Some Modern Day Musings on the Police Power

By Brian W. Ohm

"The police power of the state is one of the most difficult phases of our law to understand, and it is even more difficult to define it and to place it within any bounds."[1]

I. Introduction

"If a city does not adopt a comprehensive plan, it will lose its police powers!" Various planners and attorneys repeated this statement following the passage of Wisconsin's comprehensive planning law in 1999. The 1999 law required that beginning on January 1, 2010, certain local government actions, like zoning, needed to be consistent with the local unit of government's comprehensive plan.[2] The logic of those making the statement was that the consistency requirement made the existence of a comprehensive plan a prerequisite to having a zoning ordinance. Therefore, if a local government did not have a comprehensive plan by January 1, 2010, the local government would not be able to have a zoning ordinance so the local government's police powers would somehow disappear on January 2, 2010. While the Wisconsin courts have not yet had an opportunity to address this issue, one likely outcome would be for the court to void a local zoning ordinance if the prerequisite comprehensive plan is not in place. The voiding of a zoning ordinance, however, does not result in the total loss of a local government's police power. Nevertheless, the statement reflects the longstanding difficulty of understanding the nature and scope of the police power.

The police power is commonly thought of as the regulatory power of the state. Articles discussing the origins of zoning often leave the impression that zoning and the police power are one and the same. As will be discussed below, the police power is extremely broad. Zoning is only one small part of the police power. The police power is one of the inherent attributes of state sovereignty. These attributes also include other authorities such as the power of eminent domain, the power of taxation, the power of escheat, and the public trust doctrine. The police power is <u>not</u>, as often cited, a power that is "conferred . . . by the Tenth Amendment, U.S. Const., upon the individual states."[3] The Tenth Amendment did not confer anything.[4] Rather, in the United States, sovereignty resides with the people. The United States Constitution, which is a compact between the people and their national government, includes the Tenth Amendment as a reminder that the national government is one of limited authority and those powers that the people did not give to the federal government remain with the states and the people.[5] The police

[1] Collins Denny, Jr., *The Growth and Development of the Police Power of the State,* 20 Mich. L. Rev. 173, 173 (1921)

[2] For a discussion of the changes made in 1999 to Wisconsin's planning enabling laws see Brian W. Ohm, Wisconsin Land Use and Planning Law (2013) at chapters 3 and 4.

[3] See, e.g, Black's Law Dictionary, Sixth edition, p. 1156 (1990).

[4] The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X.

[5] According to the United States Supreme Court, the Tenth Amendment is "but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the

power is one of those authorities and remains central to the functioning of state and local government today.

This article explores the present day scope of the police power. The first section of the article provides an overview of the police power. The overview examines the genesis of the term "the police power" and then examines the evolution of the scope of the police power. The article then examines several recent state court cases that are instructive for understanding the contemporary context of this fundamental power. The article concludes that the quotation at the beginning of this article is still as relevant today as it was when it was written 94 years ago, and that is perhaps as it should be.

II. The Police Power is Much, Much More Than Zoning.

To address complex public policy issues confronting state and local governments today, it is often helpful to "think outside the box." But before one can do that they must understand that there is a box and how that box is defined. Zoning is one small box within the police power.

A. The Nature of the "Police Power"

While the term "police power" is an American convention, the concept of the police power is purported to have roots in ancient Roman Law[6] and the English Common Law. The term "police" comes from the Latin "politia" meaning the civil administration or government. This became the French term "police" and was adopted into the English language.[7] During the 1700s and 1800s, the term, "police" was used as a synonym of "policy."[8] Blackstone's *Commentaries on the Laws of England* include a discussion of "public police and economy" by which he meant "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and be decent, industrious and inoffensive in their respective stations."[9]

With the advent of the American Revolution, the proponents of the rebellion had to wrestle with the ensuing radical change in political structure resulting from the revolt. No longer would sovereignty (power) rest with the king or queen. Rather sovereignty now rested with the people as exercised through a new form of representative democracy in the original thirteen states which, united in purpose, declared their independence from the King. As these thirteen independent "Democratic Republics"[10] saw the value of united action, the advocates for a

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amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." *United States v. Darby*, 312 U.S. 100, 124 (1941).

[6] Donna Jalbert Patalano, Police Power and the Public Trust: Prescriptive Zoning through the Conflation of Two Ancient Doctrines, 28 B.C. Envtl. Aff. L. Rev. 683, 702 (2001); Hugh D. Spitzer, Municipal Police Power in Washington State, 75 Wash. L. Rev. 495, 497 (2000).

[7] Santiago Legarre, The Historical Background of the Police Power, 9 U. Pa. J. Const. L. 745, 748-749 (2007).

[8] Id. at 749.

[9] *Blackstone's Commentaries on the Laws of England*, vol. 4, p. 162, quoted in Willis Reed Bierly, *Police Power* (1907) at p. 7.

[10] Gordon S. Wood, The Creation of the American Republic, 1776-1787 (1972).

national government had to figure out what power to give to a national government and what power should remain with the states. Their first attempt, the Articles of Confederation, had certain shortcomings in the minds of many, so the second attempt resulted in the United States Constitution and the current federalist system of government. Chief Justice John Jay's 1793 opinion in what is considered the first significant United States Supreme Court decision *Chisholm v. Georgia*[11] provides a contemporary account of what had just transpired, confirming that sovereignty rests with the people:

> [I]t may be useful to turn our attention to the political situation we were in, prior to the Revolution, and to the political rights which emerged from the Revolution. All the country now possessed by the United States was then a part of the dominions appertaining to the crown of Great Britain.... All the people of this country were then, subjects of the King of Great Britain, and owed allegiance to him; and all the civil authority then existing or exercised here, flowed from the head of the British Empire. …
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> [Through] the Declaration of Independence...[f]rom the crown of Great Britain, the sovereignty of their country passed to the people of it…. [I]n the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the States, the basis of a general Government. Experience disappointed the expectations they had formed from it; and then the people, in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, "We the people of the United States, do ordain and establish this "Constitution." …Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects, in a certain manner. By this great compact however, many prerogatives were transferred to the national Government, such as those of making war and peace, contracting alliances, coining money, &c. &c.
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> If then it be true, that the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State, it may be useful to compare these sovereignties with those in Europe, that we may thence be enabled to judge, whether all the prerogatives which are allowed to the latter, are so essential to the former....
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> It will be sufficient to observe briefly, that the sovereignties in Europe, and particularly in England, exist on feudal principles. That system considers the Prince as the Sovereign, and the people as his Subjects; it regards his person as

[11] 2 U.S. 419 (1793). The case, involving a dispute over payment for goods supplied to a State during the Revolutionary War, resulting in the Supreme Court holding that private citizens from one State could sue another State in federal court. The States, upset that citizens should have this right, quickly pushed for the passage of the 11th amendment to the United States Constitution limiting federal court jurisdiction over these types of lawsuits.

> the object of allegiance, and excludes the idea of his being on an equal footing with a subject.... The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the Prince and the subject. No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are Sovereigns without Subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.
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> From the differences existing between feudal sovereignties and Governments founded on compacts, it necessarily follows that their respective prerogatives must differ. Sovereignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides. In Europe the sovereignty is generally ascribed to the Prince; here it rests with the people . . . .[12]

The Tenth Amendment to the United States Constitution acknowledged that the authority of the national government was limited to those powers enumerated in the Constitution and left states the authority over everything else. Figuring out the dividing line between national power and state power, however, has long been a source of contention. Chief Justice John Marshall is credited with first using the term "police power" in 1827 as a descriptive term to help categorize state power not delegated to the federal government -- what James Madison and others called the "residual sovereignty of the states."[13] Marshall used the term in the case *Brown v. Maryland.*[14] The case, which helped establish the primacy of Congress to regulate foreign and interstate commerce under the Interstate Commerce Clause,[15] involved a challenge to a fee imposed by the State of Maryland on importers of foreign goods. Maryland argued that the fee was necessary to protect its citizens from dangerous imports such as gunpowder. The Supreme Court, however, found the fee unconstitutional because it interfered with interstate commerce. Writing for the Court, Chief Justice Marshall noted that while Maryland could not impose the fee, Maryland could regulate gunpowder: "The power to direct removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states."[16] By coining this term, "we have taken the residuary powers of government possessed by the States in our system . . . have classified and given specific names to certain parts, e.g, power of taxation, of eminent domain, etc., and then, perhaps for want of a better term, have called what is left 'the police power.'"[17]

