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EMERGENCIES REVISITED: THE ENDURING LEGACY OF THE POLICE POWER

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INTRODUCTION

It is sometimes thought that the police power belongs with the history of constitutional and administrative law. Section I of my contribution to this *Symposium on Contemporary Issues of Administrative Law* shows that that impression is partly correct. As I explore the historical background of the police power, I invite the reader to join me in an excursion into the past indeed. Pufendorf, Blackstone, Vattel, and other fairly old-fashioned authors, deal with "police" in ways that prefigure the police power of the states in America.[1] Nevertheless, the police power is ever present, under different names, in contemporary jurisprudence; the current coronavirus pandemic is unquestionably providing strong regulatory

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1. *See infra* Section I.

powers an opportunity to shine again in the legal firmament. Section II starts by underlining how "police" landed in the nascent United States, where it became known as "police power," courtesy of an ever-creative Supreme Court Chief Justice John Marshall. This section also tracks the evolution of the police power in United States case law, distinguishing a broad from a narrow conception of police power and pointing out how the police power also received other names, such as "power of regulation" or "regulatory power." Section III of this article explains the ways in which the police power plays a significant role in international law, in particular in what has to do with foreign investment. The distinction between expropriation (including indirect takings) and non-compensable regulatory measures has been clearly accepted in bilateral investment treaties as well as in other sources of international law. Section IV of this Article explores the moral dimension of the police power, with particular focus on the law of overruling necessity, both as a principle concerning the dispensation of rules and as a principle concerning the restriction of rights. Two examples are examined in some detail. The first, coming from Argentina (the author's country of origin), involves the exceptional dispensation of the principle of separation of powers – a constitutional rule in Argentina, as well as in other countries, including of course the United States. The second, coming from the U.S., involves the restriction of property rights during emergencies, tracking the economic crisis around the great depression of 1930. Section V of this Article emphasizes the importance of having tools that help readers of this Article understand the legal aspects of the present Covid crisis, concluding that the history of the police power and its moral dimensions are of crucial importance with a view to understanding the present.

I. BIOGRAPHICAL ROOTS AND HISTORICAL BACKGROUND

I hope that you will forgive me if I start looking backwards into my own life as I share with you how I came across the police power and how I got to work on it, on and off, for the last twenty years. In 1998, I started to write a dissertation in Oxford under Professor John Finnis, the famous natural law thinker and a fellow of University College, Oxford.[2] My initial interest was in the topic of "public morality," but he suggested that it would be fruitful if instead of researching that topic as such I would first look into the police power. Finnis explained to me that he was optimistic that I would find interesting materials and theories on public morality under the police

2. John Finnis taught law and legal philosophy in Oxford from 1966 until 2010, when he retired from his Oxford chair. From 1995 he also taught at the University of Notre Dame Law School, in Indiana, until he retired from his Notre Dame chair in 2020.

power heading, as classically "public morality" was one of several goods pursued by the police power.

I started reading in chronological order the authors Finnis recommended to me. I first read Samuel Pufendorf's *De Iure Naturae et Gentium.*[3] Even though the German author never used the terms "police" or "police power" in his *magnum opus* published halfway through the seventeenth century, Pufendorf sowed the seeds of the concept of "police" – the terminological predecessor of the "police power." [4] His strategy was to tie what would shortly afterwards be called by other European writers of the eighteenth century "police" (and by the Americans a bit later "police power") to the idea of "transcendental propriety" (what the Americans would call "eminent domain" and "takings," treating it usually hand-in-hand with "police power"). Pufendorf considered the problem of police (I insist, without using that term) when he analyzed the extent of "the Nature of the Supreme Power of the Sovereign."[5] Such power, he intimated, may be reduced to three heads. First, there is a general power to make laws for the common good; second, there is the taxation power; third, "the Exercise of the Transcendental Propriety."[6]

Although, as I said, Pufendorf never uses the term "police" in his 1672 book, the examples he offers of the "first head" include exactly the same kinds of laws that would be later called by Vattel and Blackstone "police regulations". These police regulations include laws against gambling, idleness, and prodigality, among others. More relevant for our discussion here, the first head also includes economic regulations such as "Laws that forbid certain Subjects to possess certain Kinds of Goods."[7] It is worth noting that Pufendorf includes too within "the Supreme Power of the Sovereign" regulations concerning what was later called "eminent domain."[8] As already hinted, this strategy was closely followed in due time by American commentators. When dealing with what he called "the power

3. SAMUEL PUFENDORF, THE LAW OF NATURE AND NATIONS: EIGHT BOOKS 827 (Oxford 1710).

4. The tools of our trade, as academics, are propositions and meanings, statements and words. It is important to get it clear about these! For example, when dealing with police and police power it is important to keep in mind the distinction between terms and concepts. Even in the absence of the term, the concept may still be there. Cristobal Orrego, *Natural Law Under Other Names: De Nominibus Non Est Disputandum*, 52 AM. J. JURIS 77, 83 (2007).

