# FINDING MORE PIECES FOR THE TAKINGS PUZZLE: HOW CORRECTING HISTORY CAN CLARIFY DOCTRINE

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## INTRODUCTION

For more than two decades, scholarly commentary on "takings" has dominated property-related legal literature. A series of key Supreme Court cases–sometimes lacking doctrinal consistency or sound historical foundation–has only further fueled the firestorm.[1] The partisans in these conflicts are, on the one

1. *See e.g.*, Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) (city landmark preservation regulation prohibited construction in the airspace above a protected building; whether compensation would be required could be determined on a case-by-case basis according to how much the regulation caused diminution in value, interfered with the owner's investment-backed expectations, and was more like a zoning regulation than a taking); Agins v. City of Tiburon, 447 U.S. 255 (1980) (previously purchased tract of land was restricted to single-family residences by provisions of the city's open space land zoning ordinances; no compensation was awarded because the ordinance did not prevent the best use of the land or extinguish a fundamental attribute of ownership); Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (a landowner seeking a building permit was required to first give a public easement for beachfront access; the Court held the city could not impose this exaction without paying compensation, because there was no reasonable relationship between the exaction and the adverse impact of the proposed development ("reasonable nexus")); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (an owner of two beachfront lots faced post-acquisition restrictions so severe as to render the lots valueless; even though it adopted a flawed view of early takings history, the Court required compensation for this categorical taking that denied "all economically beneficial or productive use of the land." 505 U.S. at 1015); Dolan v. City of Tigard, 512 U.S. 374 (1994) (in this exaction case, the landowner seeking to develop commercial property was required to give land for a bike path; the Court required compensation for the exaction because the burden was not proportional to the adverse impact of the new development ("rough proportionality")); Palazzlo v. Rhode Island, 533 U.S. 606 (2001) (application to fill eighteen acres of coastal wetland for construction of a beach club was denied; the Court did not require compensation because some portion of the land was still available for construction of a residence,

hand, those who fear uncontrolled, uncompensated "regulatory" taking of private property rights and who therefore seek to protect private property rights, and, on the other hand, those who fear overly broad rules for mandating compensation, which may severely limit public powers to protect public interests.

As time has passed, protagonists have become increasingly polarized and courts less able to reconcile or compromise competing claims, being forced instead to choose one over the other. The rationales for such choices often are themselves inconsistent, even within jurisdictions. A few writers have taken on the challenge of rationalizing the confused case law, seeking acceptance of their own sets of guiding principles as solutions. That these attempts have all failed to gain general acceptance or create consensus is probably because the partisanship in this area rests on the protagonists' very different underlying factual and philosophical assumptions and axioms that are so fundamentally opposed that they cannot be reconciled, compromised, or accommodated. This article identifies and explains the effects of one of these philosophical assumptions, perhaps the one that is most fundamental: one's view of the nature of the police power. This article also explains and documents the early or original assumptions about aspects of police power that are at the center of takings controversies, including the purposes for which the police power may be exercised to regulate private property, and the circumstances under which a landowner impacted by police power regulations may be entitled to compensation.

In its simplest form, the term police power as used in this article is the authority by which a state or local government, for an appropriate public purpose, regulates but does not "take" property. One point in conflict is the scope of legitimate purposes for which the police power may be exercised. This article will show that, in the earliest tradition of American law, with some exceptions, the police power was used mainly for the suppression of nuisance-causing activities that adversely affected public interests. In more recent generations, some have come to accept police power exercises to achieve a much wider range

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so there was no deprivation of all economic use, as required in *Lucas*); Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) (temporary moratoria on development are not considered categorical takings requiring compensation, but should be considered by applying *Penn Central* factors).

of social benefits. This more aggressive use of police power has naturally led to a much wider range of property interests being "taken" by regulation and supposedly not entitled to compensation. It may be fairly said that virtually all regulatory takings controversies today are generated by attempts to use police power in the modern, expanded fashion.

Another point in conflict is whether a police power "regulation" of property falls outside the constitutional requirement of compensation for "taking" of property, and therefore is not subject to any compensation requirement at all. For those who take this approach, labeling a government act as an exercise of police power automatically generates an exemption from having to pay compensation. Opponents of this view believe that some exercises of police power do indeed come within the constitutional mandate for compensation, regardless of how the act is labeled. The various voices in these conflicts often claim historical validation for their positions; others attempt to discredit particular historical analyses or to deny altogether the probity of history in these matters.

This article will add two new pieces to the puzzle of if and when to compensate for regulatory takings. These new pieces will help clarify the original conception of the nature of police power and the early rules under which compensation was granted for police power regulations. These new pieces should also lay to rest some matters of persisting confusion or misconception which have infected the regulatory takings debate. With this additional doctrinal clarity, this article will better explain how police power land use regulations differ from eminent domain takings, especially with respect to the issue of compensation. This article will also clarify how these two areas of the law may be applied as complementary devices, and how they may be successfully and rationally administered in our modern era.

Section II of this article explains the origins and character of police power in Anglo-American law. Section III reveals the widespread early assumptions about limitations on the purposes for which the police power could be used. Section IV details to what extent compensation was required for police power regulation of land in the early American cases. Section V shows how the historical background of police power suggests a compelling rationale for the rules by which contemporary police power regulations may be imposed and compensated. Based on these analyses, Section VI argues that exercises of po-

lice power are not presumptively exempt from compensation requirements; that exercises of police power for affirmative purposes beyond suppression of nuisances should be subject to compensation requirements; and that compensating for police power regulations affecting property rights to achieve affirmative social benefits complies with both the letter and spirit of the constitutional compensation requirement.

## I. THE ORIGINS AND CHARACTER OF POLICE POWER IN ANGLO-AMERICAN LAW

This section describes the origins of police power in Anglo-American law in order to accurately reveal the traditional nature and scope of police power. This in turn helps reveal whether modern concepts of police power have departed from the traditional concepts, and whether any such departure generates conflict or inconsistency in takings cases.

### *A. What Is "Police Power?"*

The word "police" as used in "police power" may have come from the Greek "polis" and entered English from French.[2] The term "police power" or its equivalent does not appear in the U.S. Constitution; it was not used in a U.S. Supreme Court opinion until 1827;[3] and it was not the explicit basis for a decision by that Court until 1877.[4] Yet, in the late 19th and early 20th centuries, it attracted the attention of hundreds of judges and legal writers, and today, casting its influence in ever more subtle and diverse ways, it is a concept at the center of profound developments in the American law.

Even though its philosophical basis lies at the very foundation of English common law, the notion of governmental police power attracted little attention in this country until Thomas Cooley's watershed treatise describing constitutional limitations on state legislative power was first published in 1868.[5]

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2. ALFRED RUSSELL, THE POLICE POWER OF THE STATE AND DECISIONS THEREON AS ILLUSTRATING THE DEVELOPMENT AND VALUE OF CASE LAW 23–24 (1900).

3. Brown v. Maryland, 25 U.S. (12 Wheaton) 419, 443 (1827).

4. Boyd v. Alabama, 94 U.S. 645 (1877).

5. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1874).

Here he defined police power in phrases that immediately became standard language for the subject:

> The police power of a State, in a comprehensive sense, embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.[6]

The next sections will describe the common law origins of police power, and then the growing recognition of state police power principles that occurred in this country from the colonial era until Cooley's important pronouncement.

### *B. Common Law Origins and Rationale of the Police Power: An Ancient, Fundamental Principle.*

If, as Cooley declared, the police power of a state enforces the state's system of internal regulation, not only to protect the state, but to ensure citizens' rights relative to one another, what principles govern the application of this power? The answer to this question is found in the earliest literature of English common law.

At the heart of a government's power to regulate its citizens' private property affairs is the ancient and familiar legal maxim: "*Sic utera tuo ut alienum non laedas*," loosely translated as, "Enjoy your property in such manner as to not injure that of another."[7] The maxim's earliest expression appears about 1187 in Glanville's *The Laws and Customs of the Kingdom of England*, where, by a series of examples, the author

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6. *Id.* at 572. *See* Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) (holding that a requirement that the developer provide art in the area of the development was within the type of aesthetic control that the city was authorized to impose); Atlanta Journal and Const. v. City of Atlanta Dep't of Aviation, 6 F. Supp. 2d 1359 (N.D. Ga 1998) (maintaining that a city has an interest in using its police power to regulate the aesthetic appearance of the airport).

7. COOLEY, *supra* note 5, at 574, n.1 (1868) (quoting *Herbert Broom's Legal Maxims* 327 (5th Am. ed.)). Perhaps the more common version of the maxim today would be: "Don't use your property in such a way as to injure the property of another."

demonstrates that one may not use one's own property to the injury of another. For instance, he declares that if "any Dyke should be raised or thrown down . . . to the injury of any person's Freehold," then a King's writ should issue.[8]

Henry of Bracton, writing about 1250, referred to some types of servitudes being imposed by law: "that is that no one do anything on his own land by which danger or nuisance accrues to a neighbor."[9] In *Fleta, Commentarius Juris Anglicani*, an anonymous late thirteenth century book on English law that apparently borrowed heavily from Bracton and some contemporary tracts, the nearly identical statement and supporting examples appear: "a man is not to do anything in his own land by which harm or nuisance may be caused to his neighbour."[10] Also appearing in about 1290, the same time as *Fleta*, a book in French, purportedly penned by one Britton, likewise referred to servitudes "by law," requiring that "no one shall do anything in his own soil that may be a grievance or annoyance to his neighbour . . . ."[11]

While this principle of restraint in the use of one's real property permeates much of our common law, the maxim "*sic utere tuo ut alienum non laedas*" does not appear in extant court records until the 1594 case of *Edwards v. Halinder*.[12] Later, Sir Edward Coke cited the maxim in reporting the decision of *Aldred's Case* in 1611,[13] and in the following century statements or examples of the principle appear several times in *Blackstone's Commentaries*.[14]

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8. RANULF DE GLANVILLE, DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE [THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND], bk. 13, ch.32–39, p. 336–37 (photo. reprint 1980) (John Beame trans., London, A.J. Valpy 1812).

9. An older edition of Bracton occasionally cited in the older treatises is 3 Bracton, *De Legibus et Consuetudinibus Angliae* bk. 4, ch. 37, fols. 221, 221B; bk. 4, chs. 42–47, fols. 231b-235b at 427–81, 552–93 (Sir Travers Twiss, ed., 1250). The quote in the text is from the more modern edition edited by George E. Woodbine, translated by Samuel E. Thorne (1977). The provisions cited in the older version *supra*, fols. 220 and 222 appear in Vol. III at 163, and in the Calendar of the Thorne translation; fols. 231–35 appear in the Thorne translation at 187–99. The quote in the text is an excerpt from fol. 220.

10. FLETA SEU COMMENTARIUS JURIS ANGLICANI SIC NUNCUPATUS, bk. 4, ch. 18 (ca. 1290–93); SELDEN SOCIETY, FLETA VOL. III BOOK III AND BOOK IV (H.G. Richardson and G.O. Sayles, eds.); *see also* 1 SIR FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 210 (2d ed. 1909).

11. 1 BRITTON, bk. 2, ch. 23, pp. 359, 362 (Francis Morgan Nichols ed., 1594).

12. Edwards v. Halinder, 2 Leon. 93, 74 Eng. Rep. 385 (1594).

13. 9 Co. 57, 59 (1611).

