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**A View of Farmland Preservation
From a Different Perspective**

by

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A VIEW OF FARMLAND PRESERVATION FROM A DIFFERENT PERSPECTIVE*

James B. Wadley**

I had intended to approach the problem of farmland preservation from the point of view of the land planner and explore the difficulties that have been encountered in putting into practice the various kinds of farmland preservation devices that are currently being discussed. As I considered this approach, several observations seemed apparent. First, I think we have to recognize that most of the approaches that are frequently identified are not readily transferable from one jurisdiction to another since their success often depends upon factors that may be uniquely local. Without taking those unique local factors into account, it is very difficult to borrow an approach from one jurisdiction and apply it in another. To maximize the transferability of an approach, it is necessary to first understand why the particular program has developed the way it has. For example, it is insightful to observe that the Hawaiian approach to the land development problem was probably colored by the desire to keep the ancient trust estates intact. That these estates just happened to be comprised of farmland is also significant and may explain why the Hawaiian approach has not been particularly successful even in Hawaii since the bottom has dropped out of the pineapple market and it is no longer as financially feasible to be a pineapple farmer. Similar kinds of local factors can be expected to have influenced the Oregon approach which is very concerned with preserving the Willamette valley.

Although experience seems to suggest that most preservation approaches are probably not readily transferable due to the unique local factors which underlie them, we have been very slow to identify and explore those factors. Let me suggest that our discussion of different approaches could be far more meaningful if it is struc-

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tured in a way that will identify the unique features of the jurisdiction in ways which may explain the success or failure of the particular approach.

Second, I have observed that in the implementation of any of these programs, the opportunity for success depends in large measure on the extent to which the efforts of a number of fairly divergent professions which are often in conflict with one another can be effectively coordinated. The interest and expertise of land planners, lawyers, developers, and landowners all can have a very direct bearing on the success on a land use preservation program. Similarly related to the success of these programs is the extent to which we can or cannot integrate these approaches into the existing land use regulations structure, for example, into the framework of comprehensive plans or zoning regulations.

Third, I have observed that the single most difficult legal issue facing us is the property right concern: the extent to which a jurisdiction can deprive an individual of his right to use his land as he may wish. Companion to this property right question is the very difficult practical problem of how to spread the economic gain or loss that results from the legal regulations among those affected by them. I am sure some programs jeopardize their chances for success by not focusing on both problems. If a program ignores the risk-sharing aspect, its chances decline. Conversely, if it fails to adequately address the property right question, it is vulnerable to attack.

Finally, I have observed that the sheer cost of some programs may be the single most critical factor which deters a jurisdiction from adopting what may be, for that jurisdiction, the most appropriate response to the problem. As a result, a jurisdiction may really be looking at something that is a second choice or worse in terms of appropriateness for the jurisdiction.

After having made these observations about the problem of farmland preservation from the perspective of the land planner, I am somewhat persuaded that that may not be the most useful perspective for us here at this conference. I think one of our most frequent and major problems in addressing the farmland preservation question is that we do not tend to focus on all of the right issues or even the most critical, relevant issues. Using this theme

as a springboard, I would like to call our attention to a number of areas that are often overlooked in the current farmland preservation discussion. (At this point, I'm not so worried about whether the programs we are proposing are working or not. I have considerable difficulty deciding whether *any* of the programs are working since I have some serious reservations about the standards we are using. When we say a program is working, does that mean that it is succeeding in keeping land in agricultural uses? Or does it mean the people in the jurisdiction are satisfied with it? Does it mean we are keeping farmers on the land? Does it mean the farmers on the land are economically successful? Or does it mean that the land is being confined to what the majority of the jurisdiction think is its highest, or most appropriate, use? On the other hand, I am concerned that we appreciate what I see as really being at stake in the farmland preservation debate).

