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Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrins

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POLICE POWER AND THE PUBLIC TRUST: PRESCRIPTIVE ZONING THROUGH THE CONFLATION OF TWO ANCIENT DOCTRINES

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Abstract: The close historical affinity between the Public Trust doctrine and police power supports a more expansive view of zoning. The doctrines' kindred public interest spirit can empower localities to adopt dynamic, proactive, prescriptive zoning ordinances that promote community character. To do so, municipalities must self-define their unique community assets and ambiance through an openly developed comprehensive plan that honestly memorializes development patterns and sets forth community goals. If public interest is at the heart of the comprehensive plan, localities may consider an expansion of the police power as justified in order to zone and nurture communtiy character more justified than zoning which relies on the classic *Euclidean* general welfare criteria. A combination of the police power, infused with the Public Trust, and a candid comprehensive plan, could allow localities to adopt zoning ordinances that preserve and promote the unique set of intangibles that attract people to a community in the first place.

INTRODUCTION

In the nearly eighty years since *Village of Euclid v. Ambler Realty Co.*,[1] zoning's police power has hidden behind the four criteria that the United States Supreme Court crafted in this landmark case: public health, safety, morals, and general welfare.[2] While the relationship between a zoning ordinance and these four criteria is often appropriate, at times judicial interpretations of these standards promote a le-

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[1] 272 U.S. 365 (1926).

[2] *See Village of Euclid*, 272 U.S. at 395; Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697, 706–07 (1995). The term "police powers" first appeared in the landmark Supreme Court decision *Gibbons v. Ogden*, 22 U.S. 1 (1824).

gal fiction.[3] Indeed, tenuous relations between the recognized criteria and the zoning ordinances stretch proffered reasons to the point of snapping.[4]

This Comment assesses the use of zoning to protect community and neighborhood character and to nurture the human ecosystem of the city,[5] but not under the traditional standards of *Village of Euclid.* Municipalities should instead adopt an expansive view of zoning,[6] justified by the seldom-acknowledged historical roots of the police power.[7] In recognition of the kindred spirit of the police power and the Public Trust doctrine,[8] communities should go a step further and

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[3] *See* Bobrowski, *supra* note 2, at 728 (quoting John Donnelly & Sons, Inc. v. Outdoor Adver. Bd., 339 N.E.2d 709, 716–17 (Mass. 1975)).

[4] *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (declaring zoning power could be used to create a "quiet place where yards are wide, people few, and motor vehicles restricted . . . to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people"); Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 959 (1st Cir. 1972) (holding municipalities can use general welfare and other acceptable criteria to "preserv[e] the charm of a New England small town"); County Comm'rs v. Miles, 228 A.2d 450, 459 (Md. 1967) (finding "preservation, in some measure, of existing conditions" is an appropriate ends for zoning); Bellaire v. Lamkin, 317 S.W.2d 43, 46 (Tex. App. 1959) (ruling a thirty-inch fence violated an ordinance limiting fence height to twenty-four inches because the higher fence could serve as a hiding place for criminals); Gunning Adver. Co. v. St. Louis, 137 S.W. 929, 942 (Mo. 1911) (finding billboards "endanger the public health, constitute hiding places and retreats for criminals and all classes of miscreants"); *see also* Berman v. Parker, 348 U.S. 26, 33 (1954) (holding values that represent public welfare include the "spiritual as well as [the] physical, aesthetic as well as monetary"); Bobrowski, *supra* note 2, at 706 n.56 (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 528 n.7 (1981) (Brennan, J., concurring) (holding that an ordinance banning billboards was valid, even though Justice Brennan was not satisfied with the sufficiency of the evidence connecting billboards with traffic safety).

[5] JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES, at xvii (Modern Library Edition 1993).

[6] *See* M. Hale, *A Narrative Legall and Historicall Touchinge the Customes, reprinted in* S. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 319, 327 (3d ed. 1888) [hereinafter S. MOORE]; Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine,* 71 IOWA L. REV. 631, 636 (1986); Lynda L. Butler, *The Commons Concept: An Historical Concept with Modern Relevance,* 23 WM. & MARY L. REV. 835, 861 (1982). "Municipality" is used interchangeably with "locality" and "local government" to refer to counties, cities, towns, and villages. *See* Michael T. Kersten, *Exactions, Severability and Takings: When Courts Should Sever Unconstitutional Conditions from Development Permits,* 27 B.C. ENVTL. AFF. L. REV. 279, 280 n.2 (2000).

[7] Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases about the Environment,* 64 CORNELL L. REV. 761, 821 (1979).

[8] *See id.* A historical view affords one "a more significant perspective on legal reality than the logician's analytic intelligence." *Id.* (quoting M. Howe, *Introduction* to OLIVER W. HOLMES, THE COMMON LAW xix (M. Howe ed., 1968)); *see also* William Drayton, Jr., *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine,* 79 YALE L.J. 762, 764 (1970).

use zoning delegation not just to protect community character, but to actually foster and nurture its presence.

The police power bears a close relation to the Public Trust doctrine.[9] Both legal doctrines include similar origins in Roman law and offer protections in the public interest,[10] with the sovereign in control of each doctrine's power.[11] By acknowledging the similarities of these ancient doctrines, localities may confidently adopt dynamic, proactive, prescriptive zoning ordinances[12] to promote their community character. Just as Professor Joseph Sax urged the judiciary to reach back to Roman law in supporting the Public Trust in his seminal work, *The Public Trust in Natural Resource Law: Effective Judicial Intervention*,[13] the judiciary should now reach back to the kindred public interest roots of the police power in order to expand its scope.

Currently, permissible zoning objectives with traits similar to character zoning survive judicial scrutiny, despite tenuous relations to accepted *Euclid*-based criteria.[14] In part, this expansion of *Euclid* criteria survives despite the attenuated reasoning because courts grant a presumption of validity to zoning ordinances and only find an ordinance invalid if challengers overcome that presumption.[15] The current expansion of general welfare stretches the zoning fabric, leaving slender threads of reasoning to support the presumption that zoning ordinances meet judicially acceptable goals.[16] A more reasonable approach is available, one that does not involve continuing this premise.

Instead, localities can define community character through theories of communitarianism and consumer surplus[17] in suburban loca-

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[9] *See* Lazarus, *supra* note 6, at 636; Butler, *supra* note 6, at 861; Joseph L. Sax, *The Public Trust in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 485 (1970) [hereinafter Sax, *Judicial Intervention*].

[10] *See* Lazarus, *supra* note 6, at 636; and Butler, *supra* note 6, at 861; Patrick Devaney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 43 (1976).

[11] *See* Drayton, *supra* note 8, at 764.

[12] *See* JAMES HOWARD KUNSTLER, THE GEOGRAPHY OF NOWHERE 259 (1993) (quoting Elizabeth Plater-Zyberk, Professor, University of Miami, interview by author on May 12, 1990).

[13] *See* Sax, *Judicial Intervention*, *supra* note 9, at 475.

[14] *See* Bobrowski, *supra* note 2, at 707–08.

[15] *See* Pa. Coal v. Mahon, 260 U.S. 393, 413 (1922); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926); *see also* Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, A Source of Significant Confusion*, 23 B.C. ENVTL. AFF. L. REV. 301, 323 (1996).

[16] *See* Bobrowski, *supra* note 2, at 706.

[17] In this discussion, consumer surplus is, in part, the intangible pride owners have in their home and neighborhood. Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J.

tions[18] and then memorialize those definitions in a comprehensive plan.[19] Municipalities can design comprehensive plans to define their unique standards.[20] Communities, faced with growing sprawl and a desire for open spaces, will especially benefit from comprehensive plans and prescriptive zoning.[21] Furthermore, comprehensive plans also serve to put property owners on notice of community characteristics, the very same intangibles that prompted the buyer to choose a specific neighborhood in the first instance.[22]

Character zoning offers a societal control in the public interest. The rights of a community interested in protecting or fostering its character may trump the rights of an individual property owner.[23] Given the close affinity between the Public Trust and the police power, municipalities may support a more expansive view of the police power, one that does not erode private property rights but restores the original balance between private property rights and the public interest.[24]

In this Comment, Part I introduces the historical perspective of zoning, from the roots of zoning to the delegation of the zoning power in the United States. Part II reviews how municipalities define their own character and set standards to zone with respect to community character. Part III explores the common bonds of the police power and the Public Trust, including an examination of the police power's Roman law roots. The final section then questions whether, by recognizing the police power's historical relation to the Public

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LAND USE & ENVTL. L. 45, 79 (1994) (citing GUIDO CALABRESI, THE COSTS OF ACCIDENTS 97–100, 203–05, 221 (1970); *see also infra* note 18.

[18] Mary Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 362 (1986) [hereinafter Radin, *Rent Control*]. Professor Radin contends homeowners value continuity of neighborhoods and personal interests developed by home ownership. In turn, these liberty interests further add to a home's consumer surplus. *See id.*

[19] *See* Bobrowski, *supra* note 2, at 745 (quoting MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 150 (1992)).

[20] *See* Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1155 (1955) (finding zoning scheme without a comprehensive plan operates without "coherence and discipline in the pursuit of goals of public welfare which the whole municipal regulatory process is supposed to serve"); *see also* Karkkainen, *supra* note 17, at 79.

[21] *See* Karkkainen, *supra* note 17, at 54 n.36. The largest number of zoning ordinances are directed at suburban communities, and the suburbs attract a great deal of money for development. *See id.*

[22] *See id.* at 65, 70.

[23] *See* Butler, *supra* note 6, at 891; Lazarus, *supra* note 6, at 679 n.303; *see also* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 40 (1964) [hereinafter Sax, *Takings*].

[24] *See* ERNST FREUND, THE POLICE POWER § 16, at 12 (1904); Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 313 (1980).

Trust, zoning to protect character is more legitimate than it would be if crafted under the *Euclid* standards.

Localities need to rethink private property rights and what they represent given today's growing, demanding, and sprawling society.[25] In view of the potential benefits of character zoning, states should infuse the police power delegation explicitly with the spirit of its related doctrine, the Public Trust. This combination can appropriately bolster attempts to preserve and promote that set of intangibles that attracts private property owners to a particular community, allowing courts to recognize that the police power is infused with the Public Trust.

I. Zoning 101

Zoning's historical development is instructive in interpreting the current state of zoning regulation.

A. *Brief History of Zoning in the United States*

Historically, zoning has been connected to the common laws of nuisance and trespass so that one property owner did not use his land to harm others.[26] The most fundamental right of property ownership today is the right to exclude.[27] Zoning better identifies a private property owner's right to defend against nuisance, and thereby promotes the general health, safety and welfare of the public.[28]

States delegate authority for land use planning and regulation.[29] The Tenth Amendment of the United States Constitution reserves this regulatory power strictly for the states.[30] These powers are the

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[25] *See* Coquillette, *supra* note 7, at 764.