14. 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND

Even more importantly, however, those *Commentaries* contain a major companion concept, by which Blackstone incorporates this maxim of private conduct into the regulatory powers of the kingdom:

> The last species of offences which especially affect the commonwealth are those against the public *police* or *economy*. By the public police and economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations.[15]

Thus Blackstone regarded the rule that one should not use one's property in any way that injures another as a rule properly enforced by the state and derived from the state's police powers. This, of course, goes beyond merely permitting private citizens access to the judiciary to compel one another's proper behavior; it interjects the power of the state directly into the citizens' affairs, whether invited or not.

In medieval times, as English monarchs established hegemony over factions of the aristocracy by declaring and maintaining the "king's peace," regulating private affairs of private citizens had an important public purpose. Therefore, Glanville could write in 1187 that violations of the rule against using one's property to the injury of another could be redressed by applying for a king's writ.[16] The use of such state police power in England during the ensuing centuries varied with the relative strength of the monarchy or national government, and by the 18th century it had not attracted much attention from English judges or lawyers.[17]

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IN FOUR BOOKS 306, 307; 3 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 217–19 (William Draper Lewis ed., 1900).

15. 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 162 (William Draper Lewis ed., 1900).

16. *Id.*

17. *See* Elmer E. Smead, *Sic Utere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power,* 21 CORNELL L.Q. 276 (1936).

### *C. The Function of Police Power in Colonial America*

The earliest settlers in colonial America were confronted with a seemingly limitless supply of what for their ancestors had been a precious and narrowly distributed commodity: land. All of the early English colonial charters, both proprietary and crown, approached the issues of property rights from a traditional feudal perspective, establishing the colonial magnates as lords and the common people with tenurial holdings only. Not until the colonists boldly broke away from this venerable system to begin giving persons of every class the opportunity to acquire something like allodial rights in land did the colonies really begin to prosper.

Despite the ostensibly complete freedom of frontier conditions, however, it was clear from the beginning that some public regulation of land rights would be necessary. Even with an "unlimited" supply of land, a colonial government still would need to know who occupied or claimed rights to which parcels. And the more dense the population in the towns, the more urgent it became to establish rules that would help neighbors avoid or resolve conflicting uses of their lands. The common law mechanisms for doing just that were already in place, and as the colonies secured their establishment and matured, they turned more candidly to English common law principles for the broadly accepted values that invited the government to set limits on land-related activities of its citizens. This municipal power and responsibility to regulate land so that one occupant's use of land did not unduly inhibit another owner's use of land eventually came to be referred to as "police power."

### *D. Police Power in American Constitutional History*

The drafters of the U.S. Constitution seem to have had a police power concept firmly in mind during the creation and ratification of that document, but were not prompted to discuss it at length. Roger Sherman of Connecticut, in the convention debate of June 6, 1787, enumerated four categories of powers he thought ought to belong to the national government[18] and

18. Sherman's four categories were (1) defense against foreign danger, (2) defense against internal disputes and a resort to force, (3) treaties, and (4) regulating foreign commerce. 3 U.S. DEP'T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 70–71 (1900).

then declared that "[a]ll other matters civil and criminal would be much better in the hands of the States."[19]

On June 8, 1787, James Madison of Virginia spoke in favor of a power in the national government to "negative" legislative acts of the states which conflicted with the powers assigned to the national government.[20] Implicit in those comments is a very broad concept of state legislative power, confined only by the powers assigned to the national government.[21] Those debates concerned the provisions eventually included in the Tenth Amendment of the U.S. Constitution, reserving to the states or the people all powers not delegated to the national government or prohibited to the states.[22]

Further discussion of the Tenth Amendment concepts during the period of ratification, by means of The Federalist Papers, also shows that state police power concepts were familiar to and accepted by the drafters. In Federalist Paper No. 17, Hamilton refers to the "residuary authorities" left with the states for local purposes and denies that the national government would ever want to divest the states of those authorities.[23] In Federalist Paper No. 25, he gives specific examples of state police power used to maintain internal order.[24] A plenary statement of inherent governmental powers, in Federalist Paper No. 31, initially referring to the national government but then extended to state governments, is his most precise justification for police power:

> A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people. . . .

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19. *Id.* at 71.

20. *Id.* at 88.

21. *See id.* at 88–89. The indexers treat this passage, and that passage previously described, as references to police power, although the term "police power" nowhere appears in the text of the debates. *Id.* at 868.

22. U.S. CONST. amend. X.

23. THE FEDERALIST NO. 17, at 97–102 (Alexander Hamilton) (Henry Cabot Lodge ed., NewYork, G.P. Putnam's Sons 1888).

24. THE FEDERALIST NO. 25, at 146–52 (Alexander Hamilton) (Henry Cabot Lodge ed., NewYork, G.P. Putnam's Sons 1888).

> The State governments, by their original constitutions, are invested with complete sovereignty.[25]

He illustrated that sovereignty in Federalist Paper No. 32 by admitting that states "should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants."[26] Indeed, "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States."[27] This rule, by which most state powers "remain with them in full vigor . . . is clearly admitted by the whole tenor of that instrument which contains the articles of the proposed Constitution."[28]

James Madison declared that, in ratifying the Constitution, each state "is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act."[29] The jurisdiction of the national government extends "to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."[30] Finally, in Federalist Paper No. 45, Madison makes his most pointed reference to the police power of a state:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[31]

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25. THE FEDERALIST NO. 31, at 182–84 (Alexander Hamilton) (Henry Cabot Lodge ed., NewYork, G.P. Putnam's Sons 1888).

26. *Id.* at 185.

27. *Id.* at 186. The "act" referred to was the adoption of the national constitution.

28. THE FEDERALIST NO. 33, at 193 (Alexander Hamilton) (Henry Cabot Lodge ed., New York, G.P. Putnam's Sons 1888). In The Federalist No. 33 (Alexander Hamilton), Hamilton referred to the "residuary authorities of the smaller societies [states]." *Id.*

29. THE FEDERALIST NO. 39, at 236 (James Madison) (Henry Cabot Lodge ed., New York, G.P. Putnam's Sons 1888).

30. *Id.* at 238.

31. THE FEDERALIST NO. 45, at 290 (James Madison) (Henry Cabot Lodge ed., New York, G.P. Putnam's Sons 1888).

### *E. Police Power in American Court Cases Before 1868*

The scant attention paid police power by the Founders was continued into the early 19th century by American lawyers, judges and legal writers. The U.S. Supreme Court rarely heard a case involving police power issues.

In the Supreme Court opinion written by John Marshall in the 1827 case of *Brown v. Maryland*,[32] the term "police power" is first used by that Court to designate the residual sovereign power of the American states.[33] In this case, a state act imposing licensing requirements on importers was struck down as contrary to the constitutional commands that (1) states should not burden the import and export trade without consent of Congress and (2) Congress has the power to regulate foreign commerce. Marshall compared the prohibited legislation to other acts within the power of the states, such as removal of imported gunpowder for safety reasons, and called such power "police power." The police power, he declared, "unquestionably remains, and ought to remain, with the States."[34]

The concept of state police power, however, had by then clearly been recognized in earlier Supreme Court cases, even though not called police power. In *Trustees of Dartmouth College v. Woodward*,[35] Marshall had stated a view favorable to such implied state powers, holding void a state law materially altering the college's pre-Revolutionary War British charter. Declining to give unlimited scope to the constitutional prohibition of state laws impairing the obligation of contracts, Marshall asserted that "the framers of the constitution did not intend to resrain [sic] the States in the regulation of their civil institutions, adopted for internal government . . . ."[36] And in *Gibbons v. Ogden*,[37] Marshall wrote against New York state laws giving exclusive river navigation rights to Robert Livingston and Robert Fulton, but he acknowledged the "power

32. 25 U.S. (12 Wheat.) 419 (1827).

33. *Id.* Ruth L. Roettinger credits Marshall with this first use of the term. *See* RUTH LOCKE ROETTINGER, THE SUPREME COURT AND STATE POLICE POWER 10 (1957).

34. *Brown*, 25 U.S. (12 Wheat.) at 443.

35. 17 U.S. (4 Wheat.) 518 (1819).

36. *Woodward*, 17 U.S. (4 Wheat.) at 629. However, Marshall declared "contract," in its limited sense, would at least constitutionally "restrain the legislature in future from violating the right to property." *Id.* at 628.

37. 22 U.S. (9 Wheat.) 1 (1824).

of a State to regulate its police, its domestic trade, and to govern its own citizens."[38]

The words of Marshall in *Brown v. Maryland* were quoted with approval by Justice Barbour in the U.S. Supreme Court's next prominent police power case, *City of New York v. Miln*,[39] wherein the Court upheld a state law regulating passenger shipping in the port of New York.[40] Justice Thompson declared in a concurring opinion, "Can any thing fall more directly within the police power and internal regulation of a state . . . ?"[41] In another case later in that same term,[42] Chief Justice Taney defended states' powers "over their own internal police and improvement, which is so necessary to their well being and prosperity."[43]

Even when the Court upheld federal action as superseding state authority, as in *Prigg v. Commonwealth*,[44] it was careful to acknowledge the police power of the states:

> [W]e are by no means to 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. That police power extends over all subjects within the terri-

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38. 22 U.S. at 208. Not treated here is the controversy over whether the state and national powers defined in the Constitution were considered to be mutually exclusive, rather than being concurrent in some areas until federal preemption occurred. *Gibbons* advances the mutually exclusive powers theory, which—although concentrating on the exclusive national powers—actually is a states' rights doctrine, recognizing large areas of historical state governance from which the national government is excluded. Marshall's opinion, however, also concedes that, while the respective powers might be exclusive, the "necessary and proper" actions to execute those powers might be concurrent, and the federal actions would prevail over any conflicting "necessary and proper" state actions. Later Supreme Court cases, notably *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837) and *The License Cases*, 46 U.S. 513 (5 How. 504) (1846), instead emphasized that these state powers were sovereign and exclusive, meaning that the states' "necessary and proper" actions to carry out those powers were also exclusive of any supposedly concurrent federal powers and actions. Both of those cases are also significant in showing the developing state police power in general and are noted here from that perspective. This article thus is not intended to discuss state police power as it may come in conflict with federal powers. *See* WILLIAM W. CROSSKEY AND WILLIAM JEFFREY, JR., POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 695–96 (1953).

39. 36 U.S. (11 Pet.) 102 (1837).

40. *Id.* at 141–42.

41. *Id.* at 148.

42. Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).

43. *Charles River Bridge*, 36 U.S. (11 Pet.) at 552.

44. 41 U.S. (16 Pet.) 539 (1842).

> torial limits of the states; and has never been conceded to the United States.... [T]he operations of this police power... [are] designed essentially... for the protection, safety, and peace of the state....[45]

The occurrence of so many police power cases in controversies over respective powers of the national and state governments led to the phrase "police power" being commonly equated with powers of sovereignty, especially with respect to the states.[46]

Meanwhile, state courts gave occasional signals that they, too, recognized a police power concept. An 1815 Massachusetts case discussed the power of a state to compel militia service by its citizens, a power which could even repeal exemptions from such service granted earlier by the state.[47] The New York Supreme Court, in 1826, upheld municipal legislative power prohibiting use of land as a cemetery. As noted by the court, clothed by the state with legislative powers, the "local Legislature... are particularly charged with the care of the public morals, and the public health within their own jurisdiction."[48] The same court the next year, in *Vanderbilt v. Adams,* upheld as a valid police regulation a statute regulating harbor vessels, even at private wharves.[49] Justice Woodworth delivered a lengthy but perceptive description of police power,[50] noting par-

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45. *Id.* at 625.

