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# Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla. 1981)

Anthony E. DiResta

# CASE NOTES

**Environmental Regulation/Constitutional Law—"TAKING" JURISPRUDENCE AND ITS APPLICATION TO REGULATIONS OF SENSITIVE ECOLOGICAL ENVIRONMENTS—*Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981).**

Estuary Properties, Inc. (Estuary) owned approximately 6,500 acres of land in Lee County, consisting mostly of coastal wetlands.[1] On June 18, 1975, Estuary applied to the Board of County Commissioners of Lee County for approval of a development of regional impact (DRI).[2] Estuary's plan, ultimately calling for the construction of 26,500 residential units,[3] would require destruction of 1,800 acres of predominantly black mangroves. In place of the mangroves, Estuary proposed to build an "interceptor waterway," which would be used to raise the elevation of the remaining land for construction.[4]

The development proposal was submitted to the Southwest Flor-

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1. Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1376 (Fla. 1981). The supreme court described the land as "a sensitive ecological environment." *Id.*

2. *Id.* Pursuant to FLA. STAT. § 380.06(1) (1979), "development of regional impact means any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county."

"Developments of regional impact" is but one provision of the Florida Environmental Land and Water Management Act of 1972. The other is related to "areas of critical state concern." FLA. STAT. § 380.05 (1979). For a discussion of the process for designation of areas as "of critical state concern," see Note, *Florida's Adherence to the Doctrine of Nondelegation of Legislative Power*, 7 FLA. ST. U.L. REV. 541, 549-51 (1979).

3. 399 So. 2d at 1376. The plan, involving an estimated eventual population of 73,500, would constitute eleven commercial centers, four marinas, five boat basins, three golf courses, and twenty-eight acres of tennis facilities. *Id.*

4. *Id.* Mangrove is a common name for certain shrubs and trees that grow in dense thickets or forests along tidal estuaries and characteristically have exposed, supporting roots. ENCYCLOPEDIA BRITANNICA, MICROPAEDIA VI, at 565 (1974). In tropical estuaries,

> the vegetation sequence is dominated by mangrove trees, whose densely interwoven systems of stems and roots rapidly build up a swampy shore. With time, the substrate may build up above the reach of the tide, and the mangrove swamp may give way to oak, mahogany, and other hardwood trees. One of the greatest mangrove swamps in the world exists in southwestern Florida where the brackish estuarine water forms ideal environmental conditions. Although the estuaries may lose area, valuable land is often built up by mangrove growth. In the last 40 years in Biscayne and Florida Bay regions, some 1,500 acres of new land have formed as a direct result of mangrove growth.

ENCYCLOPAEDIA BRITANNICA, MACROPAEDIA VI, at 970 (1974).

Estuary maintained that the proposed waterway would ameliorate the potential harm from the mangrove destruction, since it "would replace the functions of the black mangroves in the ecosystem." 399 So. 2d at 1376.

ida Regional Planning Council, which recommended that Estuary's application for development approval be denied.[5] After public hearings,[6] the Board of County Commissioners adopted the Council's findings and concluded that "the proposed development would cause the degradation of the waters of Estero and San Carlos Bays."[7]

Estuary appealed the order to the Florida Land and Water Adjudicatory Commission.[8] After a de novo hearing, a hearing officer found that the record supported the findings that destruction of the black mangroves would have an adverse impact on the environment and the natural resources of the region.[9] The Adjudicatory Commission adopted the hearing officer's recommended order denying Estuary's application for development.[10] Estuary then sought judicial review.[11]

The First District Court of Appeal reversed the findings of the Adjudicatory Commission and Lee County, concluding that "denial of the requested development permit cannot be sustained absent payment of full compensation to petitioner for the taking of the mangrove acreage lying below the salina."[12] The court, reasoning from a posture of constitutionally protected rights, held that:

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5. The Council prepared a report pursuant to FLA. STAT. § 380.06(8) (1973). 399 So. 2d at 1376.

6. FLA. STAT. § 380.06(7) (1979) requires that public hearings be held after due notice prior to a decision regarding development.

7. 399 So. 2d at 1376. The regional planning agency, in preparing its report and recommendations, must evaluate the extent to which the proposed development will affect (1) the environment and natural resources of the region, (2) the economy of the region, (3) the water, sewer, solid waste disposal or other necessary public facilities, (4) the public transportation facilities, (5) the ability of the public to find adequate housing accessible to their places of employment, (6) the energy consumption, and (7) other criteria deemed appropriate by the regional planning agency. FLA. STAT. § 380.06(8) (1979). The criterion concerning the effect of the proposed development upon the energy consumption was not applicable to Estuary's application for a permit. *See* 399 So. 2d at 1376 n.1, 1378 n.6.

8. The Florida Land and Water Adjudicatory Commission is composed of the Governor and the Cabinet. *See* FLA. STAT. §§ 14.202, 380.07(1) (1979). For a discussion of an appeal of a local order to the Adjudicatory Commission, see Comment, *Burden of Proof in Land Use Regulation: A Unified Approach and Application to Florida*, 8 FLA. ST. U.L. REV. 499, 516 (1980).

9. 399 So. 2d at 1377. The hearing officer also concluded that the interceptor waterway would not adequately replace the functions of the mangroves. *Id.*

10. *Id.* at 1377 n.4.

11. Review of the Adjudicatory Commission's order may be sought by petition to the district court of appeal. *See* Comment, *supra* note 8, at 516.

12. Estuary Properties, Inc. v. Askew, 381 So. 2d 1126, 1140 (Fla. 1st Dist. Ct. App. 1979), *aff'd in part and rev'd in part sub nom.*, Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981).

> [W]hile government clearly has the right to expropriate private property for purposes beneficial to the general public, it cannot require a single property owner to bear the cost of such general benefits. This principle, which is the essence of the "property clauses" of the United States and Florida Constitutions, commands that the cost of public benefits be borne by the public.[13]

Specifically rejecting a "balancing" test[14] and utilizing instead a "diminution in value" test,[15] the court found that the "[p]etitioner has been denied the right to use its property because that use would deny the public certain free benefits."[16] In addition, the court found that the hearing officer, Lee County, and the Adjudicatory Commission erred "[i]n failing to balance the numerous factors involved"[17] and in assigning to Estuary the burden of proving that the development plan would not result in ecological change and pollution of the adjacent bay.[18]

The Florida Supreme Court, in an opinion authored by Justice McDonald, differed with the First District Court of Appeal on two grounds. First, the supreme court held that "the district court incorrectly reversed the adjudicatory commission's finding that the proposed DRI would have an adverse impact on the region."[19] The

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13. 381 So.2d at 1138.

14. The court confidently asserted:

> This principle [that the costs of benefits flowing to the public at large must properly be borne by the public] is universally accepted in more traditional contexts of governmental taking and is, in fact, the essence of constitutional property rights. The true constitutional issue in this case is whether there has been a taking of Petitioner's property rights, not whether the public benefits of preserving mangrove wetlands outweigh the private injury to Petitioner.

