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ARTICLES

The Police Power and the Takings Clause

D. BENJAMIN BARROS*

INTRODUCTION

One of the more enduring puzzles in constitutional law is the problem of regulatory takings, and it has become something of a ritual to begin articles on the issue by noting the widespread confusion that the doctrine has caused.¹ This Article seeks to clarify the regulatory takings debate by examining the scope and nature of the police power and discussing its relationship with the Just Compensation Clause.

The recent increase in federal regulation notwithstanding, the regulatory takings doctrine is primarily the product of challenges to state police power regulations. But despite the centrality of the police power to the problem of regulatory takings, an observation made nearly one hundred years ago still holds true today: "No phrase is more frequently

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1. See, e.g., James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1143 (1997) ("Regulatory takings are widely regarded as a puzzle. . . . [T]he opening cliché in most of the scholarly commentary is that the law in this area is a bewildering mess."); Andrea L. Peterson, *The Taking Clause: In Search of Underlying Principles Part I – A Critique of Current Takings Doctrine*, 77 CAL. L. REV. 1299, 1303-04 (1989) ("A major theme of this first Article is that the Court's takings doctrine is in far worse shape than has generally been recognized – indeed, that it is difficult to imagine a body of case law in greater doctrinal and conceptual disarray."); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984) (describing the regulatory takings problem as "intractable"); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (noting that "more than one recent commentator has described [regulatory takings jurisprudence] as a 'mess'").

used and at the same time less understood.”² Contemporary regulatory takings jurisprudence is plagued by misunderstandings about the police power, in part because no one has seriously attempted to analyze or define the police power since 1907³ — fifteen years before the landmark regulatory takings case *Pennsylvania Coal v. Mahon*⁴ was decided by the United States Supreme Court.

The uncertainty and confusion over the police power, however, is unnecessary. The term “police power” was introduced and defined by the Supreme Court, and has a clear meaning as a concept of American constitutional law — though one that unfortunately has been ignored in contemporary takings jurisprudence. The purpose of this Article is to explore the precise nature of the police power and its lessons for clarifying the regulatory takings debate.

Part I of this Article addresses the question: “What is the police power?” It begins by discussing the early federalism cases in which the Supreme Court introduced and defined the phrase “police power” to be synonymous with the entirety of the states’ sovereign power. It then examines the practical development of police regulations in the state courts, including the landmark decision *Commonwealth v. Alger*⁵ and the evolution from community-based common-law regulation toward the modern regulatory state. Finally, it discusses various attempts to limit the scope of the police power, from *Lochner*-era substantive due process to various academic definitions of the police power based on political theory. Part I concludes that the police power, as a concept of American constitutional law, is synonymous with the entirety of the sovereign power of the states that remained after the constitutional grant of limited powers to the federal government.

Part II discusses the interaction between the police power and the Just Compensation Clause. It begins with the ambiguous foundation of modern regulatory takings, Justice Holmes’s cryptic opinion in *Pennsylvania Coal v. Mahon*. Placing the holding in *Mahon* in the context of Holmes’s prior writings on the police power and his substantive due process dissents shows that Holmes understood the broad scope of the police power while at the same time rejected the formalistic rule that exercises of the police power could never be takings. Part II then examines the historical record and text of the Just Compensation Clause, and concludes that the central holding in *Mahon* — that exercises of the police power can in some circumstances be takings — is correct when

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

3. *See id.*

4. 260 U.S. 393 (1922).

5. 61 Mass. (7 Cush.) 53 (1851).

an exercise of the police power renders the property in question valueless, but not when the exercise of the police power results in a lesser diminution of the property's value.

Part II then looks to the nature and scope of the police power, and the history and text of the Just Compensation Clause, to make a few observations that help to clarify the regulatory takings problem. Much of the confusion in regulatory takings is due to a misunderstanding of the nature and scope of the police power, which has led to the regulatory takings question being framed in incorrect terms. Most significantly, recognition that the broad scope of the police power is not tied to the prevention of harm helps demonstrate that the character of the government act in question should have no place in the regulatory takings inquiry, and that its central role in contemporary regulatory takings cases is misplaced. When properly stated, the regulatory takings question should simply ask whether the government act has rendered the property in question valueless — if the answer is yes, then compensation is due. Finally, Part II concludes that despite their analytical incoherence, the Supreme Court's contemporary takings cases have reached results that are consistent with both the historical record and text of the Just Compensation Clause.

I. WHAT IS THE POLICE POWER?

The term "police power" is generally, but vaguely, understood in American jurisprudence to refer to state regulatory power. Most opinions and articles on regulatory takings do not move beyond this general notion; those that do look further typically misapprehend the police power's history, nature, and scope. As a result, attempts to solve the problem of regulatory takings continuously have suffered because of a lack of understanding of the nature of the police power.

The confusion about the police power has many sources. "Police power" was introduced by the Supreme Court in federalism cases, where the Court was attempting to define the border between federal and state authority, but later came to prominence in cases testing the scope of state power under the Due Process and Just Compensation Clauses. Perhaps the best early work on the scope of the police power, by W. G. Hastings, was published in a non-legal journal and has escaped the notice of many contemporary writers.⁶ Further, many academic theorists have failed to distinguish between "police power," the American constitutional law concept, and related ideas in political theory.

6. W. G. Hastings, *The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State*, 39 PROC. AM. PHIL. SOC'Y 359 (1900).

This Part discusses the introduction and evolution of the term “police power,” examining the initial definition of the term by the Supreme Court, the practical evolution of the police power as exercised by the states, and various attempts to define (and often to limit) the scope of the police power, including *Lochner*-era substantive due process. It concludes that “police power” is synonymous and coextensive with state power — a seemingly simple conclusion that potentially clarifies the regulatory takings debate.

A. Introduction of a Legal Term

The term “police power” was introduced in the Marshall and Taney Courts’ attempts to delimit the scope of federal and state authority. It was first used in 1827 by Chief Justice Marshall in *Brown v. Maryland*,⁷ a challenge to a Maryland regulation that required importers of foreign goods to obtain a license and pay a fee of fifty dollars.⁸ The plaintiff argued that this requirement violated the Commerce Clause and the constitutional prohibition on state taxes on imports. Maryland, represented by future Chief Justice Taney, argued that to find the regulation unconstitutional would undermine the state’s ability to protect its citizens against dangerous imports such as gunpowder.⁹ Marshall rejected Taney’s argument and found the regulation to be unconstitutional, but in doing so acknowledged, “The power to direct removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States.”¹⁰

While this was the first use of the term police power, the Chief Justice did not come up with it out of thin air. As Hastings noted, the term came to Marshall “by degrees” in other cases dealing with the scope of state authority in the federal system.¹¹ In the *Dartmouth College Case*, decided in 1819, Marshall wrote that the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government.¹² A few years later, in the 1824 case *Gibbons v. Ogden*,¹³ Marshall discussed this state power using the term “police” several times, at one point referring to “[t]he acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens.”¹⁴

7. 25 U.S. (12 Wheat.) 419 (1827).

8. *Id.* at 420.

9. *Id.* at 427-28.

10. *Id.* at 443.

11. Hastings, *supra* note 6, at 363.

12. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 628 (1819).

13. 22 U.S. (9 Wheat.) 1 (1824).

14. *Id.* at 208.

Marshall did not do anything unusual in using the word “police” to describe state power. At the time, “police” had several meanings relating to government. The term was used to refer broadly to civilization or civil organization,¹⁵ and “public police” meant the equivalent of public policy.¹⁶ From these usages, the term “police” evolved to mean the regulation and administration of the civil community and the enforcement of the community’s laws and public order.¹⁷ Blackstone’s widely quoted description of the public police as “the due regulation and domestic order of the kingdom”¹⁸ is an influential example of this usage.

At the time of the drafting of the United States Constitution, the use of the word “police” to refer to a sovereign entity’s power to govern and regulate was not unusual. In giving the federal government limited and enumerated powers, the Constitution left the remaining sovereign authority of the United States with the individual states. This remaining authority is described as “residuary sovereignty” in *The Federalist*,¹⁹ and at its broadest consists of, as Chief Justice Marshall wrote in *Gibbons v. Ogden* that “immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government.”²⁰ As Hastings noted, the phrase “residuary sovereignty” was not widely used.²¹ Instead, courts and commentators referred to specific state powers, such as eminent domain and taxation, or spoke more

15. 12 OXFORD ENGLISH DICTIONARY 22 (2d ed. 1989) [hereinafter OED]. As examples of this usage, the OED cites, *inter alia*, a letter by Edmund Burke decrying the lack of civilization of the Turks and a book on ants. *Id.*

16. *Id.* One example of this usage given by the OED is from a Scottish treatise: “If . . . the public police shall require that a highway be carried through the property of a private person.” *Id.*

17. *Id.*

18. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 162 (1769).

19. THE FEDERALIST No. 43, at 228 (James Madison) (George W. Carey & James McClellan eds., 2001) (“The exception in favour of the equality of suffrage in the senate, was probably meant as a palladium to the residuary sovereignty of the states . . .”); THE FEDERALIST No. 62, at 320 (James Madison) (George W. Carey & James McClellan eds., 2001) (“[T]he equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty.”).

20. 22 U.S. (9 Wheat.) at 203.

21. Hastings, *supra* note 6, at 363. Hastings wrote:

[The term “residuary sovereignty”] seems not to have to have obtained generally, perhaps because it served no one’s political needs. It is hard to find it outside of *The Federalist*. It suited those who wished to magnify the states and who feared the growth of power on the part of the national government to omit the qualifying adjective. It suited those to whom encroachments and separatist tendencies on the part of the states were a terror not to couple the words “States” and “Sovereignty” together, even with the qualification.

Id. The courts occasionally used the term to describe the scope of state sovereignty in the federal system. *See, e.g., Dredd Scott v. Sandford*, 60 U.S. (19 How.) 393, 515 (1856) (Campbell, J., concurring) (“It is sufficient for the decision of this case to ascertain whether the residuary sovereignty of the States or people has been invaded by the 8th section of the act.”).

broadly of the state's power act to promote "public justice" or enact "police regulations."²² In the constitutional debates, the term "internal police" was used to describe the area of exclusive state sovereignty.²³

Although *Brown v. Maryland* was the first use of "police power," it was the 1837 case *Mayor of New York v. Miln*²⁴ that brought the term into wide use.²⁵ *Miln* involved a challenge to a New York City regulation that required the master of every vessel arriving in the port of New York to give the city authorities a record of every passenger arriving from another state or country, including name, birthplace, age, and occupation.²⁶ In upholding the regulation, both the Opinion of the Court by Justice Barbour and Justice Thompson's concurrence used the term "police power," but both Justices also used other terms such as "regulation of internal police" to convey the same idea.²⁷

Five years later, in *Prigg v. Pennsylvania*,²⁸ the Court again discussed the police power, no longer using the term "tentatively and as a briefer substitute for fuller expressions."²⁹ In *Prigg*, the Court voided a Pennsylvania law under which the appellant had been convicted for forcibly removing a black woman from Pennsylvania to Maryland. In the Opinion of the Court, Justice Story made it clear that the problem with the law was that it was contrary to the federal Fugitive Slave Law, and that the Court's action should not "be understood, in any manner whatsoever, to doubt or to interfere with the police power belonging to the states, in virtue of their general sovereignty."³⁰ While the Justices disagreed on the exclusiveness of federal power in this area, the various opinions in *Prigg* use the term "police power" to represent the general sovereign power of the states.³¹

The process of defining "police power" reached its conclusion in

22. Hastings, *supra* note 6, at 363.

23. In debating the respective authority of the federal and state legislatures, Mr. Sherman of Connecticut proposed language that would give the federal government the authority "to make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the government of the individual states in any matters of *internal police* which respect the government of such states only, and wherein the general welfare of the United States is not concerned." 5 ELLIOT'S DEBATES 319-20 (J.B. Lippincott Co. 1941) (1836) (emphasis added). Similar language appears in *id.* at 462.

24. 36 U.S. (11 Pet.) 102 (1837).

25. See Hastings, *supra* note 6, at 365-67.

26. 36 U.S. (11 Pet.) at 102.

27. See Hastings, *supra* note 6, at 367.

28. 41 U.S. (16 Pet.) 539 (1842).

29. Hastings, *supra* note 6, at 373.

30. 41 U.S. (16 Pet.) at 625.

31. *Id.* at 625, 637, 657.

the *License*³² and *Passenger Cases*.³³ These cases concerned the question of whether the state police power and the federal commerce power overlap, or whether they form mutually exclusive spheres of authority. In both cases, Chief Justice Taney and Justice McLean were the strongest proponents of the opposing sides, with Taney arguing that the two powers overlap and McLean arguing that the two are exclusive. Both Justices, however, agreed that the police power was a product of state sovereignty. In the *License Cases*, Chief Justice Taney wrote:

But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion.³⁴

In other words, the police power and state sovereignty are synonymous.

Justice Taney's examples are critical to understanding the police power's full scope. Although today the police power is most often thought of as a regulatory power, it is in fact much more. A state does not regulate when it "establish[es] courts of justice." A state's police powers are "the powers of government inherent in every sovereignty to the extent of its dominions;" and, therefore, at its broadest the police power *includes* other, more discrete, state powers. A state exercises its sovereignty; and, therefore, the police power, when it establishes a court of law; enacts a land-use regulation that permits a parcel of property to be used as a courthouse; takes that property by eminent domain to be used for a courthouse; or taxes other property to pay for the construction and operation of the courthouse.³⁵

The widespread notion that the police power is purely regulatory is largely due to historical circumstance. Although the police power was defined in federalism cases, the term came into widespread use in legal actions challenging the scope of police regulations. The next section

32. 46 U.S. (5 How.) 504 (1847).

33. 48 U.S. (7 How.) 283 (1849).

34. 46 U.S. (5 How.) at 583. Justice McLean used similar language: "The States, resting upon their original basis of sovereignty, subject only to the exceptions, stated, exercise their powers over every thing connected with their social and internal condition." *Id.* at 588 (McLean, J., dissenting).

35. The fact that at its broadest the police power can be seen to include the power of eminent domain is not a predicate to the conclusion set forth below that exercises of the police power can violate the Just Compensation Clause. See *infra* Part II. It does, however, reinforce the hollowness of any formal distinction between exercises of eminent domain and exercises of the police power in the regulatory takings analysis. See *infra* notes 150-68 and accompanying text.

discusses the evolution of regulation enacted under the police power, while the following section discusses various attempts by courts and legal scholars, motivated either by a desire to limit state power or by a desire to create a more orderly conception of state power, to circumscribe the legitimate ends of the police power.

B. *Police Power and Police Regulation: The Evolution of Regulation by the State*

Because the Supreme Court introduced the term "police power" in the context of cases delimiting federal and state power, it is not surprising that the term was defined theoretically and broadly to mean state sovereign power. But the police power is by definition state power, and as a result, its practical scope evolved in cases testing the validity of state actions. These cases exclusively concerned the validity of police regulations (*i.e.*, regulations enacted under the police power), and as a result, the police power almost immediately came to be considered a regulatory power.

