ENVIRONMENTAL LAW—WETLAND FILL-RESTRICTIONS DO NOT CONSTITUTE A COMPENSABLE "TAKING" WITHIN THE MEANING OF THE FIFTH AMENDMENT—*Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

> The most immediate threat to the wetlands lies in their direct alteration and destruction by man. Pollution can be abated; forests can even be replanted to restore watersheds. But a wetland covered with ten feet of municipal garbage and a complex of apartment buildings can never be restored. Land use controls are therefore the essential ingredient of a viable wetlands program.[1]

In 1961, Ronald and Kathryn Just purchased 36.4 acres of land along the shore of a navigable lake in Marinette County, Wisconsin. The land was purchased for both personal use and investment purposes. The Justs sold five parcels of this land, retaining the property involved in this litigation.[2] In 1966, Wisconsin enacted a special zoning law which protects water quality through shoreland regulation, and grants the authority for shoreland zoning to counties.[3] Marinette County's shoreland zoning ordinance follows a model ordinance pub-

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1 Note, *Coastal Wetlands in New England*, 52 B.U.L. REV. 724, 725 (1972).

2 Just v. Marinette County, 56 Wis. 2d 7, 13, 201 N.W.2d 761, 766 (1972).

3 WIS. STAT. ANN. §§ 59.971, 144.26 (Supp. 1972-73). The legislation was enacted as a part of the Wisconsin Water Quality Act of 1965.

Section 144.26 states the basic purpose of the state's shoreland regulation program:

> (1) To aid in the fulfillment of the state's role as trustee of its navigable waters and to promote public health, safety, convenience and general welfare, it is declared to be in the public interest to make studies, establish policies, make plans and authorize municipal shoreland zoning regulations for the efficient use, conservation, development and protection of this state's water resources. The regulations shall relate to lands under, abutting or lying close to navigable waters. The purposes of the regulations shall be to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty.

Section 59.971 grants authority for shoreland zoning to counties. It reads in part:

> (1) To effect the purposes of s. 144.26 and to promote the public health, safety and general welfare, counties may, by ordinance enacted separately from ordinances pursuant to s. 59.97, zone all lands (referred to herein as shorelands) in their unincorporated areas within the following distances from the normal high-water elevation of navigable waters as defined in s. 144.26 (2) (d): 1,000 feet from a lake, pond or flowage; 300 feet from a river or stream or to the landward side of the flood plain, whichever distance is greater. If the navigable water is a glacial pothole lake, the distance shall be measured from the high watermark thereof.

See generally Kusler, *Water Quality Protection for Inland Lakes in Wisconsin: A Comprehensive Approach to Water Pollution*, 1970 WIS. L. REV. 35; Yanggen & Kusler, *Natural Resource Protection through Shoreland Regulation: Wisconsin*, 44 LAND ECON. 73 (1968).

For a discussion of Wisconsin's water pollution control efforts, *see* Carmichael, *Forty Years of Water Pollution Control in Wisconsin: A Case Study*, 1967 WIS. L. REV. 350.

lished by the state's Department of Resource Development.[4] The ordinance requires the property owner to secure a conditional use permit[5] for all but a limited number of permitted uses.[6] One of the conditional uses requiring a permit is the filling, drainage, or dredging of wetlands.[7]

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[4] Just v. Marinette County, 56 Wis. 2d 7, 9, 201 N.W.2d 761, 764 (1972). The ordinance divides the shorelands of Marinette County into (1) general purpose districts, (2) general recreational districts, and (3) conservancy districts. Marinette County, Wis., Ordinance 24, § 3.0, Sept. 19, 1967. A conservancy district is defined to include "all shorelands designated as swamps or marshes on the United States Geological Survey maps . . . ." *Id.* § 3.4.

[5] Marinette County, Wis., Ordinance 24, § 3.0, Sept. 19, 1967 provides in part:

> 3.42 Conditional Uses. The following uses are permitted upon issuance of a Conditional Use Permit as provided in Section 9.0 and issuance of a Department of Resource Development permit where required by Section 30.11, 30.12, 30.19, 30.195 and 31.05 of the Wisconsin Statutes.
>
> (1) General farming, provided farm animals shall be kept one hundred feet from any non-farm residence.
>
> (2) Dams, power plants, flowages and ponds.
>
> (3) Relocation of any water course.
>
> (4) Filling, drainage or dredging of wetlands according to the provisions of Section 5.0 of this ordinance.
>
> (5) Removal of top soil or peat.
>
> (6) Cranberry bogs.
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> (7) Piers, Docks, boathouses.

[6] *Id.* § 3.0 provides in part:

> 3.41 Permitted Uses.
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> (1) Harvesting of any wild crop such as marsh hay, ferns, moss, wild rice, berries, tree fruits and tree seeds.
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> (2) Sustained yield forestry subject to the provisions of Section 5.0 relating to removal of shore cover.
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> (3) Utilities such as, but not restricted to, telephone, telegraph and power transmission lines.
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> (4) Hunting, fishing, preservation of scenic, historic and scientific areas and wildlife preserves.
>
> (5) Non-resident buildings used solely in conjunction with raising water fowl, minnows, and other similar lowland animals, fowl or fish.
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> (6) Hiking trails and bridle paths.
>
> (7) Accessory uses.
>
> (8) Signs, subject to the restriction of Section 2.0.

[7] *See id.* § 3.42 (4). "Wetlands" are defined in section 2.29 of the Marinette County ordinance as

> [a]reas where ground water is at or near the surface much of the year or where any segment of plant cover is deemed an aquatic according to N. C. Fassett's "Manual of Aquatic Plants."

Section 5.42 (2) of the ordinance requires a conditional-use permit for any filling or grading

> [o]f any area which is within three hundred feet horizontal distance of a navigable water and which has surface drainage toward the water and on which there is:
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> (a) Filling of more than five hundred square feet of any wetland which is contiguous to the water.
>
> . . . .
>
> (d) Filling or grading of more than 2,000 square feet on slopes of twelve per cent or less.

