5

Separating and Distributing Powers and Functions

The police power has long been bound up, as we saw in Part I, with the broad power of the state legislature to govern. Part I's discussion of the police power has taken a somewhat abstract concept – the government's power to protect health, safety, morals, and the general welfare under the state constitution – and looked at how it was operationalized in disputes over more than 200 years of American legal history. In this chapter, we look at some key practical elements of the power, some seemingly timeless and some that have become more prominent in the past several decades and even as recently as the Covid pandemic, a multi-year episode that brought controversies over the exercise of the police power to the fore. This is how the state constitution, relevant legislation, and government practices allocate authority to exercise the police power. At bottom, state constitutional law is clear in caring now only about *what* power is being exercised by government, but *how* it is exercised and by *whom*.

THE SEPARATION OF POWERS IN STATE CONSTITUTIONS: INTERNAL AND EXTERNAL

As we discussed in Chapter 1, the separation of powers were hardwired into the revolutionary-era constitutions. They were often expressed, unlike in the US Constitution, in explicit terms.[1] The decision to preserve a coherent separation of powers was especially notable in light of the fact that the early framers in these documents "tended to exalt legislative power and the expense of the executive and the judiciary."[2] Separation of powers in these early constitutions was intended to meet multiple overlapping needs of these new governments. This constitutional structure provided important limits on what was by any account an extraordinary compass of state legislative power.[3] Even more meaningful were the restrictions imposed on the executive branch, added to reduce the risk of the king's prerogative sneaking in to new constitutional government as a sort of Trojan horse. In addition to regulating governmental action and reducing the potential for the abuse of power, the internal distribution of powers enabled these new states to have a mixed government, and so

then able to have the best combination of types of authority, representation, democracy, and wise decision-making.

More than two centuries later, we now see some of these goals as illusory, or at least overly optimistic. How, for example, was bicameralism supposed to help support a mixed government insofar as members of both houses were elected in more or less the same way? How would popularly elected judges help provide a bulwark against runaway majoritarianism, thereby protecting individual rights from government overreach? Constitutional design was shaped around the experiences of colonialism in the eighteenth century and a goal of advancing interests germane to the new states. Events unfolded quickly and conflict, rather than consensus, animated a good amount of the practice of constitutionalism in these critical early years. State constitutions were constructed in thoughtful ways, building upon the new science of politics that was emerging from the republic's founders and principal intellectual architects. Nonetheless, there were limits to how prescient the framers could be. Some structural mechanisms proved problematic, while others endured. However, let us not dwell here on when and how the state constitution makers ultimately came up short in their design for a coherent system of checks and balances, but let us focus instead on how their tactics helped shape a system of mixed government that would help them govern effectively and justly on behalf of their citizens.

There are many examples of how they aspired to do this, but let us take one to discuss in more detail: The creation of the plural executive. State constitutions have long included executive power as "unbundled,"[4] that is, power to be exercised by multiple executive departments, not limited to the governor as the supposed head of the executive branch. This distribution of executive power was designed to cabin executive power, critical in an era in which legislative power was viewed as "plenary" and as essentially superior to power authorized and exercised by other departments in state government. The plural executive, a structure that persists to the present day, notwithstanding changing views on the nature and scope of legislative and administrative power, is emblematic of the sense that constitutional framers had that power should be checked and balanced, even with respect to internal departmental functions.[5]

To be sure, conflicts have arisen frequently over the scope of legislative and executive power in the exercise of certain functions in state governance. The idea of the governor as a superior institution to other executive officials with regard to the exercise of law enforcement has been largely tempered, if not eradicated, by state court decisions that insist that attorneys general, if not other executive officers, have the residuum of executive power assigned to them by either the constitution or statute or both.[6] Viewed in the aggregate, these cases have eroded any notion of an "inherent" executive authority.[7] Governors and other executive officials have only those powers that are delegated to them.[8] Likewise, administrative agencies function under the rubric of assigned constitutional power.[9] Unlike those who would advocate in the federal constitutional context for the view, as did the late Justice

Antonin Scalia for example,[10] that all administrative power is derivative of executive power, in the state constitutional context administrative power is best viewed as a sphere of power that can and often does partake of legislative (read "lawmaking"), executive, and even judicial power.

Recent scholarship by leading state constitutional law scholars have emphasized not only the ubiquity and persistence of state administrative agency power, but also the ways in which such agencies can act in ways that both supplement and check the other branches of state government. Some of the advantages associated with state agencies are, as John Devlin notes, with respect to their independence. "Independent election by the people," he writes, "gives those elected state executive officials far greater autonomy, and far greater control over their departments, than any federal official enjoys."[11] However, as Miriam Sefter notes in her important study of agency independence, part of her larger inquiry into democracy and state political performance under the objectives of state constitutionalism, a combination of factors, including weak norms and strong governors, may stack the deck against agency independence.[12]

So far as the police power is concerned, the principal question is whether one branch and only one branch has the prerogative to exercise this awesome power. As the legislature's power has long been viewed as plenary, the question of whether the legislature has the police power is straightforward (even if the content of this power is not). More intriguing is the question whether other branches have the prerogative to exercise this power. There are three plausible answers, not unrelated, but still fundamentally inconsistent with one another. Ultimately, as will be explained, one is most convincing in light of the best overall view of state constitutional governance.

The first answer is that administrative officers cannot exercise the police power, because such an arrangement would be inconsistent with fundamental principle embedded into every state constitution that the legislature has plenary power and thus cannot delegate this power to another institution within the state government. This does not leave non-legislators without adequate power to govern, but instead embodies the view that state constitutions can and do delegate specific powers to executive, administrative, and judicial officials; moreover, any other powers that are exercised must come from legislative delegations. Just as the US Constitution instructs that the chief executive must take care that the laws be faithfully executed,[13] there is an explicit or implicit charge in every state constitution that officials outside the legislative branch will implement the laws passed by the legislature. This view leaves out any space for the executive to exercise the police power on his or her own initiative.

The implications of this view are substantial. For example, in the case of the COVID-19 pandemic, governors in the spring and summer of 2020 issued executive orders that called for extreme actions (lockdowns, travel restrictions, etc.) to be taken to combat the spread of the coronavirus, and they did so under what they insisted were their police powers. In some instances, the governor was careful to locate this executive authority in statutory delegation and, where so, the argument that this was

an unconstitutional exercise of public power was significantly weakened. In other instances, however, the objection was made that the governor lacked any explicit delegation. The implication is that the legislature lacked the constitutional power to circumvent the separation of powers under their state constitution.

A different way to view the matter is to see governmental officials outside the legislature exercising powers under the terms and conditions of legislative delegation. In this respect, the function of the executive or administrative officer is unremarkable and wholly acceptable, the only looming question being whether the statute does in fact give such authority to the officer or agency. This becomes essentially a matter of statutory interpretation. In Wisconsin Legislature v. Evers,[14] for example, decided in the early weeks of the pandemic, the Wisconsin Supreme Court read the governor's emergency powers narrowly, describing how Article IV of the state constitution listed all of the proper bases of executive power, but omitted any mention of a general emergency power, or anything else that would ground the power to impose emergency measures such as he did here.

