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EMPIRICISM AND THE PRINCIPLE OF CONDITIONS IN THE EVOLUTION OF THE POLICE POWER: A MODEL FOR DEFINITIONAL SCRUTINY

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The states' police power has traditionally been the governmental power least definable in nature and limitable in scope. It has, therefore, been the power most subject to potential legislative abuse. As both the embodiment of residual sovereignty[1] and "the expression of social, economic and political conditions,"[2] it has proved incapable of enduring, comprehensive definition.[3]

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1. THE FEDERALIST NO. 39, at 307 (A. Hamilton 1864 ed.). *See* Hastings, *The Development of the Law as Illustrated by the Decisions Relating to the Police Power of the State*, 39 PROCEEDINGS OF THE AM. PHILOSOPHICAL SOC'Y 359-78 (1900). U.S. CONST. amend. X reserves the police power to the states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

2. E. FREUND, THE POLICE POWER 3 (1904). Professor Freund stated:

> [A] detailed examination of statutes and decisions . . . will reveal the police power not as a fixed quantity, but as the expression of social, economic and political conditions. As long as these conditions vary, the police power must continue to be elastic, i.e., capable of development.

Id.

3. Defined generally as the power to promote and protect the public health, safety, morals, and general welfare, it "must be from its very nature . . . incapable of any very exact definition . . . ." The Slaughter House Cases, 83 U.S. (16 Wall.) 36, 62 (1872) (opinion of Miller, J.), discussed in text at notes 150-55 *infra*. In Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851), discussed in text at notes 57-63 *infra*, Chief Justice Lemuel Shaw attempted the first comprehensive definition of the police power. *See* L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 247-54 (1957). In describing the difficulty of such an attempt, he stated: "It is much easier to perceive and realize the . . .

The doctrinal history and development of the police power indicate, however, that the judiciary has explicitly delineated the scope of the power by assessing the responsiveness of a legislative enactment to prevailing social and economic conditions. This substantive link between the legislature's authority to regulate and contemporary conditions has been an independent means of defining the power's scope and circumscribing its applicability. Herein denominated the *principle of conditions*, it has served as a fountainhead standard of constitutional review in the evolution of the police power. In its most fundamental explication, the principle of conditions holds: To be constitutionally authorized and, therefore, valid, a police power enactment, in general and as applied, must be responsive to prevailing social or economic conditions at the time of its constitutional assessment.

The principle of conditions is a substantive component in a broader historical category of constitutional scrutiny through which the judiciary has given content to the phrase public health, safety, morals, and general welfare. This *intrinsic* or *definitional* scrutiny reflects an attempt to comprehend the power's scope without analytical reliance on private constitutional rights. That is, an interface between governmental powers and individual rights exists, whereby setting the scope of one necessarily sets the breadth of the other. Definitional scrutiny represents a means of independently defining the police power so that it may then be balanced against an allegedly infringed constitutional right. The extent of infringement may be measured by taking issue, equal protection, due process, first amendment or similar analyses. Definitional scrutiny has thus been used either alone or with a rational relationship or balancing test to assess the constitutionality of police power enactments.

Definitional scrutiny has historically included substantive principles in addition to the principle of conditions. During its early manifestations and throughout the nineteenth century, definitional scrutiny incorporated a substantive component derived from the common law of nuisance—the

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sources of this power, than to mark its boundaries, or prescribe limits to its exercise." 61 Mass. (7 Cush.) at 85.

A more recent statement of the indefinable nature of the police power is in Justice Douglas' opinion in Berman v. Parker, 348 U.S. 26, 32 (1954), discussed in text at notes 363-65 *infra*:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations . . . .

maxim *sic utere tuo ut alienum non laedas*.[4] Under this maxim, courts limited the states' use of the police power to the prospective prevention of harms (negative externalities) to the community and its inhabitants. Industrialization and urbanization and the concomitant expansion of the power into an affirmative authority capable of generating social benefits as well as preventing social harms necessarily eliminated the *sic utere* component from substantive definitional scrutiny.

Manipulations of the presumption of constitutionality under definitional scrutiny have ranged from virtually irrebuttable presumptions of validity to inverse presumptions requiring the state to advance compelling reasons to justify the enactment. Generally, however, a middle-level rebuttable presumption favoring constitutionality has been applied. Though the degree of judicial deference used in applying this favorable presumption has not been entirely consistent or predictable, the courts have tended to scrutinize the existence of legislative authority to regulate more closely than the choice of legislative policy.

This article explores the development and consequences of the application of the principle of conditions in and to the evolution of the police power. It divides that evolution into three segments. The first, concentrating on initial state court developments, traces the police power from its common law roots to the Supreme Court's *Munn v. Illinois*[5] decision in 1876. The second period, commencing with *Munn*, details the impact of industrialization and urbanization on the scope of the power. It encompasses the emergence of a comprehensive, affirmative police power and a concomitantly heightened tension between governmental power and private rights in property. This tension, crossing a number of doctrinal lines, produced some of the most interesting and contradictory subsets of cases in the evolution of the police power. The third segment begins with the Depression and continues through the decisions of the Burger Court. Following a significant transitional period during the 1930s, in which the principle of conditions played an important role in sanctioning legislative response to the chaotic social and economic conditions, the contemporary period is characterized by both a conclusive presumption of constitutionality that precludes due process scrutiny and a continued, though infrequent, use of the principle of conditions under the contract clause.

4. "Use your own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1551 (4th ed. 1968).

5. 94 U.S. 113 (1876).

At the conclusion of this historical analysis, the article proposes a normative model of definitional scrutiny. Denominated *authorization scrutiny*, this model is an attempt to manipulate the presumption of constitutionality through a range of middle level alternatives by means of objectifiable, mechanical triggers and thereby to incorporate change in social and economic conditions into the constitutional definition of the police power.

I. 1789-1876: ORIGINS AND EARLY DEVELOPMENT OF THE POLICE POWER: RELATIONSHIP BETWEEN SOURCE AND SCOPE

The development of the police power during the first three-quarters of the nineteenth century may be characterized as the juxtaposition of constitutional notions of residual sovereignty with the common law concepts of *sic utere tuo ut alienum non laedas*[6] and overruling necessity. Differential stress on these constitutional and common law origins

6. For a comprehensive analysis of the English and American development of the *sic utere* maxim, see Smead, *Sic Utere Tuo Ut Alienum Non Laedas: A Basis of the State Police Power*, 21 CORNELL L.Q. 276 (1936). Smead explicitly placed the source of the police power in both the Tenth Amendment and the *sic utere* maxim: "At the basis of the police power, reserved to the states by the Tenth Amendment to the United States Constitution, is the common law maxim enjoining one to use his property in such a way as not to injure that of another." *Id.* at 276. Moreover, the evolution and expansion of the application of the maxim was predicated upon changing conditions: "Probably the most important cause for these changes in the meaning given to the maxim by the common law courts was the developing economic system. Along with urban growth and the onslaught of the commercial and industrial revolutions, property was being used in different ways." *Id.* at 282-83. Corwin likewise characterized the maxim:

> [T]he police power was often grounded upon the common-law maxim *sic utere tuo ut alienum non laedas*, a definition of which like the historical definition bore with it the possible implication that the police power was a peculiar kind of power, exercisable constitutionally only for peculiar ends.

Corwin, *The Doctrine of Due Process of Law before the Civil War*, 24 HARV. L. REV. 366, 479 (1911) (footnote omitted).

Hastings described both the maxim and overruling necessity as the source of the police power. He believed, however, that neither principle was sufficient foundation for the power. Hastings, *supra* note 1, at 414-16. Chancellor Kent, on the other hand, found the principles underlying *sic utere* to provide the essential underpinnings for regulatory authority. His categorization of activities subject to control evidences the common law heritage of the power:

> Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.

2 J. KENT, COMMENTARIES* 340 (footnote omitted).

generated distinct federal and state court conceptualizations of the power's scope.

The Supreme Court, assessing the validity of police power enactments under the contract[7] and commerce clauses,[8] recognized doctrinal principles supportive of an expansive power. Of particular significance were those contract clause cases that recognized rudiments of the principle of conditions and those commerce clause cases that equated the power's scope with the broad, inherently uncircumscribed, scope of residual sovereignty. Concomitant with these developments, the Court established a presumption of constitutionality as a component of judicial review.[9]

The state courts regarded the power as more tightly defined and circumscribed than did their federal counterparts. These courts, particularly after mid-century, viewed the police power as encompassing prospective legislative authority to protect the rights of the community as well as those of neighboring individual property owners. These principles, derived from the common law of nuisance, limited the content of the power and the nature of the relationship subject to legislative control. Coupled with the principle of conditions, they provided the analytical components of definitional scrutiny as applied by the early state courts.

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7. U.S. CONST. art. I, § 10, cl. 1. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

8. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes . . . ."

Prior to the passage of the fourteenth amendment in 1868, the Supreme Court limited its police power scrutiny to contract clause issues. This resulted largely from its decision in Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833), holding the first eight amendments of the Bill of Rights inapplicable to the states. *See* Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 644 (1909).

9. In Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810), Chief Justice Marshall stated:

> The question whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

Justice Washington voiced similar sentiments in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827), and Green v. Biddle, 21 U.S. (8 Wheat.) 1, 93-94 (1823). *See* Cushman, *Constitutional Decisions by a Bare Majority of the Court*, 19 MICH. L. REV. 771, 773-76 (1921).

A. *Early Federal Developments: The Contract and Commerce Clauses*

Early nineteenth century contract clause cases characteristically involved an assessment of the degree to which vested rights in property circumscribed the police power.[10] Among the most significant of these were *Trustees of Dartmouth College v. Woodward*[11] and *Charles River Bridge v. Warren Bridge*,[12] in which the Supreme Court examined the relationship between the state and its chartered corporations. The Court's analyses, by Chief Justices Marshall and Taney respectively, focused on the content of the corporate charter and its status as a protected contract.[13] Neither Marshall nor Taney questioned the source of the police power or examined its constitutional scope. Marshall, however, recognized in dicta that the state could not necessarily be bound by contract to the laws prevailing when a company was enfranchised. To do so would "render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances."[14] Taney also recognized the nexus between the existence of authority and government's ability to respond to changing conditions:

> [I]n a country like ours, free, active, and enterprising, continually advancing in numbers and wealth; new channels of communication are daily found necessary, both for travel and trade; and are essential to

10. In Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), Chief Justice Marshall first linked vested rights and the contract clause. This linkage was upheld in *Dartmouth College* and, to a limited extent, repudiated in *Charles River Bridge* (discussed in text at notes 11-16 *infra*). *See* Corwin, *supra* note 6, at 379. *See also* Scheiber, *The Road to* Munn: *Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPECTIVES IN AMERICAN HISTORY 329, 376-78 (1971).

11. 17 U.S. (4 Wheat.) 518 (1819).

12. 36 U.S. (11 Pet.) 420 (1837).

13. The views of the two Chief Justices with regard to these contract clause issues were largely antithetical. In characterizing the impact of Taney's opinion on the doctrine established by Marshall in *Dartmouth College*, Professor Corwin stated:

> [I]n his great Charles River Bridge decision . . . Taney laid down the maxim that in a public grant nothing passes by implication, a doctrine which . . . would have made the decision in the Dartmouth College case originally impossible, and which did in point of fact, in the decades following, pave the way for the great but necessary curtailment of the efficacy of that decision.

Corwin, *supra* note 6, at 461 (footnotes omitted).

14. 17 U.S. (4 Wheat.) at 628. Later in the opinion, Marshall, referring to the "inviolability" of the charter over time, stated: "Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769." *Id.* at 643. By implication at least, the charter's "inviolability" might have been suspect had conditions indeed changed.

> the comfort, convenience, and prosperity of the people. A state ought never to be presumed to surrender this power . . . .[15]

Marshall and Taney thereby recognized a component of the principle of conditions: the preeminence of legislative authority in police power/contract clause conflicts.[16]

Early nineteenth century commerce clause cases extrinsically limited the police power by articulating the breadth of Congress' delegated authority to regulate interstate commerce. The Court found it sufficient in these cases to merely recognize a general state authority to regulate its internal affairs,[17] *i.e.*, it recognized the residual sovereignty left to the states after delegation of specific sovereign powers to the federal government.

The Court began to conceptualize the scope of the police power as coextensive with that of sovereignty in *Gibbons v. Ogden*.[18] In *Gibbons*, Marshall described the police power variously as "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government"[19] and as "[t]he acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens."[20] Thirteen years later in *City of New York v.*

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15. 36 U.S. (11 Pet.) at 547.

16. *See, e.g.*, Stone v. Mississippi, 101 U.S. 814 (1879), discussed in text at notes 116-21 *infra*.

17. *See, e.g.*, Henderson v. Mayor of New York, 92 U.S. 259, 271 (1875), wherein the Court, in resolving a police power/commerce clause issue, stated:

> It is not necessary for the course of this discussion to attempt to define it [the police power] more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.

See also B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, PART II: THE RIGHTS OF PROPERTY 39 (1965). In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210 (1824), discussed in text at notes 18-20 *infra*, Chief Justice Marshall stated:

> [T]he Court will enter upon the inquiry, whether the laws of New-York [*sic*], as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist . . . the acts of New-York [*sic*] must yield to the law of Congress . . . .

18. 22 U.S. (9 Wheat.) 1 (1824).

19. *Id.* at 203.

20. *Id.* at 208. One commentator advanced the hypothesis that Marshall's reference to "police" was predicated upon Blackstone's broad definition of the police power as incorporating the full range of sovereign power. B. SCHWARTZ, *supra* note 17, at 37. Blackstone defined the police power as

> the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their

Miln,[21] the Court established a comparably broad concept of state regulatory authority:

> [I]t is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends . . . .[22]

Chief Justice Taney confirmed the expansive nature of the police power in *The License Cases*[23] and *The Passenger Cases*.[24] In the former, Taney observed that the state's police powers "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."[25] In the latter, he defined the police power as "a

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general behaviour to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations.

4 W. BLACKSTONE, COMMENTARIES* 162.

21. 36 U.S. (11 Pet.) 102 (1837). *See* Morgan's S.S. Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886).

22. 36 U.S. (11 Pet.) at 138.

23. 46 U.S. (5 How.) 504 (1847). The License Cases were the first of a series of Supreme Court cases relating to liquor regulation. *See, e.g.*, Kidd v. Pearson, 128 U.S. 1 (1888); Mulger v. Kansas, 123 U.S. 623 (1887); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1873). *See also* R. MOTT, DUE PROCESS OF LAW 323 n.61 (1922) for an extensive listing of these cases.

24. 48 U.S. (7 How.) 283, 485 (1849) (Taney, C.J., dissenting). *See* Henderson v. Mayor of New York, 92 U.S. 259 (1875). The *Henderson* Court, although not directly overruling The Passenger Cases, substantially eroded their precedential value. Nevertheless, Henderson did not disparage The Passenger Cases' explication of the police power. Rather, in light of changing conditions, increased transportation of foreign passengers, the scope of the Commerce Clause had expanded, precluding state regulation.

The Passenger Cases are of interest not only because the police power was broadly defined, but also because Taney relied on the unique status of "the great commercial emporium of New York," 48 U.S. (7 How.) at 485, and the changing nature of quarantine methods to justify the law in question. Taney juxtaposed the traditional method of quarantine developed prior to extensive international passenger travel with New York's methods. The traditional method "was, no doubt, well suited to the state of the world at the time when it was generally adopted; but can there be any reason why a state may not adopt other sanitary regulations in the place of them, more suitable to the free, speedy, and extended intercourse of modern times?" *Id.* at 487. It should be noted that this use of the principle of changing conditions related to the means chosen to effectuate what was clearly historically a permissible legislative purpose. Changed conditions was not used in The Passenger Cases to alter the scope of the police power, but rather, to justify an alteration in means.

25. 46 U.S. (5 How.) at 583 (opinion of Taney, C.J.). The Chief Justice's opinion, although conferring upon the police power a definition as broad as sovereign power, was, nevertheless somewhat restrained when compared with those of a number of his colleagues on the Court. Justice McLean, for example, stated:

> The States, resting upon their original basis of sovereignty, subject only to the exceptions stated, exercise their powers over every thing connected with their

power of self-preservation,"[26] reserved to the states and never surrendered. Taney's explicit formulation of equivalence between the police power and sovereign authority to protect against harms to the community provided the basis for substantiating later expansion of regulatory authority.[27]

B. *Early State Development:* Sic Utere *and the Emerging Principle of Conditions*

Throughout the first three quarters of the nineteenth century the state courts were intimately involved in articulating the nature and scope of permissible state intervention into private economic activities. These courts relied on two doctrines to support the state's power to regulate: the principle of residual sovereignty and the common law maxim, *sic utere tuo ut alienum non laedas*. The concepts subsumed within the maxim served as a definitional limitation on the scope of the power.

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social and internal condition. A State regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare.

. . . .

The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Every thing prejudicial to the health or morals of a city may be removed. . . . It is a power essential to self-preservation, and exists, necessarily in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity.

Id. at 588 (opinion of McLean, J.).

26. 48 U.S. (7 How.) at 470 (Taney, C.J., dissenting). As in The License Cases, Chief Justice Taney's opinion is only one of a number of opinions broadly construing the police power. Justice Wayne, for example, states: "What is the supreme police power of a state? It is one of the different means used by sovereignty to accomplish that great object, the good of the state. . . . Police powers, then, and sovereign powers are the same." *Id.* at 423-24 (opinion of Wayne, J.).

27. *See* Corwin, *supra* note 6, at 461-62 (footnote omitted). Professor Corwin stated:

Taney diluted Marshall's doctrine of the paramountcy of national power within the sphere of its competence with the doctrine of the reserved sovereignty of the states, whereby he meant not merely that the states have left to them certain powers in consequence of their not being granted to the national government, which is all that the Tenth Amendment says, but that the states had an area of power which was positively reserved to them and which therefore no legitimate exercise of federal power could ever invade.

See also Groves v. Slaughter, 40 U.S. (15 Pet.) 449 (1841).

In National League of Cities v. Usery, 426 U.S. 833 (1976), Justice Rehnquist resurrected Taney's notions of inviolable state sovereignty:

We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

Id. at 845. *See generally* 125 U. PA. L. REV. 665 (1977).

Sic utere is the fountainhead maxim from which both the common law of nuisance and the police power arose.[28] As originally applied, *sic utere* "operated to protect real property from what the courts thought were injuries resulting from the use of another of his real property."[29] That is, the courts used *sic utere* principles to resolve cost spillover conflicts[30] between the existing uses of neighboring landowners. This relationship in tort between property owners originally caused the maxim and the emerging police power to be defined in terms of the prevention of harms. The early nineteenth century state courts expanded the maxim's scope to include protection of communal as well as property rights. This negative power was a legislative analog to the judicial power to declare certain noxious activities common law nuisances. It may be said that throughout this period the state courts expanded the content of the maxim to include protection of "the public health, safety and morals."

Concomitant with the expansion of common law concepts into a community-based prospective police power was the recognition of the principle of conditions. *Sic utere* expanded was incapable of precise and enduring definition. Just as it had been necessary to assess the physical conditions surrounding a land use to determine whether it was a common law nuisance in fact,[31] so had it become necessary to assess prevailing community conditions to determine the existence of legislative authority to regulate. Moreover, as *sic utere* expanded to incorporate the rights of the community, the breadth of social and economic conditions to be analyzed also expanded. Thus, the principle of conditions, along with the *sic utere* maxim, served as an essential component of the state courts' early definitional limitation of regulatory authority.

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28. *See generally* Smead, *supra* note 6.

29. *Id.* at 280. As Smead stated: "Thus the maxim came to mean, 'So use your own real property in order that you do not injure the real property of another' and this was the only meaning it had at the common law in this early period when the rights of property were paramount." *Id.* Moreover, the English courts had tended to restrict the scope of the maxim just prior to its adoption by the American judiciary. *Id.* at 282. Smead noted elsewhere that the period in which Lord Coke gave the maxim its original authority was characterized by "the existence of a stable society with rights and duties established and with the relations between individuals undergoing no great changes." *Id* at 278.

30. Cost spillovers, also known as negative externalities, are widely recognized in both economic and legal literature. *See, e.g.*, M. CLAWSON, SUBURBAN LAND CONVERSION IN THE UNITED STATES 166-87 (1971); A. PIQOU, THE ECONOMICS OF WELFARE (4th ed. 1932); POSNER, ECONOMIC ANALYSIS OF LAW (1973); Coase, *The Problem of Social Cost*, 3 J. LAW. & ECON. 1 (1960); and articles cited at note 247 *infra*.

31. *See* C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY 211 (2d ed. 1971). *See also* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 362 (2d ed. 1975).

1. *Initial Opinions: Recognition of* Sic Utere *and the Principle of Conditions*

Vanderbilt v. Adams[32] and *Coates v. Mayor of New York*[33] were among the earliest and most significant state cases explicating the scope of the police power. In each case, the New York Supreme Court upheld regulatory authority on sovereignty grounds and used *sic utere* and the principle of conditions to delineate its scope. Within that scope were both the power to declare certain uses nuisances and the power to protect the community from detrimental use of an individual's property.

Vanderbilt concerned the state's authority to regulate docking at private wharves in New York City. The court found that general authority to regulate "rests on the implied right and duty of the supreme power to protect all by statutory regulations, so that, on the whole, the benefit of all is promoted."[34] Generally beneficial enactments "do not proceed to the length of impairing any right in the proper sense of that term."[35]

This general definition of the power to regulate the use of private property did not, however, necessarily validate the harbor regulation in issue. The court recognized that the statute was "essentially necessary for the purpose of protecting the rights of all concerned,"[36] *i.e.*, mitigating cost spillovers between competing uses and rivals for dock space. Exercise of this power was necessary where justified by prevailing conditions. Generally "a crowded population" supported the authority to regulate.[37] More particularly, "where an extensive commerce is carried on," and "[d]isorder and confusion would be the consequence, if there was no control,"[38] the authority to regulate existed.

Coates involved a New York City by-law that prohibited burials in certain sections of the city. Within one of those sections, Trinity Church held property limited by grant exclusively to cemetery use. Although conceding under *Vanderbilt* that a municipality has "in general, power to so order the use of private property in the city, as to prevent its proving pernicious to the citizens generally,"[39] plaintiffs nevertheless sought to

32. 7 Cow. 349 (N.Y. Sup. Ct. 1827).
33. 7 Cow. 585 (N.Y. Sup. Ct. 1827) (decided with Stuyvesant v. Mayor of New York in a single opinion).
34. 7 Cow. at 352.
35. *Id.* at 351.
36. *Id.*
37. *Id.*
38. *Id.*
39. 7 Cow. at 604.

invalidate the ordinance as a taking. The Court acknowledged that plaintiffs' property rights had been destroyed by the regulation but held that the destruction was not an unconstitutional taking. The police power could not be limited by the nature of a property grant,[40] which was subject to *sic utere* principles. In the court's view "[e]very right . . . in property . . . is purchased and holden subject to the restriction that it shall be so exercised as not to injure others."[41] Thus, the Court allocated to the landowner the risk that a land use might over time prove noxious:

> Though, at the time, it be remote and inoffensive, the purchaser is bound to know, at his peril, that it may become otherwise by the residence of many people in its vicinity; and that it must yield to by-laws, or other regular remedies, for the suppression of nuisances.[42]

As prevailing conditions changed, and particularly as population expanded and densities increased, new laws became necessary. A previously innocent use might become subject to regulation or prohibition. Compensation need not be paid in such situations, for no property had been taken.[43] It was immaterial that the rights destroyed had vested prior to passage of the enactment.[44]

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40. *Id.* at 605. The court stated: "[I]t cannot be that the mere form of the grant, because the parties choose to make it particular, instead of general and absolute, should prevent the use to which it is limited being regarded and treated as a nuisance, when it becomes so in fact." *Id.*

In Brick Presbyterian Church v. Mayor of New York, 5 Cow. 538 (N.Y. Sup. Ct. 1826), the court had resolved a similar issue arising under the by-law in question in *Coates.* The city's conveyance to the church contained the covenant for quiet enjoyment in issue. The court held that the city, as lessor, was not liable when the city, as legislator, prohibited a previously innocent use. The growth of population at increasing densities proximate to the church threatened public health, necessitating the ordinance.

> Sixty years ago, when the lease was made, the premises were beyond the inhabited part of the city. . . . Now they are in the very heart of the city. When the defendants [originally] covenanted . . . it never entered into the contemplation of either party, that the health of the city might require the suspension, or abolition of that right. It would be unreasonable in the extreme, to hold that the plaintiffs should be at liberty to endanger . . . the lives . . . of the citizens generally, because their lease contains a covenant for quiet enjoyment.