In March, 1968, six months after the ordinance became effective, Ronald Just filled in an area, more than 500 square feet of which was wetlands located contiguous to water with surface drainage toward a lake,[8] without securing a conditional use permit. The land had characteristics which would classify it as wetlands: an accumulation of surface water, lake frontage, growth of aquatic plants on the land, and designation as swamp or marshland on United States Geological Survey maps. In order to fill more than 500 square feet of property, the Justs were required to obtain a conditional use permit from the zoning administrator of the county or incur a $10 to $200 fine for each day of violation.[9]

In consolidated actions, Marinette County sought a mandatory injunction to restrain landowners from placing fill material on their property without first obtaining a conditional use permit, and the Justs sought a declaratory judgment stating that (1) the shoreland zoning ordinance was unconstitutional; (2) their property was not "wetland";

New Jersey (N.J. STAT. ANN. § 13:9A-2 (Supp. 1972-73)) defines the wetlands as follows:

> For the purposes of this act the term "coastal wetlands" shall mean any bank, marsh, swamp, meadow, flat or other low land subject to tidal action in the State of New Jersey along the Delaware bay and Delaware river, Raritan bay, Barnegat bay, Sandy Hook bay, Shrewsbury river including Navesink river, Shark river, and the coastal inland waterways extending southerly from Manasquan Inlet to Cape May Harbor, or at any inlet, estuary or tributary waterway or any thereof, including those areas now or formerly connected to tidal waters whose surface is at or below an elevation of 1 foot above local extreme high water, and upon which may grow or is capable of growing some, but not necessarily all, of the following: Salt meadow grass (Spartine patens), spike grass (Distichlis spicata), black grass (Juncus gerardi), saltmarsh grass (Spartina alterniflora), saltworts (Salicornia Europaea, and Salicornia bigelovii), Sea Lavendar (Limonium carolinianum), saltmarsh bulrushes (Scirpus robustus and Scirpus paludosus var. atlanticus), sand spurrey (Spergularia marina), switch grass (Panicum virgatum), tall cordgrass (Spartina pectinata), hightide bush (Iva frutescens var. oraria), cattails (Typha angustifolia, and Typha latifolia), spike rush (Eleocharis rostellata), chairmaker's rush (Scirpus americana), bent grass (Agrostis palustris), and sweet grass (Hierochloe odorata). The term "coastal wetlands" shall not include any land or real property subject to the jurisdiction of the Hackensack Meadowlands Development Commission pursuant to the provisions of P.L. 1968, chapter 404, sections 1 through 84 (C. 13:17-1 through C. 13:17-86).

[8] Thus he violated section 5.42(2) of the ordinance. *See* note 7 *supra*.

> [P]ractically all grading and filling which destroys vegetation and opens land to erosion, such as the preparation of lands for residential, commercial, or industrial building sites and road building, poses a sediment threat to nearby bodies of water.

Kusler, *supra* note 3, at 42-43 (footnote omitted).

> The importance of sediment as a pollutant has been underestimated. It fills and destroys lakes and reservoirs, kills fish and bottom-feeding organisms, and makes waters aesthetically unattractive.

Id. at 43 n.29.

[9] Just v. Marinette County, 56 Wis. 2d 7, 14, 201 N.W.2d 761, 766 (1972).

and (3) the prohibition against filling was unconstitutional.[10] The trial court entered judgment upholding the ordinance, finding that the property was wetland, and that the Justs had violated the ordinance and were thus subject to a forfeiture of $100.[11]

The Justs appealed this decision, arguing that the wetland fill-restrictions were unconstitutional since they amounted to a constructive taking of their land without compensation.[12] The State of Wisconsin intervened as a party respondent[13] because of the constitutional issue, which it considered a challenge to its state program of protecting water quality through shoreland regulation.[14] In *Just v. Marinette County*, Chief Justice Hallows, speaking for the Wisconsin supreme court, held that because of the special characteristics of the wetlands and their vital role in the balance of nature,[15] it is not an unreasonable

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10 *Id.* at 8-9, 201 N.W.2d at 764.

11 *Id.* at 9, 201 N.W.2d at 764.

12 *Id.* at 8-9, 201 N.W.2d at 764 (1972). See notes 21-46 *infra* and accompanying text for an explanation of "taking."

13 *See* WIS. STAT. ANN. § 274.12(6) (1958).

14 Just v. Marinette County, 56 Wis. 2d 7, 8-9, 201 N.W.2d 761, 764 (1972). Kusler, *supra* note 3, at 47, notes that

> the use of land adjacent to a water body . . . influences the quality of water. Therefore, land use controls which restrict uses with direct or indirect pollution potential could be used to protect water quality.

15 56 Wis. 2d 7, 16-17, 201 N.W.2d 761, 768 (1972).

> What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty.

Id.

The wetlands are described in NEW JERSEY DEPT. OF ENVIRONMENTAL PROTECTION, NEW JERSEY WETLANDS ORDER BASIS AND BACKGROUND 6 (1972) [hereinafter cited as WETLANDS ORDER BASIS].

> 9.1 WETLANDS are ecosystems and are integral to larger estuarine zone ecosystems. WETLANDS support plant species and species communities which are in dynamic but delicate balance. The biophysical environment determines that balance. This complex environment is subject to and is shaped by those natural physical, chemical, and geological principles governing the tides, ocean currents, coastline slope, climate, river flows, and sedimentation patterns. . . .
> 9.2 Principal sections of this BASIS have shown that WETLANDS have multiple beneficial uses: They act as a buffer against flood, wind, and wave damage; they serve as a waterfowl, bird, and wildlife habitat; and, they accumulate, store and provide essential nutrients which make the estuary a rich and very productive area. (Estuaries provide the food serving as the base of the food chain for the larval stages of many marine forms during this critical part of their life cycles.)
> . . . .
> 9.3.1 WETLANDS play a most significant geological role as sediment accretors (Niering). Geologists have indicated that sediments which do not form marsh complexes go instead into channels, harbors, or tidal creeks and accentuate silting problems (Sanders and Ellis). Marsh build-up processes occur over 4000 year spans (Redfield); man destroys WETLANDS in one day.

exercise of the police power "to prevent *harm* to public rights by limiting the use of private property to its natural uses."[16]

Just marks the first time a court has balanced the restrictions on an individual landowner which are implicit in land-use controls against *harm* to the environment that adversely affects the rights of the public. This is a deviation from earlier cases viewing environmental regulation as an attempt to secure a public *benefit* which should be obtained by the government through the exercise of eminent domain.

The power of state and federal government to acquire private property for public use has long been recognized as a necessary "inherent power" that exists independently of any constitutional provisions.[17] Although this power of eminent domain is not expressly granted in the Constitution, there are limitations in the fifth amendment, which provides that the taking of land by the government be for a "public use" and that "just compensation" be paid for the property.[18] The Wiscon-

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9.3.2 WETLANDS play an important role in the cycling of nitrogen in natural ecosystems (Delwiche). Nitrogen oxides may accumulate in our waters, and nitrate concentrations above 45 milligrams per liter renders those waters unfit for human consumption (U.S.P.H.S.). Such waters, when drunk, can cause methemoglobinemia which usually results in brain damage. WETLANDS are an essential ecosystem; they denitrify toxic nitrogen-oxygen compounds and can act as efficient guardians of the public health (Nickerson).

