas within the Confines of the Borough (June 2011) §§ 3(a)–(f) [hereinafter BALDWIN ORDINANCE].

136. *Id.* § 3(a).

137. See *First-in-Nation: Ecosystem Files to Defend Legal Rights to Exist & Flourish*, COMMUNITY ENVIRONMENTAL LEGAL DEFENSE FUND (Jan. 12, 2015), <http://www.celdf.org/press-release-first-in-nation-ecosystem-files-to-defend-legal-rights-to-exist-flourish>.

138. BALDWIN ORDINANCE § 3(b).

environmental law, and to “flourish,” which might be associated with restoration and resilience concepts in modern environmental law. The right to a sustainable energy future provision states:

All residents, natural communities, and ecosystems in Baldwin Borough possess a right to a sustainable energy future, which includes, but is not limited to, the development, production, and use of energy from renewable fuel sources.¹³⁹

Such a community right arguably has implications beyond simply conservation, but also establishes a right to energy that could presumably be asserted against state statutes governing oil and gas production, state public utilities regulations, or even federal energy regulatory bodies that might propose energy projects that would affect the local government.

Undoubtedly, anyone familiar with the complexities of the areas of law covered by these substantive community rights realize that they almost certainly conflict with established legal precedents. That is surely the point; CELDF, and those communities that are adopting these community rights ordinances, are intending to challenge the status quo, which they believe is established by a chummy alliance of state, federal, and corporate interests. To better understand their position and why they would engage this line of reasoning, a closer review of the underlying rationale on which they assert such community rights rely is required.

B. The power to proclaim “community rights”

The community rights movement has announced two legal arguments that support local governments’ ability to proclaim community rights. The first is a radical argument based upon facially challenging established norms of corporate, federal, and state power. The second is a more nuanced argument based, simply, upon the police power. This section considers both arguments in turn.

1. The Radical Argument: Self-Governance as a Fundamental Right

The community rights ordinances first proclaim a fundamental right to self-governance, which is important to

139. *Id.* § 3(c).

the legal rationale for these ordinances. For instance, the Baldwin Ordinance, typical of these ordinances, provides:

Right to Self-Government. All residents of The City of Broadview Heights possess the fundamental and inalienable right to a form of governance where they live which recognizes that all power is inherent in the people, that all free governments are founded on the people's authority and consent, and that corporate entities and their directors and managers shall not enjoy special privileges or powers under the law which make community majorities subordinate to them.¹⁴⁰

Though local governments, with the help of CELDF, have elaborated on this argument at length, its salient points can best be summarized by reviewing CELDF's amicus briefs, which have provided the following analysis.¹⁴¹

First, the ordinances argue that there is a fundamental right to self-governance. In declaring this right, CELDF points to the fundamental right test of *Griswold*, which provides that “when considering whether a right is a fundamental right, the court [must] look to whether it is a right “deeply rooted in this nation’s history and tradition.”¹⁴² At the federal level, CELDF argues that the right of self-governance is deeply rooted in the country’s history going back to the Mayflower Compact,¹⁴³ that self-governance was “the cause of the American Revolution,”¹⁴⁴ and that self-governance is the foundation of the Declaration of Independence.¹⁴⁵ In particular, they argue that the Ninth Amendment, which provides that “the enumeration in the Constitution, of certain rights, shall not be construed to deny

140. *Id.* § 3(d).

141. CELDF is typically in the position of filing amicus briefs because lawsuits arising over the ordinances are typically between an aggrieved resident or corporation and the local governmental entity that has adopted a community rights ordinance. Although CELDF has played a significant role in drafting and advising these ordinances, the group’s legal standing is not as a party to the action.

142. *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965)

143. Defendant’s Memorandum in Support of Its Motion for Judgment on the Pleadings at 9, *Pennsylvania General Energy Company, L.L.C. v. Grant Township* (W.D. Pa.) (No. 1:14-CV-209) [hereinafter CELDF MEMORANDUM]. The author made contact with attorneys at CELDF who stated that the CELDF MEMORANDUM discussed in this article is the best statement of the merits of the case. E-mail from Thomas Linzey, Executive Director, Community Environmental Legal Defense Center, to author (Dec. 15, 2014, 14:09 MST) (on file with author).

144. CELDF MEMORANDUM at 14.

145. *Id.* at 18.

or disparage other rights retained by the people,” intended to retain natural rights to the People.¹⁴⁶ Among those fundamental rights retained by the People is the ability to “alter or abolish their form of government whenever they see fit.”¹⁴⁷ They also argue that self-governance is the origin of state constitutions.¹⁴⁸

Under this general framework, the CELDF then makes three specific claims. First, they argue that constitutional rights guaranteed by corporate personhood violate the community right to self-governance established by community rights ordinances like the Baldwin Ordinance.¹⁴⁹ They argue that corporations are creatures of state law, and that the Constitution protects the people against both the state and its creatures.¹⁵⁰ They also challenge the rights granted to corporations by the courts under various amendments, but the legal argument is vague. It appears the argument is that since legal personhood for corporations is a fiction violative of self-governance, rights granted on the basis of that fiction are equally violative of the community self-governance right.¹⁵¹

Second, CELDF argues that Dillon’s Rule infringes on the right to self-governance.¹⁵² Little known outside of the state and local government law context, Dillon’s Rule is a late-nineteenth century set of statutory interpretation canons that sought initially to limit the powers of big city political machines and has since stood for the general proposition that local governments owe their existence to states and thus are subjects of state governments. Dillon’s Rule, and the notion that local governments exist as creatures of the state, has always been known as a legal fiction: there is no doubt that many cities pre-dated existing U.S. state governments owing to cities’ origins as English, French, and Spanish colonial subjects.¹⁵³ Nonetheless, for those states that have adopted Dillon’s Rule, the Rule’s canons have come to largely, if not universally, define the legal standing of local governments as

146. *Id.* at 27–28.

