

## WETLANDS REGULATION: THE "TAKING" PROBLEM AND PRIVATE PROPERTY INTERESTS

The importance of the coastal wetland ecosystem<sup>1</sup> and the seriousness of despoilation by landfilling has prompted increased state regulation of commercial wetland development.<sup>2</sup> Difficulty has arisen in reconciling the need for such regulation with the impairment of the

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1. Wetlands operate as natural storage basins for flood prevention and as natural breakwaters against tidal action, are important in maintaining groundwater levels, and produce abundant vegetation. This plant growth is an essential element in the food chain of fish and game. Two out of every three species of Atlantic fish depend in some way upon tidal lands and water for their survival; 90% of all fish caught by man are taken in shallow coastal waters. In 1967 commercial fishing brought \$438 million to U.S. fishermen, two-thirds of which came from estuarine dependent species. Wetlands are also critical in the survival of water fowl, fur-bearing animals, turkeys, and white-tail deer. They are often used to cultivate wild rice and cranberries and also serve as open spaces with recreational and educational value. Binder, *Taking v. Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1, 19-25 (1972) [hereinafter cited as Binder]. See F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 3-6 (1973) [hereinafter cited as BOSSELMAN]; TASKFORCE ON LAND USE AND URBAN GROWTH, THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH 14 (1973); Ausness, *Land Use Controls in Coastal Areas*, 9 CALIF. WESTERN L. REV. 391, 408 (1973).

2. In general these statutes all contain similar provisions which define wetlands, establish procedures for obtaining permits to fill or dredge, empower a respective agency to enforce the statute, and establish judicial review. See, e.g., CAL. GOV'T CODE §§ 66600-58 (Deering 1974); CONN. GEN. STAT. §§ 22a-28 to 45 (1975); GA. CODE ANN. §§ 45-136 to -147 (1974); ME. REV. STAT. ANN. tit. 12, §§ 4702-4709 (1974); MD. NAT. RES. CODE ANN. §§ 9-101 to -501 (1974); MASS. GEN. LAWS ANN. ch. 130, § 105 (Supp. 1974); N.J. STAT. ANN. §§ 13, 9A-1 to A-10 (Supp. 1975); N.Y. ENVIRONMENTAL CONSERVATION LAW §§ 24-0101 to -1303, 25-101 to -602 (1973) (the latter sections deal with tidal wetlands); N.C. GEN. STAT. §§ 113-229 to -230 (1975); R.I. GEN. LAW ANN. § 11-46.1-1, *as amended* (Supp. 1974); VA. CODE ANN. §§ 62.1-13.1 to -13.20 (Supp. 1972). The California, Connecticut, New Jersey, New York, Rhode Island and Virginia statutes also contain statements of public policy.

The New York and California statutes are the largest and most comprehensive. New York has two separate statutes, one dealing with fresh-water wetlands and the other dealing with tidal wetlands. N.Y. ENVIRONMENTAL CONSERVATION LAW §§ 24-0101 to -1303, 25-101 to -602 (1973). The California statute, which established the San Francisco Bay Conservation and Development Commission, is the most detailed. It includes eleven separate statements of findings and declarations of public policy, a detailed definition of San Francisco Bay, detailed provisions creating and empowering the commission, and provisions for a comprehensive plan for the development of San Francisco Bay. CAL. GOV'T. CODE § 66600-58 (Deering 1974).

private owner's valuable use of his wetland property.<sup>3</sup> The recent New Hampshire case of *Sibson v. State*<sup>4</sup> illustrates one approach to resolving this problem but does not offer a wholly satisfactory solution.

The *Sibson* case concerned a state regulation that prohibited the filling of saltmarshes without a permit from the State Water Resources Board.<sup>5</sup> The board had denied plaintiff-owners a permit to fill four acres of marsh to enable development of a residential subdivision.<sup>6</sup> Plaintiffs appealed to the superior court<sup>7</sup> contending that denial of the permit constituted a taking under the eminent domain clauses of the New Hampshire and United States Constitutions.<sup>8</sup> The superior court sustained the report of a judicial referee dismissing the appeal and trans-

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3. The general difficulty is disagreement over the standard used to determine whether the legislation in effect confiscates the private owner's property. See BOSSELMAN, *supra* note 1, at 318-19; Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974) [hereinafter cited as Berger]; Binder, *supra* note 1, at 1; Stevers, *Land Use Controls, Takings and the Police Power: A Discussion of the Myth*, 15 N.H.B.J. 149 (1974) [hereinafter cited as Stevers]. See generally Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) [hereinafter cited as Michelman]; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) [hereinafter cited as Sax, *Takings, Private Property and Public Rights*]; Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [hereinafter cited as Sax, *Takings and the Police Power*].

