Statutory Takings Legislation: The National Context, the Wisconsin and Minnesota Proposals*

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I. INTRODUCTION

In 1994 land use and environmental policy came into the public eye with a fury. Conservative proponents in 33 states introduced 88 pieces of legislation for the purpose of institutionalizing a pro-private property rights perspective on policy. Since 1991 at least ten states have passed such legislation. Also in 1994, 22 separate private property rights bills were introduced at the federal level. The Contract with America, the policy covenant of the Republican controlled Congress, includes a property rights provision which if passed will significantly reshape the basis for land use policy in America. As part of this national movement, statutory takings bills were introduced in the state legislatures of Wisconsin and Minnesota. The fate of these bills is particularly interesting, given the rich conservation tradition and environmental leadership of both states.

Section II of this article sets the national context for examining the statutory takings issue. The movement for statutory takings legislation is rooted in the broad sweep of social conflict over private property rights throughout this century. The emergence of zoning and the regulatory takings issue in the 1920s set the stage for contemporary conflict over statutory takings. These issues were sharpened during the 1960s with the rise of environmental regulation. During this period, the analyses that appeared laid the specific groundwork for the current political and policy critique of statutory takings. These analyses took the specific form of a social movement during the late 1980s with the emergence of the so-called wise use movement; the movement's rise and activities are discussed below. Finally, the status of statutory takings legislation nationally sets the stage for the detailed examination of the Wisconsin and Minnesota proposals.

Section III of the article examines the 1994 statutory takings bills introduced in the Minnesota and Wisconsin state legislatures. The section explores the development of takings jurisprudence by the United States Supreme Court as well as its development by the Wisconsin and Minnesota Supreme Courts. Wisconsin and Minnesota have a rich history of takings jurisprudence. The decisions of both state courts during the early part of this century reflect the struggle to balance the protections afforded private property with the broader public interest. While accepting a strong public role in regulating the use of private property, recent decisions by the Wisconsin and Minnesota courts present unique twists to the balancing of these two very complex interests. This section outlines the specific provisions of the 1994 statutory takings bills introduced in Minnesota and Wisconsin and identifies some of the implications raised by the bills.

This article concludes that statutory takings legislation presents a paradox. Judicial trends, nationally and in Wisconsin and Minnesota, have
allowed for increasingly broad governmental reshaping of property rights. The proposed legislation is out of step with these trends, and national surveys of public opinion. However, supporters of statutory takings legislation are but one expression of a larger movement that is reshaping land use and environmental policy. This movement is skeptical of how such policy has been formulated and implemented through the century, and sees it as necessary that land use and environmental policy be recognized as essentially and fundamentally political in content. For this reason alone, supporters of statutory takings legislation will keep it on the forefront of legislative agendas for the foreseeable future.

II. STATUTORY TAKINGS: THE NATIONAL CONTEXT

A. The Meaning Of Takings

The takings clause of the U.S. Constitution has a rich and complex history. The twelve words which close the Fifth Amendment—"... nor shall private property be taken for public use, without just compensation"—establish four independent and interrelated concepts. Through this clause, the Constitution: (1) acknowledges the existence of private property; (2) establishes a concept denoted as taken; (3) defines a realm of activity which is public use; and (4) institutes a form of payment specified as just compensation. The interrelation of these concepts is such that where private property exists, it may be taken, but only for a denoted public use, and only when just compensation is provided. If any of these conditions are not met, e.g., the proposed use is not interpreted as public, then a taking may not occur.

Over time, the exact meaning of the concepts in this clause has varied widely. For example, in the early part of this century, public use was defined to be immediate use. Local governments were often prevented from acquiring land several years in advance of their need for it, even though this made great fiscal sense. The courts of the time felt any other interpretation would allow governmental abuse.3

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2 U.S. Const. amend. V. This provision is made applicable to the states by the due process clause of the fourteenth amendment. See Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).
3 An early Minnesota case acknowledged the changing nature of the public use requirement:
Until the dawn of the twentieth century, the implementation of the clause was fairly straightforward. If government, in exercising its public responsibilities, had a direct and immediate need for privately held land, it could take it as long as the owner was paid fairly, and in cash transferred at the time of taking. In the early part of this century, the emergence of the modern industrial economy, the rise of the modern city, and the advent of the regulatory state began to obscure this clarity. In particular, the invention and spread of zoning and the subsequent emergence of environmental regulation, clouded notions of what was private property and when a taking had occurred.

B. Zoning and Regulatory Takings

New York City is credited with developing the first “modern” zoning regulation in 1916. The regulation came about after a group of civic leaders in New York sponsored a study tour to Europe, in particular Germany, to investigate how the Europeans were managing city growth. What they found was a system of growth management that utilized real property tax policy, public purchase of urban fringe lands for future development, and regulation of in-city land development. It was the latter that they chose to adapt to U.S. legal, social and economic conditions.

New York City’s invention quickly spread across the U.S., and within a decade hundreds of cities had implemented a simple form of zoning. To its proponents and defenders, zoning provided a creative and innovative method for addressing the police power responsibilities of local government.

The term “public use” is flexible and cannot be limited to the public use known at the time of the forming of the Constitution. . . . What constitutes a public use at the time it is sought to exercise the power of eminent domain is the test. The Constitution is as it was when adopted; but, when it employs terms which change in definition as conditions change, it refers to them in the sense in which they are meant when the protection of the Constitution is sought. . . . In comparatively recent times it was questioned whether a public use extended so far as to justify the condemnation of property and the expenditure of money for public parks, or for boulevards, or for pleasure drives, or for public baths, or for playgrounds, or for libraries and museums, or for numerous other purposes which contribute to the general good. Now condemnation and expenditure for these and like or similar purposes is common, and recognized as lawful.

State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, 176 N.W. 159, 161 (Minn. 1920) (citations omitted).

New York City’s original study documented how tenement style development inadequately provided for light and air for its inhabitants and was thus a threat to public health, and how the density of development was often a threat to public safety. To its opponents and critics, zoning was a threat to the integrity of private property, and was a taking without just compensation.

In 1926 the U.S. Supreme Court was called upon to decide the constitutionality of zoning. In the watershed case of Village of Euclid v. Ambler Realty Co.\(^5\) the Court narrowly decided in zoning’s favor. Euclid was a watershed in at least three ways. First, the court itself was quite uncertain about zoning. In fact, in a first round of balloting, the justices voted to strike zoning down.\(^6\) Second, zoning represented a significant reshuffling of responsibility over private property rights. Prior to Euclid, the property bundle was largely intact for individuals. With the approval of zoning, the Court recognized a “public-ization” of certain property rights as necessary to fulfill the public interest and achieve a legitimate exercise of the police power. The right to decide the type of development, its density and its height were now matters in the public domain to be given out to individuals to the extent individual proposals fulfilled the public interest. Third, zoning validated a legitimate role for local governments in land policy. This latter point was one of contention by Ambler Realty, which argued that local governments were too parochial to be granted this authority. This role for local government added a layer to those specified in the Constitution. Shortly thereafter, the Standard Zoning Enabling Act and Standard City Planning Enabling Act were promulgated by the U.S. Department of Commerce in 1926 and 1928 respectively.

The wedge created by Euclid was not without dissent. In the same period the court was called upon to decide the legitimacy of another regulatory action.\(^7\) In a now famous sentence, Justice Oliver Wendell Holmes wrote, “[t]he general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”\(^8\) The definition of “too far” was left unresolved. It became necessary to decide each regulation and each situation on a case by case basis.

\(^5\) 272 U.S. 365 (1926).
\(^6\) Timothy Alan Fluck, Euclid v. Ambler: A Retrospective, 52 J. AM. PLAN. ASS’N, 332 (1986); ZONING AND THE AMERICAN DREAM, supra note 4, at 17. Only after a late amicus brief was accepted by the court was the vote changed from 5-4 to strike down zoning, to 5-4 in favor of zoning.
\(^7\) Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
\(^8\) Id. at 415.
Despite Justice Holmes’ warning and concern, after *Euclid* the takings issue laid relatively dormant for the ensuing fifty years. At least from the perspective of the U.S. Supreme Court, and the federal and state legislatures, the broad authority for local zoning-style regulation, and the opportunity for individual case review provided a sufficient framework. What changed all this, and provided the groundwork for the current array of statutory takings bills, was the rise and success of the modern, mainstream environmental movement.

Beginning in the mid-1960s, a number of notable commentators began suggesting the need to substantially revise zoning. One commentator even suggested euthanization.⁹ Zoning, although the most prominent tool for land use and environmental policy, was seen as unresponsive to exactly those conditions that contributed to its invention—rapid urban expansion. Commentators looked for policy instruments that were more flexible, less local, and more responsive to professional input.

At the same time, a state by state revolution was transpiring. It eventually came to be called “the quiet revolution in land use control.”¹⁰ Selected states began reasserting their constitutional authority for land use control—drawing it back to the state level. In what is now termed the first wave of growth management, states such as Vermont and Oregon passed comprehensive statewide land use control programs, Wisconsin passed a resource-selective statewide program, and Minnesota, New York and California passed programs for sub-state geographic regions. In all cases the rationale was the same. It was argued that the existing system of fragmented, decentralized local control was insufficient to achieve adequate management of a critical land use or environmental resource. Just as zoning had been justified during the early part of the century as necessary because individuals could not be counted on to make land use decisions in the greater public interest, this argument was now extended to local governments themselves.¹¹

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Parallel to this revolution was the birth of the contemporary environmental movement. The movement’s foci included the social dysfunctionality of private property, the comparable dysfunctionality of local government, and the ameliorative role of the centralized, regulatory state. From the environmentalist’s perspective, land use and environmental problems arise precisely because of the local nature of property and property control. As a result, management decisions are made which do not take into account the broader public interest and a more expansive economic calculus. A litany of common land use and environmental issues—farmland depletion at the urban fringe, wetland loss, suburban sprawl, downtown deterioration, etc.—have all been depicted as issues that arise from a version of “the tragedy of the commons.” In these instances, the tragedy is that individual landowners on the one hand, and local governments on the other, make decisions that are economically and socially sensible to them, but are not judged to be as sensible to the broader public. The environmentalist’s traditional solution to this situation is to take rights from the private property bundle and shift them to the public bundle—to further “public-ize” previously held private property rights—through federal and state environmental laws. The rationale is that better land use and environmental decisions will result.

But neither the environmental movement nor the quiet revolution were without dissent. The quiet revolution in particular drew critics from both the left and right. On the left, these critics found the move toward centralization ominous. To them, it was in step with the broader move toward centralization of the economy and the government in general. In fact, one liberal commentator noted that proposals for centralization in land use control were a logical evolution of the centralization that began during

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the New Deal, and that it was just reaching land use later.\textsuperscript{16} This same commentator noted that liberals’ and environmentalists’ enthusiasm for centralization was perhaps misplaced since the same result could be predicted for land use centralization as had occurred in other public policy areas—increased bureaucratization, decreased citizen influence, and client capture.

The critics on the right laid the seeds for the current statutory takings movement. One of the most vociferous of these was John McLaughry, a Vermont state legislator, later to be a member of the domestic policy staff during the first Reagan administration. In his reaction McLaughry uses a libertarian lens to put the quiet revolution into a historical and theoretical perspective.\textsuperscript{17} His summary point is that an abrogation of private property rights through centralized, uncompensated regulation violates a founding principle of U.S. democracy.

For McLaughry one of the main reasons for settlement in the nascent United States was a lack of access to private property rights in Europe. As Europe moved from feudalism to capitalism, its property rights structure did not respond in a flexible enough way. Private property remained concentrated and common property was privatized. The un-landed citizen had little hope of securing any rights. Colonial America provided a chance for access to these rights. Yet the political and policy history between colonial America and England demonstrated the danger of property rights which were not freehold and were controlled by a distant sovereign.

American founders responded to these experiences with a special provision for private property through the takings clause. As a constructionist, McLaughry sees the fifth amendment clause functioning in an environment where individuals are presumed to hold all rights not specifically removed from them.

For McLaughry the important historical lesson is that American founders were escaping from a feudalistic property regime. By coming to colonial America, a non-feudal, democratic society could be established. Following from John Locke, freehold property is inextricably linked with democracy. To the extent private property ceases to exist, McLaughry questions the viability of democratic society.