9.3.3 WETLANDS improve water quality by reoxygenating the water and absorbing nitrates and phosphates (McCormick and Patrick); also, marsh vegetation reduces organic load. Tinicum marsh vegetation studies indicated a daily reduction of approximately 7.7 tons of BOD, 4.9 tons of $P\text{-}PO_4$, and 4.3 tons $N\text{-}NH_3$ (McCormick). WETLANDS help prevent serious public health problems.

9.4 The WETLANDS ecosystem is delicately balanced. Seemingly minor physical alterations could stress this delicately balanced system and cause severe damage to the kinds and abundance of plant and animal species inhabiting the WETLANDS. In addition, significant alteration could affect ultimately the health, welfare, and safety of man. All of the facts are not yet known. The Department's WETLANDS ORDER has been, therefore, conservatively drawn. The ORDER is based on known scientific fact and sound ecological practice. It leaves an adequate margin of safety for protection from miscalculation and extreme natural variation. It takes into account known beneficial and detrimental effects, and it allows for multiple WETLANDS use.

16 56 Wis. 2d at 17, 201 N.W.2d at 768 (emphasis added).

17 Kohl v. United States, 91 U.S. 367, 371-72 (1876). *See also* 1 P. NICHOLS, EMINENT DOMAIN § 1.14[2] (3d ed. rev. 1964) and cases cited therein.

18 U.S. CONST. amend. V provides in relevant part:

[N]or shall private property be taken for public use, without just compensation.

This "compensation provision" of the fifth amendment has been incorporated into the fourteenth amendment. *See* Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 233-41 (1897).

Earlier cases conceived of public use as a limitation on the power of eminent domain. *See* United States v. Jones, 109 U.S. 513 (1883); Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403 (1879). However, Berman v. Parker, 348 U.S. 26 (1954), and later cases have broadly construed the concept of public use, finding that the government has the power to condemn any property rights needed to accomplish a legitimate purpose.

sin supreme court's rejection of the claim that wetland fill-restrictions so severely limit the use of land and depreciate the value of the land as to constitute a confiscatory "taking"[19] is of great significance to New Jersey and other states which have recently effected statewide coastal wetlands regulation.[20]

Until this century, recovery of compensation under eminent domain was limited to a "direct" taking of property, and recovery was denied for damages when no physical invasion or permanent taking occurred.[21] The first Justice Harlan was the principal judicial architect of this doctrine, which has been termed the "proprietary interest" theory of compensation.[22] In *Mugler v. Kansas*,[23] Justice Harlan, speaking for the Court, upheld a Kansas statute which prohibited the sale and manufacture of intoxicating liquors, finding that no compensation was due the owner of a brewery even though he was deprived of three-fourths of the value of his property. Justice Harlan reasoned that no taking occurred unless the individual owner was *directly* disturbed in the lawful possession of his property. He also analogized the situation in the *Mugler* case to that in which the private use of the property is in

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See 4 WATER AND WATER RIGHTS § 300.2 (R. Clark ed. 1970) for a discussion of public use as a requirement for the application of eminent domain.

The determination of "just compensation" is a judicial, not a legislative determination. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893). In most circumstances, it is determined by the fair market value at the time of taking. Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924).

> [D]espite the fact that the payment of compensation is not an essential element of the *meaning* of eminent domain . . . it is an essential element of the *valid exercise* of such power.

1 P. NICHOLS, *supra* note 17, § 1.11, at 6 (footnote omitted).

19 56 Wis. 2d at 26, 201 N.W.2d at 772.

20 *See* N.J. STAT. ANN. § 13:9A-2 (Supp. 1972-73). *See also* CONN. GEN. STAT. ANN. § 22a-28 (Supp. 1973); ME. REV. STAT. ANN. tit. 12, §§ 4701-09 (Supp. 1972-73); MD. ANN. CODE art. 66C, §§ 718 *et seq.* (1970); MASS. GEN. LAWS ANN. ch. 130, § 105 (1972); N.H. REV. STAT. ANN. § 483-A:1-a *et seq.* (Supp. 1972). *See generally* Wilkes, *Constitutional Dilemmas Posed by State Policies Against Marine Pollution—The Maine Example*, 23 ME. L. REV. 143 (1971); Note, *supra* note 1; Comment, *The Wetlands Statutes: Regulation or Taking*, 5 CONN. L. REV. 64 (1972); Note, *Maryland's Wetlands: The Legal Quagmire*, 30 MD. L. REV. 240 (1970).

21 Under the physical invasion theory, the extent of the damage was unimportant if there had not been actual appropriation and dispossession of the owner.

Under the more modern view, any substantial interference with ownership may be considered a taking. *See, e.g.*, United States v. Causby, 328 U.S. 256 (1946), where frequent and regular flights of federal aircraft over private property at low altitudes were held to be such an interference with use and enjoyment of land that they were considered "tantamount" to an easement. *See also* Griggs v. Allegheny County, 369 U.S. 84 (1962); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962).

22 *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 38 (1964).

23 123 U.S. 623 (1887).

the nature of a nuisance which could be restricted or abated without compensation.[24] Thus he utilized the traditional legal concepts of appropriation and noxious use to formulate a theory of taking.[25]

Justice Harlan's restricted view of taking was rejected in *Pennsylvania Coal Co. v. Mahon*.[26] There the Pennsylvania Coal Company had conveyed by deed the surface rights of the land, but in express terms had reserved the right to remove the coal under the land. The plaintiff, Mahon, brought suit to prevent the coal company from mining under his property, claiming that these rights were removed by the Kohler Act of 1921 which prohibited the mining of anthracite coal in such a way as to cause the subsidence of any structure used for human habitation. Justice Oliver Wendell Holmes, writing for the Court, enunciated a theory of taking which focused on the extensiveness of the economic injury incurred by the property owner as a result of the regulation.[27]

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[24] *Id.* at 668-69.

> [T]he present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses that may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

Id.

[25] For a discussion of the "taking" theories of Justices Harlan and Holmes, *see* Sax, *supra* note 22, at 42. Sax finds that neither of the two approaches has proved satisfactory. Harlan's view, he notes, worked only within a relatively narrow area where the exercise of the police power was easily distinguished from government appropriation.

> [I]n Harlan's day the standard sort of government activity—regulation of liquor, prostitution, fertilizer works or brickyards—can quite understandably be described as the mere regulation (rather than appropriation) of noxious (rather than innocent) uses; such activity is easily distinguished from the invasion which occurs when the government appropriates property for a highway or a post office.

Id. at 39 (footnotes omitted).

[26] 260 U.S. 393 (1922).