First, I think that in most cases we approach the problem by posing it essentially as one of land use. This typically leads us into a discussion of the various ways that the use of land can be managed. From the farmer's viewpoint, however, the problem is not one of land use but one of who is to control the decision-making as to which particular uses may occur on which particular lands. We spend a lot of time categorizing our approaches to the problem primarily based on the manner in which the land use issue is managed. Let me suggest an alternative categorization, advisable not because it has any particular recommendable advantages over others except insofar as it classifies the programs from the farmer's perspective. On the other hand, it very effectively explains why some programs tend to fail to secure the support of the major purported beneficiary group—the farmers themselves. I think it is useful to divide programs into whether they are voluntary or involuntary as to farmer participation and we might make such a list. Among the voluntary programs are the so-called Right to Farm laws (where the farmer is getting some nuisance type protection, or government restriction protection), tax benefit programs, zoning, and agricultural districting programs.

On the other hand, involuntary approaches would include the purchase of development rights programs like that suggested by Professor Juergensmeyer. Perhaps less mandatory than others, but still encompassing elements of involuntariness, would be the idea

of transferable development rights. Exclusive agricultural zoning tends to be an involuntary approach.

If we measure which of the two categories is more likely to succeed in keeping the land in farming, it seems that it is consistently the voluntary approaches that we most frequently criticize as failing. Experience with the involuntary approaches suggests that they have a much better chance of success if keeping land in agricultural use is our criteria for measuring success. The common denominator in this classification scheme is who has control over the land use decision. If the land use decision resides with the individual landowner, it is not only considered a voluntary program, it seems it is also less likely to result in the land remaining in farming than if we transfer control over that decision to the public decision-making body. This leads me to suggest that the larger question is the more critical question of who has control over the land use decision. This question brings in issues of liberty, property ownership and other questions beyond that of mere land use. And it seems to me that unless you address that question, it will always be hard to understand why our primary beneficiary group, the farmers, are most likely to object to the program and are least likely to stay in the program if they don't like it. This analysis also suggests one of two other things: either these programs really are not for the benefit of the farmers as we say, or that our programs are not particularly responsive to their needs. It seems to me we need to understand the farmers' major objections to their inability to control the use of the land before we can effectively solve the problem. In that sense, we need to broaden our focus to consider that it is more than simply a land use question—it is also a right of choice question, even though the right of choice we are concerned with is the fundamental control over the land use decision.

Second, I am concerned with the tendency to focus just on the urban fringe, though that is a logical focus since that is where the immediate impact of the problem appears to be. The cities are moving out, converting land that used to be in farming to non-farm uses and it is around the cities that we see the problem as being most acute. In a larger sense, however, farmland preservation concerns should also include, for example, the question of soil conservation. This is especially true in light of some recent Iowa decisions that seem to suggest that local soil conservation districts can

mandate what the farmer does on his land to prevent further erosion, and in that sense, suggest that control over the farmland use decision-making has been transferred to the public body.

Also to be considered is the issue of availability of water and other resources. Somewhere down the road we are going to have to make a very difficult choice as to who gets the water—the farm or the city. If we allocate it to the city, we may be indirectly deciding the surface farm land uses issue since the farmer may not be able to farm the way he is farming now, or he may not be able to farm at all without the water.

The small farm problem is also a farmland preservation problem. The small farm problem and the urban fringe problem often overlap because the small farm often tends to get converted to non-farm use first. It certainly appears to be the least capable of competing economically with the higher and better or more valuable non-farm uses. This aspect of the problem is particularly troublesome because it seems a primary concern motivating the farmland preservation effort is the fear that food production will not be adequate for the nation's needs in the future, and clearly the small farms are not substantial producers of food and fiber. On the other hand, they do represent an access vehicle for those wishing to enter farming and do offer one of the few remaining opportunities for independence and self-sufficiency.

Equally troubling is the propensity to focus on the farmland preservation problem only in its economic dimension—that is, the idea that conversion generally occurs when the farmer can no longer economically survive the urban pressure. While this may be true in the urban fringe area, I think this focus leads us to structure our programmatic approaches primarily upon economic incentives or factors and diverts us from some of the other vital farm-side concerns. This focus reflects the current, though suspect view, that the entire farm problem (of which the farmland preservation issue is but one facet) is simply an economic problem rather than a more accurate realization that it is a deeply complex social problem in which vital concerns, such as the intergenerational and intragenerational management of basic resources, and the continued availability and vitality of landownership opportunities, are raised.