McLaughry suggested that the environmental and land use legislation of the early 1970s effectively created a social condition analogous to


feudalism—in his words a “new feudalism.” In the contemporary feudal state, citizens appear to have freehold property, but the state is free to regulate any portion of it. It appeared to him that soon there would be no limits to regulation; the working rule seemed to be evolving to the point that unless the state actually took the property by act of eminent domain, the provision of the fifth amendment did not apply. For McLaughry this drift in policy structure, plus the movement for increasing centralization in policy administration, seemed conclusive evidence for his characterization.

Standing alone, McLaughry’s analysis and position is not an unusual one for conservatives. A number of scholars writing in the same period questioned the social utility of zoning. Ellickson harkened back to pre-zoning judicial, administrative and contractual land use control approaches and argued they could be as efficient and effective as zoning, without such onerous imposition on private property rights. In an empirical study of Houston, the largest U.S. city without zoning, Siegan argued that the land use outcomes absent zoning were essentially the same to those where zoning was present. A more comprehensive analysis of Ellickson’s argument was taken up by Epstein, and has become the intellectual base for the statutory takings movement.

D. The Wise Use Movement

The political base against zoning emerged several years later. In the late 1970s, Ron Arnold, a former Sierra Club member, began writing in corporate forestry magazines urging the industry to go on the offensive against the environmental movement. He argued that an activist counter-environmental movement was necessary to blunt the widespread success of the environmental movement, especially in the area of environmental regulation and restriction of property rights. This movement has become known as the self-described wise use movement. It is a conservative, pro-private property rights coalition of local groups seeking to undermine the

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ideological and policy success of mainstream environmentalism. Members of the movement argue that contemporary environmentalism is both a ruinous economic philosophy and fundamentally anti-American.

This counter movement formally coalesced a decade later in 1988 at a conference convened by Arnold and his colleague at the Center for the Defense of Free Enterprise. The conference produced the signature document of the movement—The Wise Use Agenda. The Agenda sets out a series of goals for this new movement tied together by a perspective that public lands are to be actively used for economic development and in economic production, and public actions that impact private property rights must be compensated.

Since its formation the wise use movement has had formidable success. It was instrumental in bringing about major modifications to path breaking plans for integrated land use management for the greater Yellowstone network of national park, forest and wildlife refuge lands. Recent efforts to float grazing fees on federal lands to market levels have been hampered by wise use lobbying, as have efforts to close federal lands to off-road vehicle use. Most dramatically, efforts to elevate the Environmental Protection Agency to a cabinet department were derailed by wise use related private property concerns.

But the wise use movement is not just focused on federal policy issues. This is a broad-based anti-environmental movement. For example, one component of it is known as the county movement. Drawing upon an experiment in New Mexico, members of the county movement are promulgating land use plans for adoption in rural counties throughout the U.S. These plans assert the private property rights of individual landowners as part of the normal culture and custom of the area. The plans then direct local officials, such as the county sheriff, to undertake official action against any party, including federal officials, who seek to commence action in violation of these county plans. In part, these plans are promoted

23 Jacobs, supra note 20.
26 Jacobs, supra note 20.
based on provisions of federal environmental laws that direct federal agencies to take local plans into account in their own planning. At least 40 counties have adopted these plans, and upwards of 300 (approximately ten percent of U.S. counties) have shown interest in doing so. This is in spite of an explicit, well-publicized legal decision against the legitimacy of these plans.

One presumption about the wise use movement is that it is just a 1990s version of the Sagebrush Rebellion—the anti federal public lands movement of the early Reagan years. However, observers suggest that while many of the underlying corporate-capital interests are the same, there is a qualitative difference. The sagebrush rebellion was a blatant and disorganized effort by corporate interests to seek privatization of western public lands. In contrast, the wise use movement is highly organized. Having learned strategy from environmental activism, the movement’s interests are now clothed in the guise of grassroots populist citizen action. Moreover, the agenda is broader, speaking to the private property protection concerns and Jeffersonian myth seemingly held by large segments of the American people.

E. Statutory Takings Legislation Nationally

Increasingly, the anti-environmental movement’s political and policy focus is on statutory takings legislation. While the intellectual basis for this

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28 Boundary Backpackers et al. v. Boundary County, et al. No. CV 93-995 (1st Dist. Ct. Idaho). Boundary County focused on a county ordinance which required that federal and state agencies follow the county land use plan. The Court declared this void under the Supremacy Clause of the United States Constitution. The Supremacy Clause establishes federal law as “the supreme law of the land” to which the judges in every state are bound. U.S. CONST. Art. VI. The Court also found that the ordinance violated the Idaho Constitution which provides the state with control over state lands.


31 Jacobs, supra note 20; Stapleton, supra note 30; Lewis, supra note 30, at 4; Dan Baum, Wise Guise, SIERRA, May-June 1991, at 70-71.
focus flows from Epstein’s work, the policy focus flows from Executive Order 12,630 issued by President Reagan in 1988. This order, titled “Government Actions and Interferences with Constitutionally Protected Property Rights,” required, in essence, preparation of a private property rights impact statement on all federal regulatory action. Since its issuance, bills have been introduced into Congress in every session to get the Order, and related private property protection measures, adopted as law.

Statutory takings legislation now takes at least two forms. First, bills modeled after Executive Order 12,630 require assessment of the impact of proposed governmental action on private property. The second type require compensation to private property owners if governmental action, reduces the value of private property by a certain fixed percentage. In addition to the introduction of these proposed measures in Congress, similar pieces of legislation have been proposed in state houses across the U.S. During 1994 alone, 88 takings bills were offered up in 33 states. Eleven states have passed some version of such legislation (in either of the two forms) since 1991. Some of the state bills present a hybrid or unique approach to dealing with the takings issue.

At the state level between 1991 and 1994, there was only limited success for the so-called “property rights movement.” Efforts in Congress seemed largely symbolic and ideological. All of this changed with the elections of 1994. The Republicans’ Contract with America makes the issue of takings legislation a central component of their reform program. The proposal contained in the Contract involves compensation to land owners affected by governmental action. The proposition is that any action that reduces property by more than ten percent of market value be compensated. This is a more radical level of proposed compensation, by several factors, than that contained in prior bills or introduced or adopted at the state level.

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53 See, e.g., Robert Meltz, Property Rights Legislation in the 103rd Congress, CONG. RES. SERVICE No. 94-588 A, (July 22, 1994).
55 John Martinez, Statutes Enacting Takings Law: Flying in the Face of Uncertainty, 26 URB. LAW. 327 (1994); Freilich & Doyle, supra note 34; Jacobs, supra note 20, at 3.
56 Freilich & Doyle, supra note 34, at 5.
57 Martinez, supra note 35, at 338.
58 CONTRACT WITH AMERICA (Ed Gillespie & Bob Schellhas eds., 1994).
Prior bills generally identified a 40-50 percent reduction in property value as the threshold for compensation. 39

The fate of federal level legislation is still unknown. But there is no doubt that the Republican victory at all levels provides a climate for a more serious review of legislation, and at least the likelihood of its adoption (if not its eventual implementation). The proposed bills of 1994 in Wisconsin and Minnesota will be reintroduced by their sponsors in some form in 1995. 40 Given the rich and proud conservation tradition of these states, 41 as well as the many cultural, legal, economic, and political similarities shared by these states, they provide a useful case study of the content, legal context, and likely impact of proposed statutory takings legislation.

III. STATUTORY TAKINGS: THE WISCONSIN AND MINNESOTA PROPOSALS

The statutory takings bills in Wisconsin and Minnesota reflect the need to reform land use law, particularly as it relates to the takings issue. Any reform effort must be placed within the context of the evolutionary relationship between property and land use regulation. As identified by Professor Carol Rose, within this relationship, landed property evolved through a number of stages. First, the period of unrestrained use, in which "anything goes" in the private use of land. Second, the period of nuisance adjudication, in which the courts used case-by-case, ex post rulings to curtail the negative externalities associated with unrestrained land use. Third, the period of local regulation in which local government, empowered by state legislatures, displaced nuisance law with more precise and predictable ex ante land use regulations. 42

39 Freilich & Doyle, supra note 34, at 3.
40 On February 16, 1995, four identical statutory takings bills were introduced in the Minnesota Legislature. H.F. 709, S.F. 475; H.F. 716, S.F. 636; H.F. 718, S.F. 635; H.F. 719, S.F. 634, 79th Leg., (1995). The bills were dramatically different from the 1994 bills. The format of the bills changed from an assessment approach to a compensation approach. The 1995 bills would create a cause of action against the state for actions that reduce the value of property by five percent or $1,000, whichever is less. The bills would still require review by the attorney general of proposed rules. None of the bills passed. As of July 1, 1995, no new statutory takings bill had been introduced in Wisconsin. However, the chief author of the 1994 bill intends to reintroduce a revised takings bill during summer 1995.
The period of local regulation parallels this evolution of property. Like the evolution of property, local regulation has evolved: (1) from a period of unrestrained regulation, in which “anything goes” for the regulation of private land uses; (2) to a period of takings adjudication, where courts use case-by-case ex post rulings based on ordinary practice and reasonable expectations to establish which regulations are fair and which are not; (3) to a period of state regulation in which state legislatures, “sometimes acting under the compulsion of federal environmental legislation,” shift from ex post takings adjudication to more precise ex ante legislation in which local regulators must rationalize their activities and coordinate them with surrounding communities.43 The statutory takings bills are the product of this evolution.

While many mainstream commentators agree on the need for reform,44 the more critical issue remains as to how to define a taking. The statutory takings legislation offers one approach to reform. The Wisconsin and Minnesota bills, however, attempt to change substantive takings law in each state. If passed, the bills could introduce a high degree of uncertainty into takings law which could: (1) curtail efforts by government to enforce existing regulations impacting property; (2) saddle taxpayers with substantial litigation costs and possible damage awards as ambiguities in the law are better defined; or (3) have a chilling effect on the promulgation of new regulations.

Section A below will briefly highlight the tests articulated by the United States Supreme Court for a “taking” under the United States Constitution. The section will also examine the tests articulated by the Wisconsin and Minnesota Supreme Courts for a “taking” under their respective state constitutions. Section B below will highlight the 1994

43 Id.

Wisconsin and Minnesota takings bills and show how they differ from established takings jurisprudence.

A. Takings Jurisprudence

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

While the U.S. Supreme Court has enunciated numerous tests for determining a taking, the intricacies of these tests have little meaning to the average layperson. The perceived complexity of the U.S. Supreme Court’s decisions was a significant factor in the development of the Federal Takings Executive Order which attempts “to weave a coordinated whole out of diverse, and sometimes apparently conflicting, takings decisions.” Added to the complexity of the federal takings jurisprudence is a separate realm of takings jurisprudence developed by the Wisconsin and Minnesota Supreme Courts.

The following is not intended to provide an exhaustive examination of the various takings tests articulated by the United States Supreme Court or the Wisconsin and Minnesota courts. Rather, it is intended to provide a brief overview of some of the decisions of the United States Supreme Court, as well as some of the unique takings decisions of the Wisconsin and Minnesota Supreme Courts. Minnesota was part of Wisconsin Territory until Wisconsin became a state in 1848. When Minnesota became a state in 1858, it followed many of the laws and judicial precedent of Wisconsin. Over time, however, the protections afforded private property in each state have varied according to the language of the respective state constitutions

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45 See, e.g., Bruce W. Burton, Post-Lucas Regulatory Takings and the Supreme Court’s Riddle of the R.I.B.E.: Where No Mind Has Gone Before, 25 U. Tol. L. REV. 155 (1994). Professor Burton identifies seven clusters of doctrine from the United States Supreme Court’s decisions. Id. at 165-67 n.36. Professor Norman Williams has identified fifteen tests which “have popped in and out of the opinions.” WILLIAMS, AMERICAN LANDplANNING LAW § 5B.09 (Supp. 1994).

46 Pollot, supra note 32, at 3 (Pollot was the principal draftsman and coauthor of Executive Order 12,630 and its implementing Attorney General’s Guidelines).
and the judicial interpretations of that language. While the takings standards articulated by the courts may differ in theory, the practical application of those standards by the courts share many similarities. The following overview will help provide a context for an analysis of the statutory takings issue.

