

CONSTITUTIONAL PROBLEMS IN ENVIRONMENTAL LEGISLATION—THE MASON LAW

Contemporary public concern for the environment has prompted many states to adopt constitutional amendments¹ and other legislative enactments.² In the area of specific legislation, traditional notions of state police power, tempered by Fourteenth Amendment due process considerations, may seriously affect the states' capacity to respond to ecological problems. The restriction on the states' legislative power results from the imposition on the states of the constitutional mandate, embodied in the Fifth Amendment, that private property shall not be "taken for public use, without just compensation." This provision has been applied to the states by the Fourteenth Amendment and has engendered the development of two distinct, although analogous, constitutional doctrines—eminent domain and police power.³

Under the right of eminent domain the owner of private property cannot suffer a diminution in the use or enjoyment of his property by governmental action without compensation. A central element of this doctrine requires that the property be taken by the government for the beneficial use of the public. The state's exercise of the police power, in contrast, is directed toward the elimination of a use of property which detrimentally affects the public interest. Unlike eminent domain, the police power regulates the use of, or impairs rights in, the property without awarding the owner any compensation for the loss of his property rights.

Historically, the exercise of a state's police power was limited to situations, within its borders, which have deleterious effects on the safety, health or morals of its inhabitants.⁴ But more recent decisions have been willing to include purposes other than the direct protection of safety, health or morals within the sphere of police power.⁵ This inclusion of other than traditional purposes, such as environmental

¹ See Platt, *Toward Constitutional Recognition of the Environment*, 56 A.B.A.J. 1061 (1970).

² See, e.g., N.Y. Agric. and Mkt. Law § 358-a (McKinney 1970).

³ The distinction is outlined in 29A C.J.S. Eminent Domain § 6 (1970):

It has been said to be difficult to distinguish consistently between the right of eminent domain and the police power . . . ; however, they are quite distinct, although analogous Eminent domain takes property because it is useful to the public, while the police power regulates the use of property or impairs rights in property because the free exercise of these rights is detrimental to public interest Exercise of eminent domain [in taking private property for public use results in [the] owner . . . [being] invariably entitled to compensation, while the police power is usually exerted merely to regulate the use and enjoyment of property by the owner . . . [and] the owner [is not] entitled to any compensation for any injury which he may sustain.

⁴ See, e.g., *Lawton v. Steele*, 152 U.S. 133, 139 (1893).

⁵ See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Berman v. Parker*, 348 U.S. 26 (1954).

protection, has necessarily resulted in some contraction of constitutional guarantees. Although these decisions view the substance of constitutional guarantees as essentially static, the scope of application of these guarantees is considered to be "expanding or contracting to meet new and different conditions which are constantly coming within the field of their operation."⁶

Within the last two decades, the scope of Fourteenth Amendment due process guarantees with respect to property ownership and use has narrowed in the face of growing recognition of aesthetic and ecological problems. Although the cases concerning these problems have fallen conceptually into two judicial categories—aesthetics and environmental⁷—these decisions have been substantively linked together. In these decisions, some state legislation designed to preserve or enhance the aesthetic qualities of the state has already withstood attacks based on due process considerations.⁸ Similarly, with only one notable exception,⁹ state efforts to preserve the natural environment have been upheld,¹⁰ even though implementing these efforts required the destruction or confiscation of private property without compensation.¹¹ To date, the furthest extension of judicial approval of a state's exercise of its police power occurred in *A.E. Nettleton Co. v. Diamond*.¹²

In *Nettleton*, the New York Court of Appeals declared the Mason Law¹³ to be a valid exercise of that state's police power. The Mason

⁶ *Euclid v. Ambler Realty Co.*, 272 U.S. at 387.

⁷ Although the aesthetics and environmental cases which are concerned with the exercise of the police power fall roughly into these two categories, there are no substantive legal differences between the two areas. The distinction has developed as a result of a judicial labeling process. Because the word "environment" did not possess its present broad definition when the first aesthetics cases were tried, courts chose the more specific label of aesthetics. Time has eliminated this definitional problem, yet the artificial distinction still persists. However, while observing this nominal distinction, courts have construed the problems raised in aesthetics and environmental cases as substantively the same. See, e.g., *Wes Outdoor Advertising Co. v. Goldberg*, 55 N.J. 347, 362 A.2d 199 (1970).

⁸ See, e.g., *People v. Stover*, 12 N.Y.2d 462, 240 N.Y.S.2d 734 (1963), appeal dismissed, 375 U.S. 42 (1963); *State v. Buckley*, 16 Ohio St.2d 128, 243 N.E.2d 66 (1968), appeal dismissed, 395 U.S. 163 (1969).

⁹ *Johnson v. Maine*, — Me. —, 265 A.2d 711 (1970).

¹⁰ See, e.g., *Adams v. Shannon*, 7 Cal. App.3d 427, 86 Cal. Rptr. 641 (1970); *Corsa v. Tawes*, 149 F. Supp. 771 (D. Md. 1957).

¹¹ See 29A C.J.S., supra note 3.

¹² 27 N.Y.2d 182, 315 N.Y.S.2d 625 (1970).

