

FAIRNESS AND FARMLAND PRESERVATION: A RESPONSE TO PROFESSOR RICHARDSON

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Table of Contents

I.	INTRODUCTION	375
II.	TAKINGS	378
III.	FAIRNESS	383
	<i>A. Givings</i>	386
	<i>B. General Reciprocity</i>	391
	<i>C. Property Rights and Reasonable Expectations</i>	397
IV.	A BRIEF COMMENT ON PLANNING, PDRS, AND EFFECTIVE FARMLAND PRESERVATION	402
V.	CONCLUSION	405

I. INTRODUCTION

In a recent article published in this Journal, Professor Jesse Richardson¹ attempted to refute the arguments proposed by myself and others that support the fairness of downzoning land without compensation to property owners.² As Professor Richardson noted, the issue of downzoning property to preserve farmland has become a particularly important one in recent years, especially with increased efforts by local governments to preserve farmland.³

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2. Jesse J. Richardson, Jr., *Downzoning, Fairness and Farmland Protection*, 19 FLA. ST. U. J. LAND USE & ENVTL. L. 59 (2003).

3. *Id.*, at 59-61. Several major studies in recent years have documented the loss of farmland and concluded that it presents a major societal problem. *See, e.g.*, A. ANN SORENSEN ET AL., *FARMING ON THE EDGE* (American Farmland Trust, Northern Illinois University 1997); NATIONAL AGRICULTURAL LANDS STUDY (U.S. Government Printing Office 1981). This perception is joined by a substantial amount of academic and popular commentary. *See, e.g.*, TOM DANIELS & DEBORAH BOWERS, *HOLDING OUR GROUND: PROTECTING AMERICA'S FARMS AND FARMLAND* (Island Press 1997); Lawrence W. Libby, *Farmland Protection for Illinois: The Planning and Legal Issues*, 17 N. ILL. U. L. REV. 425 (1997). A number of other commentators, however, have questioned whether farmland conversion is in fact a problem, or at least to the degree often stated by proponents of preservation. *See, e.g.*, Orlando E. Delogu, *A Comprehensive State and Local Government Land Use Control Strategy to Preserve the Nation's Farmland is Unnecessary and Unwise*, 34 U. KAN. L. REV. 519 (1986); William A. Fischel, *The Urbanization of Urban Land: A Review of the National Agricultural Lands Study*, 58 LAND ECON. 236 (1982).

Whatever the merits of this debate, all levels of government have perceived farmland conversion as a problem and have responded with a variety of programs to slow and control the rate of conversion. For instance, the federal government has initiated several actions

Central to most farmland preservation efforts is agricultural zoning, which typically involves downzoning farmland to agricultural use, precluding more intensive development. Although at times efforts are made to mitigate the economic impact of agricultural zoning — through purchase of development rights (PDRs) and transferable development rights (TDRs) — as a practical matter, both PDRs⁴ and TDRs⁵ have substantial restrictions and are of limited value at present. For this reason, many communities pursue agricultural zoning without providing compensation to regulated landowners. This means that the cost of preservation falls on property owners themselves, and often imposes substantial losses.

As I stated in a previous article, this issue raises two related concerns.⁶ First, does the downzoning of agricultural land constitute an unconstitutional taking? Second, assuming downzoning does not constitute an unconstitutional taking, is it nevertheless unfair to impose substantial economic costs on landowners absent compensation? As that article suggests, the fairness concern is an important one, since fairness is an important component in the political acceptability of farmland preservation.

The answer I provide is that agricultural zoning will rarely constitute an unconstitutional taking under current Supreme Court takings jurisprudence.⁷ This has been borne out by lower court decisions, which generally find agricultural zoning constitutional, even when downzoning is involved.⁸ Moreover, my article gives

directed toward farmland preservation, including passage of the Farmland Protection Policy Act in 1981, 7 U.S.C. §§ 4201-4209 (2004), and passage of the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996) (codified as amended in 7 U.S.C. § 7201). All fifty states have enacted a variety of measures designed to preserve farmland, including tax incentive programs, right-to-farm laws, agricultural laws, and Purchase of Development Rights Programs. *See generally*, William L. Church, *Farmland Conversion: The View from 1986*, 1986 U. ILL. L. REV. 521 (1986); Mark W. Cordes, *Takings, Fairness, and Farmland Preservation*, 60 OHIO ST. L.J. 1033, 1045-50 (1999).

4. LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 6:46 (2004); Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden?*, 1992 ANN. SURV. AM. L. 235 (1992-1993). An increasing number of states also have statutes specifically authorizing PDR programs. *See, e.g.*, ME. REV. STAT. ANN. tit. 5, §§ 6200-6210 (2004).

5. *See generally* John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75; Julian Conrad Juergensmeyer et al., *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441 (1998).

6. Cordes, *supra* note 3, at 1050.

7. *Id.* at 1055 (discussing how current Supreme Court takings jurisprudence indicates “that agricultural zoning w[ill] rarely constitute a taking,” even when substantial diminution in land value occurs).

8. *See, e.g.*, *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161 (9th Cir. 1993); *Gardner v. N.J. Pinelands Comm’n*, 593 A.2d 251 (N.J. 1991). *See generally* Cordes, *supra* note 3, at 1060-69.

three reasons why agricultural zoning should not be viewed as inherently unfair, even when a substantial diminution in value results: the concept of government giving, which enhances land value; recognition of general regulatory reciprocity, which mitigates fairness concerns; and the nature of property rights, which has long viewed private interests as being subject to broader public needs.⁹

Professor Richardson mainly disagrees on the issue of fairness, where he strongly rejects all three of my rationales supporting the fairness of downzoning farmland. His article is thoughtful and well-written, helping to identify some limitations of the fairness arguments that myself and others have used to justify farmland preservation along with other types of environmental land use controls. Ultimately, however, I believe that he misses the basic point of my analysis concerning the fairness of agricultural zoning as a farmland preservation method, even when landowners are not compensated for economic loss. The arguments concerning government giving, reciprocity, and the nature of property rights are not intended as legal concepts to be incorporated into a judicial analysis regarding the legality of a particular land use restriction. Rather, they are offered as general policy rationales that help explain why the balance drawn by the Supreme Court is a fair one, a balance that recognizes both individual property rights and broader community rights. On that basis, I believe my arguments remain quite valid, and provide a needed perspective on the fairness of downzoning farmland, even in light of Professor Richardson's criticisms.

In spite of these dichotomies of thought, Professor Richardson and I certainly agree on one point: the constitutionality and fairness of downzoning property to preserve farmland is a very important issue. By all accounts, the national movement to preserve farmland remains strong, with numerous communities grappling with issues of whether and how to preserve farmland.¹⁰ Downzoning land to only agricultural use, a common component of many preservation efforts, has significant consequences for landowners. Moreover, the basic concerns of the constitutionality and fairness of downzoning land that results in substantial diminution in value apply to other types of environmental land use controls, such as those protecting

9. Cordes, *supra* note 3, at 1072-81.

10. The last several decades have seen growing efforts by state and local governments to preserve farmland. The growing momentum of the "smart growth" movement, which often includes farmland preservation as a component of smart growth, will likely increase farmland preservation efforts. For commentary on the "smart growth" movement, see Richard Briffault, *Smart Growth and American Land Use Law*, 21 ST. LOUIS U. PUB. L. REV. 253 (2002); Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247 (2000).

wetlands and coastal zones. Like agricultural zoning, such controls often result in substantial diminution in value and lack substantial "specific reciprocity." Thus, examining the constitutionality and fairness of downzoning farmland is relevant to broader environmental issues.

The rest of this article will briefly review the takings and fairness issues noted above. It will not attempt to rehash my initial analysis or Professor Richardson's critique thereof, which can be read elsewhere. It will, however, briefly respond to Professor Richardson's critique and attempt to clarify why downzoning farmland is not inherently unfair. Part II will briefly reiterate why downzoning of farmland should usually not be an unconstitutional taking under the Supreme Court's current takings jurisprudence. Part III will then try to clarify the government giving, reciprocity, and property rights analysis. Finally, Part IV will briefly comment on the role compensatory programs like PDRs and TDRs should play in effective farmland preservation programs.

II. TAKINGS

The primary legal challenge to downzoning farmland that results in substantial diminution in value is that it constitutes an unconstitutional taking. In his article, Professor Richardson also identifies five other legal challenges to downzoning, including spot zoning, substantive due process, and equal protection.¹¹ He is certainly correct that each of these challenges might be a basis to find downzoning invalid, depending on the particular facts of a case. As he notes, however, these will typically be unsuccessful, largely because of the deference given to a local government's land use authority. Moreover, their potential success typically turns on some factor other than the economic impact of the restriction, such as the arbitrary nature of the restriction, or bias against the landowner. Concerns about the economic impact of a restriction, which have been much of the focus of the debate about agricultural zoning, are typically addressed by a takings challenge.