1. Federal Takings Jurisprudence

In 1922, the U.S. Supreme Court opened the door to the possibility of applying the takings provision of the Fifth Amendment to regulations enacted under government’s police power in Pennsylvania Coal Co. v. Mahon.47 The premise of regulatory takings is based on the Court’s recognition that the Fifth Amendment “is designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”48 Yet, given the pervasive impacts that governmental actions have on property, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”49 Justice Holmes’ opinion in Mahon did not attempt to formally define a taking but acknowledged that the question of how far is “too far” is “a question of degree—and therefore cannot be disposed of by general propositions.”50

Despite numerous opportunities, the U.S. Supreme Court has been unwilling to develop a set formula for determining when a regulation goes “too far.”51 Instead, over the years the Court has enunciated numerous tests for determining a taking.52 Generally, a court faced with a taking claim, must engage in “ad hoc, factual inquiries.”53 Because of the ad hoc, fact specific nature of the takings analysis, the Court has “found it particularly important in takings cases to adhere to our admonition that ‘the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.’”54

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47 260 U.S. 393 (1922). See also supra note 7 and accompanying text.
49 260 U.S. at 413.
50 Id. at 416.
52 See supra note 45.
53 438 U.S. at 124.
The U.S. Supreme Court has therefore always drawn a distinction between “facial” and “as applied” takings challenges. This is the distinction between challenging a regulation on its face, a conceptual challenge, versus challenging the actual application of a regulation to a particular parcel of property. An “as applied” challenge does not seek to invalidate an entire regulation. This distinction has been apparent since the Court’s early zoning decisions. In *Euclid*, the Court upheld a facial attack on the regulation of private property through the use of zoning. In *Nectow v. City of Cambridge*, which followed only two years later, the Court struck down a zoning ordinance as applied to a particular property. According to the more recent pronouncements of the Court, “[t]he test to be applied in considering [a] facial [ takings] challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it ‘denies an owner economically viable use of his land.’” Because of the Court’s reluctance to review facial challenges to regulation, the Court applies a stricter standard for establishing a taking.

Despite the straightforward approach taken by the court for “facial” takings challenges, the Court has articulated numerous and sometimes conflicting takings standards for “as applied” challenges. These standards reflect the unique interaction between a regulation and a specific parcel of property presented in each case. The Court’s case-specific factual inquiries balance the public reason for the property regulation against the loss to the private property owner being regulated. The U.S. Supreme Court has identified several factors that have “particular significance” in the balancing of public and private interests in takings cases. These factors include “[t]he economic impact of the regulation on the claimant . . . particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . .” and “the character of the governmental action.” When measuring the impact of a regulation, the Court also compares “the value that has been taken from the property with the value

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55 See supra note 5 and accompanying text.
56 277 U.S. 183 (1928).
58 447 U.S. 260-61. “Although no precise rule determines when property has been taken, . . . the question necessarily requires a weighing of private and public interests.” (Citations omitted.)
59 438 U.S. at 124.
60 Id.
that remains in the property."\textsuperscript{61} Under this equation, "one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'\textsuperscript{62}

On several occasions, the Court has identified three per se or categorical taking rules in which it is not necessary to engage in a "case-specific inquiry."\textsuperscript{63} The first category encompasses regulations that result in the "physical 'invasion'" of private property. "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."\textsuperscript{64} This category relates to the right to exclude others which the Court has held on numerous occasions to be "one of the most essential sticks in the bundle of rights that are commonly characterized as property."\textsuperscript{65}

\begin{thebibliography}{9}
\item \textsuperscript{61} 148 U.S. at 497.
\item \textsuperscript{62} Id. (quoting Frank Michelman, \textit{Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law}, 80 HARV. L. REV. 1165, 1192 (1967)).
\item \textsuperscript{64} The Court in \textit{Lucas} left many questions unanswered. One important uncertainty left open by the Court was the "composition of the denominator in our 'deprivation' fraction." While the Court noted that its uncertainty has produced inconsistencies in its decisions, the Court left the clarification of the issue for another case. \textit{Lucas}, 112 S. Ct. at 2894 n.7. \textit{See also} Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for S. Cal., 113 S. Ct. 2264, 2290 (1993).
\item \textsuperscript{65} Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).
\end{thebibliography}
The second categorical taking is where a regulation denies all economically beneficial or productive use of land.\textsuperscript{66} In the case of a regulation which deprives land of all economically beneficial use, government "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."\textsuperscript{67} To define what limitations may inhere in the title to property itself requires an inquiry into the background principles of a state's law of property and nuisance.\textsuperscript{68}

A third categorical taking identified by the Court is the "right to pass on property" to one's heirs.\textsuperscript{69} Indeed, the Court has summarized that "the right to exclude others," and "the right to pass on property" are among "the most essential sticks in the bundle of rights."\textsuperscript{70}

The Court has attempted to provide guidance on other aspects of the takings provision of the Fifth Amendment. For example, in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,\textsuperscript{71} the Court expanded the remedy for governmental regulations which constitute a taking. As a result of the Court's decision in First English, when a

\textsuperscript{66} 112 S. Ct. at 2893. The Lucas Court notes that "[r]egrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." Id. at 2894 n.7. The Court further notes some of the "inequities" related to takings law. Under the holding in Lucas, in "some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full... Takings law is full of these 'all or nothing' situations." Id. at 2895 n.8.

\textsuperscript{67} Id. at 2899.

\textsuperscript{69} Hodel v. Irving, 481 U.S. 704, 716 (1987).

\textsuperscript{70} Id.

\textsuperscript{71} 482 U.S. 304 (1987)
governmental regulation constitutes a taking, the public must compensate the property owner for his or her loss during the period of time that the regulation effected use of the property. No longer can government just rescind the regulation and avoid liability.  

In Nollan v. California Coastal Commission\textsuperscript{73} and Dolan v. City of Tigard,\textsuperscript{74} the U.S. Supreme Court articulated a two part test in an attempt to define what is “too far” in the context of land use exactions—conditions imposed on the right to develop property. First, under Nollan, in order to avoid a taking, there must be an “essential nexus” between the “legitimate state interest” and the permit condition exacted by government.\textsuperscript{75} In other words, the type of condition imposed must address the same type of impact caused by the new development. Second, under Dolan, if there is a nexus, there must be a “rough proportionality” between the burden of the condition imposed by the exaction and the impact created by the new development on the public.\textsuperscript{76} The Court in Dolan notes that “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”\textsuperscript{77}

\textsuperscript{72} The First English Court’s use of the term “temporary” did not establish a new definition of what constitutes a “taking.” The Court assumed for the purposes of its decision that a taking had occurred: “We accordingly have no occasion to decide whether the ordinance at issue actually denied appellant all use of its property or whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State’s authority to enact safety regulations.” Id. at 313 (footnote and citations omitted). The use of the term “temporary” therefore does not mean that regulations which are labeled “temporary” and which deny all economically viable use of property for a limited period of time, are automatically a “taking.” Rather, the term “temporary” in First English refers to the period of “time before it is finally determined that the regulation constitutes a ‘taking’ of his property.” Id. at 306-07. See Frank Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1617 n.81 (1988). As the Court noted in First English: “[W]here the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” 482 U.S. at 321.

\textsuperscript{73} 483 U.S. 825 (1987).
\textsuperscript{74} 114 S. Ct. 2309 (1994).
\textsuperscript{75} 483 U.S. at 837.
\textsuperscript{76} 114 S. Ct. at 2319.
\textsuperscript{77} Id. at 2319-20.
2. Wisconsin Takings Jurisprudence

The Wisconsin Constitution provides that "[t]he property of no person shall be taken for public use without just compensation therefore."\(^{78}\) In addition, section 32.10 of the Wisconsin Statutes provides for an inverse condemnation claim if property has been occupied by a person possessing the power of condemnation.\(^{79}\) Therefore, under Wisconsin law, "[i]n order to commence inverse condemnation proceedings, . . . a property owner must demonstrate that there has been either an occupation of his property within the meaning of sec. 32.10, Stats., or a taking, which must be compensated under art. I, sec. 13, of the Wisconsin Constitution."\(^{80}\)

The standard for a "taking" based upon the Wisconsin Supreme Court's interpretations of § 32.10, as well as the takings clause of the Wisconsin Constitution, can be summarized simply as requiring compensation if a property owner has been "deprived of all, or substantially all, of the beneficial use of property or of any part thereof."\(^{81}\) As an additional requirement to this standard, "[a] taking can occur absent physical invasion only when there is a legally imposed restriction upon the

\(^{78}\) Wis. Const. art. I, § 13.

\(^{79}\) Wis. Stat. § 32.10 (1994) provides: "If any property has been occupied by a person possessing the power of condemnation and if the person has not exercised the power, the owner, to institute condemnation proceedings, shall present a verified petition to the circuit judge of the county wherein the land is situated asking that such proceeding be commenced. The petition shall describe the land, state the person against which the condemnation proceedings are instituted and the use to which it has been put or is designed to have been put by the person against which the proceedings are instituted. A copy of the petition shall be served upon the person who has occupied petitioner's land, or interest in land. The petition shall be filed in the office of the clerk of the circuit court and thereupon the matter shall be deemed an action at law and at issue, with petitioner as plaintiff and the occupying person as defendant. The court shall make a finding of whether the defendant is occupying property of the plaintiff without having the right to do so. If the court determines that the defendant is occupying such property of the plaintiff without having the right to do so, it shall treat the matter in accordance with the provisions of this subchapter assuming the plaintiff has received from the defendant a jurisdictional offer and has failed to accept the same and assuming the plaintiff is not questioning the right of the defendant to condemn the property so occupied."

\(^{80}\) Maxey v. Redevelopment Auth. of Racine, 66 Wis. 2d 720, 726, 288 N.W.2d 794, 800 (1980).

\(^{81}\) Howell Plaza, Inc. v. State Highway Comm'n, 94 Wis. 2d 375, 388, 226 N.W.2d 185, 188 (1975).
property's use," and the restriction is imposed by an entity that has the legal authority to impose the restraint.\textsuperscript{2}

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

The early decisions of the Wisconsin court reflect the court's struggle to define the extent to which the Constitution interposed a barrier to the exercise of the police power. In the context of an increasingly complex society, the need for regulation became more pervasive. In 1915, seven years before the United States Supreme Court's decision in \textit{Pennsylvania Coal Co. v. Mahon}, the Wisconsin Supreme Court used language similar to that later used by Justice Holmes in \textit{Mahon} to recognize the constitutional limitations to the police power: "the degree of interference within the boundaries of reason is for the Legislature to decide, there being left in the end the judicial power to determine whether the interference goes so far as to violate some guaranteed right—regulate it so severely as to

\textsuperscript{2} Howell Plaza, Inc. v. State Highway Comm'n, 92 Wis. 2d 88, 93, 284 N.W.2d 887, 893 (1979). The Wisconsin Court of Appeals has summarized the holdings of the Wisconsin Supreme Court as follows: "In the absence of its physical occupancy or possession, private property can be taken for public use only by state, county, or municipal action which imposes a legally enforceable restriction on the use of the property. If a legally enforceable restriction is imposed on that use, then a taking occurs only if the restriction deprives the owner of all, or practically all, of the use. If a regulatory taking has occurred, an action lies for inverse condemnation under sec. 32.10, Stats., or for compensation under Wis. Constitution Article I, Section 13, whether the taking is permanent or temporary." Reel Enterprises v. City of LaCrosse, 146 Wis. 2d 662, 674-75, 431 N.W.2d 743, 749 (Ct. App. 1988).

The Wisconsin court has interpreted takings law to apply to non-real property matters such as finding that a state statute requiring the disclosure of confidential mineral exploration data constitutes a taking. Noranda Exploration, Inc. v. Ostrom, 113 Wis. 2d 612, 335 N.W.2d 596 (1983). The court in \textit{Noranda} also noted that "although a state may redefine property rights to a limited extent, it lacks the power to restructure rights so as to interfere with traditional attributes of property ownership . . . ." Id. at 626, 335 N.W.2d at 603-04. The \textit{Noranda} court also cites the U.S. Supreme Court's decision in \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 439 (1982) in which the court held that "government does not have unlimited power to redefine property rights." Noranda, 113 Wis. 2d at 626, 335 N.W.2d. at 603.
materially impair it, reasonable doubts being resolved in favor of legislative discretion.”