[26] This follows the classic property maxim *sic utere tuo ut non alienum non laedas* ("so use your own property as not to injure your neighbors"). *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926); Symposium, *Developments in the Law—Zoning: The Legitimate Objectives of Zoning*, 91 HARV. L. REV. 1443, 1449 (1978). Zoning was originally seen as a way to resolve nuisances, and courts have sometimes relied on the analogy to nuisance in defining the legitimate ends of zoning. *See Village of Euclid*, 272 U.S. at 387–88.

[27] *See* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (stating right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); *see also* JOSEPH W. SINGER, PROPERTY LAW RULES, POLICIES, AND PRACTICES 4 (2d. ed. 1997). Conservative theorists believe that "an absolute conception of property . . . [is] sacred to personal autonomy." Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957–58 (1982) [hereinafter Radin, *Property and Personhood*].

[28] *See* Symposium, *supra* note 26, at 1449.

[29] *See* William D. McElyea, *Playing the Numbers: Local Government Authority to Apply Use Quotas in Neighborhood Commercial Districts*, 14 ECOLOGY L.Q. 325, 335 (1987).

[30] U.S. CONST. amend. X.; *see* McElyea, *supra* note 29, at 335.

broadest and least limitable source of authority that states grant to municipal governments.[31] Moreover, since the delegation is granted with very little specific guidance, American municipalities arguably enjoy "the most liberal property laws on earth."[32]

Local governments derive their authority to zone from state legislatures, either from state constitutional home rule or enabling legislation.[33] This delegated authority usually contains broad parameters allowing localities to zone principally to protect property owners from "negative externalities."[34] Municipalities then use this police power for the public good to classify, specify and identify land uses.[35] Usually, the enabling statute or home rule legislation grants localities the appropriate means or tools to achieve zoning goals.[36] Generally, the terms and conditions are broad, offering the municipality flexibility in exercising the delegated power because each situation involves unique variables that a state legislature is unable to predict.[37] For example, zoning ordinances that control housing density and land uses help limit change, particularly if any change is inconsistent with, and therefore disruptive of, a neighborhood's character.[38]

Most states model their zoning enabling statutes on the Standard State Zoning Enabling Act,[39] a model act that the U.S. Department of Commerce drafted in 1926.[40] The Standard Zoning Enabling Act expressly prescribes uniformity as an underlying goal, and most states have adopted the uniformity element.[41] However, municipalities may change zoning boundaries, particularly when the locus or an adjacent

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[31] *See* James G. Hodge, Jr., *Implementing Modern Public Health Goals Through Government: An Examination of New Federalism and Public Health Law*, 14 CONTEMP. HEALTH L. & POL'Y 93, 101 (1997). Without this delegation from the state, a local government has no inherent police power. *See* McElyea, *supra* note 29, at 335.

[32] KUNSTLER, *supra* note 12, at 26.

[33] *See* McElyea, *supra* note 29, at 326.

[34] Karkkainen, *supra* note 17, at 47. Brought about by new construction and developments, negative externalities, like a junkyard, are seen as inappropriate to a community. *See id.*; *see also* McElyea, *supra* note 29, at 346.

[35] *See* McElyea, *supra* note 29, at 345.

[36] *See id.* at 346. The judiciary must interpret challenged zoning measures and has traditionally interpreted enabling legislation broadly. *See id.*

[37] *See* Symposium, *supra* note 26, at 1455.

[38] *See* Karkkainen, *supra* note 17, at 73.

[39] STANDARD STATE ZONING ENABLING ACT § 3 (1926).

[40] *See* McElyea, *supra* note 29, at 345; Symposium, *supra* note 26, at 1444; Theordore C. Taub & Katherine Castor, *Legal Effects of the Comprehensive Plan: Case Law Update*, CA34 ALI-ABA 113, 115 (1995).

[41] *See* McHugh v. Bd. of Zoning Adjustment of Boston, 147 N.E.2d 761, 765 n.1 (Mass. 1958) (quoting MASS. GEN. LAWS ANN. ch. 40A, § 2 (1924)).

area gradually changes from residential to commercial use (perhaps because of traffic patterns or because the locus abuts a commercial district).[42] If character and use of the locus change after the original zoning ordinance, a change in boundary may promote public health, morals, safety or welfare.[43] Under the generally-adopted Zoning Enabling Act, municipalities can zone "with reasonable consideration . . . to the character of the district."[44] Such consideration would not be determinative of a regulation's validity, but could "constitute the 'atmosphere' under which the zoning is to be done."[45]

In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court first outlined standards for a state's police power in municipal land-use regulation.[46] There, Justice Sutherland specified that zoning regulations cannot be clearly arbitrary and unreasonable and must have a substantial relationship to "the public health, safety, morals or general welfare."[47] In part because this zoning could easily subsume neighborhood or community character, the Court recommended municipalities zone in conjunction with a carefully drafted comprehensive plan.[48]

When municipalities wish to zone with broad authority, the general welfare ambit is the most conducive criterion available to justify this exercise of power.[49] Yet, in the early twentieth century, the general welfare criterion was considered narrowly in terms simply of health and safety.[50] Moreover, municipalities originally adopted zoning ordinances with more limited purposes in mind, such as height, setback, and lot size requirements, and reduction of traffic congestion.[51] Now however, zoning measures backed with general welfare reasoning "cannot be even colorably linked to health and safety."[52] Yet, such reasoning has passed judicial review.[53]

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[42] *See* Leahy v. Inspector of Bldgs. of New Bedford, 31 N.E.2d 436, 439 (Mass. 1941); Hopperton, *supra* note 15, at 308.

[43] *See id.*; Hopperton, *supra* note 15, at 308.

[44] STANDARD STATE ZONING ENABLING ACT § 3 (1926).

[45] *See id.* § 3 n.4.

[46] *See* 272 U.S. 365, 395 (1926).

[47] *See id.*

[48] *See* Symposium, *supra* note 26, at 1444.

[49] *See id.* at 1451, 1452.

[50] *See id.* at 1445.

[51] *See id.*

[52] *Id.* at 1446.

[53] *See id.*

Courts determine which zoning ordinances go beyond the conferred authority; those that fail this test are invalid.[54] As long as courts see a real or substantial relation between the ordinance and the public health, safety, morals or general welfare, a municipality's legislative enactment enjoys a presumption of validity under the delegated authority.[55] Courts place the burden of proof on the party challenging the regulations, in effect to disprove the stated connection to health, safety, and welfare.[56]

Still, a locality cannot enact regulations based on post-hoc justifications that function like "a few fig leaves of rationalization . . . decorously draped" on a zoning ordinance.[57] To further demonstrate the connection between an ordinance and the *Euclid* criteria, a municipality can benefit by having a carefully formulated comprehensive plan that sets forth clear, well-defined standards for a reviewing court to consider.[58] Even without a comprehensive plan, courts have ruled that there is a strong presumption in favor of the validity of an amendment, and if its reasonableness is debatable, the judgment of the local authorities will prevail.[59] Critics argue that the presumption in favor of validity, along with the expansion of delegated authority, place the judiciary in a powerful position to validate current zoning schemes.[60]

B. *The Current Status of Zoning*

The sticks in the bundle of property rights have changed over time.[61] As early as 1851, courts recognized the limited nature of property rights.[62] Chief Justice of the Massachusetts Supreme Judicial Court Lemuel Shaw asserted that implied restrictions are inherent in private property:

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[54] *See* Berman v. Parker, 348 U.S. 26, 33 (1954); Udell v. Haas, 235 N.E.2d 897, 901 (N.Y. 1968); McElyea, *supra* note 29, at 346.

[55] *See* Hopperton, *supra* note 15, at 308.

[56] *See* Johnson v. Town of Edgartown, 680 N.E.2d 37, 40 (Mass. 1997); Hopperton, *supra* note 15, at 301–02.

[57] *See* Nat'l Amusements, Inc. v. City of Boston, 560 N.E.2d 138, 141 (Mass. App. Ct. 1990).

[58] *See* Hopperton, *supra* note 15, at 307.

[59] *See* Caires v. Bldg. Comm'r of Hingham, 83 N.E.2d 550, 554 (Mass. 1949).

[60] *See* Hopperton, *supra* note 15, at 319.

[61] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926); Lazarus, *supra* note 6, at 633; Deveney, *supra* note 10, at 34.

[62] *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE 20 (1996).

> 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 their property, nor injurious to the rights of the community.[63]

Still, municipalities must provide substantive due process for private property owners subject to zoning ordinances.[64] The Fifth and Fourteenth Amendments limit the municipality's power to regulate land use.[65] Under the Fifth Amendment, the federal government cannot take private property for public use without due process of the law and just compensation.[66] State and local governments face the same due process restriction.[67] When property is taken for public use, municipalities compensate the property owner at market value rates.[68]

However, in *Pennsylvania Coal Co. v. Mahon*, Justice Holmes recognized the need for government's power to periodically redefine the range of interests included in property ownership as necessarily constrained by constitutional limits.[69] Police power must be restrained, he wrote, otherwise, without a restrained police power, "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."[70] State laws accord legal recognition and protection to the particular interest in land, usually in part a reflection of a private property owners' reasonable expectations.[71] Still, a property owner ordinarily expects property restrictions, when a locality regulates land use through the legitimate exercise of its police powers.[72] Justice Rehnquist stated "[a]s long recognized,

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[63] *See* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85 (1851).

[64] *See* U.S. CONST. amend. XIV, § 1 ("Nor shall any state deprive any person of life, liberty, or property without due process of the law"). Without substantive due process, scholars are concerned that the preferences of an elite few could be imposed on all members of the community. *See* Bobrowski, *supra* note 2, at 703.

[65] *See* U.S. CONST. amend. V, XIV; KUNSTLER, *supra* note 12, at 26.

[66] *See* U.S. CONST. amend. V ("nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation").

[67] *See* U.S. CONST. amend. XIV.

[68] *See* Pa. Coal v. Mahon, 260 U.S. 393, 413 (1922); KUNSTLER, *supra* note 12, at 26.

[69] *See* 260 U.S. at 413.

[70] *See id.* at 415.

[71] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 834–35 (1986).

