UNTIL DEATH DO U.S. PART: THE STATES AND THEIR INHERENT, NATURAL, AND BENEFICIAL POLICE POWER

Shane Haselbarth

In considering the name of our country, "The United States of America," one cannot escape the conclusion that we are (or were meant to be) a nation of united sovereigns. In our federal system, the States possess a general police power, which the national government does not. Through this division of sovereignty, the founders had in mind a particular form of governance which protected liberty and the wellbeing of the citizenry. The justness of particular laws aside, the suitable body to consider, write, and repeal those laws aimed at the welfare of the community is the individual State. This conclusion is drawn both from our unique constitution as a nation, and the principle of subsidiarity.

I. Introduction

The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, and of the public peace, has never been surrendered by the States, or restrained by the Constitution of the United States.1

The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation.2

The history of federal-State relations is long and colorful. One area in particular which merits much discussion is the role of the traditional police power of the several States as contrasted to the powers of the federal government. The great American experiment of self-government has enjoyed success beyond what many of its early critics would have guessed. Leaving behind a class-based system of governors and the governed, the United States has successfully created a "government of the people, by the people, [and] for the people . . . ."3 But whether a system of the governing and governed or a self-governing
democracy, government is government. Implicit in the very idea of
government is the notion that a people may be compelled to do or be
restrained from doing some act. In other words, a government may
command rights and prohibit wrongs. This power to govern is for the
United States explicit in the U.S. Constitution and state constitutions,
but is also universal in our western understanding of government. Sir
William Blackstone said of the legislative powers inherent in society that
the “original or first institution of parliaments is one of those matters
that lie so far hidden in the dark ages of antiquity, that the tracing of it
out is a thing equally difficult and uncertain.”

The focus of this article is the role of individual State
governments. More specifically, it concentrates on the nature of the
possession and exercise of the police power in the States. That the States
rightly exercise police power within their boundaries is widely
accepted. The background of the police power in the States will be
examined more closely in Section II.

We do not seriously question, nor entertain those who do, the
authority of government in the abstract. But we do question, rightly,
what roles a government may play or actions a government may
undertake. This article will look at the police power of States and the
effects of its exercise on the people. It will be clear that limits on the
police power, for which some provision is natural and necessary, ought
not to be as broad as they have become. In forming our republic, the
founding generation threw off a government “over there” in preference
for a self-government “over here.” The trend of our federal government
aggrandizing power to itself, at the cost of State sovereignty, is on the
road to the forming of a government “over there,” diminishing self-
governments throughout the States. Section II examines the background
of the police power in States and the justification for its historical (and
continued) existence. Section III outlines certain flawed arguments
touching on the constraint of State police power beyond its traditional
bounds. Section IV argues, in three parts, that the States, by virtue of
what they are, ought to enjoy greater discretion in the exercise of
traditional police power. In sum, this article advocates for a return to
ture State sovereignty.

II. Background of the Police Power of States

The terms “internal police,” “their [the States’] police,”
“domestic police,” and other similar terms, all referring to the authority
of States to regulate the conduct of their citizens, were used during the
Constitutional Convention, in the Federalist, in State debates, and in
The term “police power” as we use it today was first used by Chief Justice John Marshall in *Brown v. Maryland*: “The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States.” “The police power inherent in every sovereignty, for the protection of the public welfare, is difficult of exact definition.” While there is no one authoritative definition of the term ‘police power,’ one can gain a sense of what it is from different areas. In the 19th century, the U.S. Supreme Court stated that “this power, which has been denominated the police power,” is “[t]he power to make municipal regulations for . . . the preservation of the health and morals of [a State’s] citizens, and of the public peace . . . .” A modern definition closely mimics: “The inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.”

It is axiomatic that a government has an inherent police power merely by being a government. Even assuming the police power exists inherently in government, it will be useful to look at the reasons why a government possesses this power. Before examining these governmental powers, the argument is served by a short examination of what a government is.

There are two general opposing views of that nature of government. First, the philosopher Aristotle taught that the state naturally comes into existence for the sake of life. Though he saw the state as a form of partnership created with an end in view, he viewed the state as a natural institution formed by man, a political animal. This natural and necessary structure directed society with an end in view, namely, not just survival, but living nobly and well. A later, contrary view of the state is the Hobbsean/Lockean view. In their respective well-known works on government, these two thinkers proposed a view that individuals come together to form the state by agreement so that they can protect themselves. These thinkers put forth the idea that in securing individual freedom, men delegated many of their rights to the government, which would itself exercise legislative, executive, and judicial powers on behalf of the citizens, toward the end of securing individual liberty and preventing individual intrusions. Therefore the possession and exercise of certain powers which prohibit certain conduct is bound up with the nature of government itself.

Assuming the premise that governments naturally possess police powers, why does a government possess this power? William Prentice wrote that “[p]olice powers have their origin in the law of necessity.” Prentice agrees with Blackstone that the police power is an
exercise of self-defense for the state.\textsuperscript{22} Blackstone was concerned with the “mischiefs which [public crimes] produce in civil society [and those private crimes which] by their evil example, or other pernicious effects, . . . may prejudice the community, and thereby become a species of public crimes.”\textsuperscript{23} This concern for the avoidance of “mischiefs” on the community is carried through to our present day: “This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.”\textsuperscript{24} So it is clear that the primary end which the exercise of police power seeks is the protection of the people. Note, however, that this idea of protection is not understood in the limited sense in which a shield protects a soldier; rather, it is more closely analogized to the way in which an army protects a people. The people will go on living, cognizant but not concerned with the actions of the soldiers, and scarcely aware of what is avoided by securing the people’s freedom. Instead, the people are thus free to go on living (and living well), reaching their highest potential for flourishing, precisely because some bad thing was prevented from not simply destroying them, but also distracting them.

