Land Use Regulation and the Concept of Takings in Nineteenth Century America

Land use regulation is one of the most pervasive modes of governmental control of and interaction with society; yet the historical, doctrinal development of the powers by which government has sought to regulate land use has never been systematically explored. This comment examines the development of land use regulation doctrines and the concomitant evolution of the concept of compensable takings, as they reflected and were shaped by the social and institutional reorientations that occurred during the nineteenth century.

As the nation moved into the period of rapid economic expansion and urbanization that characterized the nineteenth century, the powers of government to interfere with private property were limited. In response to the need to promote general commercial development by providing adequate transportation systems, state governments granted eminent domain powers to private enterprises, powers supplemented by a narrowed definition of the kind of taking that required compensation. The general eminent domain power granted to private enterprises, however, was not applicable to the problems caused by urban development. When, in midcentury, the problems of urbanization became increasingly severe, the governmental power necessary to meet them was produced by broadening the traditional concept of common law nuisances into a general legislative authority, predicated on the police power, to regulate property in order to protect public health and safety. The concept of compensable takings was not applied to the police power because the police power was viewed as society protecting itself, while eminent domain was seen as society taking benefit to itself. When eminent domain doctrine in the 1870’s developed a broader definition of compensable takings, providing compensation for appropriations of less than fee interests, there was no immediate effect on the police power. In the last decades of the century, however, as the exercise of police power became more prevalent, the broader “bundles of rights” concept of eminent domain “ takings” was introduced as a potential limit on the scope of noncompensable police power actions.

I. EMINENT DOMAIN AND THE DOCTRINE OF INDIRECT INJURIES

Although the federal and almost all state constitutions provided for compensation for land taken by governmental authority,1 it was nec-

1 See Cormack, Legal Concepts in Cases of Eminent Domain, 41 YALE L.J. 221, 222
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necessary for the courts to define precisely what types and degrees of governmental and governmentally authorized interferences with property constituted compensable takings. These decisions reflected a tension, which existed throughout the century, related to the conceptualization of property. When property was conceived of as a tangible thing, compensation was denied for all but physical appropriations amounting to a taking of the fee. When it was conceived of as the legal interests attendant to property, less than fee takings were compensated.

Several of the early cases reflected the view that compensation was required for the taking of legal interests attendant to property. For example, in *Gardner v. Trustees of Newburgh*, a statute authorizing the town to supply its inhabitants with water provided for compensation to landowners injured by the laying of conduits and to the owners of the land from which water was taken. It did not, however, compensate landowners, like Gardner, for the water that would have flowed through their lands had the town not diverted it upstream. Although the New York Constitution did not have an eminent domain clause until 1821, Chancellor Kent, relying on Grotius and Blackstone, held that although the legislature was permitted to take private property for public uses, it could not do so without giving full indemnification. Just compensation had to be paid not merely to persons whose property was actually appropriated by the state, but also those persons whose property was injured as a result of the use made by the state of the property appropriated. Similarly, in *Proprietors of Piscataqua Bridge v. New Hampshire Bridge*, the owner of a bridge franchise from the state was compensated when the state granted another franchise over the same stretch of river. Under these cases, the taking of rights not amounting to a fee interest was to be compensated.

The origin of the countervailing attitude might be seen as Octo-


The fifth amendment’s just compensation clause was held inapplicable to the states in *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). In *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897), however, the doctrine was made applicable to the states through the fourteenth amendment.

2 2 Johns Ch. 162 (N.Y. 1816).


4 7 N.H. 35 (1834).
ber 26, 1825, when the Erie Canal was opened. The remainder of the century was characterized by expansion into the continent and the creation of new markets, sources of raw materials and agricultural goods for the industrializing, commercial East. The expansion of the western markets and the continued prosperity of the seaboard cities depended on the construction of an extensive system of internal transportation. The turnpikes, canals, and eventually, railroads of this system were constructed largely by private entrepreneurs acting under charters and franchises granted by the states. To make these private investments more secure and desirable, and to provide needed capital by turning land into money, the states granted valuable rights and concessions to the franchise holders. Among these was invariably the right of eminent domain.

The financial benefits of the possession of eminent domain power were increased by a doctrinal development—the narrowing of the definition of compensable takings through the conceptualization of property as physical objects. The benefits of this definition applied both to state projects and to the more prevalent franchised private enterprises. The “change-of-grade” cases were among those setting forth the new definition of compensable takings. The earliest of these was Callender v. Marsh, a Massachusetts case in which a drastic change in street grade exposed the foundations of the plaintiff’s house and created the danger of its collapse. The court held the plaintiff’s injury noncompensable, stating that compensation “has ever been confined, in judicial application, to the case of property actually taken or appropriated by the government . . . to the direct loss of property sustained by the individual . . . .” Property owners were thereby put on notice that

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6 Id. at 260-61.
7 Id. at 480-81.
8 State financing, although attempted, was difficult. “State debts, which had amounted to only $14,790,718 in 1820, had increased to $200,000,000 in 1840, most of which had been incurred for banks, roads, canals, and railroads.” Id. at 272.

