

NOTES

WHAT *COMMONWEALTH V. ALGER* CANNOT TELL US ABOUT REGULATORY TAKINGS

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*The most intractable questions in takings law involve determinations as to when compensation must be paid for government regulation of private property. Scholars and judges have looked to the history of takings law in the search for guiding principles that can inform, if not resolve, such questions. The 1851 opinion of Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court in *Commonwealth v. Alger* has figured prominently in these investigations.*

This Note argues that such efforts have overlooked other relevant cases Shaw decided, and therefore do not fully appreciate the extent to which Shaw's jurisprudence was informed by a flexible and instrumental view of how certain principles in takings law should be applied to decide cases. Accordingly, this new perspective on Shaw raises doubts about the extent to which a resort to history can provide effective guidance in resolving the current takings muddle.

The distinction [between eminent domain and the police power] is manifest in principle, although the facts and circumstances of different cases are so various, that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers.

—Chief Justice Lemuel Shaw of Massachusetts,
*Commonwealth v. Alger*¹

INTRODUCTION

By all accounts, takings law is a mess. Numerous commentators have noted that the U.S. Supreme Court's takings jurisprudence is

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¹ 61 Mass. (7 Cush.) 53, 86 (1851).

contradictory and confusing.² Some blame this state of affairs on the Court's ad hoc approach to resolving takings questions.³ Others suggest that such questions simply do not lend themselves to easy answers.⁴ As the epigraph above indicates, modern-day politicians, courts, and legal scholars are not the first to recognize that it is often difficult to distinguish between government regulation of property and government appropriation of property.

Nonetheless, scholars and judges have urged us to look to the history of takings law for principles that can inform current decision-making.⁵ For the most part, these perspectives are not originalist; they do not claim that, as a normative matter, we are *required* to adopt prior understandings of constitutional limitations on the government's regulatory power. They instead propose that the jurisprudence of our forebears can offer us *guidance* in addressing our present takings muddle. Some commentators claim this history provides principled limitations on the government's regulatory power, limitations that protect private property rights.⁶ Others argue that an expansive conception of the government's power to regulate is more consistent with historical understandings.⁷

² Carol Rose famously described regulatory takings law as a "[m]uddle." Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984) (describing regulatory takings problem as "intractable"); see also James R. Gordley, *Takings: What Does Matter? A Response to Professor Peñalver*, 31 ECOLOGY L.Q. 291, 291 (2004) ("The doctrine is incoherent and the cases conflict."); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299, 1303–04 (1989) ("[T]he Court's takings doctrine is in far worse shape than has generally been recognized . . . it is difficult to imagine a body of case law in greater doctrinal and conceptual disarray.").

³ See, e.g., William P. Barr, Henry Weissmann & John P. Frantz, *The Gild That Is Killing the Lily: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429, 430–31 (2005) (suggesting that Court's "balance-all-the-incommensurate-factors test" for regulatory takings has created current "mess"); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 679, 683 (2005) ("Current law . . . insists that the question whether a regulatory taking has occurred is to be decided by the Supreme Court itself, not on the basis of articulated legal doctrine, but rather on an ad hoc, case-by-case basis.").

⁴ See, e.g., James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1143–44 (1997) (asserting that by investigating "the different types of ambiguity necessarily entailed in takings cases . . . we readily can understand why the doctrine in this area is so confused and confusing"); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 100 (2002) ("[T]he vagueness in takings doctrine may well reflect a deeply ingrained societal disagreement about the nature of private property and the role of government.").

⁵ See *infra* Part I.B.

⁶ See *infra* notes 57–60 and accompanying text.

⁷ See *infra* notes 63–68 and accompanying text.

The opinion in *Commonwealth v. Alger*⁸—described by one historian as “one of the most influential and frequently cited in constitutional law”⁹—figures prominently in these analyses. In *Alger*, Chief Justice Lemuel Shaw of Massachusetts declared that a statute limiting the length of private wharves in Boston Harbor did not effectuate a taking under the state’s power of eminent domain, but instead represented a legitimate exercise of the police power.¹⁰ While this case has often been cited for the proposition that the legislature has broad power to regulate private property without providing compensation, its meaning has been, and continues to be, contested.¹¹

What commentators consistently overlook, however, is that Shaw also opined on the government’s regulatory authority in a contemporaneous line of cases involving the Mill Acts—statutes that permitted private citizens to build dams and flood neighboring lands in order to power mills. Courts in Massachusetts and elsewhere had consistently upheld these laws, which dated back well into the eighteenth century, as legitimate exercises of the state’s eminent domain power. Shaw largely rejected that view, instead depicting the Acts as police power legislation regulating competing property rights.¹² However, in two

⁸ 61 Mass. (7 Cush.) 53 (1851).

⁹ LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 247–48 (1957).

¹⁰ See *Alger*, 61 Mass. (7 Cush.) at 104. Broadly speaking, the police power is defined as the state’s power to regulate for “the advancement of the public health, safety, morals, or general welfare.” *SAN DIEGO GAS & ELEC. CO. v. CITY OF SAN DIEGO*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting). The precise scope of the state’s police power has been, and continues to be, the subject of considerable uncertainty. See, e.g., 2 JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* 136 (Boston, Ginn & Co. 1893) (“[T]he police power . . . is the ‘dark continent’ of our jurisprudence. It is the convenient repository of everything for which our juristic classifications can find no other place.”); D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 471–72 (2004) (describing contemporary confusion over police power); Walter Wheeler Cook, *What Is the Police Power?*, 7 COLUM. L. REV. 322, 322 (1907) (“No phrase is more frequently used and at the same time less understood . . .”).

For the purposes of this Note, I use the term “police power” to refer to the government’s authority to regulate private property without paying compensation. Thus eminent domain—the government’s authority to appropriate private property as long as compensation is paid—necessarily falls outside the police power. Shaw understood these two powers as being distinct. *Alger*, 61 Mass. (7 Cush.) at 85–86. The key question for him was whether a given government action properly belongs in one category or the other. *Id.* This remains the crucial issue for contemporary jurists as well. See, e.g., John C. Keene, *When Does a Regulation “Go Too Far?”—The Supreme Court’s Analytical Framework for Drawing the Line Between an Exercise of the Police Power and an Exercise of the Power of Eminent Domain*, 14 PENN ST. ENVTL. L. REV. 397, 398–99 (2006) (describing importance of distinction between police power regulation and eminent domain takings for contemporary jurisprudence).

¹¹ See *infra* Part II.A (discussing different scholarly readings of *Alger*).

¹² See *infra* notes 101–03 and accompanying text (introducing distinction between eminent domain and police power in Shaw’s jurisprudence).

opinions he invoked eminent domain theory to explain the Acts, creating uncertainty about which governmental power justified their enactment.¹³

Despite seemingly obvious similarities among these cases, no commentator has considered them holistically.¹⁴ In this Note I argue that scholars who discuss *Alger* have failed to fully appreciate the complexity of Shaw's views on the government's power to regulate the use of private property. My narrow focus on Shaw's opinions is intentional: By highlighting the extent to which the jurisprudence of a single influential judge was oriented towards deciding specific cases through a flexible and instrumental deployment of doctrine, I suggest that broad claims about how nineteenth-century principles can guide current efforts to resolve the takings muddle misperceive how such principles were applied in the past. If anything, this analysis indicates that the problem thought to plague contemporary takings law—the apparent contradictions created by ad hoc, case-by-case rulings—is in fact wholly consistent with Shaw's jurisprudence.

I focus on Shaw for a number of reasons. At the most general level, he is one of the most important judicial figures of the nineteenth century.¹⁵ Oliver Wendell Holmes described Shaw as “the greatest *magistrate* which this country has produced.”¹⁶ *Alger* is one of the most heavily cited nineteenth-century decisions regarding the extent of the police power,¹⁷ and is commonly referred to as the leading for-

¹³ See *infra* Part III.A (discussing Mill Acts opinions and their implications for understanding Shaw's jurisprudence).

¹⁴ In his classic Shaw biography, Leonard Levy does address both *Alger* and the Mill Acts cases in a single chapter—entitled “The Police Power”—but the two analyses do not inform each other to any meaningful extent. LEVY, *supra* note 9, at 247–59.

¹⁵ Shaw was the Chief Justice of the Supreme Judicial Court of Massachusetts for thirty years, during which he wrote approximately 2200 opinions across fifty-six volumes of the Massachusetts Reports, covering a broad range of subjects. *Id.* at 3.

¹⁶ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 85 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881). Levy, one of the leading constitutional and legal historians of the twentieth century, see Adam Liptak, *Leonard Levy, 83, Expert on Constitutional History*, N.Y. TIMES, Sept. 1, 2006, at C11 (describing Levy's importance as a legal and constitutional historian), described him as “the greatest state judge expounding constitutional law before the Civil War.” LEVY, *supra* note 9, at 229. Shaw's influence extended to such diverse fields as labor and criminal law, and his jurisprudence was important for antebellum doctrine in the North regarding both fugitive slaves and segregation. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 249–51, 265–67 (1975); LEVY, *supra* note 9, at 72–118, 166–228.

¹⁷ According to the Westlaw online database, *Alger* has been cited over 700 times. Almost 500 of those citations are from state and federal court decisions. *Alger* was repeatedly cited in seminal nineteenth-century Supreme Court cases such as *Mugler v. Kansas*, 123 U.S. 623, 665 (1887), *Munn v. Illinois*, 94 U.S. 113, 120, 121, 147 (1876), and *Slaughter-House Cases*, 83 U.S. 36, 62 (1872), not to mention its more recent prominence in Justice Blackmun's dissent in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1059–60

mulation of the midcentury understanding of the government's power to regulate the use of private property.¹⁸ But Shaw's central place in this Note is not meant to support a specific understanding of how takings were conceived of in the nineteenth century. Rather, I suggest that a fuller appreciation of the complexities in Shaw's opinions should give us pause as we consider the extent to which past solutions to difficult takings questions offer clear principles to guide us through our own challenging cases.

This Note proceeds in three parts. Part I begins with a brief overview of regulatory takings doctrine in the Supreme Court, with particular emphasis on the Court's efforts to articulate standards for determining whether compensation is required for government regulation. This Part then surveys current commentary on the extent to which the history of takings and regulation can inform modern jurisprudence. Part II engages in an extended analysis of *Alger* and the Mill Acts cases, focusing on how the latter decisions complicate our understanding of Shaw's conception of the government's power to regulate private property.

Part III contemplates two additional Mill Acts cases, which reveal the flexible and instrumental approach to regulation that defined Shaw's jurisprudence. This approach was less concerned with articulating principles of decision than modern scholars might wish. As a means of better appreciating the complexity of Shaw's approach, this instrumentalist view of Shaw's Mill Acts opinions is contrasted with the formalist theory presented by Morton Horwitz in his classic work, *The Transformation of American Law*.¹⁹ The Note concludes with observations on how this analysis of Shaw's jurisprudence calls into question claims about the relevance of history for modern takings law.

(1992) (Blackmun, J., dissenting). Shaw's unique characterization of the Mill Acts as exercises of the government's power to regulate incompatible uses of private property was also explicitly adopted by the Court in *Head v. Amoskeag Manufacturing Co.*, 113 U.S. 9, 24–26 (1884).