4. 115 N.H. 124, 336 A.2d 239 (1975).

5. N.H. REV. STAT. ANN. §§ 483-A:1 to -A:4, *as amended*, (Supp. 1973). The statute sets forth the legislature's conclusion that the regulatory protection of wetlands serves the public welfare by preserving the value of such areas as sources of nutrients and places of reproduction for fish, plants and wildlife. *Id.* § 483-A:1-b. Under the statute no person is allowed to excavate, remove, fill or dredge any bank, flat, marsh or swamp in or adjacent to any waters of the state (as defined by § 483-A:1-a) without giving written notice of his intention to the Water Resources Board. *Id.* § 483-A:1. The board must hold a public hearing within thirty days of receipt of the notice and "may deny the petition, or require the installation of bulkheads, barriers, proper retention and/or containment structures to prevent subsequent fill runoff into tidal water or other protective measures." *Id.* §§ 483-A:2, 483-A:3.

6. 115 N.H. at \_\_\_, 336 A.2d at 240. The land in question was a four acre parcel of a six acre area of saltmarsh (the remaining two acres had been filled previously). It is part of a 100 acre tidal wetlands area known as Awcomin Marsh. Plaintiffs purchased the property (for \$18,500) as a site for their residence and as a speculative investment. Brief for the State at *vi.*, *Sibson v. State*, 115 N.H. 124, 336 A.2d 239 (1975).

7. 115 N.H. at \_\_\_, 336 A.2d at 240. The statute allows appeal to the superior court of the county where the land in question is located. N.H. REV. STAT. ANN. § 483-A:4, I (1973). If the superior court determines that the board's decision is equivalent to a taking without compensation, and that determination becomes final, the superior court will then assess the landowner's damages. *Id.* § 483-A:4 II.

8. 115 N.H. at \_\_\_, 336 A.2d at 241 (1975). The New Hampshire Constitution provides: "[N]o part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." N.H. CONST. art. 12. For a discussion of relevant United States Constitution provisions see note 11 and accompanying text *infra*.

ferred plaintiffs' exceptions to the New Hampshire Supreme Court.<sup>9</sup> The Supreme Court upheld the denial of the permit as a valid exercise of the police power.<sup>10</sup>

Historically, there has been no conceptual problem in defining "taking"<sup>11</sup> to include actual physical appropriation or divestment of title by the government.<sup>12</sup> The focus has been on governmental regulations that are confiscatory in practice, *i.e.* de facto taking.<sup>13</sup> Before the Civil War the United States Supreme Court had little occasion to consider this issue.<sup>14</sup> The state courts at that time had established a "noxious use" doctrine which held that the reasonable exercise of the police power designed to protect the public from harm was not an unconstitutional taking.<sup>15</sup> The Supreme Court adopted this approach in *Mugler v. Kansas*<sup>16</sup> and applied the test until 1922 when Justice Holmes, in *Pennsyl-*

9. 115 N.H. at \_\_\_, 336 A.2d at 240. The referee's report concluded that the property was part of a "valuable ecological asset" of the seacoast area which the proposed fill would irreparably damage.

10. *Id.* at \_\_\_, 336 A.2d at 243.

11. The fifth amendment of the United States Constitution requires that private property shall not be taken for public use without just compensation being paid. U.S. CONST. amend. V. This has been construed to mean that before the federal government or the states are required to compensate a private property owner, there must be a finding that the property in question was "taken." *Cf.* *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166 (1871).

12. BOSSELMAN, *supra* note 1, at 106; Comment, *Land Use Regulation and the Concept of Taking in 19th Century America*, 40 U. CHI. L. REV. 854 (1973).

13. BOSSELMAN, *supra* note 1, at 3; *see* Berger, *supra* note 3, at 165; Michelman, *supra* note 3, at 1167-68; Sax, *Takings, Private Property and Public Rights*, *supra* note 3, at 151; Sax, *Takings and the Police Power*, *supra* note 3, at 36.