> In seeking a test of fairness Holmes found the Harlan approach lacking: while he never seems to have discussed or specifically rejected the proprietary interest, invasion, or noxious use tests, his own decisions rest upon entirely different grounds.

Sax, *supra* note 22, at 41.

[27] 260 U.S. at 413.

> One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there

Justice Holmes balanced the action of the state against the extent of the economic loss to the coal company. Finding that the regulation went "too far," he suggested that the excessiveness of the restriction was measured by the diminution of property value.[28]

Although *Pennsylvania Coal* has come to stand for the "diminution of value" principle, a closer reading of the case will show that it was not the only criterion.[29] The Court admitted that property values are enjoyed under certain implied limitations which must yield to the police power.[30] This concept of implied limitations was not only recognized by Justice Holmes in *Pennsylvania Coal*, but was even applied by him in other cases to sustain governmental regulation.[31]

Six years later, the Court, in *Miller v. Schoene*,[32] upheld a Virginia statute which required the destruction of red cedar trees which served as a "host" to a parasite fatal to apple orchards. The Court, weighing the burden on the individual against the benefit to the public, found that the destruction of the cedar trees was justified since there was a "preponderant public concern in the preservation of the one interest over the other" which the legislature had determined to be "of greater value to the public."[33] Similarly, in *Village of Euclid v. Ambler Realty Co.*,[34] the Court did not consider the zoning ordinance which changed the classification of plaintiff's district from industrial to residential use to be a confiscatory taking, even though the value of the owner's property was reduced substantially. The Court upheld the exclusion of the more profitable business uses through comprehensive zoning, reasoning that they would be nuisance-like in their surroundings.[35]

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must be an exercise of eminent domain and compensation to sustain the act. *Id.*

28 *Id.* at 413, 415.

29 The Court was most concerned with the fact that a valuable estate in land had been abolished. *Id.* at 414. Holmes also considered the following factors: the statute destroyed previously existing contract rights; the statute ordinarily did not apply when the surface owner was also the owner of the coal underneath; the plaintiff had assumed the "risk of acquiring only surface rights." *Id.* at 414, 416.

30 *Id.* at 413.

31 *See* Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921); Block v. Hirsh, 256 U.S. 135 (1921); Erie R.R. v. Board of Public Utilities Comm'rs, 254 U.S. 394 (1921).

32 276 U.S. 272 (1928).

33 *Id.* at 279. The cedar tree was commercially valueless while apple growing was one of the main agricultural pursuits of Virginia at that time. *Id.*

34 272 U.S. 365 (1926).

35 *Id.* at 384, 394-95.

> Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked

Obviously, then, not every destruction or injury to private property constitutes a compensable taking. The Supreme Court has held that in times of imminent peril the destruction of private property is not compensable.[36] The Court has also held that where benefits conferred on the property owner by virtue of the regulation outweigh the harm caused by the governmental activity, there is no taking.[37] The Court's definition of taking seems to vary with the times and the considerations involved in each particular case. Some of the theories which the court has applied in determining whether under a given set of facts a taking has occurred are: diminution of value, noxious use, "fairness" and physical invasion.[38] There seems to be no uniform rule to determine where a valid regulation of property ends and a taking begins.[39]

Allison Dunham, in his perspective on thirty years of Supreme Court expropriation law, has commented that the Court has not set forth a guiding principle to determine when an owner's expectations regarding the use of his property are protected against governmental ac-

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> automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

Id. at 394-95.

[36] United States v. Caltex, Inc., 344 U.S. 149 (1952) (Demolition by United States Army of oil company's facility so that it would not fall into enemy hands held non-compensable.).

[37] United States v. Sponenbarger, 308 U.S. 256 (1939) (Flood control which was beneficial to most of plaintiff's land but caused greater flooding to small portion held non-compensable.).

[38] United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) (physical invasion); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (diminution of value); Northwestern Fertilizing Co. v. Village of Hyde Park, 97 U.S. 659 (1878) (noxious use).

It has been suggested that guidelines of "fairness" and "justice" be used in determining whether a taking has occurred in "allocating resources between individuals and the community under the particular circumstances of each case." Olson, *The Role of "Fairness" in Establishing a Constitutional Theory of Taking*, 3 URB. LAW 440, 461 (1971). *See, e.g.*, YMCA v. United States, 395 U.S. 85, 92 (1969).

> But where, as here, the private party is the particular intended beneficiary of the governmental activity, "fairness and justice" do not require that losses which may result from that activity "be borne by the public as a whole," even though the activity may also be intended incidentally to benefit the public.

See also Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

[39] *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) ("There is no set formula to determine where regulation ends and taking begins."); United States v. Caltex, Inc., 344 U.S. 149, 156 (1952) ("No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged on its own facts.").

tion.[40] The individual property owner might well ask: "when must the police power yield to the fifth amendment's command that private property 'not be taken for public use without just compensation?' "

According to Ernst Freund, the distinguishing characteristics between eminent domain and the police power as distinct powers of government are

> neither in the form nor in the purpose of taking, but in the relation which the property affected bears to the danger or evil which is to be provided against.
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> Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful . . . .[41]

Regulation of a landowner's use of property enacted under the police power cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.[42] It must be reasonable, non-discriminatory, and rationally related to the purpose of the legislation.[43] While the state's police power permits it to place reasonable restrictions on the individual's right to use privately owned property if the public interest so dictates, any unreasonable or arbitrary regulation of property is deemed confiscatory and invalid.[44] Regulatory measures which leave no practical uses to the property owner are considered an extreme exercise of the police power which will not be upheld unless the owner's use or enjoyment is injurious to the public welfare.[45] A regulation will not be deemed invalid, however, merely because it deprives the property owner of the use which is most profitable.[46] Problematically, this is a question of degree.

It should be noted that, historically, the compensation clause "was designed to prevent arbitrary government action"—not to "preserve the

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40 Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 80. Professor Dunham examined eighty-nine eminent domain Supreme Court cases over the span of thirty years. He described the Supreme Court doctrine in this area as a "crazy quilt" pattern. *Id.* at 63.

41 E. FREUND, THE POLICE POWER § 511 (1904).

42 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

43 *See* Lawton v. Steele, 152 U.S. 133, 137 (1894) ("[I]t must appear . . . that the means are reasonably necessary for the accomplishment of the purpose. . . .").

44 *Id.*; Mugler v. Kansas, 123 U.S. 623, 661 (1887).

45 *See, e.g.*, Miller v. Schoene, 276 U.S. 272, 279-80 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 394-95 (1926) (common law application of nuisance analogy to zoning); Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915).