*Id.* at 1139. *See* notes 134-39 *infra* and accompanying text.

15. "This 'diminution in value' test has been since interpreted by other courts to mean that although government can regulate the use of private property for the public benefit, it cannot preclude the owner from all economically practicable uses." 381 So. 2d at 1138. *See* notes 127-33 *infra* and accompanying text.

16. 381 So. 2d at 1138.

17. *Id.* at 1137. The factors that the court is speaking of are located in FLA. STAT. § 380.06(8) (1979). *See* note 7 *supra.*

18. 381 So. 2d at 1135. The court relied upon Zabel v. Pinellas County Water and Navigation Control Auth., 171 So. 2d 376 (Fla. 1965). For a thorough criticism of the court's reliance on *Zabel,* see Comment, *supra* note 8, at 513-14.

19. 399 So. 2d at 1379.

Justice Adkins provided the sole dissent:

> I would grant rehearing and approve the opinion and decision of the district court. I also believe the dissenting opinion by Justice Brennan of the United States Supreme Court in *San Diego Gas & Electric Co. v. City of San Diego* ___ U.S. ___, 101 S. Ct. 1287, 67 L. Ed. 2d 551 (1981), controls our decision on in this case.

court distinguished *Zabel v. Pinellas County Water & Navigation Control Authority*[20] stating that "[o]nce there is sufficient evidence of an adverse impact, it is neither unconstitutional nor unreasonable to require the developer to prove that the proposed curative measures will be adequate."[21] The court, however, found that the Adjudicatory Commission, as a state agency,[22] procedurally failed to indicate requisite changes,[23] such that "Estuary could ascertain what it would be required to do to obtain approval."[24] As a result, the case was remanded to the district court.[25]

Second, the supreme court disagreed with the district court's conclusion that the facts constituted a "taking."[26] Citing *Goldblatt v. Town of Hempstead*,[27] the court found that Estuary's permit was initially denied because the proposed development would

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399 So. 2d at 1383 (Adkins, J., dissenting). For a discussion of San Diego Gas & Electric Co. v. City of San Diego, see notes 112-21 *infra* and accompanying text.

20. 171 So. 2d 376 (Fla. 1965). The court initially distinguished *Zabel* from the instant case factually: "In *Zabel* the property in question had been transferred from the state to the landowners by a conveyance which carried with it a statutory right to bulkhead and fill the property purchased," 399 So. 2d at 1379, whereas "[w]hen Estuary bought the property in question in this case . . . it did so with no reason to believe that the conveyance carried with it a guarantee from the state that dredging and filling the property would be permitted." *Id.* (footnote omitted). Significantly, the court then compared the initial findings in *Zabel* with those in the instant case: "In *Zabel* the Court did not find that any material, adverse effect on the public interest had been demonstrated," *id.*, whereas "[i]n the instant case there is no question but that the proposed development would have an adverse environmental impact." *Id. See generally* Comment, *supra* note 8, at 513-14.

21. 399 So. 2d at 1379. The supreme court reasoned that inasmuch as no specific weights are placed on the statutory criteria, a hearing officer could have permissibly determined that certain criteria outweighed others. At the heart of the court's reasoning is the principle that "[b]alancing in an adjudicatory process does not always mean that four favorable considerations outweigh two unfavorable considerations." *Id.* at 1378. *See* note 7 *supra*.

22. Relying upon FLA. STAT. § 120.52(1) (1977), the court found the Adjudicatory Commission, as "exercising administrative powers," a state agency. 399 So. 2d at 1380.

23. According to FLA. STAT. § 380.08(3) (1973), if a government agency denies a permit for development, it shall specify its reasons in writing and indicate any changes in the proposal that would make it eligible.

Appellants, in this case, argued that inasmuch as the commission adopted the recommended order issued by the hearing officer, which did not contain any specified changes, the order of the Southwest Florida Regional Planning Council is reinstated. 399 So. 2d at 1380. But, as the court indicated, "[i]f this were true . . . the commission's order should have expressly so indicated." *Id.*

24. 399 So. 2d at 1380 (quoting Estuary Properties, Inc. v. Askew, 381 So. 2d 1126, 1132 (Fla. 1st Dist. Ct. App. 1979), *aff'd in part and rev'd in part sub nom.*, Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981)).

25. 399 So. 2d at 1380. Specifically, the court ordered the district court to remand it to the Florida Land and Water Adjudicatory Commission with instructions that FLA. STAT. § 380.08(3) (1973) be followed. 399 So. 2d at 1383.

26. 399 So. 2d at 1380, 1381.

27. 369 U.S. 590 (1962). *See* notes 83-88 *infra* and accompanying text.

cause a public harm, not because a public benefit would result from the denial.[28] Furthermore, quoting from *Just v. Marinette County*,[29] the court seemed to embrace a concern for a policy of environmental sensitivity: "[A]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[30]

The court's analysis of the taking issue, however, is weak in several respects. First, although the court seemed to distinguish *Pennsylvania Coal Co. v. Mahon*,[31] it failed to address its application to the "diminution in value" test.[32] Second, despite the recognition of Chapter 380 of the Florida Statutes as involving "a balancing of the interests of the state in protecting the health, safety, and welfare of the public against the constitutionally protected private property interests of the landowner,"[33] the court failed to address whether such a balancing test pertains in determining whether a taking has occurred.[34] Third, the court failed to mention the "nuisance" feature in its harm/benefit analysis;[35] the district court even referred to this factor, indicating that the administrative process had found that destruction of the mangroves would have a damaging effect.[36] Finally, the court confused an analysis of what consti-

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28. 399 So. 2d at 1382. The court attempted to get around the problems involved in a public benefit extraction/public harm prevention analysis of the taking issue by stating:

> [T]he line between the prevention of a public harm and the creation of a public benefit is not often clear. It is a necessary result that the public benefits whenever a harm is prevented. However, it does not necessarily follow that the public is safe from harm when a benefit is created.

*Id.* *See* notes 140-42 *infra* and accompanying text.

29. 201 N.W.2d 761 (Wis. 1972).

30. 399 So. 2d at 1382 (quoting Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972)).

31. 260 U.S. 393 (1922). *See* notes 52-67 *infra* and accompanying text.

32. *Compare* 399 So. 2d at 1380, 1381 *with* 381 So. 2d at 1138. Interestingly, the supreme court acknowledges "[t]he degree to which there is a dimunition in value of the property" as a factor in determining whether a regulation is a valid exercise of the police power or a taking. 399 So. 2d at 1380.

33. 399 So. 2d at 1377.

34. *Compare id. with* 381 So. 2d at 1139. *See* note 14 *supra.*

35. *See* Finnell, *Coastal Land Management in Florida*, 1980 AM. B. FOUNDATION RESEARCH J. 307, 392-93; notes 142-46 *infra* and accompanying text.