A further issue in this regard is the issue of how we perceive

what it is we are really fighting about. In the popular vernacular, whether we talk about this in the legal literature or in ordinances, the question seems to be which kind of use is most preferable—farm use or urban growth and development? There seems to be a fear that we can't have both. That may or may not be true, but I think it is believed to the point that for those who do believe it, it becomes true. While we talk in terms of farmland preservation, at the legislative level the question still usually boils down to which lands are we going to leave open for urban expansion and which we are going to close off. At the local decision-making level, the question then inevitably becomes one of urban growth rather than or versus farmland maintenance.

This focusing on the question from the vantage point of urban growth has several negative impacts in terms of dealing with farmland preservation issues. First, it puts the farm side farmland preservation proponents immediately on the defensive, since the decision appears likely to be made in an urban oriented context and from an urban perspective. Farm side farmland preservation proponents therefore are forced to articulate those reasons for farmland preservation that are persuasive to the urban interests rather than those that are of vital import to the rural and farm interests. These urban persuasive reasons are often the same as those advanced by the non-farm side farmland preservationists and include the ideas that we want to save farms because we need the open space or because it is aesthetically pleasing, or even psychologically necessary, to have farms around our city. Other urban persuasive reasons include the notions that we need recreational access areas, that we want the cheap food that will likely result from a food supply close to our city, and we want to keep land out of development because this represents potentially low cost future housing sites.

When our dialogue involves promoting these concerns as the rationale for our farmland preservation program, the result is often the alienation of the farmers themselves. When this is coupled with the consideration of programs which shift the control over the farmland use decision from the farmer to the public decision-making body, the farmers are very likely to withdraw their support from the programs—even though they are the purported beneficiaries. They see the decisions as being made without consideration

of, or concern for, their interests.

On the other hand, it undeniably has been difficult to articulate persuasive reasons for preservation that are not somewhat urban oriented but which still will appeal to the decision makers. Probably the most persuasive reason that is not essentially urban oriented is the critical mass argument—that we need a certain minimal number of farms to maintain the agriculture support industry. When this number is not present, the feed mills, the seed suppliers, the equipment dealers and others cannot generate enough business to survive and they leave the area. This, in turn, makes it more difficult for the remaining farmers to survive since they must go increasingly further away, and at greater cost, for their production inputs or market outlets. This argument is persuasive on the farm side, but often very difficult for the urban mindset to understand. Often the urban response is, “We really don’t mind not having smelly feed mills here anyway. We actually prefer you get your farm supplies in the next town.”

Second, by addressing farmland preservation from the perspective of urban interests, the focus of the problem is necessarily confined to the urban fringe area where growth is or is not going to occur. From a conceptual point of view, this has deterred us from developing a broader based justification for the notion of farmland preservation itself. Farmland preservation is, or ought to be, a concern even in areas not affected by urban pressures. For example, as prime citrus lands are lost to non-agricultural uses in Florida, there are few other areas in the country that can pick up that reduction in production. Then we in Kansas complain that orange juice from Brazil costs too much. Further, when farmers, who still want to stay in farming, are pressured out of business in urban growth areas, they are forced to relocate to other farming areas which movement inevitably bids up the price of land in those areas, making land acquisition even more difficult for farmers already located in those areas.

If we conceive of the problem as larger than just trying to resolve the problem of competition for space in the urban fringe area, the question then is what are the true dimensions of the problem. From an urban perspective, we tend to identify our concerns fairly narrowly: first, whether there is enough agricultural land available for agricultural use to meet the food and fiber re-

