Farmers, Freedom, and Feudalism: How to Avoid the Coming Serfdom

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FARMERS, FREEDOM, AND FEUDALISM: HOW TO AVOID THE COMING SERFDOM

By JOHN MCCLAUGHRY*

In recent years, the ownership and use of land has been increasingly regulated by all levels of government, nominally through extensions of the police power. The author assesses the impact of increased government control over land on the role real property has traditionally played in the American legal system, and concludes that continued extension of government control will lead to a "new feudalism." In response, he enumerates and analyzes several alternative methods for achieving the same goals, all of which avoid the direct use of state-imposed controls.

INTRODUCTION

Among the many social and cultural movements sweeping America in the seventies is a revival of a long discarded system of legal principles defining the relation of human beings to land. The system was known for some 600 years in England. In the United States, curious remnants of it could be found in the Hudson Valley of New York as late as 1845.[1]

The name of this system was feudalism. That name long evoked thoughts of knights on horseback, damsels in distress, barbaric invaders, tumultuous throngs, religious festivals, and the often doleful, servile and short existence of the manor serf. The Old Feudalism is long gone, and its departure probably produced one of the feeblest outbursts of lamentation ever heard upon the passage of a major social, political, economic and legal system. Today, however, feudalism is coming back in a different guise. A growing body of legal theorists, allied with activist organizations and congenial political leaders, is working assiduously to replace the long cherished concept of freehold property in land with the old feudal concept of "social property." The essence of that theory is its contention that property in land cannot be "owned" by anyone; it can merely be "held" on a temporary basis subject to the overriding good of society. The ancient maxim *sic utere tuo, ut alienum non laedas*—use your own so as not to injure that of another—is now held to be insufficient as a maxim for the proper use of land. Under the New Feudalism land must be used as society prescribes; or, at the very least, in ways not objectionable to society.

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1. For a fascinating account of the popular movement that finally overthrew the Hudson Valley patroon system, *see* H. CHRISTMAN, TIN HORNS AND CALICO (1945).

Those whose economic activity is dependent on land—notably farmers and ranchers—are particularly vulnerable to this New Feudalism; for its advocates have cast concerned eyes on the broad expanses of agricultural land. To ensure that this land is always devoted to the production of food and fiber, the New Feudalists are perfectly willing to issue instructions to the farm or ranch owner as to how his land is to be used and managed. Indeed, to this mentality the desire of a farm owner to convert his farm into a housing development is akin to a willful consignment of another ten thousand babies to starvation in any of the many lands where, largely due to collectivization of agriculture, there is insufficient food available to sustain life.

The replacement of freehold property with social property would necessarily have grave ramifications for our legal, political and economic systems, all founded as they are on the existence of a widespread distribution of freehold property among independent owners. It is not, however, inevitable, despite the massive support generated for the idea in intellectual, foundation, government and environmental circles. But it will become inevitable unless those devoted to the concept of freehold property—and hence human freedom—come forward to advocate responsible techniques for dealing with genuine problems associated with land use. There are, happily, a number of such techniques in existence—techniques that do not carry with them an underlying acceptance of the theory of social property. Those alarmed by increasing governmental control of private property in land must begin to understand these various techniques and take the initiative in proposing them. The alternative is a long, defensive battle, probably culminating in defeat.

THE OLD FEUDALISM

To understand the underpinnings of the New Feudalism it is necessary to understand the basic reasons for the Old Feudalism, and the way it worked.[2] The various feudal systems of Western Europe were naturally diverse, but all were founded upon the need for protection of life and property against recurring invasions of outlanders, barbarians or greedy foreign princes, typical of the period following the breakdown of the Holy Roman Empire. In particular, the effective use of armed cavalry by the Saracens against Charles Martel made it necessary for every prince to provide himself with similar forces. Hence many princes confiscated church and other lands and bestowed them upon vassals pledged to their lord's defense.

2. The basic sources on feudal law are, of course, A. HARGREAVES, INTRODUCTION TO THE PRINCIPLES OF LAND LAW (1963) [hereinafter cited as HARGREAVES]; W. HOLDSWORTH, HISTORICAL INTRODUCTION TO THE LAND LAW (1927); W. HOLDSWORTH, HISTORY OF ENGLISH LAW (1909); F. POLLOCK & E. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (1959); A. SIMPSON, INTRODUCTION TO THE HISTORY OF LAND LAW (1961).

Under the system promoted assiduously by the Norman, William the Conqueror, who came to the English throne in 1066, all land was held to belong to the King as sovereign. The King granted a fief of land to his tenants in chief, nobles who had provided support for the King's defense, or adventures. Those tenants in chief in turn made further grants to lesser nobles by a process of subinfeudation. Smallholders were compelled, by force or fear of force against them, to cede their rights in land to the local noble, who in turn promised to protect them. They continued to work the land under the custom of the manor, providing labor and services to the lord as required.

Under this feudal system, no one save the king himself, and then only in his capacity as sovereign, actually owned land in fee simple.[3] Land holding was integrated into an intricate system of mutual protection and public administration. Public and private law with respect to land became one. Every land holder, with but a few exceptions, owed certain duties to the feudal lord, and every lord provided certain benefits to his vassals. Feudalism, thus based on personal duties and homage of vassal to lord, strongly discouraged alienability of land; there could be no assurance that

3. This assertion is not beyond some debate, however. According to Blackstone, in the 19th year of the reign of William I (1084), an invasion was apprehended from Denmark; and the military constitution of the Saxons having been laid aside, and no other introduced, William I brought over and quartered on the people a great army of Normans and Bretons. This induced the nobility to listen to the king's remonstrances and proposals for adopting the feudal system of defense. The great survey called domesday was made the next year, and in the latter end of the year all the principal landholders attended the king at Sarum, submitting their lands to the yoke of military tenures, became the king's vassals and did him homage and fealty. This new polity therefore seems not to have been imposed by the conqueror but adopted by the general assembly of the whole realm. In consequence of this change it became a fundamental maxim "that the king is the universal lord and original proprietor of all the lands in his kingdom and that no man can hold any part of it but what has mediately or immediately been derived as a gift from him to be held on feodal services." 2 W. BLACKSTONE, COMMENTARIES 45-53 (1836).

Thomas Jefferson was later to argue, however, that the Saxons held their lands in "absolute dominion, disincumbered with any superior, answering nearly to the nature of those possessions which the Feudalist term Allodial." Jefferson claims that the Norman lawyers, backed with force, succeeded in imposing feudal duties on those freehold lands even though the Saxon owners had at no time sworn homage to the king. The general principle quoted by Blackstone above (which Jefferson had copied into his "Commonplace Book") was "borrowed from those holdings which were truly feudal, and only applied to others for the purposes of illustration. Feudal holdings were, therefore, but exceptions out of the Saxon laws of possession, under which all lands were held in absolute right." Jefferson, *A Summary View of the Rights of British America (1774)*, in A. KOCH & W. PEDEN, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 307-09 (1944) [hereinafter cited as KOCH & PEDEN]. Although this argument had considerable utilitarian value to colonists seeking to disavow the king's authority in 1774, there is not much reason to believe that Saxon Englishmen had resolutely claimed fee simple ownership for the preceding 700 years. As Holdsworth points out, "[i]n the Anglo-Saxon land law we hear little or nothing of any doctrines as to ownership or possession." 2 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 76 (1923). *See also* Petro, *Feudalism, Property and Praxeology*, in PROPERTY IN A HUMANE ECONOMY 161-80 (S. Blumenfeld ed. 1974).

the person into whose possession land came would be able and willing to perform the required services to the overlord. Hence the origins of primogeniture and entail, resulting in severe restrictions on land transfers.[4] Even wills were not generally permitted in England until 1540.[5] Land was a resource, not a commodity. The feudal system guaranteed that this resource would be devoted to meeting the overriding needs of the feudal society. Property was not individual, but social. Individuals were users, as always, but they lacked the rights to use, convey, and exclude as they saw fit.

The feudal system had its virtues, especially in reference to the troubled age in which it began. It promised—and in England provided for perhaps three centuries—protection, order, and social stability. But it frustrated and discouraged trade, commerce, mobility and individual freedom. By creating a hierarchical economic, military and political order under the King, feudalism invited the abuse associated with centralized power, and was in turn subject to the disintegrative forces that inevitably undermined centralized systems.[6] The system was inflexible in the face of changing circumstances, although it must be admitted that medieval lawyers did exhibit exceeding ingenuity in helping clients escape from the toils of feudal duties which had become onerous, obsolete, and worst of all, unprofitable.[7] And of course, technological changes such as the longbow and gunpowder made the armed cavalry obsolete, removing the military base that had given rise to the system. Ironically, the system called forth in Western Europe by the Saracen cavalry of the ninth century finally fell victim to the Arab introduction of gunpowder in the fourteenth.

As feudalism decayed in England, many land holders began to realize that they were benefitting very little from the protection of their supposed lord. All that remained of feudalism was a host of nagging and onerous duties; in Lord Macauley's words, "nothing was left but ceremonies and grievances."[8] One who held his land by knight service had to pay a large fine on coming to his property. He could not alienate one acre without purchasing a license. The sovereign became the guardian of the knight's infant heirs in case of his death, and could not only claim the great part of the

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4. For a discussion of its workings in the colonies, *see* Keim, *Primogeniture and Entail in Colonial Virginia*, 25 WM. & MARY Q. 545 (1968); Morris, *Primogeniture and Entailed Estates in America*, 27 COLUM. L. REV. 24 (1927).

5. Statute of Wills, 32 Hen. VIII, ch. 1 (1540).

6. The general argument that centralized systems inevitably disintegrate has been cogently made in the various works of Leopold Kohr, including *Development with Aid: The Translucent Society* (1973); *The Breakdown of Nations* (1957); and his many articles in the British journal *Resurgence*.

7. A prime example is the effort of British lawyers to extricate clients from entails through involved devices such as recovery and fine. *See* HARGREAVES, *supra* note 2.

8. I T. MACAULEY, THE HISTORY OF ENGLAND 119 (1886).

rents received until the heir reached majority, but could also require the ward to marry the bride of the King's choice.

With the Civil War and the Commonwealth, the future of these feudal burdens became uncertain. When the monarchy was restored in 1660, the King's tenants in chief seized upon the opportunity to destroy these feudal incidents. By the Statute of Tenures,[9] Parliament abolished all but a few ceremonial relics of the feudal system; Charles II had no choice but to assent as part of his acceptance of the Restoration. After 1660, the Germanic, feudal theory of social property—divided ownership, feudal duties, restraints on conveyance, a stable social order—collapsed. The Roman dominium, with its separation of private and public law and exaltation of individual rights above public duties, came back into favor. Land ownership thereafter carried no positive duties: "Such positive duties as might be considered inherent in the conception of ownership were left strictly to the sphere of morals," wrote Hargreaves, "the law knew them not."[10]

In America feudal duties had been virtually unknown.[11] The Virginia and Plymouth Companies settled the new land on a purely commercial basis, and such royal grants as might have been feudal in nature 200 years before—as to Penn and Calvert—became grants to large commercial landlords rather than to feudal lords. The destruction of feudal tenures in England, coupled with their virtual absence in America, coincided with the beginnings of a great intellectual movement toward natural rights and individualism.

In political science, John Locke advanced the ideas that property was the natural right of those who mixed their labor with the earth, and that the purpose of government was to secure those rights.

> The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of property. . . . The supreme power cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that by entering into society, which was the end for which they entered into it, too gross an absurdity for any man to own.[12]

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9. Tenures Abolition Act, 12 Charles II, ch. 24 (1660).
10. HARGREAVES, *supra* note 2, at 190.
11. A fascinating addition to the scholarship on this point is Murray Rothbard's *Conceived in Liberty* [hereinafter cited as Rothbard], a projected multi-volume history of the United States from a libertarian point of view. On the question of feudalism in the colonies, *see* II SALUTARY NEGLECT: THE AMERICAN COLONIES IN THE FIRST HALF OF THE 18TH CENTURY (1975).
12. II J. LOCKE, TWO TREATISES OF GOVERNMENT 138 (P. Laslett ed. 1963). *See also* P. LARKIN, PROPERTY IN THE EIGHTEENTH CENTURY (1930)

In the eighteenth century, William Blackstone, the enormously influential teacher of law, exalted this individualistic concept of property to its zenith. "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property;" he wrote in his celebrated *Commentaries*, "or that sole and despotic dominion which one claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[13] And Adam Smith, the founder of modern economics, published in 1776 his seminal *Wealth of Nations*,[14] a volume which did not offer a theoretical justification of individualized property, but which demonstrated how free trade among countless property owners would inevitably result in the maximum benefit and happiness to society as a whole.

In this intellectual climate—legal, political, and economic—the founding fathers of the United States were raised. These ideas were their ideas. With the possible exception of Benjamin Franklin,[15] the founding fathers accepted without question the proposition that private freehold property was essential to individual liberty and to the success of a republican form of government. George Mason of Virginia authored a famous statement on the subject which found its way into the early constitutions of numerous states. With only small changes from Mason's version in the Virginia Constitution,[16] it now appears in the South Dakota Constitution:

> All men are born equally free and independent, and have certain inherent rights, among which are those of enjoying and defending life and liberty, of acquiring and protecting property, and the pursuit of happiness. . . .[17]

[hereinafter cited as LARKIN]; R. SCHLATER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA (1951) [hereinafter cited as SCHLATTER]; the excellent essay by Robert Goldwin, *John Locke*, in L. STRAUSS & J. CROPSEY, HISTORY OF POLITICAL PHILOSOPHY 433-68 (1963); *and* Hamilton, *Property According to Locke*, 41 YALE L.J. 864 (1932).

13. 2 W. BLACKSTONE, COMMENTARIES 1-2 (1890).

14. A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1909).

15. For a writer best known for his advocacy of the "Protestant Ethic" and small business capitalism, Franklin had the somewhat anomalous idea that all property was subject to the public command at all times, including confiscation. *See* Wetzel, *Benjamin Franklin as an Economist*, in 9 JOHNS HOPKINS STUDIES IN HISTORICAL & POL. SCI. 421 (1895). *See also* Rothbard, *supra* note 11. Thomas Paine, too, exhibited some contradiction on this point. In his famous *Common Sense* (1776), Paine described government as a necessary evil, to which a citizen finds it "necessary to surrender a part of his property to furnish means for the protection of the rest." Paine suggested in 1789 (in a paper discovered a century and a half later among Jefferson's papers) the idea that in contracting to form a state, men give up their natural rights to acquire and possess property. *See* II P. FONER, COMPLETE WRITINGS OF THOMAS PAINE 1298-99 (1945). As Schlatter observes, "[s]uch a theory, of course, would give the state full power over the property of its citizens." SCHLATTER, *supra* note 12, at 198 n.3.

16. Constitution of Virginia (June 12, 1776), in AMERICAN BAR FOUNDATION, SOURCES OF OUR LIBERTIES 311 (1959).

17. S.D. CONST. art. VI, § 1.

John Adams, the most scholarly of the signers of the Declaration, observed in 1776:

> We may . . . affirm that the balance of power in a society accompanies the balance of property in land. The only possible way, then, of preserving the balance of power on the side of equal liberty and public virtue, is to make the acquisition of land easy to every member of society, to make a division of the land into small quantities, so that the multitude may be possessed of landed estates. If the multitude is possessed of the balance of real estate, the multitude will have the balance of power, and in that case the multitude will take care of the liberty, virtue, and interest of the multitude, in all acts of government.[18]

Thomas Jefferson, writing from France in 1785, reflected the same view:

> I am conscious that an equal division of property is impracticable, but the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind.[19]

In the Constitutional Convention, James Madison saw that

> the Freeholders of the Country would be the safest depositories of Republican liberty. In future times a great majority of the people will not only be without landed, but any other sort of property. These will either combine under the influence of their common situation; in which case, the rights of property & the public liberty, will not be secure in their hands: or which is more probable, they will become the tools of opulence & ambition, in which case there will be equal danger on another side.[20]

Although this exaltation of freehold property, and the construction of political and economic institutions based upon it, dispensed with the feudal idea of positive duties to some superior, it did not dispense with the ancient negative duty *sic utere tuo ut alienum non laedas*, use your property so as not to injure that of another, the foundation of the common law of nuisance. This maxim is in force today, as it has been for nearly 1000 years. But unhappily, it is falling into desuetude with respect to all but the most localized and personal nuisance actions. Public law has steadily encroached into areas once reserved for private nuisance action.[21]

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18. Letter to James Sullivan, May 26, 1776, in IX THE WORKS OF JOHN ADAMS 376-77 (C. Adams ed.—).

19. Letter to James Madison, October 28, 1785, in KOCH & PEDEN, *supra* note 3.

20. DEBATES IN THE FEDERAL CONVENTION OF 1787, 353 (G. Hunt & J. Scott ed. 1920).

21. An early statement of the coming trend occurred in Thorpe v. Rutland & Burlington R.R., 27 Vt. 140, 149 (1855):

Because individual freehold property was the central ingredient in liberty,[22] it could scarcely be infringed by a government established to secure liberty. Yet in some cases it was clearly necessary to command the use of private property in the public interest. This collision of principles produced an obvious solution, first expressed in the 1777 Constitution of the independent Republic of Vermont:

> That private property ought to be subservient to public uses when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money.[23]

Since colonial times, then, freehold property has been the accepted way in America. It is subject to the limitations of *sic utere*, and to the possibility of confiscation for a public use or purpose, provided just compensation in money is paid to the deprived owner.[24] But it is still far, far removed from the doctrine that land belongs not to individuals, but to society as a whole; and that the land holder may thus use his land only in ways in which may promote the good of society, or at the very least, which do not merit specific instructions from society. That is the theory of social property, abandoned centuries ago as the Old Feudalism decayed and collapsed. Now the same theory is making a sudden comeback, in the form of the New Feudalism.