There is a third alternative, a middle ground of sorts, in the debate over whether the states' separation of powers can accommodate the exercise of the police power by institutions other than the legislature. Under this view, state legislatures can delegate to executive officials and administrative agencies police powers, and so the exercise of such powers is constitutionally legitimate. The fact of legislative delegation and its scope is measured by ordinary techniques of statutory interpretation. Nonetheless, there is an important constitutional limitation to legislative discretion in the form of the nondelegation doctrine. That is, the legislature cannot delegate too much power to non-legislators, for that would run afoul of the separation of powers principle that, as John Locke put it, the legislature cannot delegate the power to make legislators.[15]

In notable contrast with the Supreme Court and the US Constitution, where the nondelegation is basically moribund, a number of state courts have enforced a nondelegation doctrine against certain legislative delegations.[16] In some instances, this power has been essentially a delegated police power, deployed to regulate certain activities in order to protect the general welfare. COVID-19 once again provided an occasion for an important state court decision involving delegated administrative power. In the early days of the pandemic, Governor Whitmer of Michigan invoked the Emergency Powers of the Governor Act of 1945 to impose her emergency orders to shut down businesses in the early part of the pandemic.[17] The statute was a clear instrument of the state police power, providing that when "public safety is imperiled" the "governor may proclaim a state of emergency," then proceeding to lay out some of the requisites for such actions, including, significantly, a requirement that such orders be "reasonable."[18] In a much-watched decision, a closely-divided majority of the Michigan supreme court struck down the statute as unconstitutional "because it purports to delegate to the executive branch the legislative powers of state government – including its plenary police powers."[19]

There is both more and less than meets the eye in this insistent statement of the Michigan supreme court regarding nondelegation and the police power. The decision is remarkable in asserting the police powers are quintessentially legislative powers and, as such, cannot be delegated, even to a coordinate branch of government. It would seem then to follow, *a fortiori*, that no delegation of regulatory power to an administrative agency to protect the public health, safety, and welfare – say, a legislative delegation to a statewide public health agency – would be constitutional. Writing for the court, Justice Markman dispatched the arguments that this delegation could be properly checked through ex ante standards (in the nondelegation doctrine parlance, courts have spoken of the requirement of "intelligible principles")[20] or ex post procedural requirements.[21] In doing so, he distanced this view from other state court nondelegation decisions that have dwelled mostly on process. At the same time, there may be limited impact here because of the incredible breadth of the holding, as well as the exigencies of this pandemic, exigencies which have famously generated unusually vituperative partisan stresses and struggles. Whether this court, or other state courts, will zero in on language in the Michigan decision that declares that police power is a plenary power of the legislature that can only be exercised by this institution remains to be seen.

The three positions are, respectively, administrative officers lack the power under the constitution because they are not the legislature, the state legislature has not delegated this power to agencies under any relevant statute, and, third, the legislature is limited in its choices to delegate under principles derived from the nondelegation doctrine in the state's constitutional law.

So how do we sort out the merits of these different positions on an issue of enormous consequence, to wit, who in the state government may exercise the police power? We should do so by resort to the underlying structure and functions of state constitutionalism, as has been the theme of this book and in accord with the broad framing in the introduction and first chapter.

Let us begin with the separation of powers in state constitutionalism as such. America's "other separation of powers tradition," as Jon Marshfield describes it, looks at state constitutional structures as mechanisms not only, or even primarily, to ensure that majorities will govern and will not be interfered with by factions of the sort that worried James Madison especially, but as means of ensuring that governmental officials could be effectively monitored.[22] "What matters most under the state theory," Marshfield argues, "is that government is separated along lines that allow the public to track and respond to malfeasance."[23] What should be added to this picture of the rationale for state separation of powers in the state tradition is that these mechanisms of governance and of constitutional structure would be in the service of promoting the common good. This preservation requires tempering governmental overreach, and so the careful delineation of structural safeguards and sound administrative procedures[24] and of legal requirements (as the requirement of a public purpose and prohibition on special legislation) helps to ensure that the

government is acting for general, not special, interests, while at the same time facilitating the ability of we the people in our respective states to monitor and mobilize governmental action.

Accountability is important with respect to any department of government. And so the instruments of governmental checks hard-wired into state constitutions, along with evolving procedural mechanisms created by statute and reflected in actual administrative practice, function as the composite mechanisms control over governmental behavior. The separation of powers is a coherent mechanism for that, and it is little surprise that it would be adapted from the serious thinking on the part of the framers of the US Constitution on the structure and purpose of state constitutions.[25] These adaptations would continue in the emerging state constitutions of the nineteenth and even twentieth century. Many of the Progressive-era reforms to state constitutions are fulfilling many of the same purposes as separation of powers in the grand sense.

As we move from the general to the more specific, we can see the police power as a power that can be exercised by agencies and departments other than the legislature, and therefore as an important element of governmental purpose and functioning. While the legislative power remains plenary, broad discretion is given to these elected officials to decide how best to protect the common good and which institutions can be called upon to implement wise public policy. That these delegations were seldom mentioned explicitly in the constitutional documents was not inadvertent; rather, these constitutions reflect the understanding that the main choices to be made about whether and to what extent to delegate certain regulatory and administrative powers would best be made by legislatures.[26] They could widen these powers and they could pull them back. They might do so in times of relative calm or in the urgency of a crisis, as in the times of the Covid pandemic.

The nondelegation doctrine fulfills an important function in this regard, and so we should be reluctant to throw out the baby with the bathwater, as has been characteristic of the federal non-delegation doctrine for nearly a century.[27] The insistence upon intelligible principles to guide discretion, especially where the awesome police power is concerned, is important to cabin discretion and limit overreach. In this respect, a sensible nondelegation doctrine helps fulfill the public monitoring function that Marshfield focuses on in his discussion of this "other tradition" of state separation of powers. Also, the requirement that there may be a reasonable basis and strategy for governmental action, something which we will discuss in more detail in a later chapter, is supported by the ability of state courts to regulate legislative action through constitutional constraints.

The advantages of a modulated non-delegation doctrine in the police power context was captured nicely by Chief Justice Bridget McCormack in her dissenting opinion in the Michigan Covid case. At the outset, she recounts the myriad ways in which the state legislature can superintend the processes of administrative regulation. The nondelegation doctrine in its traditional form is focused exclusively upon ex ante

instructions. But the reality she introduces into this equation is that much of the worry with respect to rogue administrators becomes managed by ex post devices – of the sort that prominent political scientists have labelled "police patrol" and "fire alarm" oversight.[28] As Justice McCormack notes, neither history[29] nor sensible public policy demand what the majority here (essentially incorporating, as she notes, the views in various concurring opinions by Justice Neil Gorsuch and a few occasional allies), which is a comprehensive set of standards designed to guide administrators and tether discretion to transparent legislative will. "The particular standards in the EPGA," she writes, "are as reasonably precise as the statute's subject matter permits. Given the unpredictability and range of emergencies the Legislature identified in the statute, it is difficult to see how it could have been more specific. Indeed the EPGA contains multiple limitations on the Governor's authority, each limitation requiring more of the Governor 8 when exercising authority."[30]

To summarize, a vigorous separation of powers doctrine in state constitutionalism is consistent with a pragmatic view of the ability of multiple state departments, not limited to the legislature, to implement public policy that protects health, safety, and public welfare. A formalistic conception of state constitutionalism that limits this power to the state legislature is anachronistic as a matter of legal history, as executive officials and administrative agencies have long performed functions under the police powers. More to the point, it does not serve the larger objectives of state separation of powers, objectives that accomplish the twin aims of ensuring that governmental decisions will be made by representative, accountable institutions and can be properly monitored in their exercise while also facilitating the ability of governmental officials and entities to accomplish salutary aims, to engage in which we call good governing.

At the same time, judicial intervention to ensure that our complex mechanisms of government are functioning consistent with the broad goals of the state constitution is not only acceptable, but is essential.[31] Our constitutional architecture and practice give us many avenues for such useful interventions. In previous chapters, we spoke of judicially created and legislative designed mechanisms, including the public purpose requirement, prohibitions on special legislation, debt limits, and various guarantees of equal protection, due process, and reasonableness requirements. The non-delegation doctrine is copasetic with these mechanisms, so long as it is understood as a calibrated tool of sound governance, not a blunderbuss that instantiates a too-skeptical view of public power.

*

So far we have focused on state governmental institutions, be they the legislature, the governor, and state-level administrative agencies. The reality, however, is that the institutions which commonly exercise police powers, especially with regard to the creation and implementation of public safety rules, crime control and public order,

and the myriad regulations of the use of private property, are local governments. How should we think about the delegation of power to local governments to protect our public health, safety, and welfare?