While it is common to also classify the federal government's authority using similar terms such as the power to tax[18] and the power of eminent domain,[19] the states did not give the general

[12] 2 U.S. 419, 470-472.
[13] Legarre, supra note 6 at 777.
[14] 25 U.S. 419 (1827).
[15] U.S. Const. art. I, sec. 8, clause 3.
[16] 25 U.S. at 444.
[17] Walter Wheeler Cook, What is the Police Power? 7 Colum. L. Rev. 322, 329 (1907).
[18] The federal government's authority to tax is found in U.S. Const. art. I, sec. 8, clause 1 (the power to "lay and collect taxes") and U.S. Const. amend. 16, ratified in 1913, giving the federal government the power to collect an income tax.

police power to the federal government. The federal government has expansive authority to regulate Interstate Commerce but, as the United States Supreme Court reminded everyone in 1995, "the Constitution … withholds from Congress a plenary power that would authorize enactment of every type of legislation," and the United States Supreme Court is unwilling to "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[20]

The Wisconsin Supreme Court went out of its way in its 2013 decision in *Rock-Koshkonong Lake District v. Department of Natural Resources*[21] to underscore the importance of understanding the distinctions between the different classifications of state authority. While the scope of the police power was not directly at issue in the case, the majority opinion includes dicta clarifying the scope of the state's public trust doctrine[22] by discussing the authority of the Wisconsin Department of Natural Resources (DNR) to regulate the waters of the state under the police power.

The case involved a dispute about water levels on Lake Koshkonong located in south-central Wisconsin. The Wisconsin Statutes grant the DNR authority to regulate lake levels.[23] The Indianford Dam, located in Rock County, affects water levels on Lake Koshkonong. The dam was originally constructed in the 1850s, reconstructed around 1917, and rehabilitated in 2002. It had fallen into disrepair in the 1960s and did not operate properly. As a result, the water levels almost always exceeded the water level set by the DNR in a 1991 water level order. Repairs were made to the dam in 2002 that restored full operating capability to the dam's gates. After that, the water levels on Lake Koshkonong began to reflect more closely the levels set by the 1991 order and dropped water levels on the lake to levels recorded in the 1930s.

In 2003 several groups associated with Lake Koshkonong petitioned the DNR to amend the 1991 order to raise the DNR - designated water levels of Lake Koshkonong. The Petitioners contended that the 1991 order was not in the public interest because lower water levels on Lake Koshkonong led to severe restrictions on recreational boating and piers had to be extended to reach navigable water depths. In addition, the petitioners expressed concern for the effect of the lower water level on shore erosion, plants, and animal species. The DNR rejected the petition, and its denial was affirmed by an administrative law judge in a contested case hearing, by the

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[19] *Kohl v. United States*, 91 U.S. 367 (1875), in which the Supreme Court held the federal government had the power of eminent domain.

[20] *United States v. Lopez*, 514 U.S. 549, 566-568 (1995) (limiting the power of Congress to regulate commerce by striking down the Gun-Free School Zones Act of 1990).

[21] 2013 WI 74.

[22] The Public Trust Doctrine provides that the waters of the state are held in trust by the state for the benefit of all. It is an ancient legal concept that originated under Roman law concepts of common property and has been recognized for centuries under English and American Common Law. The Northwest Ordinance of 1787, creating the territories including the area that one day would become the State of Wisconsin, states that "navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free…." This language was also included in the Wisconsin Constitution, creating the State of Wisconsin. In Wisconsin, the Public Trust Doctrine has been interpreted to mean that the State owns the navigable waters of the state and land under navigable lakes. The Legislature has delegated to the DNR administration of the state's Public Trust responsibilities.

[23] Wis. Stat. ch. 31.

trail court, and by the Wisconsin Court of Appeals. The Wisconsin Supreme Court accepted review of the case.

One issue presented to the Wisconsin Supreme Court was whether the DNR exceeded its authority in making the water level determination by considering the impact of water levels on private wetlands adjacent to Lake Koshkonong but located above the ordinary high-water mark. While the Supreme Court held that the DNR properly considered the impact of the Petition's proposed water levels on the adjacent wetlands,[24] the Court also felt it was important to clarify the source of DNR's authority to consider the wetland impacts.

The DNR claimed the state's Public Trust responsibilities gave the DNR the authority to consider the impact of the water levels on wetlands adjacent to navigable waters.[25] The Court majority, however, disagreed as the to DNR's source of authority. The majority stated that DNR does not have authority under the constitutionally-based Public Trust Doctrine to consider those impacts because the Public Trust Doctrine speaks to the state's ownership of navigable waters and not the authority to regulate land that falls outside the reach of the State's Public Trust Doctrine (non-navigable land and non-navigable water above the ordinary high water mark). According to the majority, the source of DNR's authority is the police power as delegated to the DNR through legislative enactments that authorize the DNR to consider the impact on wetlands adjacent to navigable waters.[26]

The majority opinion on this issue gave rise to a strongly worded dissent that saw the majority's opinion as "a significant and disturbing shift in Wisconsin law."[27] The dissent believed the majority's opinion limited the application of the Public Trust Doctrine. Initial commentary on the case also was concerned that the majority opinion undermined the Public Trust Doctrine.[28] Nevertheless, it is important to distinguish between the focus of the Public Trust Doctrine on ownership and the broad scope of the police power to protect the public interest in wetlands. According to the majority, DNR was attempting to extend the Public Trust Doctrine to wetlands. This would take all the privately owned wetlands in the State and put them under State ownership.[29] To this end, the majority's opinion is a strike against any effort in the future to expand the Public Trust in this realm. Nevertheless, the Court is saying that it is appropriate for the legislature to use its police power authority to regulate and protect wetlands in furtherance of the state's responsibilities under the Public Trust Doctrine.[30]

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[24] The Court, however, determined that the DNR erred on several other issues and remanded the case back to the trail court.

[25] 2013 WI 74, ¶ 89.

[26] 2013 WI 74, ¶ 95.

[27] 2013 WI 74, ¶ 186.

[28] See, e.g., Christian Eickelberg, Rock-Koshkonong Lake District and the Surprising Narrowing of Wisconsin's Public Trust Doctrine, 16 Vt. J. Envtl. L. 38 (2014), but compare Mary Beth Peranteau and William P. O'Connor, Public Trust and Agency Discretion Intact, 87 Wis. Law. 34 (March 2014).

[29] 2013 WI 74, ¶ 84.

[30] An analogous context for thinking about the issue is provided by the Wisconsin Supreme Court in the recent case 118th Street Kenosha, LLC v. Wisconsin Department of Transportation, 2014 WI 125, a case in which the court denied compensation for the loss of access to a highway due to a roadway realignment project. In its opinion, the Court discussed the difference between the use of the power of eminent domain by the state to acquire the land for a highway versus the use of the police power of the state to control access to the highway. The loss of access is an

B. The Scope of the Police Power

While the police power is often referred to as the power to protect public health, safety, and welfare, it has long been conceived to be a much broader power. The United States Supreme Court opinions in the 1800s resolving conflicts over the power of the states versus the power of the federal government provide important discussions on the scope of the police power. In 1847, in his opinion in the *License Cases*[31] (three combined cases dealing with alcohol licensing laws in three states), Chief Justice Taney, writing in support of the state laws as not violating Congress' authority to regulate interstate commerce, explained the broad scope of the police power:

> But what are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers -- that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates, and its authority to make regulations of commerce is as absolute as its power to pass health laws except insofar as it has been restricted by the Constitution of the United States.[32]

By acknowledging the breadth of the police power as the power to govern, Chief Justice Taney, a state's rights proponent, also argued that it was not the role of the judicial branch to second-guess the motive of the Legislatures in enacting police power regulations.[33] Rather, courts should defer to legislative judgments about what was in the public interest:

> And when the validity of a state law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the state

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exercise of the police power and requires no compensation for the loss in value to a property as long as reasonable replacement access is provided to the property as the court found was available in this case.

