Florida State University Law Review

Volume 4 | Issue 1 Article 1

Winter 1976

The Legislature's Role in the Taking Issue

Mitchell B. Haigler

Mary M. McInerny

Robert M. Rhodes

FLORIDA STATE UNIVERSITY LAW REVIEW

VOLUME 4 FEBRUARY 1976 NUMBER 1

THE LEGISLATURE'S ROLE IN THE TAKING ISSUE

MITCHELL B. HAIGLER,* MARY M. MCINERNY,†
ROBERT M. RHODES‡

I. INTRODUCTION

The eighteenth-century draftsmen placed in the Bill of Rights the following twelve words: "nor shall private property be taken for public use, without just compensation."[1] Later, Congress provided in the fourteenth amendment that no state shall "deprive any person of life, liberty, or property, without due process of law."[2] Analogous provisions in the Florida constitution provide that "no private property shall be taken except for a public purpose and with full compensation,"[3] and guarantee that "no person shall be deprived of life, liberty or property without due process of law."[4]

Complementary to, but competing with, the constitutional due process and taking clauses is the authority of government to regulate under its police powers in the interest of the public health, safety and welfare. Such authority is an inherent attribute of sovereignty, reserved to the states or the people under the tenth amendment of the federal constitution.[5] The state police powers are broad, comprehensive, and

* B.A., University of Alabama, 1968; J.D., Florida State University, 1975. Member of The Florida Bar and the law firm of Thompson, Wadsworth, Messer, Turner & Rhodes. Formerly staff member, Governor's Property Rights Study Commission.

† B.S., Florida State University, 1962. Formerly staff member, The Governor's Property Rights Study Commission. The author is a third-year law student at Florida State University.

‡ B.A., University of California at Berkeley, 1964, J.D., 1968; M.P.A., Harvard University, 1973. Member of The Florida Bar and the law firm of Thompson, Wadsworth, Messer, Turner & Rhodes. Formerly Chief, Bureau of Land and Water Management, Florida Division of State Planning; Executive Director, Governor's Property Rights Study Commission.

The article is based on a report prepared under a grant provided by the Florida State University College of Law, Governmental Law Center. Professor Patricia A. Dore assisted in the supervision of the project and has reserved the right to comment on the report.

1. U.S. CONST. amend. V.
2. U.S. CONST. amend. XIV.
3. FLA. CONST. art. X, § 6.
4. FLA. CONST. art. I, § 9.
5. Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919); Bacon v. Walker, 204 U.S. 311 (1907); Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878); Patterson v. Kentucky, 97 U.S. 501 (1878).

have been expansively interpreted and applied by the courts. Moreover, such powers are constantly evolving to meet changing social, economic and political conditions.

Key among recent employment of the police power has been state and local enactment of land use regulations, including zoning and subdivision laws, wetlands protection, coastal construction setback lines, and extensive governmental permitting systems for specific development activities. Litigation involving such regulations has often drawn together the taking clause and the police powers, requiring judicial construction and resolution of competing private and public interests in a particular land parcel or area.

Extension or curtailment of governmental power necessarily involves the primary policy making branch of government—the legislature. Yet what type of action, if any, may a legislature constitutionally take to establish policy relative to permissible land use restraints? Although this question has been largely ignored by the courts and journal commentators, the response to it will define and shape the legislature's role in the taking issue, as well as provide a point of departure for legislative action.

This article discusses the need for legislative clarification of the taking issue, analyzes the nature of the legislative power to define a taking, and explores the potential scope of judicial review of such legislative action. Although positive legislation is urged, it is recognized that the courts will continue to serve their traditional role as final arbiters of the taking issue. A number of criteria that may be considered by a legislature in developing an appropriate statutory approach are also presented.

II. The Need for Legislative Action

No legislature has attempted to statutorily distinguish between land use regulations that are valid as an exercise of the police power and those that are invalid as a taking of property without just compensation. Legislatures have, however, attacked on a piecemeal basis various elements of the problem other than the primary task of declaring when a "taking" is deemed to occur; a common approach is to statutorily define key phrases of the constitutional prohibition, such as "just compensation,"[6] "public use,"[7] and "property."[8] Most often,

6. Rivers & Harbors Act of 1970 § 111, 33 U.S.C. § 595(a) (Supp. 1975); United States v. 967,905 Acres of Land, More or Less, 447 F.2d 764 (8th Cir. 1971), *cert. denied*, 405 U.S. 974 (1972).

7. Migratory Bird Conservation Act, 16 U.S.C. § 715*a-s* (1970); Swan Lake Hunting Club v. United States, 381 F.2d 238, 241 (5th Cir. 1967).

8. Under the common law a landowner's proprietary interest in the column of

these definitions have been formulated in relation to governmental exercise of the eminent domain power.[9] As to takings occurring through exercise of the police power, the legislatures have generally remained silent.

This protracted silence indicates a tacit decision by legislative bodies to accept the judiciary's resolution of a two-fold issue—determination of the permissible extent of governmentally imposed restraints upon land use under the taking clause, and delimitation of the police power. Recently, however, both the executive and legislative branches of Florida government have commenced inquiry into judicial treatment of the taking issue. Questions have been raised in relation to the absence of a cohesive doctrinal basis for judicial decisions, the inconsistency in cases holding "a taking" or "not a taking," and the need for predictive guidelines in this area of law.[10]

---

aerospace above the land extended to an unlimited height. *See, e.g.,* 2 W. BLACKSTONE, COMMENTARIES 18 (1902). *See also* Illinois Cent. R.R. v. City of Chicago, 48 N.E. 492 (Ill. 1897); Murphy v. Bolger, 15 A. 365 (Vt. 1888). But when the need for air travel necessitated a change in the philosophy of proprietary interest in airspace, it was by legislative action that the change occurred.

The Uniform State Law for Aeronautics, formulated in 1922, purported to delimit ownership of airspace in subjacent landowners by creating a right of flight over the lands unless the flight was made "at such a low altitude as to interfere with the then existing use" of the land, or "unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath." UNIFORM AERONAUTICS ACT § 4 (act withdrawn 1943).

In 1943, the Uniform Act was withdrawn, apparently because of federal preemption. Congress adopted the Air Commerce Act of 1926, Act of May 20, 1926, ch. 344, § 1, 44 Stat. 568. That act provided for a public right of freedom of interstate and foreign air navigation "in the navigable airspace." The 1926 act has since been repealed but the statutory declaration of national sovereignty in navigable airspace is embodied in 49 U.S.C. § 1508 (1970). *See also* United States v. Causby, 328 U.S. 256, 260-62 (1946).

Apart from defining proprietary interests in airspace, legislatures have also sought to define private interests in water: "In recent years both California and Texas have by statute redefined the property acquirable in water so as to subordinate all appropriations to the subsequently arising needs of municipalities in the state." Sax, *Takings and the Police Power,* 74 YALE L.J. 36, 53 (1964), *citing* TEX. CIV. STAT. art. 7472 (1954), and CAL. WATER CODE § 1460 (1956).