14. BOSSELMAN, *supra* note 1, at 114-15. Prior to the adoption of the fourteenth amendment, the fifth amendment was construed as a restraint only on the federal government and not the states. Regulatory taking problems were generally local in nature and concerned state constitutional provisions. They did not affect the federal government. *See* *Withers v. Buckley*, 61 U.S. (20 How.) 84 (1857); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

15. *See, e.g.*, *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851) (statute prohibiting the building of a wharf beyond a certain line held not to be a taking even though the wharf was wholly within the owner's property); *Commonwealth v. Tewksbury*, 52 Mass. (11 Metc.) 55 (1846) (statute which prohibited an owner from removing gravel from his private beach held not to be a taking of the land for a public purpose); *Stuyvesant v. Mayor of New York*, 7 Cow. 588 (N.Y. Sup. Ct. 1827) (New York City ordinance limiting cemeteries to certain parts of the city held not to be a taking).

16. 123 U.S. 623 (1887). *Mugler* concerned the beer manufacturers of Kansas who protested the 1880 Kansas constitutional amendment which prohibited the manufacture and sale of intoxicating liquors. At issue was whether prohibition amounted to a taking since its effect was to materially diminish the value of the manufacturers' brewery property. *Id.* at 655-57. Finding against the brewers, the Court restated the "noxious use" doctrine as follows: "A prohibition simply upon the use of property for purposes that are

*vania Coal Co. v. Mahon*,<sup>17</sup> enunciated the diminution of value test. The Court recognized that to some extent all governmental regulation of property diminishes the value of the property, but held that when a regulation eliminates practically all the value of the property, it amounts to an unconstitutional taking.<sup>18</sup> The diminution of value test has become the dominant standard cited by state courts to determine the "taking" effect of state regulations.<sup>19</sup> It has been used in numerous state court

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declared by valid legislation to be injurious to the health, morals, or safety of the community, cannot in any sense be deemed a taking . . . for the public benefit." *Id.* at 668.

17. 260 U.S. 393 (1922) (Pennsylvania statute prohibiting the mining of coal in such a way as to cause the subsidence of any structure used for human habitation held to be a taking).

18. Justice Holmes explained:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

*Id.* at 413. For other Holmes opinions on this concept see *Hudson Water Co. v. McCarter*, 209 U.S. 349 (1908) (statute made it unlawful to transport water from any body of water in New Jersey to any other state); *Interstate Consol. Street Ry. v. Massachusetts*, 207 U.S. 79 (1907) (statute required street railways to carry school children at a reduced rate); *Hideout v. Knox*, 148 Mass. 368, 19 N.E. 390 (1889) (statute prohibited the construction of "spite" fences over six feet in height).

Later Supreme Court decisions have been reluctant to rely on the diminution of value test. In two zoning regulation cases, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and *Nectow v. Cambridge*, 277 U.S. 183 (1928), the Court upheld the regulation without reaching the taking issue. But in *Miller v. Schoene*, 276 U.S. 272 (1928), the Court upheld a statute requiring the destruction of red cedar trees without compensation to the owners because the trees contained a parasite harmful to apple orchards, citing *Mugler's* authority. See BOSSELMAN, *supra* note 1, at 136-38. More recently in *Town of Hempstead v. Goldblatt*, 369 U.S. 590 (1962), the Court used a composite approach, balancing the extent of the diminution of the property value against the importance of the regulation to public safety and welfare and the availability of alternative means of regulation, to uphold a regulation prohibiting the operation of a gravel pit in an urbanized area. See BOSSELMAN, *supra* note 1, at 138; Note, *Wetlands Statutes: Regulation or Taking?*, 5 CONN. L. REV. 64, 80 (1972).