The essence of the Supreme Court's current regulatory takings analysis is a two-part test drawn from *Lucas v. South Carolina Coastal Council*¹² and *Penn Central Transportation Co. v. New York City*.¹³ A court first asks whether the restriction deprives the landowner of all economically beneficial use of the property.¹⁴ If it

11. Professor Richardson also briefly discusses a "[d]irect [c]hallenge of the [a]ct" and §1983 actions. See Richardson, *supra* note 2, at 61-5.

12. 505 U.S. 1003 (1992).

13. 438 U.S. 104 (1978).

14. See *Lucas*, 505 U.S. at 1015-16.

does, it is a categorical taking, unless the restriction is designed to prevent a common law nuisance.¹⁵ Second, if some economic viability remains, a court is to apply what is known as the three-prong *Penn Central* test, examining the character of the government act, the economic impact of the regulation, and the degree of interference with investment-backed expectations.¹⁶

As I have written elsewhere, agricultural zoning restrictions will rarely constitute a taking under this two-part test. First, the Supreme Court has indicated that the loss of all economic viability is an extremely rare occurrence, which is not met as long as some minimal economic benefit remains.¹⁷ The only case in which the Court found this to occur was *Lucas*, in which land, worth nearly one million dollars based on potential residential development, was downsized to preclude any development or other economic activity altogether. In holding that this constituted a categorical taking, the Court characterized the loss of all economic viability as an “extraordinary circumstance.”¹⁸ The Court’s sole focus in its discussion in *Lucas* was on the absence of any beneficial, economic, or productive uses left by the restriction, in several places italicizing words to make its point.¹⁹ There was no suggestion in *Lucas* that severe economic impact itself would constitute a categorical taking. Indeed, the Court indicated in a footnote that even a ninety-five percent loss in property value would not be a categorical taking. It noted, however, that it might constitute a taking under the *Penn Central* balancing test.²⁰

The Court’s two most recent decisions involving takings, *Palazzolo v. Rhode Island*²¹ and *Tahoe-Sierra Preservation Council*,

15. *See id.* at 1027-31.

16. *See Penn Cent. Transp. Co.*, 438 U.S. at 124. This two-part test, in which a court is to first examine whether there is a categorical taking under *Lucas*, and if not, apply the *Penn Central* analysis, has been affirmed in three recent cases. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330, 342 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001); *Lucas*, 505 U.S. at 1019 n.8.

17. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 330; *Lucas*, 505 U.S. at 1017-18.

18. *Lucas*, 505 U.S. at 1017.

19. *Id.* at 1019 (explaining that “[s]urely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted . . .). The Court went on to state that “there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses . . .” *Id.*

20. *Id.* at 1019 n.8. In this footnote, the Court responded to an argument in Justice Stevens’ dissenting opinion, in which he criticized the majority opinion as “wholly arbitrary” because a “landowner whose property is diminished in value 95% recovers nothing,” while a landowner who suffers a complete elimination of value “recovers the land’s full value.” *Id.* at 1064. The majority appeared to agree that a ninety-five percent diminution in value would not constitute a categorical taking, but was quick to note that a taking might still be found under the *Penn Central* test. *Id.* at 1019 n.8. It further noted that at times a ninety-five diminution in value would not be a taking under *Penn Central*. *Id.*

21. 533 U.S. 606 (2001).

Inc. v. Tahoe Regional Planning Agency,²² affirm the extremely rare nature of categorical takings based on loss of all economic viability. In *Palazzolo*, the regulated landowner had tried to make the case for a “total taking” by comparing the profit potential for the property, \$3,150,000, with the minimum residual value left after regulation, \$200,000. He argued that in that context, the state cannot “sidestep” *Lucas* “by the simple expedient of leaving a landowner a few crumbs of value.”²³ The Court rejected that comparison, however, focusing on what was left rather than what was taken, stating that the property was not “economically idle.”²⁴ The Court in *Tahoe-Sierra* again took occasion to emphasize the need for a complete loss of economic use before a categorical taking could be found. In discussing the reach of a categorical taking under *Lucas*, it noted that the statute in *Lucas* had “wholly eliminated the value”²⁵ of the property, and stressed that *Lucas* requires a “complete elimination of value.”²⁶

Under this standard, agricultural zoning would almost never constitute a categorical taking for the simple reason that farming is an economically viable activity.²⁷ This would be true no matter how great the economic loss in value, since the Court focuses on what is left, not what is lost.²⁸ As long as the property is suitable to be farmed, a court would certainly find enough minimal value and economic viability to meet the first prong of the *Lucas/Penn Central* test. The only exception would be where agriculturally zoned land is truly unsuitable for farming, perhaps based on parcel size or quality of the soil. In such an instance, there might be a loss of all economic viability and a taking, which a few courts have found.²⁹

Even if some economic viability remains, the Supreme Court has made it clear that a court must also analyze whether a taking has occurred under the *Penn Central* test.³⁰ The first *Penn Central*

22. 535 U.S. 302 (2002).

23. *Palazzolo*, 533 U.S. at 631 (quoting Petitioner’s Brief on the Merits at 37, *Palazzo v. Rhode Island*, 533 U.S. 606 (2001) (No. 99-2047)).

24. *Id.* at 631 (quoting *Lucas*, 505 U.S. at 1019).

25. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1017).

26. *Id.* (quoting *Lucas*, 505 U.S. at 1019-20 n.8).

27. *See, e.g.*, *Gardner v. N.J. Pinelands Comm’n*, 125 N.J. 193, 213-14 (1991) (noting the economic viability of agriculture as a land use).

28. *Palazzolo*, 533 U.S. at 631.

29. *See Petersen v. City of Decorah*, 259 N.W.2d 553 (Iowa Ct. App. 1977) (determining that the land unsuitable for farming and had been unproductive for years); *Kmiec v. Town of Spider Lake*, 211 N.W.2d 471 (Wis. 1973) (finding the land unsuitable for farming, and would cost twice as much to put property into farming condition as the property would be worth as farmland).

30. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 342; *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001); *Lucas*, 505 U.S. at 1019 n.8.

factor to be examined is the nature of the government action. This factor largely distinguishes between physical invasions, which are per se takings, and mere regulations of property, which have a strong presumption of constitutionality.³¹ The second factor, the economic impact of the regulation, examines the diminution in value of the restriction. Yet the *Penn Central* Court emphasized that diminution in value, no matter how great, is not by itself enough to constitute a taking.³²

The third factor, interference with investment-backed expectations, is therefore the most significant. At first, this factor might appear to support the argument that downzoning of farmland is an unconstitutional taking, since it can be argued that by its very nature downzoning changes previous development rights, and thus interferes with landowner expectations based on those rights. But, the *Penn Central* case itself indicates that expectations are not as concerned with previous zoning status as with the original intent when property was acquired. To illustrate, *Penn Central* used the property in question for sixty-five years as a railroad terminal, but lost extremely valuable air development rights when the property was designated as a landmark under New York City's Landmark Preservation Law.³³ In concluding that the landmark restriction was not a taking, the Supreme Court stressed that the Landmark Preservation Law did "not interfere with what must be regarded as *Penn Central's* primary expectation concerning the use of the parcel."³⁴ Thus, even though the Landmark Preservation Law eliminated more intensive development that was previously permitted by its zoning, the assurance of some economic viability and continuation of previous uses that formed earlier expectations negated any takings concerns.

31. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (stating that "[s]o, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, (internal citation omitted), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.").

32. See *id.* at 131. As an example that substantial diminution in value is not enough by itself to constitute a taking, the *Penn Central* Court cited the seventy-five percent diminution in value in *Village of Euclid v. Ambler Realty Co.*, in which the Supreme Court nevertheless sustained the validity of the challenged zoning restrictions. 272 U.S. 365 (1926). Although *Euclid* is not generally considered a takings case, the Court's discussion of it in *Penn Central* suggests that broadly applied land use restrictions can impose substantial economic loss and still not constitute a taking. *Penn Cent. Transp. Co.*, 438 U.S. at 125-35. Lower courts have similarly stated that mere diminution in value is not enough, by itself, to constitute a taking. See, e.g., *Messer v. Town of Chapel Hill*, 485 S.E.2d 269, 270 (1997); *Gardner*, 125 N.J. at 212.

33. *Penn Cent. Transp. Co.*, 438 U.S. at 115-18.

34. *Id.* at 136.