That legislative definitions of property have generally related to less well-defined property concepts, such as water and airspace rights is not unexpected. As one commentator has noted: "Such legislation . . . would seem to be most likely to receive favorable judicial treatment in connection with injuries to peripheral interests not yet fully crystallized as 'property' by judicial decisions or by long-standing legislation." Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power,* 19 STAN. L. REV. 727, 759 (1967) [hereinafter cited as VAN ALSTYNE].

9. *See* statutes and cases cited in notes 6-8 *supra.*

10. *See* GOVERNOR'S PROPERTY RIGHTS STUDY COMMISSION, STAFF REPORT NO. 1, TAKINGS, DUE PROCESS AND THE POLICE POWERS: AN ANALYSIS OF JUDICIAL APPROACHES TO LAND USE REGULATIONS IN FLORIDA (Fla. 1975) [hereinafter cited as STAFF REPORT NO. 1]; GOVERNOR'S PROPERTY RIGHTS STUDY COMMISSION, STAFF REPORT NO. 2, COMPENSABLE REGULATIONS: POLICY ISSUES AND OPTIONS (Fla. 1975 [hereinafter cited as STAFF REPORT NO. 2]. STAFF RE-

In response to these concerns, the policy of legislative reticence must be abandoned; the legislature must take an active role in statutorily defining what constitutes a taking by land use regulation. This conclusion is based upon two premises. First, the existing doctrinal basis for distinguishing between a land use regulation that constitutes a taking and one that imposes constitutionally permissible restraints does not operate satisfactorily. Moreover, there is little hope for more definitive judicial guidance. Second, given the failure of the courts to provide such guidance, it is apparent that only the legislature, the branch of government best situated to confront the multifaceted interests inherent in the taking issue, can adequately mold these interests into a uniform policy.

As to the first premise, that judicial decision making has been unsatisfactory, it is sufficient to summarize the judicial experience.[11] There is presently no single theory or guideline employed by the courts in deciding whether a particular land use regulation constitutes a taking.[12] Although new theories are propounded from time to time,[13] such concepts add to, but do not supplant, older theories. The existence of multiple theoretical bases has led to judicial juggling of rationales so that in a particular fact situation the validity of a regulation may chiefly be dependent upon which rationale the court applies. Such "theory shopping" is apparent from decisions arriving at opposite results under substantially similar factual circumstances.[14]

Lack of a unified theory or approach yields legal and policy uncertainty. Without this certainty, legislative bodies cannot pinpoint the outer limits of their authority with any degree of precision. Similarly, landowners are forced into litigation in order to determine whether a particular regulation is valid. Landowners are additionally deprived of a predictable system whereby the legally permissible parameters of future land uses may be charted and development rationally planned.

It is not surprising, though, that the legislature has deferred to long standing judicial judgment on the taking issue. In 1922, the Su-

---

PORT NO. 2 is summarized in Rhodes, *Property Rights: Yours, Mine, Ours . . .*, 2 FLA. ENVIRONMENTAL & URBAN ISSUES, No. 6, at 3-5, 15-16 (1975).

11. Dissatisfaction with judicial decision making relative to the taking clause has been expressed by numerous scholars. *See, e.g.*, Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

12. *See* note 11 *supra.*

13. *Id.*

14. *See* Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

preme Court decided *Pennsylvania Coal Co. v. Mahon.*[15] The Court's opinion, authored by Justice Holmes, developed a new test for determining when land use regulation spawns a taking: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[16] At a time when land use regulations were nascent,[17] it may have been appropriate for the Court to develop an amorphous test that could be refined as the courts became more experienced with the problem and as the arsenal of land use mechanisms became identifiable. Yet by the 1960's, when land use regulations had reached third generation status, the courts were still struggling with the problem of developing an unambiguous test. The experience of nearly half a century had not stimulated the courts to develop an objective standard. The situation is reflected in *Goldblatt v. Town of Hempstead,*[18] the Supreme Court's latest pronouncement on the taking issue and a case having precedential value exceeded only by *Pennsylvania Coal.* In *Goldblatt,* the Court clearly confessed that a judicial theory had not evolved: "There is no set formula to determine where regulation ends and taking begins."[19] Thus, in 40 years the Court had succeeded in concisely refining its standard from "goes too far" to "no set formula." Since *Goldblatt,* there have been no significant decisions attempting to explain the method for identifying a taking.

Obviously, then, the judiciary has not adequately confronted the issue. In all fairness, however, the problem is difficult and admits of no simple solution; moreover, any realistic approach to the issue must provide flexibility. Yet the essential conclusion remains: Judicial decisions have not successfully provided predictable and comprehensible standards for discerning valid from invalid land use regulations.

Once it is recognized that judicial resolution of the taking dilemma does not appear imminent, the question becomes: what other options are available? The alternatives are few. The possibility of constitutional amendment is not feasible for two reasons. First, amendment of the state constitution would not affect the federal constitution. More importantly, the amendment process is too cumbersome to allow for appropriate revision of the standard. Nor does there appear room for

15. 260 U.S. 393 (1922).

16. *Id.* at 415.

17. When *Pennsylvania Coal* was decided, the United States Supreme Court had not yet determined the validity of zoning, much less more sophisticated land use regulation measures. The validity of zoning was sustained by the Supreme Court 4 years later. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

18. 369 U.S. 590 (1962).

19. *Id.* at 594.

simplification of the issue by the executive branch. No provision in the Florida constitution countenances such power. If the executive is to play any role, it must be to execute legislative direction. The only practical avenue of assisting the judiciary, therefore, is through legislative enactment.

III. The Legislative Power to Define a Taking

Assuming legislative disposition to define a taking, is such action constitutionally permissible? There is no direct legal precedent, since neither Congress nor any state legislature has attempted to do so. Moreover, the scholars who have suggested statutory standards for determining when a taking occurs have in general been more concerned with pinpointing deficiencies in existing standards than with formulating a unified rationale for replacing the multiple theories.[20] The seminal question of legislative power has for the most part been ignored or cursorily addressed. For example, in *The Taking Issue,*[21] perhaps the best known work on the subject, the authors' analysis is limited in essence to the statement that "courts have commonly deferred to reasonable legislative attempts to define more precisely such difficult standards as the line between taking and regulation."[22]

Addressing the same issue, one commentator cites three Supreme Court decisions to support the proposition that legislative resolution of the taking issue is permissible.[23] But these cited cases appear inapposite. In the first, *South Carolina v. Katzenbach,*[24] the Court upheld a portion of the Voting Rights Act of 1965 as a valid exercise of congressional responsibilities under the fifteenth amendment. Significantly, that amendment expressly authorizes Congress "to enforce . . . by appropriate legislation"[25] the constitutional prohibition against racial discrimination in voting. The decision in *Katzenbach v. Morgan,*[26] the second cited case, similarly upheld a portion of the Voting Rights Act of 1965 as a proper exercise of power granted to Congress under the enforcement section of the fourteenth amendment.[27] The significant point of these decisions is that the legislative enactments were generated by express grants of constitutional authority. The taking and due

20. *See* note 11 *supra.*

21. F. Bosselman, D. Callies & J. Banta, The Taking Issue (1973) [hereinafter cited as Bosselman].

22. *Id.* at 266.