5. PUFENDORF, *supra* note 3, at 3.

6. *Id*.

7. *Id*. at 826.

8. *See* Santiago Legarre, *The Historical Background of the Police Power*, 9 U. of PA. J. CONST. L. 745, 755–57 (2007) (Discussing Pufendorf's strategy of tacking together eminent domain and police power).

of regulation" (what shortly after would become "the police power") James Kent – one of the first constitutional scholars of the United States – cited expressly to Pufendorf's discussion on transcendental propriety.[9]

The second author I read was Sir William Blackstone. Finnis was right again: under the name "police," the *Commentaries on the Laws of England*, written between 1765 and 1769, featured the police power and public morality in the context of so-called "crimes against the police".[10] He talks of "polity" and "police" twice: first in Book I of the *Commentaries* while dealing with the prerogative of the king, and later in Book IV when he refers to public wrongs. In Book IV, when dealing with the crimes and misdemeanors "that more especially affect the common-wealth," Blackstone points out that they may be subdivided into five species: "offences against public justice, against the public peace, against public trade, against the public health, and against the public police or economy."[11] By "the public police and economy" Blackstone means "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 to be decent, industrious, and inoffensive in their respective stations."[12] Blackstone's term "public police" landed in the U.S. shortly after he coined it and there it became "the police power."[13]

Thirdly, I turned to Emer de Vattel, a name that twenty years ago sounded vaguely familiar to me but has since become one of those authors I always return to. Again, Finnis was spot on: *Le Droit des Gens* proved to be a gold mine for my dissertation.[14] Vattel considered that to procure the true

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9. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 340 (G. F. Comstock, Little, Brown, and Company 1866) (11th ed.1866) (citing Pufendof when dealing with the power of regulation).

10. 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, A FACSIMILE OF THE FIRST EDITION OF 1765-1769 128 (University of Chicago Press 1979).

11. *Id.*

12. *Id.* at 162.

13. Blackstone's ideas, and through him those of Pufendorf and other enlightened European thinkers, had more impact in the United States than in his own country**.** Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 737 (1976) (noting that the Commentaries was an instant best seller in the United States).

14. EMER DE VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS (J. Newbery et al. trans., 1759). For the history of Vattel's book and a complete assessment of his contribution see ELISABETTA FIOCCHI MALASPINA, L' ETERNO

felicity of the nation is one of the principal objects of a good government.[15] He called this object of government "police" (in French) sometimes translated in English as "polity" sometimes as "police."[16] At any rate, these two words are cognates and were used interchangeably in the eighteenth century. Vattel elaborates on the term '"police" by giving various examples of regulations, some of them in the context of the limits of private property, along the lines of Pufendorf. I will offer a lengthy quotation as it is enlightening in retrospect, with the current rise of the police power in the light of the pandemic in the twenty-first century:

> It must also be observed that individuals are not free in the economy or government of their affairs as not to be subject to the *regulations of polity* made by the sovereign. For instance, if vines are greatly multiplied in a country, which is in want of corn, the sovereign may forbid the planting of the vine in fields proper for tillage, for here the public welfare and the safety of the state are concerned. [...] When a reason of such importance requires it, the sovereign, or the magistrate, may oblige an individual to sell all the provisions that are more than sufficient for the subsistence of his family, and fix the price. The public authority may and ought to hinder monopolies, and suppress all practices tending to raise the price of provisions […].[17]

The Swiss master of international law was elaborating here – in this general section of *Le Droit des Gens*, which precedes the treatment of international law – along regulatory lines similar to those of Pufendorf one hundred years earlier, when the German writer had referred to the "first head" of government.

RITORNO DEL *DROIT DES GENS* DI EMER DI VATTEL XVIII-XIX (Max Planck Institute for European Legal History, Frankfurt am Main, 2017).

15. VATTEL, *supra* note 14, at 21.

16. *See id.* (translating "police" as "polity"); *see also* THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 141 (Luke White trans. 1792) (using the term 'polity' for the French *police*); *id.* at 83 (Joseph Chitty trans., T. & J. W. Johnson, Law Booksellers 1834) (using 'internal police' instead of 'polity' and 'regulations of police' instead of 'regulations of polity').