Our government has inherent police powers like any government; however, in our federal system, it is the States which retain the police power.\textsuperscript{25} As will be developed in Part IV, the States rightly retain this police power, and they ought to be afforded greater latitude in exercising it. For now, it suffices to conclude that the police power is an inherent power long (and rightly) recognized in governments, especially our States. In fact, the regulation of conduct injurious to the public is the affirmative duty of the States.\textsuperscript{26}

\section*{III. Arguments to Limit the Police Power of States}

We have seen that the police power is inherent in the nature of government. It is clear from our history that governments have at times abused their authority, to the great detriment of the people (whether some or all) for whom they exist.\textsuperscript{27} In light of such times, including relatively small encroachments on individual rights (over which there often is a difference of opinion), certain arguments have been set forth in favor of restricting the police power of States. To these we now turn.

\subsection*{A. Randy Barnett and State Police Power}

As stated above, there is no argument against a government properly exercising its inherent authority to pass laws which regulate
conduct. It is not difficult to see the propriety of a culture at the same time professing liberty and regulating conduct. What is at issue, then, with regard to the police power of States is the nature of conduct to be prohibited or regulated (or not prohibited or regulated) and the reasons why.

Professor Randy Barnett devotes a chapter in his *Restoring the Lost Constitution* to construing the proper scope of state power. He begins with the premise that there is a need to construe the power in States. He first recounts that the powers of Congress are enumerated in the text of the Constitution. Noting first that federal statutes must comply with the Necessary and Proper clause, he goes on to argue that the States are constrained by their constitutions and the federal Constitution. Basing his beliefs about State power on his “presumption of liberty” developed earlier in the text, Barnett sees the exercise of the police power as subordinate to the free exercise of individual liberty.

Barnett lays out the Lockean theory of police power, which itself is grounded in Locke’s social contract theory of government and society. In this theory, man chose to leave the “state of nature” to form a civil government (and civil society) in order to remedy inconveniences inherent in the natural state. The police powers of government are used to settle, or rather, prevent differences between members of society. Because of this limited application, it is needless to apply the powers any further than as between individuals. “According to the Lockean political theory, then, because people form government to secure their rights of liberty and property more effectively than they can secure them on their own, the executive or police power must be limited to . . . protecting those same retained rights.” Thus, the police power ought to be used only to prevent infringements on another’s rights. That is, if a man has the right to enjoy his home quietly, the police power will be exercised in order to prevent obnoxious noise from a party, for example. This is seen as the limit of proper police power.

This limited view of the police power prevented any explanation for the holding in *Mugler v. Kansas*. Barnett uses this case, which I examine below, as one example of a time when “[police] power was sometimes construed more broadly than was proper.” Barnett, relying heavily on Christopher Tiedman, views regulation of actions on private property as improper. For Barnett and Tiedman, “no trade can be subjected to police regulation of any kind, unless its prosecution involves some harm or injury to the public or to third persons . . . .” While this seems to be an accurate definition of police power, I believe the premise is seriously flawed.
The police power in Barnett's view has no end in view other than keeping citizens neighborly and avoiding conflict. Thus, for Randy Barnett, following Locke and Tiedman, the police power of States is nothing more than a personal inconvenience which makes societal convenience possible. As will be seen below, this view of State police power is deficient and dangerous.

B. Supreme Court Police Power Jurisprudence

Through the decades, as the constitution of both the Court and prevalent ideology has changed, a noticeable shift has taken place in the decisions the high Court and their effects. The cases chosen here are those falling on both sides of the argument about the grandeur of State police power. It will be helpful first to consider the traditional paradigm of State police power. Mugler v. Kansas sets out, in a 7-1 opinion, the view of the Supreme Court with respect to the police power in 1887. I will then analyze Bowers v. Hardwick in light of this precedent, before moving on to the 2003 debacle Lawrence v. Texas. At first, Mugler and Bowers seem to have little to do with one another. One deals with a property dispute and the other with sodomy. Each, though, deals with some conduct which Kansas and Georgia, respectively, prohibited within their boundaries. As will be seen, the States' concern for the wellbeing of their citizens, affected by individual conduct, outweighed complaints against restrictions on individual license.


Mugler concerned two statutes and a constitutional amendment in Kansas which together prohibited the manufacture and sale of intoxicating liquors within the State. Peter Mugler owned a brewery and illegally manufactured and sold beer. Prosecuted under these laws, Mugler was fined and his brewery abated as a nuisance. The defendant then appealed this decision, arguing that the State violated his rights in the destruction of his "right" to produce the drink for his own personal use. Justice Harlan, writing for the Court, rejected the notion that the State was not permitted to prohibit this activity, basing the opinion squarely on the idea that "rights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by the competent authority to promote the common good." In so many words, Harlan invoked the police power.