The urgent need for internal transportation, the remarkable success of the Erie Canal, sectional rivalries, and the scarcity of private capital were chief among the causes leading the states to finance many of the early projects. . . . [B]efore private capital went into railroads, the government was expected to do much to make the way easy. Railroads were built under charters voted by the state legislatures; all of them contained valuable rights and concessions. . . . The right of eminent domain . . . was invariably granted.

10 Id. at 480-81.

9 18 Mass. 417, 1 Pick. 418 (1923). The importance of these early eminent domain cases was first elucidated by Professor Morton Horwitz in his unpublished article, Damage Judgments, Legal Liability and Economic Development Before the Civil War, 19-23 (on file at The University of Chicago Law Review).
10 18 Mass. at 429-30, 1 Pick. at 490-91.
there were certain risks against which "just compensation" doctrines offered no insurance,\textsuperscript{11} even though a landowner might "thus be made involuntarily to contribute much more than his proportion to the public convenience ... ."\textsuperscript{12}

In \textit{Lansing v. Smith},\textsuperscript{13} the court applied the narrow doctrine of compensable takings in order to further the development of transportation. The New York legislature had authorized the construction of a basin in Albany at the termination points of the Erie and Champlain canals. The plaintiff claimed that the erection of temporary bridges and a sloop lock, authorized as part of the construction, caused his compensable injury. The court stated: "[W]here the injury sustained is remote and consequential, it is \textit{damnum absque injuria}, and it is to be borne as a part of the price to be paid for the advantages of social condition. This is founded upon the principle that the general good is to prevail over partial individual convenience."\textsuperscript{14}

The doctrine that emerged from these cases was that property had to be taken in a physical sense, and then so completely as to amount to a fee interest, before the owner would be entitled to compensation.\textsuperscript{15} This doctrine of compensation prevailed throughout the period from 1825 to 1870. For example, in 1850, in \textit{Radcliff's Executor v. Mayor of Brooklyn},\textsuperscript{16} the New York Court of Appeals, invoking the same assumption of risk rationale found in \textit{Callender}, denied compensation to a landowner whose property was damaged as a result of the raising of his street's grade by a railroad acting with legislative authority and the consent of the city government. The narrow definition of takings was particularly helpful to the railroads, which required relatively little land for actual construction but had potential adverse effects on neighboring property. For railroad builders, the narrower, direct injury doc-

\textsuperscript{11} Scheiber, \textit{The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts} in \textit{5 Perspectives in American History} 327, 370 (D. Fleming & B. Bailyn eds. 1971).
\textsuperscript{12} 18 Mass. at 432, 1 Pick. at 432.
\textsuperscript{13} 8 Cow. 146 (N.Y. Sup. Ct. 1828).
\textsuperscript{14} Id. at 149. See also Baker v. Boston, 29 Mass. 183, 12 Pick 184 (1831) and text at notes 53-54 infra.
\textsuperscript{15} "It seems to be settled that, to entitle the owner to protection . . . the property must be actually taken in the physical sense of the word, and that the proprietor is not entitled to claim remuneration for indirect or consequential damage, no matter how serious or how clearly and unquestionably resulting from the exercise of the power of eminent domain." T. Sedgwick, \textit{A Treatise on the Rules Which Govern in the Interpretation and Application of Statutory and Constitutional Law} 519–20 (1st ed. 1857).
\textsuperscript{16} 4 N.Y. 195 (1850). See also O'Connor v. Pittsburgh, 18 Pa. 187, 190 (1851): "The constitutional provision for the case of private property \textit{taken} for public use, extends not to the case of property \textit{injured} or \textit{destroyed.}" (emphasis in the original.)
trine provided economic security and a partial solution to the problem of financing development.

II. URBANIZATION AND THE RISE OF THE POLICE POWER

Rapid urbanization characterized the second half of the nineteenth century and became, for the first time, a dominant factor in American life. Urbanization was primarily a function of the transition from an agrarian to a commercial-industrial society, coupled with increases in population, in both absolute numbers and density. The population of New York City, for example, grew from 60,489 in 1800 to 202,330 in 1860 and to nearly 5,000,000 in 1910. The demographic component of urbanization, together with advances in the level of technology and development of capitalistic institutions, helped produce a transformation in the structure of society: "[O]bservers . . . often found the city the site of social disorganization. But this disorganization was sometimes in reality only a complicated pattern of accommodation to the conditions of a new environment."