[72] See Pa. Cent. Transp. v. City of New York, 483 U.S. 104, 139–40 (1978) (Rehnquist, J. dissenting).

some values are enjoyed under an implied limitation and must yield to the police power."[73]

Today, zoning ordinances often mark the starting point, or "baseline rules," for development negotiations between localities, neighborhood groups, and developers.[74] The municipality serves as arbiter, and also defines the standards that are used in reconciling the competing private and public interests.[75] Increasingly, however, municipalities employ traditional zoning power to protect non-traditional goals in addition to the health, safety, and general welfare criteria defined in *Village of Euclid*.[76] Proponents believe an extension of the municipal power beyond the general welfare purpose reflects common sense and practicality.[77]

For example, courts have difficulty at times justifying aesthetic considerations as a valid exercise of the police power, particularly under the general welfare purpose.[78] When courts rule that aesthetic resources are protected, the judiciary interprets the general welfare prong broadly.[79] In order to convince a court to employ broad general welfare reasoning, a municipality has needed to link the protection of a visual resource to a traditional zoning goal.[80] For example, localities identified tenuous relationships between perceived eyesores such as billboards and traffic safety, a traditional *Euclid* criteria.[81]

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[73] *See id.* at 140 (Rehnquist, J., dissenting).

[74] *See* Karkkainen, *supra* note 17, at 81 n.134 (citing Carol Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 860 (1983)).

[75] *See* Sax, *Takings*, *supra* note 23, at 63.

[76] *See* Bobrowski, *supra* note 2, at 702.

[77] *See* David S. Winakor, *Not in My Front Yard?* Smith v. Greenwich Zoning Board of Appeals: *The Pitfalls of Local Zoning Decisions and the Power to Consider Historic Factors in Connecticut*, 28 CONN. L. REV. 201, 217 (1995).

[78] *See* Youngstown v. Kahn Bros. Bldg. Co., 148 N.E. 842, 844 (Ohio 1925); Louis H. Masotti & Bruce I. Selfon, *Aesthetic Zoning and the Police Power*, 46 J. URB. LAW. 773, 775 (1969).

[79] *See* Bobrowski, *supra* note 2, at 701; Symposium, *supra* note 26, at 1451; Masotti & Selfon, *supra* note 78, at 775.

[80] *See* Bobrowski, *supra* note 2, at 702. In the beginning stages of delegated zoning power in the early 20th century, aesthetics were considered a luxury. *See* Masotti & Selfon, *supra* note 78, at 777. In Western thought, however, there is a long pedigree of belief that recreation and contemplation of nature creates more civilized and sociable people. *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 781 (1986). Still, the resources and land used for this contemplation are not generally protected. *See* Bobrowski, *supra* note 2, at 703; Masotti & Selfon, *supra* note 78, at 777.

[81] *See* Bobrowski, *supra* note 2, at 711.

Some jurisdictions concede that this reasoning used to zone for aesthetics amounts to a legal fiction, but still approve of the contested zoning ordinance.[82] The Ohio Supreme Court, for example, stated:

> Mere aesthetic considerations cannot justify the use of the police power. It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified. Moreover . . . the public view as to what is necessary for aesthetic progress greatly varies. Certain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats.[83]

The legal fiction also touches upon the metaphysical.[84] In *Berman v. Parker*, the Supreme Court acknowledged that public welfare values "are spiritual as well as physical, aesthetic as well as monetary."[85]

Municipalities are increasingly employing the power to zone in order to preserve character.[86] Yet, case-by-case extensions by the judiciary fail to provide the citizenry with adequate notice of what is required under enabling legislation.[87] Courts can use general welfare, therefore, as a "catchall to constitutionalize otherwise invalid purposes."[88] Therefore, critics argue that under the general welfare expansion, municipalities may exercise the police power with very little accountability to the people.[89]

II. Standards of Community Character

In an effort to avoid claims of lack of accountability, municipalities may adopt comprehensive plans in an effort to identify both its community character and land-use objectives.[90]

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[82] *See* John Donnelly & Sons, Inc. v. Outdoor Adver. Bd., 339 N.E.2d 709, 716 (Mass. 1975) (recognizing "courts have engaged in a reasoning process, often amounting to nothing more than legal fiction, in order to avoid recognizing aesthetics as an appropriate basis for the exercise of the police power"); Bobrowski, *supra* note 2, at 728 n.183.

[83] *Youngstown*, 148 N.E. at 844.

[84] Berman v. Parker, 348 U.S. 26, 33 (1954).

[85] *Id.*

[86] *See also* Symposium, *supra* note 26, at 1451.

[87] *See* Winakor, *supra* note 77, at 219–20.

[88] Kenneth Regan, *You Can't Build that Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 Fordham L. Rev. 1013, 1020 (1990).

[89] *See* Joel Kosman, *Toward An Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 Cath. U. L. Rev. 59, 100, 108 (1993).

[90] *See* Haar, *supra* note 20, at 1155.

A. *What is a Community?*

The first critical step in zoning to protect and foster community character is to define the standards of a community.[91] Communitarianism is one approach.[92] In this ideology, individuals draw their identities from the community to which they belong.[93] People participate in a community by engaging in "one another's nature," and therefore "the self is realized in the activities of many selves."[94] Members of a community change through this realization of "many selves,"[95] and Communitarians believe that conceptions of property changes along with them.[96] Such a transformation reflects fluid notions about the nature of people in the community.[97]

A community is a human-built ecosystem[98], containing a certain "organic wholeness" that is not based on a specific type of building, or relation of buildings, but rather on a "whole menu of human values."[99] A community can be considered "a living organism" where both people and buildings create "a web of interdependencies."[100] This relationship contributes to the creation of a local economy.[101] Typically, homes and neighborhood economies develop into a community's two primary, definable elements.[102]

The home falls into a special category of property in the community, property "bound up with one's personhood" and therefore tied to "one's sense of continuity and personal identity."[103] The connection between personhood and property creates a community.[104] In an effort to better define its community, a municipality must recognize "reverence for the sanctity of the home . . . [is] inextricably part of the individual, the family, and the fabric of society."[105]

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[91] *See* Karkkainen, *supra* note 17, at 79.

[92] *See* Bobrowski, *supra* note 2, at 745.

[93] *See id.* (quoting SANDEL, *supra* note 19, at 150).

[94] SANDEL, *supra* note 19, at 150–51.

[95] *See id.*

[96] *See* Radin, *Property and Personhood, supra* note 27, at 958

[97] *See id.*

[98] JACOBS, *supra* note 5, at xvii. Jacobs admonished city planners for failing to deal "with a big city as a total organism." *Id.* at 544.

[99] KUNSTLER, *supra* note 12, at 185.

[100] *Id.* at 186.

[101] *See id.*

[102] *See id.*; *see also* Radin, *Property and Personhood, supra* note 27, at 959, 1013.

[103] Radin, *Rent Control, supra* note 18, at 362.

[104] *See* Radin, *Property and Personhood, supra* note 27, at 959, 1013.

[105] *Id.* at 1013.

Localities could also use "consumer surplus" when defining the contours of its community.[106] Consumer surplus reflects the intangible pride owners have in their homes.[107] It is, however, mostly overlooked because it is difficult to define in quantitative terms.[108] A high level of consumer surplus generally attaches to particular features of neighborhood ambiance.[109] These "non-fungible" features are "almost priceless, especially for long-term neighborhood residents, bound up in one's definition of self and sense of his or her place in the world."[110] Neighborhoods play a vital role in the development of modern urban life, creating an urban fabric to provide a community environment for development and maintenance of social relations.[111]

Defining community qualities is essential if a municipality wishes to create character-protecting zoning ordinances.[112] By failing to do this, municipalities expose such ordinances to claims of arbitrary and capricious action.[113] Ideals and characteristic traits that reflect a community's character can vary widely among different localities. The definition should embody an awareness, consciousness and respect for the whole, not viewed as a threat to individual identities, which can create a community with "amenity, charm, and beauty" for its citizens.[114] Municipalities face the demand, therefore, to develop consistent doctrines that both "satisfy the needs of society and justify the curtailment of property owners' and possessors' rights."[115]

In zoning to protect community character, communitarianism, and consumer surplus, municipalities may face charges of crafting discriminatory zoning ordinances that simply maintain the status quo without letting new members into a community.[116] Yet, some courts have validated zoning designed to protect a community's overall "charm."[117] Critics of such findings believe acceptance of such vague standards creates limitless power for a municipality to define and shape its own character through zoning regulations.[118] Most often,

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[106] Karkkainen, *supra* note 17, at 65.
[107] *See id.*
[108] *See id.*
[109] *See id.* at 65, 70.
[110] *Id.* at 70; *see also* Symposium, *supra* note 26, at 1451; Regan, *supra* note 88, at 1026.
[111] *See* KUNSTLER, *supra* note 12, at 125; McElyea, *supra* note 29, at 327.
[112] *See* Haar, *supra* note 20, at 1174–75.
[113] *See* Karkkainen, *supra* note 17, at 69–70.
[114] KUNSTLER, *supra* note 12, at 185.
[115] Coquillette, *supra* note 7, at 764.
[116] *See* Karkkainen, *supra* note 17, at 69–70.
[117] Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 959 (1st Cir. 1972).
[118] *See* Symposium, *supra* note 26, at 1452.

however, when a court approves zoning to protect community character, it justifies its holding by finding connections to more traditional general welfare reasoning.[119]

In *General Outdoor Advertising v. Department of Public Works*,[120] the Massachusetts Supreme Judicial Court found sufficient support for ordinances that prohibited billboards.[121] While the court stated that "the preservation of scenic beauty and places of historical interest would be sufficient support . . . considerations of taste and fitness may be a proper basis for actions in granting and in denying permits."[122] Yet, the court premised its reasoning on more than aesthetics.[123] The court linked aesthetics with travelers' safety, since they might become distracted by "the intrusion of unwelcome advertising."[124]

Since intangible objectives such as aesthetics and character are so amorphous, municipalities have difficulty drawing a clear distinction between ideological aims and other permissible objectives.[125] Many municipalities are exploring ways to preserve neighborhood integrity and pride in identifiable, ambient qualities.[126] Public pressure is increasing for this protection.[127] Moreover, many landowners perceive benefits from these restrictions.[128] The government can limit or subordinate existing private land use, placing reciprocal duties and demands on all members of the community.[129]

Some scholars believe that the police power should offer protection when private ownership obscures common rights.[130] The expanding scope of legitimate police power "exacerbates a growing clash in liberal ideology within natural resources law—between the need for individual autonomy and security, traditionally tied up in private property rights, and the demands of longer-term collectivist goals expressed in environmental protection and resource conservation laws."[131] Yet, a broad communitarian notion of general welfare re-

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[119] *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

[120] 193 N.E. 799, 816 (Mass. 1935).

[121] *See id.* at 816–17.

[122] *Id.*

[123] *See id.* at 817.

[124] *Id.* at 816.

[125] *See* Symposium, *supra* note 26, at 1455.

[126] *See* Masotti & Selfon, *supra* note 78, at 778–79.