46. ROETTINGER, *supra* note 33, at 12, commenting on and citing the Passenger Cases, 48 U.S. (7 How.) 283, (1849), remarked: "What is the supreme police power of the state? It is one of the means used by sovereignty to accomplish that great object, the good of the state.... Police powers, then, and sovereign powers are the same.")

47. Commonwealth v. Bird, 12 Mass. 443, 446–47 (1815).

48. Corp. of Brick Presbyterian Church v. City of New York, 5 Cow. 538, 540 (1826).

49. 7 Cow. 349, 351–53 (1827).

50. Justice Woodworth, in *Vanderbilt,* gave the following comments on police power:

> The right assumed under the law would not be upheld, if exerted beyond what may be considered a necessary police regulation. The line between what would be a clear invasion of right on the one hand, and regulations not lessening the value of the right, and calculated for the benefit of all, must be distinctly marked. On the principle contended for here, I do not perceive on what ground various regulations for the better government of the police of a crowded population can be supported. And yet, to a certain extent, it has never been doubted that the Legislature were competent to direct. Police regulations are legal and binding, because for the general

ticularly that such rights had "been assumed and acted upon without a question, ever since we became an independent government."[51] He also referred, without citations, to "numerous cases in cities, much stronger than the present, where this power has been deemed constitutional, and never drawn in question . . . ."[52] *Vanderbilt* was cited later that year in support of another exercise of police power in *Coates v. City of New York*.[53]

Undoubtedly numerous other state and local courts of the early 19th century reached decisions and issued opinions which reflected in one way or another a recognition of state police power. The citation of only a few additional examples will suffice to make the point. In *Commonwealth v. Worcester*,[54] the

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benefit, and do not proceed to the length of impairing any right in the proper sense of that term.

The sovereign power in a community, therefore, may and ought to prescribe the manner of exercising individual rights over property. It is for the better protection and enjoyment of that absolute dominion which the individual claims. The powers rest on the implied right and duty of the supreme power to protect all by statutory regulations, so that, on the whole, the benefit of all is promoted. Every public regulation in a city may and does, in some sense, limit and restrict the absolute right that existed previously. But this is not considered as an injury. So far from it, the individual, as well as others, is supposed to be benefited.

It may then be said that such a power is incident to every well regulated society, and without which it could not well exist. Is there a doubt that the Legislature have a right to authorize a road through the wild land of A without his consent? This right has been assumed and acted upon without a question, ever since we became an independent government. No compensation is allowed, in such cases, to the owner. Can he defeat the operation of the law, by saying that private right is invaded? The doctrine has not yet been advanced. Such a law, I apprehend, is constitutional and obligatory; because, in many cases, necessary for the public benefit, and not deemed injurious to the individual whose land is taken. . . . The numerous cases in cities . . . where this power has been deemed constitutional, and never drawn in question, goes strongly to prove, that regulations like those in question, do not fall within the principle contended for by the plaintiff in error. . . . Can the owner, with impunity, violate such a law, because he has the absolute right of property? It has not been heretofore so considered.

*Id.* at 349, 351–53.

51. *Id.* at 352.

52. *Id.*

53. 7 Cow. 585, 604 (1827).

54. 20 Mass. (3 Pick.) 462 (1826).

Massachusetts State Court upheld a municipal ordinance regulating the driving of wagons:

> Surely the power of the legislature to pass a local act cannot be questioned. It is not only the right, but the duty of that branch of the government, so to vary the provisions of law, as to meet, so far as is practicable, the peculiar exigencies of every portion of the community.[55]

Two years later, the same court upheld another local ordinance, noting without comment that the trial "judge instructed the jury, that the subject of the regulation was one on which it was proper for the city to legislate, it having relation to the public convenience and the health of the inhabitants . . . ."[56] The court declared, "The great object of the city is to preserve the health of the inhabitants."[57] The court later sustained an ordinance regulating the selling of produce.[58] In *Goddard's Case*,[59] an ordinance requiring property owners to remove snow from city streets where they lived was upheld as a valid "police regulation."[60]

In New York, the Supreme Court upheld a village ordinance regulating the selling of meat "as within the power conferred by the charter; it was reasonable in itself, and promotive of the public good."[61] That Court later sustained a prohibition of bowling alleys, acknowledging that the Constitution gives "all the accustomed and acknowledged powers of legislation" to a state, including "the power to create municipal corporations with the right to pass by-laws for local objects."[62]

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55. *Id.* at 473.

56. Vandine's Case, 23 Mass. (6 Pick.) 187 (1828).

57. *Id.* at 192. *See also* Bliss v. Kraus, 16 Ohio St. 54 (Ohio 1864) (dealing with municipal powers to adopt sanitary regulations for the health of its inhabitants).

58. Nightingale's Case, 28 Mass. (11 Pick.) 168 (1831). The court's syllabus of the case referred to the regulation as a "salutary police regulation." *Id.*

59. 33 Mass. (16 Pick.) 504 (1835).

60. *Id.* at 508, 509, *See also* City of Lowell v. Hadley, 49 Mass. (8 Met.) 180 (1844).

61. Village of Buffalo v. Webster, 10 Wend. 99, 101 (1833).

62. Tanner v. Village of Albion, 5 Hill 121, 131 (N.Y. 1843); Cole v. Planning & Zoning Comm'n of the Town of Cornwall, 671 A.2d 844 (Conn. App. 1996) (sawmill regulations); Natural Aggregates Corp. v. Brighton Township, 539 N.W.2d 761 (Mich.App. 1995) (sand and gravel removal permit conditioned on filing of reclamation plan and surety bond). However, despite such broad characterizations of police power, a court is still able to find that a municipality has acted outside its police power. Cellular Tel. Co., v. Village of Tarrytown, 624

Another important judicial formulation appeared in mid-century with these words from Massachusett's Chief Justice Lemuel Shaw:

> All property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. . . . The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same"[63]

The cases described in the preceding paragraphs demonstrate that through the middle decades of the 19th century, judicial recognition of police power, in both federal and state supreme courts, became more explicit. For instance, Vermont's Chief Justice Redfield, in an 1854 opinion, depicted the maxim requiring use of one's property so as not to injure the property of another as the essence of the "police power of the state," which "extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all prop-

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N.Y.S.2d 170 (1995) (holding invalid a local law imposing moratorium on installation of cellular telephone antenna as an exercise of the village's police power); Erb v. Maryland Dept. of the Env't, 676 A.2d 1017 (Md.App. 1996) (finding that sewage disposal regulation, proscribing a nuisance from coming into existence on landowner's property, is one facet of the State's power to regulate in order to protect the public health and safety); Aztec Minerals Corp. v. Romer, 940 P.2d 1025 (Colo.App. 1996) (holding that actions of Colorado Department of Public Health and Environment (CDPHE) and Colorado Department of Natural Resources (DNR) in entering into response action agreements with Environmental Protection Agency (EPA) to abate nuisance by remedying environmental contamination at former mining site and by providing technical and financial assistance to EPA did not rise to level of taking; property owners had no property right to permit continued degradation of environment surrounding site and thus creating hazard to public health); Beck Dev. Co., Inc. v. S. Pac. Transp. Co., 52 Cal.Reptr. 2d 518 (1996) (explaining that the concept of a "nuisance per se" arises when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly declares a particular object or substance, activity, or circumstance, to be a nuisance); Rhod-A-Zalea & 35th, Inc. v. Snohomish County, 959 P.2d 1024 (Wash. 1998) (requiring that owner be subject to a grading permit requirement imposed on peat miners).

63. Commonwealth v. Alger, 7 Cushing 53, 85 (Mass. 1851).

erty within the state."[64] Therefore, "it must of course, be within the range of legislative action to define the mode and manner in which every one may so use his own [property] as not to injure others."[65]

The great American law commentator, James Kent, first wrote during this same era, and in his first edition of commentaries in 1826 declared that a state legislature, in order to prevent injury to the public, may prohibit nuisances and trades harmful to life, health, and peace.[66] However, it was not until the commentary's twelfth edition in 1873, edited by Oliver Wendell Holmes, that this work contained explicit recognition of the state's police power and—so far as the power touches real property—its basis in the maxim or principle, discussed earlier, that one should not use one's property so as to injure another:

> The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens. . . . [Such regulation is justified] on the general and rational principle, that every person ought so to use his property as not to injure his neighbors, and that private in-

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64. Thorpe v. Rutland & Burlington R.R., 27 Vt. 140, 148 (1854).

65. *Id.* *See also* Barnhill v. City of North Myrtle Beach, 511 S.E.2d 361 (S.C. 1999) (ordinance prohibiting personal watercraft from launching off a public beach was within the city's police power); Phillips v. Town of Oak Grove, 968 S.W.2d 600 (Ark. 1998) (ordinance prohibiting emu farmers from keeping fowl within city limits for commercial use was upheld); Curtis v. Town of S. Thomaston, 708 A.2d 657 (Me. 1998) (town fire ordinance which required owners to build fire pond and grant town easement to use the pond was upheld as proper use of police power). *See,* Smith v. City of Arkadelphia, 984 S.W.2d 392 (Ark. 1999) (city may regulate standards of construction following a tornado); Dev. Servs. of Am., Inc. v. City of Seattle, 979 P.2d 387 (Wash. 1999) (city's denial of a permit to construct a Helistop is a proper use of police power); Rodeo Sanitary Dist. v. Bd. of Supervisors, 84 Cal.Reptr.2d 601 (1999) (holding that county has no general police power to regulate a sanitary district; that power is with the state); Commonwealth v. Siemel, 686 A.2d 899 (Pa. Commw. Ct. 1996) (holding that an ordinance prohibiting "excessive vegetation," which was defined as "any grass, weeds, bushes, brush, saplings or similar vegetation exceeding six inches in height except such as are planted for useful or ornamental purposes," was a valid exercise of police power); Baker v. City of Boston, 29 Mass. 184 (Mass. 1831) (holding that police regulations to direct use of realty to prevent public harm not void).

66. 2 James Kent, *Commentaries on American Law*, pt. V, ch. XXXIV, 274 (1826); *See also* Benjamin F. Wright, *The Contract Clause of the Constitution* 198 (1938); Miller v. Craig, 11 N.J. Eq. 175 (N.J. Ch. 1856) (dealing with the powers of a legislature to condemn a mill dam detrimental to the public health); Paul v. Carver, 24 Pa. 207 (1855) (dealing with legislative power to vacate streets and highways).

> terests must be made subservient to the general interests of the community.[67]

By this time, Cooley's definitive statement concerning state police power, noted earlier, had been issued, and this subject then entered the mainstream of American jurisprudence.

## II. THE EARLY UNDERSTANDING ON THE PROPER PURPOSES FOR APPLICATION OF POLICE POWER

As mentioned above, police power concepts drew the attention of early American legal commentators. Each adopted the view that police power regulations' main purpose was to restrain harmful activities in the nature of nuisances, private or public. Kent's 1826 commentary, referred to in the preceding section, declared that a state legislature, in order to prevent injury to the public, may prohibit nuisances and trades harmful to life, health, and peace.[68] The twelfth edition, edited by Oliver Wendell Holmes, reaffirmed the foundation of police power in the rule that one should not use one's property so as to injure another.[69]

In Cooley's definitive statement concerning state police power, noted earlier, he asserted that the purpose of the police power is:

> to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.[70]

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67. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 340 (O. W. Holmes, Jr. ed., Boston, Little, Brown, and Company 1873). *See* K. Hope, Inc. v. Onslow County, 911 F. Supp. 948 (E.D.N.C. 1995) (zoning regulation of adult and sexually oriented businesses); Threatt v. Fulton County, 467 S.E.2d 546 (Ga. 1996) (regulation requiring that vegetation be left undisturbed for 50 feet from the banks of a river); Township of Concord v. Concord Ranch, Inc., 664 A.2d 640 (Pa. Commw. 1995) (prohibition against using property as "gentleman's club"). Graham v. Township of Kochville, 599 N.W.2d 793 (Mich.App. 1999) (regulatory purpose of a connection fee).