¹⁸ Legal historian William Novak opens the first chapter of *The People's Welfare*, his seminal work on regulation in the nineteenth century, with an extended quotation from *Alger* that he describes as “one of the most famous paragraphs in the jurisprudential history of police regulation.” WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 19–20 (1996); see also Barros, *supra* note 10, at 478 (“Perhaps the most important step in the practical evolution of police regulation came in the 1851 case *Commonwealth v. Alger*”); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1599 (2003) (“*Alger* . . . may be the most comprehensive restatement of natural-right takings theory of all the cases considered [in this article].”); Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217, 222 (1984) (describing *Alger* as “landmark decision”).

¹⁹ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780–1860* (1977).

I

REGULATORY TAKINGS

A. *Supreme Court Doctrine*

The Fifth Amendment to the Constitution provides that private property shall not “be taken for public use, without just compensation.”²⁰ Though their precise language varies, state constitutions generally place two similar limitations on the government’s power to take private property: The taking must be for a public purpose and the property owner must be compensated for his loss.²¹ Supreme Court jurisprudence applies the Takings Clause to situations in which the government exercises its power of eminent domain to condemn and appropriate private property.²²

Courts have found it more difficult to determine whether government regulation that reduces the value of private property, but does not physically appropriate or invade it, demands compensation under the Takings Clause. In the past century, the Supreme Court has rendered a number of important decisions addressing the question of such “regulatory takings.” Unfortunately, none has successfully articulated a clear standard for determining when a taking has occurred.²³ Consequently, takings doctrine is described as a morass providing no clear guidance to either property owners or government regulators.²⁴ This has not prevented commentators from advancing theories for distinguishing between takings (which require compensation) and regulations (which do not),²⁵ though many have echoed

²⁰ U.S. CONST. amend. V.

²¹ *E.g.*, MASS. CONST. art. X; OR. CONST. art. I, § 18; WIS. CONST. art. I, § 13.

²² In such cases, the controversies that arise generally focus on whether the taking satisfies the Clause’s two limiting conditions—public use and just compensation. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 484, 489–90 (2005) (finding eminent domain condemnation did not violate public use requirement); *United States v. 50 Acres of Land*, 469 U.S. 24, 26 (1984) (finding eminent domain condemnation did not violate just compensation requirement). The Supreme Court has largely left just compensation decisions to state and lower federal courts. *See* Steve P. Calandrillo, *Eminent Domain Economics: Should “Just Compensation” Be Abolished, and Would “Takings Insurance” Work Instead?*, 64 OHIO ST. L.J. 451, 474 n.111 (2003) (“[M]ost eminent domain litigation questions and scholarship have centered around the specifics of the compensation amount, many of which the Supreme Court has not yet answered.”).

²³ *See* Peterson, *supra* note 2, at 1303 (“[I]t is widely acknowledged that the Court has not provided anything approaching a bright-line definition of when a taking occurs . . .”).

²⁴ *See supra* notes 2–3.

²⁵ *See, e.g.*, John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 466–69 (1983) (arguing for decisional model whose “dominant element is the proposition that a governmental incursion, physical or regulatory, under which property is taken is a presumptive, not a per se, taking”); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1171–72 (1967) (asserting that fairness test is

Shaw's admission that drawing this line is difficult.²⁶

Commentators have focused on several doctrinal principles that run through the Court's takings jurisprudence as means for distinguishing between takings and regulation. Two of these principles—whether the regulation is intended to prevent harm, rather than confer benefit, and whether it confers an average reciprocity of advantage—are particularly relevant to Shaw's jurisprudence and the scholarly commentary on it, and therefore are the subjects of the next sections.

1. *The Harm-Prevention Principle*

The harm-prevention principle states that government regulations intended to prevent a public injury do not trigger the compensation requirement, unlike those meant to confer a public benefit.²⁷ The Court first explicitly stated this principle in 1887 in *Mugler v. Kansas*: Laws that simply prohibited “the use of property for purposes . . . injurious to the health, morals, or safety of the community” did not effectuate a taking.²⁸ A prohibition that effectively abated a nuisance—even when it diminished the value of the property in question—was “very different” from a taking.²⁹

Despite this formulation, as takings law moved into the twentieth century the clear distinction between harm prevention and benefit conferral was blurred. In *Pennsylvania Coal Co. v. Mahon*,³⁰ Justice

only proper test “for ensuring that compensation is paid whenever it ought to be”); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 53, 59 (1990) (“[A] compensable taking occurs when the government intentionally forces [a person] to give up her property, unless the government is seeking to prevent or punish [her] wrongdoing.”); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150–51 (1971) (arguing for new notion of property rights that includes within police power government activities that vindicate “public rights”).

²⁶ See, e.g., Barros, *supra* note 10, at 500 (asserting that Supreme Court has rejected “formalistic distinction” between eminent domain and police power); Rose, *supra* note 2, at 594–97 (discussing tension between divergent views of purposes of property as reason “why the takings problem is so intractable”).

²⁷ Lynda J. Oswald, *The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1458 (1997).

²⁸ 123 U.S. 623, 668–69 (1887). Declaring that the police power cannot be “burdened with the condition that the state must compensate,” the Court ruled that the owner of a brewery was not owed compensation for the loss of his business due to a statutory prohibition on alcohol. *Id.* at 669.

²⁹ *Id.* at 669.

³⁰ 260 U.S. 393 (1922). *Mahon* is widely cited as the beginning of the Court's regulatory takings jurisprudence. See, e.g., Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 770 (1985) (describing *Mahon* as “the seminal eminent domain case”); Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings*:

Holmes implied that harm prevention was a sufficient justification for uncompensated regulation, though he ultimately decided the question on different grounds. Holmes found that a statute requiring mining companies to leave a certain amount of coal in the ground—to prevent the surface from collapsing—required compensation, in part because the statute was *not* aimed at preventing a public nuisance.³¹ Justice Brandeis disagreed, stating that the statute in question involved “merely the prohibition of a noxious use,” and therefore did not necessitate compensation.³² In doing so, he directly affirmed the principle that legislation protecting the public from “dangers threatened” did not effectuate a taking.³³

Late twentieth-century cases did little to clarify whether harm prevention was a cognizable ground for governmental regulation. In a footnote to his majority opinion in *Penn Central Transportation Co. v. City of New York*, Justice Brennan appeared to reject the principle as a means of determining when a taking had occurred. He stated that valid exercises of the police power did not depend upon the “‘noxious’ quality of the prohibited uses.”³⁴ But in dissent Justice Rehnquist argued for judicial recognition of the legitimacy of regula-

Toward a New Theory of Takings Jurisprudence, 40 AM. U. L. REV. 297, 300 (1990) (“The Court accepted the notion that police power regulation of land usage has definable limits in the landmark case of *Pennsylvania Coal Co. v. Mahon*.”); Peterson, *supra* note 2, at 1325 (“The notion that a taking occurs when regulation greatly diminishes the value of a thing originated in *Pennsylvania Coal Co. v. Mahon*.”); Laura McKnight, Note, *Regulatory Takings: Sorting Out Supreme Court Standards After Lucas v. South Carolina Coastal Council*, 41 U. KAN. L. REV. 615, 620 (1993) (“The Supreme Court first explicitly recognized that a police power regulation could be an unconstitutional taking in *Pennsylvania Coal Co. v. Mahon*.”). *But see* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1213 (contending that *Mahon* was not first instance of jurisprudential recognition of regulatory takings).

³¹ *Mahon*, 260 U.S. at 413–14. Holmes avoided a full harm-prevention inquiry by wholly omitting any mention of *Mugler* in his opinion. He stated that, with respect to the government’s power to regulate the uses of private property, “[t]he general rule at least is . . . if regulation goes too far it will be recognized as a taking.” *Mahon*, 260 U.S. at 415 (emphasis added). But he admitted that such determinations would necessarily need to be fact-specific, “and therefore cannot be disposed of by general propositions.” *Id.* at 416. Accordingly, this “diminution in value” principle provides little firm guidance for courts, aside from a general admonition to consider the extent to which property has been affected by regulation. *See, e.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (engaging in “ad hoc, factual inquir[y]” in which “economic impact of the regulation on the claimant” is key consideration).

³² *Mahon*, 260 U.S. at 417 (Brandeis, J., dissenting).

³³ *Id.* Only a few years later, however, the Court concluded that it “need not weigh with nicety” the question of whether a regulated use of property constituted a nuisance; the state could legitimately regulate in favor of one of two conflicting uses simply by determining which one was “of greater value to the public.” *Miller v. Schoene*, 276 U.S. 272, 279–80 (1928).

³⁴ 438 U.S. 104, 134 n.30 (1978).

tion designed to prevent harm, by articulating a “nuisance exception” through which the government could avoid paying compensation as long as it was simply preventing a property owner “from using his property to injure others.”³⁵

In *Lucas v. South Carolina Coastal Council*, Justice Scalia explicitly declared that a general harm/benefit distinction was untenable—any regulation could be portrayed as either preventing harm or conferring benefit, and the distinction was “often in the eye of the beholder.”³⁶ Accordingly, “noxious-use logic” could not distinguish takings that required compensation from regulations that did not.³⁷ But Scalia did adopt Rehnquist’s nuisance exception: Compensation was not owed if the prohibited use was impermissible under the “background principles” of the state’s common law of nuisance.³⁸ As Justice Blackmun pointed out in his dissent, this exception still requires a determination as to “whether a particular use causes harm.”³⁹ Thus, despite its checkered history, the harm-prevention principle can still help decide if a taking has occurred.⁴⁰

³⁵ *Id.* at 144–45 (Rehnquist, J., dissenting) (citing *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887)). Rehnquist contended that, in the case at hand, a New York City administrative decision preventing the owner of Grand Central Terminal from erecting an office tower above the station was not aimed at prohibiting a nuisance, and therefore the owner deserved compensation. *Penn Cent.*, 438 U.S. at 145–46.

³⁶ 505 U.S. 1003, 1024 (1992). This difficulty had been highlighted years earlier by Frank Michelman in his classic article analyzing compensation and regulation. Michelman, *supra* note 25, at 1197–1200; *see also* Jed Rubenfeld, *Usings*, 102 *YALE L.J.* 1077, 1099–1100 (1993) (presenting hypothetical to illustrate difficulty of distinguishing between harm prevention and benefit conferral).

³⁷ *Lucas*, 505 U.S. at 1026.

³⁸ *Id.* at 1029.

³⁹ *See id.* at 1054–55 (Blackmun, J., dissenting). Though Justice Scalia did not respond directly to Justice Blackmun’s riposte, a crucial distinction exists between the nuisance exception Scalia articulated and the more general harm/benefit analysis he sought to reject. While Scalia may have doubts about a contemporary judge’s ability to distinguish between harm prevention and benefit conferral, the nuisance exception simply accepts a *past* determination that the regulation in question is aimed at preventing a harmful use. For Scalia, the justification for privileging past understandings of the state’s regulatory power is clear: If the regulation simply replicates a preexisting common law prohibition, the use restriction at issue inhered in the property title; the owner never had a right to use his property in that way in the first place, thus the regulation cannot effectuate a taking. *Id.* at 1027–29 (majority opinion).