The early cities suffered from numerous problems as a result of changes in land use and increases in population density. Intraurban transportation systems were inadequate, resulting in compact development without differentiation and specialization of land uses. Population growth was largely absorbed by an increase in concentration of residences near the site of work. Incompatible uses were not segre-
gated.\(^{23}\) Increased densities compounded health and security problems.\(^ {24}\) Sanitation systems were virtually nonexistent:\(^ {25}\)

Privies or waterclosets emptied into vaults or cesspools, and the waste material soaked into the soil or was hauled away as receptacles became filled. Kitchen waste was run into the street and left to evaporate or was led off by open drains to watercourses. Ditches provided for this purpose often carried urine and fecal matter as well as house slop, since privy facilities were often hopelessly inadequate in congested districts of cities.\(^ {26}\)

Slums had appeared in New York City and Boston as early as 1815 and housing conditions deteriorated rapidly after 1890, in the years of great urban growth and industrialization.\(^ {27}\) Municipal water supply was inadequate.\(^ {28}\) The net result of these conditions was a prevalence of both epidemic and endemic diseases. Mortality statistics indicated that death rates rose in proportion to the degree of urban congestion.\(^ {29}\)

The problems that government faced as a consequence of urbanization differed radically from those it had confronted earlier in the century, when the need had been to develop transportation systems. The solution then had been to provide private developers with a means of turning land into money—the delegated eminent domain power coupled with a narrowed definition of takings. The nature of urbanization called not for economic expansion, nor for a means of financing private or governmental action, but rather for a means of directing and controlling the consequences of private expansion.

A solution to some of the new urban problems was found in a transfer of municipal services from a private-voluntary system to a public distribution system predicated upon governmental authority.\(^ {30}\) A ser-

\(^{23}\) Id.

\(^{24}\) Id.

\(^{25}\) Id. at 87.

\(^{26}\) Id.

\(^{27}\) Id. at 159–62.

\(^{28}\) Id. at 97. See generally W. Stone, History of New York City 500 (1872).

\(^{29}\) C. Glaab & A. Brown, supra note 17, at 87–89.

\(^{30}\) "['lIn the provision of such municipal services as [police], water, fire protection, and streets, cities moved from casual, semi-private systems inherited from an era when municipalities were villages, to formal programs that were entirely part of government." Id. at 97.

Distribution of municipal services was, however, hampered by governmental structure, nonavailability of power, and lack of money. "Governmental structures that had been adequate for cities of 25,000 or fewer inhabitants were strained beyond their capacities as the great nineteenth century agglomerations grew." Id. at 168. Moreover, cities seemed increasingly powerless as the century progressed. As population densities increased and municipal services became more necessary, city governments had to rely on the state to
vice oriented solution was simply not applicable, however, to the need for structuring the development of potentially incompatible land uses. The possible legal tool of nuisance law could be applied only retrospectively—after some harm had already been done—and, in the urban context, was often useless because of the lack of any single plaintiff with sufficient interest to bring a suit. Moreover, the efficacy of the doctrine as a device for controlling patterns of urban development was limited by the traditional, narrow interpretation of what constituted a nuisance. What was needed was a prospective system of greater scope than the nuisance system. This system had to be both inexpensive and reflective of the variety of interests in an increasingly complex society, and provide definite standards and criteria of permissible uses in order to create the certainty required by economic interests. "New methods are needed to deal with new problems. This is the very essence of the police power."

There was some precedent for a system of land use regulation based on the police power. Dating back to *Mouse's Case*, decided circa 1600 by Sir Edward Coke, the concept of overruling necessity had served in extreme conditions to allow certain land uses to be regulated and even prohibited altogether without compensation when such action was required to protect the interests of society. Overruling necessity was the natural law predecessor of the noncompensable police power reg-

provide the service or pass enabling legislation. "[C]ity authorities shared local power with the state capitals." *Id.* at 171. Government became more complicated and cumbersome—and more expensive.

In New York City, for example, which had spent one dollar per person on municipal government in 1810, per capita expenditures were $6.53 in 1850 and $27.31 in 1900. *Id.* at 171, 180.

The expenses of local government had been rising for at least forty years by 1880: in other words, since the time when urban population growth had begun decisively to outstrip rural. It must be remembered that the expanding services of the large cities made large capital investment necessary. . . . The largest payments by American cities toward the close of the nineteenth century were, in order, for public buildings, education, streets and bridges, police and fire protection, and interest on their public debts. *Id.* at 182.