According to the traditional account of the history of state regulation, widespread regulation under the police power was not common before the late nineteenth century. But, contrary to the traditional account, early America was "well regulated" (to use William J. Novak's term), and American courts were not strangers to police regulations, even if they were not referred to as such. Novak has cataloged the wide range of regulations enacted under the rich common law tradition prevalent in early America in his book *The People's Welfare*.³⁶

The practical scope of police regulation, however, has evolved throughout American history. Perhaps the most important step in the practical evolution of police regulation came in the 1851 case *Commonwealth v. Alger*,³⁷ which analytically linked the common law doctrines that formed the basis of early American police regulations to the broad

36. WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE* (1996); see also John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1107-31 (2000) [hereinafter Hart, *Land Use Law*] (discussing colonial-era land use regulations); John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259-81 (1996) [hereinafter Hart, *Colonial Land Use*] (also discussing colonial-era land use regulations); William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1076-77 (1994) (listing regulations enacted by the New York legislature between 1781 and 1801); William J. Novak, *Salus Populi: The Roots of Regulation in America, 1787-1873*, at 6 (1991) (unpublished Ph.D. dissertation, Brandeis University) (http://wwwwlib.umi.com/cr/brandeis/preview_img/9217499/21); Treanor, *supra* note 1, at 788-89 (discussing compensation and regulations). As early as 1388, sanitary laws regulating the disposal of garbage and the slaughter of cattle were enacted in England. W. P. PRENTICE, *THE POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY* 8 (1894) (citing D. B. EATON, *SANITARY LEGISLATION* (1872)).

37. 61 Mass. (7 Cush.) 53 (Mass. 1851).

conception of government power reflected in the term “police power” as defined by the Supreme Court. By freeing police regulation from the common law doctrines that represented its early practical scope, *Alger* formed the intellectual basis for the broad regulatory scheme prevalent today.

This Section discusses *Alger* and its significance to the development of the practical scope of regulation under the police power. It then briefly discusses the evolution of American regulation after *Alger*. It is important, however, to note at the outset that this Section discusses the evolution of police regulation, not evolution of the police power. Although its practical scope has evolved over time, the police power itself has not. The police power, by definition, has always been the residuary sovereign power of the states.

1. TRANSCENDING THE COMMON LAW TRADITION

In *Alger*, one of the nation’s great judges, Chief Justice Lemuel Shaw of the Massachusetts Supreme Court, made what is widely credited to be the first practical explication of the police power.³⁸ Shaw’s biographer, Leonard Levy, does not exaggerate when he calls *Alger* “one of the most influential and frequently cited [opinions] in constitutional law.”³⁹

Alger was a challenge to a Massachusetts law that restricted waterfront property holders’ right to build wharves in certain areas of Boston harbor. The issue for the court, as framed by Shaw, was: “What are the just powers of the legislature to limit, control, or regulate the exercise and enjoyment of [a property owner’s] rights.”⁴⁰ Shaw began his analysis into the respective rights of property holder and legislature with the “settled principle, growing out of the nature of well ordered civil society, that every holder of property . . . holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others . . . nor injurious to the rights of the community.”⁴¹ The police power, to Shaw, was simply the government’s power to enact such regulations for the good and welfare of the community as it sees fit, subject to the limitations that the regulations be both reasona-

38. See Harry N. Scheiber, *State Police Power*, in 5 ENCY. AM. CONST. at 2505 (Leonard W. Levy & Kenneth I. Karst eds., 2d ed. 2000).

39. LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 247-48 (1957).

40. *Alger*, 61 Mass. (7 Cush.) at 65.

41. *Id.* at 84-85.

ble⁴² and constitutional.⁴³ Shaw conceded, "It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise."⁴⁴

Shaw was one of the first, but by no means the last, writers to have difficulty defining the scope of the police power in a practical setting. While he acknowledged that the outer limits of the police power are indistinct, he noted that there are many cases where the reasonableness and propriety of a government regulation are obvious to "all well regulated minds."⁴⁵ Such obviously legitimate regulations include the prohibition of warehousing gunpowder in inhabited areas, construction rules designed to limit the risk of fire, and use regulations prohibiting the location of contagious disease hospitals.⁴⁶

Although prohibitions on such uses diminish the value of the property and cause economic harm to the property owner, Shaw argued that they do not require compensation because they are exercises of the police power, not the power of eminent domain. Shaw's position is consistent with the generally accepted doctrine at the time, discussed below, that the obligation to compensate was limited to exercises of eminent domain. Shaw, however, had difficulty defining the respective scopes of these two powers, saying that the distinction between them is "manifest in principle, although the facts and circumstances of different cases are so various, that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers."⁴⁷ One such distinction is manifest in the police regulations mentioned by Justice Shaw, in that each is "the restraint of an injurious private use by the owner."⁴⁸ The public enforces such restraints, not because it intends to "make any use of the property [which it would obtain through eminent domain] . . . but because it would be a noxious use, contrary to the maxim, *sic utere tuo, ut alienum non laedas*," which it would prohibit through the police power.⁴⁹

Shaw's attempt to make a principled distinction between eminent domain and the police power was understandable. In the nineteenth century, it was widely accepted that just compensation was required only

42. *Id.* at 85; see also Levy, *supra* note 39, at 254 n.91 ("Shaw intended that reasonableness be judged by the legislature, not by the judiciary.").

43. *Alger*, 61 Mass. (7 Cush.) at 85.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 86.

48. *Id.*

49. *Id.*

for physical takings, and regulatory restraints on property were generally considered to be outside of the scope of the Takings Clause. Categorizing the law that prohibited Alger from building his wharf as a regulation allowed Shaw to deny Alger's claim for compensation. By using the new term "police power," Shaw tried to explain this rule in terms of two distinct government powers, each serving a different purpose.

Shaw's discussion, however, had far more significance than its statement of the rule that regulations could not amount to takings — a distinction that the passage of time would show to be flawed.⁵⁰ Some commentators, notably Ernest Freund and Thomas Cooley, looked at Shaw's *sic utere* language and concluded that Shaw's conception of the police power was limited to regulation of noxious uses.⁵¹ Shaw's view of the police power, however, was more complex. For Shaw, the police power clearly included, but was not limited to, the regulation of those uses that were contrary to the common law *sic utere* doctrine. Rather, the legislature had the broad power "to declare what shall be deemed a dangerous or noxious trade, under what circumstances and within what distance of habitations it may or shall not be set up, how the use of it shall be regulated, and to prohibit any other than such regulated use, by specific penalties."⁵²

The purpose of this broad power was twofold. First, the power was intended to promote the public welfare. Second, and as important to Shaw, the power was intended to establish clear and certain rules. Shaw wrote:

Things done may or may not be wrong in themselves, or necessarily injurious and punishable as such at common law; but laws are passed declaring them offences, and making them punishable, because they tend to injurious consequences; but more especially for the sake of having a definite, known and authoritative rule which all can understand and obey.⁵³

As an example, Shaw referred to the case of a powder magazine. Shaw wrote that while everyone agrees that building a powder magazine too close to a village is a dangerous use, and would be punishable at common law, not everyone would agree on how close is too close. Some might think two hundred feet, others two thousand, "but within this wide margin, who shall say, who can know what distance shall be too near or

50. See *infra* notes 149-66 and accompanying text.

51. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 830-31 (7th ed. 1903) [hereinafter COOLEY, CONSTITUTIONAL LIMITATIONS]; ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 405 (1904).

52. *Alger*, 61 Mass. (7 Cush.) at 96.

53. *Id.* at 96.

otherwise?"⁵⁴ Certainty is needed, and certainty can be provided only by positive legislative enactments. This need gave the legislature the authority to make a law "defining and securing the rights of the public."⁵⁵ The law challenged in *Alger* thus legitimately established a point beyond which wharves could not be built, and *Alger's* wharf was subject to such regulation even though it was not intrinsically harmful.

The traditional account of the importance of Shaw's opinion to the development of the police power describes *Alger* as a major innovation, breaking with a *laissez-faire* tradition and ushering in an era of positivist regulation. Shaw's conception of the police power, however, was not a radical departure from the early nineteenth century tradition of common regulation that formed the basis of his opinion.⁵⁶ But *Alger* was instrumental in the evolution of positivist regulation. *Alger's* significance in this respect comes from Shaw's acknowledgement of the legislature's line drawing authority and joinder of the common law regulatory tradition with the new term "police power" and the broad conception of government authority that the term represented. Shaw held that state authority to enact police regulations includes, but is not limited to, such doctrines as *sic utere tuo, ut alienum non laedas*, and that the legislature has broad authority to exercise this power. *Alger* thus analytically freed police regulation from its common law origins, and provided an important intellectual building block for the development of the modern regulatory state.⁵⁷

2. EVOLUTION OF REGULATION BY THE POSITIVIST STATE

Although *Alger* was by no means the sole reason for this shift, American regulation changed in both degree and kind beginning in the 1850s.⁵⁸ Perhaps the most profound example of this shift was the evolution of prohibitions on the manufacture of liquor — which later aroused Justice Holmes's suspicion of the police power and formed part of the foundation of his thinking about regulatory takings that culminated in

54. *Id.*

55. *Id.* at 104.

56. See NOVAK, THE PEOPLE'S WELFARE, *supra* note 36, at 19-21.

57. Novak is critical of the idea that *Alger* represented an innovation in American legal thought. NOVAK, THE PEOPLE'S WELFARE, *supra* note 36, at 20-21. In one sense, Novak is correct — the regulation upheld in *Alger* was well within the early-American regulatory tradition, and from that standpoint *Alger* was an "easy case." *Id.* at 21. But words and concepts are important in legal analysis, and the marriage of the common law regulatory tradition with the new, broad phrase "police power" changed the terms by which the question of the validity of a particular regulation was asked. More importantly, by cogently explaining the importance of the legislature's line drawing authority and ability to regulate uses that were not intrinsically harmful, Shaw helped lay the intellectual foundation for the positivist regulatory state.

58. *Id.* at 104 n.107; see also *id.* at 236-37 (discussing differences between the early-American regulatory tradition and the modern regulatory state.); *id.* at 242-43 (same).

the landmark *Pennsylvania Coal v. Mahon*.⁵⁹ Liquor and public morals had been actively regulated in early America.⁶⁰ But this regulatory tradition “changed suddenly when temperance reformers ratcheted up the polity for a new wave of legislative experimentation — state prohibition.”⁶¹ As Novak wrote,

Prohibition marked a stunning departure in the legal and legislative history of morals and liquor regulation. Power and discretion were summarily taken out of the hands of communities and local officials and replaced with blanket state-wide legislative bans on a remarkably profitable activity . . . that previously enjoyed the sanction of law. Thomas Cooley reflected on the momentous consequences: “The trade in alcoholic drinks being lawful, and the capital employed in it fully protected by the law, the legislature then steps in, and by enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand.” He added, “The merchant of yesterday becomes the criminal of to-day, and the very building in which he lives becomes perhaps a nuisance.”⁶²

Along with other legislative innovations of the mid-1800s, “prohibition and its legal/political repercussions transformed traditional understandings of the scope of legislation, the nature of rights, and the locus of public power.”⁶³ This shift was accompanied by “judicial invocations of an ‘inalienable police power’ defined increasingly in terms of sovereignty and command rather than consent and common law precedent.”⁶⁴

With this shift toward positivist regulation in the mid- to late-1800s, the practical conception of the police power at the state level became divorced from its common-law roots, and many innovative regulations were challenged under the doctrine of substantive due process as exceeding the scope of the police power. Each of these police regulations, however, was consistent with the broad conception of the police power developed by Chief Justice Taney in the *License Cases* and by

59. See *infra* notes 168-74 and accompanying text. The profound evolution in government power represented by state prohibition statutes also raised the suspicion of Justice Shaw, although Shaw’s suspicions were manifested through the application of procedural due process. See NOVAK, *THE PEOPLE’S WELFARE*, *supra* note 36, at 181-83.

60. NOVAK, *THE PEOPLE’S WELFARE*, *supra* note 36, at 172-77.

61. *Id.* at 177.

62. *Id.* at 177 (quoting COOLEY, *CONSTITUTIONAL LIMITATIONS*, *supra* note 51, at 583-84).

63. *Id.*; see also *id.* at 188 (“State prohibition involved a distinctively upward shift in the locus of public decision-making power in the American polity. Morals police, including controls on intoxicating liquors, had been the prerogative of local self-regulating communities for centuries. With a simple fiat, state legislatures dissolved this tradition and a whole set of time-honored expectations. It replaced a local, customary, and discretionary regime with a centralized, rule-based, and stream-lined enforcement apparatus.”). A similar shift occurred in other areas of police regulation, including public health. See *id.* at 229-30.

64. *Id.* at 243.

Chief Justice Shaw in *Alger*. With the Depression-era death of economic substantive due process, discussed further below, the police power returned in both theoretical and practical scope to the "power of sovereignty, the power to govern men and things within the limits [of the states'] dominions."⁶⁵

C. Attempts to Limit the Police Power

Judges and legal scholars have made many attempts to define the police power or to draw boundaries around its scope. Writers of early treatises tried to explain the police power in terms of the common law theories reflected in cases that upheld police regulations. Courts have often defined the police power by reference to the acknowledged legitimate ends of the power, such as the promotion of the polity's health, safety, and morals, and some commentators have attempted to limit the police power to the pursuit of these ends. Many more commentators have attempted to define the police power by reference to political theory.

Some of these attempts at definition were motivated by a simple desire to define a legal concept; others were ideological attempts to limit the scope of the police power. Regardless of their motivation, however, these attempts at definition and limitation err because they make one consistent mistake: "Police power" is an American constitutional law concept that was defined by the Supreme Court to be synonymous with state power.

1. COOLEY AND TEIDEMAN — ATTEMPTS TO LIMIT TO COMMON LAW DOCTRINES

In the late nineteenth century, a number of treatise writers analyzed state power by cataloging court decisions and categorizing them as exemplars of certain state powers. Some of these treatise writers were simply trying to make sense of a confusing mass of case law,⁶⁶ but the two most influential treatise writers of the time, Thomas Cooley and Christopher Teideman, were motivated by the desire to limit the scope of state power. Cooley's landmark *Constitutional Limitations*⁶⁷ and Tiedeman's *A Treatise on the Limitations of the Police Power in the United States*⁶⁸ both attempted to do so by limiting the police power to

65. *The License Cases*, 46 U.S. (7 How.) 283 (1848).

66. For example, W. P. Prentice argued that the origin of the police power was in the law of necessity. Prentice, *supra* note 36, at 4.

67. COOLEY, *CONSTITUTIONAL LIMITATIONS*, *supra* note 51.

68. CHRISTOPHER G. TEIDEMAN, *A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES* (1886).

the enforcement of the common law *sic utere* doctrine. Motive aside, however, all of these treatise writers made the same basic error, attempting to define the police power by reference to case law discussing specific police regulations, rather than to the Supreme Court case law that defines the power itself.