¹³ N.Y. Agric. and Mkt. Law § 358-a (McKinney 1970):

No part of the skin or body, whether raw or manufactured, of the following species of wild animals or the animal itself may be sold or offered for sale by any individual, firm, corporation, association or partnership within the state of New York after the effective date of this section:—Leopard (*Panthera pardus*), Snow Leopard (*Uncia uncia*), Clouded Leopard (*Neofelis nebulosa*), Tiger (*Panthera tigris*), Cheetah (*Acinonyx jubatus*), Alligators, Caiman or Crocodile

Law prohibited the sale or offer for sale within the State of New York of any part of the skin or body of certain wild animals.¹⁴ The law's coverage extended to animals not indigenous to the state. In upholding the statute, the Court of Appeals found: (1) that the wildlife of the world was a vital asset to the people of New York, and (2) that maintenance of the world life cycle was a valid purpose within the state's police power.¹⁵ This comment will focus on the court's recognition of the state's role in maintaining the world ecological cycle as being a valid purpose within New York's police power. In particular, the comment will consider the judicial reaction to state regulation which only indirectly affects the public interest. After discussing the police power issues raised in *Nettleton* and their application to aesthetics and environmental cases, the analysis will shift to these issues as they directly affect *Nettleton*. The comment will also consider the practical consequences of the decision.

I. JUDICIAL REVIEW AND THE POLICE POWER

Fourteenth Amendment due process guarantees and the states' right to exercise police power have always existed in a state of tension.¹⁶ Because exercise of the police power often requires the confiscation or destruction of private property,¹⁷ due process guarantees¹⁸ have traditionally acted as somewhat of a restraint on this regulatory power. In the early part of this century, the Supreme Court consistently struck down state regulatory acts because it believed that the beneficial aspects of leaving the activity unregulated outweighed the negative considerations inherent in government control.¹⁹ This

of the Order Crocodylia, Vicuna (*Vicugna vicugna*), Red Wolf (*Canis niger*), or Polar Bear (*Thalarctos maritimus*), nor after a period of twelve months from the effective date of this section, of the following species: —Mountain Lion, sometimes called Cougar (*Felis concolor*), Jaguar (*Panthera onca*), Ocelot (*Felis pardalis*), or Margay (*Felis wiedii*).

The Mason Law's provisions effectively limit the market for goods made from the skins of these endangered species in New York. For corporations such as A.E. Nettleton, who manufacture and sell goods principally made from these proscribed skins, the provisions of the Mason Law will prove disastrous. These corporations are faced with the unpleasant choice of either developing a completely new line of products or transferring their operations to other states where the laws are more favorable to the corporation's products.

¹⁴ The state Supreme Court had declared the same statute unconstitutional in *A.E. Nettleton Co. v. Diamond*, 63 Misc.2d 885, 313 N.Y.S.2d 893 (1970).

¹⁵ 27 N.Y.2d at 194, 315 N.Y.S.2d at 633.

¹⁶ E. Freund, *Police Power* § 68 (1904).

¹⁷ See, e.g., *Lawton v. Steele*, 152 U.S. 133 (1893).

¹⁸ See, e.g., U.S. Const. amend. V; U.S. Const. amend. XIV.

¹⁹ See, e.g., *Adams v. Tanner*, 244 U.S. 590 (1916). In this case, a state statute forbade employment agencies from taking placement fees from employees. The legislation was designed to eliminate the extortionate practices of these agencies by shifting the expense to those who could bargain better as, for example, could the employers. The

view has eroded, however, and the steady decline of broad judicial examination of state-regulated activity has continued.²⁰ Courts now hesitate to interfere with state legislation unless it runs "afoul of some specific federal constitutional prohibition, or some valid federal law."²¹

A similar conflict between due process guarantees and state police power has developed with reference to the particular remedy selected by the state to achieve its goals. Early decisions, such as *Weaver v. Palmer Bros. Co.*,²² advocated broad judicial scrutiny of legislative action and compelled the states to devise the "least restrictive" solutions to the problems confronting them; otherwise, the statute would be declared invalid. The *Weaver* view was originally challenged by Justice Holmes.²³ He considered the function of courts as limited to determining whether the legislative remedy was related to the evil sought to be abolished.²⁴ Federal courts have largely accepted Holmes' position,²⁵ although some state courts cling to the more traditional view of *Weaver*.²⁶

The relaxation of judicial scrutiny with respect to the purpose of legislative remedies has, in constitutional terms, expanded the range of activities admitting of state regulation. This shrinking of the judicial role to "an extremely narrow one"²⁷ has, moreover, made the concept of police power an amorphous one. The range of the police power has been termed "the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition."²⁸ Coupled with the hesitancy of the judiciary to upset state legislative schemes, the uncertain definition of police power minimizes the precedent value of cases in general and emphasizes the particular facts of the individual case.

Supreme Court found that even though the agencies charged excessive rates, they served some beneficial purpose because they placed some people in jobs.

²⁰ The decline of broad judicial examination of state-regulated activity has roughly paralleled the demise of the "freedom of contract" theory of constitutional law. *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1949). The simultaneous change of judicial attitudes on these issues demonstrated the emerging willingness of the Court to permit states to restrict business activity.

²¹ *Id.* at 536. The *Lincoln* case specifically criticizes the view taken by the majority in *Adams v. Tanner*, 244 U.S. 590 (1916).

²² 270 U.S. 402 (1925).

²³ *Id.* at 415-16.

²⁴ *Id.* This view was followed in *Staten Island Loaders v. Waterfront Comm'n*, 117 F. Supp. 308 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 439, rehearing denied, 347 U.S. 994 (1954).