36. The district court stated that:

> [T]he hearing officer did find that the finding of the Board of County Commissioners of Lee County and the Southwest Florida Regional Planning Council that destruction of the black mangroves would have an adverse impact on the environment and natural resources of the region was supported by the record . . . . The hearing officer concluded that removing the black mangroves would greatly increase the risk to the surrounding bays of pollution; that pollution in the bays

tutes a legitimate exercise of the police power with an analysis of what constitutes public benefit or harm. The court started with two propositions. One was that "[i]f the regulation creates a public benefit it is more likely an exercise of eminent domain, whereas if a public harm is prevented it is more likely an exercise of the police power."[37] The other was that "[p]rotection of environmentally sensitive areas and pollution prevention are legitimate concerns within the police power."[38] From these propositions, the court concluded that "the regulation at issue here promotes the welfare of the public, prevents a public harm, and has not been arbitrarily applied."[39] From a logical point of view, however, the argument commits the fallacy of affirming the consequent.[40] It is only when the court provided the following "public harm/nuisance" factor that the conclusion logically follows: "In this case, the permit was denied because of the determination that the proposed development would pollute the surrounding bays, i.e., cause a public harm."[41]

The United States Constitution provides that "private property [shall not] be taken for public use without just compensation."[42] Similarly, the Florida Constitution provides that "[n]o private property shall be taken except for a public purpose and with full compensation."[43] Florida's Environmental and Water Management Act of 1972 recognizes the possible constitutional implications inherent in environmental regulations and cautions that the Act does not authorize any agency to act in any way that is "unduly restrictive or constitutes a taking of property without the payment of full

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would have an adverse impact on the economy of the area (the bays provide fish and other economically related marine life); that requiring the landowner to refrain from such degradation of state owned waters was both a reasonable restriction on the use of his land and a requirement of Chapter 380; and that because the interceptor waterway was not shown to be capable of assimilating the nutrients entering it, its use would not prevent the degradation of the bay waters.

381 So. 2d at 1131-32.

37. 399 So. 2d at 1381 (citation omitted).

38. *Id.*

39. *Id.*

40. *See* M. BEARDSLEY, THINKING STRAIGHT 41 (4th ed. 1975). A general rule of inference is *modus ponens*, where given two propositions, a third logically follows: (i) If *X* then *Y* and (ii) *X*, therefore (iii) *Y*. *See generally* H. KAHANE, LOGIC AND PHILOSOPHY 43 (2d ed. 1973).

41. 399 So. 2d at 1382.

42. U.S. CONST. amend. V. *See also* U.S. CONST. amend. XIV (No state shall "deprive any person of life, liberty, or property, without due process of law.").

43. FLA. CONST. art. X, § 6. *See also* FLA. CONST. art. I, § 9 ("No person shall be deprived of life, liberty, or property without due process of law.").

compensation."[44] The Act, however, fails to articulate the point at which governmental action becomes so restrictive or so complete as to become a taking which requires payment of compensation.[45]

The purpose of this note is to demonstrate that the supreme court's constitutional analysis of taking in *Estuary Properties* was inadequate from a legal and policy point of view. After tracing the United States Supreme Court's development of the "taking" concept, this note will evaluate the analytical paradigms utilized by the United States and Florida Supreme Courts. Discussion will show that taking, in an environmental context, requires a broad analytical model encompassing ethical and social norms.

The landmark case in taking jurisprudence is *Mugler v. Kansas*,[46] where the Supreme Court, in 1887, upheld the shutting down, without compensation, of a brewery under the Kansas prohibition law. The Court closely examined the character of the physical invasion as a means of distinguishing an exercise of the police power from eminent domain.[47] The Court's binary distinction between these two powers served the ends of clarity and simplicity: if the government appropriated or physically invaded the land it was eminent domain; otherwise it was an exercise of the police power.[48] Finding that (a) there had been no appropriation of the property[49] and (b) the owner's right to utilize the land for lawful purposes remained undisturbed,[50] the Court dismissed the owner's claim, reasoning that the state should not provide restitution for losses resulting from restrictions placed on the noxious use of land.[51]

Thirty-five years later, the Supreme Court, in *Pennsylvania Coal Co. v. Mahon*,[52] moved away from a *Mugler*-like determination of the nature of the government's action as either eminent do-

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44. FLA. STAT. § 380.08(1) (1979).

45. *See generally* Harris, *Environmental Regulations, Zoning, and Withheld Municipal Services: Takings of Property by Multi-Government Action*, 25 U. FLA. L. REV. 635 (1973); Haigler, McInerny, Rhodes, *The Legislature's Role in the Taking Issue*, 4 FLA. ST. U.L. REV. 1 (1976).

46. 123 U.S. 623 (1887).

47. *Id.* at 666-69.

48. *See generally* F. BOSSELMAN, D. CALLIES, J. BANTA, THE TAKING ISSUE 105-23 (1973). Justice Harlan, holding himself out as a strong proponent of the physical invasion requirement, *see* notes 122-26 *infra* and accompanying text, carefully distinguished Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871), on the ground that, unlike *Mugler*, it involved a "'permanent flooding of private property,' a 'physical invasion of the real estate of the private owner, and a practical ouster of his possession.'" 123 U.S. at 668.

49. 123 U.S. at 669.

50. *Id.*

51. *Id.*

52. 260 U.S. 393 (1922).

main or an exercise of the police power. Instead, the Court found the taking issue to be a "matter of degree" and consequently one which "cannot be disposed of by general propositions."[53] In *Mahon,* a homeowner sought an injunction against underground coal mining pursuant to a Pennsylvania statute prohibiting mining of subsurface coal in populated areas.[54] Although the Supreme Court recognized that the enforcement of the law would "destroy previously existing rights of property and contract,"[55] the Court did not hold the statute unconstitutional as violating due process of law.[56] Rather, the Court held that the mining restriction was tantamount to a taking: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[57]

Justice Holmes, writing for the majority,[58] juxtaposed the concepts of police power and eminent domain on a continuum, by stating that the difference between the two powers is one of degree:

> 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.[59]

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53. *Id.* at 416.

54. For a discussion of the purpose of the Pennsylvania Act, see F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 48, at 126-30.

55. 260 U.S. at 413. A deed executed prior to the statute's enactment by the homeowner's predecessor in title had granted the coal company the right to engage in such mining. *Id.* at 412.

56. Professor Tribe notes its significance:

> Eminent domain in *Mahon* thus became a kind of procedural substitute for substantive guarantees of contractual autonomy; rather than invalidating statutes in which the public character of the benefit was unclear while the private harm was both evident and focused, the Court in effect forced the public to internalize private costs in ambiguous cases by requiring government to compensate private parties for what they were being forced to lose.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-5, at 445 (1978) (footnote omitted).

57. 260 U.S. at 415.

58. Mr. Justice Brandeis filed the single dissenting opinion. *Id.* at 416 *See* notes 64-66 *infra* and accompanying text.

59. 260 U.S. at 413.