Cooley's treatise was first published in 1868, the same year as the ratification of the Fourteenth Amendment, and was immensely influential on late nineteenth century legal thought.⁶⁹ Cooley looked to Shaw's *sic utere* language in *Alger* and concluded that the police power was limited to prevention of harmful uses.⁷⁰ This interpretation misreads *Alger*, and confuses the ends of the police power that Shaw felt were obvious to "all well regulated minds" with Shaw's broader and subtler conception of the police power that included regulation of uses that may not "be wrong in themselves, or necessarily injurious and punishable as such at common law."⁷¹

Hostility to government regulation is more explicit in Tiedeman's work than in Cooley's. Like many *laissez faire* legal scholars, Tiedeman was strongly influenced by the Social Darwinist philosophy of Herbert Spencer. Followers of Spencerian social thought were radically opposed to government regulation of economic affairs because it interfered with the evolution of human society. As one Spencerian put it: "Let it be understood that we cannot go outside of this alternative: liberty, inequality, survival of the fittest; not liberty, equality, survival of the unfittest. The former carries society forward and favors its best members; the latter carries society downwards and favors its worst members."⁷² Tiedeman began his splenetic introduction to his treatise by railing against government economic regulation, which he saw as the unfortunate product of universal suffrage giving the ignorant masses the power to impose the tyranny of the majority on the helpless "conservative classes." By demonstrating the constitutional limits of government power, Tiedeman sought to protect "social order and liberty" against "the radical experimentations of social reformers."⁷³

69. Alan R. Jones, *Thomas M. Cooley*, in 2 Ency. Am. Const 680 (Leonard W. Levy & Kenneth I. Karst eds., 2d ed., 2000) ("The book . . . had gone through six editions by 1890 and had a broader circulation, a greater sale, and more frequent citation than any other law book published in the second half of the nineteenth century.").

70. COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 51, at 830-31.

71. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 96 (Mass. 1851); see *supra* notes 50-54 and accompanying text; see also Hart, *Land Use Law*, *supra* note 36, at 1149 (noting that colonial-era land use regulations demonstrate that the police power was not limited to the prevention of harm).

72. TIEDEMAN, *supra* note 68, at vi-viii (1886) (quoting William Graham Sumner).

73. *Id.* at vi-viii. Tiedeman wrote:

[T]he sphere of governmental activity was confined within the smallest limits

Toward this end, Tiedeman sought to limit the police power "to the detailed enforcement of the legal maxim, *sic utere tuo, ut alienum non laedas*."⁷⁴ To Tiedeman, the *sic utere* doctrine meshed perfectly with Spencer's social theory:

Mr. Spencer's entire argument is based upon his first principle of sociology: "Every man has freedom to do all that he wills provided he infringes not the equal freedom of any other man," we most heartily indorse as the ruling principle of police power in the United States, and the necessary fundamental principle in every system of sociology in a free State.⁷⁵

But like Cooley before him, and Richard Epstein after him,⁷⁶ in his effort to limit government power, Tiedeman confused examples of legitimate police regulations with the scope of the broader underlying police power.

by the popularization of the so-called *laissez-faire* doctrine, which denies to government the power to do more than to provide for the public order and personal security by the prevention and punishment of crimes and trespasses. Under the influence of this doctrine, the encroachments of government upon the rights and liberties of the individual have for the past century been comparatively few. But the political pendulum is again swinging in the opposite direction, and the doctrine of governmental inactivity in economical matters is attacked daily with increasing vehemence. Governmental interference is proclaimed and demanded everywhere as a sufficient panacea for every social evil which threaten the prosperity of society. Socialism, Communism, and Anarchism are rampant throughout the civilized world

Contemplating these extraordinary demands of the great army of discontents, and their apparent power, with the growth and development of universal suffrage, to enforce their views of civil polity upon the civilized world, the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by man, the absolutism of a democratic majority.

The principal object of the present work is to demonstrate, by a detailed discussion of the constitutional limitations upon the police power in the United States, that under the written constitutions, Federal and State, democratic absolutism is impossible in this country, as long as popular reverence for the constitutions, in their restrictions upon governmental activity, is nourished and sustained by a prompt avoidance by the courts of any violations of their provisions, in word or in spirit. . . .

The police power of the government is shown to be confined to the detailed enforcement of the legal maxim, *sic utere tuo, ut alienum non laedas*.

If the author succeeds in any measure in his attempt to awaken the public mind to a full appreciation of the power of constitutional limitations to protect private rights against the radical experimentations of social reformers, he will feel that he has been amply requited for his labors in the cause of social order and personal liberty."

Id.

74. *Id.* at vii.

75. *Id.* at 329.

76. See *infra* notes 124-30 and accompanying text.

2. ATTEMPTS TO LIMIT TO ACKNOWLEDGED ENDS: HEALTH, SAFETY, MORALS, AND WELFARE

Many courts and commentators have tried to define the police power by reference to its acknowledged legitimate ends. Perhaps the most influential example of this approach is Chief Justice Redfield's opinion in *Thorpe v. Rutland & Burlington R.R.*⁷⁷ In his opinion, Redfield, the Chief Justice of the Vermont Supreme Court, defined the police power as the power by which the state restrained persons and property "to secure the general comfort, health, and prosperity of the State."⁷⁸ Although *Thorpe* appears to be the first instance of this usage, many of the cases in which the police power developed referred to such legitimate ends of government regulation as the state's safety, health, morals, peace, and order.⁷⁹

Cases such as *Thorpe*, however, should not be understood as limiting the scope of the police power. In *Thorpe*, Justice Redfield wrote, "It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resided in the British parliament, except where they are restrained by

77. 27 Vt. 140 (1855).

78. *Id.* at 150. Another influential construction is Justice Field's statement referring to the police power as "the power of the state . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." *Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

79. See *Moore v. Illinois*, 55 U.S. (14 How.) 13, 21 (1852) ("[T]he police power, although designed essentially for other purposes—for the protection, safety, and peace of the State—may essentially promote and aid the interests of [slave] owners."); *The Passenger Cases*, 48 U.S. (7 How.) 283, 408 (1849) (McLean, J.) ("In guarding the safety, health and morals of its citizens a state is restricted to appropriate and constitutional means."); *The License Cases*, 46 U.S. (5 How.) 504, 536 (1847) ("The health laws, quarantine laws, ballast laws, &c., prove that the police power may be extended to imports and importers, if the public safety or welfare demands it."); *id.* at 592 ("And if the foreign article be injurious to the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it."); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 625 (1842) ("The rights of the owners of fugitive slaves are in no just sense interfered with, or regulated, by such a course; and in many cases, the operations of this police power, although designed generally for other purposes, for protection, safety and peace of the state, may essentially promote and aid the interest of the owners."); *Brown v. Mayland*, 25 U.S. (12 Wheat.) 419, 431 (1827) (Marshall, J.) ("[T]he police laws of the different States, made for their safety and health, exist only by the permission of congress."); see also *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 148 (1837) ("Can anything fall more directly within the police power and internal regulation of a state, than that which concerns the care and management of paupers or convicts, or any other class or description of persons that may be thrown into the country, and likely to endanger its safety, or become chargeable for their maintenance?"); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 178 (1824) ("With regard to the quarantine laws, and other regulations of police, respecting the public health in the several States, they do not partake of the character of regulation of the commerce of the United States.").

written constitutions.”⁸⁰ Thus, Justice Redfield’s “comfort, health, and prosperity” language should be understood to be referring to acknowledged legitimate ends of government action, and not limiting the police power to legislation that pursues these specific ends. Similarly, modern cases that refer to specific ends of the police power do so in the context of holding that a particular government action legitimately is aimed at these ends, and do not purport to place limits on the police power beyond those imposed constitutionally.⁸¹

Various courts and commentators, however, have from time to time attempted to restrict the scope of the police power by using its acknowledged ends as limiting, rather than exemplary. The most famous example is contained in the paragon of economic substantive due process, *Lochner v. New York*.⁸²

3. THE POLICE POWER IN THE RISE AND FALL OF *LOCHNER*-ERA SUBSTANTIVE DUE PROCESS

During the late-nineteenth and early-twentieth centuries, innovative police power regulations were often challenged under the doctrine of economic substantive due process. It is not the aim of this Article to provide a thorough examination of economic substantive due process. But the doctrine represented a significant attempt to limit the scope of the police power, and the nature of the police power plays an important role in the Supreme Court cases that represent both the apex and the demise of economic substantive due process — *Lochner* and *Nebbia v. New York*.⁸³

Lochner involved a challenge to a New York law limiting the hours worked in bakeries to sixty hours per week. In the Opinion of the Court, Justice Peckham began his analysis of the statute by noting, “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. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the

80. *Thorpe*, 27 Vt. at 142.

81. See, e.g., *Oregon Waste Sys. v. Oregon Dep’t of Envtl. Quality*, 511 U.S. 93, 112-13 (1994) (Rehnquist, C.J., dissenting) (“As far back as the turn of the century, the Court recognized that control over the collection and disposal of solid waste was a legitimate, nonarbitrary exercise of police powers to protect health and safety.”); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (“Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.”).

82. 198 U.S. 45, 64 (1905).

83. 291 U.S. 502 (1934).

public.”⁸⁴ But, Peckham went on to say, there must be “a limit to the valid exercise of the police power by the state,” otherwise “police power” would “become another an delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint.”⁸⁵ It therefore was the responsibility of the Court to inquire as to whether the act in question was “enacted to conserve the morals, the health, or the safety of the people,” or was “a mere pretext” for the exercise of “unbounded power” by the legislature.⁸⁶

In other words, the question for the Court was whether the act was “within the police power of the state.”⁸⁷ Justice Peckham’s analysis, however, incorrectly used a list of the acknowledged ends of the police power — “the safety, health, morals and general welfare of the public” — as a limit on the police power’s scope. This of course was not the only flaw in the Court’s analysis in *Lochner*. But, by framing the scope of the police power in a narrow fashion, Justice Peckham was able to hold, after coming to the suspect conclusion that the act in question did not promote the safety, health, morals or general welfare of the public,⁸⁸ that “the limit of the police power has been reached and passed in this case.”⁸⁹ In dissent, Justice Harlan articulated a broad conception of the police power, correctly describing ends such as “the health and safety of their citizens” as only a part of state power, and describing health laws as only a part of what was described by Justice Marshall in the opinion in *Gibbons v. Ogden* discussed above as “that mass of legislation which ‘embraces everything within the territory of a state, not surrendered to the general government; all of which can be most advantageously exercised by the states themselves.’”⁹⁰

84. *Lochner*, 198 U.S. at 53.

85. *Id.* at 56.

86. *Id.*

87. *Id.* at 57.

88. *Id.*

89. *Id.* at 58; see also *id.* at 61 (“On the contrary, we think that such a law as this, 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.”); *id.* at 64 (“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 for other motives.”). Other cases striking down police regulations as violations of substantive due process contained similarly narrow language describing the scope of the police power. See, e.g., *Adkins v. Children’s Hosp.*, 261 U.S. 525, 560-61 (1923) (holding that law setting minimum wages for women and children exceeded scope of police power); *Coppage v. Kansas*, 236 U.S. 1, 14-19 (1915) (holding that a law prohibiting employers from requiring employees to promise not to join labor unions exceeded scope of the police power, and framing question and answer as “what possible relation has the residue of the act to the public health, safety, morals, or general welfare? None is suggested, and we are unable to conceive of any.”).

90. *Lochner*, 198 U.S. at 73 (Harlan, J., dissenting); see *supra* notes 13-20 and accompanying

Nearly thirty years later the Court decided *Nebbia*, echoing the broad conception of the police power described by Justice Harlan in his *Lochner* dissent, and definitively marking the end of the *Lochner* era. Justice Roberts's Opinion of the Court in *Nebbia* began where Justice Harlan left off in *Lochner*, quoting *Gibbons v. Ogden*'s broad statement of the scope of state power.⁹¹ Justice Roberts then quoted the broad conception of the police power articulated in two other opinions discussed above, *Mayor of New York v. Miln* and the *License Cases*.⁹² From *Miln*, Justice Roberts took Justice Barbour's statement that "it is not only the right, but the bound and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to its ends . . . [in relation to its] internal police . . . the authority of the state is complete, unqualified, and exclusive."⁹³ And from the *License Cases*, Justice Roberts quoted Justice Taney's opinion "upon the same subject: 'But what are the Police Powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions.'"⁹⁴

In other words, *Nebbia* endorsed the broad conception of the police power as coterminous with state sovereignty articulated in the federalism cases that introduced and defined the term. By broadly articulating the scope of the police power, *Nebbia* undercut the limiting definition of the police power that gave the *Lochner* Court the rhetorical framework within which to conclude that the police regulation in question exceeded the scope of the police power. After reviewing a laundry list of cases upholding a variety of police regulations,⁹⁵ Justice Roberts concluded that a police regulation would not violate due process so long as it had a reasonable relationship to a legislative purpose and was neither arbitrary nor discriminatory.⁹⁶ In other words, post-*Nebbia*, the answer to the substantive due process question framed in *Lochner*, whether the act in question was "within the police power of the state,"⁹⁷ would almost invariably be "yes."

text (discussing *Gibbons v. Ogden*); see also *Coppage*, 236 U.S. at 29-32 (Day, J., dissenting) (discussing the scope of police power, "the limitations of which no court has yet undertaken precisely to define").

91. *Nebbia v. New York*, 291 U.S. 502, 523 (1934).

92. See *supra* notes 24-35 and accompanying text.

93. *Nebbia*, 291 U.S. at 523-24 (quoting *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837)); see *supra* notes 24-27 and accompanying text (discussing *Miln*).

94. *Nebbia*, 291 U.S. at 524 (quoting the *License Cases*, 5 How. 504, 583); see *supra* notes 32-35 and accompanying text (discussing the *License Cases*).

95. *Nebbia*, 291 U.S. at 525-30.

96. See *id.* at 537.

97. *Lochner v. New York*, 198 U.S. 45, 57 (1905).

4. ATTEMPTS TO LIMIT THE POLICE POWER BASED ON POLITICAL THEORY

This Section discusses a range of theoretical attempts to define the police power. The intent here is not to provide a catalog of every definition ever suggested for the term “police power”. Rather, to illustrate one central point, this Section discusses examples of several types of theoretical definitions of the police power and their shortcomings. The term “police power” was defined by the Supreme Court to be synonymous with state sovereignty, and it is misguided to attempt to use political theory to narrow or refine this constitutional law concept.

a. John W. Burgess

Writing in the late nineteenth century, Burgess clearly was troubled by the unorderedly mass of government power included in the police power, and complained that he could “find no satisfactory definition of this phrase, ‘police power’ in the decisions of the Supreme Court.”⁹⁸ To remedy this problem, Burgess looked to “modern” political science to provide a more satisfactory definition of “police power.”

Burgess began by tracing the etymology of the word “police” to the Greek, where the word referred to the state’s internal government, as opposed to its foreign relations.⁹⁹ He then discussed the police power in Western European countries, arguing that as these states moved away from feudalism, governmental authority became concentrated in the king, with “the police power of the crown [becoming] absolute and identical with what we now term the sphere of internal government.”¹⁰⁰ This absolute authority became despotic, leading to a concern for individual autonomy. With this concern in mind, Burgess wrote, “The political science of the present century has resurveyed the field of the police power, and has brought out four very fundamental distinctions.”¹⁰¹ These four points, according to Burgess, were that the police power (1) is administrative, as opposed to legislative or judicial, (2) is only a branch of internal authority, and is not equivalent to state internal sovereignty, (3) should be limited by constitutional or legislative guidance, and (4) should be administered on the most local level possible.¹⁰²

Burgess’s analysis is presented here not to illustrate its merit or lack of merit as a work of political science. Rather, it is presented as an

98. JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* 213 (1890).

99. *Id.* at 214.