²⁵ *Id.* Most state decisions have adopted this extremely flexible view of the relationship between the means adopted and the evil to be remedied. In these cases, the function of the court is defined as determining that the relationship between the means and the evil be not "wholly vain and fanciful." *Grimm v. City of New York*, 56 Misc.2d 525, 289 N.Y.S.2d 358 (1968).

²⁶ See, e.g., *People v. Bunis*, 9 N.Y.2d 1, 210 N.Y.S.2d 505 (1961).

²⁷ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

²⁸ *Id.*

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Together, this flexible definition and relaxed judicial posture provide the context in which the *Nettleton* case must be examined. Since the dissent in that case questioned both the constitutional propriety of the legislation's purpose and the coverage of the Mason Law's implementing provisions, the context in which these questions are considered is crucial in determining prospective adherence to the *Nettleton* result. It is suggested that an analysis of other cases in the areas of aesthetics and the environment will result in a better understanding of how this judicial climate operates, and will produce a clear rationale for the *Nettleton* decision.

II. AESTHETICS AND POLICE POWER

The judicial response to legislation designed in whole or in part to protect or enhance the aesthetic quality of a state has undergone a broad transformation in this century. Initially, courts entertained a narrow view of aesthetic considerations as a proper purpose for exercising the police power. Somewhat grudgingly²⁹ at first, this narrow outlook was supplanted by a broader view which upheld exercises of police power bottomed more explicitly upon aesthetic purposes.

The first recognition of the validity of aesthetics as a public purpose within the scope of the state's police power occurred in a Massachusetts case, *Welch v. Swasey*.³⁰ There the petitioner challenged as a deprivation of property without due process of law, the validity of a city ordinance which limited the height of buildings in certain areas of the municipality. The court found that the principal purpose of the statute was to protect citizens from the ravages of upper story fires and to insure the free flow of sunshine and fresh air throughout the urban area. The court acknowledged aesthetics as a public purpose, however, stating that

the inhabitants of a city or town cannot be compelled to give up rights in property, or to pay taxes, for purely aesthetic objects; but if the primary and substantive purpose of the legislation is such as justifies the act, the considerations of taste and beauty may enter in, as auxiliary.³¹

A later case from the same jurisdiction, *General Outdoor Advertising Co. v. Department of Public Works*,³² approached the issue of legislating aesthetic protection in a slightly different manner. In one

²⁹ For a summary of how slowly this process developed see Comment, Aesthetics as a Justification for the Exercise of the Police Power or Eminent Domain, 23 Geo. Wash. L. Rev. 730 (1955).

³⁰ 193 Mass. 364, 79 N.E. 745 (1907).

³¹ Id. at 375, 79 N.E. at 746.

³² 289 Mass. 149, 193 N.E. 799 (1935).

of the first of many suits brought by billboard owners challenging the constitutionality of state and local regulation of outdoor advertising,⁸³ the court found aesthetic preservation to be within the scope of the police power when exercised "in conjunction with the promotion of safety of travel on the public ways."⁸⁴ As distinguished from earlier cases,⁸⁵ this decision recognized aesthetics as an equally valid public purpose when joined with another more traditional purpose, such as direct physical safety. This view sharply contrasted with the earlier conception of aesthetics as an auxiliary or subsidiary purpose, and illustrated the increasing willingness of some courts to defer to legislative determination of the proper purposes for the exercise of the police power.

This broad view of police power again prevailed in *Berman v. Parker*,⁸⁶ where the Supreme Court upheld an urban renewal act of Congress as a valid exercise of the police power.⁸⁷ In characterizing the limits, as well as the subjects, of the police power as being so diverse as to be incapable of clear definition, Justice Douglas sanctioned aesthetics as a public purpose:

The values it [the results of the exercise of police power] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.⁸⁸

Justice Douglas' sweeping recognition of the police power's seemingly limitless nature, as well as the hesitancy of the judiciary to interfere with its exercise,⁸⁹ established the context in which later aesthetic cases were to be reviewed.⁴⁰ In effect, each case was to be considered on its own merits, with precedent bearing only slightly on its outcome.

The inclination of courts to consider each challenge to the police power on a case-by-case basis, rather than through broad judicial

⁸³ These regulations were principally concerned with the location and extent of outdoor advertising. In most instances, the billboards in issue were located on public thoroughfares.

⁸⁴ 289 Mass. at 187, 193 N.E. at 816.

⁸⁵ See, e.g., *Welch v. Swasey*, 193 Mass. 364, 79 N.E. 745 (1907).

⁸⁶ 348 U.S. 26 (1954).

⁸⁷ This case dealt with an act of Congress (urban renewal in the District of Columbia) which is not traditionally considered as an exercise of the police power in the sense that state and local governments exercise it. However, this federal situation is much like that of the states in that Fifth Amendment guarantees, without the operation of the Fourteenth Amendment, are in tension with the legislative exercise of the police power.

⁸⁸ 348 U.S. at 33.

⁸⁹ *Id.* at 32.

