

# Police Power

by F. Harold Essert

This article originally appeared in the 1933-1934 edition of the Nebraska Law Bulletin, published by the College of Law at the University of Nebraska. It's described as,

“. . . the winning essay in the contest conducted by the Nebraska State Bar Association, prizes amounting to \$300 being furnished by the Ancient and Accepted Scottish Rite of Free Masonry in Nebraska. The author, who received a cash prize of \$100 for his work, attended the public schools of Colorado and Wyoming and was awarded an A.B. degree by the State Normal College of Wayne in June, 1933. He has been a minister in the Methodist Church since 1928 and plans to Continue his education with a view to further work in this field or in educational work of some kind.”

A \$100 cash prize might not sound like much, but in 1933 (in the midst of the Depression), \$100 was at least the equivalent of at least \$3,000 today. It's interesting that the Masons provided the prize, and that the winner appears to have been a Methodist minister rather than a licensed lawyer. But in 1933, there probably were no licensed lawyers – at least not in Nebraska. In any case, the author's background and insight strikes me as sufficiently unusual to suggest a study of his life and further writings might be revealing.

In any case, if you read this article closely – and especially if you “read between the lines” – it offers a great deal of insight into the historic forces and justifications that accompanied the revolutionary changes in our political and judicial systems that were precipitated by the Franklin D. Roosevelt's “New Deal”.

The original author's footnotes are identified by numbers and reproduced at the end of the documents. My own comments are in blue text, added alongside of the original text and identified by footnote letters. Except for those terms which are written in Latin, all terms in the original text that are highlighted by italics are my added emphasis.

## What is Meant by the “Police Power”? In what Way and to what Extent does its Exercise Affect the “Due Process” Clauses of the Fifth and Fourteenth Amendments to the Federal Constitution?

The police power of the state has been called the “dark continent” of American constitutional law, and rightly so, for this section of the law is the most vague and difficult to define of all over which the courts have labored. To attempt to convey a true conception of its nature and its limitations involves many problems, for while it is a much explored, it is a *dimly charted*, field of judicial investigation. “The police power is a well recognized if *not fully defined* department of constitutional law.”<sup>1</sup> The power is, and must be from its nature, *incapable of any very exact definition or limitation*,<sup>A</sup> for it is that function of government which has for its direct and *primary purpose* the promotion of *public welfare* through the means

<sup>A</sup> As you'll read, this article repeatedly emphasizes that the “police power” is not, nor can it be, precisely defined – or *limited*. That imprecise definition necessarily implies a power that is “unlimited” and thus, seemingly contrary to the constitutional doctrine of limited government based on powers that are enumerated and defined with some specificity.

of compulsion and restraint over *private* rights.<sup>2</sup> <sup>B</sup>

*Who shall say* what constitutes the public welfare? Who shall say where the limits of compulsion and restraint should end? As each tomorrow shall offer *different* social, political, and economic conditions, so there shall be a *totally different interpretation* of the police power for each circumstance.<sup>C</sup>

The early conception of this power was broad—as broad as the whole field of *internal* regulation by which the State sought, not only to preserve the public order and to prevent offenses against itself, but also to establish such rules and regulations for the intercourse of *citizens with citizens*<sup>D</sup> as would insure to each the uninterrupted enjoyment of his own as far as was “reasonably consistent with a like *enjoyment*<sup>E</sup> of the rights of others.”<sup>3</sup> That is to say, the police power in its broad sense was considered to be that power *inherent* in every *sovereignty*<sup>F</sup> to govern men and things. It is evident that,

“When one becomes a *member*<sup>G</sup> of society, he necessarily parts with some rights and privileges which, as an individual unaffected by his relations to others, he might retain. . . . This does not confer power upon the whole people to control rights which are purely and exclusively private, but it does authorize the establishment of laws requiring each citizen so to conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government and has found expression in the maxim, *sic utere tuo ut alienum non laedas*. From this *source*<sup>H</sup> come the police powers.”<sup>4</sup>

To grant such broad and inclusive power to government without placing restrictions upon its use, would be to stand in *grave danger* of having *all rights*

<sup>B</sup> The article also emphasizes that “police power” is tied to an dependent upon the “public” welfare. I am increasingly suspicious that in every reference to the “public” trust, or “public” welfare, or “public” anything, the word “public” is synonymous with “nation” and “national” – which in turn suggests the “nation” of “citizens of the United States” that was created by the 14<sup>th</sup> Amendment. Within that nation/ “public,” all “citizens” are subject to Congress and its “corporate, legislative-democracy”. If my suspicions are valid, the term “public” is dangerous to any concept of freedom espoused by the Founders in the original Constitution.

<sup>C</sup> Again, the author emphasizes that no one seems to be able to officially define or limit the police power. That power is not only undefined but capable of changing dramatically on a daily and case-by-case basis. If the police power can’t be defined or limited, it seems to constitute “rule by man” rather than “rule by law”.

<sup>D</sup> If police power is intended to operate “internally” to regulate the conduct of “citizens with citizens,” it would seem that if you weren’t a “citizen” of the same sovereignty as the police, they would have no legitimate power over you. I.e., “police power” seems dependent on the concept of *citizenship*.

<sup>E</sup> The word “enjoyment” seems innocent enough, but if you read Black’s Law Dictionary (7th Ed.), you’ll see that term always involves “use or possession” of a right and thus implies 1) the presence of a trust, and the status of person “enjoying” a particular right as being a “beneficiary”.

<sup>F</sup> And who is the sovereign in the United States of America? We the People. But if the “police power” is being exercised by the “government” without direct and explicitly defined delegation from We the People, it follows that the “police power” is being exercised by a sovereign *other than* We the People and by a government (and new “sovereign”) *other than* that intended by the original Constitution.

<sup>G</sup> The concept of “membership” is very similar to “citizenship”. If you’re not a citizen-member of a particular society, you’re presumably not subject to that society’s police powers. However, the “society” created by our Federal Constitution was based on strictly enumerated and limited powers granted by the sovereign (We the People) to our “public servants,” the government officials. If our officials are exercising unlimited and undefined police powers, it follows that they are enforcing the rules of a “society” other than the one created by the Federal Constitution.

