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Compensable Regulations and an Alternative Compensation System

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COMPENSABLE REGULATIONS AND AN ALTERNATIVE COMPENSATION SYSTEM*

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I. INTRODUCTION

The traditional dichotomy between governmental regulation and takings law no longer represents a viable means of accomplishing present day societal or individual goals with respect to land use. Internally, the system is fraught with inconsistent application, disparate distribution of governmental funds, and inadequate remedies. Externally, it fails to protect our crucially important land resources.

Along with a growing awareness of the need to guard against thoughtless development of our finite resources, we are beginning to witness a transition in fundamental philosophical, social, economic, and ethical thought relative to land-use decision making. It is difficult, however, to reconcile the need for increased control with our society's constant emphasis upon individual autonomy within a private property system.

This author believes that a system can be created that considers both the interests of the government and the individual, attempting to reach an equitable and practical result with respect to each. This article explores the potential use of an alternative compensation system relating to governmental activity in the field of land use—a system based not upon the highest and best use principle, but rather upon the use of compensable regulations.

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The article begins by analyzing the internal shortcomings of the present regulation-takings law. It next provides alternatives which either remedy or avoid those shortcomings. The author addresses underlying normative and ethical issues that relate to the proposed system, testing it for its efficiency as well as its equity. Finally, the article examines compensable regulations and an alternative compensation system as applied to agricultural land preservation. The author does not suggest abandonment of all traditional concepts concerning government involvement in land use, but recommends that this area of the law be modernized.

II. THE PROBLEM

Traditionally, land use controls have been categorized as either an exercise of the government's police power or as an exercise of the government's power of eminent domain.[1] This dichotomy is no longer workable. The traditional dichotomy is anachronistic and has created three serious anomalies that render it inadequate.

First, no clear definitive line exists between a valid exercise of the police power and an invalid taking.[2] The lack of a workable standard has prompted a description of this area of the law as "apparently senseless."[3] The present standard promotes neither uniformity nor predictability within the law, both of which are necessary conditions for a viable legal sys-

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1. *See, e.g.*, Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974).

2. Generally four "tests" are enunciated for determining when a regulation becomes a taking: 1) the physical invasion test; 2) the diminution in value test; 3) the balancing test; and, 4) the noxious use test. *See* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1183-1201 (1967); *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1466-86 (1978); F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 51-138 (1973). To these tests may be added a fifth, the social versus legal property test. "Social property refers to those things well socialized people recognize as the owner's property; legal property means those things that an owner can claim as his only on the basis of legal advice." B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 156-67 (1977). *See also* Krier & Schwartz, *Book Review*, 87 YALE L.J. 1295, 1307-08 (1978) (to Krier and Schwartz, Ackerman's discussion is the "most successful and convincing account" of the regulation-takings dichotomy); Soper, *On the Relevance of Philosophy to Law*, 79 COLUM. L. REV. 44, 61 (1979). The social versus legal property test is a convenient one, but courts often fail to make the distinction or they confuse the two. *See generally* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

3. Krier & Schwartz, *supra* note 2, at 1307.

tem. Take, for example, wetlands legislation which requires that a landowner obtain a permit before she backfills and develops her land. Assume that the requested permit is denied, thus frustrating the landowner's desire to develop. The landowner can challenge the denial of the permit or the legislation on its face as an unconstitutional taking. In one state the legislation can be held to be a valid exercise of the police power, which means the land can be rendered virtually useless.[4] In another state this legislation can be held an invalid taking unless the government acts pursuant to its eminent domain power and pays the landowner just compensation according to the land's highest and best use value.[5]

Such conflicts arise because courts have a multiplicity of tests from which to choose. Furthermore, the tests themselves are not internally sound. The outcome of the balancing test, for example, naturally depends upon what goes into the balance. On behalf of the landowner do we measure the harm inflicted on the particular parcel in question or do we measure the harm to the landowner's entire property portfolio? Generally, the balancing test only evaluates harm to the parcel in question, but in comparison to what? Do we measure the gains to contiguous landowners? The community? The world? Where does the causative chain end? Thus, the first anomaly in the traditional regulation-takings jurisprudence is one of contradiction—cases with similar fact patterns often reach opposite conclusions.

There is a second anomaly in this area sometimes known as the "disparity issue."[6] This anomaly concerns the way in which the legal system affects the value of land and distribution of benefits and harms throughout society relative to land use decision-making. Return for instance, to the wetlands legislation example. Assume that the legislation was upheld as a valid police power regulation. The land, which had been purchased for $20,000, had a hypothetical market value of

4. *See* Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975); State Dep't of Ecology v. Pacesetter Constr. Co., 89 Wash. 2d 303, 571 P.2d 196 (1977); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972).

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

6. Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402, 403-05 (1977); *see also* Waite, *Governmental Power and Private Property*, 16 CATH. U. L. REV. 283, 286-94 (1967).

$25,000 as a residential tract and $50,000 as a commercial tract. But once the land use restriction (*i.e.*, the denial of the permit) was upheld, the land's market value dropped to $5,000. The landowner thus suffered a loss under current eminent domain law of up to $45,000,[7] yet retained title to a $5,000 parcel of land. To add insult to injury, the landowner still has tax and nuisance liabilities. If, on the other hand, the legislation was upheld and the government decided to condemn the land, the landowner could successfully argue that she was entitled to $50,000 as just compensation. Thus, if the government chose to use its eminent domain power, the landowner could be the beneficiary of a $25,000 gain (highest and best use minus current market value—windfall?), or if the police power were exercised the landowner could be the victim of a $45,000 loss (again, highest and best use value minus value after denial of permit—wipeout?)[8]

Why the disparity in treatment? What is in reality partially a paper loss to the landowner in the case of the exercise of the police power (since $25,000 of the $45,000 loss is based on future expectation the out of pocket loss is only $20,000) becomes a real $45,000 out of pocket payment by the government in the case of an exercise of the power of eminent domain.

The decision of which power to exercise, therefore, is crucial and must be made according to a larger frame of reference.[9] This requires an examination of the tests and standards

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7. *See* text accompanying notes 22-29 *infra* for a fuller discussion of the highest and best use value.

8. A full discussion of windfalls and wipeouts is contained in WINDFALLS FOR WIPEOUTS (D. Hagman & D. Misczynski eds. 1978).

9. The higher frame of reference now needed is one which permits consideration of the normative and positive attributes of a theory of property. This is discussed below in connection with compensable regulations in terms of equity and efficiency. For a discussion of normative principles relative to regulations-takings law in general, *see* Michelman, *supra* note 2, at 1214-24; B. ACKERMAN, *supra* note 2; WINDFALLS FOR WIPEOUTS, *supra* note 8, ch. 7; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 465 (1978).

The choice of a particular theory of property is crucial. An exposition of the range of choices is unwarranted here. For a discussion of theories of property, see Michelman, *supra* note 2, at 1202-12; L. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS (1977); B. ACKERMAN, *supra* note 2, chs. 3 & 4. It is difficult to pick a single theory as a general theory of property. In fact no unitary property theory exists. Professor Ackerman's analysis bemoans the lack of a comprehensive view in current takings jurisprudence, *id.* chs. 6 & 7. Moreover, because of the nature of our pluralist society and because of the pervasive but ad hoc government involvement in land use decision-making, it may be that no unitary theory is likely to emerge. *See,*

courts use to pigeonhole a measure into the police power or eminent domain categories which in turn produces the anomalies of contradiction and disparity because of the multiplicity of tests available.

The third and final anomaly might be called the remedy anomaly. Regulation-takings law does not provide adequate remedies as demonstrated again by our wetlands hypothetical. A governmental entity has passed a measure that purports to prevent the landowner from developing her land. It does so in the name of ecology because fragile ecosystems must be protected for the greater public good. The landowner who challenges this measure may do so on a number of substantive law theories: that the regulation violates equal protection principles as it discriminates against the landowner; that it is not reasonably nor rationally related to the ends sought to be achieved and hence is a violation of the new equal protection or the old substantive due process; or, that this regulation is simply an unlawful exercise of the police power—a taking without just compensation.

Regardless of the substantive theory chosen, the remedy is the same—a declaration of invalidity of the challenged governmental measure. The direct result is that the government's desire to protect the ecosystem is defeated. Yet, if the government's desire for ecological protection is strong enough, it may choose to exercise its power of eminent domain,[10] provided that this alternative is not prohibitively expensive. Thus, the police power/eminent domain scheme appropriately may be called "winner take all." If the government "wins," the regulation stands and the property owner's land suffers a diminution in value. If the property owner "wins," the government's regulation is invalidated and the purpose behind the regulation is frustrated.

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e.g., T. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979). Moreover, as Ackerman's analysis demonstrates, the very concept of "property" is an evolving one. *See also* Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

10. Although the exercise of this power is not free from challenge, the most common challenge is ineffective. The argument that the subject property was not taken for "public use" has not been viable since the late 1940's. Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949). *See* Berman v. Parker, 348 U.S. 26 (1954). For a discussion of public use and environmental protection see W. RODGERS, ENVIRONMENTAL LAW 2.16 (1977).

Logically, it would seem that owners of devalued land might have a damage remedy available; inverse condemnation suits were once thought to be the answer. In such a suit, the landowner would ask for money damages caused by the regulation or ask for a court order forcing the government to condemn the property and take title subject to just compensation. This approach has not been fruitful.[11] As a practical matter, the failure of inverse condemnation law seems appropriate, given the current state of the law. Otherwise, the courts would be forcing governments to take land they did not explicitly want to acquire, exercising a land-planning function reserved for local governments, and exercising considerable control over governmental purse strings.

In sum, current regulation-takings law has three serious deficiencies that might be called the anomalies of contradiction, disparity, and remedy. What is needed therefore, is a mechanism that steers a course between regulations that depress the value of private property and a strict takings jurisprudence that severely impedes the government's ability to regulate certain areas of land use decision-making. As argued below, compensable regulations provide just such a mechanism if they are accompanied by a compensation system that is truly an alternative to existing law. Such a scheme will prove to be a positive legal accommodation[12] between the eminent domain and police powers. Furthermore, such a system can be shaped so that it will accommodate both the norms underlying today's conception of private property *and* those norms that underlie the activist state. Moreover, compensable regulations can be designed to protect a class of property interests distinct from those currently protected by extant regulation-takings law, specifically, a landowner's reliance interests.

III. COMPENSABLE REGULATIONS: THE EMERGING LAW

In an era of increasing governmental regulation of land

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11. *See, e.g.*, HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975); Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980). Girard, *Agins: A Step in the Right Direction*, 31 LAND USE L. & ZONING DIG. 3 (Sept. 1979).

12. *See, e.g.*, Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975).

use, the environment, and natural resources, the legal system must re-evaluate its standards for categorizing land use controls. By dichotomizing controls into the two broad categories discussed above, an important middle ground is ignored. A decision to treat a governmental action as a regulation or a taking ignores the category of land use devices known as compensable regulations.

A growing body of scholarship supports the view that the compensation/no compensation dichotomy is no longer justifiable. The traditional categories were developed during a period of limited governmental involvement in land use and resource protection.[13] Considering the increase in government regulations that impinge upon a landowner's property rights, the dichotomy is no longer consistent with social policy.

Compensable regulation is a system that involves the payment of some compensation to the property owner to offset the devaluing effect of the governmental measure.[14] Within this scheme, the exercise of power is deemed to be a regulation, which traditionally required no compensation, yet some compensation is given. The term "some" is used in contra-distinction to the "highest and best use" measure utilized under takings law. Several questions remain: How much compensation should be paid; how much must be paid to avoid the constitutional taking challenge;[15] and, may the compensation take a form other than direct cash payments? Through this system, the government acquires an interest[16] in the regulated prop-

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13. *See, e.g.*, WINDFALLS FOR WIPEOUTS, *supra* note 8, at 256-307; F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 2, at 302-17.

14. F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 2, at 302; WINDFALLS FOR WIPEOUTS, *supra* note 8, at 256.

15. The regulation may not sustain constitutional attack if the amount of compensation is not deemed to be the "just compensation" required by the Constitution. *See, e.g.*, Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (Rehnquist, J., dissenting).

16. It is not necessary that the government acquires a property interest; it can rent:

> When there is a harsh regulation constituting a taking, the court shall require payment of damages while the invalid regulation was in force. The court shall further hold the matter and permit the local government to consider whether it wants to continue the regulation in force and pay future damages. If the government so indicates, the damages shall be the difference in the annual rental value of the property regulated and as it could be validly regulated, with payments made annually so long as the invalid regulation is continued in force. No property interest is acquired.

erty equivalent to the right to develop in excess of the regulation.

The compensable regulation approach has a number of potential advantages. First, the government can directly attack a land use problem without the need to clothe a particular land use control in regulation garb. Landowners recognize, then, that their property rights are being diminished but that the value of these rights will not be reduced to the point of disutility.[17] Second, the underlying legislation and regulations thought to be desirable will likely sustain constitutional challenge because compensation is being paid.[18] Third, the scheme should promote uniformity within the law by broadening the categories of land use activities subject to government involvement, thereby opening up a new set of land use preservation and development controls. Fourth, by requiring the government to pay less money for its activities, sources of capital may be made available for other needs. Fifth, compensable regulations need not be inflexible, rather:

> Compensable regulations are not intended to supercede public acquisition and zoning where these devices make sense as means of controlling development. They are specifically designed to help meet the objectives of timing and controlling the character of urban growth through the preservation of open space in private hands.

WINDFALLS FOR WIPEOUTS, *supra* note 8, at 296.

17. "Disutility" is used in the broad sense to mean that point below which compensation will be required. The question of the amount of compensation needed pursuant to this theory of compensable regulations is discussed below in text. This "landowner recognition" has also been termed demoralization cost. Michelman, *supra* note 2, at 1214.