Id. at 542. The grantor, in such circumstances, was not liable to the grantee. Analogizing to a traditional nuisance situation, the court stated:

> Suppose these premises had been let for a certain purpose which is proper in itself, in a detached situation, but a nuisance in a city thickly inhabited—for instance, a slaughter house—could be seriously contended, that when the use of the property in the way contemplated by the parties to the conveyance, was forbidden by the legislature, an action would lie against the grantor?

Id.

41. *Id.* at 605.
42. *Id.*
43. *Id.* at 606.
44. *Id.* at 605.

In ensuing years, changes in local conditions were also scrutinized to determine the validity of police power enactments. Two Massachusetts cases illustrate this point. In each case, the court considered population density in assessing the enactment's constitutionality. In *Vandine's Case*,[45] the Massachusetts Supreme Court upheld a Boston ordinance that prohibited the transportation of offal through city streets without a license, noting: "To arrive at a correct decision whether the by-law be reasonable or not, regard must be had to its object and necessity. Minute regulations are required in a great city, which would be absurd in the country."[46]

The court used similar reasoning in *Austin v. Murray*[47] to invalidate a Charlestown ordinance that prohibited burials noting that the regulation, if "limited to the populous part of the town . . . would have been . . . very reasonable."[48] Moreover, had increased population density prevailed throughout the town, the legislature would have had authority to enact the ordinance. Because those conditions did not exist, the court invalidated the ordinance.

2. Tewksbury *and* Alger: *Lemuel Shaw's Opinions and Their Progeny*

The Massachusetts Supreme Judicial Court and its Chief Justice, Lemuel Shaw, played a seminal role in the development of the police power and evolution of the principle of conditions. In two opinions upholding regulation of riparian rights, *Commonwealth v. Tewksbury*[49] and *Commonwealth v. Alger*,[50] Shaw provided the first comprehensive conceptualization and definition of the police power. In *Tewksbury*, Shaw held that the legislature was competent to exercise the police power, defined as the *sic utere* maxim expanded to include public rights, in appropriate circumstances. In *Alger*, he comprehensively defined and enlarged the police power, expanded the application of the principle of conditions into a method of analyzing general legislative authority to regulate, and conferred judicial imprimatur on the transition of a common law nuisance system into a legislative system of prospective regulation.[51]

45. 23 Mass. (6 Pick.) 187 (1828).
46. *Id.* at 191.
47. 33 Mass. (16 Pick.) 121 (1834).
48. *Id.* at 125.
49. 52 Mass. (11 Met.) 55 (1846).
50. 61 Mass. (7 Cush.) 53 (1851).
51. Shaw's opinion in *Alger*, by expanding the legislature's power to regulate and

Tewksbury involved a statute that prohibited the removal of sand and gravel from beach areas. Plaintiff landowner claimed the statute as applied was an unconstitutional taking.[52] After noting that the legislature is competent "to declare an indifferent act injurious to the public,"[53] Shaw held the statute valid as applied. In assessing the police power's scope, he explicitly utilized *sic utere* expanded to protect the general community:

> All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community; under the maxim of the common law, *sic utere tuo ut alienum non laedas*.[54]

An enactment protective of community rights was within the scope of the police power and, therefore, was not an unconstitutional deprivation of private property rights. Those rights, traditionally held subject to the property rights of others, were now also subject to the community's right of self-protection.

Even *sic utere* expanded, however, could not justify a legislative declaration of nuisance status absent justifying social or economic conditions.[55] Appropriate circumstances were essential to an exercise of governmental power:

> But there are many cases where the things done in particular places, or under a particular state of facts, would be injurious, when, under a

making it subject to the test of prevailing conditions, confirmed the transition of regulatory power from a common law system of nuisances, applicable only subsequent to entrepreneurial investment, into a prospective statutory system which provided some certainty to potential investors. It is difficult, indeed, to divorce Shaw's justification of this transition from an assessment of then prevailing social and economic conditions and trends; notably, increased urbanization and fledgling industrialization. Shaw, himself, detailed the need for "[a]n authoritative rule, carrying with it the character of certainty and precision . . . . The tradesman needs to know, before incurring expense, . . . builders of houses need to know . . . . This requisite certainty and precision can only be obtained by a positive enactment . . . ." *Id.* at 96-97. He also noted: "[I]t seems to us highly important to have a more precise and definite law made and promulgated, by which all persons may more certainly know their own and the public rights, and govern themselves accordingly." *Id.* at 103. This advancement of police power doctrine beyond the traditional common law of nuisances is examined in L. LEVY, *supra* note 3, at 251-53. For an analysis of contemporary social and economic development, see generally THE CITY IN AMERICAN LIFE: A HISTORICAL ANTHOLOGY (P. Kramer & F. Holborn eds. 1970); C. GLABB & A. BROWN, A HISTORY OF URBAN AMERICA (1967); A. WEBER, THE GROWTH OF CITIES IN THE NINETEENTH CENTURY (1899).

52. 52 Mass. (11 Met.) at 56.

53. *Id. See* Fisher v. McGirr, 67 Mass. (1 Gray) 1 (1854).

54. 52 Mass. (11 Met.) at 57.

55. *See id.* at 57-58.

> *change of circumstances*, the same would be quite harmless. . . . [W]e think it is competent for the legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to the public, under particular circumstances, leaving the use of similar property unlimited, where the obvious considerations of public good do not require the restraint.[56]

Thus, responsiveness to local conditions coupled with a legislative objective to preserve community rights became predicates to the exercise of regulatory authority.

Alger, decided five years after *Tewksbury*, was the most significant state court police power opinion rendered in the nineteenth century.[57] In it, Shaw comprehensively defined the police power as

> vested in the legislature by the constitution . to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.[58]

Having thus established legislative power to regulate for the common good, Shaw then constructed limitations to its exercise:[59] "In considering this question, it becomes necessary to inquire, and ascertain as far as practicable, the nature and character of the laws in question, and the object which the legislature had in view in passing them."[60]

Shaw held that the object of the challenged statute, to prevent obstruction to navigation in Boston harbor, fell within the scope of permissible regulation. Reaffirming the expanded *sic utere* principle promulgated in

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56. *Id.* at 57 (emphasis added).

57. Shaw's definition of the police power in *Alger* was the most frequently cited during this period. *See* L. LEVY, *supra* note 3, at 247-54; Hastings, *supra* note 1, at 418. *See also* T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 572-73 (1868), and cases cited therein at 573 n.1.

58. 61 Mass. (7 Cush.) at 85. Professor Corwin views the linkage between Shaw's definition and the nature of the general constitutional grant of power as one of "a number of restrictive principles" which are subsumed within due process.

> [T]he Massachusetts Supreme Court, owing to the formula by which power is vested by the Massachusetts constitution in the legislature to pass "all manner of wholesome and reasonable" laws, had never ceased to describe the police power, even when according it the broadest possible field of operation, as a power of "reasonable" legislation . . . .

Corwin, *supra* note 6, at 478.

59. Shaw recognized the inherent difficulty in this task: "It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise." 61 Mass. (7 Cush.) at 85.

60. *Id.* at 83.

Tewksbury, but finding heretofore unstated justification for it in the purposes of sovereignty, he stated:

> We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.[61]

Shaw also relied on *Tewksbury* to link the scope of the power to prevailing local conditions. A use innocent in one location could be noxious and subject to regulation in another.[62] He moved beyond the "taking" context in *Tewksbury*, however, and predicated general legislative authority to regulate on responsiveness to prevailing conditions, with authority to assess those conditions allocated to the legislature and protected by a presumption of constitutionality:

> Whether any restraint upon the use of land is necessary to the preservation of common rights and the public security, must depend upon circumstances, to be judged of by those to whom all legislative power is intrusted by the sovereign authority of the state, so to declare and regulate as to secure and preserve all public rights.[63]

Subsequent decisions in other jurisdictions independently reaffirmed the principles promulgated by Chief Justice Shaw in *Tewksbury* and *Alger*. Principal among these were *Thorpe v. Rutland & Burlington Railroad*[64] in Vermont, and *State v. Paul*[65] in Rhode Island. In neither case did the court expound as fully upon the police power as had the Massachusetts Chief Justice; yet each reaffirmed Shaw's concept of the power.

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61. *Id.* at 84-85.

62. *Id.* at 87-88.

63. *Id.* at 88. Later in the opinion Shaw linked location with the degree of protection to private property rights, finding a higher degree of community interest in land of peculiar significance:

> And so in the exercise of the more general power of government, so to restrain the injurious use of property, it seems to apply more significantly and more directly to real estate thus situated on the seashore, separating the upland from the sea, to which the public have a common and acknowledged right, so that such estate should be held subject to somewhat more restrictive regulations in its use, than interior and upland estate remote from places in which the public have a common right. The circumstances are different.

Id. at 94-95.

64. 27 Vt. 140 (1854).

65. 5 R.I. 185 (1858). *See* State v. Keeran, 5 R.I. 497 (1858).

Chief Justice Redfield's opinion in *Thorpe* has been cited with *Alger* as a seminal case in the evolution of the police power.[66] At issue was a statute requiring railroads to fence their rights-of-way. The railroad asserted that the statute impaired its charter rights. The court, however, held corporate charters subject to police power regulation. The legislature could not be deprived of the power to regulate "even by express grant to any mere public or private corporation."[67]

Redfield found the source of the police power in sovereignty and relied on principles inherent in *sic utere* to delineate its permissable scope:

> [The police power] extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non laedas*, which being of universal application, it must of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.[68]

Moreover, Redfield made explicit the presumption of constitutionality found only by implication in *Alger*: "[I]n all doubtful cases their [the legislature's] judgment is final . . . ."[69]

Chief Justice Ames' opinion in *Paul* served a pivotal role in a long series of cases upholding regulation of the manufacture and sale of spiritous liquors against substantive due process/vested rights challenge.[70] Ames held that the police power, as an attribute of sovereignty,[71]

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66. *See, e.g.*, T. COOLEY, *supra* note 57, at 574-76 n.2; Hastings, *supra* note 1, at 423.

67. 27 Vt. at 149. Judge Cooley cited *Thorpe* to support the general proposition that vested contract rights are subject to police power regulation:

> All contracts and all rights, it is held, are subject to this power; and regulations which affect them may not only be established by the State, but must also be subject to change from time to time, with reference to the general well-being of the community, as circumstances change, or as experience demonstrates the necessity.

T. COOLEY, *supra* note 57, at 574 (footnote omitted). Redfield's opinion, however, referred only in a limited way to responsiveness analysis. He found that railroads, if "specially dangerous," were subject to the same regulations and expense as "required of natural persons under such circumstances." 27 Vt. at 150.

68. 27 Vt. at 149.

69. *Id.* at 150.

70. *See* R. MOTT, *supra* note 23, at 319 n.57. Mott gives an extensive listing of cases related to the regulation of the manufacture and sale of intoxicating liquors at 319-26 nn.57-63. Both Mott and Corwin recognize *Paul* as a principal case in opposition to the notions of substantive due process initially advanced in Wynehamer v. People, 13 N.Y. 378 (1856), discussed in text at notes 87-96 *infra*. R. MOTT, *supra* note 23, at 319 & n.57; Corwin, *supra* note 6, at 471-77.

71. 5 R.I. at 193 (citing The License Cases, 46 U.S. (5 How.) 572 (1847), discussed in text at notes 23-27 *supra*).

was directly derived from and amendatory of the common law.[72] As such it was necessarily responsive to changes in social and economic conditions:

> [T]his power exists in great part for the very purpose of changing the [common law] adjustment [among property and community rights] from time to time, as the relative circumstances of the community and individuals may require. Our regulations of internal police and of trade, [are] adapted by positive law to our condition, and changed by it according to our changing circumstances . . . .[73]

Furthermore, a police power enactment, at least as to the legislative choice of means, was subject to a presumption of validity.[74]

Alger and its progeny indicated that the police power was sufficiently elastic to meet changing social and economic conditions. Both *sic utere* and the principle of conditions were components of its constitutional scope. On occasion, the courts found no justifying conditions and invalidated police power enactments. The Illinois Supreme Court rendered two such decisions,[75] each involving the regulation of cemeteries in the town of Lake View. The initial enactment prohibited burials within the town's jurisdiction. Distinguishing between nuisances *per se* and nuisances in fact,[76] the court held that, in the absence of actual conditions which render cemeteries noxious, the legislature was without power to regulate. Because Lake View was a rural community, it lacked the power either to declare cemeteries nuisances or to prohibit them.

In response to this decision, the town enacted a regulation which limited the location of cemeteries. This regulation, however, was also invalidated as unresponsive to prevailing conditions. Relying on the dynamic nature of the principle of conditions,[77] the court found no basis for justifying the ordinance in either the cemetery's location or the town's growth in the foreseeable future.[78] Moreover, the rights of the cemetery owners had vested prior to the enactment of the ordinance. The court held

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72. 5 R.I. at 191.

73. *Id.*

74. *Id.* at 192-93.

75. Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191 (1873); Town of Lake View v. Letz, 44 Ill. 81 (1867). *See* Toledo, Wabash & W. Ry. v. Jacksonville, 67 Ill. 37 (1873).

76. 44 Ill. at 83. "There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this respect depending on circumstances."

77. 70 Ill. at 194 (citing T. COOLEY, quoted at note 67 *supra*).

78. *Id.* at 197.

that the right to dispose of property lawfully acquired, though unlawfully held,[79] was beyond the reach of legislative control.[80]

3. *Emergency Cases: The Principle of Overruling Necessity*

The state court opinions discussed above were predicated upon the expansion and evolution of the principles underlying the *sic utere* maxim. The development of a subset of police power enactments based on the principle of overruling necessity paralleled this evolution. "Overruling necessity was the natural law predecessor of the noncompensable police power regulatory concept and among the purest and oldest doctrinal examples of the general welfare concept—*salus populi suprema lex*."[81] Definitional scrutiny applied through overruling necessity, represents paradigmatic utilization of the principle of conditions. In essence, extreme social and economic conditions may generate a significant, if temporary, expansion of the police power's scope. Injuries suffered by property owners because of legislative action responsive to such emergency conditions were, at common law, *damnum absque injuria*.[82]

In *Russell v. Mayor of New-York*,[83] for example, the court held that the destruction of a warehouse and its contents to create a firebreak in New York City constituted noncompensable governmental action based on overruling necessity. "[T]he principle of preservation of life and property in cases of eminent [*sic*] hazard, by the sacrifice of that which is

79. *Id.* at 198.

80. *Id.* at 197-98.

81. Comment, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854, 860-61 (1973) ("The welfare of the people is the supreme law.").

82. The principle of overruling necessity originated in Lord Coke's opinion in Mouse's Case, 77 Eng. Rep. 1341 (K.B.C. 1600), in which an individual's property had been sacrificed for the good of many—a hogshead of wine had been cast overboard in a tempest to save the lives of drowning passengers. The owner of the wine sought but did not receive compensation. This principle had continued applicability during colonial times:

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

F. DWARRIS, A GENERAL TREATISE ON STATUTES 444 (P. Potter ed. 1871).

83. 2 Denio 461 (N.Y. 1845). *Cf.* Stone v. Mayor of New-York, 25 Wend. 157 (N.Y. 1840) (building destroyed to prevent spreading of a fire); Mayor of New-York v. Lord, 18 Wend. 126 (N.Y. 1837) (building destroyed to prevent spreading of a fire).

less valuable,"[84] was not subject to the constitutional requirement of compensation.

The Supreme Court eventually adopted the principle of overruling necessity developed by the state courts during the early nineteenth century. It provided the doctrinal basis for decisions upholding extreme police power measures designed to ameliorate social and economic exigencies,[85] for example, legislation responsive to the upheaval of the Depression of the 1930s.[86]

4. Wynehamer: *The Origins of Substantive Due Process*

One final state case arising during this period requires discussion. *Wynehamer v. People*[87] rivals *Alger* in significance. Its various opinions promulgated the initial limited concepts of substantive due process.[88] Wynehamer was convicted for violation of a state liquor regulation. The state court of appeals reversed the conviction by a seven to two vote, holding that the regulation deprived Wynehamer of vested property rights without due process.

Justice Comstock's lead opinion declined to "inquir[e] into the extent of legislative power"[89] and instead dealt exclusively with "the construction, force and application"[90] of due process protections of vested rights. Comstock held the right to dispose of property legally acquired prior to an enactment prohibiting such disposition to be among those "absolute private rights" beyond the reach of the police power.[91] By focusing on the enactment's impact on private rights, Comstock did not rely on responsiveness analysis.[92]

In a concurring opinion, however, Justice A.S. Johnson recognized that the scope of permissible police power enactments necessarily

84. 2 Denio at 484 (opinion of Porter, J.).

85. *See, e.g.*, Block v. Hirsh, 256 U.S. 135 (1921), discussed in text at notes 266-73 *infra*.

86. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1933), discussed in text at notes 299-316 *infra*.

87. 13 N.Y. 378 (1856). *See* Trustees of the Univ. of North Carolina v. Foy, 5 N.C. (1 Mur.) 57 (1805); Taylor v. Porter, 4 Hill 140 (N.Y. Sup. Ct. 1843); People v. Platt, 17 Johns. 195 (N.Y. Sup. Ct. 1819).

88. *See* R. MOTT, *supra* note 23, at 317-18; Corwin, *supra* note 6, at 467-68; Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419, 421 (1973).

89. 13 N.Y. at 383.

90. *Id.*

91. *Id.* at 387.

92. *Id.*

evolves with changing conditions: "The determination as to what action shall be forbidden, necessarily involves discretion, to be exercised in view of all the circumstances which, at the time, are operating on the welfare of the people."[93] Johnson held that the legislature was the "ultimate judge" of these considerations and that judges were not to assess "the widom of the laws under review, or of their reasonableness or abstract justice."[94] Rather, the purposes that support legislative action need only protect the public welfare.[95] Legislative discretion in determining the public welfare and the means chosen to protect it were accorded a presumption of constitutionality. Nevertheless, Johnson viewed the challenged regulation as an impermissible prohibition that entirely destroyed Wynehamer's property rights.[96]

Summary

The police power underwent substantial growth and development in the state courts during the first three quarters of the nineteenth century. Although firmly established as the primary state regulatory power, it remained linked to common law nuisance concepts and limited by required responsiveness to existing conditions. Thus, it was essentially a negative power of self-protection used to prevent injury to the public health and safety. Subsequent cases, most notably those decided by the Supreme Court, hewed these common law bounds from the power's definition.

II. 1876-1926: Expansion of the Substantive Scope of the Police Power—Its Doctrinal Conflict with Substantive Due Process

The first substantive expansion of the police power's scope occurred from 1876 to the onset of the Depression. That expansion, which commenced with the Supreme Court's recognition and adoption of the principle of conditions in *Munn v. Illinois*,[97] conceptually linked the power to the broad social and economic changes engendered by post-Civil War industrialization and urbanization. This linkage provided the doctrinal rationale for the transformation of the police power from a negative power of community self-protection into an affirmative power capable of promoting the general welfare.

93. *Id.* at 411.
94. *Id.*
95. *Id.*
96. *Id.* at 421-22.
97. 94 U.S. 113 (1876), discussed in text at notes 100-14 *infra*.

In counterpoise to this emerging affirmative police power stood the vested rights principles of the contract clause, and, after some years of reluctant development, the principles of substantive due process. Tentatively advanced by the state courts prior to the ratification of the fourteenth amendment, substantive due process emerged in 1904 as a full-blown, if erratically applied, extrinsic limitation on the police power. In large measure the post 1904 period was characterized by the doctrinal conflict between a comprehensive, affirmative police power and the economic and property rights protected by substantive due process. To what extent could the regulatory authority of government control private economic activity and thereby interfere with the vested rights and economic expectations generated by the marketplace?

The principle of conditions manifested itself in several distinct lines of cases decided during this period. It provided a significant tool for undermining notions of vested rights enforced through the contract clause, and served to justify the power's intrinsic expansion under the due process clause. After 1905, the principle's primary explication came in a line of due process cases that tested the rationality or reasonableness of the relationship between legislative purpose and the means chosen to effectuate it. The principle was also applied in cases involving the taking issue, emergency legislation, and the invalidation of enactments no longer responsive to prevailing conditions. Moreover, its application as a component of due process clause scrutiny was highly personalized and analytically distorted in the substantive due process cases following *Lochner v. New York*.[98]

The presumption of constitutionality similarly influenced judicial scrutiny during this period. Its application developed with greater specificity and had increasing significance. In general, courts applied a presumption favoring constitutionality in cases utilizing definitional scrutiny and the principle of conditions, whereas an inverse presumption was used in *Lochner*-type substantive due process cases.

The expansion of the scope of the police power and the concomitant doctrinal developments during this period occurred principally in Supreme Court decisions. Relying on its fourteenth amendment jurisdiction, the Court largely preempted state court resolution of police power issues. As a consequence, few significant alterations in the power's definition occurred at the state level.[99]

98. 198 U.S. 45 (1905), discussed in text at notes 169-75 *infra*.

99. Certain state cases of this period will be discussed where relevant in the notes.

A. Munn v. Illinois: *The Roots of Expansion*

Munn v. Illinois[100] stands at the threshold of the police power's modern development. Reflecting the perceived need for the social contract state to respond to fundamental changes in social conditions, government authority was expanded to include forms of conduct and levels of restriction previously left to the internal regulation of the marketplace.

At issue in *Munn* was an Illinois statute fixing maximum rates for the storage of grain in Chicago's grain elevators.[101] The regulated business was entirely private and did not, therefore, fall within those categories of businesses traditionally subject to rate regulation.[102] Nevertheless, the Court, in a majority opinion by Chief Justice Waite, upheld the statute and thereby incorporated rate regulation of private businesses "clothed with a public interest,"[103] into the scope of the police power. The protection of individual economic rights had not yet been incorporated into the fourteenth amendment: "For protection against abuses by legislatures the people must resort to the polls, not to the courts."[104] The

100. 94 U.S. 113 (1876). The federal and particularly the state court cases leading to *Munn* are analyzed in Scheiber, *supra* note 10.

101. 94 U.S. at 123.

102. In dissent, Justice Field limited the subjects of rate regulation:

> It is only where some right or privilege is conferred by the government or municipality upon the owner which he can use in connection with his property, or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation.

94 U.S. at 146 (Field, J., dissenting). *See* B. SCHWARTZ, *supra* note 17, at 100. Schwartz found five categories of business subject to rate regulation prior to *Munn*:

1. Those carried on under the authority of a public license or franchise;
2. Those which are not carried on as of right, but are permitted by government as a mere privilege;
3. Those where the State renders special assistance, as by taxation, eminent domain, or otherwise;
4. Those where use is allowed to be made of public property or a public easement; and
5. Those which are vested with a legal monopoly.

See also Scheiber, *supra* note 10, at 385.

103. 94 U.S. at 126. Chief Justice Waite defined such businesses broadly: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large." *Id.*

104. *Id.* at 134. Justice Harlan expressed similar sentiments regarding the remedy for abuses of legislative power in Powell v. Pennsylvania, 127 U.S. 678, 686 (1888), discussed in text at notes 122-29 *infra*: "If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary." *See* Barbier v. Connolly, 113 U.S. 27, 31 (1885), discussed in text at notes 156-58 *infra*; R. MOTT, *supra* note 23, at 329-42; Corwin, *supra* note 8, at 653-62.

police power limitations found in *Munn* are definitional.

Waite's analysis began by placing the source of the police power in a philosophical/doctrinal context composed of social contract theory, common law maxim, and notions of sovereignty. When man entered the social state he lost some of his natural rights and privileges in order to prevent interdependent individuals from injuring one another; "[t]his is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non laedas*."[105] This philosophical and doctrinal analysis, blending the Court's earlier notions of residual sovereignty[106] with natural and common law doctrines developed in the state courts, gave the police power its definitional base and resolved all subsequent issues regarding its source.[107]

Waite then examined the contours of its scope. He initially noted the oligopolistic nature of the grain elevator business in Chicago.[108] Under

105. 94 U.S. at 124-25.

106. Waite quoted his predecessor in The License Cases, 46 U.S. (5 How.) 504, 583 (1847), discussed in text at notes 23-27 *supra*, to substantiate his finding of equivalence between the state police power and sovereignty. 94 U.S. at 124-25.

107. Waite found the source of the specific power to regulate rates charged by a private industry in common law precepts enunciated in Lord Hale's treatise DE PORTIBUS MARIS, *reprinted in*, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 45, 77-78 (F. Hargrave ed. 1787), written two hundred years previously: "[W]hen private property is 'affected with a public interest, it ceases to be *juris privati* only.'" 94 U.S. at 126. In form, though hardly in substance, Waite's majority opinion in *Munn* represented the mere application of these precepts. As pointed out by Justice Field in dissent, however, Lord Hale's rule applied in the limited context of navigation laws and related principally, if not exclusively, to the King's control of ferries and wharves. *Id.* at 149-51 (Field, J., dissenting). Moreover, though DE PORTIBUS MARIS had been incorporated into the scope of regulatory power, the only businesses previously held subject to rate regulation were those which enjoyed special privileges granted by the state. *See* note 102 *supra*.