19. BOSSELMAN, *supra* note 1, at 138; Berger, *supra* note 3, at 176. New Hampshire case law illustrates the legal evolution of the diminution of value test, roughly similar to the national pattern. The New Hampshire Supreme Court first adopted the "noxious use" doctrine in *State v. Griffin*, 69 N.H. 1, 39 A. 260 (1897). In *Bigelow v. Whitcomb*, 72 N.H. 473, 57 A. 680 (1904), the New Hampshire court set forth an early variant of the diminution of value test which held the permanent deprivation of a private property owner's use of his property or the profits derived from the property was a taking. *Id.* at 484, 57 A. at 686. More recently the court has held that zoning regulations which deprived the private owner of the only and best use of his land are unconstitutional takings. *Town of Surry v. Starkey*, 115 N.H. 31, 332 A.2d 172 (1975) (action by town to prevent landowners from excavating

decisions to invalidate zoning,<sup>20</sup> floodplains,<sup>21</sup> and wetlands regulations.<sup>22</sup>

*Sibson* is the most recent in a series of cases upholding fill permits as a valid form of wetlands regulation.<sup>23</sup> The *Sibson* court, however, rejected the diminution of value test,<sup>24</sup> preferring instead a composite approach based on the "noxious use" doctrine.<sup>25</sup> The composite approach balances the relative interest of the state in preventing harm to

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gravel from their land in violation of local zoning ordinance); *cf. Carter v. Town of Derry*, 113 N.H. 1, 300 A.2d 53 (1973) (plaintiff had applied for a variance from local ordinance to construct a seasonal dwelling on an undersized lot); *Flanagan v. Town of Hollis*, 112 N.H. 222, 293 A.2d 328 (1972) (town had amended its zoning ordinance in effect to prohibit plaintiff from excavating gravel from his land); *R.A. Vachon & Sons, Inc. v. City of Concord*, 112 N.H. 107, 289 A.2d 646 (1972) (after plaintiff had secured approval from the city planning board for the layout of the lots in a subdivision development which then conformed to the existing zoning ordinance, the town amended its zoning ordinance to increase minimum lot size requirements); *Lachapelle v. Town of Goffstown*, 107 N.H. 485, 225 A.2d 624 (1967) (town denied plaintiff's petition for a variance from the local zoning ordinance regulating motor vehicle junk yards).

20. *See, e.g., Aronson v. Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964) (plaintiff's land had been zoned Single Residence District-Rural for the purpose of encouraging land to be kept in its natural state); *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938) (zoning ordinance which permanently restricted property so that it could not be used for any reasonable purpose went beyond regulation and held as a taking of the property).

21. *See, e.g., Dooley v. Town Plan & Zoning Comm'n*, 151 Conn. 304, 197 A.2d 770 (1964) (local floodplain zoning classification prevented residential and most commercial construction on the plaintiff's land). *But see Turnpike Realty Co. v. Town of Dedham*, 284 N.E. 891 (Mass. Sup. Jud. Ct. 1972) (Floodplains zoning regulation was upheld, despite diminution of the value of the plaintiff's land).

22. *See, e.g., State v. Johnson*, 265 A.2d 711 (Me. 1970); *Morris County Land Improvement Co. v. Township of Parsipanny-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963).

23. *Candlestick Prop. Inc. v. San Francisco Bay Conservation & Dev. Comm'n*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970) (legislative statements clearly defined the public interest and established a rational basis for the legislature to prevent bay land owners from filling those lands); *Potomac Sand & Gravel Co. v. Governor of Maryland*, 266 Md. 358, 293 A.2d 241 (1972) (dredge and fill statute upheld as a legitimate exercise of the police power); *Morris County Land Improvement Co. v. Township of Parsipanny-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963) (plaintiff's swamp property was placed in a floodwater detention basin with the object of retaining the land in its natural state; special permit was required to fill the land); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (county ordinance that prohibited the filling of wetlands contiguous to navigable waters without a special permit upheld). *Contra, State v. Johnson*, 265 A.2d 711 (Me. 1970) (prohibition against filling wetland was an unreasonable exercise of the police power).

24. 115 N.H. at \_\_\_, 336 A.2d at 241. The court accepted the state's argument that the Holmes diminution of value formula was imprecise and unsuited to the problems of wetland preservation.