18. In a constitutional context, the question is raised as to whether or not the alternative compensation system satisfies the constitutional "just compensation" requirement. Briefly, the argument is that the highest and best use principle is not of constitutional dimension; rather, it is of a second order and that as social needs arise, these second order constitutional norms can and should change. *See, e.g.*, Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). Under the just compensation requirement the compensation must evoke the ideas of fairness and equity. *See* United States v. Commodities Trading Corp., 339 U.S. 121, 124 (1950). Thus, the highest and best use principle can be fair and equitable in an era which favors the development and expansion of resources. In another era that is less inclined to favor such development another measure would be fair and equitable. This author argues that the alternative compensation system offered here is such a principle. *See* L. TRIBE, *supra* note 9, at 463-65. The power of the court to alter such a second order constitutional rule, or to uphold a legislative enactment which does so, should be strengthened in an area where the court engages in ad hoc decision-making as it does in the taking area. *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

> These objectives can be advanced by a combination of temporary and long-term controls. The temporary controls keep land suitable for development or public acquisition open and in a natural condition until the time is right for the development or acquisition to take place. The long-term controls, through judicious preservation of open land, can shape development, conserve natural resources, and provide accessible amenities.[19]

Sixth, the land remains on the local tax rolls. While the imposition of compensable regulations may necessitate tax relief it does not eliminate the land as a source of revenue. Finally, a system of compensable regulations possesses an innate flexibility. There are various types of land use controls that can be classified as compensable regulations. These devices can be administered either through a court[20] or through more specific legislation.[21]

Having defined "compensable regulations" we have only delineated a source of government power and legitimizing authority. Even if one accepts the legitimacy of the accommodation power, there is no guarantee that compensable regulations will serve any end other than expanding government control of land use decision-making.[22] Such control hardly represents an accommodation between the interests and rights of private property owners and the government's desire to protect resources unless one asks "how much" compensation is due. This article suggests an alternative compensation system that purports to define and justify an alternative measure.

In order to understand the realm of compensable regulations, we must first examine the premises we use in valuing land. The general rule the legal system uses to value land in

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19. Krasnowiecki & Strong, *Compensable Regulations for Open Space: A Means of Controlling Urban Growth*, in NO LAND IS AN ISLAND 141 (1975). Krasnowiecki & Strong outline their own device which is not followed in this article. For a development of the history of compensable regulations see Hagman, *Compensable Regulation*, in WINDFALLS FOR WIPEOUTS, *supra* note 8, at 256-66. *See also* Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961).

20. *See, e.g.*, MODEL LAND DEVELOPMENT CODE § 9-112(3) (Proposed draft, April 15, 1975).

21. Hagman, *Compensable Regulation*, in WINDFALLS FOR WIPEOUTS, *supra* note 8, at 269-72.

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

eminent domain proceedings sounds deceptively simple: the condemnee is entitled to the fair market value of his property.[23] An accepted definition of fair market value, for eminent domain purposes, is a price "agreed to by an informed seller who is willing but not obligated to sell, and an informed buyer who is willing but not obligated to buy."[24] This definition contains certain inherent difficulties: 1) it involves a hypothetical transaction and thus is speculative; and 2) it presumes full knowledge on the part of the buyer and seller. When such a hypothetical sale is created, the land is valued from the buyer's viewpoint because the seller is assumed to know what the buyer plans to do with the property. Thus, the buyer who is in a position to develop the property to its highest and best use is valuing that property according to his own desires. Likewise, the seller attempts to set the price to fit the buyer's developmental goals. In theory, therefore, the property is sold for its highest and best use value, thereby fulfilling the landowner's highest reasonable expectations.[25] Even though it seems somewhat specious to argue that land in an undeveloped state has inherent value apart from its ownership, nevertheless, the fair market value of the land in eminent domain cases has been defined in those terms.[26] One might ask why the landowner must be given something more than that which he actually holds?

Regardless of which theory of economic development one follows, until recently, land has been regarded as the basis of wealth. Moreover, the production and development of land, including the exploitation of our nation's resources, have been the expoused policy on which land use law rests. It is not surprising that courts have valued land according to a highest and best use principle, thereby providing a profit incentive that encouraged land development.[27] Today, however, environmental regulations seek to conserve our finite resources. It seems only fitting that the courts reflect this policy in the area of eminent domain as well. The current trend toward slowing development, or at least not encouraging uncontrolled devel-

23. 4 NICHOLS, THE LAW OF EMINENT DOMAIN § 12.2 (rev. 3rd ed. 1974).

24. UNIFORM EMINENT DOMAIN CODE § 1004(a) (1978).

25. *See, e.g.*, Costonis, *supra* note 12, at 1049-55; *Developments in the Law—Zoning*, 91 HARV. L. REV. 1429, 1498 (1978).

26. *See, e.g.*, Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

27. *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 202-227 (1973).

opment, can be implemented by abandoning the highest and best use principle and adopting an alternate valuation principle.

In addition to the policy considerations discussed above, the highest and best use principle often leads to questionable results. The problems can be traced to weaknesses in the hypothetical transaction used to define fair market value. Landowners frequently sell because of an inability, financial or otherwise, to develop their land profitably. As a result, sellers are frequently compensated for the value of the highest and best use of their land, when, in fact, they had neither the intention nor the ability to develop the land to its highest and best use.

The weakness of the hypothetical willing buyer and willing seller theory is that it determines the value of property based on a fiction of the fully informed and willing buyer figure. If the constitutional mandate is to compensate owners of property, then the value of property should be based upon its value in its owner's hands. In lieu of the highest and best use principle, emphasizing the particular physical characteristics, topography, and demography of the land, the status of the owner should be the focus of a land valuation. Thus, the owner's abilities and plans to develop should be taken into account[28] along with more traditional valuation factors. Support for this proposal can be found in the New York Court of Appeals' decision in *Penn Central Transportation Co. v. City of New York*.[29] There Chief Judge Breitel not only considered the topographic and demographic characteristics of the Grand Central Terminal, but also examined the history and ownership of the Terminal and the potential for development of surrounding parcels. Only then did he decide that the land on which the Terminal was located had public and private value wholly apart from its physical characteristics.

The proposed valuation alternative should be distinguished from a pure value to the owner standard under which property is valued considering subjective attributes peculiar to a given landowner. A landowner should not be permitted to argue, for example, that the condemned land has been in his family for five generations and therefore has acquired a

28. *See* Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165, 195-98 (1974). Berger argues that taking the owner's knowledge into account in the valuation process meets a fairness criterion.

29. 42 N.Y.2d 324, 366 N.E.2d 1271 (1977).

unique value to him which is deserving of compensation. However, land is often purchased for a specific purpose such as development or agriculture production. Such land use plans are questions of fact, and the owner should have the burden of proving that his plans are neither unreasonable nor unrealistic. If he sustains that burden, then the land should be valued according to its planned purpose.

Courts appear to have adopted a value to the owner standard by espousing a policy of indemnification.[30] The courts have said that just compensation is intended to put the property owner in as good a financial position as he would have been in, but for the condemnation; the economic impact of condemnation is to be borne by the public, rather than the individual landowner. In actuality, however, the courts have not provided complete indemnification. Owners have not received compensation for numerous incidental and consequential damages such as loss of business, loss of future profits, business interruption, relocation cost, appraisals, surveys, attorneys' fees, and loss of goodwill of a going concern.

If the status to the owner standard were applied to a parcel of farmland that is undergoing development, a result more sensible than that obtained under the highest and best use principle will occur. The Farmer would receive the value of the land as farmland. On the other hand, if Speculator or Developer recently purchased the land planning to develop it, the land would be valued by its planned purpose. To the Speculator the land will be valued as land saleable on speculation; for the Developer the land will be valued for its potential—as a residential tract, for example. These development plans for the land are questions of fact. The Farmer may claim that he plans to develop the property as a space center. If that use of the land is unrealistic or unreasonable in Farmer's hands, that use should not be used to gauge its market value. If, however, Farmer claims that he plans to develop the land as a residential subdivision, and he can prove that he hired an architect and engineer, and submitted plans for approval, it would seem that he did intend to develop a residential subdivision. The land, therefore, should be valued according to its planned purpose.

A status to the owner standard can replace the highest

30. *See, e.g.*, United States v. Miller, 317 U.S. 369 (1943).

and best use principle in all applications of the just compensation clause, or can be selectively used for certain types of governmental takings.[31] For example, if a government takes land for a toll road that essentially will pay for itself, and the landowner is compensated according to the highest and best use principle, the cost of the compensation will be spread among all those who use the road rather than among the local taxpayers. Thus, although the seller may get a windfall, the taxpayers are not treated unfairly. On the other hand, when the government takes land for uses which are not income producing, for example, for social benefit such as landmarks, historic sites, and parks, use of the status to the owner standard may be more appropriate.[32] This alternative compensation model values land not according to the landowner's expectations, rather it bases compensation on reliance.

There is some debate as to whether it is desirable to shift the burden for valuation to the landowner. Two points need to be made. First, compensation to developers for governmental intrusions may serve to encourage responsible and efficient development. Second, such a valuation scheme should free-up money for governmental projects currently unaffordable by requiring that less be paid in condemnation proceedings. The effect of this proposal turns on whether society accords the right to develop, without regard to the consequences of development, a higher status than the need for resource protection.

This model is not a panacea for the elusive problem of drawing a line between regulations and takings. However, it is a palliative. Given the trend toward slowing development and conserving resources, coupled with an expanded use of the police power for resource protection, this model can serve a useful function without infringing on landowners' rights. The landowner is certainly receiving more than he would if the government appropriated land under the guise of the police

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31. There is a trend in land use legislation to single out "areas of critical state concern," "key facilities," or ecologically sensitive areas for different treatment. *See* MODEL LAND DEVELOPMENT CODE, *supra* note 20, § 7-201. Comment, *State Land Use Statutes: A Comparative Analysis*, 45 FORDHAM L. REV. 1154, 1154-55 (1977); D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 63-126 (1976).

32. It has been suggested by Professor Sax that a difference exists when the government is engaging in a proprietary function, that is, an income producing activity, as opposed to when the government is engaged in an enterprise function. Sax, *supra* note 1.

power.[33]

IV. Positive and Normative Issues of the Alternative Compensation System

Any discussion of "takings" jurisprudence inevitably raises two questions. First, when is compensation due? Second, how much compensation is due? If one starts with a utilitarian theory of property,[34] the goal of which is to maximize[35] wealth, social welfare or land values, then compensation can be said to be due "when" aggregate land value, for example, is reduced below a certain defined level. The answer to the "how much" compensation question can then be said to be that amount which brings the land value up to that defined level.[36] Nevertheless, these questions are sufficiently distinct to deserve separate treatment and this article concentrates on the "how much" question. Traditionally, takings jurisprudence has paid more attention to the first question than to the second. This is understandable for two reasons. First, the confusing regulations-takings dichotomy with its compensation-no compensation corollary has led commentators to search for guidance to determine when a regulation becomes a taking in the existing morass of case law.[37] Second, efforts to define "when" have often led legal scholars to intriguing theories of

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33. The preceding discussion is taken from Tomain, *Elimination of the Highest and Best Use Principle: Another Path through the Middle Way*, 47 Fordham L. Rev. 307 (1978).

34. Again, note the return to "first principles," Michelman, *supra* note 2, at 1171, and "hard philosophy," B. Ackerman, *supra* note 2, at 5.

35. Another terminological problem must be noted here. For analytic convenience it is desirable to separate positive "efficiency" analysis from normative or ethical decision-making. Yet the split is not an easy one. Michelman, for example, discussed "efficiency" in terms of "ethical maximizing." Michelman, *supra* note 2, at 1173. Furthermore, what is specifically maximized, be it happiness in general or land values in particular, is not crucial at this stage of the analysis. The important point to note is that a utilitarian theory of property has as its end (consequence) the maximization of something. *See, e.g.*, J.J.C. Smart & B. Williams, Utilitarianism: For & Against (1973).

36. *See, e.g.*, Costonis, *supra* note 12, at 1049-52. Given current law, this situation does not frequently occur because 1) there is no unitary theory of property; 2) there is not universal definition of "when" compensation is due; and, 3) even though we might agree that the highest and best use principle is the accepted measure of "how much" is due under the exercise of the eminent domain power, the distinct possibility remains that between two similarly situated landowners who are affected with the same land use restriction one landowner may receive no compensation.

37. *See* notes 2 & 3 *supra*.

government, causing them to ignore the narrower issue of how much compensation is due.[38]

This section emphasizes the positive and normative economic principles which support a changed scheme of compensable regulations. It should be noted that the separability or lack of separability of the "when" and "how much" issues is child's play compared to the overlap and crossover of the positive and normative issues involved in takings law.[39] The positive-normative distinction is made for convenience and is made with reference to some of the literature involved in the economic and fairness analysis of the compensation issue.

A. *Efficiency Criteria*

Efficiency is used here as a positive criterion for evaluating the alternative compensation system. According to Posner, " 'efficiency' means exploiting economic resources so that 'value'—human satisfaction as measured by aggregate consumer willingness to pay for goods and services—is maximized."[40]

The efficiency criterion also has normative impacts. In fact there is a good deal of crossover into normative areas by the very definition of efficiency.[41] Even within the simple definition chosen here, for example, the concept of value is highly individualistic and relative. What has value for one person may not have the same value for someone else. That someone else may either pay more or less evinces economic value preference. Moreover, the efficiency criterion, as a positive tool, encapsulates certain assumptions. We may not all agree that

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38. *See, e.g.*, Siegan, *Editor's Introduction: The Anomaly of Regulation under the Taking Clause*, in PLANNING WITHOUT PRICES 22-39 (1977); and, R. NOZICK, ANARCHY, STATE, AND UTOPIA 78-84, 114-15 (1974).

39. Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015 (1978); R. POSNER, PROPERTY RIGHTS IN LAW AND ECONOMICS: THE CASE OF BROADCAST FREQUENCIES, in ECONOMIC ANALYSIS OF LAW § 2.2 (2d ed. 1974). *See also* Stein, *Adam Smith's Jurisprudence—Between Morality and Economics*, 64 CORNELL L. REV. 621 (1979).