⁴⁰ For a critical view of Justice Douglas' failure to distinguish police power from the power of eminent domain in *Berman*, see Note, 40 Iowa L. Rev. 659 (1955).

declarations, is well demonstrated in two recent cases. In *State v. Buckley*,⁴¹ a state statute required, for purely aesthetic reasons, the concealment of the work and storage areas of junk yards located within the state. The court found constitutional the extensive regulations imposed by a state board on the appearance of the junk yard since the junk yard, the court held, interfered with the "natural aesthetics of the surrounding countryside."⁴² In another case,⁴³ where the interference with the natural aesthetics of the area was less than "patent and gross,"⁴⁴ the New York Court of Appeals sustained an ordinance which regulated the location of clotheslines as a valid exercise of the police power. The court stated:

It is settled that conduct which is similarly offensive to the senses of hearing and smell may be a valid subject of regulation under police power . . . and we perceive no basis for a different result merely because the sense of sight is involved.⁴⁵

Thus, the willingness of the courts to embrace aesthetics as a valid public purpose⁴⁶ which alone may justify state action, has considerably altered the context in which police power cases are examined. Similarly, the requirement, seen in the earlier cases, that police power should be exercised only to eliminate direct dangers to the public health, safety or morals has diminished.

The hesitancy of courts to interfere with statutes oriented towards aesthetics, and their concomitant failure to provide firm judicial guidelines, contributes to the nebulous definition of police power. Moreover, the progression of cases in aesthetics illustrates the development of the judicial conception of the flexible context in which police power questions should be examined. Not surprisingly, this flexible approach to the problems of police power has, to some extent, been adopted in cases dealing with the environment.

III. THE ENVIRONMENT AND POLICE POWER

The development of the judicial attitude towards state legislation aimed at preserving the environment has closely paralleled the growth of the judicial conception of police power as revealed in the aesthetics cases. With only one exception,⁴⁷ the judiciary has thus far avoided

⁴¹ 16 Ohio St.2d 128, 243 N.E.2d 66 (1968), appeal dismissed, 395 U.S. 163 (1969).

⁴² 16 Ohio St.2d at 132, 243 N.E.2d at 70.

⁴³ *People v. Stover*, 12 N.Y.2d 462, 240 N.Y.S.2d 734, appeal dismissed, 375 U.S. 42 (1963).

⁴⁴ *State v. Buckley*, 16 Ohio St.2d 128, 132, 243 N.E.2d 66, 70 (1968).

⁴⁵ 12 N.Y.2d at 468, 240 N.Y.S.2d at 739.

⁴⁶ See, e.g., *Jasper v. Kentucky*, 375 S.W.2d 709 (Ky. 1964).

⁴⁷ *Johnson v. Maine*, — Me. —, 265 A.2d 711 (1970).

interfering with environmental legislation, and has recognized the broad power of the states to legislate in this area.

The original source of this recognition was manifested in nineteenth century decisions⁴⁸ which acknowledged the right of the state to regulate the destruction of its wildlife. In these early cases, the Supreme Court recognized state confiscation of fishing equipment used in restricted waters as a valid exercise of the police power, although private property was being taken without compensation.⁴⁹ The rationale advanced for these decisions was the need of the state to preserve its indigenous food supply for the health of its citizens.⁵⁰ However, since meat and fish were being gathered and sold on a commercial basis, the protection of wildlife for the purpose of insuring an adequate food supply appears to have been an illusory effort to base the decisions on a more traditional public purpose. The statutes in question were plainly directed at conserving the supply of game, and, by implication, preserving the ecological balance of the state's wildlife.⁵¹ Adherence to the purported traditional purpose of these statutes, however, has gradually eroded. In instances where the traditional rationale was relied upon less heavily, the courts were slow to articulate an alternative rationale based primarily on ecological grounds. In *Corsa v. Tawes*,⁵² for example, a state statute prohibited the use of purse seining in Maryland's tidal waters.⁵³ In upholding the statute as a valid exercise of the state's police power, the court labored somewhat in identifying the public purpose which the statute served. Ultimately, the court determined that the purpose was to protect the Menhaden fish which provided eleven percent of another species' food supply.⁵⁴ Unlike the earlier cases, *Corsa* chose a novel public purpose as the basis for the state's exercise of the police power. Although it failed to articulate such purpose precisely, the rationale of preserving fish for the diet of another species of fish is grounded in a conception of ecological balance. *Corsa* differed from the earlier decisions in another

⁴⁸ See, e.g., *Lawton v. Steele*, 152 U.S. 133 (1893).

⁴⁹ *Id.*

⁵⁰ *Id.* See also *New York ex rel. Silz v. Hesterberg*, 211 U.S. 31 (1908).

⁵¹ The language of Justice Day in *New York ex rel. Silz v. Hesterberg* discloses this sort of rationale:

It is not disputed that this [game laws] is a well-recognized and often-exerted power of the State and necessary to the protection of the supply of game which would otherwise be rapidly depleted, and which, in spite of laws passed for its protection, is rapidly disappearing from many portions of the country.

211 U.S. at 39.

⁵² 149 F. Supp. 771 (D. Md. 1957).

⁵³ A federal statute provided that the states of the tidal region were permitted to regulate fishing in the tidal waters. *Id.* at 773.