17. VATTEL, *supra* note 14, at 115 n. 255, emphasis added. C*ompare* Joseph Chitty trans., T. & J. W. Johnson, Law Booksellers 1834 ("It must also be observed that individuals are not so perfectly free in the economy or government of their affairs, as not to be subject to the laws and *regulations of police* made by the sovereign . . . .").

Vattel's book "made a profound impression upon the mind of the time; and especially, upon the mind of America."[18] His writings on regulatory powers (under the name of "police" or "polity") have been enormously influential, especially in the United States.[19]

Professor Finnis also mentioned Jean-Jacques Burlamaqui as an author I should have consulted for my topic, but I was so overwhelmed with the other three, and with the vast American literature of the nineteenth century on the police power, that I confess I never got around reading carefully the other "Swiss star" of the eighteenth century.[20] *Mea culpa*! A cursory glance at his *Principes du Droit Naturel* (1747), however, showed me even then that, although the usual police-related topics are to be found in Burlamaqui's book in one form or another, their articulation by the Swiss writer is less clear than in Pufendorf, Blackstone, and Vattel.

II. RISE OF THE POLICE POWER

The European invention of the term 'police' had its counterpart in the United States: the police power. In a series of seminal, early nineteenth-century cases, Chief Justice Marshall successfully coined the term "police power" to refer to what earlier had been called "police."[21] In effect, the "combined phrase," as the latter has been called in an extraordinary essay by Hastings,[22] is nothing but a different name for the old idea of police.[23]

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18. 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 147 (The University of Chicago Press 1953).

19. Charles G. Fenwick, *The Authority of Vattel*, 7 AM POLIT. SCI. REV. 395 (1913); *The Authority of Vattel*, II (1914) 8 AM POLIT. SCI. REV. 375.

20. *See* Peter Korkman, *Burlamaqui and Natural Law*, OLL (Liberty fund, 2006) https://oll.libertyfund.org/page/burlamaqui-and-natural-law.

21. Like many other important phrases of American constitutional law, the term "police power" was introduced by Chief Justice John Marshall. This occurred in 1827 in the famous case Brown v. Maryland 25 U.S. 419 (1827), but the idea had already been raised by him in earlier cases, and for this reason it has been said to have come to him by degrees. W.G. Hastings, *The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State*, AM. PHIL. SOC. 163, 365–66 (1900).

22. W.G. Hastings, *The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State*, AM. PHIL. SOC. 163, 359 (1900).

23. Walter W. Cook saw this clearly in a short but significant article published in 1907: "Is there any connection between the two phrases? I believe that there is, and that a study of the subsequent history will show that the one was substituted for the other, and that the more modern phrase, "the police power," is to-day used by our courts in much the same sense that the earlier phrase ["internal police"] was used in the convention by the framers of the constitution." Walter W. Cook, *What is the Police Power* 7 COLUM. L. REV. 322, 326 (1907).

This is confirmed by judicial decisions that talk alternatively of police and police power to refer to the same thing.[24]

Since Chief Justice Marshall coined the term "police power," it has never stopped being used by the Supreme Court and by constitutional scholars.[25] Even when in recent times expressions such as "power of regulation" or "regulatory powers" have tended to substitute "police power" (especially in economic contexts, such as the ones I alluded to in the preceding section when dealing with Pufendorf, Blackstone, and Vattel),[26] the truth is, as William J. Novak has put it, "the substantive roots of state regulatory power [are found] in early modern notions of police."[27]

During the so-called *Lochner* era, at the beginning of the twentieth century, police regulations concerning welfare were regularly struck down as unconstitutional.[28] It was a time in which a narrow understanding of the police power prevailed.[29] Under this narrow meaning, the police power designated a particular branch of state legislative authority, namely the one

24. Legarre, *supra* note 8, at 784–85.

25. Under different names (including "regulatory power"), the police power has been and still is a bedrock not only of Constitutional but also of Administrative Law.

26. *See infra* Section III (illustrating the use of the terms "regulatory powers" and "power of regulation" to refer to police powers in international law).

27. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 13 (University of North Carolina Press 1996).

28. During the *Lochner* era, "if the Court believed the regulation was truly designed to protect the health, safety, or morals of the general public, it was apt to uphold the law. But if the Court perceived the law to be an effort to readjust the market in favor of one party to the contract, it was more likely to hold the regulation invalid." GEOFFREY R. STONE et al., CONSTITUTIONAL LAW 757 (3rd ed. 1996).

