

**Property In, Taxes On, Agricultural Land**

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## Property in, Taxes on, Agricultural Land

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*Farmers and other landowners are 'drawing a line in the dust' over property rights in the 90s. They contend that rule changes designed to define and protect 'the commons' in land and water use unreasonably limit options for the owner in fee....Part of the difficulty underlying the great property rights war may be misunderstanding about the very nature of property.*

*Lawrence Libby, 1995<sup>2</sup>*

Property rights are receiving renewed interest in recent times, in part because of the political debate on environmental regulation.<sup>3</sup> According to one press investigation, over 1500 property rights groups have been formed to protest and challenge regulations on the use of land and related resources.<sup>4</sup> Some of the property rights concern takes the form of legislation.<sup>5</sup>

However, beneath much of the political rhetoric are some basic ideas on the nature of property. Many of these basic ideas have engaged the attention of scholars for centuries. Very likely, the ideas will hold their interest in centuries to come because property is a dimension of our civilization--a measure of what humans are. Understanding the nature of property includes a critical review of the roots of our current ideas.

Reviewing the traditional concepts of property reveals some shortcomings that impinge on the "property rights" debate. The bundle of rights metaphor conveys an image of rigidity, definition, and permanence that is unwarranted by the workings of the system. An alternative metaphor is in order. The classic separation of natural rights and social contract defines different roles for state and individual. Social contract states it better. Finally, a property system implies certain moral imperatives that define its purpose and measure its success.

The specifics of property are guided in part by the property object. Some aspects of land property, as distinct from intellectual property, for example, depend on how it is perceived and described. Land is usually described in terms of XY territory and XYZ space. Property interests can be added as 4th dimension, Z'.

Arguments about property are ultimately arguments about the relation of the state to the individual. These arguments have been framed as the "taking" of property by state via eminent domain, regulation, or taxation. The recent, celebrated *Lucas, Nollan, and Dolan* cases<sup>6</sup> and much of the popular debate is focused on regulation of land use. A less passionate, but more imposing, issue is the level and form of taxation of land. Virtually all owners of agricultural land pay property taxes, but the level and form varies widely by jurisdiction, type of property, and taxpayer.

The real property tax is one among many features of the property system. The property system is a

relation between the state and the individual, in this case, the owner-taxpayer. Following the examination of property, ownership of agricultural land, and the real property tax, are three proposed agendas, one each on education, research, and policy.

### **Property as Space: the Case of Agriculture**

Some of us find it difficult to think about property solely in the abstract. So, within the boundaries of these pages, property is land. Land, of course, is not property but an object of property interests claimed by their owners. Property is a relation among owning entities and the state. But more on that later.

Anyone who has located a place listed in a gazetteer on a map can appreciate the usefulness of XY coordinates. So attractive was the idea of XY coordinates to describe territory, that planners of the western expansion of the United States, including Jefferson, partitioned land for jurisdictions and for private settlement basically on geographic coordinates. They abandoned natural features and bearings to gain the simplicity and generality of rectangular descriptions of territory.

We commonly describe landownership in surface area terms, the product of XY coefficients. Add topography, mineral rights, groundwater, and other third dimension attributes and ownership is defined with reference to XYZ space.<sup>7</sup>

Agriculture provides a vivid expression of property in XY territory. Indeed, agriculture occupies two thirds of the area of privately owned land in the United States.<sup>8</sup> Conversely, land is extremely important as an input to agricultural production; 75 percent of the value of assets in farming are real estate,<sup>9</sup> and most of farm real estate value is land.<sup>10</sup>

Two features of the agricultural landownership pattern worth noting for their importance in land use and public policy are 1) the skewed distribution and 2) the separation of farm operation and farmland ownership.

#### **Distribution of Landownership**

The last count of owners of land in farms taken by the Census of Agriculture (1988) yielded almost 3 million.<sup>11</sup> This number of owners is down from a mid-thirties maximum of about 5.5 million. Although the decline in owner numbers is steep, it is not as steep as the 6 million to 2 million farms in the same period. Farmland ownership is concentrating but not as rapidly as farm operations. Why has this concentration taken place and what does it mean?

The migration off farms resulted in a migration of landownership also. The same forces that consolidated farm operations, so that the average farm size rose from 195 acres in 1945 to 462 acres in 1987 and 491 acres in 1992, resulted in a concentration of farmland ownership. The total amount of farmland has changed little during most of the century but the number of farmland owners has been substantially compressed. About 3 percent of the nation's households hold two-thirds of the nation's private land.<sup>12</sup> This concentration comes about because urbanization of the population has left large areas of agricultural land in the hands of few owners, and agriculture accounts for a large portion of the nation's land.

The other form of concentration is among owners of farmland. About 4 percent of farmland owners, approximately 124,000 owners, hold 47 percent of all U.S. farmland. On the other end of the scale, 30 percent of the smallholders own but 2 percent of the land. Even when the concentration is expressed in value terms to reduce the effect of land quality, there is substantial concentration: in 1988, the top 3 percent (those with farmland holdings of \$1 million or more) held 28 percent of the value.<sup>13</sup> Land is an important dimension of the distribution of wealth, or as Geisler puts it, poverty.<sup>14</sup>

The concentration of landownership has a direct bearing on program policies where the benefits and costs of the programs are tied to the land.<sup>15</sup> Examples are the Federal programs for price supports for crops and the payments for conservation practices. Examples at the local level include land use regulations and real property taxes. Some evidence suggests that real property taxes are not paid in proportion to the value of the farmland holdings.<sup>16</sup>

Aside from the direct effect on wealth and income, concentration may affect decisions about resource use, conservation, and investment. These decisions may be related to types of owners. Do absentee landowners address pesticide and fertilizer application in the same way resident farm operators do? Absentee investor landowners may have greater capacity to make long term improvements or make conservation investments, but do they have the same preferences as farm operators?

### Separating Farming from Farmland Ownership

In 1988, 44 percent of the owners holding 41 percent of the farmland were not operating farmers.<sup>17</sup> Of those nonoperators,<sup>18</sup> 41 percent are 70 years of age or older. The 70 plus age group held 42 percent of nonoperator land which amounts to 16 percent of all farmland. Older nonoperators and others who rent their land to farmers represent a substantial segment of landowners. Their reasons for holding land and their knowledge and understanding about farm operations might differ substantially from farmers who own and rent land. Rogers found that participation in production decisions was influenced by landlord characteristics and type of lease.<sup>19</sup>

Where farmland is held by owners other than farm operator, the economics of contract choice<sup>20</sup> will have an important bearing on involvement of landlord, the contribution of parties to lease, and production outcomes. In general, we would expect landowners to be primarily concerned with major land use changes, long term investments, maintenance of land quality, and choice of entrepreneur (including self). Day to day production and marketing decisions reside primarily with the entrepreneur, who may or may not be the landowner. This separation of the levels of decision-making is, in part, a specialization argument for private, widely dispersed, landownership and farm entrepreneurship. As such it also argues for spreading ownership between investors (big picture decisionmakers) and farm operators (detail decisionmakers). Perhaps it also argues for keeping numbers of owners and operator somewhat the same for a balance of economic power.<sup>21</sup>

Once property is viewed more broadly than ownership, leasing becomes the predominant separation of interests in agriculture. Farmland leases are the prototype contract in agriculture although animal, machinery, and services are common in some types of production. In addition to farming leases, easements, mineral leases, life estates are examples of other separations of interests common in farmland.<sup>22</sup>

The Census of Agriculture in 1992 reported the highest percentage of land farmed under lease since

1940.<sup>23</sup> The massive consolidation of farm operation, which has reduced the number of farms to under 2 million, has been accomplished in part through leasing farmland from nonfarmers. While they are invisible in farmer statistics, the nonfarmer landowners share risks, provide inputs, and pay taxes on the farmland. They also share, directly and indirectly, in those public policies and programs that affect the use and value of farmland.

## The Nature of Property: beyond XYZ

*Qu'est-ce que la Propriété?*

*P. Proudhon [1841]<sup>24</sup>*

Z', the fourth dimension of property, contains the philosophic premises on which law and commerce rest. Two of those premises, natural rights and social contract, account for a large measure of the contrasts in the current property rights controversy. A brief review of these premises will achieve a better appreciation, if not resolution, of positions taken by so-called "property rights" groups and, for example, environmentalists. For the same reasons, the review also will background the role of real property taxes in a tenure system.