This problem was caused not only by plaintiffs' reluctance to bring a suit for small stakes, but also by courts' occasional refusal to find standing even when a suit was brought. See, e.g., Smith v. Boston, 61 Mass. (7 Cush.) 254 (1851) in which a private plaintiff challenging a franchised tramway as a nuisance was found not to have sufficient interest to bring a nuisance action, in spite of the fact that his shop fronted on the tram line.


12 Coke 63 (c. 1600), in which the owner of a hogshead of wine thrown overboard in a tempest to save the passengers from drowning was left uncompensated.
ulatory concept and among the purest and oldest doctrinal examples of the general welfare concept—salus populi suprema lex.\textsuperscript{35}

Before the adoption of the Federal Constitution:

it was well settled common law . . . that in cases of actual necessity,—as that of preventing the spread of fire—the ravages of a pestilence, or any other great calamity, the private property of any individual may be lawfully taken, used or destroyed for the relief, protection, or safety of the many, without subjecting the actors to personal responsibility. In these cases, the rights of private property must be made subservient to the public welfare.\textsuperscript{38}

After adoption of the Constitution and the fifth amendment, and throughout the nineteenth century, courts held that compensation was not required for exercises of the power of overruling necessity.

For example, in Russell v. Mayor of New York,\textsuperscript{37} the owners of goods stored in buildings that the mayor ordered destroyed in order to prevent the spread of a fire that was destroying millions of dollars of property were held to have no right to compensation.\textsuperscript{38} The court limited application of the state's just compensation clause to cases in which private property was taken for some public benefit or advantage, that is, eminent domain cases. According to the court, overruling necessity was based upon a principle that the just compensation restriction did not reach—"the principle of preservation of life and property in cases of eminent [sic] hazard, by the sacrifice of that which is less valuable . . . ."\textsuperscript{39}

In addition to overruling necessity, precedent for a regulatory system of land use controls was found in the charter-based system of "police regulation,"\textsuperscript{40} employed by cities "eo nomine, for time out of mind."\textsuperscript{41}

\textsuperscript{35} The welfare of the people is the supreme law.
\textsuperscript{38} F. Dwarres, A General Treatise on Statutes 444 (P. Potter ed. 1878).
\textsuperscript{37} 2 Denio 461 (N.Y. 1845).
\textsuperscript{38} See also Stone v. Mayor of New York, 25 Wend. 157 (N.Y. Ct. of Errors 1840).
\textsuperscript{39} 2 Denio at 484 (opinion of Porter, J). In 1879, the Supreme Court wrote:
   At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. . . .
   . . . In these cases the common law adopts the principle of the natural law and finds the rights and justification in the same imperative necessity.
\textsuperscript{40} Blackstone described these police regulations as "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 neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations." 4 W. Blackstone, Commentaries *162.
\textsuperscript{41} Village of Carthage v. Frederick, 122 N.Y. 268, 273 (1890).
Acts of incorporation and charters had traditionally contained limited delegations of legislative power to deal with problems of local concern. Exercise of this power was implicitly limited to conditions within the traditional, narrow common law nuisance categories. Generally, police regulations dealt with such matters as fire limits, the storage of gunpowder, and placement of cemeteries, and perpetuated a narrow application of the principle that no man should use his property so as to injure that of his neighbor—sic utere tuo alienum non laedas.

The compensation cases that arose under these early police regulations invariably held against the plaintiffs and denied compensation. One of the earliest cases was Brick Presbyterian Church v. Mayor of New York, in which the New York Supreme Court voided the City's covenant with the church for quiet enjoyment of its property as a cemetery. The covenant had been established in 1766 while the area around the church was an open common; the city had, however, developed around the church, making the cemetery a health hazard. Relying on a general welfare rationale and the principle that one should not use his own property so as to injure another's property, the court stated that "[i]t would be unreasonable in the extreme, to hold that the plaintiffs should be at liberty to endanger not only the lives of such as belong to the corporation of the church, but also those of the citizens generally...." Compensation was denied.

In Coates v. Mayor of New York and Stuyvesant v. Mayor of New York, companion cases arising under the same bylaw challenged in the Brick Presbyterian Church case, the court, using an assumption of risk rationale and the sic utere principle, said that "[e]very right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others." In subsequent cases, the New York court explicitly employed the general welfare concept in recognizing that an