<sup>H</sup> According to *Munn v. Illinois*, 94 U. S. 113, this Latin phrase means “Enjoy your own property in such manner as not to injure that of another.” The magic word “enjoy” suggests the presence of a trust and implies that the “source” of police powers may be trust-based. So if you were not a member, trustee, or beneficiary of the particular trust, you might not subject to that trust’s police powers.

and privileges, inherent in the individual, *taken away*. Power has a way of developing beyond the sane and moderate bounds desired by the sober judgment of man. Written into the *American*<sup>I</sup> Constitution we find such restraint upon the use of the police power in the due process of law clauses of the Fifth<sup>J</sup> and Fourteenth Amendments.<sup>5</sup> These clauses seek to furnish the counterpoise to that “coercive force of the community exerted upon its members for the sake of ‘*health, safety, and morals*’ of the whole.”<sup>6</sup> <sup>K</sup> We might think, then, of the police power and the due process concepts as the *two sides of the same shield*<sup>L</sup>—the force and the restraint of the power of the state lodged in the government. The state reaches out through the force and interferes with the life, liberty, or property of the individual *for the sake of the whole*.<sup>M</sup> The restraint is “a warning to the government that it must not go too far in this interference”—a warning which must be heeded.<sup>7</sup>

It is not a simple matter, however, to state the particular and definite offices of these two governmental factors. They are *elastic and constantly changing* concepts which can be understood only as seen in their relationship to the social, economic, and political conditions of the day in which they are considered.<sup>N</sup>

The term “police power” was *not used* in the Constitutional Convention,<sup>8</sup> nor did it appear in court decisions, so Judge Hastings tells us,<sup>9</sup> until Mr. Chief Justice Marshall used it in the *Brown v. Maryland* case,<sup>10</sup> in 1827. It was not immediately made current, but by 1840 the term was a popular expression to denote the *undefined* power of

<sup>I</sup> It’s interesting that the article begins with references to the “Federal Constitution” but here references the “American Constitution”. The original Constituion adopted in 1789 is absolutely the “Federal Constitution”. However, it’s unclear whether the “American Constitution” is synonymous or identifies an alternative constitution.

<sup>J</sup> Although this article begins by referencing *both* due process clauses of the 5th (adopted in 1791) and 14th (adopted in 1868) Amendments, this article analyzes only the 14th Amendment – not the 5th. There seems no obvious reason to include “another” due process clause in the 14th Amendment, unless that second kind of 14th Amendment “due process” is somehow significantly different from the previously adopted “due process” of the 5th Amendment. Comparison of the two due process clauses reveals that while the 5th Amendment reads, “. . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law;” the 14th reads, “. . . nor shall any State deprive any person fo life, liberty, or property, without due process of law . . .” See the difference? Under the 5th no person can be deprived of his various rights except by “due process” by *anyone*. Not State, local or Federal governments. Presumably, not even by private persons. But under the 14th Amendment, the “due process” clause protects against violations by the “States” – but offers no protection against violations by Federal, National or corporate governmental entities. The strong implication is that 14th Amendment “due process” is at least weaker than 5th Amendment “due process,” and more importantly, may be intended for the 14th Amendment class of citizen-subjects rather than the Citizen-sovereigns of original jurisdiction.

<sup>K</sup> The words “health” and “morals” do not appear in the body and first 27 amendments of the Constitution. The word “Safety” appears only in Article I, Section 9 Clause 2 which declares, “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” Thus, I see no foundation in the Federal Constitution for the exercise of “coercive force” of police power against anyone based on “health, safety and morals” of the whole “community”. Again, this implies that the unlimited and undefined “police power” flows from a source other than the Federal Constitution and applies to a citizenry other than that mentioned in Articles I and II of that instrument.

<sup>L</sup> While “police power and the due process” may be “two sides of the same shield” – which “due process” are we talking about? That of the 5th Amendment or the 14th? My strong suspicion is that the modern application of police power flows from the 14th Amendment, but not the 5th.

<sup>M</sup> The Declaration of Independence declares that we are endowed with “unalienable Rights” to “life, liberty and the pursuit of Happiness” and further declares that that governments are instituted to “secure these rights”. There is no proviso in that Declaration of the Federal Constitution adopted in 1789 to “interfere” with those rights except insofar as We the People granted limited powers to government to do so. We granted no such power. Thus the foundation for “police power” appears to be something other than the Declaration of Independence or Federal Constitution.

<sup>N</sup> Again, evidence of “rule by man” rather than “rule by law”.

the state *not granted to the federal government*. In Mr. Chief Justice Taney's profound opinion in the *Charles River Bridge* case,<sup>11</sup> in 1837, this power was definitely recognized as a limit upon the doctrine of the *Dartmouth College* case.<sup>12</sup> The term itself he did not use, but said in defence of the States' power:

"We cannot deal thus with the rights reserved to the states and by legal intendments and mere mechanical reasoning take away from them any portion of that power over their own internal police and improvement which is so necessary to their well-being and prosperity."<sup>13</sup>

However, at this period of our national history the individualistic doctrines of Adam Smith and the Manchester School were dominating political and legal thinking. The tendencies of the strong and determined men to manage their own affairs without governmental hindrance found support in the courts, as witnessed by the *Dartmouth College* case. "For the first three-quarters century of our national existence the individual was hampered by few legal restrictions in pursuit of his business interests."<sup>14</sup> In this phase of our national life colored, as it was, by the principle of *laissez faire*, the police power of the state was greatly over-shadowed by the prevailing public opinion to let every man find his own life, liberty, and property, and seek protection for them as best he could, with the least possible interference by the state.

In this early period of the country's growth such a policy of "hands-off" was conducive to the rapid extension of business interests and the exploitation of the natural resources; business prospered, trade flourished, fortunes were accumulated. and as there seemed to be enough for everybody there was little demand for governmental interference. If justice or property could not be obtained in established society it was an easy matter for the individual to move west where fresh lands called for cultivation and offered unbounded freedom. The sentiments of business, "the public be damned," "all the traffic will bear," and "caveat emptor," were met with indifference rather than a call for governmental regulation.