This analysis suggests that despite the substantial diminution in value that downzoning farmland often creates, it is unlikely to substantially interfere with investment-based expectations so as to constitute a taking. Almost all farmland subject to farmland preservation restrictions was originally acquired for agricultural use. As in *Penn Central*, the original investment reflects the permitted agricultural use; the downzoning only interferes with opportunities subsequent to investment. Although downzoning in such a situation clearly has an economic impact on the affected landowner, it does not interfere with investment-backed expectations as contemplated in *Penn Central*. Indeed, *Penn Central* itself essentially involved this same scenario, where previously permitted development opportunities were eliminated, resulting in significant economic impact, but it was held that the opportunities did not interfere with the original expectation of the property owner.³⁵

Lower court decisions have consistently shown that establishing a taking under the *Penn Central* test is extremely hard, a point which Professor Richardson concedes.³⁶ As a general matter, courts have consistently upheld restrictions on environmentally sensitive land, even when diminutions exceeded fifty percent of the land value.³⁷ Indeed, a recent Court of Claims decision, *Walcek v. United States*,³⁸ reviewed a number of Supreme Court, Federal Circuit, and Court of Claims cases and stated that diminution in value needed to be “well in excess of 85 percent” for a taking to be found under *Penn Central*.³⁹

Lower courts have also consistently found agricultural zoning restrictions constitutional, even when substantial diminution in

35. *See id.* The Court has explicitly or implicitly considered the issue of interference with investment-backed expectations with regard to land use restrictions in several cases since *Penn Central*, without ever finding a taking on that basis. *See* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493-94 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 262-63 (1980).

36. Richardson, *supra* note 2, at 68-69 (stating that “a downzoning would rarely amount to a taking of private property for public purposes under the *Penn Central* balancing test.”).

37. *See, e.g.*, *Nasser v. City of Homewood*, 671 F.2d 432, 435, 438 (11th Cir. 1982) (finding a fifty-three percent diminution in value not a taking); *Pace Res., Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir. 1987) (finding an eighty-seven percent diminution in value not a taking); *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1386-90 (N.J. 1992) (finding a ninety percent diminution in value not a taking).

38. 49 Fed. Cl. 248 (2001).

39. *Id.* at 271-72. In *Walcek*, the Court of Claims held that a 59.7 percent diminution in value was not a taking. *Id.* at 271. In its analysis, it noted that the Supreme Court several times has suggested “that diminutions in value approaching 85 to 90 percent do not necessarily” constitute a taking. *Id.* (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (holding a zoning ordinance valid despite a seventy-five percent diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 395 (1915) (finding no taking despite an 87.5 percent diminution in value)).

value occurs. Although these cases often blend state and federal laws together, they have generally approached takings claims consistently with the above Supreme Court standards, rejecting takings claims in the vast majority of cases.⁴⁰ In doing so, they have often noted that agricultural zoning permits economically viable use of property as long as it is suitable for farming. On occasion, courts have invalidated agricultural zoning restrictions, but this typically occurred in three situations: the land was unsuitable for farming, a unique state standard was applied, or the agricultural zoning restriction was arbitrary.⁴¹

None of this discussion is meant to suggest that downzoning farmland is never an unconstitutional taking. Takings analysis is necessarily fact sensitive, and at times, downzoning is unconstitutional. Moreover, as Professor Richardson discussed, downzoning farmland might violate other legal standards.

However, if done pursuant to good planning, agricultural zoning should rarely constitute a taking under the current Supreme Court takings analysis. This is true even if downzoning results in substantial diminution of land values, which means that local governments can pursue farmland preservation by putting the cost of regulation on affected landowners. The next section of this article will examine Professor Richardson's critique of the arguments made by myself and others advocating that placing the cost of preservation on affected landowners is not inherently unfair.

III. FAIRNESS

In addition to stating that agricultural zoning is rarely a taking, my previous writings have also argued that agricultural zoning is not inherently unfair, even when resulting in substantial diminution in property value.⁴² The takings and fairness issues

40. See, e.g., *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161 (9th Cir. 1993); *Barancik v. County of Marin*, 872 F.2d 834 (9th Cir. 1988); *Habersham at Northridge v. Fulton County, Ga.*, 632 F. Supp. 815 (N.D. Ga. 1985); *Gilliland v. City of Palmdale*, 179 Cal. Rptr. 627 (Cal. Ct. App. 1981); *County of Ada v. Henry*, 668 P.2d 994 (Idaho 1983); *Wilson v. County of McHenry*, 416 N.E.2d 426 (Ill. App. Ct. 1981); *Vanderburgh County Bd. of Comm'rs v. Rittenhouse*, 575 N.E.2d 663 (Ind. Ct. App. 1991); *Bell River Assocs. v. Charter Township of China*, 565 N.W.2d 695 (Mich. Ct. App. 1997); *Gardner v. N.J. Pinelands Comm'n*, 593 A.2d 251 (N.J. 1991); *Eck v. City of Bismarck*, 283 N.W.2d 193 (N.D. 1979); *Smythe v. Butler Township*, 620 N.E.2d 901 (Ohio Ct. App. 1993); *Murray v. Columbia River Gorge Comm'n*, 865 P.2d 1319 (Or. Ct. App. 1993).

41. See *Petersen v. City of Decorah*, 259 N.W.2d 553, 555 (Iowa Ct. App. 1977); *Kmiec v. Town of Spider Lake*, 211 N.W.2d 471, 476-77 (Wis. 1973).

42. See Cordes, *supra* note 3, at 1072-81. See also Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *ECOLOGY L.Q.* 187, 229-38 (1997) [hereinafter *Leapfrogging*] (arguing that environmental regulations that impose significant losses on landowners are not so inherently unfair so as to require compensation).

somewhat overlap, since the Supreme Court has often stated that fairness concerns are central to takings jurisprudence.⁴³ Yet there is little doubt that many people, especially affected landowners, often perceive that restrictions on farmland, though not a taking, are still unfair when there is a substantial economic impact. In that context, I have made several arguments as to why agricultural zoning should not be viewed as inherently unfair simply because there is a substantial drop in property values. It is on this issue that Professor Richardson is particularly critical of the arguments advanced by myself and others.

In making these arguments, I have been careful to state that I was not arguing that agricultural zoning is never unfair. To the contrary, I have stated that agricultural zoning, like any other land use control, might at times be unfair as applied to a particular parcel of land.⁴⁴ Similarly, I have supported modified use of PDR and TDR programs to provide some compensation to landowners to more evenly distribute the regulatory burden between affected landowners and society as a whole.⁴⁵ Indeed, in a perfect world, I would make generous use of both PDRs and TDRs to help mitigate the sometimes harsh effects of downzoning farmland. These would not only shift some of the cost of preservation to the public, but in the long run, might prove to be more effective preservation methods than agricultural zoning by itself.⁴⁶

But, we do not live in a perfect world, and PDRs and TDRs both are of limited utility because of the cost of PDRs⁴⁷ and the necessity

43. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating that takings clause "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."); *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (quoting *Armstrong*); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Armstrong*); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1997) (quoting *Armstrong*).

44. See Cordes, *supra* note 3, at 1072.

45. *Id.* at 1082-83. See also Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. REV. 419, 453-55 (2002) [hereinafter *Agricultural Zoning*] (stating that effective farmland preservation programs should incorporate some use of PDRs and TDRs with agricultural zoning).

46. The conventional wisdom is that zoning by itself is often not a particularly effective farmland preservation method in the long run, primarily because of the inherent impermanence of any system based on political choice. In particular, commentators have noted that the opportunity to change zoning restrictions through variances and rezonings undermines agricultural zonings effectiveness as a long-term answer to the problem of farmland conversion. See, e.g., Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing its Conversion to Nonagricultural Uses*, 28 ENVTL. L. 113, 118-19 (1998); Sean F. Nolon & Cozata Solloway, *Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State*, 17 PACE L. REV. 591, 628 (1997). Pressure for zoning change should be substantially lessened when landowners are compensated to some degree by PDRs or TDRs and development rights are more explicitly transferred to local government.

47. The fiscal restraints of PDR programs have been noted by numerous commentators.

of certain conditions to make TDRs work.⁴⁸ Thus, although PDRs and TDRs both have a role to play in a comprehensive farmland system, most efforts at farmland preservation must rely heavily on agricultural zoning, without compensation, to succeed. Consequently, I have argued that use of uncompensated agricultural zoning is not inherently unfair, despite the substantial economic losses it sometimes imposes on landowners.

My basic argument that agricultural zoning is not inherently unfair is three-fold. First, any perceived unfairness based on decreased property value presumes that the entire value of land was based on the landowner's efforts; to the contrary, a substantial portion of private property value is often created by government "givings." Second, any concept of fairness must not only consider how burdens and benefits are distributed within a single government action, but must also focus on the reciprocal nature of burdens and benefits within society more broadly, a concept I label "general reciprocity." Third, the argument that agricultural zoning is unfair emphasizes the private development perspective of property rights, neglecting the social dimension of property rights long integral in our legal system.

Before examining each of these arguments and Professor Richardson's critique, it should be emphasized that these arguments are offered as general policy arguments as to why uncompensated agricultural zoning is not inherently unfair. Viewed another way, they are three rationales why the balance drawn by the Supreme Court's current takings jurisprudence, in which downzoning that results in substantial diminution in value is rarely a taking, is fair. However, none of the three rationales are intended to be incorporated in any takings analysis as such, a point that I think is very clear from the structure of my previous writings.⁴⁹

See, e.g., MALONE, *supra* note 4, § 6:46; SARAH E. REDFIELD, *VANISHING FARMLAND: A LEGAL SOLUTION FOR THE STATES* 99-100 (D.C. Heath and Company 1984); William L. Church, *Farmland Conversion: The View from 1986*, 1986 U. ILL. L. REV. 521, 545-46 (1986).