To be sure, the theory of freehold property has long had its detractors. Professor Morris R. Cohen, a leading scholar of jurisprudence four decades ago, discovered that the "essence of private

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> This police power of the state extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of property within the state. According to the maxim, Sic utere tuo ut alienum non laedas, which being of universal application, it must of course be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.

From codifying the law of nuisance and providing means for private redress, legislatures steadily moved to making nuisance an offense against the state instead of private tort.

22. On the views of the founding fathers, *see generally* DEMOCRACY, LIBERTY AND PROPERTY (Coker ed. 1942); G. DIETZE, IN DEFENSE OF PROPERTY 57-64 (1971); LARKIN, *supra* note 12, at ch. V; SCHLATTER, *supra* note 12, at 187-94; Scott, Every Man Under His Own Vine and Fig Tree: American Conceptions of Property ch. 4, 1972 (unpublished Ph.D. dissertation, University of Wisconsin) [hereinafter cited as Scott].

23. Vermont Constitution of 1777, Art. 2, ch. 1. This article remains today as part of the oldest state constitution still in effect. In March, 1976, the Vermont Senate Judiciary Committee approved an amendment to this article to make the final clause read "nevertheless, whenever any person's property *or property rights* are taken for the use of the public, *depriving the owner thereof of reasonable expectations for its use or exchange*, the owner ought to receive an equivalent in money." This attempt to strengthen the taking clause against efforts to restrict "takings" to actual physical invasion and occupation was, however, rejected 22-8 on the Senate floor. Constitutional Proposition II, Vt. S. Jour. 372 (Mar. 18, 1976).

24. *See* BOSSELMAN, CALLIES & BANTA, THE TAKING ISSUE ch. 6 (1973) [hereinafter cited as THE TAKING ISSUE]. The authors describe the historical origins of the "taking clause," emphasizing cases where property was successfully taken without compensation. *See also* Heyman, *The Great Property Rights Fallacy*, in CRY CALIFORNIA (1968).

property" was not any right to use or exchange, but only "the right to exclude others."[25] He found freehold property repugnant in that private ownership led to power of the owner over all others: "Dominion over things is also imperium over our fellow human beings."[26] Professor Cohen did not, however, consider mobility, competition, or alternative means for satisfying wants, all of which seriously undermine this assertion. Cohen could discern no line between justifiable and unjustifiable confiscation of property by the state; compensation for a taking should be paid not as a matter of justice, but merely as a means of purchasing domestic tranquility.[27]

Another renowned legal scholar, Professor Francis S. Philbrick, lamented the demise of feudal land law in his classic article "Changing Conceptions of Property in Law," published in 1938.[28] "The disappearance of any long established social system," he wrote, "must involve some losses. And so, in the case of feudalism it is regrettable that there could not have been preserved the idea that all property was held subject to the performance of duties—not a few of them public."[29]

In 1965, Professor John Cribbet, taking up the same theme, observed:

> [Feudal duties] became onerous, then unnecessary, and ultimately ridiculous so that the system itself dissolved, but the concept behind them was sound. Ownership of land does involve participation in the affairs of society, and the use of land is of more than private concern. . . . It may be that the wrong concepts of feudalism survived—that we threw out the baby and kept the bath.[30]

The same theme was taken up by Professor E.F. Roberts in 1971. Recounting the unhappy results of traditional zoning (he sees it as all too often a device for protecting mortgage bankers against the ravages of the poor and nonwhite), Roberts goes on to say that "[i]f the phoenix represented by land use planning is going to rise from the ashes we must return to medieval notions for inspiration."[31] In defense of a new praxis of public land ownership with leaseback, Roberts says:

> Within the traditions of property law, moreover, there is nothing particularly radical in visualizing land being

25. Cohen, *Property and Sovereignty*, in LAW AND THE SOCIAL ORDER 46-47 (1933) [hereinafter cited as Cohen]. This essay can also be found in 13 CORNELL L. REV. 8 (1927).
26. Cohen, *supra* note 25, at 47.
27. *Id.* at 60.
28. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938).
29. *Id.* at 710.
30. Cribbet, *Changing Concepts in the Law of Land*, 50 IA. L. REV. 245, 247 (1965).
31. Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1, 6 (1971).

> owned by the sovereign and being channelled out again to persons who would hold it only as long as they performed the requisite duties which went with the land. In this instance, of course, instead of knighthood service, the land holder would have to hold and use his parcel according to the purposes set forth in the regional or statewide master plan.[32]

As a final example, consider Dr. L.K. Caldwell of Indiana University. In a 1974 law review article, Dr. Caldwell states:

> The persistence of archaic concepts of ownership rights is possibly the principal obstacle to effective land use planning. A redefinition of the rights flowing to an individual from his ownership in land is thus a necessary concomitant to land use planning, as well as to environmental management. Land law rooted in the conventions of Tudor England cannot be expected to serve the needs of the post-industrial society now emerging.[33]

The proper replacement for Tudor land law, says Dr. Caldwell, is a system strongly resembling a modernized Plantagenet land law: rights of "ownership" converted to rights to use or occupy; use rights established by the government in light of ecological capabilities and the overall good of society; taxation based on rights actually exercised, not developmental value; and the purchase, from the government, of rights to undertake more intensive development.

These observations from academe, however, lack the directness exhibited by a knowledgeable Vermont legislator and member of the bar, Representative R. Marshall Witten. In the midst of the great debate over the Vermont capability and development plan in 1973, Representative Witten addressed a conservation group in Boston as follows:

> I advocate nothing less than doing away with private ownership as it concerns real estate. We will have to change our legal philosophy to do that. We will have to stop thinking of land ownership and start thinking of land holdership.[34]

It is important to note that a special concern of many who advocate the restoration of feudalism in land law is land owned by producers of food, particularly prime agricultural lands. Perhaps the most outspoken advocate of public confiscation of the property rights of farmers and ranchers is Victor John Yannacone, Jr., a contributor to the *North Dakota Law Review*. Were Yannacone but a member of the bar of that state, practicing in a small town, his views might be less cause for alarm. Unfortunately for

32. *Id.* at 43. It should be noted that Roberts believes the sovereign state should compensate private owners for what it acquires.

33. Caldwell, *Rights of Ownership or Rights of Use—the Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759, 759-60 (1974) [hereinafter cited as Caldwell].

34. As reported in the Boston Globe, Apr. 16, 1973.

believers in freehold property, Yannacone was the founder and first counsel of the Washington-based Environmental Defense Fund. This organization, established in 1967, received over $400,000 in grants from the Ford Foundation in 1971 and 1972, and projected a 1975 budget in excess of one million dollars.[35] Its main purpose is to bring suits to set precedents in environmental law. If Yannacone's successors at EDF are successful, here is a precedent that will be enunciated:

> Preservation of the agricultural productivity of the Class I, Class II, and Class III soils of the United States is one of those unenumerated rights retained by the sovereign people of the United States in the ninth amendment, and entitled to protection under the equal protection and due process clauses of the fifth amendment and the rights, privileges and immunities, due process, and equal protection clauses of the fourteenth amendment.[36]

A less outspoken but more strategically placed advocate of a similar approach is Assemblyman Charles Warren, Chairman of the California Assembly Committee on Energy and Diminishing Materials. In an article in *California Today* in October, 1974,[37] he urged placing all prime agricultural land in California in agricultural preserves and taxing it accordingly. "We just can't wait" for comprehensive land use controls, writes Warren, because we are facing an era of chronic food shortage in the world.[38]

In a similar vein, a Florida commentator observes that "[l]egislation is needed that would compel counties to exercise

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35. From reports and statements of the Environmental Defense Fund, 1975.

36. Yannacone, *Agricultural Lands, Fertile Soils, Popular Sovereignty, the Trust Doctrine, Environmental Impact Assessments, and the Natural Law*, 51 N.D.L. REV. 615, 617 (1975) [hereinafter cited as Yannacone]. This remarkable article, in which the table of contents apparently became the title, must be read to be believed; or, for that matter, not believed.

37. Warren, *Agricultural Lands—California's Response to Worldwide Food Crisis*, CALIFORNIA TODAY, Oct. 1974, in 120 CONG. REC. E6856 (daily ed. Nov. 26, 1974) [hereinafter cited as Warren]. Assemblyman Warren thereafter introduced a bill (A.B. 15) providing, *inter alia*, that no city or county could grant a permit for any proposed development on prime agricultural lands unless several extremely stringent conditions were met. This provision was, however, deleted before the measure passed the Assembly on January 29, 1976. *See* Hill, *California Seeks to Protect Prime Farmland from Urban Use*, New York Times, Mar. 18, 1976. *See also* Ellingson, *Differential Assessment and Local Governmental Controls to Preserve Agricultural Lands*, 20 S.D.L. REV. 548, 550 (1975): "The rapidly increasing rate of conversion of farmland to urban uses is a problem which demands immediate attention. There is now a world food shortage; consequently, the potential of American agriculture makes productive farm land a critical national resource."

38. Warren, *supra* note 37, at E6857. For an analysis of the extent of conversion of farmlands, *see* Blobaum, *The Loss of Agricultural Land* (a study report to the Citizens Advisory Committee on Environmental Quality, 1974); H. Dill, Jr. & R. Otte, *Urbanization of Land in the Western States*, in SENATE COMM. ON AGRICULTURE AND FORESTRY, AGRICULTURE, RURAL DEVELOPMENT AND THE USE OF LAND 195-202 (1974); Gustafson & Bordey, *Perspectives in Agricultural Land Policy*, 30 J. SOIL & WATER CONSERVATION 36 (1975).

these dormant powers (of taxation and zoning) in a rational comprehensive manner so that fertile lands of Florida will be available to feed future citizens."[39] Two other Floridians, however, are at least nervous about the degree of acceptance this prescription will elicit among farmers.

> How easily the farmer will be able to adapt himself to the new world of changing legal concepts based on the philosophy of social action is an open question.[40]

That, perhaps, is something of an understatement. But for those farmers and ranchers who willingly abandon the idea of freehold property to shoulder the burdens of the society at large, there is to be some consolation. As Governor Richard Lamm of Colorado, a leading environmentalist, put it:

> We must consider our land as a precious natural resource, not a commodity to be sold or traded; and we must turn inward toward spiritual and educational rewards and less to materialistic rewards.[41]

Whether this thought comforts a farmer or rancher struggling through a subzero night with a first calf heifer remains to be seen.

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39. Comment, *Preservation of Florida's Agricultural Resources through Land Use Planning*, 27 U. FLA. L. REV. 130, 139 (1974).

40. Wershow & Juergensmeyer, *Agriculture and Changing Legal Concepts in an Urbanized Society*, 27 U. FLA. L. REV. 78, 96 (1974). *See also* a statement by the "Ad Hoc Committee of the Western Agricultural Research Council," prepared for the Western Governors in 1974:

> One of the problems in developing effective planning, whether it be at the fringe of an urbanization or in new development in more isolated areas, will be gaining acceptance of controls on the use of property. The tradition of independence and freedom with respect to land is strongly held in this country, especially in the west. There will inevitably be considerable controversy in attempting to balance community goals and interests with individual rights and obligations.

Land Use Planning and Control Requirements for Agriculture, in SENATE COMM. ON AGRICULTURE AND FORESTRY, WESTERN AGRICULTURE—PROSPECTS, PROBLEMS AND SOLUTIONS 293, 298 (hearings, Salt Lake City, Apr. 19, 1974) [hereinafter cited as WESTERN AGRICULTURE]. *See also* O. DELOGU, PLANNING AND LAW IN MAINE (Maine Agricultural Experiment Station Bulletin 653, Nov. 1969): "Before necessary land use controls can be implemented, popular attitudes about private property must be changed in order to engender a collective sense of social responsibility for the manner in which land is used. . . . It must be shown that the real enemy of liberty and private property is unrestricted land use." The author is a leading figure in the land use control movement in Maine. You never know who your friends are.

41. Inaugural address, January 1975; *reprinted in* 121 CONG. REC. S. 1075 (daily ed. Jan. 28, 1975). In an article written well before he became governor, Lamm called for an integrated national land use management system. "Local zoning must be guided by—or at least, not be inconsistent with—state and national land use policies. The state land use policies themselves should be responsive to, and coordinated with, state growth policies. In turn, each state's growth policy should seek a fit within the federal scheme." He terms the enactment of federal land use legislation "the most important opportunity of the 1970's." Lamm & Davison, *The Legal Control of Population Growth and Distribution in a Quality Environment: The Land Use Alternatives*, 49 DENVER L.J. 1, 51 (1972) [hereinafter cited as Lamm & Davison].

The Old Feudalism is dead. But, like the dedicated Dr. Frankenstein reconstructing his monster out of miscellaneous parts scavenged from cadavers and crash victims, the architects of the New Feudalism are hard at work—in legal periodicals, in the courts, in the legislatures, and in the press. There is, admittedly, something to be said for a system of reciprocal rights and duties tied to the possession and use of land.[42] But the advocates of the New Feudalism fail to demonstrate the implications of the restoration of feudal land law for our economic and political systems, now based on a widespread distribution of freehold property ownership.[43] They are concerned about the use and abuse of land; they have doctrines and schemes to correct those abuses in the collective name of the people of their county, state, nation, or planet, as the case may be. Those doctrines and schemes require the replacement of freehold property with social property, as in the Old Feudalism.[44] The consequences of that replacement await the kind of exploration afforded to emergence of "the new property"— the right to governmental largesse—by Charles Reich in his seminal article of that title.[45] It is not unfair to ask that those consequences be fully spelled out before one boards the careening bandwagon, perhaps one should say tumbril, of the New Fedualism.

THE NEW FEUDALISM—TECHNIQUES

Those bent on restoring the feudal concept of "social property" have seized upon a host of techniques. The most prominent is expansion of the police power under centralized control from ever-

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42. For a sympathetic and perceptive discussion of the virtues of feudalism as a remedy to modern ills, *see* Johnson, *Paths Out of the Corner*, EQUILIBRIUM, Oct. 1972, at 4.

43. This connection has not always escaped analysis. *See*, for example, Scott's description of the views of George Fitzhugh in the 1850s:

> He argued that widespread ownership of land failed to provide the majority of society with the stability necessary for happiness. It broke society into competing units and inhibited cooperation. The rapid turnover of land ownership characteristic of a nation of small landholders disrupted society and made life emotionally precarious for those whose well-being was subject to the whim and fancy of the landowner. Rather than allow the land to be broken into small, single family farms, he suggested reimposing entails, primogeniture, and restrictions on land sales. . . . Such a system would put an end to selfish land speculation which sacrificed the welfare of those dependent on the land for the opportunity of quick gain for the owner. (He) believed that if the South discarded the outworn concepts of individual property and liberty it could, through the plantation system, provide itself a ruling class with the leisure, education and wherewithal to govern wisely and with an eye to the common good.

SCOTT, *supra* note 22, at 174-75. Fitzhugh, of course, was the South's leading apologist for the institution of slavery.

44. Or, for that matter, as in the Soviet Constitution, ch. 1, art. 6 of which states that "the land . . . is state property, that is, belongs to the whole people."

45. Reich, *The New Property*, 73 YALE L.J. 733 (1964). Professor Caldwell, *supra* note 33, has perhaps made the most conscientious beginning, but he does not take up the knotty questions of preserving individual liberty that so obsessed the founding fathers.

higher levels of government. This thrust has been accompanied by a strong legal effort to demonstrate that property cannot be "taken" by regulatory action, but only by a physical invasion and occupation. In addition, advocates of the New Feudalism have developed a doctrine of public trust with potentially broad, though not all-inclusive, application. There is also an emerging doctrine of natural state preservation, and an attempt to resurrect Mexican law in the Western States which, until 1848, were owned by Mexico. Finally, there is a serious effort to establish the proposition that natural objects have rights which may be protected in court. These approaches to the restoration of feudalism will be taken up in turn.

Centralized Police Power Controls

By far the most common and popular approach to restoring social property lies in extending traditional police power controls, usually accompanied by the exercise of those controls by some higher level of government. The police power, of course, is a necessity in civilized society. It allows the public to regulate activities which threaten the health, safety, welfare and morals of the community.[46] Traditionally, however, the police power has been used to forbid or regulate harmful or noxious uses of property. In so doing, it occasionally causes some distress or lost expectations for property owners. As Professor Van Alstyne remarks, "[w]hat Justice Holmes once referred to as 'the petty larceny of the police power' has become generally accepted as a cost of the effective legislative adjustment of competing interests of specific individuals and groups which is necessary to promote the general welfare of an entire community."[47] Only in the twentieth century has the movement to use police power sought not merely to regulate harmful or noxious use, but also to regulate or forbid perfectly innocent use.

The principal technique for using the police power to move back to feudal land tenures is, of course, zoning. While ingenious arguments can be made to the effect that zoning stretches back into antiquity,[48] until the landmark case of *Village of Euclid v. Ambler Realty Co.*,[49] there was considerable doubt whether a municipality could designate exclusive use zones without paying compensation to affected landowners.[50] In traditional or Euclidean zoning, the

46. *See* R. ANDERSON, AMERICAN LAW OF ZONING (1968); T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS (1868); E. FREUND, THE POLICE POWER (1904).

47. Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 4 (1970).

48. *See, e.g.*, THE TAKING ISSUE, *supra* note 24, at 51-81.

