STUDENT NOTE:Lessons from the Jewish Law of Property Rights for the Modern American Takings Debate

2001

Reporter
26 Colum. J. Envtl. L. 483 *

Length: 22920 words

Author: By Ora R. *Sheinson*[*]

* Columbia University School of Law, Class of 2002, B.A., Yeshiva University, 1998. The author would like to thank Rabbi Moshe Schapiro, and the entire reference staff at the Yeshiva University Mendel Gottesman Library for their assistance in locating and understanding many of the original sources used in this note, and Rabbi Rueven Fink, Rabbi of the Young Israel of New Rochelle, for reviewing the Jewish concepts contained in the paper. The author would also like to thank Rabbi Saul J. Berman, Adjunct Professor, Columbia University School of Law who planted the seed for this paper, Eben Moglen, Professor of Law, Columbia School of Law, and the many other professors at Columbia who served as sounding boards for ideas. Finally the author would like to thank her entire extended family for their assistance locating original sources, and their support over the long course of this paper, and specifically her husband and son who have allowed her to take the time to research and write this piece.

Text

[*484]

/. Introduction

Jewish legal doctrine contains a unique commitment to balancing the right to use and enjoy one's property with community need. This balancing of need reflects the duty-oriented nature of Jewish law in general. [1] Unlike modern American society's rights-based orientation, Jewish society focuses on citizen duty; under Jewish law, rights are derivative of duties, not antecedent to them. [2] This fundamental difference affects all aspects of social

---

[1] See Aryeh Carmell, Judaism and the Quality of the Environment, in Challenge: Torah Views on Science and its Problems 500, 504-505 (Aryeh Carmell & Cyril Domb eds. 1978) ("The Beth Din's [Jewish Court's] … guiding principle was that the rights of the individual must always be subordinated to the good of the community.").

[2] Rabbi Mark Dratch, His Money or Her Life? Heinz's Dilemma in Jewish Law, 20 J. of Halacha & Contemp. Soc'y 111, 121 (Fall 1990) ("Although the Jewish tradition does not recognize the concept of rights per se, its system of commandments and

governance under the two systems. In the property context, Jewish law derives the right to use and enjoy one's property from the duty not to interfere with a neighbor's property. In contrast, modern American law structures societal governance only after presuming certain basic property rights.

This note presents the Jewish legal method of evaluating property rights - namely, a meaningful balancing of individual and societal interests - and then examines the fundamentals of American property law for purposes of comparison. [3] A strict comparison on these issues is difficult, however, as the two systems evolved under different circumstances and operate on different terms in modern times. [4] This note explores the influence of different background conditions on the respective development of Jewish and American law, and, despite differences between the two systems, draws lessons from a comparison of their underlying concepts. In setting forth the fundamentals of land use law in the two respective systems, this note explores the deeper implications of differences **[*485]** between Jewish and American law for modern environmental regulation, and concludes that the incorporation of certain principles of Jewish law would improve the capacity of American law to deal with increasingly complex environmental problems.

A strong commitment to property rights often restricts the ability of government to protect the health and welfare of its citizens. The American founding fathers developed the country's constitutional framework on the premise that an elected government must retain power to legislate for the greater good. [5] As discussed further below, this republican ideal of state obligation to popular welfare is very similar to the Jewish conceptual framework for governance. Despite this core commonality, however, the supremacy and force of individual rights in American law is unparalleled in Jewish law.

As this note will argue, the Jewish law approach to property rights - namely, a meaningful balancing of individual and societal interests - provides a valuable point of comparison to the current trajectory of American takings law. Nowhere is the force of rights in American law as clear as in the sphere of judicial application of the Takings Clause

---

obligations does create duties which are comparable to those considered by modern society to be the demands of human rights. For example, … An obligation to save one's life at almost any cost implies a right to life.").

[3] This note simply aims to introduce the value of Jewish law into the modern American environmental debate and does not aim to set forth a comprehensive picture of either legal system. Many legal scholars have discussed the American approach to balancing property rights and social utility in a more sophisticated manner than will be set forth here. Similarly, the Jewish concepts presented in this note have been discussed for almost two thousand years. With these existing foundations in mind, this paper argues that the Jewish approach to the balance of property and social utility is relevant and useful to modern efforts to reconcile the two.

[4] This note will not focus on actual enforcement of Jewish law, but rather on its theoretical foundations. The ability to enforce Jewish law in public affairs varied widely from community to community throughout the ages, and therefore the enforcement procedures of the law are far less codified than the theoretical principle of damages. These principles were applied to practical cases, and enforcement ranged from community sanctions to power of the state.

[5] See Paul Turner and Sam Kalen, Takings and Beyond: Implications for Regulation *19 Energy L.J. 25, 42 (1998);* see also infra Pt. V, sec A.

of the Fifth Amendment to the Constitution. [6] As discussed in more detail below, modern American takings jurisprudence places severe limits on the power of the government, and therefore on the ability of the state to guarantee public welfare. American takings law increasingly reflects the philosophy that, in the words of Richard Epstein, "all regulation, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state. n7"

The ongoi[g] scientific confirmation of the interdependence of all biological beings mandates that society and law begin to reflect an understanding that no action occurs in a vacuum. [8] American law, resistant to the principle of interdependence, reveals a deeper societal reluctance to give government the ability to respond to the ever-increasing threats to public safety and welfare. In contrast, Jewish law, which recognizes the importance of both individual property rights and broader societal needs, provides a framework for regulating that is sensitive to the realities of interdependence. This framework remains as applicable to modern environmental **[*486]** problems as it was almost two thousand years ago. In particular, recognizing that not all land use conflicts can be solved on a pure nuisance level, Jewish law permits social utility considerations to enter into the regulatory calculus. The Jewish law approach suggests that a shift of focus in American law - from individual rights to social utility considerations - may provide a more flexible framework for addressing the modern environmental problems that face America and the world today.

Ancient Jewish society faced many of the problems that confront modern society, including localized pollution, overgrazing, and deforestation. Additionally, as an agrarian society, it recognized the importance of species and land preservation and had a strong awareness of the interrelationship of human and non-human species. However, ancient Israelite society did not understand more global problems, such as pollution of aquifers, long-range air pollution and ecosystem interdependence. General respect for the environment, combined with Jewish law's incorporation of the concept of helping others as an a priori principle, form a unique and useful framework for addressing conflicting needs.

II. Preventing Harm to One's Neighbor: Moral or Legal Duty?

A comparative glance at the duty to preventing harm to another provides a useful introduction to the difference between the Jewish and American law approaches to property rights. Jewish law elevates the obligation to prevent harm from occurring to another to a judicially enforceable legal requirement that trumps individual property rights. [9] The Jew is legally obliged to rescue someone in danger. [10] In contrast, American society, despite its many

---

[6] See infra Pt. V, sec D for a discussion of the Supreme Court treatment of this issue.

[9] Richard Epstein, Takings: Private Property and the Power of Eminent Domain 95 (1985).

[8] See A. Dan Tarlock, The Future of Environmental "Rule of Law' Litigation, *17 Pace Envtl. L. Rev. 237, 257-58 (2000).*

[9] See Carmell, supra note 1.

measures to encourage charity and conservation through tax deductions and other incentives, formulates the duty to aid others as a moral duty, not as a legal obligation. Although environmental regulation and nuisance law codify some prohibitions against causing harm to others, an affirmative legal duty to rescue is lacking in American common law, [11] and attempts to impose such a duty **[*487]** have engendered strong opposition. [12] Similarly, attempts to limit individual use of private property to protect the health and welfare of others continue to encounter formidable (and increasing) opposition in the form of aggressive judicial application of the Takings Clause. [13] In the context of the "duty to rescue," as with other areas of law, American society can draw lessons from Jewish law regarding the importance of elevating social obligations to a legal level.

In Jewish law, the concept that one may not use his property in a way that will harm his neighbor is part of an a priori understanding that one's rights are limited by one's societal obligations. [14] The concept of Harchakat Nezikin (literally, distancing from harm) imposes a broad requirement to ensure that one's actions will not harm another. [15] Jewish law takes this concept a step further than American law, by requiring individuals to save others from harm if they are able to do so. [16] Communal financial support was required under Jewish law, and the rabbinical governing

---

[10] See Sheldon Nahmod, The Duty to Rescue and the Exodus Meta-Narrative of Jewish Law, 16 Ariz. J. Int'l. & Comp. L. 751, 756-60 (1991); see also infra note 16 and accompanying text. This obligation requires a Jew to hire rescuers if he is personally incapable of performing the rescue. Id.

[11] See Melody J. Stewart, How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability, *25 Am. J. Crim. L. 385, 392-94 (1998)* (The general rule in this country is that there is generally no duty to act for the benefit of another, "even if the person imperiled may lose her life in the absence of assistance, and the aid can be rendered without danger or inconvenience to the one who could undertake the rescue.").

[12] See *id. at 433* commenting on Paul H. Robinson & John M. Darly, Justice, Liability, and Blame 43 (1995) (arguing that general duty to assist laws are beyond the appropriate realm of criminal liability, and that the "penal law must content itself with keeping [individuals] from doing positive harm"). The interrelationship of ecosystems blurs the line between actively causing harm, and passively permitting harm in the environmental context.

[13] See infra Pt. V, sec. B for a discussion of takings law.

[14] See Nachum Rakover, Aychut Hasevivah: Hibatim Ra'ayonim U'mishpateem Bemikorot Hayahadut [Environmental Quality: Views, Reflections, and Laws in Jewish Sources] 17 (1993) (proposition that the phrase "thou shalt love thy neighbor as thyself" Leviticus 19:18 is the basis of the prohibition against harming one's neighbor). All translations are by author unless otherwise indicated. Professor Nachum Rakover is the Deputy Attorney General and Advisor of Jewish Law at the Israeli Ministry of Justice, and a Professor at Bar Ilan University, Department of Criminology. See also infra note 16 for the proposition that this places a positive requirement on a person to actively help another avoid harm.

[15] This obligation to society is the theme that underlies the Talmudic Tractates Baba Kamah, & Baba Batra, the two tractates that deal with laws concerning damages, and social structure.

[16] See Choshen Mishpat, Shulchan Arukh, Hilkhot Shmirat Hanefesh [Laws of Gaurding Life], 426, ("He who sees his neighbor drowning or being attacked by robbers … and is able to save him himself, or to hire others to do so, and did not do so … is guilty of transgressing the biblical commandment "You shall not stand upon thy brother's blood.") translated in Meir Tamari, With All

council of a town had the power to mandate the amount of charity that each person in the town was required to give. [17] Giving more was **[*488]** praiseworthy; giving less was punishable.

Basic tenets of Jewish property law flow directly from this foundational, duty-oriented concept of Harchakat Nezikin. In particular, Jewish law not only restricted individual property use, but also retained the power to transfer rights of use from one individual to another. [18] Another outgrowth of this principle are prohibitions that limit maximizing the economic potential of a piece of land in order to protect the quality of life of one's neighbor. In sum, the structure of Jewish law is oriented towards the duties that a Jew has to other people, animals and plants. [19] In keeping with its orientation around duties, Jewish law grants extensive powers to government to legislate individual action.

In contrast, American law's rights-based system of legislation has prevented it from imposing a general legal requirement on citizens to help one another. [20] Pursuant to a rights-based approach, imposition of a duty to rescue would unduly interfere with the liberty and autonomy of the rescuer. [21] As a result, although American social values include helping strangers and friends, giving charity, and caring for the sick and needy, in much of the country, a passerby with a life preserver can watch a person drown and not face prosecution. [22]

Your Possessions: Jewish Ethics and Economic Life 300 (1987). See also Babalonian Talmud, Sanhedrin 73a, (stating that if a person sees another in physical danger and, although not personally capable of saving him, could pay others to do so, he is bound to hire others to save the person.); Maimonides Mishne Torah Hilchot Rotzeach u'Shmirat Nefesh [Tort-Laws of Murder and Preservation of Life] 2:14.

[17] See Maimonides, Mishne Torah, Hilchot Matnot Aniyim [Laws of Gifts to the Poor] 7:10 ("He who refuses to give alms, or gives less than is proper for him, must be compelled by the court to comply, … The court may even seize his property in his presence and take from him what is proper for him to give.").

[18] See id.

[19] See infra note 56 and accompanying text for man's duty to non-human creations.

[20] The United States has no common law obligation to rescue another, and such an affirmative duty has not been incorporated into the Constitution. See Melody J. Stewart, How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability *25 Am. J. Crim. L. 385, 393 (1998);* see also Nahmod, supra note 10 at 760. Specific statutory obligations, or relationships can impose such a requirement. See Stewart at 394-5; See also *Rest. (Second) of Torts 314A* (1965) ("Special Relations Giving Rise to Duty to Aid or Protect").

[21] See Nahmod, supra note 10 at 762.

[22] See Stewart, supra, note 20 at 394. There are several states which have passed Good Samaritan legislation which imposes an affirmative duty to rescue subject to criminal liability. See *Vt. Stat. Ann. tit. 12, 519* (1973); *R.I. Gen. Laws 11-56-1* (1994); *Wis. Stat. Ann. 940.34* (West 1996). See also Nahmod, supra note 10 at n.64 (arguing that the paucity of these rules demonstrates the continuing power of the common law no-duty rule).

The primacy of the common good is actually one of the fundamental concepts underlying America's republican ideology. [23] Although the Fifth Amendment codifies an early trend towards a more individual rights-based conception of the state, [24] at the start of the country, "individual rights played no more than a secondary role in republican thought." [25] Early state constitutions often lacked a just compensation **[*489]** clause. [26] Morton J. Horwitz has noted that the founding fathers believed that a purely rights-based conception of society would cripple government. In order to enable the government to regulate, they therefore tried to meld a theory of rights with a more duty-oriented conception of law. [27] The rights-based perception of society eventually gained power in America, [28] and with it, the force of property rights. With the ascendancy of a rights-based approach, especially those placing restrictions on property, courts began to require that government regulations be compatible with a rights-based model of society. [29] The restrictions on the regulatory power of government that flowed from the primacy of rights in the American system have relegated important issues of land use and conservation to individual enforcement through nuisance actions. [30]

---

[23] See William Michael Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, *94 Yale L.J. 694, 699 (1985).*

[24] See *id. at 694.*

[25] *Id. at 699;* see also *Id. at 700* (arguing that by changing the traditional Lockian formulation of "life, liberty, and property" to "life, liberty and the pursuit of happiness"). Jefferson emphasized his belief that property was not an inalienable right. Id.

[26] See id. Treanor argues that the lack of a takings clause in the early constitution was also a reflection of faith in the legislature to make legislation necessary for the health of the republic.

[27] See Morton J. Horwitz, The Transformation of American Law 1870-1960, 156 (1992) ("Jefferson's great accomplishment was that he managed to weave all of these different strands of higher law thinking into the Declaration.").