[31] 46 U.S. 504 (1847)

[32] 46 U.S. at 583.

[33] State and local government licensing of the sale of alcoholic beverages remains a central police power function today. A recent Wisconsin Supreme Court decision, *Nowell v. City of Wausau*, 2013 WI 88, 344 Wis.2d __, 838 N.W.2d 852, stresses the Court's historic deference to legislative decision-making under the police power, reminiscent of Taney's decision over one hundred and fifty years earlier. In the *Nowell case,* the Wisconsin Supreme Court held that challenges to municipal decisions not to renew an alcohol license are subject to deferential certiorari review by the courts rather than the more searching de novo review. The case involved a challenge to the City of Wausau's decision not to renew an alcohol license for the "IC Willy's" tavern due to a number of problems including excessive noise, nudity, and failing compliance checks involving underage persons. According to the Court, the granting of a liquor license is a legislative function and "[p]ermitting a circuit court to determine de novo whether a liquor license should be granted would, in essence, improperly transfer that legislative function from the municipality to the court."

> from pestilence and disease or to make regulations of commerce for the interests and convenience of trade.[34]

In later cases the Supreme Court would refer to the police power as the power to do what was necessary for the public good: "[The police power] extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people."[35] Several years later the Court observed: "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."[36] As stated by the Court in 1954, references to terms like "public health, safety, and welfare" were merely examples of the police power and were not intended to limit the broad scope of the police power: "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."[37]

As a state power, numerous decisions of the various state supreme courts also attempt to help explain the expansive scope of the police power. Many state supreme courts issued landmark cases during the late 1800s and early 1900s that helped define the breadth of the state's police power. The increasing number of court decisions beginning in the late 1800s reflects the increased use of the police power by states in the last half of the nineteenth century. The increased use of the police power in the late 1800s correlated to issues related to the industrialization and rapid urbanization that occurred in the United States following the Civil War. Social issues related to working conditions in factories and living conditions in expanding cities resulted in political leaders passing state legislation to improve these conditions. Much of it was tied to the rise of the progressive movement and civic interest. The changing role of government through the use of the police power also generated considerable intellectual attention in the late 1800s and early 1900s with some of the most comprehensive scholarship ever written on the police power.[38]

For example in 1899, the Minnesota Supreme Court defined the term "police power" to mean:

> "the power to impose such restrictions upon private rights as are generally necessary for the general welfare of all. . . . [I]n the exercise of its police powers a state is not confined to matters relating strictly to the public health, morals, and peace, but, as has been said, there may be interference whenever the public interests demand it; and in this particular a large discretion is necessarily vested in the legislature, to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. If, then, any

[34] Id.
[35] *Bacon v. Walker*, 204 U.S. 311, ___ (1907).
[36] *Noble State Bank v. Haskell*, 219 U.S. 104, 111 (1911) (citations omitted).
[37] *Berman v Parker*, 348 U.S. 26 (1954).
[38] Some of the works include: Christopher Tiedeman's *Treatise on the Limitations of Police Power in the United States Considered from both a Civil and Criminal Standpoint* in 1886, Ernst Freund's *The Police Power: Public Policy and Constitutional Rights* in 1904 and Willis Reed Bierly's *Police Power: State and Federal Definitions and Distinctions* in 1907.

> business becomes of such a character as to be sufficiently affected with public interest, there may be a legislative interference and regulation of it in order to secure the general comfort, health, and prosperity of the state, provided the measures adopted do not conflict with constitutional provisions, and have some relation to, and some tendency to accomplish, the desired end."[39]

Likewise, in 1897 the Wisconsin Supreme Court defined the police power as encompassing "[a]ll laws for the protection of life, limb, and health, for the quiet of the person, and for the security of property. . . . It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society" and "imposes restrictions and burdens upon the natural and private rights of individuals."[40]

Another significant body of state court decisions began to appear in the 1950s. The significant decisions that appeared in the 1950s reflect the continued evolution of the police power to address a new set of social and economic issues that emerged following the end of World War II.

In 1955 the Minnesota Supreme Court would acknowledge that judicial concepts of what is a reasonable exercise of the police power "are not static but are geared to society's changing conditions and views."[41]

In 1955, the Wisconsin Supreme Court also acknowledged that society was changing and became one of the first high courts in the United States to hold that a local design review ordinance grounded upon aesthetic considerations alone was justified as an action to protect the general welfare under the police power.[42] However, not all state courts during the 1950s were comfortable with an expansive interpretation of the police power in support of land planning.[43]

While the scope of the police power is often equated with regulatory tools like zoning, it is critical to stress that the police power has long encompassed many different state and local governmental activities. It is misleading to think that the police power only encompasses regulations like zoning. Today in many states for example, the creation of a controlled access highway is considered a proper exercise of the police power.[44] Special assessments for capital

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[39] *State ex rel. Beek v. Wagener*, 77 Minn. 483, 494-495, 80 N.W. 633, 635 (1899).

[40] *State ex rel. Adams v. Burdge*, 95 Wis. 390, 398, 70 N.W. 347, 349 (1897)(dealing with compulsory small pox vaccination in schools).

[41] *City of St. Paul v. Dalsin*, 245 Minn. 325, 329, 71 N.W.2d 855, 858 (1955) (a case decided during the 1950s building boom striking down a City of St. Paul licensing ordinance that required certain building trades to have an office in St. Paul if they wanted a license to work in the City).

[42] *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955). For a discussion of the historical reluctance to use the police power to accomplish primarily aesthetic objectives see J.J. Dukeminier, Jr., Zoning for Aesthetic Objectives: A Reappraisal, 20 Law & Contemporary Problems 218 (1955).

[43] See, e.g., Corwin W. Johnson, Constitutional Law and Community Planning, 20 Law & Contemporary Problems 199 (1955) lamenting the impact of state court decisions adverse to governmental control of land use upon local planning.

[44] See, e.g., *Nick v. State Highway Comm*., 13 Wis. 2d 511, 109 N. W. 2d 71 (1961); *Stefan Auto Body v. State Highway Comm.* (1963), 21 Wis. 2d 363, 373, 124 N. W. 2d 319 (1963); *McKenna v. State Highway Comm.*, 28 Wis. 2d 179, 135 N. W. 2d 827 (1965). See, also *Wisconsin Town House Builders, Inc., v. City of Madison*, 37 Wis. 2d 44; 154 N.W.2d 232 (1967) related to city street. If reasonable access to property is taken by the creation of a controlled access highway, the government may need to provide compensation to the property owner for the loss of

improvements are also considered a police power tool in many states. [45] These tools and others represent the historic breadth of the police power.

1. The Advent of Local Government Law

Following the industrial revolution and the accompanying growth of cities in the late 19th and early 20th Centuries, the institution of local government began to play an important role in defining the scope of the police power. A significant body of state court case law began to develop during the early 1900s involving local government actions under enabling laws enacted by state legislatures delegating various police powers programs to local governments, such as zoning. Local governments are key actors in the expanded use of the police powers. More recently a significant body of case law has developed regarding local government police power innovations and how those innovation related to more traditional authorities delegated to local governments, such as zoning. It is therefore important to understand the complex institution of local government in the United States.

During the second half of the nineteenth century, the legal status of local governments was evolving. Up until this time, cities had a somewhat uncertain legal status. The origins of cities as municipal corporations shared a common heritage with private corporations.[46] As courts developed greater distinctions between public law and private law, the notion of cities as a legal entity began to change. Michigan Supreme Court Chief Justice Thomas M. Cooley became the main proponent of the theory that the people had delegated only part of their sovereignty to the states and retained the remainder for themselves, including the inherent right to local self-government.[47] Cooley articulated this theory in his *Treatise on Constitutional Limitations* published in 1868 and in decisions of the Michigan Supreme Court.

In 1872, Judge John F. Dillon of the Federal Eighth Circuit Court of Appeals and a former Justice of the Iowa Supreme Court offered a competing theory on the legal status of local government. In that year he published his *Treatise on Municipal Corporations* in which he argued that states had absolute supremacy over cities. According to Dillon, there was no inherent right to local self-government because cities only had those powers given to them by the states.[48]

Courts in many states applied various interpretations of what became known as "Dillon's Rule". It is through the legal construct that local government derives its authority from the state that state legislatures pass laws that delegate certain authorities that enable local governments to act. Zoning enabling laws are a common example of the state delegating part of its police power authority to local governments.