23. Van Alstyne 729 n.12.

24. 383 U.S. 301 (1966).

25. U.S. Const. amend. XV, § 2.

26. 384 U.S. 641 (1966).

27. U.S. Const. amend. XIV, § 5.

process clauses do not contain such grants of authority; to the contrary, they actually limit governmental power.[28] Hence, no meaningful comparison can be made between congressional authority under the fourteenth and fifteenth amendments and state legislative power under the fourteenth amendment. The third cited case is *Heart of Atlanta Motel, Inc. v. United States*,[29] sustaining the validity of Title II of the Civil Rights Act of 1964. That act was passed by Congress pursuant to the constitutional authority given Congress to regulate commerce.[30] Without doubt the commerce clause is a grant of legislative authority and is not comparable to the taking clause since, as noted previously, the fifth and fourteenth amendments contain no grants of state legislative power.

To summarize, the question of legislative authority to define what constitutes a taking has not been examined closely. The remaining portion of this article explores that issue.

The Florida Legislature, unlike Congress,[31] is constitutionally endowed with plenary legislative power.[32] This power may be limited in two ways. First, legislative power is diminished when a constitutional provision explicitly or implicitly withholds a particular power.[33] Second, legislative authority may be preempted if the constitution vests such power exclusively with another branch of government.[34] These limitations may appear in either the federal or state constitution.[35] It is therefore appropriate to consider whether either constitution has limited the otherwise plenary legislative power of the Florida Legislature.

A. The Federal Constitution

The fifth amendment's prohibition against the taking of property

---

28. "By the Fifth Amendment, [due process] was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States." Munn v. Illinois, 94 U.S. 113, 124 (1876). *See also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

29. 379 U.S. 241 (1964).

30. U.S. CONST. art. I, § 8.

31. Township of Pine Grove v. Talcott, 86 U.S. 666, 676 (1873); Legal Tender Cases, 79 U.S. 457 (1870).

32. FLA. CONST. art. III, § 1; State *ex rel.* Cunningham v. Davis, 166 So. 289 (Fla. 1936).

33. Merrell v. City of St. Petersburg, 109 So. 315 (Fla. 1926); Pursley v. City of Ft. Myers 100 So. 366 (Fla. 1924).

34. *See, e.g.*, FLA. CONST. art. IV, § 9, vesting legislative authority with the Game and Fresh Water Fish Commission.

35. *Cf.* Harlow v. Ryland, 78 F. Supp. 488 (E.D. Ark. 1948), *aff'd*, 172 F.2d 784 (8th Cir. 1949).

for public use without just compensation is made binding on the states by the due process clause of the fourteenth amendment,[36] which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[37] As will be shown, no provision of the fifth or fourteenth amendments appears to withhold from the state legislative authority to statutorily define a taking.

Despite contrary precedent,[38] the fifth amendment is often considered self-executing, requiring judicial enforcement without the necessity of prior legislative action.[39] Yet such construction does not a priori preclude legislative implementation of the amendment. No federal court, confronted with the taking issue, has ever held that legislative definition of a taking is impermissible. Indeed, such a posture would conflict with instances in which the Supreme Court has recognized that legislative bodies are free to define other key phrases of the taking clause such as private property,[40] just compensation,[41] and public use.[42] For instance, the Court in *Sauer v. City of New York*[43] recognized legislative power to determine what is compensable property for federal constitutional purposes:

> [E]ach State has . . . fixed and limited, by legislation or judicial decision, the rights of abutting [property] owners in accordance with its own view of the law and public policy. . . . [T]his court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of the various States to a uniform rule which it shall announce and impose.[44]

---

36. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 241 (1897); BOSSELMAN 115.

37. U.S. CONST. amend. XIV, § 1.

38. *Cf.* Westmoreland Chem. & Color Co. v. Public Serv. Comm'n, 144 A. 407 (Pa. 1928); Fairclough v. Salt Lake County, 354 P.2d 105 (Utah 1960). Both cases construe state constitutional provisions similar to the fifth amendment's taking clause.

39. Dillon v. United States, 230 F. Supp. 487 (D. Ore. 1964), *rev'd on other grounds*, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966), provides the most explicit recognition that the fifth amendment is self-executing. However, the federal courts have repeatedly relied upon this principle by holding that the guarantee of compensation for a taking immediately applies whenever the government appropriates property. A private cause of action arises whether or not Congress has directed that compensation or damages be paid. Armstrong v. United States, 364 U.S. 40, 48-49 (1960); United States v. Lynah, 188 U.S. 445, 464-65 (1903); Sioux Tribe of Indians of Lower Brule Reservation v. United States, 315 F.2d 378, 379 (Ct. Cl.), *cert. denied*, 375 U.S. 825 (1963). State constitutions have also been held to be self-executing. Bacich v. Board of Control, 144 P.2d 818 (Cal. 1944); Renninger v. State, 213 P.2d 911 (Idaho 1950); Schmutte v. State, 22 N.W.2d 691 (Neb. 1946).

40. *See, e.g.*, Sauer v. City of New York, 206 U.S. 536 (1907).

41. *See, e.g.*, Roberts v. New York City, 295 U.S. 264 (1935).

42. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 32 (1954).

43. 206 U.S. 536 (1907).

44. *Id.* at 548.

If the analogy to state legislative determination of the nature of property has a weakness, it is that property concepts traditionally are developed by both the legislative and judicial branches,[45] whereas the definition of a taking is generally considered a judicial function.[46]

But this traditional perspective should not be of major concern. Federal as well as state courts have historically viewed the determination of just compensation as a judicial question.[47] Yet on several occasions the Supreme Court has recognized that legislative bodies do in fact possess authority to define that term.[48] A prime example is *Roberts v. New York City*,[49] where the Court without dissent upheld a New York statute defining "just compensation" in eminent domain proceedings. Similarly, federal court decisions conclusively establish the right of the legislature to say what is a public use.[50] For instance, the Supreme Court, insisting on a high degree of judicial deference to legislative determinations of public policy, has written that: "The role of the judiciary in determining whether [eminent domain] is being exercised for a public purpose is an extremely narrow one."[51] This judicial recognition of the legislative power to define "just compensation," "public use," and "private property," is strong authority for concluding that the legislature is not precluded from enacting "taking" guidelines.

The previous discussion alludes to the balance between judicial and legislative powers. A fundamental concept of democratic government is the separation of powers doctrine,[52] which exists by implication in the federal constitution.[53] In concise, though perhaps dogmatic form, the doctrine identifies three distinct functions that should be exercised by three separate departments of government, each equal and

---

45. *See* Sauer v. City of New York, 206 U.S. 536 (1907). "[E]ach State has . . . fixed and limited, *by legislation or judicial decision,* the rights of abutting owners in accordance with its own view of the law and public policy." *Id.* at 548 (emphasis added).