In pointing out the limited precedential utility of either an expansive explication of the philosophical/doctrinal source of the power or the writings of Lord Hale, Field's dissent also included a strong statement measuring the scope of the police power exclusively in terms of the *sic utere* maxim:

> The doctrine that each one must so use his own as not to injure his neighbor—*sic utere tuo ut alienum non laedas*—is the rule by which every member of society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of State authority. Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits.

94 U.S. at 145 (Field, J., dissenting).

108. 94 U.S. at 130-31. The existence of monopoly status, unless created by governmental grant of exclusive privilege, had not, prior to *Munn*, justified regulation of prices. B. SCHWARTZ, *supra* note 17, at 101. Moreover

> [n]o other court [prior to *Munn*] has ever held that a legislature could fix the rate

these circumstances, the power to regulate must exist whatever the state of prior law:

> Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress.[109]

Thus Waite explicitly incorporated the principle of conditions into his analysis of the statute's constitutionality.[110] Changing social and economic conditions, as a matter of constitutional definition, justified significant growth in the states' regulatory authority and, therefore, its capacity to intervene into the activities of private business.

Waite also allocated to the entrepreneur the risk that new legislation might impair rights vested upon enactment: "A person has no property, no vested interest, in any rule of the common law."[111] Such an interest

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> at which a private person performing a service, in which he has no other monopoly than that which the possession of superior means for conducting his business gives to him, and no aid from the public, should be compensated for the service.

16 (New Series) AM. L. REG. 539, 545 (1877).

Brass v. Stoeser, 153 U.S. 391, 409 (1894), which upheld price regulation of the grain elevator business in North Dakota on the basis of *Munn* although approximately six hundred elevators were owned by some 125 different persons, indicates that *Munn* was more than merely the regulation of an oligopolistic industry. In *Brass*, the Court explicitly ignored the principle of site-specific varying conditions:

> When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals or associations, in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances.

Id. at 403. *See* Budd v. New York, 143 U.S. 517 (1892).

109. 94 U.S. at 133.

110. With regard to the importance of responsiveness analysis in Waite's opinion, Professor Corwin stated:

> It is true that the Court does not at first sight seem to accept the enactment under review as evidence conclusive of the public character of complainant's business, but appears to canvass the subject anew on its own initiative. . . . A careful examination of the language of the Court will show that this inquiry is entered upon not with the design of insinuating that the Court might, if it chose, overrule the legislative determination as to the public character of a particular pursuit, but in order to ascertain whether the field which the legislature in this instance had assumed to occupy was one which a legislature might ever enter legitimately.

Corwin, *supra* note 8, at 648.

111. 94 U.S. at 134.

would limit legislative authority to respond to changes in conditions: "[I]ndeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."[112]

Finally, Chief Justice Waite relied on a presumption of constitutionality to substantiate the Court's holding:

> For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of the legislative power, the legislature is the exclusive judge.[113]

If any state of circumstances could justify the statute, its validity would be presumed. Nevertheless, the Court noted that legislative understanding of prevailing conditions was not conclusive. Moreover, the Court failed to specify the manner in which the presumption was to be applied to the ultimate issue of constitutionality. If the legislature was the exclusive judge of "the propriety of legislative interference within the scope of legislative power,"[114] were the courts also to assess and determine the scope of that authority? This power/policy dichotomy was explored in subsequent cases.

Munn's primary significance lies in its expansion of the police power's scope to include regulation of previously untrammeled economic activity. To accomplish this the Court articulated new doctrinal and analytical approaches to the question of constitutional validity. Fundamental among these was the principle that a police power enactment derives justification from its reponsiveness to prevailing conditions.

B. *From* Munn *to 1905: The Emergence of a Comprehensive Affirmative Police Power and Substantive Due Process*

From *Munn* until approximately 1905, the Court applied the principle of conditions in two significant lines of cases: those involving vested rights under the contract clause, and those using the principle to continue expansion of the power's substantive scope. In addition, this period witnessed the emergence of substantive due process.

112. *Id.*
113. *Id.* at 132-33.
114. *Id.*

1. Stone: *The Contract Clause and the Inalienable Police Power*

In *Munn*, Chief Justice Waite had denied a vested right in any "rule of the common law."[115] Occasionally, however, the legislative enactment conflicted with legislatively granted charter rights. Litigants in such situations alleged the inviolability of charter provisions as vested contract rights. The principle of conditions and the continuing necessity for the legislature to respond to changing social and economic conditions provided a rationale for holding legislative authority inalienable by contract and, therefore, superior to contract rights.

Stone v. Mississippi[116] was perhaps the most significant of these early principle of conditions/inalienable police power cases. The state had granted Stone a charter to conduct a lottery. By subsequent constitutional provision, it had revoked the legislature's power to grant such charters. The Court easily found that states had generalized power to regulate lotteries; state constitutional authority was, therefore, not in issue. Rather, the question was whether the legislature had immutably bound its successors by granting the charter. Unlike its early contract clause decisions—*Dartmouth College* and *Charles River Bridge*—the Court did not distinguish between express and implied grants.[117] It held:

> No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require.[118]

The Court found this application of the principle of conditions supported by Chief Justice Marshall's dictum in *Dartmouth College*, in which he had excluded regulation of civil institutions from contract clause protection because it "ought to vary with varying circumstances."[119] The

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115. *Id.* at 134.

116. 101 U.S. 814 (1880). *See* Douglas v. Kentucky, 168 U.S. 488, 503 (1897).

117. *See* note 13 *supra*.

118. 101 U.S. at 819. The Court had previously held that the states' power of eminent domain could not be bargained away. West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848). *See* Contributors to the Pa. Hosp. v. Philadelphia, 245 U.S. 20, 23 (1917). For analysis of the states' taxing power and its apparent alienability by contract see United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), discussed in text at notes 390-410 *infra*.

119. 101 U.S. at 819-20 (quoting Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 628 (1819), discussed in text at notes 11-16 *supra*). The Court first discussed the legislature's capacity to alter a prior contract between itself and a private individual in dicta in Boyd v. Alabama, 94 U.S. 645 (1876), stating:

> We are not prepared to admit that it is competent for one legislature, by any contract with an individual, to restrain the power of a subsequent legislature to

individual charterholder bore the risk that a law might be changed.

Stone provided precedent for the continued application of the principle of conditions/inalienable police power concept to contract clause and, ultimately, due process clause cases.[120] Moreover, its repudiation of a vested contract clause right contributed to the emergence of substantive due process as a means of protecting vested economic and property rights.[121]

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legislate for the public welfare, and to that end to suppress any and all practices tending to corrupt the public morals.

Id. at 650. *See* Hale, *The Supreme Court And The Contract Clause: II*, 57 HARV. L. REV. 621, 654-60 (1944); Hastings, *supra* note 1, at 477-78. *See also* Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878); Beer Co. v. Massachusetts, 97 U.S. 25, 32 (1877). In *Fertilizing Co.* the Court stated:

> The charter was a sufficient license until revoked; but we cannot regard it as a contract guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the State, however serious the nuisance might become in the future, by reason of the growth of population around it.

97 U.S. at 670.

120. *See, e.g.*, Butchers' Union Slaughter-House & Live-stock Landing Co. v. Crescent City Live-stock Landing & Slaughter-House Co., 111 U.S. 746 (1884), in which the Court reexamined the legislature's power to repeal the grant of exclusive rights to slaughter cattle in New Orleans and environs originally upheld in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), discussed in text at notes 150-55 *infra*. The Court, per Justice Miller, upheld the validity of the repeal:

> It cannot be permitted that, when the Constitution of a State, the fundamental law of the land, has imposed upon its legislature the duty of guarding, by suitable laws, the health of its citizens, especially in crowded cities, and the protection of their person and property by suppressing and preventing crime, that the power which enables it to perform this duty can be sold, bargained away, under any circumstances as it if were a mere privilege which the legislator could dispose of at his pleasure.

111 U.S. at 751. *See* Corwin, *supra* note 8, at 656-67; Hale, *supra* note 119, at 660-61. *See also* New Orleans Gas Light Co. v. Drainage Comm'n, 197 U.S. 453, 460-61 (1905); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892) (analyzed in detail in Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970)); cases cited note 239 *infra*. *But see* New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885), in which the Court enjoined the establishment of a company chartered to compete with an older company operating under an exclusive grant. The Court found that the obligations of the earlier grant would be impaired without the injunction. Hastings sees this case as preserving the vested rights standards of *Dartmouth College* at least with regard to grants to public utilities. Hastings, *supra* note 1, at 500-01; Hale, *supra* note 119, at 661 n.265.

121. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 664-65 (1887), discussed in text at notes 159-65 *infra*: "In respect to contracts, the obligations of which are protected against hostile state legislation, this court . . . said that the State could not, by any contract, limit the exercise of her power to the prejudice of the public health and the public morals." 123 U.S. at 664-65 (Harlan, J.) (citing *Stone* and its progeny).

2. Powell, Holden, *and* C.B. & Q.: *The Power to Promote the General Welfare*

Use of the principle of conditions and its attendant presumptions to justify the expansion of the police power's substantive scope manifested themselves during this early period principally in *Powell v. Pennsylvania*,[122] *Holden v. Hardy*[123] and *Chicago, Burlington & Quincy Railway v. Drainage Commissioners (C.B. & Q.)*.[124] *Powell* applied conclusive presumptions in a unique evidentiary setting. *Holden* extended the police power into the field of labor legislation. *C.B. & Q.* confirmed the transformation of the police power into an affirmative power to promote the general welfare.

In *Powell*, a state health statute prohibited the manufacture or sale of oleomargarine.[125] Powell's evidence, demonstrating the wholesomeness of margarine, was excluded at trial;[126] Pennsylvania presented no evidence substantiating the perceived health hazard. In upholding the statute as a valid exercise of the police power, Justice Harlan's majority opinion relied on a conclusive presumption that the legislature had conducted the fullest investigation into prevailing conditions—*i.e.*, the unwholesomeness of margarine.[127] Moreover, this presumption extended to the full assessment of constitutionality: "[A]s it does not appear upon the face of the statute, or from any facts of which the court must take judicial

122. 127 U.S. 678 (1888).

123. 169 U.S. 366 (1898).

124. 200 U.S. 561 (1906).

125. 127 U.S. at 679. This same statute was later invalidated as an interference with interstate commerce in Schollenberger v. Pennsylvania, 171 U.S. 1 (1898). The majority, judicially acknowledging the wholesomeness of oleomargarine, declared that regulation of interstate importation to prevent fraud and misrepresentation would have been valid, but a prohibition designed to protect the public health was no longer justified because conditions had changed. *Id.* at 14-15. Indeed, it was the majority's judicial notice of the public's reevaluation of oleomargarine that troubled the dissenters, Harlan and Gray: "That decision [*Powell*] appears to us to establish that the courts cannot take judicial cognizance, without proof, either that oleomargarine is wholesome, or that it is unwholesome . . . ." *Id.* at 27 (Gray, J., dissenting). As in *Powell*, the Court decided *Schollenberger* without evidence.

126. 127 U.S. at 681-82. Evidence regarding the wholesomness of Powell's margarine was irrelevant because it was presumed that most kinds of oleomargarine on the market contained harmful ingredients. *Id.* at 684.

127. *Id.* at 686. Professor Corwin analogized the Court's posture regarding evidence of prevailing conditions in *Powell* and *Munn*: "In *Munn v. Illinois*, the Court sets about to canvass only facts of law, the only question for determination being the question of legal power. In *Powell v. Pennsylvania* the same point of view is adhered to with emphasis." Corwin, *supra* note 8, at 665.

cognizance, that it infringes rights secured by the fundamental law, the legislative determination of these questions is conclusive upon the courts."[128] Subsequent Court decisions did not follow this conclusive presumption, either as to legislative facts or constitutionality, until 1940. Even among Harlan's other police power decisions, his conclusive presumption in *Powell* is unique.[129]

In *Holden*, the Court used the principle of changing conditions to substantively expand the police power. Utah had enacted a statutory eight-hour day for men working in coal mines. Holden assailed the act as violating the employers' and employees' due process rights to freely contract.[130] Recognizing recent expansion of its scope of review under the due process clause,[131] the Court nevertheless found the Act constitutional. In so holding, it relied heavily on the enactment's responsiveness to changing social and economic conditions: "[T]he law [will] be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employes [*sic*] as they arise."[132] Indeed, the Court noted the general expansion in the scope of the power to protect the health of employees:

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128. 127 U.S. at 685. Justice Harlan continued:

> It is not a part of their [the courts'] functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large.

129. *See, e.g.*, Sweet v. Rechel, 159 U.S. 380 (1895), in which Justice Harlan stated:

> But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, *every reasonable* presumption must be indulged in favor of the validity of such enactment. . . . It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed.

Id. at 392-93 (emphasis added). *See also* Mugler v. Kansas, 123 U.S. 623 (1887), discussed in text at notes 159-65 *infra*. *But see* Lochner v. New York, 198 U.S. 45, 68 (1904) (Harlan, J., dissenting), discussed in note 171 *infra*.

130. Liberty to contract is distinct from the contract clause right advanced in *Munn* and *Stone*. In *Holden*, the Court denied the fourteenth amendment right to enter into contracts prospectively which it had recently promulgated in Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897), discussed in text at notes 166-68 *infra*.

131. 169 U.S. at 382.

132. *Id.* at 387. In support of this position, the Court relied on Hurtado v. California, 110 U.S. 516 (1884), in which it stated: "This flexibility and capacity for growth and adaption is the peculiar boast and excellence of the common law . . . . [W]e should expect that the new and various experience of our own situation and system will mold and shape it into new and not less useful forms." *Id.* at 530.

> While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous or so far detrimental to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property.[133]

Adaptibility and flexibility were especially important in light of the transition from an agricultural to an industrial society.[134] *Holden* thus gave potential justification to a wide range of labor regulations responsive to an increasingly industrialized society.

Although liberty to contract was recognized by the Court in *Holden* as a form of property right,[135] it did not yet have a preferred status. Rather, it was "subject to certain limitations which the State may lawfully impose in the exercise of its police powers."[136] Principal among these were the limitations on property ownership imposed by *sic utere*.[137] Thus, liberty to contract, like property rights in earlier state court decisions, was subject to responsive police power regulation designed to protect the community or its individual inhabitants.

In *C.B. & Q.*, the Court applied the principle of conditions in the context of the taking issue. A state enactment required the railroad to reconstruct a bridge which blocked the channel of a creek. The railroad objected, alleging that the enactment constituted an unlawful taking of its property and a denial of its vested property rights. The Court, in affirming the statute's validity, held that the railroad's property was owned "subject to the possibility that new circumstances and future public necessities might, in the judgement of the State, reasonably require a material change in the methods used in crossing the creek with cars."[138] It thereby relied on the principle of changing conditions in a localized setting to hold that the railroad had no vested right in immutable legislation.

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133. 169 U.S. at 391-92.

134. *Id.* at 392-93. The Court stated: "While this [police] power is necessarily inherent in every form of government, it was, prior to the adoption of the Constitution, but sparingly used in this country. As we were then almost purely an agricultural people, the occasion for any special protection of a particular class did not exist."

135. *Id.* at 391 (citing Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897), discussed in text at notes 166-68 *infra*, for the proposition that contract rights are property rights). *See* Hastings, *supra* note 1, at 543.

136. 169 U.S at 391.

137. *Id.* at 392 (quoting Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-85 (1851) (Shaw, C.J.), discussed in text at notes 57-63 *supra*, to hold liberty to contract a limited right).

138. 200 U.S. at 586.

Counsel for the railroad, however, also questioned the purpose underlying the legislative plan. Not a health measure within the traditional scope of the police power, the plan's design, in counsel's opinion, was merely to develop new lands for agriculture, a purpose not traditionally supported by the power.[139] Harlan's majority opinion did not refute this argument. Rather, Harlan expanded the scope of the power to include the promotion of the general welfare, along with the protection of the public health, morals, and safety, among those purposes that could sanction a police power enactment:[140] "We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."[141]

Two elements in this formulation of the power confirmed a significant transformation in its scope. First, the purposes supporting its exercise now incorporated a term, the general welfare, whose content was incapable of precise, comprehensive, and enduring definition.[142] Second, the

139. *Id.* at 592.

140. This re-characterization of the scope of the police power was not unprecedented. In Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865), the Court upheld a statute authorizing the construction of a bridge over the Schuylkill River, defining the legislature's authority in terms of the "public convenience." *Id.* at 722. This language had limited applicability to general police power cases, however, because courts generally considered the state's authority to construct roads and turnpikes and its concomitant power to regulate common carriers to be of a unique proprietary nature. *See* Railroad Co. v. Maryland, 88 U.S. (21 Wall.) 456, 471 (1874).

The Court also defined the police power broadly to incorporate notions of general welfare in Barbier v. Connolly, 113 U.S. 27, 31 (1885), discussed in text at notes 156-58 *infra*. Moreover, in Manigault v. Springs, 199 U.S. 473 (1905), decided in the same term as *C.B. & Q.*, the Court relied on a general welfare conceptualization of the police power to confer wide discretion upon the legislature. *Id.* at 480-81. *Manigault*, a contract clause case, reiterated the paramountcy of the police power "to any rights under contracts between individuals." *Id.* at 480.

Shortly thereafter, the Court adopted an affirmative view of the power's scope. Relying on *C.B. & Q.*, the Court in Bacon v. Walker, 204 U.S. 311 (1907), held that the police power "is not confined, as we have said, to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people." *Id.* at 318. Although the Court established the central elements of the principle of conditions test—responsive legislation arising from and justified by prevailing conditions—it did not include a presumption of validity. *See also* Halter v. Nebraska, 205 U.S. 34, 40-41 (1907); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907); Northwestern Nat'l Life Ins. Co. v. Riggs, 203 U.S. 243, 253 (1906).

141. 200 U.S. at 592.

142. "Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public

police power was no longer constrained by the need to preserve or protect, but could now "promote." This distinction was more than semantic; it served to transform the police power from a negative power of self-preservation necessarily constrained by common law notions of cost spillover mitigation (*sic utere*) or nineteenth century concepts of the community interest into an affirmative power no longer similarly constrained. This transformation, though perhaps an inevitable response to the increasing complexities of an industrializing, urbanizing society, nevertheless signaled the elimination of significant common law concepts from definitional scrutiny and the concomitant expansion of the power's scope.

Harlan, recognizing that he had heightened the definitional ambiguity of permissible police power purposes, immediately elaborated the standard of review to be used in assessing constitutionality: "[T]he validity of a police regulation, whether established directly by the State or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose."[143] He thereby linked the principle of conditions scrutiny applied in *Munn* and reiterated in *Holden* to the rational relationship/means scrutiny[144] he had developed in *Mugler v. Kansas*.[145] Harlan failed, however, to explicitly weave the application of presumptions into this analytical framework. His use of the phrase "legitimate public purpose" implies a moderate presumption favoring constitutionality.[146]

C.B. & Q., decided in 1905, thus symbolizes a transition in the evolution of the police power. No longer limited by common law definitional constraints, its scope was more fully and completely identifiable with that of residual sovereignty. Moreover, its linkage of the principle of conditions and rational relationship/means scrutiny has provided a

safety, any more than under a police regulation having no relation to such matters, but only to the *general welfare*." *Id.* at 592-93 (emphasis added).

143. *Id.* at 592.

144. Harlan explicated the means/ends due process relationship as follows: "If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action." *Id.* at 593.

145. 123 U.S. 623, 661 (1887), discussed in text at notes 159-65 *infra*.

146. Ample evidence of Harlan's use of presumptions exists, however. *See* notes 129 *supra* & 171 *infra*.

standard of review frequently applied in due process and, since 1933, contract clause cases.

3. *Substantive Due Process: From Initial Reluctance to* Lochner

In counterpoise to the emerging comprehensive police power, the Court soon began to articulate the principles of substantive due process. With the adoption of the fourteenth amendment in 1868, the Supreme Court acquired jurisdiction over a new line of cases involving the intrinsic nature and scope of the police power.[147] Its first due process opinions reflected a reluctance to impose constitutional constraints on the police power through principles protective of individual rights. They also exhibited a willingness to circumscribe the power through adoption of common law definitional limitations. That is, although the Court refused to apply concepts of substantive due process, it nevertheless began to use the *sic utere* maxim.

The Court's initial reluctance to find substantive content in the due process clause hesitantly succumbed to a variety of pressures and predilections.[148] Components of substantive due process began to surface in cases manifesting the Court's emerging desire to protect economic and property rights. These principles, erratically applied, became a significant extrinsic police power limitation in *Lochner v. New York*,[149] decided in 1905.

In its first police power decision involving the due process clause, *The Slaughter House Cases*,[150] the Court upheld a Louisiana statute creating

147. "[W]hat the Fourteenth Amendment has done is to place upon the Court the duty of weighing the individual interests comprehended under the very general terms of life, liberty, and property as against the claims of society and of the state which are subsumed under the equally general phrase, the 'police power.'" Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 966 (1927), *reprinted in* 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW 94, 114 (P. Howard ed. 1938). *See* B. SCHWARTZ, *supra* note 17, at 39. In The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 62 (1872), discussed in text at notes 150-55 *infra*, Justice Miller stated: "The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may *now* be questioned in some of its details." (emphasis in original) He reaffirmed this position in Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 132-33 (1873).

148. This transformation period is well documented. *See, e.g.*, R. MOTT, *supra* note 23, at 337-42; Corwin, *supra* note 8, at 654-66; Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737, 741-53 (1922), *reprinted in* 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW 60, 64-73 (P. Howard ed. 1938); Strong, *supra* note 88, at 422-26.

149. 198 U.S. 45 (1905), discussed in text at notes 169-75 *infra*.

150. 83 U.S. (16 Wall.) 36 (1872).

a monopoly in the New Orleans slaughterhouse business. Justice Miller's majority opinion, which incorporated only the rights of recently emancipated slaves into the scope of the clause,[151] limited the reach of the power by juxtaposing the residual sovereignty definition previously used by the Court[152] with the more highly circumscribed definition based on the *sic utere* maxim as then applied by the state courts:[153]

> This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property.[154]

Justice Miller thus applied common law definitional limitations as a matter of federal constitutional analysis of the police power.[155]

The majority's limited view of the due process clause prevailed, with exceptions, for two decades. Perhaps the most cited of these cases was *Barbier v. Connolly*,[156] in which no less a prophet[157] of substantive due process than Justice Field stated:

> But neither the [Fourteenth] Amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate as to increase the industries of the State, develop its resources, and to add to its wealth and prosperity.[158]

By the very breadth of his conceptualization of the power, Field ensured

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151. *Id.* at 81.

152. *Id.* at 63 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824) (Marshall, C.J.), discussed in text at notes 18-20 *supra*, regarding the "immense mass" of state regulation).

153. 83 U.S. (16 Wall.) at 62 (citing Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1851), discussed in text at notes 57-63 *supra*; Thorpe v. Rutland & Burlington R.R., 27 Vt. 140 (1854), discussed in text at notes 66-69 *supra*; 2 J. KENT, COMMENTARIES* 340 to support the common law derivative definition of the police power).

154. 83 U.S. (16 Wall.) at 62.

155. Miller also would have related means to ends to determine constitutionality:

> It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city, the noxious slaughter-houses . . . and to locate them where the convenience, health, and comfort of the people require they should be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual.

Id. at 64. The chosen means were also monopolistic. *See id.* at 112 (Bradley, J., dissenting). *See also* Corwin, *supra* note 8, at 657.

156. 113 U.S. 27 (1884).

157. *See* Corwin, *supra* note 8, at 653.

158. 113 U.S. at 31. *See* cases cited in R. MOTT, *supra* note 23, at 335 n.19.

that due process would not be used to interfere with the State's authority to enact police power regulations.