[28] See id at 156. (discussing the emergence of "individualistic ideas of natural rights in seventeenth century social contract theories" and the emphasis placed on the primacy of pre-political rights such as property).

[29] Progressive legal thinkers argue that the Supreme Court jurisprudence emphasized the natural law aspects of the constitution, and this permitted the rights based perception of society to attain supremacy. See id. at 157 ("Progressives charge that legal orthodoxy illegitimately turned to natural law in the late nineteenth century."). Horwitz does not completely agree with this charge. See id at 157-159. Progressives propounded the theory that even distribution of wealth across society would increase total social welfare, and argued that the state should take an active role in redistributing the wealth. See Herbert Hovenkamp, The Mind and Heart of Progressive Legal Thought, *81 Iowa L. Rev. 149 (1995).* For a more detailed discussion of the theories of this school of thought, see id.

[30] In the last one hundred years, the beginning of zoning regulation, and the more recent environmental legislation have begun to approach environmental and social problems with a broader perspective. However, it is precisely because of the rights-based notions of property law that these regulations come under constant attack.

The lack of a law imposing a duty to rescue in most of the fifty states reflects the deeper limits on the federal government's ability to regulate in America. The absence of a duty to rescue is consistent with pervasive governmental inability to protect its citizens through laws mandating pollution prevention, protection of property from degradation and flooding due to the filling of surrounding wetlands and other restrictions that protect the environment and enhance quality of life. Environmental regulation, as a codification and extension of the legal duty to avoid harm to others, is in fundamental tension with the backdrop of property rights so central to the American system. The rise of the property rights movement on both the grassroots level and in the political arena, [31] as a direct response **[*490]** to federal environmental regulation, reflects the fundamental American tension between a rights-based conception of law and one more oriented towards collective duty. [32]

The American property rights movement has its judicial counterpart, as the Supreme Court places renewed emphasis on property rights as a bar to certain environmental regulations [33] and restricts the government's ability to limit property rights without providing compensation for the reduced value in the property. [34] Proponents of strong judicial protection of private property claim that their approach is consistent with the founding fathers' strong conception of property rights. [35] Opponents note that in colonial times, there was a history of regulating private property for a broad range of purposes beyond merely preventing harm to others. [36]

---

[31] See Private Property Protection Act of 1999, H.R. 294, 106th Cong. (policy of the federal government that no law or agency action should limit the use of privately owned property so as to diminish its value); Private Property Protection Act of 1999, H.R. 2550, 106th Cong.; Private Property Protection Act of 1997, H.R. 95, 105th Cong.; Job Creation and Wage Enhancement Act of 1995, H.R. 9, 104th Cong. (bill to … strengthen property rights); Private Property Protection Act of 1995, H.R. 130, 104th Cong.; Private Property Protection Act of 1995, H.R. 925, 104th Cong.; Endangered Species Management Act of 1994, H.R. 3978, 103d Cong. (bill to amend the Endangered Species Act of 1973 to … provide private property protections.); Private Property Protection Act of 1993, H.R. 561, 103d Cong.; see e.g. Glenn P. Sugameli Takings Bills Threaten Private Property, People, and the Environment *8 Fordham Envtl. L. J. 521 (1997)* (discussing the history and impetus for the takings claim, and the takings bills introduced over the last eleven years); Frank I. Michelman, A Skeptical View of "Property Rights" Legislation, 6 Fordham Envtl. J. 409 (1967) (specifically discussing the "Jobs Creation and Wage Enhancement Act," and the property rights legislation proposed in that act as part of the Republican Contract with America).

[32] See Sugameli, supra note 31 at 523. See also John F. Hart, Colonial Land Use Law and Its Significance for Modern Takings Doctrine, *109 Harv. L. Rev. 1252, 1255 (1996)* ("Today's land use law is said to be contrary to the view of the Founding Fathers and to fundamental, longstanding American values.").

[33] See infra Pt. V., sec D for further discussion.

[34] See *Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)* (regulation that removes beneficial use from definable interest in property is a taking requiring compensation under the Fifth Amendment). For further discussion see infra note 238 and accompanying text.

[35] See Sugameli, supra note 32, at 523. ("Much of the concern behind takings bills is based on a misconception that the Constitution's Takings Clause was drafted to reflect a situation in which the government regulated private property minimally, if at all."). See also. Hart, supra, note 32 at 1282, ("modern debate over land use regulation rests on the mistaken historical

In sum, America's core philosophical commitment to rights, as opposed to duties, and to property rights in particular, has had a direct impact on the country's ability to protect the health and welfare of its citizens by imposing significant restrictions on the government's ability to regulate. A return to a more obligation-centered theory of jurisprudence, as reflected in Jewish law, might offer the beginning of a solution to the **[*491]** persistent American antagonism between advocates of property rights and environmental regulation. Although extraction from two centuries of American jurisprudence will be difficult, a change in perception is a necessary starting point.

/// Introduction to Jewish Law

A. History and Background of Jewish Law

For observant Jews, the supreme source of law is the Pentateuch, [37] given to Moses on Mount Sinai, which contains written laws relating to religious, civil, and criminal issues. Additionally, an oral tradition was given at Mount Sinai that supplements and explains the written Jewish law. [38] Rabbi Judah the Prince compiled the Oral Law into the Mishna at the end of the second century of the common era (C.E.), [39] and this code served as an outline for the Jewish oral tradition. Centuries of discussion and exegesis of the Mishna were incorporated into the Talmud in the fourth and fifth century C.E. The Talmud is therefore not an organized code of black letter law, but a description and discussion of various opinions, which often does not arrive at a definitive conclusion. There are two versions of the Talmud, the Palestinian and the Babylonian, both named after the countries where they were redacted. [40] The Babylonian Talmud develops the law governing monetary damages in a more comprehensive manner than the Palestinian.

Despite the ancient roots of Jewish law, religious Jews consider the Talmudic law applicable today, and Jewish legal discussion and analysis have continued late into the middle ages, long after the codification of the Talmud. In modern Israel, a dual civil law system permits litigants to agree to litigate before a civil religious court that applies rabbinic law to modern cases. However, due to the fact that Israel is not universally governed by Jewish law, and the general lack of Jewish political autonomy outside of Israel, many of the laws are unenforceable as a practical matter.

---

premise that an earlier tradition of property rights allowed American landowners to use their land as they wished, if they caused no harm to others").

[36] See Hart, supra note 32, at 1253.

[37] Often referred to as the Torah, the Pentateuch is the Five Books of Moses: Genesis, Exodus, Leviticus, Numbers, and Deuteronomy.

[38] See 7 Encyclopedia Judaica 1157 (1st ed. 1971).

[39] Id. at 1163. All dates in this paper will be cited using B.C.E. (Before the Common Era), and C.E. (Common Era).

[40] See 7 Encyclopedia Judaica, 1163-64 (1st ed 1971). See id. for a further discussion of the two redactions of the Talmud, and the historical development of each.

Jewish law is similar to the common law system, and prefers to present [*492] the principles of law using a series of specific real or hypothetical cases. [41] Cases are presented in the Mishna to allow for elucidation of principle from case study. Talmudic discussion further clarifies concepts set forth in the Mishna and attempts to reconcile individual cases with later cases having similar facts. The structure of Jewish law therefore necessitated codification. There were several attempts to codify the Talmud and other rabbinic discussions into a code of definitive legal principles and rulings. This paper will focus on two of these codes that received near-universal acceptance: the Mishne Torah, by Maimonides (12th Century), [42] and the Shulchan Aruch by Rabbi Yosef Caro (16th Century). [43]

Judaism does not vest the authority to make or adjudicate laws in any clearly defined individual or group. [44] Therefore, reconciliation of cases [*493] and determination of the law is generally based on a consensus of

---

[41] Immanuel Jakobovits, Journal of a Rabbi, 236 (extracted from the "Review of Recent Halachik Periodical Literature," a regular department of Tradition (New York) edited by Immanuel Jakobovits since Spring 1961) Harav Lord Immanuel Jakobovitz, 1921-1999, served as chief rabbi of England from 1967-1990, and was a widely respected authority on applications of Jewish law to modernity. See also Meir Tamari, Social Responsibility of Jewish Individuals, in Tikkun Olam: Social Responsibility in Jewish Thought and Law, 239, 239-240 (David Shatz et. al. eds., 1997) (discussing welfare laws specifically) ("Both the halackhic rulings and the philosophical or moral parameters of Judaism are primarily concerned with case law, operating within a clearly defined communal structure, with recourse to rabbinic courts to adjudicate the conflicting claims.").

[42] Moses ben Maimonides (1138-1204 C.E.), renowned medieval scholar, is widely recognized as one of the greatest Torah scholars of all time, and one of the great philosophers of the Middle Ages. He worked in Spain and Egypt in the twelfth century, and also served as chief physician to the Egyptian Emperor.

This paper will refer to Rabbinical figures, and Talmudic discussions. The footnotes will attempt to give a brief history, and the dates or historical period, for all of the Rabbinical figures discussed. The earlier the sage lived, the closer he is to Sinai - the source of all Jewish law. Thus, one can generally assume that an earlier sage will be given more deference than one from a later generation. In a similar manner, the general rule is that the earlier the source (starting with the Bible), the more authority it is given. For further understanding, or more information about the post-Talmudic Rabbinical Figure see Zechariah Fendel, Anvil of Sinai (1977).

[43] Rav Yosef Caro, Shulchan Aruch. Rabbi Yosef ben Ephraim Caro (1488-1575 C.E.), leader of the Sephardic (The Orient and Mediteranian Rim) school of learning, composed the most authoritative code of Jewish law, which was accepted throughout the Jewish world, and served as the basis for all future development of Jewish law. His work, together with the notes written by the Rema, reflecting the Ashkenazic (Central and Eastern Europe) legal practices when they differed with the Sephardic practices, is still widely accepted and studied today as the authoritative work of Jewish law.

The Rema, Rabbi Moses ben Israel Isserles (1525-1572 C.E.), an outstanding authority on Jewish law qualified Rav Yosef Caro's comments in light of differences in Ashkenazic practice.

See 7 Encyclopedia Judiaca 1165-1166 (discussing various codes of Jewish law that developed and the authority given to each. While there is no single, encompasing, definitive treatise on Jewish law, the two codes mentioned in this paper are considered to be among the most authoritative and widely accepted).

[44] See Jakobovitz, supra note 41, at 233.

opinion or an individual who is recognized by the community to have authority due to his scholarship and leadership. [45] The lack of a structure for a legislative body in Judaism means that the written and oral law, together with Takkanot (communal decrees), [46] serve as the full body of legislation. Later rabbis had to deduce and apply all principles of law from this starting point. Because the Talmud, as a codification of the Oral Law, reflects a range of opinions as to how to interpret the law, students of the law over the centuries have developed a systematic approach as to which of those opinions to accept. [47] Guiding the development of this approach are precepts handed down in the Oral Tradition that have formed the basis for Bible and Talmudic study for the past 1,300 years. Judicial governance of Jewish towns has been guided by application of this system of Talmudic case study. In a similar manner, the general principles of Jewish law developed in this paper will be extracted from a series of both Talmudic examples and later literature that illustrate the approach of Jewish law to environmental hazards and quality of life issues.

B. The General Concept of Preserving the Environment in Jewish Law

Although Jewish Law from the Talmudic and Medieval era does not contain a conception of the "environment" in the modern sense, the concept of stewardship existed in the Bible. [48] In the book of Genesis, God places man in the Garden of Eden "to till it and to keep it [the garden]." [49] Modern Jewish environmentalists cite this phrase as proof of man's responsibility to use the earth wisely. [50] Many Jewish commandments such **[*494]** as the laws concerning the sabbatical year and the jubilee, [51] and the laws requiring leaving the corners of the field

---

[45] Id. at 234, 235. See also Nahmod, supra note 10, at 754 ("authoritative legal decisions have long been made by different Jewish communities around the world through a consensual method in consultation with leading Rabbinic authorities").

[46] Individual communities had a right to enact local decrees for local conditions which generally applied only to the local communities, and were supposed to reflect application of law to the specific needs of the community. See 15 Encyclopedia Judaica 713-716 (1st ed. 1971).

[47] The Talmud discusses minority, and majority opinions, however, this paper will only discuss the majority opinions.

[48] See Rakover, supra note 14, at 17-19 (discussing the distinct commandment to guard and respect the animals and surrounding environment, which is in addition to the commandments that require man to be careful with regard to his neighbor).

[49] Genesis 2:15, as translated in The Jerusalem Bible (Koren Publishers Jerusalem LTD. 1992). All bible text translations will be taken from this edition.

[50] See Rabbi Barry Freundel, The Earth is the Lord's, Jewish Action, (Summer 5750/1990), at 22-23. Rabbi Freundel is the Rabbi of Congregation Kesher Israel in Georgetown, and the spiritual advisor to Senator Joseph Lieberman. See, e.g., Midrash Rabbah, Ecclesiastes VII. 13 I (Rabbi Dr. H. Freedman, Maurice Simon trans., 1977) ("When the Holy One, blessed be He, created the first man, He took him and led him round all the trees of the Garden of Eden, and said to him, "Behold My works, how beautiful and commendable they are! All that I have created, for your sake I created it. Pay heed that you do not corrupt and destroy My universe; for if you corrupt it there is no one to repair it after you.").

[51] See Leviticus 25:23 ("The land shall not be sold for ever: for the land is mine; for you are strangers and sojourners with me." (Emphasis added), (discussing the commandment to let the land lay fallow every seventh year); see also. Samuel Belkin, Man

unharvested for the poor, [52] emphasize man's position as guardian, not master, of the earth, [53] and emphasize respect for the natural world. Numerous Biblical statements, including the commandment not to cut down fruit trees during a siege, [54] indicate divine directives to man that the land belongs to God, who has loaned the land to man subject to conditions. [55] The prohibition against cutting down fruit trees reminds the Jews to minimize destruction of the environment and its resources in pursuit of other goals, to maximize benefit from any use of resources, and to avoid improper waste. [56] Cutting **[*495]** down a fruit tree to make a battering ram would be prohibited because it fails to maximize the use of the fruit tree and fails to use the natural resources in a way that ensures maximal

---

as Temporary Tenant, in Judaism and Human Rights, 251-258 (Milton R. Konvitz ed. 1972). Rabbi Dr. Samuel Belkin (1911-1975), served as President of Yeshiva University from 1943-1975, and Chancellor from 1975-1976.

[52] See Leviticus 19:9-10 (commandment to leave a corner of the field uncut for the poor) ("And when you reap the harvest of your land, thou shalt not wholly reap the corners of thy field … thou shalt leave them for the poor and the stranger: I am the Lord your God.").