### Natural rights, the social contract

Why should we focus on natural rights as an element in the property rights controversy? The short, simple, answer is that, despite the emergence of social contract theory more than a century before, natural rights were invoked as rationales of the American declaration of political independence and were imbedded in the U.S. Constitution. The somewhat longer answer is that the bases for, and forms of, natural rights of property changed over time and social contract notions modified, rather than absolutely displaced, natural rights.<sup>25</sup> And quite aside from the formalisms of jurisprudence and economics,

"...in America, the classical theory of natural right is so deeply embedded in popular thought that the spokesmen of big business sometimes repeat the familiar phrases, although their manner of doing so often betrays that they are not unaware of the contradictions between the classical doctrine and the institutions which they uphold."<sup>26</sup>

Since the Golden Age, the idea of property evolves as an aspect of the relation of state and individual. In Plato's ideal state, property is owned by the lower classes who produce wealth, trade of which regulated by the rulers to assure that poverty is alleviated and the arts protected. Rulers would govern but have no property or wealth. Aristotle's ideal state owned half of the land, worked by state-owned slaves; the other half of the land would be privately owned, worked by privately owned slaves. Other Greeks, notably the Stoics, had more influence on later thinking about property.<sup>27</sup>

Roman law drew extensively on Stoic notions of equality of men in the state of nature. Seneca, for example, held that, in the state of nature, property was owned in common for the benefit of all. Private property arises because of corruption, and requires conventions to preserve law and order. Thus the basic idea of property remained rooted in natural law, but involved the institutions of organized society to ensure justice and equitability. By the law of nature, men were free and equal, land was the property of all. Slavery and private property are created by convention and by code, even as natural law remained a vital tenet of Roman Law. Christian thinkers such as Aquinas, through the middle ages, further

modified the property idea from a necessary evil to an actual good.<sup>28</sup> Aegidius Romanus afforded the Church the right to own property, and thence created a general theory of property. That general theory made property a human creation "promulgated by kings and emperors."<sup>29</sup>

Political and intellectual leaders of the 17th and 18th centuries, drawing on the ideas of Golden Age and Middle Age teachers and philosophers, constructed theories of government and property based on individual rights, natural rights.<sup>30</sup> From these rights, compacts were drawn, agreeing on the powers and responsibilities of government and the rights and obligations of property. These models of government and property, incorporating the rational perspectives of the new Enlightenment, were reflected in the Declaration of Independence, the Constitution, and the Northwest Ordinance.

John Locke used natural law arguments to oppose divine rights theories which vested all property in the monarch. If not the first, Locke was one of the early authors of a labor argument for private property, that is, the things of nature are given in common, but labor creates a private interest in the property with which it is mixed.<sup>31</sup> Many of Locke's ideas on government and property were a rallying point for leaders of the American revolution.

Locke, with Thomas Hobbes, Jean Jacques Rousseau and others, bridged natural rights to social contract by addressing the relation of individual to community and government.<sup>32</sup> Although Locke and Hobbes retained elements of natural rights in their contract theory of government, the grounds for specification and protection of rights by government and the obligations and responsibilities to government had been laid. Rousseau refined the social contract idea without the baggage of natural rights. Adam Smith faulted natural rights theorists for not taking adequate account of social institutions such as property.<sup>33</sup> Immanuel Kant asserted that the social contract, civil society, logically precedes property.<sup>34</sup>

Despite widespread acceptance of Lockean premises of government and property at the time of American independence, Thomas Jefferson wisely avoided the divisiveness of property concerns by substituting "pursuit of happiness" in the Declaration. He thus afforded a political window to the latent utilitarianism in the philosophies of the 18th century.<sup>35</sup> However, the Constitution of the Commonwealth of Virginia, and several other states, contains specific reference to protection of property, often as surrogate of liberty and freedom.<sup>36</sup> The liberty and freedom connections are frequently made by the property rights groups today.

By the 19th century, natural rights arguments had been modified and refined so that utility and welfare became more of a driving force for policy. Utilitarianism and logical positivism, with a gloss of science, completed the hegemony of economics in political affairs. By mid 20th century, the idea of property was being expressed in the vocabulary of economics. From beneath the rhetoric of economics, however, the property issues are surfacing ancient premises about natural rights, pacts and conventions, social contracts. Some of these premises, largely unexamined, solidify into ideologies. And, as Keynes reminded us, ideologies become policies.<sup>37</sup>

#### Elements of "modern" theories of property

Contemporary writers have added immensely to the detail, interpretations, and intricacies of the property concept but most arguments reduce to foundations and forms of rights of property owners vis a vis nonowners and government. A selective review of some of the recent, and not-so-recent, contemporaries will focus on the structure of rights (bundle of) and the balance of rights and responsibility.

Perhaps the most widely accepted metaphor in discussions of property rights is the "bundle of rights." The concept enables one to separate a property into fractions, each with a distinct character. A "stick" in the bundle of rights, for example, might pertain to an easement of ingress/egress of a particular party for a particular period of time. Another stick may be a lease to cultivate a farm. C. Reinhold Noyes refers to these sticks or sub-rights as the "things" of property law.<sup>38</sup> As essential legal elements, they define the relations among parties--and government.

The virtue of the bundle of rights concept is that it permits flexibility in structure of property interests, important not only in defining use but in separate valuation and commerce. As a concept it is accepted by writers of widely divergent views of the economy.<sup>39</sup> The weakness of the concept, related to the metaphor, is the firmness or rigidity implied in the "things" or sticks in the bundle.<sup>40</sup> The use, the value, the force of any subset of rights is determined in part by its context. A separate interest is codependent with other interests in an object. An ingress/egress easement may be affected by a forest or farm lease. Perhaps a better metaphor for property interests would be ingredients, which blend and interact in a recipe. Noyes, in fact, uses the term ingredients in describing the origins of the rights and duties of property and then referring to Hohfeld's schema of jural opposites and correlatives.<sup>41</sup> Anthony Honoré also uses the term "ingredients."<sup>42</sup>

The Hohfeld system is at once rigorous and simple. By pairing right/noright or privilege/duty all interests become distributions of those with the rights and those without the rights. In essence, property is a matter between one who has it and one who hasn't. Social sanction or enforcement is omitted, or at least is off-stage. Liability or duty seems to center solely on the property owner, with relationships specified in terms of X and Y: "...if X has a right against Y that he shall stay off the former's land, the correlative is that Y is under a duty toward X to stay off the place."<sup>43</sup> What appears to be missing in the Hohfeld scheme is direct connection to community or state. For the rights and privileges of property there appears no clear obligation or responsibility to the society which sanctions them or the government that supports them. Relations are between X and Y as equivalent opposites or correlatives.

To extend Hohfeld a bit, another metaphor is in order. Take law or the legal environment as a mirror, reflecting perhaps the larger, societal order. Against this mirror the right of X is reflected as the duty of Y. Following an elementary physical law, the angle of incidence equals the angle of reflection (Hohfeld used "equivalent," p. 38). X's slant becomes Y's. But where in the relation between X and Y is the implicit responsibility of X to the society that made the XY relation possible? Consider an Alice's world "Through the Looking-Glass."<sup>44</sup> From behind the looking glass, society sends a Kantian message to X: the moral imperative of your right is a responsibility to the community in which you exercise it.<sup>45</sup>

The perspective from behind Alice's mirror, a private property system exists, not because of divine or natural rights of property holders, but because an ordered society believes it to be the best way to organize. As Knight and Reich put it, property is a social institution made as society sees fit.<sup>46</sup> The arguments for the private property system incorporate notions of efficiency in the allocation of productive resources and equitability in the sharing of benefits from the economic system.

Property contributes to efficiency by clearly and unambiguously assigning consequences of allocative decisions to the resource owners. Market transactions bring about efficient combinations of mobile resources, if all parties are informed, evenly matched, and unpressured, and the system has low, unbiased transaction costs. Private property permits decisions to be assigned close to a production process with attendant risks distributed widely. Individual mistakes can be made and corrected without a collapse of the system.<sup>47</sup> Private property is a practical way of organizing an economy.