46. *See generally* STAFF REPORT No. 1.

47. American-Hawaiian S.S. Co. v. United States, 124 F. Supp. 378 (Ct. Cl. 1954), *cert. denied,* 350 U.S. 863 (1955); Dore v. United States, 97 F. Supp. 239 (Ct. Cl. 1951); Cahill v. Cedar County, 367 F. Supp. 39 (N.D. Iowa 1973); United States v. 60,000 Square Feet of Land and Eight-Story Hotel Thereon, Known as Oakland Hotel, 53 F. Supp. 767 (N.D. Cal. 1943); State Plant Bd. v. Smith, 110 So. 2d 401 (Fla. 1959); M.S. Alper & Son, Inc. v. Director of Pub. Works, 200 A.2d 583 (R.I. 1964).

48. *See, e.g.,* McGovern v. City of New York, 229 U.S. 363 (1913).

49. 295 U.S. 264 (1935).

50. Hoffman v. Stevens, 177 F. Supp. 898 (M.D. Pa. 1959); United States v. 277.97 Acres of Land, 112 F. Supp. 159 (S.D. Cal. 1953).

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

52. *See generally* Forkosch, *The Separation of Powers,* 41 U. COLO. L. REV. 529 (1969).

53. The implication arises from the clauses in articles I, II, and III of the Constitution vesting different powers in each branch of the federal government.

mutually independent.[54] Under the separation of powers doctrine, a function belonging solely to one branch of government cannot be exercised by another branch.[55]

It is a judicial function "to say what the law is."[56] Not since *Marbury v. Madison*[57] has there been doubt that the Supreme Court is the final arbiter of the meaning of the Constitution.[58] But this of itself does not prohibit legislative efforts to give meaning to constitutional provisions. The Supreme Court has repeatedly stated that determinations of "public use" and "just compensation" are judicial functions; nonetheless, the Court has recognized legislative power to define and implement these constitutional provisions.[59] What is actually meant is that the Court, or the judiciary, is the final arbiter, the ultimate interpreter of the Constitution. Such ultimate authority does not preempt initial legislative efforts to statutorily effectuate the taking clause; it merely requires that any legislative definition must eventually stand up to scrutiny under standards set by the courts.

Thus, numerous cases suggest that the federal constitution does not withhold a state legislature's authority to define a taking. It is also apparent that the constitutional principle of separation of powers does not reserve such power solely to the judiciary.

B. The Florida Constitution

Article X, section 6 of the Florida constitution provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner."[60] This provision is self-executing.[61] But, as pointed out in the previous discussion

54. O'Donoghue v. United States, 289 U.S. 516 (1933).

55. *Id.*

56. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

57. *Id.*

58. *Id.*

59. Berman v. Parker, 348 U.S. 26, 32 (1954); United States *ex rel.* TVA v. Welch, 327 U.S. 546, 551-52 (1946). The Supreme Court of Florida has also recognized this legislative power. Daniels v. State Road Dep't, 170 So. 2d 846, 853 (Fla. 1964); Spafford v. Brevard County, 110 So. 451, 458 (Fla. 1926).

60. The title of article X, § 6 is "Eminent domain." At first glance this may appear to indicate that governmental takings occurring through land use regulation would not be within the provision's ambit. However, article X, § 12(h) provides that: "Titles and subtitles shall not be used in construction."

61. No case has been found expressly recognizing this fact; however, the wealth of cases in Florida acknowledging the limiting effect of article X, § 6 on the police power leave no doubt as to its self-executing nature. *See, e.g.*, Mailman Dev. Corp. v. City of Hollywood, 286 So. 2d 614 (Fla. 4th Dist. Ct. App. 1973), *cert. denied*, 419 U.S. 844 (1975); Elliott v. Hernando County, 281 So. 2d 395 (Fla. 2d Dist. Ct. App. 1973); Dade County v. General Waterworks Corp., 267 So. 2d 633 (Fla. 1972). *See* STAFF REPORT No. 1.

of the fifth and fourteenth amendments, this circumstance does not preclude legislative definition of a taking.[62] Precedent for such action is reflected in the legislature's implementation of the constitutional prohibition against searches and seizures, another self-executing constitutional prohibition.[63]

Directly on point are instances in which the Florida Supreme Court has confirmed the legislature's authority to determine what is public use,[64] private property,[65] and just compensation.[66] The principle enunciated in the cases is that these declarations of policy by the legislature are entitled to presumptive validity, and will not be disturbed unless clearly not "in accord with the judicial view of the matter."[67] It can, therefore, be concluded that the power to define a taking has neither been denied the legislature by the Florida constitution, nor has it been exclusively delegated to the courts.

To recapitulate, the Florida Legislature has plenary legislative power, including the power to define constitutional provisions, unless negated by particular constitutional provision or reserved to another branch of government. Neither federal nor state case law indicates the existence of either limitation on the legislature's power. Any legislative scheme, however, will ultimately be subject to review by the judiciary. The question of central concern, therefore, is not whether the legislature may implement a "taking" definition—it may—but rather, whether the courts will accept and defer to a statutory program.

IV. Judicial Acceptance of a Legislative Definition

By necessity, the following discussion is limited to a highly theoretical, perhaps circumstantial inquiry. But this limitation does not lessen the value of the analysis; indeed, the theoretical search persuasively indicates that the judicial response would be a willing acceptance of the legislative effort.

United States and Florida Supreme Court decisions reflect judicial receptiveness to legislative determination of what constitutes public use, just compensation, and property as elements of the taking clause.

62. No Florida court has expressly ruled out the possibility of a legislative definition. *Cf.* Gray v. Bryant, 125 So. 2d 846 (Fla. 1960) (recognizing that subject matter of a self-executing provision may also be the subject of legislative enactment).

63. Fla. Stat. § 933.02 (1975).

64. Spafford v. Brevard County, 110 So. 451 (Fla. 1926).

65. North Dade Water Co. v. Florida State Turnpike Auth., 114 So. 2d 458 (Fla. 3d Dist. Ct. App. 1959).

66. Daniels v. State Road Dep't, 170 So. 2d 846 (Fla. 1964); Glessner v. Duval County, 203 So. 2d 330 (Fla. 1st Dist. Ct. App. 1967).

67. Daniels v. State Road Dep't, 170 So. 2d 846, 852-53 (Fla. 1964); Spafford v. Brevard County, 110 So. 451, 458 (Fla. 1926).