quirements of the nation and the world; second, whether preservation of farmland is required to preserve the local economic and social benefits that flow from a viable local agricultural industry; third, whether preservation of farmland is necessary to retain open space and other environmental amenities around our cities; and fourth, whether farmland preservation is essential to a more efficient, orderly and fiscally sound urban development into fringe areas. Our focus on food supplies illustrates the narrowness of our concern. Our fear in this regard is two-fold: that the considerable acreage that has already been converted represents an irretrievable loss of productive resources which, in turn, gives rise to a fear that we are losing our capacity to meet our food and fiber needs; and second, that increasing demands for agricultural products will be such that if our food and fiber needs are to be met in the future, an expanding rather than contracting agricultural land base will be required but will not be available because of current and future conversion pressures. In this context it has been argued that even if one concedes considerable flexibility in terms of technological advances which will ensure future production increases, projected farmland requirements can be met only if the rate of conversion to non-agricultural use is reduced. To be sure, this concern is laudable and amply supported by the data. On the other hand, as this concern is implemented through our various farmland preservation programs and approaches, it appears that this concern is more verbal than real. Our current efforts at farmland preservation seem far more interested in merely stopping the conversion than in preserving a viable agricultural industry. In fact, it might be argued that the battle cry to save our prime farmlands and hence preserve agriculture's productivity is but a disguised expression of the historic urban concern that food and fiber supplies be cheap and that land be available for urban expansion at low cost. As a general rule it matters little to the consumers of food how it is produced except, perhaps, as that may raise concerns of "safety, hygiene, taste or environmental pollution." Further, by whom it is produced is of little concern other than in a primarily symbolic sense which may be understood as something of a "melancholic longing for the rural past." As a matter of fact, the current production imbalance in the agricultural sector between large farms which produce, by far, the bulk of our food and fiber and the more numerous small farms which contribute relatively little is such that most of the farmers

in the urban fringe area that are directly facing the prospect of converting their farmland to non-farm use actually make such a minor contribution to total agricultural productivity that their loss will hardly be felt in either the short run or the long run, except perhaps with respect to the question of food price — and then perhaps primarily only because closer may be cheaper. Even when we focus on the land rather than the production, we seem to lack a definite sense of direction. In most of our farmland preservation programs, our efforts are directed at saving the best land—the “prime farmland.” This is often done without conscious regard for where that land is located and even less concern with who will actually farm that land so long as our programs can shield those lands from the pressures of urban expansion. Our theory, of course, is that the best lands will be the most productive which is entirely consistent with the avowed objective of protecting food production. In most cases, prime lands are more productive when individual parcels are compared to non-prime parcels. That, of course, is not to say that prime farmlands in fringe areas produce more as a whole than do all the non-prime lands. One reason is that our program definitions, which often determine which land is to be protected, do not always account for either the impacts of technology or of husbandry upon otherwise marginal acreage. Importantly, what these definitions do is evidence an attitude that at once concedes the inevitability of conversion but attempts to minimize the loss by shielding the so-called best lands from the perceived pressures. In many cases, the regulations make the determination that growth may occur in any area unless prime farmlands are involved and in that sense, then, the prime farmland concept assumes the connotation of a negative growth limitation device. And since the pressure to convert farmland to non-farm use originates from those who wish to avoid the determination of prime farmland, there is constant pressure and a legitimate basis to fear that the concept will not accomplish its desired purpose. The unfortunate result would appear to be that the generally more numerous and geographically larger and, in the aggregate, often more productive, non-prime farmland areas in pressured areas will be retained in agricultural use only by those who can afford to give up the economic benefits that might result from the conversion, and who, for non-economic reasons, retain a sufficient attachment to the land that they will remain in farming regardless of the pressures — de-

spite how productive these lands may be with appropriate technology or adequate husbandry.

Although my task in this forum is not to suggest what might be acceptable as a broad-based justification for our farmland preservation programs, I am convinced that it should be based on, as a minimum, a recognition of the social function of farming in general and should reflect our nation's concerns over such other issues as soil loss, water availability, and farm structure.

Finally, our focus on the problem as an urban fringe/growth problem also complicates the property right question, by putting the farmer in the position of thinking that not only is he losing his right to determine what use occurs on his land, he is also forfeiting the money that could be had by converting the land to some other use.