Not all the signals of a society are clearly received by property owners. Owners of swampy farmland may not receive the message that society wants ducks as well as wheat and that part of the cost of growing wheat is leaving a swamp undrained. A question arises about how much uncertainty in changes of tastes, say, between ducks and wheat, should the owner be expected to have built into resource prices? In estimating the value of a productive asset (or consumption good), how much should the owner allow for unforeseen regulations? One allows for 10, 50, and 100 year floods; how about new requirements for being a landowner?

The extremes of some property rights views insist that all changes in value due to regulation be reimbursed to the landowner. (Presumably reimbursement would not include market or act-of-god effects) If uncertainty of regulatory reduction of value (not increase) is eliminated by assurance of reimbursement, values will increase. It follows, then, that any unpredicted regulatory reduction would be from a higher base requiring even greater reimbursement. As indicated later, society can avoid a portion of this value inflation with a tax on the asset value of land. Indeed, it would be possible to enhance real property taxes enough to cover the entire cost of regulatory reimbursement. More on this later.

Beyond efficiency and pricing is the distribution of property interests among owners. Again, the distribution can be expressed as the package of interests in XYZ space or division of interests, Z'.<sup>48</sup> In many of the land reform programs of less developed countries, redistribution focuses on ownership of the XYZ space.<sup>49</sup> In the United States today, many of the property rights concerns are with precise delineation of interests in Z' and their values. In the distribution of interests between private owners and government, regulation and taxation are significant.

### Public and Private Interests in Property

Public and private interests are reflected in three areas of law--eminent domain, regulation, and taxation. Each of the areas affect the scope of property interests and the value of those interests. Each of the areas has different, but sometimes related, social, legal, and economic dimensions.

The public interest in landownership is perhaps most vividly expressed in eminent domain.<sup>50</sup> David Schultz's *Property, Power, and American Democracy*<sup>51</sup> was limited to eminent domain as a distinct issue worthy of analysis, but held that "...property rights and eminent domain may be paradigmatic or reflect the more general relationship between the state and individual...." (p.4) Schultz noted the character of eminent domain has changed in America in 200 years since its initial constitutional expression. In general the courts' interpretation of eminent domain has enhanced the power of legislatures to acquire property for public purposes and serve more social-welfare purposes(p.183-198). While accepting his conclusion, one could interpret the expansion of eminent domain as a reflection of a more complex, interrelated, society and economy requiring broader expression of public interest. That broader expression might extend also the areas of regulation and taxation.

Current debates on property rights issues are framed largely as regulatory "takings," that is, a limitation on use or reduction of value of property. The history of treating a restriction or reduction of value as a taking is much shorter than the takings concept enunciated in the Fifth amendment. Although the Supreme Court in *Commonwealth v. Tewksbury* (1846) addressed the regulatory issue by denying that regulation constituted a taking, Mercurio asserts that not until 1887, in *Mugler v. Kansas*, was police

power clearly distinguished from eminent domain.<sup>52</sup> In the 1922 *Pennsylvania Coal Co. v. Mahon* case, Justice Holmes blended the police power with eminent domain. After Holmes, eminent domain was no longer limited to actual taking of the physical property object, but included government's regulation when it "goes too far."<sup>53</sup> More recently, property rights groups on the far right are arguing that any diminution of private prerogatives of property constitute a compensable taking.<sup>54</sup>

Thus the "takings" concept evolved from a Constitutional protection relating to seizure of the actual property object (the XYZ), to the taking of specific rights such as the air rights in *Penn Central Transportation Company v. New York* (the Z') and to a decrease in value of the interests (\$Z') as in the *Lucas v. South Carolina*, and *Dolan v. Tigard* cases. The takings process is evolving from Constitutional protection, decided case by case in the courts, to a legislation-based class entitlement of property owners.<sup>55</sup>

The takings concept has evolved from judicial protection of an individual's property right to a legislatively constituted redistribution of regulatory value from the public at large to private property owners. This evolution pertains to eminent domain and police power. It does not pertain to taxation.

Constitutionally, there is no taking of property through the power to tax. Although a tax may secondarily affect the use of a property object, the power of raising revenue for general welfare through taxation is not limited by any taking principle. Regulation may result in taking, taxation will not.

How do the three authorities affect the market price of land? Eminent domain is exercised rarely, and when it is exercised, it follows well-known, unchanging, procedures, including full compensation. Eminent domain takings are unlikely to affect aggregate land values, although individual parcels could be affected positively or negatively. Regulations on land use are common, subject to change and uncertainty in terms of legislation and administration. Regulations are more likely to affect the market price of land than eminent domain. Real property taxation is virtually universal, property values are subject to regular appraisal and assessment, levels of taxation are widely known with certainty. The effects of real property taxes on market prices of land are direct and regular. Indeed, the share of land value represented by real property taxes is so regular as to constitute a public interest in private land.

### **The Real Property Tax as a Public Interest in Land**

The idea that a tax represents a public interest in land is not so unusual: the tax is a commitment to pay a portion of the return to land under a system of rules which, when breached, may result in a forfeit of ownership. Obligations for, and exemptions of, the tax adapt and modify the interest or the value of the interest the owner/taxpayer holds in the land. The idea that the property tax is a public interest in land is not particularly new, either. Consider a 1922 quote from Arner: "... economic rent is divided between the owner and government. Thus what we speak of as value is simply the owner's rent capitalized."<sup>56</sup> Seligman, in 1899, invoked Smith (1776): "The farmer must have his reasonable profit as well as every other dealer. Hence 'the more he is obliged to pay in the way of tax, the less he can afford to pay in the way of rent."<sup>57</sup>

Governments at all levels have a tax interest in land, direct or indirect. Federal and state governments, for example, have an interest in the income generated by land; they also have a tax interest in estates or inheritances consisting of land. Most states and some local governments have real property transfer taxes. Local governments rely heavily on revenue generated by the real property tax.<sup>58</sup> All the taxes on

agricultural land sum to about \$9.6 billion for 1992.<sup>59</sup> Of these 1992 taxes on agricultural land, real property taxes were \$4.9 billion. Exploring a tax interest in land means looking at the basic qualities of the real property tax and a few of its variations.<sup>60</sup>

How is the public interest reflected in the real property tax? In the United States the real property tax is *ad valorem*; the public interest in real property arises from its value either as investment to earn income or as a consumption good. The real property tax is a wealth tax, a particular kind of wealth tax. Typically, real property taxes are based on two elements: one on the value of land and the other on the value of the capital improvement.

Distinguishing the two elements of the real property tax, land and improvements, serves an economic purpose. The supply of land is less elastic than most capital improvements. In the aggregate, the supply of land is more or less fixed. Given certain features such as seasonal amount of sunshine, moisture, and temperature; location and access; and slow mobility of complementary resources land supply may be exceedingly inelastic even for specific uses such as small grains in the Great Plains, or grazing in portions of the western United States. Taxes and tax exemptions will have no influence in aggregate supply of land.

Improvements may be temporary--a grain bin, fence, or road--and may or may not be included as an element of real estate for tax purposes. Other permanent improvements--houses, groves, barns, ponds, and line fences--represent a portion of the real estate value, commonly assessed for real property taxes. The supply of improvements is elastic. As a productive asset, improvements in land must compete with other investments in expected returns. As final or consumption good, improvements such as an owner-occupied residence compete with investment goods or other consumption goods. Taxes and tax exemptions will influence local or aggregate supply.

State constitutions and laws, which usually define in some detail the form of real property taxation within the state, often differ in treatment of land and improvements. The homestead exemption is one example of differential land and building treatment.<sup>61</sup> Preferential assessment for farmland use is often limited to land, not buildings.<sup>62</sup>

Through the authority of the real property tax, partnership of the public and the private sectors share a relationship similar to tenants-in-common. Private owners may sell or bequeath their interest in a tract of land, and the new owners become "partners" with the public.

A shadow value of the public interest in private property<sup>63</sup> is the capitalized value of the tax on the property.<sup>64</sup> If a net after-tax return on land is \$100 per acre, and the return is capitalized at .05, the market price of land is  $\$100 / .05 = \$2000$  per acre. If the tax on the land is \$20 per acre, the capitalized value of the tax is  $\$20 / .05 = \$400$ , and the total value of the property is \$2400. Halve the tax, the estimated market price increases to \$2200, but the total value remains at \$2400. The public decreases the value of its interest, the private interest increases and receives a windfall or, in market terms, a capital gain.<sup>65</sup> There is no increase in land, no increase in total value, only what Murfizer describes as a "gratuitous" transfer to the private owner. Of course, gratuitous transfers can run in either direction.