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access. *Luber v. Milwaukee County*, 47 Wis. 2d 271, 177 N. W. 2d 380 (1970); *More-Way North Corp. v. State Highway Comm.*, 44 Wis. 2d 165, 170 N. W. 2d 749 (1969).

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[46] Gerald E. Frug, City Making: Building Communities without Building Walls (1999), 26-45.

[47] Joan C. Williams, The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law, 1986 Wis. L. Rev. 83, 88; Frug, supra nopte 31 at 48.

[48] Williams, supra note 32 at 88-89; Frug, supra note 31 at 46-48.

While Cooley's theory did not receive the same level of judicial acceptance as Dillon's, Cooley's ideas were reflected in the municipal home rule movement that also began in the 1870s. The home rule movement arose in the United States as an attempt to provide greater autonomy to local governments over local affairs.[49] The home rule movement resulted in amendments to state constitutions and/or statutory changes that granted local governments some level of autonomy over certain local issues. Today all but five states have some type of municipal home rule though the type of home rule varies considerably from state to state.[50] The scope of municipal home rule can influence the extent to which local governments have police power authority independent from state legislative enactments. Generally, home rule authority provides local governments with the authority to pass local ordinances to address local issues without needing to base those ordinances on express or implied authority found in state statutes. Local authority is preempted, however, when the legislature determines that an issue is of statewide significance and the state passes legislation that provides a statewide framework for local action, as in the case of zoning enabling legislation.

While home rule and local government's ability to exercise the police power are often related, it is important to remember that they are separate concepts. Local governments that do not have home rule may still act through specific delegations of police power authority, such as zoning enabling laws, or through more general delegations of the police power such as enabling laws that authorize local governments to protect public health, safety, and welfare.

2. Constitutional Limits to the Scope of the Police Power

While the police power is broad in scope, provisions in state constitutions and the United States Constitution limit that scope. For example, as discussed above, many of the early United States Supreme Court cases discussing the police power did so in the context of distinguishing Congress' sphere of authority to regulate interstate commence from the states' sphere of authority under the police power.

Another provision in the Unites States Constitution that the United States Supreme Court used to review state police power actions was the Contracts Clause that prohibited states from passing laws that retroactively impaired the obligation of contracts.[51] During the early 1800s, the United States Supreme Court used the Contract Clause to limit state authority over business corporations.[52] However, the Court began to acknowledge police power exceptions to the Contract Clause.[53] Of significance was the concept that "the legislature cannot bargain away the

[49] Lynn A. Baker and Daniel B. Rodriguez, Constitutional Home Rule and Judicial Scrutiny, 86 Denver U. L. Rev 1337, 1340 (2009).
[50] Id., note 10.
[51] The Contracts Clause is found in Article I, section 10, clause 1. It states "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."
[52] James W. Ely, Jr., The Protection of Contractual Rights: A Tale of Two Constitutional Provisions, 1 NYU J.L. & Liberty 370 (2005).
[53]Id at 378, 397.

police power of a State."[54] State police power actions that might impair prior contractual obligations were therefore free from Contact Clause constraints.[55] The Court expanded the police power exception significantly in subsequent cases. In *Home Building & Loan Ass'n v Blaisdell*,[56] the Court found the Contract Clause did not prohibit a state from exercising its police power to abrogate private or public contracts if reasonably related to remedying a social or economic need of the community.[57]

Historically, what would eventually become one of the most significant Constitutional limitations on state police power was the 1868 ratification of the 14th Amendment. The 14th Amendment was one of the three reconstruction amendments passed following the Civil War. Up until this time, the United States Constitution and the protections of individual liberty expressed in the Bill of Rights only applied to the activities of the national government.[58] The Civil War amendments changed that relationship. U.S. Supreme Court decisions prior to the ratification of the 14th Amendment discussed the police power largely in the context of mediating the boundary between federal authority under the Interstate Commerce Clause and the state authority under the police power. After the ratification of the 14th Amendment, for the first time states were subject to federal requirements for concepts like due process, and equal protection. The 14th Amendment's guarantee of due process read: "nor shall any State deprive any person of life, liberty, or property, without due process of law." While the literal terms of the amendment made it sound like the amendment only related to procedures, the clause came to be interpreted as a limitation on the reasonableness of the substance of the enactments of state and local governments.

In the 1887 case *Munn v. Illinois*,[59] the U.S. Supreme Court discussed this change in the context of the police power. *Munn* involved a challenge to an Illinois law that established the maximum rates that could be charged by warehouses for the storage of grain in Chicago. Munn challenged the power of states to regulate private business as a violation of due process. The U.S. Supreme Court upheld the Illinois law and provided the following context for understanding the 14th Amendment:

> While [the due process] provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance

[54] *Stone v. Mississippi*, 101 U.S. 814 (1880) in which the Court upheld the State of Mississippi's repeal of a 25 year charter for a lottery several years after it had been approved.

[55] Decades later the inability of government to contract away its police power resulted in courts prohibiting the local government practice of what is known as "contract zoning." Contract zoning is an agreement between a property owner and a zoning authority, which binds the property owner to special restrictions on the use of the property and, in turn, binds the local zoning authority to grant the rezoning. Ohm, supra note 1 at p. 5-67; see also David G. Trager, Contract Zoning, 23 Maryland L. Rev. 121 (1963). The contract zoning prohibition provided to be an impediment to the development process. In response, several states have passed laws enabling the use of development agreements. David L. Callies, Cecily Talbert Barclay, Julie A. Tappendorf, Development by Agreement: A Tool Kit for Land Developers and Local Governments (2012), ch. 2.

[56] 290 U.S. 398 (1934).

[57] This is the authority some cities have used to void deed restrictions that prevent grocery stores in certain neighborhoods.

[58] *Barron v. Baltimore*. 32 U.S. 243, 247 (1833).

[59] 94 U.S. 113 (1877).

> if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States.[60]

In a passage reminiscent of the Court's decision in *Chisholm v. Georgia* almost one hundred years earlier, the Court provides another lesson in United States History to provide context for its decision:

> When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.
>
> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic … is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private … but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and … [f]rom this source come the police powers ….[61]

Several years later, in *Mugler v. Kansas*,[62] the United States Supreme Court upheld a state police power ban on alcoholic beverages against a substantive due process challenge. The Court, however, recognized that to withhold scrutiny under substantive due process, police power actions would need to substantially relate to some public need and should not invade the "fundamental law": "If, therefore, a statute purporting to have been enacted to protect the public

[60] 94 U.S. at 123-124.
[61] 94 U.S. at 123-125.
[62] 123 U.S. 623 (1887)

health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."[63]

The United States Supreme Court refined this concept in *Lawton v. Steele*[64] and held that for an exercise of the police power to be valid it must employ a reasonable means to a lawful end and must not be unduly oppressive: "First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[65] This basic test of reasonableness continues to be the fundamental element of substantive due process today.

The Supreme Court entered what is known as the *Lochner* era,[66] a period of conservative judicial activism during which the court struck down various state police power actions for violating substantive due process because the laws infringed upon economic liberties. The era ended in the later half of the 1930s when the Court established the approach followed today where the judiciary defers to legislative determinations of what is reasonable. As a result, the federal courts are reluctant to use substantive due process to strike down police power actions unless the action affects certain fundamental rights or certain minority groups.[67] Nevertheless, substantive due process concerns are still an important element for many state courts based on due process provisions in state constitutions or court precedent governing arbitrary and capricious conduct.

The United States Supreme Court has also used the Fourteenth Amendment as the vehicle to selectively incorporate the civil liberty protections found in the first ten amendments to the Constitution, the Bill of Rights, and make them apply to state and local governments. For example, in 1897 the Supreme Court made the due process requirements of the Fifth Amendment applicable to the states.[68] Later, this incorporation would include the Takings clause of the Fifth Amendment.[69] Other cases have incorporated other provisions of the Bill of Rights to make them applicable to the states. The most recent case was in 2010 incorporating the Second Amendment as a limit on state and local government efforts to deal with gun control.[70] The application of these protections to the actions of state and local governments has a significant affect on the scope of police power actions ranging from Fifth Amendment regulatory takings concerns related to land use and environmental regulations to First Amendment concerns related to sign regulations and the regulation of adult entertainment businesses.