The tendency to retain the status quo and to hinder the growth of the police power brought about the inclusion of the due process clause in the Fourteenth Amendment. By 1868 conditions had changed sufficiently so as to give business interests fear lest individual states would hinder their growth through application of the dreaded police power. The original design of the amendment was to subject all acts of the state legislatures to review by the federal courts.<sup>15</sup> While the wording of the amendment, and the engineering to secure its ratification, did not disclose the hopes of the sponsors, yet "there is plenty of evidence to show that those who framed the Fourteenth Amendment and pushed it through Congress had the purpose in mind . . . of providing a general restraining clause for state legislatures."<sup>16</sup> It was an attempt, so Professor Beard suggests, to write *laissez faire* into the Constitution. It was not long before due process came to imply the prevention of arbitrary legislation and administrative acts, and the invasion of fundamental rights of the citizens. Thus the control of a vast field of legislative action, originally intended for the states, was placed ultimately in the hands of the federal courts.<sup>17</sup>

However, in the over-emphasis of individualization appeared causes for a swing to state control of industry. A growing disregard for the public welfare on the part of business cried aloud for redress

**1 - 800  
BEAT IRS**

**KNOW YOUR  
RIGHTS!**

**CIVIL &  
CRIMINAL TAX**

**ELIMINATE TAX  
DEBTS THROUGH  
BANKRUPTCY!**

**www.beatirs.com**

**Your Ad  
Here!**

**\$90 for 10,000 copies  
(\$9 CPM)**

**\$160 for 20,000 copies  
(\$8 CPM)**

Current ad sizes & prices at  
[www.antishyster.com](http://www.antishyster.com)  
under the "advertising" link

Send ad and check to:  
**AntiShyster POB 540786  
Dallas, Texas 75354-0786  
The United States of America**

or email to:

**[adask@gte.net](mailto:adask@gte.net)**

**MC, Visa, & Amex  
call: 972-418-8993**

through the police power. Free land began to disappear. The opportunity to escape the *tyranny of an uncontrolled society*<sup>O</sup> was diminished. Urban life and factory conditions made protective legislation imperative. The demands of social inter-play called for more and more regulation of *business*<sup>P</sup> in the interest of the whole body of citizens. So the pendulum began its backward swing—its swing to the opposite extreme—to government-controlled or government-owned industry.<sup>18</sup> As early as the *Slaughter-House* cases,<sup>19</sup> in 1873, the Court took the attitude that the citizen must look to the state for protection of privileges and immunities flowing from state citizenship, and not to the Fourteenth Amendment and the Supreme Court. Three years later in the *Granger* cases,<sup>20</sup> the opinion of the Court was that *businesses* affected with a public interest were to be controlled by the public.<sup>21</sup> In this opinion, given [in 1876] by Mr. Chief Justice Waite, occurred the *revolutionary* statement:

“For protection against abuses by legislatures the people must resort to the polls, not to the courts.”<sup>Q</sup>

And in spite of certain abandonments of this position, notably in *Smyth v. Ames*<sup>22</sup> and the New York bake-shop case,<sup>23</sup> it was becoming evident, by the time the twentieth century appeared, that the police power of the state must be used more and more if the *health, safety, morals*, and even the general *welfare* and public *convenience*,<sup>24</sup> of the people were to be maintained and safeguarded.<sup>R</sup> The technological development of the “Second Industrial Revolution” brought new perils in its train: the pollution of streams by refuse, spread of contagious diseases, and the constant danger from explosives. It made possible new forms of law violation: safe blowing, machine gun banditry, wire-tapping and submarine smuggling. It offered government striking opportunities to serve the *public* good: bacteriology revealed to it responsibilities in public health never dreamed of when the Constitution was first drafted. It was accompanied by hazardous industries which increased the number of defectives and injured for whom provision had to be supplied. It penalized old age by demanding energetic youth for its machines, raising the problems of old age dependency and technological unemployment. “If governments tried to cling to the functions assigned to them in the eighteenth century, modern society could scarcely escape disaster.”<sup>25</sup>

This new trend of industrialization forced upon the courts a new interpretation of the police power, a conception that was justified by the conditions, no doubt, but a radically different conception than had prevailed under the *laissez faire* policy of government. *Public* control of, and public interference in, *business* was now deemed imperative. The courts approved and *public opinion sanctioned*<sup>S</sup> the efforts of legislative bodies to regulate the forces of the vital life of the new day. Mr. Justice Holmes expressed the attitude of the *sociological* jurist, an attitude that was soon to be held by the majority of the Court, when in the *Noble State Bank* case he said:

“We must be cautious about pressing the broad words of the Fourteenth Amendment to a dryly logical extreme. . . . The police power extends to all the great *public* needs. It must be put forth in aid of what is sanctioned by *usage*, or held by the *prevailing morality* or the strong and preponderant *opinion* to be greatly and immediately necessary to the *public welfare*.”<sup>26</sup>

It is a natural fallacy to believe that a written constitution is a bulwark of property and rights of persons. But, in the words of Professor Merriam,

<sup>O</sup> How does this “tyranny of an uncontrolled society” differ from the condition we commonly refer to as “freedom”?

<sup>P</sup> The balance of this article repeatedly links the “police power” to “business” and “commerce”. This implies that police may have no authority to “interfere” with our rights except when we are involved in those activities.

<sup>Q</sup> Note that this declaration says our recourse is no longer to courts for redress of grievances against abusive laws, but instead only to the “polls” (elections). This declaration is truly “revolutionary” because it signals that with this 1876 case (*Munn vs. Illinois*, 94 U.S. 113) the Supreme Court validated the existence of the 14th Amendment’s “legislative democracy” and replacement for the Federal Constitution’s Republic. See the point? If our only redress for grievance was in the polls (elections) rather than the courts, we 1) apparently no longer enjoyed “unalienable Rights” and standing in courts of law; and 2) must seek our redress only thru the polls of the election of the legislature. That’s probably the first evidence of the “legislative democracy,” folks. Note that this 1876 case was decided just eight years after the 14th Amendment was adopted. *Munn* is an important case that should be studied thoroughly.