For another example, capitalizing the 1992 agricultural real property tax of \$4,869 million at 6 percent<sup>67</sup>, results in a \$81 billion shadow value of public interest, which when added to the private (market) value of \$668 billion, raises the total value of agricultural land to \$749 billion.<sup>68</sup>

What are the expected impacts of a change in the real property tax? Changes in the improvement (capital) portion of the real estate will be negatively related to the tax changes. However, because the aggregate supply of land is extremely inelastic, a land tax will make little change in land use, unless applied differentially on land uses, and then only if the differential is substantial. The aggregate supply of land does not change. Land taxes are mainly redistributive. Increases (decreases) in land taxes are bad (good) for current owners, but have no economic effect on future owners whose taxes are higher (lower) but whose access to land costs less (more), whether gained through purchase or lease.

If the economic effects of the land tax are neutral, are there limits to the level of tax? Clearly if taxes reduce the private value of land to zero, raising the public share of value to 100 percent, there is no private incentive to hold and control land. But we argued that private property serves a public purpose by managing land use and attendant investment, particularly at the micro level. If there is no reward for managing, why manage? In agriculture, managers can be hired at 10 to 15 percent of the gross returns to land. So taxing at 80 percent of the gross returns to land leaves a substantial 20 percent for managing, but converts the public/private interest agricultural land from 20/80 (U.S. average) to 80/20.

Would taxing 80 percent of the return to land be excessive? From the economic logic above, no. From the moral position that favors lotteries, speculative gains, and unearned increments, perhaps yes.<sup>69</sup> From a Constitutional perspective it is uncertain but, in general, the Courts have required only that revenue collected be for public purposes. The 5th amendment gives wide latitude in collection of taxes. The 14th amendment pertains to State powers and revenue purposes.

"It was not contemplated that the adoption of the Fourteenth Amendment would restrain or cripple the taxing power of the States...When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers; and the Court will refrain from condemning a tax solely on the ground that it is excessive."<sup>70</sup>

Among the States, the real property tax has been extensively modified with exemptions, classifications, rebates, rates and separate millages to meet objectives other than pure revenue. Preferential assessments of agricultural, forestal, and open space lands are examples of such policy engineering. But the attempt to preserve these uses through tax manipulation has thus far met with little success. As Malme put it:

"There is general consensus from extensive research over a twenty year period that the economic incentive offered by lower property taxes has had minimal effect in preventing conversion of farmland to more intensive uses."<sup>71</sup>

As Malme indicates, the land use incentive of real property taxes, as currently legislated and administered, is modest. Nineteen of the states have no rollback feature, and many of the states with a rollback are for few years with little or no interest payment.<sup>72</sup> The real property tax, rather than carrying special restrictions, might be more effective if raised to the levels suggested above to reduce the private profitability of merely holding land, without improvement, for capital gain.

The lack of success in preserving agricultural uses of land may have as much to do with the level of the property tax as its form. Eliminating capital gains through property or other taxes might deter landowners from conduct which conflicts with other policies such as preservation of farmland, forests, or open space. From the standpoint of land use or environmental protection, the property tax could serve more as a complement than substitute for regulation.

If the arguments on property rights are reduced to monetary gains and losses in asset value of land, as current bills in Congress would suggest, then the clearest expression of public interest is represented by the ad valorem real property tax. If more responsibility for public services is shifted to local government, the real property tax may be a source for increasing revenue and increasing responsibility of local government to guide land use and protect the environment.

### Arguments and Agendas

Let us briefly review the arguments for viewing property, particularly property in land, as a continuum of private and public interests. The arguments concluded that there is a public interest in the existence of a private property system.

The nature of that public interest defines in part the relation of person or citizen and the state. Insight into that relationship is gained from the premises and presence of property law and conduct. Some of the differences in the views about property rights is explained by differences in natural rights and social rights concepts.

The dimensions of land illustrate the relation between a property object and property. Agricultural landownership can be measured as acres (hectares), products of X and Y dimensions. We incorporate subsurface and suprasurface rights to accommodate land's XYZ dimensions. Property, Z', relates the rights and duties of persons or legal entities to property objects. Governments, as agents of society, define, record, regulate and enforce property rights.

Governments through taxes share in the income from, and wealth of, land. Real property taxes often are instruments of policies beyond the mere collection of revenue. The exemptions, deductions, and conditions incorporated into tax laws are intended to subsidize elderly, low income, veterans, owner-residents and other qualifying taxpayers, or to favor particular land uses such as open space, agriculture or forestry.

The real property tax represents a public interest in private land. Assuming a 6 percent capitalization rate, the value of that public interest in agricultural land is \$81 billion. Added to the 1992 market value of \$668 billion the full value of agricultural land for national accounts purposes could be stated as \$749 billion.

Property rights issues are receiving renewed interest, primarily in terms of regulatory "takings." However, regulatory restrictions on use rights have been challenged as takings only rarely, at least until now. Takings under eminent domain have been even less common. On the other hand, the public interest in private lands is expressed as a tax on virtually all land every day.

Policies affecting the character and distribution of property interests warrant public debate, additional research, and political decisions. The idea that the real property tax is a sharing of public and private landownership is just unorthodox enough to warrant wider public exposure and discussion, to call for a review of research priorities, and to question policies on land use, conservation, investment, and entitlements. It is time to move land taxes high on the agendas of education, research, and policy.

The educational agenda might open with a better understanding of the nature of property and property institutions. An educational program is best based on knowledge, in depth, of the origins, character, and purposes of the present and alternative property systems. A portion of the educational agenda can be

devoted to correcting misinformation contained in the homilies, slogans, and superficial assertions about property employed by politically-oriented special interest groups.

A second, related item on the educational agenda is taxation. Taxation should be connected to the larger issues of citizenship, the relation of people to their government, particularly under democratic forms of government. An understanding of land taxes presumes an understanding of rent and land values; and educational program on land taxes would include conversation on sources of land value and the implications for resource use, and wealth distribution.

Research supports education and policy. Research on land tenure and land tax can fill both factual and analytical voids. Basic data on landownership, for example, is seriously deficient. There is no national accounting of the features, and distribution, of landownership; we have only disconnected fragments of data about who owns America's land. Census surveys in 1945 and 1987 are isolated instances of useful, though flawed, attempts to provide factual underpinnings of farmland ownership. They need to be improved, replicated and expanded to nonfarm and urban areas.

The improved data base will support analytical studies. The quality of current policy debates on public programs, for example, would be enhanced with better understanding of effects of subsidies and regulations on the "givings" and "takings" of land values.<sup>73</sup> Research on land taxation may include studies of the incidence of taxes related to farm and rural land; to the extent they exist at all, virtually all incidence studies are on urban real estate. Another area of research might determine income flows. For example, how does the deductibility of real property taxes on federal and state income taxes affect interjurisdictional flows of revenue and income? How does that deductibility affect the distribution of income and wealth? Still another area of land tax research would be the impact of tax exemptions and preferential levies and assessments: How might a lower preferential assessment of farm land than on farm improvements, for example, affect the type and level of farm investment and land use?

The policy agenda might begin with questions about the role of land taxes in broader tax (and revenue) policy. Forget the single tax idea; no one seriously believes the public's demand for services can be satisfied with a tax on land rents only. The land tax policy issue is best focused, instead, on the effect of taxes on economic rents versus other sources of revenue. Relative to other taxes or subsidies, how do land taxes and land subsidies affect resource use, and the distribution of wealth? Another policy issue is related to how the real property tax is administered: are rates on different values of similar properties the same? Does technology affect the quality of assessment and administration? How might several offices of local government be coordinated with the private sector to yield a useful geo-information system to serve multiple public and private services?

### Endnotes

<sup>1</sup>Economic Research Service, U.S. Department of Agriculture. Views are those of the author, not necessarily of the Department. I appreciate the helpful comments and suggestions of Barlow Burke, Quintin Johnstone, John Marshall, Allan Schmid, Laurence Tribe, Keith Wiebe, Joan Youngman and also participants at the University of Wisconsin, June 1995, conference on Who Owns America? where these ideas were first presented.