THE POLICE POWER AND LOCALISM

That the police power can be exercised only by institutions of the state government, following from the principle of the legislature having plenary power, is largely a shibboleth. The police power has been exercised by other institutions, all under the rubric of legislative authority and, correlatively, under the authority of the state constitution. Prominent among them are municipal governments, those acting in power on behalf of cities, townships, counties, or however else the state sub-divides its power. While police power deployed by local governments is ubiquitous, there are still some complex issues that arise in connection with state/local relations, what Richard Briffault long ago called "localism" (as an analogy to federalism).[32]

This dependence of localism on state choice is true despite a richly textured history of local governance through municipal corporations that pre-date the formation of states and state constitutions.[33] Whatever the practice of public regulation and administration prior to statehood has meant to a fuller understanding of the nuanced and politically salient connection between state and local governments in the US, the framers of our state constitutions, from early days and persistently through the next two centuries, have insisted upon a structural dependence of municipal governments on state choice.

This is not to say that the idea that there is some sort of inherent local authority did not have its moment in the sun.[34] The first great treatise on municipal corporations, authored by Eugene McQuillin, described this view, writing:

> Local self-government of the municipal corporation does not spring from, nor exist by virtue of, written constitutions, nor is it a mere privilege conferred by the central authority … [I]it is axiomatic that local self-government is not a mere privilege, but a matter of absolute political right, the existence of unlimited authority in the law making body to concentrate all the powers of local government in the state does not exist.[35]

The principal advocate of such a position on the bench was our very own Thomas Cooley. As a justice, he argued for an *imperium in imperio* view of local governments, sourced in preternatural American constitutional history and in natural law. As he wrote in People ex rel LeRoy v. Hurlbut:[36] "The state may mould local institutions according to its view of policy or expediency; but local government is a matter of absolute right, and the state cannot take It away."[37] This view, rather inscrutable in its origins and qualified, as this Cooley quotation indicates ("state may mould"), was put to rest in any event early in the twentieth century and most famously by the Court in Hunter.[38] Hunter involved a constitutional challenge to the actions of two local governments in a municipal annexation proceeding. The Court rejected this

claim and, meeting the argument that there is a constitutionally protected status of local governments viz the state, the Court elaborated on the fundamental point that municipalities enjoy no such status, but are beholden to the discretion of the state. As Justice Moody wrote in an unanimous opinion:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them…. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state…. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.[39]

Hunter remains solidly good law, and efforts to resuscitate a sphere of true *imperium in imperio*, with local governments given constitutional status and authority sans legislative or state constitutional delegation, have gone nowhere in the many decades since the Hunter decision.

Just as the Court was settling the question of whether local power could reside in some uber-principle of inherent municipal sovereignty and power, the realpolitik of the situation was pushing hard against efforts to champion local power and autonomy. The principal reason was the disastrous decisions of local governments in issuing railroad bonds.[40] John Dillon devoted a key part of his treatise on local governments to the idea that local government power should be narrowly construed in accord with state authority.[41] "All corporations, public and private, exist and can exist only by virtue of express legislative enactment, creating, or authorizing the creating, of the corporate body … municipal corporations are created by legislative act."[42] And so, in Dillon's view, "localities had no inherent sovereignty because the sovereign people delegated their entire sovereignty to the states."[43] Not only were states to be viewed as creatures of state governments, but they were creatures on a fairly tight leash![44]

Despite all this, local power did not evaporate in the face of this disposition of the big constitutional question. State constitutions enacted in the nineteenth century (including those, such as California, that were significantly reformed during this same century)[45] went to great lengths to preserve local power.[46] "States began adding provisions to their constitutions that regulated the relationship between the state and municipal governments in the mid-nineteenth century," Jeff Sutton writes, "as the local governments grew frustrated with twin evils: arbitrary, sometimes pretty, oversight of local governments, and negligent, sometimes intentional, neglect of local

conditions."[47] Home rule was a structural legal mechanism for ensuring that local governments would have a proper authority for exercising regulatory power without the need to rely upon state legislatures to authorize local power in every instance or to oversee in a micro-managerial sense the performance of local functions.[48]

That municipal governments could enact police power regulations was seldom questioned. To be sure, the content of local ordinances were regularly attacked, and many of the leading police power decisions involved local ordinances, rather than state statutes. But a close look at these decisions through the eighteenth, nineteenth, and twentieth centuries does not reveal a serious argument that local governments should, as institutions exercising the police powers as would state legislatures or administrative agencies, exercise powers that should be viewed more skeptically, and thus more narrowly, than the exercise of power at the state level.[49]

One muddy element in this otherwise rather pristine picture of local governments as police power agents involves the question of whether local governments had or should have more latitude for action, given that they were, after all, closer to the people.[50] Should this be particularly salient in those states whose constitutions contained specific authority for local governments to act, regardless of any separate statutory authority – in what came to be called "imperium in imperio" states?[51]

The basic logic of state constitutionalism in "imperium" states, was that local governments would have plenary authority to act over all matters of local concern. Arguably, a large swath of health, safety, and morals regulation fell under that rubric. Whether and to what extent the inclusion of local affairs language in the home rule provisions of state constitutions was intended to create sovereign authority, that is, the power to act without any state authority to preempt such local actions, remains a difficult historical question.[52] Some courts have read these provisions more narrowly, to maintain what Sho Sato called the "enabling" function of municipal home rule, while some courts have read them more broadly, so as to provide for a "protective" function. The rendering of home rule generally and the sphere of local affairs in particular is of direct relevance to the scope of the police power. After all, to the extent that municipal governments can act with immunity in affairs of local concern, this is quintessentially a delegation of police power to local governments in this area and, by logic, an effacing of the Hunter principle that state governments can direct its "creatures" in the way they wish.

The historical inquiry into the proper scope of municipal power has raised interesting issues of substance to our analysis of the police power and its promise. The latter part of the twentieth century saw the emergence of a strong view of local governance and the fruitful role of municipalities in creating progressive policies.[53] A diverse and growing group of social scientists and legal scholars, including Gerald Frug,[54] David Barron,[55] Saskia Sassen,[56] and Richard Schragger,[57] have described the ways in which more muscular local governance would advance social welfare and why revisiting the question of local power and the constitutional status of municipalities is essential. Though never specifically lodged in arguments about the

nature and limits of the police power, a theme culled from these local government advocates was that commitments to democracy, as an attractive normative principle in its own right, or as a component of a sound public sphere, require robust local governance. Further, localism has been defended as a means of advancing substantive constitutional rights. As David Barron writes: "This defense [of localism] proceeds instead from a structural conclusion that substantive constitutional rights sometimes presuppose the existence of a local decision-making process capable of ensuring the protection of those rights."[58]

The case for municipal governments as a fulcrum of the state police power is appealing, for just the reasons sketched, and is illustrative of wider renderings of the values and vitality of local governance. Local governments are necessarily closer to the people than are state governments. Addressing concrete public health and safety issues frequently requires local knowledge.[59] Moreover, the people whose welfare we attend to through the conscientious use of the police power are the people who are found in communities, communities whose shape is ineluctably configured by geographical and legal boundaries.[60] However, we should be careful not to embrace an overly idealized conception of local governments and their functioning. Municipal governments are indeed closer to the people. Yet this is both a virtue and a vice.

The proximity to the people means that they are able to refract more effectively the views of citizens on matters of regulatory governance, and other matters fundamental to the choices made by government officials under the police power. The values of the so-called laboratories of experimentation have long been noted in the context of American federalism. And recent efforts by prominent public law scholars, including Heather Gerken, Cristina Rodriguez, Jessica Bullman-Pozen, and others, have pointed to ways in which sub-national governments can participate in dynamic, collective conversations about policy choices and strategies of implementation.

Encircling these normative and positive debates about the components of decentralized conversation and policy choice is a wider, essential debate about what democracy means in an extended republic. Empowering local governments is a key piece of the puzzle, given their stakes in this debate about democracy and their comparative advantages in accessing and using local knowledge and recognizing citizen wants and needs. This is a larger, denser issue to contemplate and, for the most part, lies beyond the scope of this book. But we raise it to note that unless we can wrestle to the ground the question of whether the constitutional definition of health, safety, and welfare is to be answered at the state or local level, it will become rather difficult to give content to the police power or to assess the performance of state and local institutions in exercising it.

