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## **“All Rights Are Held Subject to the Police Power”: The Rise and Fall of the Police Powers in American Constitutional Law**

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*“All Rights Are Held Subject to the Police Power”: The Rise and Fall of the Police Powers in American Constitutional Law*

An Undergraduate Thesis

Albert Thomas

Abstract: Current libertarian understandings of individual rights are assumed by many to have been a fundamental part of our American culture since the nation’s founding. Yet our understanding of American individualism and its ideals is a modern one; though the Bill of Rights speaks of individual liberties which are to be protected against the federal government, local "police" powers took priority over individual rights through much of U.S. history. The police powers were predicated on a community-centered interpretation of liberty, which resembles the philosophy of Rousseau. In this thesis, I argue that 19th-century America exhibits a remarkably French understanding of religious freedom that has, over time, evolved into our present-day libertarian understanding of constitutional freedoms. Consequently, this seeks to alter our contemporary conceptualization of American legal history.

Major Department: History    Minor Department: Resource Economics

Approved by Professor Daniel Gordon

## Introduction

Examining a neglected branch of constitutional law imposes numerous difficulties and responsibilities. One such branch that jurists have largely forgotten about is police power. To most Americans, police power refers to the authority exercised by police departments and officers around the United States, yet this definition of police is a relatively recent one. For two and half centuries, police power meant something entirely different in Western jurisprudence. In his canonical work *Commentaries on the Laws of England*, the English jurist Sir William Blackstone defined Police. Many of the American founders heavily relied on the *Commentaries* for “instruction on basic English legal principles,” some of which judges and lawyers incorporated into American jurisprudence.<sup>185</sup> The term police appears in the *Commentaries* as “the due regulation and domestic order of [the] Kingdom,” and centers around the government’s obligation to “conform their [citizens’] general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.”<sup>186</sup> Unfortunately, this isolated definition inadvertently creates more uncertainties: What are “good manners?” What does it mean to be “decent...and inoffensive?” Blackstone offers one broad answer to these questions by establishing that any action or behavior endangering the “public order” of society falls under the government’s “due regulation” of police. This principle later became cemented in American law as part of the powers of state governments to regulate “internal polity,” or internal police.

Throughout much of U.S. history, state governments used their power to regulate a wide range of behaviors and practices that allegedly undermined the “the good order” of society, while the Supreme Court often confirmed the right of states to exercise this police power. In fact, since the founding of the United States, the Supreme Court, with each ruling that cited police power as justification, inflated the strength of the police powers and restricted the rights of individuals, culminating in 1879 with the Court’s decision of *Reynolds v. United States*, which held that religious freedom is supplanted by the police power. Following the evolutionary track of police

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<sup>185</sup> Akhil Reed Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By* (New York: Basic Books, 2015), 7.

<sup>186</sup> Otto Kirchner, “Local Self-Government, so Called, as it is Found in the Constitution of Michigan,” *Michigan Political Science Association* 1, no. 4 (1895): 27.

power demonstrates how its relationship to constitutionally protected rights contradicts our current understanding of America's constitutional tradition and alters the common view that the U.S. has always had a fundamentally rights-oriented and individualist view of democracy.

If police power was indeed so entrenched, why is it rarely discussed? Two reasons help to explain why such little scholarship is devoted to the police. Firstly, since the energizing of the dormant Fourteenth Amendment in 1905, police power has been subordinated in American constitutional law to legal doctrines prioritizing individual rights under the Constitution over the power of states to regulate. Secondly, scholars tend to focus on American exceptionalism—how our democracy differs from other democracies in the world. Consequently, American historians and political scientists often refer to other democracies as based on a different democratic model than the United States. However, if we view our Constitution and society from a French perspective, new insights into our legal doctrines begin to form. Using this approach to examine the police powers uncovers a newfound similarity between French and American democracies prior to the 20th century, so much so that French political thought can help us understand the tradition of police authority in the U.S. and the similarities that once existed between French and American jurisprudence.

The rights enumerated in the French Constitution are not absolute, but conditional. Unlike in the American Constitution, freedom of speech and religious expression are predicated on factors relating to the mode and message of the opinion. According to the French Constitution, if the idea or expression of said opinion violates “the established...order” of French society, the right to “speak, write, and publish freely” is revoked.<sup>187</sup> The conditionality of French constitutional rights does not represent the government's attempt to limit or silence ideological radicalism, but rather is an illustration of Jean-Jacques Rousseau's influence on French jurisprudence. Individuals can practice and express whatever ideology they like in private, but if these ideas contradict the general will or civil religion, Rousseau suggests that the government must protect the community's order at the cost of individuals' rights. Sacrificing individual rights for the well-being of a community

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<sup>187</sup> Déclaration des Droits de l'Homme et du Citoyen de 1789, Conseil Constitutionnel, accessed May 14, 2023, <https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/declaration-des-droits-de-l-homme-et-du-citoyen-de-1789Article 10>.

was popularized in Rousseau's influential book *The Social Contract* and is a fundamental feature of French society, as exemplified by the Islamic veil controversy.

Many Americans see the banning of Islamic headwear as an Islamophobic policy that encroaches on the right to express oneself religiously. While Islamophobia may have motivated some French lawmakers, another crucial factor is Rousseau's social contract theory and its influence on the tradition of French republican political thought. This is evident in a 2010 Pew Research study that, while gauging the support for the Islamic veil ban across French society, rendered results that subvert expectations. Seventy-five percent of French liberals and nearly forty-five percent of French Muslims favored the veil-banning legislation.<sup>188</sup> Why would French citizens, and more importantly, French Muslims, support a law that seemingly contradicts a constitutionally protected right? Support for the Islamic veil ban is illustrative of a quintessential French democratic philosophy that traces to Rousseau's theory of a general will and his notion of the social contract.

The limitations on Islamic headwear caused a political uproar in the United States, with nearly 65 percent of Americans disapproving of the French law.<sup>189</sup> Aversion towards the French anti-veiling law is partly due to the perceived sanctity of constitutionally protected religious rights in the United States, and the supposed differences between fundamental French and American democratic principles. However, examining how Supreme Court Justices have interpreted the police power of states suggests that our libertarian perception of America's central document is far more recent than is commonly believed. Since the founding of the United States, the Supreme Court tended to inflate the strength of the police powers and circumscribe individuals' rights, culminating in 1879 with the Court's decision of *Reynolds v. United States*, which upheld a law limiting religious rights in a similar fashion to laws found in France that limit Islamic headwear. After demonstrating the similarities between American and French interpretations of constitutional law, I argue that examining American constitutional law through the French perspective of

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<sup>188</sup> Peter Baehr and Daniel Gordon. "From the Headscarf to the Burqa: The Role of Social Theorists in Shaping Laws against the Veil." *Economy and Society* 42, no. 2 (2013): 249–280.  
<https://doi.org/10.1080/03085147.2012.718620>.

<sup>189</sup> Baehr and Gordon, "From the Headscarf to the Burqa," 250.

religious rights is key to understanding the Supreme Court's shift towards upholding individuals' rights, and, as a result, weakening the police powers of states.

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## Chapter 1: Religious Freedom in France

Scholars commenting on the Islamic veil controversy in France have observed that French democracy does not respect individual religious freedom as much as American democracy does.<sup>190</sup> Yet what currently appears to be a unique French interpretation was actually a fundamental aspect of American constitutional law prior to the 1900s.