29. Earlier formulations of the broad concept of police power, in terms of "internal police," include Justice Barbour's oft-quoted dictum in Mayor of New York v. Miln, 36 U.S. 102, 103 (1837), that "[a]ll those powers which relate to merely municipal legislation, or which may more properly be called internal police, are not surrendered or restrained; and, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive." Also in *Miln*, Justice Thompson posed the following rhetorical question: "Can anything fall more directly within the *police power and internal regulation* of a state, than that which concerns the care and management of paupers or convicts,.. ?" *Id.* at 148 (Thompson, J., concurring) (emphasis added); *see also* Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420, 552 (1837) ("We cannot deal thus with the rights reserved to the states; and by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their wellbeing and prosperity.").

aimed at promoting public health, public safety, and public morality.[30] Public welfare, on the other hand, was considered outside of the scope of the police power. For purposes of this restriction, the Court used a substantive interpretation of the due process clause of the Fourteenth Amendment of the Constitution.[31] As one commentator put it, the doctrine of economic substantive due process "represented a significant attempt to limit the scope of the police power."[32] Although it must be acknowledged that some rather exceptional cases of this period considered "general welfare" or "general prosperity" as legitimate police power ends.[33]

At any rate, it is clear that after the demise of the *Lochner* era in the mid-1930's, the police power grew to encompass more than just the promotion of public morals, health, and safety. In 1934, the Supreme Court approved Minnesota's mortgage emergency regulations[34] and upheld New York's milk pricing.[35] Both statutes were deemed to be valid exercises of the police power of the states (and we shall revisit them in section III in the light of the law of overruling necessity). The *Lochner* era came to an end when, in 1937, the Court reversed itself and upheld minimum wage legislation in *West Coast Hotel v. Parrish*.[36] From this point onwards, the Court rejected the *Lochner*-ian reading of the Due Process Clause and began to regularly uphold regulations in the economic field. This entailed an expansion of the police power. Now there was no doubt that general welfare, including economic and social interests, was within its permissible scope. In the words of a 1952 decision, "the police power is not confined to a narrow category; it extends to all the great public needs."[37]

It was therefore evident after the demise of *Lochner* that economic interests were within the legitimate scope of the police power, under the label of either public welfare or public prosperity, and this remains the case today.

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30. 3 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1766 (Baker, Voorhis, & Co., 2nd ed. 1929).

31. *Id.* at 1770.

32. D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 488 (2004).

33. Professor Tribe stresses that, contrary to widespread belief, it is not true that the *Lochner* Court struck down every single instance of the police power in economic and social matters. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1318 (Foundation Press 2000).

34. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

35. Nebbia v. New York, 291 U.S. 502 (1934).

36. W. Coast Hotel v. Parrish, 300 U.S. 379 (1937).

37. Day-Brite v. Missouri, 342 U.S. 421, 424 (1952) (upholding a conviction under a Missouri statute forbidding employers from docking the wages of employees who have absented them- selves in order to vote).

III. THE POLICE POWER IN INTERNATIONAL LAW

We have seen that the police power is an established category of American Constitutional Law. The laws of other nations, which followed those of the United States, also have incorporated the concept of the police power.[38] I will now show that in recent times the police power of the states has also been recognized by international law.

Let us begin by sharing the view of Professor Sornarajah, a respected international law scholar: "the fact that there could be an interference with the use of property by the state for the common good of society is well recognized in modern systems of law."[39] The development of international investment brought, together with progressive bonds between the several countries, considerable legal problems. Some of these have been addressed by Bilateral Investment Treaties (known as BITs).[40] To illustrate my point about the police power in international law, I will take the example of the BIT between Argentina and the United States – whose application is for the most part in the hands of the arbitral tribunals that act under the International Center for the Settlement of Investment Disputes (ICSID).

The following is the most relevant provision of the BIT between Argentina and the United States:

> Article XI, BIT Argentina–US
>
> This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.[41]

Vattel's police, Kent's power of regulation and, ultimately, the acceptance of the police power by conventional international law are all

38. Argentina, my own country, has incorporated both the concept and the term *poder de policia*, Spanish for "police power." This is unsurprising as Argentina drew inspiration from the American Constitution when drafting its own constitution.

39. M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 298 (Cambridge University Press 1994).

40. Kenneth J. Vandevelde, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L. L.J. 469 (2000).

41. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, 31 I.L.M. 124.

recognized in this provision of the BIT between Argentina and the United States. This acceptance normally goes hand-in-hand with the international recognition of another domestic power akin to the police power: the power of eminent domain, which brings to our memory Pufendorf's strategy of tacking these two powers together, discussed in section I above.[42]

The difference between eminent domain and police power, in international law, lies in the required payment of compensation in the former, which is absent in the latter: when a regulation is considered to fall within the police power no compensation is due. In Céline Lévesque's words: "by virtue of international law, the foreigner injured by a taking has a right to compensation, in the absence of which the expropriation is illegal. On the contrary, a regulation does not confer a right to compensation."[43] We ought to keep in mind, in the light of the discussion in the two preceding sections, that "regulation" (in the French original "réglementation") is equivalent to "police power."