The closeness of local governments to citizen interests can also be a vice. Madison's insight about the role of factions has special resonance in the context of local decision-making, especially as we consider the ways in which "hyper-localism" takes hold in making regulatory choices in many settings.[61] Local decision-makers,

often city council members (or the equivalent in zoning and education boards), are pushed and pulled in various directions by insistent local interests. They can become bazaars for the trading of goodies; they can become captured by powerful groups of citizens. The result can be policy that is both short-sighted and, in a broad sense, anti-democratic.

Nadav Shoked has coined the term "the new local" to describe the ways in which sublocal governance operates through mechanisms that are "informal, fluid, task-specific, ad hoc, and geographically indeterminate."[62] It is in the fluidity of these governance mechanisms that questions might arise about the democratic content of local decision-making. Moreover, local policies that generate externalities, as is common, are hard to capture without serious regional or even state-wide assessment and supervision. Even those who would valorize local choice are writing on a slate that includes the practice, long embedded, of state and even national intervention where local choice goes off the rails and where local capacity is limited.[63] it is crucial to say that the best progress in effective regulatory governance requires intentional collaboration among levels and layers of government. General-purpose local governments are one piece of a multifaceted puzzle.

The focus on localism's limits often does, but should not, distract us from focusing on the larger and rather complex point that the most productive route to regulatory success under the rubric of the police power requires collaborative solutions engaging many different levels and layers of government. In a brilliant essay entitled simply "On Participation," Hannah Fenichel Pitkin and Sara Shumer explain that democracy requires a clear-headed appraisal of the myriad dimensions of and venues for participation, thereby cautioning against the romanticization of the local polis or excessive skepticism of that form. They write

> Face-to-face citizen assemblies are indeed essential to democracy, but one single assembly of all is not. Representation, delegation, cooperation, coordination, federation, and other kinds of devolution are entirely compatible with democracy, though they do not constitute and cannot guarantee it …. The point is not to eschew all organization and all differentiated leadership, confining democracy to the local and spontaneous, but to develop those organizational forms and those styles of authority that sustain rather than suppress member initiative and autonomy. From historical examples we know that such forms and styles exist; it has sometimes been done.[64]

This insight can be applied to modern American constitutionalism and commitments to democratic choice. State constitutions, rightly understood and sensibly construed, empower state government to use a constructive mix of institutions at various levels of government in order to attend to the problems that the police power is designed to address. Neither the formal separation of powers nor the expressed and tacit concerns that choices be made democratically stand in the way of this imaginative approach to regulation and governance.

GENERAL WELFARE REQUIREMENTS

One of the more interesting, if poorly understood, elements of state constitutional checks on governmental actions are those that explicitly require that such actions be directed toward the public interest. Progressive-era reforms brought into state constitutions the requirements that legislation have a public purpose.[65] In addition, prohibitions against special legislation were added,[66] as were guarantees of equality, usually framed as equal protection clauses (enacted both before and after the Fourteenth Amendment of the US Constitution).[67] Other doctrines were invented by courts, including the public trust doctrine in the late nineteenth century, a meaningful expectation of "public use" in takings law, certain restrictions on public debt, and, with cases such as Munn and Mugler, a requirement that regulation reveal an acceptable degree to a public purpose. Taking these temporally and structurally disparate provisions as a whole, they represent a view of state governance as motivated by public-regarding, rather than private-regarding, interests. An account of the distribution of the police powers must focus both on *who* is doing the regulating (hence our discussion of other branches of state government, and municipal governments), and also on where they should look in formulating their objectives of promoting public health, safety, morals, and, especially, the general welfare.

Historians of state government and state constitutionalism have highlighted the adoption of public purpose requirements in state constitutions as illustrations of the ways in which citizens in the nineteenth century became unsettled with the choices being made by state legislators and administrators on behalf of private interests and interest groups.[68] Were these requirements that would facilitate a general welfare sense of constitutionalism that goes back to the beginning of the republic, or did the *zeitgeist* of the Progressive and Populist eras push the legislatures and courts toward a truly new of the role of government in a rapidly changing commercial republic? Whether the truth of the matter lies in one direction or another, the key point is that state constitutions were absorbing through these reform efforts and democratic energy a scheme of governance that was intended to connect the police power to a stronger public welfare orientation. That the Supreme Court joined with state courts to further this development is revealing. We would come to see by the *fin de siècle* the imperative of government operating on the people's behalf and with the public interest front of mind. Various permutations of constitutional law tests (thinking of, for example, the rise of the rational basis test in US constitutional law to examine restrictions on so-called economic liberties[69]) made these interventions perhaps less radical than one might have imagined from the discourse and even the express language of, say, a public purpose requirement for legislation. However, there remained something of substance to this insistence on a general welfare orientation to regulation.[70]

A deeper dive is needed, however, to know what was to be, and should be now, the lodestar of the people's welfare. Welfarist accounts of public policy are common,[71]

and the aggregation of myriad theories of the public welfare lead us to the vexing conclusion that there is not, nor can we ever truly expect, consensus upon what it means to pursue welfare-enhancing public policy. Debates over the common good have raged from Plato and Aristotle's times, despite the considerations by Bentham and others about utilitarianism as the best grounding for collective interests up to the present. Jodi Short, in her useful inquiry into public interest as a policy framework, has organized various theories into proceduralist, constitutive, and cognitive approaches that have helped shape debates over the public interest, but without pointing to a clear way to discern this interest in democratic processes. Resort in modern times to economic standards, and especially cost-benefit analysis, has gained favor, and indeed is hardwired into many aspects of contemporary regulatory policymaking, especially at the national level.[72] Assessing public policy by resort to cost-benefit principles, while imperfect for reasons many have noted, might nonetheless come the closest to providing a promising perspective at least for examining the demands of government to facilitate the general welfare in regulation under the police power.

More recently, scholars from different points of ideological and methodological orientation have urged attention to general welfare that goes beyond welfarist accounts represented by cost-benefit analysis. In his book on administrative governance, for example, Blake Emerson calls for government to perform a "duty of public care," one requiring government officials "to invest in the welfare of individuals [and] to provide those institutions, services, and protections that are necessary to people's moral and political agency but which they cannot obtain on their own initiative." The reference to "services" and "protections" resonates with a conception, at least a thin one, of the police power has concerned with taking care of the public.

One of the more prominent recent accounts of public welfare that specifically looks to constitutional values is Adrian Vermeule's important defense of what he calls "common good constitutionalism."[73] Explicitly contrasted with what he sees as the Progressive era's focus (what he calls its "sacramental narrative") on individualistic autonomy, common good constitutionalism would read "constitutional provisions to afford public authorities latitude to promote the flourishing of political communities, by promoting the classical triptych of peace, justice, and abundance."[74] He refers specifically to health and safety, and elsewhere describes at length the ways in which this common good constitutionalism obligates public officials to protect public morals.[75] Vermeule's focus is solely on the US Constitution and its tradition, and so the relevance of his view to the police power under state constitutionalism remains elusive. However, this ambitious theory points rather clearly to what he calls a "framework" (presumably then much short of a template) for discerning what is entailed in the common good. The police power, Vermeule notes, "create[es] a loose-fitting garment allowing the exercise of broadly reasonably discretion by government to promote the common good over time."[76] This is, taking into account the larger context of Vermeule's work, especially true of the police power's focus on the protection of public morals against myriad (secular) threats.