Eight years later, the court had an opportunity to decide that the Legislature had gone “too far.” In Piper v. Ekern, the Wisconsin Supreme Court held that a state statute limiting the height of buildings around the state capitol constituted a taking. The Court found that “from the standpoint of an infraction of private rights,” the facts of the case “far exceed” the facts of Pennsylvania Coal Co. v. Mahon, decided the year before. The purpose of the statute was to limit the height of buildings surrounding the state capitol in Madison to protect the capitol from fire. Fire had leveled the previous capitol building and was a significant consideration in the location and construction of the new structure. The court, however, was unwilling to defer to the judgments of the Wisconsin Legislature. With the precautions taken to secure the new structure against fire, the court questioned whether there was any public safety justification for the statute:

the capitol building is as nearly invulnerable from the ravages of fire as human ingenuity and science can build it. . . . What there is about the building and its contents that is destructible by fire communicated from buildings abutting the [area around the capitol], with the exception of certain books and records which could only be reached by a conflagration in an extraordinary catastrophe, is beyond the imagination. . . . An open space of 378 feet between the capitol building and the proposed building would appear to insure an almost absolute protection from the dangers connected with a conflagration.

The Court equated the height limitation to an easement. Since the state could not take private property for the site of the capitol without paying just compensation, the state also could not take an easement over private property to protect the capitol without paying just compensation.

Another key factor in the Court’s decision was the fact that the statute was designed solely for the protection of state property—the capitol building. “This act is not designed to promote the public welfare of the private owners of property abutting the Capitol Square. It is solely based upon a selfish motive, and is confined to the protection, from fire, of the

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83 Meholos v. Milwaukee, 156 Wis. 591, 601, 146 N.W. 882, 885 (1915).
84 180 Wis. 586, 194 N.W. 159 (1923).
85 Id. at 594, 194 N.W. at 162.
86 Id. at 596-97, 194 N.W. at 163.
state's property."\(^{87}\) The Court distinguished the case from valid police power regulations of a general nature in which there is a reciprocal benefit resulting from the limitation on the use of private property:

Such regulation affecting the owners of property in a certain area, to a large extent, is founded upon the mutual and reciprocal protection which owners of property derive from a general law, and, while in a sense a material diminution in value may result, nevertheless a reciprocal advantage accrues which in many instances it is impossible to estimate from a financial standpoint, but which nevertheless constitutes a thing of value and a compensating factor for the interference by the public with property rights.\(^{88}\)

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

In a strongly worded dissent, Justice Crownhart disagreed with the majority's limited conception of police power regulations and took a more expansive interpretation of the public welfare benefits of the height limitation:

In the instant case the petitioning property owners adjoining the Capitol Square claim the right to build their Towers of Babel to the sky. These buildings may shut out light and air; they may constitute a serious fire menace to this capitol and city; they may choke the streets around the square with congested traffic; they may offend against and even destroy the beauty and usefulness of our great capitol which the people of this state have paid for in the sweat of their brows, and if it pleases these business men to use the absolute rights of the soil guaranteed them by the decision of this court, they may build monstrosities thereon of such shape and design as they may desire, even placing on the tops thereof the golden calf or Chinese Joss.\(^{89}\)

The notion of the reciprocity of benefits as a legitimizing feature of police power regulations was a strong factor in the court's decision six months later when the Court upheld the constitutionality of zoning. In *State v. Harper*,\(^{90}\) which predated the United States Supreme Court's decision in *Euclid* by three years, the court again emphasized the reciprocity of

\(^{87}\) *Id.* at 596, 194 N.W. at 163. Here the court recognizes a different level of scrutiny for police power regulations based on the function of the government's activity much like the arbitration/enterprise distinction adopted by the Minnesota court in 1980. *See infra* notes 140-48 and accompanying text.

\(^{88}\) *Id.* at 591, 194 N.W. at 161.

\(^{89}\) *Id.* at 603, 194 N.W. at 165 (Crownhart, J., dissenting).

\(^{90}\) 182 Wis. 148, 196 N.W. 451 (1923).
benefits resulting from limitations imposed on the use of property by general laws: “He who is limited in the use of his property finds compensation therefore in the benefits accruing to him from the like limitations imposed upon his neighbor.” 91 The court also noted that by “protecting individual rights, society did not part with the power to protect itself or to promote its general well-being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare.” 92 Zoning ordinances were therefore seen as promoting public welfare. The court’s decision confirmed that government in the exercise of its police power could impose restrictions upon the use of property to promote the public welfare. This was significant because prior decisions questioned the extent that government could exercise its police power to restrict the use of property for purposes other than the promotion of public health and safety. 93

The Wisconsin Supreme Court expanded its holding in Harper in subsequent cases. For example, in State ex rel. Saveland Park Holding Corp. v. Wieland, 94 the court upheld the exercise of zoning powers for purely aesthetic considerations. The zoning ordinance at issue in the case regulated the architectural features of structures. Central to the Court’s decision was the conclusion that one of the primary purposes of the ordinance, in addition to zoning in general, was the protection of property values which falls within the exercise of the police power to promote the general welfare. 95 “[I]t is immaterial whether the zoning ordinance is grounded solely upon such objective or that such purpose is but one of several legitimate objectives.” 96

Like the United States Supreme Court, the Wisconsin court stayed away from developing a set formula for defining a taking. While the Wisconsin court’s decisions provide guidance for understanding the constitutional limits of the police power, often the cases are decided by the unique facts presented. Historically, the Wisconsin Supreme Court has been reluctant to find a taking for governmental activity which indirectly

91 Id. at 154. 196 N.W. at 453.
92 Id. at 153. 196 N.W. at 453.
93 Id.; see also Piper v. Ekern, 180 Wis. at 604, 194 N.W. at 166 (Crownhart, J., dissenting).
94 269 Wis. 262, 69 N.W.2d 217 (1955).
95 Id. at 270, 69 N.W.2d at 222.
96 Id.
damages private property. In State v. Herwig, however, the court held that damage to private property by a state prohibition on hunting on privately owned land constituted a taking. The hunting prohibition was part of a coordinated conservation strategy. The Court was concerned that the state was using the prohibition to establish a game refuge for waterfowl during the migratory season. The damage which the property owner suffered in the case was caused by the waterfowl foraging in his corn, alfalfa, and rye fields which amounted to $500 annually. The court in Herwig noted: “There is a limit to the extent to which the state may restrict the use of property or damage property under the police power. What amounts to deprivation of property without due process of law is often difficult to determine, and the determination largely depends upon the nature of the particular case.” Without applying any exacting standard for defining a taking, the court simply found the regulation to be an unreasonable exercise of the police power.

Yet, in other decisions, the court attempted to provide a framework for analyzing the takings issue. For example, in Buhler v. Racine County, the Wisconsin Court held that “[i]ncidental damage such as diminution of value of land because of a restricted use does not [constitute a taking] unless the restriction practically or substantially renders the land useless for

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97 See, e.g., More-Way North Corp. v. State Highway Comm’n, 44 Wis. 2d 165, 172, 170 N.W.2d 749, 753 (1969) (change of road grade resulting in loss of 42 parking stalls constituted consequential damages and therefore not a “taking”); Wisconsin Power & Light Co. v. Columbia County, 3 Wis. 2d 1, 6-7, 87 N.W.2d 279, 282 (1958) (depositing sand and gravel near tower which rendered the tower useless was consequential damage and not a “taking”); Randall v. Milwaukee, 212 Wis. 374, 382, 248 N.W. 73, 76 (1933) (obstruction of egress and ingress merely consequential damage and not a “taking”); compare Luber v. Milwaukee County, 47 Wis. 2d 271, 282, 177 N.W.2d 380, 386 (1970) (loss of rent suffered by condemnee in connection with condemnation of property is an “interest” requiring compensation and not consequential damages).

98 Id. at 442, 117 N.W.2d 335 (1962).
99 Id. at 450, 117 N.W.2d at 339.
100 Id. at 445, 117 N.W.2d at 337.
101 Id. at 447, 117 N.W.2d at 338 (emphasis added). The court’s expansive interpretation of the constitutional protections to include damage to property makes the Wisconsin decision strikingly similar to the Minnesota constitutional provisions which affirmatively protect against damage to property. See infra note 119 and accompanying text.
102 Id. at 446, 117 N.W.2d at 337. While the court did not characterize the case as one of physical occupation, the court did note that “wild animals . . . are owned by the state . . . .” Id.
103 33 Wis. 2d 137, 146 N.W.2d 403 (1966).
all reasonable purposes." The use of this language is similar to language emphasized subsequently by the United States Supreme Court: "economically viable use" and "productive use."

In *Just v. Marinette County*, the Wisconsin Supreme Court provided some guidance on how to measure the economic impact of a restriction on the use of property. The Court in *Just* held that a county shoreland zoning ordinance which regulated development within a certain distance from waterbodies did not constitute a taking. Recognizing the state's duty under the public trust doctrine to eradicate pollution, the court held that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." The court noted that "too much stress is laid on the right of an owner to change commercially valueless land when the change does damage to the rights of the public." While the Justs argued that the regulation severely depreciated the value of their property, the court held:

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

The Wisconsin Court's opinion in *Just* therefore provides one state court's answer to the questions left unanswered by the United States Supreme Court in *Lucas* regarding the factor against which diminution in value should be measured i.e. what constitutes the denominator in the diminution in value

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104 *Id.* at 143, 146 N.W.2d at 406.
105 447 U.S. at 260 (citing Penn Central, 438 U.S. at 138 n.36).
106 112 S. Ct. at 2893, 2895 n.8, 2900-01.
107 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
108 Wisconsin has a strong public trust doctrine under which the state holds title to the beds of navigable waterbodies in trust for its citizens and has an affirmative duty to protect the public's interest in those waterbodies. *See* John Quick, Comment, *The Public Trust Doctrine in Wisconsin*, 1 WIS. ENVTL. L. J. 105 (1994).
109 56 Wis. 2d at 17, 201 N.W.2d at 768.
110 *Id.* at 22, 201 N.W.2d at 770.
111 *Id.* at 24, 201 N.W.2d at 771. The public benefit/public harm distinction followed in *Just* was thrown into disrepute by the United States Supreme Court in *Lucas*.
equation. According to the Just court, diminution in value should be measured against the value of land in its natural state and not against what value land could potentially have after it is altered to something other than its natural condition.

In other cases, the Wisconsin Supreme Court has been at the forefront in defining the parameters of the takings issue. In *Zinn v. State*, for example, the Wisconsin Supreme Court established a remedy for temporary takings four years prior to the United States Supreme Court’s decision in *First English*. In *Jordan v. Village of Menomonee Falls*, the Wisconsin court applied a reasonable relationship test for upholding governmental exactions against takings challenges. *Jordan* was decided by the Wisconsin Supreme Court over twenty years before *Nollan* and *Dolan* and was relied upon by the U.S. Supreme Court in both cases.

Despite this rich history of takings jurisprudence developed independently of the United States Supreme Court, the Wisconsin Supreme Court has noted its frustrations with the lack of guidance on takings from the decisions of the United States Supreme Court:

The problem of how to distinguish between an unconstitutional taking and a police power regulation is a difficult one, and the decisions of the [United

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112 See supra note 62 and accompanying text and note 63.

113 In *M&I Marshall & Isley Bank v. Town of Somers*, 141 Wis. 2d 271, 186, 414 N.W.2d 824, 830 (1987), the Wisconsin Supreme Court noted that the analysis that value should not be based on changing the character of land at the expense of harm to public rights “is not limited to a situation where the lands involved are connected to the state’s duty under the public trust doctrine.” *Id.* at 286, 414 N.W.2d at 830.

114 112 Wis. 2d 417, 334 N.W.2d 67 (1983).

115 Unlike *First English*, however, *Zinn* should be analyzed more as a physical occupation case than a pure regulatory taking case as was the case in *First English*. *Zinn* involved an quasi-judicial decision by the Wisconsin Department of Natural Resources which erroneously placed the ordinary highwater mark so as to make the property owner’s dry land part of a lake bed and obliterating the property owner’s sole riparian ownership. The state later rescinded the decision and the property owner sued for a taking for the limited period of time the erroneous decision impacted the use of her property. See Alemante Gebre-Selassie, Note, *Inverse Liability of the State of Wisconsin for a De Facto ‘Temporary Taking’ as a Result of an Erroneous Administrative Decision: Zinn v. State*, 1984 Wis. L. Rev. 1431.