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42 Id. See also Tanner v. Trustees of Albion, 5 Hill 121 (N.Y. Sup. Ct. 1843).
45 See, e.g., Brick Presbyterian Chuch v. Mayor of New York, 5 Cow. 538 (N.Y. Sup. Ct. 1826) and text and notes at notes 47-48 infra.
46 So use your own property that you do not injure another man's property.
47 5 Cow. 538 (N.Y. Sup. Ct. 1826).
48 Id. at 542.
49 7 Cow. 585 (N.Y. Sup. Ct. 1827).
50 7 Cow. 588 (N.Y. Sup. Ct. 1827).
51 Id. at 605. But in Coates and Stuyvesant the court refused to uphold the municipal bylaw because the city failed to allege the necessity of the regulation as required by the state statute authorizing the bylaw.
exercise of the police power could justifiably interfere with the right of an owner to decide the use of his property.\textsuperscript{52}

In 1831, the Supreme Judicial Court of Massachusetts, in \textit{Baker v. Boston},\textsuperscript{53} upheld a police health regulation designed to abate the nuisance of a creek fouled by the discharge of sewage. Citing \textit{Stuyvesant}, the court held that interferences with private rights by police regulations were noncompensable, \textit{damnum absque injuria}; the landowner was presumed compensated "by sharing in the advantages arising from such beneficial regulations."\textsuperscript{54}

The concept of overruling necessity was limited, however, to extreme situations; the concept of police regulation was still closely tied to the narrow nuisance law both in its focus on existing nuisances and in its inability to reach any activities that had not traditionally been viewed as nuisances. In its traditional form, therefore, police regulation could not meet the need for legislative authority to deal prospectively with numerous small incidents that cumulatively threatened the public interest.

The Supreme Judicial Court of Massachusetts was one of the first courts to recognize this need and to deal with the question of whether new regulatory use limitations were within the definition of compensable taking. In \textit{Commonwealth v. Tewksbury},\textsuperscript{55} Tewksbury had removed sand and gravel from a beach he owned, in contravention of a statute designed to protect Boston harbor by conserving the natural embankment of its beaches. The court rejected Tewksbury's argument that the statute was unconstitutional as an appropriation of his property for public use without compensation. In his opinion for the court, Chief Justice Shaw first employed an expanded interpretation of the \textit{sic utere} maxim to justify the regulation. He went on, however, to enunciate two major analytic themes regarding the applicability of constitutional limitations on takings to exercises of the regulatory power.

\textsuperscript{52} In \textit{Vanderbilt v. Adams}, 7 Cow. 349 (N.Y. Sup. Ct. 1827), a case arising out of the increasing commercial activities in New York harbor and a legislative attempt to regulate these activities, the court wrote:

\begin{quote}
The statute in question . . . appears to be a necessary police regulation, and not void, although it may, in some measure, interfere with individual rights. . . .

. . . Police regulations are legal and binding, because for the general benefit; and do not proceed to the length of impairing any right in the \textit{proper} sense of that term . . . .

. . . 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.
\end{quote}

\textit{Id.} at 350-51.

\textsuperscript{53} 29 Mass. 183, 12 Pick. 184 (1831).

\textsuperscript{54} \textit{Id.} at 193, 12 Pick. at 194.

\textsuperscript{55} 52 Mass. (11 Met.) 55 (1846).
First, relying on the conceptual framework of nuisance law and overruling necessity and the narrow definition of taking prevalent in eminent domain cases at the time, Shaw stated that regulation of uses was not a taking, but rather a legitimate legislative determination to restrain uses inconsistent with or injurious to the rights of the public. Nevertheless, Shaw recognized a relationship between condemnation and regulation: "It is extremely difficult to lay down any general rule, or draw a precise line between cases where the restraint of the right of the owner is such that compensation ought to be provided, and where the regulation is such only as to prevent a particular use of the property from being a public nuisance." This second analytic theme, that condemnation and regulation exist on a "continuum of appropriation," ranging from absolute divestiture of title and permanent physical invasion of property (compensable as a normal eminent domain appropriation) to prevention of a particular use (noncompensable as damnnum absque injuria), was only tentatively presented in Tewksbury. Shaw was to reject it in his next opinion on the subject, Commonwealth v. Alger. It was only later in the century, after an increase in the use of the police power and the return to an expanded definition of compensable takings under eminent domain powers, that Justice Holmes in Rideout v. Knox explicitly enunciated this theme.