[127] *See id.* at 786; *see also* Drayton, *supra* note 7, at 762.

[128] *See* Lazarus, *supra* note 6, at 679 n.303.

[129] *See* Sax, *Takings*, *supra* note 23, at 66.

[130] *See* FREUND, *supra* note 24, § 16, at 11; Butler, *supra* note 6, at 890, 891.

[131] Lazarus, *supra* note 6, at 692; *see also* Karkkainen, *supra* note 17, at 70. While these are valid charges, they are beyond the scope of this Comment. For more information, see

quires some consensus as to what is beautiful, in some locally understood way.[132] This notion subsequently helps to define the very core of the community and encourages civic pride.[133] A municipality may choose a course of action that appears most likely to protect the welfare of a current neighborhood and reinforce its community values, resources and institutions. [134]

Comprehensive plans are a necessary step in promoting and protecting public values inherent in a community.[135] When drafting a comprehensive plan, localities can acquire information, through questionnaires and interviews to gauge the issues and values that the municipality's residents deem most important in their lives.[136]

B. *The Comprehensive Plan Component: Defining a Community*

A comprehensive plan can be the essence of zoning.[137] Communities define their character with comprehensive plans, thereby shaping and protecting their identity through "a certain faculty of reflection."[138] Furthermore, communities can maintain their neighborhood character through common, implied and established expectations underlying the current state of the community, while at the same time generally recognizing private property rights.[139]

This recognition is the essence of property law.[140] The legal system recognizes that "the idea of justice at the root of private property protection calls for identification of those expectations," such as private property owners' reasonable expectations of what they may do with their property.[141] A comprehensive plan is a long-term general

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generally Yale Rubin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, printed in ZONING AND THE AMERICAN DREAM 101 (Charles M. Haar & Jerold S. Kayden eds., 1989); Kosman, *supra* note 89.

[132] *See* Karkkainen, *supra* note 17, at 70.

[133] *See* Bobrowski, *supra* note 2, at 745–46.

[134] *See* Karkkainen, *supra* note 17, at 77.

[135] *See* McElyea, *supra* note 29, at 364. This is broadly consistent with the precepts of "civic republicanism:" some believe our political system is designed to promote and defend public values, so that when those public values conflict with private welfare maximization, the public values ought to trump. *See* Karkkainen, *supra* note 17, at 78 n.125.

[136] *See* Jon Witten, *Land Use Planning*, MCLE MASS. ENVTL. LAW, 1999 Supp., §19.5.1(a).

[137] *See* Udell v. Haas, 235 N.E.2d 897, 900 (N.Y. 1968).

[138] SANDEL, *supra* note 19, at 152; *see* Haar, *supra* note 20, at 1174–75.

[139] *See* Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS. L. REV. 185, 187 (1980) [hereinafter Sax, *Public Trust*].

[140] *See id.* at 186–87.

[141] *Id.* at 187.

outline of projected development, and zoning is one set of tools used to implement the long-term plan and to recognize owner expectations.[142] In part, municipalities grant private property owners notice of the reasonable expectations implied by the community's current state of being.[143]

In an effort to set land-use goals, many state legislatures encourage municipalities to draft comprehensive plans.[144] Most municipalities use a comprehensive plan as a "preliminary, sketchy, first-draft" version of their zoning ordinance.[145] Notably, most localities did not have comprehensive plans when they passed their first zoning ordinances under enabling acts.[146] Therefore, many municipalities retrofit their comprehensive plan around zoning already in effect.[147] In the best circumstances, a comprehensive plan creates an insurance policy for the municipality, in order to avoid challenges of unreasonableness when exercising their delegated zoning authority to regulate in the name of the public welfare.[148] After nearly eighty years since *Village of Euclid*, there still is no clear definition of a comprehensive plan.

To create a comprehensive plan, a municipality typically enlists a planning commission to create a first draft.[149] In addition, municipalities often also select urban planners to help, because they perceive that planners are less likely to let prejudices or short-term political considerations effect their work.[150] However, many municipalities do not enjoy the luxury of a full-time planner and instead depend on part-time consultants or a voluntary board.[151]

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[142] *See* Haar, *supra* note 20, at 1156.

[143] *See* Sax, *Public Trust*, *supra* note 139, at 187.

[144] *See* Haar, *supra* note 20, at 1174–75; *see also* Witten, *supra* note 136, § 19.5.

[145] Haar, *supra* note 20, at 1174.

[146] *See* Taub & Castor, *supra* note 40, at 115.

[147] The process of planning is greeted by a great deal of skepticism. *See generally* JACOBS, THE DEATH AND LIFE, *supra* note 5, at 544.

[148] *See* Udell v. Haas, 235 N.E.2d 897, 469 (N.Y. 1968); Haar, *supra* note 20, at 1174; Winakor, *supra* note 77, at 220–21 (explaining that a broad reading of enabling legislation can lead to a lack of notice for citizens, particularly when a local zoning board makes many exceptions to zoning ordinances through special exceptions and permits); John R. Nolan, *Comprehensive Land Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351, 351 (1993).

[149] *See* Sam D. Starritt & John H. Mcclanahan, *Land Use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West after Dolan v. City of Tigard, 114 S.Ct. 2309 (1994)*, 30 LAND & WATER L. REV. 415, 422 (1995).

[150] *See* Symposium, *supra* note 26, at 1453; Nolan, *supra* note 148, at 360.

[151] *See* Karkkainen, *supra* note 17, at 49 n.15; Thomas Farragher, *Land Battle on the Cape*, THE BOSTON GLOBE, Jan. 20, 1998, at Metro A1.

Planners divide a comprehensive plan into several principal elements, including an inventory of built and natural assets, development of goals and policies, and a list of tools to use in reaching these goals and policies.[152] The inventory focuses on assets including: a pattern of land uses, mass transportation design, street systems, park and recreational systems, and the location of affordable housing and public buildings.[153] In their comprehensive plans, municipalities also include the locations of water supplies and sanitation facilities, boulevards and tree planting, transportation of goods, and market locations.[154]

In addition, comprehensive plans ideally address the division of developable lands, regulation of building height, structure area with relation to the size of lot, and use of structures on the land.[155] Generally, professional planners agree that comprehensive plans should provide goals and objectives with respect to the communities' desired future development.[156] Lack of a comprehensive plan, and local legislative acquiescence to pressure groups or developers, allows tracts of land to pass into development with little thought towards long-term ecological or social consequences.[157]

Most importantly, the community benefits from the opportunity to gather and comment during the process, permitting zoning decisions to be based on the needs of the whole community.[158] Moreover, by memorializing goals in a comprehensive plan, localities promote more honest and predictable dealings between their zoning bodies and private property owners.[159] In this process, after drafting is complete, the locality's legislative body votes to adopt the comprehensive plan.[160]

If a town has openly developed a comprehensive plan, the existence of that plan may sustain even burdensome land regulations dur-

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[152] *See* Witten, *supra* note 136, §§ 19.5.1–19.5.3.

[153] *See* Nolan, *supra* note 148, at 363 n.51 (quoting HAROLD M. LEWIS, PLANNING THE MODERN CITY 54–55 (1949)); Witten, *supra* note 136, § 19.5.1.

[154] *See* Nolan, *supra* note 148, at 363 n.51. Comprehensive plans can be a combination of reports, maps, charts and graphs. *See* Haar, *supra* note 20, at 1174.

[155] *See* Haar, *supra* note 20, at 1174.

[156] *See* Nolan, *supra* note 148, at 364; Haar, *supra* note 20, at 1155; *see also* Witten, *supra* note 136, § 19.5.2; Starritt & Mcclanahan, *supra* note 149, at 422.

[157] *See* Devaney, *supra* note 10, at 13.

[158] Udell v. Haas, 235 N.E.2d 897, 900 (N.Y. 1968) (finding a civilized form of existence requires the input of many); *see* Nolan, *supra* note 148, at 364; Regan, *supra* note 88, at 1029; *see also* Devaney, *supra* note 10, at 35.

[159] *See* Regan, *supra* note 88, at 1029.

[160] *See* Starritt & Mcclanahan, *supra* note 149, at 422.

ing judicial review.[161] In the absence of the open communication required for a comprehensive plan, however, zoning for community character potentially endangers the creative freedoms of property owners and impinges their reasonable expectations.[162] Ultimately, judicial review exists as a check on discretionary accountability.[163] A court must test the validity of a zoning ordinance or by-law, to ensure that it complies with the terms and scope of the enabling statute and the comprehensive plan.[164] If some rational relationship exists between the regulation and the objectives of the comprehensive plan, courts take a "fresh look" at a zoning scheme.[165]

Municipalities continually struggle to separate zoning from comprehensive planning, and planners always warn of the danger of confusing the two.[166] Simply put, the locality can give notice of their self-defined community assets to the general public (and to a reviewing court) by authorizing the creation of a comprehensive plan.[167] By failing to use a comprehensive plan to its full benefit, a locality may lack notice and also fail to curtail market forces through a public plan for manageable development.[168] Rational development through a comprehensive plan can aid in stabilizing and preserving property values.[169] Yet, while legislatures encourage local governments to develop comprehensive plans, many states do not require them by statute.[170]

Comprehensive planning is becoming more critical for cities and metropolitan areas due to increased pressure on land resources.[171]

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[161] *See* Nolan, *supra* note 148, at 380, 393.

[162] *See* Regan, *supra* note 88, at 1029. Especially in the face of "big house syndrome," property owners are angered when faced with more restrictive ordinances because they believe such restrictions will ultimately decrease their property values. *See* Lisa Prevost, *Big House Syndrome Opens Doors to Complaints*, THE BOSTON GLOBE, Mar. 12, 2000, at New England D10.

[163] *See* Sax, *Judicial Intervention*, *supra* note 9, at 559; Haar, *supra* note 20, at 1174.

[164] *See* McElyea, *supra* note 35, at 346.

[165] *See* Taub & Castor, *supra* note 40, at 115.

[166] *See* Haar, *supra* note 20, at 1156.

[167] *See also* Town of E. Greenwich v. Narragansett Elec. Co., 651 A.2d 725, 727 (R.I. 1994) (finding that a comprehensive plan "is not simply the innocuous general-policy statement . . . [but is rather] comprised of text, maps, illustrations . . . establish[ing] a binding framework or blueprint that dictates town or city promulgation of conforming zoning and planning ordinances").

[168] *See* Nolan, *supra* note 148, at 351, 357.

[169] *See id.* at 355.

[170] *See* Witten, *supra* note 136, §19.5.

[171] *See supra* notes 165–70; Masotti & Selfon, *supra* note 78, at 786.