⁵⁴ *Id.* at 775-76.

sense. While those cases depicted the judiciary's role in examining police power questions as a broad one,⁵⁵ the court in *Corsa* hesitated to interfere even though the purpose of the statute was uncertain to the court, and even though a segment of the Maryland fishing industry would be destroyed if the statute were upheld.⁵⁶

The background against which the court operated in treating the police power issue in *Corsa* is similar to that present in the aesthetics cases. The rationale of *Corsa* and the aesthetic cases would seem to lend support to the broad scope of police power outlined by Justice Douglas in *Berman v. Parker*.⁵⁷ Yet there is a residual reluctance on the part of the judiciary to relinquish the more traditional notions of police power in environmental cases. In particular, the spectre of Justice Holmes' pronouncements on the sacrosanctity of real property in *Pennsylvania Coal Co. v. Mahon* lingers: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁵⁸

In *Johnson v. Maine*,⁵⁹ the Maine Supreme Judicial Court, impressed by Justice Holmes' observations on the nature of real property rights,⁶⁰ struck down as unconstitutional a state conservation measure directed at preserving the ecology of the state's marshlands. In finding that a statutory restriction on the use of privately owned wetlands constituted a taking, the court limited the exercise of the police power to regulating direct dangers to public health, safety or morals.⁶¹ Of course, Maine could limit the use of the land by compensating the owner, but as a practical matter, *Johnson* deprives the state of any control since it necessarily lacks the financial resources to provide compensation to each and every such owner.

In comparison with the aesthetics cases and the conclusions reached in *Corsa v. Tawes*, the *Johnson* decision appears to be somewhat of an anomaly. The restrictive view of the police power, as well as the court's willingness to interfere with state legislation, contrasts sharply with the results in these other cases. To some degree, the *Johnson* case may be distinguished because real property rights were

⁵⁵ See, e.g., *Lawton v. Steele*, 152 U.S. 133 (1893).

⁵⁶ The only commercially feasible way to fish for Menhaden was through purse seining.

⁵⁷ 348 U.S. 26 (1954).

⁵⁸ 260 U.S. 393, 415 (1922). Justice Brandeis, in his dissent, initiated a less protective view of property rights which has gradually, although not completely, undermined Holmes' statement of the law. *Id.* at 417.

⁵⁹ — Me. —, 265 A.2d 711 (1970).

⁶⁰ *Id.* at —, 265 A.2d at 715.

⁶¹ *Id.* at —, 265 A.2d at 717 (dictum).

at issue,⁶² although zoning ordinances, which similarly restrict the use of private property, have been held not to constitute a taking.⁶³

Besides the zoning analogy, the judicial doctrine of public trust⁶⁴ might arguably have been applied in *Johnson* to uphold the state's action. Historically, land which has a peculiarly public nature, such as waterfront property, makes adaptation of the land for *purely* private use inappropriate even though some proprietary rights may be asserted.⁶⁵ Application of the public trust doctrine to this type of land in order to restrict its owner's use has occurred in instances in which navigation or fishing rights were involved.⁶⁶ Although traditionally wetlands have not been subsumed under the doctrine, the value of these areas to the public might arguably justify the judicial limitation on their use. In view of the developments in zoning law, and the possible application of the public trust doctrine, the environmental and aesthetics cases suggest that the *Johnson* decision, despite its distinguishing feature, is certainly questionable.

Another case, *Adams v. Shannon*,⁶⁷ further undermines the rationale of the *Johnson* case. The statute in *Adams* prohibited the importation, possession or sale of any animal which a state board determined to be detrimental to native wildlife. In order to import and possess such an animal (in this instance, the animals were piranha fish), the owner had to obtain a permit from the appropriate state board. The defendant failed to comply with this provision and his fish were confiscated and destroyed. In sustaining the action of the licensing board, a California court of appeals held that such a statute is a proper exercise of police power when the "[l]egislature reasonably determines that the action is needed to protect the local ecology."⁶⁸ Like the aesthetics cases and some of the environmental decisions, the

⁶² According to the majority view, compensation must be provided for the public use of personalty as well as realty provided the personalty interest is ascertainable. 29A C.J.S. Eminent Domain § 108 (1970). Therefore, effective distinctions cannot be drawn between realty and personalty for the purpose of requiring compensation.

⁶³ See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁶⁴ One author has described the effect and limits of the judicially administered public trust doctrine:

Courts have held that since the state has an obligation as trustee which it may not lawfully divest, whatever title the grantee has taken is impressed with the public trust and must be read in conformity with it. . . . The traditional cases suggest the extremes of the legal constraints upon the states: no grant may be made to a private party if the grant is of such amplitude that the state will effectively have given up its authority to govern, but a grant is not illegal because it diminishes in some degree the quantum of traditional uses.

Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473, 486-89 (1970).

⁶⁵ *Id.* at 489.

⁶⁶ See, e.g., *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851).

⁶⁷ 7 Cal. App.3d 427, 86 Cal. Rptr. 641 (1970).

⁶⁸ *Id.* at 432, 86 Cal. Rptr. at 644.

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result in *Adams* comports with the emerging broad scope of the police power. Similarly, *Adams* also permits the legislature to determine what remedy will safeguard the local ecology. However, the decision goes one step further. By explicitly recognizing ecology as a public purpose, this case upholds the regulation of what is at best an unsubstantiated threat to the state's environment.⁶⁹ The other cases in this area require the danger to be imminent: either the aesthetic values of the state must in some way be destroyed or impaired,⁷⁰ or else the wildlife of the state must be directly affected as through extinction by destruction⁷¹ or starvation.⁷²

The recognition of the scope of the police power as including the power to eliminate not only proximate threats to the environment, but even remote dangers to the state's ecology, is quite similar to the issue raised in *Nettleton*. In addition, the context in which the issues in *Adams* were considered also approaches the judicial climate generally prevailing in police power cases concerning aesthetic and environmental legislation. Based on these considerations, an analysis of *Nettleton* should demonstrate that it was correctly decided.

