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Wisconsin Takings Law-A Brief Historical Perspective

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Wisconsin Takings Law--A Brief Historical Perspective*

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Historically, the definition of a "taking" under the constitution has been left to the interpretation of the United States Supreme Court and the various state supreme courts because these courts are the final arbiters of their respective constitutions. While the courts have provided general guidance as to what constitutes a "taking," the courts have been reluctant to develop a definitive test for a regulatory taking. This reluctance to define a taking as an absolute is based in part on the courts' perceived continuing need to balance protections afforded private rights against the protections afforded public rights in the guise of actions under police power regulations.

The following is not intended to provide an exhaustive examination of the various "takings" tests articulated by the United States Supreme Court or the Wisconsin courts. Rather, it is intended to provide a brief overview of some of the decisions of the United States Supreme Court, as well as some of the unique "takings" decisions of the Wisconsin Supreme Court.

1. Federal Takings Jurisprudence

Federal takings jurisprudence is based on the Fifth Amendment of the United States Constitution which provides " . . . nor shall private property be taken for public use, without just compensation."[1] In 1922, the United States Supreme Court opened the door to the possibility of applying the takings provision of the Fifth Amendment to regulations enacted under government's police power in *Pennsylvania Coal Co. v. Mahon.*[2] when the Court recognized that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[3] The premise of regulatory takings is based on the Court's recognition that the Fifth Amendment "[is] designed to bar government from forcing some people alone to bear public burdens which, in all

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[1]U.S. CONST. amend. V. This provision is made applicable to the states by the due process clause of the fourteenth amendment. *See* Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

[2]260 U.S. 393 (1922).

[3]*Id.* at 415.

fairness and justice, should be borne by the public as a whole."[4] Yet, given the pervasive impacts that governmental actions have on property, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[5] Justice Oliver Wendell Holmes' opinion in *Mahon* did not attempt to formally define a taking but he acknowledged that the question of how far is "too far" is "a question of degree--and therefore cannot be disposed of by general propositions."[6]

Despite numerous opportunities, the United States Supreme Court has been unwilling to develop a set formula for determining when a regulation goes "too far."[7] Instead, over the years the Court has enunciated numerous tests for determining a taking. Generally, a court faced with a taking claim, must engage in "ad hoc, factual inquiries."[8] Because of the ad hoc, fact specific nature of the takings analysis, the Court has "found it particularly important in takings cases to adhere to our admonition that 'the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.'"[9]

The Supreme Court has therefore always drawn a distinction between "as applied" and "facial" takings challenges. This is the distinction between challenging a regulation on its face, a conceptual challenge, versus challenging the actual application of a regulation to a particular parcel of property. An "as applied" challenge does not seek to invalidate an entire regulation. This distinction was apparent very early with the Court's decisions in *Euclid v. Ambler Realty*[10] in which the Court upheld a facial attack on the regulation of private property through the use of zoning, and

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[4]Armstrong v. United States, 364 U.S. 40, 49 (1960).

[5]260 U.S. at 413.

[6]*Id.* at 416.

[7]Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[8]438 U.S. at 124.

[9]Pennell v. City of San Jose, 485 U.S. 1, 10 (1987) (quoting Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 294-295 (1981)).

[10]272 U.S. 365 (1926).

Nectow v. City of Cambridge,[11] which followed only two years later, with the Court striking down a zoning ordinance as applied to a particular property. According to the Court, "'[t]he test to be applied in considering [a] facial [takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land.'"[12] Because of the Court's disdain for facial challenges, the Court follows a lenient standard for reviewing facial challenges against a constitutional attack.

Despite the straightforward approach taken by the court for "facial" takings challenges, the Court has articulated numerous and sometimes conflicting takings standards for "as applied" challenges. These standards reflect the unique interaction between a regulation and a specific parcel of property presented in each case. The Court's case specific factual inquiries balance the public reason for the property regulation against the loss to the private property owner being regulated.[13] The United States Supreme Court has identified several factors that have "particular significance" in the balancing of public and private interests in takings cases.[14] These factors include "[t]he economic impact of the regulation on the claimant . . . particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . ." and "the character of the governmental action."[15] When measuring the impact of a regulation, the Court also requires that it "compare the value that has been taken from the property with the value that remains in the property."[16] Under this equation, "one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'"[17]

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[11]277 U.S. 183 (1928).