For instance, Massachusetts loses forty-four acres a day to "sprawl."[172] According to the Environmental Protection Agency, although Massachusetts's population growth has been less than five percent during the last fifteen years, land use has increased twenty-five percent.[173] Moreover, eighty percent of construction in America has been built in the last fifty years.[174] Private property owners are destroying existing, humble homes at a record rate in order to construct today's fashionable "bigger-is-better" homes.[175]

In response, some California towns have ordered temporary halts to single-family demolitions, until these municipalities "rethink" their regulations.[176] The East Coast is experiencing the same phenomenon: Greenwich, Connecticut, long a desired location for the wealthy, issued fifty-seven permits in 1999 to demolish existing homes, compared to fifteen in 1994.[177] The current sustained economic boom has resulted in development pressure, pushing municipalities to consider adopting innovative solutions forged in the public interest.

By creating legislative history, comprehensive plans protect these solutions since all considerations identified during drafting become part of the record.[178] Finally, the community's definition of self helps to shape the contours of how that community is willing to act on behalf of the public interest. If the public interest is at the heart of a comprehensive plan, towns may consider an expansion of the police power as a justification to zone, rather than having to rely on classic *Euclidean* general welfare criteria.[179] Municipalities may look to the police power's Roman law origins to better understand the appropriateness of the police power expansion.

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[172] *See* James L. Franklin, *Growing Smarter*, THE BOSTON GLOBE, June 27, 1999, at City Weekly 1.

[173] *See id.*

[174] KUNSTLER, *supra* note 12, at 10.

[175] *See* Prevost, *supra* note 162, at New England D10.

[176] *See id.* at D11.

[177] *See id.* at D10.

[178] The Massachusetts's Legislature recently considered a bill, the Sustainable Development Act (SDA), which requires localities to adopt comprehensive plans and offers both funding and guidelines to accomplish that end. *See* H.B. 4805, 181st General Court, Reg. Sess. (Mass. 1999). The SDA would also fund the training of both town officials and voluntary planning boards, in an effort to encourage "more consistent, more predictable decision-making." *See* Franklin, *supra* note 172, at City Weekly 1. Through the SDA, a clear presumption in favor of zoning decisions supported with a comprehensive plan would exist, giving localities the ability to win zoning challenges on all but the most egregious decisions. *See* McElyea, *supra* note 29, at 363; Haar, *supra* note 20, at 1155.

[179] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); *see also* Haar, *supra* note 20, at 1168–69.

III. Roman Law Roots

Laws crafted to protect the public interest are rooted in Roman law. Legislators, jurists, and policymakers have all gained inspiration from the teachings of Roman law.[180] Furthermore, Roman law functions as "a useful model of doctrinal purity," that some scholars believe modern society should follow.[181] Both the police power and Public Trust doctrine share a common foundation in Roman Law.[182] Moreover, English law also acknowledged the interrelation between these doctrines.[183] Finally, in the United States, both doctrines developed in alliance with the public interest.[184]

A. *Common Roman Origins*

An organized legal system developed under Roman law.[185] Justinian, the Emperor from the East, commissioned legal works to memorialize the Roman legal system.[186] Justinian's relevance continues today because he collected, printed, and preserved Roman law just as the ancient world was beginning to crumble, leaving merely remnants of the developed society for reference.[187] In 533 A.D., Justinian commissioned an elementary textbook for students, *The Institutes.*[188] Although Justinian only hoped to settle outstanding controversies and formally abolish obsolete institutions with this text, Justinian's contemporaries regarded *The Institutes* highly.[189] *The Institutes* was not case law but a treatise, containing a civil code and a summary of contemporary legal scholarship.[190]

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[180] Coquillette, *supra* note 7, at 821.

[181] Drayton, *supra* note 7, at 764. "[T]he politician, the economist, the engineer and the lawyer can find inspiration in the roots of our legal heritage." Coquillette, *supra* note 7, at 821.

[182] *See infra* Part III.A.

[183] *See infra* Part III.B.

[184] *See infra* Parts III.C–D.

[185] *See* Butler, *supra* note 6, at 846.

[186] See Barry Nicholas, An Introduction to Roman Law 39 (1962). Justinian's realm centered in Constantinople, but before the end of his reign in 565, his army conquered Italy. *See id.* at 44.

[187] *See id.*

[188] *See id.* at 41; Butler, *supra* note 6, at 849.

[189] *See* Nicholas, *supra* note 186, at 41; Butler, *supra* note 6, at 850 n.61.

[190] *See* Devaney, *supra* note 10, at 19–20. Devaney quotes *Livingston v. Van Ingen*, 9 Johns. 507, 519–20 (N.Y. Sup. Ct. 1812): "The civil code was, in its origin, merely municipal; but from the extent of country and population for which it was devised, from the great antiquity of its sources. . . it has been deservedly held in reverence by all of the civilized

Of particular note, *The Institutes* examined the development of two branches of public and private law: *res publicum* and *res privatum*.[191] Under *res privatum*, a complex classification system of property rights existed, including *seisin*, the natural rights inherent to property.[192] *Seisin* included protection against interference with a private property owner's use or enjoyment of property, a concept still strong today.[193] Roman law also organized additional property classifications under separate categories, with two classifications key to the relationship between the police power and the Public Trust doctrine: *jus regium* and *jus publicum*.[194]

Like today's police power, *jus regium* in Roman law was the sovereign right to manage resources for public safety and welfare.[195] Justinian also defined the royal prerogative, where the sovereign held and safeguarded the shores and navigable rivers for the common use and benefit of the public as the *jus publicum*.[196] On the other hand, *jus publicum* allowed the government to hold certain common properties, such as rivers, the seashore and the air, for public use.[197] A lesser classification also existed, *jus privatum*, granting private rights of use and possession, which was also subject to the *jus publicum*.[198] For in-

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world, and in many European countries, is the avowed basis of their municipal laws . . . ." *Id.*

[191] *See* ERNEST METZGER, A COMPANION TO JUSTINIAN'S *INSTITUTES* 44 (1998); Butler, *supra* note 6, at 847.

[192] *See* Butler, *supra* note 6, at 847; Coquillette, *supra* note 7, at 770. These different property classifications included *res divine* (property dedicated to and subject to the gods), *res omnium communes* (things legally not property because they were incapable of dominion), and *res nullis* (things not possessed by an individual but capable of possession). *See* Coquillette, *supra* note 7, at 770; *see also* Sax, *Public Trust*, *supra* note 139, at 185. English law integrated *seisin* concepts when, in the 13th century, Bracton wrote that the natural rights of *seisin* were among the earliest legally protected rights. *See* Coquillette, *supra* note 7, at 772. From this concept, English common law delineated the classic property rule *sic utere tuo ut alienum non laedas* (so use your own property as not to injure your neighbors). *See id.* at 770–72.

[193] *See* Coquillette, *supra* note 7, at 770–72.

[194] *See* Lazarus, *supra* note 6, at 636; Devaney, *supra* note 10, at 43.

[195] *See* Lazarus, *supra* note 6, at 636.

[196] *See* Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 ALB. L. REV. 623, 628 (1998); *see also* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 89–94 (1851) (explaining the rights of the king to govern the sea gave way to the colonial government and became vested in the commonwealth).

[197] *See* Devaney, *supra* note 10, at 16.

[198] *See* Fernandez, *supra* note 196, at 627–28; *see also* BUCKLAND & MCNAIR, ROMAN LAW AND COMMON LAW 71 (1936). In addition to the general principle that a person's rights over his property were limited by the rights of others, Roman law had a number of specific rules, often local, limiting the heights of buildings, and the use of particular sites for building. *See* BUCKLAND & MCNAIR, *supra* note 198, at 71. Buckland and McNair stated

stance, the sovereign could grant *jus privatum* title to a subject, a grant conferring privileges and benefits subject to the *jus publicum*.[199]

Another Roman property classification important to the development of the Public Trust doctrine, *res communes*, reinforced *jus publicum* by declaring some property "common to all."[200] Romans endowed this classification with particular importance since their society depended on commerce related to the sea.[201] Private interest could not monopolize vital resources, like the sea, to the detriment of the rights of the general population under *res communes*.[202]

B. *English Law Development*

The English incorporated Roman concepts of common property and public rights into both the Magna Charta and the English common law.[203] In his 13th century work *De Legibus et Consuetudinibus Angliae*, the legal scholar Bracton first introduced Roman law by interpreting Justinian's *Institutes* as a declaration that the sea and seashore were common to all.[204] Scholars believe that Bracton relied on Roman law, but that he also amended the historical precepts to create a rule of law he perceived to be more desirable than a strict reading of Roman law.[205] Nonetheless, Bracton's contemporaries emulated and relied upon his scholarship.[206]

Besides recognizing *res communes* classifications, English law acknowledged *jus regium* and *jus publicum*.[207] In his *First Treatise*, Sir Matthew Hale further refined Bracton's interpretation of Roman law, describing the *jus regium* as the "prerogative intereste... that right which peculiarly belonges to the Kinge as the supreme magistrate, and this is

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that "a more peculiar feature of the Roman law is the existence of a large number of special provisions regulating the relations between neighbours, a matter which, in our law, seems to be left to the ordinary law of trespass and nuisance." *Id.*

[199] *See* Butler, *supra* note 6, at 862. While inland properties were not "trust resources" under *jus publicum*, they were still subject to the right of the Crown to manage them for the public good. *See* Wilkinson, *supra* note 24, at 274.

[200] *See* J. INST. 2.1.1; *see* Richard Ausness, *Water Rights, The Public Trust Doctrine, and The Protection of Instream Uses*, 1986 U. ILL. L. REV. 407, 409 (1986); Coquillette, *supra* note 7, at 802 n.195.

[201] *See* Ausness, *supra* note 200, at 409.

[202] *See id.*

[203] *See* Fernandez, *supra* note 196, at 627.

[204] *See* Devaney, *supra* note 10, at 36; Butler, *supra* note 6, at 858.

[205] *See* Devaney, *supra* note 10, at 36.

[206] *See* Butler, *supra* note 6, at 858.