IV. A.E. NETTLETON CO. v. DIAMOND

The A.E. Nettleton Co. was engaged in the manufacture, sale and distribution of men's footwear made from alligator and crocodile skins which are protected by the Mason Law.⁷³ A.E. Nettleton initiated an action for judgment declaring the Mason Law unconstitutional and for an injunction against enforcement of the statute. The *Nettleton* decision actually poses two questions: first, whether the purpose of the legislation in this case went beyond the scope of the state's police power; and second, if the purpose was within the scope of the police power, whether the remedy chosen was reasonably related to eradicating the evil. To answer these questions it is necessary to examine the legislative climate in which the Mason Law was enacted.

The Mason Law was the outgrowth of acute public concern over

⁶⁹ Although the case quotes state officials as saying the piranha, if placed in the local waters, would constitute a threat to the state's wildlife, there is a dispute as to evidence of whether the piranha could survive in California's waters. There is, however, proof that the piranha could be a predator which would tend to cast the local ecology into a state of imbalance. The predatory evidence depends on a showing that South American climatic conditions would prevail in California. *Id.* at 433, 86 Cal. Rptr. at 644-45.

⁷⁰ See, e.g., *State v. Buckley*, 16 Ohio St.2d 128, 243 N.E.2d 66 (1968), appeal dismissed, 395 U.S. 163 (1969). *People v. Stover*, 12 N.Y.2d 462, 240 N.Y.S.2d 734, appeal dismissed, 375 U.S. 42 (1963).

⁷¹ See, e.g., *Lawton v. Steele*, 152 U.S. 133 (1893); *New York ex rel. Silz v. Hesterberg*, 211 U.S. 31 (1908).

⁷² See, e.g., *Corsa v. Tawes*, 149 F. Supp. 771 (D. Md. 1957).

⁷³ N.Y. Agric. and Mkt. Law § 358-a (McKinney 1970).

world ecological conditions. Like its New York counterpart, the Harris Law,⁷⁴ it was drafted and enacted in concert with the Federal Endangered Species Conservation Act of 1969.⁷⁵ Although the federal act represents a national policy, it provides in part for the state to legislate on the same subject.⁷⁶ Despite the fact that part of the dispute in *Nettleton* arose because the New York list of endangered species was more extensive than the federal schedule,⁷⁷ the existence of statutes at both state and federal levels is a strong expression of the public interest in ecology. The statutes also represent a response to scientific determinations that the destruction of part of the world ecological system constitutes a distinct threat to the remaining portion—of which each state is a part.⁷⁸ Thus, the policy of the Mason Law in discouraging the destruction of endangered animal species is, in effect, an effort to remove a less than imminent, but still extant, danger to the ecological balance of New York State.

Whether such a purpose is properly within the scope of the state's police power must be considered in light of the judicial context observed in recent aesthetic and environmental decisions. When police power determinations as to proper purposes are unrelated to personal constitutional liberties, judicial interference is precluded.⁷⁹ Moreover, courts are extremely reluctant to condemn the remedies contained in these statutes unless there is neither "rhyme nor reason" between the remedy and the purposes of the statute.⁸⁰ The broad-based police power that these judicial attitudes recognize may easily include the preservation of the state's environment as it relates to the global environment as a proper public purpose.

However, the protection of the state's environment, which the Mason Law affords, is really aimed at activity outside the state, and

⁷⁴ N.Y. Conserv. Law § 187 (McKinney 1970). The Harris Law blends with the federal act since its list corresponds almost exactly with the federal list, and like the federal act, it prohibits the importation, transportation, possession or sale of any part of the body of any endangered species of fish or wildlife.

⁷⁵ Pub. L. No. 91-135 (Dec. 5, 1969), 83 Stat. 275 (1969).

⁷⁶ *Id.* § 7(a)(2), (b)(2).

⁷⁷ In *Palladio, Inc. v. Diamond*, 39 U.S.L.W. 2330 (S.D.N.Y. 1970), a federal court determined that the discrepancy between the state and federal lists was merely a matter of scientific disagreement. Neither list, the court concluded, was incorrect, but together they demonstrated a valid scientific disagreement with reference to certain endangered species.

⁷⁸ In *Palladio*, the court considered arguments about the amount of research that had been done to determine (1) the connection between these endangered species and the states, and (2) which of these species were close to extinction. In finding that ample research had been done on both of these points, the court impliedly recognized that scientific data had established the ecological connection between the endangered species and New York's environment.

⁷⁹ See, e.g., *Staten Island Loaders v. Waterfront Comm'n*, 117 F. Supp. 308 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 439, rehearing denied, 347 U.S. 994 (1954).