40. R. POSNER, *supra* note 39, at 10. This is a somewhat simplified version of Posner's definition.

41. Professor Michelman offers three variations on an efficiency criterion he called "value maximization." The variations are Social Welfare Maximization, Social Justice Maximization and Preference-Adjusted Social Justice Superiority. Michelman, *supra* note 39, at 1033-34. In an earlier work, he states that the concept of efficiency, to begin with, is a concept of ethical maximizing thus mixing the positive and normative aspects of efficiency. Michelman, *supra* note 2, at 1173.

these assumptions are true, or if true, universal. The first assumption is that man is an egoist, a rational maximizer of his own self interest. This behavioral characteristic of economic man as an egoist is not tested by the efficiency criterion.[42] A second assumption finds value in maximization of total social output, a value aptly illustrated by the notion that the bigger the pie, the bigger the pieces, and therefore, the greater the good.[43] Does this tract well with the first assumption? Might not the pie get bigger through collective action or altruism[44] rather than through egoism? And, is it not possible that less is more?

Another assumption is that valuations, as measured by one's willingness to pay,[45] are interchangeable. In order to make this assumption workable, quantification of values is necessary. If values are not interchangeable[46] or quantification of value preferences is impossible[47] then the resulting quantity "willingness to pay" is not an accurate measure.[48] Finally, for all the elegance of economic analysis it must be remembered that, at least as far as law is concerned, the economic framework is only part of a larger political and social fabric.[49] Further, the reductionist tendencies of economic analysis must be avoided. The law is not solely the embodiment of economic precepts.[50] Why then employ such a tool?

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42. *See, e.g.*, Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHILOSOPHY & PUB. AFF. 317 (1977).

43. *See, e.g.*, WINDFALLS FOR WIPEOUTS, *supra* note 8, at 143.

44. Posner points out that the self-interest factor does not necessarily mean selfishness because an actor can take the happiness or misery of other people into account as part of his own satisfactions. R. POSNER, *supra* note 39, at 1 & ch. 5. This merely expands the locus of self interest; it does not change its compass. The danger with such an all-encompassing position and definition of efficiency is that if everything is always taken into account, the analogical construct utilized may expand to the point of collapse. *See, e.g.*, Soper, *supra* note 2, at 44-45; J.J.C. SMART & B. WILLIAMS, *supra* note 35, at 88, 100; and, N. CHOMSKY, LANGUAGE AND RESPONSIBILITY 64-70 (1977).

45. R. POSNER, *supra* note 39, at 10.

46. *See, e.g.*, Michelman, *supra* note 39, at 1020; R. STEWART & J. KRIER, ENVIRONMENTAL LAW & POLICY 103-07 (2d ed. 1978).

47. *See, e.g.*, E. SCHUMACHER, SMALL IS BEAUTIFUL 36-47 (1973).

48. *See* text accompanying notes 35 & 44 *supra*.

49. *See* Schwartz, *Economics, Wealth Distribution and Justice*, 1979 WIS. L. REV. 799; Graff, Book Review, 93 HARV. L. REV. 282 (1979); and C. FRIED, RIGHT AND WRONG 81-107 (1978). Professor Fried presents a cogent critique of the economic analysis of rights yet he does not dismiss this analysis as useless. He does warn against its reductionist tendencies.

50. Michelman, *supra* note 39, at 1036-37, 1039, 1046-47.

Simply, economic analysis helps isolate and illuminate the value choices that individuals and entities are being asked to make. Thus one variable against which the alternative compensation system will be tested is that of efficiency: What impact will the proposal have on efficiency?

1. *Allocation of resources.* In reviewing specific criteria, two basic questions must be asked: How does the particular criterion, here the allocation of resources, maximize efficiency? Second, how does the alternative compensative system affect the more specific criterion?

Today the central concept behind allocation of resources stems from the welfare economics of Vilfred O. Pareto. An allocation of resources is Pareto-superior "*if and only if* at least one person believes himself better off" and "*nobody* believes himself worse off."[51] A corollary rule is that of Pareto-optimality: An allocation of resources is Pareto-optimal if it is impossible to move to "any other social state without making at least one person worse off."[52] At its most basic level, allocations that are Pareto-superior, positively meet the efficiency criteria because the aggregate value is maximized under such a formula (*i.e.*, society's gross value is maximized; hence, the efficiency principle, in its simplist form, is satisfied.). But this is not necessarily value maximizing, nor fair. Suppose an allocation of resources can be devised in which Jones, who is rich, gains, and Smith, who is poor, is unaffected.[53] Seemingly the allocation is efficient because it increases society's aggregate benefits and it is Pareto-superior because no one is worse off.

Justice Bazelon has noted in his dissent:

> The second and a more sophisticated reason for relieving the landlord from liability is the hypothesis that "it is still socially desirable not to discourage investment in and ownership of real estate, particularly private dwellings." This objective may well be desirable. But it is a fallacious over-simplification to suppose that the common law rule has much to do with the rate of investment in real property. On the other hand, it seems clear to me that the rule operates to defeat the interests of utility and justice.

Bowles v. Mahoney, 202 F.2d 320, 327 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 935 (1953).

51. Ackerman, *Introduction*, in ECONOMIC FOUNDATIONS OF PROPERTY LAW xi (B. Ackerman ed. 1975).

52. *Id.* at xiv. For other formulations, *see* Michelman, *supra* note 2, at 1168; R. STEWART & J. KRIER, *supra* note 46, at 101-03; Johnson, *Planning Without Prices: A Discussion of Land Use Regulation Without Compensation*, in PLANNING WITHOUT PRICES, *supra* note 38, at 72-73.

53. WINDFALLS FOR WIPEOUTS, *supra* note 8, at 144.

Or are they? Is not Smith worse off because the imbalance in the distribution of income has been exacerbated? With a more refined analysis we could argue that indeed the allocation is not Pareto-superior, because Smith is made worse off by the income disparity even though he loses nothing from his balance sheet. The point is that reference must be made to a normative criterion, such as the distribution of wealth and income, before a resource allocation plan is validated.

The proposed alternative compensation system suggests that, for a given property regime,[54] land that is either taken or restricted will be compensated at the land's actual use value,[55] taking into account the status of the landowner, rather than at the land's highest and best use value. How does this affect the allocation of resources within the context of the Pareto rule? On its face, the alternative compensation system is neutral. The government may restrict but it must pay for its actions. Hence, the compensated owner is neither worse off nor better off in an absolute dollar sense, because there has been an exchange of equivalents. The government has paid the affected landowner the value of that land at the time of the restriction. The landowner might argue that the value of land to him is greater than an equivalent value in money. He may insist that restrictions placed on a portion of his property have impaired the value of the whole. The response to the first argument is that the landowner may reinvest in land. The counter to the second argument is that the rules for condemnation in partial takings cases can be used.[56] The effect on aggregate value is neutral. There is no gain or loss to the landowner. Yet he may still object on grounds that his opportunity to make a profit has been eliminated because his expectation of future use has been taken.[57] It is indeed true that the alternative compensation system has shifted the focus from future expectations to past and present reliance. However, the land-

54. The second half of this article discusses the application of this scheme to preserve agricultural land. This is not a unique case. The proposal could have applicability to a number of areas, *e.g.*, wetlands, open-space, and historic preservation. Now that society, with the thrust of the environmental movement, is into a "second generation" of land-use regulation, there may be a need for a broad application of this system to all compensable regulation or to all classes of takings cases.

55. If land is restricted, then an amount of compensation will be paid to raise the value of the land to its actual use value at the time of the restriction.

56. 4A NICHOLS, *supra* note 23, § 14.2.

57. *See* Michelman, *supra* note 2, at 1168-69.

owner who can demonstrate that plans for future development are imminent will receive compensation. The farmer, who is preparing to subdivide a portion of his property for residential use and can prove that fact, through a subdivision permit for example, will receive compensation based on the value of his property as farmland and as a residential subdivision for the areas that are either actually used or will be soon for those purposes.

Relatively, the dollar transfer affects each class of persons uniformly. Each receives the value of the land in its actual state taking into account the landowner's status which in turn accounts for the landowner's reliance costs. An important part of the alternative compensation system is that it measures actual use value in part by the status of the owner, thereby creating classes of owners. A farmer, for example, might be compensated at $1,000 per acre, a speculator at $1,500, and a developer at $3,000. Each per acre figure reflects the costs and expenditures of each landowner. The speculator will pay more than the farmer and the developer more than the speculator and respectively will have more expenditures in preparing the land for its intended use. The system thus favors developers over speculators and speculators over farmers as far as the absolute amount of dollars paid are concerned, but each receives the same measure of compensation, compensation based on actual value to the owner, thus avoiding the previously discussed disparity issue.

Is this allocation efficient? Is it fair? Both questions deserve affirmative answers. It is efficient because it avoids creating waste and because it directs money to those classes of people with the demonstrated ability to best utilize the resource.[58] It is fair because it seeks to insure that the affected landowner gets what the land is actually worth to him. Finally, the alternative compensation system avoids awarding windfalls to landowners fortunate enough to have their land condemned, because compensation is not measured by the overly generous highest and best use standard.

2. *Productivity.* How does the alternative compensation system affect productivity? The efficiency principle simply posits that a system which increases aggregate value is an effi-

58. Naturally, any given development may be inefficient, but it may be better to give the money to the expert developer than to the inexpert farmer.

cient one. At a base level, the Gross National Product serves as an "efficiency index"[59] and is a readily identifiable positive measure. Again, this theory holds that the bigger the pie, the bigger the piece; hence, value is maximized, all other distributional and allocational rules being equal. This maximization, however, may be more theoretical than real. Costs in some areas have been known to rise and efficiency to decline even in the face of an increasing GNP. In addition, the theory ignores certain practical considerations. The productivity criterion holds that production is efficient if we can produce more of good A only by not producing less of good B.[60] Surely, the aggregate value to society (at least as measured by GNP) has risen, but has individual well-being risen as well? Does the mere exercise of economic voting preferences bring happiness to people? Price theory holds that consumers exercise their market vote by their willingness to pay. Hence, the questions become first, do consumers have an equal vote among themselves and second, do consumers as a class have equal or near equal bargaining power relative to producers? The regulatory state has been created because of a negative response to the latter question.

Another significant problem with the productivity criterion is that in its stated form it ignores the law of diminishing returns. Production is not a straight line; rather it is an S-curve at the top of which efficiency starts to diminish. Moreover, productivity as a criterion of efficiency is a short run explication of economic data ignoring long run consequences. Finally, the productivity criterion largely ignores externalities and public costs, concentrating rather on the immediate consequences and private costs of a particular economic decision.

Assume, for example, that a parcel of land has the following values: As agricultural land, it is worth $1,000 per acre; as single family residential, $2,000; as apartments at ten units per acre, $10,000; and, as apartments at eight units per acre, $8,000. The efficient choice measured by the productivity criterion would be apartments at ten units per acre because the aggregate is increased. This naturally leads to queries concerning what type and quality of apartments are to be built? What will the effects be on neighboring property? What is the

59. WINDFALLS FOR WIPEOUTS, *supra* note 8, at 145.
60. *Id.*

fiscal impact on the community?[61] On neighboring communities? The region? The state? How far does this go? Let us assume that the ten unit apartment increases the value of the parcel by $9,000 but reduces the value of the adjacent properties by $12,000. Is this an efficient decision? If not, will private arrangements take care to absorb these spillover costs—will the surrounding property owners protect themselves by buying out the apartment developer? Given the likelihood of holdouts and freeloaders it seems highly unlikely.[62] It is therefore argued that since private arrangements do not function ideally, public controls can help the imperfect market reach a more efficient result. Public controls, taxes, land use restrictions and the like, force the actors in the private market to take cognizance of the costs (and benefits)[63] imposed on others, thereby internalizing the externalities.[64]

Does the alternative compensation system satisfy the efficiency criterion and add to the aggregate welfare? The system appears, at worse, to be benign and neutral. Payments are made according to the amount of land transferred from the restricted owner to the government. The amount, based on the harm to a particular class of owners, is calculated to replace in dollars (or non-dollar rights) the value of the land taken. As far as immediate productivity is concerned there should be no gain or loss. The trade is even, unlike the present highest and best use principle which produces windfalls. If we look at longer range consequences, we should ask whether or not windfalls add to the GNP. If premiums are given to those not in the best position to use the windfall it may well be that some money will be wisely invested and other money wasted.

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61. Fiscal impact statements add another layer of regulations and should produce another corps of professionals. As far as land use decision making is concerned, fiscal impact statements are grand scale cost-benefit analyses. It would appear at first glance that they provide a significant source of hard positive data for decision making. The leaders in the field, however, are quick to point out the tentative and developmental nature of their work. Positive criteria must be coupled with an examination of normative variables. *See* R. BURCHELL & D. LISTOKIN, FISCAL IMPACT HANDBOOK (1978).

62. Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). There may be other disincentives for private arrangements such as high transaction costs and lack of financial wherewithall of the neighbors to put enough capital together.

63. WINDFALLS FOR WIPEOUTS, *supra* note 8, at chs. 2 & 3.

64. Johnson, *supra* note 52, at 64, 74.

Critics of such an even trade might argue that the alternative compensation system is an impediment to increased productivity because it may keep the risk-averse out of the market place. After all, why speculate or develop land when that investment may yield a return based on reliance, not expectancy? Such a system discourages investment because it does not promise a reasonable rate of return:

> Purchasing land for development requires the expenditures of huge sums of money, much of which may come in the form of loans from lenders who really seek a specified return and not a windfall. Lenders will be deterred by the possibility of substantial future diminution in value. It is likely therefore that as political risks increase, more potential investors, lenders, builders, and developers will drop out. Who, then, will build the houses, apartments, supermarkets and industrial complexes?[65]

On the other hand, the market that relies on windfall incentives such as those produced by the highest and best use principle can hardly be considered free. Rather it is another form of middle (upper?) class welfare. It is likely that what needs to be built will be built, and by more responsible investor-developers. Furthermore, the political risks involved in the public control of land use decision-making are not purposely aimed at particular developers or even at a class of developers. Such paranoia is misplaced. There is no evidence that the risks of land use restrictions are purposely aimed at particular targets.