[53] See Leviticus 19:23-24 (commandment to leave the fruit on the trees uneaten for three years "and when you shall come into the land, and shall have planed all manner of trees for food, then you shall reckon their fruit as uncircumcised: three years shall it be as uncircumcised unto you: it shall not be eaten. But in the fourth year all its fruit shall be holy for praisegiving to the Lord"); see also Nachmanides Commentary on the Torah, Leviticus 19:23 (Rabbi Dr. Charles B. Chavel trans., 1971) (all translations of Nachmanides will be taken from this series) (stating that the reason for this commandment is because the first fruit is meant for God, however, because the fruit of the first three years is not good and is therefore not appropriate to bring to God, one must wait three years before personal enjoyment as well); Rabbi Moses ben Nachman (1194-1270 C.E.), a leading Rabbinical Authority and Biblical Commentator of the early 13th century Spain, fled to Israel as a result of persecution following his famous debate with the apostate Pablo Christiani.

[54] Deuteronomy 20:19 ("When thou shall besiege a city a long time, in making war against it to take it, though shall not destroy its trees by forcing an axe against them: for thou mayst eat of them, and thou shalt not cut them down ..."). Fruit trees are also a source of food which the army will need before and after it conquers the town.

[55] Exodus 19:5 ("for all the earth is mine."); Deuteronomy 19:1 ("When the Lord thy God has cut off the nations, whose land the Lord thy God gives thee."); Psalms 24:1 ("The earth is the Lord's, and the fullness thereof; the world, and they that dwell in it."); Psalms 97:9 ("For thou, Lord, art high above all the earth.").

[56] See Sefer Hachinuch (Commandment 529, That one should not cut down a fruit tree: "And so is included inside this prohibition that you should not do any waste.") (The Sefer Hachinuch, written around the 13th-14th century C.E., is one of the major attempts to list and explain the 613 commandments of the Bible. For each commandment, the Sefer Hachinuch attempts to discern a rational or underlying reason. The work is traditionally ascribed to Rabbi Aaron Halevi of Barcelona however, more recently, the authorship of this work has become a subject of scholarly debate.). See also Samson Raphael Hirsch, Horeb: A Philosophy of Jewish Laws and Observances 279, IV Ch.56 ("Respecting All Beings as God's Property") (Dayan Dr. I. Grunfeld trans., 2d ed. 1994). Rabbi Samson Raphael Hirsch (1808-1888 C.E.), A major Rabbinic philosopher and decisor of 19th century Germany, Rabbi Hirsch advocated on the one hand integration of traditional Jewish thought with modern science, while at the same time upholding Orthodox Jewish practices; Norman Lamm, Ecology in Jewish Law and Theology, in Torah of the Earth: Exploring 4,000 Years of Ecology in Jewish Though, Vol 1, 103 109-115 (Arthur Waskow ed., 2000); Rabbi Dr. Norman Lamm is President of Yeshiva University (1976-present). See Rackover, supra note 14 at cha. Bal Tashchit 32-41.

benefit with minimal destruction. This illustrative commandment remains codified in modern Israeli law in the form of special permit requirements for cutting down olive trees. [57]

Many other Jewish law concepts reflect an awareness of the importance of non-human life. [58] Jewish law prohibits a person who comes across a nest from taking the mother bird along with her eggs [59] and prohibits the slaughtering of a cow on the same day as her calf. [60] Both Nachmanides [61] and the Sefer Hachinuch [62] explain that these commandments were intended to teach the lesson that while God allows human use of individual members of a species, the destruction of an entire species is prohibited. [63] Jewish law also instills respect for the earth and its cycles through intricate agricultural laws. The ancient commandment to let the earth lie fallow every seventh year [64] prevents depletion of the land and provides the basis for modern methods of field rotation. [65] Rabbis in **[*496]** the time of the Mishna forbade raising small cattle in Israel [66] based on ecological concerns. [67]

---

[57] D'vora Ben Shaul, Long Live the Olive Tree, Jerusalem Post, Sept. 25, 1992 at 30.

[58] See Genesis 1:31 ("and God saw everything that he had made, and behold it was very good"). See also Midrash Rabbah, Exodus X I (Rabbi Dr. H. Freedman, Maurice Simon trans., 1977) ("Our Rabbis explained … even those creatures you deem redundant in this world, like flies … nevertheless have their allotted task in the scheme of creation.").

[59] Deuteronomy 22:6 ("If a bird's nest chance to be before thee in the way in any tree, or on the ground, whether they be young ones, or eggs, and the mother bird sitting upon the young, or upon the eggs, thou shalt not take the mother bird together with the young: but thou shalt surely let the mother go, and take the young to thee.").

[60] Leviticus 22:28 (discussing the requirements for animals brought as sacrifices) ("And whether it be cow or ewe, you shalt not kill it and its young both in one day.").

[61] See Nachmanides supra note 53.

[62] See Sefer Hachinuch supra note 56.

[63] See Sefer Hachinuch Commandment 545 (Commandment of Sending the Mother) and Commandment 294 (That One Should Not Slaughter an Animal and its Son in One Day). See also Nachmanides Commentary on the Torah, Deuteronomy 22:6.

[64] Leviticus 25:1-6 ("And the Lord spoke to Moshe in Mount Sinai, saying, Speak to the children of Yisra'el, and say to them, When you come to the land which I give you, then shall the land keep a Sabbath to the Lord Six years thou shalt sow thy field, and six years thou shalt prune thy vineyard, and gather in its fruit; but in the seventh year shall be a Sabbath of solemn rest for the land, a Sabbath for the Lord: thou shalt neither sow thy field, nor prune thy vineyard. That which grows of its own accord of thy harvest thou shalt not reap, nor gather the grapes of thy undressed vine: for it shall be a year of rest for the land.").

[65] See Moses Maimonides, The Guide of the Perplexed, III:39 at 553, (Shlomo Pines trans., 1963) ("With regard to all the commandments that we have enumerated in Laws concerning the Sabbatical Year and the Jubilee, some of them are meant to make the earth more fertile and stronger through letting it lie fallow."). This practice also instilled a trust that God would provide the needed sustenance.

[66] Mishna Baba Kamma 7:7 (Rabbi Matis Roberts trans., ArtScroll Mishnah Series, 1986) ("We do not raise small cattle in the Land of Israel.").

Jewish law's prescient understanding of the needs of the earth enabled the Jews to retain their connection to the land and understand their relationship to surrounding ecosystems. [68]

As discussed further below, in addition to understanding the basic concept of stewardship, ancient Israelite society also understood the concept of environmental degradation, as reflected in their efforts to address basic forms of pollution, refuse disposal, and noxious industry. However, despite the depth of its understanding of human impacts on the environment, Talmudic law does not exhibit a deep understanding of the temporal and geographical scope of environmental damage. Jewish law generally reflects an understanding of pollution only in the context of the immediate community. Jewish law restricts a person from soaking flax in a pool near his neighbors crops for fear that the polluted water will damage the nearby crops, [69] but does not account for the possibility that the toxins will enter the groundwater and pollute the water of the neighboring village. This relatively limited level of knowledge is understandable, given that society has only acknowledged these possibilities in the last fifty to one hundred years. In addition, nuclear power plants, man-made chemicals, and many other forms of long-range, long-term pollution did not exist in Talmudic society. Societal ability to cause long-term damage was significantly less than it is today.

[*497]

IV. Jewish Principles of Property, Nuisance and Zoning Law

The Jewish laws dealing with nuisance and zoning codify the principle, discussed above, that no person is permitted to harm his neighbor. Based on the same premise, these laws are not separated by the writings of the Mishna, Talmud, or later Jewish scholars into the modern categories of nuisance and zoning. Instead, Jewish law simultaneously regulates activities as "nuisances," or zones them away from the city, depending on the probability that they will cause harm. Jewish law casts a wide net over potentially noxious activity, prohibiting even those actions with only a small probability of causing harm to others, and regulating a wide range of activity, including

---

[67] See Rabbi Matis Roberts, Yad Avraham on Baba Kama 161 in Artscroll Mishnah Series (1986) ("The Rabbis prohibited raising small cattle there, because they destroy the vegetation and hinder the settlement of the Holy Land (Rav)."). The Yad Avraham is a modern commentary which contains an anthology from various Talmudic, Midrashic, and Rabbinic Sources. Textualists will prefer the original sources, which will be cited in the remainder of this paper to the extent possible. However, easy reference by those who are not familiar with the languages of the original sources (in addition to my personal difficulty with the languages of many of the original sources), has caused me to make extensive use of this commentary. See also Rakover, supra note 14 at 42, n.103.

[68] See also Lamm, supra note 56, at 165 (noting God's concern for the ecological balance of land which suddenly has all of its inhabitants driven out without any to replace it, as indicated in Exodus 23:29-30) "I will not drive them out from before thee in one year; lest the land become desolate, and the wild beasts multiply against thee. Little by little I will drive them out from before thee.").

[69] See Mishna Baba Batra 2:10. Flax must be soaked for several days before it can be processed into linen. The soaking process releases toxins into the water, which might then be absorbed by any plants growing in the vicinity. See Yad Avraham on Baba Batra at 43.

digging pits, [70] threshing wheat, [71] and keeping birds. [72] Although these regulations prohibit a wide range of actions, actual monetary liability for harm is only imposed when there is a direct causal relationship between the action and the harm. [73] While injunctions were available for actions prohibited because of the concept of "distancing from harm,' for which there is no direct causal link, no monetary damages were awarded if the violation ultimately led to injury. [74]

A. Jewish Principles of Property Rights

Jewish law subordinates property rights to the affirmative social obligation to prevent harm to others. As discussed above, this is a notable difference between American and Jewish law with important implications for the modern American approach to zoning and environmental regulation. With lessons for the American system in mind, this section discusses the Jewish legal method of balancing quality of life with the demands of industry. Notably, the Jewish legal approach to such problems **[*498]** echoes aspects of American law. However, different cultural frameworks for these legal solutions have generated divergent results. Recognition of property rights in Jewish law is pervasive and implicit, but never explicit. There are few discussions concerning the actual existence and parameters of the right. [75] As such, this section will present examples and discussions that illustrate the underlying presumption of the right to own property in Jewish law.

---

[70] See Mishna Baba Batra 2:1.

[71] See id. at 2:8.

[72] See id. at 2:5. Doves were a potential nuisance, as they might eat the grain, or damage the crops and fruit of the neighboring field. Those who kept doves were therefore required to keep the dovecote with a minimum of fifty cubits (seventy-five feet) surrounding it, as that was the normal distance doves flew to find food. See Yad Avraham, Commentary on Baba Batra 2:5 at 47, citing Babalonian Talmud Baba Batra 23a.

[73] See Babalonyan Talmud, Baba Batra cha. 2. (contains cases and discussion that develop principle of distancing oneself from actions that might cause harm to another). See also Rabbi Moses ben Joseph Trani, Kiryat Sefer, Hilchot Shechanim [Laws of Neighbors] ch. 9. (14th century commentary on Maimonidies Mishne Torah).

[74] The strong conception of liability to God allowed for more limited application of monetary damages in many areas of law, as Jewish law considers a person liable to a higher authority, and considerers this threat to be a significant deterrent to actions that were deemed prohibited. See e.g., Nahmod, supra note 10, at 754 ("Jewish law is suffused with religion and does not separate law and morality: legal wrongs are also sins.").

[75] Although the property ethic can be imputed from the many laws and regulations relating to the treatment of private property, no clear statement of the right to own property in Jewish law exists. The Jewish tradition does not really recognize the concepts of rights per se, however, its system of duties and obligations relating to property and other areas develop many of what would be considered rights in the modern era. See Dracht, supra, note 2 at 121-22. Thus, the requirement to have a fixed threshing floor a distance from the city in order to prevent damage to one's neighbors' property implicitly recognized that the neighbors have a right to use and enjoy their property. See infra note 105 and accompanying text. However, since there is no action involved in the property right, there is no direct commandment to have a property right. The commandments instead focus on the implications of balancing the conflicting property rights.

Jewish law enjoins a judge faced with a case involving a poor litigant versus a rich litigant from favoring the poor person. [76] This prohibition reflects a conception of justice associated with protection of vested individual property rights, not the redistribution of wealth. [77] Ethics of Our Fathers, a book of the Mishna also known as Pirkey Avoth, further reflects deep judicial and social respect for private property. [78] In Pirkey Avoth, the Sages discuss four possible perceptions of the relationship between property owners, and conclude, "one who says what is mine is yours, and what is yours is mine is an ignoramus." [79] In his modern commentary to this Mishna, Rabbi Reuven Bulka explains that a lack of ownership boundaries for property would create a society with no concept of possession, and that such a society would devolve into chaos. [80] Rabbi Bulka points out that although abrogation of property boundaries would arguably result in less individualist and selfish society, such an extreme could also undermine the roots of social responsibility and security **[*499]** by condoning all robbery. [81] Thus, Jewish law encourages acts of giving and mutual aid only in so far as they are consistent with recognized boundaries around established property rights.

A closer look at the principles of Jewish property rights suggests that one potential explanation for the different treatment of property rights in Jewish and American law is the different historical and cultural background conditions for the development of the two systems of law. The biblical ideal reflected in the prophets is of an agrarian community with farmers each prospering on their own small plot, with a vineyard and palm trees. [82] The property rights of the family had a high value reflected in the law of the Jubilee, which requires the return of agrarian plots to the family every fifty years. [83] Furthermore, according to Jewish law these property rights were God-given, and therefore not even the king could take them away without due cause. [84] While Jewish property law developed prior

---

[76] See Leviticus 19:15 ("Thou shall do no unrighteousness in judgement: thou shalt not respect the person of the poor, nor honour the person of the mighty: but in righteousness shalt though judge thy neighbor.") See also Exodus 23:3 ("One shall not turn a favor to a poor man."); Hirsch, supra note 56, at vol. III, cha. 47, 232-40, (Justice in Transfer of Property and in Services).

[77] See Rashi Commentary on Leviticus 19:15, thou shalt not respect the person of the poor. Rabbi Solomon Yitzchaki (1040-1105 C.E.), wrote commentaries on the Bible and Talmud which are considered indispensable for the study of these works.

[78] This book of the Mishna deals largely with ethical and moral principles from the sages that are intended to serve as a guide in life.

[79] See Mishna Pirkey Avoth 5:13, translated in Reuven B. Bulka, Chapters of the Sages: A Psychological Commentary of Pirkey Avoth 205 (1993).

[80] Id. at 206.

[81] Id.

[82] See Kings 5:5 ("And Yehuda and Yisra'el dwelt in safety, every man under his vine and under his fig tree, from Dan to Be'er-sheva, all the days of Sholomo."); Micah 4:3-4 ("… nation shall not lift up sword against nation, nor shall they learn war anymore. But they shall sit every man under his vine and under his fig tree; and none shall make them afraid ...").

[83] See Leviticus 25:10.

to the emergence of the feudal system in Europe, the safeguards over individual ownership of the land prevented concentration of land into one hand and discouraging the development of such a system.