Having made these further observations, I have concluded that it might be more useful to suggest a radical departure from conventional theory as an approach to the farmland preservation problem. This seems appropriate as I am substituting on this program for Professor Juergensmeyer, who unfortunately could not come, and I suppose at least I should address his topic, which I understand to be along the order of "farmland preservation—a time to consider radical solutions." I rather doubt I'll steal his thunder since I understand his approach is to suggest the use of a Purchase of Development Rights (PDR) Program, financed by impact fees. This approach is based on the theory that loss of farmland is caused by new growth and therefore, newcomers ought to share the cost of acquiring rights enabling a community to keep other lands in farming. There is a lot of merit to this theory, though there have been problems in several jurisdictions over the legality and accessibility of impact fees. Some jurisdictions have taken a very restrictive view that impact fees are taxes, and unless expressly authorized by statutes, cannot be imposed. Other jurisdictions insist that the proceeds be earmarked for the benefit of that particular jurisdiction. Though I think there is merit to the suggestion, I'll leave the details of the approach for his discussion.

If radical means something that you don't agree with, then who knows whether this is going to be radical. I don't find it particularly far out in left field. But let me introduce it by focusing on

what I would expect the major impact of this approach to be. The most difficult legal problem, of course, is the property right problem. If we can get around that, then the question of preserving farmland is going to be far easier—at least from the urban viewpoint. Let me suggest a possibly radical way around the property right problem that also gives support to the farm or rural side as well.

A basic problem with the property right idea is it is so infected with the “what is mine is mine” idea. I suppose we sometimes even push this so far as to suggest that “what is yours is also mine.” It occurs to me that if we could either reconsider our property right notion itself or at least restructure it to accommodate the social function that ownership serves, we might have a very effective approach that would at once allow us to accomplish our overall urban oriented farmland preservation objectives and still give the farm side interests the protection that they need. This encourages me to digress historically to suggest that there is already in our legal system a concept that will facilitate this.

We frequently say that American property law began back in 1066 when William the Conqueror invaded England. As a matter of fact, American property rights, in some respects, began even earlier and probably originated in early Germanic law. Back in those times, one of the oldest property concepts of what we today call the common law property regime was the idea of “common ownership” that came to England from the pre-invasion Germanic period. It is interesting that the notion of “community” actually predates the more common property ideas of private dominion and “mine.” The English property law system grew up with this idea of community. Its most definite expression in the period associated with the migration of Europeans to America was in the idea of a “commons.” A “commons” was land that was communally owned—all of the individuals in the community had a property right of commons that allowed them to use that land for essentially public purposes. Unfortunately, the concept of a commons didn’t last long in the United States, but is quite interesting to see what happened to the idea in England since then and to note that it is reflected in what England is doing in a farmland preservation context. For example, the English idea of greenbelting develops this idea in a way that goes far beyond what we undertake in this coun-

try while at the same time still preserving the idea of private individual land ownership. It is entirely acceptable in their system, however, from a property rights point of view, despite being far more restrictive on land use than so-called greenbelting in this country.

I would like to suggest that we still have that tradition of community in our system, and we perhaps can revive it and apply it to the farmland preservation problem. Let's consider quickly the concept of eminent domain, which is a central legal doctrine involved in the taking of property rights question. The idea, as we all know, is that any sovereign can take property. We have qualified that right in our system by requiring that it has to be for public purpose and with the payment of just compensation. In some of our local jurisdictions, it is further qualified with the notion that there also be some public necessity. In confining the doctrine of eminent domain in this fashion, we've become kind of a minority of one or two jurisdictions in the world. The rest of the world tends to use the idea of eminent domain in quite a different context. They trace its roots to some papal bills that were promulgated in early colonial Spanish America to deal with the problem on Indian lands.¹ The idea was that those individuals held land on a stewardship basis from the sovereign and if that stewardship wasn't properly exercised, then the state had the right and responsibility to either take the land back or impose restrictions that ensured that the stewardship would be complied with. In that sense, the concept of eminent domain is merely the state enforcing a stewardship relationship between the landowner and the land, and asserting dominion over the land in the event the stewardship was not properly discharged.

Now we probably have not reached the point where we want to integrate the stewardship notion into our concept of eminent domain. On the other hand, the idea of stewardship isn't that different from some of our current views of public trust, and there is other evidence in our system that we are willing to utilize this kind of approach with respect to problems involving issues of property and its social function. Recent Iowa cases suggest that the idea of

1. See *INTER COETERA* (1494). See generally O. Fals Borda, *The Social Function of Property*, in T. LYNN SMITH, (ed) *AGRARIAN REFORM IN LATIN AMERICA* (A. Knopf, 1968).

stewardship and the exercise of local police power to enforce it may legitimately be invoked within the existing framework of our property rights system without impermissibly interfering with the rights of the farmer. One case, *Woodbury County Soil Conservation District v. Ortner*,² involved 1971 legislation which gave Iowa soil conservation districts the authority to establish and impose soil loss limits for all lands within the state.