[63] (788)
[64] 152 U.S. 133 (1894).
[65] 152 U.S. at 137.
[66] The era is named for the case *Lochner v. New York*, 198 U.S. 45 (1905) in which the Court struck down a New York law limiting the number of hours backers could work.
[67] See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003), striking down Texas' sodomy law.
[68] *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226 (1897).
[69] "[T]here is no doubt that later cases have held that the Four- teenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States. Nor is there any doubt that these cases have relied upon Chicago, B. & Q. R.R. Co. v. Chicago to reach that result." *Dolan v. City of Tigard*, 512 U.S. 374, 384 n.5.
[70] *McDonald v. Chicago*, 561 U.S. 742 (2010).

Today it is interesting to reflect on the limitations that the United States Constitution protections of civil liberties place on the scope of state and local government police power actions in light of some of the early pronouncements of the state supreme courts attempting to define the broad scope of the police power. One example is the Wisconsin Supreme Court's decision in *State ex. rel. Carter v. Harper*[71] upholding the exercise of local zoning as an appropriate exercise of the police power three years before the U.S. Supreme Court did the same in *Village of Euclid v. Ambler Realty Co.*[72] In its decision, the Wisconsin Supreme Court held that the Wisconsin Constitution's protection of private property and the Fourteenth Amendment of the United States Constitution "interpose no barrier to the exercise of the police power of the state."[73] The Court also opined that "[i]t is thoroughly established in this country that the rights preserved to the individual by these constitutional provisions are held in subordination to the rights of society."[74] The Wisconsin Supreme Court's decision does not acknowledge United States Supreme Court Justice Holmes' observation in *Pennsylvania Coal Co. v. Mahon*[75] the year before that there are Constitutional limits to the exercise of the police power. According to Holmes, the exercise of the police power could go "too far" and cross over into the boundaries of the power of eminent domain, a power for which the Constitution requires the payment of just compensation.[76]

Despite the Wisconsin Court's statements that the police power seemed to have few limits, the Court recognized a general test for the reasonableness of the legislation based on a means/ends test reflecting the substantive due process test enunciated by the U.S. Supreme Court in *Lawton v. Steele*:

> "whether a given situation presents a legitimate field for the exercise of the police power placing restraints upon the use of property or upon personal conduct, depends upon whether the situation presents a reasonable necessity for the imposition of restraint in order to promote the public welfare, and whether the means adopted bear a reasonable relation to the end sought to be accomplished. It goes without saying that the legislature may not, in the exercise of its police power, pass a law expressly prohibited by the constitution. It is also accepted doctrine, we think, everywhere that laws imposing restraints interfering with the use of property or personal liberty, in the absence of some public necessity therefor, cannot be sustained."[77]

The Wisconsin Supreme Court's opinion in *State ex. rel. Carter v. Harper* therefore both acknowledges the breadth of the authority the police power bestows on the legislative process to address the changing needs of civil society and reserves to the courts the fundamental role of arbiters of the ultimate reasonableness of the legislative enactment.

[71] 182 Wis. 148, 196 N.W. 451 (1923).
[72] 272 U.S. 365 (1926).
[73] 182 Wis. at 151, 196 N.W. at 452.
[74] 182 Wis. at 153, 196 N.W. at 453.
[75] 260 U.S. 393 (1922).
[76] 260 U.S. at 415.
[77] 182 Wis. at 152, 196 N.W. at 453.

III. Local Initiatives and the Police Power – Recent Pronouncements

The courts continue to play an active role in evaluating legislative enactments from all levels of government and judging them in the context of the police power. Some of the cases discussed above are historic decisions of the United States Supreme Court addressing fundamental issues of sues of federalism -- the boundaries of state legislative authority versus national legislative authority. Other cases discussed above are decisions of the United States Supreme Court and state supreme courts balancing the breadth of the police power within the context of various state and federal constitutional protections of civil liberties. While these are still important threads in the development of police power jurisprudence, a series of recent state supreme court decisions point to the important role of the police power in supporting various citizen and local government initiatives, many that are at odds with state policy directives. While the courts will give great deference to legislative enactments, when faced with deference to a state legislative enactment versus a local government's legislative enactment, the court's often side with local government, perhaps because local governments are closer to the people.

Some of these cases are explored below. The cases focus on police power cases related to land use and do not cover other police power initiatives related to subjects like the minimum wage, genetically modified organisms, etc.

A. Zoning v. Non-zoning Local Government Police Power Actions

As issues confronting communities across the United States change, the breadth of the police power is still central to how communities respond to those issues. Recent cases from around the country illustrate how the police power can be used in creative ways. However, conflict can arise under the multiple sources of authority available to local governments to adopt ordinances affecting the development process. As courts address these conflicts, they are called upon to distinguish various local government police power innovations that are similar, but not the same as authority derived by local governments from specific enabling legislation, such as zoning. Often these cases involve someone disagreeing with a local action taken under a non-zoning police power ordinance adopted under the general police power authority delegated to a local government. The argument is made that the non-zoning ordinance is really a zoning ordinance and it does not follow the requirements of the zoning enabling law so the non-zoning ordinance is void. There is a growing body of case law discussing zoning versus non-zoning type local laws. The cases reinforce the fact that zoning is only one small part of the police power.

One example of this type of conflict arose in the 2012 Wisconsin Supreme Court case *Zwiefelhofer v. Town of Cooks Valley* [78] in which the Wisconsin Supreme Court upheld a town's nonmetallic mining ordinance, enacted as a general police power regulation, against a challenge that it was an improperly adopted zoning ordinance. Cooks Valley is a Town located in Chippewa County in western Wisconsin. The Town of Cooks Valley is an unzoned town located in Chippewa County. Chippewa County has a county zoning ordinance but the Town has not approved the application of the County's zoning ordinance in the Town, nor has the Town

[78] 2012 WI 7, 338 Wis. 2d 488, 809 N.W.2d 362 (2012).

adopted its own zoning ordinance.[79] In 2008, the Town adopted a nonmetallic mining ordinance to regulate nonmetallic mining operations within the Town. The regulation of nonmetallic mining is a major issue in Wisconsin due to the surge in mining silica sand for use in oil and gas fracking operations elsewhere in the world.[80] The Town had adopted village powers[81] in 2001 and the Town used the general police power authority given to villages in state statute (and Towns that adopt village powers) as the authority to adopt the ordinance. This basic police power authority is "the power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public." [82]

The Town's nonmetallic mining ordinance requires a permit for the operation of nonmetallic mines and sets forth the application process. According to that process, an applicant must submit a form (included as an appendix to the ordinance) to the Town Clerk along with an application fee. Copies of the application are distributed to all residents who own land adjoining the proposed site and the Town Plan Commission initially considers the application. The Plan Commission makes a recommendation to the Town Board. The Town Board considers the recommendation at a public meeting during which the Board can take comments from the public. The Town Board then determines whether the "mine is in the best interests of the citizens of the Town, and will be consistent with the protection of public health, safety and general welfare." The Town Board also considers whether the applicant has received any required federal, state, and county permits. If these criteria are satisfied, the Town Board "shall grant the permit, either with or without conditions."[83]

[79] The structure of local government in Wisconsin includes counties, cities, villages, and towns. Counties are considered administrative units of the state and have statutorily granted limited home rule over the administrative organization of counties. Cities and villages in Wisconsin comprise the incorporated areas of the state and have constitutional home rule. Towns (similar to "townships" in other states) govern the unincorporated areas, the areas outside the boundaries of cities and villages. Town area reflects the six-by-six square mile survey unit of the original public lands survey. Towns do not have any home rule authority and need to look to express or implied delegations of authority from the Legislature.