49. 272 U.S. 365 (1926).

50. E. BASSETT, ZONING: THE LAWS, ADMINISTRATION AND COURT DECISIONS DURING THE FIRST TWENTY YEARS 26-27 (1940):

> Many eminent lawyers declared that zoning as proposed was a taking of property and not merely a reasonable regulation, and that

local planning and zoning authority designates zones, in which certain uses are allowed, and others prohibited. The ordinance customarily requires some minimum area for lots. Other provisions, which could be adopted separately in the absence of zoning bylaws, include setback requirements, height and bulk limitations, minimum floor areas for residential units, and so forth.[51]

Despite a sharp increase in poor reviews,[52] the idea of zoning continues to fire the imagination of many ardent advocates of "saving the environment" through "managed growth." At the state level, two slightly different approaches have emerged. The first is a statewide zoning scheme administered or supervised by state government. This was installed in Hawaii in 1961, shortly after that territory became a state.[53] It was also attempted in Vermont, but after the process was launched in 1970 the legislature rebelled and three times refused to adopt the ensuing state land use plan.[54] The 1974 Land Use Plan, had it been ratified by the legislature, would have put the state government in charge of the use, and hence the exchange potential, of every square foot of the state, either indirectly (through the requirement that each local government enforce regulations to the state's liking) or directly (where the local government declined to cooperate). The dream of creating this bridgehead for the New Feudalism perished abruptly on February 26, 1974, when some 700 irate citizens converged on Montpelier to successfully demand defeat of the bill.[55]

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inasmuch as private property could not be taken for public use without payment, zoning under the police power would be declared unconstitutional.

See also E. FREUND, THE POLICE POWER 162-64, 546-51 (1904); 1 LEWIS, LAW OF EMINENT DOMAIN 386-90 (1900).

51. R. ANDERSON, AMERICAN LAW OF ZONING (1968).

52. *See* examples cited in text accompanying notes 73-78 *infra*. *See also* Bobo, *The Effects of Land Use Controls on Low Income and Minority Groups: Court Actions and Economic Implications* in INSTITUTE FOR CONTEMPORARY STUDIES, NO LAND IS AN ISLAND 93-101 (1975); Johnson, *Land Use Planning and Control by the Federal Government*, *id.* at 75-86; R. LINOWES & D. ALLENSWORTH, THE POLITICS OF LAND USE (1973); Heyman, *Legal Assaults on Municipal Land Use Regulation*, 5 URBAN LAW. 1 (1973); Karlin, *Land Use Controls: The Power to Exclude*, 5 ENVIRONMENTAL L. 391 (1975); Siegan, *Controlling Other People's Property Through Covenants, Zoning, State and Federal Regulation*, 5 ENVIRONMENTAL L. 391 (1975) [hereinafter cited as Siegan]; Wolkowitz, Helfert & Swartz, *Land Use Controls: Is There a Place for Everything?*, 6 SW. U.L. REV. 607 (1974).

53. HAWAII REV. STATS. ch. 205 (1968). *See* BOSSELMAN & CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 5-53 (1971) [hereinafter cited as BOSSELMAN & CALLIES].

54. Act 250 of 1970, 10 VT. STAT. ANN. ch. 151 (1973). The whole gruesome story of the attempt to impose statewide zoning in Vermont is told in McClaughry, *The New Feudalism*, 5 ENVIRONMENTAL L. 675 (1975). For other views, *see* BOSSELMAN & CALLIES, *supra* note 53, at 54-107; E. HASKELL & V. PRICE, STATE ENVIRONMENTAL MANAGEMENT: CASE STUDIES OF NINE STATES (1973); P. MYERS, SO GOES VERMONT (1974).

55. In 1975 Governor Thomas Salmon submitted a watered-down version of the ill-fated 1974 plan (H. 201), but it was promptly killed in committee. Late in the 1975 session the House Natural Resources Committee produced its own confused version (H. 383). This measure provided for the drawing of boundaries by the town governments of the five ever-present zones. These zone boundaries, however, had no relationship at all to local

The second approach, more selective and probably more politically sophisticated, is the designation of "areas of critical state concern" and "developments of regional impact," as for example, under Florida's Environmental Land and Water Management Act of 1972.[56] These subjects of regulation stem from the American Law Institute's proposed Model Land Development Code, now in final form after over a decade of development.[57] Under this approach local governments are entrusted with traditional zoning powers, but a state agency may take action with respect to specified areas. For example, the Florida statute lists as areas of critical state concern:

(a) An area containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional or statewide importance.
(b) An area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment.
(c) A proposed area of major development potential,

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zoning. Whether or not a development permit under Act 250 could issue to an applicant whose project was not among the uses which the applicable zone "may include but is not limited to" (!) was a hotly debated question, inasmuch as the sponsors of the bill continually refused to be pinned down on it, and the language of the bill defied exegesis. The bill would also have required towns to adopt local zoning to the satisfaction of one or more state agencies (depending upon how one read the text) by 1981, on pain of losing all state permits and grant funds for "major capital projects." H. 383 endured more perils than Pauline, but ultimately suffered a mercy killing. After being reported by the House Natural Resources Committee 11-0, it was rejected 6-2 by the House Agriculture Committee; bottled up for nine months in the House Ways and Means Committee; voted out suddenly by an 11-0 vote as part of what is commonly known as a "deal;" shuttled back to the Agriculture Committee which this time rejected it 11-0; resurrected from the ashcan by a floor petition; rejected 73-65 in its first floor test; extracted once again from the ashcan by an 82-65 vote to reconsider; advanced 72-68 after the Speaker broke a 51-51 tie on the key substitution; passed by the House 74-70 after the "major capital projects" control was stricken 72-69; reported favorably 4-2 by the Senate Natural Resources Committee; and finally referred to the Senate Agriculture Committee where it was enthusiastically buried. As the measure passed the House, its chief House backer described it as a "plucked chicken;" Governor Salmon referred to it as "only symbolic;" Environmental Board Chairman Schuyler Jackson said it was "not the plan Act 250 contemplated;" and numerous legislators termed it "a ridiculous piece of crap."

56. FLA. STAT. ANN. ch. 380 (1974). *See* L. CARTER, THE FLORIDA EXPERIENCE: LAND AND WATER POLICY IN A GROWTH STATE (1974); P. MYERS, SLOW START IN PARADISE (1974); Comment, *Preservation of Florida's Agricultural Resources Through Land Use Planning*, 27 U. FLA. L. REV. 130 (1974).

57. A.L.I., MODEL LAND DEVELOPMENT CODE (Apr. 15, 1975 Draft). *See* Fox, Jr., *A Tentative Guide to the American Law Institute's Proposed Model Land Development Code*, 6 URBAN LAW. 928 (1974). For discussion of land use control proposals in various Western states, many influenced by the ALI Code, *see* Bermingham, *1974 Land Use Legislation in Colorado*, 51 DENVER L.J. 467 (1974); Landman, *Land Use Planning in Oklahoma: A Tool For the Protection of the Environment*, 10 TULSA L.J. 63 (1974); Menk, *Keep Montana Montana*, 33 FED. B.J. 132 (1974); 10 IDAHO L. REV. 87 (1973); 57 IA. L. REV. 126 (1971); 1973 UTAH L. REV. 164 (1973). For a sharp critique of the ALI Code, *see* BROWN, THE AMERICAN LAW INSTITUTE MODEL LAND DEVELOPMENT CODE, THE TAKING ISSUE AND PRIVATE PROPERTY RIGHTS (1975).

> which may include a proposed site of a new community, designated in a state land development plan.[58]

The "developments of regional impact" are defined in the same Act as "any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county."[59] This approach is politically sophisticated in that it does not attempt to impose wall-to-wall restrictions with impact on all land owners of the state, which would stimulate widespread opposition. Indeed, at the time such an act is passed, it is unlikely that any landowner will be able to learn with certainty whether his land will be a subject of state regulation. He will only discover that later on, when the act is in operation. This prevents, or at least makes less likely, the kind of citizen rebellion that dissuaded the Vermont general assembly from taking the last step toward full state control of land.

In whatever form it appears, the idea of extending the police power to its utter limits, whether locally or at a state level, rapidly shades into the idea that land is not owned by a freehold owner, but held at the sufferance of society, that is to say, the government. This argument is advanced most visibly (and vocally) when the question of taking by regulation is raised.

The fifth amendment to the United States Constitution provides ". . . nor shall private property be taken for public use without just compensation."[60] These twelve words have been the subject of an astonishing amount of litigation and legal theorizing.[61] What is "private property?" What is "public use?" What is "just compensation?" And, above all, when is property "taken?" Clearly, when an agency of government invades and seizes possession of land, as for the construction of a public highway, a taking has occurred and just compensation is required. Even the feudal property advocates have declined to demand repeal of the taking clause in its entirety.[62] Instead, their mission has been to define

58. FLA. STAT. ANN. § 380.05 (1974).
59. *Id.* § 380.06.
60. U.S. CONST. art. V.
61. Among the most useful discussions are Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974); Berger, *To Regulate or Not to Regulate—Is that the Question?*, 8 LOYOLA U.L. REV. (LA) 253 (1975); Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63 (1962); Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking?*, 57 MINN. L. REV. 1 (1972); Mercer, Jr., *Regulation (Police Power) v. Taking (Eminent Domain)*, 6 N.C. CENTRAL L.J. 177 (1975); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAW. 1 (1967); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970).
62. An exception is former Vermont Governor Philip Hoff, under

"taking" in such a way as to limit it to actual physical invasion.

The most ambitious effort toward this goal is the publication in 1973 by the federal Council on Environmental Quality of *The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control.*[63] The main argument is that fear of incurring a taking through overly strict regulation is wildly exaggerated; governments should push police power regulation to its utmost to protect the environment and manage growth and development. The courts, say the authors, should be forced to the conclusion that no amount of regulation can constitute a compensable taking. Additional advice is offered to government counsel in emphasizing the importance of the public purpose involved, careful draftsmanship and trial preparation. It does, however, include a discussion of compensable regulations,[64] which were at that time expected to be a part of the American Law Institute's draft Model Land Development Code.[65] One has the feeling, however, that the compensable regulation approach is offered only as something to fall back upon if all assaults on the taking clause fail.

While *The Taking Issue* is in part a product of the Ford Foundation's interest,[66] the Rockefeller Brothers Fund entered the confiscation competition with *The Use of Land: A Citizens Policy Guide to Urban Growth.*[67] This report, also published in 1973, advocates a major increase of government regulation of land at all levels, mainly to reassure the environmentally concerned citizenry that development, thus sanitized, should be allowed to proceed without further obstruction. The report is quite explicit in its belief that development rights must now be recognized as created and allocated to the land by society,[68] and are not attributes of free property ownership. While advocating a "mix of techniques," the report recommends that "primary reliance on federally supported, state administered, non-compensatory regulations appear to present the only realistic hope of achieving the permanent protec-

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whose chairmanship the Vermont Planning Council in 1968 produced a report calling for "redefining and achieving a new balance between property rights and human rights in our society. Vermonters must reconsider the meaning of articles 2 and 7 of the Constitution of the State." Article 2 is the article protecting private property against taking without compensation, while article 7 states the power of the people to "alter government, in such manner as shall be, by that community, judged most conducive to the public weal." This is therefore a strong hint that the citizenry should exercise their rights under article 7 to get rid of article 2. VERMONT PLANNING COUNCIL, VISION AND CHOICE: VERMONT'S FUTURE 2 (1968).

63. *See* note 24 *supra.*

64. THE TAKING ISSUE, *supra* note 24, at 302-09.

65. The version to be acted upon in 1976 no longer contains the compensable regulation provisions.

66. The report was basically supported by a research grant from the Council on Environmental Quality, which published it, but the Ford Foundation financed Mr. Callies' trip to England to collect English material. THE TAKING ISSUE, *supra* note 24, at iii.

67. THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH (W. Reilly ed. 1973). The Report is a product of a task force created by Laurance Rockefeller and sponsored by the Rockefeller Brothers Fund.

68. *Id.* at 22.

tion of critical open spaces, including buffer zones between urbanized areas."[69] Such a prescription would doubtless seem reasonable to William the Conqueror once he had mastered the details of the American federal system.

While blue ribbon task forces, legal theorists and environmental activists are plotting the assault on the taking clause in the name of social property, the California Supreme Court has been lending every possible assistance. Already famous (or notorious) for decisions upholding police power regulations,[70] the court in *HFH Ltd. v. Superior Court of Los Angeles County*,[71] rejected the plaintiff's contention that an abrupt down-zoning that lowered the value of its property from $400,000 (shopping center) to $75,000 (low density residential) constituted a taking without compensation in violation of Article 1 of the California Constitution.[72] In the 6-1 decision, the court held that a "mere" reduction in value by a zoning action is not sufficient to require inverse condemnation, and that the "damage" for which Article 1 requires compensation is not equivalent to a diminution of value. Finally, the court suggested in so many words that the land development business is a lottery anyway; one never knows when his project will be aborted by a sudden down-zoning. In any case, said the court, the market has come to discount these events, implying that in the long run, if one develops enough land, one will make out all right thanks to the law of averages, if not the law of California.

This trend toward ever-expanding police power controls is, however, creating a few backsliders. One is Dr. Frank Popper, a Harvard-trained planner now at work on a two-year study of land use controls for the Twentieth Century Fund. In an article in *Planning*, the journal of the American Society of Planning Officials, Dr. Popper all but destroys the case for a statewide land use control program.[73] "The coming failure of liberalism in land use," Popper writes, "now seems likely." This is because the liberal land use controllers may turn out to be even weaker at the state level than at the local level; the regulatory agencies will be captured by their clientele; the regulation will prove to be restrictive, inflexible, and

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69. *Id.*

70. *Cf.* McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953), *cert. denied*, 348 U.S. 817 (1954). *See* the discussion in Heyman, *Open Space and the Police Power*, in OPEN SPACE AND THE LAW 13-17 (C. Herring ed. 1965). *See also* Southern Pac. Co. v. City of Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966); Consolidated Rock Prod. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342 (1962), *appeal dismissed*, 371 U.S. 36 (1962); THE TAKING ISSUE, *supra* note 24, at 144-45.

71. 125 Cal. Rptr. 365 (1975). For a discussion of the case prior to the decision, *see* Kanner, *Developments in Eminent Domain: A Candle in the Dark Corner of the Law*, 52 J. URBAN L. 861, 887-89 (1975).

72. CAL. CONST. art. I, § 14 (1954) says that "[p]rivate property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner . . . ."

73. Popper, *Land Use Reform: Illusion or Reality*, PLANNING, Sept. 14, 1974, at 14.

partial to established interests; and the process will deteriorate into red tape and bureaucracy that only the large developers can master.[74] Popper concludes that "unless some dramatic changes occur, liberalism in land use is sure to fail, for solid political, administrative and jurisprudential, and intergovernmental reasons."[75] This verdict, it must be emphasized, is not that of the John Birch Society, but of a card-carrying liberal with a doctor's degree in planning.

This same despair is echoed by Jonathan Brownell, the author and legal midwife of Vermont's Act 250. In 1974, Brownell reviewed a number of serious emerging problems in Vermont's Act 250 approach, concluding:

> I am deeply concerned with the dissolution of clear judicial standards for valid legislative action under the Constitution, which provided clear guidelines to legislatures and the public for the limits of government's power, guidelines which took longer to change and alter than a simple legislative session. I suspect that, in our zeal, we may well have taxed beyond their capabilities the present structures of governmental decision making for the resolution of issues such as those [associated with land use controls].[76]

Yet another blow, at least to "traditional zoning," has come from the prestigious Council on Environmental Quality, a Federal agency advisory to the President. In its 1974 annual report, released in mid-1975, the CEQ bombed the traditional idea of zoning in no uncertain terms:

> Zoning has certain inherent problems as a land use control. Inasmuch as it can change the price of land from its free market value, zoning may create economic incentives which work against the successful implementation of the desired development patterns.
>
> A second problem with zoning derives from its underlying assumption that different uses should be segregated. In terms of convenience, environmental effects, and energy consumption, there are often significant advantages to locating neighborhood facilities such as a grocery store or a pharmacy within a residential area. Traditional zoning, however, generally prohibits such an intermingling of uses. Recent trends in planning and zoning seek to remedy this deficiency by moving toward a more beneficial integration of different land uses at the proper scale.
>
> An even more basic question in zoning is whether it is possible, or even desirable, for a community to establish firm criteria for land use that are expected to remain unchanged over a long period of time. Experience suggests that it is not. Commonly, zoning regulations are

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74. *Id.*
75. *Id.*
76. Brownell, *State Land Use Regulation—Where are We Going?*, 9 REAL PROP., PROB. & TRUST J. 29, 33 (1974).

> transformed. Amendments and variances which were originally intended as rarely used safety valves often become the rule. As a result, zoning provides neither stability of use nor a logical mechanism for definition of use.[77]

The report continues to criticize the actual administration of zoning as exclusionary of the poor, contributory to higher housing costs, and an incentive to unsound development practices. While the report holds out planned unit developments and "special purpose districts" as hopeful trends,[78] it is clear that the uncritical enthusiasm for zoning among ardent environmentalists, so prevalent in the early years of the decade, has waned very noticeably.