[12]Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2893 (1992) (quoting Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 495 (1987), quoting Hodel, 452 U.S. at 295-296, quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980)).

[13]447 U.S. at 260-261, "Although no precise rule determines when property has been taken, . . . the question necessarily requires a weighing of private and public interests." (Citations omitted.)

[14]438 U.S. at 124.

[15]*Id.*

[16]480 U.S. at 497.

[17]*Id.* (quoting Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967)).

On several occasions, the Court has identified three *per se* or categorical taking rules in which it is not necessary to engage in the "case-specific inquiry" outlined above.[18] The first category encompasses regulations that result in the "physical 'invasion'" of private property. "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."[19] This category relates to the right to exclude others which the Court has held on numerous occasions to be "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[20]

The second categorical taking is where a regulation denies all economically beneficial or productive use of land.[21] In the case of a regulation which deprives land of all economically beneficial use, government "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[22] To define what limitations may inhere in the title to property itself, requires an inquiry into the background principles of a state's law of property and nuisance.[23]

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[18]The Court's most recent pronouncement on the categorical takings issue was Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992). The Court in *Lucas*, however, left many questions unanswered. One important uncertainty left open by the Court was the "composition of the denominator in our 'deprivation' fraction." While the Court noted that its uncertainty has produced inconsistencies in its decisions, the Court left the clarification of the issue for another case. 112 S.Ct. at 2894 n. 7. *See also* Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 113 S.Ct. 2264, 2290 (1993).

[19]112 S.Ct. at 2893.

[20]Kaiser Aetna v. Unites States, 444 U.S. 164, 176 (1979).

[21]112 S.Ct. at 2893.. The *Lucas* Court notes that "[r]egrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." *Id.* at 2894 n. 7. The Court further notes some of the "inequities" related to takings law. Under the holding in *Lucas*, in "some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full. . . . Takings law is full of these 'all or nothing' situations." *Id.* at 2895 n. 8.

[22]*Id.* at 2899.

[23]This inquiry into state nuisance common law requires an inexact balancing "of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, . . . the social value of the claimant's activities and their suitability to the locality in question, . . . and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government . . . alike . . . . The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of

A third categorical taking identified by the Court is the "right to pass on property."[24] Indeed, the Court has summarized that "the right to exclude others," and "the right to pass on property" are among "the most essential sticks in the bundle of rights."[25]

The Court has also attempted to provide guidance on other aspects of the takings provision of the Fifth Amendment. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[26] for example, the Court expanded the remedy for governmental regulations which constitute a "taking." As a result of the Court's decision in *First English* when a governmental regulation constitutes a "taking," the public must compensate the property owner for his or her loss during the period of time that the regulation effected use of the property. No longer can government just rescind the regulation and avoid liability.[27]

In *Nollan v. California Coastal Commission*[28] and in *Dolan v. City of Tigard*,[29] the United States Supreme Court articulated a two part test in an attempt to define what is "too far" in the context of land use exactions--conditions imposed on the right to develop property. First, under *Nollan*, in order to avoid a taking, there must be an "essential nexus" between the "legitimate state

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any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so[)]. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Id.* at 2901.

[24]Hodel v. Irving, 481 U.S. 704, 716 (1987).

[25]*Id.*

[26]482 U.S. 304 (1987)

[27]The *First English* Court's use of the term "temporary" did not establish a new definition of what constitutes a "taking." The Court assumed for the purposes of its decision that a taking had occurred: "We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." *Id.* at 313 (footnote and citations omitted). The use of the term "temporary" therefore does not mean that regulations which are labeled "temporary" and which deny all economically viable use of property for a limited period of time, are automatically a "taking." Rather, the term "temporary" in *First English* refers to the period of "time before it is finally determined that the regulation constitutes a 'taking' of his property." *Id.* at 306-307. *See* Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1617 n. 81 (1988). As the Court noted in *First English*: "Once a court determines that a taking has occurred, . . . no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 U.S. at 321.

[28]483 U.S. 825 (1987).