The American Constitution makes up the foundation of American law. Although Congress and state governments may pass additional and substantial legislation, such as the Civil Rights Act of 1964, these laws fall under the sole sovereignty of the Constitution. Rather than having one document which dominates the constitutional legal system, France has four within their Constitutional Block: the Declaration of the Rights of Man and of the Citizen, the Preamble of the Constitution of 1946, the Charter for the Environment, and the Constitution of the Fifth Republic.<sup>191</sup> Due to the chronological proximity of the American and French Revolutions, both constitutions use similar rhetoric. The Free Exercise Clause and Article 10 of the Declaration of the Rights of Man and Citizen, respectively, both express anti-discriminatory sentiments regarding individuals' opinions, including “religious” ones.<sup>192</sup>

But unlike the First Amendment, the French declaration's language is much less absolute. Article 10, which establishes freedom of religion, states that, "No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order."<sup>193</sup> Article 11, which establishes freedom of political and

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<sup>190</sup> Daniel Gordon, “Why Is There No Headscarf Affair in the United States?” *Historical Reflections/Reflexions Historiques* 34, no. 3 (2008): 84, <https://doi.org/10.3167/hrrh2008.340304>.

<sup>191</sup> Déclaration des Droits de l'Homme et du Citoyen de 1789.

<sup>192</sup> Déclaration des Droits de l'Homme et du Citoyen de 1789.

<sup>193</sup> Déclaration des Droits de l'Homme et du Citoyen de 1789. Emphasis added.

religious expression, states that citizens "may therefore speak, write and publish freely, *except what is tantamount to the abuse of this liberty in the cases determined by Law.*"<sup>194</sup> Although this article protects opinions, it does not always guarantee their expression, nor does it protect beliefs that "interfere with the established Law and Order."<sup>195</sup> When the right to express opinions freely threatens law and order, the safety and stability of French society are paramount. Where does France's community-focused constitutional ideology come from? One answer points to Rousseau and *The Social Contract*.

Though Jean-Jacques Rousseau was a Swiss philosopher, his celebrated work *The Social Contract* is a foundational pillar of French democratic theory and constitutional law. Yet Rousseau's influence on French constitutional law possesses a paradox: the French Constitution is a strongly collectivist document, yet "no one has argued more strongly than Rousseau" that humans are fundamentally "individualistic."<sup>196</sup> Rousseau built his individualistic sentiment on his ideal of human nature, which he bases on the assumption that humans are not intrinsically evil. Rousseau writes that Adam and Eve's "own action, their sin," caused their Fall, and therefore, "sin is not original."<sup>197</sup> With this assumption in mind, Rousseau argues that "the human creation of society," which he suggests occurred when Adam and Eve were banished from Eden, "began the fatal process of human distortion and degeneration."<sup>198</sup> To remedy society's flaws, Rousseau suggests individuals "may regain something like their natural freedom if they enter the social contract," while also "attain[ing] moral freedom."<sup>199</sup> Although Rousseau argues that humanity's "natural freedom" is responsible for its downfall, citizens attain a new moral freedom by adopting a social contract.

Achieving moral freedom requires "the total alienation to the whole community of each associate with all his rights," so that "each gives himself up entirely," leading to society being "equal for all."<sup>200</sup> Rousseau is not suggesting that the choices of individuals should be determined

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<sup>194</sup> Déclaration des Droits de l'Homme et du Citoyen de 1789.

<sup>195</sup> Déclaration des Droits de l'Homme et du Citoyen de 1789.

<sup>196</sup> Robert N. Bellah, "Rousseau on Society and the Individual," in *The Social Contract and The First and Second Discourses*, edited by Susan Dunn (New Haven: Yale University Press, 2002): 266, <http://www.jstor.org/stable/j.ctt1npwsh.9>.

<sup>197</sup> Bellah, "Rousseau on Society and the Individual," 267.

<sup>198</sup> Bellah, "Rousseau on Society and the Individual," 276.

<sup>199</sup> Bellah, "Rousseau on Society and the Individual," 266.

<sup>200</sup> Bellah, "Rousseau on Society and the Individual," 266.

by an absolutist government body or figure, but rather that their choices should be governed by the aggregate beliefs and morals of the community in which they live, or what he calls “the supreme direction of the general will.”<sup>201</sup> Although the term “the general will” has never figured in American constitutional law, the term police, at least up to the 1900s, did figure importantly and functioned in a similar way.

Rousseau defines the general will as “a form of association which...defend[s] and protect[s], with the whole common force, the persons and goods of each associate.”<sup>202</sup> By collectivizing individual interests, the general will replaces the interests and rights of the Individual with the interests of “the whole community.”<sup>203</sup> As a result, Rousseau asserts, “the better the Constitution of a state is, the more do public affairs encroach on private in the minds of the citizens.”<sup>204</sup> Although “Constitution” in English refers to the formal binding legal document, the term has substantially broader implications for Rousseau and other philosophical writers.

For many Americans today, the “Constitution” symbolizes the document which outlines the government's authority and protects individual rights. Yet French writers would likely refer to it as *les Lois Fondamentales des États Unis* (the Fundamental Laws of the United States), instead of a constitution. This is due to the French definition of constitution, which relates to a code, order, and habit of society, rather than one text. In his original French text, where he describes the sanctity of protecting public spaces from individualist beliefs, Rousseau states that the “Mieux l'Etat est *constitué*, plus les affaires publiques l'emportent sur les privées dans l'esprit des citoyens.”<sup>205</sup> Considering that Rousseau uses the present perfect conjugation of *constituer*–*constitué*–which translates to “constituted,” he likely refers to society's far broader *moeurs* (morals) or the metaphysical constitution of society, rather than the physical one. In other words, the “constitution” includes the law and all the regulations, morals, traditions, and religions contributing to civic spirit.

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<sup>201</sup> Jean-Jacques Rousseau, *The Social Contract and Discourses*, trans. G.D.H. Cole (London: J.M. Dent and Sons, 1973), 192.

<sup>202</sup> Rousseau, *The Social Contract and Discourses*, 195.

<sup>203</sup> Rousseau, *The Social Contract and Discourses*, 266.

<sup>204</sup> Rousseau, *The Social Contract and Discourses*, 266.

<sup>205</sup> Jean-Jacques Rousseau, *Du contrat social ou Principes du droit politique : Un traité de philosophie politique de Jean-Jacques Rousseau* (Paris: BOOKS ON DEMAND, 2018), 281. Emphasis added.

Therefore, to Rousseau, a well-constituted society comprises individuals who surrender their liberties and replace them with their community's views or general will. As a result, "Private affairs are even of much less importance because the aggregate of the common happiness furnishes a greater proportion of that of each individual." Conversely, Rousseau implies that "if the citizens never think of the general interest," and instead choose to think of only themselves, then the "constitution" of society dissolves, and tyranny ensues.<sup>206</sup>

Rousseau's general will principle can be seen implied throughout the French Constitution and explicitly mentioned in Article 6. Articles 10 and 11 of the Declaration of The Rights of Man and Citizen implicitly reference the general will when rendering the freedom of opinion and expression conditional. At the same time, Article 6 explicitly states that the declaration "is the expression of the general will."<sup>207</sup> If the general will of the public supersedes individual rights and liberties, what impact does Rousseau's philosophy have on France's constitutionally protected rights?

Article 1 of the Constitution of the Fifth Republic states that "France shall be a...secular...republic," with equal treatment of citizens from any "origin, race or religion."<sup>208</sup> Immediately, the constitutional documents present a paradox: Article 10 establishes the freedom of religious expression, but Article 1 indicates secularism in France is legally enforced. Since Article 10 implies that the government has the authority to limit religious expression if it threatens "law and order," any salient public form of religious expression could tend to oppose French secularism and be legally suspect. The coexistence of these two principles in French society lies at the heart of the modern Islamic veil controversy.

To monitor secularism within France, the government established the Commission Stasi, and on December 11th, 2003, the commission released a report detailing the threat that Islamic headwear posed to the secularity of France. The report concluded that "for the educational community, the headscarf is too often a source of conflicts, divisions, and even suffering...[and]

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<sup>206</sup> Rousseau, *The Social Contract and Discourses*, 266.

<sup>207</sup> Déclaration des Droits de l'Homme et du Citoyen de 1789.