The Court, while focusing on the extent to which the restrictions impaired the value of the property rights, established a test which inquires whether the property can be put to any reasonable use: "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[60]

The *Mahon* Court seemed to utilize a balancing approach to determine if the regulation goes too far, by weighing the public interest against the magnitude of the harm to private property rights. On one side of the scale, Justice Holmes noted that the public interest in minimizing danger to the "single private house" involved was limited, while "[o]n the other hand the extent of the taking was great."[61] Applying the statute solely to the plaintiff's position, then, a public interest was not displayed to justify "so extensive a destruction of the defendant's constitutionally protected rights."[62] Justice Holmes went on, however, to discuss the general validity of the act; that he did so suggests that, for purposes of a balancing test, the harm involved should comprehend not merely the individual whose property was taken, but all potential plaintiffs. As one commentator has noted, "[t]he unanswered question is whether Justice Holmes meant to define the concept of 'reasonable use' by balancing the harm inflicted on the property owner against the public benefits flowing from the act or by measuring without regard for the public benefits involved."[63]

Justice Brandeis, dissenting, stated that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner."[64] Suggesting that the Court should have examined the value of the land as a whole,[65] Justice Brandeis criticized the majority's position that justification for the police power required a mutuality of advantage between

60. *Id.* at 414.

61. *Id.* at 413-14.

62. *Id.*

63. Harris, *supra* note 45, at 660 n.138.

64. 260 U.S. at 417 (Brandeis, J., dissenting).

65. Justice Brandeis argued that aggregate property rights could be so partitioned as to create a taking as a consequence of any regulation; furthermore, he stated that without including the value of the entire parcel of land, it would be possible to conclude that the sum of the divided interests could be greater than the whole. *Id.* at 419.

the public and the landowner.[66]

Although the analysis in *Mahon* is critical to a discussion of taking jurisprudence, its precedential value is limited by the observation that when *Mahon* was decided, land use regulations were nascent.[67] It was not until four years later, in *Village of Euclid v. Ambler Realty Co.*,[68] that the Supreme Court announced the validity of zoning.[69] Furthermore, six years after *Mahon*, the Court recognized that in certain circumstances, the economic welfare of the community can outweigh and prevail over private economic interests.

In *Miller v. Schoene*,[70] the Court upheld a Virginia statute requiring the destruction of all red cedar trees infected by cedar rust, reasoning that if the disease spread to a nearby apple orchard, the orchard's commercial value would have been completely destroyed. The Supreme Court, in upholding the statute without requiring compensation, pointed to the significance of the apple orchard to the state economy and, accordingly, deferred to the legislative judgment that protection of the apple orchards was of greater value than the landowner's rights in the ornamental cedars.[71]

The Supreme Court in *Miller*, departed from *Mahon* in two fundamental respects. First, the Court suggested that redistribution of private property may be justified in the public interest.[72] Second, the Court implied that the state has a positive role to play, a function whose exercise will benefit some individuals while at the same time hurt others.[73]

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66. *Id.* at 422. Although Justice Brandeis conceded that this reciprocity may be essential if the purpose of a regulation is to confer benefits upon the community, he asserted that governmental constraints are not proper when furthering the public safety. *Id.* (citing, among others, Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915); Mugler v. Kansas, 123 U.S. 623 (1887)).

67. *See* Haigler, McInerny, Rhodes, *supra* note 45, at 5.

68. 272 U.S. 365 (1926).

69. In *Euclid*, the court declared that "[t]he harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful." *Id.* at 392 (citing City of Aurora v. Burns, 319 Ill. 84 (1926)). The Court reasoned that the community, not the judiciary, was in the best position to formulate a legislative remedy, absent an indication that the ordinance was arbitrary, unreasonable, or unrelated to the public welfare. *Id.* at 395-97. *See* Nectow v. City of Cambridge, 277 U.S. 183 (1928) (prohibiting municipality from applying an otherwise constitutional zoning ordinance which was not shown to have substantial relationship to the public interest).

70. 276 U.S. 272 (1928).

71. *Id.* at 279. The court seemed to determine that no less drastic alternative was available.

72. *See* L. TRIBE, *supra* note 56, § 8-5, at 445.

73. *See id.* As Professor Tribe pointed out, "the Court opined that, if the state had done

The departure from *Mahon* grew from economic considerations in *Miller* to aesthetic values in *Berman v. Parker*,[74] where the Supreme Court, in 1954, extensively expanded the parameters of the police power. Although the action involved a constitutional challenge to the exercise of eminent domain, the Court relied upon an analysis of the police power to justify the acquisition of property pursuant to the District of Columbia Redevelopment Act of 1954.[75] The Court reasoned that inasmuch as the notion of public welfare is broad and inclusive, the enhancement of the qualitative aspects of life, in addition to the protection of the public, warrants justification under the rubric of police power.[76] As in *Miller*, the *Berman* Court deferred to legislative determinations of public welfare: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[77]

Inasmuch as *Berman* was an eminent domain proceeding, the Court was not asked to evaluate the economic consequences of an application of the police power; the Court considered the rights of the property owners as satisfied, since the element of just compensation accompanied the eminent domain proceeding.[78] In the 1960s, however, the Court had three opportunities to address the magnitude of economic harm involved in police power actions.

In *Armstrong v. United States*,[79] the Court faced the issue of whether a compensable taking of property occurred where the gov-

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nothing and permitted disaster to strike the apple orchards, 'it would have been none the less a choice.' . . . [T]he majority rejected the common law of nuisance as a baseline in favor of a more generalized idea of the public interest." *Id.* at 445-46 (quoting from Miller v. Schoene, 276 U.S. at 279) (footnote omitted).

74. 348 U.S. 26 (1954).

75. Pursuant to the Act, a public agency was formed and granted the power of eminent domain to acquire all the property within large areas of the city found to contain high concentrations of slums and substandard housing. Once the area had been obtained, property designated for public use was transferred to a governmental agency and the remainder of the property was sold to a private redevelopment company for renovation and resale.

Two hypotheses have been offered as to why the court used the police power to justify an exercise of eminent domain. One is that the Court inter-changed the concepts of "public purpose" required for the police power and "public use" as specified in the fifth amendment. The second is that the Court viewed eminent domain as a means of fulfilling the broader public purpose under police power. *See* Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1036-37 (1975).

76. 348 U.S. at 33.

77. *Id.* at 32.

78. *Id.* at 36.

79. 364 U.S. 40 (1960).

ernment had made certain materialmen's liens unenforceable by asserting sovereign immunity.[80] Finding that the government's action constituted a taking of property without just compensation, the Court stated:

> Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done.[81]

*Armstrong* may be interpreted in one of two ways: (1) a *Mahon*-like finding that the assertion of sovereign immunity made the liens useless for any reasonable purpose, or (2) a *Mugler*-like determination that the government appropriated the property for its own advantage in a proprietary capacity.[82]

Two years later, in *Goldblatt v. Town of Hempstead*,[83] the Court admitted that "[t]here is no set formula to determine where regulation ends and taking begins."[84] Upholding a safety ordinance which prohibited commercial use of property, the Court cited *Mugler* for the proposition that a deprivation of the most beneficial use of land is justified when existing uses are prejudicial to the public interest.[85] The Court, nevertheless, preserved the vitality of

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80. The United States had contracted for the building of ships under an agreement providing that, in the event of default by the company, title to all completed and uncompleted work would be transferred to the United States. Default occurred and several hulls passed to the Government. Because the shipbuilder had not paid for all of his materials, petitioners-materialmen sought to enforce their state materialmen's liens against the United States. *See* Harris, *supra* note 45, at 643 n.45.