46 Goldblatt v. Town of Hempstead, 369 U.S. 590, 592, 594 (1962).

economic status quo."[47] Even so, the diminution of value theory which had its genesis in *Pennsylvania Coal* has become the dominant test of "taking" in state courts.[48] Although the Supreme Court has, at times, not found this view to be persuasive,[49] in recent cases involving wetlands protection laws and flood plain zoning, the state courts have applied the "diminution of value" test and have found the regulations confiscatory.[50] These cases have relied heavily on the majority opinion in *Pennsylvania Coal,* where Justice Holmes stated that property expectations may be damaged "to a certain extent" but "if regulation goes too far it will be recognized as a taking."[51] Such reliance implies that this is the only test by which courts should determine compensability. For example, in *Dooley v. Town Plan & Zoning Commission,*[52] the Supreme Court of Errors of Connecticut held that a flood plain zoning ordinance which prohibited the plaintiff from developing his property for building purposes was confiscatory. The court stated that

> [w]here most of the value of a person's property has to be sacrificed so that community welfare may be served, and where the owner does not directly benefit from the evil avoided . . . the occasion is appropriate for the exercise of eminent domain.[53]

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47 Sax, *supra* note 22, at 58. The term eminent domain is thought to have originated with Hugo Grotius who in 1625 wrote the following in his work "De Jure Belli et Pacis":

> ". . . The property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property . . ."

Quoted in 1 P. NICHOLS, *supra* note 17, § 1.12[1], at 10 (footnote omitted).

48 Sax, *supra* note 22, at 58; see cases cited note 50 *infra; cf.* Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 231-32, 15 N.E.2d 587, 591-92 (1938).

49 *See, e.g.,* Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83 (1946); Miller v. Schoene, 276 U.S. 272, 279-80 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

50 Cases following the diminution of value theory found in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) include: Bartlett v. Zoning Comm'n, 161 Conn. 24, 282 A.2d 907 (1971); Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964) (combined flood plain zoning and wetlands protective ordinance); State v. Johnson, 265 A.2d 711 (Me. 1970) (state wetlands protection law); Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965) (state wetlands protection law); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963) (wetlands protection ordinance). *See also* Candlestick Properties, Inc. v. San Francisco Bay Conserv. & Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (Dist. Ct. App. 1970).

51 260 U.S. at 415.

52 151 Conn. 304, 197 A.2d 770 (1964).

53 *Id.* at 312, 197 A.2d at 774.

Under this theory, Maine's Wetland Protection Act[54] was also found to be confiscatory in *State v. Johnson*,[55] where the court held that the restrictions against filling wetlands as applied to those plaintiffs constituted a deprivation of reasonable use since absent the addition of fill, the land involved had no commercial value. The court cited Justice Holmes for its guiding principle that when the regulation reaches a " 'certain magnitude in most if not in all cases there must be an exercise of eminent domain and compensation.' "[56] The court regarded the wetland fill-restrictions as an attempt to preserve a natural resource at the expense of the individual landowner. As such, the court considered the resulting *benefit to the public* but ignored the *environmental harm* which would be caused by filling the wetland.[57]

In 1963, the New Jersey supreme court, in *Morris County Land Improvement Co. v. Parsippany-Troy Hills*,[58] ruled that the Meadows Development Zone provision of 1960, which had as its primary objective the retention of marshland in its natural state, was a taking of property since its restrictions left the property owner without any reasonable use of his property.[59] The court found that its predecessor, a 1954 amendment to the zoning ordinance, acted as an interim or stopgap measure, freezing regulations with the hope that higher governmental authority would acquire the area for a regional flood control project. Furthermore, the court noted that since the 1960 zoning provision had been enacted for the specific purpose of aiding in flood control, it was for the *public benefit*, and the land should have been acquired through purchase.[60] While the court did quote Holmes as to the excessiveness of the regulations involved,[61] it was more concerned with the fact that under the ordinance the only uses left to the owner were public or quasi-public rather than with the diminution of property

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54 ME. REV. STAT. tit. 12, §§ 4701-09 (Supp. 1972-73).

55 265 A.2d 711 (Me. 1970).

56 *Id.* at 715 (quoting *Pennsylvania Coal*, 260 U.S. at 413).

57 *Id.* at 716.

58 40 N.J. 539, 193 A.2d 232 (1963).

59 *Id.* at 558-59, 193 A.2d at 243. The land in its natural state constituted a natural detention basin for flood waters in times of heavy rainfall. *Id.* at 543, 193 A.2d at 235.

60 *Id.* at 552-53, 193 A.2d at 240.

> It is equally obvious from the proofs, and legally of the highest significance, that the main purpose of enacting regulations with the practical effect of retaining the meadows in their natural state was for a public benefit. This benefit is twofold . . . : First, use of the area as a water detention basin in aid of flood control in the lower reaches of the Passaic Valley far beyond this municipality; and second, preservation of the land as open space for the benefits which would accrue to the local public . . . .

Id. at 553, 193 A.2d at 240.

61 *Id.* at 555, 193 A.2d at 241.

value.[62] The court evidently believed the evidence presented at trial which indicated that the government was trying to seek a way to avoid payment for the land.[63] In fact, Joseph Sax, in his article, *Takings and the Police Power,* includes this case among those where government employs

> [o]ne of the oldest tricks of capitalizing on form . . . to try to depreciate the value or inhibit the development of property through zoning, so that it has a much reduced market value when the government gets around to buying it.[64]

Morris County Land Improvement has been cited frequently in both New Jersey and other jurisdictions where courts have held floodplain and wetland protection zoning ordinances to be confiscatory takings and therefore invalid.[65] But the holding of *Morris County Land Improvement* seems to be based on the special circumstances of the particular case. The diminution of value test was not applied by Justice Hall who expressly reserved opinion in a situation where it might be found that the primary purpose of a municipal regulation was to promote intra-municipal, rather than regional, flood control:

> There is no substantial evidence in this case that the matter of intra-municipal flood control had any bearing on the adoption of the meadows zone regulations. . . . This case, therefore, does not involve the matter of police power regulation of the use of land in a flood plain on the lower reaches of a river by zoning . . . and nothing said in this opinion is intended to pass upon the validity of any such regulations.[66]

For this reason, *Morris County Land Improvement* was limited to its particular facts in *Turnpike Realty Co. v. Town of Dedham,*[67]

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[62] *Id.*, 193 A.2d at 241-42.

> While the issue of regulation as against taking is always a matter of degree, there can be no question but that the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water detention basin or open space.

Id., 193 A.2d at 241.

[63] *Id.* at 554, 193 A.2d at 240-41.

[64] Sax, *supra* note 22, at 46-47 (footnote omitted).