⁴⁰ *See* Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 *COLUM. L. REV.* 1630, 1634–35 (1988) (“[The] distinction between harm and benefit . . . refuses to die.”); Oswald, *supra* note 27, at 1487 (“[T]he intuitive pull of the implicit notions of the harm/benefit test is self-evident even within Justice Scalia’s own opinions.”); Poirier, *supra* note 4, at 118–19 (“[D]espite Scalia’s pronouncement, prevention of harm remains a major fountainhead of the legitimacy of police power regulation . . .”).

2. *The Average Reciprocity of Advantage Principle*

The second principle evident in the Court's jurisprudence, average reciprocity of advantage, provides even less guidance than harm prevention. Much of this difficulty is due to confusion regarding what "average reciprocity of advantage" actually means.⁴¹ Holmes invoked this principle in *Mahon* to distinguish a prior case, in which the Court had upheld a similar statutory requirement that mining companies leave coal in place to prevent flooding into neighboring mines, which might endanger workers. Since under the prior statute each company received an equal benefit or advantage—protection from flooding—the statute did not effectuate a taking.⁴²

In *Penn Central*, however, the Court offered a broader formulation of average reciprocity of advantage (although it did not refer to the principle by name): The burdens on a regulated property owner are mitigated by the fact that she shares in the general societal benefits of the relevant legislation.⁴³ On this view, the principle appears to be satisfied when the burden the law places on the owner is balanced by *some* generalized benefit it creates, regardless of whether he shares in it equally.⁴⁴

Thus it is unclear whether "average reciprocity of advantage" refers to a principle of horizontal equality among regulated property owners or a principle of balance between the benefits and burdens for an individual owner. Accordingly, it provides limited guidance for determining whether a regulation effectuates a taking.⁴⁵ Despite the ambiguous utility of both the average reciprocity of advantage and the

⁴¹ See Coletta, *supra* note 30, at 301 ("The term 'average reciprocity of advantage' is subject to a wide range of definitions.").

⁴² Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (citing Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914)); see also William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 820–21 (1998) (describing facts of *Mahon*). Though Holmes was not explicit on this point, there was no reciprocity in the statute at issue in *Mahon* because it was aimed at preventing surface collapse and therefore benefited above-ground property owners, rather than other similarly-regulated mine owners.

⁴³ See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 134–35 (1978) (stating that Court could not conclude "that the owners of the Terminal have in no sense been benefited by the Landmarks Law").

⁴⁴ In his *Penn Central* dissent, Justice Rehnquist seemed to accept the majority's formulation of the principle, if not its application in the case. He concluded that the burdens the Landmark Law imposed on a few property owners were insufficiently balanced by their share of the public benefit. *Id.* at 147–49 (Rehnquist, J., dissenting).

⁴⁵ See Oswald, *supra* note 27, at 1522 (stating that *Penn Central* majority opinion "essentially wiped out the average reciprocity of advantage rule's ability to distinguish between valid police power actions and invalid regulatory takings").

harm/benefit tests,⁴⁶ certain scholars remain confident that the history of regulatory takings law can provide guidance for resolving difficult cases.

B. Looking to History in Takings Analysis

As the preceding historical analysis reveals, the Supreme Court has had difficulty articulating clear principles for determining whether a taking has occurred. Nonetheless, this lack of doctrinal clarity has not dissuaded certain Justices from arguing, both implicitly and explicitly, that the history of takings law can provide principled guidance for current decisionmaking.⁴⁷ Accordingly, scholars have looked to history to determine the original intent behind the Takings Clause of the U.S. Constitution⁴⁸ as well as similar state provisions,⁴⁹ to investigate the application of just compensation requirements in the states,⁵⁰ to explore the nineteenth-century understanding of the term “public use,”⁵¹ and to examine the public use requirement as an element of classical republicanism.⁵²

Commentators also make historical arguments about regulatory takings in particular, drawing upon *Alger* and other nineteenth-century decisions.⁵³ As the following analysis details, there is little agreement in the scholarship as to how history and prior case law can and should inform the regulatory takings debate. Some commentators contend that history can provide us with general direction and per-

⁴⁶ See *supra* notes 36–37 and accompanying text (discussing Justice Scalia’s objection to harm/benefit distinction in *Lucas*).

⁴⁷ See Jonathan Lahn, Note, *The Uses of History in the Supreme Court’s Takings Clause Jurisprudence*, 81 CHI.-KENT L. REV. 1233, 1235 (2006) (discussing use of historical arguments in *Lucas* and in *Kelo*).

⁴⁸ Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far,”* 49 AM. U. L. REV. 181 (1999); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

⁴⁹ E.g., Derek O. Teaney, Comment, *Originalism as a Shot in the Arm for Land-Use Regulation: Regulatory “Takings” Are Not Compensable Under a Traditional Originalist View of Article I, Section 18 of the Oregon Constitution*, 40 WILLAMETTE L. REV. 529 (2004).

⁵⁰ David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497 (2004).

⁵¹ Eric R. Claeys, *Public-Use Limitations and Natural Property Rights*, 2004 MICH. ST. L. REV. 877.

⁵² Nathan Alexander Sales, Note, *Classical Republicanism and the Fifth Amendment’s “Public Use” Requirement*, 49 DUKE L.J. 339 (1999).

⁵³ E.g., Barros, *supra* note 10, at 473, 479–84, 500–03; Claeys, *supra* note 18, at 1597–1604; Myrl S. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1144–52 (1996); Kobach, *supra* note 30, at 1260–65; Oswald, *supra* note 27, at 1454–55. For further discussion of these authors, see *infra* notes 57–58, 65–67 and accompanying text.

haps even clear rules for protecting private property from uncompensated regulation. Others argue that regulation has historically not been subject to such limiting principles, suggesting that current doctrine should take the same approach. Both categories of claims fail to adequately account for the complexity of nineteenth-century takings law.

The willingness of several Justices to undertake similar inquiries has inspired some of this interest in historical analysis. In *Lucas*, Justice Scalia's majority opinion explicitly tied the government's power to regulate to "background principles" of South Carolina's common law of nuisance,⁵⁴ as required by the "historical compact recorded in the Takings Clause."⁵⁵ While Scalia did not consider specific judicial decisions or doctrine in evaluating whether the regulation in *Lucas* was legitimate, his articulation of a nuisance exception invites other courts to examine their jurisprudential past when making such decisions.⁵⁶ Thus, historical understandings of the state's power over property are thought to provide a timeless set of normative principles for answering current regulatory takings questions.

Following the Court's lead, commentators have advanced different visions of how history can inform takings jurisprudence. Kris Kobach and Eric Claeys separately contend that nineteenth-century courts consistently awarded compensation for government regulation; in their view, this approach was characterized by "coherence" and "clarity," and can therefore serve as a better guide in deciding regulatory takings questions than the Court's current post-*Penn Central* "ad hoc" approach.⁵⁷

Other scholars are less sanguine about the idea that a historical perspective can provide definite rules for assessing regulatory takings, but look to the past nonetheless. Lynda Oswald criticizes the Court

⁵⁴ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031–32 (1992).

⁵⁵ *Id.* at 1028.

⁵⁶ The Court remanded the case to the South Carolina Supreme Court for a determination of whether the state's common law principles would have prevented all economically beneficial uses of the owner's land, as the current regulation did. *Id.* at 1031–32. Justice Scalia, however, was not shy about declaring that he found the possibility "unlikely." *Id.* at 1031.

⁵⁷ Claeys, *supra* note 18; Kobach, *supra* note 30. According to Claeys, the state was charged with securing each property owner her equal use of her property, and restrictions on the "right[s] incident to property ownership" were only justified to the extent that they "enlarge[d] both the personal rights and freedom of action of everyone regulated." Anything beyond that was an "invasion" that required compensation. Claeys, *supra* note 18, at 1553–54, 1572–73. Kobach argues that numerous courts "required compensation when property remained in the possession of its owner but the state restricted usage rights or diminished the property's value," and urges the Court to follow the approach taken in these decisions in its current jurisprudence. Kobach, *supra* note 30, at 1213–14.

for “corrupt[ing]” the harm/benefit test and the average reciprocity of advantage rule. She looks to recover earlier formulations of those principles as means of resolving current takings problems.⁵⁸ In a similar vein, Douglas Kmiec criticizes both the Court and scholars for rejecting the harm/benefit test, and suggests that the “neutral benchmark between harm and benefit” found in historical, common-law conceptions of nuisance can help delineate the scope of the police power.⁵⁹ Catherine Connors urges the Court to apply a nuisance exception narrowly, “[i]n order to remain faithful to its historical origins.”⁶⁰

If the majority opinion in *Lucas* was the inspiration for recent historical scholarship on regulatory takings, Justice Blackmun’s dissent also deserves credit. While Justice Scalia confidently assumed that common law “background principles” of property and nuisance could be judicially determined,⁶¹ Blackmun discussed *Alger* and other nineteenth-century cases in support of his claim that, historically, judges have recognized no “common-law limit on the State’s power to regulate harmful uses.”⁶² This claim is also central to William Novak’s seminal study of regulation in nineteenth-century America. On his account, this period was characterized by extensive, uncompensated government regulation in the name of *salus populi*, “the people’s welfare.”⁶³ Though Novak does not explicitly suggest that past practice should directly inform current jurisprudence, from the outset he makes it clear that one of his purposes is to “explode tenacious myths about nineteenth-century government (or its absence).”⁶⁴

Other commentators have built upon Novak’s work to argue for open-ended regulatory authority. Focusing on Shaw’s opinion in *Alger*, Myrl Duncan claims that the nineteenth century was characterized by a robust doctrine of public rights that privileged the evolving needs of the community in determining the extent to which private

⁵⁸ See Oswald, *supra* note 27, at 1452 (“A return to the original intent of these two rules would enable courts to draw a clearer distinction between regulatory takings and valid police power actions, and would thus provide a critical first step toward resolving the current takings dilemma.”).

⁵⁹ Kmiec, *supra* note 40, at 1639–40.

⁶⁰ Catherine R. Connors, *Back to the Future: The “Nuisance Exception” to the Just Compensation Clause*, 19 *CAP. U. L. REV.* 139, 140 (1990).

⁶¹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–29 (1992).

⁶² *Id.* at 1059–60 (Blackmun, J., dissenting).

⁶³ NOVAK, *supra* note 18, at 13–16. In addition to judicial decisions upholding regulation, Novak exhaustively catalogs the numerous codes, ordinances, bylaws, and statutes that he claims constituted “the overwhelming presence of the state and regulation in nineteenth-century American life.” *Id.* at 235.

⁶⁴ *Id.* at 1.

property could be regulated absent compensation.⁶⁵ He contends that, conversely, the Court's decision in *Lucas* articulates a static conception of "essential use" that mistakenly prioritizes individual benefit over community norms.⁶⁶ D. Benjamin Barros makes a similarly broad claim: Modern regulatory takings decisions should focus exclusively on "whether the government act has rendered the property in question valueless," as that is all our predecessors were truly concerned with.⁶⁷ The current focus in regulatory takings decisions on the "character of the government act" is misplaced, as past courts did not predicate their decisions regarding compensation on whether the regulation was aimed at preventing harm.⁶⁸

The lack of scholarly agreement regarding how history can and should inform the regulatory takings debate is due in large part to the nature of the investigation itself. One hundred and fifty years of state and federal court jurisprudence provides far too much material for one scholar to fully assimilate. Perhaps nineteenth-century takings jurisprudence was too broad and varied to provide any definitive guidance for decisionmaking in the twenty-first century.⁶⁹ Or perhaps the dearth of historical materials renders it too difficult to reconstruct the past in a way that can provide meaning in the present.⁷⁰

Such formulations of the problem are misguided, however, because they presume that with perfect historical information scholars could derive cohesive principles and reach definitive conclusions. But nineteenth-century regulatory takings provoked the same difficulties modern commentators confront. Rather than resolve into either a community-regarding, regulation-friendly jurisprudence of "public rights" or an individual-focused doctrine protective of private property rights, I suggest that nineteenth-century takings law was complex, flexible, and contextual.⁷¹ As the epigraph to this Note indicates, Shaw had as much difficulty articulating a cognizable distinction

⁶⁵ Duncan, *supra* note 53, at 1142–54.