81. 364 U.S. at 48.

82. *See* Harris, *supra* note 45, at 644.

The three dissenting Justices in *Armstrong* argued that no taking had occurred, since the economic damage inflicted was a mere "consequential incidence" of a valid exercise of the power of sovereign immunity. 364 U.S. at 49 (Harlan, J., joined by Frankfurter and Clark, JJ., dissenting). Furthermore, they argued that "[t]he very nature of the doctrine of sovereign immunity precludes regarding its interposition as a Fifth Amendment 'taking.'" *Id.* at 50. For a discussion of the dissent's "consequential incidence" theory, see Harris, *supra* note 45, at 644 n.50.

83. 369 U.S. 590 (1962).

84. *Id.* at 594.

85. *Id.* at 593. In addition to *Mugler*, the Court cited the following cases: Walls v. Midland Carbon Co., 254 U.S. 300 (1920); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinmen v. Little Rock, 237 U.S. 171 (1915). *See* Laurel Hill Cemetery v. City and Cty. of San Francisco, 216 U.S. 358 (1910).

*Mahon* by indicating that "[t]his is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation."[86] In blending *Mugler* and *Mahon* to preserve the possibility that a regulation may require compensation if it prevents an owner from making any reasonable economic use of his property,[87] the Court enumerated flexible criteria for evaluating the validity of the police power, including: (i) the scope of the public interest in relation to the interference with private property, (ii) the efficiency of the means in light of the alternatives, (iii) the nature and extent of the interference with private property, and (iv) the financial loss resulting from the regulation.[88]

Finally, five months after *Goldblatt*, the Court failed in an opportunity to clarify its ambiguity regarding the analytical *Mugler-Mahon* hybrid. In *Consolidated Rock Products Co. v. City of Los Angeles*,[89] the Court considered an appeal from a zoning case that posed the question "whether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable effects a taking of property without compensation."[90]

The case arose when Los Angeles zoned the appellant's property for agricultural and residential use, thereby prohibiting the removal of rock, gravel, and sand from the land.[91] The California Supreme Court held that no right of compensation existed, reasoning that the property could be used for other purposes.[92] The United States Supreme Court dismissed the appeal for want of a substantial federal question.[93] Inasmuch as the dismissal was technically on the merits, it stands as good precedent.[94]

In 1978, the Supreme Court continued its expansion of the ap-

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86. 369 U.S. at 594.

87. *See id.* at 592; Harris, *supra* note 45, at 645.

88. 369 U.S. at 595. The Court, however, found that the absence of relevant evidence precluded the application of these criteria. *Id.*

89. 20 Cal. Rptr. 638 (1962), *appeal dismissed per curiam*, 371 U.S. 36 (1962).

90. Brief for Appellant, Jurisdictional Statement at 5.

91. *See* 20 Cal. Rptr. at 640.

92. *Id.* at 647.

93. 371 U.S. 36 (1962) (Justices Harlan and Douglas thought that probable jurisdiction should have been noted).

94. *See* Harris, *supra* note 45, at 646 n.66 (citing H. HART AND H. WECHSLER, FEDERAL COURTS AND THE FEDERAL SYSTEM 574 (1953); Note, *Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707, 712 (1956); Note, *The Insubstantial Federal Question*, 62 HARV. L. REV. 488, 494 (1949)). For a discussion of the use of *Consolidated Rock Products* as precedent, see Harris, *supra* note 45, at 646 n.66.

plication of police powers in *Penn Central Transportation Co. v. City of New York.*[95] While *Berman v. Parker*[96] incorporated aesthetic values into traditional notions of public welfare, the *Penn Central* majority "sanctioned broadened uses of police power in the governmental formulation of solutions (by recognizing) the complex problems emanating from increasingly concentrated communities and from concurrent pressure to enhance the quality of citizens' lives."[97]

In *Penn Central,* Penn Central Transportation Company sought to construct a multi-story office building above the Grand Central Terminal. A Landmark Preservation Committee[98] disapproved of the plans, ruling that the proposal was incompatible with the character and design of the terminal.[99] Penn Central contended that the landmark restrictions constituted a taking of its air rights in violation of the fifth and fourteenth amendments of the Constitution.[100] The New York Supreme Court ruled that the New York City Landmark Preservation Law was unconstitutional as applied.[101] The Appellate Division disagreed, indicating that there could be no taking without complete deprivation of all beneficial use of the terminal.[102] The New York Court of Appeals affirmed,[103] reasoning that the transfer development rights[104] granted sufficiently mitigated the regulation's adverse financial effects.[105]

The United States Supreme Court affirmed and held that New York City's Landmark Preservation Law did not constitute an unconstitutional taking.[106] The Court found the exercise of eminent

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95. 438 U.S. 104 (1978).

96. *See* notes 74-78 *supra* and accompanying text.

97. Comment, *You Don't Have to Take It or Leave It,* 31 U. FLA. L. REV. 429, 440 (1979).

98. For a discussion of the New York City Landmark Preservation Law, see *id.* at 429, n.4.

99. 438 U.S. at 117-18.

100. Brief for Appellants at 4.

101. Jurisdictional Statement app. at 71.

102. Penn Cent. Transp. Co. v. City of New York, 377 N.Y.S.2d 20, 29 (1975) (citing Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958)).

103. Penn Cent. Transp. Co. v. City of New York, 397 N.Y.S.2d 914 (1977).

104. Transfer development rights provide a landowner with an opportunity to further develop other property in lieu of lost development potential as a consequence of regulation. *See generally* Marcus, *Air Rights Transfers in New York City,* 36 L. & CONTEMP. PROB. 372 (1971); Costonis, *Development Rights Transfer: An Exploratory Essay,* 83 YALE L.J. 75 (1973); Note, *Development Rights Transfer in New York City,* 82 YALE L.J. 338 (1972).

105. 397 N.Y.S.2d at 921.