[65] *See* cases cited note 50 *supra.*

[66] 40 N.J. at 556 n.3, 193 A.2d at 242.

[67] — Mass. —, 284 N.E.2d 891 (1972), *cert. denied,* — U.S. — (1973). The court in *Just* found that

> [t]his case is analogous to the instant facts. The ordinance had a public purpose to preserve the natural condition of the area. No change was allowed which would injure the purposes sought to be preserved and through the special-permit technique, particular land within the zoning district could be excepted from the restrictions.

56 Wis. 2d at 23, 201 N.W.2d at 771.

where the Massachusetts supreme court upheld the validity of a zoning by-law establishing a flood plain district. The petitioner in this case argued that prior to the enactment of the by-law, the best use of his land was for apartment buildings and, after the enactment, the best use was for agriculture. Although there was an alleged reduction in property value of 88 percent, the court did not consider the mere decrease in the value of a particular piece of land to be conclusive evidence of an unconstitutional deprivation of property. The court balanced the substantial restrictions on the use of petitioner's land against the *potential harm* to the community from overdevelopment of a flood plain area. In so doing, the majority found that even though there was a substantial diminution in the value of the petitioner's land, they were unable to conclude that the decrease was such as to render it an unconstitutional deprivation of his property.[68]

This opinion, while recognizing the diminution of value theory, emphasized that there is no formula to determine where land use regulation ends and taking begins.[69] The court's guidelines seem to be the "peculiar circumstances of the particular instances" coupled with a balancing of the restrictions on land use against potential harm prevented.[70] However, the majority opinion did not indicate what might constitute a "substantial diminution" in value. Moreover, Chief Justice Tauro, in his concurring opinion, qualified the majority's opinion by adding that the court did not have to decide whether the petitioner was the uncompensated victim of a taking until the board's action on the petitioner's permit was either affirmed or denied.[71]

Turnpike Realty represents a "break" from the traditional state approach to land-use control legislation. Unlike *Dooley*, *Turnpike Realty* viewed the preservation of a flood plain area in its natural state as preventing a *public harm* rather than conferring a *public benefit.* Thus, instead of concentrating solely on diminution of value to determine whether there was a "taking" or a valid exercise of the police power (as was the custom in the "diminution of value—public benefit" approach), the court balanced the restrictions upon the landowner's use and its diminishing effect on property value against the potential harm to the public. This balancing approach is analogous to the one taken in cases involving nuisance-like activity.[72] But the problem in applying

68 — Mass. at —, 284 N.E.2d at 900.

69 *Id.*

70 *Id.*

71 *Id.* at —, 284 N.E.2d at 901-02.

72 *See* Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed,* 371 U.S. 36 (1962).

this principle to wetlands regulation is that not every land owner is injuring the property of another or is engaged in nuisance-like activity.

The court in *Just* saw the issue as a basic conflict between the public interest in preventing the despoilation of natural resources and the owner's right to use his property as he wishes.[73] The environmental aspects distinguished this case for the presiding justice from most police power condemnation cases.[74] The interrelationship of the wetlands, the swamps and the natural environment of the shorelands to the purity of the water and to other natural resources caused the court to reexamine the concepts of *public benefit* in contrast to *public harm*, and to question whether the ownership of property is so absolute that man can change its nature to suit his purpose.[75] The court found that an owner of land has no absolute right to change the essential 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 others."[76]

The court noted that filling a non-commercially usable swamp is

> not *in and of itself* an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp.[77]

It reasoned that since the owner was not prevented from using his land for natural and indigenous uses, and since the filling of the wetlands resulted in *damage* to the natural environment and therefore to the general public, it was an unreasonable use of land.[78]

Finding that the restrictions on the use of the Just's property were *not to secure a benefit for the public but to prevent harm to nature and public rights* resulting from the unrestricted activities of humans, the court stated that

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[73] 56 Wis. 2d at 16, 201 N.W.2d at 767.

[74] *Id.* at 16-17, 201 N.W.2d at 768. *See also* note 15 *supra* for a description of the environmental aspects of the wetlands.

[75] *Id.* at 16-17, 201 N.W.2d at 768.

[76] *Id.* at 17, 201 N.W.2d at 768.

> We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man made. The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters.

Id. at 16, 201 N.W.2d at 768.

[77] *Id.* at 22, 201 N.W.2d at 770. The court distinguished the Wisconsin "taking" cases on the basis that the unreasonableness of the police power exercise lay in the excessive restriction of the *natural* use of the land. *Id.* at 19-20, 201 N.W.2d at 769.

[78] *Id.* at 17-18, 201 N.W.2d at 768. The court stated:

> The ordinance does not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans.

Id. at 24, 201 N.W.2d at 771.

> nothing this court has said or held in prior cases indicate that destroying the natural character of a swamp or a wetland so as to make that location available for human habitation is a reasonable use of that land when the new use, although of a more economical value to the owner, causes a harm to the general public.[79]

The filling and dredging activities required to render most wetlands appropriate for commercial development are incompatible with the preservation of the important natural features of the land.[80] If left to the individual's choice, population and economic pressures would probably win out over the natural use of the land, especially since wetlands are particularly vulnerable to vacation sites and commercial and industrial development.[81] The cost of unregulated wetland development would be borne not by the private developer or speculator but by marine life, fishermen, the consumer, sportsmen, neighboring landowners and the public in general.[82] The building of an estuarine en-

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79 *Id.* at 18, 201 N.W.2d at 768.

The *Just* court observed that the special permit system was now common practice and stated that it was "of some significance in considering whether or not a particular zoning ordinance is reasonable." *Id.* at 22, 201 N.W.2d at 771.

80 Note, *supra* note 1, at 29-30.

81 Note, *State and Local Wetlands Regulation: The Problem of Taking Without Just Compensation*, 58 VA. L. REV. 876, 878-79 (1972).

82 *See* COUNCIL ON ENVIRONMENTAL QUALITY, THIRD ANNUAL REPORT 187 (1972) [hereinafter cited as ENVIRONMENTAL QUALITY].

> Five percent of New Jersey's land area consists of tidal salt marsh, which is critical as a nursery to many species of commercial and sport fish and as a feeding ground to hundreds of species of migratory birds.

See also WETLANDS ORDER BASIS, *supra* note 15, at 5-6.