This case was selected to review because it demonstrates a certain understanding of the community which is not easily found today. The Court was drawing on a rich tradition, both legal and social, which viewed the community as a good to be protected. This is not to say,
however, that the *Mugler* court or our tradition has rejected individual liberty. Indeed, if "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects . . . it is the duty of the courts to so adjudge, and thereby give effect to the constitution[.]")" which protects the individual from "depriv[ation] of life, liberty, or property without due process of law." But if the common good of the community (which itself includes the individual good) is the end to which law is ordered, that is, "[i]f the public safety or the public morals require [abatement of an injurious action], [then] the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals . . . may suffer."

The basis of Justice Harlan's opinion is the recognition that some individual conduct, while arguably authorized by "natural liberty," could have a potential deleterious effect on the public health, safety, morals. It is the police power which "prescribe[s] regulations to promote the health, peace, morals, education, and good order of the people." What was regulated in *Mugler* was the production and sale of intoxicating liquor. What is regulated generally in these types of situations is that category of behavior which has the potential of producing "mischiefs" in civil society. Thus, regulations affecting individuals are permitted in a system which recognizes inherent police powers in the government if it inures to the benefit of all, including the very individuals affected.

The Court responded to Mugler's argument that he had a Fourteenth Amendment right to manufacture beer by stating that "[i]t cannot be supposed that the states intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community." This is so because "[n]o legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants." Justice Harlan cited no empirical evidence to show that excessive use of alcohol could lead to evils affecting society. Indeed, for all but the most sheltered among us, none is needed. He did state that it was "established by statistics accessible to everyone" that certain social disorders are traceable to abusing alcohol. Based on these possible (but thereby avoided) evils, the legislature "deem[ed] an absolute prohibition of the manufacture and sale [of intoxicating liquors] within [state] limits . . . to be necessary to the peace and security of society." It is clear that when a legislature acts pursuant to its police powers for the protection of the community, it cannot be said that the action is invalid because it causes an individual to alter his or her activity. If the
very activity is harmful, or possibly harmful, to the community, then only its reduction or prohibition can successfully promote the health, safety, and morals of that community. As Justice Harlan stated, in ratifying the Fourteenth Amendment the States did not impose restraints upon the exercise of police power for the protection of the community. To the simple argument that citizens have an inherent right to manufacture liquor for their own use, the Court responded flatly: "Such a right does not inhere in citizenship."

This case was chosen to present the traditional view of State police power in the United States. While it is natural and good for doctrines to be developed as our history continues forward, we should not lose sight of where we originated. Indeed, "traditional ways of conducting government . . . give meaning" to the Constitution. According due exception for illegitimate exercises of sovereignty in the past, these "traditional ways" must, for the most part, be given great deference. With obvious similarities to the doctrine of stare decisis, tradition has much to offer to the present.


In Bowers v. Hardwick, the respondent brought an action challenging the constitutionality of a Georgia statute prohibiting sodomy. The district court dismissed the action for failure to state a claim on which relief could be granted. The Eleventh Circuit reversed, ruling that sodomy is a private association beyond the reach of state regulation. Framing the question presented as whether the Federal Constitution confers a fundamental right to engage in sodomy, the Supreme Court, by Justice White, reversed.

Hardwick made an argument that sodomy was within the rights of privacy created by other privacy, especially sexual liberty, cases such as Pierce v. Society of Sisters, Loving v. Virginia, Griswold v. Connecticut, Eisenstadt v. Baird, and Roe v. Wade. The Court rejected the notion that these cases dealing with child-rearing and education, marriage, contraception, and abortion bore any semblance to acts of homosexual sodomy. Indeed, in the above cases, both a man and a woman were required in every one to create and educate the child, marry, avoid conception during sexual intercourse, and commit an abortion on a child. It is clear, the Court stated, that there is a far jump from these traditional-family questions to the act of male homosexual sodomy, where no conception or child is possible. The Court then rejected the invitation to confer a fundamental right to engage in sodomy on Hardwick. Noting that the Court will restrain itself when "announcing rights not readily identifiable in the Constitution's text[.]"
the Court looked to the nature of such rights that have qualified for "heightened judicial protection." This category includes "those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty or justice would exist if [they] were sacrificed.'" Put another way, fundamental liberties are those "deeply rooted in this Nation's history and tradition." The Court then recounted the ancient proscriptions against sodomy which lasted through the common law of England, and were adopted in the colonies and States very early.

Hardwick relied on *Stanley v. Georgia,* which prevented conviction for possessing obscene material in one's home, to say that he may conduct his homosexual sodomy within his home. The Court rejected any similarity between the cases because *Stanley* involved an objective First Amendment (or simply, a textual) claim which this case did not. The Court saw "no similar support in the Constitution" for Hardwick's claim and found that Georgia was the proper body to regulate the conduct of its citizens. Hardwick's last claim which failed was one that a law proscribing certain conduct cannot be justified only by a moral belief of the majority. The Court noted that the law is constantly based on morality. The Court was "unpersuaded that the sodomy laws of some 25 States should be invalidated on [the basis of Hardwick's morality claim]."

Hardwick was probably correct in his claim that the sodomy law was based on morality. The "ancient roots" of which Justice White spoke were often religious, but there were also distinct health considerations. Indeed, it is clear, that Georgia was validly exercising its police power when prohibiting sodomy.

3. **Police Power Undone:** Lawrence v. Texas

In 2003, the Supreme Court issued an opinion which turned sodomy jurisprudence on its head. Harris County, Texas, police officers entered an apartment in response to a reported weapons violation. The officers observed petitioners engaged in an act of sodomy. They were arrested and convicted before a justice of the peace. Their appeal to the Supreme Court won a reversal of their convictions, a change in the American legal landscape, and a blow to the police power of the States.