For example, the judicial policy in Florida is to uphold statutory definition of a public use unless "the use is clearly and manifestly of a private character."[68] The Supreme Court, according great weight to the legislative determination of public purpose, has asserted that the courts have only a very limited role to play in that decision.[69] An earlier decision cast palpable doubt upon even this limited scope of review: "We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority."[70]

Concerning the element of just compensation, the Florida Supreme Court has not only invited legislative declaration, but has indicated that such legislative policy will be afforded substantial deference:

> [T]he legislature may declare its policy with respect to the compensation that should be made in taking private property for public use; . . . these declarations, while not conclusive or binding, are persuasive and will be upheld unless clearly contrary to the judicial view of the matter.[71]

Similarly, the Supreme Court in *Roberts v. New York City*,[72] upholding a New York eminent domain statute, stated that a statutory just compensation mechanism will be upheld where "fair upon its face."[73]

The likelihood of judicial acceptance of a legislative definition of a taking is also increased by the venerable rule of construction that where a provision is ambiguous, great weight should be accorded to the meaning given it by the legislature.[74] Beyond this general rule there exist several other rationales for judicial deference to legislative interpretation of constitutional terms. As recently stated by Chief Justice Burger: "[W]hen we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem."[75] That the judiciary has found few answers to the question of when a land use regulation becomes a taking is apparent from the Court's pronouncement in *Goldblatt v. Town of Hempstead*[76] that a formula to answer the question has not yet been established.

68. Spafford v. Brevard County, 110 So. 451, 458 (Fla. 1926).
69. Berman v. Parker, 348 U.S. 26, 32 (1954).
70. United States *ex. rel.* TVA v. Welch, 327 U.S. 546, 551-52 (1946).
71. Daniels v. State Road Dep't, 170 So. 2d 846, 853 (Fla. 1964).
72. 295 U.S. 264 (1935).
73. *Id.* at 277. *See also* Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).
74. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).
75. CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973).
76. 369 U.S. 590, 594 (1962).

The Supreme Court has further indicated that the weight given a congressional interpretation of the Constitution must be determined, *inter alia*, by the attitude of the judiciary regarding the question involved.[77] The judicial attitude toward the taking clause seems to suggest that a legislative construction would have substantial force. First, the generality of expression found in the existing doctrines on the subject readily invites specific legislative formulation. Second, inability of the judiciary to adopt a unified rationale[78] indicates a strong likelihood that legislation defining a taking would be respected, if not welcomed. If the judiciary cannot develop a suitable doctrinal basis to resolve the issue, and the executive branch lacks the constitutional authority to do so, it is incumbent upon the legislature to take the initiative. Third, the present line of cases lacks practical guidelines.[79] The decisions do not provide predictability or guide the legislature in determining the scope of the police powers; they confuse landowners and encourage litigation. It is therefore apparent that any legislative scheme, even a codification of the existing multiple taking theories, would reduce litigation and enhance predictability. Additionally, the Supreme Court has indicated that the provision of a usable standard is a prime determinant in whether a legislative determination will be upheld.[80] For these reasons, it is likely that a reasonable and practical statutory scheme would be afforded great weight if challenged in the courts.

An additional principle affecting the weight given by the courts to legislative construction of the Constitution warrants discussion. The

---

77. Myers v. United States, 272 U.S. 52, 170 (1926).

78. 1973 COUNCIL ON ENVIRONMENTAL QUALITY, ANNUAL REP. 129.

79. *See* text accompanying notes 11-19 *supra*.

80. *See* CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). In *CBS* the Court rejected the contention that a broadcaster's ban on all paid public issue announcements, upheld by the Federal Communications Commission, was an unconstitutional deprivation of freedom of speech. Of particular importance to the decision was the extensive system of regulation established by Congress and the FCC to accommodate the competing demands placed upon the broadcast media:

> Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For, during that time, Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned.

Id. at 102. The Court did not believe that this carefully constructed regulatory framework should be straitjacketed by the first amendment. "Congress, and the Commission as its agent, must remain in a posture of flexibility to chart a workable 'middle course' in its quest to preserve a balance between the essential public accountability and the desired private control of the media." *Id.* at 120.

Supreme Court has recognized that the very nature of the question under discussion is itself an important factor.[81] The question at hand is where to fix the acceptable boundary between the police power and the taking clause. In *United States v. Cress*,[82] the Supreme Court reasoned that "it is the character of the invasion . . . that determines the question whether it is a taking."[83] As Professor Van Alstyne correctly suggests, "The 'character of the invasion' test invites consideration of all relevant competing policy aspects of the particular case, rather than confining judicial attention to the narrower issue of whether a property interest has been invaded or destroyed."[84] Yet, if the decision is based upon policy, the decision of what constitutes a taking is more properly a legislative rather than a judicial function. "The responsibility of [the Supreme] Court," Justice Black has explained,[85] ". . . is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations."[86] The policy laden character of the taking issue itself encourages legislative resolution.

Thus, in conclusion, it appears that there is legislative power to enact a boundary between the police power and an impermissible taking of property, although this statutory determination will of course be subject to judicial review. The likelihood of judicial acceptance of such a legislative definition appears promising since the issue requires a policy judgment, and since courts have failed to adopt a satisfactory formula.

V. Criteria for a Legislative Approach

As previously discussed, the court decisions have not articulated a set formula for determining whether a land use regulation is a valid or invalid exercise of the police power.[87] The Florida Supreme Court, in *Town of Bay Harbor Islands v. Schlapik*,[88] and a number of prominent commentators[89] have characterized one process used in de-

81. Fairbank v. United States, 181 U.S. 283 (1901).

82. 243 U.S. 316 (1917).

83. *Id.* at 328. *See* United States v. Causby, 328 U.S. 256, 266 (1946).

84. Van Alstyne 727, 761.

85. Evans v. Abney, 396 U.S. 435 (1970).

86. *Id.* at 447.

87. *See* notes 11-19 and accompanying text *supra*.

88. 57 So. 2d 855 (Fla. 1952). "The exercise of the police power from its very nature, clashes with full enjoyment of property by its owner, and it is only because the welfare of the whole people so far outweighs the importance of the individual that this interference with constitutional guaranties can be justified." *Id.* at 857.

89. Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. Fla. L. Rev. 1, 9-10 (1972); Kratovil & Harrison,

termining the validity of a property regulation as a balancing test—a weighing of the public benefit against the private harm. When the private detriment resulting from the challenged restriction substantially outweighs the potential community benefit to be realized by its enforcement, the courts will strike down the regulation as unreasonable or arbitrary.[90] Although the unique set of facts involved in each case will determine the particular factors the court will place on the scales, a number of guidelines have achieved credibility through frequent employment by the courts. The legislature, in formulating its own policy on the taking issue, may wish to consider the following criteria that have been considered significant by the courts.

A. Diminution in Value

The Supreme Court's decision in *Pennsylvania Coal Company v. Mahon*,[91] articulated a relationship between the diminution in value of the private individual's property and the validity of the police power regulation generating the diminution. The Court espoused the rule that a regulation that causes too great a devaluation of property is invalid.[92] This doctrine seemed to confine the question of when compensation must be paid to the owner strictly to a consideration of the value of the regulated property. Yet in *Goldblatt v. Hempstead*,[93] the Court declared in dicta that "[a]lthough a comparison of values before and after [the regulation] is relevant, it is by no means conclusive."[94] This is undoubtedly the most important consideration for

---

Eminent Domain—Policy and Concept, 42 CALIF. L. REV. 596, 609-10 (1954); VAN ALSTYNE 31 (VAN ALSTYNE refers to the test as one of "suitability" rather than "balancing," although the components are the same); Comment, 38 WASH. L. REV. 607, 612-13 (1963). Most of these commentators cite the balancing test as one of the few stated formulas and theories the courts use to approach this question. The balancing test is probably the most important and most often used test, even though not always explicitly stated.