106. 438 U.S. at 138.

domain as government acting in its proprietary role and utilizing private resources pursuant to an enterprise function.[107] Furthermore, the Court found that the use of police power is warranted when government acts as a mediator among various social interests and implements a program which adjusts benefits and burdens in light of community goals.[108] In distinguishing *Mahon* from *Penn Central*, the Court indicated that *Mahon* represented distinct investment-backed expectations,[109] while *Penn Central*'s primary expectation was not impaired.[110] In giving great weight to the transfer development-rights as a form of compensation, the Court, nevertheless, stated that when an adverse economic impact on a private landowner outweighs the public benefits, deprivation of the use of property may require compensation.[111]

The most recent pronouncement by the Supreme Court concerning the taking issue is *San Diego Gas & Electric Co. v. City of San Diego*.[112] In this 1981 case, the appellant owned 412 acres within the municipal limits of San Diego which was acquired in 1966 as a possible site for a nuclear power plant. Approximately one-half of the land fell within an estuary known as the Los Perasquitos Lagoon. Additionally, roughly one-third of the land was subject to tidal action from the Pacific Ocean.[113]

In 1973, the San Diego City Council rezoned parts of the property from industrial to agricultural. That same year, the City of San Diego established an open-space plan while the City Council proposed a bond issue in order to obtain funds to acquire open-space lands.[114]

As a result of these events, the appellant instituted an action alleging that the City took its property without just compensation. The landowner argued that it was deprived of the entire beneficial

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107. *Id.* at 128 (discussing United States v. Causby, 328 U.S. 256 (1946)).

108. *Id.* at 124-25.

109. *Id.* at 130 n.27.

110. *Id.* at 137. The Court expressed the belief that neither the complete exploitation of potential land development nor the most beneficial use of the land is protected under the fifth amendment. *Id.* at 125-30.

111. *Id.* at 136 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).

Justice Rehnquist dissented, arguing that the record did not support the value of the transfer rights as just compensation. He found the context of noxious uses, as found in *Mugler*, to be determinative for evaluating whether the public's safety, health, and welfare were greater than the private landowner's interest. 438 U.S. at 138 (Rehnquist, J., dissenting).

112. 101 S. Ct. 1287 (1981).

113. *Id.* at 1289.

114. *Id.* at 1290.

use of the property. The City's response was that the appellant had never sought its approval for any development plan.[115]

After a complex procedural history,[116] the Supreme Court dismissed the appeal because of the absence of a final judgment.[117] The case is significant, though, inasmuch as it articulates a stance of the majority of the Court, through Justice Brennan,[118] with respect to when "a government entity must pay just compensation when a police power regulation has effected a "taking" of "private property" for "public use" within the meaning of that constitutional provision."[119]

Employing a *Mahon*-like balancing test,[120] the minority declared that a "taking" occurs where the effects of the governmental action completely deprived the owner of his proprietary interest:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal condemnation or in-

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115. *Id.*

116. After a non-jury trial on the issue of liability, the court granted judgment for the appellant. *Id.* at 1291. A subsequent jury trial on the issue of damages resulted in a $3 million judgment for the appellant. *Id.* On appeal, the California Court of Appeal affirmed. *Id.* The California Supreme Court, in granting the city's petition for a hearing, automatically vacated the appellate court's decision. Before the hearing, however, the supreme court retransferred the case to the court of appeal for reconsideration. *Id.* When the case was retransferred, the court of appeal reversed the judgment of the superior court. *Id.* at 1292. The California Supreme Court denied further review. *Id.* at 1293.

117. *Id.* at 1293. Justice Blackmun, delivering the opinion of the Court, and Justice Rehnquist, concurring, relied upon 28 U.S.C. § 1257 (1980). *See* 101 S. Ct. at 1294.

118. Justice Brennan, joined by Justices Stewart, Marshall, and Powell, reached the merits of the case "[b]ecause the Court's conclusion fundamentally mischaracterizes the holding and judgment of the Court of Appeal." 101 S. Ct. at 1296. Justice Rehnquist, providing the swing vote, stated:

> If I were satisfied that this appeal was from a "final judgment or decree" of the California Court of Appeal, as that term is used in 28 U.S.C. § 1257, I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan.

*Id.* at 1294.

119. *Id.* at 1301 (footnote omitted).

120. See notes 61-62 *supra*.

creasing electricity production through a dam project that floods private property.[121]

To summarize, the Supreme Court has utilized five analytical paradigms to evaluate whether a situation is compensable for purposes of constitutional law. The first determines whether the public has physically used or occupied something belonging to the claimant.[122] In other words, a compensable taking occurs when governmental action results in an encroachment upon a privately-owned asset of economic worth.[123] This "physical invasion" criterion fails, however, on three levels: (i) inasmuch as "taking" connotes a physical appropriation, "the magic of physical invasion is rooted in wordplay;"[124] (ii) it does not explain those situations where compensation for physical destruction is denied;[125] and (iii) it does not recognize those situations where the regulation may become so restrictive that the landowner is precluded from making reasonable use of his property.[126]

Given the limitations of the physical invasion analysis, a second paradigm arises which focuses upon the amount or degree of harm inflicted upon the claimant.[127] Pursuant to this "diminution in value" test, a regulation which prevents the most beneficial use of the claimant's property does not constitute a taking,[128] while a regulation which prevents any reasonable use is a compensable tak-

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121. 101 S. Ct. at 1304 (footnotes omitted). The minority amplified by indicating that "[w]hen one person is asked to assume more than a fair share of the public burden, the payment of just compensation operates to redistribute that economic cost from the individual to the public at large." *Id.* at 1306. *Cf.* Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981) (Justice Brennan's analysis applicable in a 42 U.S.C. § 1983 suit).

122. *See generally* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184-90 (1967). For a discussion of the evolution and demise of the physical invasion concept, see Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 38-46 (1964).

123. *See* Harris, *supra* note 45, at 640 (citing Mugler v. Kansas, 123 U.S. 623 (1887); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871)).

124. *See* Michelman, *supra* note 122, at 1185; L. TRIBE, *supra* note 56, § 9-3, at 459-60.

125. *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928); Lawton v. Steele, 152 U.S. 133 (1894).

126. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). For a list of Florida cases which demonstrate this proposition, see Harris, *supra* note 45, at 640 n.31.

127. *See generally* L. TRIBE, *supra* note 56, § 9-3, at 460; Harris, *supra* note 45, at 652-58; Michelman, *supra* note 122, at 1190-93.

128. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Consolidated Rock Prods. Co. v. City of Los Angeles, 20 Cal. Rptr. 638, *appeal dismissed per curiam*, 371 U.S. 36 (1962).

ing.[129] This test, however, is subject to two criticisms. First, the element of "magnitude of the harm" is highly subjective.[130] Frequently, decisions which have been based upon "noxious" or "nuisance-like" uses of property are void of reasoning regarding "magnitude of harm" considerations.[131] Accordingly, this test is generally applicable only to those situations which involve neither a physical takeover nor "nuisance" restrictions.[132] Second, there is the problem of determining the dispositive factor: "Is the supposedly critical factor the size of the private loss absolutely, or rather the size of that loss compared with some other quantity?"[133]

The third paradigm evaluates whether the claimant's loss is outweighed by the public's gain, *i.e.*, a balancing of the social gain and the private detriment.[134] As the Florida Supreme Court stated in