Despite all this backsliding by former enthusiasts, the social property movement is far from spent. Indeed, it is possible that in its urge to prevent any disturbance to various organisms,[79] it will attempt to promote a far more lax interpretation of the taking clause in rural than in urban areas. The reason for this emerging double standard is basically that most environmentalists consider central cities to be irretrievable land use disasters; their goal is to prevent the infection of unspoiled rural areas by the "Great Despoiler," Man.[80]

Richard Babcock, perhaps America's most knowledgeable zoning attorney, has voiced a backhanded sort of concern about the emergence of a double standard.[81] Citing *Just v. Marinette County*,[82] and *Steel Hill Development, Inc. v. Town of Sanbornton*,[83] Babcock predicts that the courts may be warming to the idea that governmental regulation can be far more strict in unspoiled rural areas without constituting a taking. That is, since undeveloped

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77. COUNCIL ON ENVIRONMENTAL QUALITY, FIFTH ANNUAL REPORT 52 (1974).

78. *Id.*

79. The California Coastal Plan (California Coastal Zone Commission, December 1975) is based, *inter alia*, on the ecological principle that "organisms have requirements essential to life. If any of these requirements are met in amounts too small to satisfy the organism, it will not be able to survive in a particular area." *Id.* at 19. Perhaps this clause is a result of the lobbying efforts of the Fair Play for Bacteria Committee. In Vermont, environmentalists raised hue and cry that a brutal developer would, in building a handful of lakeside cottages on Ryder Pond, extinguish "a rare and irreplaceable species of bladder wort." A typical response was that of an elderly gent who declared that "[i]f I found I had one of them bladder worts I'd right quick have it took out." The California Coastal Plan claims that it protects the legitimate rights of property owners because, under the state and federal Constitutions, nothing could possibly violate those rights; this is akin to observing that one cannot be murdered because there are laws against it. *Id.*

80. As described by noted planner Ian MacHarg, man is "a blind, witless, low-brow, anthropocentric clod who inflicts lesions on the earth." R. ADAMS, SAY NO! 143 (1971).

81. Babcock, *On Land Use Policy*, PLANNING, June 1975, at 126 [hereinafter cited as Babcock].

82. 56 Wis. 2d 7, 201 N.W.2d 761 (1972). *See also* text accompanying notes 100-02 *infra*.

83. 469 F.2d 956 (1st Cir. 1972). *See* THE TAKING ISSUE, *supra* note 24, at 179-82; Comment, *Zoning Rural America: A New Lease on Life?* 10 SAN DIEGO L. REV. 887 (1973).

open spaces (*i.e.*, farms, ranches, forest areas, wetlands, etc.) may now involve more important ecological and environmental considerations, the necessity for protecting those areas will justify strict regulation that, in urban areas, would clearly be a taking. Babcock professes to be nervous about equal protection to rural landowners, but goes on to express even more concern that city dwellers might be "denied regulatory authority which could substantially reduce the public costs necessary to reconstruct the urban environment."[84] Farmers and ranchers, alarmed at the prospect of losing even more property rights than their urban neighbors, may take some comfort in knowing that Babcock will be striving to reduce urban landowners to the same level.

One other aspect of police power controls to prevent conversion of farm land deserves mention—the effect of restrictive regulation on farm credit. In some parts of the country, notably the suburban fringe and resort vacation areas, there is considerable demand for the conversion of farmland to other uses. This demand drives up both the price and the tax valuation of farmland. The resulting higher taxation becomes an ingredient of the pressure on farmers to convert their land to more intensive uses. This fact underlies the enactment of farm property tax relief acts in a majority of states.[85]

Strictly speaking, a farm loan is, or at least should be, made on the basis of the farmer's capacity to repay from income earned by farming. Where land values for non-farm uses have risen significantly above the farm use value level, it becomes increasingly likely that farm loan appraisers will begin to consider the enhanced value of the collateral as well as the income-producing potential of the loan. Thus the loan decision begins to resemble not so much a business loan as a home mortgage, where the loan is based on three factors: repayment capacity of the mortgagor, physical conditions of the property, and economic soundness of the neighborhood.[86]

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84. Babcock, *supra* note 81, at 15.

85. For a summary of these acts, *see* Hady & Sibold, *State Programs for the Differential Assessment of Farm and Open Space Land*, in ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, AGRICULTURAL ECONOMIC REPORT No. 256 (1974). *See also* INTERNATIONAL ASSOCIATION OF ASSESSING OFFICERS (I.A.A.O.), PROPERTY TAX INCENTIVES FOR PRESERVATION: USE VALUE ASSESSMENT AND THE PRESERVATION OF FARMLAND, OPEN SPACE AND HISTORIC SITES (1976); McClaughry, *A Model State Land Trust Act*, 12 HARV. J. LEGIS. 563, 569-79 (1975) and references cited therein; 8 HARV. J. LEGIS. 158 (1970).

86. The criterion of "economic soundness" of the neighborhood has in recent years been relaxed by Congress in enacting federal housing insurance statutes, notably by section 223(e) the National Housing Act, added by section 105 of the Housing and Urban Development Act of 1968 (Pub. L. No. 90-448). Section 223(e) allows dwellings to be insured if they appear to be an "acceptable risk," in "reasonably viable" inner city areas, "giving consideration to the need for providing adequate housing for families of low and moderate income" in such areas. For the problems this produced in the FHA home ownership program, see McClaughry, *The Troubled Dream: The Life and Times of Section 235 of the National Housing Act*, 6 LOYOLA U.L.J. (CHICAGO) 1 (1975). *See also* House Comm. on Government Opera-

To illustrate, consider a farmer who wishes to refinance his farm to permit the investment of an additional $50,000 in stock buildings and a milking parlor. He seeks a $50,000 loan for 20 years at 6 per cent, requiring an annual amortization payment of $4,300. He must normally be able to show that he can net an additional $4,300 per year to justify such a loan. Because of urban pressure for development, however, the farm's land value has increased drastically. Even though the farmer cannot prove he can clear an additional $4,300 per year on the investment, the lender knows that the overall collateral value of the farm is more than enough to recoup the lender's investment in the event of default. Since the lender is inclined to help the farmer, the loan is made even though it cannot clearly be repaid from increased farm income. The lender is protected because the development value of the farm guarantees recovery.

To the extent this occurs, the farmer receives a current benefit from the increased land value: it strengthens his credit. What happens after lenders have habitually given the farmer the benefit of the enhanced collateral value, and the farm land is suddenly subjected to anti-development restrictions by the government? When stock is offered as collateral in a business transaction, and subsequently declines in price, the other party to the transaction customarily requires additional collateral via a margin call. While a farm lender might not take such a drastic action, it seems clear that to the extent that development values influenced the lending decision, the lender's margin of safety has just been erased.

Where farmers have benefited from strengthened credit through increased collateral value, the enactment of stringent anti-development laws can only undermine farm credit. It can of course be argued that the farmer was not entitled to the enhanced credit in the first place; the lender made a departure from customary business lending practice. But human nature being what it is, that argument will not appeal to the farmer when his next loan application is turned down. He will naturally believe that the stringent land use controls destroyed the credit capacity he had come to expect, and he will of course be right.

The extent to which farm lending in areas of rising development value actually includes enhanced collateral value as well as income producing potential is a very murky question. The farm credit system is unable to produce any published guidelines dealing with the effect of development restrictions on farm appraisal values.[87] The American Society of Farm Managers and Rural

tions, *History of Risk Concepts in Home Mortgage Insurance Legislation*, in DEFAULTS ON FHA INSURED HOME MORTGAGES—DETROIT, MICHIGAN, H.R. REP. NO. 92-1152, 92d Cong., 2d Sess. 249-56 (1971).

87. An officer of the Federal Land Bank of Springfield, Massachusetts, made a diligent search for guidelines, at the author's request, with no result.

Appraisers is uncertain about the matter.[88] The Farmers Home Administration definition of the "three way approach to market value" lists among the items of "essential quality" in comparing sales "alternative uses," but the regulations do not make clear whether such alternative uses are those to which the parcel could economically be put, or those to which zoning currently allows the property to be put.[89] A practice question of the reviewing appraisers course of the American Institute of Real Estate Appraisers, relating to valuation of a residentially-zoned lot on a commercial strip, produces an uncertain discussion of the probability of change of restriction as a factor somehow to be taken into account.[90]

This is a question which obviously needs considerable further exploration. But what does seem clear is the fact that, where farm credit is in part based on development value of land as well as expected farm income, stringent anti-development restrictions can only operate to undermine or destroy the credit expectations of farmers and ranchers. Even though it may be argued that those expectations are not justified, the effect on the preservation of agriculture can only be adverse.

Public Trust Doctrine

A second technique for restoring social property is the resurrection of the concept of the public trust. As described by Large, "[b]riefly, the basic theory is that the state holds the public lands of the state in trust for the public and that any attempt to sell these lands to private interests, or to otherwise divert them to private use, will be viewed with skepticism."[91] On its face, the public trust doctrine would not seem to have general applicability, inasmuch as the great era of public conveyance to private owners has long since ended. The corollary has been raised, however, that past conveyances may be invalidated under public trust doctrine to effect present governmental designs. The most remarkable example of this ingenious reasoning is *International Paper Co. v. Mississippi State Highway Department.*[92]

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88. Personal communication, November 19, 1975.

89. Farmers Home Administration, Reg. § 422.1. *See also* 7 C.F.R. § 1821.12 (Supp. 1975).

90. Made available to the author by Arlo Woolery, Executive Director of the Lincoln Institute of Land Policy, Cambridge, Massachusetts, a trained land appraiser. One leading text on farm appraisal, MURRAY, FARM APPRAISAL AND VALUATION (5th ed. 1970), does not even discuss the problem of restrictive regulations.

91. Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039, 1067 [hereinafter cited as Large].

92. 271 So. 2d 395 (Miss. 1972). *See* discussion in Large, *supra* note 91, at 1067-70. *Compare* C.B. & Q. Ry. v. Illinois *ex rel.* Grimwood, 200 U.S. 561, 586 (1906), wherein Justice Harlan suggested that since the state held its power over waterways in trust, it could not grant a railroad company permanent rights to bridge a watercourse even if its legislature so desired. *See also* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970). *But see* Alamo Land & Cattle Co., Inc. v. Arizona, 96 S. Ct. 910 (1976).

This case arose in the early 1970's when, much to the surprise of the company (IPC), the State of Mississippi casually began building a public highway across an IPC-owned island in the Pascagoula River. Upon recovering from its astonishment at this act of audacity, IPC sued to enjoin the state from trespassing on its land. It based its claim of ownership on a patent granted by the state to its predecessors in interest in 1895, and noted that it had paid property taxes on the island for many years.

Counsel for the state advanced the argument that the state had become trustee of all public land when Mississippi entered the Union in 1817. When, in 1895, the state conveyed its interest in the island to IPC's predecessor in interest, counsel argued that the state had violated this unwritten public trust by conveying to a private party for a private purpose. Hence the conveyance was invalid, and the state, not IPC, owned the island. The court agreed, and also denied IPC's claim of estoppel through collection of taxes. Justice Smith, dissenting, argued that acceptance of the public trust doctrine established an ancient common law rule as "perpetual and paramount," thus preventing the legislature from ever dealing with public lands.

The public trust reasoning in the IPC case quickly leads to a sweeping and earthshaking conclusion: that the state, invested with a public trust in lands, could not violate that trust by conveying public lands to private parties; and that no matter how long ago the conveyance was made, and no matter what the consideration given by the recipient, and regardless of the payment of taxes by the putative private owner through the period of private control, the original conveyance was null and void if it later appeared that the public interest would have been better served had the conveyance not been made! In other words, the failure of the Mississippi legislature in 1895 to anticipate that state's need for a highway bridge over the IPC island in 1970 is sufficient to invalidate the conveyance, and hence IPC's claim to ownership.

Clearly this theory has revolutionary implications, for practically all of the privately held lands of the United States outside the original thirteen colonies were at one time owned by some government in public trust.[93] If this theory gains ascendance, the state can, without compensation, recover the title to any parcel of land if it can be shown that the original grant was made with insufficient anticipation of the benefit of public ownership that might ensue a century or two later. This is instant feudalism. Fortunately, the case as yet does not appear to have stimulated a major trend among government solicitors, but it certainly bears watching.

93. *See generally*, E. DICK, THE LURE OF THE LAND: A SOCIAL HISTORY OF THE PUBLIC LANDS (1970); B. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES (1924); E. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES (1951); R. ROBBINS, OUR LANDED HERITAGE: THE PUBLIC DOMAIN 1776-1936 (1962).

The public trust doctrine, however, is in current favor among New Feudalists, of whom an outstanding example is the aforementioned Victor John Yannacone. Yannacone is eager to impose the public trust doctrine on whatever private property comes to his attention, but particularly on agricultural lands.

> The evolution of our society and the demands of civilization have elevated our prime agricultural lands to the level of public property subject to equitable protection on behalf of the people of the United States. Our courts of equity cannot shut their eyes to matters of public notoriety and general cognizance. People are starving—not just in Africa, India, and the rest of the Third World, but in the ghettos of our once great cities, on Indian reservations, and in spent rural areas like Appalachia. . . . Enforcement of the public trust is one of the great objects of equitable jurisprudence.[94]

In so many words then, courts of equity should be asked to enjoin the conversion of privately owned farmlands to other uses so long as people are starving anywhere in the world. Yannacone is particularly clear about implementing his version of public trust.

> In the case of a national, natural resource treasure such as the limited supply of prime agricultural land in the United States, a court of equity can act to protect the public interest in the property even if it means limiting the rights of the nominal "owner." Equity can be called upon to protect the rights of the sovereign people of the United States in and to the benefit, use, and enjoyment of property vested with the public interest long after it has come into private ownership. Prime agricultural lands and the arable soils of this nation have become so important to the welfare of the people of this generation and those generations yet unborn that they are bested (sic) with sufficient public interest to impose the obligations of a trustee for the public benefit upon the nominal owners.[95]

Yannacone finds the ultimate justification for this assertion in the natural law. He feels it must be resurrected to overcome the mischief of legal positivism, which he associates with the Third Reich.[96]

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94. Yannacone, *supra* note 36, at 629-30.

95. *Id.* at 621. Yannacone is clearly the kind of person who worries Roger W. Fleming, Secretary Treasurer of the American Farm Bureau Federation. "The drive to make American agriculture a public utility is becoming an issue of overriding importance . . . . Federal land use control remains a major threat to farmers and ranchers." NORTHEAST AGRICULTURE (Feb. 1976). So is Richard Babcock: "I suggest that land has many of the attributes of those commodities our society has insisted to be subject to licensing or public regulation as a utility." Babcock, *supra* note 81, at 16.

96. Yannacone, *supra* note 36, at 651. Yannacone may be a little unfair to the late Adolf Hitler, who stated at a press conference in Nuremberg on September 14, 1936, "Whenever private interests clash with the interests of the nation, the good of the community must come before profits to the individual." Interestingly, where Yannacone places great reliance on the natural law, an equally enthusiastic advocate of social property, J.E. Don-

Other current examples of advocacy of the public trust doctrine have focused on the more limited areas of beaches and shorelines, notably in California.[97] Here there is clearly some respectable content to the public trust theory, inasmuch as common law does give the state a considerable interest in shorelines, beaches, and navigable servitudes. Whether Mexican law can be resurrected in California after a lapse of some 130 years to justify state occupation of public rights in beachfront properties is an interesting question.[98] It is also interesting to learn whether the alleged use of coastal beaches by Indians conducting "wild turkey drives" in bygone days will be seized upon by the courts to prevent a denial of access to beaches by riparian landowners.[99]

Natural State Preservation Doctrine

While efforts to promote extended police power controls and the public trust doctrine have proceeded, yet a third doctrine has been hatched by the Wisconsin Supreme Court in the landmark case of *Just v. Marinette County*.[100] In 1961, Ronald and Kathryn Just, a machine driver and secretary respectively, purchased 36 acres of land in Marinette County, of which 1266 feet fronted on Lake Noquebay. Over the ensuing five years the Justs sold five lots from

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aldson, argues that natural law constraints must be purged from the 14th amendment, and that "American notions of property . . . should not suggest any delimitation of public power to regulate the use and enjoyment of land." Donaldson, *Regulation of Conduct in Relation to Land—The Need to Purge Natural Law Constraints from the 14th Amendment*, 16 WM. & MARY L. REV. 187, 199 (1974). But, adds Donaldson, having triumphantly purged natural law, land regulation must be "reasonable." Where art thou, Cicero, now that we need you?

97. CAL. CONST. art. 15, § 2 provides as follows:

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall always be attainable for the people thereof.

See Eikel & Williams, *The Public Trust Doctrine and the California Coastline*, 6 URBAN LAW. 519 (1974), especially the theory of "implied dedication" at 568-70. Senator Henry Jackson has sponsored a bill (S. 2621, 93d Cong., 1st Sess. (1973)) "to declare a national policy that the beaches of the United States are impressed with a national interest and that the public shall have free and unrestricted right to use them as a common consistent with such property rights of littoral landowners as may be protected absolutely by the Constitution. . . ." 119 CONG. REC. S19605 (daily ed. Oct. 30, 1973).

98. Dyer, *California Beach Access: The Mexican Law and the Public Trust*, 2 ECOLOGY L.Q. 571 (1972). Lest landowners in the Great Plains dismiss this attempt as relevant only to Southern California, it should be noted that the land ceded to the United States by Mexico included all of California, Arizona, Nevada, and Utah, plus parts of New Mexico, Colorado, and Wyoming.

99. Michael Berger recalls a Sierra Club spokesman offering this rationale for implied dedication. *See To Regulate or Not to Regulate—Is That the Question?* 8 LOYOLA U.L. REV. (LA) 253, 297 (1975).