Counties have certain functions, such as social services and criminal justice, which apply in both the incorporated and unincorporated parts of the county. Other functions, such as zoning, apply only in the unincorporated areas (the towns). Counties, however, do not have unilateral authority to zone land in the unincorporated area. Rather, the zoning of town land is best described as a "partnership" reflecting a complex institutional relationship between counties and towns dating from the early 1930s when Wisconsin became the first state to enable the use of zoning for rural lands. General zoning is not mandated in Wisconsin. Most counties, though not all, have adopted a county zoning ordinance. In counties with no county zoning ordinance, a town is either unzoned or the town can adopt its own zoning ordinance. In counties with a county zoning ordinance, towns have three options. The town can be unzoned, the town can decide to allow the county ordinance to apply in the town, or the town can adopt its own zoning ordinance. In counties with a county zoning ordinance, if a town wants to adopt its own zoning ordinance, the county must approve the town's zoning ordinance. For a detailed discussion of the town-county zoning relationship see Ohm, supra note 1, Chapter 5.

[80] Wisconsin has the largest deposits of silica sand left by the glaciers in the United States. For a series of stories on the issues due to the mining activity, see <http://wisconsinwatch.org/series/frac-sand/>.

[81] Towns have the authority in Wisconsin to adopt "village powers." While towns do not have constitutional home rule like villages, adopting "village powers" allows a town to follow many of the enabling laws used by villages, including the statute enabling general police power authority for villages.

[82] Wis. Stat. § 61.35(1).

[83] 2012 WI 89, ¶¶ 16-17.

The Ordinance includes the following type of conditions that the Town may impose on nonmetallic mining "to protect public health and safety and promote the general welfare of the Town:"

> restrictive provisions and proof of financial security for reclamation, restrictive provisions and proof of financial security for town road maintenance and repair, restrictions on hours of operation, restrictions on truck routes on town roads, restrictions on truck and traffic volume into and out of the mine site, restrictions to protect groundwater quantity and quality, restrictions to safeguard public and private drinking and agricultural wells, restrictions to control air emissions and dust from the mine and its operations, and any other restrictions deemed necessary and appropriate . . . .[84]

Finally, the Ordinance exempts preexisting mines from the application and permit requirements but it applies to expansion of preexisting mines.

The plaintiffs in the lawsuit own land in the Town and have engaged in nonmetallic mining operations. They brought the lawsuit contending that the nonmetallic mining ordinance is a zoning ordinance and is invalid because the Town did not have the County approve the ordinance, as required for town zoning ordinances in counties with a county zoning ordinance. The Town claimed the ordinance is not a zoning ordinance, recognizing that different types of ordinances, such as subdivision ordinances, can overlap. The trial court, however, agreed with the property owners. The Town appealed to the Wisconsin Court of Appeals. In evaluating the appeal, the Court of Appeals, did not decide the case. Rather, the Court of Appeals certified the appeal to the Wisconsin Supreme Court to clarify the factors that distinguish a zoning ordinance from other ordinances enacted under a town's general police powers. The Wisconsin Supreme Court granted the certification petition of the Court of Appeals.[85]

The Wisconsin Supreme Court's review of the case focused on whether or not the nonmetallic mining ordinance is a zoning ordinance. In a unanimous decision, the Wisconsin Supreme Court concluded the Town's ordinance was not a zoning ordinance and was a valid police power ordinance.

The Court's opinion notes that zoning "is a subset of the police power" and distinguishing zoning ordinances from non-zoning police power ordinances "is not necessarily a simple task."[86] To identify whether a police power ordinance is a zoning ordinance, the Court evaluated the Town's ordinance against some of the common characteristics of a traditional zoning ordinance. The Court identifies six characteristics of a zoning ordinance and determines that they are absent from the Town's ordinance.

[84] 2012 WI 89, ¶¶ 18.
[85] *Zwiefelhofer v. Town of Cooks Valley*, 2011 WI 89, 336 Wis. 2d 641, 804 N.W.2d 82.
[86] 2012 WI 89, ¶¶ 31, 33.

First, the Court notes that a zoning ordinance divides a geographic area into multiple zones or districts and consists of text explaining the districts and a map showing the districts.[87] The Towns' ordinance, however, did not create districts or zones.[88]

The second characteristic identified by the Court is that within the established districts a zoning ordinance typically allows certain uses and prohibits others.[89] The Court's examination of the Town's ordinance found that it does not automatically permit or prohibit any land use.[90]

The third characteristic is that zoning ordinances are traditionally control where a use takes place as opposed to how it takes place.[91] The ordinance does not confine nonmetallic mining to any particular area in the Town nor are any parts of the Town foreclosed to nonmetallic mining. The ordinance does not directly affect where an activity may take place. Rather it governs how an activity must be conducted and incidentally limits where it may be conducted.[92]

The fourth characteristic is that zoning ordinances traditionally attempt to comprehensively address all possible uses within a jurisdiction.[93] The Town's ordinance did not comprehensively address a wide range of potential classes of land use. It applied to only a single, specific land use.[94]

The fifth characteristic is that, with the exception of conditional uses, zoning ordinances make a fixed determination of what uses will be permitted as opposed to a case-by-case determination.[95] The Town's ordinance operated exclusively on a case-by-case basis.[96] While the Court acknowledges that the Town's ordinance grants "conditional use permits" for mines, the Court notes that non-zoning police power licensing ordinances often focus on establishing conditions and that labeling something a "conditional use" does not automatically transform it into a zoning ordinance.[97]

The final characteristic identified by the Court was that traditional zoning ordinances allow uses that were legal prior to the adoption of the ordinance to continue despite the failure of the use to conform to the new zoning ordinance.[98] Here the court acknowledges that the Town's ordinance "grandfathers" existing mines but states there is no rule that prohibits a non-zoning police power ordinance from exempting preexisting uses.[99]

[87] 2012 WI 89, ¶ 36.
[88] 2012 WI 89, ¶ 51.
[89] 2012 WI 89, ¶ 38.
[90] 2012 WI 89, ¶ 52.
[91] 2012 WI 89, ¶ 39.
[92] 2012 WI 89, ¶¶ 53-55.
[93] 2012 WI 89, ¶ 40.
[94] 2012 WI 89, ¶ 56.
[95] 2012 WI 89, ¶ 41.
[96] 2012 WI 89, ¶ 66.
[97] 2012 WI 89, ¶¶ 67-69.
[98] 2012 WI 89, ¶ 42.
[99] 2012 WI 89, ¶ 70.

The Court recognized that its list was not exhaustive and that ordinances that might not fit in the traditional mold of zoning may still constitute a zoning ordinance.[100] The Court recognized that the Town's ordinance "clearly regulates the use of land in a potentially dramatic way. A landowner might be barred from engaging in nonmetallic mining in a certain location or in the entire Town because of the terms of the ordinance."[101] While the Supreme Court recognized that the extent to which an ordinance affects the use of land is a relevant consideration in determining whether the regulation is a zoning ordinance, that consideration is not dispositive: "Many non-zoning ordinances affect the use of land."[102]

The Court's decision confirmed the use of the police power as a broad power available to local government to regulate activities such as nonmetallic mining to protect public health, safety, and welfare. What is perhaps most interesting is the breadth of the police power that towns can acquire by adopting village powers even though towns do not have home rule. Presumably cities and villages would have a greater degree of police power authority through their constitutional home rule, but this is not clear. The case is also interesting because of how some people refer to local government authority to now enact either police power ordinances or zoning ordinances.[103] What is missing is the fact that zoning is also a police power ordinance.