In contrast, as discussed further below, the American emphasis on property rights is often traced to the close historical and cultural association of property ownership and individual freedom that emerged at the end of the feudal system in Western Europe. [85] Jewish law does not harbor the deep distrust of authority and central government that American society contains, because the instrument of enforcement in Jewish law is the religious court which answers to God. Perhaps because this fear is an American concept, and because property rights and individual freedoms never faced serious internal challenge in Jewish society, Jewish philosophical and legal doctrine does not connect the property right to the right of individual freedom in the American manner. Rather, ownership of property is part of the Jewish system of law because it is necessary for societal development. Basing property rights on this premise, Jewish law more easily abrogates property rights as needed for societal development, and protection of the individual, and such abrogation does not create the **[*500]** deep conflict associated with such incursions in the American system.

B. How Much to Regulate: The Talmudic Debate over Potential Future Damage

One of the key challenges for regulating nuisances is the decision about how far to regulate actions with the potential for causing future harm. Significant Talmudic debate therefore focuses on the extent of the requirement to distance or abate actions that do not presently cause harm, but possess significant potential for future damage. [86] As described above, [87] the Talmud is a series of discussions attempting to interpret and properly apply the Mishna. Post-Mishnaic generations gave Mishnaic sources significant authority, and any understanding of the law was required to comport with Mishnaic statements. Thus, Talmudic scholars are baffled by the statement in the eleventh Mishna of the second chapter of Baba Batra concerning the permissibility of planting a tree near a pit that is on one's neighbor's property: "R' Yose says: even if the pit preceded the tree he may not cut [it] down, because this one digs within his property and that one plants within his property, and the law is according to R' Yose." [88] According to Talmudic explanation, [89] the reason for why one might not be able to plant the tree is fear that the

---

[84] See 1 Kings 21:2 (Story of the King Ah'av, who desired the land of his subject Navot, and offered him land or money in return for the land. When Navot refused to accept the money or land, Ah'av could not take it for himself while Navot remained alive.).

[85] See infra note 152 and accompanying text.

[86] See Mishna Baba Batra 2, and Talmudic discussion surrounding this chapter.

[87] See supra note 40 and accompanying text.

[88] See Mishna Baba Batra 2:11 (discussing the permissibility of planting a tree on one's property line, next to a pit that already exists on a neighboring property). As mentioned previously, the Mishna was redacted prior to the Talmud, and the Talmud is basically a codex of a series of discussions in various schools that attempted to discern what the editors of the Mishna intended as law. Thus, statements in the Mishna that a particular opinion is law are generally accepted. See 7 Encyclopedia Judaica 1163 (1st ed. 1971).

roots of the tree will grow and damage the wall of the neighbor's pit. Therefore the simplest interpretation of Rav Yose's statement seems to require a ruling that one need not distance actions from others if there is no immediate danger that such actions will result in damage. However, this interpretation would conflict with Harchakat Nezikin, the large body of laws regarding distancing from harm. [90] Rabbinic discussions therefore attempt to reconcile these two sources of law.

The strong emphasis that Jewish law places on societal interests, as reflected in the Harchakat Nezikin, has required Talmudic scholars and commentators to understand R' Yose's position in a broader manner than an initial reading suggests. In fact, in recognition of social utility considerations, **[*501]** Jewish legal scholars have interpreted R' Yose to broaden the obligation to abate potential nuisances to the greatest extent possible. [91] The Jerusalem Talmud explains R' Yose's permission to plant the tree as a reflection of his determination that the social utility value of a tree is greater than the social value of a pit. [92] The Rosh [93] also offers a social utility explanation, and opines that the pit under discussion was a simple pit. As such, the Rosh explains that the monetary value of the tree was greater than the value of the pit. [94] The Rosh then explains that if the pit is a lined pit, and therefore of greater value and harder to move than an unlined pit, R' Yose would hold that the tree cannot be planted.

Notably, the explanation of both the Jerusalem Talmud and the Rosh interpret R' Yose's statement as a reflection of a balancing of values. Namely, actions with the potential for future damage are only allowed when the value of the action exceeds that cost of the damage - a flexible approach characteristic of Jewish law. [95] Indeed, the general duty to prevent harm to another is a flexible goal that Jewish law balances against other social utility considerations such as economic development. This flexibility permits Jewish law to respond to social changes.

C. Nuisance and Zoning in Jewish Law

---

[89] See Babalonian Talmud, Baba Batra 25b.

[90] See supra note 18 and accompanying text.

[91] This stance is later explained by the Talmud as admitting that the tortfeasor must abate a nuisance if it is his own harmful act that is causing the interference a neighbor's right to use of his own land. See Shalom Albeck, Nuisance, in The Principles of Jewish Law 329, 330 (Menachem Elon ed. 1975).

[92] See Jerusalem Talmud Baba Batra 2:10.

[93] Rav Asher ben Jechiel (1250-1327 C.E.) is a formative medieval western European Talmudic scholar whose halachic decisions are extensively cited in the Shulchan Aruch, the major codification of Jewish law written in the 16th century. See supra note 43.

[94] Rav Asher ben Jechiel, She'alot Ve' Te'shuvt HaRosh [Questions and Answers of the Rosh] 91 (clal 108, siman 10).

[95] The Rosh notes that this flexibility is only available when the damage from the actions is not immediate. See id. The definition of immediate damage, and the case law surrounding it is a very complex area of Jewish law that will not be addressed in detail in this paper.

Ancient Jewish law includes one of the first documented cases of systematic land planning regulations for cities and surrounding areas. [96] The Rabbinic oral tradition also contains a complex set of laws governing placement of nuisances that presented a danger to public health or detracted **[*502]** from the beauty of the town. These laws, enforced by injunctions from the governing court of Rabbis in the city, [97] address everything from noxious uses to municipal aesthetics. The Bible mandates an uncultivated green belt of 2000 cubits around all Levite cities [98] and the Talmud extends this injunction to all Jewish cities. [99] Jewish law prohibits any encroachment on this green belt through expansion or cultivation, as doing so would destroy the aesthetics of the town. [100] Fear that smoke from furnaces would blacken the traditionally white walls of Jerusalem stone caused the Rabbis to prohibit furnaces anywhere within the boundaries of the city of Jerusalem. [101] These and other statements in the Talmud indicate that health and aesthetic issues were a significant consideration in municipal development. [102]

Forms of pollution that were a danger to public health or an unbearable intrusion on quality of life were also subject to broad zoning restrictions. Thus, industries that were a constant source of smoke, smell, or particulates, were

---

[96] The Talmud and rabbinic laws contain a complex set of zoning regulations that date back to the Bible. See Numbers 35:3-5 (requiring a green belt around all Levite towns); Deuteronomy 23:13-15 (stipulation that men go outside of the army camp to relieve themselves, and the requirement that a spade be included with their gear so that they can dig a hole and cover their waste). See also Maimonides, Mishne Torah, Hilchot Melachim [Laws of Kings], 6:14-15 (elaboration on the positive commandment to prepare a special place outside of the camp for the purpose of relieving oneself).

[97] See, e.g., Prohibition against planting a tree within twenty-five cubit of city, in order to establish a green belt surrounding the city. See also Mishna Baba Batra 2:7; Maimonides, Mishne Torah, Hilchot Shechanim [Laws of Neighbors] 10:1.

[98] Numbers 35:5.

[99] See Babylonian Talmud Arachin 33b. See also Maimonides, Mishne Torah, Hilchot Shemitah Veyovel [Laws of the Sabbatical Year] 10:1.

[100] See id. See also Carmell, supra note 1 at 508 (Map of the proposed Town Plan). Carmell notes that these laws "anticipated by some 3,500 years the "Green Belt' legislation of modern times." Id. at 507.

[101] See Babylonian Talmud, Baba Kamma 82:b ("Ten things were said about Jerusalem… and we do not place in it furnaces… because of smoke") (Rashi comments that this is "smoke that blackens the wall, and is not nice"). See also Maimonides, Mishne Torah, Hilchot Beit Habechira [Laws of the Chosen House] 7:14 ("And we don't put in it [Jerusalem] furnaces because of the smoke."). See also Nimukai Yosef glosses to the Rif, citing Rashba (commenting on Talmud Baba Batra 24b) (stating that the people of a town may waive their rights and allow a threshing floor at a closer distance except in the land of Israel, because the beauty of the land of Israel is at stake). Rav Shlomo ben Avraham Aderet (1235-1310 C.E.) was a major Spanish rabbinical figure, halachik decisor, Talmudic scholar, and communal leader, many of his rulings on the law are incorporated into the Shulchan Aruch, the 14th century codification of Jewish law. See Caro, supra note 43.

[102] See Palestinian Talmud Kiddushin 4:12 ("It is forbidden to live in a city in which there are no physicians, no bath, and no court that is able to administer punishment.") Babylonian Talmud Sanhedrin 17b ("A Torah Scholar should not reside in a city that lacks these items: … public baths, sewage disposal."). Thus, at least in ancient times, zoning for aesthetic and health purposes was also a method of drawing scholars to the city.

banned within city limits. The eighth Mishna of the second chapter in the Tractate of Baba Batra mandates that "one must distance a fixed threshing floor fifty cubits [103] from a town. One may not establish a fixed threshing floor within his own property unless he owns fifty cubits [of land] in every direction, and he must distance [it] from the plantings **[*503]** of his neighbor and from his plowed-over areas so that is should not damage [them]." Threshing floors, used to separate chaff from grain, produce a large amount of chaff (particulate matter), which is a public health hazard. This prompted Jewish law to relegate the entire industry outside municipal limits. [104] Additional Jewish laws mandate that carcasses, graves, tanneries, and furnaces be distanced fifty cubits from a town [105] because they are all constant sources of smoke and smell that can blow into the city.

In one of the earliest forms of air pollution control, the Mishna mandates that industries that generate noxious odors not only be placed at a certain distance from any city, but also to the east of any city in light of prevailing wind patterns in Israel. The Talmud also includes complex discussion over whether the placement should change in Babylonia in light of different wind patterns there. [106]

Rabbinic regulations also regulate constant sources of pollution more stringently, recognizing that such sources are more likely to harm the community. As discussed above, Rabbinic law relegates smokehouses to the outside of Jewish towns. An individual is permitted to have a stove inside of his house, despite the fact that individual stoves are likely to emit a small amount of smoke at various points in the day. [107] Jewish law treats the smoke from a commercial bakery as less polluting than a smokehouse, but more polluting than an individual home stove. As a

---

[103] Approximately 270 meters.

[104] The chaff is very dry, and fine, and can cause damage both to people who breath it in, and to the crops that are growing, or newly planted.

[105] See Babalonian Talmud Baba Batra 2:9. The Tosefta on Baba Batra 1:10 adds that one must also distance furnaces fifty cubits from the city. See The Tosefta, NeziQin 149 (Jacob Neusner trans. 1981).

[106] See also Maimonides, Mishne Torah, Hilchot Shechanim [Laws of Neighbors] 10:4. For further discussion about concern for the air quality in towns, see Maimonides, Medical Works Vol 1 Regimen Sanitatis [Letters on the Hygeine of the Body and of the Soul] 67-68 (Suessmann Muntner trans. 1957):

The quality of the air in the cities compared to the air in the desserts and forests is like the water that is thick and murky compared to water that is thin and clear. And that is because in the cities the height of the buildings and the narrowness of the pathways … the waste … the stench of the waste … sits, and makes all of the air moldy, murky, smoky, and smoggy, and it is blown back by the winds according to the times. And not one of us would stay … but we don't have any clue about this because we grew up in the cities, and have already gotten accustomed to it. We should at least pick from the cities, a city with a balance [not on the top of the mountain, and not at the bottom of the valley], and it also should have a wind from the east and from the north … and if you can't even do this, to leave the city, at least sit in the periphery of the city on the northeast from the city, and have the foundation of your house big enough, and your courtyard wide enough that a northern wind can come through, and the sun, because the sun will help with the pollution and will thin it out.

[107] See Rema referral to Shulchan Aruch, 155: 37. There were however restrictions on how close to the wall of the house the stove might be placed when the wall was shared with his neighbor.

reflection **[*504]** of a hierarchy of noxious uses, Jewish law therefore did not automatically relegate bakery stoves to the outskirts of the town, but rather allowed neighbors the right to enjoin the use of a building as a bakery if the smoke was intolerable. In a similar vein, although Jewish law relegates fixed threshing floors to the municipal outskirts, [108] it allows smaller threshing floors within the city limits. [109] In sum, Jewish legal approaches to noxious uses of private property reflect a nuanced balancing of individual and social interests. The degree to which Jewish law envisions interference with the use of private property is a direct reflection of the magnitude and probability of harm associated with the use at issue.

Under Jewish law, many domestic uses that cannot be relegated outside municipal limits such as ovens, outhouses, and laundry pits are subject to preventative regulation. These preventative measures reflect an early variant of modern best available technology requirements. [110] The Mishna prohibits the placing of olive refuse, manure, salt, and lime immediately against the wall of one's neighbor in light of the corrosive properties of these materials. [111] The Mishna allows such activity if one whitewashes the wall with lime to protect the wall. [112] Ovens are similarly regulated to reduce the possibility of fire spreading to an upstairs or downstairs neighbor [113] by requiring four cubits of space above an oven if there is an upstairs neighbor, and a layer of plaster three cubits thick underneath an oven located on the second floor. [114]

Additional Jewish laws segregate incompatible uses in the municipal context for which preventative measures such as those discussed above are not available. Thus, Jewish law enjoins an individual from opening a bakery, dye shop, or cattle shed under another person's storehouse because **[*505]** the associated heat and odor might damage produce stored above. [115] Other Mishnaic laws include laws to distance a flax pool from neighboring vegetable gardens, [116] leeks from onions [117] and mustard plants from bees. [118] The Mishna also requires a

---

[108] Mishna Baba Batra 2:8.

[109] See Nimukei Yosef, Baba Batra, Glosses to 23a of Alfasi's Code (Babalonian Talmud Baba Batra 24b). Alfasi's Code, written by Rav Issac ben Jacob Alfasi 1013-1103. The foremost Halackik scholar of 11th century North Africa, he moved the center of Talmudic study away from Babylonia to Europe and North Africa.

[110] See Clean Water Act 301 (b)(2)(A), *33 U.S.C. 1311* (2001) (requiring application of the best available pollution control technology before discharge of material into the water) as an example of a modern use of this method of regulation.

[111] See Mishna Baba Batra 2:1; Yad Avraham on Baba Batra at 25.

[112] See Mishna Baba Batra 2:1 ("or plaster it with lime,") Yad Avraham on Baba Batra at 25. The Mishna also prohibits placing a plow, seeds, or urine against the wall, but does not permit whitewashing as a mitigating factor. See Mishna Baba Batra 2:1. See also Yad Avraham on Baba Batra at 25 (explaining that the Mishna does not permit whitewashing for a plow, seeds, or urine, because these substances damage the earth, which loosens the foundations of the wall).