147. *Id.* at 28.

148. *Id.* at 22.

149. *Id.* at 30.

150. CELDF MEMORANDUM at 33.

151. *Id.*

152. *Id.* at 37.

153. *Id.*

subordinate to states.¹⁵⁴ Despite this century of established precedent, the CELDF challenges Dillon's Rule and its progeny as violative of the right of self-governance.¹⁵⁵

Third, and perhaps most radically, the CELDF argues that preemption should act as a floor, rather than a ceiling, to regulation.¹⁵⁶ Despite this claim, the argument here appears not to challenge the doctrine of constitutional supremacy—a sure loser—but rather to challenge the sheer rise of federal and state preemptive laws that the Center argues are typically written at the behest of corporations and that limit local self-governance.¹⁵⁷

Although novel in its scope, the CELDF's argument faces a number of legal hurdles in light of existing state and federal constitutional principles. For instance, the central premise of self-governance as a fundamental right of local government is problematic as the Supreme Court has not, in fact, recognized self-governance as a fundamental right. Further, the challenges to corporate rights, Dillon's Rule, and preemption all are antithetical to established precedents of the last century. CELDF is presumably aware of this: the very point of their critique appears to be that such precedents are, in the grand scope of American law, relative newcomers. Instead, CELDF is urging a return to an era they argue is more in line with the original vision of American law, an era before mid-nineteenth century corporate personhood, before the late-nineteenth century rise of Dillon's Rule, and before an era when federal and state laws routinely preempted local decision making. That, CELDF seems to argue, was a time of local self-governance more closely aligned with the founding documents of the country.

CELDf may win some of these legal claims, but perhaps these radical claims are better viewed as provocations. Even if CELDF loses these claims under established norms, they might still succeed in opening a conversation about corporate

154. *Id.* at 39.

155. *Id.* at 40.

156. CELDF MEMORANDUM at 41.

157. *Id.* at 30 (“Business corporations are a species of property. The doctrine of corporate constitutional “rights” gives the constitutional rights of people to this property. Then, when local government enacts a law that a corporation dislikes, the corporation may assert its constitutionally-derived “rights” to challenge and defeat the law. Thus, the existence and enforcement of that doctrine prevents the people of Grant Township from exercising their right of local, community self-government.”).

rights, Dillon's Rule, and the prevalence of preemption that could lead to more power for local governments. At least one district court, as of this writing, has felt otherwise, and largely rejected these claims.¹⁵⁸

2. *The Pragmatic Argument: The Police Power and Community Rights*

The community rights ordinances also contain a less provocative claim to legitimacy: they are supported by language stating that they are exercises of the municipal police power. For instance, the Baldwin Ordinance provides that, "the protection of residents, neighborhoods, and the natural environment constitutes the highest and best use of the police powers that this municipality possesses."¹⁵⁹ Given that the ordinances also contain a severability clause, all of the provocative claims of legitimacy discussed previously—self-governance and the violations of self-governance by corporate rights, Dillon's Rule, and preemption—could be struck down, and the substantive community rights could still survive if a court held that they were within a local government's police powers. As a result, another way to view the community rights ordinances is purely as a matter of substantive community rights—clean water, clean air, sustainable energy, rights of natural communities, and beyond—all falling within the "delimited" powers of the police power. Viewed in this light, the community rights movement could well be the most substantive challenge to the established norms of the police powers limits in contemporary legal thought. It is also the most substantive effort to frame the police power as a matter of community rights, perhaps the most coherent effort to do so since the Supreme Court's discussion of community rights in *Charles River Bridge*.¹⁶⁰

Although not as provocative as the ordinances' challenge under self-governance as a right, the potential for police power to support community rights might ultimately prove to be a more profound shift in local government law. If the police power were viewed not only as the ability of a local government to regulate for public health, safety, welfare, and morals, but

158. *Swepi, LP v. Mora Cnty., N.M.*, No. CIV 14-0035 JB/SCY, 2015 WL 365923 (D.N.M. Jan. 19, 2015).

159. BALDWIN ORDINANCE § 1.

160. *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).

also to establish community rights, it would provide a new formulation of the police power doctrine with largely unknown results. The following section explores aspects of community rights that illustrate this uncertainty, both potentially for good and ill.

III. PROBLEMS AND PROSPECTS OF THE POLICE POWER AS A COMMUNITY RIGHTS DOCTRINE

The community rights movement posits that the police power may be reformulated as an embodiment of community rights; a further investigation is invited to contemplate the implications of such a change. This section proceeds in three parts. First, this section investigates several sociological and theoretical inquiries as to what defines a community. These investigations help to elucidate the social dimensions of community that, in turn, help to clarify some of problems with implementing rights at a community level. Second, this section investigates several legal obstacles to implementing a community rights formulation of the police power. Third, this section investigates some of the benefits that could arise from a community rights vision of the police power.