<sup>2</sup>Lawrence Libby, "Conflict on the Commons: Natural Resource Entitlements, the Public Interest, and Agricultural Economics" [1994 Presidential address to the American Agricultural Economics Association] *American Journal of Agricultural Economics*, Vol. 76, No. 5 (Dec 1994) pp.998-1000.

<sup>3</sup> For example, title IX in the draft "Job Creation and Wage Enhancement Act" of the 104th Congress (so-called Contract With America) pertains directly to potential impacts of regulation on property rights. The Farm Bureau has interpreted the Supreme Court's holding in *Lucas, infra*, as pro-property rights and asserts the property rights position (Farm Bureau News, July 13, 1992, p.2). The view of the Competitive Enterprise Institute is: "The protection of property rights is central to the promotion of free enterprise and limited government. Without the protection of property rights there can be no economic liberty." (J.Adler, Asso. Director, Jan 1955). The Audubon society's view of compensation for the change in value of land is: "...these bills would require the public to pay many billions of dollars when no taking has occurred and no just compensation is due...speculators...demand a financial windfall at taxpayers expense." Since the late 80s and early 90s property rights issues have become popular in the media.

<sup>4</sup> Bridget Schulte, Washington Post, Dec 31, 1993

<sup>5</sup> In the 104th Congress, the House passed H.R. 925 (the Private Property Protection Act of 1995) requiring payment by government to landowners, the value of any portion of whose land is reduced by Federal action by 20 percent or more. At least 18 states have passed property rights protection laws, and 48 states have considered or are considering such legislation (Land Letter, April 20, 1995 p.4)

<sup>6</sup> *Lucas v. South Carolina Coastal Council*, 60 U.S.L.W 4842 (June 29, 1992); *Nollan v. California Coastal Commission*, 483 U.S. 825 (June 26, 1987); *Dolan v. City of Tigard, Oregon*, 62 U.S.L.W. 4576 (June 21, 1994). The Court held in favor of landowners in all three cases. In *Lucas*, a state law created after the landowner had purchased land for a development was employed in a way that eliminated virtually all of the property value. For a more refined legal discussion of *Lucas* see Rubinfeld, *infra*, at pp. 1091-4. In terms of public-private tradeoffs, *Lucas* is not as instructive as *Nollan* and *Dolan*. Both of the latter cases were decided 5 to 4. In *Nollan* the public sought an access easement in return for a building permit; In *Dolan* the public sought dedication of a public bike path. In both cases, it might have been possible to treat the dedications from the landowners as "exactions." When developers, for example, put in streets, donate land for schools, etc. in exchange for zoning or permits an exaction represents a return to the public some of the gain expected from the development. For a full and interesting treatment of gains and losses to property losses due to community or the government activity see now classic by Don Hagman and Dean Misczynski, *Windfalls For Wipeouts: Land value and compensation*, Chicago: American Society of Planning Officials, 1978.

<sup>7</sup> Two renowned court cases, *Pensylvania Coal v. Mahon* (260 U.S. 393 [1922]) and *Penn Central v. NYC* (438 U.S. 104 [1978]), illustrate the Z dimension of space as a property object. The Court found in the first case that a statute preventing mining beneath residences was excessive regulation, a taking. In the second case, the Court upheld New York City's restriction on building in the air space over a historic building, Grand Central Station; the restriction was not a taking.

"A piece of land is not usually taken to be identical with the soil and rock etc. at a given location. If anything, the land is identified with the location--a region of three-dimensional space..." See Jeremy Waldron, *The Right to Private Property*, Oxford: Clarendon Press (1988) pp. 36,37 for a conceptual examination of property in general, cited later in property concepts section of this paper.

<sup>8</sup> Of the 1326 million acres of private land in the 48 states of contiguous United States, 830 million are in cropland, pasture and range. An additional 48 million acres are in farm woodland, farmsteads and roads for a total of 878 million acres. If 380 million acres of private forest land is added, about 95 percent of the private land area of the U.S. is agricultural. Hawaii's 1.6 million acres of land in farms is 39 percent of the state's total area. Alaska's .9 million acres of land in farms is much less than one percent of the state's total area. See "Landownership" in *Agricultural Resources and Environmental Indicators*, USDA, Economic Research Service, Agricultural Handbook 705 (Dec 1994).

<sup>9</sup> Kenneth Erickson, et al, *Farm Business Balance Sheet, 1960-91* USDA Economic Research Service, Statistical Bulletin 856, (May 1993) p. 16. In part, because of the volatility of farm real estate prices, farmland as a percent of all asset value has ranged from 70 to 80.

<sup>10</sup> According to Canning, about four-fifths of farm real estate value is land. Patrick Canning, *Farm Buildings and Farmland: An Analysis of Capital Formation* USDA Economic Research Service Technical Bulletin 1801, (Feb 1992) p. 40. The Federal Reserve System, *Balance Sheets for the U.S. Economy, 1945-93*. (Sept 1994) p.19 places the proportion of real estate in the farm business at 77 percent in 1993, compared to proportion of land in all real estate (including farming) of 33 percent. The same Federal Reserve report showed that farm businesses in 1993 represented 6 percent of all real estate value and 14 percent of all land value.

<sup>11</sup> U.S. Dept. of Commerce, Bureau of Census, *1987 Census of Agriculture* Vol 3. "Agricultural Economics and Land Ownership Survey, 1988" (July 1990). The estimated number of 2,952,282 excluded some owners such as railroads, and some types of enterprises such as horticultural. Also landlords were named in 1987 and omissions in 1988 were not replaced so there was a slight undercount. If all owners were included the estimate would have been near 3.1 million owners of farmland.

<sup>12</sup> Households (numbering 93 million in 1990) are a better measure than the much larger total population because minors do not own land, many owner units are joint ownerships, legal entities such as corporations, trusts, partnerships, estates, etc are multi-person. The largest aggregation of landowners, of course, is homeowners--at least 60 million of them. See USDA Agr. Handbook 705, op cit.

<sup>13</sup> U.S. Dept. of Commerce, AELOS *op. cit.*, and Gene Wunderlich, *Owning Farmland in the United States*, USDA Economic Research Service AIB 637 (Dec 1991) pp. 3,4.

<sup>14</sup> Charles Geisler, "Land and Poverty in the United States: Insights and Oversights" *Land Economics*, Vol.71, No. 1 (Feb 1995) pp. 16-34. He concludes his article: "The connection between land and wealth is somehow more intuitive than the connection between land and poverty. Research on the former will illuminate and motivate research on the latter." (p.30)

<sup>15</sup> See Robbin Shoemaker, Margot Anderson, James Hrubovcak, U.S. *Farm Programs and Agricultural Resources*, USDA Economic Research Service AIB 614 (Sept 1990); C. Ford Runge et al, "Government Actions Affecting Land and Property Values: An Empirical Review of Takings and Givings" January 23, 1995 draft manuscript. The latter is a review of the land market price effects of a broad range of programs on many types of land use. Most empirical studies express results in terms of market price of land, omitting the secondary effects on property taxes, and leaving total value impacts in question. Alternatively, studies of land price effects of property tax policies, such as preferential assessment or circuit breakers, incorporate other programs under agricultural income or omit entirely. An example of excellent theoretical/empirical studies are: John E. Anderson, "State tax credits and land use: Policy analysis of circuit-breaker effects" *Resource and Energy Economics*, Vol. 15 (1993) pp. 295-312. See also Anderson's references.

<sup>16</sup> See Gene Wunderlich and John Blackledge, *Taxing Farmland in the United States*, USDA Economic Research Service AIB 679 (Mar 1994). In 1988, holdings valued at less than \$70,000 were taxed an average of \$1.45 per \$100 of value, holdings valued at \$5 million or more were taxed an average of \$0.47 per \$100 of value.

<sup>17</sup> Wunderlich, AIB 637, *op. cit.*

<sup>18</sup> The percentage is only of the individual and partnership owners, that is excluding corporations.

<sup>19</sup> Denise Rogers, *Leasing Farmland in the United States*, USDA Economic Research Service AGES-9159 (Dec 1991) pp. 12,13. Also: Denise Rogers and Ann Vandeman, "Women as Farm Landlords: Does Gender Affect Environmental Decision-Making on Leased Land?" *Rural Sociology*, Vol 58, No. 4 (Winter 1993) pp.560-8.