The alternative compensation system should not hamper the output of goods and services. People in the business of land development have economies of scale to protect. They will keep working in order to keep their businesses going. Should the government decide to restrict a particular parcel of land under the proposed system, then the landowner is compensated only at a lower rate than now exists. And under this proposal the restricted landowner has a better chance of receiving some compensation and should avoid the sort of contradiction described earlier.[66] With this proposal, there is more predictability. Professor Michelman suggests that the risks attendent with public land use controls are over stated:

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65. Siegan, *supra* note 38, at 26.

66. *See* text accompanying notes 2-5 *supra*.

> We are thus led to inquire whether there is any reason to suppose that a visible risk of majoritarian exploitations should have any greater disincentive effect than the ever-present risk that accidents may happen, this being the only supposition which seems, on utilitarian premises, to justify a constitutional former sort of risk.[67]

The visible risks can be insured against. The proposed compensation scheme offers a safeguard against accidents by bringing some uniformity and predictability into this area of the law. It merely reduces the amount awarded. Hence, there is an element of protection for the risk-averse. Developers should not be paralyzed or kept from the market by the uncertainty that a land use restriction under this proposal will not earn them a windfall.

3. *Administrative costs.* The topic of administrative costs today automatically raises the Coase theorem.[68] A discussion of administrative costs, transaction costs,[69] or settlement costs[70] proceeds along two lines. First, costs involved in settling disputes either between private disputants or between a public decision-making body and a private party are identified. If the settlement costs, for example, outweigh the supposed benefits of a decision, the decision is not one worthy of implementation.[71] The basis for such a statement comports with the efficiency criterion—if administering the settlement of a dispute or implementing a public land use control costs more than it confers in benefits, then the decision is inefficient.[72] Still, as discussed later on, criteria other than aggregate value maximizing can justify a seemingly inefficient decision.[73]

The second line of inquiry, and the basis of the Coase theorem, deals with assigning liability rules. The argument is that where cost-free bargaining could occur, an economically

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67. Michelman, *supra* note 2, at 1216-17.

68. Coase, *The Problem of Social Cost,* 3 J. LAW & ECON. 1 (1960).

69. *See, e.g.,* R. STEWART & J. KRIER, *supra* note 46, at 133-46.

70. Michelman, *supra* note 2, at 1214-18.

71. *Id.* at 1215.

72. *See* B. FRIEDEN, THE ENVIRONMENTAL PROTECTION HUSTLE (1979). The rationale for land use controls is based on a belief that governmental controls can improve the decisions made in the private market. What happens in the event of legislative failure? Do we resort to the judiciary? *See, e.g.,* Fiss, *Foreword: The Forms of Justice,* 93 HARV. L. REV. 1, 5-17 (1979).

73. *See, e.g.,* Michelman, *supra* note 39; Schwartz, *supra* note 49.

efficient allocation of resources would be reached regardless of where society places a liability rule. The paradigm is that of the polluting factory which emits particulates and noxious odors.[74] The Coase theorem argues that someone suffers a "harm" no matter upon whom liability is placed. If the factory is permitted to pollute, then the surrounding neighbors are harmed. If the neighbors are allowed to stop the pollution, then the factory is harmed. This analysis uses a facile test for "harm". Arguably the factory is not harmed because it loses nothing, *i.e.* the factory has no legal right to pollute and hence no liberty is denied the factory owner. Coase argues that, leaving ethical precepts aside, an efficient state is reached regardless of how liability is defined because the most effective cost avoider will buy out the other interest. If it is less costly for the factory to purchase the right to pollute, it will buy out the surrounding property owner. If the homeowners can better bear the cost, they will purchase the right to be free from pollution. The immediate problem with this analysis is that in the first situation (the factory purchasing the right to pollute from the homeowners) there may be holdouts among the homeowners, thus raising the costs of settlement beyond actual value. In the reverse situation, some homeowners might try to freeload, thereby raising the proportionate costs to those homeowners willing to pay.[75] Thus, inequities appear. Furthermore, it may be easier for one party of a dispute to administer a settlement than it is for another. It may be cheaper and easier for the factory to settle the dispute because it has a central management network and more working capital for this sort of enterprise. The homeowners on the other hand, may need to band together and incur management costs; and they may have a more difficult time than the factory in accumulating enough capital to settle the dispute. Moreover, the same amount of capital may be more valuable

74. This hypothetical also presents the problem of collective or public good, that is, the factory is polluting the air which belongs not only to the property owner, but to all who breathe. *See, e.g.*, THE ECONOMICS OF LEGAL RELATIONSHIPS 353-480 (H. Manne ed. 1975). It can also be argued that the factory owner's legal right to pollute and the homeowner's legal claim to be free from pollution are not conflicting legal rights (the right to pollute versus the right to be free from pollution); rather, they are correlative rights (the right to pollute is circumscribed by the right to be free from pollution). *See* Tarlock, *A Correlative Rights Approach to the Taking Issue*, in PLANNING WITHOUT PRICES, *supra* note 38, at 159.

75. Calabresi & Melamed, *supra* note 62, at 1106-10.

to the homeowners than it is to the factory.

Next, one must consider what administrative costs are involved with the alternative compensation scheme and whether the burden of those costs falls more heavily on one party than another. The system does involve ongoing transaction costs. Once a goal is defined, agricultural land preservation for example, it is necessary to develop a standard to determine when and how much compensation is due. Once the standards are developed, individual parcels must be evaluated.

There are essentially three systems of compensable regulations that can be coupled with an alternative compensation system. Transaction costs depend on the type of compensable regulations chosen. These costs can be borne either by private parties in the marketplace or by a public body such as a court or administrative agency. Whether or not the transaction costs go beyond the value of the prospective benefits to be conferred, and whether the burden falls on a particular side depends on the type of system chosen. Given a system in which the transactions take place in the private market, the transaction costs are freely bargained for and need not concern us. Given a system in which the government functions as arbiter, the costs are spread among the taxpayers and are de minimus *vis á vis* any one party.

There is no guarantee, however, that some governmental decisions will not be inefficient. The government may decide, for example, to restrict a parcel of land, resulting in a diminution in value of $1,000. The landowner may challenge the legality of the regulation and the amount of the lost value. When the landowner's challenges have run their course, she may have spent in excess of the claimed $1,000, and the cost to the government may also exceed that sum. Hopefully, such improvident challenges will be rare. Nevertheless, even when such a system cannot be soundly defended on grounds of efficiency, non-efficiency criteria may justify allowing such suits. Everyone, after all, is entitled to her day in court.

B. *Equity Criteria*

In our discussion of the three efficiency criteria the acid test was whether or not the specific criterion was value-maximizing. The alternative compensation system was then measured against that standard. A similar touchstone exists for so-called equity criteria: Does the criterion treat people with

equality?[76] Is it fair?[77] Further, can a result be "fair" even though the net social product is not maximized and hence the efficiency criteria are not satisfied.

The hardest conflict is between efficiency and equity. Given outcome A which is fair but inefficient and outcome B which is unfair but efficient, which is to be preferred? And by whom? Individual? Legislator? Judge? Note that the alternative compensation system is intended to be legislatively implemented. It is not within the scope of this article to develop a theory of legislation that resolves this conflict. Moreover, efficiency issues and equity issues are not discrete and insular. But for a given legislator the question is political and the choice is difficult. What is meant by denominating the choice between outcomes based on positive efficiency criteria and those based on normative equity criteria a political question? Some suggest that such conflicts must be resolved with reference to a larger context, the legislator's comprehensive view,[78] for example, or the legislator's view of her role in relationship to her constituency. A given legislator may have ordered her decision-making parameters in such a way that empirical efficiency criteria take precedence over intuitive or rational equity criteria. We should not ask more of her here than that her ordering be reasonable.[79]

1. *Distribution of wealth and income.* The state in a given compensation system is responsible for distributing resources whether the resources are in the form of dollars or legal rights that can be valued in terms of dollars.[80] Fair and equal distribution of these benefits is the problem of distribu-

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76. *See, e.g.*, J. RAWLS, A THEORY OF JUSTICE §§ 3, 11, 13, 14 (1971); Michelman, *supra* note 2, at 1220.

77. J. RAWLS, *supra* note 76, §§ 1-9; Michelman, *supra* note 2, at 1219.

78. *See, e.g.*, B. ACKERMAN, *supra* note 2, at 41-87. Ackerman's discussion relates to a judge's comprehensive view of the law, legal institutions and his role and function within the system. One may argue that legislators who deal with the compensation issue must do so in the context of a similar comprehensive or philosophical view. The alternative compensation system presented here, for example, should be examined in the context of how we think and talk about property and how we think and talk about the state in relationship to the individual.

79. *See, e.g.*, J. RAWLS, *supra* note 76, § 8.

80. For example, a landowner might complain that a regulation is value depressing and the government may, instead of paying actual dollars, offer tax abatement or lessen the restrictions on the parcel in question or transfer a legal right from the restricted parcel to another parcel which has a dollar value. Transferable development rights are a form of non-dollar compensation that can be sold in a marketplace.

tive justice[81] against which the alternative compensation system must be measured. Note the parallel between this equitable principle and the efficiency criterion of allocation which held that an allocation was efficient as long as it was value maximizing and no one was worse off after regulation. Here a distribution can be said to be fair and equitable as long as compensation is distributed proportionately,[82] even though value is not maximized.[83]

Proportionality of distribution is only one factor in weighing the fairness of distributions. One might assume that, given an imbalance of wealth and political power in society, an equalitarian or Robin Hood distribution[84] that takes from the rich and gives to the poor may be "fair," and in the long run will tend toward equality. Does this Robin Hood principle carry with it "side constraints"[85] such as work incentives or disincentives?[86] Still, another problem is that end-state distribution patterns may prove to be too inflexible and thus infringe on individual liberty and autonomy.[87]

Essentially, the core of the compensation question is distribution.[88] The proposed compensation scheme does effect a redistribution of wealth. Instead of the uniform highest and best use compensation principle which is tied to the parcel of land in question, the alternative shifts emphasis to the landowner. Accordingly, *classes* of people will be treated differently. The highest and best use principle may have its genesis in a species of egalitarianism because it treats all landowners equally. The Farmer, Speculator, and Developer, with few ex-

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81. *See, e.g.*, ARISTOTLE, NICOMACHAEN ETHICS bk. 5 (Bobbs-Merrill 1962); J. RAWLS, *supra* note 76, §§ 41-50; R. NOZICK, ANARCHY, STATE AND UTOPIA ch. 7 (1974).

82. ARISTOTLE, *supra* note 81, at 118-20. Aristotle bases his discussion of distributive justice on the "principle 'To each according to his desserts.'" *Id.* at 118. This coincides with the dessert theory of property. *See* Michelman, *supra* note 2, at 1203-05; L. BECKER, *supra* note 9, at 49-56. *See also* R. NOZICK, *supra* note 81, at 154-55.

83. *See* note 35 *supra*.

84. Wealth and political power are linked here because access to political institutions in an activist state can affect one's wealth. *See* WINDFALLS FOR WIPEOUTS, *supra* note 8, at 155-58.

85. R. NOZICK, *supra* note 81, at 29-33.

86. A deeper problem is that "the language of wealth distribution is often awkward and is quite capable of obscuring or distorting a genuine justice issue." Schwartz, *supra* note 49, at 811.

87. R. NOZICK, *supra* note 81, at 153-60.

88. "Redistribution" is a more accurate term, but the principles discussed here are identical. *See* Michelman, *supra* note 2, at 1208.

ceptions, receive the same amount of compensation. Yet to accept this measure as fair because there is equal payment is to ignore both efficiency and equity criteria. The proposed alternative does not pay the Farmer, Speculator, and Developer an equal amount; it does pay each equally according to his desserts: production, expenditures, ability, and reliance. The fairness of the alternative compensation scheme stems from the inherently equal treatment of classes of persons; the proposal comports with the proportionality principle of distributive justice. While the Farmer may get less than the Developer, he receives payment equivalent to that which was "taken" from him. Developers are favored only insofar as absolute dollars are concerned, yet the relative value of the dollars, given the risks the Developer takes and the expenditures he makes in reliance, may be less than the relative value to the Farmer. Most likely, the relative values will be similar. In any event, the proposal seeks to avoid windfalls and wipeouts, both of which treat the landowner unequally and hence unfairly.

2. *Arguments from felicity.*[89] Society strives for the good, the *summum bonum,* and the state, as an agent of the populace, too, seeks this end. For our purposes, the state's compensation principle should also satisfy this desire for felicity. But, there are myriad ways hypothecated by which this result might be achieved. Three formulas that have been proposed for compensation systems are mentioned below, followed by an assessment of the one principally under consideration.

Professor Michelman's utility formula provides a fitting starting point.[90] In his taxonomy, "efficiency gains" are the dollar benefits gainers are willing to pay over the dollar amount losers insist on as compensation. "Demoralization costs" are the dollars necessary to offset the realization that no compensation is forthcoming, once a land use decision is implemented, and the capitalized value of lost future production is determined. Finally, "settlement costs" are the dollars needed to avoid demoralization costs through a compensation

89. This subtitle is a loose one. Happiness is only indirectly involved in the discussion. Formulations of compensation systems that seek to avoid unhappiness and dissatisfaction are actually under scrutiny.

90. Michelman, *supra* note 2, at 1214-18. *See also Developments in the Law—Zoning,* 91 HARV. L. REV. 1427, 1486-97.

settlement. The following rules emerge from these definitions and from Professor Michelman's allegiance to utilitarianism:

> When pursuit of efficiency gains entails capricious redistribution, either demoralization costs or settlement costs must be incurred. It follows that if, for any measure, both demoralization costs and settlement costs (which ever were chosen) would exceed efficiency gains, the measure is to be rejected; but that otherwise, since either demoralization costs or settlement costs must be paid, it is the lower of these two costs which should be paid. The compensation rule which then clearly emerges is that settlement costs are lower than both demoralization costs and efficiency gains. But if settlement costs, while lower than demoralization costs, exceed efficiency gains, then the measure is improper regardless of whether compensation is paid. The correct utilitarian statement, then, insofar as *the issue of compensability* is concerned, is that compensation is due whenever demoralization costs exceed settlement costs, and not otherwise.[91]

Thus stated, the primary concern is the avoidance of demoralization costs either through compensation or through the implementation of a land-use decision that entails net efficiency gains.