100. 56 Wis. 2d 7; 201 N.W.2d 761 (1972). *See* Large, *supra* note 91, at 1074-81; Siegan, *supra* note 52, at 429-32.

the tract, leaving them with one additional lot for sale plus the parcel they intended to retain for their own home. In late 1967, Marinette County adopted an ordinance pursuant to a state law regarding pollution of waterways. The ordinance required a permit for any filling, draining or dredging of specified wetlands.

Six months after enactment of the ordinance, the Justs began to fill along their shoreline without a permit; the county brought suit to enforce the ordinance, and the Justs were fined $100 and enjoined from futher filling. On appeal, the Justs raised the issue of an unconstitutional taking. Ordinarily, as Large points out,[101] such a case would be decided by contrasting the diminution of value in the Just's property, if substantial, with the public purpose and public benefit resulting from enforcement of the ordinance. This is the familiar balancing test between private burden and public benefit. The court did not follow this normal practice, however, but plunged forward into a wholly new doctrine.

In its opinion, the court noted that the state had restricted plaintiff's actions not to secure an affirmative benefit for the public generally, but to prevent a harm.

> In the instant case we have a restriction on the use of a citizen's property not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizen's property. We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man made. The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. This is not, in a legal sense, a gain or a securing of a benefit by the maintaining of the natural status quo of the environment. . . .
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> . . . .
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> The shoreland zoning ordinance preserves nature, the environment, and the natural resources as they were created and to which the people have a present right.[102]

This startling rationale is pregnant with implications. First, it seems to require the state to take affirmative action to stop pollution of the waterways, implying that if the legislature had not adopted a statute permitting county shoreland control ordinances, the court would instruct it to do so. One wonders what other affirmative duties a court might impose upon a legislature under such a theory.[103] Secondly, as Large points out, the "benefit-detriment distinction [in *Just*] augments the state's power to protect wetlands but adds nothing to its power to build high-

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101. *See* Large, *supra* note 91, at 1075.
102. 56 Wis. 2d 7, —, 201 N.W.2d 761, 767-71 (1972).
103. It is conceivable that the *Just* doctrine could open the way for courts to issue voluminous instructions to legislatures, paralleling the judicial activism flowing from Baker v. Carr, 369 U.S. 186 (1962), with respect to legislative apportionment.

ways."[104] Thirdly, the concept of valuation allowed by the court in effect extinguishes any notion of potential value for future development; swamp land is worth only what a swamp is worth. Ordinances prohibiting improvement of the swamp do not vitiate any property interest of the owner, because the owner has no property interest in his expectations if those expectations involve altering the natural environment. Finally, and perhaps most importantly, the court seems to be saying that any human interference with the existing natural environment may be prohibited by regulation without incurring a compensable taking.[105] One almost wonders whether a public-spirited citizen fighting a lightning-caused forest fire might not be enjoined from interference with the working of nature. Most legislatures would probably not carry this doctrine to such an extreme, nor would courts exercise the power hinted at to require legislative action to protect alleged public rights. Nonetheless, if such an optimist as Thomas Jefferson could write that "I consider all the ills as established, which may be established,"[106] those nervous about the advance of the New Feudalism would do well to watch for citations to *Just* in later cases.

Rights for Natural Objects

As if the foregoing expansions of legal doctrines were not enough to occupy the legal soldiers of the environmental movement, Professor Christopher D. Stone has entered the lists with yet another theory: that natural objects have legally defensible rights.[107] He argues that throughout legal history, each successive extension of rights to some new entity (*i.e.*, women, children, slaves) has been a bit unthinkable. Now, he argues, it is time for human beings to think about conferring rights upon natural objects like trees, rocks, and wild animals.[108] Since experience suggests that trees are not likely to amble into the courtroom in search of injunctions, Stone proposes that a friend of a natural object would apply to the court for a guardianship, as a friend might do in the case of a legal incompetent. The guardian would then sue to protect the object's natural rights and could recover damages for

104. Large, *supra* note 91, at 1078.

105. If this natural areas presumption is adopted, the law will return to the doctrine obtaining in the United States prior to the rush of development in the early 19th century. For a discussion of how the "natural state" doctrine gave way to a "social benefit" doctrine in land use conflict cases in the early 19th century, particularly with respect to floodings caused by mill dams in New England, *see* Horwitz, *The Transformation in the Conception of Property in American Law, 1780-1860*, 40 U. CHI. L. REV. 248 (1973).

106. Letter to James Madison, December 20, 1787, in KOCH & PEDEN, *supra* note 3.

107. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972), also printed as a book by the same title in 1974.

108. C. STONE, SHOULD TREES HAVE STANDING 6 (1974). One reviewer wryly notes the "homocentric nature of the term 'granting' as opposed to suggesting that the legal system recognize existing rights of natural objects." Huffman, *Trees as a Minority*, 5 ENVIRONMENTAL L. 199, 201 (1974).

injury to that object. This doctrine has at least won judicial notice in *Sierra Club v. Morton*,[109] although it has not yet won widespread acceptance, at least not among humans. For all we know, trees think it is terrific.

The Stone theory, which perhaps not coincidentally became well known just prior to the recent "pet rock" craze, contains a few aspects which might charitably be referred to as problems. The first, of course, is the problem of ascertaining what the tree wants. Stone seems to think a tree wants what a human environmentalist thinks a tree wants; namely, to die of natural causes and thereafter rot peaceably on the forest floor, to the enormous benefit of various species of fungi. For all we know, however, a redwood may be pining[110] for the day when it is made into picnic tables and siding for the benefit of mankind. Indeed, if one is to believe the Bible, that is the sort of thing God had in mind for trees.[111]

Even assuming that a tree wants nothing more than to be left alone, who is to be named the legal guardian of the tree? What happens when competing claimants appear in the courtroom asking to be appointed the guardian of El Capitan? If damages collected in a court action are placed in a trust fund administered by the guardian on behalf of the natural object, as Stone proposes, are there limitations on the administrative fees taken by the guardian? If not, this system may vault into popularity among lawyers as a remedy for the financial depredations of no-fault insurance statutes.

It is easy to engage in ingenious speculation about the consequences of a system where a legal aid lawyer can bring suit against a fisherman on behalf of a trout. Indeed, such a topic could well provide a hilarious evening at a law school eating and drinking club. But Stone's work is being taken seriously enough to temper the hilarity. Like the police power, public trust, and natural state doc-

109. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. . . .

> The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fish, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.

Sierra Club v. Morton, 405 U.S. 727, 741-43 (1972) (Douglas, J., dissenting).

110. The author wishes to state that this unfortunate choice of verb was totally unpremeditated.

111. As God observed to Noah upon the termination of the flood, "The fear of you shall be upon every beast of the earth, and upon every bird of the air, upon everything that creeps on the ground and all the fish of the sea; into your hand they are delivered. Every moving thing that lives shall be food for you; and as I gave you the green plants, I give you everything." *Genesis* 9:2-3. Perhaps Professor Stone traces his descent from someone other than Noah.

trines, it may yet become a useful weapon in the renaissance of feudalism in land.

THE NEW FEUDALISM—ALTERNATIVES

The central theme of the New Feudalism is that freehold property is no more; that all land is not owned by individual owners, but merely held at the sufferance of the state. Certainly, if one embraces this doctrine, all the difficult problems—the taking issue, private rights versus public benefits, the funding of acquisition—are at one stroke swept away. Along with them, of course, are likely to go a few other items like human rights, individual liberties, and a republican form of government.[112] The destruction of these values is a dreadful price to pay for the supposed convenience of complete public power over the use and exchange of all land. But what if freehold property is reaffirmed, and social property rejected? Are there still effective techniques for dealing with the genuine problems of land use?

The answer to that question is clearly affirmative; there is a host of techniques both effective in dealing with land use problems, and conformable to the freehold property theory. It should not be presumed that these are laissez-faire techniques, they are not. Complete laissez-faire in land use, aside from private enforcement of nuisance suits, might well be an improvement over the elaborate fiascos brought into being by 50 years of zoning.[113] But it is not necessary to consider laissez-faire as the exclusive alternative to social property. All free market activity, in any but a completely primitive or theoretical society, must operate within a context which

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112. *Cf.* Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972):

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

See also PROPERTY IN A HUMANE ECONOMY (S. Blumenfeld ed. 1974); Tate, *Notes on Liberty and Property* in WHO OWNS AMERICA? (H. Agar & A. Tate ed. 1936); *and* references cited note 22 *supra.* For confirmation from an unlikely source, *cf.* Attorney General Ramsey Clark:

> There is no more vital concept in the Constitution [than the 5th amendment's prohibition against taking without compensation] for it protects the citizen in his property, and freedom cannot exist in a propertyless state. Property affords the opportunity for the exercise of liberty.

Quoted in Weisl & Cohen, *Federal Condemnation Law and the Public Interest*, in PROCEEDINGS OF THE EIGHTH INSTITUTE ON EMINENT DOMAIN 45 (1968).

113. Bernard Siegan, in his exhaustive study of land use patterns in non-zoned Houston versus other zoned cities, is the leading advocate of this position. B. SIEGAN, LAND USE WITHOUT ZONING (1972); Siegan, *No Zoning is the Best Zoning*, in INSTITUTE FOR CONTEMPORARY STUDIES, NO LAND IS AN ISLAND 157-68 (1975); Siegan, *Non-Zoning in Houston*, 13 J. LAW & ECON. 71 (1970); Siegan, *Controlling Other People's Property Through Covenants, Zoning, State and Federal Regulations*, 5 ENVIRONMENTAL L. 391 (1975).

includes some law of real property, eminent domain, taxation, and governmental activity of many kinds. Insofar as these impinge on the free market system, they may be considered to a degree coercive. But the techniques discussed in the following pages avoid, in every case, the use of the coercive power of the state to confiscate the property rights of landowners pursuing innocent enjoyment of their property, without at the very least requiring the public to give something of equivalent value to the landowner for his coerced cooperation—something of economic value, in addition to whatever warm, rosy glow may result from his giving up his rights in land for the benefit of the public. The discussion that follows is not a lawyer's encyclopedia of land use techniques, but a decidedly heuristic overview of the subject; readers must consult the references cited for a more detailed exposition in each case.

Individual Action Techniques

In any kind of civilized society, some land use conflicts are inevitable. Since the floodgates opened in *Euclid v. Ambler Realty*,[114] the dominant philosophy has held that it is inconvenient, inefficient, and even undesirable for individuals and groups of individuals to attempt to deal with land use conflicts on their own; the decision-making and regulation should be imposed collectively by the government.[115] As noted above, however, satisfaction with the results of this collective regulation is becoming increasingly scarce. The search for new, decentralized, individualized techniques has thus begun.

Foremost among these techniques is the ancient practice of nuisance litigation. Traditionally, a nuisance suit is brought by one property owner against an adjacent property owner with respect to activities of the latter. The plaintiff seeks an injunction against the noxious activity, damages, or both. Professor Joseph Sax has used nuisance theory as a starting point for a strategy for citizen action to protect the environment, in no small measure as a result of his progressive disenchantment with environmental protection by government bureaucracies.[116] The key sentence in Sax's model Michigan legislation, modestly titled by its legislative sponsors as the "Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970," reads:

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114. 272 U.S. 365 (1926).

115. As Alfred Bettman, a great name in city planning, argued in his brief supporting the zoning in Euclid, "[t]he zone plan, by comprehensively districting the whole territory of the city and giving ample space and appropriate territory for each type of use, is decidedly more just, intelligent, and reasonable than the system, if system it can be called, of spotty ordinances and uncertain litigations about the definition of a nuisance." A. BETTMAN, CITY AND REGIONAL PLANNING PAPERS 171 (1946). *See generally* R. BABCOCK, THE ZONING GAME (1966).

116. J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971).

> Sec. 2. (1) The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.[117]

The Sax approach imposes upon the court the responsibility for identifying or devising some standard of performance to guide a determination in each case. Where performance standards exist in legislation, this may not be a difficult task, but in many cases the judge will be forced to break a path through the wilderness. In addition, by allowing any person to bring the action, the Sax bill opens the door to professional public trust protectors whose abstract concern for the environment may give little weight to the concerns of local communities and the wishes of their people. For example, the Sierra Club might well wish to bring an action to stop discharge of papermill wastes into a remote lake, with no concern for the economic well-being of the people in the community who would necessarily balance a clean environment against the threat of massive unemployment.[118] Yet another difficulty arises if a state attorney general may bring an action under the statute even though the offender is actually complying with state environmental regulations.[119] The basic approach of making it simple

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117. Mich. Public Act 127 of 1970 § 2(1), MICH. STAT. ANN. §§ 14:528 (201)-14,528(207) (Supp. 1975). For commentary, *see Environmental Report*, NAT'L J. 1245-50 (1971); 4 J. LAW REFORM 358 (1970).

118. *See* the critique in Bloch & Wertz, *Resolving Environmental Disputes: Regulation, Litigation, and Arbitration* in PERSPECTIVES ON PROPERTY 181-87 (G. Wunderlich & W. Gibson Jr. ed. 1972) [hereinafter cited as Bloch & Wertz]. In Pinkney v. Ohio Environmental Protection Agency, 375 F. Supp. 305 (N.D. Ohio 1974), the court held that the right to a non-hazardous environment is not a fundamental right guaranteed by the U.S. Constitution, using the criteria set forth by the Supreme Court in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). This may head off some of the wilder attempts to discover new rights scarcely contemplated by the framers of the ninth amendment, as, for example, "every American's right to look across and to range great areas of the earth's natural landscape, provided that the exercise of such right does not damage the landscape itself." McCloskey, Jr., *Preservation of America's Open Space: Proposal for a National Land Use Commission*, 68 MICH. L. REV. 1167, 1172 (1970). *See*, on the *Pinkney* case, Kirchick, *The Continuing Search for a Constitutionally Protected Environment*, 4 ENVIRONMENTAL AFFAIRS 515 (1975). For a truly outstanding example of litigation to prevent imagined ills, *see* United States *ex rel* Mayo v. Satan and His Staff, 54 F.R.O. 283 (W.D. Pa. 1971), in which plaintiff brought a civil rights action claiming that defendants had "placed deliberate obstacles in his path and . . . caused plaintiff's downfall."

119. In Kelley v. National Gypsum Co., No. 1118 (Mich. App., Sept. 25, 1973) the Michigan attorney general brought suit under the state EPA even though the company was complying with the state's Air Pollution Control Commission regulations.

and effective for a citizen to bring an action to redress genuine environmental wrongs has much to recommend it, however.

Professor Allison Dunham sees considerable potential in enforcement of planning decisions by reducing marketability of a landowner's property by 1) threatening the income forthcoming from the property; 2) making it difficult to adhere to established management and marketing practices; and 3) rendering the title defective so that buyers and lenders will not or cannot purchase an interest in his commodity.[120] For example, a tenant can be relieved from paying rent if the landlord's certificate of occupancy is revoked for housing code or other violations. Violations can be made to trigger clauses in insurance policies and mortgages producing unpleasant results for the violator. Recordation of subdivision plans can be denied, forcing a land developer to describe his lots in inconvenient metes and bounds manner, which is not appreciated by real estate marketing and financial institutions. Most important, Dunham envisions title encumbrances flowing from ordinance violations, such as a senior lien imposed by a city government for improvements made by the city on private property.

Dunham's proposal operates within the context of collective zoning and ordinances. Yet the techniques could as easily be applied to a decentralized "privatized" system. For example, under a little-noticed part of Vermont's celebrated (or notorious) Act 250, a deed to property may not be recorded unless the seller certifies "that the conveyance of the real property and any development thereon by the seller is in compliance with or exempt from the provisions of chapter 151 of Title 10 [Act 250]."[121] Dunham also anticipates Sax's proposal for direct action by individuals to enforce planning decisions against non-complying neighbors, and actions seeking mandamus against public officials who have ignored enforcement of such ordinances.

A comprehensive and conceptually sound approach to a decentralized, privatized system has now been offered in a masterful article by Professor Robert C. Ellickson,[122] which lays the groundwork for a reform of the legal system to permit individuals to resolve land use disputes in accordance with clear and workable principles.

Ellickson discusses the economic concepts underlying land use conflicts. He points out that an economic solution to such con-

120. Dunham, *Private Enforcement of City Planning*, 20 LAW & CONTEMP. PROB. 463 (1955). *See also* Brown Jr., *Zoning Laws: The Private Citizen as Enforcement Officer*, 9 U. RICHMOND L. REV. 483 (1975), describing VA. CODE ANN. § 15.1-486 (Repl. Vol. 1973), which allows private citizens to bring suit to halt construction allegedly in violation of zoning ordinances.

121. 32 VT. STAT. ANN. § 9608 (Supp. 1975). *See also* Burke, Jr., *Governmental Intervention in the Conveyancing Process*, 22 AM. U.L. REV. 239 (1973).

122. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973) [hereinafter cited as Ellickson]. For a heavily theoretical approach, *see* McDougal, *Land-Use*

flicts should minimize the sum of nuisance costs, prevention costs, and administrative costs. Upon analysis, he finds very little to recommend currently practiced zoning programs. "In the United States," he says, "zoning generally works to the detriment of the poor and near-poor, racial minorities and renters; it operates for the benefit of the well-to-do, particularly home-owners, by artificially increasing the supply of sites on the market usable for only expensive homes and thus reducing their cost."[123] Ellickson then offers a reformulation of nuisance law to place the risk of loss from external harms on the landowner carrying out the damaging activity. Once a plaintiff establishes a prima facie case of nuisance involving substantial harm to him—when an activity is deemed "unneighborly" by contemporary community standards—he will seek judicial relief. The court may decide among one of four possibilities:

1) Injunctive relief;
2) Damages without injunctive relief;
3) Neither damages nor injunctive relief (judgment for the defendant);
4) Injunctive relief with compensation to the defendant.