A. *The Trouble with "Community"*

Gertrude Stein once quipped of her hometown, Oakland, California, "There is no there there."¹⁶¹ Later, in 2005, several artists erected a sculpture on the border between Oakland and Berkeley that was simply enormous letters reading "HERE" on the Berkeley side and "THERE" on the Oakland side near the cities' jurisdictional bound.¹⁶² The sculpture illustrates an important problem with community as a legal concept: the relative there-ness of community and the here-ness of another involves boundaries. Sometimes these boundaries are jurisdictional, but often they are social, not easily defined, and

161. GERTRUDE STEIN, *EVERYBODY'S AUTOBIOGRAPHY* 289 (1937, 1971 ed.).

162. Carolyn Jones, *Berkeley: No tea cozy for 'There' sculpture*, S.F. CHRON., June 2, 2010, available at <http://www.sfgate.com/bayarea/article/Berkeley-No-tea-cozy-for-There-sculpture-3263028.php>. In 2010, several artists, feeling that the sculpture was an insult to Oakland, knitted an enormous tea cozy to the "T" on the Oakland side, ostensibly to equalize the cities' "here"-ness. The original artist of "HERETHERE," for his part, said he meant no reference to Stein's famous line, but instead meant for the sculpture to be "neutral, as in 'neither here nor there,' or as a compliment to Oakland, as in 'the grass is always greener over there.'"

erected or dissolved over time with the fluctuations of real estate markets. Sometimes city boundaries make a difference; sometimes not. In fact, one of the chief problems with community as a concept—not just as a legal principle but as a concept for any sort of rigorous inquiry—is that demarcating the here-ness and there-ness of community is a challenging, perhaps even insurmountable, task to achieve with any precision. Although conducted over fifty years ago, one of the most poignant examples of community’s elusiveness is the 1955 study by sociologist George A. Hillery, Jr. Hillery gave himself an almost insurmountable task: categorize extant definitions of community.¹⁶³ His study remains one of the most comprehensive efforts of its kind. Hillery catalogued 94 definitions of community from prominent sources finding that they illustrated 16 non-exclusive concepts in their definitions.¹⁶⁴ There was no perceptible pattern to the definitions that pointed towards consensus.¹⁶⁵ Hillery’s results catalogued nearly a century’s worth of social science efforts to come to grips not just with an elusive concept of community, but also with social forces that were changing the nature of community in dramatic fashion. Hillery’s study lays bare the difficulty in pursuing a rigorous exploration of community where strict definitions are sought, for instance, in law, where ambiguity and vagueness are eschewed. Still, the difficulty of the enterprise does not doom it; instead, this section seeks to offer several brief summaries of sociological studies that, in turn, assist in understanding the prospect of community as a legal concept.

1. Neighborhoods’ Rights

For many urban dwellers, community is not the jurisdictional bound of the city, but instead the confines of the neighborhood. Yet, defining a neighborhood, like defining a community, is a complicated task. As one prominent sociologist, Albert Hunter, noted, a neighborhood is “a social/spatial unit of social organization, and that it is larger than a household and smaller than a city. The problem with presenting a further list of definitive characteristics is that

163. George A. Hillery, Jr., *Definitions of Community: Areas of Agreement*, 20 RURAL SOCIOLOGY 111 (1955).

164. *Id.*

165. *Id.*

they often become normative rather than descriptive.”¹⁶⁶ In other words, objective classification of a neighborhood, whether by size, characteristics of residents, or physical characteristics, ultimately represents the priorities of the person engaging in the classification.

Several definitional components of neighborhoods are useful to consider, however. First, neighborhoods have a “concentric geography” to them; in other words, there is a built environment that is physically connected.¹⁶⁷ This is important in distinguishing neighborhoods from other forms of community that may flourish virtually online, across town, and across jurisdictional lines. Second, neighborhoods often have overlapping borders, which means that the ambiguous nature of boundaries is a persistent definitional problem that also has legal and policy implications.¹⁶⁸ Third, neighborhoods change over time, often because of a lack of local organizations, but also because of other social pressures and social dynamics.¹⁶⁹ For instance, nineteenth century brownstone neighborhoods of Brooklyn have given shelter to Walt Whitman, Jewish immigrant communities, African American communities, and hipster enclaves. The “community” that embodied the “neighborhood” changed over time.

Fourth, there is substantial variation in how individuals relate to their neighborhoods.¹⁷⁰ How an individual experiences the sense of community in a neighborhood has been the source of a tremendous body of research. Neighborhood involvement, having young children, or being married, elderly, a homeowner, or a long-time resident in the neighborhood have all been found to lead to a stronger sense of community.¹⁷¹ If factors as varied as these affect how people relate to the neighborhood, so, too, would they affect the

166. Albert Hunter, *The Urban Neighborhood: Its Analytical and Social Contexts*, 14 *URBAN AFFAIRS QUARTERLY* 267, 270 (1979).

167. Ralph B. Taylor, *Defining Neighborhoods in Space and Time*, 14 *CITYSCAPE* 225, 225 (2012).

168. *Id.* at 226.