<sup>20</sup> The phrase was inserted from the title of Yujiro Hayami and Keijiro Otsuka, *The Economics of Contract Choice*, NY: Oxford University Press (1993). Their book is a formal, generalized, economic treatment of tenure forms. It represents a good state of art summary on the neoclassical theory of tenure.

<sup>21</sup> The power arguments have not been addressed here but power, economic and political, are adroitly discussed by Schmid and by Schultz: Allan Schmid, *Property, Power, and Public Choice*, NY: Praeger (1978); David Schultz, *Property, Power, and American Democracy*, New Brunswick NJ: Transaction Publishers (1992).

<sup>22</sup> See: Richard Almy, J. Gossett, S. Miller, and D. Moyer, *Separated Rights in Real Estate*, USDA Economic Research Service AGES 20806 (Aug 1982); Keith Wiebe, B. Kuhn, A. Tegene, *Partial Interests in Land: Policy Tools for Resource Use and Conservation*, USDA Economic Research Service (forthcoming)

<sup>23</sup> Gene Wunderlich, "Landownership" in *Agricultural Resources and Environmental Indicators*, USDA Economic Research Service, Agricultural Handbook 705. (Dec 1994) p. 24.; and Gene Wunderlich and Keith Wiebe, *AREI Updates: Farmland Tenure*, (June, 1995).

<sup>24</sup> Pierre-Joseph Proudhon. *What is Property?* ed by D. Kelley and B Smith, Cambridge: Cambridge University Press, (1994) [original 1841].

<sup>25</sup> Bernard Schlatter's *Private Property: The History of an Idea*, London: George Allen and Unwin (1951) provides an excellent portrayal of the evolution of the idea of property from a historians perspective. Other excellent sources are C. Reinhold Noyes, *The Institution of Property*, New York: Longmans, Green (1936); Francis Philbrick, "Changing Conceptions of Property in Law" *University of Pennsylvania Law Review*, Vol 36, No.7 (May 1938) pp.691-732.

<sup>26</sup> Schlatter, *ibid.* p.280.

<sup>27</sup> Schlatter, *ibid.* p.19.

<sup>28</sup> The evolution of Christian thought is treated extensively by Frank Grace in chapter two, a historical summary, in his *The Concept of Property in Modern Christian Thought*, Urbana: University of Illinois Press (1953). He concludes: "The concept of property to which modern Christianity subscribes, although oriented toward an industrial society, is the evolutionary product of a theory of property formulated in the agrarian society of the Old Testament period...Man individually may hold property, but its possession is in the nature of a trust that imposes an obligation to use the property in a manner beneficial to society as a whole." (p. 150)

<sup>29</sup> *Ibid.* p.60. The arguments of the Christian church relating to property are far too lengthy and formal to be included here. For example, Schlatter notes that St. Augustine and the Stoics said that property was "conventional" (anticipating the social contract idea) but the conventions are in turn part of natural law. Aegidius said that such conventions of natural law may not be abrogated by princes, i.e., princes may not take the property of the church without its consent.

The Reformation, via Luther and Melanchthon, further advanced an absolutist view of property. The Ten Commandments were natural law. Private property meant thou shalt not steal. Calvin, in the Institutes of the Christian Religion, included the theory of stewardship in relation to property, the idea that ownership implied obligations.

<sup>30</sup> Hugo Grotius, a Dutch intellectual, produced a definitive work on international law in 1625 that combined classical philosophy, reformation concepts, and new age rationalism. His theory of property rights began with natural law but, by pacts or agreements, divided community property into private ownerships. Samuel Pufendorf also began in the natural rights school, but took the individual occupation of land as an implicit pact, not founded on nature. Private property somewhat more benignly is the result of agreements among men. These thinkers anticipated some of the ideas of, and gave rise to a reaction by, John Locke. Locke wrote in part as a response to the divine rights implications of Grotius and Pufendorf. See: Hugo Grotius, *The Law of War and Peace*, NY:Bobbs-Merrill (1925), esp. Chapter 2 "Of Things Which Belong to Men in Common"; Samuel Pufendorf, *Of the Law of Nature and Nations* (translation), Oxford: L. Lichfield (1710).

<sup>31</sup> James Tully, *A Discourse on Property: John Locke and his Adversaries*, Cambridge: Cambridge University Press (1980) p. 144-5.

<sup>32</sup> Thomas Hobbes, *Leviathan*, [1651] New York: E.B. Dutton (1950): "The right of nature...is the liberty each man hath, to use his own power. p. 106"; Jean Jacques Rousseau, *The Social Contract*, [1762] New York: Oxford U.Press (1962); James Tully, *ibid*.

<sup>33</sup> Muller discusses Smith's criticism of natural rights theorists for their inadequate treatment of social creation of institutions: "Following the lead of Hume and another Scottish intellectual, Lord Kames, Smith demonstrated that the rights claimed by the natural-rights theorists were based on the development of social and historical institutions." Jerry Z. Muller, *Adam Smith in His Time and Ours: Designing the Decent Society*, NY: the Free Press (1993).

<sup>34</sup> Kant held that without the prior existence of a civil society, there can be no property. Further, according to Williams, "Kant argues that the right to property cannot exist without the *a priori* postulate of an original community of ownership. Howard Williams, "Kant's Concept of Property" *Philosophical Quarterly* Vol. 27 (1977) pp. 32-40. Kant's position of no natural right in property thus differed from that of Locke. Locke's philosophy pervaded the thinking of many of those who formed the constitutional outlook in the early days of the nation. Elements of the Kantian outlook appear in modern times, perhaps anticipating a socially-oriented view of property.

<sup>35</sup> Jefferson and other learned leaders of his time, were exposed to David Hume, Adam Smith, and physiocracy. Although utilitarianism was fully developed in the early 19th century by Jeremy Bentham, James Mill, and John S. Mill, the elements, including consequentialism, were extant among philosophers a century before. The publication in 1776 of Adam Smith's *Wealth of Nations*, sequel to his *Theory of Moral Sentiments*, suggests a commonality, in time at least, of political and economic thought.

<sup>36</sup> The Virginia Bill of Rights (June 12, 1776) in Section 1 states: "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." In this passage one sees elements of natural rights, social contract, and utilitarianism common throughout state Constitutions shaped during the revolutionary period and later. Passage from: Richard Perry (ed) *Sources of Our Liberties: Documentary origins of individual liberties in the United States Constitution and Bill of Rights*, Chicago: American Bar Association (1978) p. 311.

<sup>37</sup> Keynes concluded his famous General Theory with the often-quoted passage: "Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back." John Maynard Keynes, *The General Theory of Employment Interest and Money*, London: Macmillan and Co. (1961) p.383.

<sup>38</sup> C. Reinold Noyes, *The Institution of Property*, NY: Longmans, Green (1936) p.305-310. "A legal 'thing,' then, is any one of a great number of kinds of aggregate, or bundle, of property rights. It is simply what we have come to call a property interest....All the aggregates combined, which have reference to a single object, constitute complete property in that object." (p.310)

<sup>39</sup> Demsetz opens his neo-classic on property with "When a transaction is concluded in the marketplace, two bundles of property rights are exchanged...." Harold Demsetz, "Toward a Theory of Property Rights" *American Economic Review*, Vol. 57, No.2, (May 1967) p. 347. The Bromley and Schmid perspectives of property differ sharply from, not necessarily conflict with, the view of Demsetz. Placed within a larger context of institutions, Bromley and Schmid see property as more than a vehicle for economic equilibrium. See: Daniel Bromley, *Economic Interests and Institutions: The conceptual foundations of public policy*, NY: Basil Blackwell, (1989); A. Allan Schmid, *op. cit.* 78.

<sup>40</sup> Waldron, with credit to Honoré, calls property "a complex bundle of relations, which differ considerably in the character and effect." He acknowledges the fluidity of ownership, noting that "the term 'ownership' serves only as an indication that some legal relations, some rights, liberties, powers, etc., are in question." Waldron, *op cit* pp. 28,29.