Where injuries are pervasive but individually insubstantial, and where a reasonably stable objective index of noxiousness exists,[124] a public body would assess fines to internalize the costs to the public generally.[125] Where such an index does not exist, mandatory standards would be applied. The collective aspect of the system would be implemented through "nuisance boards" combining rule making, administrative, and adjudicatory functions within the guidelines of state law.

The foregoing brief discussion does little justice to the breadth and depth of Ellickson's proposal. It would clearly take a very determined and farsighted effort by bar associations and other organizations to install Ellickson's nuisance system in state law. That effort will probably not come until it becomes apparent even to the casual observer that the current trend toward more and higher-level zoning is totally misdirected, and, in fact, destructive of many of the ends it seeks.

In connection with Ellickson's approach, the use of mediation and arbitration to cope with environmental and land use disputes

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Planning by Private Volition: A Framework For Policy-Oriented Inquiry, 16 ARIZ. L. REV. 1 (1974).

123. *See* Ellickson, *supra* note 122, at 705.

124. As, for example, the primary and secondary air pollution control standards established and monitored by the federal Environmental Protection Agency.

125. *See, e.g.*, the effluent discharge program created by Vermont's unique "pay to pollute" law, 10 VT. STAT. ANN. § 1265(e) (1973). *See also* W. BECKERMAN, PRICING FOR POLLUTION (1975); J. DALES, POLLUTION, PROPERTY, AND PRICES (1968); E. DOLAN, TANSTAAFL: THE ECONOMIC STRATEGY FOR THE ENVIRONMENTAL CRISIS (1971); A. FREEMAN, R. HAVEMAN & A. KNEESE, THE ECONOMICS OF ENVIRONMENTAL POLICY (1973); Woodroof, *Pollution Control: Why Not Cost Allocation?*, 21 DRAKE L. REV. 133 (1971).

is still in its infancy.[126] The Center for Dispute Settlement of the American Arbitration Association has recently begun to participate in a growing number of mediation and arbitration cases involving such disputes. Development of model arbitration rules in various kinds of disputes—something that could easily be based upon the Ellickson proposal—would be a useful advance in this direction.

Mutual Defense

Covenants have long been used as a private voluntary means of land use control.[127] This is essentially a private zoning plan voluntarily agreed to by all affected landowners. It is most commonly established by a subdivision developer prior to selling lots on the market, since he has complete ownership of all parcels at that point. It can, however, be established among numerous individually owned parcels, although the transaction costs are much higher and unanimity is usually required if the plan is to be effective.

Bernard Siegan has authoritatively described the workings of a covenant system in the nation's largest unzoned city, Houston, Texas.[128] After a detailed and exhaustive study of real estate patterns in Houston, and comparison with similar cities which have zoning (*e.g.*, Dallas), Siegan can find absolutely nothing favorable to say about municipal zoning. Through a covenant approach, buttressed with some general performance ordinances to govern nuisances, Siegan believes free market forces would do a far better job of shaping land use than the inevitably political activity of centralized land controls.

Building upon Siegan's definitive work, lawyers at the University of Southern California Law School have developed an institutionalized covenant system which has the effect of shifting to the public the costs of creating and enforcing a private covenant system.[129] Thus, for example, whenever a land owner undertook a land use which violated the covenant governing his land, any affected person could bring a quick, effective action for restraint

126. *See* Bloch & Wertz, *supra* note 118, at 185-86. The Ford Foundation, in 1975, made a $120,000 grant to the Institute for Environmental Studies, University of Washington, to develop techniques of environmental dispute mediation. FORD FOUNDATION LETTER, Sept. 1, 1975. An environmental mediation project is also operating at Washington University, St. Louis. *See also* Smith, Jr., *The Environment and the Judiciary: A Need for Cooperation or Reform?* 3 ENVIRONMENTAL AFFAIRS 627 (1974).

127. J. CASNER & B. LEACH, CASES AND TEXT ON PROPERTY ch. 34 (1951). *See also* Dunham, *Promises Respecting the Use of Land*, 8 J. LAW & ECON. 133 (1965); Lundberg, *Restrictive Covenants and Land Use Control: Private Zoning*, 34 MONTANA L. REV. 199 (1973); MacEllven, *Land Use Control Through Covenants*, 13 HASTINGS L.J. 310 (1962); 35 N.Y.U.L. REV. 1344 (1960); 55 TEXAS L. REV. 741 (1966).

128. *See* note 113 *supra*.

129. Note, *Land Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335 (1972).

of the offender. The system, in effect, rationalizes what grew up almost accidentally in Houston, and provides public mechanisms for efficient citizen enforcement.

Finally, petition zoning should at least be mentioned, although it does represent coercion of a minority of landowners by the majority.[130] Under petition zoning, landowners owning, say, two-thirds of the assessed valuation of property in a self-defined district may petition local government to exercise its police power to impose a very simplified, highly localized zoning plan in their neighborhood. This is not, strictly speaking, within the purview of this article because it does involve direct coercion of dissenting landowners. In its decentralized and simplified nature, however, it is probably preferable to zoning schemes determined and enforced by distant governments and their bureaucrats.

Compensated Regulation

Law review commentators are increasingly offering the view that the distinction between police power regulation and eminent domain taking of property is rapidly disappearing. In its place is emerging the concept of compensated regulation. Where Ellickson suggests an injunction with compensation to the person enjoined as a promising avenue of land use guidance, Chicago attorney Fred Bosselmann has offered much the same idea with regard to public regulation.[131] Under his plan, instead of the state either taking property under eminent domain with compensation, or posing restrictions on privately held property which may virtually destroy its value, the state would impose regulation and pay the landowner for the value of his land extinguished by the regulation.

Under Bosselmann's proposal, the state would pay damages for reducing the value of land beyond a certain point. The state would not have to take the property, as in eminent domain, but it would periodically compensate the landowner who is forced to forego certain activities in the public interest. This device avoids the present dilemma of zoning cases, where an either-or situation obtains: either the ordinance is upheld, and the plaintiff forced to absorb the loss; or the ordinance is declared to be invalid regarding plaintiff's property and he is free to embark on his desired use, the public interest notwithstanding. While Bosselmann's plan is coercive in forcing a landowner to do certain things against his will, the plan at least recognizes the justice of payment by the state for what it takes in the name of the public.

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130. *See* Eveleth, *New Techniques to Preserve Areas of Scenic Attraction in Established Rural-Residential Communities—The Lake George Approach*, 18 SYRACUSE L. REV. 37, 42-43 (1966); 51 J. URBAN LAW 94 (1973).

131. Bosselman, *The Third Alternative in Zoning Regulation*, 17 ZONING DIGEST 73-80, 113-19 (1965).

A far more detailed proposal along the same lines has been offered by University of Pennsylvania Law Professors Jan Z. Krasnowiecki and James C.N. Paul.[132] Under their plan the land in question is first valued as in an eminent domain proceeding. The state or local government guarantees this value to the landowner. Then zoning-type regulations are applied to guide the future use of the land. If these use regulations prohibit an existing use, the owner may draw upon his guarantee for damages. If they prohibit a possible future development use, the owner may ask for a government-supervised sale of his property. If the proceeds of the sale are less than the guaranteed value, the government makes up the difference. The guaranteed value includes an escalation clause to account for inflation in the value of the dollar (but not inflation of local real estate prices). The owner thus receives a guarantee of his parcel's value as of the date the restrictions were first imposed. The guarantee lasts as long as the controls continue. It is protection against loss of value due both to regulation and to a possible depression in real estate prices.

Professor John Costonis has elaborated a similar approach, blending eminent domain and police power into a single power he labels "the accommodation power."[133] The dilemma produced by the existence of two separate and different types of public power, Costonis argues, is that the proposed solutions are "stilted":

> Police power advocates . . . give short shrift to compelling legal, equity and political considerations. Despite deft legal arguments for extending police power, confiscation remains a stumbling block to ambitious public governance. . . . As Donald Hagman has noted, the ethics of wiping out a few private landowners to benefit the many are troublesome at best. Besides it is politically naive to push for an indiscriminate police power approach. Even assuming . . . that this approach is legal and ethical, it does not face up to the political realities surrounding land use. Whether we speak of landmark attrition in Chicago, the Vermont legislature's refusal to approve a state land use plan, or congressional neglect in failing to pass a national land use bill, the result is the same. Systems that ignore possible financial costs to politically powerful groups will have little chance of practical success.[134]

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132. Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961). *See also* Krasnowiecki & Strong, *Compensable Regulations for Open Space*, 29 J. AM. INST. PLANNERS 87 (1963), *reprinted in* INSTITUTE FOR CONTEMPORARY STUDIES, NO LAND IS AN ISLAND (1975); Lamm & Davison, *supra* note 41, at 13-15; 10 WILLAMETTE L.J. 451 (1974).

133. Costonis, *Fair Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975). The citations below are from a layman's version: *A New Approach to the Taking Issue*, PLANNING, Jan. 1976, at 18. *Cf.* City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969) ("zoning with compensation" ordinance upheld).

134. *A New Approach to the Taking Issue*, PLANNING, Jan. 1976, at 18.

Eminent domain advocates, Costonis continues, "advance a bloated view of private property rights and indict public governance as being bungling and antisocial."[135] His remedy is the delineation of an "accommodation power" based on the concept of "reasonably beneficial use." Regulation prohibiting more profitable uses could be imposed without compensation under the police power. If the regulation does not allow reasonably beneficial use, either the regulation must be relaxed to permit such use, or fair compensation must be paid to the landowner. Costonis defines "fair compensation" as somewhat less than highest and best use value, but still sufficient to "honor the property owner's legitimate claim to fair treatment."[136] Such compensation could be paid either in dollars or in a "marketworthy alternative whose dollar value can be determined reasonably through accepted appraisal methods."[137] These alternatives include zoning bonuses,[138] nonconforming use amortizations,[139] and transferable development rights.[140]

Compensated regulation seems to be an idea whose time is rapidly coming. It is being forced on us by the realization that freehold private property cannot just be extinguished by ingenious legal interpretation as desired by the New Feudalists, and by the parallel realization that an untrammelled free market can scarcely avoid environmental and land use planning disasters of one sort or another. Along with increased public acquisition of rights in land, compensated regulation is probably the wave of the future.

Public Acquisition and Land Banking

Public ownership has long been a feature of American life, dating back to the Puritan era.[141] There are few who argue that the public has no business acquiring certain interests in real estate, although a lively debate exists about how far public ownership should be extended.[142] In our time, William H. Whyte has been a most influential voice for the public acquisition of easements or interests less than fee simple to preserve natural scenery and

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135. *Id.*
136. *Id.* at 20.
137. *Id.*
138. *See* Svirsky, *San Francisco: The Downtown Development Bonus System*, in THE NEW ZONING 139 (N. Marcus & M. Groves ed. 1970).
139. *See* Graham, *Legislative Techniques for the Amortization of the Nonconforming Use: A Suggested Formula*, 12 WAYNE L. REV. 435 (1966); Katarincic, *Elimination of Nonconforming Uses, Buildings, and Structures by Amortization—Concept versus Law*, 2 DUQUESNE L. REV. 1 (1963); Moore, *The Termination of Nonconforming Uses*, 6 WM. & MARY L. REV. 1 (1965); Young, *The Regulation and Removal of Nonconforming Uses*, 12 WESTERN RES. L. REV. 681 (1961).
140. *See* text accompanying notes 174-88 *infra*.
141. For an excellent summary, *see* Reps, *Public Land, Urban Development Policy, and the American Planning Tradition*, in MODERNIZING URBAN LAND POLICY 15-48 (M. Clawson ed. 1973).
142. *Cf.* discussion in ALI, MODEL LAND DEVELOPMENT CODE 253-54 (1975).

resources.[143] In acquiring easements, of course, the state must either make an offer acceptable to the landowner or initiate eminent domain involving compensation and a jury trial on its amount. Various tax benefits—such as deductibility of the easement value as a charitable contribution to the governmental body—add incentive to landowners to donate easements or make a donative sale at a reduced price.[144] The Nature Conservancy, a private organization, has developed donation techniques to a fine art.[145]

Public acquisition of land or interests in land may appear at first glance to resemble the social property technique, where all land is owned by the sovereign. There are, however, some important distinctions. Public acquisition of interests in land requires payment to the landowner, either through negotiation or through eminent domain proceedings with due process of law. The New Feudalism generally scorns payment to landowners, except as a sort of bribe to prevent tumult and rebellion. For under the social property theory the sovereign already owns the land, and the so-called landowner is a presumptuous usurper of the public's rights. There can be no such thing as expropriation under the New Feudalism, for under that system the property expropriated is actually owned by the expropriator. Since the public is obliged to pay for what it takes, it is highly unlikely that any unit of government would be able to find the resources to buy up all or most of the land in its jurisdiction.[146] Budgetary and borrowing limitations, and political resistance to widespread expropriation would present severe obstacles.

Public acquisition can, however, have a very salutary effect on development patterns. The Reporters of the American Law Institute's Model Land Development Code foresee the "gradual disintegration of a community's plan" by development pressure, a disintegration before which traditional zoning is powerless. The Model Code thus recommends the use of acquisition of interests to achieve planning objectives.

> A local government may, when reasonably necessary, acquire an interest in land to achieve the objectives of a state or local Land Development Plan or the objectives of per-

143. W. WHYTE, THE LAST LANDSCAPE (1968). Note especially chapter 5.

144. *See* C. LITTLE, CHALLENGE OF THE LAND (1968); Weissburg, *Legal Alternatives to Police Power: Condemnation and Purchase, Development Rights, Gifts*, in OPEN SPACE AND THE LAW 29-52 (F. Herring ed. 1965).

145. *See* Law, *Ways of Giving*, NATURE CONSERVANCY NEWS, Winter, 1976 (first of a four part series).

146. Two small "single tax" enclaves, Fairhope, Alabama and Arden, Delaware started with complete ownership by a trust, an arrangement which continues to this day. The trust collects ground rents and pays them to the local government as property taxes. *See* SUBCOMM. ON INTERGOVERNMENTAL RELATIONS OF THE SENATE COMM. ON GOVERNMENT OPERATIONS, PROPERTY TAXATION: EFFECTS ON LAND USE AND LOCAL GOVERNMENTAL SERVICES 42-49 (1971). Miami University, Oxford, Ohio is the beneficiary of a Revolutionary War land grant by which the University owns the entire township.

missible regulation under this Code including the following purposes

(1) to protect or improve environmental values including ecological balance

(2) to preserve historical or archeological structures or sites;

(3) to minimize potential damage from floods, earthquakes, hurricanes or other natural disasters;

(4) to protect existing scenic or recreational values or to preserve open space;

(5) to facilitate the future construction of, or the continued usefulness of, needed public facilities.[147]

In an explanatory note, the Reporters say:

> The gradual disintegration of a community's plan [by development pressures] can be avoided if in the first instance the government acquires an appropriate interest in the land and pays compensation to the property owner, thus allowing the plan to remain in effect. The land acquisition authorized by this section is designed to accomplish through the land acquisition power a degree of regulation for which the landowner cannot reasonably be asked to bear the entire cost.
>
> The breakdown of a community's plan can have a heavy financial impact on the community, and expenditure of funds for land acquisition may actually result in a savings to the local government. The cost of acquiring an interest in the land may be much cheaper than the cost that results when an area is characterized by unplanned development.[148]

The program contemplated in the Model Code includes compensation to owners for rights conveyed, and does not rely on the theory that the rights really belong to the public in the first place.

Land banking is a closely related technique which is rapidly gaining in favor.[149] Article VI of the Model Code is devoted to the subject, which it defines as

147. ALI MODEL LAND DEVELOPMENT CODE § 5.106 (Apr. 15, 1975 Draft).

148. *Id.* at 212-13.