68. *See supra* note 66

69. *See supra* note 67.

70. COOLEY, *supra* note 4, at 572. *See supra* n. 5.

This same sentiment about the limited purpose of police power regulations was evident as the subject of police power entered the mainstream of American jurisprudence. Beginning in the late 19th century, police power became the focus of encyclopedic legal reference works devoted solely to this single subject. In 1886 Christopher Tiedeman published *A Treatise on the Limitations of Police Power in the United States*, a massive work in which he aligned himself with Cooley in considering police power limited to preventing harm, rather than including the broader power to legislate affirmatively in promoting the general welfare.[71] Ernst Freund's 1904 treatise, *The Police Power: Public Policy and Constitutional Rights,* explored every known application and incident of police power and its consequences in both federal and state levels of government. The work is principally descriptive. By drawing on masses of cases, the author established two main characteristics of the police power: "it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion."[72]

The view that the police power is limited to preventing harm, espoused by Cooley and Tiedeman, is consistent with Blackstone's view that the power originated in the law of necessity. Massachusetts Chief Justice Shaw had declared in an 1851 case that private property rights were subject to the implied restraint that use of those rights not be injurious to the rights of the community.[73] While the modern U.S. Supreme Court has not been clear or consistent about what it believes is the operating basis of the police power,[74] this approach of restraint was evident in Justice Scalia's opinion in the important 1992 case of *Lucas v. South Carolina Coastal Council,*[75] especially when limitations on private property rights, for the public good, were already a part of the state's basic property law.[76]

Numerous modern scholars and writers, espousing a wide variety of competing views, have also acknowledged in the specific context of takings, that early applications of police power regulations were usually for the limited purposes of restraining

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71. *See* ROETTINGER, *supra* note 24, at 15.

72. ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 3 (1904).

73. Commonwealth v. Alger, 7 Cushing 53, 84–85 (Mass. 1851).

74. JAN G. LAITOS, THE LAW OF PROPERTY RIGHTS PROTECTION 1–8 (1999).

75. 505 U.S. 1003 (1992).

76. *Id.* at 1027–28 .

nuisance activities.[77] This point seems to be conceded even by those writers who insist that the police power in modern times

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77. *See* Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970) (acknowledging that police power regulation of land has now expanded beyond mere suppression of nuisances); Ellen M. Randle, *The National Reserve System and Transferable Development Rights: Is the New Jersey Pinelands Plan an Unconstitutional Taking?* 10 B.C. ENVTL. AFF. L. REV. 183, 208–28 (1982) (averring that police power was traditionally applied to avoid harm caused by private use of land, and therefore no compensation was necessary. The author acknowledges that modern trends have expanded the scope of noncompensated police power regulations); Russell P. Schropp, *The Reasonableness of Aesthetic Zoning in Florida: A Look Beyond the Police Power*, 10 FLA. ST. U. L. REV. 441 (1982) (pointing out the expansion of police power applications from the traditional purpose of regulating nuisance, usually in furtherance of the general welfare); David B. Fawcett, III, *Eminent Domain, the Police Power, and the Fifth Amendment: Defining the Domain of the Takings Analysis*, 47 U. PITT. L. REV. 491, 492–93 (1986) (describing a historically clear distinction existed between eminent domain and police power, in which the purposes of police power were to restrain harmful used of land); John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 30–39 (1986) (documenting expansion of police power from its traditional application of restraining harm, an expansion especially pronounced since zoning was approved); Thomas A. Hippler, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" from* Mugler *to* Keystone Bituminous Coal, 14 B.C. ENVTL. AFF. L. REV. 653 (1987) (stating that the police power originally was to be used to abate common law nuisances, but–as police power applications were broadened–the courts subjected those applications to due process challenges. Accordingly, regulations can be found valid if they provide some public benefit, and the concept of public benefit is no longer restricted to avoidance of harm); Herman Schwartz, *Property Rights and the Constitution: Will the Ugly Duckling Become a Swan?* 37 AM. U. L. REV. 9 (1987) (believing that this country was founded on ideals that restrict property uses and encourage government regulation; the modern increase of police power property regulations–from restraining harm to pursuing societal welfare goals—to meet societal needs is consistent with those ideals. Courts should be reluctant to overturn legislation that determines the level of protection for property rights); Charles H. Clarke, *Private Property, the Takings Clause and the Pursuit of Market Gain*, 25 AKRON L. REV. 1 (1991) (acknowledging that police power has expanded from its traditional base of restraining harm); Charles H. Clarke, *Regulatory Takings, Accommodation and Extreme Choices*, 23 CAP. U. L. REV. 667 (1994) (acknowledging the traditional role of police power regulation to restrain harm, but believing the state should be able to regulate in promotion of important state interests, but still be sensitive to landowners who had no expectation of regulation); Bernard Schwartz, *Takings Clause–"Poor Relation" No More?* 47 OKLA. L. REV. 417, 419–21 (1994) (traditionally, the police power was used to abate a nuisance); Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 FORDHAM ENVTL. L.J. 433, 441–53 (1995) (stating that the traditional objective of police power to restrain harm to rights of others is grounded in the principle that one should not use one's property in a way that harms another's use of property); Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1044–46 (1997) (arguing that police power needs to be limited to its original purpose of restraining harm in order to

should be used for more expansive purposes. Several law students who have written excellent articles on this topic also agree on this point,[78] as do scholars whose interest is broader than the takings clause.[79]

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protect property); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far"*, 49 AM. U. L. REV. 181 (1999) (showing early authority for compensating regulatory takings—exercises of police power that went beyond restraining harm).

78. *See e.g.*, Note, *State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation*, 58 VA. L. REV. 876, 891–94, 906 (1972) (arguing for no compensation for wetland regulations designed to prohibit abatable common law nuisances, because that purpose was traditionally the basis for noncompensated police power regulations); Recent Case, *Environmental Law–Zoning–Ordinance Prohibiting Filling of Wetlands Adjacent to Navigable Waters Without Permit Is Constitutional Exercise of Police Power Not Requiring Payment of Compensation*—Just v. Marinette County, *56 Wis.2d 7, 201 N.W.2d 761 (1972)*, 86 HARV. L. REV. 1582, 1584–86 (1973) (viewing a wetland ordinance that merely protects society from harm that would be caused by destruction of wetlands as a traditional exercise of police power not requiring compensation); Lawrence W. Andrea, Note, *Trespass at High Tide: The Supreme Court Gives Heightened Scrutiny to a State Imposed Easement Requirement*: Nollan v. California Coastal Commission, 54 BROOK. L. REV. 991, 1017–24 (1988) (noting that the criteria for a valid exercise of police regulatory power are now the finding of a reasonable state interest and a regulation that substantially advances that interest); Richard J. Gallogly, Note, *Opening the Door for Boston's Poor: Will "Linkage" Survive Judicial Review?* 14 B.C. ENVTL. AFF. L. REV. 447 (1987) (contrasting the historical use of police power to prevent harm with modern applications to provide public benefits. The author cites the modern trend of extending deference to legislative determinations of proper police power use, concluding that compensation is usually required); Marc David Bishop, Note, *Property Law*–State v. Jones*: Aesthetic Regulation–From Junkyards to Residences?* 61 N.C. L. REV. 942 (1983) (perceiving aesthetic regulation as an expansion of police power from its traditional purpose of regulation nuisance).

79. J. Michael Veron, *The Contracts Clause and the Court: A View of Precedent and Practice in Constitutional Adjudication*, 54 TUL. L. REV. 117 (1979) (documenting the extension of police power from preserving health, safety and morals to promoting economic needs in the context of what the author believes is a progressively weakened contracts clause of the U.S. Constitution); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 890–91 (1987) (noting that the takings clause had been significantly narrowed during the preceding 50 years, and that this has engendered a generous approach to the police power, expanding its applications from its traditional base of restraining harm); Roger Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*," 68 NOTRE DAME L. REV. 507, 518, 540–44 (1993) (asserting that the nation's move from natural law to utilitarianism led to government being seen as a force for positive social changes, with expanded police power as one of its tools to that end); Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL RTS J. 1 (1997) (noting that, in general, courts historically sustained police power measures intended to promote the public health, safety, morals, and welfare); Donald J. Kochan, *'Public Use' and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L.& PO. 49 (1998) (criticizing takings that are

This discussion of the proper purpose for police power land use regulations is inextricably bound up with the issue of whether any compensation should ever be paid to landowners for the adverse impacts of those regulations. And here the strict logic of the old rules is enlightening: if a landowner is prohibited by regulation from using the land in a harmful way–that is, in a way that would already by prohibited or restrained by nuisance law–then no compensation should be owed; no disadvantage through loss of property rights has been suffered. Moreover, the same underlying philosophy authorizing police power regulations–that one should not use one's property in a way adverse to another's use of property–forms the philosophical foundation of nuisance law.[80] Therefore, it is enlightening to review the early American jurisprudence on rules for compensation, both for eminent domain takings and police power regulatory "takings," to perceive if they have been consistent with this logic.

## III. EARLY AMERICAN CASES ON POLICE POWER AND THE REQUIREMENT OF COMPENSATION

With the adoption of the U.S. Constitution's Fifth Amendment requirement that takings of private property for public purposes be fairly compensated, it has been natural for some to assume that (1) a requirement of compensation was not widespread until adoption of the Fifth Amendment, (2) that "taking" referred to only direct and total appropriation of land, and (3) that anything less than such a full taking was not entitled to compensation. In fact, none of these assumptions is correct, in light of decisions in early American state courts. Early American jurisprudence on these subjects in the late eighteenth and early nineteenth centuries was not monolithic, that is, courts did not manifest a completely consistent position on any one legal doctrine. Thus it is possible to present some evidence of legislation and case decisions to sustain a wide variety of often inconsistent viewpoints. And indeed, this is a major difficulty facing most scholars' attempts to identify original intent behind

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not limited to the original purpose of restraining harm, but that are approved if they merely benefit overall social utility and even if they are not actually necessary).

80. *See* 8 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 67.03 (David A. Thomas ed., 1994).

constitutional provisions. Under these circumstances, the best approach is to gather the evidence and acknowledge the mixed results, rather than attempting to pronounce a particular approach as prevailing.

Modern scholars have explored the history of the compensation requirement, even if they do not think the history should necessarily govern the present, and have reached a variety of conclusions, often in conflict with one another. Sometimes the research by these scholars has centered on constitutions and statutes, while paying less attention to cases. Clearly, no one source gives a complete picture. The cases noted and summarized in this section have generally been overlooked by scholars, even though, both directly and indirectly, they reveal much about actual early compensation practices and help dispel several misconceptions about the early history of regulatory takings.

This section presents from most of the original states summaries of early cases revealing something of the judicial attitudes toward compensating for either taking or regulating property. These cases reveal that (1) philosophical acceptance of the notion of compensation for taking property was already widespread in the era surrounding the time the Fifth Amendment was adopted and implemented; and (2) at the same time the idea that compensation would be owed for deprivation of property rights short of complete appropriation was also widely accepted, even if not often tested. The author's evaluation of the insight on compensation practices derived from each case is shown in italics.