Writing for the majority, Justice Kennedy framed the case as a question of restraint upon liberty under the Due Process Clause. He first reviewed the decisions creating and expanding the right to privacy, including *Griswold v. Connecticut, Eisenstadt v. Baird,* and *Roe v. Wade.* The opinion presents *Griswold* as finding a protected interest in a right to privacy, with an emphasis on the marital relationship involved in that
Justice Kennedy then described *Eisenstadt* as establishing "a right to make certain decisions regarding sexual conduct" beyond the marital relationship. He relates that *Eisenstadt* was decided under the Equal Protection Clause, but that the Court there was concerned with "the fundamental proposition that the law impaired the exercise of personal rights." Thus, the focus has already shifted from concrete interests at stake, such as the marriage bond, to individual conduct (with a generalized notion of the supremacy of autonomy over proscriptions on conduct). This trajectory is then traced through *Roe* and *Carey v. Population Services International*.

The Court then takes up the issue of the *Bowers* precedent. In a clever display of rhetoric, Justice Kennedy states in conclusive terms that statutes prohibiting sodomy, as in *Bowers* and here, "seek to control a personal relationship" which "liberty [is] protected by the Constitution." In essence, he concludes first that homosexual sodomy is a protected action under the Constitution, and then asks the question whether the Constitution prohibits a state from proscribing it. When termed in this manner, the answer is easy, and the road to overruling *Bowers* is short indeed. The rest of his reasoning uncritically dismisses arguments on the historical basis and reasoning of such statutes, the non-enforcement of such statutes, and the difficulty in proving violations of such statutes. Part of what the Court relied on in ruling in favor of petitioners is the fact that after *Bowers*, some states repealed their laws criminalizing homosexual sodomy. In *Bowers*, the Court ruled that a state is not prohibited from outlawing homosexual sodomy. In response, many states repealed their statutes or simply declined to continue exercising this authority, in preference for some other interests. A more obvious display of the exercise of police power may not be found. Years later, petitioners from Texas were unhappy that their state did not follow suit. Rather than persuading their fellow voters or than mounting a political campaign to argue for the legalization of homosexual sodomy, petitioners convinced the Supreme Court to bypass the political process, usurp state police power, and strike down Texas's ban on homosexual sodomy.

With regard to Texas's interest in regulating conduct within its boundaries, the Court curtly states that "[t]he State cannot demean [petitioners'] existence or control their destiny by making their private sexual conduct a crime." There is, quite understandably, no discussion of Peter Mugler's existence being demeaned by Kansas' prohibition of the production of liquor. The *Lawrence* opinion follows with: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." His
statement of no legitimate state interest stems from his statements that this case does not involve minors, persons who might be injured or coerced, public conduct, etc. Amici, though, submitted many pages defending the interests of the State of Texas in outlawing sodomy. The Texas Physicians Research Council in support of Texas pointed out, "[t]he [Center for Disease Control] has identified men who have sex with men as among the groups that are most vulnerable to STDs and their consequences." The brief then recounts a sobering list of the potential problems which result from sodomy. The Family Research Council and Focus on the Family justify Texas's statute as a defense of traditional marriage, which is inherently and fundamentally different from any homosexual sexual interaction. These are but a few of the numerous examples of Texas's interest in prohibiting homosexual sodomy within its borders.

What is clear from the Lawrence opinion is that federalism has been broken down. While "[w]e the People" have established the Constitution, the States have always retained their reserved rights, as discussed in Mugler and Bowers. Now, however, the Supreme Court, like Professor Barnett, have placed order and ordered liberty under the feet of the individual and his autonomy. Clamoring loudly for the individual, Justice Kennedy brusquely asserts: "Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the government." Are we to understand that the States have given up their authority over their citizens when ratifying the Fourteenth Amendment? Certainly not. As pointed out by Justice Scalia, Justice Kennedy grossly misstates the text of the Amendment, which "expressly allows States to deprive their citizens of 'liberty,' so long as 'due process of law' is provided: 'No state shall . . . deprive any person of life, liberty, or property, without due process of law.'" Lawrence landed a sturdy punch right in the teeth of the traditional police power of States. "What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change." These cases demonstrate a change (the removal of genuine State powers to the federal government) which has taken place in a number of areas.

The notion that a State may defend itself and its people by regulations on the conduct permissible within its borders (and making certain conduct impermissible within its borders) has been stated above. Making regulations or prohibitions on conduct to further the health, safety, and morals of the community governed is part and parcel of
living in a civil society. Mugler tolerated the (perhaps questionable) choice by Kansas to criminalize the production and consumption of alcoholic beverages because the community’s welfare could be benefited. Bowers indeed allowed just the same action: the choice of Georgia to proscribe certain conduct thought (by those charged with care of the community) injurious to public health and morals could not be stayed because some disagreed with the decision. The focus shifted dramatically in Lawrence to maximizing the license of the individual, without any real concern for the ability of the community to defend itself from conduct thought injurious. The next section will argue why this shift in focus is unnatural and dangerous to the health of our nation.

IV. Why the Police Power of States Should Not Be So Limited

A noticeable shift in judicial perception of the bounds of states’ police power has been demonstrated above. But does this shift make any sense when viewed in light of our Anglo-American, Western legal tradition? For the reasons given below, this question must be answered in the negative. Some might argue that if certain decisions were placed in the hands of the federal government, they would have unhappy consequences to the citizens of States which they affect. However, “[i]t is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse.” But I will not make such an argument. Rather, I will argue that States are in fact sovereign (or “more sovereign” than they appear), and, too, that they ought to be so.