<sup>208</sup> "The Constitution of The Fifth Republic," Élysée, last modified December 14, 2022, <https://www.elysee.fr/en/french-presidency/constitution-of-4-october-1958>.

is perceived by most people as contrary to the educational mission.”<sup>209</sup> Shortly after, in 2004, French public school students were restricted from wearing Islamic veils. This polarization of religious expression was further developed in 2011 when the French Senate approved the Concealment Act. The divisive law restricts Muslim women from wearing any religious face-covering in public. In the years following the Concealment Act, a French Muslim woman filed the 2014 suit *S.A.S. v. France*, but the European Court of Human rights ruled that Muslim women wearing a veil are “breaching the right of others to live in a space of socialization which makes living together easier.”<sup>210</sup> Regardless of the number of women who wear an Islamic veil, the French and European Courts agree with one another that the Islamic veil undermines the general will’s secularist interest in protecting values of “equality...[and] fraternity.”<sup>211</sup> Considering Article 10 of the Declaration of the Rights of Man and Citizen, how is the Concealment Act a viable piece of legislation?

Although the French Constitution outlines the freedom of political and religious expression, an underlying secularist culture within France is “dedicated to the inculcation of a common French identity independent of religion.”<sup>212</sup> This belief is connected to Rousseau’s definition of a well-constituted society. Naturally, this involves downplaying the role of religion in society and instead playing up what Rousseau called a “civil religion.”<sup>213</sup> Rather than a spiritual belief system, the principles of the “civil religion ought to be few, simple, and exactly worded... social sentiments without which a man cannot be a good citizen.”<sup>214</sup> Civil religion is not structured around religious stigmas, but rather “social sentiments” or the general will of society. Although the government cannot “compel” individuals to support the civil religion, “the state...can banish him not for impiety, but as an anti-social being...incapable of sacrificing, at need, his life for his duty.”<sup>215</sup> The European Court of Human Rights echoed Rousseau’s anti-social concept in its

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<sup>209</sup> Nusrat Choudhury, “From the Stasi Commission to the European Court of Human Rights: L’affaire Du Foulard and the Challenge of Protecting the Rights of Muslim Girls,” *Columbia Journal of Gender and Law* 16, no. 1 (2007): 227, <https://doi.org/10.7916/cjgl.v16i1.2540>.

<sup>210</sup> *S.A.S. v. France* (Eur. Ct. H.R. 2014).

<sup>211</sup> *S.A.S. v. France*.

<sup>212</sup> Robert E. Snyder, “Liberté Religieuse en Europe: Discussing the French Concealment Act,” *Human Rights Brief* 18, no. 3 (2011): 15.

<sup>213</sup> Rousseau, *The Social Contract and Discourses*, 303.

<sup>214</sup> Rousseau, *The Social Contract and Discourses*, 307.

<sup>215</sup> Rousseau, *The Social Contract and Discourses*, 303.

conclusion, which argues that the veil hinders “socialization” between individuals.<sup>216</sup> Just as Rousseau wrote that the individual has a social obligation to “abandon” certain religious liberties when living in a society, for the French government these secular interests ultimately outweigh an individual’s right to express their religiosity.<sup>217</sup>

Article 10 of the French Constitution can restrict religious expression if “the manifestation of such opinions...interfere[s] with the established Law and Order.”<sup>218</sup> This established order encompasses the constitutionally rooted civil religion of *Laïcité*, or the principle of civil secularism.<sup>219</sup> Considering public expressions of spirituality oppose society’s secularism, the Concealment Act attempts to justify itself using Article 10 and the conditionality of constitutional rights to preserve France’s secular civil religion. Therefore, following the government’s logic, individuals who publicly express their religiosity are directly challenging the general will of society, which renders them “anti-social”; hence, public displays of religiosity violate constitutional principles and can thereby be legally revoked.

France’s civil religion is the product of the general will of society, which aims at establishing a secular community. However, the collective interest in secularism creates a civil religion that punishes individuals who publicly display their spirituality, as this opposes the general will’s objective. Consequently, religious freedom becomes a conditional right dependent on society’s will. Academics see this aspect of French society as a quintessentially anti-American set of principles. Robert Bellah, perhaps the most influential American scholar of religion of his generation, writes in his essay *Rousseau on Society and the Individual* about how Rousseau’s assertions “must seem bewildering...to Americans.”<sup>220</sup> Claiming that individual freedom is “dependent on the community” and that citizens must achieve “total alienation to the whole community” is a concept Americans may find “hard to take.”<sup>221</sup> Contrary to the modern individualist American identity, Rousseau’s guiding principles have influenced American constitutional law far more than scholars have previously believed. While the United States may

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<sup>216</sup> *S.A.S. v. France* (Eur. Ct. H.R. 2014).

<sup>217</sup> Rousseau, *The Social Contract and Discourses*, 307.

<sup>218</sup> Déclaration des Droits de l’Homme et du Citoyen de 1789.

<sup>219</sup> Snyder, “Liberté Religieuse En Europe,” 14.

<sup>220</sup> Bellah, “Rousseau on Society and the Individual,” 276.

<sup>221</sup> Bellah, “Rousseau on Society and the Individual,” 277.

now have a libertarian view that protects the rights of individuals, this has not always been the case. In fact, the interplay between societal beliefs and individual liberties is exemplified by the police power of states: for much of American history, constitutionally protected freedoms were interpreted by Justices as being conditional and subject to police power.

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## Chapter 2: Police Power in the 18th and 19th Centuries

For a contemporary audience, the word police has certain legal and political connotations that, until recently, were never associated with it. The term police has a Greek origin, stemming from the term *polis*, meaning a community or group of people. Once the Latins adopted the term, the Romans developed the word *politia*, which referred to local and civic administration. *Politia* evolved into the French word *police* while keeping its Latin meaning. The term was rarely used outside France during the Medieval period and only became an established legal concept in British Common Law in the 18th century.<sup>222</sup> Sir William Blackstone was the first theorist to incorporate the term police into English law, notably in his *Commentaries on the Laws of England*.<sup>223</sup> The term Police is mentioned in Blackstone's discussion of crimes threatening or "offending...Public Polity."<sup>224</sup> Blackstone's interpretation of Police centers around the government upholding "rules of property" and especially "good manners," and he delineates that "Clandestine marriages and bigamy, Idleness and vagrancy, Luxury, and Gaming" are examples of crimes that endanger the "public order."<sup>225</sup> Argentine legal scholar Santiago Legarre asserts that Blackstone uses "Domestic administration," "Public Polity," and Police synonymously in his *Commentaries* when referring to maintaining public order, thus giving readers an understanding of what police meant to 18th-century jurists and legal scholars.<sup>226</sup>

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<sup>222</sup> Santiago Legarre, "The Historical Background of the Police Power," *University of Pennsylvania Journal of Constitutional Law* 9, no. 1413 (2007): 749.

<sup>223</sup> Legarre, "The Historical Background of the Police Power," 755.

<sup>224</sup> Legarre, "The Historical Background of the Police Power," 758.

<sup>225</sup> Legarre, "The Historical Background of the Police Power," 760.

<sup>226</sup> Legarre, "The Historical Background of the Police Power," 758.

Blackstone heavily influenced the architecture of the American Constitution, and thus the Founders held similar interpretations of Police. The term had three meanings in the United States during the 18th century, yet one in particular resembles Blackstone's interpretation.<sup>227</sup>

Throughout the First Continental Congress of 1774, "Internal Police" was mentioned by members when discussing colonial policies concerning Great Britain's domestic politics. Joseph Galloway, a prominent colonial attorney, proposed a British and Colonial Union, in which "each colony shall retain its present constitution, and powers of regulating and governing its *Internal Police*, in all cases whatsoever."<sup>228</sup> Considering Galloway was a successful lawyer prior to the American Revolution, his understanding of the term Police is likely representative of his colleagues' interpretations; his proposal indicates that colonial lawyers and politicians believed the term police held a broad, all-encompassing meaning similar to Blackstone's. In response to Galloway's proposal, the Continental Congress passed a legislative resolution that called for "a free and exclusive power of legislation...in all cases of taxation and internal polity."<sup>229</sup> The ambiguous use of "internal polity," or internal police, illustrates that all-encompassing understanding seen Blackstone's work.