Lochner, however, did not, like Aphrodite emerge full-grown. Among the earlier cases in which components of substantive due process surfaced were *Mugler v. Kansas*[159] and *Allgeyer v. Louisiana*.[160] In *Mugler*, Justice Harlan set out the rational relationship test that provided the analytical framework adopted in a wide variety of due process cases and to which he added the principle of conditions in the *C.B. & Q.* case.[161] Harlan's rational relationship test presumed that police power enactments were valid.[162] This presumption did not, however, preclude the courts from looking "at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."[163] Courts were to scrutinize the rationality of the relationship between the enactment and the public health, morals, or safety:

> If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.[164]

Harlan's test left two questions unanswered. First, was it legislative purpose or means which must be rationally related to the public health, safety, or morals? Or was it both means and purpose? Secondly, how were the courts to define the content of the terms public health, safety, or morals? Failure to answer this latter question was, perhaps, understandable in light of Harlan's reliance on the prevailing concept of police power as limited to the prevention of harms.[165]

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159. 123 U.S 623 (1887). *Mugler* has been cited as the case in which the Court "definitely established the due process of law clause as a restriction upon state legislation of a substantive character affecting life, liberty, or property." Brown, *supra* note 147, at 947.

160. 165 U.S. 578 (1896). *See* Watertown v. Mayo, 109 Mass. 315 (1872); *In re* Jacobs, 98 N.Y. 98 (1885), as formative state court substantive due process cases.

161. 200 U.S. 561 (1906), discussed in text at notes 138-46 *supra*.

162. 123 U.S. at 661. Harlan cites the Sinking-Fund Cases, 99 U.S. 700 (1878), to support his use of the presumption. In that case, which involved an act of Congress, the Court stated:

> Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on the strict observance of this salutary rule.

Id. at 718.

163. 123 U.S at 661.

164. *Id.*

165. *Id.* at 669.

In *Allgeyer*, Justice Peckham, the author eight years later of *Lochner*, stated the specific economic and property rights to be protected and preferred under the due process clause:

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[166]

The most significant fourteenth amendment right established in *Allgeyer* was liberty to contract,[167] a more inclusive freedom than the right to be free from impairment to the obligation of contracts previously balanced against the police power. Earlier contract clause cases dealt with the authority to alter vested rights. Liberty to contract involved, *inter alia*, the right to prospectively enter into contracts. Thus, liberty to contract protected economic expectations as well as vested rights.[168]

Lochner v. New York,[169] elevated liberty to contract to a preferred constitutional status. *Lochner* involved a state statute which limited the employment hours of bakers to ten per day. Finding the enactment unconstitutional, Justice Peckham's majority opinion ostensibly balanced

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166. 165 U.S. 578, 589 (1897). *See* Moore v. City of E. Cleveland, 431 U.S. 494, 542-47 (1977) (White, J., dissenting); Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Hurtado v. California, 110 U.S. 516, 532 (1884).

167. *See* Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 12 n.67 (1973):

> Had Chief Justice Marshall persuaded one more of his brethren to join him in Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 332 (1827), the contract clause would have applied without regard to whether a challenged law was enacted before or after a contract had been made, and something like the *Lochner* era would have begun in 1827.

168. Professor Strong characterizes the evolution to "a far more embracive conception of the kinds of property rights protected by due process," occurring during the period in which *Allgeyer* was decided, "as a transition . . . from use value—the 'tangible physical thing'—to exchange value, 'the market value expected to be obtained.' " Strong, *supra* note 88, at 422. Economic expectations are a prime determinant of market or exchange value.

The general expansion in the definition of property and contract rights under the due process clause is discussed in Brown, *supra* note 147, at 98-102; Corwin, *supra* note 6, at 468; Corwin, *supra* note 8, at 664; Pound, *Liberty of Contract*, 18 YALE L.J. 454, 461 (1909). *See also* Truax v. Corrigan, 257 U.S. 312, 342-43 (1921) (Holmes, J., dissenting).

169. 198 U.S. 45 (1905).

the police power against the liberty to contract possessed by both employers and employees to determine the statute's constitutionality.[170] The court did not, however, independently derive and then balance the power against the rights allegedly infringed; rather, it focused on the extent of infringement to a preferred liberty to contract.

By measuring the extent of infringement upon individual rights in this manner, the majority skewed the rational relationship test promulgated in *Mugler*.[171] It required the state to demonstrate a heightened relationship between the legislative purpose and the means chosen to effectuate it. Moreover, that purpose had to be independently justifiable:

> The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.[172]

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170. *Id.* at 57. Justice Peckham stated: "It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract."

171. Justice Harlan, in dissent, took exception to the majority's skewing of the *Mugler* analytical framework. At two points in his opinion he reiterates that *Mugler* called for invalidation only when "there is . . . no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation." 198 U.S. at 69 (Harlan, J., dissenting).

Rejecting the majority's inverse presumption of validity, Harlan advocated a presumption bifurcated as to purpose and means which he characterized in virtually conclusive terms. After briefly describing the difference of opinion among experts on the health hazards of baking, Harlan stated:

> If such reasons exist that ought to be the end of this case, for the State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. We are not to presume that the State of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information, and for the common good. We cannot say that the State has acted without reason nor ought we to proceed upon the theory that its action is a mere sham.

Id. at 72-73. *See* Powell v. Pennsylvania, 127 U.S. 678 (1888), discussed in text at notes 122-29 *supra*. Earlier in his dissent, however, Harlan split the application of this presumption between ends and means and characterized it in less conclusive terms:

> If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional.

198 U.S. at 68. *See* note 129 *supra*.

172. 198 U.S. at 57-58.

Peckham thus inverted the presumption of constitutionality and placed a heavy burden on the state to establish validity. The majority opinion also reveals a primary concern with legislative policy rather than the existence of legislative authority:

> Statutes of the nature of that under review . . . are not saved from condemnation by the claim that they are passed in the exercise of the police power . . . unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed. If this be not clearly the case . . . the legislature of the State has no power to limit their right as proposed in this statute.[173]

In assessing the existence of conditions constituting a "material danger," Peckham dismissed the findings and views of experts and commissions[174] and relied instead on expansive judicial cognizance of "common understanding" to determine that baking was not an unhealthful trade.[175]

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173. *Id.* at 61.

174. *Id.* at 70-71 (Harlan, J., dissenting).

175. *Id.* at 59. In handling the judicially noticed information, Peckham drew the following conclusions:

> The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. . . .
>
> . . . .
>
> We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker.

Id. at 57-58. *See* Pound, *supra* note 168 at 470. Dean Pound stated that, "More than anything else, ignorance of the actual situations of fact for which legislation was provided and supposed lack of legal warrant for knowing them, have been responsible for the judicial overthrowing of so much social legislation." *See also* Tribe, *supra* note 167, at 12. Professor Tribe recognized the judicial "role of revising legislative findings about existing social and economic conditions and about the dynamics of change that governed them" as a principal problem with *Lochner* and its progeny.

Judicial cognizance of the "common understanding" that baking was not a health hazard to bakers constituted the means by which the majority distinguished Holden v. Hardy, 169 U.S. 366 (1898), discussed in text at notes 130-37 *supra*. In *Holden*, the Court had expansively defined the police power's scope in the substantive area of labor regulation. *See* text at notes 133-34 *supra*. Peckham stated for the *Lochner* majority: "There is nothing in *Holden v. Hardy* which covers the case now before us." 198 U.S. at 55. The Court limited *Holden*, therefore, to its facts. It did not authorize a broad legislative power to regulate the relationships of employers and employees. Rather, it only narrowly expanded the scope of the power to protect against direct, cognizable dangers to the health of employees in extremely hazardous industries. Peckham, the author of *Allgeyer*, supported this highly restrictive view by quoting from the Supreme Court of Utah's opinion in *Holden* which confined the power to regulate employees' work hours to " 'classes

He did not defer to legislative fact-finding, but substituted judicial notice of prevailing conditions.

Lochner was, therefore, doctrinally distinct from prior principle of conditions and substantive due process cases. The majority applied a balancing test derived from a manageable analytical method in an inverted and unmanageable manner. Because it focused on a preferred right to contract, the Court failed to independently define the power against which the alleged impairment of rights could be weighed. Moreover, it ignored available evidence regarding prevailing conditions and instead assumed those conditions that supported its holding.

C. *From 1905 to the Depression: The Conflict Between Power and Rights*

Lochner, like *C.B. & Q.*, symbolizes a transition in doctrinal evolution. Both stand at the threshold of the doctrinal struggle between the police power and economic rights that characterized the period from 1904 to 1930. Several important subsets of cases emerged from this conflict, including the principle of conditions/rational relationship cases following the *C.B. & Q.* standard of review; inverse presumption /preferred rights cases following *Lochner*; contract clause cases reaffirming the inalienability of the police power; vested rights/taking issue cases; emergency cases; and, finally, cases in which courts examined the continuing validity of police power enactments. One final case, *Village of Euclid v. Ambler Realty Co.*,[176] giving federal sanction to zoning as a police power authority, combined many of the analytical components developed in these cases.

1. *The Principle of Conditions/Rational Relationship Cases*

In *C.B. & Q.*, Justice Harlan articulated an analytical framework for determining the constitutionality of police power enactments under the due process clause which used the principle of conditions to assess the permissibility of legislative purpose and then analyzed the rationality of the relationship between that purpose and the means chosen to effectuate it. A series of cases in which a comprehensively defined police power was arrayed against protected, but not preferred, economic and property rights and the liberty to contract adopted Harlan's framework. These

subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters.' " 198 U.S. at 55.

176. 272 U.S. 365 (1926), discussed in text at notes 285-95 *infra*.

cases relied on the principle of conditions to assess responsiveness, often deferring to local knowledge of local conditions. This presumption was, at times, bifurcated along a power/policy axis, with judicial review more rigorous in establishing the scope of the power than in determining questions of policy.

In *Lochner* the Court invalidated a labor/health regulation governing hours of employment. Subsequent cases involving employment regulations, however, did not use the preferred liberty to contract or inverse presumption analysis of *Lochner*. In *Muller v. Oregon*,[177] the Court considered the constitutionality of a maximum hours of employment limitation enacted solely to protect women. In upholding the statute, the *Muller* Court found that liberty to contract, inviolate in *Lochner*, was "not absolute."[178] Moreover, although "it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action . . . a widespread and long continued belief concerning [a debatable question of underlying facts and conditions] is worthy of consideration."[179] To that end, the Court may "take judicial cognizance of all matters of general knowledge."[180] Relying on extensive documentation provided by Louis Brandeis, who filed a separate brief,[181] the Court recognized the unique physical status of women and the public interest in protecting their health.[182]

In another employment case, *McLean v. Arkansas*,[183] the Court articulated its analytical method:

177. 208 U.S. 412 (1908). *See* Radice v. New York, 264 U.S. 292 (1924); Bosley v. McLaughlin, 236 U.S. 385 (1915); Miller v. Wilson, 236 U.S. 373 (1915); Riley v. Massachusetts, 232 U.S. 671 (1914); Sturges v. Beauchamp, 231 U.S. 320 (1913).

178. 208 U.S. at 421.

179. *Id.* at 420-21.

180. *Id.* at 421.

181. *Id.* at 419. Brandeis' separate brief in *Muller* was the archetype "Brandeis brief." Its impact was apparently determinative. Professor Cushman reported: "No intelligent group of men could shut out from their minds the telling force of this presentation of facts. The Supreme Court succumbed to it . . . ." Cushman, *supra* note 148, at 754-55.

Brandeis, as a practicing attorney and a Supreme Court Justice, along with Justices Frankfurter and Cardozo, strongly advocated the legal realism philosophy. *See, e.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); B. CARDOZO, SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO (M.E. Hall ed. 1947); Brandeis, *The Living Law*, 10 ILL. L. REV. 461 (1916); Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353 (1916). This school supported "the idea of presenting to the court the actual evidence to prove that legislative regulation of social and economic conditions was virtually necessary and for that reason constitutionally legitimate." Cushman, *supra* note 148, at 754. *See also* cases cited at notes 251 & 296 *infra*.

182. 208 U.S. at 421-23.

183. 211 U.S. 539 (1909).

> If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.[184]

This protected liberty to contract was not, however, "unlimited in its nature."[185] Moreover, the court applied a presumption of constitutionality. Disagreement with legislative choice of public policy "afford[ed] no ground for judicial interference unless the act in question is unmistakably and palpably in excess of legislative power."[186] Nor was it necessary for the Court to question legislative judgment concerning prevailing conditions:[187] "[T]he legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments."[188] Accordingly, the Court held that the enactment, based upon a "very full investigation by the industrial commission,"[189] was responsive to prevailing conditions and thus rationally related to the public health and safety.[190]

In *Chicago, Burlington & Quincy Railroad v. McQuire*,[191] Justice Hughes' majority opinion drew a more precise line between permissible

184. *Id.* at 548.

185. *Id.* at 545.

186. *Id.* at 547.

187. *Id.* at 551. The Court did not question whether the state's presentation of substantiated legislative facts accurately reflected prevailing conditions:

> It is not for us to say whether these are actual conditions. It is sufficient to say that it was a situation brought to the attention of the legislature, concerning which it was entitled to judge and act for itself in the exercise of its lawful power to pass remedial legislation.

188. *Id.* at 547. Deference to local knowledge of local conditions also manifested itself in Schmidinger v. Chicago, 226 U.S. 578 (1913); Murphy v. California, 225 U.S. 623 (1912); Williams v. Arkansas, 217 U.S. 79 (1910); Welch v. Swasey, 214 U.S. 91 (1909); Bacon v. Walker, 204 U.S. 311 (1907), discussed in note 140 *supra*; Otis v. Parker, 187 U.S. 606 (1903). *See* Brown, *supra* note 147, at 111.

189. 211 U.S. at 549.

190. *Id.* at 550. The Court held:

> We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity for such laws, evinced in the enactments of the legislatures of various States, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and the promotion of the harmonious relations of capital and labor engaged in a great industry in the State.

191. 219 U.S. 549 (1911). The Court did not use the principle of conditions in *McQuire*. Legislative power, both general and as articulated in and applied by the enactment, was not in issue. "Here there is no question as to the validity of the regulation or as to the power of the State to impose the liability which the statute prescribes." *Id.* at 571.

and impermissible judicial scrutiny. Disagreement regarding policy considerations was insufficient to invalidate an enactment. Nevertheless, the Court was to determine the existence and scope of legislative power.[192] Moreover, the right to contract was not preferred above other property rights.[193] Consequential damages to contract rights could also be *damnum absque injuria*. If "the interference with the right to contract is incidental to the main object of the regulation, and if the power exists to accomplish the latter, the interference is justified as an aid to its exercise."[194] In addition, the *Lochner* inverse presumption was not to be applied.[195]

The Court's reliance on the principle of conditions was more emphatic in *Mutual Loan Co. v. Martell*.[196] Justice McKenna, writing for a unanimous Court, obliquely criticized the degree of judicial imagination exercised in *Lochner* when he stated: "Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it . . . ."[197] Citing *C.B. & Q.*, McKenna viewed the police power as incorporating comprehensive, affirmative authority to regulate.[198] He accorded deference to local knowledge of local conditions,[199] and "allow[ed] [the legislature] a very comprehensive range of judgment," subject to "constitutional limitations."[200] The Court, therefore, could not hold "that the statute as a police regulation is arbitrary and unreasonable and not designed to accomplish a legitimate public purpose."[201]

Justice McKenna carefully examined the power's elasticity and re-

192. *Id.* at 569. The Court drew the power/policy dichotomy precisely:

> The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

Id. (emphasis in original).

193. *Id.* at 569-70.

194. *Id.* at 570.

195. *Id.* at 569.

196. 222 U.S. 225 (1911).

197. *Id.* at 233.

198. *Id.* at 232-33 (also citing Bacon v. Walker, 204 U.S. 311 (1907), discussed in note 140 *supra*).

199. 222 U.S. at 234.

200. *Id.* at 233.

201. *Id.* at 234.

sponsiveness in *Eubank v. Richmond*:[202] "It [the police power] is not susceptible of circumstantial precision. . . . Governmental power must be flexible and adaptive. Exigencies arise, or even conditions less preemptory, which may call for or suggest legislation . . . ."[203] Moreover, the power's scope included legislation designed to promote the general welfare. The Court nevertheless invalidated the statute because the means were irrationally related to the legitimate state ends.[204]

In *German Alliance Insurance Co. v. Lewis*,[205] the Court revitalized the principle that a private business clothed with a public interest is subject to rate regulation.[206] Plaintiff challenged a state statute that regulated fire insurance rates. Relying on the history of insurance industry regulation[207] and the principle of conditions, the Court upheld legislative authority to act. *Munn* provided the precedential support:[208] "It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application."[209] The Court regarded the determination of the general welfare's content as primarily a legislative function calling for circumscribed judicial review.[210] The power/policy dichotomy articulated in *McQuire*, drawn in terms of means and objects, determined the parameters of that review.[211]

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202. 226 U.S. 137 (1912). *See* City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976); Cusack v. Chicago, 242 U.S. 526 (1917).

203. 226 U.S. at 142-43.

204. *Id.* at 143. Even applying a presumption of constitutionality, the enactment failed because it precluded administrative discretion in site-specific cases.

205. 233 U.S. 389 (1914).

206. Subsequent to *Munn*, only transportation and public utility rates had been regulated. *Id.* at 406-07. That is, the "business clothed with a public interest" principle had been used almost exclusively in its traditional common law context—franchised industries frequently functioning as legalized monopolies. Moreover, because these industries enjoyed special state privileges, they fell within the category of industries subject to rate regulation prior to *Munn*. *See* note 102 *supra*.

207. 233 U.S. at 412. In Jackman v Rosenbaum Co., 260 U.S. 22, 31 (1922), the Court explicitly distinguished between historical justification and reliance on the principle of conditions. *Jackman* involved the validity of a party wall statute:

> [W]e might be driven to the economic and social considerations that we have mentioned if the law were an innovation, now heard of for the first time. But if, from what we may call time immemorial, it has been the understanding that the burden exists, the land owner does not have the right to that part of his land except as so qualified and the statute that embodies that understanding does not need to invoke the police power.

208. 233 U.S. at 408.

209. *Id.* at 411.

210. *Id.* at 413-14.

211. "It would be very rudimentary to say that measures of government are deter-

In *New York Central Railroad v. White*,[212] "modern conditions of employment" supported legislation which abrogated common law rules governing the employer-employee relationship in tort by establishing state workmen's compensation.[213] A unanimous Court held liberty to contract subject to "a reasonable exercise of the police power."[214] Moreover, "No person has a vested interest in any rule of law . . . ."[215] Thus, the common law rules, though related "to the fundamental rights of liberty and property," were only "guides of conduct . . . not beyond alteration by legislation in the public interest . . . . It cannot be that the rule embodied in the [common law] maxim [*respondeat superior*] is unalterable by legislation."[216]

Reliance on underlying conditions also supported a maximum hours of employment statute that governed both men and women and required overtime pay. Unlike *Muller*, the Court in *Bunting v. Oregon*[217] could not distinguish *Lochner* on the basis of sex. Moreover, Justice McKenna's majority opinion made no mention of liberty to contract. Rather, it applied a presumption of constitutionality to limit judicial review[218] and relied on continuing responsiveness to prevailing conditions to justify the enactment.[219] "New policies are usually tentative in their beginnings, [and] advance in firmness as they advance in acceptance. . . . Time may be necessary to fashion them to precedent customs and conditions and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal."[220]

Thus, although *Lochner* obstructed economic regulation for almost thirty years, particularly legislation protective of employees, it could be circumvented. The Court did not uniformly regard liberty to contract a preferred right. Under the *C.B. & Q.* review standard, it balanced economic rights against a comprehensive, affirmative police power. Furthermore, in juxtaposing definitional and means scrutiny, the Court

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mined by circumstances, by the presence or imminence of conditions, and of the legislative judgment of the means or the policy of removing or preventing them." *Id.* at 415.

212. 243 U.S. 188 (1917).

213. *Id.* at 197. *See* Ward & Gow v. Krinsky, 259 U.S. 503 (1922); New York Cent. R.R. v. Bianc, 250 U.S. 596 (1919); Arizona Employers' Liability Cases, 250 U.S. 400 (1919); Second Employers' Liability Cases, 223 U.S. 1 (1912).

214. 243 U.S. at 206.

215. *Id.* at 198.

216. *Id.* at 197-98.

217. 243 U.S. 426 (1917).

218. *Id.* at 435, 437.

219. *Id.* at 436-37.

220. *Id.* at 438.

applied the principle of conditions with a presumption of constitutionality to legislative policy, means, and knowledge of prevailing local conditions to overcome the preferred liberty to contract conferred by *Lochner*.

2. *The Inverted Presumption Cases:* Lochner's *Progeny*

Lochner's inverse presumption and judicial manipulation of prevailing conditions analysis nevertheless affected a significant number of cases decided prior to 1930.[221] In some of these, such as *Coppage v. Kansas*,[222] the Court ignored the principle of conditions and focused exclusively on the extent of impairment to individual fourteenth amendment contract rights.[223] In others, such as *Adkins v. Children's Hospital*[224] and *Tyson & Brother v. Banton*,[225] the Court invoked an inverse presumption requiring the state to demonstrate special or exceptional circumstances; the police power was generally found too narrow to support the legislation in question. Liberty to contract retained the preferred status it had acquired in *Lochner*. Finally, in a few cases, notably *Jay Burns Baking Co. v. Bryan*,[226] the Court revised legislative findings of prevailing conditions to justify its invalidation of the enactment.

Adkins and *Tyson* both concerned state rate regulations. In *Adkins*, the majority invalidated a minimum wage regulation for women, stating: "[F]reedom of contract is . . . the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of *exceptional* circumstances."[227] Similarly, in *Tyson* the Court invalidated an ordinance that regulated the resale price

221. *See* B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 154 (1942).
222. 236 U.S. 1 (1915).
223. *Id.* at 14.
224. 261 U.S. 525 (1923).
225. 273 U.S. 418 (1927).
226. 264 U.S. 504 (1924).
227. 261 U.S. at 546 (emphasis added). *See* Charles Wolff Packing Co. v. Court of Relations, 262 U.S. 522, 536 (1922), in which the Court stated:

> The circumstances which clothe a particular kind of business with a public interest, in the sense of *Munn v. Illinois* and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

An attempt in *Wolff Packing* to justify the regulation by invocation of emergency conditions failed. *Id.* at 544.

In People v. Budd, 117 N.Y. 1, 15, 22 N.E. 670, 675 (1889), *aff'd*, 143 U.S. 517 (1892), the New York court, upholding regulation of the rates charged by grain elevator operators, stated: "We have no hesitation in declaring that unless there are special conditions and circumstances which . . . justify legislative control and regulation in the particular case, the statute . . . cannot be sustained."

of theater tickets because of the absence of special circumstances.[228] In these and similar substantive due process cases, the Court continued to elevate liberty to contract to virtual inviolability by applying the inverse presumption standard. Only by proving the existence of exceptional circumstances could the legislature justify the enactment in question.

Nevertheless, the *Adkins* Court did recognize that the police power could adapt to changing conditions to promote the public welfare: "[T]he line beyond which the power of interference may not be pressed is neither definite nor unalterable but may be made to move, within limits not well defined, with changing need and circumstance."[229] The public welfare to be protected and promoted, however, included the individual's right to be free from governmental restraint.[230] The Court thereby defined public welfare not with regard to communal conditions but with regard to the individual rights ordinarily subjected to restraint in furthering that welfare. Social benefit was not balanced against individual deprivation; the Court incorporated the prevention of individual deprivation into the definition of social benefit.

Jay Burns Baking Co. involved a standard weight bread law designed to protect the public against fraud. *Schmidinger v. Chicago*[231] had previously established general legislative authority to regulate such matters. Nevertheless, the Court invalidated the statute under a *Lochner*-derived test. The majority relied on an unsubstantiated view of prevailing conditions to hold the regulation an "intolerable burden upon bakers of bread."[232] In dissent, Justice Brandeis admonished the majority for its failure to inquire into the facts.[233] Relying on broad judicial notice,

228. 273 U.S. at 429. *See* Ribnik v. McBride, 277 U.S. 350 (1928); Adams v. Tanner, 244 U.S. 590 (1917).

229. 261 U.S. at 561.

230. To sustain the individual freedom of action contemplated by the Constitution, is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of the constituent members.

Id.

231. 226 U.S. 578 (1913). The *Schmidinger* Court had relied on the following presumptions of constitutionality:

> This court has frequently affirmed that the local authorities entrusted with the regulation of such matters and not the courts are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakenly in excess of any reasonable exercise of the authority conferred.

Id. at 587-88.

232. 264 U.S. at 515.

233. "Unless we know the facts on which the legislators may have acted, we cannot

Brandeis detailed and substantiated both prevailing conditions and prior legislative experience with standard weight bread laws. He then applied this knowledge to an analysis of the legislative purpose, the rationality of the relationship between the chosen means and that purpose, and the level of deprivation suffered by the regulated bakers.[234] A presumption of validity resolved any conflict in favor of the legislation.[235]

Courts and commentators have frequently criticized these *Lochner*-derivative substantive due process cases arguing that their elevation of contract and property rights, inversion of the presumption of constitutionality, and imaginative fact-finding "embodied a single immutable doctrine that determined in advance and for all time which particular substantive ends . . . the state could legitimately pursue, and which . . . must remain beyond the state's reach."[236] As such, they were antithetical to reasoned, predictable application of constitutional limitations on the police power including the principle that regulatory enactments must be responsive to prevailing and ever-chainging social and economic conditions.