A. What a State Is: The Sovereignty of the States

Aristotle saw the state as a partnership formed for some end in view. The partners who make up the state for Aristotle are neighboring villages within the state. Aristotle’s “state” is sometimes more aptly termed a “city-state.” But his progressive view of the formation of the state is easily applied to our nation. Our federal government is simply an additional layer above the States. It is for this reason that the state should be the locus of any great authority over the conduct of citizens. Our federal system is structured (at least ideally) such that the national government of enumerated powers acts within its limited, enumerated realm and that the State governments possess much wider residual authority. Alexander Hamilton demonstrated something very similar to the Aristotelian notion of a government above as applying to our own system of government. In response to an argument that the national government may be too powerful, he states: “Allowing the
utmost latitude to the love of power, which any reasonable man can acquire, I confess I am at a loss to discover what temptation the persons entrusted with the administration of the general government could ever feel to divest the States of the authorities [judged proper to leave with the States for local purposes]." He goes on to distinguish national concerns of commerce, finance, and war from local and State concerns of private justice between individuals and agriculture.

Decades later, the Supreme Court was in accord: "[i]t is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States." This statement has two implications. First, it clearly calls for an objective basis upon which to base federal action (including acts of the federal judiciary). Secondly, and as the foundation of this required objective basis, it implies an inherent and plenary sovereignty in the states.

B. What a State Ought to Be: The Principle of Subsidiarity

The proper place for police power to rest lies with the States, flowing from the very nature of what a State is. We now consider whether the exercise of police power at the State level is consistent with how things ought to be.

"Subsidiarity" is the name given to the idea that "nothing should be done by a larger and more complex organization which can be done as well by a smaller and simpler organization. In other words, any activity which can be performed by a more decentralized entity should be." The term is taken from the social teaching of the Catholic Church. In 1891, in response to the changes sweeping the world via the Industrial Revolution, Pope Leo XIII issued his encyclical Rerum Novarum dealing with the rights and duties of capital and labor. While concentrating heavily on the condition of the working classes, Pope Leo discusses the proper role of the state. Rejecting forms of government which strive to end poverty by over-involvement or even dispossessing all of private property, the Pope stated those contentions "are emphatically unjust, for they would rob the lawful possessor, distort the functions of the State, and create utter confusion in the community." The teaching of this encyclical is that state involvement in social matters is inevitable and even laudable, but it must be done on a limited and as-necessary basis. The theme of a "subsidiary function" of the state was taken up by Pope Pius XI forty years later. In his encyclical Quadragesimo Anno, Pope Pius stated that:
[t]he supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands.\textsuperscript{117}

A government which refrains from action in preference for the intervention of smaller social groups, in other words, keeps a “graduated order” among associations,\textsuperscript{118} and avoids becoming “overwhelmed and crushed with almost infinite tasks and duties.”\textsuperscript{119}

The wisdom of this teaching, and its applicability to the American system, is readily apparent: trash collection is more aptly and feasibly done at the local level, while conducting war is more aptly and feasibly done at the national level. These notions of limiting the role of government are not foreign to our governmental system. As any even remedial student of American history knows, “Americans have always been attached to the concept of limited government.”\textsuperscript{120}

An argument favoring subsidiarity is seemingly a counterpart to Lord Acton’s famous sentiment that power tends to corrupt and absolute power corrupts absolutely. To be sure, if power corrupts, the less power should result in less corruption. The statement may be true of a government limited in fact but not in principle. However, subsidiarity is a principle different \textit{in kind} from a general notion that authority should be limited in order to avoid corruption. “[T]he foundations of subsidiarity are not merely negative. The foundations of subsidiarity, that is to say, go beyond the simple fear that higher political authorities will abuse their power. The reasons are deeper and more powerful, more principled, because they would apply even in the case of a good ruler and not merely in the ‘accidental’ case of a bad one. They reflect the primacy of the person over things . . . .”\textsuperscript{121} Subsidiarity is both “a bulwark of . . . personal freedom[,]”\textsuperscript{122} and, clearly understood, the “concept of subsidiary function [is] the cardinal principle of social order.”\textsuperscript{123}

Subsidiarity is not only natural to our human and political associations, but it is also a \textit{practical} system of governance. Especially in a democratic system, absent any moral imperative to the contrary, “it would seem desirable to minimize the occasions when people must live under rules with which they disagree.”\textsuperscript{124} Indeed, the founding fathers
anticipated this. Maximizing subjective satisfaction in an area of moral freedom is worthwhile “both for its own sake and for the stability this satisfaction contributes to political arrangements.” In this case, if much of the law making is done at a level more closely answerable to the people (the State level), they can better respond to the actions of the government. “Moreover, this line of reasoning suggests another traditional advantage of decentralization: in conditions of uncertainty, the possibility of different rules being made by different political subunits provides an opportunity for experimentation and comparison of results.” There is support for this argument in Supreme Court jurisprudence: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without the risk to the rest of the country.”

In their quest to limit the power of government, the Framers of the Constitution created a national government of enumerated and limited powers. Thus, the States were meant to exercise the greater role in the regulation of individuals’ conduct. There is an argument to be made, elsewhere, for the propriety (or impropriety) of possession of such great power in the State governments. Perhaps it would be more in accord with our social and political nature to vest the police power in groups smaller still, such as counties or towns. It is enough to emphasize here that our system of government, as it was originally fashioned, vested such power in the States and not in the federal government, and so this must be our starting point.