48. To succeed, TDR programs require the right mix of market conditions, including appropriate "receiving areas" that are restrictive enough to make the TDRs valuable and which can easily absorb increased development. They also require stability of zoning restrictions so that the value of the TDRs are not undermined. *See* Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565, 578 (1991-1992). The frequency with which zoning change requests are granted often makes this difficult to achieve.

49. In my primary article on farmland preservation, *Takings, Fairness, and Farmland Preservation*, I discuss takings issues and fairness issues in two completely different sections of the article. Cordes, *supra* note 3. Moreover, nowhere do I suggest that the arguments regarding givings, general reciprocity, and property rights should be incorporated into a takings analysis. Rather, I offer the arguments to show why the line drawn by the Supreme Court's takings jurisprudence, in which restrictions imposing substantial economic costs on

Moreover, the three arguments are not intended to be primarily applied on a case-by-case basis to determine the fairness of a particular land use restriction. Rather, they are offered as general considerations on why substantial diminution in value from agricultural zoning is not inherently unfair.

A. *Givings*

The idea of focusing on government “givings,” and not just takings, has become a popular one in recent years.⁵⁰ Government “givings” are those actions by government entities which increase land values. As noted by others, much of the value of farmland is the result of government givings, which enhance the value of land.⁵¹ For example, the very act of zoning regulation itself adds significant value to land. Specifically, the increased value of agricultural land in alternative, residential use exists in part because government zoning would protect any residential development from conflicting industrial and commercial uses. Any arguments based on loss of property value necessarily reflect property values largely enhanced by protective government regulatory schemes.

As I previously discussed, the most obvious example of government givings in regard to farmland subject to development pressure is basic infrastructure support that makes land developable in the first place. This is particularly relevant with regard to farmland preservation issues, where high land values reflect conversion pressure, which in turn reflects various government actions. Specifically, highway and road development greatly enhance land values by increasing accessibility to property for residential use. These programs are primarily paid for by general tax revenues; however, they often result in disproportionate financial benefit to undeveloped land, often farmland, in proximity to development.⁵²

landowners are usually not takings, is not inherently unfair.

50. See Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 295 (2003); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001); Cordes, *supra* note 3, at 1072-75; C. Ford Runge, *The Congressional Budget Office's Regulatory Takings and Proposals for Change: One-sided and Uninformed*, 7 ENVTL. L. & PRAC. 5 (1999); Donald L. Elliot, *Givings and Takings*, 48 LAND USE L. AND ZONING DIG. 1, 3 (1996); Edward Thompson, Jr., *The Government Giveth*, 11 ENVTL. FORUM 2, 22 (March/April 1994).

51. See, e.g., Elliot, *supra* note 50, at 3; Thompson, *supra* note 50, at 22.

52. It is important to recognize that in recent years developers have been increasingly required to pay for some infrastructure costs through exaction requirements, typically in the form of land dedications and impact fees. See generally ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, REGULATION FOR REVENUE 19-20, 35-39 (The Brookings Institution 1994). It might therefore be argued that through the practice of exactions, landowners themselves pay for the enhanced value of the land. This is subject to several limitations. First, land values

A variant of a simple example I have used elsewhere illustrates the potential impact of government givings on land values.⁵³ Assume a tract of farmland, somewhat remote and removed from major development, has a value of \$50,000. The government then puts in a major highway near the property, making it far more accessible to several suburban areas. Over the course of several years, development begins to occur, more roads are put in, and the value of the farmland increases to \$300,000. The local government then restricts the property to agricultural use, decreasing its value to \$100,000. Although it might initially appear that government action diminished the property value by two-thirds, in fact the cumulative effect was to double its value.

Real life examples are not nearly this clear cut, but the example illustrates the basic point: government action often accounts for a substantial part of land value. In turn, agricultural and other land use regulations, which at first glance appear to be unfairly taking substantial economic value from landowners, in fact might be taking back values the government itself created. This is not meant to ignore or minimize the considerable role private enterprise often plays in enhancing land values. Further, it should not foreclose use of compensatory schemes, such as PDRs and TDRs, in preserving farmland. However, it does suggest that true land value loss is often not nearly as great as it might at first appear.

Professor Richardson had three criticisms of using government givings to help establish the fairness of downzoning. First, he said that it proves too much, since all landowners, not just owners of undeveloped farmland, benefited from government givings.⁵⁴ As he noted, the value of residential property and businesses in proximity to farmland also reflects givings by government acts. Recognizing that all property benefits from government givings raised two "equity issues." First, it is inequitable to recover givings from some landowners and not others. Second, recovering givings from

are often substantially enhanced by government activities not typically financed by exactions, such as major highways. Second, exactions are designed to help pay for new infrastructure necessitated by development, whereas the givings argument focuses on the enhanced value of undeveloped land created by government infrastructure prior to any development. Third, the amount of exactions can only correspond to the burden imposed by new developments, not to enhanced land values. *See* *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (requiring "rough proportionality" between exaction and development impact). As a practical matter, the enhanced value of property through exactions imposed by government in its coordinating function far exceeds the cost of the exaction.

53. *See* Mark W. Cordes, *The Public/Private Balance in Land Use Regulation*, 1998 DETROIT C.L. REV. 681, 698 (1998) [hereinafter *Land Use Regulation*]; *Leapfrogging*, *supra* note 42, at 235-36.

54. Richardson, *supra* note 2, at 76-78.

farmland owners creates an additional giving to nearby property owners.⁵⁵

I certainly agree with Professor Richardson that all property values reflect government givings, but that is hardly fatal to the givings argument. First, when government entities preserve farmland, they are not intentionally seeking to recapture their givings from a few landowners. Rather, they are imposing controls to protect broader public interests, often resulting in loss of economic value to affected landowners. The givings argument is simply an explanation of why the resulting economic loss is not as unfair as it might at first appear. Other owners of undeveloped land might also be, and frequently are, subject to downzoning for the public good, and in such instances, recognition of government "givings" might also help explain why the loss in value is not as unfair as it might first appear. The givings analysis is by no means unique to farmland preservation, and indeed, to the extent necessary, it might be applied to downzoning other types of undeveloped land for the public good.

Second, although all land value reflects government givings, all land does not benefit to the same degree. The givings argument regarding farmland preservation is predicated on the fact that undeveloped land on the suburban fringe often receives disproportionate givings, which greatly increases the property value.

Finally, and this is very important, the discussion regarding givings and fairness is in the context of restrictions on undeveloped land, such as farmland. The law has long drawn a distinction between development expenditures on property, which is largely protected absent nuisance activity, and investment in undeveloped land, which is not protected. There are very strong policy reasons to protect actual development expenditures in land, which the law currently protects through the takings and vested rights doctrines. Thus, Professor Richardson's implicit suggestion that the givings analysis might be used as an excuse to place new restrictions on already developed property, such as homes, businesses, and industrial uses, is quite misleading.⁵⁶

55. *Id.*

56. Land use law has long provided substantial protection of actual development of land through its vested rights doctrine. *See generally* DANIEL R. MANDELKER, LAND USE LAW §§ 6.12-6.23 (5th ed. 2003). This body of law says that at a certain point in the development process, usually including issuance of a building permit together with some reasonable development expenditures, a landowner establishes vested rights in current permitted uses which cannot be subsequently restricted by government regulations. Although what is necessary to establish vested rights varies considerably from state to state, in no state is the mere purchase price of undeveloped land, even when reflecting then permitted land uses,

Professor Richardson's second argument against the givings analysis is that it proves too much, because if pushed to an extreme, it would justify elimination of all property rights. This is because land has no value absent "government regulations to specify and enforce property rights."⁵⁷ Richardson states:

If the logic of the givings argument holds, the government may therefore confiscate all property without compensation. The givings argument asserts that what the government giveth, it may take away. Such a rule results in nonexistent property rights and valueless property. No government action constitutes a taking under this regime.⁵⁸

Richardson is right that, *if* pushed to an extreme, the givings analysis might negate the takings analysis. However, no one is making that argument or anything like it. Current takings law reflects a balance between the protection of private property rights on the one hand, and recognition of broader community rights on the other, a balance which I strongly support. As noted earlier, the balance falls heavily in favor of private property rights once actual development expenditures are made on land.⁵⁹ Conversely, takings law leans heavily in favor of broader public interests regarding undeveloped land.⁶⁰ I have written elsewhere on why this balance makes sense and recognized the important role protection of private property plays in society.⁶¹ The "givings" argument is simply one component as to why drawing a balance in favor of the public

sufficient to establish vested rights.