[29]114 S.Ct. 2309 (1994).

interest" and the permit condition exacted by the public.[30] The "type" of condition imposed must address the same "type" of impact caused by the new development. Second, under *Dolan*, if there is a nexus, there must be a "rough proportionality" between the condition imposed by the exaction and the burden or impact created by the new development.[31] The Court in *Dolan* notes that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[32]

2. Wisconsin Takings Jurisprudence

The Wisconsin Constitution provides that "[t]he property of no person shall be taken for public use without just compensation therefore."[33] In addition, section 32.10 of the Wisconsin Statutes provides for an inverse condemnation claim if property has been occupied by a person possessing the power of condemnation.[34] Therefore, under Wisconsin law, "[i]n order to commence inverse condemnation proceedings, . . . a property owner must demonstrate that there has been either an occupation of his property within the meaning of sec. 32.10, Stats., or a taking, which must be compensated under art. I, sec. 13, of the Wisconsin Constitution."[35]

The standard for a "taking" based upon the Wisconsin Supreme Court's interpretations of

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[30]483 U.S. at 837.

[31]114 S.Ct. at 2319.

[32]*Id.* at 2319-2320.

[33]WIS. CONST. art. I, § 13.

[34]Wis. Stat. § 32.10 (1994) provides: "If any property has been occupied by a person possessing the power of condemnation and if the person has not exercised the power, the owner, to institute condemnation proceedings, shall present a verified petition to the circuit judge of the county wherein the land is situated asking that such proceeding be commenced. The petition shall describe the land, state the person against which the condemnation proceedings are instituted and the use to which it has been put or is designed to have been put by the person against which the proceedings are instituted. A copy of the petition shall be served upon the person who has occupied petitioner's land, or interest in land. The petition shall be filed in the office of the clerk of the circuit court and thereupon the matter shall be deemed an action at law and at issue, with petitioner as plaintiff and the occupying person as defendant. The court shall make a finding of whether the defendant is occupying property of the plaintiff without having the right to do so. If the court determines that the defendant is occupying such property of the plaintiff without having the right to do so, it shall treat the matter in accordance with the provisions of this subchapter assuming the plaintiff has received from the defendant a jurisdictional offer and has failed to accept the same and assuming the plaintiff is not questioning the right of the defendant to condemn the property so occupied."

[35]Maxey v. Redevelopment Auth. of Racine, 94 Wis.2d 375, 388, 288 N.W.2d 749, 800 (1980).

Wis. Stat. § 32.10, as well as the "takings" clause of the Wisconsin Constitution, can be summarized simply as requiring compensation if a property owner has been "deprived of all, or substantially all, of the beneficial use of property or of any part thereof."[36] As an additional requirement to this standard, "[a] taking can occur absent physical invasion only when there is a legally imposed restriction upon the property's use," and the restriction is imposed by an entity that has the legal authority to impose the restraint.[37]

Such simplification, however, ignores the rich history of takings jurisprudence in Wisconsin. While Wisconsin takings jurisprudence is similar to federal takings jurisprudence, many of the Wisconsin decisions predate similar decisions by the United States Supreme Court. Despite the jurisprudential independence of the Wisconsin court, the decisions of the United States Supreme Court have nonetheless influenced the Wisconsin court. A summary of some of the significant developments in Wisconsin takings jurisprudence follows.

The early decisions of the Wisconsin court reflect the court's struggle to define the extent to which the constitution interposed a barrier to the exercise of the police power in light of an increasingly complex society in which the need for regulation became more pervasive. In 1915, seven years before the United States Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*, the Wisconsin Supreme Court used language similar to that later used by Justice Holmes in *Mahon* to recognize the constitutional limitations to the police power: "the degree of interference within the

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[36]Howell Plaza, Inc. v. State Highway Comm'n, 66 Wis. 2d 720, 226 N.W.2d 185 (1975).

[37]Howell Plaza, Inc. v. State Highway Comm'n, 92 Wis. 2d 74, 88, 284 N.W.2d 887, 893 (1979). The Wisconsin Court of Appeals has summarized the holdings of the Wisconsin Supreme Court as follows: "In the absence of its physical occupancy or possession, private property can be taken for public use only by state, county, or municipal action which imposes a legally enforceable restriction on the use of the property. If a legally enforceable restriction is imposed on that use, then a taking occurs only if the restriction deprives the owner of all, or practically all, of the use. If a regulatory taking has occurred, an action lies for inverse condemnation under sec. 32.10, Stats., or for compensation under Wis. Constitution Article I, Section 13, whether the taking is permanent or temporary." Reel Enterprises v. City of LaCrosse, 146 Wis. 2d 662, 674-75, 431 N.W.2d 743, 749 (Ct. App. 1988).