[113] See Mishna Baba Batra 2:2.

[114] See id.

[115] See Mishna Baba Batra 2:3; Commentary of Rashi on Baba Batra 2:3.

person digging a pit on his own property to leave a distance of at least three cubits from the wall of any pit on his neighbor's property [119] so that the seepage from his pit does not damage the wall of his neighbor's pit. [120] Furthermore, according to the Mishna, if the neighboring plot might eventually require irrigation pits, then, even if there is presently no pit on the other side, one must leave three cubits between any pit and the boundary of the neighboring property. [121] In sum, Jewish law insists on considering potential future use of land in estimating probability of harm and the related need for regulating use of private property.

The Talmud also dictates that the burden of preventing harm lies with the person acting in the potentially harmful manner. Thus, even if damage might result from an intervening natural force or will be in some way removed from the original action, Jewish law requires the potentially liable actor to take precautions. [122] Both the Talmud and the majority of later commentators rule that a person who is beating flax [123] must distance himself from any place where there is a reasonable chance that the chaff might be carried by the wind and hit another person. [124] Thus, even if the wind is a potential intervening force bringing particulate matter into contact with others, any individual generating such harmful matter must distance **[*506]** himself from others accordingly. [125] This low threshold for prohibiting actions that may result in environmental damage is reflected in other cases involving a person who builds his threshing floor, or a similar nuisance, at the proper distance from the city, only to find subsequently that the city grows to meet him. [126] Despite the absence of individual fault in such a case, the Rema rules that such a

---

[116] See Mishna Baba Batra 2:10. Flax must be soaked for several days before it can be processed into linen. The soaking process releases toxins into the water, which might then be absorbed by any plants growing in the vicinity. See Yad Avraham on Baba Batra at 43.

[117] See id; see also Commentary of Maimonides on Baba Batra 2:10 (explaining that leeks diminish the sharpness of onions that are grown near them).

[118] See id. (explaining that when bees eat mustard, their honey becomes pungent, and is ruined).

[119] See Mishna Baba Batra 2:1.

[120] See Maimonides, Mishne Torah, Hilchot Shechanim [Laws of Neighbors] 9:1.

[121] See Mishna Baba Batra 2:1.

[122] The opinion of Rav Yossi as expressed in the Talmudic discussion surrounding Mishna Baba Batra 2:11 places the burden of moving on the person to whom the damage is caused, unless the damage is the direct result of an action "by your hand." However, the Talmudic discussion finally concludes that the majority of the time, the requirement to move is placed on the individual performing the action. See Roberts, supra note 67, at 46.

[123] One beats flax in order to make it softer, and when flax is beaten, there are small pieces chaff that fly off.

[124] See Babalonian Talmud Baba Batra at 26a. See also X Encyclopedia Talmudit, Harchakat Nezikin [Distancing Harms] 4228, 4266, n.462 (Rabbi Shlomo Yosef Zevin et al., eds. 1992) (citing the Tosafot, Rif, Rosh, Rashba, Rema, and Maimonides). These figures are the leaders of the Religious Jewish World in the Middle ages.

[125] See Maimonides, Mishne Torah, Hilchot Shechanim [Laws of Neighbors] 11:1.

person must move his industry. [127] Thus, under Jewish law, the duty to avoid harm lies ultimately on the person who is the potential source, regardless of any contributing natural or man-made force that might exacerbate, or even cause, the harm.

D. Jewish Law Consideration of Health and Property Law

Jewish laws regarding the transfer of property rights through easements further reflect a balancing of the interests of industrial development with those of public health. [128] Jewish law allows the creation of easements through continued, unchallenged use, such as in the case of damage to property through flooding, or encroachment on boundaries, such as building one's wall over the property line of another. The biblical time period for establishing a general easement to a neighbor's property for either physical invasion or nuisance is three years, after which the neighbor permanently forfeits his right to object. [129]

The Rabbis established a special category of nuisances that are a danger to health and do not qualify for this three-year rule. Namely, certain types of pollution such as smoke, smell, dust, and vibrations, are presumptively intolerable. Neighbors therefore retain an indefinite right to protest and bring suit, demanding cessation of activities with these externalities. [130] This law is in keeping with the Jewish law that one who initially tolerates an intrusion to health may still complain at a later date. [131] Thus, if a women marries a tanner and later states that she cannot handle the smell, the Rabbinical courts force the man to give his wife a divorce, **[*507]** even if he worked as a tanner prior to the marriage. [132] In sum, concern for individual health imposes specific limits on private property rights under Jewish law.

---

[126] See Rema glosses to Shulchan Aruch,155:22.

[127] However, the city is required to compensate him for the costs of moving, unless the boundaries of the city are in dispute, and there is a claim that the conflicting use has always been too close to the city. See id.

[128] Jewish law sometimes fails to reflect modern understanding of health issues. However, the general concept exists, as will be detailed below.

[129] See Mishna Baba Batra 3:1.

[130] Maimonides, Mishne Torah, Hilchot Shechanim, [Laws of Neighbors] 11:4. This right even passes from one occupier to the next. See id. See also Nachmanadies Commentary on Babalonian Talmud Baba Batra 59b, noted in Rakover, supra note 14, at 68.

[131] See Maimonides, Mishne Torah, Hilchot Shechanim [Laws of Neighbors] 11:4.

[132] See Babalonian Talmud Ketuvot 77a. R' Meir states that even if she said initially that she could handle the smell, she can subsequently declare that she can not handle it. See id.

Actively relinquishing the right to protect one's health is also addressed in Rabbinic writings. Rabbaynu Tam [133] writes that someone who sells his or her right to complain of a nuisance [134] can rescind the sale upon realizing that the intrusion is in fact intolerable. [135] Maimonides, who wrote the controlling opinion in this case, offers a different view, [136] stating that sale of the right to complain of a nuisance, even for categories of nuisance for which there is an ongoing cause to complain, such as those discussed above, [137] is not revocable. [138] In his decision to permit the permanent sale of nuisance to an individual's health, Maimonides' ruling reflects the practical consideration that not all industry can be located on the outskirts of the city and recognizes that a right to revoke such a sale would increase the vulnerability of industry and would thus inhibit the location of even minor industry inside municipal limits. In this respect, Maimonides' ruling is compatible with other cases that allow economically productive activities to override traditional injunctions against nuisance. Under Jewish law, for example, a person who moves to a town where the main industry is dyeing wool may not complain despite the fact that Jewish law generally authorizes complaints against dye **[*508]** making as a recognized source of pollution. [139]

---

[133] See Tosefot, Babalonian Talmud Baba Batra 23a, Ein Chazaka Le' Nizikin [There is no Presumption for Tort Damages] (citing Rabbaynu Tam). Rabbaynu Jacob Ben Meir Tam (Circa 1100-1171) was the major Jewish intellectual force in early medieval France and Germany, and revolutionized Talmudic study.

[134] The right to complain is here envisioned as one aspect of property ownership. Thus, just as one is permitted to rent part of one's land, or sell the right to subadjacent support in American law, one might be permitted to sell the right to complain that attaches to his property.

[135] This is in keeping with the Jewish concept that if any part of an agreement is later found to be erroneous, it is declared invalid. See also supra note 132 for a discussion of the Jewish law that a women who marries a tanner). Rabbaynu Tam's ruling implicitly recognizes the concern that most sales of the right to complain could be rendered invalid when the person realizes that he truly can not live with the physical invasion. See supra note 132 and accompanying text for discussion of the validity of a contract when the contract is found to have been based on a false pretense. Although an extensive discussion of the reasoning behind the argument is not within the purview of this paper, this debate has much in common with the modern concern about free will in contracts. The modern debate stresses the many factors that go into a person's decision to sign or acquiesce to a contract, and argues for consumer protection against contracts that are entered into without full understanding.

[136] See Maimonides, Mishne Torah, Hilchot Shechanim [Laws of Neighbors] 11:4.

[137] See supra note 130 and surrounding text.

[138] See Maimonides, Mishne Torah, Hilchot Shechanim [Laws of Neighbors] 11:4. Maimonides actually discusses the precept in the same paragraph in which he rules that one can sell his right to complain.

[139] Jewish law typically relegates dye making to the outskirts of the city. The Maharshadam brings an illustration of Shimon who moves to a city where the majority of Jews earned their living dyeing wool. Shimon complains about the smell from the wool dyeing activities of Reuven next door. Reuven has been engaging in this activity for ten years, and has already invested in the equipment. Noting that the person was aware of the prevalence of the industry before he moved in, the Maharshadam states his complaint could force neither the cessation, nor the removal of the industry. See Responsa, Maharshadam Question and Answer 462, construed in Harav Hoshea Rabinowitz, Midat Ha Achriyot Linezek Ecologia Bi Hashkayah [The Degree of Liability of Ecological Damages Caused by Watering] 7 Techumin 403, 406-407 & 12 (1985-1987). (Published by Machon Tzomet,

In sum, concern for individual health is a primary motivation behind Jewish legal restrictions on use of private property. The following section discusses the development of American nuisance law and American legal restrictions on use of private property. As will become clear, many ancient Jewish prohibitions on certain noxious uses of private property have specific counterparts in the American legal system. Despite similarities in many of the prohibitions found in both systems, the underlying structure and values that give rise to land use regulations under Jewish and American law differ in important ways.

V. American Nuisance and Zoning Regulations [140]

This section will first present the historical conception and development of the background principle of property rights as fundamental to American society, including the core concepts of eminent domain and the police power. The section will then discuss the fundamentals of American nuisance law, an early method of balancing neighboring property concerns, as it relates to similar principles of Jewish law. Finally, modern American zoning and takings law is presented, noting that the conceptual basis for takings does not incorporate the balancing approach to property rights so characteristic of Jewish law. The section argues that American zoning and takings jurisprudence, as reflections of the primacy of property rights, pose significant threats to governmental ability to regulate nuisance properly and to meaningfully balance individual and societal needs.

[*509]

A. Fundamental Background Principles of American Property Law

American law, like Jewish law, has traditionally recognized many restrictions on rights of private property use. Indeed, as suggested by the ancient Roman maxim sic uteri tuo ut alienum non laedas (literally "use your own property that you may not injure another's"), [141] all societies with a conception of property rights must develop a framework with which to deal with the inevitable conflicts between adjacent landowners. American legal restrictions on private property use have often conflicted with the strong national conception of property rights, and American courts and legal scholars alike have been forced to balance these conflicting values. An early American example of this jurisprudential balancing is Mugler v. Kansas, [142] in which the Supreme Court stated that although no person shall be deprived of life, liberty, and property without due process, [143] this principle "has never been regarded as

---

Techumin is an annual compilation of articles reflecting different aspects of Jewish law and Society in Israel.) [The Mharshadam, R. Shmuel d. Medina (1506-1580 C.E.) founded an important yeshiva in Salonika, Greece, a center of Sephardic learning for centuries until the Holocaust.]

[140] This section is not meant to be a comprehensive review and analysis of American nuisance and takings law, as many scholars have treated these spheres in depth. Instead, this section presents the fundamental principles associated with these areas of law with the aim of setting forth how the Jewish approach in equivalent spheres of law can inform the American approach.

[141] Jesse Dukeminier & James E. Krier, Property 744 (4th ed. 1994) [hereinafter Dukeminier & Krier].

[142] *123 U.S. 623 (1887).*

incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." [144] Likewise, even Chancellor Kent, [145] a staunch supporter of American property rights, recognized that government retained the right to regulate private property usage, arguing that "Property, like Liberty, has been taught that some of its most cherished immunities are not absolute, but relative." [146]

These early indications suggest that the conception of inviolable property rights as fundamental to American legal thought did not develop until later in American history. [147] Indeed, as discussed above, absolute protection of property rights was not as fundamental to the thinking of the American founding fathers as proponents of the modern property rights movement maintain. [148] Early Republicans such as Benjamin Franklin felt that ownership of property was not a natural right and that private interests **[*510]** were therefore properly subordinated to the general good. [149] However, despite the evidence of an early willingness to recognize the concept of non-interference with the rights of others, more recently a perception of the primacy of a pre-existing property right has prevailed over a balancing approach to land use in America.

One of the principle arguments underlying the current property rights movement is that defense of property rights in America has historically been one of the chief duties of the government. [150] This argument is based on John Locke's theory of natural law, which asserts that that the right to own property is a natural right that predates the founding of society. Pursuant to a Lockean theory of the state, protection of private property is the primary motivation for entrance into the social contract. As such, any deprivation of property rights destroys one of the fundamental bases for the existence of an organized state. [151]

---

[143] *Id. at 665.*

[144] Id. (citing *Beer Co. v. Massachusetts, 97 U.S. 25, 32 (1877)).*

[145] Chancellor James Kent (1763-1847) is widely regarded as the American Blackstone. See Robert J. Goldstein, Green Wood In the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law, *25 B.C. Envtl. Aff. L. Rev. 347, 354 (1998).*

[146] Id.

[147] See Paul Turner & Sam Kalen, Takings and Beyond: Implications for Regulation, *19 Energy L.J. 25, 46 (1998)* (arguing that the period from 1789-1910 marked a period of increasing focus on the importance of property rights to the American Legal Order).

[148] See supra note 25 and accompanying text.

[149] See Turner & Kalen, supra note 147, at 41-42.

[150] See Turner & Kalen, supra note 147, at 39.

[151] See John Locke, Second Treatise of Government 65-66 (C.B. Macpherson ed. 1980 (1690)).

The strong connection between individual liberty and the right to own property that developed when the feudal system dissolved in England contributed to the force of Lockean theory in early America. [152] As John McClaughhry argues, the slow response of the European system to the move from feudalism to capitalism forced "un-landed' citizens to find new lands to acquire in order to exercise their new-found freedoms, a phenomenon that directly led to settlement in the colonies. [153] McClaughhry's line of argument supports the federalist theory that protection of private property is an integral part of independence.

The merging of the ideology of freedom and private property, reflected in the work of theorists like McClaughhry, is one of the key reasons for the unique potency of private property rights in American law. Rooted in these background cultural principles, the American private property ethos has prevailed over a balancing approach to land use regulation. As discussed further below, private property rights have significantly weakened government's ability to regulate in accordance with a growing **[*511]** awareness of the effects of individual actions on the environment. [154] The courts have become venues for this attrition of state regulatory power, and many American courts now allow regulation of private property only in instances where there is proof of damage to property or compelling proof of a high probability of damage. [155] These tendencies are discussed further below in relation to two core concepts in American property law: eminent domain and the police power.