<sup>R</sup> Now the police power is no longer based on mere “health, safety and morals,” but has expanded to include “welfare” and even “convenience”.

<sup>S</sup> Apparently, the ultimate authority for police power is “public opinion”. This is consistent with modern government reliance on “polls,” mainstream media and “spin doctors”.

“ . . . those who thus rely upon words of any constitution for such support are leaning upon a broken reed; and their sense of security is a false one. *The Constitution does not protect persons or property against unjust invasion, or prevent governmental control and regulation of business, for after all this depends upon interpretations and application by courts.*”<sup>27</sup> <sup>T</sup>

And the courts are selected from among the ranks of men filled with the spirit of the times. We are certain to find the Constitution a growing and expanding instrument. For that very reason it is a living and not a dead Constitution. By suiting itself to different times and circumstances it lives.

So, too, the police power must continue to be elastic— capable of development—as economic, social, and political conditions vary.<sup>28</sup> Therefore, the rule of precedent, *Stare Decisis*, is not a sufficient basis upon which to judge the present-day meaning of this term, nor the extent of its scope. According to Goodnow, “*the government may exercise the police power unrestricted by the constitutional limitations to be found in the Bill of Rights.*”<sup>29</sup> <sup>U</sup> Under this power it is possible, says Professor Merriam,<sup>30</sup> to *take the most of a man’s income,*<sup>V</sup> and to do it in a perfectly legal manner. The Supreme Court of today might reverse the opinion of the Court which decided the Child-labor case in 1918,<sup>31</sup> if the Black 30-hour labor bill should pass Congress and be questioned as to its constitutionality. “Although such a law was declared unconstitutional by the Supreme Court of Illinois in 1895, at the present time the courts are upholding laws which forbid women working more than 8 hours a day.”<sup>32</sup>

The one aspect of this enlarging scope of the police power which shows more clearly than any other the inability of confining its field of operation to a given narrow area, is the rapid growth of the federal police power. The federal police power has grown even faster than that of the states. Congress, of course, may establish police regulations, confining their operations to the subjects covered under the taxing power, the commerce power, and the power to control bankruptcy laws, coinage, post offices and post roads, weights and measures, and patents and copyrights.” These specific powers have been extended to cover many other projects which may seem at first to be excluded,— <sup>W</sup>

“ . . . protection to industry through tariffs, banking, anti-trust laws, and to a number of other matters which have *no logical relation* to the power under which control was justified. In the words of Charles E. Hughes: ‘There has been in late years a series of cases sustaining the regulation of interstate *commerce*, although the rules established by Congress had the quality of *police* regulation.’ ”<sup>34</sup>

Typical of the uses of the police power by the federal government are laws: prohibiting the transportation in interstate commerce of impure foods and drugs, misbranding articles, intoxicating liquors, prize-fight films and advertising seeking to defraud the *public*;<sup>X</sup> to stamp out bank notes; prohibit the coloring of oleomargarine to look like butter; regulating the manufacture of phosphorus matches; fixing warehouse and grain standards; arranging for the protection of migratory birds

<sup>T</sup> This is madness or treason. If the strict language and construction of the Constitution offers no protection against the “interpretations and applications” of the courts, we have rule by men (judges), not rule by law. But since the 1876 *Munn* case has already declared our only remedy for abuses by the legislatures is in the polls (elections) rather than the courts, it appears that our “Brave New Government” deprives us of both Constitution and courts when it comes to challenging the authority of our 14th Amendment masters – the Congress.

<sup>U</sup> Again, whatever police powers are, they are not derived from, nor obviously subject to the organic Constitution (adopted in 1789) nor the Bill of Rights (adopted in 1791). But note that while the “police power” seems initially immune to all constitutional limits – nothing is said about those amendments (like the 14th) that were adopted *after* the Bill of Rights in 1791. Again, we see the implication that police power flows from the 14th Amendment and may apply only to 14th Amendment “citizens of the United States,” “U.S. citizens” and beneficiaries of the various governmental trusts.

<sup>V</sup> If that’s the basis for your income tax, then it follows that your obligation to file and pay may flow from your status as a “citizen” subject to the “police power” of Congress under the 14th Amendment and/or your relationship to a government trust.

<sup>W</sup> They may have been excluded “at first” under the organic Constitution adopted in 1789 and the amendments adopted prior to the Civil War. But after the Civil War, especially with the passage of the 14th Amendment and creation of a new class of “citizens” subject to – rather than sovereign over – Congress.

<sup>X</sup> I am extremely suspicious that the terms “public” and 14th Amendment “citizens of the United States” are synonymous.

flying north and south over state lines; and subsidizing the states in highway construction.

As the policy of individualization ran to States' Rights and ultimately to Civil War, so a steady swing to *social control* is running more and more to centralization, and, it *may be, to dictatorship*. This fear was expressed as early as 1917 by the American Bar Association when confronted by the Child-labor law of that year.

"This case was undoubtedly the Pandora's box from which burst forth with amazing speed and ever-increasing velocity the tendency to federalize and *centralize*. . . . It was the beginning of that steady, unending, unceasing movement in *Congress* to stretch far beyond its real meaning, and far beyond what any fair construction, however liberal, warranted the *Commerce* Clause of the Constitution. This movement has progressed so steadily, has been pressed so persistently, and has gone so far that it threatens to utterly *annihilate our dual system of government*, to *utterly destroy the police power of the states*, and finally to be about to *deprive our people of the inestimable blessing of local government*, unless it is checked speedily and sharply."<sup>35</sup> Y

Many legal and political observers have seen this tendency to centralize and have called for a re-alignment of purpose and policy. But the forces which have caused this swing are strong and difficult to stay: rapid transportation, direct communication, lessening of barriers and social distinctions, complexity of problems, shifting populations, the greater ease of persuading one legislative body of the need of a law than to persuade forty-eight separate bodies, and, above all, a sense of *national* unity over-topping all *local* loyalties.<sup>Z</sup> There has been a gradual replacement of that philosophy of *individualism* which prevailed during the last century by a philosophy of *collectivism* "evidencing itself in governmental *paternalism*."<sup>36</sup> AA