169. *Id.*

170. *Id.*

171. S. D. Greenbaum, *Bridging ties at the neighborhood level*, 4 *SOCIAL NETWORKS* 367 (1982) (criticizing Granovetter regarding idea that strong ties lead to a fragmented neighborhood). An excellent summary of this research through the early twenty-first century used for this section is in Hollie Lund, *Pedestrian Environments and Sense of Community*, 21 *JOURNAL OF PLANNING EDUCATION AND RESEARCH* 301, 301–03 (2002).

perceived rights that should be afforded to the community.

Further, the physical design of the neighborhoods may also affect a sense of community including “diverse, urban environments; the character, design, and architectural quality of the neighborhood; the availability of structured public and semiprivate space; and the presence of local stores and neighborhood facilities.”¹⁷² This indicates that urban design may well play an important role in how residents feel about their neighborhood and, as a result, whether that neighborhood should be afforded particular rights.

All of this indicates that while the feeling of community can be an important social value that cities need to foster for the vitality of its existing residents and as a means of encouraging in-migration, converting that sense of place into legal rights is a daunting task. There are at least three ways that community rights could prove problematic as related to neighborhoods. First, there could be tension between the city leadership and the neighborhood, with both parties seeking to claim the mantle of community rights. Second, there could be tensions between overlapping or adjacent neighborhoods, both of which may seek to influence an area or a proposal as within the domain of its community rights. Finally, there could be intra-neighborhood conflicts and thus conflicting notions of who represented the community and its rights. While each of these potential conflicts arguably already exists within the existing power struggles of cities exercising the police power, a turn to a community rights-based language could exacerbate these questions of belonging and turn them into legal questions.

2. *Propinquity and the Multiplicity of Communities*

Although neighborhoods remain a staple in the discussion of communities,¹⁷³ modern technology and communication have also altered the nature of community identity that could also complicate efforts to assign rights at the community level. Since at least the Sixties, scholars such as Melvin Webber have argued that community has been inexorably altered and no

172. For numerous references on these subjects, see Hollie Lund, *Pedestrian Environments and Sense of Community*, 21 JOURNAL OF PLANNING EDUCATION AND RESEARCH 301, 301–03 (2002).

173. See ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* (2012).

longer requires propinquity, the need for spatial closeness.¹⁷⁴ As Webber noted, “Americans are becoming more closely tied to various interest communities than to place communities”;¹⁷⁵ in other words, technology and transportation have made it possible for individuals to find like-minded individuals across town, and even across the world, and thus community no longer depends upon spatial ordering.

Of course, the technology with the greatest potential for community-changing is the Internet, and a vast literature has emerged seeking to understand how the Internet is affecting community.¹⁷⁶ By the turn of the twentieth century, it was already evident that the neighborhood was not the only form of community in which people engaged. By that time, community was already “rarely based on local neighboring, densely-knit solidarities, organized groups, or public spaces.”¹⁷⁷ Community members were more likely to interact in private spaces, such as households or phone lines, than in public spaces, such as street corners, parks, and cafes.¹⁷⁸ In addition, people already had more friends outside their neighborhoods than within them,¹⁷⁹ while many people had more ties outside their metropolitan areas than within them.¹⁸⁰

Research indicated that the Internet did little to alter these already existing conditions. Indeed, an early, turn-of-the-century study of Internet culture, which was based upon providing a neighborhood access to a neighborhood-only listserv, found that the Internet “intensified the volume and range of neighborly relations,” which included more recognition of neighbors, greater frequency of communication, both on and offline, and participation in the public and private realms.¹⁸¹ In other words, even though the Internet can

174. Melvin M. Webber, *Order in Diversity: Community without Propinquity*, in *CITIES AND SPACE* 25 (1963); see also Jane Jacobs, *The Death and Life of Great American Cities* 146, 153 (Modern Library Ed., 2011) (1961) (arguing for three levels of city neighborhoods: the city as a whole; street neighborhoods; and in the case of large cities, a “subcity size” of 100,000 people or more).

175. M. Webber, *Order in Diversity: Community without Propinquity*, in *CITIES AND SPACE* 25, 29 (1963).

176. For a summary of the literature, see Keith Hampton & Barry Wellman, *Neighboring in Netville: How the Internet Supports Community and Social Capital in a Wired Suburb*, 2 *CITY & COMMUNITY* 277, 278–85 (2003).

177. *Id.* at 303.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

facilitate the creation of anonymous connections without propinquity, the Internet could also be used as a valuable tool to increase neighboring and community. It is increasingly evident that technologies are seeking to foster this type of neighborliness within the traditional spatial relation, or propinquity, of community. Take, for instance, the Internet community Nextdoor, which essentially uses a Facebook-style social media platform where membership is limited to those within defined neighborhoods.¹⁸² The popularity of such applications makes evident that the Internet can be a new tool for traditional neighboring as well as for forming and maintaining bonds around the world.

This research indicates that, while community can be based upon propinquity, it is not a necessary condition especially given the transience and technology of today. This raises complex questions for community rights in an era where community does not require propinquity. In particular, local governments would be forced to consider how much weight to place upon community members not located in the community's jurisdictional bounds but with an expressed interest in a particular project. Arguably, local governments already do this to some degree; however, community rights could seemingly become a mechanism that would legally require a local government to consider extra-jurisdictional interests in the exercise of the police power.