C. A Response to Randy Barnett

Barnett, and those from whom he draws, looks to “individual rights” as the touchstone of all laws affecting personal conduct. In this line of thinking, individual freedom to act in certain ways, termed “rights,” is held as the irrebuttable presumption of any question of a law’s validity. Indeed, most actions are individual actions, and many possible proscriptions of conduct can unjustly affect the individual’s behavior. From Tiedman to Barnett, individual rights are seen as the boundaries of a proper exercise of police power. The major flaw, however, in holding up individual rights beyond all else is that individual rights tend to overshadow the real purpose behind an exercise of police power: that is, “the protection of the safety, health, [and] morals of the community.” This formulation of the goal of the police power has as its end (telos) the common good. As seen in sub-sections A and B above, the common good of a community neither opposes nor trumps the
individual good, but includes it. These principles of the police power and community protection have been stated with stunning clarity:

Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "contra bonos mores," i.e., immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. While there may be great diversity of view on whether various of these prohibitions should exist (though I have found few ready to abandon, in principle, all of them), there is no doubt that, absent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate "morality."\(^{131}\)

I do not imply that everyone from Tiedman to Barnett is wrong for holding that a government must not interfere with conduct that does not itself interfere with the rights of others. Put simply, a government has no business telling a man what color socks he may wear. But what Barnett (and those who may misread Blackstone) misunderstands about individual conduct is that people may be ill-affected by, and so the government may properly regulate, conduct which does not apparently touch another person's physical or financial wellbeing. Tiedman, cited favorably by Barnett, believes there can be no regulation of an activity unless it is inherently violative of rights and necessarily produces injury to others.\(^{132}\) This severely inflexible limit on the police power could have dangerous consequences to the community (that is, the very thing the police power is meant to protect).

Locke, another thinker cited favorably by Barnett, had a similar belief about the role of government. In Locke's limited (and distorted) world view, the only possible application of State police power to individual conduct must necessarily stop where the rights of others are not involved.\(^{133}\) Any sense of community is removed from society and we are left with a cold "social contract." This view of the police power is inconsistent with traditional American jurisprudence.\(^{134}\) It is possible to read William Blackstone's Commentaries as in agreement with Barnett, for Blackstone, too, limits the application of human law to crimes affecting the community and not to private vices.\(^{135}\) But his view of what affects the public is more broad than Barnett's (and thus, more healthy): "All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society [and private crimes,
too, which] by their evil example, or other pernicious effects, . . . may prejudice the community.” Blackstone is thus concerned both with preventing over-involvement by the state and with preventing harms to the community by way of example or “other pernicious effects.” In this manner, the community is better protected, and in fact, liberty is more greatly honored. While liberty is indeed a great social good, an ordered liberty is necessary to be most fully human. Such order in our society is achieved, inter alia, through the proper regulation of conduct by the police power of the States.

The limits on the exercise of police power regulation called for by Locke, Tiedman, and Barnett are in fact necessary. Their shortcoming, though, is that the limits are ill-placed in their conceptions of society. Indeed, it would be wrong to suggest that a state (or any human lawgiver) should make all immoral acts illegal. To this end, Thomas Aquinas noted the prudence of human law refraining from proscribing all vices. Such restraint in law allows a certain amount of moral freedom to the common citizen, which allows the person to live well, in an Aristotelian sense. After all, the argument on subsidiarity given above is incomplete without inquiry into the issue of what is left to the citizen himself. However, freedom of action approaching unbridled license is not the logical conclusion. A person’s community (meaning family, town, etc.), as well as the law, is important to his own moral development, for man is by nature a social being.

To be sure, freedom is of paramount importance. Most will agree that freedom is fundamental to real human flourishing. Indeed, it is freedom that argues for a limited government. But the notion that the States are prohibited from exercising their traditional police powers based on the modernist reading of individual rights can have dangerous consequences. Even in a culture of freedom, even with a limited and subsidiary government, the individual is not completely insulated from a proper amount of regulation. Contrary to Locke’s (and Barnett’s) concept of the role of a government’s laws aimed merely to prevent certain civil wrongs, a government “is not an association for . . . the sake of preventing mutual injustice and easing exchange . . . . What constitutes a polis is an association of households and clans in a good life, for the sake of attaining a perfect and self-sufficing existence.” As seen above, the Lockean understanding of limited government leads to an anti-social individualism. However, because of “the fallacious concept of freedom, the individualist interpretation of the state’s subsidiary function cannot but be inadequate. It restricts the state’s authority to the safeguarding of the individual’s person and liberty and allows it no function of ordering the social process.” This proper
degree of governmental intervention, I argue, is the exercise of traditional police powers in the States.\textsuperscript{145}

\textbf{V. Conclusion}

It is clear that the nature of government is something which has occupied public discourse from time immemorial. It is clearer still that for such discourse to have any meaning, it must be leading somewhere. The problem I see with certain formulations of federal-State relations is this: States have been robbed of their proper police power in favor of a strong central government which champions individual "rights" without taking care to afford the community the protection it deserves (or, allow the community to protect itself). An oppressive government which quashes legitimate expression and individual action has no place in the American republic. But to deny the States their genuine, justifiable, and proper authority to regulate for the health, safety, and morals of the community is to raze the "bulwark of personal freedom"\textsuperscript{146} and threaten the wellbeing of the community.