25. 115 N.H. at \_\_\_, 336 A.2d at 241-43. The court maintained that so long as the action of the state was a valid exercise of the police power, it would not be a taking. The court distinguished this from the state's appropriations of private property for public use, where compensation would be required.

the public against the interests of the private owners.<sup>26</sup> In applying this test *Sibson* relied on the landmark case of *Just v. Marinette County*<sup>27</sup> which refused to consider the appreciated value of the land if filled,<sup>28</sup> since filling would have impaired the public interest.<sup>29</sup> The court also distinguished *Sibson* from a series of New Hampshire cases that had applied a variation of the diminution of value test to zoning regulations of current uses.<sup>30</sup>

In contrast to *Sibson*, the Maine Supreme Court in *State v. Johnson*<sup>31</sup>

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26. The composite approach analyzes the validity of the state action by balancing "the importance of the public benefit which is sought to be promoted against the seriousness of the restriction of a private right sought to be imposed." *Richardson v. Beattie*, 98 N.Y. 71, 75-76, 95 A.2d 122, 125 (1953) (state board of health had prohibited all human activity in certain areas of a lake to prevent contamination of a city water supply). In balancing these considerations, there is a presumption in favor of the state regulation. The regulation will be sustained unless the public interest is so clearly of minor importance as to make the restriction of private rights unreasonable. *Shirley v. New Hampshire Water Pollution Comm'n*, 100 N.H. 294, 124 A.2d 189 (1956) (state water pollution commission issued a cease and desist order to enjoin a town from discharging untreated sewage); *Dederick v. Smith*, 88 N.H. 63, 184 A. 595 (1936) (state veterinarian forcibly entered plaintiff's property to examine cattle for tuberculosis); *Woolf v. Fuller*, 87 N.H. 64, 174 A. 193 (1934) (statute requiring itinerant vendors to pay a license fee applied to plaintiffs who temporarily operated a retail shoe store). See note 18 *supra*.

27. 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (plaintiff filled a portion of his wetland property in violation of a county ordinance prohibiting such filling without first obtaining a permit).

28. The *Sibson* court agreed with the referee's determination that none of the traditional uses of marshlands, e.g., wildlife observation, hunting, clam and shellfish harvesting, had been denied plaintiffs. The board's denial of the permit was not seen as a denial of the plaintiff's current use of the marsh, but rather as the prevention of a major change in the marsh for speculative profit: "An owner of land has no absolute and unlimited right to change the essential character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." 115 N.H. at \_\_\_, 336 A.2d at 243, quoting, *Just v. Marinette County*, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972).

If the land in *Sibson* had been filled and subdivided as planned, it would have been worth approximately \$158,000. In its unfilled condition the land was of no economic value. Brief for Plaintiff at V., *Sibson v. State*, 115 N.H. 124, 336 A.2d 239 (1975).

29. It seems to us that filling a swamp not otherwise commercially usable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp. Too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the public. *Just v. Marinette County*, 56 Wis. 2d. 7, 18, 201 N.W.2d 761, 770 (1972). The court also emphasized Wisconsin's public trust doctrine which requires that "the state not only promote navigation but also . . . protect and preserve those waters for fishing, recreation and scenic beauty." *Id.* at 13, 201 N.W.2d at 768.

30. *Sibson v. State*, 115 N.H. 124, \_\_\_, 336 A.2d 239, 242-43 (1975). The court expressed an unwillingness to extend its holding in *Sibson* to the line of zoning cases dealing with legitimate current uses which are the most feasible uses of the zoned property. *Id.* at \_\_\_, 336 A.2d at 242. See note 19, *supra*, for a discussion of these zoning cases.

31. 265 A.2d 711 (Me. 1970). See also Halperin, *Conservation, Policy and the Role of Counsel*, 23 MAINE L. REV. 119 (1971).

relied heavily on the diminution of value test to declare a wetlands regulation unconstitutional as a taking.<sup>32</sup> Using the prospective value of the land in a filled state as a basis, the court determined the extent of the private owners' loss and found that the owners had been deprived of the reasonable use of their property. The regulation was "both an unreasonable exercise of the police power and equivalent to taking."<sup>33</sup>

*Johnson* and *Sibson* represent the extremes in resolving the conflict between the public interest in preventing despoilation of wetlands and the protection of private property rights. *Johnson* relied heavily on the diminution of value test and considered the appreciated value of the filled property.<sup>34</sup> *Sibson* discounts both of these considerations.<sup>35</sup>

Both approaches, however, are subject to significant criticism. Many commentators have asserted that the diminution of value test, relied on in *Johnson*, is inadequate.<sup>36</sup> Particular criticism has focused upon the inequities of valuing property interests<sup>37</sup> and the questionable fairness of a decision which relies almost solely on the value of the property.<sup>38</sup> The test has also been challenged as inconsistent with previous constitutional law and the historical bases of the fifth amendment.<sup>39</sup> The *Sibson* approach, however, does not offer a wholly sound alternative. A doctrine which reasons that a property owner may not use his land for any purpose which may cause harm to the public can be extended to encompass actions by private property owners that heretofore have never been characterized as harmful to the public. Such extension of the definition operates to reduce the private ownership interest<sup>40</sup> in develop-

32. 265 A.2d 711, 715. In *Johnson*, the Wetlands Control Board rejected the landowners' application for a permit to fill their wetlands property for building purposes.