100. *Id.* at 215.

101. *Id.*

102. *Id.* at 215-16.

illustration of a critical error that other theorists after Burgess have made, which is to give the term "police power" a theoretical meaning separate from its legal meaning. In constructing a theoretical model of the state, a political theorist like Burgess may wish to divide government power into more orderly subdivisions. The term "police power," however, was introduced by Chief Justice Marshall to represent a legal concept, the states' power to exercise their sovereign authority. Burgess argued that the Court, by continuing to use the term police power to represent this legal concept, maintained an "obsolete" theory of the police power at odds with modern political science.¹⁰³ Burgess may be correct that the Court's usage is at odds with his theoretical view of the state, but the Court's usage, as a legal concept, was in no way obsolete in 1890, and is not obsolete today.

b. Ernst Freund

Ernst Freund's treatise on the police power,¹⁰⁴ published in 1904, is perhaps the best-known work on the subject. Freund's definition of the police power as "the power of promoting the public welfare by restraining and regulating the use of liberty and property"¹⁰⁵ is superficially broad enough to appear to be similar to the Supreme Court's definition of the police power as the states' residuary sovereignty. Freund's actual conception of the police power, however, was much narrower than his definition would suggest, and he, like Burgess, erred by defining "police power" more by reference to political theory than to law.

Unlike Burgess, Freund wrote primarily as a legal scholar, and said that his definition of the police power was derived from an examination of "the mass of decisions, in which the nature of the power has been discussed, and its application either conceded or denied."¹⁰⁶ Consistent with this claim, most of Freund's treatise is devoted to the analysis of particular cases involving different types of police regulations. But the beginning sections of the treatise, which contain the meat of Freund's analysis, discuss the police power in terms of political theory, not case law. As a result, Freund gave an inappropriately narrow theoretical definition to the broad legal concept of the police power.

Freund distinguished between "the great objects of government: the maintenance of national existence; the maintenance of right, or justice; and the public welfare."¹⁰⁷ Of these objects of government, Freund

103. *Id.* at 216.

104. FREUND, *supra* note 51.

105. *Id.* at iii.

106. *Id.* § 3.

107. *Id.* § 4.

argued that the proper end of the police power was to promote the public welfare, which Freund described in utilitarian terms: "The care of the public welfare, or internal public policy, has for its object the improvement of social and economic conditions affecting the community at large and collectively, with a view to bringing about 'the greatest good for the greatest number.'"¹⁰⁸ To Freund, the political state promoted the public welfare by solving two problems. First, certain conditions beneficial to all members of the community could not be achieved by individual effort; the state solves this problem by facilitating "collective communal action."¹⁰⁹ Second, certain types of individual conduct, while providing some benefit to the individual, caused a greater harm to the community; the state solves this problem by "restraint and compulsion exercised over individuals."¹¹⁰ As Freund's definition of the police power ("the power of promoting the public welfare by restraining and regulating the use of liberty and property")¹¹¹ reflects, in his model of the state, the police power includes only this second type of government action.

Freund's division of the state's power to promote the public welfare into regulatory and non-regulatory subgroups is consistent with his more general view of state power. Like many treatise writers, Freund argued that there are several generally recognized state powers, each distinct from the other "in object and content": the military, taxing, eminent domain, and police powers.¹¹² Unlike the other treatise writers, Freund did not see these powers as including all state power; rather he argued that there "has never been an exhaustive classification of [the state's] powers,"¹¹³ implying that there are distinct, unnamed state powers outside of the limited scope of the named powers. One example of such an unnamed power in Freund's model of the state is the non-regulatory power to promote the public welfare.

Thus, while Freund thought that the police power is the broadest government power, "and therefore necessarily the vaguest,"¹¹⁴ he rejected the idea that the police power included all of the state's sovereign power outside of the narrower scope of the other acknowledged powers,¹¹⁵ let alone that the police power *included* the other powers. The Supreme Court, however, defined the police power as synonymous with the state's *entire* sovereign power. Freund, like Burgess, gave the

108. *Id.* § 8.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* § 1.

113. *Id.*

114. *Id.*

115. *Id.* § 3.

term "police power" a theoretical meaning separate from its legal meaning. As used by the Supreme Court, the "police power" includes all of the state's sovereign power, and at its broadest can be seen to encompass other state powers. While this power can be theoretically subdivided, giving one subdivision the name "police power," as Freund did, greatly confuses matters.

In addition to making the functional claim that the police power should be limited to regulation, Freund's theory also placed subject matter limitations on the police power. Freund divided the public welfare into three subsections: (1) primary social interests (safety, order, and morals), (2) economic interests, and (3) non-material and political interests.¹¹⁶ He, within the tradition of Justice Redfield in *Thorpe*, noted that government action to promote the safety, order, and morals "constitutes the police in the primary sense of the term."¹¹⁷ On the other hand, the pursuit of non-material interests (meaning "moral, intellectual and aesthetic")¹¹⁸ and political interests (meaning the operation of government and promotion of patriotic institutions), Freund argued, are clearly outside of the scope of the police power.

In between are government acts that promote economic interests. While Freund acknowledged that "[w]ealth is almost as essential to our civilization as safety, order, and morals,"¹¹⁹ he was doubtful about the ability of government policies to produce wealth. The safety, order, and morals of the community could be furthered by government regulation, but the creation of wealth came from individual effort, and in a capitalist economy, "governmental activity in the care and control of economic interests must operate largely as interference and disturbance, as favoritism or oppression."¹²⁰ Freund recognized that many government actions ostensibly aimed at preventing "not only fraud and oppression, but against disorder, disease and accident,"¹²¹ were in fact intended to benefit certain economic interests, or to benefit economically or socially weak political classes. Such government interference in the economy, either explicit or implicit, was not to Freund fundamentally legitimate or illegitimate; rather, such regulations were "still in an experimental stage,"¹²² and he felt that their legitimacy would evolve over time.

Freund's view on the legitimacy of economic regulations comports with his view that the police power was not "a fixed quantity," but rather

116. *Id.* § 9.

117. *Id.* § 10.

118. *Id.* § 13.

119. *Id.* § 12.

120. *Id.*

121. *Id.*

122. *Id.* § 15.

"the expression of social, economic and political conditions," which "must continue to be elastic, *i.e.*, capable of development."¹²³ In this, Freund was entirely correct. As discussed above, the practical scope of regulations enacted under the police power has evolved over time. In the late nineteenth century, regulation of health, safety, and morals was recognized as legitimate, regulation of the economy was of questionable legitimacy, and aesthetic regulation was generally viewed as illegitimate. Freund's categorization of the legitimate and illegitimate substantive ends of the police power simply reflected the particular social situation of his time.

Thus, while Freund correctly acknowledged the evolutionary nature of police regulation, his conception of the substantive limits of the police power was flawed. Although he was a legal scholar, Freund's conception of the police power was based on political theory, not constitutional law. "Police power," however, is a constitutional law concept, and Freund committed the same error as Burgess.

c. Richard Epstein

In *Takings: Private Property and the Power of Eminent Domain*,¹²⁴ Richard Epstein developed a theory of government regulatory power nominally based on the political theory of John Locke. Epstein defined the police power as "those grants of power to the federal and state government that survive the explicit limitations found in the Constitution."¹²⁵ While this definition erroneously states that the federal government has a police power,¹²⁶ it captures the essence of the correct definition of the police power as the state's residual sovereign power.¹²⁷

Epstein's conception of the police power, however, is much more limited than this broad definition would indicate. Looking to first principles, Epstein argued that it would make no sense for government not to have some regulatory power. In Locke's political theory, individuals in the state of nature enter into the political state to gain personal secur-

123. *Id.* § 3.

124. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

125. *Id.* at 107.

126. As discussed above, the term "police power" was introduced in federalism cases delimiting the scope of federal and state power, and it is incorrect to say that there is a federal police power. See *supra* notes 7-35 and accompanying text; *infra* notes 137-38 and accompanying text; see also *United States v. Morrison*, 529 U.S. 598, 618-19 (2000) (holding that there is no federal police power). The fact that the federal government now exercises something that often resembles the police power simply is a reflection of the vacuity of contemporary Commerce Clause jurisprudence, which (with a few laudable recent exceptions) has come very close to abandoning the principle of a federal government of limited powers.

127. See *supra* notes 7-35 and accompanying text.

ity,¹²⁸ and therefore, Epstein argued, the sole purpose of the Lockean state is to protect personal security. Under the Lockean approach advocated by Epstein, the police power should therefore be limited to the protection of personal security. In Epstein's view, the theory behind the police power is simply the application of the principle of self-defense to representative government,¹²⁹ and the police power should be understood to protect individuals only "against all manifestations of force and fraud."¹³⁰

Like the theories of Tiedeman, Burgess, and Freund, Epstein's conception of the police power is fatally flawed because it is based on his idea of what the police power should be, rather than what the police power is. Whether or not Epstein correctly represents Lockean political theory, Locke's ideas were not the foundation of the police power. Rather, the Supreme Court introduced the term "police power" to refer to a broad conception of state power that in both theory and practice extends well beyond the protection of individual security.

D. *The Expansive Police Power*

Hastings, author of the important early work on the police power discussed above,¹³¹ wrote, as one commentator put it, "as a student of constitutional law rather than as a political scientist."¹³² After surveying the development of the term in the Supreme Court, Hastings concluded that:

[T]he police power is a fiction. Every judge whom we have seen attempt to analyze it finds in it Madison's "indefinite supremacy" of

128. EPSTEIN, *supra* note 124, at 108. Epstein's view that the word "police" indicates that the police power should be understood to be concerned with protecting individual security inappropriately defines the police power by reference to the modern meaning of "police," rather than the meaning given to "police" at the time the term "police power" was introduced by Chief Justice Marshall. See *supra* notes 15-23 and accompanying text.

129. EPSTEIN, *supra* note 124, at 111.

130. *Id.* at 112. For a similarly limited view of the scope of the police power, see ELLEN FRANKEL PAUL, *PROPERTY RIGHTS AND EMINENT DOMAIN* 4-5 (1987) (writing that the police power is justifiable "as a tool for prohibiting criminal activity and setting punishments for transgressions."). Paul argues that the pursuit of the "general welfare" has only been recently acknowledged as a legitimate end of the police power. *Id.* Even *Lochner*, however, included "general welfare" in the laundry list of acknowledged ends of the police power, and *The License Cases* included similar language. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) ("[The police power,] broadly stated, and without, at present, any attempt at a more specific limitation, relate[s] to the safety, health, morals and general welfare of the public."); *The License Cases*, 46 U.S. (5 How.) 504, 536 (1847) ("[T]he police power may be extended to imports and importers, if the public safety or welfare demands it."). In any event, it is incorrect as a general matter to try to define the scope of the police power by its acknowledged ends. See *supra* notes 77-97 and accompanying text.

131. Hastings, *supra* note 6.

132. Cook, *supra* note 2, at 324.

the state. . . . [T]he term is certainly a mere abstract and collective one for the state, where regarded as employed in certain functions; and constant forgetting of this fact has made endless trouble.¹³³

Freund took strong issue with this assertion,¹³⁴ but Hastings, while being somewhat hyperbolic, captured the essence of the police power. In his 1907 essay *What is the Police Power?*, Walter Wheeler Cook wrote:

Mr. Hastings is in part, at least, right when he says that the police power is "indefinite supremacy," only we must add that while the power must always remain "indefinite" it by no means follows that it is unlimited; we must interpret "indefinite" to mean simply "undefined" and "undefinable," in the sense that what can be done under it can not be enumerated; that its limits can only be ascertained only by a process of finding out what can not be done rather than by describing what can be done. On the other hand, regarded in this way, the police power is not "a fiction," though it certainly is "the State, regarded as employed in certain functions."¹³⁵

The efforts of Burgess and Freund to narrow the police power into something more manageable were well intentioned but misguided. When Burgess wrote that "the police power is the dark continent of our jurisprudence[,] . . . the convenient repository of everything for which our juristic classifications can find no other place,"¹³⁶ he was clearly disapproving, but his statement is correct. The police power encompasses state power in its entirety, and cannot be limited by categorization.

So what is the police power? Cook wrote that it is the "residuary power of government vested by the constitution of the United States in the respective States."¹³⁷ This definition is close, but gets the grant of power backwards. The police power, properly viewed, is the sovereignty of the United States that remained with the states after the grant of limited powers to the federal government, and it is subject to only those limitations imposed by the state and federal constitutions. Or, as the Supreme Court stated in both the *License Cases* and *Nebbia*: "[W]hat are the Police Powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the

133. Hastings, *supra* note 6, at 549.

134. FREUND, *supra* note 51, § 3 ("It has been inferred from this vagueness of the term police, that the idea of the police power must be equally undefined, and a recent author has gone so far as to deny its existence, treating it as a fiction, and holding it equivalent to indefinite supremacy. The inference is, however, unwarranted." (citation omitted)).

135. Cook, *supra* note 2, at 329.

136. BURGESS, *supra* note 98, at 136.

137. Cook, *supra* note 2, at 329.

extent of its dominions.”¹³⁸

II. THE POLICE POWER AND THE TAKINGS CLAUSE

This Part explores the question of when, if ever, an exercise of the police power constitutes a taking of property within the meaning of the Just Compensation Clause. It first examines the lessons to be learned from Justice Oliver Wendell Holmes, the author of the landmark regulatory takings case *Pennsylvania Coal v. Mahon*,¹³⁹ who was both a critic and defender of the police power. It then looks to the historical record and the text of the Just Compensation Clause to gain insight into when an exercise of the police power should be considered to be a taking. Finally, this Part uses the foregoing discussion to make a few observations that help to clarify the regulatory takings problem.

A. Justice Holmes's Wisdom

Justice Holmes played a pivotal, and at first blush contradictory, role in the history of the constitutional limitations on the police power. A career-long student and critic of the police power, Holmes was the author of the opinion of the Court in *Mahon*, the first case to hold that an exercise of the police power could be a taking and unquestionably the foundation of contemporary regulatory takings jurisprudence.¹⁴⁰ At the same time, Holmes was a dissenter in many *Lochner*-era substantive due process cases, eloquently defending the constitutionality of innovative exercises of the police power.

This Section explores Justice Holmes's understanding of the police power, first briefly discussing *Mahon* itself, then placing *Mahon* in the context of Holmes's other writings to gain insight into Holmes's view of the relationship between the police power and the Takings Clause. It concludes that Justice Holmes's wisdom was to recognize the broad scope of the police power while rejecting the flawed formalistic doctrine that held that exercises of the police power could never be takings. In this way, he recognized that the justification for a police regulation as harm-preventing was both unnecessary to satisfy due process and insufficient to satisfy the Just Compensation Clause.

1. PENNSYLVANIA COAL V. MAHON

The facts of *Mahon* are grounded in the problem of subsidence. Coal companies would remove all of the coal underlying a particular

138. *Nebbia v. New York*, 291 U.S. 502, 524 (1934), (quoting the *License Cases*, 46 U.S. (5 How.) 504, 583 (1848)).