Professor Ackerman provides a gloss on Michelman's utility formula in his "Utilitarian Comprehensive View."[92] Ackerman's formula is similar to, in fact derived from, Michelman's and his taxonomy is similar. The "Appeal to General Uncertainty" argument is based on the fact that when an institution makes a decision that increases the level of uncertainty costs (U), another form of disability called citizen disaffection (D) is present that imposes costs on society. Lastly, process costs (P) are the costs incurred in administering the system. To a restrained judge in Ackerman's universe, "If $P > U + D$, compensation should be denied; if $P < U + D$, it should be granted."[93]

Ackerman offers us another comprehensive view from which to choose—a Kantian model.[94] This model requires

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91. Michelman, *supra* note 2, at 1215.

92. B. ACKERMAN, *supra* note 2, at 41-70.

93. *Id.* at 48. Other formulations are possible, indeed encouraged, in Ackerman's book depending on a judge's view of role. Activist and reformist judges will have different interpretations of the formula.

94. Although he says it is possible to imagine "any number of Comprehensive

compensation "when P<B-C, where P is process cost, B is project benefit, and C is other projects costs."[95] The easy case for the Kantian model occurs when process costs are less than net project benefits—then compensation is due. The underlying premise is that, to the Kantian judge, people are ends in themselves and that larger ends other than maximizing social utility exist.[96]

The formulas described above are shorthand methods for determining when compensation is due and as such they need not concern us beyond their ability to illuminate the compensation problem. These three examples of felicific calculus do, however, illustrate certain things. First, the calculations indicate that efficiency is not a dispositive parameter. Efficiency may or may not be taken into account, and when taken into account, can be weighted differently. Second, the formulas relate to a higher, more generalized and more abstract statement about compensation systems calling for reference to more comprehensive philosophies. Finally, the formulas attempt to work out accommodations insofar as they account for benefits and harms to individuals and society, and costs to governments.

The alternative compensation system has like reference points. It does take efficiency into account on both sides of the equation, and does so in the long run. On the developers' side, efficiency occurs on the theory that a lesser amount of compensation should have the effect of deterring inefficient developers or high risk takers from entering the market place. Those developers interested in a quick, high return on their investment will be greatly disappointed, since the compensation they will receive is likely to do little more than cover their investment. On the government's side of the equation (which is also the taxpayers' side), the system is designed to provide increased fiscal resources and legitimate authority to make land use decisions. These decisions will cost less[97] and

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Views" such as Marxist, Maoist, Existentialist, or Absurdist the Utilitarian and Kantian views predominate. *Id.* at 41.

95. *Id.* at 74.

96. *Id.* at 72. *See* Soper, *supra* note 2, for a brief critique of Ackerman's use of the term "Kantian."

97. Naturally, if this proposal is adopted across the board and every value-depressing regulation is held to require compensation, the system will break down. It is imperative that the proposal be added to the police and eminent domain powers rather than supplant them.

the government will be free to expand and experiment in the area of land use decision making. This should promote efficiency by avoiding the contradictary results reached under present law.

Because this represents an expansion of government power and because it requires a change in the existing legal order, there must be an accompanying statement of philosophy or policy. Basically, the alternative scheme is grounded in a philosophy of stewardship and responsible growth and development.[98] Land development utilizing a private market may or may not be efficient. Assuming that it is efficient, this is so only in the short run. Furthermore, private market decisions do not adequately assess correlative rights. Nor does the private market, which is intended to measure productivity alone, take non-efficiency criteria adequately into account. In the vein of Kantian analysis we can ask: "Is the land merely a means of production or is it something more, something that is an end in itself?"[99] In agricultural land use, for example, it may be immediately efficient to increase yields through the use of higher technologies, but there may well be a resultant increase in soil erosion and soil depletion. Likewise, it may be efficient to increase the size of one's farm, thereby decreasing the number of "family farms"[100] but a viable subculture is eliminated thereby. It may be extremely efficient to sell one's farmland to a developer[101] rather than maintain it as a farm, but there are still real losses on the other side of the ledger. The alternative compensation system is intended as an accommodation between the private harms, public benefits, and costs to government entailed by governmental measures to protect natural resources.

3. *Acquisition and transfer rules.* Rather than concentrate on a substantive policy, it might be desirable instead to develop a procedure or set of procedures designed to facilitate

98. *See* E. SCHUMACHER, *supra* note 47, at 95-109 (1973); B. WARD, PROGRESS FOR A SMALL PLANET (1979); T. ROSZAK, PERSON/PLANET 31-59 (1978); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); W. RODGERS, ENVIRONMENTAL LAW § 216 (1977).

99. E. SCHUMACHER, *supra* note 47, at 98.

100. The Family Farm: A Statement of the Committee on Social Development and World Peace, United States Catholic Conference (Feb. 14, 1979).

101. *See, e.g.*, Thomasson, *Connecticut Pays $252,000 to Preserve Man's Farm*, N.Y. Times, Dec. 15, 1979, at 30, col. 1.

the acquisition[102] and transfer[103] of property in a manner that is fair and equitable. Michelman's principle of fairness and compensation, which is derived from Rawls, makes this argument and is independent of value maximizing criteria.[104]

> Rawls finds that two fundamental principles would emerge from this convention of the circumspect. The first principle is a general presumption that social arrangements should accord no preferences to anyone, but should assure to each participant the maximum liberty consistent with a like liberty on the part of every other participant. The second principle defined a justification for departures from the first: an arrangement entailing differences in treatment is just so long as (a) everyone has a chance to attain the positions to which differential treatments attach, and (b) the arrangement can reasonably be supposed to work out to the advantage of every participant, and especially the one to whom accrues the least advantageous treatment provided for by the arrangement in question.[105]

What is crucial is that the alternative compensation policy be governed by a set of rules that provides equal opportunity among different classes.[106] Such a rules-oriented system may also be justified because of the difficulty or impossibility of verifying the behavioral and psychological assumptions on which the other efficiency and equity criteria rest. The proposal here does not contain any procedural rules at this stage. They will come once a particular property regime is established that can apply the alternative compensation system. If, for example, the alternative compensation system is to be

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102. *See, e.g.*, L. BECKER, *supra* note 9, ch. 9; R. NOZICK, *supra* note 81, at 174-82.

103. *See, e.g.*, R. NOZICK, *supra* note 81, at 167-74; WINDFALLS FOR WIPEOUTS, *supra* note 8, at 162-69.

104. Michelman, *supra* note 2, at 1219-24.

105. *Id.* at 1220. From these principles Michelman develops a substantive compensability criterion:

> A decision not to compensate is not unfair as long as the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite direction.

Id. at 1223.

106. There are other values involved. Rules that favor the status quo or "Burkean" rules may be seen as conservative. *See* Michelman, *supra* note 39, at 1041.

applied to agricultural land and open space preservation, rules would be developed to protect classes of interested landowners fairly and equitably.

C. *The Normative Context of Compensable Regulations and the Alternative Compensative System*

1. *Of takings and regulations.* In the discussion of the legal environment surrounding just compensation or takings law, it was argued that governmental activities in the land-use field have been traditionally confined to either the police power/regulation category or the eminent domain box. Likewise, discussion of the value issues, value in the normative or ethical sense, also can be grouped into these classifications.

The discussion of normative issues centers on the question of government involvement in land-use decisionmaking. The philosophical discussion concerns creation of a land-use ethic which attempts to resolve the question of whether or not government involvement in land use is "good." In this section very brief, and consequently over-simplified, accounts will be given of the ethical and normative bases of takings law and the bases for governmental regulations. Next, a subsection is devoted to an examination of a land ethic which is compatible with the emerging law of compensable regulations.

a. *Takings.* The most vocal proponents of a compensable takings jurisprudence are economically motivated and strongly in favor of a *laissez-faire* posture in land use.[107] The government should stay out of the land use, development, and preservation business, they argue, and the market will work out the most effective allocation of this resource.[108] As a corollary, if the government does decide to step in, it must pay the landowner for any restrictions the government imposes on the land.[109] Most of the reasons for such a posture are laudatory but not entirely clear, except perhaps to a confirmed libertarian. It is argued that by forcing the government to pay for its value-depressing activities, private property, personal autonomy, and separation of state and individual will be pre-

107. *See* Costonis, *supra* note 12, at 1026-33.

108. R. POSNER, *supra* note 39, §§ 2.5, 23.1.

109. B. ACKERMAN, *supra* note 2, at 2, 156. This is a simple and extreme view of the taking clause and, as Professor Ackerman points out, is not seriously taken by anyone.

served.[110] On a more pragmatic level, requiring the government to pay in these situations will encourage investment, development, and competition, all of which will result in a more efficient allocation of resources.[111] This position really speaks more directly to a philosophy of state than to a land-use ethic. Those who advocate that the government should pay for its value-depressing activities are really arguing for a broader agenda—keeping government out of the land-use business.[112]

b. *Regulations.* Cast opposite the free marketeers are those who would give the government more freedom to operate within the police power.[113] This means, naturally, that with broader police powers the government can do more to protect the environment and otherwise involve itself in land-use decision making without paying for it. The arguments in favor of more regulation without compensation center on the notion of land as a scarce resource requiring governmental protection.

The most recent and notorious advocates of the pro-regulation position are the authors of *The Taking Issue.*[114] At one point the authors suggest a simple solution to the takings problem by limiting the instances that require compensation to physical takings: "A return to this simple and unsophisticated principle would go a long way toward upholding the type of environmental protection currently needed."[115] *The Taking Issue* and its adherents base their position on the need for protection and a strict construction[116] of the taking clause in favor of "heavyweight public purposes."[117]

In an earlier work,[118] two of the authors of *The Taking Issue* chronicle what they characterize as a "new concept of

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110. Seigan, *supra* note 38, at 22-25.

111. *Id.* at 25-28.

112. *Id.* at 156. *See also* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis,* 86 YALE L.J. 385 (1977); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls,* 40 U. CHI. L. REV. 681 (1973).

113. *See* Costonis, *supra* note 12, at 1024-26.

114. F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 2.

115. *Id.* at 255.

116. *Id.* at 238-55.

117. *Id.* at 260-65. *See also* Sax, *Takings, Private Property and Public Rights,* 81 YALE L.J. 149 (1971).

118. F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

land."[119] Indeed, how society deals with, defines, and talks about property changes with the times.[120] The very topic of this article, alternatives to the existing compensation system, supports this fact. The questions become how, in what direction, and to what extent is our concept of real property changing?

The *Quiet Revolution*, cited above, does point out the direction of our changing attitude:

> Basically, we are drawing away from the 19th century idea that land's only function is to enable its owner to make money . . . As we increasingly understand the science of ecology and the web of connections between the use of any particular piece of land and the impact on the environment as a whole we increasingly see the need to protect wet lands and other areas that were formerly ignored.
>
> This concern over the interrelatedness of land uses had led to a recognition of the need to deal with entire ecological systems rather than small segments of them. . . .
>
> The new attitude toward land can also be seen reflected in the increasing concern about its scarcity.[121]

The new concept of land can be characterized as one that views land as a resource as well as a commodity. In addition, this concept admits a series of connections and interconnections between ownership and use of land. Since what one does with one's land affects others, land-use decisions by individuals in a private property regime ignore both the costs and benefits imposed and conferred on others. Since these externalities are ignored, public controls are needed.[122] The new conceptualists, as defined in this section, argue that the social costs of private choice are too great to be left unregulated. The fear is that in the short run, private choices opt for inefficient, intensive uses of land and that in the long run, the efficiency of their resources will not be maximized. Rather, the more efficient use of land is not to develop or to limit development in the name of ecosystem stability. Their position is

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119. *Id.* at 314.

120. *See, e.g.*, Reich, *supra* note 9; B. ACKERMAN, *supra* note 2; and, Philbrick, *supra* note 9.

121. F. BOSSELMAN & D. CALLIES, *supra* note 118, at 314-15.

122. Johnson, *Planning Without Prices: A Discussion of Land Use Regulation Without Compensation*, in PLANNING WITHOUT PRICES, *supra* note 38, at 63.

supported by the argument that even if property rights are based on the protection of expectations, *e.g.*, expectations of gain, it is not fair to let one landowner utilize choices freely. Competing expectations exist, as do correlative rights, which must be recognized and accommodated.[123] Given the seriousness of both positions, compensable regulations can take the strengths of each in formulating an ethic which permits accommodations.

The Taking Issue contains the seeds of two significant changes in legal and philosophical attitudes toward land.

Legally, the old framework is no longer functional. A new system must be designed to replace the old order, and that system must be responsive to what is perceived to be a new concept. These legal accommodations can be made in the guise of compensable regulations that are also alternative compensation systems. The system is based on the premise that the government cannot render one's land valueless or even nearly so. Yet the hands of the government cannot be restrained, nor can legislation designed for the public benefit be invalidated, because no alternatives are presented. Here, following Professor Costonis,[124] and Professor Hagman,[125] it is argued that a middle ground exists, that the government should be able to exercise a legitimate intermediate power which affords less than the technical just compensation measure now used.

Professor Costonis keys this third power, which he calls the "accommodation power," to the economic return of which the land is capable. By way of example, suppose the government describes a category of land-use controls to which the accommodation power will be applied—for instance, the protection of prime agricultural land. The government then creates a set of controls and imposes them on particular landowners. Assuming that such a categorization fulfills a legitimate public purpose, if the land is incapable of earning a reasonable economic return, then a payment to the landowner is made up to the reasonable economic return, rather than the

123. Tarlock, *A Correlative Rights Approach to the Taking Issue*, in PLANNING WITHOUT PRICES, *supra* note 38, at 159, 168.

124. Costonis, *supra* note 12; for a critique see Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976).

125. WINDFALLS FOR WIPEOUTS, *supra* note 8, ch. 11.

highest and best use level. Under Costonis' scheme, the landowner's reasonable expectations are satisfied and the government's side is protected.[126] Exact measurements can be legislatively and administratively devised.