In 1974, a farmer filed a complaint under this act with the local soil conservation district, alleging his property was being damaged by soil erosion from other farms. The soil conservation district inspected and found the erosion level to be higher than state law allowed. The district ordered the landowners, to whom the problem was attributed, to reduce soil erosion within six months. The defendants argued enforcement of the soil loss limits was an unconstitutional exercise of the state's police power and resulted in a taking of their property without due process. The district court agreed. On appeal, the only issue before the Iowa Supreme Court was the "taking" question. The court devised a balancing test to evaluate the problem. Simply put, the test was "whether the benefits to the public outweighed the specific restraints imposed on the farmer." Applying this test, the court considered "the economic impact of the regulation on the farmer, particularly the extent to which the regulation has interfered with distinct investment-backed expectations" and found no denial of use or enjoyment of property sufficient to support the trial court's finding of unconstitutionality. It concluded the state had a right to impose the financial burden caused by compliance with the district's order. In dicta, the court implied the conservation districts could act by themselves to require landowners to meet the established soil loss limits.

Closely related to *Woodbury*, is the 1981 decision in *Moser v. Thorp Sales Corp.*,³ where the Iowa Supreme Court dealt with the question of whether a farmer who occupies land owned by another may be held liable for damages to the land caused by soil erosion. In this case, the erosion damages were allegedly accelerated by the particular cultivation practices employed by the farmer in posses-

2. 279 N.W.2d 276 (Iowa 1979).

3. 312 N.W.2d 881 (Iowa 1981).

sion of the land. In its decision, the court agreed a tenant farmer could sustain liability under these circumstances. In its narrowest interpretation, this case suggests that a tenant farmer who abuses the land can be held liable by the owner of the land for the damage done to the soil. In its broadest construction, this case is but a short step away from the position that a tenant farmer or even a landowner who does not adequately care for the land should be held accountable to the public at-large.

Although these cases analyze the problem within the confines of the traditional police power/eminent domain framework, they indicate a growing concern with the social functions served by particular uses of land. Indeed, these cases have been characterized as establishing a "malpractice" standard for farming, framed in terms of the social need for careful stewardship over the land. While these cases appear forward-looking, they may actually be but contemporaneous expressions of much older concepts.

If we pose the question, "Does this idea of stewardship exist in contemporary American law," the answer must be "Yes!"—particularly when we define property rights in terms of the social function theory that was espoused by Leon Duguit.⁴ Leon Duguit concluded that ownership was not an absolute right but a right that was permitted and protected only to the extent it is consistent with the needs of society at a given time.⁵ At least three somewhat recent articles⁶ take the position that at least since the New Deal, and arguably as early as the Supreme Court's decision in *Village of Euclid v. Ambler Realty*,⁷ the concept of ownership, not as an absolute right, but conditioned upon social need, has been alive and well in this country.

I think we can point to other areas of the law that give more support for this view of property. The ancient Roman law idea of

4. J. JUERGENSEMEYER AND J. WADLEY, *THE COMMON LANDS CONCEPT: A "COMMONS" SOLUTION TO A COMMON ENVIRONMENTAL PROBLEM*, 14 NAT. RES. JOURNAL 361 at 380 (1974).

5. *Id.*

6. J. Juergensmeyer, *The American Legal System and Environmental Pollution*, 23 U. FLA. L. REV. 439 (1971); J. Juergensmeyer and J. Wadley, *The Common Lands Concept: A "Commons" Solution to a Common Environmental Problem*, 14 NAT. RES. J. 361 (1974); M. KADAM, *LA NOTION ET LES LIMITES DE LA PROPRIETE PRIVEE EN DROIT COMPARE* (University of Geneva, prepared for the Faculte Internationale pour l'Enseignement du Droit Compare, Ca. 1970).