A full engagement with Vermeule's theory of common good constitutionalism is beyond the scope of this book. Ditto the various other accounts, some bolder and more worked out than others. But a few general thoughts here, pertinent to our discussion of the police power. First, Vermeule's account finds common ground in many of the cases, and especially the nineteenth-century and early twentieth-century ones (which were discussed in Chapter 3), where the courts aim toward protecting health, safety, and morals even where such powers trample – or as Novak, cited by Vermeule, put it, "destroy[] private right, interest, liberty or property." Common good here could be traded as a phrase for general welfare, and the same essential point would be well illustrated. Common good constitutionalism has doctrinal roots in classic police power cases, those that constructed and advanced the *salus populi* vision of the power. Second, and in some ways in tension with this point, the components of the common good as Vermeule defines it are sourced in what he describes as our country's "classical legal tradition." The resort to old principles and moral commitments to decide modern cases seems anachronistic without a fuller explanation of why we should be beholden to the past. For example, Vermeule has a sidebar note on laws prohibiting blasphemy and laws grounded in the police power, and ruminates about what we have lost with our more modern approaches to free speech protections.[77] Can we really associate laws prohibiting blasphemy or pornography with a convincing modern account of the common good? Vermeule's account has a timeless quality – reviewers have insisted that it is the product of a distinctly sectarian worldview, Roman Catholic, to be exact[78] – that makes it more challenging to defend as a plausible account of the common good. Still and all, there is a through line from an account of the police power as embedded in constitutional objectives and this well-developed theory offered here by one of our leading public law theorists, and this is reason enough to take this account seriously. We can vigorously disagree about whether and to what extent his view of the common good is the best one while seeing the enterprise as broadly congruent with the objective of defining what good governing is about and what it aspires to.

The police power speaks in terms of what the government is able to do. It is a power, after all, and so the legal question must necessarily turn back to how wide a discretion has the government acting under this power. However, we can only understand this matter of discretion and authority when we understand the obligation of government to act in the common good, an obligation that is revealed in our collective discussion about what the public's interest means and legislative demands of government. More succinctly, inquiry into the scope of the power illuminates what the government is authorized to it; and yet a deeper inquiry into the nature of the power helps illuminate what the government *should* do. A full account of the police power must deal with *both* aspects of this – power and performance, discretion and obligation. Any exercise of governmental power to improve health, safety, and welfare must account for the responsibility of the government to act with a public purpose, and in the public interest. These are intersecting principles

of state constitutionalism and, perhaps more generally, in the moral authority and government, and we can best see them as structural principles baked into the state police power.

EXPERTISE, DELEGATION, AND THE RULE OF LAW

As we discussed earlier in connection with the use (and misuse) of the nondelegation doctrine to limit administrative power, a persistent concern among commentators and courts at the federal and state level is that the legislature is shirking its lawmaking responsibilities by assigning important tasks and functions to agencies, usually made up of unelected officials and with meagre statutory instructions. This ubiquitous concern has been expressed in both formal and functional ways. Formally, the objection is that the only institution properly authorized to make public policy, whether under the police power or another source, is the legislature. This formalism is made concrete in Article I of the US Constitution, but is also echoed in myriad state constitutions that express a substantially similar distribution of powers, with the legislature assigned the exclusive power of lawmaking. In earlier versions of the nondelegation doctrine, at both the national and state level, it was said by courts that the legislature may not assign its "core functions" to another body,[79] although that rigid rule softened by the time of the New Deal and was displaced by the standard that requires only that adequate intelligible principles be provided.[80] Nonetheless, the formalist objection to delegation has hardly withered away. There remains a drumbeat of scholarly arguments, often drawing upon constitutional history, against delegation on the grounds that it violates the letter and the spirit of the separation of powers.[81]

There is nothing especially new in all this, save for the increasing support within the conservative majority of the Supreme Court and a few state supreme courts. While the use of agencies and administrators to create and enforce regulation has been an omnipresent part of our governmental system from time immemorial, controversy over administrative discretion in the exercise of public power has accompanied its use, going back to the Progressive era, and continuing to the present. For example the legendary Ernst Freund, as Daniel Ernst pointed out in a thoughtful analysis of Freund's effort to bring to the US what he calls an "American Rechstaadt," was concerned about restraining administrative discretion, even while promoting an ambiguous use of the police power to protect health, safety, and the general welfare.[82]

Many scholars from various perspectives, writing about the development of administrative governance in the late nineteenth century, have described why and how administrative bureaucracy emerged as an essential tool for creating and administering this novel new regulatory regime.[83] The story is substantially similar at the state level and, indeed, state bureaucracies emerged even earlier than their federal brethren, as regulation required innovations in governance and institutions

which were neither legislatures, named executive entities, or courts, were created to implement policy.

The widespread use of agencies reflected a confidence in the idea and ideal of expertise, or technocratic planning, represented by Max Weber in broad theory[84] and Frederick Winslow Taylor in practice[85] and captured concisely in Mayor LaGuardia's famous statement, "there is no Democratic or Republican way to pave a street."[86] Expertise in administration would become essential to the broadening sphere of regulation, in both states and later in the federal government. The implications of this development for democracy were noticed, and the push toward bureaucratic modalities of policymaking and administration were accompanied by variegated campaigns for such experiments, campaigns reflected in public commentary and in legal advocacy. "Legitimacy," Daniel Carpenter writes, "is the foundation of bureaucratic autonomy in democratic regimes. Only when politicians and broad portions of the twentieth-century American public became convinced that some bureaucracies could provide unique and efficient public services, create new and valuable programs, and claim the allegiance of diverse coalitions of previously skeptical citizens did bureaucratic autonomy emerge."[87]

The rise of administrative bureaucracy persisted well into the twentieth century, and the New Deal was an important focal point for the struggle over the scope and domain of agency governance.[88] In the policy areas that were best suited for the exercise of the police power, regulatory agencies emerged as critical instruments of social policy. This was true at the national level, as the common story reveals, but this was also true at the state and local level.[89] State and national regulation were more often complements than they were substitutes. And it is important to understand the techniques of public power at all levels of government as the state police power reveals a systemic commitment to bureaucratic governance and expertise as a precept of governance.

One feature of administrative delegation largely unique to the states has been the use and utility of special-purpose authorities.[90] These authorities are created by the state legislature to carry out specific functions. They are often funded through own-source revenues and occasionally are constructed in collaboration with regional and local authorities – think here of transportation as an example – in order to function on behalf of the state government.[91] While it is hard to imagine that the framers of nineteenth-century state constitutions expected the police power to be exercised energetically by institutions that were neither the legislature nor general-purpose municipal governments, the reality of modern regulation in the American states is that these special-purpose authorities have become very common, and even essential, to the administration of public policy. To illustrate this phenomenon with some data on special-purpose governments, census data from five years ago indicates that of the approximately 90,000 local governments in the United States, over 50,000 are special-purpose governments. In Illinois, the figure is 6,000 of the 8,900 local governments and in California, there are over 3,300 special districts providing myriad

services, including fire protection, sewers, airport, and other transportation, and this is not counting the very large number of independent school districts (nearly 1,000).

In a number of states, the advent of special-purpose governments has transformed enormously both the scape and the techniques of governance. Courts have largely blessed these developments, and various constitutional doctrines (for example, the electoral equality principle)[92] have been adapted to meet the needs of legislatures determined to create these new methods and methods of policy making and implementation. The creation of local administrative bodies to replace for certain discrete purposes the reliance on general-purpose municipal governments has been a notable development of the last century or so as well.[93]

Looking at bureaucratic governance through a wider aperture, concerns about the scope of administrator power have been expressed by critics over many years.[94] The late Theodore Lowi proclaimed in *The End of Liberalism* that the New Deal had "established the principle for all time that in a democracy there can be no effective limit on governmental power."[95] The twin critiques that expertise is too porous to sustain an enduring basis for unelected bureaucrats making policy with little control and, further, that democracy is a superior goal to technocracy have steadily grown in vehemence and in attention. Moreover, with Covid-era restrictions, as discussed in Chapter 4, has come a skepticism toward expertise-based arguments for important limitations on liberty.[96] Some have chalked this up to an anti-science sentiment, pointing especially to vaccine hesitancy.[97] But another way to look at all this is to see this as an example of an eroding faith in expertise as a basis for policy.