33. *Id.* at 716.

34. *Id.*

35. See notes 26-29 and accompanying text *supra*.

36. BOSSELMAN, *supra* note 1, at 238-55; Berger, *supra* note 3, at 176; Binder, *supra* note 1, at 4; Michelman, *supra* note 3, at 1190-93; Sax, *Takings, Private Property and Public Rights*, *supra* note 3, at 151-52; Sax, *Takings and the Police Power*, *supra* note 3, at 37-38; Stevers, *supra* note 3, at 159-62.

37. Sax, *Takings and the Police Power*, *supra* note 3, at 37-38; Stevers, *supra* note 3, at 159-62.

38. Michelman, *supra* note 3, at 1190-93.

39. BOSSELMAN, *supra* note 1, at 238-40; Stevers, *supra* note 3, at 159-62.

40. Justice Holmes expressed a fear of this in his opinion in *Pennsylvania Coal*: "When this seemingly absolute protection [of private property] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This problem is due, in part, to the difficulty of defining the concept of harm. Neither the courts nor commentators have adequately dealt with the problem. Professor Sax would limit harm to specific categories, *i.e.*, uses that "physically restrict a

ment of the land, as in *Sibson*. Prior to the recognition of the important environmental role of wetlands, the property owner's speculative interest in filling the marshland for commercial purposes was generally recognized since such commercial development was seen as the only practical use.<sup>41</sup> The importance of private property interests is reflected in a variety of proposals which account for the landowner's speculative concern based on cost-benefit analysis and resource allocation.<sup>42</sup> *Sibson* effectively eliminates these interests by refusing to take into account the value of the marshland in its filled state.

The conflict involved in the regulatory taking issue is too complex to be resolved entirely by either the diminution of value approach or the *Sibson* approach. The net result of the respective approaches is confusion in those difficult cases where the court feels forced to choose between substantial harm to the public and destruction of important private property interests.<sup>43</sup>

An alternative approach to resolving these difficult cases would be to uphold the regulation when use of the police power is the only feasible means of protecting the public interests. The existence of an alternative that would protect the private property owner's interest as well as protect the public interest would show that the use of the police power

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neighbor, burden a common, impose on the community an affirmative burden of providing public services, or adversely affect some interest in health or well-being." Sax, *Takings, Private Property and Public Rights*, *supra* note 3, at 151-52. See also 86 HARV. L. REV. 1582, 1590-91 (1973).

41. Cf. Binder, *supra* note 1, at 25-30. Wetlands are ideal locations for airports, garbage dumps, and industrial and residential developments. *Id.* at 25.

42. Ausness, *Land Use Controls in Coastal Areas*, 9 CALIF. WESTERN L. REV. 391, 418-23 (1973); Berger, *supra* note 3, at 193-226 (first-in-time approach provides a means of dealing with the taking problem based on estoppel); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1115-24 (1972) (discussion of a method of choice between alternative means of wealth distribution based on use of the alternative with the greatest economic efficiency); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973) (development potential of a piece of property is transferred to another piece of property); Michelman, *supra* note 3 (cost-benefit analysis based on utilitarian philosophy); Sax, *Takings, Private Property, and Public Rights*, *supra* note 3 (argues that owner of property is entitled to the highest and best use of his land that can be made without producing adverse effects on health or property of others); Sax, *Takings and the Police Power*, *supra* note 3 (discusses the government as arbiter and as participant in competition among conflicting interests in property uses as a basis for distinguishing "takings" and exercises of the police power); Waite, *Governmental Power and Private Property*, 16 CATHOLIC U.L. REV. 283, 284-85 (1967) (discusses the economic and social effects of government on private property).