116 28 Wis. 2d 608, 137 N.W. 2d 442 (1965).

117 483 U.S. at 840; 114 S. Ct. at 2319.
States] Supreme Court have not made it less difficult. Decisions in this area of the law must necessarily be made on an ad hoc basis.\textsuperscript{118}

While the Wisconsin decisions provide further guidance for understanding the takings issue, the Wisconsin court's decisions do not present the definitive takings

3. Minnesota Takings Jurisprudence

Like Wisconsin, Minnesota takings jurisprudence has a rich historical past. That past, however, has led to some very different standards for delineating the constitutional limitations of the police power. In contrast with both the Wisconsin and United States Constitutions, the Minnesota Constitution provides that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation, therefor, first paid or secured."\textsuperscript{119} The words "destroyed or damaged" were added to the original constitution in 1896 because court interpretations of the takings provision denied consequential or indirect damages.\textsuperscript{120} With the requirement that government compensate for: (1) the taking of private property, (2) the destruction of private property, or (3) damage to private property, the Minnesota Constitution provides broader protection for private property interests than either the Wisconsin or the United States

\textsuperscript{118} Noranda Exploration, Inc. v. Ostrom, 113 Wis. 2d 612, 623, 335 N.W.2d 596, 603 (1983).

\textsuperscript{119} MINN. CONST. art. I, § 13 (emphasis added). The Minnesota Constitution is one of twenty-three state constitutions which require compensation when private property is "taken or damaged." See Note, Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance, 26 STAN. L. REV. 1439, 1439-40 n. 3 (1974). While the Minnesota statutes do not include a statutory inverse condemnation procedure similar to the Wisconsin statutes, the Minnesota Statutes do allow for the recovery of costs and expenses incurred in bringing certain inverse condemnation claims. MINN. STAT. § 117.045 (1994) provides: "Upon successfully bringing an action compelling an acquiring authority to initiate eminent domain proceedings relating to a person's real property which was omitted from any current or completed eminent domain proceeding, such person shall be entitled to petition the court for reimbursement for reasonable costs and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred in bringing such action."

\textsuperscript{120} Dickerman v. City of Duluth, 92 N.W. 1119 (1903). See also Lowry Hill Properties, Inc. v. State, 200 N.W.2d 295, 296 (Minn. 1972).
Constitutions which only require compensation for the taking of private property.\textsuperscript{121}

Like Wisconsin, the decisions of the Minnesota Supreme Court from the beginning of the twentieth century reflect the tensions of balancing police power restrictions against the protection of private property. In 1916, six years before Justice Holmes' verbage in \textit{Mahon} stating that a regulation could go "too far" in restricting private property rights, the Minnesota court recognized that:

\begin{quote}
[t]he dividing line between restrictions which may be lawfully imposed under the police power and those which invade the rights secured to the property owner by the constitutional provisions that his property shall not be taken or damaged without compensation, nor be deprived of it without due process of law, has never been distinctly marked out, and probably cannot be. As different cases arise, the courts determine from the facts and circumstances of the particular case whether it falls upon one side or the other of the line.\textsuperscript{122}
\end{quote}

Initially, the Minnesota court narrowly interpreted the scope of the police power such that only those uses of property could be restricted which "may produce injurious consequences, or infringe the lawful rights of others."\textsuperscript{123} Thus governmental restrictions prohibiting a property owner from making use of his or her property that is not harmful to the public were deemed unconstitutional.\textsuperscript{124}

The Minnesota Legislature responded by authorizing certain cities to pursue a unique approach to restricting the use of private property which combined the police power with the power of eminent domain. Initially, the Minnesota Supreme Court held this approach to be unconstitutional because its application did not meet the public use requirement of the constitution. In \textit{State ex rel. Twin City Bldg. & Inv. Co. v. Houghton},\textsuperscript{125} the court held that a condemnation to prevent an apartment building from being built in an exclusive residential district in which apartment buildings

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{121}] The Wisconsin Supreme Court has recognized this distinction and the lesser degree of protection afforded private property under the Wisconsin Constitution. \textit{See} Wisconsin Power & Light Co. v. Columbia County, 3 Wis. 2d 1, 6, 87 N.W.2d 279, 281-82 (1958).
\item[\textsuperscript{122}] \textit{State ex rel. Lachman v. Houghton}, 158 N.W. 1017, 1019 (Minn. 1916).
\item[\textsuperscript{123}] \textit{Id.} at 1021.
\item[\textsuperscript{124}] \textit{Id.} at 1021-22. The court in \textit{Lachman} held that an ordinance prohibiting the construction of a store in an exclusive residential district was unconstitutional. \textit{Id.} at 1022.
\item[\textsuperscript{125}] 174 N.W. 885 (Minn. 1919).
\end{itemize}
\end{footnotesize}
were prohibited was not a public use.\textsuperscript{126} The court did not believe the public use requirement was met because neither the city nor the general public would enjoy the physical use of the condemned property.\textsuperscript{127} The court also feared that the exclusionary nature of the law could “cause discontent with the government as one controlled by class distinction.”\textsuperscript{128}

Following a rehearing of the case several months later, however, the court overruled its earlier decision regarding the nature of the public use requirement.\textsuperscript{129} The court noted that “[t]he notion of what is public use changes from time to time. Public use expands with the new needs created by the advance of civilization and the modern tendency of the people to crowd into large cities.”\textsuperscript{130} The court felt compelled to follow the “tendency . . . of extending the power of restriction, either through the exercise of the police power or the exercise of the right of eminent domain in aid of the so-called city planning or the improvement of housing conditions.”\textsuperscript{131} Among the numerous reasons that the court used to justify its redefinition of “public use” was that giving the people a means to secure for that portion of a city, wherein they establish their homes, fit and harmonious surroundings, promotes contentment, induces further efforts to enhance the appearance and value of the home, fosters civic pride, and thus tends to produce a better type of citizens. . . . People are beginning to realize this more than before, and are calling for city planning, by which the individual homes may be segregated from not only industrial and mercantile districts, but also from the districts devoted to hotels and apartments.\textsuperscript{132}

Five years later, and one year before \textit{Euclid}, the Minnesota Supreme Court departed from precedent and expanded the scope of the police power even further. In \textit{State ex rel. Beery v. Houghton}, the court held that restricted residential districts should be accomplished through the exclusive exercise of the police power under a comprehensive zoning ordinance.\textsuperscript{133} The court summarized the changing nature of the police power:

\textsuperscript{126} \textit{Id.} at 888.
\textsuperscript{127} \textit{Id.} at 887.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{State ex rel. Twin City Bldg. & Inv. Co. v. Houghton}, 176 N.W. 159, 163 (Minn. 1920).
\textsuperscript{130} \textit{Id.} at 161.
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} at 162.
\textsuperscript{133} 204 N.W. 569 (Minn. 1925).
The police power, in its nature indefinable, and quickly responsive, in the interest of common welfare, to changing conditions, authorizes various restrictions upon the use of private property as social and economic changes come. A restriction, which years ago would have been intolerable, and would have been thought an unconstitutional restriction of the owner’s use of his property, is accepted now without a thought that it invades a private right. As social relations become more complex, restrictions on individual rights become more common. With the crowding of population in cities, there is an active insistence upon the establishment of residential districts from which annoying occupations, and buildings undesirable to the community are excluded.\footnote{134
Id. at 570.}

More recent decisions of the Minnesota Supreme Court reflect a varied approach to takings cases.\footnote{135
For a summary of Minnesota takings jurisprudence, see Floyd B. Olson, The Enigma Of Regulatory Takings, 20 WM. MITCHELL L. REV. 433 (1994).} In one line of cases, the Minnesota Supreme Court has used the “taken, destroyed or damaged” language to provide a remedy for inverse condemnation cases not involving the application of governmental regulations to private property. In Wegner v. Milwaukee Mutual Ins. Co.,\footnote{136
479 N.W.2d 38, 40 (Minn. 1991).} for example, the court applied “the plain meaning of the language of Minn. Const. Art. 1, §13” to require compensation for damages caused to a house by the police apprehending an armed suspect barricaded in the home. As the court stated:

This type of constitutional inhibition ‘was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’ . . . The purpose of the damage clause is to ensure that private landowners are compensated, not only for physical invasion of their property, but also damages caused by the state where no physical invasion has occurred.\footnote{137
Id. at 40 (quoting Armstrong v. U. S., 364 U.S. 40, 49 (1960)).} The Minnesota Supreme Court has also recognized a taking for governmental actions which result in a physical appropriation of land due to flooding. Spaeth v. City of Plymouth, 344 N.W.2d 815 (Minn. 1984). See also State v. Strom, 493 N.W.2d 554 (Minn. 1992), a condemnation case, in which the court used the broad language of the Minnesota Constitution to allow evidence of loss of view from a redesigned highway to be considered in the condemnation award.\footnote{138
216 N.W.2d 651 (Minn. 1974).}
in the form of airplane noise. The Minnesota Supreme Court held “when those interferences reach the point where they cause a measurable decrease in property value, it is reasonable to assume that, considering the permanency of the air flights, a property right has been, if not ‘taken or destroyed,’ at the very least damaged, for which our constitution requires that compensation be paid.”\textsuperscript{139}

In the regulatory takings context, there are at least two distinct lines of cases with different standards for defining a taking. Neither of these standards is really based on the “destroyed or damaged” language of the Minnesota Constitution. Rather it is based on the “taken” protections of the Minnesota Constitution.

In \textit{McShane v. City of Faribault},\textsuperscript{140} the Minnesota Supreme Court adopted the dual standard for regulatory takings based on the differing functions of governmental activity. One standard for a regulatory taking recognized by the court in \textit{McShane} is based on the “enterprise” function

\begin{footnotesize}
\begin{enumerate}
    \item[139] \textit{Id.} at 662. The court in \textit{Alevisos} noted the difficulty of trying to define “property”: “Any statement of what constitutes ‘property’ can only be nebulous at best. Not every economic, social, or other interest or advantage is a property right, the taking of which must be compensated.” \textit{Id.} at 661. For a recent application of the test articulated in \textit{Alevisos}, see Finke v. State, 521 N.W.2d 371, 375 (Minn. 1994). \textit{See also} Castor v. City of Minneapolis, 429 N.W.2d 244 (Minn. 1988) (taking found for interference of a skyway with an implied easement of air, light and view).

    \item[140] 292 N.W.2d 253 (Minn. 1980). The plaintiffs in \textit{McShane} owned property adjacent to a municipal airport. The property was trisected by an interstate highway and a state trunk highway. All parties conceded that while the property had been used for agricultural purposes, the trisection of the property by the highways made the property more valuable for commercial and industrial use. There was also testimony that the continued agricultural use of the property was rendered impractical and in some places impossible by the location of the highways. Portions of the property were zoned commercial and industrial, and a large section was zoned “urban expansion” (agricultural, but future rezoning contemplated). Because of the proximity of the plaintiffs’ land to the airport, airport hazard overlay zones were placed over plaintiffs’ property limiting the use of their property. The parties conceded that commercial development would not be permitted in the most restrictive zone. There was testimony that “just prior to the announcement of the airport zoning regulations plaintiffs had negotiated a lease-purchase agreement and an option agreement to sell parcels for commercial development, but the options were not exercised.” \textit{Id.} at 255-56.
\end{enumerate}
\end{footnotesize}
of government.\textsuperscript{141} The other standard is based on the “arbitration” function of government.

Under the “enterprise” function, government regulates land for the sole benefit of a governmental enterprise.\textsuperscript{142} Under this theory, where a specific governmental enterprise is involved, such as a municipal airport,\textsuperscript{143}

the burden of its activities falls on just a few individuals while the public as a whole receives the advantage of property rights for which it did not pay. In essence, the public has appropriated an easement. In such cases, . . . the burden on the landowner is grossly disproportionate to the burden he should be expected to bear as an ordinary citizen, and the use of regulation to take his property rights is, in effect, a shortcut to avoid compensation. Therefore, even though the burdened property retains some reasonable usefulness, the public should pay for the diminution in value just as any private landowner must purchase an easement.\textsuperscript{144}

According to the court in \textit{McShane}, the “diminution” in value must be “a substantial and measurable decline in market value as a result of the

\begin{footnotes}
141 \textit{Id.} at 258. \textit{McShane} was decided before \textit{First English} in which the United States Supreme Court removed the option for governments of rescinding an ordinance and not having to pay damages for the taking. The Court in \textit{McShane}, however, determined that repealing the ordinance without paying compensation was an option. \textit{Id.} at 259. In a classical separation of powers argument, the Minnesota court recognized that the decision on whether or not to spend money to purchase the property rights is a function of the city and not of the trial court. \textit{Id.} “The decision to purchase property is a discretionary one. . . . [I]f the city decides it is wiser to close the airport than to spend potentially huge amounts of money on the necessary property rights, clearly it has the discretion to do so.” \textit{Id.} (citations omitted). One can only speculate on whether the Minnesota Supreme Court would have adopted the arbitration/enterprise distinction if \textit{McShane} had been decided after \textit{First English}.