3. *Communities' Relationships, Weak and Strong*

Sociological research also indicates that what makes community function as community may not be its most obvious components, but instead its "weak ties." Efforts to define or empower communities with rights would seemingly need to also address how the legal empowerment of the community would affect—or not affect—these valuable, but often seemingly tangential, components of community identity.

In 1973, Mark Granovetter published *The Strength of Weak Ties*,¹⁸³ a landmark article in which he posited a network systems theory of "strong ties" and "weak ties," where "the strength of a tie is . . . [a] combination of the amount of time,

182. See Nextdoor, *Nextdoor*, at https://nextdoor.com/static/docs/city_resources/nextdoor_overview_flyer_english.pdf.

183. Mark Granovetter, *The Strength of Weak Ties*, 78 AMERICAN JOURNAL OF SOCIOLOGY 1360, 1371 (1973).

the emotional intensity, the intimacy. . . , and the reciprocal services which characterize the tie.”¹⁸⁴ Strong ties involve a greater time commitment; those with strong ties are more similar in various ways and are more likely to become friends once they meet.¹⁸⁵ In subsequent literature, “strong ties” have also been called “bonding ties,” such as those between people who know each other very well, such as family connections and connections between close friends.¹⁸⁶ Weak ties are also referred to as “bridging ties” such as connections to people outside one’s own local groups.¹⁸⁷

The import of Granovetter’s article was the counter-intuitive argument that weak ties could, in some instances, prove to be far more valuable than strong ties. For example, those seeking to reach a large number of people will find that weak ties are a valuable resource because these weak ties are also “bridges,” meaning that they move across the cliques that strong ties reinforce.¹⁸⁸ In the context of cities, Jane Jacobs referred to those weak ties with this bridging capacity as “hop-skip people.”¹⁸⁹ For instance, a job seeker might imagine that the best way to get a job is to get the word out to a person’s strong ties; however, Granovetter’s theory indicated that it was the weak ties, those that “move in circles different from our own” that “have access to information different from that which we receive” that ultimately are the most useful.¹⁹⁰

Granovetter also posited a theory of community involvement related to city urban renewal policies in an effort to understand why some communities work more easily toward common goals while others are “unable to mobilize resources, even against dire threats.”¹⁹¹ The example he chose to investigate was the Italian community of Boston’s West End and their inability to fight against the urban renewal policies

184. *Id.*

185. *Id.* at 1362.

186. Ann Dale & Lenore Newman, *Social capital: a necessary and sufficient condition for sustainable community development?*, 45(1) COMMUNITY DEVELOPMENT JOURNAL 5 (2008).

187. *Id.*

188. Mark Granovetter, *The Strength of Weak Ties*, 78 AM. J. OF SOCIOLOGY 1360, 1366 (1973).

189. DEATH AND LIFE at 175–76.

190. Mark Granovetter, *The Strength of Weak Ties*, 78 AM. J. OF SOCIOLOGY 1360, 1371 (1973).

191. *Id.* at 1373.

that “ultimately destroyed” the community.¹⁹² Granovetter found this “anomalous” because the West End social structure had been described as “cohesive,” and yet, the West End community had not mobilized successfully against urban renewal as successfully as other working-class communities had done.¹⁹³ Granovetter posited that the reason the West End had not mobilized to fight urban renewal was counter-intuitive: it had a lot of strong ties, few weak ties, and those weak ties were not “bridging” ties. In other words, the West End was a place of strong families and lifelong friendships; however, those strong ties were highly fragmented from each other.¹⁹⁴

In contrast, Granovetter noted that Charlestown, a working-class Boston community that successfully organized against a similar urban renewal plan, “had a rich organizational life, and most male residents worked within the area.”¹⁹⁵ These additional organizations and work relations provided weak ties that provided bridges between groups that allowed the neighborhood to rally against the city.¹⁹⁶ Granovetter argued that “for a community to have many weak ties which bridge, there must be several distinct ways or contexts in which people may form them,”¹⁹⁷ and that, “the more local bridges in a community and the greater their degree, the more cohesive the community and the more capable of acting in concert.”¹⁹⁸

Although Granovetter proffered only a hypothesis in his article, the hypothesis was provocative in postulating why some communities band together in the face of neighborhood-altering plans and others do not.¹⁹⁹ Granovetter’s hypothesis also points to the political and legal implications of considering weak ties; indeed, it may be such weak ties that ultimately provide the kind of relations most valuable in fighting for the

192. *Id.*

193. *Id.*

194. *Id.* at 1375.

195. Mark Granovetter, *The Strength of Weak Ties*, 78 AM. J. OF SOCIOLOGY 1360, 1375 (1973).

196. *Id.*

197. *Id.*

198. *Id.* at 1376.