In Alger, Justice Shaw made what was to become the major exposition of the theme that police power regulation was not a taking but rather a legitimate legislative decision to restrain uses injurious to the rights of the public. In Alger, the defendant had violated a statute prohibiting the erection of wharves beyond specified lines in Boston Harbor. Justice Shaw wrote:

We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the

56 Shaw presents an expanded definition of the doctrine sic utere tuo ut alienum non laedas. "All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or generally impair the public rights and interests of the community . . . ." Id. at 57.
57 Id. at 58–59.
58 61 Mass. (7 Cush.) 53 (1851).
59 148 Mass. 358, 372–74 (1889); see text at notes 90–91 infra.
rights of the community. 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. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.61

Appropriate legislative restraints were specifically said to include restraints of acts not "injurious or punishable as such at common law."62 They were justified not only because of the injurious consequences of such acts, "but more especially for the sake of having a definite, known, and authoritative rule which all can understand and obey. . . ."63

Shaw was careful to distinguish between compensable exercises of eminent domain power and these new, uncompensated, police power regulations. Eminent domain involved a taking for public benefit, while police power restraints were justified:

[n]ot because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim, sic utere tuo, ut alienum non laedas. It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain.64

Public benefits were those projects seeking to create a positive benefit through public use of unoffending privately owned land. Public nuisance involved the structuring of a land use so as to prevent encroachment of the regulated land on its unoffending neighbor. Viewed in this way, the new police power doctrine would allow governmental interference with property rights for the general welfare, but would not allow the types of governmental takings that were used to finance the early transportation development.

Although Shaw's opinion tended to realign the exercise of government power from the courts to the legislatures, it did not abrogate judicial responsibility for reviewing regulatory legislation or establish

61 61 Mass. (7 Cush.) at 84–85 (emphasis added).
62 Id. at 96.
63 Id.
64 Id. at 86.
the legislatures as the only proper judge of the necessity for the exercise of the restraining power. As police power regulations became prevalent, the courts made it clear that they would not allow the substitution of noncompensated police power regulations for compensated eminent domain powers. In *Watertown v. Mayo*,\(^6\) for example, the Massachusetts court stated that "[t]he law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen."\(^6\) In *In re Cheesebrough*,\(^6\) the municipal government had built drains across Cheesebrough's land; Cheesebrough derived no benefit from the drains, nor had his land been the source of the nuisance that required their construction. The court held that Cheesebrough was entitled to compensation for the land that the government had appropriated: "[T]here never can be any necessity under the police power or the law of necessity to permanently appropriate land to the public use without compensation. It may be temporarily interfered with or appropriated; necessity may justify so much; but when the necessity passes away, the right ceases."\(^6\)

III. Restrictions on Eminent Domain and Police Power Takings

*Cheesebrough* and other cases that attempted to prevent overuse of the police power were decided in the 1870's. At the same time, the courts began to return to a broader definition of the types of interferences that constituted compensable takings under eminent domain doctrine. "[F]rom the very beginning, the exemption of consequential damages from the general principle of just compensation stood as a doctrine in search of a rationale."\(^6\) A number of other factors—the enhancement of urban land values, the transition from eminent domain delegation to a federal land grant system for financing railroads, the radical transformation of the economic structure of the country following the Civil War, and an increasing recognition of the hardships and inequities inflicted under the strict rule of "no compensation for consequential or indirect injuries"—made the narrow doctrine of compen-

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\(^6\) 109 Mass. 315 (1872).
\(^6\) Id. at 319. In this case the court upheld, as a valid exercise of the police power, a regulation prohibiting the use of certain buildings for slaughter houses.
\(^6\) 78 N.Y. 232 (1879).
\(^6\) Id. at 237–38. See also People v. Haines, 49 N.Y. 587 (1872); People *ex rel.* Cook *v.* Nearing, 27 N.Y. 306 (1863).
\(^6\) Horwitz, *supra* note 9, at 21.
sation that had developed in the early part of the century vulnerable to attack.\textsuperscript{70}

The attack took two forms. First, a number of states adopted constitutional provisions modifying the strict, physical approach to compensation. In Illinois, for example, dissatisfaction with the lack of compensation in street grade cases led to the inclusion of a clause in the constitution adopted in 1870, providing compensation not only for property taken but also for property damaged.\textsuperscript{71} Other states soon followed suit.\textsuperscript{72}

Second, in \textit{Pumpelly v. Green Bay Co.},\textsuperscript{73} decided in 1871, the Supreme Court indicated that absolute conversion of property to public use was no longer requisite to compensation. A dam built across the Fox River had caused the waters of Lake Winnebago to overflow onto 640 acres of Pumpelly's land. Despite the lack of actual physical appropriation to public use, the Court held for compensation on the ground that the government should not be able to avoid compensating a land owner for "irreparable and permanent injury" simply by refraining from the absolute conversion of property.\textsuperscript{74} The opinion, however, limited its holding to cases in which real estate had actually been "invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness. . . ."\textsuperscript{75} A physical conception of taking was thereby preserved at least to the extent of requiring a physical invasion of the land. Nonetheless, denial of a beneficial use, that is, the taking of a less than fee interest in land, was sufficient to require compensation.