The Wisconsin court has interpreted takings law to apply to non-real property matters such as finding that a state statute requiring the disclosure of confidential mineral exploration data constitutes a taking. Noranda Exploration, Inc. v. Ostrom, 113 Wis.2d 612, 335 N.W.2d 596 (1983). The court in *Noranda* also noted that "although a state may redefine property rights to a limited extent, it lacks the power to restructure rights so as to interfere with traditional attributes of property ownership. . . ." *Id.* at 604-605. The *Noranda* court cites the U.S. Supreme Court's decision in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982) in which the court held that "government does not have unlimited power to redefine property rights." Noranda, 335 N.W.2d. at 603.

boundaries of reason is for the Legislature to decide, there being left in the end the judicial power to determine whether the interference goes so far as to violate some guaranteed right--regulate it so severely as to materially impair it, reasonable doubts being resolved in favor of legislative discretion."[38]

Eight years later, the court had an opportunity to decide that the Legislature had gone "too far." In *Piper v. Ekern*,[39] the Wisconsin Supreme Court held that a state statute limiting the height of buildings around the state capitol constituted a "taking." The Court found that "from the standpoint of an infraction of private rights," the facts of the case "far exceed" the facts of *Pennsylvania Coal Co. v. Mahon*, decided the year before.[40] The purpose of the statute was to limit the height of buildings surrounding the state capitol in Madison to protect the capitol from fire. Fire had leveled the previous capitol building and was a significant consideration in the location and construction of the new structure. The court, however, was unwilling to defer to the judgments of the Wisconsin Legislature. The Court equated the height limitation to an easement. Since the state could not take private property for the site of the capitol without paying just compensation, the state also could not take an easement over private property to protect the capitol without paying just compensation.

Another key factor in the Court's decision was the fact that the statute was designed solely for the protection of state property--the capitol building. "This act is not designed to promote the public welfare of the private owners of property abutting the Capitol Square. It is solely based upon a selfish motive, and is confined to the protection, from fire, of the state's property."[41] The Court distinguished the case from valid police power regulations of a general nature in which there is a reciprocal benefit resulting from the limitation on the use of private property:

> Such regulation affecting the owners of property in a certain area, to a large extent, is founded upon the mutual and reciprocal protection which owners of property derive from a general law, and, while in a sense a material diminution in value may result, nevertheless a reciprocal advantage accrues which in many instances it is impossible to estimate from a financial standpoint, but which

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[38]Meholos v. Milwaukee, 156 Wis. 591, 600, 146 N.W. 882, 885 (1915).

[39]180 Wis. 586, 194 N.W. 159 (1923).

[40]*Id.* at 594, 194 N.W. at 162.

[41]*Id.* at 596, 194 N.W. at 163.

> nevertheless constitutes a thing of value and a compensating factor for the interference by the public with property rights.[42]

The court did not find any reciprocal benefits flowing from a statute enacted purely for the protection of the state capitol.

The notion of the reciprocity of benefits as a legitimizing feature of police power regulations was a strong factor in the court's decision six months later when the Court upheld the constitutionality of zoning. In *State v. Harper*,[43] which predated the United States Supreme Court's decision in *Euclid* by three years, the court again emphasized the reciprocity of benefits resulting from limitations imposed on the use of property by general laws: "He who is limited in the use of his property finds compensation therefore in the benefits accruing to him from the like limitations imposed upon his neighbor."[44] The court also noted that by "protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare."[45] Zoning ordinances where therefore seen as promoting public welfare. The court's decision confirmed that government in the exercise of its police power could impose restrictions upon the use of property to promote the public welfare. This was significant in that prior to this case, the courts questioned the extent that government could exercise its police power to restrict the use of property for purposes other than the promotion of public health and safety.[46]

The Wisconsin Supreme Court expanded upon its holding in *Harper* in subsequent cases. In *State ex rel. Saveland Park Holding Corp.*,[47] for example, the court upheld the exercise of zoning powers for purely aesthetic considerations. The zoning ordinance at issue in the case regulated the architectural features of structures. At the heart of the court's decision was the conclusion that one

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[42]*Id.* at 591, 194 N.W. at 161.