139. 260 U.S. 393 (1922).

140. *Id.*

piece of property, sometimes causing the surface to collapse. In 1921, the Pennsylvania legislature enacted the Kohler Act, preventing coal companies from removing all of the coal, thereby creating a risk of subsidence, under a dwelling.¹⁴¹ Pennsylvania recognized two distinct property rights to the coal: the right to mine the majority of the coal, and the support right, which was the right to mine the coal that, if removed, would cause the surface to subside. In the case before the Court, the Mahons owned the surface of the property, while the Pennsylvania Coal Company owned both the right to mine the coal and the support right. The Mahons sued to prevent Pennsylvania Coal from removing the coal that made up the support right. Pennsylvania Coal won in the Court of Common Pleas, but the Supreme Court of Pennsylvania reversed, holding that because the Kohler Act was a valid exercise of the police power, it was not a taking.¹⁴²

The United States Supreme Court, through Justice Holmes's famous opinion, held that the Kohler Act violated the Just Compensation Clause. Despite its brevity, Justice Holmes's opinion discusses a wide range of cases and legal principles before coming to the conclusion that "[t]he general rule at least is that while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking."¹⁴³ But Holmes declined to provide any general guidance about how to determine when a regulation has gone "too far," saying that "this is a question of degree — and therefore cannot be disposed of by general propositions."¹⁴⁴

As the first case to hold that an exercise of the police power violated the Just Compensation Clause, *Mahon* can fairly be described as "the foundation of our 'regulatory takings' jurisprudence."¹⁴⁵ It also is the clear source of much of the confusion that subsequently has plagued the regulatory takings debate. Justice Holmes's Opinion of the Court is short and cryptic, and studiously avoids discussion of prior cases holding that exercises of the police power could never be takings. Indeed, Holmes's opinion in *Mahon* is opaque enough to act as something of a Rorschach test for a reader's views on regulatory takings, with the contours of the opinion capable of fitting the wide range of theories offered

141. *Id.* at 412-13.

142. *See id.* at 412-13. As is often the case, the facts as recounted in the Court's opinion tell only part of the story, and the problem of subsidence may have been exaggerated in the briefing of *Mahon*. For a fascinating discussion of the facts of *Mahon*, the problem of subsidence, and the Kohler Act, see WILLIAM A. FISCHER, *REGULATORY TAKINGS — LAW, ECONOMICS AND POLITICS* 13-45 (1995).

143. *Id.* at 415.

144. *Id.* at 416.

145. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting).

by subsequent courts and commentators to explain the significance of the case.¹⁴⁶ Looking to the language of Holmes's opinion for the entire solution to the regulatory takings problem is therefore a questionable, and probably futile, endeavor.

Whatever else *Mahon* does, though, there can be no doubt that the holding that "if a regulation goes too far it will be recognized as a taking"¹⁴⁷ rejected the contention made both by the Pennsylvania Supreme Court in the opinion below and by Justice Brandeis in dissent that because the Kohler Act was an exercise of the police power it *per se* could not violate the Just Compensation Clause.¹⁴⁸ In other words, *Mahon* rejected the formalistic distinction in place since at least *Alger* between exercises of eminent domain, which were considered takings, and exercises of the police power, which were not.¹⁴⁹

2. MAHON IN CONTEXT

Even though Holmes's cryptic opinion in *Mahon* itself is a somewhat questionable guidepost, placed in context the holding in *Mahon* provides important guidance on the relationship between the police power and the Takings Clause. This Section revisits Justice Shaw's formal distinction in *Alger* between exercises of the police power and of eminent domain, discusses Justice Holmes's career-long suspicion of the formalistic rule that exercises of the police power could never be takings, and compares Justice Holmes's views on regulatory takings with his substantive due process dissents in which he eloquently articulated a broad conception of the legitimate scope of government power.

a. *Alger* Revisited and *Mugler* Visited — The Flaws in a Formal Distinction

Prior to *Mahon*, courts and commentators generally had answered

146. Because of the foundational nature of *Mahon*, a reference to all of the theories put forward to explain the case would amount to a bibliography of regulatory takings literature. For articles devoted entirely to *Mahon*, see Robert Brauneis, *The Foundation of Our 'Regulatory Takings' Jurisprudence': The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613 (1996); Rose, *supra* note 1; William Michael Treanor, *Jam For Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813 (1998).

147. *Mahon*, 260 U.S. at 415.

148. See *id.* at 417 (Brandeis, J., dissenting) ("Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking."); *Mahon v. Pennsylvania Coal Co.*, 118 A. 491, 493 (Pa. 1922) ("[T]he statute before us is a police measure which does not . . . contemplate the taking of private property for public use or the transferring of it from one person to another." (citations omitted)).

149. See *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (Mass. 1851); see also *supra* notes 47-50 and accompanying text.

the regulatory takings question by making a formalistic distinction between eminent domain and the police power.¹⁵⁰ In *Alger*, Shaw noted that "it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers."¹⁵¹ But Shaw articulated a principled reason for the distinction (later echoed by Ernst Freund) that the state takes property because it intends to use that property, while the state exercises the police power to prevent a noxious use.¹⁵² This distinction provided justification for the contrasting results on the question of compensation, with the state being required to pay for property that it intended to use, but not required to pay for the restricting a noxious use.¹⁵³

Shaw's analysis in *Alger* made a certain degree of sense in the context of the eighteenth century legal thought, where regulation was firmly situated in a common law tradition that provided a community-based moral framework for the exercise of government power. But even the facts of *Alger* itself call Shaw's distinction into question. As discussed above, Shaw's opinion in *Alger* helped provide the analytical framework for the evolution of police regulation beyond the common law tradition by affirming the legislature's line-drawing power to restrict the use of property, including those uses, like *Alger's* wharf, that were not intrinsically noxious in the sense of a common-law nuisance.¹⁵⁴

Shaw's noxious-use reasoning was echoed in the 1887 case *Mugler v. Kansas*,¹⁵⁵ the Supreme Court's leading pre-*Mahon* statement on regulatory takings.¹⁵⁶ *Mugler* involved a takings challenge to a police regulation prohibiting the manufacture of beer.¹⁵⁷ The appellants contended that their breweries were built when the manufacture of beer was legal, and that the challenged regulation would make their property valueless.¹⁵⁸ The Supreme Court, in an opinion by Justice Harlan, rejected the takings challenge. Justice Harlan first made the formalistic observation that a police regulation "does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose

150. See Treanor, *Political Process*, *supra* note 1, at 792-97.

151. *Alger*, 61 Mass. (7 Cush.) at 86.

152. *Id.* See also HENRY E. MILLS & AUGUSTUS L. ABBOT, *MILLS ON THE LAW OF EMINENT DOMAIN* 87-89 (2d ed. 1888); FREUND, *supra* note 51, at 546-47; *supra* notes 48-49 and accompanying text.

153. *Alger*, 61 Mass. (7 Cush.) at 86. See also FREUND, *supra* note 51, at 546-47; *supra* notes 48-49 and accompanying text.

154. See *supra* notes 52-54 and accompanying text.

155. 123 U.S. 623 (1887).

156. See Treanor, *Political Process*, *supra* note 1, at 797.

157. *Mugler*, 123 U.S. at 623.

158. *Id.* at 664.

of it," but instead only restricts certain uses of that property.¹⁵⁹ Justice Harlan then stated his rationale for denying the property owners compensation:

The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.¹⁶⁰

While phrased at first in terms of the need to protect the states' ability to act in the public interest, Justice Harlan's rationale has a strong moral component that concludes the quoted passage — the property owners were not entitled to compensation because they were "inflicting injury on the community" through a "noxious use of their property."¹⁶¹

This moral condemnation of manufacturers of liquor, however, is undercut by Justice Harlan's observation a few sentences later that "[i]t is true, when defendants in these cases purchased or erected their breweries, the laws of the state did not forbid the manufacture of intoxicating liquors."¹⁶² As discussed above, state prohibitions on the manufacture of liquor were among the first types of police regulation to transcend the common law regulatory tradition.¹⁶³ The liquor laws were remarkable examples of government power being exercised at the state level to categorically prohibit an activity that previously had been lawful.¹⁶⁴ As Thomas Cooley commented, under prohibition laws, "the Merchant of yesterday becomes the criminal of to-day, and the very building in which he lives becomes perhaps a nuisance."¹⁶⁵

The condemnation of a use as noxious provides a moral justification for the denial of compensation even if the prohibition of that use renders the property in question valueless. This moral aspect of *Mugler's* regulatory takings analysis is reflected in Treanor's restatement of the *Mugler* rule: "If something was so harmful as to justify regulation under the police power, it could be regulated without compensation, regardless of the effect of the regulation on value."¹⁶⁶ The flaw in this reasoning is that the police power extends far beyond the

159. *Id.* at 669.

160. *Id.*

161. *Id.*

162. *Id.*

163. See *supra* notes 59-64 and accompanying text.

164. See *supra* notes 59-64 and accompanying text.

165. COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 51, at 583-84.

166. Treanor, *Political Process*, *supra* note 1, at 801.

prohibition on noxious uses. As discussed above, there is no need to support an exercise of the police power with a harm-preventing rationale,¹⁶⁷ and just because a use is prohibited by an exercise of the police power does not mean that the use is so noxious as to provide a moral justification for the denial of compensation regardless of the impact of the prohibition of that use on the property owner.

Restrictions on the size of wharves or the manufacture of liquor are certainly within the broad scope of the police power. But building a wharf is not so inherently harmful to be condemned as a noxious use, and the prior legality of the manufacture of liquor renders suspect Justice Harlan's condemnation of that activity as inherently noxious. Using a more contemporary example, a zoning regulation setting minimum lot sizes for a residential area can be seen as reducing the environmental impact and burdens on the community created by housing development. But it is extreme to say that building a home is intrinsically harmful, or violates the common-law *sic utere* doctrine requiring property owners not to use their property in a manner harmful to their neighbors.¹⁶⁸ A takings challenge to a restriction on the size of wharves, a prohibition on the manufacture of liquor or a zoning regulation cannot simply be dismissed with a criticism of the property owner for engaging in a noxious use.

As the modern regulatory state developed in the late nineteenth century, and the scope of police regulation increasingly transcended its community-based common law roots, police regulations increasingly restricted uses of private property that were not so inherently harmful that they could be condemned as noxious uses. This is not to say that the evolution of the modern regulatory state represented a radical change that itself justified a shift away from the rule that exercises of the police power *per se* could not be takings; rather, as the practical scope of police regulation expanded with the evolution of the modern regulatory state, the flaws inherent in the formalistic doctrine that exercises of the police power could never be takings became increasingly apparent, particularly to a career-long student of the police power, Justice Holmes.

b. Holmes's Suspicion of the Police Power

Justice Holmes was no stranger to the police power when *Mahon* was decided in 1922. Throughout his career, Holmes had expressed a

167. See *supra* notes 70-71 and accompanying text.

168. Although extreme, this position has been taken in some contemporary takings cases by those seeking to fit modern land-use regulations into the early line of cases denying compensation for regulations preventing noxious uses of property. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1051 n.13 (1992) (Blackmun, J., dissenting).

suspicion that the police power was being invoked to justify restrictions of property that were constitutionally suspect. In an early review of Cooley's *Constitutional Limitations*, Holmes "suggested that the term police power was 'invented to cover certain acts of the legislature which are seen to be unconstitutional, but which are believed to be necessary.'"¹⁶⁹

Holmes thought that certain police regulations prohibiting the manufacture of liquor were particularly suspect,¹⁷⁰ and later referred to Justice Harlan's opinion in *Mugler* as "pretty fishy."¹⁷¹ At the time *Mahon* was decided, *Mugler* was the leading case standing for the proposition that an exercise of the police power could never be a taking,¹⁷² and *Mugler* was prominently cited by Justice Brandeis in dissent.¹⁷³ It is therefore somewhat surprising that Holmes ignored *Mugler* entirely in his *Mahon* opinion. In a letter written shortly after *Mahon* was decided, Holmes regretted his lack of elaboration on the bases of his decision, and suggested that his disagreement with *Mugler* was influential in shaping his holding in *Mahon*.¹⁷⁴

Holmes's disagreement with the *Mugler* principle that exercises of the police power could never be takings, even if they deprive property holders of all economic use of their property, was also reflected in opin-

169. Treanor, *Political Process*, *supra* note 1, at 798-99 (quoting Book Review, 6 AM. L. REV. 140, 141-42 (1871-72)). Holmes was similarly suspicious of "the rule that regulations intended to abate nuisances were necessarily valid, and that rejection reflected his view that the category of nuisances was hollow. As he wrote in his 1894 article, *Privilege, Malice and Intent*, the core nuisance doctrine 'sic utere tuo ut alienum non laedas' — 'Use your own property in such a manner as not to injure that of another' — was an 'empty general proposition[] . . . which teaches nothing by a benevolent yearning.'" Treanor, *Jam For Justice Holmes*, *supra* note 146, at 843 (quoting Oliver Wendell Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 2 (1894)).

170. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 340 n.2 (editorial comment by Holmes) ("The most remarkable cases as to the exercise of [the police] power are those arising out of the liquor laws.").

171. MARK DEWOLFE HOWE, HOLMES-LASKI LETTERS 473 (1953) (letter of January 13, 1923).

172. Treanor, *Political Process*, *supra* note 1, at 800-01 ("At the time of *Pennsylvania Coal*, Supreme Court case law was still consistent with the position enunciated in *Mugler*: If something was so harmful as to justify regulation under the police power, it could be regulated without compensation, regardless of the effect of the regulation on value."). Treanor's formulation of the *Mugler* rule illustrates its core flaw — as discussed above, a use does not need to be harmful to justify a regulation under the police power, and the moral imperative of preventing harm cannot itself justify insulating exercises of the police power from takings challenges. See *supra* notes 150-68 and accompanying text.

173. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 418 (1922) (Brandeis, J., dissenting).

174. See Howe, *supra* note 8, at 473 (1953) (letter of January 13, 1923: "But nevertheless when the premises [of *Mahon*] are a little more emphasized, as they should have been by me, I confess to feeling as much confidence as I often do. I always have thought that old Harlan's decision in *Mugler v. Kansas* was pretty fishy."). My reading of *Mahon* is that it is profoundly contradictory to *Mugler*, and I therefore have difficulty with Treanor's "thesis that *Mahon* was fundamentally consistent with the case law that preceded it." See Treanor, *Jam For Justice Holmes*, *supra* note 146, at 868.

ions he wrote while on the Massachusetts Supreme Court. More than thirty years before *Mahon*, Holmes suggested that "Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; large ones could not be, except by the exercise of eminent domain."¹⁷⁵ Ten years later, in *Bent v. Emery*, Holmes wrote that:

It would be open to argument at least that an owner might be stripped of his rights so far as to amount to a taking without any physical interference with his land. On the other hand, we assume that even the carrying away or bodily destruction of property might be of such small importance that it would be justified under the police power, without compensation. We assume that one of the uses of the convenient phrase, "police power" is to justify those small diminutions of property rights which, although within the letter of the constitutional protection, are necessarily incident to the free play of the machinery of government. It may be that the extent to which such diminutions are lawful without compensation is larger when the harm is inflicted only as an incident to some general requirement of public welfare. But, whether the last-mentioned element enters into the problem or not, the question is one of degree, and sooner or later we reach a point at which the Constitution applies and forbids physical appropriation and legal restrictions alike, unless they are paid for.¹⁷⁶

Writing for the United States Supreme Court in the 1908 case *Hudson County Water Co. v. McCarter*,¹⁷⁷ Holmes continued in this theme, suggesting that a police regulation that deprived an owner of all beneficial use of property would constitute a taking:

[T]he police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.¹⁷⁸

Holmes's opinion in *Mahon* therefore can be seen as a reflection of his career-long rejection of the *Mugler* principle that exercises of the police power could never violate the Just Compensation Clause, even if they rendered the property in question valueless. Holmes stated in both *Bent v. Emery* and *Mahon* that the question of when a police regulation reached the point of becoming a taking was one of degree.¹⁷⁹ But he

175. *Rideout v. Knox*, 148 Mass. 368, 372-73 (1889).