[207] *See* Devaney, *supra* note 10, at 43; *see also infra* note 210, 215.

uncomunicable to any subject."[208] This right, Lord Hale stated, was "lodged" in the Crown in order to attain safety for the kingdom, protect commerce and trade, and safeguard the revenue of the Crown and his subjects.[209] In distinguishing *jus regium* and *jus publicum*, Lord Hale believed the sovereign held a duty to protect and preserve the *jus publicum* because the Crown protected public rights under *jus regium* (those duties that a sovereign owed to its people).[210]

With a focus on coastal resources and the commerce it created, Lord Hale defined the *jus regium* as encompassing the police powers of the sovereign, the ability of the Crown as sovereign to manage the kingdom's resources for public safety and welfare.[211] Lord Hale introduced the concept of *jus publicum*, the idea that no one, not even the Crown, could destroy or alienate certain public rights in property.[212] The sovereign defends any public rights existing in privately held land under his *jus regium*.[213] So, in early English common law, the Crown held title to tidal lands and waters for public benefit.[214] English lawyers cited the passage in Justinian's *Institutes* promoting *res communes:*

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[208] S. MOORE, *supra* note 6, at 327; *see* Butler, *supra* note 6, at 861. The American judiciary acknowledged Lord Hale's renown and considered him "a most learned judge" who carried the "authority of... great men." Arnold v. Mundy, 6 N.J.L. 1, 52, 53 (N.J. 1821) (Kirkpatrick, C.J.).

[209] S. MOORE, *supra* note 6, at 327.

[210] *See* Butler, *supra* note 6, at 861, 863. Lord Hale wrote his treatise at the time of Charles II. *See* Devaney, *supra* note 10, at 41.

[211] *See* Butler, *supra* note 6, at 861.

[212] *See id.* at 862. Lord Hale's writing has been seen as a set of governing rules "recognized by the courts of justice as controlling doctrines." Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 423–24 (1842).

[213] *See* Butler, *supra* note 6, at 862.

[214] *See id.* at 878. Some controversy among legal historians exists as to the strength of the original assertion by the Crown that the sovereign held this land in trust. *See* Devaney, *supra* note 10, at 43. In the sixteenth century, the Crown attempted to regain possession of the tidelands through the work of Thomas Digges, a lawyer, surveyor and engineer, who published a pamphlet on behalf of Elizabeth I entitled *Proofs of the Queen's Interest in Lands Left by the Sea and the Salt Shored Thereof*, reprinted in S. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 185–211 (3d ed. 1888). Digges answered possible objections by relying on Cicero's stoic rule that "by nature nothing is private" (*sunt autem privata nulla natura* . . .). Devaney, *supra* note 10, at 45 (quoting CICERO DE OFFICIIS 1, 7). This push to regain the shore was prompted in part because the English monarchs allowed much of this land to fall into private hands in the Middle Ages, and now wanted to regain possession. *See id.* Digges controversial "prima facie" theory of tidelands as a distinct category of property that private parties could only acquire by an express grant from the sovereign was at first rejected by English courts, until Sir Matthew Hale later adopted it in his influential treatise *De Jure Maris*. *See* Ausness, *supra* note 200, at 409–10; M. Hale, *A Treatise Relative to the Maritime Law of England in Three Parts*, reprinted in S. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370 (reprinted 1993) (3d ed. 1888).

"[b]y natural law, these things are the common property of all: air, running water, the sea, and with it the shores of the sea" to support the Crown's dominance over these properties.[215]

The New World colonies succeeded to the Crown's interests after the Revolution.[216] Like the King, the colonies (and then the states) held these lands in trust for the benefit of the public.[217] Under Royal charters, England granted colonies title to both *jus publicum* and *jus privatum* lands, as well as the right to regulate such lands under the *jus regium*.[218] After the American Revolution, these property interests, and the related police power and Public Trust doctrine, passed to the newly created states and have remained in the purview of state law.[219]

In 1842, the Supreme Court resolved the succession of power from the Crown to the colonies, and ultimately to the state governments as representatives of the people.[220] The dispute in *Martin v. Waddell* focused on the right to cultivate oyster beds in mudflats.[221] The Court ruled that the "letters patent" handed to the Duke of York from his brother Charles II did indeed carry with it all rights of the sovereign.[222] Moreover, since New Jersey was now sovereign, it held the *jus regium* in the land underlying the waters.[223] The *jus regium* followed the public character of the property, as it was held by the whole people for purposes in which the whole people were interested.[224] This right was further defined in *Commonwealth v. Alger*, when the Massachusetts Supreme Judicial Court established that the *jus regium* was a royal prerogative.[225]

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[215] Coquilette, *supra* note 7, at 801 (quoting J. INST. 2.1.1 (Professor Coquilette's translation)).

[216] *See* Ausness, *supra* note 200, at 411; Butler, *supra* note 6, at 879–80.

[217] *See* Arnold v. Mundy, 6 N.J.L. 1, 78 (N.J. 1821); Ausness, *supra* note 200, at 411.

[218] *See* Heather J. Wilson, *The Public Trust Doctrine in Massachusetts Land Law*, 11 B.C. ENVTL. AFF. L. REV. 839, 845 (1984).

[219] *See Arnold*, 6 N.J.L. at 78. Here, the court stated *the people* of each state became themselves sovereign. *See id.* (defining the *jus regium* as "the right of regulating, improving, and securing for the common benefit of every individual citizen"); *see also* Wilson, *supra* note 218, at 845.

[220] *See* Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 415 (1842).

[221] *See id.* at 407.

[222] *See id.* at 415.

[223] *See id.* at 416.

[224] *See Martin*, 41 U.S. at 410–11.

[225] Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 92 (1851). A *prerogative* is primarily defined by Webster as "an official and hereditary right (as a royal sovereign) that may be asserted without question and for which there is in theory no responsibility or accountability as to the fact and manner of its exercise though in practice it is usually limited by the power of public opinion or by statute and is generally (as in England) exercised on the

C. *American Development of the Police Power*

In the United States today, police power centers on the dual goals of securing and promoting the public welfare with both regulatory restraints and compulsions.[226] The Supreme Court affirmed that the police power should be exercised on behalf of the public interest.[227] States secure this role by reserving sovereign power over "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."[228] States delegate police power to municipalities, in place of specific statutory provisions.[229] A municipality may only exercise this power in the public interest and in a way rationally formulated and impartially administered to attain the desired purpose.[230] Even with appropriate means, the state's police power encroaches on private property ownership.[231]

The police power evolved in response to increased societal concern.[232] Even in *Village of Euclid*, Justice Sutherland understood that the scope of the application of the police power "must expand and contract to meet the new and different conditions."[233] Courts have broadened legitimate police power goals in a more flexible embrace of preservation goals, an end result that is in the public interest at large.[234] Courts find it harder to define the police power given this flexibility.[235]

Despite Justice Sutherland's view in *Village of Euclid*, courts generally construed the police power narrowly in the early 20th century.[236] At that time, scholars suggested natural resource conservation and aesthetic protection fell outside the confines of the police power's

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advise of ministers who are responsible to a legislative body." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1791 (Philip Babcock Gove, Ph.D. ed., 1986).

[226] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926); FREUND, *supra* note 24, §3, at 3.

[227] *See Village of Euclid*, 272 U.S. at 387; *see also* Berman v. Parker, 348 U.S. 26, 32 (1954).

[228] THE FEDERALIST No. 45, at 292–93 (James Madison) (Clinton Rossiter ed., 1961). The Framers of the Constitution understood sovereign police powers to pre-exist the country's formation. *See* Hodge, *supra* note 31, at 101.

[229] *See* Masotti & Selfon, *supra* note 78, at 774.

[230] *See id.*; *see supra* notes 29–44 and accompanying text.

[231] *See* Regan, *supra* note 88, at 1031.

[232] *See* Lazarus, *supra* note 6, at 658.

[233] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

[234] *See* Lazarus, *supra* note 6, at 678.

[235] *See* Berman v. Parker, 348 U.S. 26, 32 (1954).

[236] *See* Symposium, *supra* note 26, at 1443. State courts held the primary responsibility for defining the legitimate ends of the police power at this time. *See id.* at 1444.

traditional health and safety concerns.[237] However, in time, regulation of both land and commerce has increased, and the impact of the police power on private ownership can, in Professor Sax's words, hardly be ignored.[238]

Justice Holmes acknowledged the potential "petty larceny of the police power."[239] In *Pennsylvania Coal v. Mahon*, he warned of the police power's erosive effects on private property: "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]."[240] A more expansive view of the police power does result in the further narrowing of private property rights and its corresponding scope of private expectations.[241] The Supreme Court recognized the difficulty in placing real limits on the police power in *Berman v. Parker*.[242] Justice Douglas wrote that "an attempt to define [the police power's] reach or trace its outer limits is fruitless for each case must turn on its own facts. . . . Yet they merely illustrate the scope of the power and do not delimit it . . . the concept of the public welfare is broad and inclusive. . . ."[243]

The police power developed into an elastic construct, "neither abstractly nor historically capable of complete definition."[244] Police power regulations "mirrored" the public property doctrine.[245] The police power allows allows property regulation, which in turn protects the part of the economoy tied to real estate interests (such as real estate development or a business's ability to control rental expenses).[246]

The private landowner always held land subject to a common right, even if the right was not fully exercised to the broad expansion of today's general welfare power.[247] Every member of the community submits to these regulations, though not all are affected by them.[248]

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[237] *See* FREUND, *supra* note 24, § 15, at 11; Sax, *Takings*, *supra* note 23, at 39.

[238] *See* Sax, *Takings*, *supra* note 23, at 40.

[239] *Id.* at 55 (quoting 1 HOLMES-LASKI LETTERS 457 (Howe ed. 1953)).

[240] 260 U.S. 393, 415 (1922).

[241] *See* Lazarus, *supra* note 6, at 679 n.303.

[242] *See* 348 U.S. 26, 33 (1954).

[243] *Id.* at 32.

[244] *Berman*, 348 U.S. at 32; *see* FREUND, *supra* note 24, § 3, at 3; *see* Hodge, *supra* note 31, at 100; Regan, *supra* note 88, at 1017.

[245] Rose, *supra* note 80, at 773.

[246] *See id.* at 772. The classic police power case, *Munn v. Illinois*, illustrates this point. 94 U.S. 113 (1877). There, Chief Justice Taney defined the police power as the authority of "every sovereign to the extent of its dominions." *Id.* at 126–27.

[247] *See* Butler, *supra* note 6, at 846. A common right (such as the ability for a community to zone particular densities) might not be apparent or exercised. Butler states that "inaction usually is not an effective method of extinguishing a property right." *See id.*

[248] *See* Sax, *Takings*, *supra* note 23, at 66.