⁶⁶ *Id.* at 1154–57.

⁶⁷ Barros, *supra* note 10, at 473.

⁶⁸ *Id.* at 473, 479–84, 503 (citing cases in which compensation was denied for regulations limiting uses that were not inherently harmful or noxious).

⁶⁹ See Daniel J. Hulsebosch, *The Anti-Federalist Tradition in Nineteenth-Century Takings Jurisprudence*, 1 N.Y.U. J.L. & LIBERTY 967, 967 (2005) (explaining that "diversity within American takings jurisprudence" is due in part to variations in state property law).

⁷⁰ Andrew Gold has concluded that, "due to a scant and ambiguous historical record," the original intent of the Takings Clause with respect to regulatory takings cannot be known. Gold, *supra* note 48, at 182.

⁷¹ As I indicate in my discussion of Shaw's jurisprudence in the Mill Acts cases, there is good evidence that his flexible and instrumental approach was as confusing for his contemporaries as it is for modern readers. See *infra* notes 105–06, 122, 138 and accompanying text.

between takings and regulation as current judges do. The question I explore in the following Parts is whether making such a distinction is what he had in mind in the first place.

II

THE JURISPRUDENCE OF LEMUEL SHAW

This Part compares the police power theory Shaw articulated in *Commonwealth v. Alger* with the view of the government's authority to regulate private property expressed in the Mill Acts cases. *Alger* has been read by several scholars to express an innovative and expansive conception of the police power: Government regulatory authority was freed from its common law moorings, enabling the legislature to place restrictions on property without incurring an obligation to compensate the owner for any consequent diminution in value.⁷² Other scholars have suggested that *Alger* expressed a theory of the police power still tied to traditional principles, rather than a judicial *carte blanche* for regulation.⁷³ In Part II.A, I explain that Shaw's opinion, while not susceptible to definitive readings, articulated a view of governmental authority grounded in the legislature's role as the protector of public rights against incursions by private property owners. The powers that came with that role, while broad, were not without limit.

By reading *Alger* in tandem with a contemporaneous line of cases however, we can see how Shaw simultaneously conceived of the police power in more expansive ways. Part II.B turns to cases addressing the Mill Acts, statutes that allowed mill owners to flood others' land. Shaw contravened Massachusetts precedent and the views of his judicial contemporaries by characterizing the Acts as an expression of the state's power to regulate competing private property rights, not as a taking under eminent domain. As such, these cases offered a more expansive view of regulatory authority: The government could proactively intercede to alter private property arrangements—not simply to protect specific public rights, as in *Alger*, but also to promote a broader public interest or benefit.

⁷² See *infra* notes 82–84 and accompanying text. But see NOVAK, *supra* note 18, at 21 (arguing that *Alger* was “easy case” and Shaw's formulation of police power was not novel).

⁷³ See *infra* notes 86–87 and accompanying text.

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ALGER AND REGULATORY TAKINGS

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A. *Alger and the Defense of Public Rights*

Defendant Alger was indicted for having built a wharf into Boston Harbor beyond the statutory boundary.⁷⁴ He contended that the statute could not, without providing compensation, interfere with his vested right (as a grantee of the former colony) to build wharves and piers on the tidal flats.⁷⁵ As the court conceded, his wharf did not impede navigation in the harbor.⁷⁶

Shaw invoked the language of harm prevention to distinguish between police regulation and a taking: The “restraint of an injurious private use” of property was not an “appropriation” of that property for public use, even if the restraint “diminish[ed] the profits of the owner.”⁷⁷ Shaw emphasized that the statute in *Alger* sought to resolve a conflict between the private right of the landowner to build a wharf into the harbor and the public’s right to navigate the harbor. This resolution emphasized preventing injury to public rights.⁷⁸

When a landowner’s “general duty” to respect public rights was not specific enough for practical enforcement, the legislature could prospectively declare what uses were prohibited.⁷⁹ But while Alger’s wharf extended beyond the statutory boundary, it did not actually impede navigation.⁸⁰ In Shaw’s formulation, the legislature had the power not only to prospectively legislate against private injury to public rights, but also to positively determine what property uses would be considered injurious, even if the same use would not be considered so under the common law of nuisance.⁸¹

It is this move that commentators have found so groundbreaking. Leonard Levy stresses the extent to which the opinion was oriented toward justifying legislation that transcended common law formula-

⁷⁴ *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 64 (1851).

⁷⁵ *Id.* at 59.

⁷⁶ *Id.* at 65.

⁷⁷ *Id.* at 86.

⁷⁸ *See, e.g., id.* at 84 (“The manifest object of these statutes is *to prevent injurious obstructions* in the harbor of Boston . . .” (emphasis added)); *id.* at 85 (“Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall *prevent them from being injurious* . . .” (emphasis added)); *id.* at 86 (“[The regulation] is not an appropriation of the property to a public use, but *the restraint of an injurious private use* by the owner, and is therefore not within the principle of property taken under the right of eminent domain.” (emphasis added)); *id.* at 94 (describing power “*to restrain the injurious use of property*” as “more general power of government”(emphasis added)).

⁷⁹ *Id.* at 95–96.

⁸⁰ The State stipulated to this fact at trial. *Id.* at 56–57.

⁸¹ *Id.* at 96 (“Things done may or may not be wrong in themselves, or necessarily injurious and punishable as such at common law; but laws are passed declaring them offences, and making them punishable, because they tend to injurious consequences.”).

tions. Levy argues that in upholding legislation that not only prospectively guarded against potential nuisance-like activity, but that actually defined what uses of property were sufficiently injurious to warrant restriction, Shaw sought to define the police power in a way that was not “merely declaratory of the common law.”⁸² Harry Scheiber echoes Levy: “Shaw’s opinion represented a profound advancement over previous doctrinal efforts” as “[t]he police power (as Shaw defined it) was not . . . to be restricted to the abatement or regulation of what the common law considered nuisances.”⁸³ Similarly, Justice Blackmun, in his *Lucas* dissent, cited *Alger* to support his claim that the government’s regulatory power was historically not constrained by common law conceptions of nuisance.⁸⁴ Connors argues that “whether or not the use at issue [in *Alger*] was actually a nuisance was not determinative.”⁸⁵

Levy’s argument is in large part a refutation of earlier commentators, who claimed that Shaw grounded the police power in the common law maxim *sic utere tuo ut alienum non laedas* (“use your own so as not to injure another’s”).⁸⁶ Kobach revives this argument in

⁸² LEVY, *supra* note 9, at 253 n.89. Though now a half-century old, Levy’s biography remains tremendously influential among scholars discussing Shaw and his importance. See, e.g., Barros, *supra* note 10, at 479–80 (citing Levy). For a more recent analysis of *Alger* that similarly finds the references to “injurious” uses and “nuisance” to be irrelevant to the decision, see Connors, *supra* note 60, at 155–58. Connors correctly asserts that whether the use in *Alger* was *actually* injurious did not determine the legitimacy of the regulation in question. She further argues that the invocation of nuisance in *Alger* was not meant to establish a nuisance exception in the modern regulatory takings sense, but rather that “references to ‘injurious’ uses and ‘nuisances’ simply describe the ambit of the police power generally.” *Id.* at 156. Justice Scalia later made essentially the same argument in *Lucas*. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 (1992).

⁸³ Scheiber, *supra* note 18, at 222–23. But although Scheiber acknowledges his debt to Levy, *id.* at 224 n.31, instead of emphasizing the ways in which Shaw empowered the legislature to reach beyond common law nuisance for its regulatory authority, Scheiber focuses on Shaw’s formulation of the “political community as a collective entity” as the source of the legislature’s authority. It is the rights of the public—in this case, the right to navigate unimpeded through Boston Harbor—that provide the ground for legislative action. *Id.* at 224.

⁸⁴ *Lucas*, 505 U.S. at 1059–60 (Blackmun, J., dissenting). Bradley Karkkainen makes a similar point in discussing the police power as a “background principle” and “inherent limitation.” Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826, 839–40 (2006). He quotes *Alger* for the proposition that, contrary to Justice Scalia’s “crabbed interpretation” of these terms in *Lucas*, nineteenth-century courts and legislatures reserved a broad and undefined power to regulate private property and, therefore, “regulatory enactment[s] falling within the scope of the state’s reserved power could never result in a compensable ‘taking’ or deprivation of private property.” *Id.* at 839.

⁸⁵ Connors, *supra* note 60, at 157.

⁸⁶ Levy notes that Shaw only used the term once in *Alger*. LEVY, *supra* note 9, at 253. In his classic work on the police power, Ernest Freund criticized *Alger* for its “very vague” definition of the power in *sic utere* terms. See ERNST FREUND, *THE POLICE POWER:*

his article on regulatory takings, contending that the wharf line at issue in *Alger* only “served to clarify what was already prohibited under the common law of nuisance.”⁸⁷

My purpose here is not to adopt one view or the other; *Alger* is a sufficiently complex opinion to permit a variety of reasonable interpretations. Throughout the opinion, however, Shaw repeatedly references injurious and noxious uses.⁸⁸ At its core, Shaw’s justification for the statute in *Alger* rests on the view that the state is empowered to do through legislation what it has always done through the courts—prevent private harms to public rights.⁸⁹ So while the theoretical bounds of the police power were expansive, Shaw framed the inquiry primarily in terms of preventing injury to the public’s right to navigation, not promoting the benefit of public navigation. This suggests that Shaw saw a principled distinction between harm prevention and benefit conferral, one that might serve as the basis for determining whether a statute is a legitimate exercise of the police power or a taking requiring compensation. As we will see in Part II.B, however, the Mill Acts cases undermine this reading of Shaw’s jurisprudence.

It could be argued that *Alger* instantiates a different principle for limiting the scope of government regulation. In the opinion, Shaw articulated a secondary “benefit” the statute provided: “a definite, known and authoritative rule which all can understand and obey.”⁹⁰ Statutes that defined legal obligations with “certainty and precision” had the advantage of preempting disputes over the boundary between

PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 405 (1904) (“[The] application [of the maxim] to the case in hand . . . is based upon no intelligible principle.”). Edward Corwin, on the other hand, lauded Shaw for his role in linking the police power to the common law of nuisance. EDWARD S. CORWIN, *THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY* 68 (1934) (“Chief Justice Shaw for the first time associated the police power with the Cokian maxim, ‘*sic utere tuo ut alienum non laedas*,’ whereby the police power was later on put into leading strings to the common law, more particularly the law of nuisance.”). On the origin and meaning of *sic utere*, see Jeremiah Smith, *The Use of Maxims in Jurisprudence*, 6 HARV. L. REV. 13, 15–17 (1895).