199. See Mark Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, 1 SOCIOLOGICAL THEORY 201, 204–05 (1983) (reviewing literature based upon author’s 1973 article and noting no studies testing the West End hypothesis).

community's future. In a community rights framework, then, there would arguably be some force to providing legal recognition to those weak ties that exist not only within the immediate community but elsewhere. For instance, perhaps there are people who own or frequent businesses in the community but live elsewhere; people that used to live in the community, who now live elsewhere, but who retain an affinity for the community. As a tangible example, some cities, such as Los Angeles, permit those who have a "factual basis" for an interest in a neighborhood to be a part of a neighborhood council upon filing an application with sufficient proof.²⁰⁰ Presumably, a greater emphasis on community rights could enhance how those with such extra-territorial addresses but an interest in a community—whether conceived of as a city or a neighborhood—might attain a legal status with regard to governance of that community's future not typically recognized by political or legal structures.

4. *Teaching Community as a Value*

A fourth way that sociological research might improve understanding as to how community rights would function has focused on the question of what makes individuals work for the common good. A 2013 study conducted by researchers at Stanford provides some useful information about how subjects respond to community-oriented motivations, or interdependent actions, as opposed to individual-oriented motivations, or independent actions.²⁰¹

One of these studies is of particular import here. In this online study, participants were presented two potential new course offerings at the university about environmental sustainability.²⁰² Although the course descriptions were identical, student learning and participation were framed independently for one group, and interdependently for another group.²⁰³ The independent course frame told students "they would take charge of sustainable solutions, learn to work

200. Motion No. 2012-1682, BD. OF SUPERVISORS (City of Los Angeles, CA), Oct. 23, 2012, at 1, *available at* http://clkrep.lacity.org/onlinedocs/2012/12-1682_MOT_10-23-12.pdf.

201. MarYam G. Hamedani, Hazel Rose Markus & Alyssa S. Fu, *In the Land of the Free, Interdependent Action Undermines Motivation*, PSYCHOLOGICAL SCIENCE 1, 3–6 (2013).

202. *Id.* at 4.

203. *Id.*

autonomously, develop personal skills (e.g., “know your own perspective,” “be unique”), and cultivate expertise in individual action.”²⁰⁴ On the other hand, the interdependent course frame told students that they “would work together for sustainable solutions, learn to collaborate with others, develop skills for social coordination (e.g., “take others’ perspectives,” “be flexible”), and cultivate expertise in social action.”²⁰⁵ Students were then asked to rate how much effort they would put into the respective classes and also allocate funds to these courses.²⁰⁶ In response, those students of European American sociocultural contexts indicated less motivation for and allocated fewer resources to the course framed in terms of interdependent than independent behavior than did those students of Asian American sociocultural contexts.²⁰⁷

The researchers concluded that, for European American sociocultural contexts, “acting independently is the most pervasive, promoted, valued, and psychologically beneficial style of behavior in mainstream.”²⁰⁸ In such a context, “independence is the normative schema for thought and action,” one in which “‘good’ behavior is characterized by acting autonomously, feeling in control, and determining one’s own outcomes free from others’ influence.”²⁰⁹ Motivating those with such a context to participate in community-based problems is best accomplished by encouraging people to “take charge” rather than to “work together.”²¹⁰

Further, the study concludes that, for community-based planning to become part of long-term social goals, “it needs to be valued and promoted in American worlds and by American selves to the same extent as independence is,” a conclusion buttressed by the study’s responses from students with an Asian American context.²¹¹ The study concluded:

Until interdependence is more consistently and effectively represented in the ideas, practices, products, and institutions, successfully encouraging the perspective that

204. *Id.*

205. *Id.*

206. *Id.*

207. MarYam G. Hamedani, Hazel Rose Markus & Alyssa S. Fu, *In the Land of the Free, Interdependent Action Undermines Motivation*, PSYCHOLOGICAL SCIENCE 1, 5 (2013).

208. *Id.* at 7.

209. *Id.*

210. *Id.*

211. *Id.*

our destiny is 'stitched together' may require invoking independent behavior to achieve interdependent ends.²¹²

The study offers several lessons for community rights. First, it illustrates that the idea of community, as well as the relative weight to be placed on the concept, is tied to culture. In this case, the students of Asian American sociocultural contexts illustrated a greater connection to the concept of community than students of European American sociocultural contexts. In America's multi-ethnic and multi-racial cities, the varied sociocultural contexts likely offer a wide array of connections to the concept of community. Whether these varied cultural relations should be provided community rights in varying degrees accordant to the expectations of the various communities is a question worth pondering.

Further, the study also makes clear that the European American sociocultural context continues to prioritize individualized actions. Therefore, to the extent that community rights seeks to be as powerful, or more powerful, of an invocation of the police power, it would need to offer a rebuttal to the preference for individualism that dominates today especially in these European American dominated communities.

5. *In Sum*

In the review of the sociological aspects of community above, the primary goal has been to give form to the malleability of the concept of community. Given that the police power has proved difficult to define for nearly two centuries of constitutional law, perhaps there is no harm in linking the malleable concept of the police power to the malleable concept of community rights. However, to the extent that an invocation of community rights as a new definition of the police power seeks to offer clarity, this review of the sociological literature indicates that community rights is likely only to offer another strain of complex analyses as complex and slippery as the concept of community itself.

B. Legal Complexities of Community Rights

Despite the complexities raised in the concept of community by sociological work, community rights faces an

212. *Id.*

even greater legal challenge: there is almost no discussion about the proposition of community rights exercised by a local government in modern legal circles. Indeed, the American legal tradition has favored individual rights with such conviction that there has been almost no room for discussion of what rights might be afforded to communities.²¹³ This section, therefore, seeks to provide a simple outline of the reasons why community rights have not taken hold in American jurisprudence, and also to outline the arguments from those few who do promote community rights.