B. Eminent Domain and the Police Power

In American law, the ability to zone and otherwise regulate private property stems from two different powers of the state. The first is commonly referred to as "the police power," which is the power granted to the state to protect its citizens from harm or danger. The police power is rooted in a semi-contractual theory under which the sovereign state, which had original and absolute ownership of property, reserved the power to take back some of the property when it granted the property to its citizens. [156] Under this theory, the state should not be required to pay the citizen

---

[152] See 2 James Kent, Commentaries on American Law 327-328, quoted in Robert J. Goldstein, Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law *25 B.C. Envtl. Aff. L. Rev. 347, 354 (1998)* ("In England, the right of alienation of land was long checked by the oppressive restraints of the feudal system, and the doctrine of entailments. All those embarrassments have been effectively removed in this country.").

[153] See Harvey M. Jacobs & Brian W. Ohm, Statutory Takings legislation: The National Context, The Wisconsin and Minnesota Proposals, *2 Wis. Envtl. L.J. 173, 180 (1995)* [hereinafter Statutory Takings]. McClaughhry was a Vermont state legislator, later to be a member of the domestic policy staff during the first Reagan administration. See id.; see also Epstein supra note 7.

[154] See Eric T. Freyfogle, Ownership and Ecology, *43 Case W. Res. L Rev. 1269, 1269-70 (1993).*

[155] For a detailed discussion of the extensive knowledge of deaths caused by various hazardous substances, and extensive knowledge in the American industry of the hazards associated with these products, see Barry L. Castleman, Asbestos: Medical and Legal Aspects (4th ed. 1996). See also Trade Secrets: A Moyers Report (PBS television broadcast, Mar. 26, 2001), transcript and additional information available at *http://www.pbs.org/tradesecrets* (last visited Apr. 23, 2001).

for its use. Gradually this theory was replaced with the conception of the police power as an outgrowth of state sovereignty. [157] By the 1870's, the police power became the basis for the state's right to promulgate regulations relating to citizen health, safety, and morality.

The second source of state power to regulate in American law is the power of eminent domain, which is "the power of the government to force transfers of property from owners to itself." [158] In colonial times, the power of eminent domain was recognized as a legitimate exercise of state power that did not necessarily require compensation. [159] As American society began to place a greater emphasis on individual property **[*512]** rights, statutes and judicial opinions began to require compensation for the exercise of the power of eminent domain. By 1890, the courts had interpreted the new "due process" requirement of the 14th amendment to incorporate the concept of "just compensation" from the 5th amendment. [160] This served as a new basis for parties to challenge exercises of state and local government police power. [161]

Determination of whether a particular regulation is a legitimate exercise of the police power or an exercise of eminent domain requiring compensation has became a job for the courts. Generally the reason behind the taking or regulating of the property is the focus of the decision. When land is needed to fulfill a public good, courts have generally considered an action to seize the land to be an exercise of the power of eminent domain. [162] When the public benefits from land use restrictions, the courts generally require compensation, because of the perceived inequity in forcing the individual landowner to bear the entire cost of a public benefit. [163] Generally, regulation of

---

[156] See Grotius and Pufendorf, 17th century, reviewed by Dukeminier & Krier, .supra note 141 at 23, 1102.

[157] See *Commonwealth v. Alger, 7 Cush. 53 (Mass. 1851),* noted in Horwitz supra note 27 at 27 as the turning point for the shift from private law contract to sovereignty as the perceived source of state regulatory power.

[158] Dukeminier & Krier supra note 141, at 1102.

[159] See Treanor, supra note 23 at 694-95 (pointing to the absence of a just compensation clause in the first state constitutions, as support for the notion that in early America, the citizens believed that the property right could be compromised in order to advance the common good).

[160] See Dukeminier & Krier, supra note 141, at 1102. See also Paul Turner & Sam Kalen Takings and Beyond: Implications for Regulation, *19 Energy L.J. 25, 49 (1998).*

[161] See *id. at 49.*

[162] See Ernst Freund, The Police Power: Public Policy and Constitutional Rights 511, at 546-47 (1976).

[163] See ***Armstrong v. United States, 364 U.S. 40, 49 (1980)*** ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

nuisances and other public harms is considered an exercise of the state's police power. [164] In that sense, because the legislation is merely replacing a private nuisance lawsuit, the government is not required to pay compensation.

Purchasing all of the private land necessary to protect our natural resources would be prohibitive because of the great costs involved. Therefore federal, state, and local governments have strained to determine what regulations are permissible to achieve these ends while remaining within the police power of the state. Unfortunately, a detailed examination of Supreme Court jurisprudence starting in the 1800's does not yield any one governing principle for determining which actions will be declared an exercise of state powers requiring compensation. [165] The Court **[*513]** has often avoided the need to balance conflicting rights and regulations by reverting to the construct of nuisance. [166] Thus, in instances when the police power has regulated a categorical nuisance as defined by common law, the Court has ruled such an exercise of power valid and has avoided the larger issue of defining the police power. [167] By the 20th century, the emergence of a largely industrialized society led to the breakdown of the fixed common law categories under which the police power had been traditionally subsumed. [168] Today, as a result, the government faces uncertainty as to whether regulations will be categorized as an exercise of police power or eminent domain, and whether the Court will decide that a regulation is a taking requiring compensation.

In one of the more recent cases on the issue, [169] the court interjected the concept of nuisance back into the discussion over regulatory takings, when it essentially declared that the government's ability to regulate was limited to categories of common law nuisance actionable on an individual level. [170] Understanding the present discussion over what constitutes a taking therefore requires an understanding of the principles of nuisance on which, according to the Supreme Court, the government's ability to regulate is grounded.

C. American Nuisance Law

---

[164] See Dukeminier & Krier supra note 141 at 1146; see also Frank Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1196-97 (1967).

[165] See Charles M. Harr & Michael Allan Wolf, Land-Use Planning: A Casebook on the Use, Misuse, and Re-use of Urban Land 879-888 (4th ed. 1989). Excerpts from famous judicial decisions from the last one hundred years show "the Justices' reluctance to draw sharp distinctions." Id. at 888.

[166] Horwitz, supra note 27, at 28.

[167] Id.

[168] See id. at 30 (arguing that as society became more unequal in an increasingly industrialized world, all acts of government became suspect of the redistributive intent which had previously been ruled an illegal use of the police power).

[169] *Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).*

[170] See Louise A. Halper, Untangling the Nuisance Knot, *26 B.C. Envtl. Aff. L. Rev. 89, 91-92 (1998).*

Many principles of American nuisance law, as developed in early jurisprudence and captured in the Restatement (Second) of Torts, are similar to the Jewish balancing approach to regulating nuisance set forth above. For much of this century, individual nuisance cases served a smaller role in regulating industry, as zoning and other forms of large-scale land use litigation became more prominent in American law. However, the growth of the American property rights movement has presented a threat to government's ability regulate nuisance in this comprehensive manner. In particular, as discussed below, challenges from private litigants have effectively changed many of the original balancing principles of American nuisance and zoning law. (Many of these litigants rely on the authority of the Takings Clause of the Fifth Amendment **[*514]** to argue that a particular regulation amounts to a taking of their property without proper compensation.)

Nuisance law developed in both English and American common law as a method of dealing with land use conflicts. One of the most important elements that nuisance law introduced to land use regulation was a flexibility in balancing societal needs with the rights of the private landowner. [171] Nuisance law is generally divided into areas of public and private nuisance. A public nuisance involves an action that interferes with a public highway or interferes with some other common good, and only a plaintiff who can show a harm distinct from that suffered by the rest of the public has standing to sue for such a nuisance. [172] In contrast, a private nuisance is an invasion of property rights that is unintentional and involves unreasonable, negligent, reckless, or ultra-hazardous conduct. [173] Many public nuisances are now regulated by statutes such as zoning ordinances, and thus a suit under a public nuisance theory often need only show violation of the governing statute. Thus, in the public nuisance context, the balancing of public need and individual rights occurs on the legislative level. In contrast, for private nuisance actions, the balancing of needs remains at the level of judicial decision-making. Attempting to derive from case law coherent principles for balancing nuisance disputes is difficult and many scholars have actually concluded that no coherent doctrine of nuisance can be formulated. [174] This section will therefore present some of the basic recognized principles in this area, and will rely heavily on pre-existing analysis.

Many aspects of American nuisance law are similar to principles discussed in the section on Jewish nuisance and zoning law. In particular, each system employs a balancing approach to regulating nuisance. However, as discussed below, reliance on a balancing approach to regulating nuisance has generated very different results in the two systems. In the sphere of nuisance law, the Jewish principles of Harchakat Nezikin [175] generally produce

---

[171] The earlier approach to land use conflicts in English law revolved around the doctrine of trespass, which was a tort of strict liability, prohibiting consideration of extenuating circumstances such as mistake or necessity. See Robert V. Percival et al., Environmental Regulation: Law, Science, and Policy 73 (3d ed. 2000).

[172] See *Rest. (Second) of Torts 821B* (1979).

[173] See *Rest. (Second) of Torts 822* (1979).

[174] See Halper, supra note 170, at 90.

[175] See supra note 18 and accompanying text.

laws that are less permissive of potential nuisance activity than those that have developed in the American system. Both Jewish and American laws permit injunctions against actions that **[*515]** can be shown to have the potential to cause damage. [176] Additionally, both systems recognize that the amount and regularity of the harm should inform the decision as to whether the harm can be enjoined. [177] Although injunctive relief for actions that may cause damage is available in both Jewish and American law, the American legal evaluation of whether to grant an injunction requires a higher threshold of proof than is required to award damages for harm that has already occurred. [178] The American approach to nuisance thus prohibits a narrower range of actions than under Jewish law, while permitting recovery for harm in more instances. [179]

Another aspect of the American approach to nuisance law that differs from the Jewish approach is the American emphasis on the requirement of interference with actual ownership of the land for a cause of action. [180] This emphasis on ownership stems from the historical roots of American nuisance law in the original doctrine of trespass. Trespass is an unintentional tort and therefore any physical invasion of the land results in liability without regard to the amount of harm, the reasonableness of the activity causing it, or the intent of the trespasser. [181] As a result of this nexus between trespass and nuisance in the common law, American courts generally consider any amount of harm to a person's land actionable under nuisance law. Establishing a cause of action in nuisance based on discomfort or harm to an individual is more difficult. [182] In contrast, as discussed above, Jewish nuisance law accords special protection of individual health against harmful interference. [183]

---

[176] See *Rest. (Second) of Torts 822* d (1979). See supra note 107 and accompanying text for a discussion of the Jewish law on this subject.

[177] See *Rest. (Second) of Torts 822(a)* comm. g. (1979). See supra note 74 and accompanying text for a discussion of the Jewish law on this subject.

[178] See *Rest. (Second) of Torts 822(a)* comm. g (1979).

[179] See supra note 74 and accompanying text for a discussion on the Jewish law concerning damage payments in cases where harm results from failure to follow a law dictated by the principles of Harchackat Nezikin.

[180] H. Marlow Green, Common Law, Property Rights and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future, *30 Cornell Int'l L.J. 541, 547 (1997).* See also supra note 173 and accompanying text for the definition of "nuisance.'

[181] See *Rest. (Second) of Torts 163*, 164 (1978) (one must intentionally enter the land, but need not know that the land is not his, nor that he has no permission).

[182] See Rest. (Second) of Torts 827b comm. d (1978) ("If the invasion involves physical damage to tangible property, the gravity of the harm is ordinarily regarded as great even though the extent of the harm is relatively small. But if the invasion involves only minor and temporary personal discomfort and annoyance, the gravity of the harm may be regarded as slight.").

In response to pressures from industrial growth, American nuisance **[*516]** law has shifted from a strict liability regime to a reasonableness and interest balancing approach, [184] which in turn has resulted in an attenuation of the doctrine's ability to restrict potentially harmful activities. In early American nuisance law, emphasis on physical invasion of the land allowed landowners to enjoin the activities of large industrial operations. [185] However, the judicial shift towards using a weaker balancing test for determining the existence of a nuisance often left small landowners without remedy against industry. [186]

A seminal case in the development of a balancing approach in American nuisance law is the New York case Boomer v. Atlantic Cement Co. [187] In Boomer, a group of neighboring landowners requested injunctive relief against a cement company that caused serious vibrations in the surrounding area and spewed dirt and smoke into the air. The Court of Appeals noted that investment in the cement company exceeded 45 million dollars and that over 300 jobs were at stake. [188] Recognizing that granting an injunction would effectively shut down the company, the court attempted to craft a ruling that would both protect the industry and compensate those affected by the nuisance. The court ordered the cement company to pay plaintiffs lifetime damages to compensate for harms incurred from operation of the plant. [189] In his dissent, Judge Jasen argued that the majority decision effectively permitted the cement company to purchase the ability to harm its neighbors. [190]

---

[183] As noted above, Jewish law refuses to permit an easement for health nuisances such as smoke, smell, vibrations, and articulates. See supra note 130 and accompanying text.

[184] See Halper, supra note 170, at 100-04.

[185] See *Hay v. Cohoes, 2 N.Y. 159, 161 (1849),* cited in,Green supra note 180, at 548, for the principle that New York initially adopted the proposition that any physical interference with land was unreasonable, regardless of the value of the operation causing the interference. See also *Boomer v. Atlantic Cement 26 N.Y.2d 219, 223 (1970); Whalen v. Union Bag & Paper Co., 208 N.Y. 1 (1913)* (court enjoined the operation of a pulp mill whose investment totaled more than a million dollars, where pollution from the mill resulted in a small loss to a downstream farm).

As mentioned above, the American law of nuisance differs according to jurisdiction. For consistency, this section will therefore attempt to use predominantly New York cases.

[186] See Green, supra note 180, at 551.

[187] *26 N.Y.2d 219 (1970).* See supra note 179, at 556 ("Boomer may be viewed as the paradigm for the modern-day application of nuisance law in environmental torts. It has been praised for creating an innovative remedy for those injured by industrial pollution.").

[188] *Id. at 225.*

[189] Id.

[190] *Id. at 230.*

Applying the principles of Jewish law to the Boomer case, allowing an easement for continued operation of nuisances such as smoke and vibrations is not permissible. [191] As discussed above, while Jewish law ultimately permits the sale of a person's right to enjoin the nuisances at issue **[*517]** in Boomer, concerns for health prohibited the involuntary relinquishing of the right that would otherwise result after continued lack of enforcement. [192] The forced sale in Boomer, while providing compensation, forced the plaintiffs to suffer injury to their health, which reflects a lower level of protection of health than the Jewish approach discussed above.