It will be seen then, that in attempting to state what is meant by the police power we are faced by many difficult problems. *We do not mean today what was meant by the term fifty or a hundred years ago*. Something of the *social* conditions of the *moment* must be known to justify many of the operations of this power.<sup>BB</sup> We must sense the change in the attitude of the public which sanctions greater centralization of power and usurpation of the police power functions belonging to the states. Above all we must test the *reasonableness* of the relation between the public welfare and the deprivation which someone suffers because of the regulation. The capacity of States to control or regulate through police power measures "hinges on the Supreme Court's reading of *the* due process clause."<sup>37</sup> CC It has become a practice with this body to test *each case* on its own merits, and to say whether in *each particular case* due process of law has been absent.<sup>DD</sup>

One of the very famous definitions of the police power, as it is coming to be, was given by Mr. Chief Justice Shaw:

"The power vested in the *legislature* by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the *Commonwealth*, and of the *subjects* of the same."<sup>38</sup> EE

Perhaps *no* other attempt to define this power has been *bet-*

Y Well, there's a warning that went unheeded, hmm?

Z The 14th Amendment created a single, homogenous "nation" of "citizens" to supplant the former "Citizens" of the original and separate States. Thus the observation that "national unity over-topping all local loyalties" is a polite way of saying the single 14th Amendment "nation" has supplanted the several former States.

AA That's a pretty succinct description of the patriot movement: the individualists vs. the collectivists.

BB Since the police power can change moment by moment according to prevailing "social conditions," it appears that the police power is not based on any "eternal principles". Thus, the police power is purely political and is clearly not based on or derived from any biblical precepts of godly commands.

CC Uh-huh - but *which* "due process" clause? The 5th Amendment's or the 14th's?

DD The mandate that each case be decided on a "case by case" basis without regard to precedent signals that the jurisdiction of the "national" courts that oversee the "police power" and (presumably) the 14th Amendment citizens are courts of *equity* rather than courts of law.

EE This definition of the police power might be interpreted as saying that the "legislature" (trustees) can write administrative laws for the "Commonwealth" (the trust) for the "good and welfare" (benefits) of the "subjects" (beneficiaries) of that Commonwealth/trust. If this interpretation is valid, it implies that "police power" flows from a trust and is intended to regulate the behavior of the beneficiaries.

ter phrased.<sup>FF</sup> It is generally held that over and above the rights of the *individual* are certain rights of the *public person*, the State, and that the continuance and welfare of this civic whole is more to be desired than that the individual be guaranteed convenience or even *existence*.<sup>GG</sup> The *whole* is greater than its *parts*.<sup>HH</sup> It is certainly true that no government has an *ethical* right to be except as it promotes the *welfare* of its citizens, but, for this very reason, it is necessary that the State should possess the power “in *all* cases of need to subordinate private rights to public necessities.”<sup>39</sup> **I**

However, the individual holds an inherent claim to certain rights which even the State must recognize and respect. The growth of *democracy* down through the ages is evidence of the fact that a recognition of these rights has been *won* and maintained.<sup>JJ</sup> The due process of law clauses in the Fifth and Fourteenth Amendments to the federal Constitution stand, today, as a measure of the scope of the police power. If the *policy*, as stated above, of the *expediency* of the police power is carried too far, without limitation, we shall follow in the footsteps of the Italian *Fascists* who have based their program on “the rights of the State, the preeminence of its authority, and the superiority of its ends.” In opposition to this view, the American dream of a “better, richer, and happier life for all her citizens of every rank” can be realized if the State remains the *means* and *not the end* of attainment. In order to guard ‘against the “hydra-headed tyrant” that lies sleeping in the rule of the majority, the Constitution, and the spirit of the American people, have called for a “square deal” for every citizen.<sup>40</sup> “In a word, due process of law is a synonym for *fair play*.”<sup>41</sup> **KK**

We may say, then, that the due process clauses of the Fifth and Fourteenth Amendments limit or modify the exercise of the police power by demanding “a square deal” and “fair play” to every man who deserves the right. In all actions of the police power there should be an observance of the judicial *forms* and usages which by general *consent* have become the essentials of a just proceeding.<sup>42</sup> That is to say, if a given legislative act does not “deprive” an individual of his “life, liberty, or property” in a way that is contrary to *accepted* standards of justice and fairness, both “as to the *method* of doing it and the *purpose*”<sup>LL</sup> for which it is done,” then it may be said to come within the police powers, and not to violate the due process clause.<sup>43</sup> For the due process clause has been interpreted by the courts as applying to substantive law as well as to matters of procedure.<sup>44</sup>

In dealing with the police power the courts have worked out a technique involving the following questions: (1) Is the *purpose* of the act in question legitimate; that is, does it serve the *end* of the public health, safety, order, *morals*,<sup>MM</sup> or general welfare?<sup>45</sup> (2) Do the *means* employed *reasonably* tend to accomplish

<sup>FF</sup> If the previous definition is the best available, it’s true meaning needs to be studied and absolutely discerned.

<sup>GG</sup> No “unalienable Rights” (like the right to “life”) in this system of government.

<sup>HH</sup> The “whole” (the artificial entity we call the “collective”) is greater than the “parts” (the natural persons who were created by God and endowed with “unalienable Rights”).

<sup>I</sup> Note that the authority for government exercising police power (and apparently acting in the capacity of trustee) to even exist seems based on “*ethical* rights” which are in turn based on the “welfare” (benefits) of its “citizens” (beneficiaries). Note also, that if the government must possess power “in *all* cases” to “subordinate private rights to public necessities,” whatever kind of government they are describing is not bound to respect God-given, “unalienable Rights”.

<sup>JJ</sup> Whatever “certain rights” the state must recognize, insofar as those rights have been “won,” it seems unlikely that those rights include “unalienable Rights”. After all, we have hardly “won” the “unalienable Rights” with which we were equally endowed by our Creator.

<sup>KK</sup> “Fair play” sounds much like a trustee’s obligation to treat all beneficiaries equally. No such obligation exists in law where the issue of title and right dominate all others. In law, if you have legal title, you have legal right, and all others (and fair play) be damned.