Though the United States Constitution is void of any mention of police power or internal police, the founders recognized its importance. The preamble to New York's Constitution of 1777 states the importance of "erecting and constituting a new form of government and internal police."<sup>230</sup> Similarly, South Carolina's Constitution of 1776 is responsible for "regulating the internal polity of this colony."<sup>231</sup> A preamble is responsible for delineating the purpose of the document, and therefore must synthesize an entire constitution into a few lines. Considering numerous state constitutions mention "internal police" and "internal polity," the founders clearly viewed internal police as a core focus of state governments, so that they may regulate the manners

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<sup>227</sup> Legarre, "The Historical Background of the Police Power," 771.

<sup>228</sup> Worthington Chauncey Ford et al, *Journals of the Continental Congress, 1774-1789* (Washington D.C.: Government Print Office, 1904), 49, <https://www.loc.gov/item/05000059/>. Emphasis added.

<sup>229</sup> Ford, *Journals of the Continental Congress*, 68.

<sup>230</sup> *Journals of the Provincial Congress, Provincial Convention Committee of Safety and Council of Safety of the State of New York, 1775-1776-1777* (Albany: Thurlow Weed, 1842).

<sup>231</sup> "Constitution of South Carolina - March 26, 1776," in *Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now Heretofore Forming the United States of America*, edited by Francis N. Thorpe (Washington, D.C: Government Printing Office, 1909), The Avalon Project, [https://avalon.law.yale.edu/18th\\_century/sc01.asp#1](https://avalon.law.yale.edu/18th_century/sc01.asp#1).

of individuals. Although the founders intended for state governments to protect the “good manners” of their citizens, courts have varied in their interpretations of the extent to which states can utilize police towards that aim.

In 1824, the Supreme Court heard *Gibbons v. Ogden*, one of the first substantive cases linking Blackstone and the founders’ interpretations of police power and moral regulation. *Gibbons* hinges on the Commerce Clause of the Constitution, which granted the federal government power to regulate river navigation and interstate commerce. Though this case is not typically remembered for Chief Justice John Marshall’s interpretation of police powers, it is a substantial aspect of the opinion. The Court deemed that, “a state has the power to regulate its police and domestic trade and to govern its citizens.”<sup>232</sup> Yet according to Justice Marshall, the validity of laws “regulating their own purely internal affairs...or police...depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution.”<sup>233</sup> Justice Marshall simultaneously established a limit of police power while granting states full authority to regulate their internal citizens. The delicate balance between police powers and constitutionally protected rights became a point of tension in the decades following *Gibbons*. Marshall’s demarcation may seem plain and direct, but later Justices did not interpret the police powers as he did.

Like *Gibbons*, the 1842 case *Prigg v. Pennsylvania*, which dealt with the Fugitive Slave Clause of the Constitution, also had an impact on the Court’s interpretation of the police powers which has gone largely unnoticed. Justice Peter Daniel’s opinion of *Prigg* asserts how, “the states, in the exercise of their police powers, may arrest and imprison vagrants or fugitives who may endanger the peace and good order of society.”<sup>234</sup> Thus, if a fugitive enslaved person is not endangering the peace and order of society, states may not arrest and imprison them under the guise of police powers. Justice Daniel states that if “a person [fugitive enslaved person] may be...merely passing through the state peaceably and quietly,” then “he would not be a proper subject for the exertion of the police power.”<sup>235</sup> In situations where a fugitive enslaved person poses a threat to a community, the Court asserts that they can be apprehended and returned.

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<sup>232</sup> *Gibbons v. Ogden*, 22 U.S. (1824): 208.

<sup>233</sup> *Gibbons v. Ogden*, 210.

<sup>234</sup> *Prigg v. Pennsylvania*, 41 U.S. 539 (1842): 657.

<sup>235</sup> *Prigg v. Pennsylvania*, 657.

This may seem like the police power is protecting the rights of enslavers, but the Court makes clear that even though the enslavers may benefit from this interpretation in some scenarios, their benefit is only a byproduct of the police power's primary goal of protecting the community. Consequently, the Court asserts that the police power of a state cannot be employed unless the "peace and good order of society" is threatened.<sup>236</sup> The court's ruling of *Prigg* sets a precedent that evidence of disorder and unrest must be presented in order for states to employ their police power, expressly that, "The arrest or confinement, merely because he is such [a slave], falls not regularly within the objects of police regulations."<sup>237</sup> In other words, if the state wishes to employ their police power when capturing an enslaved person, that enslaved person *needs* to present a threat to the peace and order of society in order for the arrest to be deemed legal under the police power.

Stemming from the understanding of police power as expressed by the *Gibbons* and *Prigg* decisions, three other cases from the latter half of the 19th century serve as key markers of the Supreme Court's evolving interpretation of police power. In the years following the Civil War, the scope of police power experienced enormous growth, culminating in the controversial ruling in *Reynolds v. United States*.

The first case which mentioned the police power following the Civil War was *Beer Co. v. Massachusetts*. Before prohibition, the Boston Beer Company could manufacture and sell beer on their property. However, following the national temperance movement, Boston Beer Co. was sued for violating the 1867 Prohibitory Liquor Law; although the beer company received its charter in 1828, the Court sided with the state and restricted its manufacturing and vending rights.<sup>238</sup> Boston Beer Co.'s appeal posed a curious issue for the United States Supreme Court. Overturning a previously established chartered right was a critical legal battlefield for abolitionists prior to 1861. To Justice Joseph Bradley and his associates, alcohol, like slavery, was a health and morality issue. Justice Bradley acknowledged the importance of contract rights but could not overlook the danger alcohol posed to "the lives, health, and property of...citizens, the maintenance of good order, and the preservation of the public morals."<sup>239</sup> With this reference to public morals, the Court argues

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<sup>236</sup> *Prigg v. Pennsylvania*, 657.

<sup>237</sup> *Prigg v. Pennsylvania*, 657.

<sup>238</sup> *Beer Co. v. Massachusetts*, 97 U.S. (1877): 29.

<sup>239</sup> *Beer Co. v. Massachusetts*, 29.

that the state can legally limit the beer company's rights via Massachusetts' police powers because, as Justice Bradley suggests, the police powers extend to "public safety or the public morals." As alcohol threatens these aspects of society, "the legislature cannot...devest itself of the power to provide for these objects."<sup>240</sup> The Court goes even further, delineating the full extent and scope of the police powers. Bradley asserts that "*All rights* are held subject to the police power of the State."<sup>241</sup> The precedent set is surprising, as well as concerning, considering the concept of individual liberties and freedoms in the context of the American Constitution. Using such general language threatens constitutionally enumerated rights, dismisses the Fourteenth Amendment, and undermines the entire Bill of Rights.

The Court's opinion of *Beer Co.* demonstrates an underlying tension between the rights of individuals and the rights of states, which academics frequently overlook. Historians and legal scholars tend to focus on Reconstruction and the Supreme Court's inability to enforce the Fourteenth Amendment in the late 19th century. As a result, the Court's interpretation of police power and its relationship with constitutionally protected rights has not been given the adequate attention it deserves. The frequency of police power in Supreme Court cases in the late 19th century proves how influential police powers were during this transition period in American history.

This influence is further illustrated in the 1878 case *Fertilizing Co. v. Hyde Park*. The Northwestern Fertilizing Company operated just beyond Chicago's city limits, using dead animals to produce fertilizer; due to the company's production process, the Hyde Park community, which sat adjacent to the factory, experienced an "unendurable...stench." Members of the Hyde Park community and others near the production facility experienced "Nausea, discomfort...[and] sickness" along with a "depreciated...value of property" as a result of the noxious fumes.<sup>242</sup> Attorneys representing Hyde Park residents argued that, under Illinois' police power, the fertilizer plant ought to be closed due to the danger it posed to nearby residents. The company's attorneys claimed that, "It is a contradiction...to say that an authority to carry on a particular business...which has been *expressly* granted by a binding contract, may be taken away at her

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<sup>240</sup> *Beer Co. v. Massachusetts*, 29.