[43]182 Wis. 148, 196 N.W. 451 (1923).

[44]*Id.* at 154, 196 N.W. at 453.

[45]*Id.* at 153, 196 N.W. at 453.

[46]*Id.*; *see also* 180 Wis. at 604, 194 N.W. at 166 (Crownhart, J., dissenting).

[47]269 Wis. 262, 69 N.W.2d 217 (1955).

of the primary purposes of the ordinance, as well as zoning in general, was the protection of property values which falls within the exercise of the police power to promote the general welfare.[48] "[I]t is immaterial whether the zoning ordinance is grounded solely upon such objective or that such purpose is but one of several legitimate objectives."[49]

Like the United States Supreme Court, the Wisconsin court stayed away from developing a set formula for defining a taking. While the Wisconsin court's decisions provide guidance for understanding the constitutional limits of the police power, often the cases are decided by the unique facts presented. Historically, the Wisconsin Supreme Court has been reluctant to find a "taking" for governmental activity which indirectly damages private property.[50] In *State v. Herwig*,[51] however, the court held that damage to private property by a state prohibition on hunting on privately owned land constituted a taking. The hunting prohibition was part of a coordinated conservation strategy. The Court was concerned that the state was using the prohibition to establish a game refuge for waterfowl during the migratory season.[52] The damage which the property owner suffered in the case was caused by the waterfowl foraging in his corn, alfalfa, and rye fields which amounted to $500 annually.[53] The court in *Herwig* noted: "There is a limit to the extent to which the state may restrict the use of property *or damage property* under the police power. What amounts to deprivation of property without due process of law is often difficult to determine, and the determination largely

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[48]*Id.* at 270, 69 N.W.2d at 222.

[49]*Id.*

[50]*See, e.g.*, More-Way North Corp. v. State Highway Comm'n, 44 Wis.2d 165, 173, 170 N.W.2d 749, 753 (1969)(change of road grade resulting in loss of 42 parking stalls constituted consequential damages and therefore not a "taking"); Wisconsin Power & Light Co. v. Columbia County, 3 Wis. 2d 1, 7, 87 N.W.2d 279, 282 (1958)(depositing sand and gravel near tower which rendered the tower useless was consequential damage and not a "taking"); Randall v. Milwaukee, 212 Wis. 374, 383, 249 N.W. 73, 76 (1933)(obstruction of egress and ingress merely consequential damage and not a "taking"); *compare* Luber v. Milwaukee County, 47 Wis.2d 271, 283, 177 N.W.2d 380, 386 (1970)(loss of rent suffered by condemnee in connection with condemnation of property is an "interest" requiring compensation and not consequential damages).

[51]17 Wis.2d 442, 117 N.W.2d 335 (1962).

[52]*Id.* at 450, 117 N.W.2d at 339.

[53]*Id.* at 445, 117 N.W.2d at 337.

depends upon the nature of the particular case."[54] Without applying any exacting standard for defining a "taking," the court simply found the regulation to be an unreasonable exercise of the police power.[55]

Yet, in other decisions, the court attempted to provide a framework for analyzing the takings issue. For example, in *Buhler v. Racine County*,[56] the Wisconsin Court held that "[i]ncidental damage such as diminution of value of land because of a restricted use does not [constitute a 'taking'] unless the restriction practically or substantially renders the land useless for all reasonable purposes."[57] The use of this language is similar to language used by the United States Supreme Court in subsequent decisions in which the Court emphasized "economically viable use"[58] and "productive use."[59]

In *Just v. Marinette County*,[60] the Wisconsin Supreme Court provided some guidance on how to measure the economic impact of a restriction on the use of property. The Court in *Just* held that a county shoreland zoning ordinance which regulated development within a certain distance from waterbodies did not constitute a "taking." Recognizing the state's duty under the public trust doctrine[61] to maintain the natural *status quo* of the environment, the court held that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of

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[54]*Id.* at 447, 117 N.W.2d at 338 (emphasis added).