In addition to the vested rights doctrine, the Supreme Court's takings jurisprudence would appear to apply with particular force when government interferes with established, rather than just potential, uses. Indeed, an argument can be made that this is the clearest example of the type of interference with investment-based expectations that would constitute a taking under *Penn Central*. The *Penn Central* Court, in finding no taking, emphasized there was no interference with the original use of the terminal, strongly suggesting that interference with established uses would be a different matter, absent a clear nuisance-like activity. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978).

57. Richardson, *supra* note 2, at 78.

58. *Id.* at 79.

59. See *supra* note 56.

60. Commentators have often recognized this sharp distinction between restrictions on established uses, which are granted substantial protection, and restrictions on potential uses, which are often subject to substantial limitations in order to serve the broader public interest. See, e.g., Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 134 (1995-1996) (explaining that "[i]n the law of takings, a considerable difference exists between a regulation that interferes with a current land use and one that bans a prospective land use").

61. See Mark W. Cordes, *Property Rights and Land Use Controls; Balancing Private and Public Interest*, 19 N. ILL. U. L. REV. 629 (1998-1999); *Land Use Regulation*, *supra* note 53.

interest with regard to preserving farmland might not be as unfair as the drop in land value might initially suggest.

Professor Richardson's third argument against the givings analysis is that "the law simply fails to condone the givings argument," stating that the Federal Constitution, state constitutions, and eighty years of legal analysis lack reference to the idea of givings.⁶² But again, Richardson misses the point. At least as presented in my writings, the givings argument is not intended to be incorporated into the takings analysis, but instead is simply an observation on why restrictions that result in substantial drop in property value, which are rarely takings, are also not inherently unfair. The fact that the Supreme Court has failed to discuss givings is irrelevant. Professor Richardson seems to suggest that unless the Supreme Court has given its imprimatur to an idea, it lacks validity. That makes little sense, especially when the idea is not intended to be directly incorporated into the takings analysis.

It is also somewhat ironic that Professor Richardson states that "[t]he reasoning behind the givings doctrine ignores the takings clause of the U.S. Constitution and over eighty years of legal case law."⁶³ The givings argument, as developed by myself and others, is in part intended to defend the basic fairness of the Court's current takings doctrine, which clearly permits restrictions on undeveloped land which result in substantial diminution in value. Givings proponents are quite cognizant of the Supreme Court's takings jurisprudence, including the substantial ability it gives local governments to preserve farmland without paying compensation.⁶⁴ It is Professor Richardson who appears to be quite bothered by the implications of the Court's current takings jurisprudence, with Richardson implicitly suggesting that downsizing without compensation is inappropriate.

Finally, Professor Richardson made the statement that "[n]owhere does the U.S. Constitution, nor any state constitution, prohibit givings."⁶⁵ That, of course, is true, but if he was suggesting that I am opposed to givings, nothing could be further from the truth. I strongly support government actions, such as provision of infrastructure, which enhance land values. Further, I do not believe that government entities should try to recapture those givings. My only point is that when the government pursues other actions for the good of society, such as environmental regulations or farmland

62. Richardson, *supra* note 2, at 79.

63. *Id.*

64. See *supra* notes 12-39 and accompanying text..

65. Richardson, *supra* note 2, at 79.

preservation, that decrease property values, people should be aware that much of the lost value often reflects government givings. As such, the perceived unfairness of the restriction is not as great as the drop in land value might suggest.

Givings arguments are not perfect, and they are subject to limitations, as Professor Richardson partially demonstrates. But their imperfection hardly means they are invalid. Taken for what they are, arguments showing that some of the decreased value resulting from downzoning farmland reflects value created by government givings, helps mitigate the perceived harshness and unfairness of downzoning. Although not drawn from judicial analysis, givings arguments are certainly consistent with and supportive of the basic balance drawn by the Supreme Court and lower courts in takings cases. Additionally, the givings argument does not pose the Hobbesian threat of potentially eliminating all property rights, as suggested by Professor Richardson. Takings jurisprudence has drawn a clear line to prevent elimination of property rights, and the givings analysis simply is one component in understanding why the line the Supreme Court has drawn is a sensible one.

B. General Reciprocity

Related to the idea of government givings is reciprocity, which is the idea that government regulations often bestow both reciprocal burdens and benefits to property owners. I have suggested that the concept of reciprocity can be viewed from two perspectives, "specific reciprocity" and "general reciprocity."⁶⁶ Specific reciprocity refers only to benefits and burdens flowing from the same regulation. This appears to be what the Supreme Court typically means when it refers to an "average reciprocity of advantage."⁶⁷ In the case of zoning, for example, individual landowners are burdened by restrictions placed on their land, but receive some benefits from neighboring property having similar burdens. Although benefits and burdens are not always evenly distributed, and burdens might

66. Cordes, *supra* note 3, at 1075-77; *Leapfrogging*, *supra* note 42, at 236-37.

67. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017-18 (1992); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). For general discussions of the Supreme Court's treatment of reciprocity of advantage, see Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 *UCLA J. ENVT'L. L. & POL'Y* 1 (2003-2004); Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in Comprehensive Takings Analysis*, 50 *VAND. L. REV.* 1449 (1997); Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 *AM. U. L. REV.* 297 (1990).

outweigh benefits, reciprocal benefits might at least partially offset the burdens imposed by a particular regulation.

I have also argued that reciprocity can be viewed from a broader perspective. Under this perspective, the reciprocal burdens and benefits of regulatory life are generally considered, as opposed to only those flowing from a specific regulation. Thus, although a particular regulation might decrease the value of an owner's property, that same owner might benefit from numerous other regulations that restrict other parties.⁶⁸ For example, an owner whose property is subject to particular land use restrictions might benefit from Clean Water Act restrictions over one neighbor, wetland controls over a second, and flood plain restrictions over a third. On a much broader level, various economic and social regulations may benefit the person economically.

As I state elsewhere, any serious argument about fairness must recognize the significant regulatory benefits that flow to landowners as a result of other regulations. Focusing only on the burden caused by a particular regulation distorts the regulatory equation, making the government accountable for burdens imposed, but not giving the government credit for the benefits created. For all practical purposes, it makes almost all government regulatory efforts vulnerable to charges of unfairness, because when viewed in isolation, most regulations will burden some parties more than others.⁶⁹ Viewing benefits and burdens from a broader perspective helps to mitigate perceptions of unfairness.

Professor Richardson was particularly critical of the concept of general reciprocity, stating that it lacks any basis in the law and that it would prove unworkable in practice.⁷⁰ Again, he misses the basic point. The idea of general reciprocity is not intended to be included in the takings analysis as such. Rather, it helps explain why downzoning property is not necessarily unfair and why regulations should not only be considered in isolation, but also viewed in a broader regulatory context.

Professor Richardson was partially correct when he stated that the idea of general reciprocity "is on shaky ground, at best,"⁷¹ at least in terms of specific endorsement by the Supreme Court. Although the Supreme Court's use of reciprocity is a very loose one, requiring no quantification of actual benefits and making it clear

68. See Cordes, *supra* note 3, at 1075-77; *Leapfrogging*, *supra* note 42, at 236-37.

69. Cordes, *supra* note 3, at 1076-77; *Leapfrogging*, *supra* note 42, at 237. See also, Lawrence W. Libby, *Property Rights — The Public — Private Balance?*, MSU LAND USE FORUM CONF., Jan. 9-10, 1996, at 93, 98 (noting that our tendency is to accept the benefits of a regulation as a given, but complain about the burdens as an infringement of rights).

70. Richardson, *supra* note 2, at 82-85.

71. *Id.* at 83.

that benefits need not equal burdens,⁷² it nevertheless has been in the context of discussing benefits and burdens from the same regulation. But, as I continually note, I have never intended the concept of general reciprocity to be incorporated into the takings analysis. Rather, it is offered as a rationale as to why negative impacts from a particular regulation are not inherently unfair, since from a broader perspective, losers from one regulation might be winners in another.

Moreover, although the Supreme Court has not articulated the concept of general reciprocity as such, it has at times stated that most regulatory burdens must be borne “as concomitants of the advantage of living and doing business in a civilized community.”⁷³ In stating this principle, the Court made no effort to identify reciprocal benefits from the challenged regulation, but instead put regulatory burdens in a broader context. This is reciprocity stated at the most general level possible, but the point is quite valid. There are enormous advantages and benefits gained from doing business in America’s regulatory framework, and the burdens imposed by any particular regulation must be evaluated in that context. This applies to land development as well as other business activity.

The importance of viewing reciprocity from a broader perspective was also emphasized in a recent California Supreme Court decision, *San Remo Hotel v. City of San Francisco*,⁷⁴ where the court essentially endorsed the idea of general reciprocity. *San*

72. See, e.g., *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987). The Court, in a footnote, stated:

The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

Id. at 492 n.21.