<sup>241</sup> *Beer Co. v. Massachusetts*, 29. Emphasis added.

<sup>242</sup> *Fertilizing Co. v. Hyde Park*, 97 U.S. (1878): 664.

pleasure, in the exercise of that power.”<sup>243</sup> Therefore, “Police regulations cannot be constitutionally enforced.”<sup>244</sup>

Justice Noah Swayne, the author of the court’s opinion, “cannot doubt” that “the police power of the state was applicable and adequate to give an effectual remedy.”<sup>245</sup> According to Swayne, the state’s implementation of police powers “rests on the fundamental principle that every one shall so use his own [business and property] as not to wrong and injure another.”<sup>246</sup> The Justices insinuate that individuals have certain societal obligations that can be enforced by the police power of a state, resulting in the right to produce and sell fertilizer being subject to the community’s rights. When individuals do not abide by this “fundamental principle,” Justice Bradley, in his concurrence, empowers the police powers’ responsibility of upholding “the protection of the lives, health, and property of the citizens” and preserving the “good order and the public morals.”<sup>247</sup>

The Justices pay close attention to defining police powers and discussing when states ought to implement them to protect a community’s “public morals” and “good order.” But the Court gives little attention to protecting the rights of individuals and charting how these rights coexist with police powers. The Justices dedicate multiple pages to outlining when states can and should use their police powers, but neglect to discuss when these police powers cannot or should not be enforced. To find any substantial analysis of the interaction between individual rights and police powers, it is necessary look to Justice Strong’s dissent. Strong admits that “Nothing...is more indefinite than the extent or limits of what is called police power,” but stresses that, “Certainly it has limits.” According to Justice Strong, police power “regulations must have reference to the comfort, safety, or welfare of society,” and “must not be in conflict with any of the provisions of the charter, and...take from the corporation any of the essential rights and privileges which the charter confer[s].”<sup>248</sup> Strong concludes that using the police power in order to “amend” past charters, thereby taking “without compensation, rights which a former [legislature] has accorded,”

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<sup>243</sup> *Fertilizing Co. v. Hyde Park*, 661. Emphasis added.

<sup>244</sup> *Fertilizing Co. v. Hyde Park*, 661.

<sup>245</sup> *Fertilizing Co. v. Hyde Park*, 667.

<sup>246</sup> *Fertilizing Co. v. Hyde Park*, 667.

<sup>247</sup> *Fertilizing Co. v. Hyde Park*, 669.

<sup>248</sup> *Fertilizing Co. v. Hyde Park*, 680.

establishes a “very grave” precedent.<sup>249</sup> Where does the state’s ability to “take away” rights through enacting police powers end? If states can revoke or amend manufacturing and vending rights bestowed upon individuals by previous legislatures, what rights rest beyond the police powers’ grasp? Turning back to *Beer Co. v. Massachusetts*, we find an answer: “all rights are held subject to the police power.” Such a broad and unfettered interpretation of the police powers is the exact precedent Justice Strong fears may take hold. Considering Justice Strong was aware of the explicitly broad interpretation of police power in *Beer Co.*, he likely feared that revoking Northwestern Fertilizing’s production rights would only cement the validity of Justice Bradley’s assertion.

Just as Justice Strong feared, the scope of the police powers inevitably restricted the religious liberty of American citizens, culminating in *Reynolds v. United States*, whereby the Supreme Court permitted the state of Utah to revoke an individual’s First Amendment right to the free exercise of religion. *Reynolds* revolved around George Reynolds’ polygamous marriage and the Court’s ability to restrict religious practice. Justice Morrison Waite, the author of the Court’s opinion, asserts early on that the Court acknowledges the importance of religious protection, referencing the framers’ opposition towards religious restrictions by quoting Thomas Jefferson, who found “disappointment at the absence of an express declaration ensuring the freedom of religion clear” within the Constitution’s first draft. Jefferson was a known advocate for minimizing the government’s power over the spiritual lives of Americans.<sup>250</sup> While writing to Richard Rush in 1813, Jefferson stated, “the subject of religion...[is] as a matter between every man and his maker, in which no other, & far less the public, had a right to intermeddle.”<sup>251</sup> Jefferson’s support for religious freedom was clear; however, in an address to the Danbury Baptist Association of Connecticut in 1802, Jefferson established “that the legitimate powers of government reach actions only, & not opinions.”<sup>252</sup> He delineates two aspects of the Free Exercise Clause, which he alludes to being the right to believe and the right to exercise one’s religion. Jefferson asserts that the “powers of government” cannot reach religious “opinions,” thereby rendering religious beliefs

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<sup>249</sup> *Fertilizing Co. v. Hyde Park*, 682.

<sup>250</sup> *Reynolds v. United States*, 98 U.S. (1878): 163.

<sup>251</sup> *The Papers of Thomas Jefferson, Retirement Series 6, 1 July 1823 to 31 March 1824*, edited by J. Jefferson Looney (Princeton: Princeton University Press, 2009): 160.

<sup>252</sup> *The Papers of Thomas Jefferson*, 160–161.

absolute. Yet he concedes that religious “actions” are within the government’s authority and thus narrows the scope of the Free Exercise Clause, which differs dramatically from the views of other founders, primarily James Madison.

Madison held a far broader interpretation of the Free Exercise Clause and argued in 1785 that “the equal right of every citizen to the free exercise of his religion...is held by the same tenure with all our other rights.”<sup>253</sup> Madison does not see belief and practice as two separate identities, but rather one with which “our laws” must not “intermeddle.”<sup>254</sup> Justice Waite’s inclusion of Jefferson’s interpretation of religious freedom is a significant feature of the Court’s opinion as it demonstrates which interpretation the Court would uphold. Considering Jefferson’s relatively narrow reading of the Free Exercise Clause, it is reasonable to assume that the Justices would also distinguish between religious opinions and religious actions.

In the Court’s opinion, Justice Waite delineates that congressional authority includes the ability to legislate “actions...in violation of social duties or subversive of good order,” and that the police power of states is a fundamental part of this congressional authority.<sup>255</sup> Waite goes on and uses the concept of police power to justify the Court’s support for restricting polygamous marriages and concludes that “we [Justices] think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offense against society.”<sup>256</sup> In this ruling, the police power and Jefferson’s narrow understanding of the Free Exercise Clause work with one another; the distinction between religious actions and beliefs facilitates the police power’s authority. However, Justice Waite exacerbates this narrowing of the Free Exercise Clause as he continues to confine the entire meaning of religious freedom.

Justice Waite argues in his opinion that “Congress was deprived of all legislative power over mere opinion but was left free to reach actions which were in violation of social duties or subversive of good order.”<sup>257</sup> Notice the careful omission of religion; he is removing the religiosity of Reynold’s marriage. Waite’s language here starkly resembles that of Blackstone on police authority, as Blackstone explicitly states in his *Commentaries* that “Clandestine marriages,” which

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<sup>253</sup> James Madison, *James Madison: Writings* (New York: Library of America, 1999), 35.

<sup>254</sup> Madison, *Writings*, 34.

<sup>255</sup> *Reynolds v. United States*, 164.

<sup>256</sup> *Reynolds v. United States*, 165.

<sup>257</sup> *Reynolds v. United States*, 164.

include polygamy, are examples of crimes threatening society's moral fabric. The government has the authority and obligation to restrict these crimes since they subvert the "internal polity"; this obligation is an illustration of the state's police power. Considering that Justice Waite writes that polygamy is "an offense against society," Blackstone's influence becomes apparent. The opinion concludes that, "the only defense of the accused in this case is his belief that the law ought not to have been enacted. It matters not that his belief was a part of his professed religion: it was still belief, and belief only."<sup>258</sup> The key distinction made by Justice Waite was to equate the free exercise of religion not with the exercise of religiously-inspired actions, but only with religious opinion privately held. *Reynolds* does not merely uphold the banning of polygamy, but also defines religious freedom in the narrowest possible way, thus enlarging the scope of the police power over what we would today consider basic First Amendment rights.