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129. This analytical paradigm is well illustrated in Moviematic Indus. Corp. v. Board of County Commissioners, 349 So. 2d 667 (Fla. 3d Dist. Ct. App. 1977). The court based its conclusion that "the challenged resolution has [not] so restricted petitioner's use of his property as to render it *valueless*," *id.* at 671 (emphasis added), on three premises: (i) "[a] zoning ordinance is confiscatory if it deprives an owner of the beneficial use of his property by precluding *all* uses to which the property might be put or the *only* use to which it is reasonably adaptable," *id.* (citing Forde v. City of Miami Beach, 1 So. 2d 642 (Fla. 1941); County of Brevard v. Woodham, 223 So. 2d 344 (Fla. 4th Dist. Ct. App. 1969)) (emphasis added); (ii) "it is not necessary to the constitutional validity of an ordinance that it permit the *highest and best use* of a particular piece of property," *id.* (citing City of Miami v. Zorovich, 195 So. 2d 31 (Fla. 3d Dist. Ct. App. 1967), *cert. denied*, 201 So. 2d 554 (Fla. 1967)) (emphasis added); and (iii) "government through the exercise of its police power may impose *reasonable restrictions* upon the use of property in the interests of the public health, morals, safety and public welfare," *id.* (citing City of Miami Beach v. Ocean and Inland Co., 3 So. 2d 364 (Fla. 1941); Sarasota County v. Barg, 302 So. 2d 737 (Fla. 1974)) (emphasis added).

130. *Compare* Miller v. Schoene, 276 U.S. 272 (1928) (upholding statute requiring destruction of all red cedar trees infected by cedar rust disease due to economic welfare of community) *with* Corneal v. State Plant Bd., 95 So. 2d 1 (Fla. 1957), *modified*, 101 So. 2d 371 (Fla. 1958) (compensation must be paid for lost profits by the owner whose healthy trees were destroyed, where citrus trees were destroyed to contain a citrus disease).

131. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915); Consolidated Rock Prods. Co. v. City of Los Angeles, 20 Cal. Rptr. 638, *appeal dismissed per curiam*, 371 U.S. 36 (1962).

132. "Its main targets are regulations directed against 'innocent' property uses, and nontrespassory devaluations consequent on public development." Michelman, *supra* note 122, at 1191.

133. *Id.* at 1192.

134. If the private losses are found to be outweighed by the social gains, no compensation need be provided. *See generally* Harris, *supra* note 45, at 659-64; Michelman, *supra* note 122, at 1193-96.

In direct contrast to the approach the Florida Supreme Court adopted in *Estuary*, Professor Binder indicated that "[t]he main problem with the balancing tests previously proposed is that, aside from a simple statement of the principals to be considered in balancing, no attempt is made to weigh and analyze the varying factors. Certain considerations are obviously more important than others and should bear more weight." Binder, *Taking Versus*

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."[135] A balancing of social gains against private losses, however, extracts a "social interest" criterion not shared by all members of that society.[136] Furthermore, such an approach presupposes a utilitarian ethic:[137]

> Whether traced to a principle that society simply should not exploit individuals in order to achieve its goals, or to an idea that such exploitation causes too much dissatisfaction from a strictly utilitarian point of view unless it is brought under control, the just compensation requirement appears to express a limit on government's power to isolate particular individuals for sacrifice to the general good.[138]

Finally, the balancing process experiences difficulty in determining the relevant factors; in other words, "[h]ow can the 'individual loss' be extracted from the calculation of the 'social gain' so as to be 'weighed against' it?"[139]

The fourth paradigm distinguishes between private fault and public benefit, or harm prevention and benefit extraction. This harm prevention/benefit extraction model denotes that compensation is required if the restriction creates a public benefit at a private owner's expense, while compensation need not be given if the governmental restriction prevents nuisance-like behavior in order to avoid harm to the public.[140] Generally speaking, this approach

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*Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1, 10 (1972). *See* notes 7, 21 *supra*.

135. Town of Bay Harbor Islands v. Schlapik, 57 So. 2d 855, 857 (Fla. 1952).

136. *See* Michelman, *supra* note 122, at 1194.

137. *See id.* at 1194-95.

138. L. TRIBE, *supra* note 56, § 9-4, at 463 (footnotes omitted).

139. Michelman, *supra* note 122, at 1194.

140. *See* Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 663-69 (1958). *See generally* Harris, *supra* note 45, at 664-69; Michelman, *supra* note 122, at 1196-201.

In his treatise on the police power, Freund tied the harm/benefit distinction into the distinction between eminent domain and police power:

> [I]t 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. . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not.

E. FREUND, THE POLICE POWER § 511, at 546-47 (1904).

encounters a difficulty with classification. A criterion of "neutral" conduct must be enunciated "which enables us to say where refusal to confer benefits (not reversible without compensation) slips over into readiness to inflict harms (reversible without compensation)."[141] Justice Sutherland's aphorism exemplifies the problem: "A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard."[142]

What if, however, the parlor has come to the pig rather than the pig going to the parlor?[143] This question of just who is the nuisance characterizes the difficulty with the "nuisance" theory, a species of the harm/benefit paradigm. As *Mugler v. Kansas*[144] displayed, a central feature of this theory is its fault underpinning; the offending party may be required to stop, or, if he refuses, his property may be seized as a means of enforcing social stability.[145] Central to the nuisance theory, then, is the perception that "society is competent to override such inefficient private decisions by directing a reallocation."[146]

Recognition of the problem of classifying the object of the nuisance in contradistinction to the object of the fault has led to a variant of the harm/benefit paradigm which would distinguish between governmental enterprise and arbitral functions.[147] When government acts in an enterprise or participant capacity and private economic loss results, compensation is required. If, however, government acts in its arbitral role in society, compensation need

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141. Michelman, *supra* note 122, at 1197.

142. Village of Euclid v. Amber Realty Co., 272 U.S. 365, 388 (1926).

143. *See* L. TRIBE, *supra* note 56, § 9-3, at 462. For a similar illustration of the "nuisance" problem employing Miller v. Schoene, see Michelman, *supra* note 122, at 1198.

144. 123 U.S. 623 (1887). *See* notes 46-51 *supra* and accompanying text.

The *Mugler* Court stated:

> 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 they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

123 U.S. at 669.

145. *See* Boomer v. Atlantic Cement Co., 309 N.Y.S.2d 312 (1970) (nuisance-like activity allowed to continue while paying damages to the affected landowners). *See also* L. TRIBE, *supra* note 56, § 9-3, at 461.