73. This idea was first articulated by Justice Brandeis in a dissent in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922), where he identified a number of previous cases where a taking was not found despite the absence of any reciprocal advantage from the regulation, “unless it be the advantage of living and doing business in a civilized community.” In more recent cases the Supreme Court has referred to this concept to indicate that most regulatory burdens must be viewed in light of “the advantages of doing business in a civilized society.” See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984) (stating that “such restrictions are the burdens we all must bear in exchange for ‘the advantage of living and doing business in a civilized community’”) (internal citation omitted); *Kirby Forest Indus. v. United States*, 467 U.S. 1, 14 (1984) (explaining that “most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of ‘the advantage of living and doing business in a civilized community’”) (quoting *Andrus v. Allard*, 444 U.S. 51, 67 (1979)).

74. 27 Cal. 4th 643 (2002).

Remo Hotel involved a challenge to an ordinance requiring payment of an impact fee when residential hotels converted to tourist hotels. The fee was designed to help replace lost housing. The court held the ordinance constitutional, finding that imposition of the impact fee was a reasonable response to problems posed by hotel conversion.⁷⁵ The court rejected the argument that the ordinance lacked reciprocity of advantage, stating that:

[T]he necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.⁷⁶

It is also noteworthy that Professor Frank Michelman's highly influential article on takings, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*,⁷⁷ also endorsed the idea of general reciprocity, although he did not call it by that name. Not only has this article greatly influenced the takings theory, but scholars have often noted that the article appeared to greatly influence the Supreme Court's thinking in *Penn Central*.⁷⁸ In that portion of the article primarily focusing on fairness as an underlying concern in takings jurisprudence, Professor Michelman noted that land use regulations will often diminish property values without compensation, which might appear unfair. He believes that this problem is addressed by considering the regulations from a broader perspective, stating:

75. See *id.* at 672-73.

76. *Id.* at 675-76.

77. 80 HARV. L. REV. 1165 (1967).

78. See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1165 (4th ed. 1998) (stating that "the distinct investment-backed expectations' formulation is obviously drawn from Professor Michelman's influential essay on takings") (citation omitted); R.S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449, 449-55 (2001) (discussing how the factor described as "the degree to which a regulation interferes with 'distinct investment-backed expectations'" in *Penn Central* originated in the Michelman article).

Efficiency-motivated collective measures will regularly inflict on countless people disproportionate burdens which cannot practically be erased by compensation settlements. In the face of this difficulty, it seems that we are pleased to believe that we can arrive at an acceptable level of assurance that *over time* the burdens associated with collectively determined improvements will have been distributed “evenly” enough so that everyone will be a net gainer.⁷⁹

Whether one agrees with Michelman that over time everyone will be a net gainer from regulatory life in general, it is quite reasonable to believe that the harsh economic impacts from one regulation will often be offset by economic benefits from other regulations.

Finally, I would like to respond briefly to Professor Richardson’s discussion of specific reciprocity. As he noted, this is what the Supreme Court is referring to when it mentions average reciprocity of advantage from time to time in its cases. Professor Richardson endorsed the need to account for such specific benefits when engaging in a takings analysis, stating that “the less specific reciprocity the regulation contains, the more likely the court will strike the regulation down.”⁸⁰ This suggests that it is a significant factor in the takings analysis.

The Supreme Court has certainly mentioned “reciprocity of advantage” on a number of occasions, and at times suggested it was an important consideration. For example, in the early case of *Pennsylvania Coal v. Mahon*,⁸¹ the Court struck down a statute prohibiting the mining of anthracite coal when subsidence damage would result. The Court held the statute an unconstitutional taking, focusing primarily on the statute’s severe economic impact on the property interests of coal companies.⁸² In doing so, however, it distinguished this case from an earlier one upholding a coal regulation. The Court stated that in the earlier case, the regulation was “secured [on] an average reciprocity of advantage” that the Pennsylvania statute in this case did not possess.⁸³ More recently, in *Agins v. City of Tiburon*,⁸⁴ the Court upheld a low density

79. Michelman, *supra* note 77, at 1225.

80. Richardson, *supra* note 2, at 83.

81. 260 U.S. 393 (1922).

82. *See id.* at 413-15.

83. *Id.* at 415. The earlier case was *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), where the Court said a law requiring coal companies to leave pillars of coal on the boundaries of adjacent property was constitutional.

84. 447 U.S. 255 (1980).

residential restriction on land, in part because other properties had similar restrictions, providing some reciprocity of advantage.⁸⁵ Thus, on occasion, the Court has appeared to give some weight to the presence or absence of specific reciprocity in its analysis.

Upon closer examination, however, in recent years the Court has generally not stressed the absence of substantial specific reciprocity in its analysis, or at least has been very generous in finding specific reciprocity. The most obvious example is *Penn Central* itself, where the Landmark Preservation Law restricted only isolated properties throughout the city, imposing substantial burdens on them that were not shared by neighboring properties. For all practical purposes, there was very little, if any, true reciprocity from the ordinance in question, a point strongly emphasized both by Penn Central Company and Justices Rehnquist and Stevens in dissent.⁸⁶ The majority, however, took a much more generous view of reciprocity, stating that Penn Central benefited from the other landmarks in the community.⁸⁷ This was somewhat of a stretch. Since Penn Central was one of only a very few properties affected, it would gain very little benefit compared to the substantial burdens imposed. Even more remarkable, the Court appeared to suggest that since the Landmark Preservation Law was designed to benefit all the citizens and structures of New York, Penn Central received some benefit from the law, which was all that was required.⁸⁸

As Professor Richardson noted, I have acknowledged that agricultural zoning does not provide substantial specific reciprocity because most of the perceived benefits of farmland preservation, including food security and environmental amenities, go to the public more generally.⁸⁹ This is not to say that there are not some benefits to landowners flowing from the restrictions themselves. First, as members of society, landowners receive the above mentioned benefits like everyone else, and arguably to a somewhat

85. *See id.* at 262.

86. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 147-49 (1977) (Rehnquist, J., dissenting).

87. *See id.* at 134.

88. The Court stated that:

Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole — which we are unwilling to do — we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law.

Id. at 134-35.

89. Cordes, *supra* note 3, at 1076.

greater degree than others.⁹⁰ More importantly, however, if restrictions are imposed as part of a comprehensive program, as they should be, then restricted landowners receive the benefits of agricultural zoning on surrounding property. Specifically, this insulates farms from the problems of conflicting residential use, including traffic problems, stormwater runoff damage to crops, and potential nuisance suits.⁹¹ These types of reciprocal benefits are every bit as substantial, and probably more so, than the burdens the property owners received in *Penn Central*. Thus, although most of the benefits of agricultural zoning go to society in general and not to regulated landowners, there is certainly enough specific reciprocity from agricultural zoning to meet the rather loose standards that the Supreme Court has established for reciprocity of advantage.

C. Property Rights and Reasonable Expectations

A final argument for the fairness of downzoning farmland is predicated on the social dimension of property rights and landowner expectations. To a certain extent, perceptions about the unfairness of downzoning farmland are based on the view that property owners have a right to do what they want with property, and that downzoning forces landowners to forego opportunities that are interwoven into their rights as owners of private property. However, as noted by a number of scholars, such a perspective is neither the traditional nor the proper way to view property rights.⁹² Rather, our legal system has long recognized that private property interests are subject to broader public interests, in which property ownership must be seen in a broader social setting with responsibilities as well as rights.⁹³ Thus, restricting property to

90. See *Penn Cent. Transp. Co.*, 438 U.S. at 134-35.

91. See J. Dixon Essecks & Lela M. Long, *The Political Viability of Agricultural Protection Zoning to Prevent Premature Conversion of Farmland*, in CONFERENCE PROCEEDINGS, PROTECTING FARMLAND AT THE FRINGE: DO REGULATIONS WORK? Sept. 5-7, 2001, at 80-83 (discussing studies documenting variety of problems that non-farm land uses posed to farming, including trampling of crops, injury to livestock, vandalism of equipment and property, theft, trash and litter, damaged tile and drainage ditches, crop losses due to storm water runoff, traffic concerns, and potential nuisance suits).

92. See generally Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095 (1996); Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265 (1996).

93. See John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) (discussing numerous public limitations on private property designated to further the public good); Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735, 751-52 (1985) (discussing restrictions on perceived noxious activity in early America); Duncan, *supra* note 92, at 1133-37 (discussing types of restrictions on property use found in early America).

agricultural use does not necessarily involve the deprivation of property rights, but rather asserts a limitation inherent in the property itself.

This longstanding recognition that private property is subject to public interests flows from the fact that property is a social construct and society can legitimately define the extent of private property interests to be limited by social concerns.⁹⁴ Construing property interests in this way recognizes that the consequences of property use inevitably extend beyond land boundaries and will often conflict with other social needs, necessitating a reasonable accommodation of interests. This includes not only the avoidance of nuisance-like activity, but also protection of sensitive lands, including farmland, as a social resource. Although the need to encourage investment in property requires substantial protection of private property, which the law provides, it is reasonable to assume that these private interests end when they interfere with broader social interests.⁹⁵ This is particularly true when the restrictions are on future or potential uses, rather than established uses.