*Reynolds* was arguably the peak of the police power's authority over religious freedom. But with the turn of the 20th century, the Court's energizing of the dormant Fourteenth Amendment rendered Justice Waite's narrow interpretation of religious freedom void and substantially weakened police power. This was expressed in numerous 20th-century Supreme Court cases which illustrate how the Court's implementation of the Fourteenth Amendment bolstered religious freedoms and led to diminished police power—ushering in the more libertarian constitutional order that we are accustomed to today.

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### Chapter 3: Religious Freedom Following Reynolds

The First Amendment's Free Exercise Clause protects the religious freedom of individuals from congressional regulation. The amendment restricts Congress, not state or local governments, meaning states had the power to establish official religions and limit the actions of individuals, even if these actions were a part of their professed religion. The decision to omit any reference to

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<sup>258</sup> *Reynolds v. United States*, 167.

states or local governments was likely a result of the founders attempting to balance federal and state authority, but following the Union's victory in 1865, the freedoms granted to state governments were revoked when the federal government chose to amend the Constitution. To ensure that Southern states would enforce the Civil Rights Act of 1866, the Fourteenth Amendment was made to the Constitution in 1868. Championed by John Bingham, the amendment placed the federal and state governments under the same constitutionally enumerated restrictions.

The Fourteenth Amendment's implementation prevents states from making any law regarding the establishment or exercise of religion. Yet the Court's ruling in *Reynolds*, which regulates religious marital practices, and *Beer Co.*'s assertion that "all rights are subject to the police power of states," completely undermine the Fourteenth Amendment, even though both cases were decided nearly twenty years after the amendment was approved. The Court's decision to seemingly overlook the Fourteenth Amendment was embedded in a narrow interpretation of the amendment that empowered the police power of states. One possible justification for this interpretation can be found in the *Slaughter-House Cases*.

In the Slaughterhouse Act of 1869, Louisiana ordered that the slaughterhouses of New Orleans be conglomerated under one corporation to reduce their adverse effects.<sup>259</sup> As a result, Louisiana granted the Crescent City Livestock, Landing, and Slaughterhouse Company an exclusive right to operate in New Orleans.<sup>260</sup> Believing the Act of 1869 established an unfair government monopoly, the Butchers Benevolent Association was formed and filed multiple suits against the state of Louisiana, consolidating in the *Slaughter-House Cases*. Justice Samuel Miller, the author of the Court's opinion, demonstrated the narrow interpretation of the Fourteenth Amendment that was partially responsible for the growth of police powers. According to the Court, there are two different forms of citizenship: "a citizenship of the United States, and a citizenship of a State, which are distinct from each other."<sup>261</sup> Justice Miller arrives at this conclusion by examining Article IV, Section 2 of the Constitution, which suggests that "the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional

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<sup>259</sup> *Slaughter-House Cases*, 83 U.S. (1872): 59.

<sup>260</sup> *Slaughter-House Cases*, 36.

<sup>261</sup> *Slaughter-House Cases*, 74.

and legislative power of the States.”<sup>262</sup> Thus, Miller’s interpretation of the Fourteenth Amendment reduces the federal government’s power to enforce state compliance with the Constitution and bolsters the states’ authority over policing their citizens. Justice Miller recognizes the consequences of his conclusion and asserts that, “the police power of the State...undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society...in almost numberless ways.”<sup>263</sup> Miller’s interpretation allowed state governments to hurdle the congressional restrictions enumerated in the Constitution, thereby rendering the Fourteenth Amendment nothing more than a “vain and idle enactment.”<sup>264</sup> Hence, the all-encompassing nature of the police powers expressed in *Beer Co.* is partially a result of the *Slaughter-House Cases*, which saw the implementation of a weakened Fourteenth Amendment. However, at the turn of the 20th century, the Supreme Court ushered in a far stricter understanding of the Fourteenth Amendment; consequently, a simultaneous decline and fear of the strength of police powers took place, which is best seen in the 1905 case *Lochner v. New York*.

In the late 19th century, New York passed the Bakeshop Act to protect the health and well-being of bakers and other similar artisans by setting a daily and weekly work limit for employees so that employers could not overwork them. Joseph Lochner, a Bakeshop owner in Oneida County, New York, was indicted by the state for permitting an employee to work over the 60-hour weekly limit imposed by the Bakeshop Act.<sup>265</sup> But contrary to the state’s fear, Lochner did not force his employee to work past the weekly limit; instead, the employee voluntarily wished to work longer hours. The conflict of this case centered around Lochner’s rights as a business owner, his employee’s rights, and New York’s police powers. Just as in *Fertilizing Co.*, *Beer Co.*, and *Reynolds*, the state argued that their police powers granted them the authority to punish the actions of Lochner as his actions threatened “the safety, health, morals, and general welfare of the public.”<sup>266</sup>

Yet that was where the similarities ended. On just the second page of the Court’s opinion, Justice Rufus Peckham steps away from *Lochner* and examines the judicial history of police power.

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<sup>262</sup> *Slaughter-House Cases*, 26.

<sup>263</sup> *Slaughter-House Cases*, 33.

<sup>264</sup> *Slaughter-House Cases*, 38.

<sup>265</sup> *Lochner v. New York*, 198 U.S. (1905): 46.

<sup>266</sup> *Lochner v. New York*, 53.

He writes: “There are...certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts.”<sup>267</sup> For Justice Peckham, implementing limits on police power is not only at the center of *Lochner* but is at the forefront of American constitutional law. Peckham believes that past courts have given so little attention to limiting the police powers of states that Justices have not “attempted” an “exact description and limitation” of their authority.<sup>268</sup> The Court’s view was consistent in cases throughout the 19th century, with Justices using vague phrases like “the good order of society,” and going so far as to claim that “all rights are held subject to the police power of states.” Justice Peckham’s opinion shifts away from this rhetoric:

When the state...in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons...it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring.<sup>269</sup>

For Justice Peckham, it was clear that *Lochner* was far more than just a labor law case: it would confront the police power’s authority head-on. In fact, Justice Peckham was one of the first Justices that explicitly presented the police power as an opposition to individual freedom. This was a significant shift away from precedent and a philosophical deviation from Rousseau; no longer was the individual’s liberty supplanted by the community’s well-being, and hence there was a shift toward a libertarian society.

Justice Peckham first focuses on the public health and well-being aspect of the police powers and makes references to instances of the “valid...[and] proper exercise of the police powers.”<sup>270</sup> He references *Jacobson v. Massachusetts*, which ruled that the state has the proper authority to enforce that citizens are vaccinated. *Jacobson* was a clear example of a case where an individual’s liberty directly threatened a community’s health and well-being, hence why Massachusetts’ police power justification in *Jacobson* was sufficient.<sup>271</sup> This example illustrates a

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<sup>267</sup> *Lochner v. New York*, 53.

<sup>268</sup> *Lochner v. New York*, 53.

<sup>269</sup> *Lochner v. New York*, 54.

<sup>270</sup> *Lochner v. New York*, 55.