> 7.1 Department of Interior statistics for 1967 indicate that New Jersey's commercial coastal fisheries landed 117 million pounds of seafood having a dockside value of $10 million. . . .
>
> About two-thirds of the commercial fish catch on the Atlantic Coast is believed to be WETLANDS (estuarian)-dependent (McHugh 1966). Department of Environmental Protection studies in the Great Bay-Mullica River estuary tend to confirm that many fin-fish species, at some stage in their life cycle, utilize estuarine waters. At Cape Horn, Great Bay, thirty-one species of fish were taken over a year's time; the Bay Anchovy was most abundant, Silversides were second, and other seined species included the Silver Perch, Northern Pipefish, Northern Puffer, Winter Flounder, Red Hake, and Black Sea Bass. The fisheries yield from the U.S. Atlantic Continental Shelf has been estimated to be equivalent to about 535 pounds per acre of estuary (Stroud). Loss of estuarine habitat could cause substantial losses of fisheries products to those dependent on high sustained yields for their economic well-being.
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> 7.2 Reliable sports fishing statistics for the New Jersey Coast are not available. Recent estimates, however, indicate that nearly one million sportsmen fish in coastal waters each year and catch at least 10 million pounds of fish. Creel census results in the Great Bay-Mullica River estuary show that nearly one million fish are taken each year by sports fishermen. The contribution to the State's economy by these sportsmen is substantial even though quantitative data are unavailable. Boat and motor sales, charters, rentals, licenses, fishing equipment,

vironment (of which the wetlands are a most significant element) is a natural land reclamation process lasting thousands of years. This delicate environment can be destroyed by an afternoon's fill operation.[83]

How can this valuable resource be protected? Consensus exists that all further development be prohibited.[84] The government could condemn the land in eminent domain proceedings but then the states would have to spend tax money to compensate property owners. Thus, regulation of the wetlands through the police power appears to be the more logical solution.[85]

Some attempts were made to regulate the wetlands through local zoning ordinances and permit programs, but these attempts were held invalid when challenged.[86] Then, in 1965, Massachusetts became the first state to enact a state-wide wetlands law.[87] Under this law, the Commissioner of Natural Resources is authorized to exercise the power of eminent domain to purchase land if the courts decide that the regulations are too restrictive regarding particular parcels of land.[88] Other

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bait, travel, motel, marina costs, and food expenditures for these services and supplies are all related to the attractiveness of the tidal WETLANDS and bays.

7.3 In addition to commercial and sports fishing, estuaries (WETLANDS) are used for other multi-purpose activities. Studies conducted by the Department of Environmental Protection indicate that about 129,000 man-days of use was made of the Great Bay-Mullica River estuarine zone in one year. Those uses included fishing, boating, shell fishing, bathing, hunting, water skiing, and the harder-to-document kinds of activities such as sightseeing and scientific research. All of these uses are important to man—they contribute to the enhancement of the quality of life as well as to his economic and social well-being.

83 See section 9.3.1 of the WETLAND ORDER BASIS, *supra* note 15.

84 See President Nixon's message on the environment, Feb. 8, 1972:

> The Nation's coastal and estuarine wetlands are vital to the survival of a wide variety of fish and wildlife; they have an important function in controlling floods and tidal forces; and they contain some of the most beautiful areas left on this continent. These same lands, however, are often some of the most sought-after for development. As a consequence, wetland acreage has been declining as more and more areas are drained and filled for residential, commercial, and industrial projects.

Reproduced in ENVIRONMENTAL QUALITY, *supra* note 82, at 374.

85 The Federal Water Bank Act of 1970, 16 U.S.C. §§ 1301-11 (1970), subsidizes landowners who agree not to fill or destroy the natural character of their wetland property. However, this act does not apply to coastal wetlands.

86 *See, e.g.*, Bartlett v. Zoning Comm'n, 161 Conn. 24, 282 A.2d 907 (1971); Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964); MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 255 N.E.2d 374 (1970); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963).

87 This law is now MASS. ANN. LAWS ch. 130, § 105 (1972).

88 *Id. See also* N.J. STAT. ANN. § 13:9A-6 (Supp. 1972-73) which provides that

> [a]ny person having a recorded interest in land affected by any such order or permit, may, within 90 days after receiving notice thereof, file a complaint in the Superior Court to determine whether such order or permit so restricts or other-

states have followed Massachusetts' example, and have enacted statewide programs.[89] Thus far, in cases challenging these regulations as confiscatory, the courts have found most of them to be invalid.[90]

By confronting the scope of the property owner's right to use his property as he wishes, the court in *Just* has given a viable and valuable rationale to courts in states like New Jersey where legislation has recently been enacted to protect coastal wetlands and where challenges regarding reasonableness of such regulations will presumably arise.[91] In addition, it is evident from the opinions in *Just, Turnpike Realty,* and various law review articles[92] that *Morris County Land Improvement* (which would be the major New Jersey authority cited to support an attack on the wetlands regulation) could be distinguished by the particular circumstances of the case. Justice Hall, who spoke for the majority in *Morris County Land Improvement,* has shown an awareness in recent decisions of the importance of environmental factors and natural resources when dealing with the problem of land use regulation. In *Borough of Neptune City v. Borough of Avon-by-the-Sea,*[93] Justice Hall's opinion suggested in dictum that beach front land above the high water mark might be so related to the common resource of

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wise affects the use of his property as to deprive him of the practical use thereof and is therefore an unreasonable exercise of the police power because the order or permit constitutes the equivalent of a taking without compensation. If the court finds the order or permit to be an unreasonable exercise of the police power, the court shall enter a finding that such order or permit shall not apply to the land of the plaintiff; provided, however, that such finding shall not affect any other land than that of the plaintiff. . . .

89 See statutes cited note 20 *supra.*

90 *See, e.g.,* State v. Johnson, 265 A.2d 711 (Me. 1970) (Maine wetland provision as applied to plaintiff was confiscatory); Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965) (prohibition against filling was a "taking" of plaintiff's property).

91 N.J. STAT. ANN. § 13:9A-1(b) (Supp. 1972-73) provides that

[t]he Commissioner of Environmental Protection shall, within 2 years of the effective date of this act, make an inventory and maps of all tidal wetlands within the State. The boundaries of such wetlands shall generally define the areas that are at or below high water and shall be shown on suitable maps, which may be reproductions or aerial photographs. Each such map shall be filed in the office of the county recording officer of the county or counties in which the wetlands indicated thereon are located. . . .

The following counties have been regulated under the New Jersey coastal wetlands protection act (N.J. STAT. ANN. § 13:9A-1 (Supp. 1972-73)): Monmouth, Middlesex, Ocean, and Cape May (western part only). Atlantic (eastern part), Burlington, Camden and Mercer counties have been mapped and should now be under the regulations. As of the end of the 1973 calendar year, all of the counties that are covered in the act should be regulated. Telephone conversation with Richard Sullivan's office, State Commissioner of Department of Environmental Protection, March 26, 1973.

92 *See, e.g.,* Sax, *supra* note 22, at 46-47.