There are two stories that are important for our large assessment of the police power generally and for our examination in this chapter of the structural separation and distribution of powers. In a sense, they come in chronological sequence. The rise of expertise as an underpinning of the choice to vest broad authority in bureaucratic institutions has fueled the use of the police power by agencies to implement good policy. After all, the faith in experts and expertise trade on a faith in scientific truth and the ability of governments to find this truth. Ideally, we should agree on what is truly in the service of public health or safety or even general welfare. With such agreement comes less to argue about in making and assessing policy, and so disputes over the content of policy and who decides becomes less freighted with controversy. Without overly romanticizing the sixty or so years from the post-Reconstruction to the end of the Second World War, we can nonetheless view this era as one in which confidence in public health authorities and in local governments regulating the use of land, to take two of the more conspicuous examples of common policy choices, were high, insofar as citizens viewed these as matters which could be solved by experts, preferably by science.

The other story, still very much unfolding, is one of growing skepticism with experts and expertise. With it, there is an erosion in faith in legislatures and courts' ability and willingness to control bureaucracy in its pursuit of public policy. The emergence and persistence of such skepticism is not linear, of course, as this has

happened unevenly, and as much more of a punctuated equilibrium than a steady collapse in the faith in expertise. For example, the 1960s brought with it some confidence in health and safety regulation, with the biggest impact being at the federal level, as new regulatory agencies were created in order to implement new welfarist policies.[98] By the end of that decade, we even put a man on the moon, evincing a faith in science and engineering and ability to mobilize resources, vision, and energy to implement a common good. As we moved into the seventies and eighties, skepticism in government grew with Watergate and the Vietnam War fresh in view, and with respect to human well-being at the sub-national level, the concerns about the state of order in our cities and our educational system grew. Concerns with our aging infrastructure also expanded as we came into the new century. Further, we would see in the period after the Great Recession an erosion of trust in expertise in many aspects and elements, without some profound differences noted between national, state, and local institutions.[99] The Covid pandemic has exacerbated this decline of faith; and institutions as consequential as the US President (Trump from 2016–20) and the Supreme Court (from this same period up to the present) have opined on the flaws in unelected bureaucrats – sometimes described as the "deep state" – making public policy with adequate controls.[100]

There is an inextricable, even if sometimes ineluctable, connection between the matter of what power can be exercised under our constitutions and who gets to exercise this power. We have seen in the rise and fall our faith in administrative governance how the "who decides" question gets tangled up in the dispute over whether power can be exercised at all. At the national level, a debate rages on two fronts about the nature and scope of federal agency power. There are serious, if somewhat measured, threats lobbed by the more conservative members of the Supreme Court to resuscitate the nondelegation doctrine to limit Congress's power to delegate governing power to agencies.[101] Meanwhile, this same conservative majority on the Court has constructed the so-called Major Questions Doctrine as a means of reining in administrative power.[102] The idea there is that questions of major social and economic significance should be decided by Congress, not by agencies. This is not the place to take on these normative arguments for a significant change to our constitutional and administrative law. We will note in passing, however, that both of these significant developments in the Supreme Court and other federal courts often rest on undertheorized, if not largely unexamined, premises about the performance of the regulatory bureaucracy, the relationship between Congress and agencies, and the origins of the administrative state.

The legal developments just recounted involve turbulence in federal policy and its implementation mechanisms. However, the currents of policy and public opinion do not easily separate matters into "national" and "state." It is perhaps just a matter of time before some version of the Major Questions Doctrine emerges in state constitutional law to limit significantly the choices that institutions other than legislatures, here including administrative agencies, special-purpose authorities,

and maybe even municipal governments, can make in controversial areas of social and economic policy.[103] Whether intended or not, such a move would risk degrading public governance by limiting the objectives and also the strategies of multiple levels and institutions of government in state systems. A more robust set of anti-administrativist legal tactics at the state level would likely hamstring governance instruments, thus effectively limiting the scope of the state police power and making it all around more difficult to govern.

Still, we might come at this conundrum from a different direction. Rather than focusing on the legal consequences of anti-administrativist and anti-regulatory thinking, we might return to the threshold question of how we have arrived at a place where there is so much ambient distrust in the capacity of government institutions to implement the people's will. In an influential paper discussing the matter of trust in government officials, Houston and Harding note that "**trust** refers to a willingness to rely on others to act on our behalf based on the belief that they possess the capacity to make effective decisions and take our interests into account."[104] In the polarized US, government efficacy is often tied to a perception of whether the government is acting in our best interests or, instead, in the best interests of the other guy. This concern with factions was noted by Madison, of course, but what makes it fresh is the increasing rigidity of individual beliefs, a rigidity that can be explained in no small measure by the role of social and other media, population sorting, and other ways in which we have come to form and maintain political opinions in a series of echo chambers. Repairing a broken public and securing a republic that encourages cooperation and empathy, generally and with respect to confidence in government more specifically, is a tall task and one that preoccupies many contemporary big thinkers.

A necessary, even if not sufficient, focal point should be on evaluating government performance, with appropriate evidence and upon measures that agreed upon by otherwise divided social groups. This commitment to evidence-based evaluation of government performance – here including all levels and levers of government – should be equally strong with respect to public health and safety. Without being naïve about the promise of public acceptability and restoring public trust in government, we can say two things decisively: First, the restorative project is absolutely critical to choices made about both the mechanisms of government power (Should we be using agencies more? Less? Is the legislature a more trusted source of regulation? Can we create new institutions that are more likely to garner public trust?) and also about the scope of the power itself. Various legal consequences, not to mention political consequences, emerge from the public's trust or mistrust in government and its regulatory strategies, as we have discussed in this chapter. Second, public trust follows transparency, as well as widely disclosed evidence of success. State and local governments need better press agents! Seriously, the performance of government at the level less conspicuously covered by mainstream media – recalling that we are witnessing the disappearing of a meaningful local press[105] – can only be assessed when it is more widely known. In order to sustain

a robust police power, distributed in ways acceptable to our constitutional architecture and objectives, we need to be able to point to evidence of both good and bad governing. That is, if we want to repair the torn fabric of public trust in government.

STRUCTURING POWER, ENABLING GOVERNANCE

State constitutions create the conditions under which state legislatures will work collaboratively with other institutions to implement policy. They are documents that aspire to, and even frequently assume, meaningful institutional collaboration, even while they attend to the risks of excess governmental power and the threat to property and to individual liberty. This commitment to collaboration is essential to realize the aims of good governing. After all, many of the constructive solutions to health and safety issues require coordinated solutions. As we consider specific policy domain later in this book, most issues that are addressed by governmental action under the police power are instances of so-called "wicked problems," those that require imaginative strategies and, at least, inter-institutional coordination. They also require the creative design of institutions. Such design is not inconsistent with, nor is it orthogonal to, the text and structure of our state constitutions and our larger constitutional tradition. On the contrary, the commitment to creative problem-solving and the use of properly constructed institutions that facilitate good governing is deeply and broadly consistent with the best sense of our constitutional system of government. Yet, as we will see in the next chapter, this is not, to borrow from a famous depiction of the US Constitution as a "machine that would go of itself."[106] Fulfilling the promise of a police power that has both integrity to the historical objectives and circumstances that gave it life in the creation (and, where needed, reform) of the relevant state constitution and also is well suited to the needs and wants of a contemporary citizenry requires attention to not only structure but, as is inevitable in our legal order, sensible judicial interpretation. The articulation of a set of principles and doctrines that can ground a successful modern police power is the subject matter of the next chapter.

With respect to matters of institutional design, a few lessons from the previous discussion, here and in the earlier, more historically tinged, chapters. One lesson is that the constitution must aspire in its structure to a balance between majoritarian and counermajoritarian elements. In this respect, we return to our discussion of constitutional strategy in Chapter 2 and also our short discussion of the Constitution's founders early in Chapter 3. We want in our state constitutions a decision-making architecture that will enable it to promote and implement the general welfare. Viewed in a less sanguine way, the constitution must safeguard private interests to a level that reduces the stake of politics, hoping to maintain stability in government and hoping as well to ensure the protection of private liberty and property rights, protection which will be vital to a government that wants to eschew violence and pursue endeavors that will safeguard the common good. In addition, the police power should be seen by well-intentioned governments as a source of authority that

she could be exercised in a measured way. We referenced the so-called "presumption of liberty" in an earlier chapter. This captures the important point that the government ought to be duly parsimonious with its use of coercive powers, given the rational fear that citizens might have about government will choose security over liberty, will develop, say, restrictive public health measures even where burdens fall heavily on particular citizens and interfere with their personal goals.