90. STAFF REPORT No. 1, at 6-7.

91. 260 U.S. 393 (1922).

92. *Id.* at 413. The Court stated that:

> Government 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. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. 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 must be an exercise of eminent domain and compensation to sustain the act.

Id.

93. 369 U.S. 590 (1962).

94. *Id.* at 594. The Court, in stating that the comparison of values is not conclusive, cited Hadacheck v. Sebastian, 239 U.S. 394 (1915), where diminution in value from $800,000 to $60,000 was upheld.

the landowner, but regardless of its importance it will be only one of the elements the court will consider.[95]

B. Comprehensive Plan

Since *Village of Euclid v. Ambler Realty Co.*[96] in 1926, the Supreme Court has recognized the restriction of property to certain uses in accordance with a comprehensive plan as a valid exercise of the police power. In fact, the critical factor in *Euclid* was the comprehensive nature of the plan.[97]

The courts of Florida and other states have recognized the advantages flowing from an overall development scheme as compared to piecemeal efforts to tackle the problems of our complex, ever growing society; the result has been reluctance to invalidate regulations that would affect the ordered growth and development of an area.[98] More importantly, as government has become more sophisticated in its approach to the problem through the use of regional and statewide systems of planning, the courts have continued to follow *Euclid* by giving great deference to legislative attempts to deal with the problem through comprehensive land use planning.[99]

C. Objective or Purpose of Regulation

The legislature can only act so as to promote the general health, safety, morals or welfare of the public.[100] The objective or purpose for

95. City of Miami Beach v. First Trust Co., 45 So. 2d 681, 688 (Fla. 1949); Polk Enterprises, Inc. v. City of Lakeland, 143 So. 2d 917, 919 (Fla. 2d Dist. Ct. App. 1962). For a survey of the role diminution in value has actually played in decisions relating to the validity of land use regulations, *see* BOSSELMAN 208-11.

96. 272 U.S. 365 (1926).

97. *See* BINDER, *supra* note 89, at 14.

98. The Florida Supreme Court, in holding land use restrictions valid or invalid, has considered, among other things, the effect upon the city's zoning plan. City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953); City of Miami Beach v. First Trust Co., 45 So. 2d 681, 688 (Fla. 1949); City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364, 366 (Fla. 1941). *See also* Consolidated Rock Products Co. v. City of Los Angeles, 370 P.2d 342 (Cal.), *appeal dismissed*, 371 U.S. 36 (1962); Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

99. *See, e.g.*, Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm., 89 Cal. Rptr. 897 (Ct. App. 1970). Florida recently has enacted legislation adopting a regional planning approach with respect to developments of regional impact, FLA. STAT. §§ 380.012-.12 (1975), and water resource regulation, FLA. STAT. §§ 373.012-.6161 (1975). Neither of these statutes has faced a constitutional challenge. In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), the United States Supreme Court may have given an added boost to comprehensive state-wide land use regulations. *Id.* at 5 n.3 and accompanying text. *See* 2 FLA. ST. U.L. REV. 787, 795-97 (1974). *See generally* BOSSELMAN 192-94, 214-29.

100. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); City of Miami Beach v. Lachman, 71 So. 2d 148, 150 (Fla. 1953).

which the legislation is designed may tip the balance in favor of its validity or invalidity. Where private benefits or objectives are advanced instead of the promotion of general community interests, the regulation will be struck down. Examples include those zoning regulations employed to restrict or eliminate business competition;[101] to enrich the government through its regulating powers;[102] and to exclude various ethnic, social, or economic groups.[103] Emergency situations are often given great weight towards upholding the land use regulation.[104] In contrast, regulations which have the objective of promoting aesthetics have been given less deference by the courts.[105]

D. Suitability of Property for Uses Permitted by Regulation

A landowner has no right to the highest and best use of his property,[106] but a regulation may not restrict the property so that it deprives the landowner of the only use for which it is reasonably adapted,[107] or

---

101. Wyatt v. City of Pensacola, 196 So. 2d 777 (Fla. 1st Dist. Ct. App. 1967); *See generally* VAN ALSTYNE 19-20 nn.96-99.

102. In City of Miami v. Silver, 257 So. 2d 563 (Fla. 3d Dist. Ct. App. 1972), and Board of Comm'rs of State Institutions v. Tallahassee Bank & Trust Co., 108 So. 2d 74 (Fla. 1st Dist. Ct. App. 1958), the zoning ordinances appeared to have been adopted for the purpose of depressing land values preliminary to eminent domain proceedings. *See generally* VAN ALSTYNE 23-26.

103. VAN ALSTYNE 22 nn.105-07. *But see* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); 2 FLA. ST. U.L. REV. 787, 795-97 (1974).

104. YMCA v. United States, 395 U.S. 85 (1969) (troop occupation and resulting damage to buildings during 1964 Panama Canal Zone riots not considered a taking); Surocco v. Geary, 3 Cal. 70 (1853) (city had to dynamite a building to serve as a firebreak). *See also* Russell v. New York, 2 Denio 461 (N.Y. Sup. Ct. 1845). That war efforts can be lumped under this classification as being given great deference by the courts, *see* United States v. Central Eureka Mining Co., 357 U.S. 155 (1958).

105. Aesthetic values have had a varied history of recognition in court decisions. Only a few state courts have upheld the validity of zoning regulations based solely upon aesthetic considerations. Oregon City v. Hartke, 400 P.2d 255 (Ore. 1965); Cromwell v. Ferrier, 225 N.E.2d 749 (N.Y. 1967). Aesthetic values are often considered with other factors when the welfare of the community is involved. City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364 (Fla. 1941); General Outdoor Advertising Co. v. Department of Pub. Works, 193 N.E. 799 (Mass. 1935), *appeal dismissed,* 297 U.S. 725 (1936). Certain prohibitions, such as those pertaining to outdoor advertising and junk yards have been upheld on highway safety and economic considerations. Desert Outdoor Advertising v. County of San Bernardino, 63 Cal. Rptr. 543 (Ct. App. 1967); City of Shreveport v. Brock, 89 So. 2d 156 (La. 1965). Also, certain zoning restrictions used to preserve the character of historic districts have been upheld. *See, e.g.,* City of Santa Fe v. Gamble-Skogmo, Inc., 389 P.2d 13 (N.M. 1964). *See generally* Steinbach, *Aesthetic Zoning: Property Values and the Judicial Decision Process,* 35 MO. L. REV. 176 (1970).