⁸⁰ *Defiance Milk Co. v. Dumond*, 309 N.Y. 537, 541, 132 N.E.2d 829, 830 (1956).

state regulation usually extends only to affairs within its borders. Constitutionally, the federal government, and not the states, is responsible for directly regulating activity in other states⁸¹ or in other parts of the world.⁸² But the Mason Law does not represent a usurpation of such regulatory power since the statute only indirectly discourages the out-of-state activity by eliminating the market for the skins of endangered species in New York. Unfortunately, there is a paucity of cases dealing with legislation the purpose of which indirectly extends protection beyond the state's borders. An Ohio case, *State v. Kosloff Fisheries, Inc.*,⁸³ held unconstitutional an exercise of the police power whereby a state statute forbade the importation and sale of undersized fish within the state even though such fish had been caught in out-of-state waters. In reaching this result, the court stated that "[i]n this case the protection of wildlife in the waters of the State of Ohio obviously was not in any way affected by the statute."⁸⁴ This case can be distinguished from *Nettleton* on its facts and background. The most obvious distinction is the lack of scientific information confirming the deleterious effect which the taking of undersized fish elsewhere would have on Ohio's environment, as contrasted with the scientifically ascertained connection between the destruction of the endangered species and New York's environment.⁸⁵ A related distinction is the absence of strong supporting federal legislation in the Ohio case and its presence in *Nettleton*.

The scientific data⁸⁶ demonstrating the relationship between the destruction of endangered species and potential harm to New York's ecology would seem to establish the purpose of the Mason Law as a proper one. Nevertheless, the court must still determine whether there is a sufficient connection between the statutory remedy and the danger the legislature seeks to regulate. The dissent⁸⁷ in *Nettleton* considered this issue crucial to the outcome since the coverage of the Mason Law was broader than that of the federal act.

In stressing the issue of the statute's coverage, the dissent relied largely on an earlier New York decision, *People v. Bunis*.⁸⁸ The broad role of the judiciary in examining the evil-remedy relationship that

⁸¹ U.S. Const. art. I, § 8.

⁸² U.S. Const. art. I, § 10.

⁸³ 16 Ohio Op.2d 367, 174 N.E.2d 640 (1960).

⁸⁴ Id. at 370, 174 N.E.2d at 644.

⁸⁵ See note 78 supra.

⁸⁶ Id.

⁸⁷ There was no actual written dissent in this case. The dissenting judges voted to affirm the opinion at Special Term. That opinion extensively considered the question of the statute's coverage. *A.E. Nettleton Co. v. Diamond*, 63 Misc.2d 885, 313 N.Y.S.2d 893 (1970).

⁸⁸ 9 N.Y.2d 1, 210 N.Y.S.2d 505 (1961).

the *Bunis* case posited was itself drawn from the language of *Weaver v. Palmer Bros. Co.*⁸⁹ The broad view outlined in that case—that the judiciary will require the state to select the “least restrictive” remedy—has been questioned and delimited significantly by later decisions.⁹⁰ Other cases in the area of ecology also undermine the broad view of judicial scrutiny taken in *Bunis*.

A New York case, *Boomer v. Atlantic Cement Co.*,⁹¹ lends support to this narrow view of the scope of judicial review, although it specifically considered the issue of air pollution abatement. In *Boomer*, several homeowners brought suit to enjoin a local cement company from continuing to pump noxious fumes and dust upon their property. Even though the court found that the cement company’s activity constituted a nuisance, it refused to grant injunctive relief. In declining to follow a strong precedent for granting relief,⁹² the same New York Court of Appeals characterized the judiciary’s capacity to improvise pollution abatement remedies as being extremely limited.

[I]t seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution.⁹³

Responsibility for fashioning adequate remedies for these problems, the court recognized, rests with the legislature which is better able to uncover and formulate the necessary solutions.⁹⁴

The hesitancy of the *Boomer* court to utilize judicial power to remedy ecological problems emphasizes the judicial inclination to refrain from substituting its judgment for legislative solutions or inaction. Since the *Boomer* court refused to grant relief because of the judiciary’s limited ability to determine the proper environmental remedy, this same court which decided *Nettleton* would be acting in an entirely inconsistent manner if it condemned the legislative determinations of the Mason Law as inappropriate. Thus, *Nettleton* and *Boomer*, both decided by the same court, would seem to be entirely consistent with each other and with the emerging unwillingness to review legislation designed to protect the environment.

Still another, older, case implicitly recognizes the legislature’s power to enact broad statutory remedies. A Supreme Court decision, *New York ex rel. Silz v. Hesterberg*,⁹⁵ identified the state legislature

⁸⁹ 270 U.S. 402 (1925).

⁹⁰ See note 79 supra.

⁹¹ 26 N.Y.2d 219, 309 N.Y.S.2d 312 (1970).

⁹² Id. at 223-25, 309 N.Y.S.2d at 315-17.

⁹³ Id. at 223, 309 N.Y.S.2d at 314.

⁹⁴ Id.

⁹⁵ 211 U.S. 31 (1908).

"itself [as] the judge of the necessity or the expediency of the means adopted."⁹⁶ The statute in this case made it illegal to possess certain proscribed game. Although the statutory language ignored any distinction between game taken within and without the state, the Supreme Court approved its broad sweep, holding that it was within the legislature's power to sacrifice accuracy for expediency.⁹⁷

These decisions admit legislative power to determine the appropriate remedy for environmental problems and, at the same time, cast doubt upon the rationale of the dissent in *Nettleton*. The latter observation seems valid in light of the aspect of the statute which the dissent considered too broad. Specifically, the state legislature enlarged the federal list of endangered species, contending that certain additional species were near extinction. A later decision, *Palladio, Inc. v. Diamond*, has found the differences between the lists to be based on honest scientific disagreement.⁹⁸ To leave to the legislature the selection of either of these equally valid scientific approaches comports with the position of the court as expounded in both *Boomer* and *Silz*.