93 61 N.J. 296, 294 A.2d 47 (1972).

beach front land below the high water mark that it would be subject to the public's right to use the ocean waters.[94]

It is also noteworthy that in his dissenting opinion in *New Jersey Sports & Exposition Authority v. McCrane*,[95] Justice Hall disagreed with the court's treatment of the ecological and environmental considerations involved in the case, stating that

> [m]odern man has finally come to realize . . . that the resources of nature are not inexhaustible. Water, land and air cannot be misused or abused without dire present and future consequences to all mankind. Undue disturbance of the ecological chain has its devastating effect at far distant places and times. . . .
>
> One of the most important ecological areas in this connection is the so-called "estuarine zone" . . . . Our legislature has specifically declared, in the wetlands act . . . that it is "one of the most vital and productive areas of our natural world" and that "it is necessary to preserve the ecoligical [sic] balance of this area . . . ."[96]

Joseph Sax suggests a new concept of property rights since current taking law, in his view, stands as an obstacle to rational resource allocation:

> Nearly every attempt to regulate the private use of land, water, and air resources may be claimed to violate the takings clause. This conflict, along with other aspects of the campaign for environmental quality, suggests the need for a reconsideration of the notion of property rights.[97]

Sax views property as an interdependent network of competing uses rather than as a number of independent and isolated entities. He suggests that it ought to be determined whether a "common" exists, *i.e.*, whether a resource such as the ambient air is "inextricably intertwined with the use of various properties." Then, when a resource-user seeks to use the "common" in such a way as to produce a "spillover" which has a deleterious effect on other resource-users, such activities may be regulated pursuant to the police power.[98]

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[94] *Id.* at 308, 294 A.2d at 54. For a discussion of the application of the "public trust" doctrine to New Jersey's tidal wetlands, see Porro & Teleky, *Marshland Title Dilemma: A Tidal Phenomenon*, 3 SETON HALL L. REV. 323 (1972).

[95] 61 N.J. 1, 55, 292 A.2d 545, 573 (1972) (Hall, J., concurring and dissenting in part).

[96] *Id.* at 62-63, 292 A.2d at 577.

[97] Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 149-50 (1971) (The author repudiates his earlier theory of government as enterpriser and government as mediator as a basis to distinguish a "taking" from a valid exercise of the police power.).

[98] *Id.* at 161. The author suggests:

> The water overlying wetlands that serves as a breeding ground for the adjacent ocean should . . . be viewed as a common as to conflicting demands of ocean users and the owner of the wetlands.

Id. at 162.

While not totally embracing this new concept of property, the decision in *Just* gives the courts an "environmental" theory to use in deciding when or whether a state should compensate owners for property losses inflicted by environmental land use regulation. Under this theory, emphasis is placed on three factors that must necessarily be present. The conduct of the property owner must result in (1) harm, (2) to the natural characteristics of the land, (3) adversely affecting the general public.

In deciding if a land use regulation is confiscatory, the court would determine if the three elements were present and would then weigh the economic loss sustained by the individual under the restrictions against the harm to the environment resulting from the proffered uses. This would not only make environmental land use control more feasible, but the individual would not be forced to bear the burden of economic loss in every case.

In applying a balancing rationale, perhaps courts could also assign a cost/benefit ratio to the damage done to the natural elements.[99] In that manner, the less profitable economic uses left to the property owner under a wetlands restriction would be balanced against the ecological "price-tag" concomitant with the destruction or alteration of the natural characteristics of the land.[100]

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99 *See* B. COMMONER, THE CLOSING CIRCLE 16-17 (1971).

> The environment makes up a huge, enormously complex living machine that forms a thin dynamic layer on the earth's surface, and every human activity depends on the integrity and the proper functioning of this machine. Without the photosynthetic activity of green plants, there would be no oxygen for our engines, smelters, and furnaces, let alone support for human and animal life. Without the action of the plants, animals, and microorganisms that live in them, we could have no pure water in our lakes and rivers. Without the biological processes that have gone on in the soil for thousands of years, we would have neither food crops, oil, nor coal. This machine is our *biological capital*, the basic apparatus on which our total productivity depends. If we destroy it, our most advanced technology will become useless and any economic and political system that depends on it will founder. The environmental crisis is a signal of this approaching catastrophe.

Id. (emphasis added).

100 *Id.* at 273.

> Another way to look at this situation relates to the value of the capital created by the operation of the private enterprise system. In the creation of this capital, certain goods are regarded as freely and continuously available from nature: the fertility of the soil, oxygen, water—in general, nature, or the biological capital represented by the ecosphere. However, the environmental crisis tells us that these goods are no longer freely available, and that when they are treated as though they were, they are progressively degraded.
>
> This suggests that we need to reconsider the true value of the conventional capital accumulated by the operation of the economic system. The effect of the operation of the system on the value of its *biological* capital needs to be taken into account in order to obtain a true estimate of the over-all wealth-producing capability of the system. The course of environmental deterioration shows that as conventional capital has accumulated, for example in the United States since

In view of the speculative investment uses of property, the economic value of an industry's presence in a small community, and man's inability or refusal to make rational choices[101] concerning the use of his property, it is left to the legal institutions to cope with the problem of protecting natural resources. Attorneys defending wetlands regulations must be prepared to support the state's action with the economic, biological and environmental data that would sustain it as a valid exercise of the police power.[102]

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1946, the value of the biological capital has *declined*. Indeed, if the process continues, the biological capital may eventually be driven to the point of total destruction. Since the usefulness of conventional capital in turn depends on the existence of the biological capital—the ecosystem—when the latter is destroyed, the usefulness of the former is also destroyed. Thus despite its apparent prosperity, in reality the system is being driven into bankruptcy. Environmental degradation represents a crucial, potentially fatal, *hidden* factor in the operation of the economic system.

101 In its January newsletter the New Jersey Public Interest Research Group (NJPIRG) noted:

> In Ocean County developers are dumping sand and gravel 12 hours/day, six days/week in a frantic effort to destroy the wetlands before the law goes into effect. State officials admit that the destruction is going on, but say they are powerless to act.

NJPIRG in Action, January, 1973, at 1.

102 Wilkes, *supra* note 20.

> [L]awyers must build their briefs around the fact that the battle of precedents is too risky a game to play with threatened coastlines. If the judge is presented only with the precedents by both sides in these areas where constitutional shifts are still occurring, the briefs may ensure the disappearance of coastal ecology.

The author of this article states that the hearing record in State v. Johnson, 265 A.2d 711 (Me. 1970) is "silent on the State's monetary interest in its natural resources immediately adjacent to the Johnson marsh." *Id.* at 158 (footnote omitted).