"Coming to the nuisance" in American law, has traditionally weakened a nuisance claim, but has not necessarily barred damages or relief. For example, in Spur Industries, Inc. v. Del E. Webb Development Co, [193] a developer challenged a neighboring feedlot under nuisance law despite the fact that he had purchased and developed his land knowing of the existence of the adjacent feedlot. The Supreme Court of Arizona noted that traditional rules did not permit relief when a landowner knowingly came to an area reserved for industry or agricultural endeavors, and then suffered damage. [194] However, the court determined that because the feedlot was a public nuisance, the court had greater latitude to restrict its operations. [195] Therefore, although the court allowed the developer to enjoin the feedlot operation, the court required the developer to pay the feedlot owners the costs of moving or shutting down their operation. [196]

Jewish law also sheds new light on the Spur Industries case. In a similar case brought before a modern Israeli civil religious court, the residents of one kibbutz complained about the odors that arose when the neighboring kibbutz watered their fields with treated sewage. [197] The court ultimately determined that the kibbutz using the treated sewage had to take all possible precautions to limit the odors, but refused to enjoin them from using the sewage water. [198] Citing a medieval case involving a man prohibited from complaining when he knowingly moved to a town

---

[191] See supra note 30 and surrounding text.

[192] Id.

[193] *108 Ariz. 178 (1972)* (developer brought action against operator of cattle feedlot for creation of public nuisance caused by the smell and flies generated by the feedlot).

[194] *Id. at 184-85.*

[195] Id.

[196] The court also determined that the owners of the feedlot could not reasonably have contemplated that a significant city would grow in the area, and that the monetary relief to Spur was premised on the fact that the nature of the surrounding areas prior to the arrival of the developer made the operation of the feedlot lawful. See *108 Ariz. at 707-08.*

[197] See Harav David Ben Tzion Klien, Niziki Rayach BiHashkeya?: Psak Din [Damages Caused by the Smell of Water Used in Irrigation: A Judgement], 7 Techumin 410 (1985-1987).

[198] See id. at 411-12.

involved in making dye, [199] the Israeli court stated that the people who were complaining knowingly moved to an agricultural area and thus were cognizant that such an area might occasionally have agricultural smells. Despite the fact that the particular odor at issue in the case was a **[*518]** recent development in the area, [200] the court held that the odor was consistent with longstanding local land use.

Both the rule in the Israeli case discussed above, and the Spur Industries holding reflect an understanding of the need to designate specific areas where industrial activities will be permitted. In this area, both Jewish and American law recognize and provide for segregating uses by town or area of development. However, aside from the specific relegation of certain industries to the outskirts of town, the modern American method of designating a specific area for industrial development is not indicated in Jewish law. In Jewish law, once a town has "self designated" as an industrial town or an area has become designated as agricultural, e.g., similar activities are less likely to be enjoined. The differences between Jewish and American law in the context of nuisance, while related to the more fundamental differences discussed above, may also relate to the differences in land availability. Although land constraints are an issue in any society, the extent of the land constraints in America in the last 100 years may have forced the development of more comprehensive land management plans, and has arguably forced the balancing presented in Boomer, as there is increasingly no place an industry can locate that will not impose nuisance on neighbors.

The need for segregation of residential and industrial actions became a paramount concern in America as industry and the population expanded. American cities began to use zoning as a consistent system of regulation in 1916, when New York City promulgated zoning laws in response to concerns for the public safety and welfare from the crowded tenements and dense development. [201] Zoning regulations soon spread across the country as a tool for fulfilling the police power responsibilities of local governments. [202]

As discussed below, zoning regulation and the associated sphere of **[*519]** takings law has largely superseded nuisance law in importance in America. Nonetheless, nuisance law remains integral to the American legal

---

[199] See supra note 139 and accompanying text.

[200] The watering with treated sewage had been constant, however the recent smell was due to a breakdown in the system which could not be fixed until the season was over.

[201] See Statutory Takings, supra note 153, at 176-67. The ideological roots of modern zoning regulations can be traced to Ebenezer Howard, who in 1898 proposed a detailed scheme of wholesome housing, and different areas designated for industry, commerce, public buildings, and residential areas. See Ebenezer Howard, Tomorrow: A Peaceful Path to Real Reform (1898) (known since its revised edition in 1902 by the title Garden Cities of Tomorrow). Howard's book was spurred by the growth of his city, and the increasing industrialization that was spreading across the world. See id. The first "modern" zoning regulations were enacted in 1916 in New York City, after a group of civic leaders from New York sponsored a tour to study how Europeans were managing city growth. See Statutory Takings, supra note 153, at 176. Of the methods they encountered, regulation of in-land development seemed best suited to adapt to U.S. legal, social and economic conditions.

[202] See id. at 177.

landscape by continuing to inform the extent to which the American government can legislate land use. [203] Many of the zoning laws that have become so central to American regulation of land use have goals and results similar to the Jewish zoning regulations discussed above. Unlike Jewish law, however, the efficacy of American zoning law has been seriously compromised, as the primacy of the private property ethic in America has prevented zoning laws in America from generating outcomes consistent with their original intent. The following section discusses this dynamic in the context of zoning and takings jurisprudence.

D. Zoning and Takings Jurisprudence

This section will set forth the fundamentals of American takings jurisprudence with the aim of drawing lessons from the Jewish principles discussed thus far. As with the Jewish law discussed above, [204] traditional American nuisance law permitted injunctive relief. However, the American courts tended to apply more stringent considerations for granting an injunction than when permitting recovery of damages. [205] This stricter test reflected the courts' lack of desire to grant injunctive relief, as such actions would hinder industrial development. [206] Zoning and environmental regulations are similar to the Jewish restrictions discussed above under the principle of Harchakat Nezikin, [207] which are aimed at preventing harms. In this sense, American zoning and environmental regulations are a departure from the normal reluctance to grant injunctive relief, as these damage-preventing regulations essentially grant injunctive relief to whole categories of actions without establishing a need in each individual case.

With the growth and evolution of zoning law came predictable challenges from private property owners arguing that zoning regulation overstepped the permissible exercise of the power of eminent domain and the police power. [208] Those opposed to zoning characterized these laws as a new and unauthorized form of taking away a property right without **[*520]** compensation, and the Takings Clause provided the vehicle for these claims. [209] In relying on the Takings Clause to challenge the reach of zoning regulations, private property owners in America have advanced the presumption that private property rights enjoy primacy over society's need to regulate competing uses. They

---

[203] See Halper, supra note 170 at 92 (arguing that the Supreme Court, in Lucas v. South Carolina Coastal Council, reintroduced nuisance as a central aspect of the takings debate).

[204] See supra note 74 and accompanying text.

[205] See *Rest. (Second) of Torts 822* comm. d. (1978).

[206] Halper, supra note 170, at 112.

[207] See supra note 15 and accompanying text.

[208] See *Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1962)* (upholding the right to zone).

[209] See id. See also Statutory Takings, supra note 153, at 180-182. The prohibition against taking land without compensation is rooted in the 5th Amendment. The 5th amendment is not directly applicable to the states without application of the 14th Amendment, which declares that no one can be deprived of life, liberty, or property, without due process of the law.

argue that while a limited right to regulate property exists, the government does not have the ability to engage in large-scale land management, nor to limit uses of property in specific areas. As discussed above, this limited perception of government's ability to regulate is at odds with the colonial perception of a broader government role in regulating society. In modern society, this view is also at odds with increasing knowledge of the effects that individual actions have on surrounding properties, and the widespread and long-lasting nature of these effects. [210] As will be discussed in more detail below, limiting the government's ability to this perception of government's position fails to recognize the problems faced by the modern world.

A brief review of some of the seminal cases in takings law illustrates the scope of the restrictions under which American government regulates land use. As detailed above, Jewish law recognized that healthy societal development requires a strong government role in balancing conflicting uses. The restrictions on regulation that current proponents of property rights urge would greatly restrict the American government's ability to adequately perform the same balancing. As discussed above, these restrictions ignore the growing need for comprehensive land management, as industry and population expands, and as individuals' actions have an increasing ability to influence those around them.

[*521] One of the early seminal cases in the evolution of the modern regulatory takings doctrine is the 1922 case Pennsylvania Coal Co. v. Mahon. [211] The Supreme Court, in deciding whether to apply the takings provision of the Fifth amendment to regulations enacted under government's police power, declared that: "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." [212] This declaration marked a significant change in the attitude of the courts. Until this decision, takings was largely understood to mean

---

[210] See John F. Beggs, Note: the Theoretical Foundations of the Takings Clause and the Utilization of Historical Conceptions of Property in the Ecological Age, *6 Fordham Envtl. L.J. 867, 905 (1995).*

In addition to learning that our land and its resources are finite, we are also learning that each thing in our environment is connected with every other, and thus whatever happens to one part has ramifications for all of the rest. Traditional conceptions of property, rooted in the pre-ecological age, abstracted each landholding into the proverbial "Blackacre"; each parcel was removed from its native ecosystem and, as a result, its interconnection and interdependence with surrounding parcels were not considered. Gradually, we are becoming cognizant that seemingly isolated factories, farms, and landfills are not nearly as solitary as had once been assumed, or as we would want them to be. Therefore, we are coming to the realization that each parcel of land is part of a network of natural systems extending beyond the boundaries described in the deed, and that the activity of the landowner on each parcel has effects that reverberate throughout the entire ecosystem.

[211] *260 U.S. 393 (1922).*

[212] *Id. at 415.*

a physical appropriation of the land. [213] As Justice Brandeis recognizes in his dissent, Pennsylvania Coal Co. opened the door to cases that would require compensation even where the owner retained the land. [214]

The Pennsylvania Coal decision indicates Supreme Court acknowledgment that the American conceptualization of property as a bundle of rights [215] had gradually overcome the traditional focus on the physical ownership of the land. [216] However, this shift did not imply that the government could not regulate property at all, and in 1926, zoning laws withstood their first Supreme Court challenge. [217] Although the concept of using the police power to protect the public interest was not new to the Court [218] or the public, zoning laws as a use of those powers was an important step in the attempt to regulate development. In Village of Euclid v. Amber Realty Co., [219] the Supreme Court explicitly expressed its continued recognition that certain property rights needed to be placed in the hands of the public in order to fulfill the public interest, and achieve a legitimate exercise of the police power of the state. [220] This decision reflects an approach to balancing industry and development that is akin to **[*522]** the Jewish law grant of large discretionary powers to the government discussed above. [221] However, because of the strong emphasis on property rights in American law, the areas of regulation permitted to the government remained a source of debate. Unfortunately, between the 1920's [222] and 1978 [223] the Supreme Court said almost nothing

---

[213] See Edward J. Sullivan, Evolving Voices in Land Use Law: a Festschrift in Honor of Daniel R. Mandelker: Part II: Discussions on the National Level: Chapter 4: Proposals: The Rise of Reason in Planning Law: Daniel R. Mandelker and the Relationship of the Comprehensive Plan in Land Use Regulation, *3 Wash. U. J.L. & Pol'y 323, 328 (2000).*

[214] See *260 U.S. 393 at 417.*

[215] See Epstein, supra note 7, at 57 (discussing property as a "bundle of ownership rights"), & 59 (discussing this bundle of rights as ownership of a particular thing). See also Goldstein, supra note 145 at 365-69 (discussing the evolution and understanding of the bundle metaphor for property rights).

[216] See supra note 179 and accompanying text for further discussion of this concept.

[217] See *Village of Euclid v. Amber Realty Co., 272 U.S. 365, 17-20 (1926).*

[218] See *Northwestern Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667 (1878)* ("the police power clearly rests upon the fundamental principle that everyone shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary function.").

[219] *272 U.S. 365 (1926).*

[220] See id. at 18-21 (discussing the legality of zoning requirements the court emphasizes that the police power is necessary to the state to protect the welfare of its citizens).

[221] See supra note 17 and accompanying text.

[222] See *Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Nectow v. City of Cambridge, 277 U.S. 183 (1928).*

about the takings issues surrounding zoning regulations [224] and left the development of approaches to balancing to the jurisprudence of individual states. [225]

By the late 1980's, the Supreme Court began to set parameters for permissible zoning. Agins v. City of Tiburon [226] involved a zoning ordinance that placed the Agins's property in a stricter zoning category. The court declared that land use regulation amounts to a taking if it (1) does not "Substantially advances a legitimate state interest", and (2) "denies an owner economically viable use of his land." [227] The open-space ordinance in Agins passed both prongs of this test, because it properly advanced the legitimate state goal of discouraging the conversion of open space to urban congestion. Additionally, although the ordinance limited development, it did not deny the owner economically viable use of his land.

The court clarified the first part of the Agins test in Keystone Bituminous Coal Ass'n v. DeBenedictis [228] by deciding that any state interest relied on for regulation had to be defended to the court. The more defensible **[*523]** the state interest, the more likely it is to be upheld. [229] The court reiterated that while physical appropriation of land would generally be considered an act which required compensation, restraints on the use of property is consistent with the notion of "reciprocity of advantage" advocated by Justice Holmes in Pennsylvania Coal. [230] Because the

---

[223] See *Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).*

[224] See David L. Callies, Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts are Doing About it, *28 Stetson L. Rev. 523, 524-525 (1999);* see also David L. Callies, After Lucas and Dolan: An Introductory Essay, in Takings: Land-Development Conditions and Regulatory Takings after Dolan and Lucas, 1, 3 (David L. Callies ed. 1996) [hereinafter Callies, After Dolan and Lucas].

[225] See *Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123-124 (1978).* In that case, the Supreme Court admitted that examination of past jurisprudence did not yield discernable principles of when a government action required compensation. "The question of what constituted a "taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. This court quite simply, has been unable to develop any "set formula' for determining when "justice and fairness' require that economic injuries caused by public action be compensated by the government … we have frequently observed that whether a particular restriction will be rendered invalid … depends largely "upon the particular circumstances." Id.

[226] *447 U.S. 255 (1980).*

[227] *Id. at 260.*

[228] *480 U.S. 470 (1987)* (Pennsylvania statute regulating the coal industry, requiring that fifty percent of the coal beneath certain structures be left in place in order to minimize risks of subsistence. A mining corporation challenged this regulation, claiming that it was a taking of its property, because it lost the economic development potential of the remaining coal.).

[229] See id.

[230] *260 U.S. 393, 415 (1922).*

government's primary way of preserving the public good is by restricting the individual uses of property, the court expressed a hesitance to finding a taking when the state "merely restrains uses of property that are tantamount to public nuisances." [231]

The same year as Agins, in Nollan v. Calif. Coastal Comm'n, [232] Justice Scalia clarified the "legitimate state interest" section of the Agins test, emphasizing that this test was stricter than a mere reasonableness, or rational basis standard. [233] Justice Scalia stated that there must be an "essential nexus" between the harm caused by the landowner's use of her land, and the solution demanded by the state. [234] In Dolan v. City of Tigard, [235] the Supreme Court added that the government must show a "rough proportionality" between the nuisance created by the landowner's use of his land, and the solution the government seeks to implement through its regulation. [236] When the government cannot demonstrate this proportionality, the regulation becomes "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations." [237]

Five years later, in Lucas v. South Carolina Coastal Council, [238] the Supreme Court further clarified the second prong of the Agins test. Lucas involved a coastal-protection statute, passed after Lucas purchased land, which prevented building of houses on the land thereby greatly reducing its value. The court affirmed that "a regulation that removed all **[*524]** "productive or economically beneficial use' from a discrete, definable interest in property, is a taking requiring compensation under the Fifth Amendment." [239] In keeping with Agins, the court permitted the state to "identify background principles of nuisance and property law that prohibit the uses he now intends in the

---

[231] See *480 U.S. at 491.*

[232] *483 U.S. 825 (1987).*

[233] See Douglas W. Kmiec, At Last, the Supreme Court Solves the Takings Puzzle, in Takings: Land Development Conditions and Regulatory Takings after Dolan and Lucas 107, 109 (David L. Callies, ed. 1996).