<sup>LL</sup> Thus, to prove a legislative act deprives one of his “life, liberty, or property” (unalienable Rights?) one must prove the legislature actually *intended* to do so. Proving a legislature’s purpose is almost impossible.

<sup>MM</sup> The obligation to serve their subjects’ “morals” may be a serious loophole in the exercise of police power. As explained in “The Amoral Majority” articles in Volume 9 No. 3 and Volume 10 No.2 of the AntiShyster, to be a moral person, one must know the difference between right and wrong, and that knowledge seems premised on knowing God. Thus, it should be possible to defend against the police power if it can be argued that such power restricts our spiritual knowledge of God.



the end sought? (3) Do these means maintain a *reasonable balance of convenience* between the public necessity on the one hand and the degree of interference with private rights on the other? As long as the *end* is legitimate, the means provide to secure the end, and *not something else*, and the means stand the test of “*reasonableness*,” then the act lies within the realm of the police power and does not violate the due process caution of *fairness*.

It cannot be clearly and definitely stated,<sup>NN</sup> then, to what extent the exercise of the police power affects the due process clause. *Each case* must be judged upon its own merits, and *each court may approach the whole matter on new and untried ground*.<sup>OO</sup> In the last analysis the police power rests upon *public* opinion—the extent of its exercise stops where public sentiment demands. For it is public opinion which actually rules a democracy.<sup>46</sup> It is *public* sentiment, then, which must be caught and persuaded if a just balance between these two governmental forces is maintained. Co-operation on the part of the state might well take the place of federal usurpation of the police power if *public* opinion were only so determined. “As the general police power can better be exercised under the provisions of local government,”<sup>47</sup> state legislatures might well *work together* in adopting measures which would create *unanimity* without summoning the help of the central government.<sup>PP</sup> A wave of the right type of public opinion might save us from what we seem headed for, and which Attorney-General Wickersham called “the hydra-headed tyrant of the future,” the *evils of majority rule*.<sup>48</sup> <sup>QQ</sup>

An eminent political scientist of England has said of our American political condition:

“A political *democracy* confronts the most powerful economic autocracy the world has even seen. The separation of powers has broken down. . . The constituent states of the republic have largely lost their ancient meaning. New *administrative* areas are being evolved. A patent unrest everywhere demands enquiry. . . and . . . anyone who analyses the changes from the narrow individualism of Brewer and Peckham to the liberalizing scepticism of Mr. Justice Holmes and the passionate rejection of the present order which underlies the attitude of Mr. Justice Brandeis, can hardly doubt the advent of a *new time*.”<sup>49</sup>

We are in a new time, and one which cannot be met with old methods. The police power must be used to bring security and better life to every person as against the demands of special groups, and yet the rights of the minorities must be maintained and guaranteed against too much governmental interference. This can be done successfully only as *public opinion* is caught and crystallized. “*Public opinion* is everything,” said Abraham Lincoln, “without it nothing can succeed, with it nothing can fail.” The police power will be capricious and deadly, or humane and equitable as public opinion is *well guided*.<sup>RR</sup>

<sup>NN</sup> The idea that that the extent of police power cannot be “clearly and definitely stated” is an absolute violate of the fundamental precepts of the organic Constitution. A law that cannot be known is not a law, it is an unlimited license for some to exercise unbridled power. Further, if such “law” can’t be known, then it can’t be conducive to public morality since a moral person, by definition, must *know* the difference between right and wrong. Where knowledge is impossible, so is moral choice. (See “The Amoral Majority” in AntiShyster Vol. 9 No. 3 and Vol. 10 No. 2).

<sup>OO</sup> So far as I know, the only courts which can try every case on “new and untried grounds” are courts of equity. Courts of law are absolutely bound by law and strongly bound by precedent. Courts of equity judge rule by their personal conscience on a case-by-case basis. Again, since the administration of trusts is among the primary responsibilities of courts of equity, the highlighted statement is more evidence that police power is an attribute of *trust* administration. If so, it follows that if you are not a beneficiary, trustee, or member of the particular trust, trust officials will have no police power over you.

<sup>PP</sup> The states are now famous for making “uniform” and “standard” laws that are virtually identical in all jurisdictions. The Uniform Commercial Code is just one example of that “unanimity”.

<sup>QQ</sup> More madness. The s.o.b.s. have created and extol the virtues of a legislative “democracy” – and yet they fear the “evils of majority rule”.

<sup>RR</sup> Lincoln’s observations on government’s dependence on public opinion would not precisely apply to a true constitutional government. Under the organic Constitution, public opinion is interesting, but no match for a strict reading of the Constitution. The Constitution controls in a Republic. In a democracy, that control is relegated to the vagaries of public opinion. But then, Lincoln was a dictator. Many of his acts were clearly unconstitutional, but he got away with them because 1) the Civil War was an “emergency” and 2) he was able to control public opinion. But I’m sure Lincoln realized that he would not only be impeached, but possibly hung if he ever lost control of the public opinion.

Today’s “police power” democracy is simi-

<sup>1</sup> W. G. Hastings, "The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State," p. 1.

<sup>2</sup> Ernst Freund, "The Police Power" as quoted in "The National Government and Business," p. 12, by Rinehart John Swenson.

<sup>3</sup> Thomas Cooley, "A Treatise on the Constitutional Limitation," p. 829.

<sup>4</sup> Chief Justice Waite in *Munn v. Illinois*, 94 U. S. 113. (*Sic utere*, etc.—"Enjoy your own property in such manner as not to injure that of another.")

<sup>5</sup> Daniel Webster in the Dartmouth College case, 4 Wheat. 629, identified the due process clause with "the law of the land," by which "is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

<sup>6</sup> Leon Whipple, "The Story of Civil Liberties in the United States," p. 265.

<sup>7</sup> Ben Albert Arneson, "Elements of Constitutional Law," p. 227.

<sup>8</sup> Judge Hastings, *loc. cit. supra* n. 1, says that the Convention identified the power with Madison's "residuary sovereignty" or Marshall's "immense mass of legislation" left to the states. p. 19.

<sup>9</sup> *Ibid.*, p. 21.

<sup>10</sup> 9 Wheat. 210.

<sup>11</sup> 11 Pet. 420.