⁸⁷ Kobach, *supra* note 30, at 1262.

⁸⁸ See, e.g., *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 96 (1851) (“[W]e think it is competent for the legislature to interpose, and by a specific enactment to declare what shall be deemed a dangerous or noxious trade”); see also *supra* note 78 (quoting references in *Alger* to “injurious” uses).

⁸⁹ As Levy points out, in addition to restraints on injurious uses, Shaw stated that the police power more generally authorized “regulations . . . as the legislature . . . may think necessary and expedient.” *Alger*, 61 Mass. (7 Cush.) at 85; LEVY, *supra* note 9, at 253 n.90 (quoting language). This language does indicate Shaw saw the police power as resting on a broader foundation than nuisance, one not wholly defined by common law authority. However, the opinion focuses heavily on the prevention of injurious uses and hews closely to traditional understandings of what the appropriate objects of governmental action were.

⁹⁰ *Alger*, 61 Mass. (7 Cush.) at 96.

noxious and innocent uses, and gave owners increased security in their property by making them “sure of the protection of the law.”⁹¹

This “certainty and precision” benefit suggests a role for the average reciprocity of advantage principle in nineteenth-century takings cases. Claeys views *Alger*—which he suggests “may be the most comprehensive restatement of natural-right takings theory” among the cases he considers⁹²—as expressing a form of this principle. He argues that nineteenth-century natural-law concepts required compensation when statutes interfered with the owners’ “free and equal use” of their property.⁹³ Statutes that merely “regulated” property—i.e., “order[ed] and encourage[d its] free and equal use”—were legitimate as long as the rearrangement was to the benefit of all those affected by the regulation, even if they “forcibly rearranged owners’ uses of property.”⁹⁴ Claeys emphasizes Shaw’s contention that the statute in question provided the defendant and those similarly situated with security: As long as they kept their wharves within the boundary line, their property was safe. Claeys views this as the kind of nineteenth-century *quid pro quo* that defined the law as a regulation and distinguished it from a compensable taking.⁹⁵

But Claeys overstates the extent to which Shaw’s validation of the statute in *Alger* was predicated on the supposed benefit it provided wharf owners. Shaw did mention that boundary-fixing statutes offered property owners security by defining legitimate uses.⁹⁶ Nonetheless, as Shaw noted at the end of the opinion, regulatory statutes were for the most part justified by “the expediency and necessity of defining and securing *the rights of the public*,”⁹⁷ not the rights of individual owners. Rather than serving as the basis for his decision, Shaw’s brief reference to the potential benefit owners received from the statute merely clarified that he did not want to require that regulations provide an average reciprocity of advantage in order to be held valid.⁹⁸ Above all, in *Alger* Shaw expressed his concern over the

⁹¹ *Id.* at 96–97.

⁹² Claeys, *supra* note 18, at 1599.

⁹³ *Id.* at 1553–55. Claeys suggests that modern scholars, including Novak, who describe the nineteenth century as a period of heavy government regulation, have read the relevant cases anachronistically. This reading projects a twentieth-century utilitarian worldview onto decisions that Claeys contends were guided instead by natural-rights theory. *Id.* at 1562–63.

⁹⁴ *Id.* at 1554; *see also id.* 1585, 1587–89 (providing fuller discussion).

⁹⁵ *See id.* at 1599–1604 (“The boundary laws did not appropriate *Alger*’s property, because they forced him and every other riparian owner into an advantageous exchange.”).

⁹⁶ *Alger*, 61 Mass. (7 Cush.) at 96–97.

⁹⁷ *Id.* at 104 (emphasis added).

⁹⁸ In addition, nowhere in the opinion does Shaw specifically state that the law in *Alger* is justified because it benefits wharf owners; the brief discussion of the “security” such

rights of the public and upheld the statute in question because it prevented uses that “tend to injurious consequences.”⁹⁹

Thus the search for clear principles in Shaw’s opinion is a frustrating one. He was not prepared to fully liberate the police power from its traditional basis in the nuisance-prevention principle. But his jurisprudence, in *Alger* and elsewhere, was clearly animated by an ethic of deference to legislative judgments.¹⁰⁰ Had he really wanted to restrain the police power in *Alger* he would have insisted on average reciprocity of advantage, as Claeys suggests. And as the Section below shows, in looking at the Mill Acts cases we see that Shaw was wholly willing to transcend traditional doctrinal boundaries and empower the legislature to regulate broadly in the public interest.

B. *The Mill Acts and Promotion of the Public Interest*

Though modern readings of *Alger* may overstate the extent to which Shaw’s decision postulated a new, common law–transcendent theory of the police power, the Mill Acts cases suggest that Shaw’s views were truly expansive, but in ways that have not been fully appreciated. Most notably, limiting principles such as harm prevention or average reciprocity, which can plausibly be read into *Alger*, have disappeared from view.

Throughout Shaw’s tenure as Chief Justice, the Massachusetts Supreme Judicial Court was confronted with cases involving alleged takings of private property, most notably the flooding of land authorized by the Mill Acts.¹⁰¹ Prior to the mid-1830s, the Acts had consist-

regulations offer private owners is illustrated instead by general examples. *See id.* at 96–97 (explaining benefits of legislation regarding, for example, powder magazines and slaughterhouses).

⁹⁹ *Id.* at 96.

¹⁰⁰ *See id.* at 63 (“We do not doubt the power of the legislature to establish this line”); *id.* at 64 (“[T]he legislature may impose restrictions for the public good.”); *id.* at 82 (“[T]he power of the . . . legislature, over the sea, its shores, bays, and covers, and all tide waters, is not limited, like that of the crown at common law.”); *Norwich v. County Comm’rs of Hampshire*, 30 Mass. (13 Pick.) 60, 61 (1832) (“It is always to be presumed, that any act passed by the legislature is conformable to the constitution and has the force of law, until the contrary is clearly shown.”).

¹⁰¹ The Acts were a series of laws dating to the colonial era, which empowered Massachusetts mill owners to build dams and flood their neighbors’ lands. The statutes also removed the landowner’s common law action for trespass, stipulating that the dam-builder was only liable for money damages. *See* HORWITZ, *supra* note 19, at 34–35, 47–49; LEVY, *supra* note 9, at 256–57. For examples of individual Acts, see An Act relating to the support and regulation of Mills, ch. 109, 1826 Mass. Acts 177 (Feb. 28, 1826); An Act in addition to an act, entitled, ‘An Act for the support and regulation of Mills,’ and the several acts in addition thereto, ch. 153, 1825 Mass. Acts 658 (Feb. 26, 1825); An Act for the support and regulation of Mills, ch. 50, 1796 Mass. Acts 573 (Feb. 27, 1796). Many states had equivalent legislation. *See* *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 17 n.* (1885)

ently been deemed a constitutional exercise of eminent domain, given the broad public benefit they brought.¹⁰² In a series of cases stretching over his three decades on the court, Shaw articulated a unique theory regarding these statutes: They did not authorize a taking under the state's power of eminent domain, but instead represented an exercise of the state's authority to resolve conflicts over private property rights to the public's benefit. This version of the police power¹⁰³ complicates our understanding of Shaw's opinion in *Alger*. It posits a legislative authority that did not simply vindicate public

(listing principal statutes from twenty-nine states); Abram P. Staples, *The Mill Acts*, 9 V.A. L. REG. 265 (1903) (comparing Virginia statutes to those from other states).

¹⁰² See, e.g., *Boston & Roxbury Mill Corp. v. Newman*, 29 Mass. 472, 481, 12 Pick. 467, 476 (1832) (declaring statute to be constitutional exercise of eminent domain given "certain and direct interest and benefit" to public); *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. (12 Tyng.) 466, 468–69 (1815) (finding that act providing compensation for damage caused by canal project—"a great public object"—met constitutional requirements); *Stowell v. Flagg*, 11 Mass. (11 Tyng.) 364, 368 (1814) (upholding law providing compensation for flooding due to stated "public importance" of project). In the eighteenth century most of the mills established under the Acts were grist mills, which the "public"—i.e., the local community—did *actually* use. Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 206 (1978).

¹⁰³ While in these cases Shaw is rather opaque as to the Mill Acts' positive source of authority and never explicitly identifies it as the police power, there are several reasons to categorize these cases as such, rather than eminent domain by another name. In *Alger*, Shaw clearly identified the police power and eminent domain as two different sources of authority. *Alger*, 61 Mass. (7 Cush.) at 85. This distinction was not an idiosyncrasy: As Novak writes, "[t]he two categories—'taking' and 'regulation,' 'eminent domain' and 'police power'—were mutually exclusive in the nineteenth century." NOVAK, *supra* note 18, at 278 n.94. Since Shaw unequivocally stated that the Mill Acts were not exercises of eminent domain, by negative inference we can surmise that he saw them as an iteration of the police power.

Before we accept this conclusion, however, we must consider the issue of compensation. The key feature of police power regulations in *Alger* is that they did not require compensation. An argument could be made that because the Mill Acts included a compensation mechanism, then, by definition, they did not come under the police power. But there are at least three reasons to think otherwise. First, Shaw paid relatively little attention to compensation in the opinions in which he characterized the Mill Acts as police power regulation. Compare *Bates v. Weymouth Iron Co.*, 62 Mass. (8 Cush.) 548, 553 (1851) (containing brief discussion of compensation under regulatory view of Acts), with *Hazen v. Essex Co.*, 66 Mass. (12 Cush.) 475, 478–80 (1853) (including lengthy discussion of whether compensation requirement was met in case decided under eminent domain theory). Furthermore, Shaw explicitly stated that no compensation was awarded by the public under the Acts. *Murdock v. Stickney*, 62 Mass. (8 Cush.) 113, 116 (1851). Finally, Shaw described the compensation mechanisms provided for in the statutes in a perfunctory manner, see *Bates*, 62 Mass. (8 Cush.) at 553 (describing compensation from owner "paying annual or gross damages, the equitable assessment of which is provided for by the acts"); *Fiske v. Framingham*, 29 Mass. 69, 73, 12 Pick. 68, 71 (1831) (stating that statute "directs the mode in which such damages shall be assessed and recovered"), suggesting that, unlike in eminent domain cases, the legitimacy of the statutes did not turn on whether they provided compensation.

While Shaw appeared to firmly distinguish the two theories in *Alger*, my reading of two additional Mill Acts opinions in Part III.A, *infra*, suggests that he was much less con-

rights (such as harbor navigation), but also interceded in the arrangement of private rights in order to confer public benefits.

The essential Mill Acts cases were decided around 1850, though Shaw articulated the central component of his unique theory as early as 1831: The Acts regulated competing property rights. As the mill owner and the landowner could not “both enjoy their full rights” and “the public interest in such case coincides with that of the mill-owner . . . the latter shall yield to the former.”¹⁰⁴

While Shaw rejected eminent domain theory more explicitly in subsequent decisions,¹⁰⁵ litigants were apparently confused by his innovation. In 1851, Shaw declared in *Murdock v. Stickney* that the “principle upon which [the Mill Acts are] founded is not, as has sometimes been supposed, the right of eminent domain It is not in any proper sense a taking of the property of an owner of the land flowed, nor is any compensation awarded by the public.”¹⁰⁶ He explained that the Acts authorized neither a taking nor a “use” of the land as a reservoir; they simply granted the mill owner the right to “place a dam on his own land, in order to raise a head of water for mills.”¹⁰⁷

Then came the key move. Since the erection of a milldam could cause the water to “overflow the land of another,” under the common law the landowner could bring an action for trespass. But Shaw continued: “Here the law steps in and declares, that *in consideration of the advantage to the public*, to be derived from the establishment and maintenance of mills, the owner of the land shall not have an action for this necessary consequential damage against the mill-owner,” but rather, “the law deem[s] an adequate and practicable remedy for all the damage sustained, by a compensation in money.”¹⁰⁸ So the compensation requirement in the Mill Acts was not a payment for the

cerned with maintaining clear doctrinal categories when it came to deciding other difficult cases.