3. *The Contract Clause Cases: Vested Rights vs. Inalienable Power*

A third subset of cases raising the doctrinal conflict between the police power and protected economic rights concerns the principle of conditions in its familiar and increasingly traditional role of justifying the inalienability of the police power. Derived from *Stone v. Mississippi*[237] and its nineteenth century progeny,[238] these contract clause/due process cases frequently involved interpretation of the charter rights of railroads with respect to grade crossings.[239] In *Atlantic Coast Line Railroad v. Goldsboro*[240] and *Chicago & Alton Railroad v. Tranbarger*,[241] for

properly decide whether they were (or whether their measures are) unreasonable, arbitrary or capricious. Knowledge is essential to understanding; and understanding should precede judging." *Id.* at 520 (Brandeis, J., dissenting).

234. *Id.* at 520-33.

235. *Id.* at 533-34.

236. Tribe, *supra* note 167, at 12 and authorities cited at 13 n.70.

237. 101 U.S. 814 (1879), discussed in text at notes 116-21 *supra*.

238. *See* cases eited in note 119 *supra*.

239. *See, e.g.*, Erie R.R. v. Board of Pub. Util. Comm'rs, 254 U.S. 394, 411 (1920); Denver & Rio Grande R.R. v. Denver, 250 U.S. 241, 244-45 (1919); Northern Pac. Ry. v. Minnesota *ex rel.* Duluth, 208 U.S. 583, 595-97 (1908); Chicago, Burlington & Quincy R.R. v. Nebraska *ex rel.* Omaha, 170 U.S. 57, 73-74 (1898); New York & New England R.R. v. Bristol, 151 U.S. 556, 567-68 (1894).

240. 232 U.S. 548 (1913).

241. 238 U.S. 67 (1915).

example, Justice Pitney held "that this [police] power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."[242] In *Goldsboro*, the Court defined the power in terms of its responsiveness to prevailing conditions and *sic utere* expanded "to secure the health, safety, good order, comfort, or general welfare of the community. . . ."[243] *Tranbarger* also used *sic utere* to justify the enactment,[244] but defined the power more broadly to include "regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals or safety."[245] Neither enactment constituted an unconstitutional taking of property.[246] Thus, the police power stood superior to vested rights when protected by the contract clause.

4. *The Taking Issue Cases: More on Vested Rights*

Additional attempts to protect vested economic rights involved the taking issue.[247] Originally a component of constitutional scrutiny arising under the fifth amendment's just compensation clause, the vested rights protection implicit in taking issue analysis had been incorporated into the due process clause in 1886 in *The Railroad Commission Cases*.[248] During the pre-Depression period, *Hadacheck v. Sebastian*[249] and *Penn-*

242. 238 U.S. at 77; 232 U.S. at 558.

243. 232 U.S. at 558.

244. 238 U.S. at 77.

245. *Id.*

246. 238 U.S. at 77; 232 U.S. at 558-59.

247. The taking issue has been discussed frequently. *See, e.g.*, F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE (1973); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; Michelman, *Property, Utility & Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property & Public Rights*, 81 YALE L.J. 149 (1971); Schreiber, *supra* note 10.

248. 116 U.S. 307 (1886). The Court stated: "This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. . . . [T]he State cannot . . . do that which in law amounts to a taking of private property for public use without just compensation or without due process of law." *Id.* at 331. Professor Corwin, *supra* note 8, at 658, identifies this finding of equivalence as an initial analytical step toward the emasculation of *Munn*'s "clothed with a public interest" concept and the emergence of substantive due process.

249. 239 U.S. 394 (1915). Reinman v. City of Little Rock, 237 U.S. 171 (1915), and Goldblatt v. Town of Hempstead, 369 U.S. 590 (1961), discussed in note 363 *infra*, presented the Court with analogous situations. In *Reinman*, the Court upheld an ordi-

sylvania Coal Co. v. Mahon[250] were the principal taking issue cases. In *Hadacheck*, the Court applied the principle of conditions to uphold an enactment that significantly impaired vested property rights. In *Pennsylvania Coal*, only Justice Brandeis in dissent recognized the potential applicability of responsiveness analysis.[251] Justice Holmes' majority opinion held that significant diminution in the value of vested property rights rendered the enactment unconstitutional.

Hadacheck involved a classic nuisance situation. A residential neighborhood had expanded to surround Hadacheck's brickyard, originally erected and used in a rural setting. So long as the land use operated in an area bounded by countryside, it remained safe from the regulatory constraints customary in more densely populated regions. Conditions had changed, however, eliminating the variation. The Court allocated the risk of such change to the property owner, and prohibited the brickyard as a nuisance. The police power's capacity to respond to changing conditions thus justified regulatory action previously held beyond the scope of legislative authority.[252]

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nance that declared a livery stable in a populous part of town a nuisance. There was no question of the legislative authority "to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law . . . ." 237 U.S. at 176. *See* Pierce Oil Corp. v. City of Hope, 248 U.S. 498, 501 (1919) and Dobbins v. Los Angeles, 195 U.S. 223, 238 (1904). In *Dobbins*, the Court stated:

> [T]he right to exercise the police power is a continuing one, and a business lawful to-day [*sic*] may in the future, because of the changed situation, the growth of population or other causes, become a menace to the public health and welfare, and be required to yield to the public good.

Id. at 238.

250. 260 U.S. 393 (1922).

251. To Brandeis, the principal issue in *Pennsylvania Coal* was whether prevailing conditions authorized the statute. "[U]ses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation . . . ." 260 U.S. at 417 (Brandeis, J., dissenting). Having found the power, he would have upheld the statute. Moreover, Brandeis recognized that an enactment responsive at its inception might become nonresponsive over time. "Whenever the use prohibited ceases to be noxious,—as it may because of further change in local or social conditions,—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore." *Id.* Responsiveness over time was a prerequisite to continued constitutional validity. *See also* note 181 *supra* and cases cited in note 296 *infra*.

252. It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable . . . . A vested interest cannot be asserted against it because of conditions once obtaining . . . . To so hold would preclude development and fix a city forever in its primitive conditions.

239 U.S. 394, 410 (1915).

Hadacheck concerned a land use traditionally considered noxious under both nuisance law and early self-protective notions of the police power. Analysis of the taking issue could therefore be structured along doctrinal lines which distinguished eminent domain from the police power by means of the harms/benefits dichotomy: "In the one case, a nuisance only is abated; in the other, inoffending property is taken away from an innocent owner."[253] The reconceptualization of the police power from a negative to an affirmative power rendered this mode of analysis obsolete. Some new analytical method was necessary, therefore, to distinguish takings from infringements *damnum absque injuria*.

Justice Holmes in *Pennslyvania Coal* introduced such a method; it may be characterized as a continuum of appropriation/diminution in value theory.[254] The police power and eminent domain exist on a continuum bounded by compensable divestitures of title and noncompensable regulation generating reciprocal benefits.[255] One measure of the transition point from constitutionality to unconstitutionality is the diminution in economic value suffered by the owner. "When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[256] Thus, the definition of vested property rights in terms of exchange value became a potential protection against excessive governmental infringement.

5. *Emergency Cases: Paradigmatic Application of the Principle of Conditions*

Subsequent to the adoption of the fourteenth amendment, the Supreme Court relied on the common law principle of overruling necessity to justify various regulations relating to emergency conditions.[257] Although

253. Mugler v. Kansas, 123 U.S. 623, 669 (1887), discussed in text at notes 159-65 *supra*.

254. *See* Rideout v. Knox, 148 Mass. 368, 372-74, 19 N.E. 390, 392-93 (1889), in which Holmes, as a member of the Massachusetts Supreme Judicial Court, first developed this continuum of appropriation theory. *See also* Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

255. Reciprocal benefits exist when the regulated party is compensated for his individual loss by his share of the public benefit.

256. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

257. *See* R. MOTT, *supra* note 23, at 345 n.43 & n.44 for a listing of these cases.

The Court had recognized the principle of overruling necessity as early as its decision in Republica v. Sparhawk, 1 U.S. (1 Dall.) 357, 362 (1788). *See* American Land Co. v. Zeiss, 219 U.S. 47 (1911) (upheld emergency legislation designed to clear up land titles after the destruction of public records during the San Francisco earthquake); Bowditch v. Boston, 101 U.S. 16 (1879) (upheld Massachusetts statute denying compensation to persons whose homes were destroyed to stop the spread of fire unless the home was destroyed under an order of three or more fire department engineers).

the precedential value of these cases was contextually limited,[258] they represent paradigmatic application of the principle of conditions.

In *Jacobson v. Massachusetts*,[259] for example, the Court used overruling necessity[260] to uphold compulsory smallpox vaccinations. The state's general power to protect the public health was acknowledged under "settled principles."[261] The issue was whether the means chosen to accomplish that end unconstitutionally infringed individual liberty secured by the fourteenth amendment. The Court held that liberty "is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others,"[262] *i.e.*, constrained by the *sic utere* concept. Moreover, "upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[263] The police

The Court also decided during this period a subset of overruling necessity cases dealing with procedural due process requirements for summary abatement. Generally, emergency conditions justified summary action to prevent the injury, provided that the property owner was ultimately afforded a hearing. *See* North American Storage Co. v. Chicago, 211 U.S. 306 (1908); Sentell v. New Orleans & Carrollton R.R., 166 U.S. 698 (1897); Lawton v. Steele, 152 U.S. 133 (1893).

At the state level, see *In re* Cheesebrough, 78 N.Y. 232 (1879), in which the court recognized that extreme circumstances could justify the taking of private property without compensation. "In such cases, the rights of private property must be made subservient to the public welfare; and it is the imminent danger and the actual necessity which furnish the justification." *Id.* at 237. Such taking, however, could not amount to permanent appropriation. Property "may be temporarily interfered with or appropriated; necessity may justify so much; but when the necessity passes away, the right ceases." *Id.* at 237-38. Although overruling necessity might justify extreme enactments, such justification, and, therefore, the continued existence of power, were limited in time.

258. *See, e.g.*, Tyson & Bro. v. Banton, 273 U.S. 418, 437 (1927); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

259. 197 U.S. 11 (1905). In Zucht v. King, 260 U.S. 174 (1922), the Court upheld the state's generalized power to require vaccination for all children attending public school even though it found no evidence of an impending epidemic. The rule announced in *Jacobson*, therefore, outgrew its emergency setting in much the same way the rule in *Munn* had outgrown the need for monopoly conditions. *See* Brass v. Stoeser, 153 U.S. 391 (1894), discussed at note 108 *supra*.

This analogy does not, however, encompass all state court decisions on this question. Some state courts had not required the existence of emergency conditions to justify vaccination laws in cases decided prior to *Jacobson*. *See* cases cited in R. MOTT, *supra* note 23, at 347 n.46.

260. The Court stated: "Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." 197 U.S. at 27. *See* R. MOTT, *supra* note 23, at 345-46.

261. 197 U.S. at 25.

262. *Id.* at 27 (quoting Crowley v. Christensen, 137 U.S. 86, 89 (1890).

263. 197 U.S. at 27.

power had sufficient flexibility to permit legislatures "under the pressure of great dangers,"[264] to enact a law that might otherwise be considered an extreme infringement of personal rights. To hold emergency-based vaccinations "arbitrary and not justified by the necessities of the case" would usurp legislative authority.[265]

In *Block v. Hirsh*,[266] the Court upheld a rent control law enacted to alleviate emergency housing conditions in the District of Columbia during and after World War I. A two-year time limit had been placed in the act. Justice Holmes for a five-member majority applied a presumption of validity to Congress' declaration of the underlying circumstances.[267] The issue then became whether those circumstances justified governmental regulation.[268] Ordinarily, rent control laws exceeded the scope of public regulatory power. Nevertheless, "circumstances may so change in time or differ in space as to clothe with [a public] interest what at other times or in other places would be a matter of purely private concern."[269] In the majority's view the housing shortage in Washington constituted "a public exigency" subject to legislative control.[270]

Having established legislative authority to regulate, Holmes then applied the principle of conditions to resolve the taking issue.[271] The rent control ordinance concededly diminished the landlord's power to profit from his property.[272] Although this diminution might have been sufficient to invalidate the enactment in normal times, emergency conditions justified extreme exercise of the police power. Furthermore, the regulation was only a temporary measure; "[a] limit in time, to tide over passing trouble, may well justify a law that could not be upheld as a permanent change."[273] By placing an explicit and definite time limit in the statute, the legislature had ensured its constitutionality. Three years later, in *Chastleton Corp. v. Sinclair*,[274] Justice Holmes utilized that timing

264. *Id.* at 29.
265. *Id.* at 28.
266. 256 U.S. 135 (1921). *See* Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922); Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921).
267. 256 U.S. at 154-55.
268. *Id.* at 155.
269. *Id.*
270. *Id.* at 156.
271. *Id.* Justice Holmes formulated the issue in terms of a continuum of appropriation: "For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law." *Id.*
272. *Id.* at 157.
273. *Id.*
274. 264 U.S. 543 (1924).

constraint. A Washington landlord contended that the housing emergency had ended and that the rent control statute was, therefore, no longer constitutional. Justice Holmes not only remanded the case for a complete development of the facts, he also agreed with plaintiff's understanding of the applicable principle of law: "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed."[275]

Emergency cases presented the paradigmatic substantive application of the principle of conditions. They explicitly predicated an exercise of the police power upon the existence of social and economic conditions necessitating governmental interference with individual rights. Furthermore, they required responsiveness to changing conditions to justify both the law's enactment and its continuing validity.

6. *Continuity of Conditions*

Continuity of conditions formed the basis of two other police power/principle of conditions cases decided during this period—*Laurel Hill Cemetery v. San Francisco*[276] and *Abie State Bank v. Bryan*.[277] In *Laurel Hill Cemetery*, plaintiff sought to enjoin the city and county of San Francisco from enforcing an ordinance that prohibited burials in existing cemeteries. The city had allegedly enacted the ordinance as a health measure to protect growing residential neighborhoods from the evils associated with burials.[278] Plaintiff challenged this justification, claiming that cemeteries no longer constituted health hazards; such regulations, although originally responsive, had become invalid upon a change of conditions.[279] Justice Holmes relied heavily on a presumption of constitutionality and on the "[t]raditions and habits of the community"[280] to uphold the ordinance. Evidence concerning changes in burial methods failed to convince the Court that the legislature's findings of fact were unsupportable. Holmes indicated, however, that plaintiff's constitutional theory was correct: "The plaintiff must wait until there is a change of practice or at least an established consensus of civilized opinion before it can expect this court to overthrow the rules that the

275. *Id.* at 547-48.
276. 216 U.S. 358 (1910).
277. 282 U.S. 765 (1931).
278. 216 U.S. at 363.
279. *Id.* at 364-65.
280. *Id.* at 366.

lawmakers and the court of his own State uphold."[281] Upon conclusive proof of changed conditions even a previously justified regulation might no longer be a legitimate exercise of the state police power.

In *Abie State Bank*, a Nebraska statute established a depositors' guaranty fund and mandated specified contributions by state banks. Although the Court had previously upheld the statute in *Noble State Bank v. Haskell*,[282] plaintiff contended that twenty years of operation had demonstrated its ineffectiveness. The Court, after analyzing data relating to the statute's impact on banking practice,[283] concluded that the enactment was unresponsive to contemporary conditions and had become "by reason of later events, arbitrary and confiscatory in operation."[284] Nevertheless, the Court upheld the law on the basis of a legislative amendment that provided for the fund's liquidation.

7. Village of Euclid v. Ambler: *The Themes Converge*

Village of Euclid v. Ambler Realty Co.[285] was perhaps the Court's most salient exposition of the principle of conditions during the pre-Depression period. It continues to be of significant precedential value. In *Euclid*, the Court confirmed state legislative power to regulate the use of land through zoning. Justice Sutherland, writing for the Court, began his analysis with a classic application of the principle of changing conditions:

> Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of

281. *Id.*

282. 219 U.S. 104 (1910).

283. 282 U.S. at 770.

284. *Id.* at 772. In defense of its enactment, the state argued that twenty years of compliance with the statute estopped the banks from litigating its validity. The Court refused to find such estoppel, stating: "The principle that a police regulation, valid when adopted, may become invalid because in its operation it has proved to be confiscatory, carries with it the recognition of the fact that earlier compliance with the regulation does not forfeit the right of protest when the regulation becomes intolerable." *Id.* at 776.

285. 272 U.S. 365 (1926). Subsequent zoning cases decided by the Court during this period include Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 117 (1928); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Gorieb v. Fox, 274 U.S. 603 (1927); Zahn v. Board of Pub. Works, 274 U.S. 325 (1927).

> which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. . . . And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.[286]

Having established justification for the existence of power in the advanced conditions of urbanization, Sutherland established its parameters:

> The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.[287]

The principle could be applied on a community-wide basis, and to site-specific situations, *i.e.*, in taking issue cases. When an ordinance is "applied to particular premises, . . . or to particular conditions, . . . some of them, or even many of them, may be found to be clearly arbitrary and unreasonable."[288] Courts considering such a challenge were, however, to apply a middle level presumption of constitutionality.[289]

Moreover, although no longer controlling as a component of definitional scrutiny, the Court "consulted" the *sic utere* maxim "for the helpful aid of its analogies in the process of ascertaining the scope of the power."[290] Whereas *sic utere* had controlled negative spillovers between parcels of real property, zoning was designed to prospectively reconcile competition between uses before negative spillovers arose. As such, it was analogous in principle to the maxim.

The Court also placed the requirement of continuing responsiveness on the power to zone. Ambler contended that Euclid was without authority to divert natural regional development from its boundaries.[291] Sutherland dismissed this argument, noting the pre-eminence and independence of

286. 272 U.S. at 386-87.

287. *Id.* at 387.

288. *Id.* at 395.

289. *Id.* at 388. ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative power must be allowed to control.").

290. *Id.* at 387-88. Because of its ad hoc nature, nuisance law has been largely replaced in the twentieth century by prospective legislative zoning.

291. *Id.* at 389.

each municipality to govern its internal affairs.[292] Nevertheless, future changes in conditions might justify a reappraisal of that position. There was always "the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[293]

Having established regulatory power and applied definitional limitations, Sutherland next analyzed the rationality of the relationship between legislative means and object. Unlike former nuisance ordinances, zoning prospectively segregates land uses that are not customarily regarded as noxious. Nevertheless, Sutherland relied on state supreme court cases to uphold the Euclid enactment as a permissible response to changing conditions.[294] If doubt remained as to the efficacy of the means chosen, Sutherland resolved them by invoking a presumption of validity.[295]

The Court in *Euclid*, therefore, applied the principle of conditions to both justify and circumscribe a new exercise of the police power. Urbani-

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292. *Id.*

293. *Id.* at 390. *See also* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), discussed in text at notes 417 & 426-32 *infra*.

294. *Id.* at 390-91. Of these state cases, Miller v. Board of Pub. Works, 195 Cal. 477, 234 P. 381 (1925), *appeal dismissed*, 273 U.S. 781 (1927), may represent the most exhaustive explication of the principle. *Miller* concerned the extent of legislative authority to zone. Plaintiffs conceded, in light of extensive precedent and historical practice, that the police power could be used to segregate nuisances and "near-nuisances" from certain districts, but questioned whether it extended to the segregation of "vocations, business enterprises, and residential uses which are not intrinsically obnoxious." *Id.* at 487, 234 P. at 384. The Court held that such transformation in scope of the police power was permissible: "[T]he police power, as evidenced in zoning ordinances, has a much wider scope than the mere suppression of the offensive uses of property . . . it acts, not only negatively, but constructively and affirmatively, for the promotion of the public welfare . . . ." *Id.* at 487-88, 234 P. at 384 (citations omitted). The general scope of the power was linked to the principle of changing conditions. "[A]s the commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions." *Id.* at 484, 234 P. at 383. Thus, the Court predicated transformation upon "the increasing complexity of our civilization and institutions," *id.* at 485, 234 P. at 383, and particularly upon increases in population and the attendant problems of urban congestion. *Id.* at 489, 234 P. at 385. Moreover, enactments under the police power thus defined a presumption of constitutionality particularly with regard to the legislatively chosen means. *Id.* at 490, 234 P. at 385-86. *See Ex parte* White, 195 Cal. 516, 234 P. 396 (1925); Zahn v. Board of Pub. Works, 195 Cal. 497, 234 P. 388 (1925), *aff'd*, 274 U.S. 325 (1927); City of Aurora v. Burns, 319 Ill. 84, 93, 149 N.E. 784, 788 (1925); Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 1103-04, 184 N.W. 823, 826-27 (1921); Wolfsohn v. Burden, 241 N.Y. 288, 298-99, 150 N.E. 120, 123 (1925), all of which explicitly linked the power to zone to its responsiveness to prevailing conditions.

295. 272 U.S. at 395.

zation, increased population densities, and the variety of land uses within the city heightened the likelihood of inter-parcel interdependencies and negative spillovers. These changing conditions required an expansion of the power's scope. Varying conditions and the requirement of continued responsiveness limited the breadth of that expansion. In addition, Sutherland applied these components of the principle of conditions through the *C.B. & Q.* analytical framework: definitional scrutiny coupled with rational relationship analysis of legislative means. The Court also refined its use of the presumption of constitutional validity: presumptions would be applied not only in taking issue cases but also when assessing the validity of legislative policy as to means.

Summary

Beginning in 1876 with *Munn v. Illinois* and culminating in 1926 with *Euclid v. Ambler Realty Co.*, the Supreme Court applied the principle of conditions as a component in its review of numerous social and economic regulations in a variety of analytical contexts. Its application generated and supported a police power responsive to society's urbanization and industrialization. These cases were overshadowed in social significance, however, by the exception that became the rule—the preferred rights/inverted presumption substantive due process analysis introduced in *Lochner*. The unresponsiveness to conditions mandated by *Lochner* when confronted with the chaotic social and economic conditions of the Depression generated new constitutional standards of review that continue today.

III. 1933 TO DATE: DISPARATE VIEWS TOWARD ECONOMIC RIGHTS UNDER THE CONTRACT AND DUE PROCESS CLAUSES: REEMERGENCE OF THE PRINCIPLE OF CONDITIONS

An examination of the use of the principle of conditions in contemporary Supreme Court analysis reveals a doctrinal evolution engendered by the social and economic upheaval of the Depression.[296] The Court aban-

296. Application of the principle of conditions was not, however, limited solely to assessing Depression-spawned enactments. In Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935), for example, the Court, per Justice Brandeis, invalidated a Tennessee statute that required the railroad to pay one half of the cost of constructing grade separations. Regulation of grade crossings and the imposition of costs on railroads had long been held to be within the scope of the police power. *Id.* at 413. The railroad contended, however, that under the circumstances of the case, its property had been unconstitutionally taken. Principal among those circumstances was the recent development of a federal highway system in direct competition with the railroads. *Id.* at 416.

doned substantive due process as an explicit standard of review while incorporating the *C.B. & Q.* definitional scrutiny/rational relationship test into contract clause scrutiny. The adoption of a "well-nigh conclusive" presumption of constitutionality when reviewing social and economic legislation has largely precluded application of definitional scrutiny under the due process clause. The contract clause, however, has provided an infrequently utilized arena for application of definitional scrutiny. It has also recently served as a vehicle conveying an inverted presumption *Lochner*-type test.

In reviewing the statute, the state supreme court found itself precluded from assessing whether changed economic and transportation conditions had rendered the enactment invalid. *Id.* at 414-15. Brandeis disagreed: "A rule to the contrary is settled by the decisions of this Court. A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied." *Id.* at 415. He then thoroughly documented the changes in the transportation industry and held the enactment invalid. Brandeis thereby used the principle of conditions to assess continuing validity, consistent with Abie State Bank v. Bryan, 282 U.S. 765 (1930), discussed in text at notes 282-84 *supra*; Chastleton Corp. v. Sinclair, 264 U.S. 543 (1923), discussed in text at notes 274-75 *supra*; Laurel Hill Cemetery v. San Francisco, 216 U.S. 358 (1909), discussed in text at notes 276-81 *supra*.

Brandeis frequently relied on the principle of conditions in his opinions. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (Brandeis, J., dissenting), discussed at note 251 *supra*; Galveston Elec. Co. v. Galveston, 258 U.S. 388, 400-01 (1921) ("A rate ordinance invalid when adopted may later become valid, just as an ordinance valid when made may become invalid by change in conditions."); Truax v. Corrigan, 257 U.S. 312, 356 (1921) (Brandeis, J., dissenting) ("Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby.").