In addition to the Court's decision in *Zwiefelhofer,* Wisconsin court have recently decided other police power court cases that are the result of some of the unique town-county relationship in Wisconsin. An increasing number of towns under county zoning want to have a greater say over how development occurs in the town and have adopted zoning-like police power ordinances.[104] Towns adopt "village powers" and then adopt police power ordinances that are not expressly authorized in town enabling authority. These ordinances have generated lawsuits where the party challenging the ordinance makes the argument that it is not a validly enacted ordinance because it is a zoning ordinance and the town is under county zoning so the town cannot adopt its own zoning. The courts recognize the breadth of the police powers and hold that while these ordinances may be similar to zoning, they are not zoning and are appropriate under the town's police powers.[105]

Courts in other states have also recently decided cases seeking to invalidate a non-zoning police power ordinance because the ordinance did not follow state zoning law.[106] For example, in 2004,

[100] 2012 WI 89, ¶ 43.
[101] 2012 WI 89, ¶ 73.
[102] Id.
[103] See, e.g., Joseph M. Russell, Getting Along: Wisconsin's Frac Sandbox, 87 Wis. Law. 32, 34 (July/August 2014).
[104] If a town is under county zoning, the town cannot have its own zoning ordinance. Also it is difficult for the town to get out from county zoning. The only way a town can get out from county zoning is if the county completes a comprehensive revision of the county zoning ordinance. Some counties are reluctant to do a comprehensive revision of their zoning ordinance for fear that the towns will decide to not fall under county zoning, resulting in the county losing its ability to control growth in that town. As a result, counties have zoning ordinances that were first adopted forty or fifty years ago.
[105] See, e.g., *Ottman v. Town of Primrose*, 2011 WI 18, 332 Wis.2d 3, &96 N.W.2d 411 (upholding use of a non-zoning town "driveway ordinance" to protect agricultural land).
[106] See, e.g., *Greenville County v. Kenwood Enterprises, Inc.,* 353 S.C. 157, 577 S.E.2d 428 (2003), holding that a county had authority under its statutorily granted police powers to enact an non-zoning ordinance regulating the location of sexually oriented businesses. Only about half of Greenville County was zoned so the County adopted the

the Tennessee Supreme Court considered whether a demolition ordinance adopted by the City of Knoxville was a zoning ordinance.[107] Contrary to the approach of the Wisconsin Supreme Court in *Zwiefelhofer* that considered a variety of characteristics to determine is a non-police power ordinance is a zoning ordinance, the Tennessee Supreme Court adopted a test whereby an ordinance is a zoning ordinance if it "substantially affects" the use of land.[108] Applying this test to the ordinance, the Court determined that the denial of a demolition permit under the demolition ordinance at issue substantially affected the property owner's use of property so it was a zoning ordinance. Since the demolition ordinance was not enacted in accordance with statutory zoning law, the demolition ordinance was invalid.

However, in a subsequent case the Tennessee Supreme Court modified the test to require that courts first look at the non-zoning ordinance and determine if it is so closely related to the zoning ordinance that it is "tantamount to zoning."[109] Only after a court determines that the non-zoning ordinance is tantamount to zoning does the court determine whether the ordinance substantially affects the use of the property.[110] Like the Wisconsin Supreme Court, the Tennessee Supreme Court has recognized that many different types of police power ordinances can affect the use of land. To automatically classify them all as zoning ordinances would be inappropriate. Most recently the Tennessee Court of Appeals held that a city's sign regulation banning digital billboards in certain zoning districts was not a zoning ordinance.[111]

Another recent example is Minnesota Court of Appeals decision in *Dean v. City of Winona*.[112] The case arose out of the City of Winona, Minnesota's efforts to address problems associated with the concentration of student rental housing near the Winona State University campus. The city adopted a licensing ordinance under the City's housing code that limits to 30% the number of lots on a block that are eligible to receive certification as rental property. The lawsuit was brought by property owners who purchased their property after the adoption of the 30% rule who wanted to rent their house but could not. The property owners argued that "the ordinance was an exercise of respondent's statutory zoning power and not an exercise of its police power" and the ordinance was not a valid exercise of zoning authority.[113] However, the Court of Appeals found that the adoption of the ordinance was an exercise of its police power and found it was not necessary to determine whether it was also an exercise of its zoning authority. The City of Winona is a home rule charter city under Minnesota whereby cities have "all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld."[114]

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ordinance as a non-zoning regulation with countywide application. Some business owners sued arguing that the ordinance was invalid because it had not been adopted pursuant to the procedures for enacting zoning ordinances under South Carolina law. The South Carolina Supreme Court did not agree.

[107] *Cherokee Country Club v. City of Knoxville*, 152 S.W.2d 466 (Tenn. 2004).

[108] Id. at 473.

[109] *SNPCO, Inc. v. City of Jefferson City*, 363 S.W.3d 467, 478. (Tenn. 2012) (holding that an ordinance banning the sale or fireworks within a city is not a zoning ordinance.)

[110] Id.

[111] *Metropolitan Government of Nashville & Davidson County v. Board of Zoning Appeals*, 2014 Tenn. App. LEXIS 654.

[112] 843 NW 2d 249 (Minn. Ct. App., 2014).

[113] Id. at 257.

[114] *Bolen v. Glass*, 755 N.W.2d. 1, 4-5 (Minn. 2008) (quotation omitted).

In addition to cases where non-zoning police power ordinances are challenged as invalid zoning ordinances, the scope of the police powers arises in other local governmental contexts. One is the use of the police powers to support impact fees to fund capital improvements. In these cases the argument is made that impact fees are a tax and cannot be collected without delegation of the power to in state legislation or the state constitution under the power. Courts, however, are unwilling to categorize these fees as coming under the power to tax and find authority for the fees in the police power. An example is the recent Alabama Supreme Court decision in *St. Clair County Home Builders Ass'n v. City of Pell City*.[115] The Alabama Supreme Court held that an impact fee ordinance was an appropriate exercise of the City's police power authority and not a tax. The deference to the City's actions to develop a way to fund public infrastructure to serve new development was interesting in light of the fact there was not express enabling legislation for the fee and Alabama is considered a strong Dillon's Rule state.

If people do not agree with the outcome of the cases upholding local government non-zoning police power actions, the response may be to convince the legislature to pass a law that would attempt to preempt or otherwise limit local governments from using their police powers. For example, while the *Zwiefelhofer* case can been seen as a victory for local control, the Wisconsin Legislature's initial response was to introduce a bill to limit local police powers.[116] The bill did not pass but it is anticipated that future bills will attempt to achieve similar results. While state legislatures preempting local police power authority is a very real issue, the courts are often supportive of local policy choices and can make it difficult to preempt local control, as discussed below.

B. Preemption

Naturally, many of police power cases deal with the issue of preemption – the legal concept that the laws of one level of government are supreme over the laws of another level of government. Federal laws can preempt laws passed by states and local governments and state laws can preempt local government laws. The scope of local government's authority under the police powers, though broad, is tempered by the legal status of local government as "creatures of the state." Local initiative under the police powers can be preempted by state legislation.[117] A key determinant for preemption is often whether the higher level of government has occupied the field covered by the law in question.

The recent New York Court of Appeals decision in *Matter of Wallach v. Town of Dryden*,[118] raises an interesting preemption issue that is a theme in a growing number of cases nationally concerning the need to distinguish between zoning and non-zoning police power actions by local governments. In that case, the New York Court of Appeals (New York's highest court) held that the State's Oil, Gas and Solution Mining Law did not preempt a town's zoning ordinance

[115] 61 So. 3d 992 (Ala. 2010).
[116] See Tamara Dean, The Fight Over Frac sand Mining in Wisconsin, *Isthmus* (March, 20, 2014), available at: <http://www.isthmus.com/isthmus/article.php?article=42332>.
[117] See, e.g., *Apartment Assoc. of South Central Wisconsin, Inc. v. City of Madison*, 2006 WI App 192, 296 Wis. 2d 173, 722 N.W. 2d 614, striking down portions of Madison's inclusionary zoning ordinance because it was preempted by state statutes prohibiting rent control. While popularly referred to as an "inclusionary zoning" ordinance, the ordinance was not a zoning ordinance but an exercise of the City's police powers.
[118] 23 N.Y.3d 728, 16 N.E.3d 1188, 992 N.Y.S.2d 710 (2014).

banning hydrofracking within municipal boundaries. The State mining law stated that it superseded "all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries." The Court, however, held that this language was not intended to preempt local zoning ordinances. Rather it was only intended to preempt non-zoning local ordinances that regulate the mining industry.

State police power authority is likewise subject to preemption by federal legislation. A recent case addressing the issue of whether federal law preempts state police power authority is the Iowa Supreme Court's 2014 decision in *Freeman v. Grain Processing Corp.*[119] The case involved a lawsuit brought by eight residents of Muscatine, Iowa, alleging a corn wet milling facility operated by the Grain Processing Corporation (CPG) caused harmful pollutants and noxious odors to invade their land, thereby diminishing the full use and enjoyment of their properties. The residents based their claims on common law nuisance, trespass, and negligence. CPG argued that the Federal Clean Air Act preempted the residents' common law claims. The Iowa Supreme Court disagreed with CPG.