[55]Id. at 446, 117 N.W.2d at 337. While the court did not characterize the case as one of physical occupation, the court did note that "wild animals . . . are owned by the state . . . ." *Id.*

[56]33 Wis.2d 137, 146 N.W.2d 403 (1966).

[57]*Id.* at 143, 146 N.W.2d at 406.

[58]447 U.S. at 260 (citing Penn Central, 438 U.S. at 138 n. 36).

[59]112 S.Ct. at 2893, 2894, 2895 n.8, 2900-01, 2901.

[60]56 Wis.2d 7, 201 N.W.2d 761 (1972).

[61]Wisconsin has a strong public trust doctrine under which the state holds title to the beds of navigable waterbodies in trust for its citizens and has an affirmative duty to protect the public's interest in those waterbodies. *See* John Quick, Comment, *The Public Trust Doctrine in Wisconsin*, 1 WIS. ENVTL. L. J. 105 (1994).

others."[62] The court noted that "too much stress is laid on the right of an owner to change commercially valueless land when the change does damage to the rights of the public."[63] While the Justs argued that the regulation severely depreciated the value of their property, the court held:

> this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.[64]

The Wisconsin Court's opinion in *Just* therefore provides one state court's answer to the questions left unanswered by the United States Supreme Court in *Lucas* regarding the factor against which diminution in value should be measured--what constitutes the denominator in the diminution in value equation. According to the court in *Just*, diminution in value should be measured against the value of land in its natural state and not against what value land could potentially have after it is altered to something other than its natural condition.[65]

In other cases, the Wisconsin Supreme Court has been at the forefront of attempting to define the parameters of the "takings" issue. In *Zinn v. State*,[66] for example, the Wisconsin Supreme Court established a remedy for temporary takings four years prior to the United States Supreme Court's decision in *First English*.[67] In *Jordan v. Village of Menomonie Falls*,[68] the Wisconsin court applied

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[62]56 Wis.2d at 17, 201 N.W.2d at 768.

[63]*Id.* at 22, 201 N.W.2d at 770.

[64]*Id.* at 24, 201 N.W.2d at 771. The public benefit/public harm distinction followed in *Just* was thrown into disrepute by the United States Supreme Court in *Lucas*.

[65]In M&I Marshall & Ilsley Bank v. Town of Somers, 141 Wis.2d 271, 414 N.W.2d 824 (Wis. 1987), the Wisconsin Supreme Court noted that the analysis that value should not be based on changing the character of land at the expense of harm to public rights "is not limited to a situation where the lands involved are connected to the state's duty under the public trust doctrine." *Id.* at 286, 414 N.W.2d at 830.

[66]112 Wis.2d 417, 334 N.W.2d 67 (1983).

[67]Unlike *First English*, however, *Zinn* should be analyzed more as a physical occupation case than a pure regulatory taking case as was the case in *First English*. *Zinn* involved an quasi-judicial decision by the Wisconsin Department of Natural Resources which erroneously placed the ordinary highwater mark so as to make the property owner's dry land part of a lake bed and obliterating the property owner's sole riparian ownership. The state later rescinded the decision and the property owner sued for a taking for the limited period of time the erroneous decision impacted the use of her property. *See* Alemante Gebre-Selassie, Note, *Inverse Liability of the State of Wisconsin for a De Facto 'Temporary Taking' as a Result of an Erroneous Administrative Decision: Zinn v. State*, 1984 WIS. L.

a reasonable relationship test for upholding governmental exactions against takings challenges. *Jordan* was decided by the Wisconsin Supreme Court over twenty years before *Nollan* and *Dolan* and was relied upon by the United States Supreme Court in deciding both cases.

Despite this rich history of developing takings jurisprudence independently of the United States Supreme Court, the Wisconsin Supreme Court has noted its frustrations with the lack of guidance on takings from the decisions of the United States Supreme Court: "The problem of how to distinguish between an unconstitutional taking and a police power regulation is a difficult one, and the decisions of the [United States] Supreme Court have not made it less difficult. Decisions in this area of the law must necessarily be made on an ad hoc basis."[69] While the Wisconsin decisions provide further guidance for understanding the takings issue, the Wisconsin court's decisions do not present the definitive takings definition.

REV. 1431.

[68]28 Wis.2d 608, 137 N.W. 442 (1965).

[69]113 Wis.2d at 623, 335 N.W.2d at 603.