<sup>271</sup> *Lochner v. New York*, 55.

level of specificity that, according to Justice Peckham, was often missing in other police power cases. Peckham observes that state governments often propose a “mere assertion” that the behavior in question “relates, though but in a remote degree, to the public health.” To Justice Peckham, the fact that subjects are tangentially related to public health “does not necessarily render the [regulation] valid.”<sup>272</sup> Peckham takes this observation and directly questions the validity of prior police power cases, asserting that, “it is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives.”<sup>273</sup>

This criticism easily applies to the *Reynolds* decision, in which the Court presented polygamy as a threat to the good order of society with little supporting evidence; regardless of the government’s motive for limiting this type of behavior, the expansion of police power encourages further encroachment into the lives of individuals. Justice Peckham goes so far as to warn that failing to constrain the police powers will lead to the state “assuming the position of a supervisor, or *pater familias*, over every act of the individual.”<sup>274</sup> For the majority of the Court, it is clear “that almost all occupations more or less affect the health” of individuals and, therefore, are tangentially related to the public health of society. Consequently, ruling in favor of New York in *Lochner* would mean “No trade, no occupation, no mode of earning one’s living, could escape this all-pervading power.”<sup>275</sup> Hence, the Court ruled that “such a law...although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid.”<sup>276</sup>

Although the Court ruled in favor of Joseph Lochner, multiple Justices wrote noteworthy dissents that echoed the sentiments held by previous courts. In his dissent, Justice Oliver Wendell Holmes Jr. reminds the Court of, “various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious.” Justice Holmes implies that the Court’s majority argument is naive, as, “The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same...is interfered

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<sup>272</sup> *Lochner v. New York*, 57.

<sup>273</sup> *Lochner v. New York*, 64.

<sup>274</sup> *Lochner v. New York*, 62.

<sup>275</sup> *Lochner v. New York*, 59.

<sup>276</sup> *Lochner v. New York*, 61.

with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.”<sup>277</sup> Justice Marshall Harlan’s dissent expresses similar rhetoric of past cases which proclaimed that “all rights are held subject to the police power.” Harlan claims that “neither the [Fourteenth] Amendment...nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power.”<sup>278</sup> Based on these dissents, the police power’s influence in 1905 was still believed by many to be paramount, but Justice Peckham’s open criticism and aversion to limiting the rights of individuals demonstrated a newfound libertarian direction for the Court and the decline of the police power.

In the decades following *Lochner*, Justice Peckham’s libertarian understanding of individual liberties gained greater traction in the 1940 case of *Cantwell v. Connecticut*. In 1940, Newton Cantwell and his two sons were found guilty of disturbing the peace when they walked down Cassius Street in New Haven, Connecticut, playing religious songs and handing out pamphlets. The trio were members of the Jehovah’s Witnesses and were conducting their fundamental religious tradition of spreading their ideology. This tradition consisted of asking residents if they were interested in listening to various speeches and songs that criticized and condemned other religions, primarily Catholicism. As many residents found Cantwell’s religious paraphernalia offensive, the Connecticut Supreme Court believed Cantwell was responsible for inciting violence and disturbing the peace.<sup>279</sup> Yet when the case reached the Supreme Court, the Justices unanimously decided that Cantwell’s freedom to exercise his First Amendment rights was paramount to the state’s right to exercise its police power.

Justice Owen Roberts wrote the Court’s unanimous opinion and expressed the same concerns that Justice Peckham had of the police powers. According to Roberts, the First and Fourteenth Amendments work simultaneously to protect individuals from all forms of governmental oversight, rendering “the legislatures of the states as incompetent as Congress to enact...laws” regarding religion and the free exercise thereof.<sup>280</sup> This principle applies not only to

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<sup>277</sup> *Lochner v. New York*, 75.

<sup>278</sup> *Lochner v. New York*, 76.

<sup>279</sup> *Cantwell v. Connecticut*, 310 U.S. (1940): 301.

<sup>280</sup> *Cantwell v. Connecticut*, 303.

religious belief but behavior as well, according to Roberts, who separates the notion of religious freedom into two distinct liberties: “Freedom to Believe and Freedom to Act.”<sup>281</sup> In essence, Justice Roberts delineates two different forms of religious liberty, reflecting Thomas Jefferson’s distinction in his address to the Danbury Baptist Association in 1802, as well as referencing the *Reynolds* decision that “Congress [is] deprived of all legislative power over mere opinion, but [is] left free to reach actions which violated social duties or subversive of good order,” which was also based on the Jeffersonian reading of the First Amendment.<sup>282</sup>

Contrary to these earlier interpretations of religious liberty, Justice Roberts posits that an individual’s “Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.” Thus, the Fourteenth Amendment, operating in tandem with the First Amendment, “safeguards the free exercise of the chosen form of religion.”<sup>283</sup> Nevertheless, Justice Roberts concedes that the state does have the authority to regulate religious behavior when it substantially threatens society, and therefore the right to act “must have appropriate definition to preserve the enforcement of that protection.”<sup>284</sup> It would be “absurd” to suggest that the government has no authority over religious actions, as people “under the cloak of religion...may, with impunity, commit frauds upon the public.”<sup>285</sup> But when such an example arises, “the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.”<sup>286</sup>

To Justice Roberts, the difficulty of *Cantwell* ultimately arises from two conflicting interests: those of states using their police powers and those of individuals exercising their religion. Just as Justice Peckham demonstrated in *Lochner* that the police powers challenged individual liberties, Roberts illustrates how precarious the coexistence of these two authorities had become by the time of the case. On the one hand, “The fundamental law declares the interest of the United States that the free exercise of religion is not prohibited and that freedom to communicate information and opinion be not abridged,” while on the other hand, “The state of Connecticut has

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<sup>281</sup> *Cantwell v. Connecticut*, 303.

<sup>282</sup> *Reynolds v. United States*, 165.

<sup>283</sup> *Cantwell v. Connecticut*, 303.

<sup>284</sup> *Cantwell v. Connecticut*, 303.

<sup>285</sup> *Cantwell v. Connecticut*, 306.

<sup>286</sup> *Cantwell v. Connecticut*, 304.

an obvious interest in the preservation and protection of peace and good order within her borders.”<sup>287</sup> Roberts rewords Justice Peckham’s illustration of the clash between the police power and an individual’s Constitutionally protected right. *Lochner* had not given an absolute answer as to which ought to be preferred; therefore, Justice Roberts believed the court must establish a litmus test for situations where states could lawfully exercise their police powers without abridging an individual’s right. The Justices unanimously agreed that the clear and present danger doctrine conceived by Justice Holmes in *Schenck v. United States* drew that line of demarcation.

In a case relating to the distribution of anti-war flyers during World War 1, Justice Holmes had established the clear and present danger doctrine that limited an individual’s freedom of speech. Holmes argued that the freedom of speech is not absolute, due to the potential harm it could bring about in specific social and political environments; he coined the analogy of “falsely shouting fire in a theatre” as an example of offensive speech not protected by the First Amendment.<sup>288</sup> While many see the clear and present danger doctrine as a hindrance to freedom of speech, its application in *Cantwell* empowered individual religious freedom. In order to use the police powers to limit an individual’s exercise of religion, Roberts and his fellow Justices required that the state prove that a “clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order” had taken place. Thus, the court unanimously agreed to employ the clear and present danger doctrine to prevent a state from “unduly suppress[ing] free communication of views, religious or other, under the guise of conserving desirable conditions.”<sup>289</sup>

*Cantwell* demonstrated the court’s interest in drawing an explicit limitation on the usage of police power, which *Lochner* first brought into question. Moreover, considering the Court’s split decision in regulating the police powers just thirty years before in *Lochner*, the unanimity of opinion in *Cantwell* also illustrated the Court’s gradual acceptance of libertarianism in the 20th century. This trend was further displayed just three years following *Cantwell*, when the Jehovah’s Witnesses would take center stage in another crucial free exercise case.

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<sup>287</sup> *Cantwell v. Connecticut*, 304.

<sup>288</sup> *Schenck v. United States*, 249 U.S. (1919): 52.

<sup>289</sup> *Cantwell v. Connecticut*, 308.