176. *Bent v. Emery*, 173 Mass. 495, 496 (1899).

177. 209 U.S. 349 (1908).

178. *Id.* at 355.

179. *Mahon*, 260 U.S. at 416; *Bent v. Emery*, 173 Mass. at 496.

also suggested in *McCarter* that a regulation that rendered property "wholly useless" would be a *per se* taking,¹⁸⁰ and held in *Mahon* that the Kohler Act violated the Just Compensation Clause by prohibiting all economic use of the support right owned by the Pennsylvania Coal Company.¹⁸¹

Holmes therefore held a consistent view throughout his career that restrictions imposed through the police power could reach a point where they become takings and violate the Just Compensation Clause. If, to the contrary, the "seemingly absolute protection" given to private property by the Takings Clause was "found to be qualified by the police power, the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappears."¹⁸²

c. Holmes's Substantive Due Process Dissents

The suspicion of majoritarian abuse of the police power reflected in *Mahon* stands in superficial contrast with Justice Holmes's dissents in cases where the Supreme Court struck down police regulations under the doctrine of substantive due process.¹⁸³ In *Lochner*, Holmes made his famous rebuttal to *laissez faire* constitutionalism, stating that "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics . . . [the] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."¹⁸⁴ Holmes went on to eloquently defend the constitutionality of innovative legislative actions, arguing that the Constitution "is made for people of fundamentally differing views, and the

180. *McCarter*, 209 U.S. at 355.

181. *Mahon*, 260 U.S. at 414 ("It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, 'for practical purposes, the right to coal consists in the right to mine it.'" (quoting *Commonwealth v. Clearview Coal Co.*, 256 Pa. 328, 331 (1917))).

182. *Id.* at 415.

183. See Treanor, *Political Process*, *supra* note 1, at 802 ("As one Holmes biographer has observed, Holmes's approach in *Pennsylvania Coal* is 'almost exactly the reverse' of his approach in his due process dissents, in which the police power took precedence over individual rights." (quoting G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 402 (1993))).

184. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); see *supra* notes 72-75 and accompanying text (discussing Spencer's influence on Teideman). Holmes's substantive due process dissents make it suspect to impugn *Mahon* as the product of "an overwhelmingly conservative Supreme Court." Treanor, *Political Process*, *supra* note 1, at 802. It simply is wrong to dismiss *Mahon* as "an erratic holdover from a discredited era of *laissez faire* constitutionalism." Hart, *Land Use Law*, *supra* note 36, at 1156. Justice Stevens's attempt to tar *Mahon* and regulatory takings with the *Lochner* brush is similarly misplaced. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (Stevens, J., dissenting). As to the "cult of Holmes" referred to by Hart, count me a card-carrying member. See Hart, *Land Use Law*, *supra* note 36, at 1156.

accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”¹⁸⁵

Holmes’s positions in *Mahon* and his substantive due process dissents, however, are not inconsistent. Holmes understood that the Takings Clause and the Due Process Clause ask different questions. Months after writing for the majority in *Mahon*, Holmes dissented in *Adkins v. Children’s Hospital*.¹⁸⁶ Holmes agreed that the police regulation in question could violate a specific constitutional provision: “For instance it might take private property without just compensation.”¹⁸⁷ But the question before the court was not whether the regulation was a taking, but rather whether it was contrary to the “vague contours” of the Due Process Clause.¹⁸⁸ Holmes concluded that “the law in its character and operation is like hundreds of so-called police laws that have been upheld,” and was therefore valid.¹⁸⁹ Justice Holmes echoed this conclusion several years later in another substantive due process case, writing that “[t]he truth seems to me to be that, subject to compensation when compensation is due, the Legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it.”¹⁹⁰

Using the language of Justice Peckham in the opinion of the Court in *Lochner*, substantive due process asks whether the act in question is “within the police power of the state?”¹⁹¹ Despite his career-long suspicion of the police power, Holmes invariably answered the substantive due process question “yes,” deferring to the majoritarian decision-making process even where he had doubts about the wisdom of a particular statute.¹⁹² Holmes understood that the Takings Clause, in contrast, asks a different question: whether the government act in question takes property for public use, and therefore requires the payment of just compensation. For Holmes, the answer to this question — when a “regulation goes too far,”¹⁹³ to the point where it becomes a taking — was to be determined on a case-by-case basis, but was to be answered “yes” if regulation rendered property valueless.

In *Mahon*, Holmes’s problem with the Kohler Act was not that it

185. *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

186. 261 U.S. 525 (1923).

187. *Adkins*, 261 U.S. at 568 (Holmes, J., dissenting).

188. *Id.* (Holmes, J., dissenting).

189. *Id.* at 570 (Holmes, J., dissenting).

190. *Tyson & Brother-United Theatre Ticket Offices Inc. v. Banton*, 273 U.S. 418, 446 (1926) (Holmes, J. dissenting).

191. *Lochner v. New York*, 198 U.S. 45, 57 (1905).

192. *See Adkins*, 261 U.S. at 570 (Holmes, J., dissenting).

193. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

went beyond the scope of the police power in the substantive due process sense.¹⁹⁴ Rather, Holmes held that the Kohler Act was an illegitimate exercise of the police power because it rendered the support right owned by Pennsylvania Coal valueless without compensation, and therefore violated the Just Compensation Clause.¹⁹⁵ Justice Holmes's wisdom was to correctly recognize the broad scope of the police power while rejecting the flawed formalistic doctrine that held that exercises of the police power could never be takings, and to recognize that the justifi-

194. Some courts and commentators have labeled *Mahon* a substantive due process case in an unconvincing attempt to discredit it as kin to *Lochner*. See *Dolan v. City of Tigard*, 512 U.S. 374, 407 (Stevens, J., dissenting); Brauneis, *supra* note 146 (passim); see also Treanor, *Jam For Justice Holmes*, *supra* note 146, at 826-28 (discussing Stevens's and Brauneis's analyses). Holmes's language in *Mahon* is admittedly muddy, and Holmes does use due process language throughout his opinion. But at its core, *Mahon* is a takings case. Holmes wrote:

- "When [the diminution in value] reaches a certain magnitude, in most if not all cases there must be an exercise of *eminent domain and compensation* to sustain the act." 260 U.S. at 413 (emphasis added);
- "The protection of private property in the Fifth Amendment presupposes that it is wanted for *public use*, but provides that it shall not be *taken* for such use *without compensation*." *Id.* at 415 (emphasis added);
- "The General rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a *taking*." *Id.* (emphasis added).

Simply put, "taking," "public use" and "compensation" are terms from the Just Compensation Clause, not the Due Process Clause, and Holmes used these terms to discuss takings concepts, not substantive due process concepts. Although it is fair to criticize Holmes's opinion for its lack of coherence, Holmes was evaluating the constitutionality of the Kohler Act using a takings analysis, and *Mahon* cannot be dismissed merely by invoking the pejorative "*Lochner*."

Treanor has also labeled *Mahon* a substantive due process case. See Treanor, *Jam For Justice Holmes*, *supra* note 146, at 856. Although his analysis is more sympathetic to Holmes than those of Stevens and Brauneis, Treanor is able to suggest that Holmes took a deferential balancing approach to the takings question by lumping *Mahon* into Holmes's substantive due process canon. See *id.* at 856-61. But while Holmes was deferential to government regulation on substantive due process questions, he was not deferential on the takings question.

The centerpiece of Treanor's analysis is the idea that in *Mahon*, Holmes drew on concepts from cases involving businesses affected with the public interest to introduce the concept of diminution of value into a substantive due process analysis that previously would have simply asked if the act was within the scope of the police power. *Id.* at 856-57. Holmes, however, had little patience for the doctrine of business affected with the public interest, viewing it as a largely meaningless concept. See *id.* at 852. Dissenting in *Tyson & Brother v. Banton*, Holmes wrote:

[T]he notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, *subject to compensation when compensation is due*, the Legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it.

273 U.S. 418, 446 (Holmes, J., dissenting) (emphasis added). In other words, Holmes took the same deferential approach to the scope of government power in cases involving the doctrine of businesses affected with the public interest as he did in other substantive due process cases. See *supra* note 192 and accompanying text. As the language of *Mahon* quoted above makes clear, however, Holmes was not deferential on the separate question of whether the government had taken property without just compensation.

195. *Mahon*, 260 U.S. at 413-16.

cation of a police regulation as harm-preventing was both unnecessary to satisfy due process and insufficient to satisfy the Just Compensation Clause.

B. *History and Meaning — Interpreting the Just Compensation Clause*

Mahon raises two obvious questions of constitutional interpretation: Is it correct that exercises of the police power can violate the Just Compensation Clause, and, if so, under what circumstances do they do so? This Section discusses the origin and meaning of the Just Compensation Clause as it relates to these two questions. The history of the clause has been thoroughly documented by William Michael Treanor,¹⁹⁶ and I rely heavily on Treanor's historical analysis. Looking at the same historical record, however, I come to a significantly different conclusion than Treanor regarding the interrelationship between the Just Compensation Clause and the police power.

1. HISTORY

The Just Compensation Clause was written, as was the rest of the Bill of Rights, by James Madison. Unlike the other provisions of the Bill of Rights, however, the Just Compensation Clause was not requested by the state conventions held to ratify the Constitution,¹⁹⁷ and the direct historical record of the creation of the Just Compensation Clause is therefore relatively sparse. The historical context of the clause's creation combined with Madison's writings, however, provide important insight into the clause's meaning.

a. Historical Context

While Madison included the Just Compensation Clause in the Bill of Rights on his own initiative, the idea of a compensation requirement was not a radical Madisonian innovation in American constitutionalism. The Vermont and Massachusetts state constitutions both included compensation requirements, as did the Northwest Ordinance of 1787.

As Treanor documents, these precursors to the Just Compensation Clause can be seen as responses to certain historical events. Vermont was originally part of the colony of New Hampshire, and when the English government transferred Vermont to the New York colony, the New York colonial government refused to recognize the Vermont land

196. Treanor, *Political Process*, *supra* note 1. For an alternative analysis of the history of the Takings Clause, see Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181 (1999).

197. Treanor, *Political Process*, *supra* note 1, at 791.

grants issued by the New Hampshire government.¹⁹⁸ Vermonters' outrage at New York's attempted thievery is apparent in the preamble to the Vermont Constitution,¹⁹⁹ and this outrage was manifested substantively in the Vermont Constitution's just compensation clause.²⁰⁰ In Massachusetts, a proposed constitution was rejected in 1778 because it failed to adequately protect private property. The framers of the 1780 constitution responded to this concern by including property qualifications for voting and state office holding, which were demanded by the town meetings that rejected the 1778 constitution, and a takings clause, which was not demanded in the town meetings.²⁰¹ Given the lack of demand for this takings clause, it is likely that in seeking to add additional protection of private property, the framers of the 1780 constitution simply copied the idea of a takings clause from the Vermont constitution.²⁰² The takings clause in the Northwest Ordinance, which required compensation when "public exigencies" made it necessary to take property "for the common preservation" suggest that this clause aimed at uncompensated takings by the military.²⁰³

The uncompensated seizures by the military that seem to have inspired the takings clause in the Northwest Ordinance were a source of great concern during the revolutionary era,²⁰⁴ and were the government abuses of private property that was most likely in the minds of the ratifiers of the Fifth Amendment's Just Compensation Clause. Treatise writer St. George Tucker, who was well positioned to comment on the ratification of the clause,²⁰⁵ suggested that the Just Compensation Clause

198. *Id.* at 828.

199. *Id.* at 828-29.

200. *Id.* at 829. The clause reads: "That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent of money." VT. CONST. cl. II.

201. Treanor, *Political Process*, *supra* note 1, at 830.

202. *Id.* at 830-31. Treanor suggests that it is possible that the Massachusetts takings clause, like that in the Northwest Ordinance, was inspired by uncompensated takings by the military during the revolutionary war. *Id.* at 832. This alternative explanation is helpful to Treanor's attempt to show that the takings clauses were intended to remedy only certain types of government actions that were uniquely subject to political process failure, and that the takings clauses therefore did not represent a general fear that majoritarian decision-making would inadequately protect private property interests. *See infra* notes 221-26 and accompanying text. The most obvious explanation for the Massachusetts takings clause, though, is that it was copied from the Vermont constitution as part of an attempt by the Framers of the 1780 constitution to assuage Massachusetts citizens' fear that the majoritarian legislature would inadequately protect private property. Treanor, *Political Process*, *supra* note 1, at 830-31. In any event, a better view of the particular events that inspired the takings clauses is that they were simply the governmental abuses of private property that illustrated the need for constitutional protection of private property. *See infra* text accompanying note 229.

203. Treanor, *Political Process*, *supra* note 1, at 831.

204. *Id.* at 831.

205. *Id.* at 835-36.

"was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war."²⁰⁶

b. Madison's Intent

Because James Madison was the author and chief promulgator of the Just Compensation Clause, his views on the purpose of the clause and on the necessity of constitutional protection of property hold particular importance in interpreting the clause, and this importance is increased by the scarcity of other sources that can be used to understand the clause's meaning. Madison was a great defender of private property, and his writings have often been relied on by authors advocating a broad reading of the Just Compensation Clause that would require compensation for any government action that redistributed wealth. Madison's view of the Just Compensation Clause, and his more general political theory, however, support a more complex and limited view of the clause's meaning.

Madison's understanding of the Just Compensation Clause was that it would only apply to physical takings of property. This understanding is reflected in his original phrasing of the Just Compensation Clause, which read "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without just compensation."²⁰⁷ This understanding is also reflected in the essay *Property*,²⁰⁸ in which Madison criticized Alexander Hamilton's economic program. In *Property*, Madison argued against re-distributive government actions, asking how a government that provides compensation for "direct violations" of private property could engage in act that "indirectly violat[e]" private property.²⁰⁹ Madison's position in *Property* is consistent with his description of the Just Compensation Clause in his speech proposing the Bill of Rights, in which he indicated that the clause would serve two distinct functions, establishing a judicially enforceable rule against uncompensated takings while also having a moral or educative function that would guide the whole community.²¹⁰ In *Property*, Madison argued that while the redistributive government actions that he was criticizing

206. See 1 WILLIAM BLACKSTONE, COMMENTARIES WITH NOTES OF REFERENCES TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., Rothman Reprints 1969) (1803).