### *A. Delaware*

*Barney's Lessee v. Townsend*:[81] In an ejectment action, the court's instruction to the jury incorporated the declaration of plaintiff's counsel, "To divest property without compensation is contrary to the principles of the social compact."[82] *This court considered a requirement of compensation for property divestment to be a principal of natural law, and the practice of compensation thus predated the Fifth Amendment.*

81. 1 Del. Cas. 290, 310–15, 1801 Del. Lexis 1 (1801) (citation omitted).
82. *Id.* at 295 (citing 2 Dall. 310–315).

*Horsey v. Evans*:[83] This is a case challenging the procedure in an action for damages sustained by the plaintiff landowner from erection of a mill by the defendant. *The case reveals that a public law, enacted in exercise of police power and in furtherance of the public good and to reduce harmful effects on private land, required one private landowner to compensate another landowner for actions which adversely affected, but did not "take," the other owner's land. Stated another way, the compensation was considered appropriate even though the land was not physically appropriated, but was only "damaged" by diminution of some of the landowner's rights.*

*B. Maryland*

*Partridge v. Dorsey's Lessee*:[84] One Caleb Dorsey had in 1772 devised land to his son Samuel on condition that Samuel not be then (at the time of the devise) married or committed to marriage or thereafter married. Samuel was at the time married, and in 1773 he procured passage of legislation nullifying the condition on the devise. Years later, the brother of Samuel, who would have obtained the property if Samuel had been disqualified by marriage, and who had now attained the age of majority, brought action to have the legislation declared invalid and have the property declared to be his. The county court affirmed the validity of the legislation, and this judgment was upheld by Court of Appeals. One of the lawyers unsuccessfully argued that the act of the legislature was a nullity, using a rationale that revealed a common understanding regarding compensation for public acts which diminish property rights: "A legislative body has no more right to do a judicial act, than a court of justice has to do a legislative act; each are equally improper, each equally void. No legislature has a right to interfere with, change, alter or take away, private property, except where the public interest demands it, nor then without making a compensation to the person from whom it is taken."[85] The court eventually upheld the legislation because of the acquiescence of all interested parties at the time and thereafter.[86] *The lawyer's argument reveals an apparently commonly accepted*

83. 2 Del. Cas. 129, 1800 Del. Lexis 17 (1800).
84. 3 H. & J. 302, 1813 Md. Lexis 1 (Md. Ct. of Appeals 1813).
85. *Id.* at 312 (citing 1 Blk. Com. 139. P. 4).
86. 1813 Md. Lexis at 9.

*philosophy that any changing, altering or taking away of property in the public interest would require compensation to the owner of the property.*

*Levy Court of Baltimore County's Lessee v. Gwynn*:[87] In 1769, pursuant to legislation of 1768, agents of Baltimore County surveyed and condemned land for a county courthouse and jail. Apparently, the land, though condemned, was never paid for, no owner having been identified, and the improvements were built on different land. In 1813 the county brought action to eject private parties from the land that had been condemned but never used, offering some documentary evidence (most of the participants having since died) that a condemnation procedure had been followed, admittedly not in full, but at least in substantial compliance with the statutory requirements. The occupants, who were successors in interest to the private owners, challenged the alleged condemnation on the ground that it was not in strict compliance with the statutory requirements. The court affirmed the trial court judgment that the evidence must show strict compliance with the statute; otherwise, the attempted condemnation is ineffective to vest title in the public entity, and time will not necessarily cure the defects.[88] *This case shows unquestioning acceptance of the principle of compensation, and this acceptance relates back at least to the legislation of 1768.*

### *C. Massachusetts*

*Commonwealth v. The Blue Hill Turnpike Corporation*:[89] This case concerned damages sustained by a landowner over whose land a turnpike road had passed, for which damages compensation was ordered. *The case demonstrates compensation being given for damage to the land, as well as for land that was actually taken. This compensation was awarded even though at the time turnpikes were considered as conferring significant benefits on all nearby land.*

*Commonwealth v. Justices of the Court of Sessions for the County of Norfolk*:[90] This case also concerned estimating damages to land occasioned by the location of a highway. *The case*

87. 4 H. & J. 227 (Md. 1816)
88. 4 H. & J. at 232, 1816 Md. Lexis at 13.
89. 5 Mass. (1 Tyng) 240 (1809).
90. 5 Mass. (1 Tyng) 435 (1809).

*indicates a judicial commitment to requiring compensation for merely damaging land in ways that did not effect a complete appropriation of the land.*

*Cragie v. Mellen*:[91] This case, decided by the Supreme Judicial Court of Massachusetts in 1809, refers to locating a town way, citing the tenth article in the declaration of rights requiring reasonable compensation for the property of any individual appropriated to the public uses.[92] *This case demonstrates a firm commitment to the principle of compensation.*

*Baxter v. Taber*:[93] This case, decided in 1808 by the Supreme Judicial Court of Massachusetts, refers to the unconstitutionality of "an appropriation of private property to public uses without compensation to the proprietors." *Thus the requirement of compensation is accepted without question.*

*Commonwealth v. Carpenter*:[94] This case, decided by the Supreme Judicial Court of Massachusetts in 1807, concerned damages to private land reported by a committee for laying out a highway. *The decision reveals a legislative scheme for compensating landowners for damage that is less extensive than a complete appropriation of their land.*[95]

*Gedney v.The Inhabitants of Tewksbury*:[96] This case also refers to an award of damages by a committee for locating a highway. *This decision, as the decision reported immediately above, also reveals legislative provision to compensate for damage to land that is less than a complete appropriation of the land.*[97]

*Vandusen v. Comstock*:[98] in a case decided by the Supreme Judicial Court of Massachusetts in 1807, a landowner whose land was damaged by a downstream mill-dam brought action to impanel a jury to determine yearly damages. The jury determined to approve no relief and further decided that the land could, as a result of operating the mill-dam, be overflowed from the first of November until the twentieth of April for public convenience, and without payment of damages. The jury verdict of no damages was rejected by the court, because the mill-

91. 6 Mass. (1 Tyng) 7 (1809).
92. *Id.* at 8.
93. 4 Mass. (1 Tyng) 361, 365 (1808).
94. 3 Mass. (1 Tyng) 268 (1807).
95. *Id.* at 270.
96. 3 Mass. (1 Tyng) 307 (1807).
97. *Id.* at 310.
98. 3 Mass. (1 Tyng) 184 (1807).

dam owner had not effectively pleaded in response to the complaint.[99] *This case reveals a legislative scheme of compensating adversely affected landowners for improvements installed on other land, the improvements being important to the public. The damages to land for which compensation is authorized are less extensive than a complete appropriation of the land.*

*Commonwealth v. Peters*:[100] This case, decided in 1806 by the Supreme Judicial Court of Massachusetts, held that only money is a sufficient award in compensatory damages for laying out a highway over private land.[101] *This case simply reveals a firm jurisprudential commitment to the principle of compensation for taking of land.*

*Wales v. Stetson*:[102] This case, decided in 1806 by the Supreme Judicial Court of Massachusetts, denied a turnpike the right to place a gate on an existing highway, saying "There is an implied reservation in every legislative grant, that the property or right granted may be taken for the public use, when public necessity or utility requires it, paying therefor a reasonable compensation." *This statement significantly refers to compensation not only for property but also for rights that are taken or diminished.*

*Spring v. Lowell*:[103] This case, decided by the Supreme Judicial Court of Massachusetts in 1805, was also concerned with paying annual damages to those whose lands were overflowed by a mill-dam. *Thus the case shows that compensation would be given for even temporary damage to land, and not only for physical appropriations.*

*Commonwealth v. City of Roxbury*:[104] The Supreme Judicial Court of Massachusetts issued a somewhat lengthy opinion in 1857 discussing ownership issues relating to shorelands above the high and below the low water marks. The court stated, "[The legislature] may authorize a mill corporation to exclude water from flats to maintain a tide mill, making reasonable compensation . . . . Such exclusion of the tide water does not affect the title to lands in the basin." *This statement illustrates the principle that compensation is considered appropriate for*

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99. *Id.* at 187.
100. 3 Mass. (1 Tyng) 229 (1807).
101. *Id.* at 128.
102. 2 Mass. (1 Tyng) 143, 145 (1806) (citation omitted).
103. 1 Mass. (1 Tyng) 422 (1805).
104. 75 Mass. (1 Tyng) 451, 519–20 (1857) (citation omitted).

*causing adverse impacts on land, even when the impacts are something less than an appropriation of the land.*

*D. New Jersey*

*Patterson & Hamburgh Turnpike Co. v. Van Orden*:[105] In this case, decided by the Supreme Court of Judicature of New Jersey in 1809, a landowner complained unsuccessfully of irregularity in the proceedings by which a jury assessed damages done to several landholders when a turnpike road was run through their lands. The procedure for paying damages was set forth in the turnpike act.[106] *The legislation shows a traditional commitment to paying compensation for damage done to land, even for damage amounting to less than full appropriation of the land.*

*E. New York*

*Cortelyou v. Van Brundt*:[107] This case, decided by the Supreme Court of New York in 1807, involved a prescriptive fishing right. One attorney mentioned in his argument that "the 'Act to regulate highways in the counties of Suffolk, Queens, Kings and Richmond,' directs compensation to be made for highways," because the land taken for highways had become vested in the people of the state as public property.[108] *This statement shows a tradition of paying compensation for damage to land even if the damage amounts to less than full appropriation of the land.*

*Steele v. The President, Directors and Company of the Western Inland Lock Navigation*:[109] This case, decided by the Supreme Court of New York in 1807, involved the owner of land through which a canal was cut. The owner brought an action for damage caused by water overflowing the land, both from leaks occasioned by neglect and because the canal stopped up the natural drains and watercourses for carrying off the water. The court ruled that the company, proceeding under legislative authority, was not liable for damage for cutting the ca-

105. 3 N.J.L. 535 (1809).
106. *Id.* at 126.
107. 2 Johns. 357 (N.Y. Sup. Ct. 1807).
108. *Id.* at 359.
109. 2 Johns. 283 (N.Y. Sup. Ct. 1807).

nal, but only for damages resulting from neglect.[110] Apparently compensation was paid to the owner when the canal was first laid out. *This case illustrates that compensation could be paid for damages even when the land was not directly appropriated.*

*The People ex rel. Macey Et. Al. v. The Hillsdale and Chatham Turnpike Company*:[111] This case, also decided by the Supreme Court of New York in 1807, involved a turnpike company that made a road through privately owned land but did not give compensation as required by statute. The statute required compensation for damage, not simply for the land appropriated. *Again, the case illustrates that compensation could be paid for damages even when the land was not directly appropriated.*

*Clute v. Robison*:[112] This case, decided by the Supreme Court of New York in 1807, makes reference to a state statute giving lands to war veterans.[113] However, if such grants displace persons who had settled on the land under color of title, compensation to the settlers would be required. *This case simply illustrates compensation for taking.*

*In the Matter Between the Mayor, Aldermen and Commonalty of the City of New York, and the President and Directors of the Manhattan Company*:[114] This case concerned appraising and paying for damage caused to street pavement by the laying of pipes in Manhattan. *The case illustrates the state's requirement and practice of paying compensation for merely injuring the land, without requiring a full appropriation of land before compensating.*

### *F. North Carolina*

*Trustees of the University v. Foy*:[115] In this 1804 action in ejectment to recover from Foy lands that had been given to endow the university (the recovery prompted by repeal of those acts), lawyers in the previous term had argued against ejectment. This report is solely a summary of the arguments in behalf of the university. In the course of the argument the law-

110. *Id.* at 287.
111. 2 Johns. 190 (N.Y. Sup. Ct. 1807).
112. 2 Johns. 595 (N.Y. Sup. Ct. 1807).
113. *Id.* at 614.
114. 1 Cai. R. 507 (N.Y. Sup. Ct. 1804).
115. 3 N.C. (2 Hayw. 310) 275 (1804).

yer emphasized the principle of compensation for one who suffers loss of property to serve the public interest. He also avers that the right of the legislature to take private property is premised on a degree of necessity. He asserts further that the amount of compensation cannot be determined in the sole discretion of the legislature, but is subject to the judgment of a jury.