A second lesson is that there is a decent amount of intrastate diversity that should be accounted for in the implementation of certain police power measures. Even in the absence of any notion of inherent local authority, local governments have powers that need not be inert. In Chapter 3, we looked at the advent and role of zoning, quintessentially local powers. Because zoning power is generally focused on local governments, municipal decisions usually drive land use strategy and enable local citizens to, as economist Charles Tiebout asserted several decades ago, sort themselves in order to find a place amenable to their views.[107] Looking at this the opposite way around, it would be good to have local governments promote and implement goals that are relevant only to a certain cohort of folks and do not necessarily aspire to comprehensive treatment or coverage. Ultimately, the police power is a flexible mechanism, one that will enable local governments (general-purpose municipal governments and others), to look at what is the best of goods and services can be made available to respond to the needs and wants of residents.

Finally, democracy and administration entail tradeoffs. We could tie the police power scrupulously to the legislature and to general-purpose local governments, institutions with representatives elected by the people and accountable in ways that classic models of democracy expect. That democratic decision-making is an attractive ideal where the authority of the state is at issue presumably needs no extended defense, either long ago or today. On the other hand, we have learned by experience, political and otherwise, that sophisticated policymaking benefits from institutions who are constructed in order to develop and manifest expertise. Sometimes democracy is rightly sacrificed for more bureaucratic arrangements. The rise of administrative agencies beginning in the nineteenth century and the utility of special-purpose governments for myriad policy tasks indicates that we have committed to such arrangements, even in a system that prides itself for its democratic bona fides. Our system is not either/or, and we can appreciate that social choice requires adaptation and tradeoffs. This is true as much of the police power's use as of any tools of modern governance.

NOTES

1. See, e.g., R.I. Const. art. V. ("The powers of the government shall be distributed into three separate and distinct departments, the legislative, executive, and judicial."). See Jeffrey S. Sutton, *Who Decides? States as Laboratories of Constitutional Experimentation* 193 (2022) ("At the founding, several constitutions separated power implicitly *and* explicitly").

2. William Wiecek, *The Guarantee Clause of the U.S. Constitutions* 21 (1972). See generally Robert E. Williams & Lawrence Friedman, *The Law of American State Constitutions* 267 (2nd ed., 2023).
3. See Williams & Friedman, *American State Constitutions*, at 267–68.
4. See Christopher Berry & Jacob Gersen, "The Unbundled Executive," 75 *U. Chi. L. Rev.* 1385 (2008).
5. See Sutton, *Who Decides?* Chapter 5.
6. See, e.g., Perdue v. Baker, 586 S.E.2d 606 (2003); Matter of Johnson v. Pataki, 91 N.Y.2d 214 (1997).
7. See generally Louis Fisher, "The Unitary Executive and Inherent Executive Power," 12 *J. Con. Law* 569 (2010); William P. Marshall, "Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive," 115 *Yale L. J.* 2446 (2006).
8. Likewise, it has eradicated any notion of a so-called "unitary executive" at the state level. On unitary executive theory generally, see Stephen Calabresi & Christopher Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (2008).
9. See Sutton, *Who Decides?*
10. See Morrison v. Olson, 487 U.S. 654 (1988). See generally Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* 63–83 (2015).
11. See John Devlin, "Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions," 66 *Temp. L. Rev.* 1205, 1228 n.80 (1993).
12. See, e.g., Miriam Seifter, "Further from the People? The Puzzle of State Administration," 93 *NYU L. Rev.* 107 (2018). See also Miriam Seifter, "Gubernatorial Administration," 131 *Harv. L. Rev.* 483 (2017).
13. U.S. Const. Art. II.
14. 20-cv-00608
15. See John Locke, *Two Treatises of Government* 408–409 (P. Laslett ed., 1963).
16. See Sutton, *Who Decides?* at 193–215.
17. Executive Order 2020–21: Temporary requirement to suspend activities that are not necessary to sustain or protect life. https://bit.ly/3TYSRT8
18. Se Emergency Powers of the Governor Act, 10.31(1)
19. In re Certified Questions, No. 161492, 48 (Oct. 2, 2020).
20. Ibid., at 55.
21. Ibid.
22. Ibid., at 597–98; 608–10.
23. Ibid., at 551.
24. See Sutton, *Who Decides?*
25. See Williams & Friedman, *American State Constitutions*, at 58–73. See also Christian G. Fritz, "Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate," 24 *Hastings Const. L. Q.* 287 (1997).
26. See generally Julian Davis Mortenson & Nicholas Bagley, "Delegation at the Founding," 121 *Colum. L. Rev.* 277 (2021).
27. See Cass R. Sunstein, "Nondelegation Canons," 67 *U. Chi. L. Rev.* 315, 322 (2000) ("the constitutional doctrine has had one good year and 211 bad ones").
28. Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms," 28 Am. J. Pol. Sci. 165 (1984).
29. "It is armchair history to suggest that the founding generation believed that the constitutional settlement imposed restrictions on the delegation of legislative power or that it empowered the judiciary to police the Legislature's delegations." In re Certified Questions, at 6 n.2.

30. Ibid., at 7–8.
31. Ibid.
32. See generally Richard Briffault, "Our Localism, Part I – The Structure of Local Government Law," 90 *Colum. L. Rev.* 1 (1990).
33. See Hendrik Hartog, *Public Property and Private Power* (1983).
34. See generally Howard Lee McBain, "The Doctrine of an Inherent Right to Local Government," 16 *Colum. L. Rev.* 190 (2016). For a recent defense of the notion of local sovereignty, see Paul R. DeHart & Ronald J. Oakerson, "Are Local Governments Mere Creatures of the States?" 56 *National Affairs* (Spring 2022).
35. Eugene McQuillen, *Municipal Corporations*, I (1928), at 388.
36. 24 Mich. 44 (1871) (Cooley, J., dissenting).
37. Ibid., at 108.
38. For a creative exegesis of localism as a constitutional construct, building upon Cooley's thesis, see David Barron, "The Promise of Cooley's City: Traces of Local Constitutionalism," 147 *U. Penn L. Rev.* 487 (1999).
39. Ibid., at 178–79.
40. See David Schleicher, *In a Bad State* (2023).
41. See 1 John F. Dillon, *The Law of Municipal Corporations* (2nd rev. ed., 1873).
42. Ibid., at 95.
43. Joan C. Williams, "The Constitutional Vulnerability of American Local Governments: The Politics of City Status in American Law," 1986 *Wisc. L. Rev.* 83 (1986).
44. John F. Dillon, *Treatise on the Law of Municipal Corporations*, at 101–102 (1872). On John Dillon's background as a railroad lawyer, a background that likely had influence over his view about local authority, see Williams, "City Status," at 90–100.
45. See generally Harry N. Scheiber, "Race, Radicalism, and Reform: Historical Perspectives on the 1879 California Commission," 17 *Hastings Con. L. Q.* 35 (1989).
46. See Calif. Const. [1879]. See generally Daniel B. Rodriguez, "State Supremacy, Local Sovereignty: Reconstructing State/Local Relations under California Constitution," in *Constitutional Reform in California* (R. Noll & B. Cain eds., 1995).
47. Sutton, *Who Decides?* at 308.
48. See generally Frank J. Goodnow, *Municipal Home Rule: A Study in Administration* (1895).
49. See Chapters 2 and 3.
50. Hartog describes some of the early conflict between the Federalists and the Jeffersonians on this matter, writing "Jeffersonians did not contend that local government could properly be reduced to a powerless agency of legislative authority. They did not mean to deny to city government the power to govern or the power to initiate change. Their concern, rather, was with the location of sovereignty in the legislature and with the capacity of that body to change institutional structures when the popular will mandated change." Hartog, *Public Property*, at 138.
51. See generally Lynn Baker & Daniel B. Rodriguez, "Constitutional Home Rule and Judicial Scrutiny," 86 *Denv. L. Rev.* 1337 (2009).
52. Ibid., at 1367.
53. Dirk Hartog, in his depiction of local power in the context of the Corporation of the City of New York in the eighteenth and nineteenth century, sees this emergence of local authority coming earlier. It was "the city, in its other, more modern aspect of a public government, which became the venturesome agent of public power." Hartog, *Public Property*, at 80.
54. See Gerald E. Frug, "The City as a Legal Concept," 93 *Harv. L. Rev.* 1057 (1983).