43. Compare *State v. Johnson*, 265 A.2d 711 (Me. 1970), with *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

was not absolutely necessary.<sup>44</sup> Such an approach would have the practical effect of encouraging the use of alternatives that better balance public and private interests. In those cases involving multiple alternatives, that alternative which adequately protects the public interest with the least invasion of private interests should be chosen.

The state can protect tidal wetlands through either large-scale use of the power of eminent domain or use of a police power regulation similar to zoning. A strict application of the diminution of value test would prevent use of the police power and leave only the state power of eminent domain.<sup>45</sup> Such large-scale use of the eminent domain power,<sup>46</sup> however, would make the cost of preserving tidal wetlands prohibitive.<sup>47</sup> In those states with a smaller total acreage of wetlands or endangered areas, the use of the eminent domain power might be less expensive and less impractical. Factors to be considered in determining the feasibility of such an alternative include the absolute cost of the use of the eminent domain power, the social costs (measured by cost-benefit analysis), the economic and social effects of increased government regulation,<sup>48</sup> and the public benefit derived from wetlands preservation.

Another approach applicable to the regulatory taking issue is the first-in-time analysis developed by Professor Berger.<sup>49</sup> Under this

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44. Underlying this analytical approach is a pragmatic recognition that private ownership interests are important, but often in conflict with equally important public interests. It recognizes that unnecessary invasion of either interest may lead to significant physical, economic and social damage. *See* *Town of Hempstead v. Goldblatt*, 369 U.S. 590 (1962).

45. Brief for the State at 1, 8, 12, *Sibson v. State*, 115 N.H. 124, 336 A.2d 239 (1975).

46. The cost of the use of the power of eminent domain to purchase all privately-owned wetlands in New Hampshire was estimated at \$178 million. *Id.* at 1.

47. *Id.* at 8.

48. *Id.* at 1, 8, 12.

49. Berger, *supra* note 3, at 193-226. Professor Berger outlines a rather complex set of tentative rules for applying the first-in-time approach. *Id.* at 223-26. Rule 7 outlines in detail the application of the approach to the regulatory takings problem:

If at the time of detrimental act [defined in rule 1(a) to refer to that time when an owner of land enters into a binding agreement to purchase realty or to construct improvements upon it] an owner of land knows or should know of governmental plans to prohibit by local regulation his projected activity in that place, and such a regulation is later passed, the regulation is not an unconstitutional taking of his property no matter how adversely the regulation affects him. But if at the time of detrimental act the owner does not know and should not know of the plans, or if in fact there then are no such plans at all, and such a regulation, later passed, causes a decrease in the value of his land, then

(a) if the harms inflicted by the activity are less than the benefits it confers, and if

(1) the decrease in value to the owner's property caused by the regulation is substantial, the regulation should be declared void as an unconstitutional taking; but if

(2) the decrease in value to the owner's property caused by the regulation is less than substantial, the regulation should go into effect and compensation be paid

analysis, an owner's knowledge of government plans to prohibit development activities by regulation will prevent any subsequent restriction of land use from being an unconstitutional taking despite its effect on property values.<sup>50</sup> If the property owner has no reason to know of such regulation, he will then be entitled to compensation based on the difference between the value of the property after the enactment of the regulation and the value it would have had if there had been no regulation.<sup>51</sup> The first-in-time analysis appears to be preferable to the public-private interest balancing test formulated by the *Sibson* court. The government's need to pay compensation is restricted to a narrow set of circumstances and a form of equitable protection is extended to truly unknowledgeable property owners.

*Sibson* upheld the fill permit system of wetlands regulation under a test which courts have refused to apply in other taking cases involving traditional zoning regulations.<sup>52</sup> Despite recognition of the importance of the environmental issues involved, the court failed to adequately resolve the public versus private interest conflict inherent in the regulatory taking issue. Neither the police power analysis used in *Sibson* nor the diminution of value doctrine which it rejected have been totally satisfactory. Alternative approaches must be sought.

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measured by the difference between the value of the land immediately after the enactment of the regulation and the value it would have had at that time if there had been no regulation.

(b) if the harms inflicted by the activity are more than the benefits it confers, the regulation should go into effect and compensation be paid measured by the difference between the value of the land immediately after enactment of the regulation and the value it would have had at that time if there had been no regulation.

*Id.* at 224-25.

50. *Id.* at 196.

51. *Id.* See discussion of diminution of value test notes 19 & 30 *supra*.

52. See note 23 *supra*.