<sup>12</sup> 4 Wheat. 629.

<sup>13</sup> 11 Pet. 552, as quoted in W. G. Hastings, *loc. cit. supra* n. 1.

<sup>14</sup> Rinehart John Swenson, "The National Government and Business," p. 11.

<sup>15</sup> C. E. Martin, "An Introduction to the Study of the American Constitution," p. 255.

<sup>16</sup> Charles A. Beard, "Contemporary American History," Ch. 3.

<sup>17</sup> C. E. Martin. *op. cit. supra* n. 15, p. 256.

<sup>18</sup> William Bennett Munro in his "The Invisible Government," p. 62, says: "No prediction can be safer than that the momentum in either direction will automatically check itself and produce revolution—and one which is directly proportioned to the strength of the preceding swing."

<sup>19</sup> 16 Wallace 36.

<sup>20</sup> *Munn v. Illinois*, 94 U. S. 113.

<sup>21</sup> The opinion stated: ". . . property does become clothed with public interest when used in a manner to make it of public consequence, and affects the community at large . . . and must submit to be controlled by the public for the common good."

<sup>22</sup> 169 U. S. 145.

<sup>23</sup> 198 U. S. 45.

larly dependant on public opinion. This dependence explains government's obsession with controlling mainstream media. But new communication technologies like the internet offer alternative media and opportunity for widespread growth of "politically incorrect" public opinions. If a democracy depends on *controlling* public opinion, then the internet directly threatens the democracy's very existence. I.e., without media control, the democracy forfeits control of public opinion, truth is revealed, and the democracy perishes – or at least evolves to represent the true interests of knowledgeable voters rather than the secret interests of government and its favorite corporations.

Democracy's dependance on public opinion may even explain government's attempt to control public education and resist home-schooling, private schools and voucher plans. If the democracy's survival depends on public opinion, that survival would be enhanced by an ignorant and "dumbed down" public. A Republic based on the Constitution has no need to control public opinion; a democracy based on public opinion can't survive unless that opinion is controlled.

But government control of public opinion necessary means that some of the truth is concealed from the public or replaced with lies. As a result of this restricted access to truth, the people can't possibly have the knowledge needed to know the difference between right and wrong and must necessarily live as "amoral" persons (those who don't know the difference between right and wrong). This definition of "amoral persons" (not knowing the difference between right and wrong) is synonymous with the definition for "legal insane". Thus, the amoral (ignorant) majority remains in undeniable need of government supervision and regulation. My people perish for lack of knowledge.

It may be true that most Americans are incapable of knowing the difference between right and wrong and thus becoming moral persons even if the necessary knowledge were readily available. Nevertheless, government cannot justify controlling the media and denying virtually all of us access to the truth (knowledge of right and wrong) necessary to become moral persons.

Why? Because the road to eternal salvation depends ultimately on knowing God, receiving knowledge from Him on the difference between right and wrong and becoming a moral person. Thus, government control of public opinion (restricting public access to truth) is not merely contrary to our secular *moral* interests, but contrary to our *spiritual* interests.

At first glance, it seems absurd to argue that government control of mainstream media and/or education might impact our spiritual interests. But

<sup>24</sup> Charles Warren in “The Supreme Court in United States History,” Vol. III, p. 466, says: “When, in the last decade of the nineteenth century, it (the Court) took the radical step of expanding the old classic phrase defining the objects of the police power— ‘public health, safety, and morals’—by interpolating the words ‘public welfare’” it tended to accept the theory that the law must recognize the priority of social interests.<sup>55</sup>

<sup>25</sup> Charles A. Beard in THE NEW REPUBLIC, June 18, 1930, “Government by Technologists.”

<sup>26</sup> Noble State Bank v. Haskell, 219 U. S. 104.

<sup>27</sup> Charles Edward Merriam, “The Written Constitution and the Unwritten Attitude,” p. 14.

<sup>28</sup> Ernst Freund as quoted in Ransom, “Majority Rule and Judiciary,” p. 62.

<sup>29</sup> Frank J. Goodnow is quoted in Whipple, *op. cit. supra* n. 6, p. 264.

<sup>30</sup> Merriam, *loc. cit. supra* n. 27, p. 14.

<sup>31</sup> Hammer v. Dagenhart, 247 U. S. 251.

<sup>32</sup> J. R. Commons and J. B. Andrews, “Principles of Labor Legislation,” p. 17.

<sup>33</sup> Art. I, Sec. 8.

<sup>34</sup> John M. Clark, “Social Control of Business,” p. 200. Howard Lee McBain in his “The Living Constitution,” p. 49, speaks of a class of laws which Congress has passed, under the sanction of the Courts, with the intent of regulating commerce. “These are,” he says, “in fact police enactments.” See also, Thomas Cooley, *op. cit. supra* n. 3, p. 856.

<sup>35</sup> As quoted in Warren, *op. cit. supra* a. 24, p. 472.

<sup>36</sup> Swenson, *op. cit. supra* n. 14, p. 12.

<sup>37</sup> Felix Frankfurter in the Yale Review March 1933. p. 479, ‘Social Issues Before the Supreme Court.’

<sup>38</sup> Commonwealth v. Alger, 7 Cush. (Mass.) 53.

<sup>39</sup> W. W. Willoughby, “Constitutional Law of the United States,” p. 1229.

<sup>40</sup> Warren, *op. cit. supra* n. 24, p. 467, in footnote quoting Everett v. Abbott: “The doctrine reached by the court is nothing but the formulation in legal phraseology of that thing which every American so ardently desires, ‘a square deal’.”

<sup>41</sup> William Bennett Munro, “The Constitution of the United States,” p. 143.

<sup>42</sup> Warren, *op. cit. supra* n. 24, p. 321, quotes from Missouri Pac. R. Co. v. Humes, 115 U. S. 512.

<sup>43</sup> Frankfurter, *loc. cit. supra* n. 37, p. 495, quoting from Mr. Justice Brandeis.

<sup>44</sup> Swenson, *op. cit. supra* n. 14, p. 68.