Brandeis, a legal realist, would have found justification for regulations preventive of ruinous competition in the emergency conditions of the Depression. In a dissenting opinion in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), he described prevailing conditions:

> The people of the United States are now confronted with an emergency more serious than war. Misery is widespread, in a time, not of scarcity, but of overabundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions.

Id at 306. He then made his eloquent plea for legislative experimentation and judicial restraint:

> To stay experimentation in things social and economic is a grave responsibility . . . . This Court has the power to prevent an experiment . . . . We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

Id. at 311. *See* note 321 *infra*; Whalen v. Roe, 429 U.S. 589, 597 n.20 (1977).

State court development largely paralleled that of the Supreme Court. Substantive due process analysis has been widely, although not entirely, abandoned in favor of a heavy presumption of constitutionality. Nevertheless, state courts have continued to use the principle of conditions in assessing the constitutionality of numerous police power enactments.

A. *Federal Developments*

1. *The Transitional Period: Emergency Conditions and the Demise of Substantive Due Process*

Among the economic dislocations contributing to and arising out of the Depression was the rapid decline in market value of real estate, particularly farm properties. This decline, coupled with the inability of lending institutions to refinance the short-term balloon-type mortgages customarily used to purchase such property, forced many mortgagors to default. Banks and savings and loan associations foreclosed, acquired the properties at very low prices, and sought deficiency judgments against the mortgagors to recover the difference.[297] In response to these conditions, twenty-five states enacted mortgage moratoria legislation.[298]

Minnesota's moritoria legislation was the first to reach the Supreme Court. In *Home Building and Loan Association v. Blaisdell*,[299] the Court upheld against due process and contract clause challenges a moratorium statute authorizing judicial postponement of foreclosure sales and extension of the redemption period. Explicitly based on emergency conditions, the statute was to remain in effect only while such conditions prevailed or for a maximum period of two years.[300] If conditions changed prior to mandatory expiration, the act empowered the courts to modify their individual orders granting postponements or extensions.[301]

Chief Justice Hughes' majority opinion established a contract clause/due process linkage that persists to date.[302] He regarded the

297. WOOD, DUE PROCESS OF LAW, 1932-1949, at 125 (1951).
298. *Id.* at 125 n.89.
299. 290 U.S. 398 (1933).
300. *Id.* at 416.
301. *Id.* at 418.
302. *See* B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 258-59 (1938); Hale, *supra* note 119, Part III, at 890; Comment, *The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause*, 125 U. PA. L. REV. 167, 179 (1976). *See also* Allied Structural Steel Co. v. Spannaus, 46 U.S.L.W. 4887 (June 27, 1978); United States Trust Co. v. New Jersey, 431 U.S. 1, 15-16 (1977), discussed in text at notes 390-410 *infra*.

Court's task as "harmonizing the constitutional prohibition with the necessary residuum of state power,"[303] *i.e.*, applying a balancing analysis. "The question," Hughes wrote, "is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to the end."[304] He used the *C.B. & Q.* test to review a police power inherently inalienable either by contract or prior legislation. Definitional scrutiny, applying the principle of conditions to an emergency situation, established the legitimacy of the state's purpose. Rational relationship scrutiny then gave sanction to the legislatively chosen means. The *Blaisdell* decision relied fully on the principle of conditions.

Hughes' definitional scrutiny first detailed the prevailing economic emergency and then considered its relation to constitutional power.[305] Was the moratorium responsive to prevailing emergency conditions? "While emergency does not create power, emergency may furnish the occasion for the exercise of power. . . . The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions."[306] Hughes squarely predicated emergency legislative authority

303. 290 U.S. at 435.

304. *Id.* at 438.

305. *Id.* at 425.

306. *Id.* at 426 (quoting Wilson v. New, 243 U.S. 332, 348 (1917)). *Wilson* involved congressional power under the commerce clause to respond to emergency conditions. Contemporary commentators disagreed over Hughes' use of emergency conditions to alter the scope of permissible police power activities. Some felt that expansion of the power in response to emergency conditions was unconstitutional. *See, e.g.*, Zelkowich, *Mortgage Moratorium*, 28 ILL. L. REV. 830, 835 (1934). Others, linking emergency power to the principle of overruling necessity, thought precedent supported the majority in *Blaisdell*. *See, e.g.*, Clark, *Emergencies and the Law*, 49 POL. SCI. Q. 268-83 (1934). *See generally* Corwin, *Moratorium Over Minnesota*, 82 U. PA. L. REV. 311 (1934); Heffernan, *The Minnesota Mortgage Moratorium Case*, 9 IND. L.J. 337 (1934); Prosser, *The Minnesota Mortgage Moratorium*, 7 S. CAL. L. REV. 353 (1933); Note, *The Minnesota Moratorium Case*, 3 BROOKLYN L. REV. 313 (1934); Note, *Constitutionality of Mortgage Relief Legislation*, 47 HARV. L. REV. 660 (1934).

Whatever the status of the conditions relied upon in *Blaisdell*, subsequent decisions have transformed the emergency circumstances of the Depression into everyday economic conditions. For example, in Veix v. Smith Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940), the Court held a New Jersey statute regarding the withdrawal of shares from savings and loan associations, passed as a permanent rather than temporary enactment in 1932, to be emergency legislation. Moreover, even if justified originally by the prevailing emergency conditions, the Court found continued validity in light of the continuing economic difficulties of savings and loan associations:

upon the existence of exigent social and economic conditions.[307] Because emergency conditions were temporary, however, they could justify expansion of the power's scope only for a limited time. When the emergency disappeared, so did the legislative authority.[308]

> The emergency of the Depression may have caused the 1932 legislation, but the weakness in the financial system brought to light by that emergency remains. If the legislature could enact the legislation as to withdrawals to protect the associations in that emergency, we see no reason why the new status should not continue.

Id. at 39. The emergency conditions had persisted and over time had become part of the general economic setting. The law drew its continuing justification from that transformation. In light of that continuing justification, any alleged impairment of contract clause rights was *damnum absque injuria. Id.* at 38.

Emergency status for prevailing conditions was also unnecessary to uphold deficiency judgment legislation in Gelfert v. National City Bank, 313 U.S. 221 (1940). The act in question limited a mortgagee's potential deficiency judgment to the difference, if any, between the amount owed and either the fair market value of the security or its foreclosure sale price, whichever was higher. Substantially identical legislation had been upheld two years earlier in Honeyman v. Jacobs, 306 U.S. 539 (1938). The new legislation was not, however, similarly "addressed to a declared public emergency." 313 U.S. at 230. Justice Douglas, for the Court, nevertheless found it valid. The basis of the power to regulate was a legislative extrapolation of equity's historical jurisdiction over unconscionability in mortgage foreclosures. *Id.* at 231-32. Douglas found any rights potentially upheld under the contract clause subject to the "reserved legislative power" to alter the "formula . . . adopt[ed] for determining the amount of a deficiency judgment." *Id.* at 231. Quoting from *Blaisdell*, he attributed this power to alter contracts to "the reservation of essential attributes of sovereign power . . . read into contracts as a postulate of the legal order." *Id.* (quoting 290 U.S. at 435). *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 22 n.19 (1977), discussed in text at notes 390-410 *infra*; East New York Sav. Bank v. Hahn, 326 U.S. 230 (1945), discussed in text at notes 373-82 *infra. But see* cases cited in note 308 *infra*.

307. Hughes did not limit application of the principle of conditions to emergency conditions. He also linked the scope of the power to the normal progression and development of an increasingly interdependent society:

> The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity.

290 U.S. at 442.

308. *Id.* at 439-40. Chief Justice Hughes stated:

> But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community. . . . [I]f state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood or earthquake, that power cannot be said to be non-existent when the urgent public need demanding such relief is produced by other and economic causes.

Id. Chief Justice Hughes used this requirement that emergency legislation be temporary in nature and directly linked to prevailing conditions in W.B. Worthen Co. v. Thomas, 292

In addition, a legislative declaration of the existence of emergency conditions, although not conclusive, was "entitled to great respect."[309] This deference did not apply, however, when the Court assessed the continuing validity of previously upheld legislation:

> [A] law "depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends.[310]

Having established legislative authority to enact temporary mortgage moratoria legislation, Hughes addressed the vested rights/contract clause issue. He concluded, after analyzing prior opinions, that the clause's prohibition against impairment of contract obligations "is not an absolute one and is not to be read with literal exactness like a mathematical formula."[311] Although laws in existence upon the execution of a contract formed a part of that contract, the state retained amendatory power in light of emergency conditions and the general public interest: "The legislation cannot 'bargain away the public health or the public morals . . . .' The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contract."[312] This principle of conditions/police power concept, reflecting "the reservation of essential attributes of sovereign power,"[313]

U.S. 426 (1934), to invalidate an Arkansas statute that placed the proceeds of insurance contracts beyond the reach of existing creditors. The state attempted to justify the statute by reference to emergency conditions. *Id.* at 432. Hughes found, however, that "the legislation was not limited to the emergency and set up no conditions apposite to emergency relief." *Id.* He distinguished *Blaisdell* as involving temporary legislation "limited to the exigency to which the legislation was addressed." *Id.* at 434. A statute containing "no limitations as to time, amount, circumstances, or need" could not be upheld merely because the legislature declared it necessary to meet emergency conditions. *Id. See also* Triegle v. Acme Homestead Ass'n, 297 U.S. 189, 195 (1936).

309. 290 U.S. at 442.

310. *Id.* (quoting Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1924)), discussed in text at notes 274-75 *supra*).

311. 290 U.S. at 428. Society's ever-changing nature required flexibility in the interpretation of constitutional provisions: "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time." *Id.* at 442. This analysis of historical progression is particularly significant since the Framers' purpose in incorporating the contract clause into the Constitution had apparently been to protect credit obligations from impairment by debtor relief legislation. B. WRIGHT, *supra* note 302, at 4-6. *See* 290 U.S. at 427.

312. 290 U.S. at 436-37, 439.

313. *Id.* at 435.

applied not only to entirely private contracts, but also to legislative enactments providing contract enforcement remedies and contracts in which the state is an implicit party. Thus, since *Stone v. Mississippi*,[314] the principle of conditions had functioned expansively to define the power against alleged infringements to vested contract clause rights.

In analyzing the rationality of the relationship between means and ends, Hughes emphasized that the statute was narrowly drafted to protect the interests of creditors.[315] Although it altered the legislative remedy for default, the statute left the creditor's interests and the debtor's obligations largely unimpaired.[316] After balancing the minimal infringement suffered against the communal interests served, the Court held that in light of the emergency conditions the means chosen were not unrelated to the ends.

The Court also decided *Nebbia v. New York*[317] in 1933. In *Nebbia*, the Court considered the scope of legislative authority to regulate the price of privately produced goods and services, an issue left unresolved by *Munn*. Following *Lochner*, the Court had viewed price regulation as that form of police power enactment which most seriously infringed preferred due process contract rights. The state had, therefore, been required to demonstrate "special circumstances" to justify the enactment, *i.e.*, the state had to overcome the inverse presumption. The Court's validation of the price regulation in *Nebbia* significantly reex-

314. 101 U.S. 814 (1880), discussed in text at notes 116-21 *supra*.

315. *See* Comment, *supra* note 302, at 184-85.

316. 290 U.S. at 425, 429-34. The case law relating to the contract clause and the availability of legislative enforcement remedies has had substantial longevity. *See, e.g.*, Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1866); Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827); Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).

Opinions following *Blaisdell* found the legislature's authority to alter contract remedies somewhat more circumscribed than therein indicated. In Richmond Mortgage & Loan Corp. v. Wachovia Bank, 300 U.S. 124 (1937), for example, the Court stated: "The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right." *Id.* at 128. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.17 (1977), discussed in text at notes 390-400 *infra*; Honeyman v. Jacobs, 306 U.S. 539 (1939). *But see* El Paso v. Simmons, 379 U.S. 497, 506-07 n.9 (1965), discussed in text at notes 383-89 *infra*; East New York Sav. Bank v. Hahn, 326 U.S. 230 (1945), discussed in text at notes 373-82 *infra*; Gelfert v. National City Bank, 313 U.S. 221 (1940), discussed in note 306 *supra*; Viex v. Smith Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940), discussed in note 306 *supra*. The Court did not use the obligations/remedies dichotomy in any of these cases.

317. 291 U.S. 502 (1934). *See* Hegeman Farms Corp. v. Baldwin, 293 U.S. 163 (1934).

panded the power's scope and initiated the demise of substantive due process analysis.

The issue in *Nebbia* was whether New York State could regulate milk industry prices in non-emergency circumstances.[318] Justice Roberts, author of the majority opinion, detailed both prevailing milk industry conditions[319] and the progression of past regulation.[320] He noted that extensive legislative investigations had uncovered "destructive and demoralizing competitive conditions and unfair trade practices."[321] Price regulations had been imposed "to prevent ruthless competition."[322]

Roberts, following Chief Justice Waite in *Munn*, relied on *sic utere* principles to determine the power's scope: "Equally fundamental with the private right is that of the public to regulate it in the common interest."[323] Moreover, quoting from Justice Taney's opinion in *The Licence Cases*, Justice Roberts linked the scope of the general welfare with residual sovereignty[324] to provide support for legislative authority to

318. *See* WOOD, *supra* note 297, at 108 for an analysis of the significance of the Court's treatment of the conditions in *Nebbia* as arising from ordinary rather than emergency conditions. *See also* Polikoff, *Commodity Price Fixing and The Supreme Court*, 88 U. PA. L. REV. 934 (1940).

319. 291 U.S at 515-18.

320. *Id.* at 521-23.

321. *Id.* at 530. Ruinous competition had also been the economic condition advanced to support legislation requiring a certificate of public convenience for the construction of a plant to manufacture ice in Oklahoma. A majority of the Justices held that statute invalid as excessively infringing "the common right to engage in a lawful private business." New State Ice Co. v. Liebmann, 285 U.S. 262, 278 (1932). In dissent, however, Justice Brandeis, joined by Justice Stone, found justification for the statute in prevailing economic conditions and linked the legislature's general authority to regulate to changing conditions:

> To grant any monopoly to any person as a favor is forbidden even if terminable. But where, as here, there is reasonable ground for the legislative conclusion that in order to secure a necessary service at reasonable rates, it may be necessary to curtail the right to enter the calling, it is, in my opinion, consistent with the due process clause to do so, whatever the nature of the business. The existence of such power in the legislature seems indispensable in our ever-changing society.

Id. at 304 (Brandeis, J., dissenting).

Justice Brandeis had also sought to eliminate the distinction between businesses clothed with a public interest and all other private businesses:

> The notion of a distinct category of business "affected with a public interest," employing property "devoted to a public use," rests upon historical error . . . . In my opinion the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character of the scope of regulation permissible.

Id. at 302-03. *See* note 296 *supra*. This distinction was eliminated by Justice Roberts in *Nebbia*: " '[A]ffected with a public interest' is the equivalent of 'subject to the exercise of the police power.' " 291 U.S. at 513.

322. 291 U.S. at 530.

323. *Id.* at 523.

324. *Id.* at 524.

regulate prices. He then used the principle of conditions to equate price regulation with other less onerous forms of police power enactment:

> It is clear that there is no closed class or category of businesses affected with a public interest, and the function of the courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances indicate the challenged regulations as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory.[325]

In place of the inverse presumption/special circumstances requirement, the Court accorded the enactment "every possible presumption . . . in favor of its validity . . . unless palpably in excess of legislative power."[326] It thus relied on a comprehensive, though not conclusive, presumption of constitutionality[327] that left marginal determinations of the power's scope to the judiciary.

The Court also incorporated the principle of varying conditions into its taking issue review. Whether the application of regulatory authority to specific conditions constituted an unlawful taking depended upon the "given circumstances."[328] Hence, "a regulation valid for one sort of business . . . may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."[329]

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325. 291 U.S. at 536. At a later point in his opinion, Justice Roberts stated:

> If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public.

Id. at 538. Roberts thereby specified the nature of the conditions open to judicial scrutiny and, therefore, necessary to justify price regulation of private industry.

326. *Id.* This presumption is analogous to the presumption generally used by the first Justice Harlan. *See* notes 129 & 171 *supra*.

327. Application of this presumption along a power/policy dichotomy was unclear. It was, perhaps, only applicable to legislative policy decisions:

> [A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose . . . . With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal.

291 U.S. at 537.

328. *Id.* at 525.

329. *Id.*

Nebbia, therefore, expanded the scope of the police power to include regulation of the converse economic conditions to those present in *Munn*. Its definition of the power, moreover, permitted price regulation of a private industry without regard to its status as a business clothed with a public interest. Moreover, it relied upon the principle of conditions in a variety of substantive and analytical contexts.

Two cases reaching antithetical results on the issue of minimum wage regulation for women—*Morehead v. New York ex rel. Tipaldo*[330] and *West Coast Hotel Co. v. Parrish*[331]—followed *Nebbia*. In *Morehead*, the Court relied on *Adkins*[332] and invalidated the regulatory statute. In *Parrish*, the Court overruled *Adkins* and hastened the demise of substantive due process.

Notwithstanding its recent elimination of the special circumstances requirement in *Nebbia*,[333] the majority in *Morehead* held that liberty of contract could be abridged only by laws enacted pursuant to exceptional circumstances.[334] The Court found such circumstances absent in this case even though the statute itself contained an extensive recitation of prevailing economic conditions.[335]

Chief Justice Hughes and Justice Stone, joined by Justices Brandeis and Cardozo, filed separate dissenting opinions. Both opinions recited the legislative findings of fact concerning the employment conditions of women and children in New York.[336] The Chief Justice then explicitly linked the enactment's validity to prevailing conditions.[337] The definitional scrutiny thus utilized incorporated both the principle of conditions and a general welfare component: "The test of validity is not artificial. It is whether the limitation upon the freedom of contract is arbitrary and capricious or one reasonably required in order appropriately to serve the public interest in the light of the particular conditions to which the power

330. 298 U.S. 587 (1936).

331. 300 U.S. 379 (1937). *See* Brown, *Minimum Wage Cases in the Supreme Court*, 11 S. CAL. L. REV. 256 (1938); Hale, *Minimum Wages and the Constitution*, 36 COLUM. L. REV. 629 (1936).

332. Adkins v. Children's Hosp., 261 U.S. 525 (1923), discussed in text at notes 224-30 *supra*.

333. The majority made no reference to *Nebbia*.

334. 298 U.S. at 610.

335. *Id.* at 626-27 (Hughes, C.J., dissenting).

336. *Id.*

337. *Id.* at 625. The Chief Justice stated: "The validity of the New York act must be considered in the light of the conditions to which the exercise of the protective power of the State was addressed." *Id.*

is addressed."[338] It eliminated, therefore, both the special conditions requirement[339] and the preferred right status previously accorded the liberty to contract.[340] Justice Stone's dissent relied even more heavily on the principle of conditions.[341] Citing *Munn* and its progeny, he linked the state's power to regulate women's wages with the economic conditions—the Depression—arising since *Adkins*.[342]

In *Parrish*, decided one year later, Justice Roberts joined the four-member *Morehead* minority to uphold a virtually identical minimum wage law. Unlike *Morehead*, in which the majority would not reconsider the vitality of *Adkins*,[343] the *Parrish* Court squarely reexamined the constitutional issues presented by state regulation of the employer-employee relationship.[344] In his majority opinion, Hughes applied the stan-

338. *Id.* at 629.

339. *Id.* Although the Chief Justice's analytical method did not require a showing of special conditions to justify an enactment, he believed "the special conditions calling for the protection of women, and for the protection of society itself, [were] abundantly shown." *Id.*

340. *Id.* at 630.

341. *Id.* at 632 (Stone, J., dissenting). He stated:

> They include cases, which have been neither overruled nor discredited, in which the sole basis of regulation was the fact that circumstances, beyond the control of the parties, had so seriously impaired the regulative power of competition as to place buyers or sellers at a disadvantage in the bargaining struggle such that a legislature might reasonably have contemplated serious consequences to the community as a whole and have sought to avoid them by regulation of the terms of the contract.

Id.

342. *Id.* at 635. Justice Stone stated:

> In the years which have intervened since the *Adkins* case . . . [w]e have had opportunity to perceive more clearly that a wage insufficient to support the worker does not visit its consequences upon him alone; that it may affect profoundly the entire economic structure of society and, in any case, that it casts on every taxpayer, and on government itself, the burden of solving the problems of poverty, subsistence, health and morals of large numbers in the community. Because of their nature and extent these are public problems. A generation ago they were for the individual to solve; today they are the burden of the nation.

Id.

343. According to the *Parrish* majority, the *Morehead* Court considered only the question whether *Adkins* was distinguishable from the New York statute. 300 U.S. at 389. Indeed, Justice Roberts noted in *Morehead*: "The validity of the principles upon which [*Adkins*] rests is not challenged . . . . [Petitioner] is not entitled and does not ask to be heard upon the question whether the *Adkins* case should be overruled." 298 U.S. at 604-05.

344. 300 U.S. at 390. Chief Justice Hughes stated:

> The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State

dard of review proposed in his *Morehead* dissent and held: "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[345] Thus, a police power enactment, responsive to prevailing conditions and protective of the public welfare, met the substantive standards of the due process clause. In implementing this test, Hughes again analyzed the economic conditions attendant upon the employment of women, particularly in light of the Depression.[346]

As in his *Morehead* dissent, Hughes limited the nature and extent of liberty to contract: "Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."[347] Liberty to contract was thus subject to society's right to protect and provide for the collective welfare.[348] By limiting freedom to contract, Hughes eliminated the state's need to prove special circumstances. In place of the inverse presumption/special circumstance requirement, he applied the comprehensive *Nebbia* presumption of constitutionality.[349] By granting that "the legislature has necessarily a wide field of discretion in police power matters and, particularly, regulation relating to working conditions,"[350] he provided the foundation for extensive judicial reliance on the presumption of constitutionality in resolving economic due process issues.

2. Olsen *and its Progeny: Emergence of the "Well-Nigh Conclusive" Presumption*

In *Olsen v. Nebraska*,[351] Justice Douglas completed the demise of substantive due process initiated by *Nebbia* and *Parrish* in upholding a Nebraska statute that regulated employment agency prices. The Supreme Court reversed the state supreme court's decision to invalidate the act on the basis of *Ribnik v. McBride*,[352] and explicitly repudiated the special

must be considered, make it not only appropriate, but we think imperative, that in deciding the present case the subject should receive fresh consideration.

345. *Id.* at 391.

346. *Id.* at 399.

347. *Id.* at 391.

348. *Id.* at 392 (quoting Chicago, B. & Q. R.R. v. McQuire, 219 U.S. 549 (1911), discussed in text at notes 191-95 *supra*.

349. 300 U.S. at 398.

350. *Id.* at 393. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

351. 313 U.S. 236 (1941).

352. 277 U.S. 350 (1928).

circumstances standard of constitutionality employed in *Lochner* and its progeny.[353] In eliminating the inverted presumption, however, Justice Douglas created a virtually conclusive presumption of constitutionality:

> We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which "should be left where . . . it was left by the Constitution—to the States and to Congress" . . . There is no necessity for the state to demonstrate before us that evils persist . . . .[354]

This presumption, more comprehensive and determinative than that used in *Nebbia* and *Parrish*, effectively eliminated constitutional analysis under the due process clause of alleged infringements to economic and property rights. As a consequence, the Court abandoned responsiveness analysis as a due process standard of review. The *Olsen* presumption was analogous to that used fifty-three years earlier in *Powell v. Pennsylvania*,[355] decided at a time when protection of due process rights was left "to the legislature, or to the ballot-box, not to the judiciary."[356]

Olsen fostered a line of decisions in which the Court, principally through Justices Douglas and Black, reaffirmed the demise of *Lochner*:[357] "[I]t is [not] the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process."[358] The Court, however, "has not divested itself of the power to review and strike down legislation as violative of due process."[359] Both procedural due process and Bill of Rights freedoms, selectively incorporated through the due process clause, have been applied to protect a variety of personal liberties.[360]

353. 313 U.S. at 246-47.

354. *Id.*

355. 127 U.S. 678 (1888), discussed in text at notes 122-29 *supra*. The *Powell* presumption was extreme even prior to the discovery of substantive content in the due process clause. *See* text at note 129 *supra*.

356. 127 U.S. at 686.

357. *See, e.g.*, North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973); Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Day-Brite Laundry Co. v. Missouri, 342 U.S. 421 (1952); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Daniel v. Family Ins. Co., 336 U.S. 220 (1949); Lincoln Fed. Labor Union v. Northwestern Co., 335 U.S. 525 (1949); Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946). *See generally* WOOD, *supra* note 297, at 183; Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 880-81 (1976); Strong, *supra* note 88, at 449-55.