In 1943, prior to the ruling in *West Virginia State Board of Education v. Barnette*, West Virginia passed a law requiring all students to perform “the ‘stiff-arm’ salute” while reciting the Pledge of Allegiance in unison. West Virginia claimed that performing the Pledge every day while saluting the flag was “teaching, fostering and perpetuating the ideals, principles and spirit of Americanism.”<sup>290</sup> This notion of fostering a common culture is what Rousseau and other proponents of the social contract believed to be a vital element of a well-constituted society. This can be found in modern-day France, where the educational mission is to enforce the Constitutional principle of *Laïcité*, or public secularism, while in the case of *Barnette*, West Virginia’s law planned on “fostering and perpetuating the ideals...of Americanism.” Just as the French government “can banish” a citizen who does not comply with the social contract for being an “anti-social being,” West Virginia’s educational law asserted that, “Failure to conform is ‘insubordination’ dealt with by expulsion. Readmission is denied by statute until compliance.”<sup>291</sup> The rhetorical and conceptual similarities between the general will’s reliance on education and the West Virginian law highlight the relationship between the police power of states to regulate primary and secondary schooling and Rousseau’s notion of a civil religion.

Conversely, Justice Jackson wrote in the Court’s opinion that the state’s right to enforce the ideals of Americanism does not supersede the First Amendment liberties of the Jehovah’s Witnesses. Jackson argues that members of Jehovah’s Witnesses “are an unincorporated body teaching that the obligation imposed by [the] law of God is superior to that of laws enacted by temporal government,” so their religious duty is to “not bow down thyself to [forms of governments] nor serve them.”<sup>292</sup> As a result, Justice Jackson writes that, “the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”<sup>293</sup> The Court demonstrated an overt libertarian stance that not only secured First Amendment rights, but also used the clear and present danger doctrine yet again to question the validity the state’s regulating of religious speech and practice. Justice Hugo Black and Justice William Douglas echo this sentiment by affirming that

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<sup>290</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. (1943): 625.

<sup>291</sup> *West Virginia State Board of Education v. Barnette*, 629.

<sup>292</sup> *West Virginia State Board of Education v. Barnette*, 629.

<sup>293</sup> *West Virginia State Board of Education v. Barnette*, 642.

the educational law “cannot be justified as a means of meeting a ‘clear and present danger’ to national unity,” due to the isolated context in which the refusal to salute the flag had taken place.<sup>294</sup> Thus, West Virginia’s defense had to be “denied.”<sup>295</sup> The Court’s rulings in *Barnette* and *Reynolds* revolved around two instances of religious conduct violating societal norms: to Justice Waite, George Reynolds’ religious act was seen as a clear threat to the good order of society, while Justice Jackson’s Court concluded the opposite in *Barnette*. The narrow reading of the First Amendment in *Reynolds* inflated the police power of states, while the Court’s broad view of the First Amendment in *Barnette* undermined the police power and the state’s ability to regulate religious behavior. This trend continued long past *Barnette* and the Free Exercise Clause, increasingly leading the court to a broad, libertarian understanding of the First Amendment.

In 1969, the Supreme Court heard *Brandenburg v Ohio*; this case was racially charged and hinged on Justice Holmes’ interpretation of the First Amendment. Throughout much of the 20th century, the Court had taken Justice Holmes’ interpretation of the clear and present danger doctrine and applied it to free exercise cases, thereby upholding the religious rights of individuals. In *Brandenburg*, the Court continued to use the clear and present danger doctrine when interpreting free speech, which resulted in the steady decline of police powers. In *Brandenburg*, the Court concluded that the First Amendment protected the inflammatory speech of a Ku Klux Klan member. The Court cited that during a Klan rally, the accused announced that, “We are marching on Congress July the Fourth, four hundred thousand strong,” while pronouncing “derogatory” rhetoric towards Black and Jewish people.<sup>296</sup> The Justices considered this rhetoric’s targeted danger but asserted that any limitation on the freedom of speech “intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments,” except when “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>297</sup> As the Court believed that the speech did not meet this requirement, any restriction of the accused’s expression would be abridging a right “which our Constitution has immunized from governmental control.”<sup>298</sup> This was the broadest interpretation of the First Amendment that had been seen thus

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<sup>294</sup> *West Virginia State Board of Education v. Barnette*, 662.

<sup>295</sup> *West Virginia State Board of Education v. Barnette*, 666.

<sup>296</sup> *Brandenburg v. Ohio*, 395 U.S. (1969): 446.

<sup>297</sup> *Brandenburg v. Ohio*, 447.

<sup>298</sup> *Brandenburg v. Ohio*, 448.

far in the 20th century. Following the Court's reasoning, the clear and present danger doctrine was abandoned and as a result, all forms of speech that pass the imminent lawless action test were protected from government regulation, thereby rendering much of state or federal limitation void. Moreover, the clear and present danger doctrine still applied to actions, since, if the state sought to regulate religious behavior, it must still prove that said behavior caused a clear and present danger to society.

This libertarian trend continued throughout the rest of the 20th century and still holds significant weight in the present-day Supreme Court. Although, when the Court heard *Oregon v. Smith* in 1990, it seemingly deviated from a libertarian interpretation of the Free Exercise clause by banning peyote for religious purposes while at work; numerous states passed Religious Freedom Restoration Acts, which were specifically designed to counteract *Smith*. Consequently, it is difficult to conclude whether businesses must face the same hurdles as the government if they wish to ban religious speech or behavior. The Court has mirrored prior free exercise cases in the more recent case of *Kennedy v. Bremerton School District*. The Court ruled that the Free Exercise Clause protects Joseph Kennedy, a public-school sports coach, from any punishment for a public display of religiosity performed on school grounds. *Kennedy* echoes the decision in *Barnette* and indicates that the Court still affirms that an individual's right to exercise his religion is a fundamental feature of American society. Therefore, the Court's new libertarian trend has ultimately diminished the strength of the police power by almost completely removing the once-present conditionality of the First Amendment.

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## Conclusion

Police powers have experienced a drastic rise and fall throughout American history. In the 19th century, Supreme Court Justices saw the police powers as a crucial limb of state government, as they intended to protect citizens from physical and moral danger. However, the states' adherence to an obligation to protect public morals and order often led to states abridging individual liberties.

In the interest of conserving public morals, the supreme court revoked Boston Beer Co.'s right to produce and distribute alcohol, justifying their ruling by claiming it was for the "maintenance" of society's "good order." In an attempt to protect public health, the Supreme Court upheld the Louisiana law conglomerating the slaughterhouses of New Orleans, leading to the court revoking operating rights of countless butchers. And in 1879, police power reached new heights over the constitutional right to free exercise of religion when the Court restricted George Reynold's ability to practice polygamy.

Yet after *Reynolds*, a shift in the interpretation of the Fourteenth Amendment led to the decline of the police power. The Court split when deciding *Lochner*, as justices either feared the growing strength of the police power or saw them as a necessary function of state government; nevertheless, Justice Peckham drew a clear line delineating between valid and invalid uses of police power and established that states must prove that an individual's action endangers society's public order or morals to limit an individual's rights. *Cantwell* and *Barnette* further developed this interpretation of police powers, which imported Justice Holmes' clear and present danger doctrine from *Schenck*, arguing that states must prove that an individual's religious behavior has directly endangered society if they wish to restrict their First Amendment rights.

Many Americans ultimately view this libertarian understanding of the Free Exercise Clause and the First Amendment as the bedrock of American history. Not only has this been brought into question, but this thesis illustrates that, at one-point, American society was far closer to that of France than scholars often assume. Because of this mainstream view, the similarities between French and American constitutional law frequently go unnoticed. But by examining the police powers against the backdrop of the French Islamic veil controversy and Rousseau's social contract theory, we gain a greater understanding of how religious rights have evolved throughout the history of American constitutional law. The present-day sanctity of certain constitutional rights is a relatively new phenomenon that, in many circumstances, was limited and restricted by government in order to protect an ideological model of a well-ordered society. Though this thesis has primarily focused on religious freedoms and the Free Exercise Clause, the police power's impact was likely to have been felt in many other aspects of constitutional law and may therefore changes how we perceive the development of our present-day inalienable rights.

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