149. *See* R. BRYANT, LAND: PRIVATE PROPERTY, PUBLIC CONTROL, ch. 13-14 (1972) [hereinafter cited as BRYANT]; S. KAMM, LAND BANKING: PUBLIC POLICY ALTERNATIVES AND DILEMMAS (1970); LAND BANK HANDBOOK (Van Alstyne ed. 1972); W. LETWIN, MUNICIPAL LAND BANKS: LAND RESERVE POLICY FOR URBAN DEVELOPMENT (1969); K. PARSONS, PUBLIC LAND ACQUISITION FOR NEW COMMUNITIES AND THE CONTROL OF URBAN GROWTH: ALTERNATIVE STRATEGIES (1973); Fitch, Ruth, & Mack, *Land Banking*, in THE GOOD EARTH OF AMERICA 134-54 (C. Harris ed. 1974); Barnes, *Buying Back the Land*, in THE PEOPLE'S LAND 223-34 (P. Barnes ed. 1975); Fishman & Gross, *Public Land Banking: A New Praxis for Urban Growth*, 23 CASE W. RES. L. REV. 897 (1972) [hereinafter cited as Fishman & Gross]; *Land Banking Can Ease Some Growing Pains*, CONSERVATION FOUNDATION LETTER (Dec. 1975); Reps, *The Future of American Planning: Requiem or Renascence?*, PLANNING 1967: SELECTED PAPERS FROM THE 1967 ASPO NATIONAL PLANNING CONFERENCE 47, 59-65 (1967); Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1, 36-50 (1971). The Housing and Urban Development Act of 1970, Pub. L. No. 91-609, authorized 50 per cent federal grants to municipalities for open space acquisition and 75 per cent grants for land

> [a] system in which a governmental entity acquires a substantial fraction of the land in a region that is available for future development for the purpose of controlling the future growth of the region. . . .
>
> Land banking requires (1) that the land being acquired does not become committed to a specific future use at the time of acquisition, and (2) that the land being acquired is sufficiently large in amount to have a substantial effect on urban growth patterns.[150]

Land banking has been popular in Western Europe and Canada for decades, even centuries.[151] In Liverpool, England, the municipal estate can be dated to early in the thirteenth century,[152] and the Stockholm experience is widely known.[153] Closer to home, the city of Saskatoon, Saskatchewan, has had experience with long range banking dating back to 1904, with these results:

> 1. the City, as the major land developer, has been able to control the price of land by offering serviced land to homeowners at a reduced cost while at the same time controlling the price of serviced land developed by the private sector;
>
> 2. Saskatoon is one of the few, if not the only, municipality in Canada to capture the increased value in land and return these profits to the community in the form of required services and additional raw land for future residential development;
>
> 3. the City has demonstrated, both as a municipal planning authority and as a land owner, how to integrate community planning and public land assembly in order to plan and develop the city in the fullest comprehensive sense. It has been able to control the direction, rate and type of growth related to services and development;
>
> 4. all of the above mentioned benefits in effective planning and lower land costs were accomplished within the framework of a "uni-city" approach; that is, with relatively little jurisdictional fragmentation. Further, Saskatoon as a level of local municipal government, made land purchases outside of its boundaries. This point appears to be the exception on the Canadian scene.[154]

Similar results have been attained by the City of Edmonton, Alberta, and in the rural areas of Prince Edward Island by the P.E.I. Land Development Commission.[155]

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banking to shape growth, citing the need to prevent urban sprawl and blight. This program was folded into community development revenue sharing by § 116 of Pub. L. No. 93-383, the Housing and Urban Development Act of 1974.

150. ALI MODEL LAND DEVELOPMENT CODE, at 254 (Apr. 15, 1975 Draft).

151. *See* discussion in BRYANT, *supra* note 149.

152. Hough, *The Liverpool Corporate Estate*, in TOWN PLANNING REVIEW (1950).

153. BRYANT, *supra* note 149, at 198-201; Sidenbladh, *Stockholm: A Planned City*, SCIENTIFIC AMERICAN, Sept. 1965, at 106.

154. D. RAVIS, ADVANCE LAND ACQUISITION BY LOCAL GOVERNMENT: THE SASKATOON EXPERIENCE 57 (1973).

155. *See* McClaughry, *Rural Land Banking: The Canadian Experience*, 7 N.C. CENTRAL L.J. 73 (1975) [hereinafter cited as McClaughry].

While municipalities have for many years engaged in advance land acquisition for specific purposes, such as urban renewal, reservoir sites, mass transit and highways, there has always been considerable doubt whether they could acquire land by condemnation in the absence of a specific and immediate use. In *Commonwealth of Puerto Rico v. Rosso*[156] the Supreme Court of Puerto Rico took a major step in validating public land banking. Act 13 of 1962[157] had empowered the Commonwealth government to condemn land for unspecified future uses, and to hold down skyrocketing land prices in the path of development. Plaintiff Rosso argued that private property could be condemned only for a specific use. The court disagreed, holding that "public use" is synonomous with social benefit, social interest and the common good. This decision, if followed in other jurisdictions, would reverse the historic practice of striking down condemnations lacking any specific and immediate purposes,[158] and open the way to far more extensive use of land banking.

The small town of St. George, Vermont, (pop. 477) has carried out an interesting land banking program. The voters voted in town meeting to buy a choice 48-acre parcel at the town's only crossroads. A local bank advanced the funds on a short-term note based only on the town's promise to repay. The town then sponsored an architectural contest to design the most suitable town center to occupy the site, in which nine architectural firms participated. Armed with the winning concept, the town is now prepared to deal with any developer who wishes to undertake the venture, possibly even as a joint venturer with the town itself. In a move of doubtful legality, the town also zoned adjacent parcels noncommercial to create for the town government a monopoly on commercial land. Later the town set up a home-made transferable development rights program, whereby any developer wishing to develop in the town center site would have to acquire and deed to the town the development rights to outlying properties which the town fathers did not want developed. To date the town has not been deemed ripe for intensive development, but the expansion of the Burlington metropolitan area along Interstate 89 suggests that its time will come within a decade.[159]

An example of private land banking is the community land trust. It has been defined as a "legal entity, a quasi-public body,

156. 95 P.R.R. 488 (1967), *appeal dismissed*, 393 U.S. 14 (1968).

157. Puerto Rico Land Administration Act No. 13 of 1962; P.R. LAWS ANN. tit. 23, § 311f(s) (1964). *See* Callies, *Commonwealth of Puerto Rico v. Rosso: Land Banking and the Expanded Concept of Public Use*, 2 PROSPECTUS 199 (1968); Fishman & Gross, *supra* note 149, at 916-23; 76 DICK. L. REV. 266 (1971).

158. State v. 0.62033 Acres of Land, 49 Del. 174, 112 A.2d 857 (1955); *cf.* Board of Education v. Baczewski, 340 Mich. 265, 65 N.W.2d 810 (1954).

159. McClaughry, *The Land Use Planning Act: An Idea We Can Do Without*, 3 ENVIRONMENTAL AFFAIRS 595, 611 (1974); Wilson, *Precedent Setting Swap in Vermont*, 61 AM. INSTITUTE ARCHITECTS J. 51 (1974).

chartered to hold land in stewardship for all mankind present and future while protecting the legitimate use rights of its residents."[160] While this sounds like "social property," it should be emphasized that the community land trust is based on voluntary acquisition of land from private freehold owners. Under a typical land trust, the trust agreement spells out in general terms the allowable uses of the land and charges the trustees with administration. The trust-held land is customarily leased to tenants (frequently homesteaders in rural areas) on a long term basis, subject to certain restrictions on use and an obligation to pay a stated amount to cover property taxes and other essential carrying costs. A land trust can as easily be created to allow commercial and industrial uses.[161]

The land trust concept can be applied to public entities as well as to those created by private individuals. A public land trust would acquire land and rights in land through open market purchase and lease or possibly through eminent domain. It would in turn lease land back to those desiring to carry out suitable activities on it, notably farming.[162] By removing the possibility of development, the value of the land would be lowered and the property tax burden would be reduced. The trust could also lease the development rights from, say, an operating farmer.[163] During the period of the lease the farmer would pay local property taxes only on the value of the land for agricultural purposes, while the trust would pay to the local government the taxes on the trust-held development rights. If the farmer wished to re-acquire the development rights at some later time, he would be required either to pay a roll-back price equivalent to the cumulative value of the tax benefits enjoyed, or to share any appreciation in the value of the development rights with the trust.

One further example of public acquisition of rights—in this case an unwilling acquisition—should be noted. The imposition of land use controls necessarily diminishes the value of private land by restricting its use, and hence its exchange value. Current case law gives little clear guidance in takings cases, inasmuch as every case is arguably distinguishable, and a host of precedents can be construed to support the positions of both parties to the action.

To deal with this problem, many commentators have pursued inverse condemnation criteria whenever private land owners are

160. THE COMMUNITY LAND TRUST 1 (1972).
161. *See* Gottschalk & Swann, *Planning a Rural New Town in Southwest Georgia*, 1 ARÊTE 3 (1970).
162. This is the practice of the Sasketchewan Land Bank Commission. *See, A Land Transfer System*, in THE PEOPLE'S LAND 213-14 (P. Barnes ed. 1975); WESTERN AGRICULTURE, *supra* note 40, at 49-51 (statement of E.W. Smith, North Dakota Farmers Union); McClaughry, *supra* note 155, at 82-84.
163. *See* McClaughry, *A Model State Land Trust Act*, 12 HARV. J. LEGIS. 563 (1975).

compelled to make some contribution for the alleged benefit of the public, whether accepting a radical down-zoning, a subdivision exaction, or the like.[164] As Professor Van Alstyne observes,

> [i]t is submitted that statutory prescription of carefully conceived specific criteria applicable to the entire range of compelled contributions should be ranked among the important objectives of contemporary law reform.[165]

Such criteria have been worked out under the British Town and Country Planning Act.[166] Basically, the local government in England must buy land from a private owner upon presentation by him of a "purchase notice" whenever "the land is incapable of reasonably beneficial use in its existing state," and that "the land cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which permission either has been granted or has been undertaken to be granted either by the local planning authority or by the Secretary [of State for Environment]."[167] While a step in the right direction, this definition still poses numerous problems of judicial interpretation.

The author has elsewhere proposed a simple inverse condemnation statute for the benefit of landowners who find their land severely regulated.

> Whenever implementation of a state or local land use planning and regulatory program restricts the use or exchange value of land so as to reduce its fair market value to less than fifty percent of its unrestricted fair market

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164. *See* Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970) [hereinafter cited as Van Alstyne]; *see also* note 61 *supra*. *See also* Buescher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, 1968 URBAN L. ANN. 1 (1968); Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U.L. REV. 1238 (1960); 33 ALBANY L. REV. 537 (1969); 26 STAN. L. REV. 1439 (1974). The Federal government provides a right of inverse condemnation in certain cases. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 establishes the policy that "[i]f the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire the entire property." 42 U.S.C. § 4651(9) (1970). "Uneconomic remnant" is defined as "a parcel of real property in which the owner retains an interest after partial acquisition of his property and which has little or no utility or value to such owner." 24 C.F.R. § 42.135(g) (Supp. 1975). Congressional intent was that "[n]o property owner should be forced into the position of retaining an uneconomic remnant in any case." HOUSE COMM. ON PUBLIC WORKS, UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT OF 1970, H.R. REP. No. 91-1656, 91st Cong., 2d Sess. 24 (1970). How this policy might apply to a parcel where the owner retains a fee, but has been stripped of his development rights, is not clear.

165. Van Alstyne, *supra* note 164, at 67.

166. *See generally* Hart, *Control of the Use of Land in English Law*, in LAW AND LAND: ANGLO-AMERICAN PLANNING PRACTICE 3-27 (C. Haar ed. 1964); THE TAKING ISSUE, *supra* note 24, at ch. 14; Mandelker, *Notes from the English: Compensation in Town and Country Planning*, 49 CALIF. L. REV. 699 (1961); Megarry, *Town and Country Planning in England: A Bird's Eye View*, 13 WESTERN RES. L. REV. 619 (1962).

167. THE TAKING ISSUE, *supra* note 24, at 269-70.

> value, the owner of such land shall have the right to invoke condemnation by the government imposing the restrictions, or to receive appropriate compensation from that government, and in either case to have compensation determined, at his request, by a jury.[168]

This proposed statute leaves open the question of a regulation which reduces the value of the property less than 50 per cent; it does not deal with governmental actions other than regulation which adversely affects property values; it leaves open the question of whether "unrestricted" fair market value means its value without any police power limitations, or whether the diminution of value attributable to reasonable police power limitations is part of the 50 per cent reduction needed to trigger the inverse condemnation.

A more detailed and thoughtful approach has been offered by Professor Lawrence Berger.[169] Building on the concept of fairness developed by Professor Michelman,[170] Berger proposes a two-fold standard for inverse condemnation or compensable damages, as the case may be.

> Every realty owner should be protected in his reasonable expectations as of the time of his purchase or other detrimental act with respect to the property with regard to those variables under government control that affect its value. If at that time the owner did not know and should not have known of government plans for an act which later substantially decreased the value of his property, then compensation should be paid. . . .
>
> If at the time of his purchase an owner did not know and should not have known of government plans for an act which later substantially increased the value of his property, then he ought to pay the windfall increase in value to the government.[171]

Berger develops these principles into eleven tentative rules of law governing governmental interference with the value of property.[172]

Public acquisition of rights in land can be a most important tool for meeting public planning and environmental protection objectives. While acquisition by condemnation is a coercive act of the government against the landowner, the fifth amendment and the various state takings clauses provide a guarantee that the expropriated owner receives compensation in money for his losses. While some commentators regard compensation as a pragmatic

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168. McClaughry, *The Land Use Planning Act: An Idea We Can Do Without*, 3 ENVIRONMENTAL AFFAIRS 595, 613 (1974).
169. *See* note 61 *supra*.
170. *Id.*
171. Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165, 196 (1974).
172. *Id.* at 223-26.

requirement only, the great bulk of citizens doubtless views it, as the founding fathers did, as a matter of simple justice.[173] Public payment for what the public takes presumes that the prior owner had lawful title to it, a notion compatible with freehold property theory, but not with New Feudalism.

Transferable Development Rights

The idea of intangible development rights that may be transferred from a parcel of land in an area where development cannot be accommodated or should not be allowed, to a parcel where development is not objectionable, has received a sudden wave of attention.[174] It is not a new or novel idea, as both tangible and intangible interests in land date back to remote antiquity. Yet one prominent commentator on the subject, Professor Jerome Rose, suggests "that the introduction of TDR (transferable development rights) proposals—a 'strange' new concept in the body of property law—may evoke a form of intellectual xenophobia, that is, fear of a stranger, at least in the beginning."[175] The flood of recent

173. *Cf.* the interesting opinion in Watson v. Branch County Bank, 380 F. Supp. 945, 965-66 (W.D. Mich. 1974):

> The taking of goods from another's possession, without the latter's contemporaneous consent, necessarily involves the hostile physical invasion of the possessor's personal territory, and is a serious assault upon his dignity, privacy and self-esteem. Such an invasion naturally tends to excite emotions and to provoke violent retaliation.
>
> In the Anglo-Saxon period of English history, the law recognized, indeed, was almost entirely based upon, the concept of the personal "peace," or *grith*. The *grith* was a person's psychological sphere of interest, marked, with regard to tangibles, by possession and control. The concern for the integrity of the *grith* was part of the common law's concern for the preservation of human dignity in the context of a stable social order. Where a person's "peace" was respected, there was an absence of violence, and the person's "peace," in its modern connotation, prevailed. In contrast, where the personal peace was breached or broken, there was contention and violence.

See also Armstrong v. United States, 364 U.S. 40, 49 (1960):

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

174. *See* B. CHAVOOSHIAN, G. NIESWAND, & T. NORMAN, GROWTH MANAGEMENT PROGRAM (Rutgers University Cooperative Extension Leaflet 503, 1974); J. ROSE, THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE FOR LAND USE REGULATION (1975); SPACE ADRIFT: SAVING URBAN LANDMARKS THROUGH THE CHICAGO PLAN (1974) [hereinafter cited as SPACE ADRIFT]; *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL ESTATE L.J. 635 (1974); Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. L. REV. 35 (1974); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); *Development Rights Transfer: A Proposal for Financing Landmark Preservation*, 1 REAL ESTATE L.J. 163 (1972); *From the Legislatures Development Rights Device for Land Use Control*, 1 REAL ESTATE L.J. 276 (1973); Rose, *The Transfer of Development Rights: A Preview of an Evolving Concept*, 3 REAL ESTATE L.J. 330 (1975).

175. Rose, *The Transfer of Development Rights: A Preview of an Evolving Concept*, 3 REAL ESTATE L.J. 330, 354 (1975) [hereinafter cited as Rose].

articles and books on the subject in the past three years indicates that a beginning has now been achieved, and students of the subject are using the initials TDR without pause or explanation.

The TDR idea would be little more than a matter of private contract, absent some form of collective land use controls. That is, where anyone might develop his land as he wished, subject only to private nuisance actions, a transfer of development rights would most likely occur only when some other landowner wished to prevent a development to the point of paying to obtain the exclusive right to undertake it. This sort of state of nature version of TDR's is not under serious discussion today. What is under serious discussion is the use of TDR's in conjunction with public regulations regarding land use, density and bulk limitations, landmark preservation, and environmental protection.

Any such system of regulation creates "winners and losers;"[176] the winners get windfalls, the losers get wipeouts.[177] Both windfalls and wipeouts reflect injustice, and a land use regulation system which produces both is crying for remedial action. TDR's are a valuable device for producing that remedy. As Professor Hagman points out, a system generating injustice will produce resistance to environmentalism, public perceptions of arbitrariness, and invitation to corruption, special interest influence, backroom horsetrading, vitiation of a municipal plan, and the steady progress of sprawl.[178] Two obvious courses are available in removing these injustices. One is the libertarian solution of a completely free market, subject only to nuisance rules. The other is the use of devices to balance windfalls and wipeouts. Among the devices for dealing with windfalls, Hagman includes special assessments, subdivision permission exactions, subdivisions fees, development permission exactions, development taxes, capital gains, transfer and unearned increment taxes, and the single tax on land. For wipeout protection, he lists eminent domain, zoning, public ownership, and development rights transfer.[179]

To illustrate the use of TDR's to eliminate windfalls and wipeouts in a land use regulation scheme, consider first a simplified free-market oriented plan.[180] The local government makes essentially two decisions based on planning data: 1) the total intensity

176. *See* Godwin & Shepard, *State Land Use Policies: Winners and Losers*, 5 ENVIRONMENTAL L. 703, 726 (1975). The authors, political scientists, come to the conclusion that emerging state land use control programs may well "produce a situation in which the positions of the lower and lower middle classes will be further weakened as regulatory policies increasingly take on the characteristics of distributive policies."

177. *Cf.* Hagman, *Windfalls for Wipeouts*, in THE GOOD EARTH OF AMERICA 109-33 (Harris ed. 1974) [hereinafter cited as THE GOOD EARTH].

178. *Id.* at 112-19.

179. *Id.* at 119-27.