*Trustees of the University of North Carolina v. Foy and Bishop*:[116] This case is the decision rendered in the above case and decided by the North Carolina Supreme Court in 1805, in which the court held that the university could not by legislative act be deprived of property once vested. The report refers to a Magna Carta-like provision from the state bill of rights (prohibiting either an individual or a corporation from being deprived of property without due process of law) to restrain the state from depriving the university of its vested property right.[117] *These cases reveal a commitment to the principle of compensation for taking of land.*

### *G. Pennsylvania*

*Coolbaugh v. Commonwealth*:[118] This 1808 case, decided by the Supreme Court of Pennsylvania, involved a claimant who sought to maintain a suit against the commonwealth for lands taken. Estimates were available for the lots or parcels of the land in its natural state, independent of improvements, as shown by witnesses. The claim was compromised by a break in the chain of title. *The case reveals the state's acceptance of the principle of compensation for lands taken.*

*In re Hill*:[119] This opinion, issued by the Supreme Court of Pennsylvania, describes a procedure that assigns persons to view the route of a road and recommend the route that best serves the public good and does the least injury to private property. The court noted that it did not appear that the road passed through improved lands. The court inferred that, if the road did pass through improved lands, the prejudice to the lands of the individual owners may entitle the owners to com-

116. 5 N.C. (1 Mur.) 58 (1805).
117. *Id.* at 73.
118. 4 Yeates 493 (Pa. 1808).
119. 4 Yeates 372 (Pa. 1807).

pensation.[120] *The opinion in this case reveals a practice of compensating owners for damage to their lands or to the value of their lands, even if the lands are not actually appropriated for public use.*

*Cert. to remove all proceedings on a petition to open a street*:[121] The report of this proceeding mentions an act of 1804, amending an act of 1802, requiring that streets and alleys not be deemed highways until compensation is paid to the owner of the ground. Viewers were appointed, and they reported that the road prayed for was necessary for a public utility. One provision of the law also required the viewers to take into consideration the advantages arising from the road, but this section was deemed repealed. Also, the state constitution, Art. 9, Sec. 10, required compensation for property taken for public use. The court concluded that compensation must be paid, reversing the court below.[122] *This case report reveals both constitutional and statutory provisions requiring compensation for property taken for public use.*

*M'Clenachan v. Curwin*:[123] This decision, rendered in 1802 by the Supreme Court of Pennsylvania, discusses the original Pennsylvania scheme for compensating landowners affected by the laying out of roads. For the great provincial roads, formerly king's highways, the original land grants included a 6% supplement, because of which no additional compensation was required when land was taken for such a road. For cartways and private roads, from and after a law of 1700, compensation would be paid for improved land taken, but no compensation for taking woodland or unimproved land, "evidently contemplating their liability to contribute on account of the additional 6 per cent, granted them to supply the roads and highways."[124] And even if more than 6% would be taken, that would not be inequitable, considering "an equivalent likewise accruing to the purchaser [landholder], from the vicinity of such public roads to their buildings and improvements."[125] In this case, compensation was not granted for building the road on unimproved land. *In this and the Pennsylvania cases previously reported in this*

120. *Id.*
121. 4 Yeates 133 (Pa. 1804).
122. *Id.* at 134.
123. 3 Yeates 362 (Pa. 1802).
124. *Id.* at 372.
125. *Id.*

*section, the principle of compensation is well-accepted, but parties differ on the functional details.*

*Feree v. Meily*:[126] This case held that because of the property allowance for highways in original grants (6 percent supplement to the amount of the land granted), no compensation allowance for the soil of even improved lands would be authorized, it being concluded that the legislature at the time of the authorizing did not contemplate such compensation, nor had it been a factor in a subsequent century of practice and interpretation. *The case indicates the well-accepted practice of compensating owners for lands appropriated for public use.*

*Breckbill v. Turnpike Company*:[127] This 1799 decision by the Supreme Court of Pennsylvania held that no compensation was authorized for land taken for a turnpike road, such lands not taking up more than 6 percent of the tract of 216 acres. *Although compensation was not authorized in this case, the principle of compensation land is revealed to be well-accepted.*

*The Trustees of the University of Pennsylvania v. Commonwealth*:[128] This 1795 Supreme Court of Pennsylvania case found that the university was entitled to compensation for lands taken. "The good faith and honor of government can only be preserved by a virtuous fulfillment of this engagement."[129] *Again, acceptance of the principle of compensating for lands taken underlies this case.*

*The President, Managers, and Company of the Schuylkill and Susquehanna Navigation v. Diffebach*:[130] This 1794 Supreme Court of Pennsylvania case adjudicated whether proper procedures had been observed in determining damages to various property owners for purposes of providing them their respective compensation (their land having been taken for a canal and locks). The procedures were deemed proper.[131] *The case illustrates that compensation is required for taking lands for public purposes.*

*Respublica v. Sparhawk*:[132] This case, decided by the Supreme Court of Pennsylvania in 1788, involved a citizen who had lost personal property (barrels of flour) to the British when

126. 3 Yeates 153 (Pa. 1801).
127. 3 Dall. 496 (Pa. 1799).
128. 1 Yeates 495 (Pa. 1795).
129. *Id.* at 496.
130. 1 Yeates 367 (Pa. 1794).
131. *Id.* at 368.
132. 1 Dall. 357 (Pa. 1788).

they occupied Philadelphia. The plaintiff's claim for compensation most likely rested on the way the authorities had directed the movement and storage of those barrels. The court, in dictum, commented on the right of an individual to "seek for redress and compensation, where his property has been divested for the use of the public. The right is clear, and that every right must have a remedy, is a principle of general law, which the legislature of Pennsylvania has expressly recognized . . . ."[133] *In this case, the principle of compensation was well-recognized, but no compensation was allowed because the act was deemed to be not for a public purpose, but under the exigency of war.*

*H. South Carolina*

*Lindsay v. Commissioners*:[134] In this 1796 case decided by the Constitutional Court of South Carolina, an evenly divided court could not agree on whether the common law and statutes of South Carolina authorized eminent domain appropriations without compensation. Even those who opposed compensation agreed that compensation should be paid when improvements had to be removed or destroyed. The no-compensation partisans thought that all lands were held subject to the state's eminent domain right and most owners did not even ask for compensation because their unimproved lands were benefited by the road. None of the statutes mentioned compensation. The particular act challenged was not held unconstitutional, because the court was evenly divided. *Apparently the uncertainty over the principle of compensation was soon resolved in favor of compensation, as indicated in the immediately following case.*

*Shoolbred v. The Corporation of the City of Charleston*:[135] In this case, a private owner had buildings and gardens removed for extension of a city street. The legislature authorized the extension of the street and the procedure for determining compensation. *This case dealt with a conflict over which governmental entity should raise the money to pay the compensation. The main point of interest here is the ready acceptance of the principle of compensation. Also, the payment is for the*

133. *Id.* at 359.
134. 2 S.C.L. (2 Bay 38) 16 (1796).
135. 2 S.C.L. (2 Bay 63) 26 (1796).

*building and gardens, and the street simply runs over the ground, as if it were considered an easement.*

*Bowman v. Middleton*:[136] This case was a challenge to an act of 1712 under which a freehold was transferred from one heir at law to another. The court upheld the challenge, as the act was considered against common right and the principles of Magna Carta. It was further against those principles to so shift the freehold without compensation. The act of 1712 was thus held void.[137] *The opinion shows a strong and traditional requirement in state law to pay compensation when land is taken.*

### *I. Virginia*

*Coleman v. Moody*:[138] Decided in 1809 by the Supreme Court of Appeals of Virginia, this case involved a riparian owner who requested and obtained permission from the county court to erect a water grist-mill at a point on the stream where he owned both shores. He proposed to erect a dam over fifteen feet high and started procedures to determine damages to an upstream owner. The dispute centered on purported deficiencies in that procedure. It was determined that the backed up water would not cover any mansion-house, office, curtilage, or orchard. *The opinion is significant because it proposes to order payments for loss of some incidents of ownership and improvements, without any party actually taking a fee interest. The damages to be paid by the private owner were somewhat equivalent to damages paid by a governmental entity, since the owner's action was authorized and payment ordered by the public authority.*

*Wilkinson v. Mayo*:[139] Decided by the Supreme Court of Appeals of Virginia in 1809, this is another case in which a landowner purporting to own land on both sides of the river applied to the court for leave to build the dam and pay damages to an upstream owner whose land would be covered by the water. The procedure was halted when the upstream owner proved that part of the dam would be built on land not owned

136. 1 S.C.L. (1 Bay 252) 101 (1792).
137. 1 S.C.L. at 253.
138. 14 Va. ( 4 Hen. & M. 3) 789 (1809).
139. 13 Va. (3 Hen. & M. 565) 764 (1809).

by the dam builder. *This case again illustrates the points in the preceding case.*

*The Attorney General (in Behalf of the Commonwealth) v. Turpin*:[140] This 1809 case, decided by the Supreme Court of Appeals of Virginia, also addressed compensation. As public buildings were to be built in Richmond following the shift of the state capital from Williamsburg, two landowners were in competition for their lands to be chosen as public building sites, and each donated two additional acres to the proposed building sites, enhancing their offers. One owner's land was chosen and that decision was later reversed, prompting the disappointed landowner to ask for his two acres back. The court denied the request on the ground that the two acres, once taken over by the state, were vested in the state, especially since the conditions were not made explicit.[141] *The opinion acknowledged the principle of compensation, considered compensation only in the context of a physical taking, and accepted the "forced" donation partly on the ground that the disappointed donee's retained lands were much enhanced in value by the construction of the nearby public buildings. Although this case considered compensation only in the context of an actual physical taking, compensation was not so limited in the overall jurisprudence of the state.*

*Commonwealth v. Colquhouns*:[142] This case describes tobacco inspectors apparently stealing some of the tobacco they were inspecting. A record of the argument of one of the attorneys states, "[t]here is no instance in any government of a State's claiming a right to take private property without compensation, not even in the reign of Robespierre."[143] *This quote suggests that the principle of paying compensation for taking private property was of long-standing tradition in Virginia.*

### *J. Summary*

These cases collectively show state courts generally accepting the principle of compensating not only for land taken but also for diminished rights of use or enjoyment, and for land damaged or diminished by nearby takings. This latter feature

140. 13 Va. (3 Hen. & M. 548) 758 (1809).
141. 13 Va. at 564.
142. 12 Va. (2 Hen. & M. 213) 403 (1809).
143. 12 Va. (2 Hen. & M. 213, 227–28) 403, 408 (1809).

demonstrates that compensation for the type of damage known today as regulatory takings imposed by police power was practiced in at least several states in the earliest years of nationhood. It should also be noted that some of these decisions were based on statutes dating back to colonial times.