I am in agreement with Mr. Hale, a post-Civil War congressional representative from New York, who "took the position that however desirable it might be that there should be reforms in state law, such reforms should be made by the States."\textsuperscript{147} Absent an express prohibition on the power of States to act,\textsuperscript{148} they are free to exercise their retained and plenary powers. "[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon whether the statutes embodying them conflict with the Constitution of the United States."\textsuperscript{149} Rather, that document contains specific powers to be exercised by the federal government and specific proscriptions on the actions of both the State and federal governments. In giving due deference to the reserved sovereignty of the several States, we can better protect our welfare and defend our liberty, while avoiding the corrosive influences of license.
Notes


5. See U.S. Const., art I, § 1; see, e.g., Pa. Const., art. II, ¶ 1.

6. See, e.g., William Blackstone, supra note 4, at 1:142 (“The most universal public relation, by which men are connected together is that of government . . .”).

7. William Blackstone, supra note 4, at 1:143.

8. See Exxon Corp. v. Eagerton, 462 U.S. 176, 190 (1983) (“Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State to safeguard the vital interests of its people.”) (citation omitted).

9. See U.S. Const., amend. I.


11. 25 U.S. 419, 443 (1827).


25. See, e.g., U.S. Const., amends. IX, X. See also *Brown v. Maryland, supra* note 11.

26. See *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) (“The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well being and tranquility of a community.”) (emphasis added).
27. For one example among many: slavery and Jim Crow laws.


29. Id. at 319-20.

30. Id. at 325.

31. Id. at 327.

32. Id. at 327 ("In this way, Lockean theory provides . . . an important limit upon the powers of government that is reflected in the police power doctrine.").

33. See Barnett, supra note 10, at 329.

34. Id.

35. Id. at 330.


37. See discussion infra Part IVC.

38. Barnett, supra note 10, at 324 ("[P]olice power regulations seek to facilitate the exercise of these rights and prevent their infringement before the fact. Whereas damage actions compensate for past violations of rights, the police power regulations permit laws to prevent rights violations from occurring.") (citation omitted).

39. An exhaustive recapitulation of Supreme Court case law in support of this assertion is not only unnecessary but is without the scope of this article. The cases discussed in Part II.B.2-3 are used as one example of the trend which has taken place in certain areas.

40. 123 U.S. 623 (1887).


42. 539 U.S. 558 (2003).

43. Mugler, 123 U.S. at 653.
44. Id. at 664, 653.

45. Id. at 660.

46. Id. at 663.

47. See, e.g., William Blackstone, supra note 4, 1:121 (stating that civil liberty is natural liberty restrained by human laws as is necessary and expedient for the general advantage of the public).

48. Mugler, 123 U.S. at 661.

49. Id. at 665.

50. See Gaudium et Spes ¶ 74.


52. Id. at 663, quoting Barbier v. Connolly, 113 U.S. 27, 31 (1885).

53. See William Blackstone, supra note 4, at 4:41.

54. See Mugler, 123 U.S. at 662 ("And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the efforts to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest in the community, to disregard the legislative determination of that question.").

55. Id at 664.


57. Id. at 662.

58. Id.

59. See id. at 664.

60. Id. at 662.
61. Mistretta v. United States, 488 U.S. 361, 401 (1989), citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 601 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.").

62. Cf. G.K. Chesterton, Orthodoxy (Fort Collins, Colorado: Ignatius Press, 1995) (1908), 53. Tradition may be defined as the extension of the franchise. Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead. Tradition refuses to submit to the small and arrogant oligarchy of those who merely happen to be walking about. All democrats object to men being disqualified by the accident of birth; tradition objects to their being disqualified by the accident of death. Democracy tells us not to neglect a good man's opinion, even if he is our groom; traditions ask us not to neglect a good man's opinion, even if he is our father.

63. 478 U.S. 186 (1986).

64. Id. at 188.

65. Id.

66. Id. at 190, 189.

67. Id. at 190.

68. 268 U.S. 510 (1925).

69. 388 U.S. 1 (1967).

70. 381 U.S. 479 (1965).

71. 405 U.S. 438 (1972).


74. Id. at 191.


77. Bowers, 478 U.S. at 192.


80. See id. at 195-96 ("[I]t would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home.").

81. Id. at 196.

82. Id. ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts would be very busy indeed.").

83. Id. In other words, the exercise of traditional police powers in some 25 states would not be prevented on Hardwick's historically and textually baseless claim of infringement.

84. See, e.g., Gen 18:20 – 19:29.


86. The reader will keep in mind that the thesis of this article is not defending the wisdom of the laws at issue in Mugler and Bowers, but rather defending the notion that the suitable body to consider, write, or repeal these laws is in fact the States.

87. Lawrence v. Texas, 539 U.S. at 562.
88. Id. at 562-63.

89. Id. at 564 ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.").

90. Id. at 564-65. See Griswold, 381 U.S. 479 (1965).


92. Lawrence, 539 U.S. at 565. See Eisenstadt, 405 U.S. at 454.


94. Lawrence, 539 U.S. at 567. The reasoning is either flawed or incomplete because "nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' . . . ." Id. at 586 (Scalia, J., dissenting). Thus, because this is not a fundamental right, this is not a constitutional issue. See Washington v. Glucksberg, 521 U.S. 701, 721 (1997) (noting the Due Process Clause protects fundamental rights).