Likewise, Jason L. Gudofsky stated:

> The police power represents the major exception to the requirement that property owners be compensated for their expropriated property. This exception, which is recognized under both international and municipal law, serves as the fundamental means by which a government can implement necessary programs in pursuit of safety, health, welfare, comfort and morals without being consequently held liable to compensate property owners whose property has been negatively impacted as a result of such measures.[44]

It follows from this quotation that international law has emulated municipal, domestic law in elaborating the relevant distinction between expropriation and police power.

Some international arbitral tribunals have dug deeper to try to find the dividing line between expropriation and police power. An UNCITRAL/NAFTA Tribunal, for example, held in *Methanex Corporation v. United States of America*:

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42. PUFENDORF, *supra* note 3.

43. Céline Lévesque, *Les Fondements de la Distinction entre l' Expropriation et la Réglementation en Droit International*, 33 REVUE GÉNÉRAL DE DROIT 41 (2003).

44. Jason L. Gudofsky, *Shedding Light on Article 1110 of the North American Free Trade Agreement (NAFTA) Concerning Expropriations: An Environmental Case Study*, 21 NW. J. INT'L L. & BUS. 243, 287 (2000) (emphasis added).

> The key dividing line between a taking and a police power regulation […] lies in whether or not there was in effect an expropriation. […][An] expropriation […] does not occur if [...] the regulatory action has not deprived the Claimant of control of his company, [...] interfered directly in the internal operations [...] or displaced the Claimant as the controlling shareholder.[45]

Furthermore, in the same case the NAFTA Tribunal provided a careful characterization of the police power:

> [...] as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[46]

This characterization led ultimately to the rejection of Methanex's claim for compensation for "no such commitments were given to Methanex."[47] Hence the concluding words of the arbitral tribunal: "From the standpoint of international law, the California ban was a lawful regulation and not an expropriation."[48]

Going back to domestic (or municipal) law and instantiating that law again with the paradigmatic example of the United States, we shall see that the same distinction between the compensable and the non-compensable applies there. As recalled by Madeline Stone, the Restatement of Foreign Relations Law addresses this problem.[49] Section 712 of the

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45. Methanex Corporation v. United States of America, UNCITRAL Arbitration/ NAFTA 281 (2005).

46. *Id*. at 278.

47. *Id*. at 279.

48. *Id*. at 281.

49. Madeline Stone, *NAFTA Article 1110: Environmental Friend or Foe?* 15 GEO. INT'L ENVTL. L. REV. 763, 770 (2003). Stone recalls: "As in the spheres of domestic contracts and tort law, the American Law Institute writes and updates a Restatement of Foreign Relations Law, which is compiled by American scholars on international law. The Restatement, though an unofficial document, represents the current state of inter- national law as understood by these leading international law scholars."

Restatement, titled "State Responsibility for Economic Injury to Nationals of Other States," refers directly to the conditions of and States' responsibilities for expropriation under international law.[50] Like Article 1110 of NAFTA,[51] section 712 sets three criteria as the baseline for a legal activity of a State:

> A state is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation [...].[52]

Stone next explains: "As with other Restatements, much of the substance of section 712 is revealed in the comments and notes that follow the provisions."[53] According to Comment g, section 712(1) applies to direct expropriations and to other actions of the government that have the effect of taking the property, in whole or in large part, outright or in stages.[54] In other words, both direct and indirect expropriations are compensable. On the other hand, the Restatement distinguishes a category of activities that, while arguably falling under section 712(1), are not compensable:

> A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory [...] and is not designed to cause the alien to abandon the property to the state or sell it at a distress price.[55]

Both the word "regulation" *and* the term "police power" feature prominently in this succinct and accurate description of the non-compensable or, in the words of the Restatement, that for which "a state is not responsible."

Let us finish this section with the words of Brower and Steven that aptly sum up this topic of expropriation versus police power in international law: "it is a difficult task to draw the line between a taking and a regulation,

50. *Id.*
51. Gudofsky, *supra* note 44, at 243.
52. Stone, *supra* note 49, at 770.
53. *Id.*
54. *Id.*
55. *Id.* at 771.

and international law has not fully articulated all the relevant criteria [...] [but] this is equally true under domestic law."[56] These scholars summed up this time while responding in anticipation to a much foreseeable concern.