106. Forde v. City of Miami Beach, 1 So. 2d 642 (Fla. 1941).

107. City of Clearwater v. College Properties, Inc., 239 So. 2d 515 (Fla. 2d Dist. Ct. App. 1970); STAFF REPORT No. 1, at 17.

restrict it to a use to which it is unsuitable.[108] Unsuitability seems to connote a substantial unlikelihood of development of the property within the stated restrictions because of economic considerations or the use being made of surrounding properties.[109]

E. Availability of Less Restrictive Alternatives

Where less restrictive alternatives exist, courts tend to weigh this in favor of striking the regulation. This particular concept has been interpreted by one commentator to mean that the use restriction in question must be indispensable to the general plan.[110] The Supreme Court, ruling in *Nectow v. City of Cambridge*[111] that a zoning ordinance was invalid as applied, emphasized the lack of indispensability.[112] On the other hand, where it appears that surrounding properties could be affected[113] or the general zoning plan would be jeopardized by failure to uphold the use restriction,[114] courts have generally upheld the regulation.

F. Trends in the Land Development Pattern of the Community

This element requires an overview of the general character of the community,[115] and a determination as to whether that character has been altered because of natural changes[116] or artificial development.[117] If there have been no basic shifts in the development pattern of the

108. Forde v. City of Miami Beach, 1 So. 2d 642, 646 (Fla. 1941); STAFF REPORT NO. 1, at 17.

109. In *Forde*, the court stated that restricting the property in question to single family residences was unsuitable because of the high cost of reclamation and the heavy expense of taxes. In Burritt v. Harris, 172 So. 2d 820, 823 (Fla. 1965), the court held the land unsuitable for classification more restrictive than industrial "A." At the time of the suit it was zoned for residential use. In so deciding the court considered: (1) the predominant zoning in the area (industrial "B," which allowed heavier industrial development than "A"); (2) the fact that the land was near an airport which created a high noise level; (3) the close proximity of a paper and pulp plant which spewed noxious odors. *See also* VAN ALSTYNE 33-34.

110. VAN ALSTYNE 732.

111. 277 U.S. 183 (1928).

112. *Id.* at 188.

113. Blank v. Town of Lake Clarke Shores, 161 So. 2d 683, 685 (Fla. 2d Dist. Ct. App. 1964).

114. *See* note 98 *supra.*

115. *See, e.g.,* City of Miami Beach v. Ocean & Inland Co., 3 So. 2d 364, 364-66 (Fla. 1941); Blank v. Town of Lake Clarke Shores, 161 So. 2d 683, 686 (Fla. 2d Dist. Ct. App. 1964) (residential character was paramount attribute of the community).

116. *See, e.g.,* Forde v. City of Miami Beach, 1 So. 2d 642, 646 (Fla. 1941), where the court looked at the effect of hurricane damage to the property in question.

117. *See, e.g.,* Burritt v. Harris, 172 So. 2d 820 (Fla. 1965) and Tollius v. City of Miami, 96 So. 2d 122, 125-26 (Fla. 1957), where the court examined the area of the city near the property, paying particular notice to traffic and highway changes.

locality since the adoption of the regulation, courts generally will not force change on the area.[118] The premise here is that existing regulations promote community stability. But if the character of the community has changed, the judiciary has been more disposed to invalidate an ordinance as applied to the subject property.

Here again the court analyzes the surrounding property, with particular attention given to the restrictions placed on neighborhood land. The court is not likely to uphold restrictions that create a "veritable island," where the subject property is surrounded by land wholly of a different classification or of different characteristics.[119]

Conversely, the court will not uphold an ordinance that reflects spot zoning.[120] The emphasis once again is on the preservation of regularity in the community's system of regulation:

> [T]o zone a single piece of property that has theretofore been a part of a comprehensive zoning plan without any other reasons than to place it in an adjacent zoning district, is a form of zoning erosion that if permitted would completely emasculate the orderly processes of zoning as we know them.[121]

G. *Nuisance*

Numerous legislative efforts outlaw certain activities as unreasonable interferences with the enjoyment of surrounding property or the welfare of the community.[122] These "noxious uses," as they are called, are justifiably abated when sufficiently onerous to the community, even though private loss results to the owner.[123] Assuming a regulation falls

---

118. "It has long been settled in Florida that zoning regulations which promote the integrity of a neighborhood and preserve its residential character are related to the general welfare of the community and are valid exercises of the legislative power." City of Miami v. Zorovich, 195 So. 2d 31, 37 (Fla. 3d Dist. Ct. App. 1967); *accord,* Blank v. Town of Lake Clarke Shores, 161 So. 2d 683 (Fla. 2d Dist. Ct. App. 1964); Gautier v. Town of Jupiter Island, 142 So. 2d 321 (Fla. 2d Dist. Ct. App. 1962).

119. Tollius v. City of Miami, 96 So. 2d 122, 125 (Fla. 1957). The court considered this "island" as one of the characteristics that required a finding of invalidity. "Aside from the characteristics of the land, and the land around it, apparent from the sketch, there was abundant testimony that the property in litigation no longer retained the features which at the time of passage of the zoning ordinance justified classifying it as a site usable only for one purpose." *Id.*

120. City of Miami v. Ross, 76 So. 2d 152 (Fla. 1954). *See also* STAFF REPORT No. 1, at 14-15.

121. Cole v. Oka, 131 So. 2d 757, 758-59 (Fla. 3d Dist. Ct. App. 1961).

122. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919); Northwestern Laundry v. City of Des Moines, 239 U.S. 486 (1916); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. City of Little Rock, 237 U.S. 171 (1915); Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878).

123. Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915). Even though the value of

within this narrow classification, there is strong precedent for upholding the regulation.[124]

H. Economic and Environmental Consequences to the Community

The Supreme Court in *Miller v. Schoene*[125] recognized that in certain circumstances the economic welfare of the community can outweigh and prevail over private economic interests. In *Miller* the Court upheld a Virginia statute mandating the destruction of all red cedar trees infected by cedar rust disease that were within a 2-mile radius of an apple orchard. The legislative judgment that protection of the apple orchards was of greater value than the owner's rights in the ornamental cedars was instrumental to the decision.[126]

The Florida Supreme Court, in *Corneal v. State Plant Board,*[127] considered a similar case, where citrus trees were destroyed as part of a program to control and contain the citrus disease "spreading decline." In *Corneal* both infected trees and noninfected trees were destroyed. The Court held that compensation must be made at least for the loss of profits sustained by the owner whose healthy trees were destroyed.[128]

Since the 1908 decision in *Hudson County Water Co. v. Mc-*

---

the subject property diminished from $800,000 to $60,000, the regulation was found a justifiable exercise of the police power.

124. The rationale in the following cases was that the activity prohibited could reasonably be regarded as incompatible with surrounding community use: Pierce Oil Corp. v. City of Hope, 248 U.S. 498 (1919) (storage of gasoline within 300 feet of any dwelling); Northwestern Laundry v. City of Des Moines, 239 U.S. 486 (1916) (emission of smoke from industrial furnaces); Haddacheck v. Sebastian, 239 U.S. 394 (1915) (manufacture of bricks within specified area of municipality); Reinman v. City of Little Rock, 237 U.S. 171 (1915) (operation of livery stables in certain parts of the city); Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878) (maintenance of fertilizer works in village).