95. Lawrence, 539 U.S. at 568-70.

96. Id. at 570-71.

97. Id. at 578. The syllogistic problem with first assuming, without evidentiary support, that petitioners belong by right to an identifiable class and then concluding that laws which may hinder the activities of this class are unjustifiable need not be addressed for the purposes of this article.

98. Id.


100. Id. at 9 (citation omitted).
101. See Brief Amicus Curiae of the Family Research Council, Inc. and Focus on the Family in Support of the Respondent, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 470066, 9-10 (arguing that the State is compelled by the interests of the common good to promote marriage and discourage fornication and homosexual acts).

102. Lawrence, 539 U.S. at 578.

103. See Mugler v. Kansas, supra note 55 ("It cannot be supposed that the states intended, by adopting that amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community.").

104. Lawrence, 539 U.S. at 592 (Scalia, J., dissenting) (emphasis in original).

105. Id. at 603 (Scalia, J., dissenting).

106. See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (prohibiting a State from continuing to proscribe abortion any longer except under certain limited conditions). See also, e.g., Kitzmiller v. Dover Area School Dist., 400 F. Supp. 2d 707 (M.D. Pa. 2005) (ruling that a local [and elected!] school board's decision to present a short statement to its ninth grade science students of possible flaws in Charles Darwin's theory of evolution violates the Establishment Clause of the First Amendment). While this article deals heavily with the Supreme Court, Congress, as well, has interrupted some traditional State powers. See, e.g., South Dakota v. Dole, 483 U.S. 203 (1987) (allowing Congress to direct the withholding of State highway funds to compel each state to raise its minimum age requirement for the purchase alcohol to 21).

107. The Court's opinion never mentions the term "ordered liberty," one traditionally used to describe proper regulations on conduct. Rather, the opinion only speaks of "liberty" and clearly interprets it to apply mainly to individual conduct.


110. Id. at 9.

112. Id. at 105-106.


114. Of course, the States' power is plenary, but voluntarily subjected to delegations of their power to the federal government.


117. Pope Pius XI, Quadragesimo Anno ¶ 80. The Pope is here speaking in terms of State (that is, "government") action on one hand and individual/associational action on the other. While this is properly understood as a warning to nations to limit their involvement in local affairs, the application of this teaching to a federal system like ours is readily apparent.

118. Id.

119. Id., ¶ 78.


121. Id. at 87.

122. Bosnich, supra note 115, at 9. See also Johannes Messner, Freedom as a Principle of Social Order: An Essay in the Subsistence of Subsidiary Function, in The Modern Schoolman 28 (1951), 97 (arguing true freedom and true human flourishing can be achieved only by a society with a subsidiary government).

123. Messner, supra note 122, at 110.
124. Wolfe, supra note 120, at 88.

125. See U.S. Const. art IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

126. Wolfe, supra note 120, at 88.

127. Wolfe, supra note 120, at 89.


129. See The Federalist, supra note 111, No. 45 (James Madison), at 313 ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.").


133. See Barnett, supra note 10, at 325-27.

134. See Mugler v. Kansas, 123 U.S. 623, 662-63 (holding that Kansas may proscribe the manufacture and sale of alcohol because its use is or may become hurtful to the safety, health, or morals of the community).

135. See Blackstone, supra note 4, at 4:41.

136. Id.

137. I do not mean to imply William Blackstone's entire line of thinking is the proper paradigm of looking at police powers. Regardless of what Blackstone thought of the regulation of particular actions such as alcohol production or sodomy, his general view of the wide scope of police power regulation is more in keeping with the end in view for such regulation: that is, the protection of the community.

138. "[R]ights are best secured, in our government, by the observance, upon the part of all, of such regulations as are established by the
competent authority to promote the common good.” *Mugler*, 123 U.S. at 663.

139. I side with the lawyers of Tocqueville’s day: “Lawyers are attached to public order beyond every other consideration, and the best security of public order is authority. It must not be forgotten, also, that if they prize freedom much, they generally value legality still more: they are less afraid of tyranny than of arbitrary power . . . .” Alexis de Tocqueville, *Democracy in America* (New York: Alfred A. Knopf, 1994) (1835), 275.

140. See Thomas Aquinas, ST, Ia IIae, Q. 96, a. 2. Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, with the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and suchlike.

141. Cf. Pope John XXIII, *Mater et Magistra*, ¶ 219 (“[I]ndividual human beings are the foundation, the cause and end of every social institution. That is necessarily so, for men are by nature social beings.”).

142. See Messner, *supra* note 122, at 102 (“Real social good is impaired and reduced so far as social authority presumes to determine the pattern of self-fulfillment of the human personality . . . . Clearly, then, if social order is to bring about the optimum social good, freedom is itself a radical ordering principle, and the state’s function can only be subsidiary.”).


144. Messner, *supra* note 122, at 98.

145. This conclusion is bolstered in a democracy such as ours. If our state legislatures have gone beyond what the electorate thinks proper, the people are free (and indeed called) to vote wise and restrained representatives into office.

147. Horace Edgar Flack, *The Adoption of the Fourteenth Amendment* (Baltimore: Johns Hopkins Press, 1908), 57. I am in agreement with the general spirit of this statement. I express no opinion on the desirability of forgoing the Civil War Amendments in favor of waiting for State action.

148. E.g., U.S. CONST., art. I, § 10 (“No state shall . . . pass any bill of attainder . . . or grant any title of nobility.”).