To the extent a conversation over non-individual rights has existed in American legal circles, it has defined itself around the concepts of “collective rights” or “group rights” of non-government associations. Moreover, these movements of collective rights or group rights have most often been associated with those seeking to advance the interests of minority groups as against the government. Such arguments have stalled, though, in part because of a perception that what successes minority groups have attained in achieving equality have come through vindicating those individual rights guaranteed by the Constitution.²¹⁴ Even if collective or group rights had received favorable treatment in attaining favorable results for minority community as against the government, such victories would seemingly not be applicable to the police power as an exercise of community rights. Collective or group rights of minorities have been sought as against a government entity; the proposition of community rights as an exercise of government power—as the community rights formulation of the police power proposes—would be inapposite to these efforts.

Theoretical investigations into group rights have also

213. Bruce P. Frohnen, *The One and the Many: Individual Rights, Corporate Rights and the Diversity of Groups*, 107 W. VA. L. REV. 789, 791 (2005) (“The Lockean individualist reading of the founding as the triumph of individual rights, along with the more generalized Whig reading of history as the unfolding of individual rights, continues to dominate contemporary discourse. Moreover, contemporary liberal theorists have insisted on the continuing, paramount importance of individual rights as the grounding for any just order.”).

214. See William Bradford Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995 (1984) (“We are, I submit, at a crossroads in the development of civil rights policy in this country. We can adhere to the fundamental principles that got us this far and fight—as did the leaders of the civil rights movement in the 1960’s—for the rights of individuals, or we can continue the drift in the direction of race-conscious decisionmaking, elevating the interests of particular groups above the rights—the civil rights—of their members.”).

granted such rights cold welcome. Take, for instance, the following from Ronald Dworkin:

The existence of rights against the Government would be jeopardized if the Government were able to defeat such a right by appealing to the right of a democratic majority to work its will. A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done.²¹⁵

Those, such as Dworkin, worry that the government will seek to suppress individual rights through appeal to the collective sensibilities. In this case, representing the police power as community rights could become a means of majoritarian suppression that so concerned Madison at the country's founding.

Another attack on the concept of collective and group rights has been the argument that collective or group rights are simply the aggregate of individual rights. In this argument, community rights would be a kind of "double-counting"

Finally, if the police power were reimagined as the exercise of community rights, larger implications may arise. Consider, for instance, how standing requirements—long focused on the individual with exceptions for groups embodied in third-party standing requirements—would be implicated. Thus, a turn of the police power from its residual sovereignty formulation or public health, safety and welfare formulation to a rights-based formulation could have legal implications beyond a mere turn of rhetoric.

Against these challenges, and others, a small but concerted effort to claim some voice for collective and group rights has emerged. These scholars have made several arguments. First, the Canadian scholar Dwight Newman has argued that certain collective rights are necessary to the exercise of individual rights.²¹⁶ However, even to the extent that Newman argues for collective and group rights, his arguments are limited to the notion of the police power as

215. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 194 (1978).

216. NEWMAN, DWIGHT, *COMMUNITY AND COLLECTIVE RIGHTS: A THEORETICAL FRAMEWORK FOR RIGHTS HELD BY GROUPS* (2011) ("This argument [for collective rights] is that certain individual interests that ground duties are meaningful interests and can be fulfilled only on the precondition that certain collective interests are also rights.").

community rights in several ways. First, Newman limits his arguments to moral rights, not legal rights.²¹⁷ Second, Newman imagines his discussion of rights as being for groups seeking rights for the group as against the government, which would seemingly not apply to community rights as exercised by the government.

While this is a cursory review of the legal landscape governing rights, it proves sufficient to illustrate that there is little precedent within existing American legal practice or theory for collective, or “community” rights exercised by the government on behalf of the people, even if only at the local government level. As a result, if such an approach were adopted for the police power it would open a new chapter in American law with little precedent.

C. Potential Benefits of a Community Rights Formulation of the Police Power

The previous sections have offered considerable reasons to be wary of community rights. This section will now consider several reasons why why community rights could prove a valuable means of invoking the police power.

First, the community rights movement offers a potentially new life for a rhetorical formulation of a rights-based police power all-but-forgotten. As illustrated in Section I of this article, three rhetorical formulations of the police power have predominated since the police power came to prominence in the 1880s. Those three formulations are the Madisonian residual sovereignty formulation, the *Lochner*-ian narrow reading of the health, safety, and morals formulation, and the *Berman* broad reading of the health, safety and morals formulation. However, as the police power has no constitutional text to anchor it, its rhetorical invocation is arguably fluid. For instance, as noted in Section I, the contemporary Court currently uses both the broad *Berman* enumerated formulation and the Madisonian residual sovereignty formulation of the police power. A community rights-based rhetorical invocation of the police power could seemingly also be used to describe even the existing police power. As noted previously, such a rhetorical formulation flows from the Court’s *Charles River*

217. See *id.*; Dwight G. Newman, *Collective Interests and Collective Rights*, 49 *Am. J. of Jurisprudence* 127, 128 (2004) (noting that his inquiry into collective and group rights is based on moral rights, not legal rights).