Because private property is subject to such inherent limitations to the public good, and because such restrictions are frequently imposed on undeveloped land, downzoning of farmland to serve such interests cannot usually be viewed as an unreasonable interference with landowner expectations. This is particularly true with regard to undeveloped property, such as farmland, which is often subject to newly enacted regulations to promote the public good. This relates to the idea of regulatory risk, the idea that property ownership always involves the risk of regulation, and therefore, any investment should take into account the possibility of regulation.⁹⁶ The Supreme Court has developed this idea in several cases, stating that the risk of regulation is part of economic

94. Scholars have often noted that property is a social creation of the state. *See, e.g.*, Daniel W. Bromley, *Regulatory Takings: Coherent Concept or Logical Contradiction?*, 17 VT. L. REV. 647, 653-55 (1993); Coletta, *supra* note 67, at 361-63; John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339, 344-45 (1989).

95. The Supreme Court has frequently recognized this principle, stating that property ownership is limited by public needs. *See, e.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (stating that private property interests must at times "yield to the good of the community" for the sake of "progress"); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (stating that private property limited by other public interests, including exercise of the police power "to protect the atmosphere, the water and the forests"); *Mugler v. Kansas*, 123 U.S. 623, 665 (1887) (stating that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.").

96. *See, e.g.*, Humbach, *supra* note 94, at 367-68; Daniel Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 233-36 (1995); Frank I. Michelman, *A Skeptical View of "Property Rights" Legislation*, 6 FORDHAM ENVTL. L.J. 409, 415 (1995).

life, which includes the possibility of economic loss.⁹⁷ Thus, since reasonable expectations necessarily incorporate the possibility of land use restrictions, especially on undeveloped land, expectations are not unfairly interfered with when such restrictions are imposed.

Not surprisingly, Professor Richardson found the idea of regulatory risk and landowner expectations mitigating fairness concerns unpersuasive. First, he said that “reasonableness” must be based on available data, and the data available to owners of farmland shows a proliferation of suburban subdivisions, suggesting that farmers can also reasonably expect to develop.⁹⁸ Second, any concept of reasonableness should be incorporated into market prices, which typically reflect development potential, which “proponents of downzoning ... fail to recognize ... as an objective measure of reasonable expectations.”⁹⁹ Third, he argued that the Supreme Court has endorsed a concept of “temporal equity” that “means that if your neighbors were allowed to develop their property in the past, it is unfair that you be denied that opportunity.”¹⁰⁰ Finally, he argued that the regulatory risk argument presented perverse incentives for owners of farmland to prematurely develop property.¹⁰¹

The first two criticisms above, which have some merit, are partly answered by simply distinguishing between the “likelihood” and the “possibility” of future restrictions. The concept of regulatory risk is not based on the likelihood of future regulations; rather, it need only be based on the possibility of future restrictions. It is true that the available “data” might often suggest that land can likely be developed. However, the possibility of future restrictions exists as long as the property is undeveloped. Therefore, a landowner’s expectations needs to incorporate that possibility, even if it is not a probability. This is particularly true in our legal system, which has long provided far greater protection to established uses than potential uses.¹⁰² Further, the land use field is heavily regulated, and subject to frequent changes, thus providing some degree of

97. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (explaining that “[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.”) (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)). See also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) (stating that “our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations”); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30 (1984).

98. Richardson, *supra* note 2, at 87.

99. *Id.*

100. *Id.*

101. *Id.*

102. See MANDELKER, *supra* note 56, §§ 6.12-6.23.

reasonable expectation of possible, though not necessarily likely, change.¹⁰³

For similar reasons, current market prices should discount future market prices by the possibility of regulation. Thus, if property is worth \$10,000 an acre if it can be developed, but only \$5,000 an acre if zoned farmland, and there is a twenty percent chance that the property will be downzoned to farmland, the market should discount the \$5,000 per acre difference by the twenty percent probability it will occur. That would result in a \$1,000 per acre discount and thus a \$9,000 per acre value. Admittedly, however, possibilities of future regulation are hard to determine, and thus, markets might inappropriately ignore them. Nevertheless, a rational market participant should discount for regulatory risk, and, indeed, it probably happens to some degree. As illustrated by this example, high value farmland on the suburban fringe, if zoned for development, does not necessarily signal that some discounting has not occurred.

Professor Richardson's third criticism of reasonable landowner expectations, concerning "temporal equity," has less merit, and, indeed, is just plain wrong. *Lucas* cannot be fairly read for the principle that "if your neighbors were allowed to develop their property in the past, it is unfair that you be denied that opportunity."¹⁰⁴ The finding of a taking in *Lucas* was based on the loss of *all* economic viability and the trial court's finding that the property was left with absolutely no value.¹⁰⁵

The problem with the "temporal equity" argument, depending on how it is defined, is that it would lock land uses into the past, making it very difficult for local communities, as well as society in general, to respond to changing social conditions. As noted by Carol Rose, however, the nature of public interests that private property

103. The dynamic, as opposed to static, nature of land use regulations, in which regulatory changes frequently occur, has been noted by numerous commentators. See, e.g., ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 104-05 (2d ed. 2000) (discussing the "dynamic" nature of zoning as practiced today, in which zoning map restrictions are essentially "first offers"); JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 152 (2003) (noting "that the name of the zoning game is change.").

104. Richardson, *supra* note 2, at 87.

105. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-20, 1030 (1992). Nowhere does the Court in its analysis suggest that being deprived a right others had in the past is relevant in the basic takings inquiry. The Court does suggest that once a loss of all economic viability is established, an extremely rare occurrence, then "[t]he fact that a particular use has long been engaged in by similarly situated owners" suggests that the restriction does not fall within the nuisance exception to the loss of all economic viability as a categorical taking. *Id.* at 1031. But, that fact does not become relevant until the landowner challenging the restriction first establishes the loss of *all* economic viability.

is subject to necessarily evolves over time.¹⁰⁶ What constitutes the broader public interest is not static, and neither should be restrictions on land to pursue those interests. This admittedly might interfere with expectations in the short term, but at a more general level, there is the expectation that since public needs might change over time, so must restrictions. Otherwise, there is a temporal domino effect, where new restrictions can never be imposed because someone was allowed to develop in the past. Indeed, in the seminal zoning case of *Village of Euclid v. Ambler Realty Co.*,¹⁰⁷ the Supreme Court recognized the principle that restrictions which might have been unconstitutional in one period will be constitutional at a later date because of changing societal needs.¹⁰⁸ This principle has been borne out repeatedly over the years, as courts have recognized the validity of new forms of land use controls that substantially interfered with pre-existing development opportunities.¹⁰⁹

Professor Richardson's final point, that the regulatory risk argument creates perverse incentives for owners of farmland to prematurely develop their property, makes some sense. As stated by Richardson, "[i]f a landowner assumes that regulations will become more restrictive, then the landowner holds an incentive to develop his property immediately before the rules change. Given this incentive, land will be prematurely developed and the aim of farmland protection frustrated."¹¹⁰

106. See Rose, *supra* note 92, at 274-84.

107. 272 U.S. 365 (1926).

108. The Supreme Court stated:

Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

Id. at 386-87.

109. *Id.* One obvious example is zoning itself, which was necessitated by the problems attendant to increasingly urbanization. Another example is wetland regulation.

110. Richardson, *supra* note 2, at 87.

I concede this is a potential problem. It is tempered, however, by several considerations. First, development itself requires the right set of market conditions, and as a practical matter, landowners cannot simply decide to develop their property. Thus, the threat of premature development will often fail to materialize, if for no other reason than that there is not yet a market. This is true even if the market value of the land is substantially higher if it can be developed, since markets often anticipate future opportunities and speculate. In fact, the law as currently developed certainly presents landowners with the threat of regulatory risk, whether expressing it as such or not, and communities have still been able to identify farmland for preservation. This indicates that the threat of regulatory risk, which is a very real one in our society, has not precipitated a premature rush to development.

Second, the problem of perverse incentives can in part be addressed by strategic use of PDRs and TDRs, when available. Although I do not believe that such compensatory programs are necessary for agricultural zoning to be fair, I support their use in appropriate situations. By targeting PDR and TDR use to properties that are likely to face substantial development pressure in the near future, but not using them for farmland more distant from development, a limited use of PDRs and TDRs can address the perverse incentive problem, to the extent it might exist. This will be examined more in the next section.

IV. A BRIEF COMMENT ON PLANNING, PDRs, AND EFFECTIVE FARMLAND PRESERVATION

Contrary to the impression created by Professor Richardson, I am not opposed to compensatory farmland preservation programs such as PDRs and TDRs. To the contrary, I have stated on several occasions that to be effective, farmland preservation must involve a comprehensive approach incorporating right-to-farm laws, differential taxation provisions, compensatory programs to the extent feasible, and agricultural zoning.¹¹¹ I do not believe, however, that the use of agricultural zoning should be dependent on accompanying compensatory programs in all instances. This is certainly not constitutionally required, and I do not believe it is mandated by fairness concerns.