While such cases have not figured in the research and conclusions of several prominent modern scholars, it is useful, nevertheless, to review their valuable work on this important subject. This review is set forth in the next section.

## IV. THE BATTLE OF THE SCHOLARS: HOW MODERN WRITERS HAVE DIFFERENTLY PERCEIVED EARLY AMERICAN COMPENSATION RULES AND PRACTICE

In this section the writings of several scholars who have addressed the history of police power regulations' purpose and compensation practices are reviewed and compared. Of course, those who publish first are critiqued, corrected, or expanded upon by later writers. Certain writers, even after being effectively corrected, tend to be continually cited as authoritative, perhaps because of the prestige of the author, of the author's institution, or of the law review itself. These unfortunate practices persist in opinions even of the highest courts, which thus participate as guilty parties in perpetuating palpable errors.

### *A. 1975 (Bosselmen, Callies, and Banta)*

The first close modern review of takings compensation history was published by Fred Bosselman, David Callies, and John Banta in 1973.[144] They noted that colonial land use regulations promoted growing of staple crops (corn, not tobacco) and not exhausting the soil;[145] urban regulations promoted health and safety (including even a requirement for shade trees in Philadelphia).[146] Compensation for takings was common for taking land that was considered developed (improved or enclosed), with exceptions for emergencies such as fire control,

144. FRED BOSSELMAN ET. AL., COUNCIL ON ENVIRONMENTAL QUALITY, THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS (1973).

145. *Id.* at 82–83.

146. *Id.* at 84.

but not for undeveloped land (which might have been deemed essentially valueless anyway).[147] Land was taken for roads, public buildings, and new towns; unoccupied land was often forfeited.[148] These authors conclude that, before enactment of the Fifth Amendment's Takings Clause, compensation was not generally required.[149] This conclusion they base on the observation that compensation requirements were not common in colonial legislation and, if Massachusetts laws of 1641 are typical, compensation was required for taking cattle and goods, but not for taking land.[150] Late in the colonial era, some states adopted formal compensation requirements. Vermont's first constitution in 1777 contained a requirement for compensation;[151] Massachusetts' constitution of 1780 also had a compensation clause, based on a 1780 declaration of rights drafted by John Adams.[152] Other state statutes required landowner or legislative approval for takings, but not for compensation.[153]

The authors conclude that during the first half of the nineteenth century, when takings compensation became more conspicuous in the decades after adoption of the federal requirement in the Fifth Amendment, compensable takings consisted of physical takings in the great majority of cases.[154]

These authors base their conclusion about the relative rarity of compensation on the paucity of colonial legislation or early state constitutional provisions. However, without a survey of contemporary cases, this is an incomplete review of the actual compensation practices of the time, which were far more widespread than these authors depict. In declaring that indirect and consequential injuries to property from police power regulations were not compensated, these authors overstate their case, as case descriptions in an earlier section of this article affirm, and they fail to note that almost all the regulations at issue were in the nature of nuisance restraints, which would not qualify for compensation under any rule.

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147. *Id.* at 85–86.
148. *Id.*
149. *Id.* at 92.
150. *Id.* at 92–93.
151. *Id.* at 94.
152. *Id.* at 95.
153. *Id.* at 96–97.
154. *Id.* at 106.

### *B. 1985 (Treanor)*

The next important scholarly review of early takings history was published by William Michael Treanor in 1985,[155] with a follow-up article in 1995.[156] This author declares that "the principle that the state necessarily owes compensation when it takes private property was not generally accepted in either colonial or revolutionary America."[157] Supporting this proposition, he insists that "[n]either colonial statutes nor the first state constitutions recognized a right to receive compensation when the government took property from an individual."[158] The colonial statutes denied compensation because of royal prerogatives or limitations in original land grants; state constitutions did not provide for compensation because of the republican ideology that the "property right could be compromised in order to advance the common good."[159] He points out that when colonial legislatures took private property without compensation, it might be for failure to develop the land, which land was given to someone else.[160] Or it might be taking for a public road, but noncompensation applied only if unimproved land were taken. Enclosed or improved land was compensated. Massachusetts compensated both types of takings.[161] Because English legal tradition taught that property was held from the state, some land grants were conditioned on settlement for validation.[162] Even unrestricted land grants could be subject to development if the lack of restriction was seen as undermining royal authority.[163] After royal authority ended and during the revolutionary era, some uncompensated takings occurred, including seizure of loyalist property, taking undeveloped land for roads, and taking goods for military purposes.[164] Early state constitutions had no just compensation clauses and only three had a clause

155. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985).

156. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

157. Treanor, *supra* note 80, at 694.

158. *Id.* at 695.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 697.

163. *Id.* at 697–98.

164. *Id.* at 698.

from the Magna Carta which permitted takings only with consent of the owner or legislature.[165]

In all of these statements, Treanor is able to show some authority. The conclusions he draws from this authority are overbroad generalizations, and other authorities, such as the early American state cases described in this article, are ignored or undiscovered. Thus Treanor appears to selectively cite authority, and to be seriously misleading in the generality of his conclusions. Nevertheless, the Treanor theses have been uncritically adopted by some later writers and judges.

### *C. 1996 (Kobach)*

The Treanor theses were first effectively challenged by Kris W. Kobach in 1996.[166] He describes federal takings jurisprudence at the end of the nineteenth and early twentieth centuries as not having recognized regulatory takings, but that definitively changed[167] with the decision in *Mahon*[168] in 1922. But he also believes that the scholarly assumption that *Mahon* was the first recognition of regulatory takings is wrong. His research reveals that the first recognition of regulatory takings took place in the 1810s, rather than the 1920s:

> By 1861, numerous courts required compensation when property remained in the possession of its owner but the state restricted usage rights or diminished the property's value .... The federal judiciary was notably absent from this early doctrinal evolution ....I suggest that the present Supreme Court would do well to revisit these forgotten decisions of the early nineteenth century. Not only do they lend historical legitimacy to the notion of regulatory takings, many possess a doctrinal coherence that is lacking in recent treatment of the issue.[169]

He points out how commonly scholars state that regulatory takings began with *Mahon*, and how now the Supreme Court even believes so.[170] He especially criticizes Justice Blackmun's

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165. *Id.*

166. *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211 (1996).

167. *Id.* at 1212.

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

169. Kobach, *supra* note 91, at 1213–14.

170. *Id.* at 1213, 1215.

historical analysis in the *Lucas* decision,[171] which analysis was uncritically accepted even by Justice Scalia.[172] Justice Blackmun's conclusion is based on a book by Stephen Siegel and a book by Bosselman, David Callies, and John Banta (reviewed above). Kobach believes the first is wrong, and the second is both wrong and was written from an openly biased point of view.[173] He excuses the Justices somewhat, because their view was typical also of scholars, such as Morton Horwitz.[174]

So, having demonstrated how entrenched that viewpoint is, he then undertakes to show that it is wrong. He details the state constitutional provisions that emerged in the post-constitutional and antebellum period, pointing out how, even in the absence of explicit or detailed constitutional provisions, a broadly accepted notion of natural law led to a general acceptance of the principle of compensation for takings.[175]

According to Kobach, the first devaluative takings recognized as qualified for compensation were those diminishing usage rights of riverside property owners,[176] followed by takings of usage rights in a variety of nonriparian situations.[177] A significant subcategory of usage rights—access rights—was treated as devaluative takings also.[178] He next deals with cases recognizing compensable takings from acts which necessitated expenditures, but only in those cases where the property suffered no physical damage.[179]

He concludes that most state courts first confronted and accepted devaluative takings between 1810 and 1840. Where compensation was denied, the denial could be readily explained on the ground that the use at issue would be considered a nuisance, anyway. He also identifies coherent common themes from among these early state cases, and says those could inform modern federal and state jurisprudence: (1) noncompensable takings were more or less defined by nuisance law; (2) no explicit categorical distinctions existed between devaluative takings and acquisitive or destructive takings; (3) no minimum

171. *Id.* at 1215–21.
172. *Id.* at 1215–16.
173. *Id.* at 1218–20.
174. *Id.* at 1221–22.
175. *Id.* at 1229–34.
176. *Id.* at 1234–45.
177. *Id.* at 1245–50.
178. *Id.* at 1250–53.
179. *Id.* at 1253–59.

devaluation threshold for compensation was observed; (4) takings of only vested rights were protected as compensable; and (5) actions that devalued property only very indirectly were not compensable takings.[180]

### *D. 1999 (Gold)*

Another writer attacked the Treanor theses in 1999.[181] Andrew Gold challenged Treanor and others who have challenged the existence of original intent for compensation for mere regulatory takings, claiming instead that the record is too sparse or gives mixed indications.[182] In support he cites a selection of early state cases applying the compensation conception embodied in the Takings Clause, almost all of them later than the cases cited in this article.[183] He believes the Founders wanted the Fifth Amendment to zealously guard property interests in all forms and this should shape the interpretation of the Fifth Amendment in deciding if there is a taking.[184]

### *E. 2000 (Hart)*

William Treanor was again a key authority cited in the next significant contribution to this debate, an article by John F. Hart published in 2000.[185] Hart believes, along with William Treanor, that land use law in the founding era does not give support to the regulatory takings doctrine. While conceding that compensation was generally paid when the legislature appropriated land for a public use, mere regulation of land was uncompensated; he asserts that extending compensation to takings by regulation violates the original meaning of the Constitution. He finds support for his theses in the writings by Treanor and by Bosselman et al., but ignores the work by Kobach.

Hart avers that early state land use law (ca. 1776-1789) not only did not extend compensation for merely regulating land, but also included regulations that extended beyond the

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180. *Id.* at 1259–65.
181. Gold, *supra* note 77 at 181.
182. *Id.* at 182.
183. *Id.* at 228–40.
184. *Id.* at 240–42.
185. John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000).

function of suppressing nuisance. His examples of such extra-nuisance subjects of regulation are drawn from New York, Connecticut, Georgia, Virginia, and Massachusetts.[186] "Legislation coercively promoted uses of private land that were viewed as conducive to the community's well-being."[187] Also, he notes that mill acts, public legislation authorizing private riparian owners to condemn neighboring land for purposes of building a mill dam or flooding the land, are cited as examples of delegated state power over private land.[188] The acts required either compensation or payment of damages, but Hart, who has written on these specific acts, characterizes them as "tacit subsid[ies] from the original owner to the improving owner,"[189] rather than examples of compensation for takings.

Similarly, drainage acts required owners of wetlands to acquiesce and "cooperate if neighbors owning a sufficient proportion of land agreed to undertake a drainage project."[190] Such owners had to not only acquiesce in having their land transformed (presumably improved), but also had to pay their share of expenses and help in maintenance. Such wetlands were possibly already useful in their existing state. Hart concludes that these delegations of power over land to private owners favored the affluent who could afford the equipment necessary to turn drained land into more productive plowland.[191] He does not mention how analogous this is to the enclosures taking place in contemporary England; these practices may reflect a familiarity with enclosures rather than a failure to accept the compensation principle. Hart also mentions the similar example of Connecticut's open field legislation of 1746, which enabled majority owners of old common field acreage to coerce minority owners into actions that could be seen as characteristic of the old common field system.[192] In invoking this example, Hart makes no mention of the ancient roots of these methods and traditions.