<sup>45</sup> For cases which serve to illustrate these ends of the police power refer to: Health: the right to enforce vaccination to prevent spread of disease (Jacobsenv. Mass., 197 U. S. 11).; requiring land to be drained (New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453); Safety: act requiring certain type of railroad headlights (Atlantic Coast Line Ry. Co. v. Georgia, 243 U. S. 280); demolition of wooden buildings if fire hazard (Macquire v. Readon, 255 U. S. 257. Morals: restraint of sale of liquor (Foster v. Kansas, 112 U. S. 205); regulation of obscenity (L’Hote v. New Orleans, 177 U. S. 587). General welfare: protecting against fraud as in control of practice of medicine and the training of practitioners (Dent v. W. Virginia, 129 U. S. 114); protection against economic oppression in control of labor conditions (Bunting v. Oregon, 243 U. S. 426); public convenience and advantage in prohibiting burials in cemeteries close to populous districts (Laurel Hill Cemetery v. San Francisco, 216 U. S. 358); compulsory benefits in favor of economically weak as in regulation of employment agencies (Adams V. Tanner, 244 U. S. 590); protec-

do government schools teach our children that “Thou shalt not commit adultery” and “Thou shalt not murder?” Or do they teach the “virtues” of safe sex (use of condoms), reproductive choice and abortion? While the Bible declares God regards homosexuality as an abomination, government-controlled media and schools teach homosexuality is merely an “alternative lifestyle”. If God is real, government control of the knowledge dispersed by mainstream media and public schools is placing innumerable Americans at risk of losing their immortal souls. That risk is absolutely contrary to the democracy’s “purpose” of protecting the public “morals”. I suspect that legal arguments based on that theory might give government fits.

<sup>55</sup> If our law (which was initially based on biblical principles, mandates and commands) has been changed to recognize “the priority of social interests,” the step was truly “radical” since that change was not simply political but was fundamentally *spiritual* (a rejection of God and his values). Also, note the timing: In the last decade of the 19th century (the 1890s) – approximately one generation after adoption of the 14th Amendment. Note also that the term “public welfare” was grafted onto “health, safety and morals” as a foundation for police power. I suspect that the term “public welfare” (especially as first used in 1890s) may be “code” for whatever new government (corporate? legislative democracy? “public” trust?) and/or citizenship was created under the 14th Amendment.

tion of bank depositors from loss (Noble State Bank v. Haskell, 219 U. S. 104); control of fares and rates of railroads (Chicago, Burlington & Quincy Railroad, 94 U. S. 155); destruction of cattle, trees, etc.. to prevent infection (Omnia Commercial Co. v. U. S., 43 Sup. Ct. 437); restriction of the length of working days for women (Muller v. Oregon, 243 U. S. 426).

<sup>46</sup> Norman Angell in his "Public Mind" writes: "Democracy . . . means that form of political society in which the collective will is recognized as the basis of government, its expression being organized through appropriate apparatus." p. 191.

<sup>47</sup> Swenson, *op. cit. supra* n. 14, p. 296.

<sup>48</sup> Warren, *op. cit. supra* n. 24, p. 473.

<sup>49</sup> Harold J. Laski, "Authority in the Modern State," p. 116.

## Conclusion

Based on F. Harold Essert's article and other anecdotes I've observed, I'm pretty sure that the "police power" is based on and tied to the administration of one or more trusts.

Whatever the police power's foundation, as Mr. Essert implied, that power does not seem to flow directly from the body or Bill of Rights of the Federal Constitution. Although that power seems to flow from the 14th Amendment (and may only apply to 14th Amendment citizen-subjects) even that source of authority is not clearly revealed.

Mr. Essert's article was so well written and insightful that his failure to specify a precise source for the police power can't be dismissed as an oversight. Instead, the failure to expressly identify the legal foundation for the police power source implies that 1) the government is up to something that is sneaky and at least non-constitutional; and 2)

government is vulnerable to public exposure of the police power's foundation. In other words, the "police power" might not be able to survive a thorough public analysis.

Although the police power is probably imposed through trickery and deception, I don't believe for one minute that this power is somehow "illegal". Therefore, I conclude that, by itself, a thorough analysis of the police power would not reveal violations of law or the Constitution sufficient to revoke that power's validity. But if the police power is not inherently illegal, why is government seemingly unwilling to reveal the true foundation for that power? In other words, if exposure would not cause the law itself to be revoked, why all the secrecy?

I suspect the answer may lie in the strong probability that the police power may only apply to persons who are members, trustees or beneficiaries of whatever entity or trust is being administered by the "police". While the police power itself might not be revocable, it may be possible to revoke our "membership" or relationship to whatever entity is being "policed". Thus, if you rescind your relationship to that "governmental" entity, it seems likely that that entity's "police" would lose any claim of jurisdiction over you.

My guess is that the "mys-

tery" of police power is maintained to prevent the serfs from leaving the feud. I suspect that we have unwittingly "volunteered" into membership in whatever "public trust" is being policed.

But since we seem to have acquired our "voluntary" membership so unwittingly (easily), there is a very strong probability that it might be just as easy to revoke our relationship with that "public trust". If that relationship could be revoked, it follows that that entity's jurisdiction and "police power" over us would also be lost.

Our relationship to the "public trust" may be analogous to working for a Ross Perot corporation. When you work for Ross, you must wear your hair a certain length, wear a certain colored suit, tie and shoes. If you mess up and let your hair grow too long or wear the wrong colored suit, Mr. Perot's "corporate police" will punish you accordingly. However, if you quit working for Mr. Perot's corporation, you can wear your hair any length you like and Mr. Perot's "internal police" will have no authority over you.

Could it be that easy? Could we simply "quit" the "public trust" and thereby escape that trust's "police power"? The next article may offer some answers to that question. ■

# Your Ad Here!

\$90 for 10,000 impressions (\$9 CPM)

\$160 for 20,000 impressions (\$8 CPM)

Current ad sizes & prices at <http://www.antishyster.com>  
under the "advertising" link

Send ad and check to: AntiShyster POB 540786 Dallas,  
Texas 75354-0786 The United States of America  
or email to: [adask@gte.net](mailto:adask@gte.net)

MC, Visa, & Amex call: 972-418-8993