There is a practical advantage in developing this alternative power through legislative enactments and administrative actions rather than through judicial decisions (*e.g.*, inverse condemnation suits). There will be resources allocated through public planning initiatives rather than by licensing discordant private development; categories of protected resources will be enunciated; and, the true costs of resource allocation and regulation should surface. Further, individual liberty will be more clearly protected against over-ambitious governmental intrusiveness.[127] Alternative systems, then, are a compromise:

> Private litigants should not be permitted to compel government to compensate for overbroad regulatory measures; but to deal fairly with landowners and to enhance the prospect for effective regulation, government should resort to the accommodation power whenever it recognizes beforehand that restrictions it imposes may not be defineable [sic] under the police power.[128]

Qualitative and normative principles also support alternative systems. It was earlier shown that traditional legal categories present anomalies which should be alleviated. Ethical arguments augment the legal and pragmatic reasons for so doing.

An extension of the normative posture of the new concept discussed above can be found in the ideals of trusteeship and stewardship.[129] No one really "owns" the land in the popular sense. Rather, we are all renters. Land ownership is short-run and resources must be preserved for future generations. High intensity usage threatens to significantly impair the prospects

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126. Costonis, *supra* note 12, at 1049-55. There are alternative measurements, *see* Tomain, *supra* note 33, at 319-22.

127. Costonis, *supra* note 12, at 1053, 1071-81.

128. *Id.* at 1073.

129. Anthan & Muhm, *Save the Land as God's Stewards, John Paul says in Iowa Message*, Des Moines Reg., Oct. 5, 1979, at 1, col. 2; Dingman & Hart, *Wanted: U.S. Land Redistribution*, National Catholic Rep., Oct. 5, 1979, at 11. This idea of trusteeship and protection of natural resources for future generations was the central focus of Pope John Paul II's Midwest visit.

of future development. Legal rules that favor concentration of ownership, encourage intense short-run development, and reward developers' highest expectations are counterproductive in the long run.[130] Carried further, legal rules designed to promote land ownership across a broader base of the populace encourage individual responsibility for land use, promote individual liberty, and encourage a return to sought after values inherent in a manner consistent with family farming and rural life.[131] It is hoped that a rational system of land preservation can forestall the alienation of farmer from farmland and the depersonalization brought on by mindless technology.[132] These are the hopes of individuals who advocate a more personalized view[133] of land use, a view that makes room for human dignity while honoring private ownership with responsible government supervision.

The alternative compensation system represents a legal and ethical middle road. Normatively, the values inherent in such a system lie between a libertarian or *laissez faire* attitude of no government involvement unless the government pays for its intrusion, and a socialism which posits that the government can do almost anything in the name of the public good without compensation.[134]

The alternative, by its very nature, does not guarantee that the land ethic described will be achieved. The consequences will depend on how the particular techniques and methodology is designed. A system of transferable development rights, for example, could be created that encourages the accumulation of large land holdings and promotes intense development, thus frustrating a trusteeship ethic. Nevertheless, the existence of compensable regulations coupled with a reformulated compensation policy gives the government another tool with which to implement a more comprehensive land use policy.

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130. Strangers and Guests: Toward Community in the Heartland, Draft Statement of the Catholic Bishops of Regions VII, VIII, IX, (copies available from National Catholic Rural Life Conference, Des Moines, 1979).

131. *See, e.g., Berglund's Call for a New Look at Family Farm and How to Save it*, Des Moines Reg., Mar. 26, 1979, at 14a.

132. E. SCHUMACHER, *supra* note 47, at 95-109.

133. T. ROSZAK, *supra* note 98, at 31-59.

134. L. BECKER, *supra* note 9, ch. 9.

IV. COMPENSABLE REGULATIONS AND AN ALTERNATIVE COMPENSATION SYSTEM APPLIED: AGRICULTURAL LAND

Agricultural land is a finite and increasingly scarce resource. Although statistics indicate that the market is not doing an effective job of preserving farmlands, it is entirely possible to preserve the better agricultural tracts. The market is hastening the loss of land through market incentives that foster large-scale production with consequent increased soil erosion and the lure of large profits gained by selling the land for development.

Government, whether federal, state, or local, does not have a comprehensive land-use policy for farmland preservation. In fact, farmland preservation is a hodge-podge of devices that are only starting to be applied.[135] Not only does the lack of a comprehensive government policy hinder agricultural land preservation, the existing legal concept of land use also hinders the development and implementation of a truly workable farmland preservation policy.

It is beyond debate that agriculture is a key industry for the nation. In addition, few would contest that a need exists for a land preservation and development policy to ensure that finite land resources, natural areas, and valuable agricultural lands are utilized, preserved, and protected for the benefit of both present and future generations.[136] Yet to state the issue so simply and to agree that this is a shared consensus is to ignore the delicate balances, trade-offs, and countervailing forces that lie beneath the surface of an agricultural land preservation policy.

The amount of land devoted to agriculture is expected to decline.[137] On a per farm basis the number of farms is declin-

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135. *See* Meyers, *The Legal Aspects of Agricultural Districting*, 55 IND. L.J. 1 (1979); B. Davis & J. Belden, A Survey of State Programs to Preserve Farmland (prepared pursuant to CEQ grant, April 1979).

136. *See* Temporary State Land Preservation Policy Commission, Mar. 1, 1979 (Iowa Land Preservation and Development Policy Interim Report). R. Blobaum, The Loss of Agricultural Land: A Study Report to the Citizen's Advisory Committee on Environmental Quality (1974); Note, *Assessment to Preserve Agricultural Land*, 47 U. MO. KAN. CITY L. REV. 629-32 (1979).

137. R. Blobaum, *supra* note 136, at 1-5. Statistics show that the nation can no longer count on a rise in productivity and increased high yields, *see* H.R. REP. No. 95-1400, 95th Cong., 2d Sess. 7-10 (1978). *See also* Pedersen, *Iowa's Land: Our People, Our Future*, Des Moines Reg., Apr. 8, 1979, at A-1; Parker, *Farm Land Squeezed in Urban-Rural Vise*, Des Moines Reg., July 15, 1979; Krause & Hair, Trends in Land

ing and the average size of a single farm is increasing. Until recently, the reduction in the number of acres devoted to agriculture was not considered a threat because productivity per acre was on the rise. Increasing productivity can no longer be taken for granted.[138]

The reduced growth of productivity is attributable to two major trends: First, the significant increase in the use of fertilizer and increased mechanization has resulted in soil losses.[139] Second, competing land uses are taking prime and unique farmlands out of production.[140] At present reserve lands available for farm production still exists; however, note that in 1974 it was estimated that the country had 266 million acres of reserve farmland, but the number dropped precipitously to 111 million in 1978.[141]

Thus, as population rises, as the desire to develop continues, and as conversion of prime agricultural land results, responsible preservation techniques deserve serious consideration. A responsible preservation policy can accommodate agricultural and non-agricultural users as long as the lands that are taken out of agricultural production are not prime lands. A preservation policy must also guard against adopting farming methods that increase the tendency for soil erosion or depletion.[142]

The effect of the above-stated developments on the cost of farmland cannot be ignored or overstated. Costs are skyrocketing as "landflation" heats up.[143] This has two noteworthy consequences: First, entry costs are growing rapidly. It is estimated that a new farmer would need $172,392 to finance

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Use and Competition For Land to Produce Food and Fiber, in Perspectives on Prime Lands (1975) (U.S. Dept. Agriculture).

138. Anthan, *Feeding Our Hungry World From Less and Less Farm Land,* Des Moines Reg., July 8, 1979; Anthan, *Land, People Trends Hint at Food 'Disaster,'* Des Moines Reg., July 9, 1979, [hereinafter cited as Anthan I and Anthan II respectively]; R. Blobaum, *supra* note 136, at 5.

139. R. Blobaum, *supra* note 136, at 5. *See also* Betts, *Soil Conservation: Saving Our Number One Resource,* USDA SOIL CONSERVATION SERVICE, IOWA FARM BUREAU SPOKESMAN, June 16, 1979, at 2A.

140. R. Blobaum, *supra* note 136; Krause & Hair, *supra* note 137.

141. Anthan II, *supra* note 138. *See also* Note, *Regulatory Authority to Mandate Soil Conservation in Iowa After* Ortner, 65 IOWA L. REV. 1035 (1980).

142. "Acid rain" caused by increased urbanization and industrialization has a detrimental effect on soil fertility, animals, crops, and human health. *See, e.g.,* Webster, *Acid Rain: An Increasing Threat,* N.Y. Times, Nov. 6, 1979, at C1.

143. Pedersen, *supra* note 137. *See generally* note 136 *supra.*

the land and equipment necessary to start operation of a 240 acre farm.[144] Second, it is becoming increasingly attractive for farmers to sell their land for development.[145] Legislative activity or regulation must take notice of these delicate financial and ecological balances.

What follows is not an exhaustive list of techniques that may be classified as compensable regulations since redefinition of terms will produce infinite variations. When the government, for example, grants tax relief to a particular landowner or group of landowners in exchange for the imposition of some land-use regulation, this could properly be classified as a compensable regulation. Restrictive covenants, subdivision regulations, or variances that are used with some element of compensation would also fall into this category.

This article will focus on specific devices that have fairly unique characteristics: transferable development rights (TDR's), easements, and a procedural mechanism. After describing each device, its legal status will be noted. Finally, the interrelationship of these techniques for preserving agricultural lands will be explained with reference to more or less direct controls (zoning and eminent domain, and tax assessment respectively) to construct a comprehensive and workable scheme.[146]

A. *Transferable Development Rights*

Basically, a development right permits the property owner to build upon or develop his land. In an urbanizing region it is usually the owners' most valuable property right.[147] In our legal system when we discuss a particular land-use regula-

144. Anthan I, *supra* note 138. This is a smaller than average farm which is estimated to be 393 acres nationally. Anthan, *Pressures Mount on Farmers to Sell 'Last Cash Crop,'* Des Moines Reg., July 10, 1979, [hereinafter cited as Anthan III].

145. Anthan III, *supra* note 144.

146. This article concentrates on devices that have been denominated compensable regulations. Zoning is a strict police power device and no compensation is required. Eminent domain, naturally, requires compensation based on the highest and best use principle. A truly effective agricultural land preservation system would combine these techniques and supplement them with a responsible tax policy. *See* Meyers, *supra* note 135.

147. B. Chavooshian, T. Norman, & G. Nieswand, Transfer of Development Rights: A New Concept in Land Use Management, Leaflet 492-A, 7 (1975) (Cook College Cooperative Extension Service, Rut.-State U. of N.J.). *See also* J. Helb, B. Chavooshian & G. Nieswand, Development Rights Bibliography, Leaflet 533 (1976).

tion or control, we are talking about how the right to develop land is being affected. No landowner has an absolute right to develop his land, since, even in the absence of specific legislation, the system derived from common law imposes an obligation on the landowner to refrain from injuring his neighbor. The Latin maxim *sic utere tuo ut alienum non laedas* (use your property in such a manner as not to injure that of another) states the guiding principle of land use controls generally recognized at common law. Today, however, we have moved from reliance on judge-made land-use controls to more specific, legislative ones.[148]

The concept of transferable development rights permits development rights to be split off from a particular parcel and transferred "to land where more intense development will not be objectionable."[149] The desired result is protection of the threatened resource on the restricted site while allowing the landowner to recoup the economic value represented by the site's frozen potential.[150]

TDR systems can be administered by either the private marketplace or a governmental entity. The basic procedure involved in the design of a privately operated TDR system is relatively straightforward. It consists of six basic steps.[151] It is somewhat of a misnomer to label this a "private" system, because the government creates the TDR's. The reference is to the private sale and purchase of rights rather than through government sale and purchase. The first step involves identification of those lands that are to be preserved; but there are preliminary decisions that need to be made prior to this identification process. First, a time frame for the designation of prime agricultural land that will be affected by the TDR system must be established (that is, will only that land which is in immediate danger of development fall under the plan, or will land that is in potential danger of development within an undetermined period also be included). The other preliminary decision that needs to be made is what exactly constitutes

148. In either event land use controls are directed to the landowner's development rights and such a right is truly a property interest.

149. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 86 (1973).

150. *Id.* at 85.

151. NATIONAL CONFERENCE OF STATE LEGISLATORS, TRANSFERABLE DEVELOPMENT RIGHTS 39 (1977).

prime agricultural land. Once the preliminary questions are resolved the actual process of mapping can begin.

The second step in the six-step process involves a determination of the capacity or development potential of the affected land. If the land is already zoned, this can be a relatively simple process because the restrictions are already in existence. The development potential calculation can be based on what could be built under that ordinance. Once again, however, it may be advisable to actually examine the proposed restricted parcels to determine what sort of development would be likely to occur there. Ironically, prime agricultural land is also often a most attractive site for intensive development because of its deep soils, good drainage, resistance to erosion and slight slopes.[152] As a result, care must be taken to recognize patterns of development so that controls can be used to channel rather than frustrate development.

After the designation is completed, the third step necessitates the establishment of a system whereby landowners can be compensated for the frozen or taken development potential that was calculated in the second step. This aspect of the system provides for allocation of the development rights to be transferred. The system could operate on a straight acreage basis, but this would ignore valuing development potentials. The New Jersey Legislature, for example, chose to base its calculation on the ratio between the value of the particular parcel to the total value of the preservation zone.[153] This allocation system should lead to a more equitable distribution of development rights than the straight acreage system, and it should be easier to administer.