<sup>41</sup> Wesley N. Hohfeld, *Fundamental Legal Conceptions: As applied in judicial reasoning and other legal essays*, New Haven: Yale University Press (1920). Hohfeld lays off jural opposites in pairs: right/no right; privilege/duty; power/disability; immunity/liability; and jural correlatives also in pairs: right/duty; privilege/no-right; power/liability; immunity/disability. Around this system Hohfeld develops an essay on a broad range of judicial reasoning. It became the basis of the Restatement of the Law of Property by the American Law Institute and remains a common reference point for modern commentators on property.

<sup>42</sup> Honoré describes the "necessary ingredients in the notion of ownership...the right to possess, the right to use, the right to the income...(he lists eleven). A. M. Honoré, "Ownership" in *Oxford Essays in Jurisprudence*, A. Guest (ed), Oxford: Clarendon Press, 1961, pp. 112,113.

<sup>43</sup> Hohfeld, p.38. My interpretation here may be more than simple, really simplistic. Again, my purpose is not to elaborate a theory of property but place property issues in a context of state and individual. For an excellent, but relatively brief, review of Hohfeld for a theory of property see: Stephen Munzer, *A Theory of Property*, NY: Cambridge University Press (1990).

<sup>44</sup> Lewis Carroll, *Through the Looking-Glass, and What Alice Found There*, Oxford: Oxford University Press, (1982) [Original 1872]. Said Alice: "I'll tell you all my ideas about Looking-glass House. First, there's the room you can see through the glass--that's just the same as our drawing-room, only the things go the other way."

<sup>45</sup> Responsibility may be built on a set of premises that differs radically from the property rights theories. For a theory of responsibility see Hans Jonas, *The Imperative of Responsibility*, Chicago: University of Chicago Press. (1984). "The lengthened reach of our deeds moves responsibility...into the center of the ethical stage. Accordingly, a theory of responsibility, lacking so far, is set forth for both the private and public sphere. Its axiom is that responsibility is a correlate of power and must be commensurate with the latter's scope and that of its exercise."(p. x) Is it fair to say that responsibilities are rights viewed from the other side of the looking-glass?

<sup>46</sup> To state it somewhat more forcefully: "[P]roperty is a social institution; society has the unquestionable right to change it or abolish it at will, and will maintain the institution only so long as property-owners serve the social interest." Frank Knight, *Risk, Uncertainty and Profit* [1921] NY: Augustus Kelley (1964), p. 360. Reich almost paraphrased Knight in his New Property article: "Property is not a natural right but a deliberate construction by society. If such an institution did not exist, it would be necessary to create it, in order to have the kind of society we wish." Charles Reich, "The New Property" *Yale Law Review*, Vol. 73, No. 5, (Apr 1964) p. 771-2.

<sup>47</sup> Substantial gain has been made in the economic content of property rights concepts. Indeed, a review of the property rights literature of economics might be appropriate here but for length. Yoram Barzel wryly commented in his excellent *Economic Analysis of Property Rights* (1989): "The intellectual content of 'property rights,' a term that has enchanted and occasionally mesmerized economists, seems to lie with the jurisdiction of the legal profession. Consistent with their imperialist tendencies, however, economists have also attempted to appropriate it." (p. xi) A list of readings of contemporary economists on property should extend back to Knight (1921), Demsetz (1967), and Ronald Coase, "The Problem of Social Cost," *Journal of Law and Economics*, Vol. 3, No.1 (1960) pp. 386-405, but any listing runs the risk of excluding major contributions. I like an extensively documented article by Warren Samuels, "Welfare Economics, Power, and Property" in *Perspectives of Property*, Wunderlich and Gibson (eds), Pennsylvania State University (1972). Among more recent books, in addition to Barzel, I suggest Bromley (op. cit. 89), and Schmid (op. cit. 78) which provide reviews of contemporary thought and add their own substantial contributions to the subject.

<sup>48</sup> Barzel notes "the inherent difficulty of delineating rights fully," the heart of his arguments on transaction costs. These inherent difficulties (p.2) are similar to elusiveness of ingredients of property I described in the bundle of rights metaphor.

<sup>49</sup> In the United States until late in the 19th century, for example, most of land distribution issues such as the 160 or 320 acre homestead were concerned with the division of XY space, owner qualifications, and, in some instances, compensation.

<sup>50</sup> Eminent domain pertains to the right of government to take private property for public purposes. It has been called "the highest and most exact idea of property remaining in the government, or in the aggregate body of the people in their sovereign capacity." (*Beekman v. Saratoga & S.R. Co.* 22 Am.Dec. 679) The limit on government's power of eminent domain references specifically to the Fifth Amendment of the U.S. Constitution: "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

<sup>51</sup> David Schultz, *Property, Power, and American Democracy*, New Brunswick NJ: Transaction Publishers (1992).

<sup>52</sup> Nicolaus Mercurio, "The Takings Issue: A continuing dilemma in law and economics" in Mercurio (ed) *Taking Property and Just Compensation*, Boston: Kluwer Academic Publishers, (1992). In *Mugler* a state prohibition law enforcement law destroyed the value of *Mugler's* brewery. His claim of taking was denied but on the grounds of public welfare. Precursors of the Court shift in *Mahon* is carefully reviewed in Jed Rubenfeld, "Usings," *Yale Law Review*, Vol. 102, (1993) pp. 1077-1163. Rubenfeld offers a clarification of the confused takings issue with an emphasis on the actual use of property by the condemning public agency.

<sup>53</sup> *Pennsylvania Coal* is widely cited as point at which regulations became subject to review for possible "takings." As noted above, even before *Pennsylvania Coal*, however, courts were scrutinizing the application of regulations for their possible impacts on property rights. More recently, in *Lawton v. Steele*, 152 U.S. 133 (1984), for example, while holding the New York legislation allowing destruction of fishing nets unlawfully used as a valid exercise of police power, noted in dicta that "legislatures may not, under the guise of protecting the public interests, arbitrarily interfere with private business..." Thus, awareness of the overlap of police powers and property rights has a long history.

<sup>54</sup> Examples of the groups are Defenders of Property Rights, Competitive Enterprise Institute, and Council on Private Property. In the spirit of any-regulation-is-a-taking, President Regan signed Executive Order 12630, March 15, 1988. By placing requirements on federal agencies, it sought to obstruct any regulation that might affect property values. The Executive Order was not rescinded but its exercise does not appear to be vigorous.

Allan Schmid, in his review of this paper, noted that "a regulatory lowering of the value of one parcel of land is often the vehicle for increasing the value of other individually owned parcels." It follows, then, that land so enhanced by regulations, might be lowered if previously lowered values were enhanced by removing

regulations. Changes in regulations may have differential impacts on land types and owners. Removing the restrictions on draining wetlands, other things equal, would increase the supply, and lower the price, of nonwetland.

<sup>55</sup> See previous note on H.R. 925 of the 104th Congress.

<sup>56</sup> Arner, G.B.L. "Lecture V. The Rent of Land and the Cost of Housing" in *Urban Land Economics: Lectures* by Ely, Rostovtzeff, Shine, Whitbeck, and Arner. Madison WI: Institute for Research in Land Economics (1922), p.139. Arner actually credited C.B. Thompson of Columbia University with many of the ideas in his published lecture.

<sup>57</sup> E.R.A. Seligman, *The Shifting and Incidence of Taxation*, NY: Columbia University Press, (1899) p. 143. The quotation was introduced in part because Seligman was not a strong advocate of Ricardian principles in taxation. Even Seligman probably would admit the incidence propositions as applied to agricultural land. The incidence of the land portion of the real estate tax is virtually unshiftable. Because agricultural real estate consists mainly of land, farmland owners are able to shift little of the real property tax. For a critique of Seligman, generally, see: Mason Gaffney and Fred Harrison, *The Corruption of Economics*, London: Shepard Walwyn (1994).

<sup>58</sup> The declining role of the real property taxes in local government financing is concisely summarized by Netzer who ends his discussion (p. 76) with: "...without major changes in fiscal federalism in the shape of shifting financing responsibilities for local public services to the higher levels of government, the overall role of the property tax will change little." Dick Netzer, "Property Taxes: Their past, present, and future place in government finance" in *Urban Finance Under Siege*, T. Swartz and F. Bonello (eds), NY: M.E. Sharpe, (1993). If current moods of Congress and Administration prevail, will the shifts of governmental responsibilities to states and local jurisdictions imply a rising role for the real property tax?