Although the legislation challenged in *Nettleton* may indirectly affect activity beyond the state's borders by discouraging the extinction of non-indigenous animals, there is abundant support for finding the Mason Law a proper exercise of the state's police power. Recent cases indicate that the list of endangered species adopted in New York, in spite of its controversial character, constitutes a proper standard by which to formulate a remedy reasonably related to eliminating the danger to the state.

V. PRACTICAL CONSIDERATIONS

Aside from the issues concerning the Mason Law's constitutional validity, practical questions arise in connection with enforcement of the Mason Law. Like other statutes oriented toward environmental protection, the remedy in the Mason Law provides for immediate relief from the ecological danger. Such relief often results, as in *Nettleton*, in the dismantling of a local business organization.⁹⁹ Although the *Boomer* court felt disinclined to make such a choice judicially, it is

⁹⁶ *Id.* at 40.

⁹⁷ *Id.*

⁹⁸ See note 77 *supra*.

⁹⁹ The A.E. Nettleton Co. claimed that the more extensive regulations under the Mason Law would ruin its business—manufacturing leather goods. Since the federal standards do not include alligators among the list of endangered species, businesses located in other jurisdictions would be able to provide a wide range of shoe and alligator leather products, whereas A.E. Nettleton's production would be curtailed under the New York provisions. Retailers, A.E. Nettleton contended, would only buy from a manufacturer who offers an entire range of products, including alligator leather goods. As a result, A.E. Nettleton argued that it would be forced out of business. *A.E. Nettleton Co. v. Diamond*, 63 Misc.2d 885, 313 N.Y.S.2d 893 (1970).

unlikely that the legislature will consider itself so restrained. As a result, continuation of this legislative pattern appears inevitable.

The harshness of such choices is undeniable. However, the effect can be more equitably absorbed if future federal legislation adopts more stringent standards. The particularly damaging impact of the Mason Law on New York business could be mitigated in other states having similar legislation if the federal schedule of endangered species corresponded to the most extensive state list. In this way, situations may be avoided wherein the businesses of one state are more heavily handicapped than those of another because the state of their location adopts stricter regulations. Moreover, more stringent federal regulatory standards would tend to discourage state efforts to ignore environmental problems in order to attract the types of businesses which seek to avert their ecological responsibilities. Inadequate federal standards should not infringe upon the states' power to prevent the operation of certain businesses within their boundaries.¹⁰⁰ Raising these federal standards would not only advance the cause of environmental protection, but would also spread more evenly the restrictive impact of these statutes on the national business community.

CONCLUSION

Recent decisions in the areas of aesthetics and the environment have altered the traditional balance of police power and Fourteenth Amendment due process guarantees where personal constitutional liberties are not in issue. The readjustment of this traditional balance has resulted in an expansion of the scope of the state's police power as well as a diminution in the once transcendent concern for private property rights.

In large measure, the transformation in the judiciary's conception of its role in treating police power questions has engendered this change. The particular reluctance of courts to interfere with legislative determinations as to proper purposes contrasts dramatically with their earlier inclination to intrude in these matters. The legal context which these new attitudes have fostered encourages a case-by-case examination of police power questions, with less emphasis on precedent and more concern with the facts of each particular case.

¹⁰⁰ Numerous cases have recognized the power of the states to curb businesses operating within their jurisdiction. *Nebbia v. New York*, 291 U.S. 502 (1933). Such a power is analogized to the right of the states to abate public nuisances. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Some decisions have permitted the state to render a business nearly inoperative for the purpose of preserving the state's natural resources. *Champlin Refining Co. v. Commission*, 286 U.S. 210 (1931). *Nettleton* implicitly raises an interesting question in this respect; namely, whether a state may effectively dismantle a business because a part of its activity may be indirectly detrimental to the state. The Court of Appeals decision in this case represents an affirmative answer.

No longer need an exercise of the police power be designed to eliminate a direct threat to public safety, health or morals. Instead, police power may be exercised to preserve the aesthetic quality of the state, the state's environment, and, as *Nettleton* demonstrates, the state's environment as it relates to the global ecological system. The increase in the range of the proper purposes of the police power has been partly enhanced by the de-emphasis of the necessity for a direct danger to be present before the police power can be invoked. Indeed, *Adams* and *Nettleton* indicate that remote danger is an adequate basis for the exercise of the police power.

In the legal climate of these recent developments, *Nettleton* emerges as a sound decision. Although the Mason Law indirectly discourages activity outside the state, there is sufficient scientific information to link that activity with the environment of New York State. Similarly, the strong national policy concerning endangered animal species also demonstrates the validity of this connection. Finally, the honest scientific disagreement over the endangered animal species strengthens the conclusion that the statutory remedy is neither arbitrary nor capricious.

The indirect regulation of out-of-state activities for the purpose of protecting resources within the state, sanctioned by the *Nettleton* decision, constitutes a clear expansion of the concept of police power. Although the extension is consistent with the present judicial characterization of police power, it represents a modern approach to state regulation, one which confines itself to logical extensions of traditional state police power concepts to solve new and expansive problems. In this respect, *A.E. Nettleton Co. v. Diamond* provides a logical basis for the development of new state remedies to meet environmental problems.

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