The fourth step involves locating areas within the municipality, county, or region that can serve as receiving districts for the transferable development rights. This is the most crucial and difficult step in implementing the TDR system. The transfer area must be the most developable land in the area outside the preserved prime agricultural land. It must be an area that is or will soon be served by an infrastructure, and it should be the most lucrative site possible. If the transfer area is so defined, then development will be channeled rather than

152. Roe, *Innovative Techniques to Preserve Rural Land Resources*, 5 ENVT'L AFF. 419, 420 (1976).

153. NATIONAL CONFERENCE, *supra* note 151, at 45.

frustrated and the development potential of the affected area will be maximized. Also, by designating as a transfer area land that is second only in its development potential to the land designed to be protected, the transfer payments for the TDR's will be less.[154] All of these elements are necessary so that orderly development can proceed on sites that are economically attractive to developers. It is only under such circumstances that the system will be able to guarantee the marketability of the transferred rights. This guarantee is necessary to avoid some of the financial and constitutional objections that can be raised.

One way of accomplishing guaranteed marketability is to locate the transfer district in a proper transition area. Transition areas are those that are moving toward higher densities as a result of market forces or local planning. As far as farmlands are concerned, we define transition areas as those farmlands that, because of criteria such as soil conditions, land value, and regional development patterns, are less valuable as farmland than for development purposes. If the demand exists for greater density and development than that which the current zoning ordinance would permit, the area can be designated as a transfer area rather than rezoned, thus providing a development supply for the excess demand. This system provides a guaranteed market that is ready, willing, and able to purchase the development rights.

The fifth step involves calculating the receiving capacity of the transfer zone. It is necessary to determine what uses will be permitted in the transfer zone. Even though the rights transferred from the preservation zone may have been based on criteria such as the number of residential units that could have been built there, there may be no reason why the rights, once transferred, cannot or should not be used for commercial or industrial purposes. The probability of conversion must be taken into account. For this reason it might be simpler to identify the rights in terms of economic value rather than physical units. Nevertheless, it should be apparent that any

154. Carried one step further, it is possible that a comprehensive land use control system which utilizes the best devices in the most compatible and most efficient manner can create value. In effect the value of the area designated as a transfer area may be enhanced. It follows then that a windfall recapture provision should be established to facilitate transfer payments. *See* WINDFALLS FOR WIPEOUTS, *supra* note 8, at 376-398.

TDR scheme involves considerable planning and should be considered a part of any comprehensive growth management plan.

The final step involves establishing a procedure to achieve a reasonable balance between the outstanding number of development rights and the transfer zone's capacity to absorb those rights. This is potentially a problem because some developers may not purchase development rights, choosing instead to build at a lower density. If this happens, there is an immediate surplus of transfer zone capacity and the market becomes unstable.

The procedure outlined above is essentially a private TDR proposal; the government is not involved in the actual purchase and sale of the TDR's. The marketplace absorbs transaction costs in connection with the purchase and sale while costs of identification, definition, and mapping are borne by the government. The government also designates areas as preservation districts or transfer areas, thus creating the "property interest" known as the TDR.

TDR systems are amenable to varying degrees of government involvement. Note that one principle purpose behind government involvement in TDR systems is the avoidance of the marketability problem. One public TDR system, the Puerto Rico plan, provides for the government purchase of all the development rights; no private market for the purchase or sale exists.[155] This plan operates through the Puerto Rico Planning Board which is unusually comprehensive in its jurisdiction, having island-wide authority. Such regional jurisdiction allows the Planning Board to determine land use in other areas as development proposals emerge. The Board is also party to all transfer transactions and defines precisely the situations requiring compensation and the amount of compensation due.

Under the Chicago Plan, a hybrid public scheme, the government would establish a development rights bank. If the owner of development rights is unable or unwilling to sell his rights on the open market, he has the option of selling his

155. COSTONIS & DEVOY, THE PUERTO RICO PLAN: ENVIRONMENTAL PROTECTION THROUGH DEVELOPMENT RIGHTS TRANSFER (1975).

A government purchase system was used in Suffolk, New York. *See* Peterson & McCarthy, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment*, 26 DEPAUL L. REV. 447 (1977).

rights to the government owned bank, thus guaranteeing saleability. Some TDR rights' advocates feel hopeful for this sort of system, believing that it could eventually become profit-making for the government.[156] Others are doubtful as to its feasibility and question the bank's ability to survive financially when construction activity slumps.[157]

The New Jersey TDR program contains the least amount of governmental involvement. In that state there is a five million dollar reserve fund. If a development rights owner can prove to the TDR commission that he is unable to sell his rights on the open market, the TDR commission will buy those rights with monies from the fund and will reimburse the fund upon sale of the rights.[158]

Prior to implementation of a TDR program or passage of any legislation, substantial thought needs to be given to its potential impact, legality, marketability, urban design, statutory approval, and uniformity.

Guaranteed marketability of the development rights is necessary to avoid the taking issue in a TDR scheme. Critics of the program question the legality of some measures that might be utilized to accomplish such a scheme. They argue that the TDR's artificially depress the market value of the property in the transfer area in order to make the TDR's valuable. Likewise, if the TDR's have nowhere to locate, their value disappears.[159]

Some question whether zoning enacted merely to create a ceiling and hence to guarantee marketability of TDR's is a valid exercise of the police power. The answer is yes, but only if the TDR's and zoning together operate to further goals set by the comprehensive plan and the land value is not depressed below constitutional limits. Critics of TDR systems argue that development rights that can drift across the city and touch down anywhere within a transfer district must necessarily upset the zoning design.[160] This assumes that zoning laws are in perfect balance and that zones are drawn to allow

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156. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972).

157. B. Chavooshian, T. Norman & G. Nieswand, *supra* note 147, at 805.

158. NATIONAL CONFERENCE, *supra* note 151, at 315.

159. Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, *appeal dismissed*, 429 U.S. 990 (1976).

160. Berger, *supra* note 124, at 808.

the maximum development potential of the land. Probably neither assumption is entirely true. In any event a well thought out TDR scheme can be coordinated with zoning to carry out the comprehensive plan in a more effective manner.[161] With the intelligent planning needed to select transfer districts, to place limits on the use of transfer rights, to establish procedures to monitor the plan's impact on both the preservation of land and development within transfer areas, this will assure the critical input required to satisfy the comprehensive plan.[162]

Most communities lack enabling power to carry on preservation via the purchase and sale of development rights. Local governments must therefore be prepared to demonstrate that state legislatures have authorized them to enact these programs under the police power.

Uniformity simply requires that no owner within a district be subject to restrictions more burdensome than his neighbors within that district. It does not bar one owner from gaining a special benefit, so long as all other owners within the district have the same opportunity. If TDR's are equally available to all landowners within the transfer district, uniformity will not be a problem. PUD and cluster zoning should serve as sufficient precedent to obtain judicial approval with regard to any uniformity objection.[163]

Owners of the resource selected for protection argue that, as a result of the TDR system, their property rights are being taken without due process of law. It is at this juncture that the alternative compensation system would be utilized to avoid this constitutional objection or to foster the new land ethic described earlier. The constitutionality of a TDR system from a compensation point of view is discussed by Chief Justice Brietel in *Penn Central Transportation Co. v. City of New York.*[164]

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161. *See generally* Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976).

162. Berger, *supra* note 124, at 810.

163. Costonis, *supra* note 149, at 120.

164. 42 N.Y.2d 325, 366 N.E.2d 1271 (1977), *aff'd*, 438 U.S. 104 (1978). The United States Supreme Court held no taking had occurred. The Court, therefore, found it unnecessary to decide whether the TDR's would have constituted adequate or just compensation. This Court did not address the viability of a middle ground. Some commentators believe the Court explicitly recognized the constitutionality of TDR's. *See, e.g.*, Marcus, *Penn Central Transportation Co. v. City of New York*, 30

The use of TDR's for the preservation of prime agricultural land is promising if used in the right geographical area, and is an equitable solution to an increasingly serious problem. However the true test as to its workability depends on empirical data regarding the actual areas involved, and the economics affecting that land.

If a private system is used and the purchase and sale of TDR's occurs in the market place, no alternative compensation system is needed. The system will simply funnel costs back into the private system. If, however, the government steps in to assure marketability, it seems appropriate to value TDR's according to an alternative compensation system. Otherwise the cost to the government of guaranteeing a market may be prohibitive.

B. *Easements*

Several states have adopted the use of conservation easements as an alternative means of dealing with the problem of preservation of prime agricultural land.[165] A conservation easement exists when "the fee owner relinquishes all development rights [on his land] except those specifically reserved in the easement grant instrument."[166] The rights that the fee owner reserves include "any regular use [of the land] exercised prior to acquisition of the easement"[167] that does not "materially impair" the preservation of the agricultural land.[168] In return for its newly acquired interest in the land, the government must compensate the fee owner in an amount equal to the worth of the relinquished development rights. This arrangement gives local government a tool almost as ef-

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LAND USE L. & ZONING DIG. No. 9, at 4 (1978).

165. *See* N.J. STAT. ANN. §§ 4:1B-1 to 4:1B-15 (West Supp. 1979-1980) which reestablishes a demonstration "development easement" program for New Jersey. Farmers voluntarily sell their "development easements" to a state body which pays "fair value of the development potential of such lands for non-agricultural purposes."

This discussion of easements applies to covenants as well with only technical legal modifications. Essentially, the government bargains for a promise from the landowner not to develop his land rather than take a grant from the landowner. *See also* CAL. GOV'T CODE §§ 51200-51295 (West 1966 & Supp. 1980); CAL. REV. & TAX. CODE §§ 421-430.5 (West 1970 & Supp. 1980).

166. Comment, *Easements to Preserve Open Space Land*, 1 ECOLOGY L.Q. 728, 733 (1971) [hereinafter cited as *Easements to Preserve Open Space*].

167. *Id.*

168. *Id.* at 733; Note, *Scenic Easements*, 8 IDAHO L. REV. 131, 132 (1971) [hereinafter cited as *Scenic Easements*].

fective as a fee purchase, but usually with lower costs.[169]

The basic procedure for determining which lands are to be preserved by means of conservation easements is a relatively simple three step process: First, it is necessary to define precisely what constitutes prime agricultural land. Second, it is necessary to determine which general areas are or will be in danger of development within a set period of time. Third, it is necessary to locate the specific parcels within those general areas that meet the criteria of prime agricultural land.

Once the specific parcels to be preserved are located, it is necessary to determine the development potential of those parcels. If the land is already zoned, the development potential can be based on the highest and best use possible under the zoning ordinance or alternatively, on the actual use value as described earlier.[170]

A conservation easement may be acquired by a negotiated transaction or by eminent domain. An easement that is acquired through the former means may either be purchased or donated, with the seller receiving either payment or tax benefits as compensation.[171]

The amount of compensation is generally measured by "the difference between the value of the land given its highest and best use before the imposition of restrictions . . . and the value of the land given its highest and best use after the easement restrictions are in effect."[172] As noted above, however, this is not the only measure available—the alternative compensation is based on the actual use value at the time the easement is purchased. Information such as "neighborhood data regarding growth patterns, location, availability of utilities, topography, access, and real estate tax rates"[173] can all be helpful in establishing this alternative figure.

Of course, it is financially more desirable for the government to persuade land owners to donate the easements. "The

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169. *Easements to Preserve Open Space, supra* note 166, at 731. A distinction must be made between acquiring an easement for the purpose of preserving land, which we assert is valid if coupled with some form of compensation, and restricting land to depress its value so that the government can acquire it later, which we assert is invalid. *See* Morris County Land Improvement Co. v. Township of Parsippany 40 N.J. 539, 193 A.2d 232 (1963).

170. Roe, *supra* note 152, at 434.

171. *Id.* at 430.

172. *Easements to Preserve Open Space, supra* note 166, at 742.

173. *Id.* at 731.

donor of a conservation easement would be entitled to a charitable reduction on her income taxes"[174] in an amount "equal to the fair market value of the property right donated."[175] In addition, and perhaps more importantly, the landowner would likely be entitled to a reduction in the property taxes levied against the protected land.[176]

Because some landowners might refuse to relinquish their development rights voluntarily, it is necessary to provide for the exercise of eminent domain power as an alternative means of obtaining conservation easements. Often the threat of condemnation is an effective way to induce the few inevitable hold-outs in the targeted preservation zone to negotiate.[177] Nevertheless, the landowner who relinquishes his development rights through eminent domain proceedings will theoretically receive the same compensation as the landowner who voluntarily sells his rights. The government, however, will find eminent domain proceedings more expensive as a result of added administrative costs.

After determining how the easement will be acquired, it is necessary to decide how long the easement will run. An easement may run in perpetuity or for a term of years. Easements running in perpetuity, of course, are of greatest benefit to the public. Not only does this form avoid the administrative expense of renewing an expiring easement, but also an easement in perpetuity more effectively fulfills the public purpose of preserving open space.[178] A short term may serve

> as only an incubatory term for the development potential of the land, while a term of perpetuity will assure that the easement will be abandoned only if a public space purpose no longer exists. Furthermore, given the increasing development value of most land, renegotiation of an easement twenty years hence could well result in a higher price for the easement,[179]

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174. Roe, *supra* note 152, at 430.

175. *Easements to Preserve Open Space, supra* note 166, at 736.

176. Roe, *supra* note 152, at 430. This is an example of combining the direct method of easement acquisition with the indirect method of tax relief. *See also* Meyers, *supra* note 135, at 7-23.

177. Comment, *The Use of Easements to Preserve Oregon Open Space,* 12 WILLAMETTE L.J. 124, 129 (1975) [hereinafter cited as *The Use of Easements*].

178. *Id.*

179. *Easements to Preserve Open Space, supra* note 166, at 739.

thereby creating an unbearable financial burden on local governments. On the other hand, landowners might feel more comfortable about relinquishing their development rights for a period of years, knowing that at some point they can put their land to a different and perhaps more profitable use.[180]

The greatest benefit the government derives from the use of easements is their economy. In addition, "all easements leave the encumbered land on the local property tax rolls because the fee subject to the easement remains in the hands of the original owners."[181] Furthermore, "the expense of maintaining the land remains with the fee owner."[182]

The benefit to the landowner in the easement scheme is that he is allowed to remain on his land and continue to use it in the manner delineated by the arrangement between fee owner and easement purchaser. If the value of the land is depressed below the actual use value, then some compensation for governmental intrusion will be made. In addition, if the landowner grants a conservation easement on a portion of his land, development values may increase on the remainder because of a guaranteed absence of creeping urbanization.