207. JAMES MADISON, *Amendments to the Constitution* (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 201 (Charles F. Hobson et al. eds., 1979).

208. JAMES MADISON, *Property*, *Nat'l Gazette*, Mar. 27, 1792, in 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983).

209. *Id.* at 267-68.

210. Treanor, *Political Process*, *supra* note 1, at 837.

did not violate the judicially enforceable rule created by the Just Compensation Clause, they did violate the moral rule that was the basis for the clause.²¹¹

As Treanor notes, Madison's disparate treatment of direct and indirect violations of property raises an obvious question: If Madison felt that both direct and indirect violations were wrong, why did he create a judicial rule that applied only to one and not the other?²¹² The answer is suggested by Madison's broader political theory. In Federalist Ten, Madison explained that each of the factions within society uses the political process to seek its own advantage. Because the interests of the different factions often conflict, the successful promotion of one faction's interest in the political arena often comes at the loss of another faction. The structure of the national government, however, provided some protection against the abuse of property because the legislators elected at the national level would tend to be people "of general respectability" who would tend to be sympathetic to propertied interests, and because on the national scale, the diversity of interests and factions made less likely the formation of a majority intent on harming the interests of other citizens. In other words, Madison believed that government actions involve winners and losers, but that the political process provided some structural protection of property owners.²¹³

Despite this belief that the political process provided some protection to property owners, the inclusion of the Just Compensation Clause in the Bill of Rights clearly indicates that Madison thought that property needed additional protection. In particular, Madison felt that two types of property, interests in land and in slaves, would not be adequately protected by the political process. Madison believed that the United States would experience a population explosion, and that landowners would soon become a minority.²¹⁴ Madison also believed that landless employees of manufacturers would vote as their employers instructed, and that "the future belonged not to 'Landlords & Tenants,' but to 'the great Capitalists in Manufactures & Commerce and the members employed by them.'"²¹⁵ Landowners were therefore likely to become a minority unable to rely on the political process to protect their interests. Madison was similarly concerned that the political process would be insufficient to protect the interests of slaveowners.²¹⁶

211. *Id.* at 839.

212. *See id.* at 840.

213. *See id.* at 843.

214. *Id.* at 849.

215. *Id.* at 850 (quoting James Madison, *Note to his Speech on the Right of Suffrage* (1821), in

3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 452 (Max Farrand ed., 1966).

216. *Id.* at 851-54.

Madison's view of the interaction between property and the political process thus had two parts. Madison believed that property owners would be naturally impacted by the political process, sometimes negatively and sometimes positively, but that the process as a general matter offered adequate protection to property owners. At the same time, Madison believed that in some circumstances, the political process would fail and, as a result, property owners would suffer such a severe negative impact — their property being taken — that additional protection was necessary.

c. The Significance of the History

Treanor looks at the historical evidence and concludes that the background understanding, as embodied by the history of the state takings clauses, the framer's intent, as embodied by Madison's writings, and the ratifiers' intent, as embodied by Tucker's statement, all indicate that the Just Compensation Clause was concerned with redressing political process failure.²¹⁷ The abuse of Vermont landowners at the hands of the New York Legislature and impressment by the military during the revolutionary war were particular instances of process failure, while Madison's fears about landowners and slave owners reflected the potential for political minorities to suffer great losses as losers in the political process. While I agree with the conclusion that the Just Compensation Clause was concerned with remedying political process failure, Treanor and I come to dramatically different conclusions as to the significance of the political process in interpreting the meaning of the Just Compensation Clause.

2. POLITICAL PROCESS AND THE MEANING OF THE JUST COMPENSATION CLAUSE

a. Treanor's Model

Treanor uses a translation model of fidelity to give meaning to the Just Compensation Clause. The goal of the translation model, as stated by Treanor, is "to identify the ends that the Constitution's framers sought to advance and then interpret[] a constitutional provision in a way that best advances those ends in today's world."²¹⁸ The translator begins by determining the historical context, and meaning within that context, of the constitutional provision being studied. The translator then identifies the factual presuppositions behind the original understanding that have changed, and "reinterprets the text in light of changed

217. *Id.* at 855.

218. *Id.* at 857.

circumstances, altering the original reading as little as possible while seeking its modern 'equivalent.'"²¹⁹

Treanor begins his application of this model with the original understanding, discussed above, that the Just Compensation Clause required compensation when the government interfered with the physical possession of property.²²⁰ Moving to changed circumstances, Treanor argues that none of the factual bases for the original protection of physical possession still hold true. Slave ownership is obviously no longer a concern.²²¹ Landownership, Treanor argues, also no longer needs the protection of the Just Compensation Clause. Madison's fears that landowners would become a minority and that employees would vote as their employers wished have not come true,²²² and the unique factual situation behind the Vermont takings clause is no longer present.²²³ While seizures by the military in wartime are still a risk, such situations are unique and extraordinary.²²⁴ Treanor also finds significant the public choice theory analysis that landowners are particularly well suited to defend their interests in the political arena.²²⁵ Thus, because of changed circumstances the vulnerable property interests that were the focus of the original understanding "either no longer exist or are now adequately protected by [the political] process."²²⁶

Based on these changed circumstances, Treanor proceeds with his translation by attempting "to determine what property interests must now be protected if we are to be consistent with the original purposes of the clause."²²⁷ From the premise that the original purpose of the Just Compensation Clause was to guard those interests uniquely subject to process failure, Treanor turns this task into identifying those situations where property owners are particularly vulnerable to process failures. Looking to public choice theory and footnote four jurisprudence, Treanor concludes that such vulnerability exists, and compensation should therefore only be due, when a government action singles out a property owner or adversely impacts a discrete and insular minority.²²⁸

219. *Id.*

220. *Id.* at 859.

221. *Id.* at 863.

222. *Id.*

223. *Id.* at 865.

224. *Id.* at 866.

225. *Id.* at 863-64.

226. *Id.* at 866.

227. *Id.*

228. *Id.* at 866-78; see also Treanor, *Jam For Justice Holmes*, *supra* note 146, at 874 ("Evidence of a process failure would be, in particular, that a statute or regulation singles out an individual, or that it disproportionately affects people who live outside the jurisdiction or, as in environmental racism cases, that it burdens discrete and insular minorities.").

b. Compensation for the Losers in the Political Process

While I agree with Treanor's account of the history of the Just Compensation Clause, I disagree with his interpretation of the clause's meaning on several levels, but most basically on the significance of the relationship between the original understanding and process failure.

The original understanding of the Just Compensation Clause only required compensation when a government action interfered with the physical possession of property, and both the historical context and Madison's writings suggest that the clause was intended to protect property owners from suffering a severe loss in the political process. Looking at this historical record, Treanor argues that the clause protected only physical possession because it was uniquely subject to process failure.²²⁹ This assertion leads to the conclusion that forms the critical premise for the rest of his analysis: that the Just Compensation Clause should be read to protect only those property interests that are uniquely vulnerable to process failure.

The original understanding and the concern with process failure, however, suggests a very different conclusion to me. A more simple explanation of the original understanding is that compensation was only required for physical expropriation not because physical possession was particularly vulnerable, but because all of the examples of process failure that lead to enactment of the Just Compensation Clause were physical expropriations. The attempted taking of Vermont property by the New York legislature and military expropriation during the Revolutionary War both involved physical expropriation, as did the hypothetical danger to slaveholders that partially motivated Madison.

Moreover, the text of the Just Compensation Clause makes it clear that it is not a process-oriented provision. Unlike a provision directed at avoiding process failures detrimental to property owners — for example, a property qualification for voters — the Just Compensation Clause simply provides a remedy for the victim of the process failure. The text requires compensation for every taking of property, and does not require an examination of the political process that led to the taking. As Treanor himself notes: “[T]he original understanding did not involve making the individuals who were likely to suffer process failure better off than those protected by the political process. Rather, the Takings Clause was intended to put everyone who suffered the same injury on the same footing: Everyone whose property was physically taken received compensation.”²³⁰ The Just Compensation Clause, then, is not concerned with

229. Treanor, *Political Process*, *supra* note 1, at 854.

230. *Id.* at 872.

how or why the process failure occurred. Instead, it is concerned with the impact a government action has on the property owner. If the impact is sufficiently severe (which necessarily could only result from a process failure), then compensation is due.

Because the examples of process failure that inspired the Just Compensation Clause were physical takings, the original understanding was that compensation was only required for physical takings. But it is clear today — and was clear to Justice Holmes throughout his career — that a government action can severely and negatively impact a property owner without interfering with physical possession. A local government seeking to preserve a certain parcel of land as open space can exercise the police power to forbid development of that parcel or can take the parcel by eminent domain.²³¹ In either case, the impact of the government action on the property owner essentially is the same. It would be an absurd exercise of formalism, and would go against Madison's intent to provide a remedy for particularly severe losses caused by process failures, to hold that of two government actions that had essentially the same impact on the property owner, one was a taking because it was an exercise of eminent domain while one was not because it was an exercise of the police power. Justice Holmes's holding in *Mahon* that an exercise of the police power can be a taking therefore is consistent with the intended meaning of the Just Compensation Clause.

The more difficult question, though, is where to draw the line between exercises of the police power that go "too far" and those that do not. The Takings Clause does not provide direct protection of property; rather it provides compensation for the deprivation suffered by the property owner. It stands to reason that the impact of a government action on the property owner should be measured in terms of the thing that the Just Compensation Clause protects, that is: value.

The history of the clause suggests that it was not intended to protect ordinary diminutions in value; Madison's writing in *Property* indicates that he was aware that in its ordinary function the political process could negatively impact property holders, and did not intend compensation to be due for every such loss.²³² Rather, the historical record of the Just Compensation Clause suggests that compensation should be due when a government action has essentially the same impact on the property

231. See *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652-53 (1981) (Brennan, J., dissenting); see also FISCHEL, *REGULATORY TAKINGS*, *supra* note 142, at 52-54 (discussing an example of use of the police power as a substitute for eminent domain in a municipality's effort to preserve open space).

232. See *supra* notes 207-10 and accompanying text.

holder as physical expropriation — that is, compensation should be due if the government action renders property valueless.

C. *Lessons for Contemporary Regulatory Takings Jurisprudence*

Following Justice Holmes's lead in *Mahon*, the Supreme Court's contemporary takings jurisprudence has tended to eschew clear tests, and instead is characterized by "ad hoc, factual inquiries"²³³ involving a wide range of factors. The result is something of a cacophony of competing ideas and theories. Rather than addressing contemporary takings jurisprudence in its entirety, this Section follows on the foregoing discussion of the history and nature of the police power and the history of the Takings Clause by making two observations that may help to clarify the regulatory takings debate.

First, much of the confusion in contemporary takings analysis is the result of misunderstandings of the nature and history the police power. Second, the history and text of the Just Compensation Clause are consistent with the results of recent Supreme Court cases holding that an exercise of the police power that renders property valueless should be considered a taking, while exercises of the police power that result in lesser diminutions of value are not takings.

1. MISUNDERSTANDING THE POLICE POWER IN CONTEMPORARY TAKINGS JURISPRUDENCE

Part of the confusion endemic to contemporary takings jurisprudence is attributable to a lack of clarity about the nature and scope of the police power. Often, the regulatory takings question is asked incorrectly, leading to confusion between the substantive due process question (is the government act within the scope of the police power?) and the takings question (does the act take property without just compensation?). This confusion in turn leads to an unwarranted focus on the character of the government act in the takings analysis. Further, confusion over the relationship between the police power and the prevention of harm pervades recent takings cases and commentary.

As often is the case with regulatory takings problems, the confusion on takings law about the police power can be traced in significant part to Justice Holmes's cryptic opinion in *Mahon*. There, Justice Holmes observed that the Kohler Act had "very nearly the same effect for constitutional purposes as appropriating or destroying [the coal],"²³⁴ and that, as a result, the impact of the Act on Pennsylvania Coal reached the point where the Act could not be "sustained as an exercise of the police

233. Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

234. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

power.”²³⁵ Instead, “there must be an exercise of eminent domain and compensation to sustain the act.”²³⁶

In other words, Holmes held that when a police regulation went too far, it would violate the Just Compensation Clause, and would have to be replaced with an exercise of eminent domain accompanied by compensation, in order to be constitutional. Thus, at the same time he was holding that a police regulation had violated the Just Compensation Clause, Holmes’s language perpetuated a formal distinction between exercises of the police power and of eminent domain. Using Holmes’s phraseology, valid exercises of the police power would never require compensation, because those exercises of the police power that violated the Just Compensation Clause would, like the Kohler Act, be invalid.

As a result of Holmes’s choice of language, takings jurisprudence developed a distinction between “takings” and “valid exercises of the police power.” For example, Joseph Sax observed in his influential article *Takings and the Police Power* that the phrase “police power” was “used by the courts to identify those state and local governmental restrictions and prohibitions which are valid and which may be invoked without payment of compensation.”²³⁷ This terminology is correct in a technical sense if it is understood that exercises of the police power that violate the Just Compensation Clause are invalid; ergo, valid exercises of the police power are not takings and do not require compensation. But this formulation of the takings question is misleading because it is imprecise about the reason for the validity of the government act in question: is it valid in the substantive due process sense (*i.e.*, the act is within the scope of the police power) or in the takings sense (*i.e.*, the act does not violate the Just Compensation Clause)? Because of the broad scope of the police power, the answer to the substantive due process question will almost invariably be “yes,” and the substitution of the substantive due process question for the takings question would lead to a return to the *Alger/Mugler* formalistic rule, rejected in *Mahon*, that exercises of the police power can never be takings.²³⁸

Although obscured in some respects by his choice of language in

235. *Id.*

236. *Id.* at 413.

237. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 36 n.6 (1964).

238. See *Mahon*, 260 U.S. at 412 (reversing holding of lower court that finding that “statute was a legitimate exercise of the police power” was dispositive of the takings issue). Indeed, the recent takings case that focuses most strongly on the nature of the act in question can be read as advocating a return to the *Mugler* rule. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 488-90 (1987). But even *Keystone*, best seen as a full-out attack on *Mahon* that has since convincingly been repulsed in *Lucas v. S.C. Coastal Council* (505 U.S. 1003 (1992)), is consistent with the rule that an act that renders a piece of property valueless will be considered to be a taking. 480 U.S. at 493-502; see *infra* note 256.

Mahon, Justice Holmes's wisdom was to understand that the substantive due process and takings inquiries ask different questions, and the effect of *Mahon* was to hold that a police regulation (the Kohler Act) had violated the Just Compensation Clause.²³⁹ Contemporary takings jurisprudence has begun to move away from the concept that an exercise of the police power that violates the Just Compensation Clause is invalid and must be replaced with an exercise of eminent domain, instead embracing the concept of inverse condemnation and recognizing that an exercise of the police power can directly take property.²⁴⁰ This recognition clarifies that the regulatory takings question that should be asked is, "Does the act take property without compensation?" rather than, "Is the act a taking or a valid exercise of the police power?"