Hart points out that some state legislatures exercised a power to compel private lands to be used for mining and metal production; if this required appropriation of land, compensation

186. *Id.* at 1107–16.
187. *Id.* at 1107.
188. *Id.* at 1116.
189. *Id.*
190. *Id.* at 1117.
191. *Id.* at 1117–19.
192. *Id.* at 1122–23.

was always paid, but compensation was measured by the land's value in its prior (unimproved) state, not its market value. In some states, owners had a choice of conducting the mining themselves, or letting the states or state agents conduct the mining on their land. Legal permission for private prospecting could also be very intrusive.[193]

As additional examples of intrusive regulation without compensation, Hart discusses ordinances in Boston empowering town officials to take over land of idle persons and work it into productivity, applying the produce and income to the support of the idle owner and family. Hart characterizes this as authorizing great intrusion on possessory rights to impose "greater rationality" on owners' use of their own property.[194] Also, some legislatures developed schemes for penalizing passive ownership of land, especially speculative, inactive land ownership. This included lot size and proximity restrictions, alienation restrictions, taxation of large, unimproved holdings, and threatening forfeiture of unoccupied or unimproved lands, even if development or improvement had not been a condition of the original grant. The philosophy of this had a firm precedent in some of the original colonial charters and in colonial legislation. Unoccupied lands might be deemed vacant. Threats of forfeiture were not considered an infringement on owners' rights, even when imposed under a state constitutional provision requiring compensation for takings.[195]

From all of this Hart concludes that, both before and after 1776, "many land use laws were intended not to protect health or safety but to extract positive benefits from landowners that would be useful to others in the community."[196]

Hart also concludes from these examples that state police power was routinely used to regulate for purposes extending beyond nuisance suppression, and that such regulations were usually not accompanied by compensation. As with Treanor, on whom he relies as authority, his examples support his specific observations, but do not justify the overbroad generality—indeed, do not support the absolutism—of his ultimate conclusions. He seems to take no account of the kinds of common activities occurring in the states throughout this early period, as

193. *Id.* at 1119–21.
194. *Id.* at 1123.
195. *Id.* at 1123–30.
196. *Id.* at 1130.

revealed in the cases cited earlier in this article. The better conclusion seems to be that the practices were mixed, and that it is inaccurate either to conclude that compensation was never paid for early regulatory takings or that compensation was uniformly paid for regulatory takings.

Hart next turns his attention to the argument that nothing in the text or history of the Takings Clause suggests that it was intended to govern regulation. He believes the sparse record suggests that the Takings Clause was intended to be an affirmation of the status quo, which was that payment would occur only for actual physical appropriations.[197] Statutes following the compensation clause authorized compensation only for physical appropriations. This was the plain meaning of "take." The concept of compensation for regulation is not in evidence. From this he concludes that any argument that modern takings are so much more extreme than at the time of the constitution and thus justify a new doctrine of compensation is weakened by the evidence of heavy land use regulation at that time.[198]

It is clear that Hart reaches some of the same absolutist conclusions as Treanor, and—like Treanor—is reluctant to recognize just how mixed the historical record is. A possibly more balanced and accurate view appeared in the most recent published statement on these issues, noted in the next paragraph.

### *F. 2002 (Dana and Merrill)*

In a "nutshell"-type book, David A. Dana and Thomas W. Merrill describe English and colonial practices on regulatory takings and what they believe was the original understanding of the Takings Clause.[199] They adopt Hart's view that compensation was normal when land was taken or damaged, and the conclusions from Treanor that compensation was not always given when undeveloped land was taken.[200] They also note that the development enabled by the taking could have been considered significant compensation for the retained land.[201] They adopt the Bosselman suggestion that some

197. *Id.* at 1132–33.

198. *Id.* at 1139–47.

199. DAVID A. DANA & THOMAS W. MERRILL, TURNING POINT SERIES: PROPERTY: TAKINGS (Foundation Press 2002).

200. *Id.* at 17.

201. *Id.*

adopt the Bosselman suggestion that some especially intrusive forms of regulation did not generate compensation; these regulations were often just nuisance regulations, but some were like modern zoning regulations; and some were affirmative in the "use it or lose it" sense.[202]

They believe the conclusion that the Founders contemplated compensation for only actual takings overstates the record, as does the position that the Founders perceived police power regulation as appropriate only for nuisance-type activities, since some were designed to spur economic activity.[203]

They depict the natural law commentators as favoring compensation so that property owners are treated evenhandedly, a form of horizontal equity; Blackstone, according to the authors, favored compensation to maintain a sort of balance between citizen and sovereign, a form of vertical equity.[204] They believe one can only speculate whether these viewpoints were specifically in the thoughts of the Framers:

> The truth is that no one who participated in the drafting and ratification of the Takings Clause—including James Madison, who bears the most responsibility for the Clause—had given any sustained thought to the purposes of eminent domain and the compensation requirement.[205]

The authors point out that the Takings Clause was originally drafted by Madison, amended by a committee, and approved without further change.[206] They note that an eighteenth-century American commentator opined that the clause was probably designed to redress the excessive and arbitrary taking of private goods for military supplies, as often occurred during the Revolutionary War.[207] The authors surmise that the lack of discussion leads to the inference that the clause was perceived as effecting no significant change in the "legal status quo."[208]

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202. *Id.* at 18.
203. *Id.* at 19.
204. *Id.* at 19–24.
205. *Id.* at 25.
206. *Id.* at 9–11.
207. *Id.* at 11–12.
208. *Id.* at 14–15. *See* Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1287–90 (2002).

### *G. Summary*

It appears that responsible scholars publishing later are able effectively to build upon the valuable research findings of earlier writers. On issues concerned with doctrinal origins and history, the passage of time brings more pieces into the puzzle, and the intellectually honest assess the new findings and fashion better conclusions. Thus the Dana and Merrill work, summarized in the preceding paragraph, probably represents the most reliable perception of the historical evidence, even without taking into account the early police power history and early state cases introduced in this article.

## V. HOW DOES ANY OF THIS HELP CLARIFY REGULATORY TAKINGS DOCTRINE?

### *A. The Original and Principal Purposes of Police Power Regulations Were to Restrain Offensive Uses of Land*

Police power originated in common law as an authority to restrain offensive or nuisance-type uses of land. The guiding philosophical principle—that one should not use one's land in ways adverse to others' land uses—is exactly the same principle that guides nuisance law. Therefore, it is accurate to conclude that the main objective of early police power land use regulations was to restrain nuisance-type land uses. This is also the view of all the early writers. The only departures from this rule are found in some of the early state cases. These departures are understandable in view of the fact that all of these courts were dealing with compelling local frontier situations, were generally unaware of decisions on these issues in other states' courts, and were presumably less concerned with doctrinal purity or consistency. Despite these aberrations, it is probably safe to conclude that police power was presumed to be mostly for nuisance suppression, and departures from this rule were the exception in early times.

### *B. Police Power Regulations Restraining Offensive Uses of Land Should Not Require Compensation*

If the police power is used to regulate land use so that nuisances are not committed, then no "taking" occurs, because no

landholder has a right to use the land in such a fashion. Therefore, as a general proposition, no compensation is owed for such a regulatory "taking." If police power land use regulations were used only for such purposes, compensation for regulatory takings would never be an issue. That appears to be a generally accurate statement of American colonial and early state practice, but clearly aberrations existed. Perhaps the most common aberrations, especially in the frontier setting, were land use regulations that went beyond nuisance restraint and imposed affirmative requirements. These were commonly perceived as introducing a civilizing element to the vicinity subject to the regulation, so that those regulations, when implemented, carried with them their own form of indirect compensation. Therefore, compensation for the adverse effects of police power restrictions was seldom given, because those restrictions were simply suppressing nuisances rather than "taking" any existing property rights. The more modern statement that police power regulations are valid if related to preserving or protecting the public health, safety, morals, or welfare is rooted in the nuisance-suppression origins of police power; however, such a statement can obviously be manipulated into a wider list of purposes. Whether such an expansion can or should generate a different compensation rule is a central issue in modern takings debates.

### C. *Different Validation and Compensation Rules Are Applied to a Fifth Amendment Taking and to Police Power Regulations*

By constitutional law, a governmental entity may "take[]" private property if the taking is for a "public use" and is accompanied by "just compensation."[209] By comparison, modern jurisprudence authorizes police power land use regulations that preserve or protect the public health, safety, morals, or welfare; imposing those regulations does not presume a requirement of compensation. One possible rationale for these differences is that the range of reasons for a compensated taking—"public use"—is vastly broader than the range of reasons for a noncompensated police power regulation—"public health, safety, morals, or welfare." Moreover, as explained in the pre-

209. U.S. CONST. amend. V.

ceding paragraph, the police power range of reasons, historically at least, has been generally limited to regulating conduct to which the landowner had no right anyway, so no loss or "taking" of anything was caused by the regulation. This naturally leads to the query of what happens to the no-compensation rule of police power regulations if the purpose of the regulations strays beyond the "suppress the nuisance" boundary of police power into the broad pasture of "public use" that underlies compensated "takings."

### *D. The Notion That Compensation, When Allowed, Was Limited to Physical Appropriation "Takings," Is a Pernicious Fiction*

Compensation for taking, as well as regulating, occurred in early American history, under both statutory and judicial authority. The notion that compensation could be made only for actual appropriations of the land itself is not found in the historical record, but is merely a modern judicial and scholarly fiction. The notion that compensation could be made for the impact of police power land use regulations seeking to achieve affirmative social or economic benefits beyond suppression of nuisances has ample historical precedent. Compensation was not a new principle introduced with the enactment of the Fifth Amendment.

### *E. No Strict, Mutually Exclusive Boundary Exists Between Compensated Takings and Noncompensated Regulations*

That a strict boundary exists between compensated takings and noncompensated regulation has been a popular assumption, but certainly not compelled by any sources of law on the subject. Merely to place a police power label on certain governmental conduct has for some definitively determined that no compensation should be awarded. No warrant for this position exists in the text of the Fifth Amendment or in any of the early jurisprudence on this issue. Also, any such assumption would seem to have less validity as the scope of regulations increased.

### *F. Just Compensation for a Taking for Public Use Is the Key Constitutional Mandate*

With historical precedent for deprivations of rights being compensated as takings, and the plain text of the Fifth Amendment requiring that a taking be for public use and be justly compensated, one cannot evade the conclusion that a regulation depriving a landowner of a right that is not otherwise voided as a nuisance should clearly qualify for the Fifth Amendment's protection. Predictions of doom for governmental entities required to carry greater compensation burdens do not ameliorate the unconstitutionality, illegality, and moral perfidy of wrongful deprivations of private property by irresistible public power. To suggest that property rights should be vulnerable to subjective notions of changing societal values is to negate the rule of law. "Changing values" can indeed be invoked, but only for a democratically acceptable notion of public use, and only accompanied by just compensation.

## CONCLUSION

This article has offered two more pieces to the puzzle of historical origins of American police power land use regulations and early landowner compensation practices. These pieces are a more detailed description of the common law concepts of the police power and an analysis of early state cases on compensation practices for physical and regulatory takings.

With these clarifications, it is more defensible to conclude that, in general, early police power regulations were limited mostly to nuisance suppression and therefore did not justify compensation. Some early regulations went beyond the nuisance limits and were often compensated, but sometimes were not. Compensation practices were widespread in the states before enactment of the U.S. Constitution's Fifth Amendment and counterpart provisions in state constitutions. It is reasonable to conclude, and perhaps mandated by the Fifth Amendment, that as police power land use regulations extend beyond their traditional boundaries of nuisance suppression, they must be governed by the constitutional takings rules, requiring validation of public use and payment of just compensation for deprivation of private property rights considered as takings. While the history elucidated in this article may not demand that

these conclusions be reached, it certainly shows that history poses no impediment to them.