146. Michelman, *supra* note 122, at 1200.

147. The idea is to discriminate between governmental roles by classifying one role as a public enterpriser and the other as an arbitrator of shifting values. *See* Sax, *supra* note 122, at 62-63.

not be paid.[148] Professor Sax finds two assets to this approach: (i) a physical invasion is not necessarily required to find the enhancement of the government's resource position, and (ii) the dispositive issue for compensation is the examination of the parties involved and of government's role in that conflict, rather than whether governmental behavior is a restriction upon use.[149] This approach, however, turns on an illusory tagging of fault and begs the question with respect to harm prevention and benefit extraction.[150]

The final paradigm focuses upon the range of reasonable expectations by the private property owner, the disruption of which requires compensation.[151] This analysis was demonstrated by the Florida Supreme Court in *Estuary:* "Another factor which may be considered in determining the reasonableness of an exercise of the police power involves the investment-backed expectations of the use of the property."[152] On the basis of this factor, the court first distinguished *Zabel* from *Estuary* factually: "In *Zabel* the property in question had been transferred from the state to the landowners by a conveyance which carried with it a statutory right to bulkhead and fill the property purchased," whereas "[w]hen Estuary bought the property in question in this case . . . it did so with no reason to believe that the conveyance carried with it a guarantee from the state that dredging and filling the property would be permitted."[153] Significantly, the court then compared the initial findings in *Zabel* with those in the instant case: "In Zabel the court did not find that any material, adverse effect on the public interest had been demonstrated," whereas "[i]n the instant case there is no question but that the proposed development would have an adverse envi-

148. *See generally* Harris, *supra* note 45, at 669-72; Michelman, *supra* note 122, at 1200.

149. *See* Sax, *supra* note 122, at 63.

150. Michelman offers the following:

> In the case of the ban on highway advertising, for example, it would evidently be enough to substantiate a claim for compensation that the regulation has the effect of making more valuable the public's property. . . . But if the ordinance were one calling for removal of billboards from areas in which the beneficiaries were all private land owners, so that no significant benefit would accrue to the public at large, no compensation would be required.

Michelman, *supra* note 122, at 1200 (footnote omitted).

151. Professor Tribe augments: "[T]he expectations protected by the [compensation] clause must have their source outside the positive law of the state. Grounded in custom or necessity, those expectations achieve protected status not because the state has designed to accord them protection but because constitutional norms entitle them to protection." L. TRIBE, *supra* note 56, § 9-5, at 465.

152. 399 So. 2d at 1383. *See* note 20 *supra* and accompanying text. *See also* Kaiser Aetna v. United States, 444 U.S. 164, 175, 179 (1979).

153. 399 So. 2d at 1379 (footnote omitted).

ronmental impact."[154] A paradigm grounded in the language of expectations is circular, however, inasmuch as the expectations themselves are subject to governmental manipulation.[155]

From these analytical paradigms developed by the United States Supreme Court, the Florida Supreme Court in *Estuary* adopted the paradigms of harm prevention/benefit extraction[156] and balancing,[157] as well as a reasonable expectations analysis, in the context of environmental regulation. Given the problems inherent in these approaches, a lack of theoretical unity and predictability can result.[158] Furthermore, the court's reliance upon problematic models fails to account for the ethical duties, rights, and obligations which provide the fundamental underpinnings of environmental regulation:

> As our scientific and technological understanding expands, we find that activities once thought innocent may cause incalculable harm. Where harm is shown, nuisance law—and, by analogy to nuisance, the police power—can stay the activity, even if this would leave property with little value. Yet not all harmful activity is immediately toxic; generations unborn may suffer from activities that we fail to control today. The regulatory power can guard the future, and indeed, we trust it to do so.[159]

Given the recognition by the United States Supreme Court that states have a right to protect their natural resources,[160] coupled with the fact that "[m]aintenance of fragile lands . . . , particularly wetlands and coastal estuarine areas, . . . is important for preservation of ecological systems on which man ultimately depends,"[161] a judicial doctrine could have been announced in *Estuary* which would have outlined the social responsibilities and costs. Two doctrinal archetypes were possible. One is the "public trust" doctrine,[162] which would involve the state holding designated prop-

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154. *Id. See generally* Comment, *supra* note 8, at 513-14.

155. *See* Tribe, *supra* note 56, § 9-5, at 465.

156. 399 So. 2d at 1382. *See* note 28 *supra* and accompanying text.

157. 399 So. 2d at 1377. *See* notes 33, 34 *supra* and accompanying text.

158. *See generally* Haigler, McInerny, Rhodes, *supra* note 45.

159. Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799, 823 (1976).

160. Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

161. *Developments in the Law-Zoning*, 91 HARV. L. REV. 1427, 1593 (1978) (footnotes omitted). *See* Sibson v. State, 336 A.2d 239 (N.H. 1975); Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972).

162. *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892). *See generally* Sax, *The Pub-*

erty in trust as a trustee for the benefit of the people. As a result, the people can utilize the doctrine to ensure that the state protects and maintains the property for the common good.[163] The doctrine was utilized in *Just v. Marinette County*[164] with respect to regulation of lands adjacent to or near navigable waters:

> This is not a case of an isolated swamp unrelated to a navigable lake or stream, the change of which would cause no harm to public rights. Lands adjacent to or near navigable waters exist in a special relationship to the state. They . . . are subject to the state public trust powers.[165]

The other archetype would involve construing cases involving wetlands and coastal estuarine areas under the Florida Constitution.[166]

"Taking" jurisprudence traditionally has centered around whether to compensate a private landowner for governmental action when that action "deprived" the "faultless" landowner of a use of his property which was deemed to be "reasonable" or "harmless." As exemplified in *Estuary*, the taking issue, within the context of environmental regulation, generally revolves around whether the public must compensate a coastal wetlands owner whose desire to develop has been frustrated because of the external destructiveness of his activities. The debate, however, should encompass a broader base which circumscribes ethical and social concerns common to discussions in constitutional matters. In other

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*lic Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970).

163. 1 V. YANNACONE & B. COHEN, ENVIRONMENTAL RIGHTS AND REMEDIES 11-15 (1972).

164. 201 N.W.2d 761 (Wis. 1972).

165. *Id.* at 769.

166. "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." FLA. CONST. art. II, § 7. *See* Seadade Indus., Inc. v. Florida Power & Light Co., 245 So. 2d 209 (Fla. 1971).

One commentator has proposed the following revision to the Florida Constitution:

> The people of the State, of both the present and future generations, have the right to a healthful environment. As trustee for the people, the State shall protect the environment and enforce the right of the people in it. Any citizen may enforce the right on behalf of the State, or upon refusal of the State to enforce the right recognized in this provision, any citizen may bring an action against the State for breach of trust. Any damages awarded in a suit for the enforcement of this right shall be deposited in a trust fund held by the State expressly designated for correction of damage done to the environment of the State.

Note, *A Proposal for Revision of the Florida Constitution: Environmental Rights for Florida Citizens*, 5 FLA. ST. U.L. REV. 809, 825 (1977) (footnote omitted).

words, "taking" must be perceived as a flexible constitutional concept and not subject to sterile analytical paradigms based upon necessary and sufficient conditions, since:

> [m]aintenance of sufficient fresh water, fresh air, and productive soil is more than a social desideratum; it is an imperative to the continuation of human life. . . . Accordingly, it should occupy the highest priority in promoting what, arguably, is the ultimate goal of any legal system: "establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of man."[167]

ANTHONY E. DIRESTA

167. Finnell, *supra* note 35, at 390 (footnotes omitted).