55. See Barron, "Promise of Cooley's City."
56. See Saskia Sassen, *The Global City* (1991).
57. See Richard Schragger, *City Power* (2016).
58. Barron, "Promise of Cooley's City," at 603.
59. See, e.g., Lea S. VanderVelde, "Local Knowledge, Legal Knowledge, and Zoning Law," 75 *Iowa L. Rev.* 1057 (1990). The locus classicus of the analysis of why local knowledge is essential in government planning and regulation is Friedrich A. Hayek, "The Use of Knowledge," 35 *Amer. Econ. Rev.* 519 (1945).
60. See Richard Ford, "The Boundaries of Race: Political Geography in Legal Analysis," 107 *Harv. L. Rev.* 1841 (1994).
61. See generally Noah Kazis, "Transportation, Land Use, and the Sources of Hyper-Localism," 106 *Iowa L. Rev.* 2339 (2021).
62. Nadav Shoked, "The New Local," 100 *Va. L. Rev.* 1323, 1335 (2014).
63. See Briffault, "Localism."
64. Hannah Fenichel Pitkin & Sara Shumer, "On Participation," *Democracy* Oct. 1982, at 43.
65. See Williams & Friedman, *State Constitutions*, at 190
66. Ibid., at 199.
67. Ibid.
68. See, e.g., Molly Selvin, "The Public Trust Doctrine in American Law and Economic Policy, 1789–1920," 1980 *Wisc. L. Rev.* 1403 (1980).
69. See, e.g., Lee Optical.
70. This orientation is given modern life through recent efforts by leading legal scholars who draw upon these ideas in forging a "new democracy" (Novak) or "anti-oligarchic" (Fishkin & Forbath) vision of American constitutionalism.
71. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* (2002); Matthew D. Adler & Chris William Sanchirico, "Inequality and Uncertainty: Theory and Legal Applications," 155 *U. Pa. L. Rev.* 279 (2006).
72. On cost-benefit analysis, see Richard L. Revesz & Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and our Health* (2008); Daniel A. Farber, "Review: Rethinking the Role of Cost-Benefit Analysis," 76 *U. Chi. L. Rev.* 1355 (2009).
73. Adrian Vermeule, *Common Good Constitutionalism* (2022).
74. Ibid., at 36.
75. Ibid.
76. Ibid., at 62.
77. Ibid., at 172–73.
78. Ibid.
79. This older formulation of the nondelegation doctrine is illustrated by J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) and Field v. Clark, 143 U.S. 649 (1892).
80. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).
81. See Cass R. Sunstein, "Nondelegation Canons."
82. Ernst summarizes Freund's struggles, by reference to the emergence of administrative power in Dean Roscoe Pound's influential sociology and law: "The new 'social' or 'sociological' approach had broad implications for law, explored in Pound's brilliant critiques of the constitutional law of the Supreme Court, the construction of 'socialized' juvenile and municipal courts, and the law professor John Welsey Hohfeld's system of jural relations. In Hohfeld's system a common-law rule that created an area of *damnum absque injuria* was no anomaly but a conscious choice of a legal regime, which he called the

jural relation of 'privilege-no right.' Within this realm, which lay between 'plain illegality' and plain 'liberty,' Freund argued, administrators, acting under the police power, could lawfully restrain private acts that were 'legitimate but attended with peril or liable to abuse.' Administrative law was 'the system of legal principles which settle the conflicting claims of executive or administrative authority on the one side, and of individual or private right on the other'." See Daniel Ernst, "Ernst Freund, Felix Frankfurter and the American Rechtsstaat: A Transatlantic Shipwreck, 1894–1932," 23 *Stud. Am. Political Dev.* 171–88 (October 2009). With respect to the reference to Hohfeld, the classic text is Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Legal Reasoning," 23 *Yale L. J.* 16 (1913).

83. See, e.g., Blake Emerson, *The Public's Law: Origins and Architecture of Progressive Democracy* (2019); Joanna L. Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (2012).
84. See Max Weber, *Economy and Society* (1922).
85. See Frederick Winslow Taylor, *The Principles of Scientific Management* (2011).
86. This quotation is widely associated with Mayor Fiorello LaGuardia of New York.
87. Daniel P. Carpenter, *The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862–1928* 14 (2001).
88. See, e.g., G. Edward White, *The Constitution and the New Deal* 94–127 (2000); Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (1995).
89. See Morton Keller, *The Affairs of State: Public Life in Late Nineteenth Century* (1977).
90. See generally Conor Clarke & Henry Hansmann, "Between Public and Private Enterprise: The Role and Structure of Special-Purpose Governments" (Sept. 2022).
91. Jack Georger, "Special Purpose Governments and Special Purpose Frameworks," in *Audits of State and Local Governments: What You Need to Know* (2018).
92. See Ball v. James, 451 U.S. 355 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969). See generally Richard Briffault, "Who Rules at Home: One Person/One Vote and Local Governments," 60 *U. Chi. L. Rev.* 339 (1993).
93. See Shoked, "The New Local," describing this phenomenon. See also Nadav Shoked, "Quasi-Cities," 93 *Boston U. L. Rev.* 1971 (2013).
94. In Miriam Seifter's important work on the anti-democratic legislature, for example, the predicament of local agencies exercising broad powers because, so the claim goes, that there are policy experiments has grown and, with it, powerful threats to the democratic structure and purposes of state governance under state constitutions.
95. Theodore Lowi, *The End of Liberalism* xv–xvi (2nd ed., 1979).
96. See Reuel E. Schiller, "Reining in the Administrative State: World War II and the Decline of Expert Administration," in *Total War and the Law: The American Home Front in World War II* 185 (D. Ernst & V. Jew eds., 2002).
97. P. Ball & A. Maxmen, "The Wpic Battle against Coronavirus Misinformation and Conspiracy Theories," *Nature*. (2020).
98. See generally Reuel E. Schiller, "Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s," 53 *Admin. L. Rev.* 1139 (2001); Reuel E. Schiller, "Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970," 53 *Vand. L. Rev.* 1389 (2000).
99. On the connections between this skepticism and developments in administrative law in the latter part of the twentieth century, see Grisinger, *Unwieldy American State*, at 195–250.

100. See Gillian E. Metzger, "1930s Redux: The Administrative State Under Siege," 131 *Harv. L. Rev.* 1 (2017).
101. See, e.g., Gundy v. United States, 588 U.S. __ (Gorsuch, J., dissenting).
102. See generally Daniel Deacon & Leah Litman, "The New Major Questions Doctrine," 109 *Va. L. Rev.* 1009 (2023); Beau J. Baumann, "Americana Administrative Law," 111 *Geo. L. J.* 465 (2023).
103. See Eric Zoldan, "The Major Questions Doctrine in the States," 101 *Wash. U. L. Rev.* 359 (2023).
104. D. J. Houston & L. H. Harding, "Public Trust in Government Administrators: Explaining Citizen Perceptions of Trustworthiness and Competence," 16 *Public Integrity* 53 (2013).
105. See Martha Minow, *Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech*, Chapter 1 (2021).
106. James Russell Lowell, *Political Essays*.
107. Charles Tiebout, "A Pure Theory of Local Expenditures," 64 *J. Pol. Econ.* 416 (1956).