¹⁰⁴ *Fiske*, 29 Mass. at 72, 12 Pick. at 71. *Boston & Roxbury Mill Corp. v. Newman*, decided the next year, highlighted the extent to which Shaw’s reformulation of the grounds for the Mill Acts in *Fiske* contrasted starkly with contemporary jurisprudence. In *Newman* the court, sitting without the Chief Justice, explicitly declared the Act in question to be a constitutional exercise of eminent domain given “the certain and direct interest and benefit” to the public it created. 29 Mass. at 481, 12 Pick. at 476.

¹⁰⁵ In the years after *Fiske*, Shaw declared that the Mill Acts conveyed no property interest to the mill owner, “or any authority to make any actual use of the other’s land,” since the land owner had every right to build an embankment against the pent-up water and prevent it from flooding his field. *Williams v. Nelson*, 40 Mass. (23 Pick.) 141, 143 (1839). He also stated that, technically, the Acts conferred to the mill owner only a right to build a dam, not to flood his neighbor’s land “or mak[e] any other direct use” of it. *Fitch v. Seymour*, 50 Mass. (9 Cush.) 462, 466 (1845).

¹⁰⁶ 62 Mass. (8 Cush.) at 113, 116 (1851).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (emphasis added).

taking of land under eminent domain, but rather a statutory mechanism for determining damages in place of what would otherwise be a common law action for trespass, ensuring that mill owners would not be compelled to destroy their dams.¹⁰⁹ At the end of the opinion Shaw reaffirmed his earlier view that the Acts were grounded in the state's power to regulate competing property rights,¹¹⁰ and he repeated this "regulatory" view in another case decided the same year.¹¹¹ On his view, when confronted with two competing—and, presumably, equally valid—property rights, the Mill Acts operated to place a legislative thumb on the scales in favor of the usage that was more to the benefit of the community.

Here we see how the Mill Acts cases expanded the scope of the police power beyond the vision articulated in *Alger* and in ways not fully accounted for by contemporary scholarship. The Mill Acts cases did not restrict the authority to regulate to the prevention of what could reasonably be termed an "injury." If anything, the Acts *encouraged* injury, in that they facilitated the flooding of one person's land by another.¹¹² So while harm prevention was at the core of *Alger*, it played no role in the Mill Acts cases. Harm prevention and benefit conferral were independent justifications for government regulation, and could be judicially determined.

Furthermore, there was no suggestion that the regulation in question had to benefit the affected landowner. This casts doubt upon Claeys's theory that nineteenth-century jurisprudence, including that of Shaw in *Alger*, contained a firm, average reciprocity of advantage principle.¹¹³ The Mill Acts cases do not mention any benefit that accrued to the regulated party, i.e., the flooded landowner. All talk of

¹⁰⁹ *Id.* For a discussion of the role of compensation in Shaw's Mill Acts jurisprudence, see *supra* note 103.

¹¹⁰ *Murdock*, 62 Mass. (8 Cush.) at 116, 118 ("[T]he mill acts were intended to regulate the right enjoyed by every owner of land, through which a running stream of water . . . passes.").

¹¹¹ See *Bates v. Weymouth Iron Co.*, 62 Mass. (8 Cush.) 548, 553 (1851). According to Shaw:

[The right to build a dam under the Mill Acts] is not a right to take and use the land of the proprietor above, against his will, but it is an authority to use his own land and water privilege to his own advantage and for the benefit of the community. It is a provision by law, for regulating the rights of proprietors

Id.

¹¹² While Shaw denied that the flooding engendered by the Mill Acts constituted takings, he recognized that they caused "damage." *Murdock*, 62 Mass. (8 Cush.) at 116.

¹¹³ See *supra* notes 92–99 and accompanying text; see also Oswald, *supra* note 27, at 1521 (stating that average reciprocity of advantage rule "provided a useful mechanism" for determining which regulations were to be compensated).

benefit referred to the public, in terms of what the mills provided.¹¹⁴ Ultimately, regardless of whether *Alger* prescribed some form of reciprocal benefit, the Mill Acts cases show that Shaw did not consider such reciprocity as a necessary condition for legitimate police power regulation.

These Mill Acts decisions articulate a version of the police power reminiscent of—but distinct from—eminent domain and largely unconstrained by limiting principles such as harm prevention or reciprocity. Ultimately, in conflicts between competing rights—be they public-private as in *Alger* or private-private as in the Mill Acts cases—the legislature had broad authority to regulate such rights to the benefit of one and the detriment of the other. Were this the end of the story, we might conclude that the expansive vision Shaw expressed in the Mill Acts cases is indicative of a permissive attitude towards government regulation, and the limitations on the police power suggested in *Alger* should be ignored by those seeking guidance from the nineteenth century when making takings decisions in the twenty-first. But as the next Part indicates, Shaw was not wholly consistent in his characterization of the Mill Acts, and this variability has important implications for the current relevance of his jurisprudence.

III

SHAW RECONSIDERED

In two Mill Acts cases decided contemporaneously with those discussed in Part II, Shaw deviated from his regulatory view of the Acts and found that the statutes in question were, instead, grounded in eminent domain theory.¹¹⁵ As I explain in Part III.A, these cases demonstrate that Shaw's Mill Acts jurisprudence was highly flexible and fact-specific. They also raise doubts about whether firm "principles" can be extracted from his opinions. In Part III.B, I discuss how a holistic account of all the cases discussed in this Note calls into question the formalist theory of Shaw's jurisprudence advanced by Horwitz in *The Transformation of American Law*.¹¹⁶

¹¹⁴ Claeys might argue that the flooded landowner, as a member of the general public, shares equally in the mill benefits. But Claeys's view is predicated on the concept of free use; the "forcible rearranging" of private property can only go uncompensated when it increases each property owner's enjoyment of his *own* property. See *supra* notes 93–94 and accompanying text. It is hard to see how having one's fields flooded increases one's enjoyment of them.

¹¹⁵ *Hazen v. Essex Co.*, 66 Mass. (12 Cush.) 475 (1853); *Chase v. Sutton*, 58 Mass. (4 Cush.) 152 (1849).

¹¹⁶ HORWITZ, *supra* note 19.

A. *The Mill Acts Complicated*

In *Chase v. Sutton*, decided two years before *Alger*, the plaintiff already had received damages from a canal company that flooded his land to create a reservoir.¹¹⁷ He claimed that the subsequent abandonment of the canal project and transfer of the dam to a new owner necessitated either the dam's removal or a second damages payment.¹¹⁸ Shaw unequivocally declared that it did not.¹¹⁹ As he examined the basis of the claim and the defendant's counterarguments, however, Shaw offered a somewhat oblique discussion of the theory behind the Acts: Because mills were a "public object," the Acts were "consistent with justice and the provision of the constitution,"¹²⁰ suggesting that the Acts were an exercise of eminent domain.¹²¹

But then Shaw muddied the waters. He contrasted the Mill Acts in general with the specific statutes incorporating the canal company, stating that "these [latter] acts justifying the flowing of another's land, without his consent, *can rest only on the right of eminent domain*," because the navigable canal was "a use manifestly public."¹²² Shaw concluded that the mills at issue served a "*quasi public*" purpose.¹²³ For reasons not fully clear, Shaw seemed willing to grant that this particular mill, associated with a canal project, was a product of eminent domain, and that the flooding of the land had created a property right in the flooder.¹²⁴

Why would Shaw feel the need to declare that the flooding in this case created a "perpetual easement" through a taking? He had previ-

¹¹⁷ *Chase*, 58 Mass. (4 Cush.) at 156–57.

¹¹⁸ *Id.* at 162–63.

¹¹⁹ *Id.* at 166–68, 171.

¹²⁰ *Id.* at 169.

¹²¹ See *infra* note 127 (discussing cases where constitutional public use requirement was satisfied by broad public interest finding).

¹²² *Chase*, 58 Mass. (4 Cush.) at 169–70 (emphasis added). This sentence has led more than one reader to conclude that *Chase* stands for the proposition that the Mill Acts were generally justified by eminent domain. See HORWITZ, *supra* note 19, at 285 n.110 ("Shaw himself on occasion reverted to a 'pure' eminent domain theory." (citing *Chase*, 58 Mass. (4 Cush.) at 169–70)); Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 619 & n.22 (1940) ("[E]ven such jurists as Chief Justice Shaw of the Massachusetts' Court had no hesitation in holding that such expropriations were valid under the power of eminent domain" (citing *Chase*, 58 Mass. (4 Cush.) at 169)). This confusion may have been shared by Shaw's contemporaries and may explain why Shaw felt constrained to flatly declare two years later that "[t]he principle upon which [the Mill Acts are] founded is not, as has sometimes been supposed, the right of eminent domain" *Murdock v. Stickney*, 62 Mass. (8 Cush.) 113, 116 (1851).

¹²³ *Chase*, 58 Mass. (4 Cush.) at 170.

¹²⁴ *Id.* at 171. ("[W]hen such flowing extends over the lands of another, it is an easement in such lands annexed to the privilege").

ously declared that the Mill Acts gave the dam builder no interest in the landowner's property¹²⁵ and would soon declare in *Murdock* that, as a general matter, the Mill Acts were *not* grounded in eminent domain.¹²⁶ His rationale for making these decisions may lie in the specific facts of the case.¹²⁷

The original legislative enactment at issue in *Chase* allowed the company to build dams and reservoirs as part of a larger canal project, though they could also be used to power mills.¹²⁸ When the canal venture failed, a new enactment permitted the canal company to sell the canal bed to a railroad but keep the dams, which were then sold to another corporation.¹²⁹ The central issue was whether a landowner, having been compensated once for the flooding of his land, could demand an additional payment when the ownership—and purposes—of the dams changed.

Shaw ruled that the original compensation was sufficient.¹³⁰ In doing so, however, he apparently could not maintain the position he expressed in prior cases: that a flooding conveyed no property interest.¹³¹ Though Shaw was not explicit, the logic is clear: If the original flooding of land was seen as simply the “regulation” of competing property interests, the canal company never “took” the underlying land, and therefore it could not transfer this property to a successor. So when the new dam owner looked to benefit from the reservoir's mill-power potential, this was a new “use” conflicting with the land owner's still-existent interest in using his (flooded) land.

¹²⁵ See *Williams v. Nelson*, 40 Mass. (23 Pick.) 141, 143 (1839) (“The statute . . . conveys no interest in the nature of a leasehold or easement . . .”).

¹²⁶ *Murdock*, 62 Mass. (8 Cush.) at 116.