Bridge decision, which noted that “the community also have [sic] rights” that are embedded within the police power. Although the language of *Charles River Bridge* seems to be the sole instance of the United States Supreme Court speaking of the police power as rights of the community, the rationale would arguably be equal to other formulations because there is no constitutional language defining the police power.

A community rights formulation could provide more than just rhetorical flourish; as research discussed in Section III indicated, the willingness to take action for community is often influenced by how the community is perceived. Local governments exercising the police power are often challenged by individuals seeking to exercise well-defined individual rights. Against the definition of an individual right, the arcane invocation of public health, safety, and welfare or residual sovereignty holds little rhetorical sway. The same claim of an individual right, when weighed against “community rights” may more appropriately explain the choice a local government faces in choosing to subordinate an individual interest in light of those of the community generally. A rhetorical turn towards rights-based language could clarify for the public the choice between community interests and those of individuals that often weigh at the heart of local government decision-making.

Second, a move towards community rights could have a substantive turn: it could, in fact, broaden the police power through recognition of enumerated community rights, such as those of the community rights ordinances, or others. This could, for instance, arise through the validation of the community rights ordinances, discussed in Section II, that evince community rights to pure water, clean air, sustainable energy, and so on. Under this kind of approach, there would likely emerge in police power jurisprudence lines of cases on specific community rights, perhaps foremost the enumerated formulations “public health,” “safety,” “welfare,” and “morals.” Whether this strengthened or weakened the police power would be a matter of how those rights were applied by courts.

There is some reason to believe that such community rights could be interpreted more broadly than at present. For instance, in *Robinson Township*, the court found that a state constitutional provision, the Pennsylvania Environmental Rights Amendment, required local governments to consider future generations in their land use decision making. Some theorists have similarly sought a way to consider future

generations within existing legal structures.²¹⁸ A police power authority premised on community rights could welcome an investigation of future community members that seems more attenuated in an invocation of public health, safety, and welfare. While *Robinson Township* addressed future generations in the context of environmental law, police power-enabled consideration of future generations could also be relevant to other aspects of social life typically the concern of local governments, such as universal pre-kindergarten education, which has been shown to have long-term, positive impacts in increasing income and lowering violence. To the extent that community rights permits a local government to envision, and act for, communities beyond those living, then a community rights approach to could prove a valuable formulation of the police power. This is just one way to imagine the benefits that could be derived from a community rights vision of the police power.

CONCLUDING REMARKS

The future of the community rights ordinances that are becoming increasingly fashionable among American local governments is questionable; many rest on largely untenable positions relative to supremacy and preemption, state law constructions of local government power, and corporate personhood doctrines all several centuries in the making. Regardless of the fate of those arguments, the popularity of the community rights movement indicates that it has fastened upon an approach to collective governance that is powerful and resonant.

218. Glen O. Robinson, *Communities*, 83 VA. L. REV. 2969 (1997); Michael Sarbanes & Kathleen Skullney, *Taking Communities Seriously: Should Community Associations Have Standing in Maryland?*, 6 MD. J. CONTEMP. LEGAL ISSUES 283 (1995); Daniel S. Reiner, *The Role of "Community" in the Pacific Northwest Logging Debate*, 66 U. COLO. L. REV. 223 (1995); Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257 (2014); Nadav Shoked, *The Community Aspect of Private Ownership*, 38 FLA. ST. U. L. REV. 759 (2011); Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, CORNELL L. REV. 1 (1989); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375 (1994); GREGORY S. ALEXANDER & EDUARDO M. PENALVER, *PROPERTY AND COMMUNITY* (2010); Gregory S. Alexander & Eduardo M. Penalver, *Properties of Community*, 10 THEORETICAL INQ. L. 127 (2009) (describing "utilitarian/economic" and "liberal/contractarian" views of community and positing "human flourishing" vision of same); Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75 (2010).

Integrating community rights into established police power precedent is fraught with legal complications, however, given the American legal system's preferences for individual rights and the complexities inherent in the concept of community itself. It remains unclear what the result would be for daily practice in local governments.

Should such a community rights approach to the police power come to nothing more than rhetoric, the turn to community rights from "health, safety, and welfare" or "residual sovereignty" formulations would, at a minimum, have the effect of giving new voice to a term that has, for nearly two centuries, been defined by phraseology that defies even those who have written treatises on it. Whether that new phraseology would have legal import is unknown. The history of the police power, however, tells us that the rhetorical formulation of the police power does have consequences, as the *Lochner*, *Berman*, *Lopez*, *Morrison*, and *Sebelius* decisions make evident.

History further instructs that, through *Charles River Bridge*, there is precedent for considering the police power as an embodiment of community rights, however the courts may come to define that term. Should the courts turn to *Charles River Bridge* and community rights as a formulation of the police power, there may be room for consideration of communities—existing and future—that have otherwise been alienated from legal power at the local level. On the other hand, such a new formulation could be used, through the slippery terms of community, to oppress the rights of individuals that already form the outer bounds of the police power. Whether proceeding on such an endeavor to redefine the amorphous, ill-defined police power is worth it will be the province of tomorrow's judges and justices whose predecessors have, for nearly two centuries, chosen among various formulations of the police power and breathed life into them.