Nonetheless, a reciprocity exists because all members of the community have similar obligations.[249] The police power creates protections for the public when individual interests need to yield to general social interests because of social, economic, and political conditions.[250] Therefore, when a municipality places restrictions on land, it is acting as a sovereign, in the public interest, exercising its *jus regium*.[251]

D. *American Development of the Public Trust Doctrine*

Today, scholars and jurists recognize that the Public Trust is a common law principle with constitutional dimensions, because it restricts the power of state legislatures.[252] In 1821, an American court first suggested the concept of the Public Trust in *Arnold v. Mundy*.[253] The New Jersey Supreme Court stated that "the wisdom of [the common] law has placed it in the hands of the sovereign power, to be held, protected and regulated for the common use and benefit."[254] But the court also recognized the relation to the *jus regium* of the police power in setting the lands aside.[255]

In this case, which focused on the ownership of oyster beds, Chief Justice Kirkpatrick stated that legal title to common property vested at the Revolution in "*the people*."[256] The people then passed this power to their representatives in the legislature. This power

> that is nothing more than what is called the *jus regium*, the right of regulating, improving, and securing for the common benefit of every individual citizen. The sovereign power itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state divesting all the citizens of their common right.[257]

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[249] *See id.*

[250] *See* FREUND, *supra* note 24, §§ 3, 16, at 3, 12.

[251] *See infra* notes 226–31.

[252] *See* Ausness, *supra* note 200, at 408 n.8. Some states have now codified the Public Trust in their constitutions: Florida, Michigan, New York, Pennsylvania, Rhode Island and Virginia. *See id.*

[253] Arnold v. Mundy, 6 N.J.L. 1, 78 (N.J. 1821).

[254] Bell v. Gough, 1852 WL 3448, at *34 (N.J. Err. & App. 1852) (quoting *Arnold*, 6 N.J.L. at 71 (Kirkpatrick, C.J.)).

[255] *Arnold*, 6 N.J.L. at 78.

[256] *See id.*

[257] *Id.*

The Supreme Court crafted the classical concept of the Public Trust in American jurisprudence in *Illinois Central R.R. Co. v. Illinois.*[258] In this case, the Court voided the Illinois state legislature's grant of more than 1,000 acres of lakeshore property in the City of Chicago to the Illinois Railroad Company.[259] Justice Field wrote that the legislature failed in its role as trustee for this land because "trusts connected with public property, or property of a special character, like lands under navigable waters. . .cannot be placed entirely beyond the direction and control of the state."[260] Such property, Justice Field wrote, is subject to the "public concern to the whole people of the state . . . and cannot be alienated . . . without detriment to the public interest. . . ."[261]

In *Illinois Central R.R. Co.*, the Supreme Court also associated the Public Trust with the *jus regium.*[262] Justice Field reiterated the words of Chief Justice Taney in *Martin v. Waddell*:[263]

> the power exercised by the state . . . is nothing more than what is called the *jus regium*, the right of regulating, improving, and securing them for the benefit of every individual citizen . . . '[t]he sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant . . . divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.'[264]

However, Justice Shiras, in the dissent, disagreed with the connection of the *jus regium* with the *jus publicum.*[265] He stated that the extent of a grant and its resulting effect on the "public interests" in the property are matters of legislative discretion.[266] Nonetheless, the Court's majority recognized the symbiotic relationship between the police power and the Public Trust doctrine.[267]

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[258] *See generally* 146 U.S. 387 (1892).
[259] *See id.* at 433, 454.
[260] *Id.*
[261] *Id.* at 455.
[262] *See id.* at 456 (quoting Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 414 (1842).
[263] *See Illinois Cent. R.R. Co.*, 146 U.S. at 456.
[264] *Id.*
[265] *See id.* at 466 (Shiras, J., dissenting).
[266] *See id.* at 467.
[267] *See id.* at 456, 466.

Thirty years ago, legal scholars revitalized the essentially dormant Public Trust doctrine.[268] During the reinvigoration of the Public Trust doctrine in the early 1970s, scholars pointed to Roman law for historical support for the theory that certain public interests are "so intrinsically important to every citizen" that they must continue in today's legal system.[269] The historical role of the Public Trust was to provide a public property basis for resisting the exercise of private property rights in natural resources that was deemed contrary to the public interest. The historical role came back into vogue.[270]

The Public Trust doctrine relies on judicial review and judge-made principles.[271] Parties allegedly violating the Public Trust face three categories of claims: (1) private citizens suing the government; (2) private citizens suing other private parties; and (3) the government suing private parties.[272] However, litigation focusing on the Public Trust imposes a "destabilizing disappointment of expectations held in common but without formal recognition such as title."[273] Simply put, there is a notice problem.[274] In his seminal work on the Public Trust, Professor Joseph Sax argues that at some point courts should hold private property owners responsible for knowing that "historical protection and open-space preservation [are] important public values and that they [are] increasingly being protected to the detriment of landowners."[275] Therefore, Professor Sax concludes, courts should not be sympathetic to property owners' claims of reasonable expectations being usurped by the Public Trust doctrine.[276]

Flexibility is an essential characteristic of the Public Trust doctrine.[277] The Public Trust, however, is less flexible than the police power, perhaps because of the substantive mandate of the police power.[278] In the last fifteen years, municipalities have invoked the Public Trust doctrine in the majority of cases brought to resolve disputes.[279] In contemporary cases, the Public Trust represents an op-

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[268] *See* Lazarus, *supra* note 6, at 646.

[269] Sax, *Judicial Intervention*, *supra* note 9, at 484 (quoting Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 414 (1842)); Drayton, *supra* note 8, at 787.

[270] *See* Lazarus, *supra* note 6, at 633.

[271] *See* Wilkinson, *supra* note 24, at 315.

[272] *See* Lazarus, *supra* note 6, at 645–46.

[273] Sax, *Public Trust*, *supra* note 139, at 188.

[274] *See id.* at 188 n.13.

[275] *Id.*

[276] *See id.*

[277] *See* Wilkinson, *supra* note 24, at 304–05.

[278] *See* Lazarus, *supra* note 6, at 274 n.269.

[279] *See* Sax, *Public Trust*, *supra* note 139, at 188.

portunity for *after-the-fact* democratization of the process of zoning and development.[280]

IV. Police Power: Preservation, Promotion & Enhancement of Community Character

A. *Similarities in Scope and Perspective*

The conflation of the Public Trust doctrine and the police power started with *The Institutes*.[281] When classifying property into distinct categories particularly critical to the relationship between the police power and the Public Trust doctrine, Justinian imbued both doctrines with the public interest.[282] This common bond decreed the necessity that the sovereign act for the public good.[283] *The Institutes* defined a *jus regium* shaped by the sovereign's royal right to manage resources for public safety and welfare.[284] This is the root of today's police power.[285] In Roman law, the Public Trust also reflected a similar public interest purpose.[286] Even the grant of land subject to a *jus privatum* title was still conditioned on *jus publicum* concerns.[287]

The English continued the *jus regium* and *jus publicum* doctrines proposed by Justinian in their common law.[288] When Lord Hale, who was both renowned by contemporaries and respected by later legal theorists, adapted Bracton's interpretation of *The Institutes*, it received additional strength.[289] The rules laid down by Lord Hale have always been understood as the governing rules "recognized by the courts of justice as controlling doctrines."[290] Lord Hale saw a connection between *jus publicum* and *jus regium*: the sovereign had a duty to protect and preserve the *jus publicum* because the Crown protected public rights under his *jus regium*, the duties that a sovereign owed to its people.[291]

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[280] *See* Devaney, *supra* note 10, at 13.
[281] *See supra* notes 185–99.
[282] *See* Lazarus, *supra* note 6, at 636; Devaney, *supra* note 10, at 45.
[283] *See* Buckland & McNair, *supra* note 198, at 74; Fernandez, *supra* note 24, at 628.
[284] *See* Lazarus, *supra* note 6, at 636.
[285] *See* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 92–93 (1851).
[286] *See* Sax, *Judicial Intervention*, *supra* note 9, at 477.
[287] *See* Buckland & McNair, *supra* note 198, at 71; Fernandez, *supra* note 23, at 628.
[288] *See* Devaney, *supra* note 10, at 45.
[289] S. Moore, *supra* note 6, at 327; Butler, *supra* note 6, at 861.
[290] Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 423–24 (1842).
[291] *See* Butler, *supra* note 6, at 861; Devaney, *supra* note 10, at 41.

The Public Trust doctrine is in one way much more limited than the police power. With the Public Trust, courts determine if the land contains water interests when deciding which land the trust applies to and which land it does not.[292] Courts trace this distinction back to Justinian.[293] The Public Trust doctrine treats as trust property those with water interests, such as sea shores or river banks.[294] Water interests were critical because Romans depended upon the sea for commerce.[295] The police power is not limited by such distinctions.[296] The *jus regium* applies to all lands within the border of the sovereignty.[297]

The role of the sovereign is a key element that both the Public Trust and police power have in common.[298] Justinian defined the royal prerogative, which developed into the police power, as the *jus regium* that the Crown holds to safeguard shores and navigable rivers for the common use and benefit of the public.[299] Yet, the *jus regium* is not limited to lands with water interests.[300]

The history of delegation is also similar for both doctrines.[301] Delegation traveled from the English crown, to the colonies through royal charters, and then to *the people* after the Revolutionary War.[302] The Supreme Court settled this succession, giving the people control of the police power and in effect allowing them to define its contours.[303] Effectively, however, the sovereign holds the police power in trust for the people. The reasons for this are pragmatic. In order to have a well regulated society, the government must exercise the police power through regulations and ordinances.[304] Yet, *the people* can define the police power in part through a well drafted comprehensive plan.

The Public Trust doctrine never grants the same full delegation power to *the people*. Although the sovereign holds the trust lands for *the people*, the sovereign exercises the power on their behalf, just as the

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[292] *Martin*, 41 U.S. (16 Pet.) at 410–11.

[293] *See* Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 92 (1851).

[294] *See id.* at 89–94; BUCKLAND & MCNAIR, *supra* note 198, at 74.

[295] *See* Ausness, *supra* note 200, at 409.

[296] *See* Butler, *supra* note 6, at 893.

[297] *See id.* at 861.

[298] *See* Lazarus, *supra* note 6, at 636; Ausness, *supra* note 200, at 409.

[299] *See* S. MOORE, *supra* note 6, at 327.

[300] *See* Butler, *supra* note 6, at 861.

[301] *See* Ausness, *supra* note 200, at 411; Butler, *supra* note 6, at 880; Wilson, *supra* note 218, at 845.

[302] *See* Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 415 (1842).

[303] *See id.*

[304] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

sovereign holds the police power.[305] The right of regulation follows from the public interest of all property, just as the Public Trust doctrine does with those properties with water interests.[306] The police power has no such limitations.[307] Both fall under the sovereign's interest in managing resources for the public benefit.[308]

Today, every citizen submits to regulation.[309] Municipalities, in their sovereign role, act in the public interest by managing the Public Trust and by exercising the police power.[310] Moreover, the sovereign cannot alienate either *jus publicum* or *jus regium*, especially because the public's interest is such an intrinsic element.[311]

The judiciary plays a significant role in defining the scope of both doctrines.[312] Courts have broadened legitimate police power goals in a more flexible embrace of preservation goals, an end result that is in the public interest.[313] The Public Trust was first recognized by the judiciary in *Arnold v. Mundy*.[314] While some states have now codified the Public Trust, the judiciary, urged by legal scholars, has been at the forefront of crafting the contours of the Public Trust.[315]

Jus regium and the Public Trust doctrine were fused in nineteenth century jurisprudence.[316] In fact, cases that discussed the *jus regium* were often premised on claims of the Public Trust doctrine.[317] The

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[305] *See* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 456 (1892).