¹²⁷ A possible general explanation is that a canal was quite literally “used by the public,” whereas mills were not. Thus, canal-affiliated mills better satisfied a narrow reading of the public use requirement of the Massachusetts Constitution's takings clause than did mills alone. But this explanation fails given Shaw's later suggestion that a manufacturing mill was *independently* justified under eminent domain. See *Hazen v. Essex Co.*, 66 Mass. (12 Cush.) 475, 477–78 (1853) (“The establishment of a great mill-power for manufacturing purposes, as an object of great public interest, . . . justif[ies] the exercise of the right of eminent domain.”). Shaw's colleagues on the Court also seemed to have no qualms about characterizing mills as a “public use” for constitutional purposes. See *Boston & Roxbury Mill Corp. v. Newman*, 29 Mass. 472, 480–82, 12 Pick. 467, 475–77 (1832) (upholding use of eminent domain for Mill Acts because public was benefited by “improvement[s]” of all sorts, including employment opportunities offered by “manufactories”). In its most recent eminent domain case, the Supreme Court confirmed its practice of reading the U.S. Constitution's public use requirement in a similarly broad manner. See *Kelo v. City of New London*, 545 U.S. 469, 479–82 (2005) (finding that Supreme Court had long held that broad “public purpose” satisfied requirements of Takings Clause).

¹²⁸ *Chase*, 58 Mass. (4 Cush.) at 154–55.

¹²⁹ *Id.* at 157, 167–68.

¹³⁰ *Id.* at 166, 168, 171.

¹³¹ *E.g.*, *Williams v. Nelson*, 40 Mass. (23 Pick.) 141, 143 (1839).

Under the regulatory theory of the Mill Acts, a new pair of competing uses would require a new regulation and a second payment could be required. But if the original flooding *did* grant the canal company a property interest in the underlying land, such an interest could then be transferred to a successor corporation, and no new compensation would be required of the new dam owner.¹³²

So the simple explanation for why Shaw seemed to inconsistently apply the principles of his police power theory is that, in remaining faithful to his “regulatory” view of the Acts, he would be confronted with an undesirable outcome—subjecting a successor owner to additional compensation claims. Shaw seemed unwilling to thus contravene what he acknowledged in *Chase* to be the purpose of the act in question: encouraging the mill owner in “carrying on a great public enterprise.”¹³³

Four years later, in *Hazen v. Essex Co.*,¹³⁴ Shaw deviated again from the regulatory view of the Acts, describing the establishment of mills for manufacturing purposes as “an object of great public interest” and a legitimate “public use, justifying the exercise of the right of eminent domain.”¹³⁵ While this language seems incomprehensible in the face of his declaration in *Murdock* only two years earlier that the Mill Acts were *not* an exercise of eminent domain,¹³⁶ the facts of the case may again explain the discrepancy. The plaintiff in *Hazen* was not a landowner complaining about his flooded fields, but another mill owner whose mill was destroyed by the erection of a new mill half a mile downstream.¹³⁷ Shaw described as a “fallacy” the plaintiff’s apparent claim that a mill was “exempted from being taken under the power of eminent domain.”¹³⁸

Shaw then reasoned that mill owners, as entrepreneurs “for the general benefit,” needed security in their investments.¹³⁹ Those who

¹³² Shaw was at least clear on this point, as he saw fit to state several times that the landowner was not entitled to double compensation. *Chase*, 58 Mass. (4 Cush.) at 166, 168, 171.

¹³³ *Id.* at 165.

¹³⁴ 66 Mass. (12 Cush.) 475 (1853). It is worth noting that *Murdock* and *Bates*, the two primary “regulatory” Mill Acts cases, *see supra* notes 106–11 and accompanying text, were both decided in 1851, halfway between *Chase* and *Hazen*.

¹³⁵ *Id.* at 477–78 (emphasis added).

¹³⁶ *See supra* note 106 and accompanying text.

¹³⁷ *Hazen*, 66 Mass. (12 Cush.) at 475. Apparently the new milldam backed the river up such that the old mill was flooded. *Id.*

¹³⁸ *Id.* at 476. He went on to explain that “[a]n impression of that kind may have arisen from the rule applicable to the general mill acts,” *id.* (emphasis added), suggesting that his attempt in *Murdock* to clear up the general confusion surrounding the theory behind the Acts had only sown further confusion for the litigants in *Hazen*. *See supra* note 122 and accompanying text (describing confusion created by Shaw’s inconsistent theory of Acts).

¹³⁹ *Hazen*, 66 Mass. (12 Cush.) at 477.

first erected a mill on a given stream should not be subject to injury by subsequent mill projects, so on general principles “a mill-proprietor . . . cannot flow a mill already erected.”¹⁴⁰ But since the legislature, under eminent domain, had plenary power to “determin[e] what is necessary to be taken for public use [and] the value of a mill can . . . be compensated in money,” the taking here was legitimate.¹⁴¹

While the exposition in *Hazen* may have lacked clarity, the takeaway, coming at the end of a line of several cases, was clear: Pre-existing mills could only be taken under eminent domain, while fields could be flooded pursuant to the government’s power to regulate; the compensation requirement would be closely scrutinized in eminent domain cases, but only briefly alluded to under the regulatory view.¹⁴² While Shaw appeared to defer to the legislature in *Hazen*,¹⁴³ declaring that the particular act was a legitimate exercise of eminent domain, by characterizing this as an eminent domain case he was in fact imposing constraints on the government’s power to interfere with mill owners’ property rights.¹⁴⁴

These two cases suggest that any attempt to extract broad, readily applicable principles from *Alger* and the Mill Acts opinions should be viewed skeptically. All indications are that Shaw viewed both eminent domain and the police power as flexible—and perhaps interchangeable—doctrines to be deployed according to the facts and circumstances of the cases before him. The government’s power to regulate, while broad, was not unlimited. But Shaw’s understanding of those limits did not necessarily anticipate the principles often advanced today to determine when a regulation becomes a taking. Taken together, *Alger* and the panoply of Mill Acts cases indicate that Shaw held an instrumental, ends-oriented view of the police power and eminent domain. The interests at play dictated which of the two theories he advanced as the basis for a given statute and the limits that doctrinal choice imposed on the legislature’s power. Above all, Shaw oriented his jurisprudence towards the promotion of a particularly

¹⁴⁰ *Id.*

¹⁴¹ *Id.* Shaw easily found mills to be a public use. *Id.* at 477–78. The remainder of the opinion was devoted to a lengthy discussion of why the compensation requirement was adequately met. *Id.* at 478–79.

¹⁴² See *supra* note 103 (analyzing how compensation is addressed in Mill Acts cases).

¹⁴³ 66 Mass. (12 Cush.) at 477 (declaring that general principles protective of mill owners “can have no influence on the legislature, in determining what is necessary to be taken for a public use” and “whether a particular structure . . . is for the public use, is a question for the legislature”).

¹⁴⁴ The protection afforded private property in these cases complicates Duncan’s position that “Shaw believed . . . it was the legislature’s role to protect *public* rights in property . . .” Duncan, *supra* note 53, at 1156 (emphasis added); see also Scheiber, *supra* note 18, at 222–24 (describing Shaw’s jurisprudence in *Alger* as public rights-oriented).

broad understanding of the “public interest,” one that viewed the advancement of private industry as a social good.¹⁴⁵

B. *Shaw and Instrumentalism*

At first glance, this reading of Shaw’s jurisprudence appears to accord well with Horwitz’s central thesis in *Transformation*: In the seventy to eighty years following the American Revolution, an alliance of judges and commercial interests overthrew the antidevelopment legal doctrines of the eighteenth century and transformed the legal system into an instrument for the promotion of economic growth.¹⁴⁶ But Horwitz does not deem Shaw’s regulatory theory of the Mill Acts part of this trend.¹⁴⁷ He contends instead that Shaw’s rejection of eminent domain in the Mill Acts cases was part of the midcentury rise of formalism in American law,¹⁴⁸ wherein those who benefited from the early prodevelopment legal regime adopted legal formalism as a means of locking in their gains against future wealth redistribution.¹⁴⁹

Horwitz’s characterization of Shaw’s regulatory theory of the Mill Acts as a noninstrumental and nonpolitical doctrinal category is perplexing.¹⁵⁰ He describes a broad midcentury shift “from the expansive and growth-oriented utilitarian categories of private law to the restrictive, formal categories of public law,” placing eminent domain among the former.¹⁵¹ He connects the shift from political to formal legal criteria with “the sharply antilegislativ trend that began to take hold in the courts.”¹⁵² While this clarifies Horwitz’s understanding of the term “nonpolitical,” it renders his application of it to Shaw’s jurisprudence all the more questionable, as the Mill Acts opinions are replete

¹⁴⁵ See, e.g., *Murdock v. Stickney*, 62 Mass. (8 Cush.) 113, 116 (1851) (noting “the advantage to the public, to be derived from the establishment and maintenance of mills”); *Fiske v. Framingham*, 29 Mass. 69, 72, 12 Pick. 68, 70–71 (1831) (noting “the interest which the community at large has in the use and employment of mills”).

¹⁴⁶ HORWITZ, *supra* note 19, at xiv–xvi.

¹⁴⁷ *Id.* at 261.

¹⁴⁸ *Id.* (“By ‘formalizing’ the inquiry—that is, by reclassifying the problem into a supposedly nonpolitical doctrinal category—Shaw was able to defuse its general redistributive significance.”).

¹⁴⁹ *Id.* at 254–61. According to Horwitz, after the period in which instrumental doctrines like eminent domain fueled massive wealth redistribution and tremendous economic growth, those who benefited from these changes began to favor formalist nonpolitical legal doctrines as a way of disguising “both the recent origins and the foundations in policy and group self-interest of all newly established legal doctrines.” *Id.* at 253–54.

¹⁵⁰ *Id.* at 261.

¹⁵¹ *Id.* at 259–60.

¹⁵² *Id.* at 259.

with proclamations of legislative deference.¹⁵³ In addition, the regulatory Mill Acts cases are as instrumental as they are political, if we presume that “instrumentalist” or “utilitarian” refers to the view that “legal rules and other forms of law are most essentially tools devised to serve practical ends.”¹⁵⁴ i.e., the appropriations served a public purpose or provided a public benefit. As we have seen, both the regulatory *and* eminent domain Mill Acts cases were replete with references to the public interest.¹⁵⁵

In fact, considerations of the public interest are the crucial element of Shaw’s regulatory theory. In cases like *Fiske*, *Murdock*, and *Bates*, the government had the authority to “regulate” competing property uses by sanctioning the flooding of land precisely because the use the statutes favored—the mills—better coincided with the public interest.¹⁵⁶ If nothing else, this is precisely an instrumental and political view of regulation, in that its validity, in Shaw’s conception, turns on a rather open-ended legislative determination of what best serves public needs.

¹⁵³ See, e.g., *Hazen v. Essex Co.*, 66 Mass. (12 Cush.) 475, 477 (1853) (“In general, whether a particular structure . . . is for the public use, is a question for the legislature . . .”); *Chase v. Sutton*, 58 Mass. (4 Cush.) 152, 169 (1849) (asserting that legislature is “competent to decide what is for the public benefit”); *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55, 57 (1846) (“[I]t is competent for the legislature to interpose, and by positive enactment to prohibit a use of property which would be injurious to the public.”). It also seems curious that Horwitz characterizes eminent domain, a constitutional doctrine directly implicating the power of the government vis-à-vis private citizens, as “private law.” One explanation is that Horwitz may designate eminent domain as private law due to its intimate relation with the law of property. See HORWITZ, *supra* note 19, at 254–55 (describing how developers sought change in courts to secure low-cost development and how property law was judicially created).