Local governments face a three-fold financial burden in implementing the use of easements: lost tax revenues, administrative expenses, and procurement costs. In addition to the reduction in present tax revenues, there is a potential revenue loss by preventing the intensive land development that would increase the future tax base of the community. Administrative expenses include, but are not limited to, the costs of surveying, title examination, property valuation, negotiation, and litigation expenses.

"Ironically, society's need for open space is usually greatest in the urban fringe area where development pressure is greatest and land values are highest."[183] When an easement is purchased near the urban fringe where the development potential is great, the value of that easement "is measured in large part by the benefit that the owner would have received from development or from sale."[184] This valuation may ap-

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180. *See generally* Conference on Scenic Easements in Action, Workshop Manual, Univ. of Wis. (1966).

181. *Easements to Preserve Open Space, supra* note 166, at 735.

182. *Id.* at 735-36.

183. *Id.* at 741.

184. *Scenic Easements, supra* note 168, at 138.

proach the cost of a fee, in which case an alternative means of compensation must be sought together with a package of agricultural land preservation tools.

There is a need for legislation to cover land preservation easements since courts are reluctant to impose new land use restrictions.[185] Statutory language could provide that all conservation easements will be construed to run with the land, thereby avoiding common law questions of interpretation as to whether an easement is appurtenant or in gross—an interpretation that will determine how long an easement is effective.[186] One constitutional challenge to the conservation easement scheme might be that such a scheme does not serve a valid public purpose. This challenge is also applicable to TDR's used for the same purpose. The United States Supreme Court, however, indicated that the use of eminent domain to satisfy asthetic goals serves a valid public purpose.[187] This policy should easily extend to compensable regulations, particularly where the effect of the regulation is to preserve food resources through conservation of agricultural land. The outcome will probably depend on whether courts perceive the loss of prime agricultural land as both an immediate and severe problem.

Statutory problems can be overcome with careful drafting of the legislation. Some suggestions from Oregon include precisely defining preservation easements to maintain separation from the scenic easement definition, allowing for the power of eminent domain, providing for funding, establishing that all such conservation easements run with the land, and providing guidance for the state and local governments who will administer the programs.[188]

In sum, using easements with a compensatory regulation for the preservation of prime agricultural land is a relatively simple concept. There are no major legal roadblocks, and operationally the system seems workable. The major difficulty attending the use of conservation easement is funding. The element that distinguishes easements from TDR's is transferability. With easements, the government is the purchaser and the development rights attendant to the easement do not go

185. *Id.*
186. *Id.* at 142.
187. Berman v. Parker, 348 U.S. 26 (1954).
188. *The Use of Easements, supra* note 177, at 126.

anywhere. With TDR's, on the other hand, transfer of development rights is the essence. If the areas that are most in need of preservation also happen to be the areas that are most expensive due to development potential, the easement program might be economically unfeasible. The decision of whether to use TDR's or easements to preserve land depends, therefore, on how much money the state has available for use in such projects and on what geographical areas are in need of preservation.

C. *Institutional Alternatives: The Florida Property Rights Law*

Thus far, our discussion has centered on TDR's and easements, all property interests. Should a government feel that such devices are too cumbersome or too costly, then institutional changes in courts or administrative agencies can and should be made to create a legal cause of action in the property owner to redress perceived losses caused by governmental regulation. The Florida Property Rights law[189] is a good example. This law creates a cause of action and the trial court provides a forum for the disposition of taking claims that arise because of a denial of certain enumerated permits.[190]

The Florida law enables any person who feels substantially affected by certain enumerated agencies' regulations to initiate a court suit requesting monetary damages or other relief. For our purposes, a similar law might specify that farmers aggrieved by actions of the identified state agencies may challenge the actions of those bodies. What the act does is grant to the landowner a cause of action for monetary damages in addition to allowing the landowner to seek a judicial declaration of invalidity of the complained of regulation. It is the statutory equivalent of the inverse condemnation suit.[191] In Florida, court review is confined solely "to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without compensa-

189. FLA. STAT. ANN. §§ 161.212, 253.763, 373.617, 380.085, 403.90 (West Supp. 1980). *See also* Comment, *Oregon's Senate Bill 827 and the Problem of Just Compensation for Down Zoning*, 59 OR. L. REV. 124 (1980).

190. Rhodes, *The Florida Property Rights Law*, 31 LAND USE L. & ZONING DIG. No. 1, at 5 (1979).

191. *See* text accompanying note 11 *supra*.

tion."[192] Once that determination is made, the matter is remanded to the agency which shall either grant relief from the regulation or pay monetary damages.[193] If the agency fails to submit a proposed order within a reasonable time not to exceed ninety days, the court may order relief or damages together with attorney's fees and costs to the prevailing party.[194]

The Florida plan was designed to allow inverse condemnation suits which the Florida courts would not entertain.[195] The purpose was to make available to landowners an alternative remedy necessitated by the advent of "second generation land use restrictions" such as resource protection regulations.[196]

The chief weakness in the statute is that it sets out no criteria for either the court or the agency by which they can make a determination as to what constitutes a compensable event. According to the legislative history of the act there has been a taking without compensation when a private property owner suffers a greater burden than other real property owners as a result of land use restrictions for the benefit of the public or a sector of the public.[197] The courts are authorized to grant relief upon finding that the individual property owner is "carrying more than his fair share as the price for public benefit."[198]

Since the test does not clarify at what point a property owner becomes unduly burdened by a regulation, the result is that the unduly burdened individual's property has been taken in the traditional sense. For this he is entitled to receive highest and best use compensation according to article V, section 2 of the Florida Constitution.

The second weakness in the statute is its silence as to the amount of compensation. If the agency or the court is required to authorize the payment of compensation according to the highest and best use standard, the purposes of alternative compensation systems are destined to fail. Under the Florida

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192. FLA. STAT. ANN. § 380.085(3) (West Supp. 1980).

193. *Id. See also* MODEL LAND DEVELOPMENT CODE, *supra* note 20, at 9-112(3).

194. FLA. STAT. ANN. §§ 380.085(4)-(5) (West Supp. 1980).

195. *See* Mailman Dev. Corp. v. City of Hollywood, 286 So. 2d 614 (Fla. 1973), *cert. denied*, 419 U.S. 844 (1974); Rhodes, *supra* note 190, at 6.

196. Rhodes, *supra* note 190, at 5.

197. FLORIDA SENATE SELECT COMM. ON PROPERTY RIGHTS AND LAND ACQUISITION, FINAL REPORT 6 (1976).

198. *Id.* at 4.

law the same anomalies inherent in the traditional takings law means that the regulation is invalidated, and hence the purpose of the legislation is frustrated, or the government is forced to pay the maximum for its regulation.[199]

In contrast, the primary goals of the TDR or easement schemes are lacking in the Florida plan. First, TDR's and easements both attempt to decrease the cost to the government in acquiring developmental rights. They do so by allowing the property owner to continue his present use of the land while paying him only the value of that which is taken as a result of the regulation. Conversely, the Florida plan appears to be an all-or-nothing proposition. Either the regulation stands as valid or full compensation is paid. In the alternative, a variance is granted or the regulation is altered on its face to come within the ambit of a valid police power regulation. In any event, either the government or the individual property owner is the sole victor. There is no middle ground or compromise under the Florida plan.

Second, through the use of easements or TDR's there is an attempt to remedy the potential inequities of the regulation prior to or concurrently with its implementation. The government accepts the burden of determining who the affected property owners will be and thereby compensates them for their loss. Conversely, under the Florida scheme, the property owner cannot seek a remedy until after implementation of the regulation and he is forced to incur the expense of litigation with no guarantee of relief.

In conclusion, the Florida plan does no more than specifically authorize remedial relief for overly burdensome regulations, but does so on an *ad hoc* basis that seems destined to frustrate any comprehensive or regional planning objectives. The procedure is expensive in terms of the compensation required as well as the court costs incurred. This device, as drafted, simply implies that the regulation will stand when coupled with compensation. In traditional legal terms, the governmental regulation will result in a forced condemnation or judicial invalidation.

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199. Rhodes, *supra* note 190, at 5.

VI. CONCLUSION

The fundamental premise of this article has been that the various levels of government have no comprehensive land preservation policy. Indeed, the need for government control at this or any other time is debatable. Nevertheless, there exist certain social, political, economic, and legal perceptions that favor a serious consideration of the question of government control to preserve this resource.

There are fundamental political and legal reasons for the lack of a comprehensive preservation policy. Politically, there is a lack of coordination between the levels of government, with a lopsided balance of power in the land-use field in favor of local government autonomy. This results in a parochial application of land use laws that undercuts effective coordinated and complimentary land uses. Hence, before a truly workable and comprehensive land preservation policy can be developed, certain basic allocations of authority must be made.

A second area in which coordination would be beneficial is in the implementation of particular land use controls. The primary focus of this article has been what we have termed "alternative compensations systems." They can, if properly designed, strike a balance between the traditional compensation/no compensation classifications. Even so, these are only tools that must be properly mixed with foresight and intelligent general planning, employing a broad range of other available controls (*e.g.*, zoning,[200] land banking,[201] taxation,[202] and

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200. An alternative to the use of compensatory regulations for preservation of farmland is the implementation of zoning ordinances. Zoning is at the regulation end of the police power-eminent domain continuum and requires no compensation. In its simplest form, zoning is the restriction of a particular area of land for particular uses. A similar device is the "agricultural district" which offers farmers a package of benefits such as favorable valuation, restriction on taxation of utilities, limitations on the power of eminent domain, less regulation of normal farming practices and a policy encouraging state agencies to promote the preservation and development of farmlands. *See Assessment to Preserve Agricultural Land, supra* note 136, at 643-45; N.Y. AGRIC. & MKTS. LAW § 27 (McKinney Supp. 1979-1980); VA. CODE §§ 15.1-1506 to -1513 (Supp. 1979). Zoning for agricultural purposes is a valid technique under appropriate circumstances.

Keeping a basic constitutional framework in mind, it is possible to explore zoning and its particular applicability to the preservation of farm land. In the past, two types of zoning ordinances have been used to preserve agricultural land. One involves zoning through large minimum lot size requirements, which has the effect of making farming the only economically feasible use of the land. Note, *Farmland Preservation Techniques; Some Food for Thought*, 40 U. PITT. L. REV. 258, 260-61 (1979). The other involves zoning strictly for agricultural use. *See* Gisler v. County of Madera, 38

eminent domain). Even if economic efficiency is the state's long range goal, the question that now must be asked is which mixture of devices in what geographical areas can be used to achieve that end?

This article has discussed the role of TDR's and conservation easements as tools for land preservation. Because of this restriction tax relief may be necessary, but also, depending on what the government hopes to achieve, a tax policy may be designed with appropriate incentives or disincentives for the accumulation of large holdings or for sale for development. Roll back provisions, for example, may be effectively used to discourage sales for non-agricultural purposes. It is

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Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974).

The second type of zoning ordinance may be implemented strictly for the preservation of prime agricultural land. Preservation of prime agricultural land is gaining increased acceptance as a legitimate public purpose. Joyce v. City of Portland, 24 Or. App. 689, 546 P.2d. 1100 (1976).

Some states have implemented agricultural zoning by statute. The statutes are all similar in that they set aside areas which are to be used for agriculture and other uses which do not conflict with farming. *See* HAWAII REV. STAT. § 205-5 (Supp. 1979); OR. REV. STAT. §§ 215.203-215.263 (1979); WIS. STAT. §§ 91.71-91.179 (West Supp. 1979-1980).

201. Land banking is a mechanism by which the government acquires privately held land through purchase, gift or condemnation pursuant to a general state plan. This device is at the opposite end of the continuum in relation to zoning, which means that the government must pay dearly to acquire land through this technique. The government then manages the land, leases it or sells it to farmers subject to appropriate development right retention or restrictive covenants. "The central legal issue confronting [a land banking scheme to preserve agricultural land] is whether the power of eminent domain used for acquiring land for unspecified uses at some unprescribed future date" serves a valid public interest. Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RESOURCES J. 119, 142 (1979). *See also* Commonwealth of Puerto Rico v. Russo, 95 P.R.R. 488 (1967); Berman v. Parker, 348 U.S. 26 (1954).

Land banking is presently being used by authority of statute in several states. The statutes are all similar in that they provide for condemnation of privately held land for future agricultural use. *See* HAWAII REV. STAT. §§ 155-1, 171-20, 171-33-171-37, 171-65-171-68, 171-111-171-117 (Supp. 1979); MASS. GEN. LAWS ANN. ch. 61, § 14 (West Supp. 1980); PA. STAT. ANN. tit. 32, §§ 5001-5013 (Purdon Supp. 1979); TENN. CODE ANN. § 11-1716 (Supp. 1980); WASH. REV. CODE § 84.34.200-84.34.240 (West Supp. 1980).

Land banking appears to be a viable alternate mechanism to preservation of agricultural land. Recently, the American Law Institute adopted a comprehensive land banking provision. MODEL LAND DEVELOPMENT CODE, *supra* note 20, art. 6. Land banking is defined as a "system in which a governmental entity acquires a substantial fraction of the land in a region that is available for future growth of the region." *Id.* at 221.

202. *See* Dunford, *A Survey of Property Tax Relief for the Retention of Agricultural and Open Space Lands*, 15 GONZAGA L. REV. 675 (1980).

necessary to recognize that these devices generally cannot be used in isolation. At the extremes, zoning and land banking have their place as well. Zoning, in areas unthreatened by development, may be the only direct device needed. Land banking may be used in more rapidly developing areas where the government wants to insure protection of farmlands and other open space. And of course, application or elimination of the highest and best use principle of compensation permeates decisions surrounding each of the devices discussed above.

These alternative and traditional devices can be applied in a pattern of concentric circles: land banking in the heart of a developed area, then TDR's, easements, and zoning as we move outward. Concommitently, these devices must be coupled with a compensation system that is compatible with the objectives of each. These objectives are not served by a scheme utilizing the highest and best use principle, rather by an alternative compensation system that can and will work.