I also do not believe that farmland preservation should be pursued at all costs, oblivious to other societal needs. The need to preserve farmland must be considered in the context of other public needs, most notably affordable housing and land for economic

111. See Cordes, *supra* note 3, at 1082-84; *Agricultural Zoning*, *supra* note 45, at 453-55.

development.¹¹² In theory, the market itself would arguably reflect societal preferences and needs through pricing mechanisms. Markets are imperfect, however, and fail to incorporate a number of external costs, a problem that is particularly true with regard to farmland.¹¹³ Yet it is important to emphasize that farmland preservation itself must be viewed in a broader context, and it is undoubtedly in society's best interest that some farmland be converted to residential and other uses.

To the extent economically feasible, PDRs, and if possible, TDRs, should be used for two reasons. First, they admittedly address the perceived unfairness of substantial drops in property value and make preservation more politically acceptable. Second, they also are more likely to be effective in permanently restricting land to agricultural use rather than agricultural zoning. Zoning, as practiced today, tends to be a very dynamic system, in which upzoning changes are granted with ease, especially when subject to political or development pressure. For this reason, zoning is often viewed as an unstable control mechanism, especially when applied to undeveloped land subject to substantial development pressure.¹¹⁴ In contrast, restrictions pursuant to PDR and TDR programs are

112. See *Agricultural Zoning*, *supra* note 45, at 442-44. Farmland preservation, if not done correctly, is potentially in tension with efforts to provide affordable housing. This is because agricultural zoning might potentially raise the cost of new entry level development by limiting the supply of available land for new construction. All else being equal, when the supply of a commodity decreases, and demand remains the same, the price increases. Opponents of growth control measures have argued that such control will raise housing prices. See Clint Bolick, *Subverting the American Dream: Government Dictated "Smart Growth" is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859 (2000); Paul J. Boudreaux, *Looking the Ogre in the Eye: Ten Tough Questions for the Antisprawl Movement*, 14 TUL. ENVTL. L.J. 171, 188-89 (2000). See also ELLICKSON & BEEN, *supra* note 103, at 996 (noting that most empirical studies conclude that growth controls raise housing prices). Other scholars, however, have suggested that efforts to combat sprawl need not increase housing costs, and indeed, sprawl itself has a negative impact on affordable housing. See Robert H. Freilich & Bruce G. Beshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183, 191 (1997).

As a practical matter, it would appear that the actual impact of agricultural zoning on the cost of new entry housing in part depends on whether there are concomitant plans for compact growth. To the extent government decreases the supply of land through agricultural zoning, but fails to pursue compact growth alternatives, the cost of new housing might increase. On the other hand, if effective efforts at compact growth accompany agricultural zoning, as advocates of smart growth suggest, the overall effect might well be to decrease housing costs. This is because compact growth reduces the percentage of housing cost attributable to new land and also reduces infrastructure costs.

113. The social costs of suburban sprawl, of which conversion of farmland is an integral part, have been well documented. See, e.g., Henry R. Richmond, *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma*, 13 PACE L. REV. 327, 335-36 (1993); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 69-77 (1999); Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183 (1997).

114. See MALONE, *supra* note 4, § 6:48; White, *supra* note 46, at 118-19.

often more insulated from pressure, in part because compensation has been provided to the affected landowner.

For this reason, and to the extent feasible, PDRs should be used in conjunction with agricultural zoning, a point I have emphasized in several previous articles.¹¹⁵ Assuming that the finances for PDRs are limited, they need to be used in a strategic fashion, balancing several competing concerns. On the one hand, they arguably should not be used too closely to rapidly growing areas with substantial development pressure, where development might be inevitable and possibly needed at some point. Conversely, use of PDRs too far out is a poor use of limited funds. Such land can be zoned agricultural without compensation, since the economic impact is likely to be more minimal. Instead, it makes most sense to use PDRs where a growth line should be formed, creating a buffer zone between more intensive uses and other farmland subject to just agricultural zoning.¹¹⁶

This potentially serves three purposes. First, it insulates the property most subject to development pressure from conversion, decreasing conversion pressure on agriculturally zoned land. Second, it targets use of PDRs to those landowners who face substantial economic loss by agricultural zoning, but whose property might still be realistically preserved as farmland. Third, the use of PDRs to create buffers helps the perception of farming stability, encouraging investment in farms.¹¹⁷

Communities might also consider use of TDRs as a compliment to agricultural zoning, which provide some compensation to affected landowners without the fiscal limitations of PDRs. For this reason, they have been successfully used as a compliment to agricultural zoning in a few instances, most notably Montgomery County in Maryland and the Pinelands in New Jersey.¹¹⁸ In both cases, use of TDRs have provided a compensatory basis for zoning, helping to ensure its acceptability in the farming community, while also helping to provide for increased development density within designated growth areas. As noted earlier, however, to be successful, TDRs require the right mix of development conditions

115. See Cordes, *supra* note 3, at 1082-84; *Agricultural Zoning*, *supra* note 45, at 453-55.

116. See *Agricultural Zoning*, *supra* note 45, at 454.

117. *Id.* Commentators have noted that the encroaching development problem undermines farming stability and viability because of increasing interferences with non-farm uses and the elimination of a critical mass to sustain a farm economy. Remaining farms thus become even more susceptible to conversion, even for those who desire to remain in farming. See Edward Thompson, Jr., "Hybrid" Farmland Protection Programs: A New Paradigm for Growth Management?, 23 WM. & MARY ENVTL. L. & POL'Y REV. 831, 839-40 (1999).

118. See DANIELS & BOWERS, *supra* note 3, at 179-86 (describing six different TDR programs designed to preserve farmland).

suitable to absorb transferred development, as well as stability of zoning controls within those areas, a relatively rare occurrence.¹¹⁹ For that reason, few successful TDR programs have emerged, despite their significant popularity in academic literature.

Above everything else, farmland preservation, including agricultural zoning and compensatory programs, needs to be done pursuant to sound planning. This includes identifying farmland that perhaps should be considered for development at some future date in order to meet growth needs. At the same time, farmland targeted for preservation should be identified as early as possible to minimize the economic impact on affected landowners. Such early planning should substantially mitigate perceptions of unfairness, since most agriculturally zoned property will not yet reflect substantially higher value based on possible development.

V. CONCLUSION

There is little reason to believe that the debate surrounding the validity and fairness of farmland preservation and other environmental land use controls will abate any time soon. The “smart growth” planning movement is picking up steam and often includes farmland preservation as a central component.¹²⁰ At the same time, suburbs continue to expand, placing increased pressure on some of America’s prime farmland.¹²¹ Central to the discussion of fairness of farmland preservation methods is the nature of private property rights, and to what extent they should yield to the broader public interest.

American law does and should provide substantial protection to private property rights, while still recognizing broader public interests. The balance the law has drawn, and one implicit in the Supreme Court’s takings jurisprudence, is that private rights in land are given substantial protection once actual development expenditures have occurred, absent nuisance-like activity. In such instances, there are strong policy reasons to protect expenditures, which are critical to societal well-being. In particular, unless owners and land developers have reasonable expectations of continued ownership and productive use, there is little reason to build housing and other land uses essential to society.

Conversely, the law leans more heavily in favor of public interests when regulating potential or future uses of property,

119. See Kayden, *supra* note 48, at 578 and accompanying text.

120. See generally Briffault, *supra* note 10; Pollard, *supra* note 10.

121. See SORENSON, *supra* note 3, at 8-20 (documenting increasing development pressure on some of America’s prime farmland).

including restrictions on undeveloped land. Even here the law continues to provide some protection to private property interests, but to a much more limited degree. This is reflected in the Court's two-part *Lucas/Penn Central* test for regulatory takings, which permits government entities to place substantial restrictions on undeveloped land, often resulting in substantial diminution in value, without a taking being found. As applied to farmland, this current takings analysis should rarely result in a taking, a fact borne out by a number of lower court decisions.

To the extent possible, PDRs and TDRs should be considered as means to mitigate the economic impact of restrictions, but this is often unrealistic. The question then remains whether imposing agricultural zoning on farmland, absent compensation, is inherently unfair, and it is here that Professor Richardson and I disagree. He emphasized the individual status of the landowner in relation to the single restriction in question. In his world, landowners can frequently be regulatory winners, but not losers. Receiving from the government is expected, but not giving back. Further, individual property rights appear to take preeminence over broader social needs.

In contrast, I and many others see matters through a broader regulatory and social context. High land values near advancing development reflect not only private investment, but also substantial government expenditures, mitigating the perceived unfairness of restrictions that diminish those values. The fairness of a regulation must not only be evaluated by itself, in which some losers are almost inevitable, but also from a broader perspective in which other regulations benefit the same person. Most importantly, individual rights in potential or future land use are held in balance with broader social needs, a balance that has long been recognized in our legal system. This perspective is the one that most clearly corresponds with takings jurisprudence. I believe it is also one that corresponds with basic notions of fairness.