¹⁵⁴ ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 20 (1982); see also Willard Hurst, *The Unfinished Work of the Instrumentalists*, 82 MICH. L. REV. 852, 853 (1984) (book review) (“At the heart of instrumentalist thinking has been its future-regarding insistence that people in this society seek to use law to achieve practical social goals.”).

¹⁵⁵ Compare *Murdock v. Stickney*, 62 Mass. (8 Cush.) 113, 116 (1851) (noting “the advantage to the public, to be derived from the establishment and maintenance of mills”), and *Fiske v. Framingham*, 29 Mass. 69, 72, 12 Pick. 68, 70–71 (1831) (noting “the interest which the community at large has in the use and employment of mills”), with *Hazen*, 66 Mass. (12 Cush.) at 477–78 (“The establishment of a great mill-power for manufacturing purposes [is] an object of great public interest . . .”).

¹⁵⁶ See *Bates v. Weymouth Iron Co.*, 62 Mass. (8 Cush.) 548, 553 (1851) (declaring that Acts gave mill owner “authority to use his own land and water privilege to his own advantage and for the benefit of the community”); *Murdock*, 62 Mass. (8 Cush.) at 116 (declaring that, “in consideration of the advantage to the public,” law steps in to regulate competing land uses); *Fiske*, 29 Mass. at 72, 12 Pick. at 71 (declaring that as mill owner and landowner could not “both enjoy their full rights” and “the public interest in such case coincides with that of the mill-owner . . . the latter shall yield to the former”).

If, as Horwitz contends, Shaw wanted to formalize the Mill Acts inquiry,¹⁵⁷ it would appear that he went about it in the wrong way. The better approach would have been simply to follow many of his midcentury colleagues and restrict the definition of public use to actual “use by the public.”¹⁵⁸ This would have excised from eminent domain the instrumental inquiry regarding whether a broadly conceived public benefit inhered in the proposed taking, and substituted a more formal inquiry into whether the public would actually make “use” of the project.

Shaw developed his public interest-oriented regulatory theory precisely because he did *not* want to formalize the Mill Acts inquiry. Rather than joining the midcentury “antilegislativ trend” that Horwitz describes, Shaw remained committed to a flexible approach. In generally recasting the Mill Acts as an exercise of the police power, Shaw sought to broaden the legislature’s ability to regulate private property. Yet he remained ready to intercede when needed with eminent domain (and its compensation requirement) on behalf of industrial interests.¹⁵⁹

CONCLUSION: SHAW AND THE USES OF HISTORY

This analysis of Lemuel Shaw’s jurisprudence is not meant to establish definitive truths regarding the regulation of private property in the nineteenth century. In fact, my primary intent in this Note is to suggest the opposite: Modern claims about the extent to which historical principles animating takings law can inform current debate are potentially problematic, as they often fail to account for doctrinal and jurisprudential intricacy. This review of Shaw’s opinions suggests that if one of the central legal figures of the nineteenth century articulated a complex and seemingly contradictory vision of takings, we would be well advised to view with skepticism claims that history offers us clear guidance for twenty-first century decisionmaking.

This analysis is relevant to the debate over the extent to which common law understandings of nuisance can provide a basis for evaluating the legitimacy of regulation.¹⁶⁰ Justice Scalia confidently

¹⁵⁷ HORWITZ, *supra* note 19, at 261.

¹⁵⁸ See Berger, *supra* note 102, at 208–09 (describing midcentury trend in which courts defined public use to mean “right to use . . . by the public”).

¹⁵⁹ As discussed in Part III.A, *supra*, Shaw retained an eminent domain theory of the Acts when it served to protect industrial interests from successive claims to compensation or the predations of competitors. Landowners without mills, however, received no such protection, as shown in Part II.B, *supra*.

¹⁶⁰ For a history of the nuisance exception explaining the development of nuisance doctrine and its application to regulatory takings, see generally Connors, *supra* note 60.

assumed in *Lucas* that common law “background principles” of property and nuisance can be judicially determined, such that the inherent restrictions on property rights required to avoid a total takings claim become evident.¹⁶¹ Justice Blackmun, in contrast, cited *Alger* for the proposition that, historically, judges have recognized no “common-law limit on the State’s power to regulate harmful uses,” largely because the legislature could itself define what was or was not a nuisance.¹⁶² While my reading of *Alger* suggests that the statute’s validity was more closely tied to its nuisance prevention role than Justice Blackmun or current scholars recognize,¹⁶³ the Mill Acts cases indicate that, according to Shaw, nuisance could be dropped entirely from the police power analysis. The State then could step in to “regulate” private property in ways that were actually harmful to individual interests, by authorizing the flooding of land.

Accordingly, Justice Scalia might be correct that the harm/benefit distinction is not a historically tenable one, but not necessarily, as he claims, because the distinction “is often in the eye of the beholder.”¹⁶⁴ Instead, the harm/benefit test may be a suspect basis for determining the validity of regulation simply because harm prevention and benefit conferral are, and were (at least in Shaw’s mind), flexible concepts to be deployed when needed.¹⁶⁵ In *Alger* harm prevention is the touchstone, while benefit conferral plays a minor role. In the Mill Acts cases the state’s intervention is justified entirely by the benefits mill-dams provide to the public; any notion that governmental regulation must be tied to preventing injurious uses is absent. Thus, these cases suggest that nineteenth-century takings law, at least as articulated by Shaw, was characterized by a flexible vision of how to deploy the doctrinal principles articulated in the opinions. Much like today, the line between regulations and takings was a malleable one.

The lesson learned from Shaw’s jurisprudence, however, is not simply that he struggled with the same line-drawing problems we face now. While the cases presented here can be read to prefigure current controversies over how to distinguish regulations from takings, to read principles like harm prevention and average reciprocity of advantage back into the past is anachronistic. The Mill Acts cases demonstrate that a judge like Shaw was seemingly unafraid to mobilize doctrine in

¹⁶¹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–29 (1992).

¹⁶² *Id.* at 1059–60 (Blackmun, J., dissenting).

¹⁶³ *See supra* Part II.A.

¹⁶⁴ *Lucas*, 505 U.S. at 1024.

¹⁶⁵ *See supra* note 112 and accompanying text.

ways that have proved contradictory and confusing to both modern readers and his contemporaries.¹⁶⁶

This uncertainty about exactly how Shaw conceived of the bounds of the police power poses problems for a number of current commentators. Most obviously, scholars who explicitly look to history for cognizable standards and bright-line rules¹⁶⁷—ones that can be imported into the present and serve as principled restraints on the government's authority to regulate private property—should be troubled by the confusion that the Mill Acts cases sow in standard readings of Shaw's jurisprudence. The totality of Shaw's jurisprudence demonstrates that principles *of any kind* were quite possibly not what he was aiming for.

This insight also poses certain difficulties for scholars who argue that history supports a permissive doctrine of regulatory takings.¹⁶⁸ Namely, while claims that *Alger* stands for a lenient attitude toward government regulation find support in Shaw's jurisprudence in the regulatory Mill Acts cases discussed in Part II.B, the cases in Part III.A suggest that Shaw was prepared to bring the Acts within the ambit of eminent domain when it would serve the end of protecting industrial interests. This flexible and instrumental approach, which seemingly created inconsistency among cases decided at essentially the same time, leaves *any* broad claims about the historical scope of the government's regulatory authority on shaky ground.

The assertion that history is indeterminate and therefore a questionable source of legal authority is not new, so it is not my intention to reconstruct an argument that has been ably made elsewhere.¹⁶⁹ Suffice to say that history, like other sources of legal authority, can be interpreted in ways that lend support to a variety of arguments. This does not mean that certain conclusions about the past are “wrong,” though it does raise doubts about which ones, if any, are “right.”

Indeterminacy, however, is only part of the problem; the greater difficulty is anachronism, or at least misinterpretation. For the most part, the scholars discussed in Part I of this Note view history as a

¹⁶⁶ See *supra* note 122 and accompanying text.

¹⁶⁷ See *supra* notes 57–60 and accompanying text.

¹⁶⁸ See *supra* notes 63–68 and accompanying text.

¹⁶⁹ See Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1029 (1997) (applauding legal historians who treat law “as [a] cultural artifact[], [an] imaginative construct[], historically contingent and perpetually contested and renegotiated”); Suzanna Sherry, *The Indeterminacy of Historical Evidence*, 19 HARV. J.L. & PUB. POL'Y 437, 441 (1996) (“[P]rofessional historians do not attempt to answer the questions which [legal scholars] have raised, because they recognize that history is indeterminate.”).

guide, not as a command.¹⁷⁰ These are not originalist arguments—the past is persuasive, rather than binding, authority.¹⁷¹ Therefore, for the scholars discussed here, absolute precision with respect to what “actually” happened in the nineteenth century is not a necessary condition for using history; it is sufficient that the past provide us with guidance on how to resolve current difficult problems. But this approach does rely on the notion that, at some point in the past, the principles so identified helped our predecessors make the kinds of decisions we struggle with today. There is a sense that our forebears “got it right” and therefore, in facing similar problems, we would be wise to identify and adopt the principles they followed when seeking our own solutions.¹⁷²

My analysis suggests that a “principled” approach is perhaps not what a jurist like Lemuel Shaw was concerned with; or at the very least, he had a flexible and instrumental view of how to apply general principles to specific cases. This does not mean that mobilizing clear rules and standards will fail to extricate us from the takings muddle.¹⁷³ It simply means that looking to history to find those principles may be a misguided effort to discover what was never really there in the first place.

¹⁷⁰ Even Kobach, in referencing the “historical legitimacy” and “doctrinal coherence” of the cases he discusses, only suggests that the Supreme Court “would do well to revisit these forgotten decisions.” Kobach, *supra* note 30, at 1214. Only Justice Scalia—in asserting that the “historical compact recorded in the Takings Clause” prohibits a regulation from depriving the owner of all economic benefit without a background common law principle to support it—suggests that dispositive weight be given to prior understandings, and this originalist view forms only a small part of his overall analysis in *Lucas*. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 (1992). For an example of a recent Supreme Court takings opinion that adopted an explicitly originalist perspective, see *Kelo v. City of New London*, 545 U.S. 469, 506–23 (2005) (Thomas, J., dissenting).

¹⁷¹ What exactly “originalism” means is a subject of much discussion in the legal academy. For good surveys of various understandings, see generally Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L. J. 1765 (1997); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998).

¹⁷² This view is akin to what Michael Dorf calls “heroic originalism,” wherein we privilege the views of our predecessors (and specifically the Framers) because “we believe that in many respects they were wise and farsighted.” Dorf, *supra* note 171, at 1803.

¹⁷³ Some contend that this muddle is intrinsically valuable. Marc Poirier argues that the “mysterious and vacuous limits” of regulatory takings doctrine are actually beneficial: Rather than providing discussion-foreclosing *ex ante* rules, the “vagueness” of takings doctrine fosters ongoing societal discourse in which competing visions of property are worked out in a spirit of community and fairness. Poirier, *supra* note 4, at 190–91; see also Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 604–10 (1988) (arguing that since, in property law, ambiguous “mud” rules and bright-line “crystal” rules serve different dialogic functions, the latter are not necessarily preferable to the former).