358. Ferguson v. Skrupa, 372 U.S. 726, 729 (1963).

359. WOOD, *supra* note 297, at 183.

360. The Court has also substantially expanded the application of the equal protection

With regard to economic rights, however, the Court "in effect has found that a restriction embodied in a law which the legislative branch has deemed necessary and appropriate to the welfare of the state is, for that reason, due process of law."[361] It has thus continually reaffirmed the creation of a substantial and virtually irrebuttable presumption of constitutionality. As stated by Justice Black in *Ferguson v. Skrupa*:

> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws . . . . Legislative bodies have broad scope to experiment with economic problems and this Court does not sit to "subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure."[362]

Adoption of this presumption has not, however, eliminated the use of definitional scrutiny. In *Berman v. Parker*,[363] for example, the Court

clause since 1940. *See, e.g.*, Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court*, 86 HARV. L. REV. 1 (1972); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969). *But see* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

361. WOOD, *supra* note 297, at 183.

362. 372 U.S. 726, 730 (1963) (quoting Sproles v. Binford, 286 U.S. 374, 388 (1932)). The presumption in *Sproles* was not nearly so extensive as that used in *Ferguson*. Chief Justice Hughes had there written, as quoted by Justice Black in a footnote:

> When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome. 286 U.S. at 388-89.

372 U.S. at 730 n.7. When read with the Chief Justice's dissenting opinion in *Morehead* and his majority opinion in *Parrish*, it may be said that the presumption in *Sproles* was substantially more circumscribed than the presumption it supported in *Ferguson*. Hughes did not abandon all due process scrutiny to a conclusive presumption. Rather, he structured it to reflect required responsiveness to prevailing conditions and the public interest, leaving definition of the power's scope to the courts functioning within parameters set by a favorable but not conclusive presumption. *See* Stephenson v. Binford, 287 U.S. 251 (1932).

363. 348 U.S. 26 (1954). *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), discussed in note 365 *infra*; Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). In *Goldblatt*, a case factually analogous to Hadacheck v. Sebastian, 239 U.S. 394 (1915), discussed in text at notes 249-53 *supra*, the Court, per Justice Clark, upheld a zoning ordinance regulating the dredging and excavation of gravel pits. "[I]ndulging in the usual presumption of constitutionality," 369 U.S. at 594, it held that the ordinance was not an unconstitutional taking as to Goldblatt. The ordinance was reasonable, defined in terms of both definitional and means scrutiny: "To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the

linked the power's scope to prevailing conditions to uphold an urban redevelopment act passed by Congress for the District of Columbia. Justice Douglas not only relied on the "well-nigh conclusive" presumption he developed in *Olsen*,[364] but also expansively defined the public welfare and scope of the police power to include aesthetic considerations.[365] Urban slum conditions justified this expansion:

> [T]raditional application[s] of the police power to municipal affairs . . . merely illustrate the scope of the power and do not delimit it. . . . Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. . . . The concept of the public welfare is broad and inclusive.[366]

The Court's repudiation of substantive due process, however, has not been final. In a number of recent decisions, the Burger Court has relied on components of both substantive due process[367] and definitional

availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance." 369 U.S. at 595.

364. 348 U.S. at 32 ("when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive").

365. *Id.* at 33. Justice Douglas stated:

> The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Id. In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), Justice Douglas interpreted *Berman* as having "refused to limit the concept of public welfare that may be enhanced by zoning regulations." 416 U.S. at 5. His conceptualization of the scope of the police power in *Belle Terre*, which involved an equal protection challenge to a zoning ordinance limiting occupancy of single-family homes to families was, perhaps, even more expansive than his conceptualization in *Berman*:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within Berman v. Parker . . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample 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.

416 U.S. at 9. In his opinions in *Berman* and *Belle Terre*, Justice Douglas removed any federal definitional limitation on the scope of the police power as it relates to zoning. *See also* Warth v. Seldin, 422 U.S. 490 (1975).

366. 348 U.S. at 32-33. Justice Douglas concluded by assessing the means chosen to effectuate the valid public purpose. *Id.* at 33-36. Here again, he relied heavily on the presumption of constitutionality. *Id.* at 33.

367. These cases, however, have involved personal rights and not the economic and property rights characteristically preferred and protected in earlier substantive due process cases. For example, in Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974), the Court invalidated the Board's pregnancy leave regulations. Justice Stewart, writing for a six member majority, used the means scrutiny component of substantive due process to assess the legislation. *Id.* at 632-34. The use of definitional scrutiny was not necessary

because the state's purposes—protection of the teacher's health and classroom/teacher continuity—were clearly within the scope of the power. *Id.* at 641 n.9.

Most recently, the Court relied on a rational relationship/means scrutiny analytical structure to invalidate a zoning ordinance controlling the identity of those family members who may permissibly occupy a single-family dwelling. Moore v. City of East Cleveland, 431 U.S. 494 (1977). Five separate opinions were filed in the five to four decision.

The ordinance in question was found to tread upon "freedom of personal choice in matters of marriage and family life . . . protected by the Due Process Clause," by Justices Powell, Brennan, Marshall, and Blackmun. *Id.* at 499 (quoting Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639-40 (1974). Justice Stevens, in concurrence, believed that "a fundamental right normally associated with the ownership of residential property" had been infringed. *Id.* at 520. Justices Stewart and Rehnquist, in dissent, would "not elevate either the appellant's claim of associational freedom or her claim of privacy to a level invoking constitutional protection." *Id.* at 535. Justice White, also in dissent, could not believe the right in question "is one that calls for heightened protection under the Due Process Clause." *Id.* at 549.

Concomitant with the various views expressed concerning the nature and importance of the right infringed was the variety of standards of review considered applicable. Justice Powell, for Justices Brennan, Marshall, and Blackmun, rejected the standard for zoning ordinances promulgated in *Euclid* and, instead, found that "when a city undertakes such intrusive regulation of the family . . . the usual judicial deference to the legislature is inappropriate." *Id.* at 499. The burden of persuasion was apparently placed on the government: "But when the Government intrudes on choices concerning family living arrangements, this court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Id. See* United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), discussed in text at notes 390-410 *infra*, in which the Court also found the "importance of the governmental interests advanced" to be in issue. The ordinance in *Moore* was invalidated because the chosen means were not substantially and rationally related to the permissible legislative purposes. "Although these are legitimate goals, the ordinance before us serves them marginally, at best." 431 U.S. at 500.

Justice Brennan, in a separate concurring opinion, agreed with Powell's rational relationship analytical format and the protected status of family-related rights. *Id.* at 507-08. His opinion is noteworthy principally because he continued by developing sociological data with regard to the prevailing status of the family. *Id.* at 509-10.

Justice Stevens also relied on a rational relationship test, although he believed the limited *Euclid* standard of review appropriate: "Under that standard, East Cleveland's unprecedented ordinance constitutes a taking of property without due process and without just compensation." *Id.* at 521.

Justices Stewart and Rehnquist, in dissent, would have relied on the equal protection clause mere rationality test. *Id.* at 538. Quoting from *Belle Terre*, in which a similar occupancy-related zoning ordinance had been upheld, they stated: "Every line drawn by a legislature leaves some out that might well have been included. The exercise of discretion, however, is a legislative, not a judicial, function." *Id.*

Justice White, in an instructive dissent, would apparently limit the content of the due process clause to procedural due process and selective incorporation of substantive Bill of Rights protections. *Id.* at 548-49. Recognizing "ample precedent for the creation of new constitutional rights," he was nonetheless, "extremely reluctant to [have the Court] breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare." *Id.* at 544. Nevertheless, "[a]ccepting the cases as they are [and] the Due Process Clause as

scrutiny in analyzing the constitutionality of police power enactments. Notably, in *Roe v. Wade*,[368] the Court supported its invalidation of a Texas statute prohibiting abortions by means of a changed conditions analysis. Justice Blackmun, for the Court, detailed changes in medical knowledge, the history of abortion regulation, and general attitudes to demonstrate the contemporary invalidity of such statutes.[369] Of particular interest was his use of medical data. When originally enacted, abortion laws had been justified by the hazardous nature of the medical procedure.

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construed by them," he recognized "several forms" of scrutiny "each differing in the severity of review and the degree of protection offered to the individual." *Id.* The protection of some preferred rights required the balancing of social benefit against individual deprivation with the balance skewed against the enactment's validity: "There are various 'liberties' . . . which require that infringing legislation be given closer judicial scrutiny, not only with respect to existence of a purpose and the means employed, but also with respect to the importance of the purpose itself relative to the invaded interest." *Id.* at 548. Another form of scrutiny relying on rational relationship/means analysis would skew the balance in favor of the legislation:

> This means-end test appears to require that any statute restrictive of liberty have an ascertainable purpose and represent a rational means to achieve that purpose, whatever the nature of the liberty interest involved. This approach was part of the substantive due process doctrine prevalent earlier in the century, and it made serious inroads on the presumption of constitutionality supposedly accorded to state and federal legislation. But with *Nebbia v. New York*, 291 U.S. 502 (1934), and other cases of the 1930's and 1940's such as *West Coast Hotel Co. v. Parrish, supra*, the courts came to demand far less from and to accord far more deference to legislative judgments. This was particularly true with respect to legislation seeking to control or regulate the economic life of the State or Nation. Even so, "while the legislative judgment on economic and business matters is 'well-nigh conclusive . . . , it is not beyond judicial inquiry." *Poe v. Ullman, supra*, at 518 (Douglas, J., dissenting). No case that I know of . . . has announced that there is some legislation with respect to which there no longer exists a means-ends test as a matter of substantive due process law. This is not surprising, for otherwise a protected liberty could be infringed by a law having no purpose or utility whatsoever. Of course, the current approach is to deal more gingerly with a state statute and to insist that the challenger beat the burden of demonstrating its constitutionality; and there is a broad category of cases in which substantive review is indeed mild and very similar to the original thought of *Munn v. Illinois*, 94 U.S. 113, 132 (1877), that "if a state of facts could exist that would justify such legislation," it passes its initial test.

Id. at 547-48. Finding this test appropriate under the circumstances of the case and the ordinance in question "not wholly lacking in purpose or utility," White would have upheld it. *Id.* at 550.

It is difficult to discern from the various *Moore* opinions the future application of substantive due process in personal rights cases. *Moore* may, however, signal its reemergence. *See* Poelker v. Doe, 432 U.S. 519 (1977) (per curiam); Maher v. Roe, 432 U.S. 464 (1977); Whalen v. Roe, 429 U.S. 589 (1977).

368. 410 U.S. 113 (1973). *See* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

369. 410 U.S. at 129-47.

Blackmun noted, however, that "[m]odern medical techniques have altered this situation."[370] The high mortality rates associated with early abortions were now as low or lower than those for normal childbirth. "Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure . . . has largely disappeared."[371] The Court held, therefore, that the state could no longer prohibit abortions during the first trimester of pregnancy, but could continue to regulate those aspects of the abortion procedure which traditionally fall within its power to protect the public health.[372]

3. *Contract Clause and Due Process Combined: Contemporary Use of the Principle of Conditions*

Although the conclusive presumption has, until recently, largely precluded the use of definitional scrutiny in due process and economic rights cases, its vitality in contract clause cases has continued. These cases, although few in number since the Depression, have reaffirmed the seminal value of *Blaisdell* and its use of the *C.B. & Q.* analytical framework and the principle of conditions. Moreover, in contrast to the personal interests protected in *Roe v. Wade*, these cases have applied a standard of constitutional review originally developed under the due process clause to protect economic and property rights.

The first contract clause case decided after *Olsen* and its promulgation of the conclusive presumption was *East New York Savings Bank v. Hahn*.[373] In *East New York*, the Court considered a contract clause challenge to the continuing validity of an extension and amendment of New York's twelve year old mortgage moratorium law.[374] Justice Frankfurter relied on *Blaisdell* and *Manigault v. Springs*[375] to establish the power's general supremacy over the obligations of entirely private contracts.[376] The bank contended, however, that changed economic conditions had removed the constitutional basis on which the original act had been predicated, citing Justice Holmes' opinion in *Chastleton Corp. v. Sinclair*.[377] Frankfurter noted that New York had annually reenacted

370. *Id.* at 149.
371. *Id.*
372. *Id. See* Doe v. Bolton, 410 U.S. 179 (1972).
373. 326 U.S. 230 (1945).
374. *Id.* at 231. The Court found the bank's due process arguments "too feeble to merit consideration." *Id.*
375. 199 U.S. 473 (1905), discussed in note 140 *supra*.
376. 326 U.S. at 231-33.
377. 264 U.S. 543 (1924), discussed in text at notes 274-75 *supra*.

and frequently amended its statute to reflect "changed economic conditions," as comprehensively assessed by joint legislative committee, and was thus distinguishable from *Chastleton*:[378] "The whole course of the New York moratorium legislation shows the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of reasonable forecasts."[379] Not only the legislature's method but also the extent of its analysis of prevailing economic conditions demonstrated that the appropriate locus of decision-making was the legislature and not the courts.[380]

Although the emergency conditions that originally justified the moratorium legislation had ended, the Court noted that comparably compelling conditions presently existed because "[s]udden termination . . . might well result in an emergency more acute than that which the original legislation was intended to alleviate."[381] Frankfurter, therefore, incorporated the continued existence of the moratorium into the expectations of the business community. The potential adverse impact of destroying those expectations in light of the recent conclusion of World War II justified the Act's extension.[382]

The Court also relied on *Blaisdell* in *City of El Paso v. Simmons*[383] to uphold an amendment to Texas' Land Sales Act which reduced a previously unlimited reinstatement period to five years from the date of forfeiture. Cited as "a comprehensive restatement of the principles underlying the application of the Contract Clause,"[384] *Blaisdell* established that the state possessed sovereign authority to protect its "economic interests" and "to safeguard the vital interests of its people," and to "exercise . . . its continuing and dominant protective power notwithstanding interference with contracts."[385] Such an exercise of the police power, moreover, was presumptively valid.[386] Nevertheless, as *Blaisdell* itself indicated: "The reserved power cannot be construed so as to destroy the [contract clause] limitation, nor is the limitation to be

378. 326 U.S. at 233-34.

379. *Id.* at 234-35.

380. *Id.* Consonant with this position, the Court applied a presumption of constitutionality. *Id.* at 233.

381. *Id.* at 235.

382. *Id.* at 234-35.

383. 379 U.S. 497 (1965).

384. *Id.* at 508.

385. *Id.* (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 437 (1933), discussed in text at notes 299-316 *supra*).

386. 379 U.S. at 508-09 (citing East N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 232-33 (1945), discussed in text at notes 373-82 *supra*).

construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other."[387] The Court, therefore, balanced social benefits arising from the legislation against individual contract impairment to determine its constitutionality:

> The program adopted at the turn of the century . . . was not wholly effectual to serve the objectives of the State's land program many decades later. . . . Given these objectives and the impediments posed to their fulfillment by timeless reinstatement rights, a statute of repose was quite clearly necessary. The measure taken to induce defaulting purchasers to comply with their contracts . . . was a mild one indeed, hardly burdensome to the purchaser who wanted to adhere to his contract of purchase, but nonetheless an important one to the State's interest. The Contract Clause does not forbid such a measure.[388]

The state now had a "vital interest" in generating revenues for schools and providing space for its growing population.[389] These objectives, responsive to changing conditions, outweighed the speculative interests of purchasers.

In 1976, the Court discussed the "harmony" between the contract clause and the police power in *United States Trust Co. v. New Jersey*.[390] *United States Trust* concerned the protection of vested rights arising from a contract between the state and private citizens. The challenged enactment repealed a covenant between New York and New Jersey that had limited the Port Authority's ability to subsidize commuter rail transportation out of revenues and reserves pledged as security for its consolidated bonds. The Court invalidated the repeal by a four to three vote.[391]

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387. 379 U.S. at 509.

388. *Id.* at 516-17.

389. *Id.* at 515.

390. 431 U.S. 1 (1977). *United States Trust* tends to confirm "suggestions that the Burger Court is more sympathetic to business than was the Warren Court." Howard, *supra* note 357, at 881. Professor Howard documents this transition, but concludes: "[W]hatever the philosophical assumptions underlying these decisions, they do not seem to have undercut the Court's refusal to revive the old uses of substantive due process in economic cases." *Id. But see* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 379 (1974) (Powell, J., concurring), cited in Howard, *supra* note 357, at 881 n.40. To the extent that the majority's opinion in *United States Trust* represents the application of *Lochner*-derivative substantive due process to economic rights under the contract clause it extends the Burger Court's sympathies into uncharted regions. In Allied Structural Steel Co. v. Spannaus, 46 U.S.L.W. 4887 (June 27, 1978), the Court reaffirmed the vitality of the contract clause as a means of protecting economic and property rights: "If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a state to abridge existing contractual relationships even in the exercise of its otherwise legitimate police power." 46 U.S.L.W. at 4889.

391. Justices Stewart and Powell did not take part in the Court's decision.

Justice Blackmun's majority opinion confirmed and extended the linkage between the contract and the due process clauses. Indeed, the test applied is similar to that used in *Lochner* substantive due process cases and thus departs significantly from *Blaisdell* and its progeny.

Although Justice Blackmun recognized that the police power is inalienable by contract, he held this status non-determinative in "an inquiry into the purpose or reasonableness of the subsequent impairment."[392] Moreover, because the repealed covenant had altered a financial obligation of the state, it was predicated not only on the police power but also on the taxing and spending power. This latter power could be "contracted away."[393] Blackmun then structured the applicable contract clause test:

> As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.[394]

The most critical component of this vested rights/substantive due process test was its inverse presumption of constitutionality. The majority applied two forms of presumption. First, when the state is a party to the contract, it has the burden of proving the impairment's constitutionality. Because the "State's self-interest is at stake" whenever it contracts with private persons under its sovereign powers, this inverse presumption may apply to more than financial obligations. Of greater significance, however, is the inverse presumption implicit in the phrase "important public purpose," recognized and made explicit by Chief Justice Burger's concurring opinion.[395] This presumption is analogous to the inverted "special circumstances" presumption of *Lochner* and its progeny.[396] If applied generally, it could provide a means of protecting and conferring preferred status on vested economic rights.

Reasonableness, the first component of Justice Blackmun's test, is a function of responsiveness to changed circumstances—with a twist.

392. 431 U.S. at 23.

393. *Id.* at 24. In his dissenting opinion, Justice Brennan found that "[a]s either an analytical or practical matter, this distinction is illusory." *Id.* at 51.

394. *Id.* at 25-26.

395. *Id.* at 32-33.

396. It is also analogous in kind, and potentially in degree, to the inverted "compelling state interest" presumption found in substantive equal protection cases.

Despite the undoubted growth in the "public perception of the importance of mass transit . . . because of increased general concern with environmental protection and energy conservation . . . these concerns were not unknown in 1962, and the subsequent changes were of degree and not of kind."[397] The impact of the covenant when repealed was substantially identical to its impact when adopted.[398] Justice Brennan's dissent, found the "surprise" or "unforeseeability" component of this test contrary to customary judicial deference and without historical foundation.[399] The data as herein developed strongly confirms Justice Brennan's view. Prior to *United States Trust*, the Court had not imposed an inverted presumption in contract clause scrutiny.

Necessity, the second component of Blackmun's standard of review, is a means test that focuses on the degree and depth of infringement. An enactment is necessary when "essential," that is, when no "less drastic" alternative is available, and no "alternative means of achieving" the state's purpose can be adopted.[400] The majority explicitly placed the burden of proving necessity on the state.[401] The majority also declined to balance social benefit against individual deprivation,[402] despite its reliance on *Blaisdell* and *El Paso*: "We do not accept this invitation [by appellees] to engage in utilitarian comparison of public benefit and private loss."[403]

Justice Brennan, in dissent, criticized the Court's unwillingness to balance,[404] referring to trial evidence indicating that appellants' loss from

397. 431 U.S. at 32.

398. *Id.*

399. *Id.* at 54-55 nn.17 & 59. Justice Brennan viewed the majority's inversion of the presumption as applicable only to public contractual obligations. He stated:

> The Court makes clear that it contemplates stricter judicial review under the Contract Clause when the Government's own obligations are in issue, but points to no case in support of this multi-headed view of the scope of the Clause . . . . [T]his position finds no support in the historical rationale for inclusion of the Contract Clause in the Constitution.

Id. at 53 n.16.

400. *Id.* at 29-30.

401. *Id.* at 31.

402. *Id.* at 29.

403. *Id.*

404. *Id.* at 34. Justice Brennan stated:

> In my view, the Court's casual consideration both of the substantial public policies that prompted New Jersey's repeal of the 1962 covenant, and of the relatively inconsequential burdens that resulted for the Authority's creditors, belies its conclusion that the State acted unreasonably in seeking to relieve its citizens from the strictures of this earlier legislative policy.

Id.

the covenant's repeal was minimal.[405] He also noted that the "less restrictive alternative" standards chosen by the Court enable it to "hypothesize other means of achieving some or all of the State's objectives . . . ;"[406] contrary to the traditional method of applying this test.[407] Brennan's dissent was also significant for its historical analysis of the police power's inalienability:

> One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days.[408]

Moreover, in applying this principle of conditions test, Brennan adopted the traditional *Blaisdell/C.B. & Q.* analysis to assess the contract clause validity of police power enactments:

> But if a State, as here, manifestly acts in furtherance of its citizens' general welfare, and its choice of policy, even though infringing contract rights, is not "plainly unreasonable and arbitrary, . . . our inquiry should end:
>
> "The question is . . . whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."[409]

This standard of review was to be applied despite Brennan's concern that "this Court should have learned long ago that the Constitution—be it through the Contract or Due Process Clause—can actively intrude into such economic and policy matters only if my Brethren are prepared to bear enormous institutional and social costs."[410]

Thus, the principle of conditions has survived in the post-*Olsen* era as a component of combined due process/vested contract right protection of economic interests. Its application, however, has been skewed by the Burger Court.

B. *State Developments: Zoning and the Principle of Conditions*

State courts have reacted inconsistently to the Supreme Court's post-

405. *Id.* at 41-42.

406. *Id.* at 54-55 n.17.

407. *Id.* Justice Brennan cited Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967).

408. 431 U.S. at 45.

409. *Id.* at 53 (quoting Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 438 (1933), discussed in text at notes 299-316 *supra*).

410. *Id.* at 62.

Olsen economic due process analysis.[411] Although most jurisdictions have followed the Court's lead, others continue to rely on *Lochner*[412] as vital precedent. In both lines of cases, however, courts have applied the principle of conditions to uphold[413] and invalidate[414] police power enact-

411. *See* Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13 (1959); Howard, *supra* note 357, at 879-91; Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950); Note, *Counterrevolution in State Constitutional Law*, 15 STAN. L. REV. 309 (1963).

412. 198 U.S. 45 (1905), discussed in text at notes 169-75 *supra*.

413. *See, e.g.*, Wilson v. City of Zanesville, 130 Ohio St. 286, 199 N.E. 187 (1935); Herrin v. Arnold, 183 Okla. 392, 82 P.2d 977 (1938). Both courts relied on the comprehensive *Nebbia* presumption and the principle of conditions to uphold regulation of hours and prices in the operation of barbershops. As stated in *Wilson*:

> The police power is not static and must ever be exercised in the light of changing conditions. To continue to apply principles in accord with circumstances no longer existing and to refuse to curtail new evils from fear of demolishing outworn precedents is to close the eyes to the necessities of the times and thus fail to give to constitutional guaranties their true import.

130 Ohio St. at 297, 199 N.E. at 192. *See* City of Miami Beach v. Texas Co., 141 Fla. 616, 194 So. 368 (1940), invalidating an ordinance prohibiting the storage of gasoline in specified areas of the city. The court added, however:

> The right of the State to regulate a business which may become unlawful is a continuing one, and a business lawful today may, in the future, because of changed conditions, the growth of population, or other causes, become a menace to the safety and public welfare and the continuance thereof must yield to the public good.

Id. at 634-35, 194 So. at 376.

In Opinion to the Governor, 75 R.I. 54, 63 A.2d 724 (1949), the court upheld emergency public housing legislation, stating:

> [T]he police power may be exercised by the state in case of an emergency which the legislature has found to exist as a matter of fact, and which it has declared is causing widespread distress with resulting danger to the health, safety or morals of the public generally . . . . To justify recourse to that [police] power, the declaration of an emergency must rest upon findings of fact by the legislature as to the existence of unusual circumstances which, unless temporarily relieved, would endanger the public health, safety or morals.