IV. THE LAW OF OVERRULING NECESSITY AND THE MORAL DIMENSION OF THE POLICE POWER

The concept of police power preexisted the invention of the term police power and the use of the term in domestic and international law. It is a moral concept and is always valid under different names.[57]

According to William J. Novak, the law of the police power may be summarized in the following four principles: *sic utere tuo ut alienum non laedas; salus populi suprema lex est; ubi necessitas;* and *parens patriae*.[58] All four are very important, but in this section, I will focus especially on *ubi necessitas*, as it is arguably the cornerstone of the police power, both in the common law and in the civil law worlds.

All four principles were originally Roman Law maxims, later adopted by the Common Law.[59] The principles, however, preexisted any Civil Law or Common Law recognition, as they are moral principles, (morally) valid with independence of any legal positing. They are an instance of what Thomas Aquinas called a derivation of positive law from natural law by way of conclusion.[60] This type of derivation is one of two possible ways in which a certain legal principle or rule is connected with the permanent principles of practical reasonableness – the latter expression being another term for what the classics called "natural law."[61]

The vast majority of legal, positive rules are derived from those permanent principles "by way of determination,"[62] where the connection between the legal rule and the moral rule is less visible and more remote

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56. Charles N. Brower & Lee A. Steven, *NAFTA Chapter 11: Who Then Should Judge? Developing the International Rule of Law Under NAFTA Chapter 11*, 2 CHIC. J. INT'L. L. 193, 200 (2001).

57. The same is true, for example, about "natural law." I refer again the reader to Cristobal Orrego, *Natural Law Under Other Names: De Nominibus Non-Est Disputandum*, 52 AM. J. JURIS. 77 (2007).

58. William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1091–95 (1994).

59. *Id.* at 1091.

60. THOMAS AQUINAS, *Whether Every Human Law Is Derived From the Natural Law?*, *in* SUMMA THEOLOGICA, pt. I-II q. 95, art. 2 (Fathers of the English Dominican Province trans., Benziger Bros. 1915) (1485).

61. Santiago Legarre, *A New Natural Law Reading of the Constitution*, 78 LA. L. REV. 877, 885–92 (2018) (explaining in detail what natural law is).

62. AQUINAS, *supra* note 60.

than in derivation by way of conclusion. In derivation by way of determination, the human legislator specifies a certain, general, moral principle in one of several possible ways. In other words, the legislator determines the right option out of a broad menu of more or less equally reasonable alternatives – reasonable *a priori* insofar as they would all be conducive to the promotion of the general, moral principle in question: the moral principle being determined by the *determinatio*.[63] On the other hand, some positive rules and principles, such as *ubi necessitas*, are connected straightforwardly with natural, moral law. When the human legislator enacts them into positive law it is for the most part ratifying legally what was already required morally (as right or wrong).[64] In these cases, the legal rule is endorsing (legally) a preexisting moral rule and, ordinarily, accompanying it with previously non-existing sanctions. In a relevant way, one can speak in this situation of the coexistence of two normative orders, one natural and one positive, which is not to say that both orders are exactly the same or that they have the same goals.[65]

Let us explain the legal principle known as "the law of overruling necessity"[66] – one of the four maxims alluded to in this article by its Latin name: *ubi necessitas* – in the light of the more general scheme of derivation by way of conclusion. The principle has two formulations or subprinciples: *ubi necessitas cessat lex* and *ubi necessitas cessat ius*. The literal translation from Latin of "*ubi necessitas cessat lex"* is "in case of necessity the law ceases to exist" and of "*ubi necessitas cessat ius*," "in case of necessity the right ceases to exist." Sometimes the classics just put both simply as "necessity knows no law" ("*necessitas legem non habet*").[67]

The law of overruling necessity is applied and ought to be applied everywhere and always; its intrinsic reasonableness makes it a derivation from natural law by way of conclusion. During emergencies, however, the application of the law of overruling necessity becomes more prominent as in emergency situations "necessity" arises in an unexpected and pervasive way. This is very clear when it comes to physical emergencies such as floods, tsunamis, and earthquakes. In some parts of the world (such as my

63. Santiago Legarre, *Derivation of Positive from Natural Law Revisited*, 57 AM. J. JURIS. 103, 104–06 (2012) (providing examples of *determinatio* and contrasting them with examples of derivation by way of conclusion).

64. Legarre, *supra* note 61, at 889–91.

65. John Finnis, *Coexisting Normative Orders? Yes, but No*, 57 AM. J. JURIS. 111, 117 (2012) (arguing that while natural law is an incomplete normative order positive law presents itself as complete).