A year after \textit{Pumpelly}, the Supreme Court of New Hampshire handed down its decision in \textit{Eaton v. Boston C. & M. R.R.},\textsuperscript{76} where it explicitly relied on the bundle of rights conception of property and provided compensation for the taking of a less than fee interest in property. In \textit{Eaton}, the railroad company had placed its road through the plaintiff's property and had paid compensation for the damages. It had also cut into a nearby ridge, thus allowing an adjacent river occasionally to flood the plaintiff's farm, covering it with earth and stones and making it unfit for cultivation or use. The court, stating that the vital issue was whether the damage caused the plaintiff

\begin{itemize}
  \item \textsuperscript{70} See Kratovil & Harrison, \textit{supra} note 33, at 599.
  \item \textsuperscript{71} ILL. CONSR. art. II, § 13 (1870); see Rigney v. Chicago, 102 Ill. 64 (1882).
  \item \textsuperscript{72} See 2 P. NICHOLS, \textit{THE LAW OF EMINENT DOMAIN} 324 (3d ed. 1950).
  \item \textsuperscript{73} 80 U.S. (13 Wall.) 166 (1871).
  \item \textsuperscript{74} Id. at 177-78.
  \item \textsuperscript{75} Id. at 181.
  \item \textsuperscript{76} 51 N.H. 504 (1872).
\end{itemize}
amounted to a taking of his property, held the deprivation of beneficial use compensable. "'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' [citation omitted] If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of these rights, such interference 'takes,' pro tanto, the owner's 'property'..."77

In a subsequent case, the New Hampshire court further refined its definition of property, holding that property is an aggregation of qualified privileges, and that "'[p]roperty is taken when any one of those proprietary rights is taken, of which property consists.'"78 The court thus broadened the definition of compensable taking to include limitations on any one of the package of rights that make up property, with the exception of the right so to use one's land as to diminish the value of a neighbor's land. The implicit recognition of the sic utere maxim indicated that even when taking was defined to include less than fee interests, regulation of nuisances or potentially obnoxious land uses was not considered a taking of property that required compensation.

The doctrine developed in Pumpelly and Eaton was not, however, immediately accepted. For example, in Transportation Co. v. Chicago79 and Gibson v. United States,80 both Pumpelly and Eaton were characterized as extreme qualifications of the consequential damages doctrine, and distinguished as involving "a physical invasion of the real estate of the private owner, and a practical ouster of his possession[,]"81 i.e., a virtual appropriation of title. Nonetheless, Pumpelly and Eaton stand as early examples of a line of cases more fully developed in twentieth century eminent domain and police power cases in which the concept of property was expanded through a recognition of intangible rights, the deprivation of which required compensation.82

The doctrinal expansion of Pumpelly and Eaton, although largely a response to the same forces of urbanization and development that resulted in the limitations on property rights expounded in Commonwealth v. Alger,83 stands in contrast and seeming opposition to the police power regulatory concept. In spite of this seeming opposition, however, exercises of the police power to protect against public "nui-

77 Id. at 511.
78 Thompson v. Androscoggin River Improvement Co., 54 N.H. 545, 552 (1874).
79 99 U.S. 635 (1878).
80 166 U.S. 269 (1897).
81 99 U.S. at 642; 166 U.S. at 276.
82 Perhaps the most famous and influential of these cases were Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) and Tyson & Bros.—United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418 (1927). See note 91 infra.
83 61 Mass. (7 Cush.) 53 (1851).
sances” continued to be regarded as noncompensable. For example, in *Railroad Co. v. Richmond*, Chief Justice Waite echoed Justice Shaw's opinion in *Alger*, holding that, in accord with the *sic utere* maxim, “[a]ppropriate regulation of the use of property is not ‘taking’ property, within the meaning of the constitutional prohibition.”

The most complete and influential explication of the distinction between the police power and the power of eminent domain came in *Mugler v. Kansas*. A Kansas statute that prohibited the manufacture of intoxicating liquors made the defendants’ brewery relatively worthless. They contended that, under the *Pumpelly* doctrine, the state could exercise such regulatory power only if it compensated them for the harm that the regulation caused. The Supreme Court held that *Pumpelly* had no application because it arose under the state’s eminent domain power, while the Kansas intoxicating liquor statute was an exercise of the police power. The Court continued: “A prohibition simply upon use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. . . . In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.” The Court in *Mugler* thus insisted that exercises of the police power are conceptually distinct from eminent domain takings and that regulations passed under the police power cannot constitute compensable takings. The response to the conflict inherent between the expansion of the concept of property in eminent domain cases and the narrowing of the rights to use property in the police power cases was to deny that police power limitations of less than fee interests constituted a taking that mandated compensation.