142 \textit{Id.} at 258. In adopting the arbitration/enterprise distinction, the Minnesota court adopted the distinction articulated in \textit{Joseph Sax, Takings and the Police Power}, 74 YALE L. REV. 36 (1964).

143 The Minnesota Supreme Court expanded the arbitration/enterprise test in \textit{Pratt v. State Dept. of Natural Resources}, 309 N.W.2d 767 (Minn. 1981). In \textit{Pratt}, the court held that the mixed arbitration/enterprise functions of a wild rice harvesting regulatory scheme may constitute a taking if “there is a substantial diminution in the market value of the property.” \textit{Id.} at 774.

144 292 N.W.2d at 258.
\end{footnotes}
regulations.\textsuperscript{145} The court, however, provided little specific guidance as to the meaning of "substantial and measurable decline in market value."

The other taking standard is for the "arbitration" function of government. Zoning constitutes the arbitration function\textsuperscript{146} where government "arbitrates" between competing land uses among various owners of private property. Under the arbitration function, there is a "reciprocal benefit and burden accruing to all landowners from the planned and orderly development of land use."\textsuperscript{147} Because of this reciprocal benefit and burden, the McShane court adopted a more liberal standard for the arbitration function than for the enterprise function. The standard for a taking under the arbitration function is, unless "property has been rendered practically useless," the regulation must be upheld.\textsuperscript{148}

Therefore, for takings under the arbitration function of government, the Minnesota courts follow a standard similar to Wisconsin and federal law.\textsuperscript{149} Yet, like the decisions of the Wisconsin and United States

\textsuperscript{145} Id. at 259. With respect to the facts of the McShane case, at trial, plaintiffs' expert appraisers testified that plaintiffs' land was worth $522,000 when put to its highest and best use, commercial development. Plaintiffs' appraisers testified that the diminution in value because of the restrictions was $360,000, or 67 percent. Defendants' appraisers valued the land without restrictions at $234,500. They estimated that a portion of the land was reduced 50 percent in value because of the restrictions and another portion was reduced 9.3 percent. "All parties conceded that the diminution in value was substantial." Id. at 256.

\textsuperscript{146} Id. at 258.

\textsuperscript{147} Id. at 257.

\textsuperscript{148} Id.

\textsuperscript{149} For further articulation of the regulatory taking standard in Minnesota see Czech v. City of Blaine, 253 N.W.2d 272 (Minn. 1977) ("For there to be an unconstitutional taking a landowner must demonstrate that he has been deprived, through governmental action or inaction, of all the reasonable uses of his land." Id. at 274.); Holaway v. City of Pipestone, 269 N.W.2d 28 (Minn. 1978) ("Plaintiffs assert that the diminution in value of their property constituted a taking entitling them to damages under MINN. CONST. art. 1, ¶ 13. . . . Mere diminution in market value" does not demonstrate a deprivation of all reasonable uses of land "when a reasonable use of the land is permitted under the zoning ordinance and currently undertaken by plaintiffs. The result would be similar under the Federal Constitution." Id. at 30.); Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258 (Minn. Ct. App. 1992) in which the Minnesota Court of Appeals applied the Penn Central test to determine that the denial of all economically viable use for the duration of a two year moratorium did not constitute a categorical taking under Lucas. In the context of conditions imposed on the development of property, the Minnesota Supreme Court has followed the rationale articulated by the Wisconsin Supreme Court in Jordan v. Village of Menomonie Falls, 28 Wis. 2d 608, 137 N.W. 2d 442 (1965), to require a reasonable relationship between conditions imposed on a
Supreme Courts, the decisions of Minnesota Supreme Court fail to offer an absolute takings standard.

B. A Comparison of the Proposed Legislation in Wisconsin and Minnesota

During the 1994 session of the Minnesota Legislature, a bill entitled the "Property Rights Preservation Act," was introduced in both the Senate and House. In 1994, similar legislation was introduced in the Senate and Assembly of the Wisconsin Legislature. Neither bill passed either house in the respective legislatures. The Minnesota bill and the original Wisconsin bill can be characterized as assessment bills. The amended Wisconsin bill includes an assessment provision, a compensation requirement if the value of property is diminished by 40 percent, and calls for the establishment of a property rights advocate office.

Both the Minnesota and Wisconsin bills express a concern for protecting private property rights within the parameters of the state and federal constitutions and the decisions of the U.S. and state Supreme Courts. Yet, both bills attempt to expand the substantive scope and procedural requirements of their respective state constitutions as well as the United States Constitution. Both bills would require a facial analysis of the impact of governmental activity on property. While the United States Supreme Court has been very clear that the test for facial challenges is "denial of all reasonable use," both bills would seek to reduce the burden on the challenger by applying guidelines that are normally used in "as applied" cases. The Wisconsin bill goes even farther in that it seeks to redefine what constitutes a taking more broadly.

municipality and the needs of the municipality. Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976).

150 S.F. 2677, H.F. 2335, 78th Leg. (1994) [hereinafter Minn. S.F. 2677]. All references will be to the Senate version of the bill which is identical to the House version.

151 S.B. 757, A.B. 1185, 1993-1994 Leg. [hereinafter Wis. S.B. 757]. Both the senate and assembly versions of the bill were amended in an attempt to deal with concerns that were raised in response to the original versions. The analysis which follows will focus on the amended version, Senate Substitute Amendment 1 [hereinafter Wis. S.B. 757 Am. 1]. Some of the changes from the original version will be highlighted as illustrative of the difficulties in dealing with this issue. All references will be to the Senate version of the bill and subsequent amendment, both of which are identical to the Assembly version.

152 See supra notes 54-57 and accompanying text.
With such an expansion of substantive takings law, many governmental actions on their face could constitute a taking because it is almost always conceivable to think of some hypothetical situation in which the "as applied" factors would constitute a taking. It is less clear whether these situations would ever actually occur. It is because these situations might not exist in the real world that courts do not use factors developed in "as applied" cases to review "facial" takings.\footnote{[O]ne of the virtues often attributed to the common-law system is its refusal to decide abstract questions of law divorced from concrete cases. Common-law courts do decide cases and lay down rules knowing who will be affected by them." Stewert E. Sterk, Nollan, Henry George, and Exactions, 88 Colum. L. Rev. 1731, 1747 (1988).} Requiring "facial" review of actions using "as applied" factors under the takings bills may result in governmental unwillingness to risk actions in the public interest that might impact property, even though under judicial standards there would not be a taking.

1. Takings Assessment

Both the Wisconsin and the Minnesota bills require the preparation of an assessment of the constitutional taking implications of governmental actions on private property.\footnote{The Minnesota bill does not offer any definition of what constitutes "private property." The original version of the Wisconsin bill also did not contain a definition of "private property" but the amended version stated that private property "means real property owned by a person other than the federal government, the state, a state agency or a local governmental unit." This definition was added to deal with concerns that the term "private property" could include many forms of property in addition to real property such as personal property, employment rights, intellectual property, financial assets, and contract rights. See, Dept. of Agric., Trade and Consumer Protection, 1993 Senate Bill 757 Fiscal Estimate, at 1 (1994).} The Wisconsin assessment procedure applies only to state agencies.\footnote{The original bill applied to both state agencies and local governmental units.} The Minnesota bill applies to both state and local governments.\footnote{The bill applies to "state agencies" which is broadly defined to mean "the state of Minnesota and any officer, agency, board, commission, department, or similar body of the executive branch of state government and any of the political subdivisions of the state or agencies thereof." Minn. S.F. 2677 § 3(a). The term "political subdivisions" includes cities, towns, and counties as well as regional governments such as the Metropolitan Council.} Under both bills, the assessment must be
prepared before engaging in any governmental action\textsuperscript{157} that may result in a taking. The Minnesota bill defines a taking to mean "the taking of private property by governmental action such that compensation to the owner of that property is required by either the Minnesota or United States Constitutions."\textsuperscript{158}

The Wisconsin bill originally included a similar definition with a reference to the appropriate provision in the Wisconsin Constitution. The amended bill dropped this definition and replaced it with "governmental action which reduces the fair market value of the private property by 40 percent or more."\textsuperscript{159} This definition would dramatically expand the

\textsuperscript{157} The Minnesota bill defines "Governmental action" as: "(1) rules and proposed rules and regulations that if adopted or enforced may limit the use of private property; (2) existing or proposed licensing or permitting conditions, requirements, or limitations on the use of private property; or (3) required dedications or exactions of private property." Minn. S.F. 2677 § 3(b). The Wisconsin bill includes similar language to the Minnesota bill in its definition of "governmental action" except that the Wisconsin bill substantially broadens the definition of "governmental action" by including "[a]n order that is issued by a state agency, local governmental unit or court, that is authorized by law and that is the result of a violation of law." Wis. S.B. 757 Am. 1 § 4. This requirement in the Wisconsin bill could undermine the ability of state agencies to enforce the law because the agencies would need to prepare assessments almost every time they seek to enforce a permit violation, etc.

Both bills also include an explanation of what "governmental action" is not. The Minnesota bill excludes: (1) the formal exercise of the power of eminent domain; (2) the forfeiture or seizure of private property by law enforcement agencies as evidence of a crime or for violations of law; (3) orders issued by a [local or state government] or court of law that result from a violation of law and that are authorized by statute; or (4) the discontinuance of government programs. Minn. S.F. 2677 § 3(c). The list of exclusions in the Wisconsin bill is similar to Minnesota bill except the Wisconsin bill does not include the third exclusion because it is included in the definition of "governmental action." One must question whether this difference is intentional or whether the Wisconsin version mistakenly reversed what should be included in the definition of "governmental action" and what should not. An additional difference is that the Wisconsin version of the fourth exclusion reads: "The repeal or amendment of an ordinance or rule in a manner that lessens interference with the use of private property." Wis. S.B. 757 § 4.

\textsuperscript{158} Minn. S.F. 2677 § 3(d).

\textsuperscript{159} Wis. S.B. 757 Am. 1 § 4. The redefinition of takings law under the Wisconsin bill also includes a claim for past takings. Any governmental action of a state agency which, within the past 6 years preceding the effective date of the bill, reduced the fair market value of the person's property by 60 percent or more may file a claim for damages.