BOSSELMAN at 199 compares the application of the nuisance criteria in two fairly recent cases: Consolidated Rock Products Co. v. City of Los Angeles, 370 P.2d 342 (Cal.), *appeal dismissed,* 371 U.S. 36 (1962) (regulation prohibiting mining of rock and gravel in agricultural and residential districts sustained); Lyon Sand & Gravel Co. v. Township of Oakland, 190 N.W.2d 354 (Mich. 1971) (regulation prohibiting gravel mining without a permit, limiting the depth of excavation, and restricting the manner of operation in a relatively rural area struck down).

125. 276 U.S. 272 (1928).

126. *Id.* at 279. The Court also appeared to consider the fact that no less drastic alternative was available.

127. 95 So. 2d 1 (Fla. 1957).

128. *Id.* at 6–7. The court stated that absolute destruction is a very extreme exercise of the police power and is justified only within the limits of actual necessity. *Id.* at 4. Since the healthy trees offered no immediate menace to the trees in a neighboring grove, their destruction was not justifiable. *Id.* at 6. The court in dictum did say that "the Plant Board would have been justified in destroying the diseased trees without compensation to the owner, if this had been found to be a practicable method of containment of the disease." *Id.* at 5. That the disease posed a serious threat to the citrus industry was the deciding fact for upholding a program of destruction of infected trees. *Id.*

Carter,[129] the United States Supreme Court has recognized the states' right to protect their natural resources even though interference with private use of those resources results.[130] Although the Court has not been involved significantly in environmental questions,[131] state courts have experienced significant activity in the 1970's.[132] A Wisconsin decision, *Just v. Marinette County*,[133] has probably been the most significant proenvironment decision in recent years. In *Just*, the court upheld as a valid exercise of the police power a shoreline zoning ordinance restricting the filling of certain swamp areas.[134] Recently, the Florida Supreme Court, in *City of Daytona Beach v. Tona-Rama, Inc.*,[135] has ruled that the doctrine of customary rights gives the public enforceable recreational rights in the dry sand portions of the state's beaches.[136]

All of the elements discussed above have been recognized in court decisions; however, the particular weight or emphasis to be given any one of them is generally not clear. Certainly the facts of each case shape the court's reasoning, as well as the often-repeated maxim that the court will not substitute its judgment for that of the legislature where decisions about policy are involved.[137] But the courts are constantly called upon to evaluate whether a regulation or its particular application is a valid exercise of the police power, and they must accomplish this task by assuming a legislative posture of balancing the

129. 209 U.S. 349 (1908).

130. "[I]t is recognized that the State as *quasi*-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." *Id.* at 355. *See also* Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 185-86 (1950) (acknowledging the power to prevent waste of natural resources); Champlin Refining Co. v. Corporation Comm., 286 U.S. 210, 233 (1932) (the state has a right to reasonably regulate the use of oil and gas supplies in order to prevent unnecessary loss, destruction, or waste).

131. The Court has in fact gone far to limit its review of such questions. In Sierra Club v. Morton, 405 U.S. 727 (1972), the petitioner, "a membership corporation with 'a special interest in the conservation and the sound maintenance of the national parks,'" *id.* at 730, lacked standing under the federal Administrative Procedure Act, 5 U.S.C. § 701 *et. seq.*, (1970), to challenge the construction of a recreation area in a national forest as violative of federal law.

132. For a comprehensive review of this area of the law, *see* BOSSELMAN 141-82, 212-35.

133. 201 N.W.2d 761 (Wis. 1972).

134. *Id.* at 768. For a more detailed discussion, *see* BOSSELMAN 217-21. *But see* on the topic of filling and dredging, Zabel v. Pinellas County Water and Navigation Control Authority, 171 So. 2d 376 (Fla. 1965), a three-three decision holding a statute prohibiting the filling or dredging of Boca Ciega Bay, thereby depriving the owner of any valuable use of his property, to be a taking without just compensation in the absence of proof of overriding public necessity. *Id.* at 379-80.

135. 294 So. 2d 73 (Fla. 1974).

136. *See* Comment, 2 FLA. ST. U.L. REV. 806 (1974).

137. *See* Zahn v. Board of Pub. Works, 274 U.S. 325 (1927); STAFF REPORT No. 1, 6-8.

public and private interests involved in land use regulation. Perhaps it is time for the legislature itself to confront the issue, to statutorily balance the competing interests, and provide the courts with a firm policy.

VI. Conclusion

If uniform, comprehensible, and predictable compensation policies are to be established to delimit the desirable exercise of regulatory powers, the task lies with the legislature. The complex mix of competing economic, social and legal concerns woven throughout the taking issue cannot be assessed and molded into an integrated policy by the judiciary. Moreover, the courts should not be expected to resolve the private-public property rights imbroglio. Courts must wait for litigation to be initiated, are bound by the distinct facts of an individual case, and are constrained to rule only on the particular situation in question. These factors, coupled with the doctrine of stare decisis, effectively reduce the potential for judicial resolution of the taking conundrum.

The issue requires review by a body able to weigh all interests, consider numerous options, and develop and initiate innovative policies. This is the unique role of a state legislature. Moreover, any policy should include a fiscal program or funding source, enactment of which is the sole prerogative of the legislative branch.

Although the judiciary is the final arbiter or ultimate interpreter of constitutional provisions, the Florida Legislature may enact legislation effectuating the taking clause. The power to take such action is not reserved exclusively to the courts. Moreover, given the paucity of judicial guidance relative to the taking issue, and the policy-laden nature of the question, the judiciary may be disposed to accept and validate a practical and functional statutory program.

Necessary to any legislative approach to the taking issue is a determination of what should be considered a taking, as well as a sensitivity to what may be proscribed as a taking. The legislature therefore should provide a number of policy options. For example, it could determine that as a matter of policy, not constitutional mandate, property owners whose land value is diminished to a certain level by regulations should be compensated in a particular manner. Or a program could be enacted to afford property owners appropriate compensation once particular regulations are judicially invalidated.

The exact nature of compensation provides a fertile area for legislative analysis. Compensation could be monetary or could include a mix of development density bonuses or transfer of development rights

to other areas. An exchange of land may also be considered appropriate compensation in certain circumstances. Any program would of course be reviewable by the courts as to the minimal constitutional adequacy of compensation in an individual case.

A number of additional compensation options are available to the legislature. Many of these approaches, as well as potential sources of revenue for funding a compensation program, have been outlined by the Governor's Property Rights Study Commission.[138]

In sum, resolution of the taking issue must be accomplished by the legislature. The inclination of the legislature to assume this responsibility and the disposition of the judiciary to accept a reasonable and practical legislative program will in large part determine the fate of growth management in Florida.

---

138. *See* note 10 *supra*.