<sup>59</sup> The total "land taxes" on agricultural land consists of estimates of income taxes, transfer taxes, and property taxes. The "income" from, or return to land was derived from rent paid to nonoperator plus an amount charged to farm operator owners. It was assumed operator land income was proportional to the AELOS estimates of agricultural land value held by operators and nonoperators. Nonoperators held 38 percent of land value in 1988, which we assume has not changed substantially. Net rent to nonoperators in 1992 was \$9602.8 million, which, at 38 percent, implies a total return to land for both operator- and nonoperator-owners of \$25,270 million. At an income tax rate of 15 percent Federal, 3 percent state, the tax on annual return to land is \$4.5 billion. AELOS *op. cit.*; Erickson et al, Balance Sheet *op. cit.*; Economic Research Service.

Transfer taxes range from .01 percent (Colorado) to 2 percent (Delaware) in 36 states. Ownership of agricultural land changes infrequently--about 3.5 percent--for all types of transfers. Because only a limited number of states tax transfers, and many transfers are subject to limitations and exclusions, the total tax collected on transfers is probably small relative to income or property taxes. Assuming that \$22 billion (\$635 x .035) of farmland is transferred and taxed at 1 percent, \$220 million may be added to land taxes. Data on transfer tax rates from: U.S. Department of Commerce, 1982 Census of Governments *Taxable Property Values and Assessment-Sales Price Ratios*, Vol.2, (1984) p.xxx-xxxiii.

Inheritance or estate taxes on land are so dependent on estate planning, an aggregate revenue from inherited or gifted agricultural land is virtually impossible to determine accurately. All inheritance/gift taxes are about 2 percent of individual income taxes. About one third of farmland is inherited or bequeathed. If taxes on estates of farmland are proportional to inheritances and gift taxes generally, the land tax on inherited farmland would be about \$35 million. U.S. Department of Commerce, *Statistical Abstract of the United States, 1994*, 114th ed, (Sept 1994) table 505.

On agricultural land, income, transfer, and inheritances sum to \$4,755 million, which, when added to the 1992 estimate of \$4,879 million of real property taxes, result in a total land tax of \$9,634 million. In other words, about half of the tax on land is indirect or imputed; about half is a direct tax on the estimated (assessed) value

of land. U.S. Department of Agriculture, *RTD Updates: Agricultural Real Estate Taxes*. USDA Economic Research Service, (May 1994) p.2.

<sup>60</sup>On economic features, Netzer, *op.cit.*, and on legal features see: Joan Youngman, *Legal Issues in Property Valuation and Taxation: Cases and Materials*, Chicago: International Association of Assessing Officers (1994).

<sup>61</sup> Homestead exemptions exist in at least 20 states, U.S. Dept. of Commerce, *1987 Census of Governments Vol 2. "Taxable Property Values"* (Mar 1989) p.xxi. Partial exemptions for homesteads, veterans, and seniors exist in at least 31 states, U.S. Dept. of Commerce, *1992 Census of Governments Vol 2 "Taxable Property Values: Assessed Valuations for Local General Property Taxation"* (Aug 1994) p. xi.

<sup>62</sup> All 50 states have some form of preferential assessment for agricultural land; terms vary widely. J. David Aiken, *State Farmland: Preferential Assessment Statutes*, University of Nebraska RB310, (Sept 1989); U.S. Dept. of Commerce, *1992 Census of Governments op. cit.* Appendix C.

<sup>63</sup> Conversely, there may be a private interest in public land, an example of which is a private ranch adjacent to public grazing lands. Landowner entitlements to public services from roads or riparian access to navigable streams are other examples. The intermingling of public and private interests serves to make public and private property a continuum, not a dichotomy.

<sup>64</sup> J. Eckert, R. Gloude-mans, and R. Almy (eds), *Property Appraisal and Assessment Administration* Chicago: International Association of Assessing Officers (1990) p. 197. R. Netzer, *Economics of the Property Tax*, Washington DC: Brookings Institution (1966) p.33-36.

<sup>65</sup> "When property tax differentials are created and capitalized, they generate one-time capital gains or losses in property values." H. Aaron, *Who Pays the Property Tax?* Washington DC: Brookings Institution (1975) p.64. Indeed, as Pechman and Okner put it: "The proposition that the burden of the property tax on unimproved land falls on the owner when the tax is imposed or increased has been accepted by virtually every economist since Ricardo." J. Peckman and B. Okner, *Who Bears the Tax Burden?* Washington DC: The Brookings Institution (1974) p. 36.

<sup>66</sup> Stephen Munzer, *A Theory of Property*, NY:Cambridge University Press (1990), chapter 13, gratuitous transfers. Not all redistributions are without some offset. Neither are all transfers zero-sum; it is quite possible that the individual landowner and the public might gain from a transfer in either direction. Much of the general increase in land values is gratuitous to the individual in the sense that population growth, creating increased demands, cause increments in land values without any effort or saving on the part of the landowner.

<sup>67</sup> The 6 percent is arbitrary. Long term rates of return on farmland are more likely half this rate. Karl Gertel and Patrick Canning, *Returns, Interest Rates, and Cropland Prices in Selected Regions*, USDA Economic Research Service Technical Bulletin 1778 (May 1990). Lower interest rate would also be consistent with the national average of real property taxes representing 19 percent of the agricultural return, as determined by cash rentals in 1992, USDA Economic Research Service, Farm Cost and Return survey, special run.

<sup>68</sup> The taxation, and incidence of taxation, of separated interests has not been addressed here. One way of viewing the issue is that the owner of the fee interest, named as taxpayer in tax records, is the "tax collector" of all interests in the parcel. In a lease, for example, the landlord adapts the rental fee to cover the renters share of the tax including any risk that the rental will not be fully paid. The tax paid on a term easement could be taken into account in the price of the easement to the easement taker. Under such assumptions, assessing officials could assess the property for the full value of the property including the discounted present value of the lease and easement. For an extensive treatment of taxation in relation to separated interests see: Joan Youngman, "Defining and Valuing the Base of the Property Tax," *Washington Law Review* Vol. 58, No. 4, (Nov, 1983) pp. 713-812; Daniel Stockford, "Property Tax Assessments of Conservation Easements," *Boston College Environmental Affairs Law Review*, Vol. 17 (Summer 1990) pp. 823-853.

<sup>69</sup> As a practical matter, of course, such changes would be politically untenable, requiring major changes in state legislation. Every state except Connecticut, Maine, New Hampshire, and Vermont have some tax and expenditure limitation that affects the property tax. Many of the constitutional or legislative restrictions on local governments severely restrict the level and form of property tax. See: Advisory Commission on Intergovernmental Relations, *Tax and Expenditure Limits on Local Governments*, Information Report M-194, (March 1995).

<sup>70</sup> U.S. Library of Congress, *The Constitution of the United States of America: Analysis and Interpretation*, Washington: U.S. Govt Printing Office (1964) pp. 1149-50. Cases cited included *Southwestern Oil v. Texas* (1910), *Fox v. Standard Oil Co* (1935), *Stewart Dry Goods v Lewis* (1935). As for the regulatory (economic influence?) effect of taxation, Tribe sees little concern so long as the tax performs a legitimate tax purpose: "...the Court's expansive modern interpretation of the commerce clause substantially reduces the likelihood that a tax, even if found to be regulatory, would be held to be beyond congressional power." Laurence Tribe, *American Constitutional Law, 2nd ed*, Mineola NY: the Foundation Press (1988) p. 320. Presumably the same position held for the Federal government would extend to the powers of the States.

Bittker, in commenting on the limits of Federal powers of taxation, cites *Brushaber v. Union Pacific Railroad*, 240 U.S. 1 (1916), to say that " Courts could intervene if a taxing provision 'was so arbitrary...that it was not the exertion of taxation but a confiscation of property' but this reservation of a residual judicial function in extreme cases became a virtual dead letter." Boris Bittker, "Constitutional Limits on the Taxing Power of the Federal Government," 41 *Tax Lawyer* 3-12, (1987). The same would seem to apply to State authority.

<sup>71</sup> Jane Malme, *Preferential Property Tax Treatment of Land*, Cambridge MA: Lincoln Institute (1993) p. 22.

<sup>72</sup> Aiken, *op. cit.*

<sup>73</sup> For an extensive review and evaluation of the values of "givings" and "takings" see: C. Ford Runge, et al, *supra* note 15.