The use of fixed percentages raises the "all or nothing" problem noted in\textit{Lucas}. See\textit{ supra} note 66. A person whose property value is diminished 41 percent
substantive definition of what constitutes a taking under Wisconsin law. No reported court decision in Wisconsin has ever held that a 40 percent diminution in value alone constitutes a taking. While this definition attempts to provide some degree of certainty as to what constitutes a “taking,” basing diminution in value on a fixed percentage leaves open many uncertainties as to how to measure the diminution. This uncertainty is evidenced by the fact that the experts in the valuation of property—appraisers—seldom agree on the value of property.\footnote{160} Furthermore, appraisers’ disagreements are based on valuations of property in “as applied” situations. Appraisers are not dealing with a facial analysis, where the process would be even more uncertain. There are many factors in any valuation. The valuation of property can change daily because of the fluidity of the free market. In an abstract facial evaluation of the impact of a regulation on property, it will be difficult to set a “before restriction” price, and an “after restriction” price in many cases. While it may be possible to do an evaluation on an “as applied” basis, the Wisconsin bill fails to provide an effective procedure to accomplish such a review.\footnote{161}

The Minnesota bill requires that the assessment do the following:

1. assess the likelihood that the governmental action may result in a constitutional taking;
2. clearly and specifically identify the purpose of the government action;
3. explain why the government action is necessary substantially to advance that purpose, and why no alternative action is available that would achieve the agency’s goals while reducing the impact on the private property owner;
4. estimate the potential cost to the government if a court determines that the action constitutes a constitutional taking;
5. identify the source of payment within the agency’s budget for any compensation that may be ordered; and
6. certify that the benefits of the government action exceed the estimated compensation costs.\footnote{162}

The assessment requirements under the Wisconsin bill are more extensive. Like the Minnesota bill, the Wisconsin bill requires: (1) an analysis of the likelihood that the governmental action may constitute a taking, (2) an alternatives analysis of other ways to satisfy the objectives of

\footnote{160} See, e.g., the difference in the appraisal amounts in McShane, supra note 145.
\footnote{161} Several authors have suggested alternative procedures for dealing with “as applied” claims. See Mixon supra note 44 and Klavens, supra note 44.
\footnote{162} Minn. S.F. 2677 § 6(b).
the state agency while reducing the risk of a taking, and (3) an estimate of the financial cost and the source of payment if a taking occurs.163

In addition, the Wisconsin bill requires a “report” that (1) “[i]dentifies, with as much specificity as possible, the public health or safety risk created by the use of the private property;” (2) “[e]stablishes that the governmental action substantially advances the purpose of protecting health and safety against” that specific risk; (3) “[e]stablishes, to the extent possible, that the restrictions imposed on the private property are proportionate to the extent that the use contributes to the overall risk;” and (4) estimates the cost to the state if there is a taking.164

This report is distinct from the assessment and would potentially apply to many more actions. The assessment applies to governmental actions that “may constitute a taking” as defined by the bill. The report applies to any governmental action that “restricts” the use of property. This would encompass minimal restrictions that may have a one percent diminution in value. The reporting requirement also only applies to governmental actions with the purpose of protecting “health and safety.” The term “welfare” is absent from the normal “health, safety, and welfare” nomenclature of the police power. The bill therefore seems to exempt regulations exacted purely for welfare purposes such as in Saveland165 and Penn Central.166 The exclusion of “welfare” regulations presumes a bright line distinction between governmental actions taken for “health and safety” purposes and for “welfare” purposes. This exclusion introduces a degree of uncertainty because many governmental actions are undertaken for mixed purposes—for health, safety, and welfare purposes.

Next, the Wisconsin bill requires that when a state agency engages in any governmental action that may result in a taking the agency must: (1) “ensure” that permit conditions “directly relate to the purpose for which the permit is issued, substantially advance that purpose and are expressly authorized by law;” (2) “ensure” that any restriction on the use of private property “is proportionate to the extent that the use contributes to the problem that the restriction is intended to redress;” and (3) “ensure” that the duration of any permitting or decision-making process “is no longer than necessary.”167 It is unclear what “ensure” means.

Even though the assessment requirements and the reporting requirements do not apply to local governmental units, the bill requires that

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163 Wis. S.B. 757 Am. 1 § 4.
164 Id.
165 See supra note 94 and accompanying text.
166 438 U.S. 104.
167 Wis. S.B. 757 Am. 1 § 4.
every permit issued by the state or local government "shall set forth the
objective of the permit and the societal values sought to be protected by the
permit." 168

2. Guidelines

Both the Minnesota and Wisconsin bills require the development of
guidelines to assist the governmental identification of takings. The
Minnesota bill requires the Minnesota attorney general to develop guidelines
to "assist in the identification and evaluation of governmental actions that
may result in a constitutional taking." 169 The Wisconsin bill, however,
requires the establishment of a "council on constitutional taking of private
property" within the Wisconsin Department of Administration. 170 The
council would consist of seven persons. 171

While the Minnesota bill specifies that the guidelines must be based on
current takings law as articulated by the Minnesota and United States
Supreme Courts, the bill also mandates that the guidelines "observe" the
following principles:

(1) government actions that result in a physical invasion or occupancy of
private property or that decrease the value or limit the use of property
may constitute a taking;
(2) government action may amount to a taking even though it constitutes
less than a complete deprivation of all use or value of all separate and

168 Id.
169 Minn. S.F. 2677 § 4.
170 Wis. S.B. 757 Am. 1 § 1.
171 Council membership would consist of the following: An attorney who has
tried cases in circuit court related to the public taking of private property; an attorney
who has argued a case in the supreme court related to the public taking of private
property; an attorney who has experience as an advocate for the interests of private
property owners and four persons who do not have any of the qualifications required
of the other members, one of whom was a defendant in a case related to the public
taking of private property and one of whom was a plaintiff in a case related to the
public taking of private property. The four persons who are not required to be
attorneys are required to be members of or affiliated with organizations which have
demonstrated advocacy for the rights of property owners. It is not clear form the bill
who would appoint the members. Id.

Originally, the bill called for a council of nine persons serving terms of three
years. Members originally included but excluded in the amended version are the
attorney general or his or her designee; the secretary [of] agriculture, trade and
consumer protection or his or her designee; the secretary of natural resources or his
or her designee; and a district attorney or corporation counsel. Wis. S.F. 757 § 1.
distinct interests in the same private property or the action is only
temporary in nature;
(3) the mere assertion of a public purpose is insufficient to avoid a taking.
Government actions to protect the public health and safety or otherwise
to further the public interest should be taken only in response to real
and substantial public needs and shall be designed significantly to
address those needs;
(4) although normal government processes do not ordinarily constitute
takings, undue delays in decision-making that interfere with private
property use may be a taking. In addition, a delay in processing may
increase significantly the size of compensation due if a constitutional
taking is later found to have occurred; and
(5) the constitutional protections against private property are self-executing
and require compensation regardless of whether the underlying
authority for the action contemplated a taking or authorized the
payment of compensation. 172

The Wisconsin bill requires that the council follow a similar set of
principles in developing the guidelines. Many of the principles, however,
seem superfluous given the restrictive definition of a taking as constituting
a 40 percent diminution in value. The Wisconsin bill also specifies that a
"delay of more than 180 days in governmental decision-making that
interferes with the use of property may be held to be a constitutional
taking." 173

The guideline requirements of both takings bills reflect an interesting
institutional dynamic. Historically, courts interpreted the constitutional
protections to provide the parameters for what constituted a taking. The
takings bills shift this definitional responsibility away from the courts. This
shift is due in part to frustration with the courts' failure to clearly articulate
a takings test and uncertainty over whether the courts will expand
constitutional protections of private property. While a more efficient
process may be needed to adjudicate takings cases, the takings bills fail to
provide any process. Rather, the bills change the role of the courts from
interpreters of the constitution to the enforcers of legislative or
administrative standards, thereby creating a new cause of action for the
protection of property rights.

The small group of individuals who develop the guidelines will have
an enormous impact on the ability of government to regulate property. It
will be up to these individuals to carefully tailor a set of guidelines that
clearly articulate what constitutes a taking. Given the "ad hoc" nature of
the court's own analysis which has resulted in ambiguities and differing

172 Minn. S.F. 2677 § 4.
173 Wis. S.B. 757 Am. 1 § 4.
interpretations of those ambiguities by scholars, this will be no small task. The drafters will need to articulate standards for deciding when an individual has borne more than his or her just share of the burdens of government. In Wisconsin, the drafters will also need to determine how to measure a 40 percent diminution in value. Yet, the drafters are not required to have any training in the valuation of property.\footnote{174}

The drafters will need to clarify the concept of the nature of property ownership, and how future development, profits, and remaining value are to be treated in the takings analysis.\footnote{175} The drafters will also need to address questions left unanswered by the courts. For example, will the drafters determine that the United States Supreme Court's decision in \textit{Lucas}\footnote{176} overruled the Wisconsin Supreme Court's decision in \textit{Just}\footnote{177} or will the drafters follow the guidance of the \textit{Just} decision in developing guidelines for measuring a taking? Building upon the arbitration/enterprise distinction in Minnesota, the drafters of the guidelines could determine that wetland and shoreland protection measures in Minnesota are confiscatory and require compensation.\footnote{178} There will be difficult judgement calls in the face of this uncertainty which will involve significant policy trade-offs.\footnote{179} Are the drafters capable of making these policy judgments? The bills are premised on developing objective standards for dealing with a subjective world. Due to the difficulties of trying to define a taking, many ambiguities will undoubtedly remain as to how to apply the guidelines to specific governmental actions.\footnote{179} These ambiguities will be left for the courts to resolve in subsequent litigation.

\footnote{174} Under a normal inverse condemnation action, a panel of commissioners experienced in condemnation proceedings and ultimately a jury decide the very factually specific nature of valuing property based on competing expert testimony as well as other evidence.


\footnote{176} The issue of whether \textit{Lucas} overruled \textit{Just} is raised in \textit{Sax}, supra note 63, at 1440.

\footnote{177} See \textit{supra} note 143.

\footnote{178} See Wise, \textit{supra} note 175, at 418.

\footnote{179} The difficulties of achieving consensus as to what constitutes a taking is apparent in the inability of the justices of the supreme courts to agree as to what constitutes a taking as evidenced by the large number of dissenting opinions in takings cases such as \textit{Penn Central, Agins, First English, Keystone Bituminous, Nolan, Lucas, and Dolan}. See also Noranda Exploration, Inc. v. Ostrom, 113 Wis. 2d 612, 335 N.W.2d 596 (1983).
3. Enforcement

Enforcement of the Minnesota bill would be left to the attorney general, who must designate an official within the office of the attorney general to be responsible for ensuring compliance with the bill.\textsuperscript{180} The bill also specifies a private right of action to enforce compliance with the act\textsuperscript{181} and allows for the recovery of attorneys fees and costs for a successful constitutional taking claim.\textsuperscript{182}

The Wisconsin bill has a much more elaborate enforcement mechanism. First, the Wisconsin bill provides a substantial penalty section. The Minnesota bill has no corresponding section. The Wisconsin bill states that any "person who is injured as a result of the failure of a state agency to comply with [the assessment requirements] may recover three times the amount of the damages resulting from that injury." In addition the bill provides that "[a]ny governmental action that may result in a constitutional taking that is taken by a state agency without first complying with this section is void."\textsuperscript{183}

Next, the bill calls for the creation of a "property rights specialist," an attorney, who must formally intervene in all proceedings relating to a constitutional taking when requested to do so by a majority vote of the council or by the secretary of administration. The property rights specialist may also intervene on his or her own initiative or upon the request of any committee of the legislature in those proceedings where intervention is necessary to protect private property.\textsuperscript{184} The Wisconsin bill also provides that a person may commence an action against the state or local governmental unit for damages resulting from a constitutional taking.\textsuperscript{185}

C. Implications

To successfully deal with the issue of regulatory reform, it is critical that the proponents of change clearly articulate the issues they are attempting to address. The reform should focus on the particular issue or

\textsuperscript{180} Minn. S.F. 2677 §§ 5, 10.
\textsuperscript{181} Id. § 10.
\textsuperscript{182} Id. § 9.
\textsuperscript{183} Wis. S.B. 757 Am. 1 § 4.
\textsuperscript{184} Id. The property rights specialists would serve as a counterpart to the public intervenor. The public intervenor is an assistant attorney general in the Wisconsin Department of Justice who has authority to initiate proceedings against state agencies to protect public rights in water and other natural resources. \textit{Wis. Stat.} §§ 165.07-.076, (1994).
\textsuperscript{185} Id.
issues identified to avoid overreaching. For example, if the proponents of the Wisconsin takings bill are unhappy with a particular program or programs, such as wetland or shoreland regulations, they should seek to amend or repeal that particular program. Proponents of such an attack on the wetland and shoreland protection programs, without offering a viable alternative for the protection of these important natural features, however, would probably be characterized as “anti-environmental” as opposed to “protectors of private property.” As a political strategy, this might not have as much popular appeal in an age when the majority of the general public view themselves as “environmentalists” and consider natural resource protection to be a priority.

Rather, than attacking any specific governmental program, the takings legislation targets a very expansive array of governmental actions which potentially affect the value of property. It will be difficult for governmental agencies to comply with the burdensome bureaucratic, time consuming, and costly requirements of the takings bills. Combined with the very punitive nature of the bills for failing to comply with the provisions of the bills, governmental agencies will be unwilling and unable to adopt regulations which affect the value of property or enforce existing regulations. Agencies do not have the resources to perform the type of analysis required by the bills or provide the guarantees required by the bills. In this age of fiscal restraint, it is unlikely that agencies will be given additional resources to meet the requirements of the bills. Rather than overwhelming government with the exhaustive requirements of the bills it may be simpler if the bills stated “there shall be no regulation of private property.” The statutory takings legislation therefore is representative of a very broad distrust of governmental regulation at all levels.