Three state cases of the period, however, suggested that the bundle of rights concept of less than fee takings might be an applicable limitation on police power regulations. In New York, in *In re Jacobs*, legislation prohibiting the manufacture of cigars in tenement houses was invalidated because it was an unjustifiable deprivation of the owner’s right to use his property. Relying on due process principles rather than constitutional limitations on the power of eminent domain, the court

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84 96 U.S. 521 (1877).
85 Id. at 529.
86 123 U.S. 628 (1887).
88 98 N.Y. 98 (1885).
said that the "capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."\(^9\)

In *Rideout v. Knox*, Justice Holmes, writing for the Massachusetts Supreme Judicial Court, relying on the "continuum of appropriation" concept, announced what would later become a major twentieth century limitation on the police power:

> It may be said that the difference [between police power and eminent domain] is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be, except by the exercise of the right of eminent domain."\(^9\)

The third case, *Health Department v. Rector of Trinity Church*, in approving a requirement that water and sinks be provided in tenement houses, held that a regulation "must not be an unreasonable exaction either with reference to its nature or its cost," and, invoking principles of equal protection, said that "[t]hese exactions must be regarded as legal so long as they bear equally upon all members of the same class. . . ."\(^9\)

These beginnings of limitations on the police power were not, however, further developed in the nineteenth century. The bundle of

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\(^9\) Id. at 105.
\(^90\) 148 Mass. 368 (1899).
\(^91\) Id. at 372-73. For an indication of how this principle was developed by Justice Holmes, see his opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), holding that a law restricting mining, in conflict with certain contractual rights of the plaintiff, exceeded the legitimate exercise of police power and entitled the plaintiff to compensation. See also Tyson & Bros.--United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418 (1927), in which he dissented from the Court's holding that an "anti-scalper" statute was an invalid intrusion on property rights.

Fairness, as Holmes finally formulated it, required some restraint on the part of all parties. The owner of private property must concede that the "constitutional requirements of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work." And on the other hand those who would promote change must recognize that the "play" in the machine "must have its limits or the contract and due process clauses are gone" and "private property disappears."


\(^92\) 145 N.Y. 32 (1895).
\(^93\) Id. at 42.
rights concept was not further applied to invalidate police power regulations or to require compensation for interferences that were a less than fee taking. Thus, in *Sweet v. Rechel*, 94 although the court required compensation for takings under a statute that authorized the municipality to take title to land in order to abate a health nuisance resulting from poor drainage, the decision sought its justification in the complete nature and extent of the appropriation. In *New Orleans Gas Light Co. v. Drainage Commission*, 95 the Supreme Court upheld a police power action that had forced the gas company to change the location of its pipes at its own expense in order to accommodate a new public system of drainage. And in *Chicago, B. & Q. Ry. v. Illinois ex rel. Drainage Commissioners*, 96 the Court, in upholding a similar regulation, relied on the distinction between "an incidental injury to rights to private property resulting from the exercise of governmental powers, lawfully and reasonably exerted for the public good, and the taking, within the meaning of the Constitution, of private property for public use." 97 These decisions essentially resulted in takings under the police power. They were predicated upon a physical conception of property and appropriation, as initially exemplified in the change of grade cases, and the consequent failure of the Supreme Court to recognize the continuum of appropriation theme. As long as the definition of property was limited to physical objects, the police power could be used to effectively deprive owners of substantial rights in property without compensation. It was not until 1922, that Justice Holmes, in *Pennsylvania Coal Co. v. Mahon*, 98 first enunciated the continuum of appropriation theme for the Supreme Court.

**CONCLUSION**

In order to facilitate the development of transportation systems in the early nineteenth century, state governments delegated their eminent domain powers to private parties. At the same time, and perhaps for the same reasons, the courts limited the scope of takings that required compensation. The problems of urbanization that emerged at midcentury required a different response, a means of structuring development and limiting the hazards of expansion. The governmental power necessary to deal with these problems was found in an expansion of the "police regulation" concept into a police power concept, which al-

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94 159 U.S. 380 (1895).
95 197 U.S. 453 (1905).
96 200 U.S. 561 (1906).
97 Id. at 583.
98 260 U.S. 393 (1922); see text and notes at notes 82 and 91 supra.
allowed legislatures to define prospectively the subjects of regulation, free from the confines of the common law definition of nuisances. When, in the 1870's, the concept of compensable eminent domain takings was broadened in a partial return to the pre-1825 standards, there was no substantial effect on the police power. Toward the end of the century, however, the police power came to be used to provide benefits for new public projects similar to the benefits provided by the earlier eminent domain powers. Perhaps because of this, courts took some tentative steps towards applying to the police power the same doctrines of compensation that they applied to the power of eminent domain. This development continued, and became the subject of major controversy, in the twentieth century.  

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