66. Novak, *supra* note 58, at 1092.

67. JOHN FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 260 n.30 (1998).

own country, Argentina), emergency situations may more commonly result from deep economic crises (always pervasive, sometimes more unexpected than others). I shall offer one such example from Argentina. My other example of an economic emergency will be a historical one which arose in the United States. Even though in recent decades the law of overruling necessity has (luckily!) not manifested itself in the economic realm in North America, the current, 2020 coronavirus pandemic alerts us to the regrettable possibility that the not-so-good old times may revisit us soon.

In Argentina (but the same is true of the United States and of many other countries), the law of overruling necessity has been applied in a remarkable way to issues of separation of powers.[68] This is an instance of the Argentine legal system making room for the first manifestation or subprinciple of the law of overruling necessity (*ubi necessitas cessat lex*), because under an emergency, a certain rule (in Latin, *lex*) may "cease" to exist. I italicize "*cease*" to stress that what happens under the necessity principle is not so much that the rule ceases to exist, but rather that the rule (e.g. separation of powers) seems less stringent than in normal circumstances. The best example of this situation in Argentine constitutional practice is the *Peralta* case, which arose in the context of one of the biggest economic crises in Argentine history. The facts were as follows.[69]

In July 1989, Argentina was suffering from a huge inflationary process, so called *hyper-inflation*.[70] At the same time, the exchange rate was fluctuating wildly with the dollar increasing its worth every day and the Austral – the national currency at that time – tending to lose all its buying power.[71] Then-President Carlos Menem had inherited this situation from his predecessor, Raúl Alfonsín, who had ended his term before completion in the midst of social chaos and violence, enhanced by the economic crisis.[72]

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68. By way of contrast, in the United States the principle of necessity does not extend, as a matter of principle, to issues of separation of powers. Nevertheless, for possible exceptions in which there appears to be a flexible interpretation of the separation of powers in the presence of an emergency, *see* Youngstown Tube & Sheet Co. v. Sawyer, 343 U.S. 579 (1952); *see also* Dames & Moore v. Regan, 453 U.S. 654 (1981).

69. On the general background of the *Peralta* case, and more generally, on emergencies in Argentina and the way they impact jurisprudential thought, see Jose Sebastian Elias, *Legal Reasoning In Developing Countries: The Case Of Argentina*, THE 2005 ANNUAL PUBLICATION OF THE AUSTRALIAN LEGAL PHILOSOPHY STUDENTS ASSOCIATION 95 (Max Leskiewicz ed., 2006).

70. Paul Beckerman, *Central-Bank 'Distress' and Hyperinflation in Argentina, 1989–90*, 27 J. LATIN AM. STUD. 663, 663 (1995).

71. *Id.* at 672–73.

72. *Id.* at 663.

In a dramatic context, as soon as he took office, Menem managed to get congressional approval of laws 23.696 and 23.697, which declared the country in a state of "economic emergency" and at the same time implemented several measures designed to deal with the situation.[73] A few months later, in January 1990, another piece was added to the new economic policy: a presidential decree or executive order (number 36/90) which turned most bank deposits of over one million Australes (approximately $600 U.S. dollars) into long-term government bonds.[74] Mr. Peralta was one of hundreds of thousands of Argentines who were impeded by decree 36/90 to take their money from their bank accounts. Instead, he was given government bonds called "Bonex." Since his bank was forced to do this by a presidential decree, Mr. Peralta sued the government (instead of suing his bank who had no alternative but to comply with the law).[75] The case eventually reached the Supreme Court.[76]

In its nearly unanimous opinion, the Supreme Court, in order to justify Menem's executive order, offered a flexible interpretation of the separation of powers principle included in the Argentine constitution.[77] According to the Court, the relaxation of the separation of powers principles was justified by the subprinciple of necessity *ubi necessitas cessat lex.*[78] Under that principle, and in the face of an evident emergency like the one in question, one ought not to have adhered strictly to the idea that it was for Congress to regulate bank deposits. On the contrary, swift action by the Executive with a view to preserve the integrity of the Nation was of paramount importance and allowed for the aforementioned flexible interpretation of the distribution of competencies between the Legislative and the Executive branches of government. The Court was pointing here implicitly to another police power maxim: *salus populi suprema lex est* (the health of the nation is the supreme law of the land)[79], as it is clear from the

73. Juliana Bambaci et al., *The Political Economy of Economic Reforms in Argentina*, J. POL'Y REFORM 75, 80 (2002).

74. Presidential Decree No. 36/90, Jan. 30, 1990, 2 E.D.L.A. 11 (1990) (Arg.); *see also* Horacio Spector, *Don't Cry for me Argentina: Economic Crises and the Restructuring of Financial Property*, 14 FORDHAM J. CORP. & FIN. L. 771, 783 (2009).