[306] *See Martin*, 41 U.S. at 410; Arnold v. Mundy, 6 N.J.L. 1, 78 (N.J. 1821).

[307] *See supra* notes 226–32 and accompanying text.

[308] *See Village of Euclid*, 41 U.S. at 387; *Illinois Cent. R.R. Co.*, 146 U.S. at 452.

[309] *See* Sax, *Takings*, *supra* note 23, at 66.

[310] *See* Lazarus, *supra* note 6, at 636.

[311] *See Illinois Cent. R.R. Co.*, 146 U.S. at 454–55. As long as a government existed, the police power existed. *See* Butler, *supra* note 6, at 846.

[312] *See* Sax, *Judicial Intervention*, *supra* note 9, at 566; Lazarus, *supra* note 6, at 646; Masotti & Selfon, *supra* note 78, at 773; Bobrowski, *supra* note 2, at 711.

[313] *See* Lazarus, *supra* note 6, at 678.

[314] Ausness, *supra* note 200, at 411.

[315] *See* Ausness, *supra* note 200, at 408 n.8; Wilkinson, *supra* note 24, at 315; Sax, *Takings*, *supra* note 23, at 63–66.

[316] *Illinois Cent. R.R. Co.*, 146 U.S. at 456, 466–67; Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 92, 93 (1851); Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 420 (1942) (Thompson, J., dissenting); Arnold v. Mundy, 6 N.J.L. 1, 78 (N.J. 1821).

[317] *See, e.g.*, Shively v. Bowlby, 152 U.S. 1, 14 (1858); *Illinois Cent. R.R. Co.*, 146 U.S. at 456, 466–67; *Alger*, 61 Mass. at 92, 93; *Martin*, 41 U.S. at 420 (Thompson, J., dissenting); *Arnold*, 6 N.J.L. at 78; *see also* Kraft v. Burr, 476 S.E.2d 715, 720 (Va. 1996); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 52–53 (N.J. 1972); Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 443 P.2d 205, 210 (Or. 1968); Wilson v. Welch, 7 P. 341, 344–45 (Or. 1885); Providence Steam-Engine Co. v. Providence & S.S.S. Co., 1879 WL 3545 at *8 (R.I. 1879); Town of Oyster Bay v. Commander Oil Corp., 177 Misc. 2d 1025, 1028–29 (N.Y. Sup. 1998); *In re* Pea Patch Island, 30 F.Cas. 1123, 1137 (Arb. Ct. 1848).

Supreme Court also discussed the distinction in using either the *jus regium* or the Public Trust to decide a case.[318] The *Illinois Central* majority viewed the Public Trust as the appropriate tool to invalidate the transfer of title to the railroad.[319] The dissent, however, believed similar action could be accomplished instead with the police power.[320]

Both doctrines have enjoyed a recent expansion of powers.[321] The police power has evolved in response to increased societal concern.[322] The application of police powers "must expand and contract to meet the new and different conditions."[323]

The police power's expansion has been under the "general welfare" ambit of *Village of Euclid*.[324] Some argue that the police power is not definable.[325] This criticism is less relevant once a connection between the Public Trust and the police power is understood.[326] The police power, like the Public Trust, is exercised for the public good, for a public purpose.[327] Moreover, in the face of natural resource depletion and desired aesthetic protection, municipalities may want to employ the police power beyond general welfare concerns to deal with public interests.

In using the police power in this broad way, municipalities can avoid charges of arbitrary and capricious acts. The police power's public purpose intent can be further defined when a municipality adopts a comprehensive plan.[328] To avoid successful challenges to zoning ordinances, municipalities should flex police power limits by identifying the expectations of private property owners.[329]

A comprehensive plan memorializes those definitions to promote and enhance their community character.[330] Without this open communication, municipalities will be hard pressed to conduct honest

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[318] *See Illinois Cent. R.R. Co.*, 146 U.S. at 456, 466–67.

[319] *See id.* at 456.

[320] *See id.* at 466–67.

[321] *See* Lazarus, *supra* note 6, at 633; Symposium, *supra* note 26, at 1446.

[322] *See* Lazarus, *supra* note 6, at 658.

[323] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

[324] *See id.* at 395.

[325] *See* Berman v. Parker, 348 U.S. 26, 32 (1954). Justice Douglas wrote that "an attempt to define [the police power's] reach or trace its outer limits is fruitless. . . ." *See id.*; Sax, *Takings*, *supra* note 23, at 39.

[326] *See* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 456, 466–67 (1892).

[327] *See* KUNSTLER, *supra* note 12, at 27.

[328] *See* Haar, *supra* note 20, at 1174–75.

[329] Sax, *Public Trust*, *supra* note 139, at 187.

[330] *See* Haar, *supra* note 20, at 1174–75.

dealings with private property owners.[331] And if the zoning ordinance is struck down because reasonable expectations are not met, it also fails because community members were not given sufficient notice of standards through the comprehensive plan goals.[332]

B. *Revitalization of Public Trust*

The Public Trust was revitalized by Professor Joseph Sax in the 1970s.[333] While Sax originally premised his theory on the ability of citizens to step in and force government action, most cases now are brought by the government.[334] The main critique of the recent expansion of the Public Trust is two-fold. First, it is most often a judge-made doctrine.[335] Secondly, private property owners are caught off guard, not knowing that they are essentially missing property rights.[336] At some point, as argued by Professor Joseph Sax, important public values will demand that protections increase, even if at the detriment of private property ownership.[337]

The police power can overcome the criticisms aimed at the Public Trust. First, the judiciary need not define the police power as it does the Public Trust. Instead, the municipalities should define it, both by working within the public interest and by defining those interests through a comprehensive plan. Secondly, the private property owner may participate in that definitional exercise and therefore would be hard pressed to argue in good faith that the comprehensive plan unreasonably impinges on ownership expectations. Moreover, the municipality should argue that the private property owner had reasonable notice of the police power through the current community condition and ambiance.

Both of these expansions are responses to changing conceptions of property.[338] There are indeed fewer "sticks in the bundle."[339] The

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[331] *See* Regan, *supra* note 88, at 1029.

[332] Masotti & Selfon, *supra* note 78, at 778.

[333] *See passim* Sax, *Public Trust*, *supra* note 136; Sax, *Judicial Intervention*, *supra* note 9; Sax, *Takings*, *supra* note 22.

[334] *See passim* Sax, *Public Trust*, *supra* note 136; Sax, *Judicial Intervention*, *supra* note 9; Sax, *Takings*, *supra* note 22.

[335] *See* Wilkinson, *supra* note 24, at 315.

[336] *See* Sax, *Public Trust*, *supra* note 139, at 188.

[337] *See id.* at 188 n.13.

[338] *See* Karkkainen, *supra* note 17, at 69–70; *see also* Lazarus, *supra* note 6, at 692.

[339] *See* Lazarus, *supra* note 6, at 679 n.303; *see also* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

essence of property law is respect for reasonable expectations,[340] yet increased demand on resources places these reasonable expectations at risk.[341] An ambiguous general welfare standard simply cannot protect the public interest with definable, limitable goals, but the police power can.

Both expansions are also in response to growing demands on resources and land.[342] Perhaps this growth is appropriate. Public lands, whether public because affected by public regulation or because part of the Public Trust, is in fact valuable because of its "publicness."[343] If constituents so value this public land, municipalities will face demands of property protection in the face of resource depletion.

C. *Revitalization of the Police Power*

This conflation of the Public Trust and the police power is the correct course. The expansion of police power need not be unnaturally linked to the *Village of Euclid* criteria.[344] Inherently, the police power contains a public purpose element that can be better defined than an ad hoc, rationalized connection to the general welfare criterion.[345] When municipalities place restrictions on land, they are acting as sovereigns, in the public interest, exercising their *jus regium*.[346] Police powers do erode private property rights, but states can limit that erosion by compelling municipalities to act in the public interest by defining their police power in part through comprehensive plans.[347]

By properly acknowledging the roots of the police power,[348] municipalities can only act within the public purpose rationale. Both expansions are reasonable, given common roots in public purpose. Such a distinction may seem like splitting hairs, the difference between the public interest and general welfare is one just of degree. But a municipality's ability to define the limits of the public interest, including nurturing community character, under the police power is an achievable goal, particularly with comprehensive plans. The reasonable ex-

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[340] *See* Sax, *Public Trust*, *supra* note 139, at 188.

[341] *See supra* notes 165–70 and accompanying text.

[342] *See supra* note 322–28 and accompanying text.

[343] Rose, *supra* note 80, at 773.

[344] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

[345] *See* Nat'l Amusements, Inc. v. City of Boston, 560 N.E.2d 138, 140–41 (1990); Sax, *Judicial Intervention*, *supra* note 9, at 559.

[346] *See* Sax, *Takings*, *supra* note 23, at 63.

[347] *See* Pa. Coal v. Mahon, 26 U.S. 393, 413 (1922).

[348] *See Village of Euclid*, 272 U.S. at 387; *see also* Berman v. Parker, 348 U.S. 26, 32 (1954).

pectations of private property owners cannot be violated because the community members define those expectations, such as fostering neighborhood ambiance, through a comprehensive plan.[349] Still, municipalities must stay within their delegated authority, a public interest foundation which makes the municipality a trustee of public interests, as it does with the Public Trust doctrine.[350]

Conclusion

Municipalities should zone under the public interest element of their police power rather than the general welfare criterion from *Village of Euclid.* In turn, the judiciary needs to recognize the Roman foundation of the police power, just as they acknowledged the same foundations in Public Trust cases. By recognizing the connection between these doctrines, the judiciary would encourage municipalities to define the contours of the police power in a more effective manner than through the general welfare criteria. A locality can recognize the unique qualities of its community through comprehensive plans. Still, communities should not view this as an opportunity to disregard important public interest elements that contribute to the community character, like neighborhood businesses and well-planned, affordable housing. Armed with a well-defined police power mandate and an honest assessment of all community needs, municipalities must instead zone in the public interest. Localities should include in that mandate prescriptive zoning measures to protect and nurture their community character.

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[349] *See* Sax, *Public Trust, supra* note 139, at 188.

[350] *See* Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387, 456, 466–67 (1892).