[234] *483 U.S. at 837.*

[235] *512 U.S. 374 (1994).*

[236] The city of Tigard required the owner of a hardware store to deed to the city a portion of her land along the river as a floodplain, and bicycle path, as a requirement for granting a permit to expand her store, and pave part of her parking lot. The court determined that because the city could have achieved protection of the floodplain by denying the permit altogether, requiring her to deed the land to the city was neither the only method of achieving the goal, nor proportional to the harm that her expansion would have caused.

[237] *512 U.S. 374, 390 (1994).*

[238] *505 U.S. 1003 (1992).*

[239] After Lucas and Dolan, supra note 224, at 7.

circumstances in which the property is presently found." [240] However, the Supreme Court specifically stated that natural resource protection ordinances do not qualify as legitimate exceptions. [241] Justice Scalia therefore forced the government to restrict its regulations to those actions that would be considered actionable by a private landowner in common law. [242]

One of the reasons for the development of zoning regulations was the recognition that individual nuisance actions could not adequately address the growing conflicts in American land use. The zoning regulations helped contribute to economic development and population growth, and provided a method of balancing the need for industrial development and the need for living spaces that were not contaminated by industrial by-products. Recognition that pollution traveled far beyond the boundaries of the industrial areas, along with increasing knowledge of the extent of the harms caused by pollution and environmental degradation led to the passage of environmental regulations and natural resource protection ordinances. These regulations and ordinances, along with zoning regulations, were intended to protect both humans and nature from the ravages of uncontrolled residential and industrial development. The force of the Dolan, Nollan and Lucas tests effectively limit governmental ability to fulfill these goals and protect broad environmental and societal interests. As set forth below, Jewish law offers some important insights and lessons for American takings jurisprudence and its impact - namely, an impairment of governmental capacity to regulate for the public and environmental good.

[*525]

E. Implications of Current Jurisprudence on Takings

As argued by David Callies, the majority in Lucas essentially "rewrote part of the historical background to regulatory takings" [243] when it wrote that it has always regarded the taking of all economic use by regulation to be a taking that requires compensation. [244] Prior to Lucas, judicially ordered compensation for land regulation was

---

[240] *Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992).* The court stated that identifying these principles would indicate to the Court that the restriction on building on this land was actually present in the title to the land when it was purchased by Lucas. Such a finding would deprive Lucas of his argument that the council violated his reasonable expectations by devaluing his land after purchase.

[241] See *Lucas 505 U.S. 1003.* See also *State v. Johnson, 265 A.2d 711 (Me. 1970); MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635 (1970),* noted in *Just v. Marinette County, 56 Wis. 2d 7, 23 (1972)* (cases where similar ordinance preventing fill of wetlands was ruled an unreasonable exercise of the police power); Donald W. Large, This Land is Whose Land? Changing Concepts of Property Law, 1973 Wis. L. Rev. 1039, 1041.

[242] See Halper, supra note 170 at 95.

[243] See After Dolan and Lucas, supra note 224, at 6. See also *Lucas 505 U.S. 1003, at 1055-56* ("It is not clear from the Court's opinion where our "historical compact' or "citizens' understanding' comes from, but it does not appear to be history. The principle that the State should compensate individuals for property taken for public use was not widely established in America at the time of the Revolution.") (Blackmun, J. dissenting).

rare, and compensation was only required for a physical invasion of the land. [245] The growth of the use of zoning regulations and other ordinances as a tool for managing environmental resources has since led to an increasing number of cases arguing that regulations removing part of the value of the land require compensation as well. [246] As Callies notes, the Court recognized the trend towards increasing government regulation of private property in the context of environmental and other land use regulations, and therefore wrote the Lucas decision in a way that would eventually justify requiring compensation for even partial regulatory takings. [247] This shift of judicial emphasis from the physical aspect of owning property to an economic and rights-based definition of ownership raises the specter of a wholesale move towards an Epstein-oriented perception of regulation and property rights. [248]

Epstein's conception of government regulation does not permit government to make social utility judgments unless it is willing to pay for the resulting restrictions on property owners. [249] Epstein therefore approves of these stronger restrictions on the government, and in fact argues that the government should have no more leeway in its ability to **[*526]** appropriate private property than an individual. [250] Epstein argues that every stick in the bundle of property rights is covered by the Fifth Amendment, and restricting even one stick requires compensation. [251] While he grants that the police power gives the government a limited ability to regulate, Epstein insists that this power is merely an aggregate of the individual's power, and therefore the government has no broader powers than the individual. [252] Additionally, Epstein believes that neither land nor animals have independent rights, and therefore protection of natural resources does not qualify as a valid exercise of police the power. [253] As a result, he agrees

---

[244] The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land use regulation "… denies an owner economically viable use of his land." *Lucas 505 U.S. 1003 at 1015-16.*

[245] See *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)* (holding that a regulation mandating a permanent physical invasion of the land always requires compensation, even if the physical invasion was minimal, and it neither interfered with the owner's use of her property, nor diminished its economic value).

[246] See supra note 208 and accompanying text.

[247] See Percival et al., Environmental regulation: Law, Science, and Policy 8 (3d ed. 2000). See also Michael M. Berger, Lucas v. South Carolina Coastal Council: Yes Virginia, There Can be Partial Takings, in Callies, After Dolan and Lucas, supra note 224, at 148.

[248] See supra note 7 and accompanying text.

[249] See id. at 114-16.

[250] See Epstein, supra note 7, at 36; see also Kmiec, supra note 233, at 109 (arguing that if "the government action would be treated as a taking of private property if it had been performed by some private party … there is a taking of private property, and we must examine further to determine whether compensation must be paid").

[251] See id. at 57-62.

[252] See id. at 107-15.

with the Lucas court that any regulation to protect natural resources requires compensation, because "the simple alteration of privately owned lands does not come within a light year of invasion or [sic] another's property." [254]

Adoption of Epstein's perception of the government's ability to regulate would greatly restrict the government's ability to protect individual health and safety. Such a move would be directly opposite the position adopted by Jewish law. The Jewish conception of government grants the government a broad ability to regulate. Jewish law suggests that rather than protecting individual rights, overly restricting the government's ability to regulate would endanger those rights. American society focuses on property rights, and the rights to economic development, and as such, is concerned when environmental and zoning regulations restrict those rights. Jewish law focuses on the individual's right to a healthy environment, and as such, is concerned when use of property results in degradation of the individuals standard of living. Phrased in these terms, Epstein's restrictive approach to government regulation and property rights fails to recognize the right of every individual to a healthy and safe environment.

Epstein's refusal to recognize natural resource protection as a legitimate exercise of the police power also fails to reflect modern scientific understanding of the interrelationship between the various parts of the ecosystem, and the effect that the degradation of one parcel of land can **[*527]** have on neighboring lands. Justice Hallows, Chief Justice of the Supreme Court of Wisconsin, recognized that developing wetlands has a negative effect on both water quality and flood control in the neighboring properties. [255] He therefore ruled that an ordinance regulating wetlands development was not a taking, because the ordinance was passed to control a public harm. [256] Hallows had the support of his contemporary, Professor Donald W. Large, who argued that much environmental regulation of this nature should properly be viewed as defending the individual property right to prevent nuisances such as

---

[253] See id. at 123, commenting on *Sibson v. New Hampshire, 115 N.H. 124, 126 (1975)* (holding that landfill activity was "bad for the marsh, and bad for mankind"). Epstein asks, "But wherein lie the rights of the Marsh?" Id.

[254] *Id. at 125.*

[255] See *Just v. Marinette County, 56 Wis. 2d. 7 (1972).*See also Michael J. Bean, Taking Stock: The Endangered Species Act in the Eye of a Growing Storm, 13 Pub. Land L. Rev. 77, 83 (1992), cited in Mark Sagoff, Institute of Bill of Rights Law Symposium Defining Takings: Private Property and the Future of Government Regulation: Muddle or Muddle Through? Takings Jurisprudence Meets the Endangered Species Act, *38 Wm. & Mary L. Rev. 825, 839 (1997),* for the proposition that "restrictions aimed at protecting endangered wildlife are designed to keep the exercise of one property right (the landowner's) from destroying another property right (the public's)."

[256] See *Just v. Marinette County, 56 Wis. 2d. 7.* Hallows emphasizes further that limiting the use of private property to the uses which it is naturally suited for is not an unreasonable exercise of the police powers of the state. See *id. at 16.* "Is ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes? An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Id. at 15.*

flooding. [257] They should therefore be considered an exercise of the police power of the state - preventing a public bad, which should not require compensation. [258]

While Jewish law does not address the wide-ranging types of pollution that exist today, nor the extent of natural resource degradation that the current large population of earth has wrought, its framework of laws and principles continues to have lessons for modern problems. As discussed above, the framework permitting a strong government avoids many of the issues raised by the strict interpretation of the police power that Epstein advocates. Recognizing that not all land-use conflicts can be solved on a pure nuisance level, Jewish law permits social utility considerations as the basis for making such determinations. Epstein's denial of the rights of natural resources contradicts the respect for nature imbued in **[*528]** the Jewish tradition. In addition to theological reasons for loving and protecting nature, members of the Jewish agrarian society recognized that protection of natural resources was necessary to their continued sustenance. The Jewish laws restricting the use of property and natural resources therefore reflect recognition that such restrictions are necessary for a properly functioning society. Thus, a legal tradition more than 1000 years old offers the flexibility necessary for dealing with these modern problems while still preserving the principle of the importance of individual property rights.

VI. Conclusion

When man first invented fire, his neighbor probably complained of the smoke, and the local community board asked him to move. Since then, societies have developed different methods of balancing industrial development and individual health. For each society, underlying principles of governance and the balance of power between the government and the citizens dictates how this balancing develops. This paper compares the Jewish and American approaches to balancing the growth of industry and population and the principles each used in its approach. As discussed above, American governance is hindered by distrust of government. In revolting against a government seen as overly oppressive, the mind set of the new democracy was one of individual freedoms, and minimal government interference. While the actual amount of government interference at the time is a matter of debate, the strong concept of individual liberty continues to be a part of the American psyche. Jewish law, lacking this fear of strong government, permits broader government regulation of nuisance and property. The strong sense of duty to both society and others, pervasive in Jewish law, also contributes to the different development of Jewish regulation. Thus the balancing of conflicting rights in Jewish and American law is based on different principles, and has evolved in different directions.

---

[257] Id. See also Goldstein, supra note 145, at 381. "Filling a wetlands affects the private property rights of every single landowner whose land, in proximity to that wetland, ultimately will be affected. The fact that the government is acting on behalf of those landowners does not invoke constitutional questions" because the government is merely pre-emptily protecting a right that could have been enforced through litigation. Id.

[258] See also Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970), cited in Frank Grad, Treatise on Environmental Law 10-34 (2d ed. 1978), for an explanation of the Critical Natural Features Theory, which proposes that there are some critical features of the land such as wetlands, which are so important to the public that no one can claim the right to alter them in a way that would violate the public interest.

Jewish law and its underlying principles emphasize the duty of each individual to ensure that he does not harm another. Expressed in the modern language of rights, this principle is increasingly reflected on a local and international level, most recently in the draft declaration of Principle of Human Rights and the Environment. [259] Principle 2 of the **[*529]** Declaration states that "all persons have the right to a secure, healthy and ecologically sound environment. This right, and other Human rights … are universal, interdependent, and indivisible." [260] While this document does not actually demand any specific action from individual governments, the existence of these principles calls for "a reassessment of existing obligations." [261] This right to a healthy environment along with the precautionary principle discussed above, are important tools for developing and handling both local and international environmental problems. While American law begins to express the approach of the precautionary principle, true adherence to the precautionary principle requires Americans to relinquish some of the individual freedoms cherished by certain segments of the American public. As discussed above, attempts to legislate according to the precautionary principle have faced strong opposition in the form of a revived emphasis on property rights. The current debate over when and why the government must compensate individuals for environmental regulations that reduce the value of their land indicates that neither the precautionary principle, nor the right to a healthy environment has been embraced by large segments of the American public.

The current administration seems to echo this sentiment in its emphasis on assuring that economic growth does not "suffer" from environmental regulations. [262] Repudiation of the Kyoto Protocols, and refusal to act in the face of global warming [263] indicate that the Bush administration has not embraced the precautionary principle. This reluctance seems to be based on the fear that this principle would require halting industrial development and slowing the economy.

This paper presents the Jewish approach to balancing economic development and individual rights in hopes of showing the existence of a system that permits industrial development, while protecting individuals from harm.

---

[259] See Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned, Human Rights and the Environment: Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, U.N. ESCOR Commission on Human Rights, SubCommission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994), annex 1, Draft Principles on Human Rights and the Environment as cited in Neil A.F. Popovic, In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment, *27 Colum. Hum. Rts. L. Rev. 487, 490 n. 12 (1996)).* "The Draft Declaration is neither the last word nor necessarily the best word in any particular aspect of environmental human rights, but it is the most prominent international instrument in the standard-setting process for environmental human rights. *Id. at 493.*

[260] *Id. at 504.*

[261] *Id. at 493.*

[262] See Edmund L. Andrews, Bush Angers Europe by Eroding Pact on Warming N.Y. Times, Apr. 1, 2001, at A3.

[263] See Douglas Jehl, U.S. Going Empty-Handed to Meeting on Global Warming, N.Y. Times, Mar. 29, 2001, at A22.

While the Jewish approach does not address all of the complex issues which face modern society, the recognition that individuals [*530] have a right to a healthy and nuisance free existence is an important principle with modern applications. Emphasis on individual health and welfare in the context of industrial development and a protection of property rights is a method of balancing which can be applied to current attempts to balance these two often conflicting needs. The fierce independence of the American people, while helpful in an age of frontiers and "conquering" the wilderness, is less helpful in an age where the wilderness has been conquered, and the concerns for the future health and safety of humans is at issue. Adopting some of the underlying principles of Jewish law, and adapting them to the modern environmental problems facing America and the rest of the globe would provide this country with a new framework for addressing the increasingly complex environmental issues that face mankind.

End of Document