7. 272 U.S. 365, 47 S.Ct. 114 (1926).

usufruct holds that certain things were not susceptible of private ownership—the seashore, running water, the air. This idea has been incorporated into our water rights framework to hold that the owner of a water right, while recognized as property, has only a right to use the resource and not an ownership interest in the water in place.⁸ Misuse of the resource may also result in the termination of the water right.

In the land development area, the oft-mentioned case of *Just v. Marinette County*,⁹ stands for the proposition that there is no property right to change the land from its natural condition.

Finally, as a matter of judicial construction, we ought to mention the case of *Willow River Power Company v. United States*.¹⁰ There, the court considered the breadth of the Fifth Amendment prohibition against uncompensated takings. First, the court noted that not all takings were offensive:

The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but only those which result from taking of property. If damages from any other cause are to be absorbed by the public, they must be assumed by act of Congress, and may not be awarded by the courts merely by implication from the constitutional provision.¹¹

Then the court considered whether the economic interest at stake was a protected property interest, and concluded that, “not all economic interests are ‘property rights’; only those economic advantages are ‘rights’ which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.”¹²

From this it clearly appears that a property right is nothing more nor less than that which the law will protect as property. Further, the notion of property itself is fraught with overtones of

8. See, e.g., *Village of Tequesta v. Jupiter Inlet Corporation*, 371 So. 2d 663 (Fla. 1979); *Stone v. Gibson*, 630 P.2d 1164 (Kansas 1981).

9. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

10. 324 U.S. 499 (1945).

11. 324 U.S. at 502.

12. *Id.*

social concern and benefit. While that obviously makes it difficult to predict whether one has a property right, it does seem to suggest two important things. First, it appears there is significant flexibility in the assigning of a property right and unless assigned, the right is not protected. Second, it appears that if there is a compelling social function to be served by that assignment—such as maintaining a particular land use such as farming—that is necessary to achieve a particular desired social outcome, then regulating the property right to maintain the social benefit would seem to be proper and not an interference with the property rights involved. The difficult problem, of course, is how to show that farmland ownership has that compelling social function? This is clearly a question that has not often been raised in the farmland preservation debate. This is also a difficult question to explore. It seems, however, that if the debate is broadened to include farm structure as an issue, there is at least a growing body¹³ of empirical data that suggests that small farms do serve a vital social function in a number of respects: small farms operate as price buffers, as access vehicles to farming, and are essential for rural community stability and welfare. In rural communities that harbor small farms, income levels are higher than in those in which large farms predominate. Communities with small farms have more newspapers, schools, churches, civic centers, parks, and less unemployment problems. But, as the small farms decrease in a community, the rural community starts to suffer, and not surprisingly, the first professionals to leave are doctors and lawyers.

Small farms also serve a definite psychological function: they provide an opportunity for individuals to pursue goals of self-sufficiency and provide an opportunity for individual land ownership. This opportunity for individual land ownership seems particularly important in light of evidence that ownership has become very concentrated in the hands of a few.¹⁴ Clearly small farm ownership is one remaining opportunity to pursue what is left of an American dream.

13. See, generally J. Wadley, *Small Farms: the USDA, Rural Communities and Urban Pressures*, 21 WASHBURN L.J. 478 (1982); *Family Farm Antitrust Act of 1979: Hearings on § 334, Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Committee on the Judiciary*, 96th Cong. 1st Sess (1979).

14. See, generally PEKKANEN, *THE LAND, WHAT DOES THE FUTURE HOLD?* Part II, Vol. 137, TOWN & COUNTRY (June 1983) pp. 89-95.

Although this view of the problem is undoubtedly half-baked in many respects, it does serve to focus our attention on the single most critical question associated with the farmland preservation debate: can we identify a social value for farming, beyond that of a mere producer of food and fiber, sufficient to justify governmental intervention into the making of the land use decision. If we can answer that question in the affirmative, there seems ample precedent to redefine the nature of the land ownership right in terms of stewardship notions, such that we can both ordain that the land stay in farming and at the same time mandate that the farmer will be protected as he continues to farm.