When the regulatory takings question is asked properly, it becomes apparent that the character of the government act should not have a significant role in the takings analysis, which focuses on *whether* the act takes property (measured by impact on property owner), not *why* it takes property (measured by the nature of the act). Unless it has a direct bearing on whether property has in fact been taken, as in a case involving physical invasion,²⁴¹ the character of the act should not be a factor in the takings analysis.²⁴² Recent Supreme Court takings cases have considered the character of the government act at issue, largely as a result of substantive due process issues from earlier cases improperly creeping into the takings analysis.²⁴³ The resulting test, which has been articu-

239. See *supra* note 193 and accompanying text.

240. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-19 (1987); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982) ("The Court of Appeals determined that [the act] . . . is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid."); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652-53 (1981) (Brennan, J., dissenting).

241. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

242. The nature of the act is relevant to the question of whether the act meets the "public use" requirement. However, following the order of the text of the Just Compensation Clause, this issue should be decided after it has been determined whether the act amounts to a taking of property. If and when this question is reached, it will almost invariably be answered "yes" in a regulatory takings case, because the public use requirement has been interpreted to be coextensive with the scope of the police power. See *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). If for some reason the "public use" requirement was not met, then the act would be invalid in the substantive due process sense — the government may not take property for a private use regardless of whether compensation is paid.

243. The inclusion of the character of the government act in the Supreme Court's contemporary takings analysis can be traced in significant part to two cases: *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) and *Nectow v. Cambridge*, 277 U.S. 183 (1928). See *Penn. Central*, 438 U.S. at 125-27 (citing *Nectow* and *Goldblatt*); *Agins v. Tiburon*, 447 U.S. 255, 261 (1980) (citing *Nectow*). Both *Goldblatt* and *Nectow*, however, are predominantly substantive due process cases. See *Goldblatt*, 369 U.S. at 591 (property owners claimed that regulation "takes

lated in many recent takings cases as "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests,'"²⁴⁴ is a substantive due process test that has no relevance to the takings question.²⁴⁵ These same cases, however, have been clear that even if an exercise of the police power satisfies the "legitimate state interest" test, it will result in a taking if it "denies all economically beneficial or productive use" of the property in question.²⁴⁶ This latter test properly focuses on whether the act has taken property, rather than on the nature or generality of the act.²⁴⁷

their property without due process of law in violation of the Fourteenth Amendment"); *Nectow*, 277 U.S. at 185 ("The attack upon the ordinance is that, as specifically applied to plaintiff in error, it deprived him of his property without due process of law in contravention of the Fourteenth Amendment."). *Goldblatt* involved a challenge to a restriction on gravel mining below the water table. The Court first held that if the "ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." *Goldblatt*, 369 U.S. at 592. The Court then immediately observed that "[t]his is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation." *Id.* at 594 (citing *Mahon*). Thus, the Court's first observation about the validity of the police regulation referred to the constitutionality of the act in the substantive due process sense, and the Court was clear that the takings analysis asks a different question that focuses on the burden of the act on the property owner. The Court found that the act satisfied due process (because there was no evidence in the record to suggest that the act was unreasonable) and that it was not a taking (because there was no evidence that it reduced the value of the property in question). *Id.* at 594-96. *Nectow* invalidated a zoning regulation on purely due process grounds, based on "the express finding of the master . . . that the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question." *Nectow*, 277 U.S. at 188. Though a finding that the act was a taking may have been supported by the master's finding that the parcel in question had been rendered essentially valueless, the Just Compensation Clause did not factor into the Court's analysis. *Id.* at 187.

244. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1024 (1992) (quoting *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987)); *Agins*, 447 U.S. at 260; see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488-90 (1987); *Penn. Central*, 438 U.S. at 125. The only relevance that this substantive due process inquiry should have on the takings analysis should be in the context of determining whether the act satisfies the "public use" requirement of the Just Compensation Clause, which logically should be determined after it has been determined whether or not the act amounts to a taking. See *supra* note 241.

245. See *supra* note 238 and accompanying text; see also John D. Echeverria, *Does a Regulation That Fails To Advance A Legitimate Governmental Interest Result In A Regulatory Taking*, 29 ENVTL. L. 853 (*passim*) (1999) (discussing substantive due process nature of takings test based on state interest analysis).

246. *Lucas*, 505 U.S. at 1015; see also *Nollan*, 483 U.S. at 834; *Keystone*, 480 U.S. at 495; *Agins*, 447 U.S. at 260; *Penn. Central*, 438 U.S. at 127 (holding that regulation may be a taking "if it has an unduly harsh impact upon the owner's use of the property.").

247. The generality of an act (*i.e.*, whether it is broadly applied or singles out individual property owners) is an appropriate consideration for a due process analysis, but not a takings analysis. The strongest articulation of a generality analysis in recent Supreme Court takings cases came in Justice Stevens's dissent in *Lucas*. See *Lucas*, 505 U.S. at 1071-75 (Stevens, J., dissenting). Justice Stevens supports his process argument with the observation that "[t]his principle of generality is well rooted in our broader understandings of the Constitution as designed in part to control the 'mischiefs of faction.'" *Id.* at 1072 n.7 (Stevens, J., dissenting) (quoting

While the character of the act should generally not be a factor, the character of the use being restricted may be relevant to the takings analysis. As discussed above, the broad scope of the police power far transcends the prevention of harm, and although virtually any government act can be given a harm-preventing justification, the police power includes, within its scope, the regulation of many uses that are not morally repugnant.²⁴⁸ Justice Holmes therefore recognized that the characterization of a police regulation as harm-preventing was neither necessary to satisfy substantive due process nor sufficient to defeat a regulatory takings claim.²⁴⁹ Certain uses, however, are sufficiently noxious to be considered to be nuisances that can be abated without compensation, regardless of the impact on the property owner. Because the property owner has no right to engage in a noxious use, a police regulation prohibiting such uses would not take anything from the property owner, and therefore would not be considered to be a taking, regardless of the severity of the impact on a property owner.²⁵⁰ Under this analysis, however, it is the nature of the prohibited use, not the nature of the regulation, that is relevant.²⁵¹

Federalist No. 10, p. 43 (G. Wills ed. 1982) (J. Madison)). Unlike other constitutional protections, however, the text and history both indicate that the Just Compensation Clause is not a process-oriented provision, *see supra* note 241 and accompanying text, and Justice Stevens's reference to Federalist No. 10 therefore is misplaced.

248. *See Lucas*, 505 U.S. at 1022-26.

249. *See supra* text accompanying note 194. Much of the confusion about the relevance of the prevention of harm to the regulatory takings analysis is attributable to Holmes's failure in *Mahon* (which he later regretted) to squarely confront *Mugler*. *See supra* notes 169-73 and accompanying text. Indeed, although subsequent courts and commentators have tried to square *Mahon* and *Mugler*, the better view is that the two decisions are fundamentally inconsistent. Indeed, this inconsistency has continued in contemporary takings jurisprudence, with *Keystone* representing an attempted repudiation of *Mahon* and resurrection of *Mugler*, and *Lucas* representing a repudiation of *Mugler* and a reinforcement of *Mahon*.

250. *See Lucas*, 505 U.S. at 1027 ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."); *see also id.* at 1029 ("Any limitation so severe [as to prevent all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership"). The opinion of the Court in *Lucas* asserts that "'prevention of harmful use' was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value." *Id.* at 1026. As discussed above, the police power does not require a harm-preventing justification, and it would be more accurate to say that the "harm preventing" language was the rationale used to deny compensation, even when it was difficult to truly condemn the use as immoral or illegal. *See supra* notes 154-68 and accompanying text. The history of the Just Compensation Clause also indicates that regulatory diminution of value that falls short of the equivalent of a physical expropriation (*i.e.*, total diminution in value) does not require compensation. *See supra* note 231 and accompanying text.

251. The rule that the abatement of truly noxious uses does not require compensation can of course be articulated in terms of the nature of the government act — *i.e.*, that exercises of the

2. THE RESULTS, IF NOT THE ANALYSIS, OF RECENT TAKINGS CASES
ARE CONSISTENT WITH THE HISTORY AND TEXT OF THE JUST
COMPENSATION CLAUSE

The text and historical record of the Just Compensation Clause support the rule, most clearly applied in *Lucas*, that an exercise of the police power that renders an owner's property economically valueless will be considered a taking.²⁵² This rule reflects a practical observation that the government can take property through an exercise of the police power. As Justice Holmes held in *Mahon*, the Kohler Act had "very nearly the same effect for constitutional purposes as appropriating or destroying [the coal]."²⁵³ Justice Brennan echoed this observation in a dissenting opinion in *San Diego Gas & Elec. Co. v. San Diego*:

Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property. Appellees implicitly posit the distinction that the government *intends* to take property through condemnation or physical invasion whereas it does not through police power regulations. But "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.²⁵⁴

police power aimed at abating noxious uses are not takings. Because the rationale for this rule is that the property owner does not have a property right to engage in a noxious use, the analysis is more correctly phrased in terms of the nature of the use being abated.

252. *Lucas*, 505 U.S. at 1015-19; see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) ("[A] regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause." (internal quotation omitted)); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to a particular property effects a taking if the ordinance . . . denies an owner economically viable use of his land."); *supra* notes 245-246 and accompanying text. The trial court's conclusion in *Lucas* that the government act in question had rendered the property valueless appears to have been correct. See FISCHEL, REGULATORY TAKINGS, *supra* note 142, at 59-61.

253. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

254. *San Diego Gas & Elec.*, 450 U.S. at 652-53 (Brennan, J., dissenting) (citations omitted).

Because the Just Compensation Clause protects value, reduction in value is the correct measure of the impact of an exercise of the police power on a property owner, and because the deprivation of all economic use is the functional equivalent of physical expropriation, requiring compensation in these circumstances is consistent with the historical record of the Just Compensation Clause.²⁵⁵

Similarly, the contemporary Supreme Court cases that have addressed the merits of a regulatory takings claim and held that no taking had occurred have all involved diminutions in value that fell short of total takings,²⁵⁶ and are consistent with Madison's understanding that the political process would result in adverse impacts on property owners that would not be compensable.²⁵⁷ Thus, although the analysis in contemporary Supreme Court regulatory takings cases sometimes borders on incoherence,²⁵⁸ the results of these cases are consistent with the text

Hart has posited that the Supreme Court's regulatory takings jurisprudence is grounded on the idea that land use was generally unregulated in the colonial era, and is therefore undercut by evidence that colonial land use regulation was in fact widespread. See Hart, *Land Use Law*, *supra* note 36, at 1100; Hart, *Colonial Land Use*, *supra* note 36, at 1252-53. Hart's thesis exaggerates the importance of the absence of colonial land use regulation to the Supreme Court's takings jurisprudence, which is founded in a much more concrete way on Holmes's observation, eloquently reinforced by Justice Brennan, that a state can take property through exercises of the police power. Hart is correct that the pervasiveness of land use regulation in the colonial era undercuts the argument that the Takings Clause requires compensation for any economically burdensome land use regulation, and as discussed above, Madison understood that the political process would result in the passage of laws that might negatively impact property owners. See *supra* notes 208-212 and accompanying text. But other than the abatement of noxious uses, early American land use regulations fell far short of rendering the affected property valueless. See Hart, *Land Use Law*, *supra* note 36, at 1107-31. Therefore, early American land use regulation is consistent with the rule that an exercise of the police power that renders property valueless is a taking.

255. See *supra* notes 231-32 and accompanying text.

256. See *Palazzolo*, 533 U.S. at 616 (denying takings claim where regulation "permit[ed] a landowner to build a substantial residence on an 18-acre parcel."); *Agins*, 447 U.S. 255, 260 (1980) (denying takings claim where "the challenged ordinances allow the appellants to construct between one and five residences on their property."); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136-37 (1978) (denying takings claim where some use of property right was possible); *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) (denying takings claim where there was "no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question."); see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-502 (1987) (unconvincingly distinguishing *Mahon* but denying compensation on ground that police regulation did not deprive owners of all economic use of their property); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-97 (1981) (denying takings claim largely on ripeness grounds, but noting that "in the posture in which these cases comes before us, there is no reason to suppose that 'mere enactment' of the Surface Mining Act has deprived appellees of economically viable use of their property."). The Court may have been wrong in some of its factual assumptions, and *Agins*, in particular, lends itself to an analysis that the government's actions were the equivalent to the exercise of eminent domain. See FISCHER, *REGULATORY TAKINGS*, *supra* note 142, at 52-54.

257. See *supra* notes 207-13 and accompanying text.

258. Compare *Mahon*, 260 U.S. 393 (holding that police regulation prohibiting mining of

and historical record of the Just Compensation Clause, finding takings where an exercise of the police power has rendered property valueless but not where the government act has resulted in a lesser diminution of value.²⁵⁹

CONCLUSION

This Article has attempted to solve some of the confusion in contemporary regulatory takings jurisprudence by clarifying the nature and scope of the police power and examining the relationship between the police power and the Takings Clause. A correct understanding of the broad scope of the police power clarifies and simplifies matters by demonstrating that the character of the act in question should have no role in the takings analysis. Rather, the takings question should focus on the impact of the government act on the property owner — *i.e.*, does the act take the owner's property? Because the Just Compensation Clause protects value, the impact of the government act should be measured by the reduction in value of the affected property. Consistent with Madison's intent, a taking should only be found if the exercise of the police power results in a severe impact on the property owner equivalent to a physical expropriation. Thus, the regulatory takings question should be simply phrased as "has the government act rendered the property in question valueless?" A simple test, easily applied, that surprisingly enough would reach the same result as the Supreme Court's recent takings cases, but without all the mess.

support right was a taking) with *Keystone*, 480 U.S. 470 (holding that similar police regulation prohibiting mining of support right was not a taking). A contributing source of the incoherence in regulatory takings case law is the Court's unwillingness to recognize contradiction where it plainly exists. While Treanor correctly observed that none of the opinions in *Lucas* suggests any conflict between *Mugler* and *Mahon*, the two cases are profoundly contradictory. See *supra* note 174; Treanor, *Jam For Justice Holmes*, *supra* note 146, at 868. Similarly, Justice Scalia's Opinion of the Court in *Lucas* avoided discussion of conflict with *Mugler* even as it implicitly overruled one of *Mugler*'s core holdings. Compare *Lucas*, 505 U.S. at 1029 (holding that "regulations that prohibit all economically beneficial use of land" cannot be newly enacted by the legislature without compensation to the property owner) with *Mugler*, 123 U.S. at 668-70 (holding that newly-enacted legislation prohibiting manufacture of beer did not require compensation even though it rendered property valueless).

259. See *supra* notes 230-31 and accompanying text. This result is reflected in a jury instruction recently affirmed by the Supreme Court:

For the purpose of a taking claim, you will find that the plaintiff has been denied all economically viable use of its property, if, as the result of the city's regulatory decision there remains no permissible or beneficial use for that property. In proving whether the plaintiff has been denied all economically viable use of its property, it is not enough that the plaintiff show that after the challenged action by the city the property diminished in value or that it would suffer a serious economic loss as the result of the city's actions.

City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 700 (1999) (citing 10 Tr. 1288, 1303-06 (Feb. 9, 1994)).