75. *See generally* Manuel José J. García-Mansilla, *Separation of Powers Crisis: The Case of Argentina*, 32 GA. J. INT'L & COMP. L. 307, 353 (2004) (describing President Menem's attempts to quell hyperinflation).

76. On the *Peralta* case, and related emergency matters, see García-Mansilla, *supra* note 75; *see also* Spector, *supra* note 74, at 783–84.

77. Spector, *supra* note 74, at 783–84.

78. *Id*. at 783.

79. In the maxim, *salus populi suprema lex est*, "*salus*" means literally "health" but metaphorically "salvation" or "survival" (of the people or nation).

reasoning that for the Court, the argument of necessity was reinforced by the argument of the survival of the nation.[80]

The interpretation in the *Peralta* case eventually led to a Constitutional amendment in 1994, incorporating a more flexible system of separation of powers, as the amendment provided expressly for the possibility of executive orders on legislative matters during emergencies.[81] Although the amendment was intended to provide some sort of positive recognition to the legislative powers of the Executive during emergencies, with a view to their moderation, the truth is that since 1994 the instances in which the Executive has legislated have multiplied exponentially.[82]

As a matter of historical, constitutional practice in the United States, the law of overruling necessity has been outstandingly applied to restrict property rights. This is an instance in the U.S. legal system of the second manifestation or subprinciple of the law of overruling necessity: *ubi necessitas cessat ius*, because under emergencies *rights* "cease" to exist. I italicize "*cease*" to stress that what happens under the necessity principle is not really that the right is annihilated, but rather that the right (e.g. property) is more severely constrained in an emergency than in normal circumstances.

The main historical example of the restriction of property rights during an economic emergency in the U.S. is the regulatory scheme that followed the great depression of 1930 (though in part the regulations that preceded the crisis, especially at the state level, were similarly instances of

80. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 27, 1990, "Peralta, Luis Arcenio c. Estado Nacional," Fallos (1990-313-513) (Arg.). The Court made its argument for the survival of the nation under the name of "securing national union," a union that would vanish into thin air if the country would blow into pieces as a result of the tremendous economic crisis. Section 33 of the majority opinion reads: "It is of utmost importance the preservation of the *national union*, understood in this case to be within the framework of the promotion of the *general welfare* within reachable levels, such that neither that union or this welfare can become illusory because of unsuitable demands, nor be passively abandoned by the Powers called to preserve them (emphases in the original)."

81. Art. 99, § 3, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (as amended in 1994) (regulating so-called "decretos de necesidad y urgencia," namely executive orders in case of emergencies). Some legislative subject-matters, such as taxation and criminal law, are excluded from those that the executive may take over during emergencies.

82. *See* Santiago Legarre, *Precedent in Argentine Law*, 57 LOY. L. REV. 781 (2011) (discussing the *Bustos* litigation of 2002).

the police power).[83] During the first third of the twentieth century, several police power laws restricted property in new, more severe ways, instantiating unprecedented forms of social and economic control by the government, both state and federal. As we know, during the *Lochner* era, the Supreme Court almost systematically invalidated these laws, effectively denying room in the legal system for the *ubi necessitas cessat ius* subprinciple.[84] Probably, because the law of overruling necessity is inherent to any reasonable legal system, the Court ended up overturning those precedents and it did so for good, as explained in Section II above. From the late 1930's onwards the Court regularly upheld regulations in the economic field, including applications of *ubi necessitas cessat ius*.[85]

CONCLUSION: THE EMERGING PANDEMIC AND THE RESURRECTION OF THE POLICE POWER

The coronavirus crisis that unleashed itself on the world at the beginning of 2020 provided for a new, unexpected opportunity for the application of police measures. All around the world, rights in general suffered from severe restrictions for the sake of public health. In particular, and like in the old days, property rights have been sacrificed often times in an attempt to preserve higher values. What matters now is to prevent an excessive surprise in the eyes of the onlooker and to offer him or her epistemological tools that will help the individual to have a clue. Understanding the underpinnings of the police power and its articulation with the law of overruling necessity might be a promising way of providing such tool. It is my hope that this Symposium Article will have constituted a modest contribution to the understanding of the present, rather chaotic, status quo.

83. State laws, such as the ones dealt with by the Supreme Court in the first decades of the twentieth century, during the *Lochner* era (for instance, minimum wages and maximum hour laws, that arguably restricted property rights of the employer), are forerunner examples of regulatory schemes preceding the great depression – even though the content of the post-1930 regulations (mostly federal in origin too) was radically different.

84. 3 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 809 (Baker, Voorhis and Company 2nd ed.1929).

85. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 489–92 (West Group 8th ed. 2010).