180. A reasonable facsimile is the proposal by Fairfax County, Virginia supervisor Audrey Moore, *Transferable Development Rights: An Idea Whose Time Has Come*, in Rose, *supra* note 175, at 337-41.

of development that can be accepted in the jurisdiction, and 2) the amount of development rights required to undertake any particular use. Thus, to oversimplify, the government might determine that 100,000 units of additional development should be allowed to take place in the jurisdiction; that factories would require 300 TDR units per acre, with a minimum of 1000; multistory residential buildings would require 50 TDR units per dwelling, and so forth.

There would be the customary ordinances concerning setbacks, offstreet parking, and so forth, but there would be no traditional zoning. Once the government adopted the development ceiling and the schedule of required rights, it would exercise no control whatever over the location of the resulting development. Development rights would be apportioned among all existing landowners (or owners of undeveloped land) on the basis of acreage, assessed value, or a combination. Then the local government would step aside and the market would price the TDR units in response to development opportunities. If a developer wished to construct a motel complex requiring 1200 TDR units, and his 8 acre parcel had an apportionment for only 800 units, he would have to enter the TDR market for the additional 400 units. The seller of those units could not thereafter develop his property unless he acquired TDR units in the market from another landowner. If at some future time the government determined that additional growth could be accommodated, a second apportionment of TDR's could be made to existing owners, and the overall ceiling increased.

Among the virtues of this simplistic system, from a free market point of view, is that although the government does make two crucial decisions—overall intensity of development and the relative weight of different types of development—once those decisions are made the government disappears as an actor. There is, for example, no payoff in suborning the zoning board because the board could take no action beneficial to a specific parcel of land. It could only raise the ceiling or adjust the schedule, actions which would accrue to the benefit of many property owners besides the suborner. The free riders would then get the benefit of the bribe without having to share in its expense. Such a system would surely be maddening to numerous shady urban real estate operators.

This minimal-government version is not, however, the version attracting the most interest. More typically, a TDR land use control plan includes reliance on traditional zoning, and serves only to redress its excesses. Such a plan is that offered by Professor Rose and under consideration in New Jersey.

> —Each local government would prepare a land-use plan that specifies the percentage of remaining undeveloped land in the municipality. The plan would also designate what land will be preserved as open space land. The land-use plan would also designate the land to be developed and

would specify the uses to which the developable land may be put. A zoning law would be enacted or amended to implement this plan.

—The planning board of each local government would prescribe the number of development rights required for each housing unit to be developed. On the basis of this numerical assignment, the planning board would then compute the number of development rights which would be required to develop the municipality in accordance with the land-use plan. The local government would issue certificates of development rights (ownership of which would be recorded) in the exact amount so determined.

—Every owner of preserved open space land would receive certificates of development rights in an amount that represents the percentage of assessed value of all undeveloped land to be preserved in open space in the jurisdiction.

—An owner of developable land, who desires to develop his land more intensively (for example, to build apartments instead of single-family residences) would have to buy additional development rights on the open market from those who have acquired such rights from either original distribution or subsequent purchase.

—Thus, owners of preserved open space would be able to sell their development rights to owners of developable land (or real estate brokers or speculators). What happens is that the landowners have sold their rights to develop their land in the future. Money received from the sale is compensation for keeping the land undeveloped. Their land will thus be preserved in open space and the owners will have been compensated without any capital costs to government.

—Development rights would be subject to ad valorem property taxation as a component of the total assessed value of the developable real property in the jurisdiction.[181]

TDR schemes can be used for dealing with matters other than comprehensive land use control or open space preservation. Professor Costonis and Robert DeVoy of the Real Estate Research Corporation have devised a version to protect the ecological resources of Puerto Rico's "phosphorescent bay."[182] Costonis has used the concept in legislation to preserve historical landmarks in Chicago.[183] Southhampton, Long Island, has used the device for encouraging the construction of moderate and low income housing.[184] The same community also permits a farm owner to concentrate all of the development rights of his land onto a small segment of it. The farmer can then develop this parcel at high density, or transfer the rights to others. The farmland from which

181. Rose, *supra* note 175, at 340.
182. *Id.* at 342-44.
183. *Id.* at 338-39; *see also* SPACE ADRIFT, *supra* note 174; Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972).
184. Rose, *supra* note 175, at 348-50.

the TDR's are taken is, of course, then taxed at agricultural use value only. The farmer is compensated for his loss of development rights by the increased value of the portion of land upon which the TDR's are concentrated.[185]

Space does not permit a full discussion of the complicated economic, planning, and legal questions involved in comprehensive TDR plans; nor, for that matter, does the author's competence. It should be pointed out, however, that a TDR scheme could be subject to constitutional attack under at least two theories.[186] First, if the TDR is offered as compensation for a taking, a landowner may claim that instead of a dollar payment he is being given only a vague right to claim benefits that may or may not result, depending on the strength of the market for TDR's and alternative development opportunities allowed by the government. Secondly, it could be claimed that the TDR plan in effect forces an owner to promote the public benefit at his own personal expense, in violation of the doctrine laid down in cases such as *Armstrong v. United States*.[187] One commentator states, after reviewing potential challenges to TDR schemes, that "the ultimate conclusion is that TDR will not survive the tide of court challenges it is likely to face."[188] Although this is not a frivolous conclusion, it seems likely that careful draftsmanship in full light of potential problems can avoid such a painful result. The TDR concept is obviously one of great power and potential in each of the areas in which it has been proposed. It also has the virtue of recognizing the need for fair and just treatment of freehold property owners when larger considerations are deemed to limit their use of their own land.

Taxation Devices

Taxation has long been recognized as an important influence in shaping economic decisions. Perhaps the most famous apostle of harnessing tax policy to land use and development was Henry George. In his enormously influential work *Progress and Poverty*, published in 1879, George advocated the abolition of all taxes save that upon land values; *i.e.*, to appropriate rent by taxation.[189] The result, he was convinced, would be that the single tax on land would either force owners to improve it, or sell it to others who would. This would, in George's view, stimulate a great productive

185. Reuter, *Preserving Farm Land Through Zoning and a Community Land Trust*, in ASPO LAND USE CONTROLS ANNUAL (1971).
186. 84 YALE L.J. 1101 (1975).
187. *See* note 173 *supra*.
188. 84 YALE L.J. 1101, 1103 (1975).
189. H. GEORGE, PROGRESS AND POVERTY 406 (1940). *See also* Hansen, *Henry George: Economics or Theology?*, in PROPERTY TAXATION U.S.A. 65-78 (R. Lindholm ed. 1969); Hagman, *The Single Tax and Land Use Planning: Henry George Updated*, 12 U.C.L.A. L. REV. 762 (1965); 9 HARV. J. LEGIS. 115 (1971). An interesting Georgist periodical is *Incentive Taxation*, published at 580 N. Sixth St., Indiana, Penn. 15701.

boom by making it impossible for landowners to hold their land out of production.

Henry George's plan has never enjoyed widespread acceptance or application in the United States.[190] Nonetheless, it suggests a means for encouraging concentrated development in some areas and no development in others, one of the goals commonly sought by police power controls over land use. Assuming state constitutions permitting the differential taxation, a plan could be devised which placed heavy taxes on land in urban centers, but very little or none on improvements. In rural and natural resource areas, the reverse would be true; there would be very heavy taxation of other than agricultural improvements, and very low taxation on land itself. In between there could be intermediate zones with differing proportions.[191]

There is little doubt but that such a scheme would have a drastic effect on land use in a very short time. Indeed, for the first year or two it would certainly be a real estate broker's dream. One serious drawback would be that of completely and suddenly altering the expectations of millions of private landowners by switching over to the new system. A second and not inconsiderable problem is that a differential taxation system based on zones may well run afoul of state constitutional provisions requiring property taxation based strictly on fair market value.[192] Finally, since the designation of zones in which similar properties will be taxed differently carries the potential for drastic differences in tax liabilities, the scheme would necessarily invite all the corruption now associated with the designation of zoning boundaries. While the

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190. *See* note 146 *supra.*

191. Montana in May 1975 enacted just such a scheme. Montana Sess. Laws 1975, ch. 549 (House Bill 672). Under this "Economic Land Development Act," local governments will classify all land in the state either residential, commercial, industrial, agricultural, recreational, or open space. Planning objectives for the use of each type of land are specified. Landowners who do the "right" planning things enjoy tax benefits, while landowners who do the "wrong" things suffer tax penalties. The relationship of this act to existing zoning is unclear. The act has been widely criticized as an incredibly sloppy and confusing piece of work, even by some who support the underlying concept. The cost of implementation also appears to be enormous. The Montana Department of Community Affairs Planning Division believes "that a land use planning measure which, in effect, allows property owners to buy their way out of the comprehensive plan or which, in the alternative, rewards them for obeying local zoning regulations is philosophically bankrupt." (Personal Communication, March 2, 1976.) For a discussion of the controversy, *see* Toner, *Montana's Land Use Bill: Is It Just Pie in Big Sky?*, PLANNING, Feb. 1976, at 9.

192. *See, e.g.*, VT. CONST. ch. I, art. 9 (of 1777—still in force): "That every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportions towards the expense of that protection. . . ." *See also*, S.D. CONST. art. VI, § 1. *See generally* Gaffney, *Tax Reform to Release Land*, in MODERNIZING URBAN LAND POLICY 115-52 (M. Clawson ed. 1973); Hagman, *Open Space Planning and Property Taxation*, 1964 WIS. L. REV. 628 [hereinafter cited as Hagman]; Slitor, *Taxation and Land Use*, in THE GOOD EARTH, *supra* note 177, at 67-87; Woodruff, *How Changing Land Laws Affect Land Development*, 20 URBAN LAND 1 (1961); Zimmerman, *Tax Planning for Land Use Control*, 5 URBAN LAW. 639 (1973).

idea is worth exploring—and indeed is being explored under a $900,000 multi-year grant from the Department of Housing and Urban Development to the Vermont Department of Budget and Management—the problems associated with it are substantial.

The use of the "betterment levy," though unsuccessful in Great Britain, has inspired a number of taxation devices in this country aimed at the windfall-wipeout problem.[193] In California, for example, resistance to the imposition of ever-larger subdivision exactions inspired local governments to impose a business license tax on developers, measured by, for example, the number of bedrooms constructed.[194] This, like its predecessor the subdivision exaction, has the flavor of legalized bribery, with the proceeds going not into the pocket of the commissioners but into the general revenues of the municipality. Another tax device which has an effect on the use of land is the Vermont capital gains tax on land sales.[195]

Professor Gordon MacDonald of Dartmouth College, an original appointee to the Council on Environmental Quality, has developed a plan for a system of user charges, in effect taxes, to discourage land uses thought by the public to be harmful.[196] The tax would be based on the difference between the use priority established by the government and the actual use.

> If an industry wishes to locate on a wetland, it should be allowed to do so, provided that it is charged to an extent commensurate to the total cost to society of that use—on an annual basis, the cost to fisheries, wildlife, recreation, and so on . . . . Unlike the property tax, the user charge would not be a means of raising revenue but rather a way of employing the market mechanism to influence land use decisions.[197]

Interestingly, Professor MacDonald told the Senate Interior Affairs Committee in 1973 that he had reversed his earlier support of Senator Jackson's land use bill as a result of his study of the workings of nearby Vermont's environmental control laws.[198]

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193. *See* Harriss, *Land Value Increment Taxation: Demise of the British Betterment Levy*, 25 NAT. TAX J. 567 (1972); *see also* note 166 *supra*.

194. Hagman, *supra* note 177, at 121.

195. 32 VT. STAT. ANN. §§ 10001-10. *See* Baker, *Controlling Land Use and Prices by Using Special Gain Taxation to Intervene in the Land Market: The Vermont Experience*, 4 ENVIRONMENTAL AFFAIRS 427 (1975); Rose, *Vermont Uses The Taxing Power to Control Land Use*, 2 REAL ESTATE L.J. 602-05 (1973); 49 WASH. L. REV. 1159 (1974).

196. *Hearings on the Land Use Policy and Planning Assistance Act Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 388-89 (1973). An interesting measure along these lines was offered by the Nixon Administration in the 93rd Congress: H.R. 5884, the "Environmental Protection Tax Act" (perhaps stimulated by Professor MacDonald). The bill would have prohibited the use of accelerated depreciation methods on structures built on wetlands; disallowed improvement deduction claims for dredging and filling wetlands; and encouraged charitable donation of land for conservation purposes. It was not acted upon.

197. *Id.*

198. *Id.* at 336.

Public Investment Controls

Public capital investment has the dual virtue of having an enormous effect on private development decisions, while avoiding a coercive effect on the use of private property. In a society where highways, water and sewer systems, police and fire protection, schools, municipal buildings, rapid transit, and airports are commonly public enterprises, and where in addition private gas and electric distribution and common carriers are so regulated by the public as to make them for all practical purposes public enterprises, control by the government over these activities offers a shining opportunity for guiding growth decisions and hence land use.

Interestingly, while environmentalists have raised a hue and cry about "irresponsible" actions by private developers, they have been slow to recognize that much of the problem of unplanned and disorderly growth stems from the inability of government properly to use its own investment policy to influence private decisions. A good example is the much-lamented "strip development" on highways near the edge of urban areas. Such development could, of course, be controlled and largely prevented by a denial of entry onto adjacent property. In recent years the advent of the shopping center, bringing a number of stores together in a plaza with only one or a few entrances onto public highways, has partially dealt with the problem of strip development.

In November 1973, the House Committee on Public Works opened a pioneering series of hearings on *A National Public Works Investment Policy: A Strategy for Balanced Population Growth And Economic Development.*[199] Congress requires an annual report on the efforts of the Executive Branch to spur development in rural areas.[200] The same Act also requires the President to report to Congress on the location of new federal offices and other facilities.[201] The Housing and Urban Development Act of 1970[202] requires the President to transmit to Congress a biennial report on national growth. HUD has sponsored contract studies on such topics as *The Sewer Moratorium as a Technique of Growth Control and Environmental Protection.*[203] Many states are beginning to move toward coordinating public investment decisions among various state agencies and local governmental bodies with an eye to encouraging orderly growth instead of random happen-

199. 93d Cong., 1st Sess. (1973). *See also* A NATIONAL PUBLIC WORKS INVESTMENT POLICY (task force reports prepared for the same committee, Dec. 1974) (committee print).

200. 42 U.S.C. § 3122 (1970).

201. *See, e.g.*, Presidential message, *"Report on the Location of New Federal Offices and Other Facilities,"* 117 CONG. REC. 31,680 (1971).

202. 42 U.S.C. § 4503(a) (1970). For a useful summary of various Federal activities in this field, *see* SENATE COMM. ON GOVERNMENT OPERATIONS, TOWARDS A NATIONAL GROWTH AND DEVELOPMENT POLICY: LEGISLATIVE AND EXECUTIVE ACTIONS IN 1970 AND 1971, 92d Cong., 2d Sess. (1972).

203. HUD Contract No. H-2095R (June 1973).

ings. Control over public investments is an exceedingly powerful tool for guiding private land use decisions without imposing restrictions on private land owners, and the renewed attention given it in recent years should yield substantial dividends.

Conclusion

The land tenure theories associated with the Old Feudalism are attempting a comeback. A growing body of lawyers and theorists, allied with well-funded action organizations and political leaders, seek to replace the concept of freehold property with the polar concept of "social property." Under this ancient concept, all rights in land are not owned by free individuals, but merely "held" at the sufferance of some superior. With the disappearance of the medieval monarch, the modern state—or in some cases national—government has been nominated as a successor. The consequences of such a radical step backward concern not only the use and exchange of land, but also the basic concepts of individual liberty and a republican form of government, both rooted in the assumption of reasonably widespread freehold property ownership.

Farmers, ranchers and others whose livelihood is based on the use and productivity of land are particularly vulnerable targets for this movement, for it is their land, far more than the developed (some would say misdeveloped) urban areas of the nation, which now excites the imagination of advocates of the New Feudalism. Happily, there is a host of techniques and devices that can be employed to deal with genuine environmental and land use problems without installing the theory of "social property." These techniques are sound, workable, and just. Though formulating the appropriate mixture of techniques for a given situation is still a problem demanding a high level of expertise, there seems little reason to doubt that any problem can be solved without abandoning the underlying concept of freehold property, although, of course, in some cases it will be necessary to ask the public to pay for benefits instead of imposing society's burden on a hapless landowner.

Those recognizing the fundamental importance of freehold property theory to American institutions should have a strong incentive to take the initiative in dealing with legitimate land use problems. Their reluctance to act gives the initiative to those whose goal, whether professed or not, is destruction of freehold property and the erection of social property in its place.

As the author has elsewhere observed:

> The Old Feudalism was not without virtue. It meant military security in an age of brigandage and invasion. It curbed economic fluctuations by preventing alienability of land. It was a strong force for social stability, and well defined relationships between classes. It imposed a system

> of mutual rights and responsibilities, tied to the use of land, some of which might profitably be restored in our own day. The problem of the Old Feudalism was that it stifled individual liberty, productivity, and self-government.[204]

Having paid this modest tribute to the Old Feudalism, it is time to swing shut the creaky door to the tomb in which it is interred. It served our forefathers in its day, but that day is happily past. To meet the problems of today, those who believe in freehold property with all its time-honored limitations must take the initiative for creative action. If they do not, they may well find themselves overrun by the theories of those who wish to reinstate and enthrone a social, economic, political, and legal order which was tried for half a milennium, and found wanting over three centuries ago.

204. McClaughry, *The New Feudalism*, 5 ENVIRONMENTAL L. 675, 701-02 (1975).