Id. at 61-62, 63 A.2d at 728-29. *Cf.* People *ex rel.* Greening v. Bartholf, 388 Ill. 445, 58 N.E.2d 172 (1944) (aviation legislation); Zelney v. Murphy, 387 Ill. 492, 56 N.E.2d 754 (1944) (unemployment compensation legislation); Fenske Bros. v. Upholsterers Local 18, 358 Ill. 239, 193 N.E. 112 (1934) (anti-injunction legislation). Although the principle of conditions was recognized in *Fenske*, its application was highly circumscribed by the use of a broad presumption of constitutionality.

414. *See, e.g.*, City of Winston-Salem v. Southern Ry., 248 N.C. 637, 105 S.E.2d 37 (1958), in which the court invalidated an ordinance allocating the full cost of rebuilding a railroad overpass to accomodate street widening. The court found the ordinance no longer responsive:

> [W]hat was at one time regarded as an improper exercise of the police power may now, because of changed conditions, be recognized as a legitimate exercise of that power . . . . Similarly, a police regulation or measure, although valid when promulgated, may become unreasonable and confiscatory in operation as a result of later events or changed conditions.

Id. at 643, 105 S.E.2d at 41.

ments. Two recent zoning decisions are illustrative.

During the 1920s the principle of conditions played a seminal role in determining the constitutionality of zoning enactments.[415] Following these early decisions, land use controls became more pervasive as the interdependence of urban conditions increased. Whereas zoning was used originally as a mechanism for reconciling interparcel cost spillovers within central cities, suburbanization and the concomitant balkanization of zoning jurisdictions within interdependent metropolitan regions, now cause it to impede the reconciliation of intermunicipal spillovers. Responding to these changed conditions, two state courts have invalidated zoning enactments because they no longer are responsive to prevailing conditions. In *National Land and Investment Co. v. Easttown Township Board of Adjustment*,[416] the Pennsylvania Supreme Court invalidated a four acre minimum lot size requirement as applied to the company's land. In *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*,[417] the New Jersey Supreme Court invalidated the township's entire zoning ordinance.

In *National Land*, the company challenged the constitutionality of Pennsylvania's minimum lot size requirement. Justice Roberts' majority opinion detailed the municipality's history and recent development,[418] and

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In Safeway Stores, Inc. v. Botti, 137 N.J.L. 437, 60 A.2d 318 (1948), the New Jersey Supreme Court invalidated an emergency-based ordinance mandating the closing of butcher shops on Mondays. It stated:

> A regulation depending upon the existence of an emergency or other certain state of facts to uphold it loses its force and authority upon the termination of the emergent condition or a change in the basic facts, even though valid when passed . . . . The operation of the regulation itself could not validly outlast the emergency.

Id. at 439, 60 A.2d at 320. *See* Atlantic Coast Line R.R. v. Ivey, 148 Fla. 680, 685, 5 So. 2d 244, 247 (1941) ("It is well settled that a statute valid when enacted may become invalid by change in conditions to which it is applied . . . ."); Realty Revenue Corp. v. Wilson, 181 Misc. 802, 804, 44 N.Y.S.2d 234, 236 (1943) ("a statute which is valid as to one set of facts may be invalid as to another, and one which is valid when enacted may become invalid by change in the conditions to which it is applied."); Taylor v. Baltimore & O.R.R., 138 W. Va. 313, 75 S.E.2d 858 (1953).

415. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), discussed in text at notes 285-95 *supra*; cases cited in notes 285 & 294 *supra*.

416. 419 Pa. 504, 215 A.2d 597 (1965). *See* Surrick v. Zoning Hearing Board, — Pa. —, 382 A.2d 106 (1978); Township of Willistown v. Chesterdale Farms, Inc., — Pa. —, 341 A.2d 466 (1975); Appeal of Concord Township, 439 Pa. 466, 268 A.2d 765 (1970); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970).

417. 67 N.J. 151, 336 A.2d 713 (1975). *See* Holy Name Hosp. v. Montroy, 153 N.J. Super. 181 (1977); International Looms, Inc. v. Jono Textile Co., 34 Conn. Sup. 599, 379 A.2d 3 (1977); Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977). *See generally 1975-76 N.J. Supreme Court Term*, 30 RUTGERS L. REV. 482, 488 (1977).

418. 419 Pa. at 519-20, 215 A.2d at 605-06. Easttown Township is a suburb of Philadel-

assessed the ordinance's validity in light of these conditions. The court, relying on a balancing analysis, weighed the diminished value of the company's property against the community benefits from the enactment.[419] In establishing this balance, the court accorded the zoning ordinances a limited presumption: "[T]he burden of proof imposed upon one who challenges the validity of a zoning regulation must never be so onerous as to foreclose, for all practical purposes, a landowner's avenue of redress against the infringement of constitutionally protected rights."[420] Moreover, zoning ordinances "must bear a *substantial* relationship"[421] to the health, safety, morals, or general welfare.

The municipality advanced five public purposes to support the enactment.[422] The court rejected each, and found instead an impermissible exclusionary purpose:[423] "A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future services cannot be held valid."[424] Such an ordinance denied the township's regional responsibilities because it was unresponsive to

> the demands of evolving and growing communities . . . . Zoning is a means by which a governmental body can plan for the future— it may not be used as a means to deny the future . . . . Zoning provisions may not be used, however, to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring.[425]

The Court thus incorporated responsiveness analysis of prevailing and predictable regional population movement into its delineation of the power's scope.

The incorporation of responsiveness analysis of regional population movement was determinative in the New Jersey Supreme Court's *Mount Laurel* decision. In order to keep property taxes down, Mount Laurel, a largely undeveloped suburban community, had enacted an exclusionary ordinance fairly typical of zoning regulations in developing municipalities.[426] Justice Hall, writing for the court, assessed the validity of this

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phia under pressure of population growth not only from the central city but also from a neighboring industrial-commercial complex.

419. *Id.* at 525, 215 A.2d at 608.

420. *Id.* at 522, 215 A.2d at 607.

421. *Id.* (emphasis added).

422. They were pollution control and sewage disposal, prevention of prospective burdens on the town's system of roads, preservation of the town's rural character, creation of a greenbelt, and preservation of historic sites. *Id.* at 524-30, 215 A.2d at 608-11.

423. *Id.* at 533, 215 A.2d at 613.

424. *Id.* at 532, 215 A.2d at 612.

425. *Id.* at 527-28, 215 A.2d at 610.

426. The ordinance excluded low and moderate income housing, and multi-family

purpose in light of changing conditions, including the decentralization of population into the developing suburbs, the prevalence of exclusionary zoning,[427] and the plight of those left behind in the central cities.[428] Traditionally, zoning ordinances had been upheld when merely in furtherance of the enacting municipality's general welfare.[429] Regional interdependence, however, now precluded such a narrow interpretation of general welfare: "[W]hen regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served."[430] Otherwise the enactment will be considered contrary to the general welfare and, therefore, beyond the scope of the police power.[431] The enacting municipality had the burden of demonstrating the

development except when allowed by agreement with a developer in a planned unit development, limited the number of bedrooms in that multi-family housing, and zoned large areas of the town exclusively for industrial development. *Id.* at 161-73, 336 A.2d at 718-24. Its commonality among municipalities was noted by Justice Hall:

> This pattern of land use regulation has been adopted for the same purpose in developing municipality after developing municipality. Almost every one acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing. There has been no effective inter-municipal or area planning or land use regulation.

Id. at 171, 336 A.2d at 723.

427. *Id.* at 183-85, 336 A.2d at 730. *See* Pascack Ass'n v. Mayor and Council of Washington, 74 N.J. 470, 379 A.2d 6 (1977).

428. Camden, the urban center of the metropolitan region containing Mount Laurel, was losing not only population but also commerce and industry and the jobs and tax base they represented. *Id.* at 172-73, 336 A.2d at 724. Moreover, the court found "a desperate [statewide] need for housing, especially of decent living accommodations economically suitable for low and moderate income families." *Id.* at 158, 336 A.2d at 716. Although the court referred to the housing shortage in New Jersey as a "crisis," at no point did it use the principle of conditions as it relates to emergency situations.

429. *Id.* at 177, 336 A.2d at 726.

430. *Id.* The New York Court of Appeals followed *Mount Laurel*'s explication of the regional general welfare in Berenson v. Town of New Castle, 38 N.Y.2d 102, 108, 341 N.E.2d 236, 240-41, 378 N.Y.S.2d 672, 679 (1975).

431. 67 N.J. at 183, 336 A.2d at 730. Changing conditions scrutiny, as a component of state substantive due process and equal protection, *id.* at 174, 336 A.2d at 725, had had a significant doctrinal history in New Jersey zoning cases. The *Mt. Laurel* court noted that in previously upholding broadly restrictive zoning measures, it had warned: " 'If and when conditions change, alterations in zoning restrictions and pertinent legislative and judicial attitudes need not be long delayed.' " *Id.* at 177, 336 A.2d at 726 (quoting Pierro v. Baxendale, 20 N.J. 17, 29, 118 A.2d 401, 408 (1955)). In addition to *Pierro*, the court referred to Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied*, 371 U.S. 233 (1955); Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1955); Lionshead Lake v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953).

constitutionality of an exclusionary ordinance;[432] it was presumptively invalid.

Thus, reliance on the principle of changing conditions produced an alteration in the power's scope. Zoning ordinances, previously justified by serving the community's general welfare, were now justifiable only if they furthered the region's general welfare. Therefore, although the Supreme Court has virtually abandoned the principle of conditions in federal due process scrutiny, state courts still provide a receptive forum for definitional scrutiny.

IV. A NORMATIVE ANALYTICAL MODEL: AUTHORIZATION SCRUTINY

The foregoing doctrinal history and development of the police power demonstrates that the judiciary has explicitly defined and delineated the power's scope by analyzing the responsiveness of an enactment to the conditions prevailing at the time of its assessment. The changing nature of social and economic conditions has caused the constitutional scope of the power to expand and contract. As a means of judicially controlling this fluctuation, a normative model of definitional scrutiny, herein denominated authorization scrutiny, is proposed.

Authorization scrutiny is a middle level review standard designed to link the nature and scope of the police power to prevailing social and economic conditions.[433] As such, authorization scrutiny may be used to assess an enactment's validity at the time of its promulgation as well as its continuing validity throughout its existence. Moreover, it may be applied either independently or as an initial component in a broader rational relationship or balancing analysis. In the latter context, the social benefit to be derived from the challenged enactment is first independently derived through application of authorization scrutiny and is then balanced against an independent evaluation of the infringement of a constitutionally protected right. The extent of infringement may be measured by taking issue, equal protection, due process, first amendment or similar analyses.

Definitional scrutiny of the police power has been applied in a variety of ways with a variety of components. The following normative model of

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432. 67 N.J. at 179-80, 336 A.2d at 728.

433. Many commentators have analyzed the relationship between law and social change. *See generally* H. ROTTSCHAEFER, THE CONSTITUTION AND SOCIO-ECONOMIC CHANGE (1948); Cushman, *supra* note 148; Soref, *The Doctrine of Reasonableness in the Police Power*, 15 MARQ. L. REV. 3 (1930); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); Wright, *The Relation of Law in America to Socio-Economic Change*, 28 ARK. L. REV. 440 (1975).

authorization scrutiny thus represents a distillation of and extrapolation from the analytical mechanisms developed and used to produce the desired level of review in over two centuries of definitional scrutiny police power litigation. It implements the principle of conditions primarily by manipulation of the presumption of constitutionality to provide a link between societal change (time) and the scope of the police power. It also relies substantially less than traditional judicial review on manipulation of the degree of responsiveness required to hold an enactment constitutional.[434] By relying on this form of presumption rather than on the degree of responsiveness, authorization scrutiny attempts to provide "a process through which constitutional principles can be shaped both to admit change (or stability) and to minimize the justices' discretionary role in decreeing it."[435]

The presumption of constitutionality, as a function of the separation of judicial and legislative power, has been a component of constitutional analysis since at least 1810.[436] Manipulation of the presumption has contributed to the substantial analytical chasm between modern equal protection's mere rationality and strict scrutiny levels of judicial review.[437] Similarly, the historical development of substantive due process has been characterized by manipulation of the presumption. While *Lochner*[438] and its progeny relied on an inverse presumption, modern substantive due process cases have applied a "well-nigh conclusive"[439] pre-

434. *See* Brown, *supra* note 147, at 105.

435. Tribe, *supra* note 433, at 295.

436. *See* cases cited in note 9 *supra*; Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 86-89; Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143-44 (1893). Professor Karst identifies differential application of the presumption in distinct areas of constitutional assessment:

> There is not just one presumption of constitutionality; there are several, of varying vigor and applicability. Thus the Supreme Court typically pays less deference to the legislative judgment underlying state economic regulations when they are challenged on commerce grounds than when they are challenged as violations of due process. So also, the Court tends to give a greater presumption of validity to congressional legislation than it does to that of the states. Some degree of "preferred position" for First Amendment freedoms over other constitutional values is firmly established, even though the Court has now repudiated earlier suggestions that legislation restricting speech is presumed to be invalid. Finally, when there is no judgment by a legislature at all, as in cases of abuse of power by law enforcement officials, there is little justification for any presumption of constitutionality.

Karst, *supra*, at 87.

437. *See* Gunther, *supra* note 360, at 20-21.

438. 198 U.S. 45 (1904), discussed in text at notes 169-75 *supra*.

439. Justice Douglas used the phrase "well-nigh conclusive" to describe the presump-

sumption of constitutionality. In these examples of extreme manipulation, the judicial balance has either been skewed heavily in favor of the state (mere rationality equal protection and post-1940 substantive due process) or heavily against it (strict scrutiny equal protection and pre-1933 *Lochner*-type substantive due process).

Extreme examples do not, however, exhaust the variety of available formulae for applying the presumption of constitutionality.[440] A form of middle level presumption requires the plaintiff[441] to meet his burden of persuasion by clear and convincing proof of unconstitutionality rather than by a preponderance or greater weight of proof. This form of presumption, although marginally skewed in favor of the state, diminishes the heavy biases characteristic of the extreme formulations.

Without regard to the level of persuasion, the presumption of constitutionality has "one vital difference from the ordinary evidentiary presumption . . . [t]he facts to be established are those bearing on the appropriateness of the legislation."[442] That is, the presumption of validity affects the ultimate issue of constitutionality. Under authorization scrutiny, the enactment's constitutionality depends upon its responsiveness to prevailing conditions. Responsiveness is thus the ultimate issue. In authorization scrutiny cases, the presumption of constitutionality is the equivalent of a presumption of responsiveness. Responsiveness is, in turn, a function of the relationship between the prevailing social and economic conditions at which the enactment is directed and its legislative purpose or object. These two components of authorization scrutiny

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tion of constitutionality afforded legislative enactments in post-1937 economic and property rights cases in Berman v. Parker, 348 U.S. 26, 32 (1954), discussed in text at notes 363-66 *supra*.

440. *See* Karst, *supra* note 436, at 88. Professor Karst identifies three distinct formulae for application of the presumption:

> Formulas for the presumption of constitutionality vary. It is sometimes said that a statute is presumed valid if its supporters produce evidence of facts supporting the view that it is appropriate legislation, even though the statute's opponents produce countervailing evidence. Another version which seems less formidable for the opponents presumes the statute valid unless contrary evidence is produced "showing that the evil did not exist or that the remedy was inappropriate." The most sweeping formula would make the opponents' task nearly impossible; the statute is presumed valid "if any state of facts reasonably can be conceived" which would make the legislation appropriate.

Id. These three formulae may, in turn, be roughly analogized to the clear and convincing standard, the preponderance standard, and the "well-nigh conclusive" standard.

441. Throughout this presentation of authorization scrutiny, the term plaintiff will be used to refer to the individual citizen or group of citizens alleging the unconstitutionality of the legislation in issue.

442. Karst, *supra* note 436, at 88. *See* Corwin, *supra* note 8, at 665.

constitute prerequisites to the application of the presumption of constitutionality. When the legislature not only substantiates its assessment of prevailing conditions with evidence derived from comprehensive legislative hearings or commission investigations but also articulates its purpose, the challenged enactment is accorded a presumption of responsiveness (constitutionality). Once the presumption is triggered, plaintiff may rebut it only by establishing clear and convincing proof of invalidity. When either substantiated legislative facts or articulated legislative purpose are not in evidence, the presumption of responsiveness is not triggered. In its absence, a preponderance of proof prevails.

Use of substantiated legislative facts and articulated legislative purpose as triggers for different levels of presumption presents a number of advantages. Both are the relatively objective product of fact-finding and are within the initial and continuing control of the legislature. Thus, to retain the presumption, the legislature must periodically reassess and, if necessary, amend its legislation. Moreover, the authorization scrutiny triggers cut across categorizations of constitutional rights and classifications and are applicable whether or not the rights at stake are fundamental or the classifications presented are suspect. Furthermore, and perhaps most significantly, they provide a means by which the presumption may be manageably and predictably manipulated through time.

The process of authorization scrutiny should begin with judicial documentation of the social and economic conditions at which the challenged enactment is directed.[443] When assessing recently enacted legislation, the court should rely on the legislature's statement of prevailing conditions so long as that statement is substantiated by investigative commission findings or comprehensive legislative hearings. This statement of legislative facts not only meets the state's burden of going forward with evidence, it also provides the first trigger necessary to generate the presumption of responsiveness. The judicial balance between the plaintiff and the state is, therefore, skewed in the legislature's favor. Depending upon the depth of its research and the sophistication of its analysis of

443. Many commentators have described and analyzed the presentation of social and economic data in constitutional litigation. *See generally* Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6 (1924); Karst, *supra* note 436; Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281 (1952); Note, *Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to the Courts*, 61 HARV. L. REV. 692 (1948); Note, *The Presentation of Facts Underlying the Constitutionality of Statutes*, 49 HARV. L. REV. 631 (1936).

prevailing conditions, the legislature's statement of conditions may be extremely difficult and expensive for the plaintiff to overcome. If, however, no statement of legislative facts exists, the court should make its own determination of prevailing conditions. In doing so, the court should rely on the evidence of social and economic conditions developed in the litigation rather than on its own imagination. The court should neither conceive of any state of facts which could support the enactment's validity, nor should it require the state to demonstrate special or exceptional conditions. That is, in the absence of legislative facts, courts should apply neither a presumption of validity nor of invalidity. Plaintiff may thus rebut the legislature's evidence of prevailing conditions and meet his burden of persuasion by establishing the existence of contrary conditions by a preponderance of proof. This analytical structure, therefore, insures a more evenly balanced assessment and thus increases plaintiff's likelihood of success.

When an enactment is assessed for continuing validity, the passage of time and concomitant change in the social and economic conditions preclude continued utilization of a presumption of responsiveness. Because there may have been both a general change in conditions and a specific change in those conditions at which the enactment was originally directed, the legislature's statement of circumstances is no longer presumptively accurate. Under authorization scrutiny, responsiveness must exist at the time of the judicial assessment. Thus, as to the ultimate issue of continued responsiveness, no presumption of constitutionality may be applied. In the absence of contemporary substantiated legislative facts, either party may prevail by establishing a preponderance of proof.

In both the initial constitutional assessment of recently enacted police power legislation and the assessment of an enactment's continuing constitutional validity, therefore, authorization scrutiny relies on the relationship in time between legislative fact-finding and prevailing social and economic conditions to establish the first prerequisite to the presumption of constitutionality and to allocate the burden of persuasion among the parties.

Having ascertained the relevant social conditions, the court should then separate the legislative purpose from the means chosen to effectuate it. In the context of authorization scrutiny, legislative purpose means the social harm to be prevented or the social benefit to be promoted. In this regard, legislative purpose or object must be distinguished from either legislative motivation or "furtherance of the public health, safety, morals

or general welfare," *i.e.*, the constitutional formulation of the permissible police power purposes.

Legislative purpose constitutes the second prerequisite to the presumption's application. If available, the court should rely on the legislative statement of purpose. When the enactment's object is not so evidenced, however, the court should require evidentiary presentation to determine it as a factual (not constitutional) matter. No presumption of any kind should be applied. The legislature should not be required to demonstrate a "compelling state interest" or an "important public purpose," nor should the court deferentially conceive any supportable purpose. Thus, either party may prevail by establishing a preponderance of proof.

The court should juxtapose its findings of prevailing conditions and legislative purpose to determine responsiveness and, therefore, constitutionality. If legislative facts have been recently substantiated and legislative purpose has been articulated, the presumption of responsiveness is triggered and plaintiff's burden of persuasion is elevated to a clear and convincing standard. In the absence of either trigger, a mere preponderance of proof will prevail.

Authorization scrutiny's manipulation of the presumption of constitutionality provides a relatively mechanical and manageable standard by which a middle level burden of persuasion may be used to apply as a link between the constitutional scope of the police power and the evolution of social and economic conditions. By providing a means for judicial use of legislative fact-finding to assess prevailing conditions, authorization scrutiny also produces an incentive to increased legislative reliance on more comprehensive data to support its enactments.

Having allocated the burden of persuasion through manipulation of middle level presumptions, a court applying authorization scrutiny must then translate that allocation into standards of responsiveness. Determination of these standards may be characterized as the search for the appropriate degree of responsiveness on a continuum described by responsiveness and non-responsiveness. The middle level nature of the authorization scrutiny model establishes the appropriate boundaries on that continuum within which judicial discretion in particularizing the required degree of responsiveness is exercised. A range of points around the continuum's center point would meet the middle level standard. Within these boundaries, judicial articulation of the required degree of responsiveness, unless uniform in all cases, necessarily involves some means of classifying types of legislation or protected rights. A number of classification schemes, each with its attendant costs to analytical consis-

tency and predictability in determining constitutional policy, are available.

The use of classifications based on type of legislation or protected right in determinations of the required degree of responsiveness is not without historical precedent. Emergency enactments have customarily been held to a higher degree of responsiveness than other less intrusive forms of police power legislation. These cases, however, constitute a distinct subset with no ready analog among other groupings of police power legislation.

A second historical means of classifying police power enactments involves a perceived dichotomy between harms and benefits. As noted above, the nineteenth century police power only incorporated authority to prevent harms to the community and its inhabitants. Indeed, this limitation to "self-protective" legislation provided a fundamental component of nineteenth century definitional scrutiny. By the first decade of the twentieth century, however, the constitutional definition of the power had come to incorporate not only self-protective legislation but also legislation designed to promote the general welfare, *i.e.*, to prospectively generate benefits for the community and its inhabitants. This dichotomy between harm-preventing and benefit-producing legislation could serve as a means of allocating differential degrees of responsiveness. Benefit-promoting enactments, having less historical justification because less closely linked to an original source of the police power, would have to be more highly responsive than protective enactments. The harms/benefits dichotomy is, however, difficult to draw with precision because analysis of the dichotomy depends largely on the perspective of the reviewing party. Moreover, since its incorporation into the police power lexicon, the term "general welfare" has incorporated the traditional self-protective purposes, thus obscuring the dichotomy between harms and benefits.

The degree of responsiveness could also be analytically linked to the degree of infringement of constitutionality protected individual rights. A continuum of infringement could be aligned with the continuum of responsiveness. The more severe the deprivation, the higher the degree of responsiveness. Use of this continuum, however, presents two significant difficulties. First, because authorization scrutiny involves analysis of legislative purpose, it presents historically documented risks of judicial policy abuse. Second, the assessment of the degree of infringement should be made through some form of independent analysis. Assessment of social benefit (intrinsic analysis) and individual infringement (extrinsic analysis) should be analytically separated to prevent inadvertent and premature skewing of the balancing process.

The required degree of responsiveness could also be linked with the fundamental interest/suspect classification system. A higher degree of responsiveness could be required when the interest infringed is fundamental and/or the classification used is suspect. This method of categorization has, however, proved difficult to apply with certainty and precision in equal protection analysis.[444] Indeed, one of the advantages of the manipulation of the presumption in authorization scrutiny is its use of easily definable triggers. Moreover, reliance on the fundamental interest/suspect classification system would again make intrinsic and extrinsic scrutiny interdependent.

Given the difficulties of creating predictable, consistent standards against which to measure responsiveness, a relatively narrow range of points near the center of the continuum of responsiveness is called for in the authorization scrutiny model. The degree of responsiveness required should reflect only the differential in the burden of persuasion produced by application of the presumption of responsiveness.

V. CONCLUSION

Authorization scrutiny, encompassing both the principle of conditions and an analytical framework establishing middle level scrutiny through manipulation of the presumption of constitutionality by means of objectifiable triggers, is thus an attempt to incorporate the progression of social and economic conditions into constitutional assessment of the police power. In so doing, authorization scrutiny reflects the continuing evolution of definitional scrutiny as a means of ascertaining the constitutional scope of legislative authority.

444. *See generally* San Antonio Independent School Dist. v. Rodriguez, 411 U.S 1 (1973); Gunther, *supra* note 360.