In the largely rural states of Wisconsin and Minnesota, the takings bills and the distrust of government may not be founded entirely on the economic

186 Similarly, at the federal level, takings legislation has been introduced which would have a profound impact on a very broad assortment of governmental programs. Yet, the focus of much of the criticism at the federal level is with the Endangered Species Act. One surprising aspect of this attack is that the limited number of reported challenges to the Endangered Species Act as constituting a taking. Bruce Babbitt, The Endangered Species Act and Takings: A Call for Innovation Within the Terms of the Act, 24 ENVTL. L. 355, 361 (1994).


188 Wise, supra note 175, at 426.
motive for owning property as protected through the "reasonable investment-backed expectation" theories enunciated by the United States Supreme Court. In part, the bills may reflect a broader split between the interests of urban/suburban interests and rural interests. Behind this split lies a heightened noneconomic significance of property for rural landowners as compared to urban/suburban property owners. The majority of the population in both states live within metropolitan areas of the states which geographically cover relatively small portions of the state as a whole. Rural landowners may be reacting to the transfer of power to an urban/suburban majority that has promoted the development of the numerous state environmental programs impacting the use of land which are based on an urban/suburban understanding of property rights.

If the effect of the bills would unravel the system of public regulation, the unanswered question would be: what will replace the system? How will society deal with discordant land uses at all levels—neighbor to neighbor disputes, neighborhood to neighborhood disputes, municipality to municipality disputes, region to region disputes, and state to state disputes? The absence of governmental regulation does not leave a system of private property within which people have an absolute right to do whatever they want with property. In the absence of public regulation, society would return to an earlier stage in the evolution of property rights in which private property is regulated through devices such as restrictive covenants and neighborhood agreements, and by state common law doctrines such as nuisance.

Restrictive covenants and neighborhood agreements/associations have historically been used as land has been subdivided for development in order to exert certain controls over the use of property. Sometimes such devices

\[\text{189} \text{ James B. Wadley & Pamela Falk, } \text{ Lucas and Environmental Land Use Controls in Rural Areas: Whose Land is it Anyway?, } 19 \text{ WM. Mitchell L. Rev. 331, } 351-64 (1993). \text{ See also Neil D. Hamilton, } \text{Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law, } 72 \text{ Neb. L. Rev. 210, } 240-45 (1993); \text{ Harvey M. Jacobs, } \text{Social Equity in Agricultural Land Protection, } 17 \text{ Landscape Urban Plan. 21 (1989).} \]

\[\text{190} \text{ Wadley & Falk supra note 189, at 364.} \]

\[\text{191} \text{ See Hamilton, supra note 189, at 244 ("by diverting the current policy debate on environmental protection to a referendum on 'property rights' the agricultural community may miss an important opportunity to help society develop creative alternatives which accommodate both the public interest and land owner's desires").} \]

\[\text{192} \text{ No purely private property system could exist in practice. "Property rights were initially allocated through some form of political process, and in many cases through the most crude form of rent-seeking behavior: exercise of brute physical force." Sterk, supra note 153, at 1745 n.41.} \]
are very extensive in regulating the appearance and use of property. Other examples include privately developed “new towns” such as Columbia, Maryland, and Reston, Virginia. Residents of these communities, however, are not always happy with the outcome.

A potential result of returning to an earlier stage in the evolution of property rights and governmental regulation might in fact undermine some of the objectives property rights advocates seek to achieve. Property rights proponents have been unsatisfied with the courts’ “incremental, fact-based approach to property rights issues” which has been “costly and ineffective.” This, however, is exactly what, by definition, constitutes common law nuisance. Common law nuisance is extremely ad hoc and unpredictable:

Long before the modern era of comprehensive zoning, courts in the hit and miss, haphazard fashion of our case law and through loose standards of private and public nuisance were attempting to mitigate against the worst effects of unplanned, topsy-turvy land development in English and American communities. . . . The judge-made criteria for the resolution of such land use disputes show just the sort of vagueness, and resultant flexibility one would expect. And they show the extreme difficulty of choosing, through the individualized process of case law, between clashing land uses that exist in bewildering variety.

Herein lies a dilemma. Zoning evolved as a tool to address the problems of ad hoc adjudication and uncertainty in the era of nuisance control. The institutional incapacity of local government to address issues having broader than local impacts through zoning led to the federal and state programs in the early 1970s to protect critical natural resources. It is primarily these programs that are the target of the statutory takings reform.

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194 See Briefly Noted, 22 LAND USE LAW REPORT 207 (Dec. 28, 1994) (Some residents of Columbia, Maryland want the town to become a city rather than a community association because of the influence which the developer, the Rouse Company, exerts over commercial development in the town center and who ultimately works in the town. Residents of Reston, Virginia, are similarly studying alternative forms of governance because the town “for too long has been defined by the vision of its developer.” Id.).

195 Republicans Introduce Property Rights Bills, 23 LAND USE LAW REPORT 3 (Jan 11, 1995).

To return to an earlier era in the evolution of property rights and governmental regulation will reintroduce the problems of that era. While there seems to be consensus among many that the present system of land use regulation is not working, the solution lies in finding a way to work through the valid issues that the varied interests represent. Land use and environmental disputes are not going to go away.

IV. CONCLUSIONS

There are two ways to look at statutory takings legislation, and the anti-environmental and anti-government sentiments it represents. One way is through a legal lens, the second way is as expression of cultural symbol and as part of a broader social movement.

From a legal perspective, there is a strong basis to suggest that statutory takings is on shaky ground. The thrust of statutory takings legislation is to enshrine a particular concept of private property. It is a concept that sees private property as foundational to American democracy, and where the individual’s bundle of sticks should be as intact as feasible, absent a compelling public need. Yet, we have a rich literature that demonstrates the fact that property is a social creation, and is reshaped by society as social needs change. Professor Daniel Bromley’s recent discussion provides an example.\textsuperscript{197}

Bromley argues that private property only exists because society recognizes it and establishes a set of rules to enforce what society defines and accepts as private. Drawing from Kant, Bromley develops the notion of \textit{intelligible possession}, and distinguishes it from the idea of \textit{empirical possession}.\textsuperscript{198} Intelligible possession recognizes that “rights can exist only when a social mechanism that gives duties and then binds individuals to those duties exists. In the starkest possible terms, what I own is a

\textsuperscript{197} Daniel W. Bromley, \textit{Regulatory Takings: Coherent Concept or Logical Contradiction?}, 17 VT. L. REV. 647 (1993); Neil Hecht, \textit{From Seisin to Sit-In: Evolving Property Concepts}, 44 B.U. L. Rev. 435 (1964) (Provides a non-environmental example of the same phenomenon. He discusses the civil rights movement and racial integration in the early 1960s. In particular he addresses the public preemption of the private property right of a commercial establishment operator to refuse service. For over a century it had been assumed that the extension of commercial service was a private property right which the individual operator could exercise as they best saw fit. Changes in social mores resulted in a removal of this right from the property bundle absent compensation.)

\textsuperscript{198} Bromley, \textit{supra} note 197, at 653-54, emphasis in original.
function of what the members of the polity say I own—not what I say I own.”

The implication is that since the very nature of property originates with society, society is never illegitimate in its action toward private property. When society’s actions appear to represent a departure from a prior set of rules governing individual-social interaction, society is just articulating new rules, reflective of new social circumstances and necessities. Society is not obliged to any a priori rule structure. For Bromley, property is a completely moldable social construct, established by society to fulfill social needs, and thus changeable as social circumstances require it. As an example, he notes the widespread acceptance of public action that prevents a landowner from cultivating marijuana or running a house of prostitution. He ponders why this is socially acceptable while regulatory action to protect wetlands or farmlands is not. More precisely, Bromley wonders why one action is not a violation of private property rights under the provisions of the fifth amendment and the other is.

Presaging the sentiments of supporters of statutory taking legislation, Bromley summarizes his position by acknowledging that “land use and environmental policy is contentious precisely because it joins claims of individual freedom and private property rights.” He then reflects the environmentalist response by talking about the “myth of the overarching sanctity of private property,” and arguing that “the public cannot continue to be held hostage to the extortion that emanates from this view.” He concludes that this myth and view has “no basis . . . in economics, in philosophy, or in the law.”

To a large extent the emergence of the state and national movement for statutory takings is a direct response to the success of the environmental and land use movements, especially their regulatory aspects. For example, the quiet revolution in land use control of the early 1970s expanded and evolved through the 1980s and 1990s. It now encompasses state-based programs in 13 states and a plethora of resource-specific programs. At the national level, regulatory efforts based on the Endangered Species Act and the Clean Water Act are logical extensions of this same concern—i.e. that actions on the part of individual land owners and local governments

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199 Id. at 653.
200 Id. at 655.
201 Id. at 682.
need to cede to the authority of a more centralized perspective in order to yield resource management in the public interest. As the regulatory component of the environmental movement has expanded, it has been accompanied by legal analyses which suggest that private property must yield ever more to social concerns.\textsuperscript{203}

But the persuasiveness or "truth" of a legal/philosophical/political-economic analysis does not take away from the emotional power of private property in the U.S. as a cultural symbol. And it is this cultural symbol that is the driving force behind statutory takings legislation at all levels.

The cultural symbol of private property is being married to larger scale changes in the very way we go about planning for land use and environmental resource management. Throughout much of this century land use and environmental planning has been based on a model which was increasingly expert dependent, science deferential and administratively centralized.\textsuperscript{204} What can be seen throughout the U.S. is a multi-faceted movement, of which statutory takings legislation is but one part, which challenges this model.\textsuperscript{205}

Administrative centralization is challenged by a renewed sense of localism across the country.\textsuperscript{206} While citizens can rationalize the basis for centralization, they are increasingly concerned about ceding control for land use and environmental management decisions to levels of government which can be difficult for them to access and influence. It appears that there are instances where they prefer the anarchy of fragmented local control to the bureaucratization of centralized control.

This renewed sense of localism is part and parcel of widespread citizen activism which is itself in part fueled by the availability and possibilities of


\textsuperscript{205} Michael Heiman, \textit{From 'Not in My Backyard!' to 'Not in Anybody's Backyard!': Grassroots Challenge to Hazardous Waste Facility Siting}, 56 J. AM. PLAN. ASS'N 359 (1990) (documents a non anti-environmental example which is nonetheless borne of the same sentiments).

\textsuperscript{206} Jacobs, \textit{supra} note 14.
new information technologies. Citizen activism brings more people with more types of articulated interests into the policy and planning process. Increasingly citizens are convinced that their perspective on the public interest is the correct one, and they seem less willing to compromise, especially in an era of tight fiscal resources. The new information technology decentralizes access to specialized information resources. This allows citizen activists to develop more sophisticated analyses to support their positions, and to challenge the official positions put forth by planning agencies.\textsuperscript{207} Together, widespread citizen activism and the new information technology make planning processes less and less dependent upon experts, and more overtly political.

So, ultimately, statutory takings legislation presents a paradox. It is decidedly out of step with legislative and judicial trends throughout this century, nationally and in Wisconsin and Minnesota. These trends have, in general, allowed for increasingly broad governmental reshaping of private property rights so as to achieve an ever evolving and expanding definition of the public interest. Legal and philosophical analyses support these trends. These analyses emphasize the social basis and construction of private property. In contrast is the cultural and political basis for statutory takings legislation. It emphasizes the historical and social role, the necessarily fixed position, of private property in a democratic society. For supporters of statutory takings legislation it is precisely the legislative and judicial trends of the century which are the problem. For statutory takings supporters, it is necessary to introduce such legislation expressly to derail these trends and to establish a new direction in public policy.

The activism, even the fervor, of statutory takings supporters is in keeping with the increasingly politicized nature of land use and environmental policy. In general, the future of such policy will be centered around acknowledging that it is an area that is not and cannot be treated as purely technocratic or scientific. Land is a unique economic, ecological and social resource. Statutory takings legislation shows that land use policy can and does act as the stage for fundamental and complex social debate about individual and social rights and the impassioned articulation of ideals about democracy and social justice. For this reason alone, in one form or another, statutory takings legislation will be with us for the foreseeable future.