In a unanimous decision, the Iowa Supreme Court noted the parameters outlined by the United States Supreme Court related to preemption quoting from *Rice v. Santa Fe Elevator Corp*.: "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[120] Next the Iowa Supreme Court concluded that the residents' claims in the case were part of the police powers: "the existence of common law causes of action to address pollution has been part of the 'historic police powers' of the states."[121] The Iowa Court then reviewed the language of the Clean Air Act that stated the Act did not preempt state statutory or common laws claims related to air pollution. Since the Iowa Supreme Court could not find the clear and manifest intent of Congress to supersede the states' police powers, the Court concluded the Clean Air Act did not preempt the residents' common law claims.

The Iowa Supreme Court's conclusion that private causes of action by citizens are part of the police powers of the state is an uncommon articulation of the scope of the police power. It is recognition by the Iowa Supreme Court of the breadth of the police power and a way to categorize common law doctrines developed by the courts in the states as a vehicle to help protect public health, safety, and welfare.

One of the most significant recent cases on the issue of preemption of local government authority is the Pennsylvania Supreme Court decision in *Robinson Township v. Commonwealth of Pennsylvania*[122] In the *Robinson* case the Pennsylvania Supreme Court declared that certain sections of a state law passed to promote the extraction of natural gas from the Marcellus Shale Formation (the extraction process is known as "fracking") violated the Environmental Rights Amendment to the Pennsylvania Constitution. The Pennsylvania fracking law, also known as

[119] *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014).
[120] 331 U.S. 218, 230 (1947).
[121] 848 N.W.2d at xx. The Court also quoted *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960) ("to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power").
[122] 83 A.3d 901 (2013).

Act 13, was enacted under the State's police powers. The Pennsylvania Supreme Court determined that the law went too far and violated the Environmental Rights Amendment of the Pennsylvania Constitution. [123]

Act 13, passed in 2012, was a major overhaul of Pennsylvania's Oil and Gas Act. The intent of Act 13 was to permit optimal development of Pennsylvania's oil and gas resources recognizing the emphasis on the fracking process. Among other things, Act 13 created a process by which the Pennsylvania Department of Environmental Protection could grant waivers to oil and gas well permit applicants from statutory protections of certain types of water of the Commonwealth of Pennsylvania.[124] Act 13 also was intended to preempt and supersede local regulation of oil and gas operations and institute a uniform regulatory process statewide.[125] In so doing, Act 13 trumped local zoning by requiring local governments to allow oil and gas drilling operations in all zoning districts including residential.[126]

A group of Pennsylvania municipalities, individuals, and environmental groups sued the state challenged Act 13 as a violation of the Equal Rights Amendment of the Pennsylvania Constitution. The Pennsylvania Supreme Court agreed. According to the Court, "as an exercise of the police power" the disputed provisions of Act 13 "are incompatible with the Commonwealth's duty as trustee of Pennsylvania's natural resources"[127] under the Environmental Rights Amendment.[128]

The Environmental Rights Amendment, ratified by the citizens of Pennsylvania in 1971, states:

> "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." [129]

The Court notes that only a handful of states "affirm the people's environmental rights" in their respective state constitution.[130] The Court notes that these rights are inherent to humankind and thus are secured, rather than bestowed, by Constitutions.[131]

In its decision, the Court is troubled by Act 13's "unprecedented" impact on local government authority through the "displacement of prior planning, and derivative expectations, regarding

[123] Pa. Const. art. 1, § 27.
[124] 83 A.3d at 931.
[125] 83 A.3d at 970.
[126] Id.
[127] 83 A.3d at 985.
[128] Id.
[129] Pa. Const. art. 1, § 27.
[130] 83 A.3d at 962-963. In addition to Pennsylvania, the Court notes that the Montana and Rhode Island Constitutions explicitly protect environmental rights as part of a "Declaration" or "Bill of Rights" and Hawaii, Illinois, and Massachusetts include environmental protections elsewhere in their Constitutions. The Court also notes several other state constitutions that include various statements about the conservation or protection of various natural resources. Id.
[131] 83 A.3d at 948, n. 36, citing *Driscoll v. Corbett*, 69 A.3d 197 (Pa. 2013).

land use, zoning, and the enjoyment of property."[132] While the Court repeats the conventional wisdom that local governments are "creations of the state with no powers of their own,"[133] the Court recognizes that local governments have a certain inherent authority. The Court, in holding that Robinson Township has standing to bring the challenge, acknowledged the retained powers and accompanying responsibility that local governments have "to protect the quality of life of its citizens."[134]

The Court later notes that the Environmental Rights Amendment names "the Commonwealth," and not the Pennsylvania Legislature as trustee.[135] "[A]s a result, all existing branches and levels of government derive constitutional duties and obligations with respect to the people."[136] Since the Pennsylvania legislature "has no authority to remove a political subdivision's implicitly necessary authority to carry into effect its constitutional duties," "constitutional commands regarding municipalities' obligations and duties cannot be abrogated by statute."[137] "The police power, broad as it may be, does not encompass such authority to so fundamentally disrupt these expectations respecting the environment."[138]

The Court acknowledged that in passing Act 13 the Pennsylvania legislature "exercises its constitutional police powers . . . but it must also exercise its discretion as trustee of the public natural resources."[139] In reviewing the waiver for the oil and gas industry from certain statutory protections for water in Pennsylvania, the Court held that Act 13 "fails both to ensure conservation of the quality and quantity of the Commonwealth's waters and to treat all beneficiaries equitably in light of the purposes of the trust" and thus "failed to properly discharge the Commonwealth's duties as trustee of the public natural resources."[140]

The *Robinson* case presents an interesting reminder that provisions in state constitutions limit the scope of a state's police power. It is interesting to compare the Wisconsin Supreme Court's decision in *Rock-Koshkonong* discussed earlier in this article with the Pennsylvania Supreme Court's decision in *Robinson Township.* While the Robinson case strengthens the reach of Pennsylvania's public trust doctrine, there is a perception that the Wisconsin Supreme Court's decision in the *Rock-Koshkonong* case limits the scope of Wisconsin's Public Trust Doctrine. Nevertheless, the Court in *Rock-Koshkonong* notes that "the DNR's police power-based statutory authority . . . is subject to constitutional and statutory protections afforded to property. . . ."[141] The waters Wisconsin are constitutionally protected as the property of the citizens of the State. If the Wisconsin Legislature were to pass a law that infringes on the State's responsibilities under the public trust, the constitutionality of the legislative enactment could be subject to challenge following an argument similar to that used by the Pennsylvania Supreme Court in *Robinson*.

[132] 83 A.3d at 972.
[133] 83 A.3d at 977.
[134] 83 A.3d at 920.
[135] 83 A3d at 977.
[136] Id.
[137] Id.
[138] 83 A.3d at 978.
[139] Id.
[140] 83 A.3d at 984.
[141] 2013 WI 74, ¶101.

IV. Conclusion

The police power continues to evolve in very complex ways. Collin Denny's observation that appears at the beginning of this article remains as true today as it was in 1921 when he wrote it. The police power of the state today remains one of the most difficult phases of our law to understand, define, and place within any bounds. What is interesting about many of the recent cases is the support of the courts for local control and the local democratic process. The number of significant cases involving the police powers and some part of the fracking process is also instructive. While support by the courts is not universal, many states have moved beyond a constrained view of the scope of the police power and the confines of doctrines like Dillon's Rule. Perhaps this gives some credence to Cooley's notion of an inherent right to local self-government.

Throughout history, the concept of the police power has invited innovation to do what is in the elusive public interest. As a court created concept, the police power remains available to the courts to play an active role in a system of checks and balances to influence development of civil law. The courts can expand or contract state police power authority depending on their interpretation of the police power. As legislative bodies act, the courts react to those legislative enactments and support or limit the use of the police power. The outcome of these cases may, in turn, prompt the legislative bodies to react expand their efforts if supported or redirect then if limited.