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POLICY COORDINATION AND THE TAKINGS CLAUSE: THE COORDINATION OF NATURAL RESOURCE PROGRAMS IMPOSING MULTIPLE BURDENS ON FARMERS AND LANDOWNERS

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I. INTRODUCTION

The Fifth Amendment[1] prohibits state and local "[g]overnment[s] from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[2] The United States Supreme Court's "ad hoc" approach to regulatory takings historically weighed the benefits gained by the public against the regulatory burdens imposed upon a property owner. This balancing of benefits and burdens is implicated by recent trends in farm policy and legislation requiring coordination[3] of agricultural land and related programs. Legislation requiring such coordination may have the effect of multiplying burdens for given benefits and assistance to a landowner.

This article considers whether the operative provisions of recent farm legislation constitute a taking. This study begins with an examination of policy and regulatory trends and their constitutional implications under takings jurisprudence. Part II argues that coordination of federal policies sustains agricultural land productivity and also reduces harm to water and other environmental qualities on and off the farm. Part III relates how, through voluntary participation, coordination programs enforce land use and management restrictions that collectively impose burdens, and possibly effect a regulatory taking. With coordination as an operative enforcement scheme, Part III of this article discusses land use, land management and farmland preservation

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1. U.S. CONST. amend. V.

2. Armstrong v. United States, 364 U.S. 40, 49 (1960).

3. Coordination and other regulatory mechanisms employed by the United States Department of Agriculture are succinctly explained in UNITED STATES DEPARTMENT OF AGRICULTURE, A NATIONAL PROGRAM FOR SOIL AND WATER CONSERVATION: THE 1988-89 UPDATE (1989) [hereinafter NATIONAL PROGRAM UPDATE]. It states:

> In the Food Security Act of 1985 [16 U.S.C. §§ 3801-45 (1988)], Congress and the President mandated broader coordination between USDA commodity and conservation programs. The act requires that participants in USDA commodity programs develop and implement conservation plans if they farm highly erodible fields. It also denies program benefits to persons who produce agricultural commodities on wetlands where conversion began after December 23, 1985. However, price and income support mechanisms provide incentives for some farmers to increase production without regard to environmental consequences. USDA will continue to seek ways to reduce or eliminate undesirable consequences of such policies and will seek other appropriate modifications in farm commodity programs whenever possible and practical. One of the goals is for USDA farm commodity and income support programs to conform with soil and water objectives.

NATIONAL PROGRAM UPDATE, *supra*, at 23.

Though the intentions of Congress and the President are noteworthy on production and conservation coordination, the linchpin of coordination is voluntary participation under long-term contracts. Because such contracts are not permanent, coordination may need to be extended under other terms or perhaps more forceful regulation. *See* Terry Cacek, *After the CRP Contract Expires*, 43 J. SOIL & WATER CONSERVATION, July-Aug. 1988, at 291.

policies and their separate constitutional validity by examining federal and state legislation, as well as judicial decisions. Parts IV and VI discuss whether enforcement mechanisms for coordinating policies that impose multiple burdens on landowners effect a regulatory taking under the Fifth and Fourteenth Amendments to the U.S. Constitution. Parts III and V further discuss whether the enforcement of natural resource use, planning, and control requirements to coordinate programs remains a valid regulation under the Court's ad hoc takings analysis. Consideration of these points requires reflection on the government's simultaneous enforcement of related public interests, the economic impact on farm operations, transfer and development, and the unwieldy nature of governmental regulation for the coordination of several programs. Parts III and IV also address whether coordination can be expanded to include programs that need consistency to control the hodgepodge of restrictions, standards, and requirements that may regulate nonexistent natural resource problems or conditions.

There is a great need for enforceable policies that protect the public interest in natural resources and farming. The effects of natural resource and farm regulation on private property, however, cause much concern. This article concludes that coordination of such programs can withstand a facial challenge under the Takings Clause. Such coordination, however, should be designed, planned, and implemented with due consideration for natural resource and economic conditions affecting property rights and economic expectations.[4] Notwithstanding recent Supreme Court decisions, coordination should, with Congress' new implementing regulatory scheme,[5] pass constitutional muster and survive a facial challenge.[6]

II. EXPANDING CROSS-COMPLIANCE AND COORDINATION UNDER FACT AND FSA

Land use, land management, and environmental policies[7] preserve and protect economic and natural resources on agricultural land. Although these policies are still implemented under separate regulatory programs, the Food Security Act of 1985 (FSA),[8] as amended by the Food, Agriculture, Conservation, and Trade Act of 1990 (FACT),[9] re-

4. *See infra* part VI.

5. *See supra* note 3; *infra* notes 10, 12 and accompanying text.

6. *See infra* parts V, VI.

7. For a discussion of land use, land management, and environmental policies and programs, see *infra* part IV.

8. 16 U.S.C. §§ 3801-3845 (1988).

9. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1401, 104 Stat. 3359, 3568, Title XIV (Title XIV codified at 16 U.S.C. §§ 1003a, 1010, 3801-3862 (Supp. II 1990) and 7 U.S.C. §§ 136i-1, 2814, 3130, 5401-5403, 5502-5506 (Supp. II 1990)).

quire their coordination. Under FSA and FACT, the Conservation Compliance Provision (CCP)[10] requires the coordination of land management policies,[11] including farm production and soil conservation, in order to maintain consistency between farm production and soil conservation programs.[12] As an enforcement mechanism, the CCP still remains an effective law, and promises coordination on an even greater enforcement level in the future.[13]

A. Federal Farmland Protection Policy

FACT amended the Farmland Protection Policy Act (FPPA) to increase support for state farmland preservation policies and programs.[14] The FACT amendments assist states by guaranteeing loans to establish farmland preservation trusts.[15] These trusts allow the states to preserve

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10. 16 U.S.C. § 3811, *amended by* § 1411, 104 Stat. at 3569. Land owners presently participating in the following conservation and commodity programs are required to participate in the soil and water conservation programs: chapters 2 and 3 of subtitle C of Title XIV of §§ 1439-1440, 104 Stat. at 3576 (agricultural water quality incentives and environmental easements); the Food Securities Act, 16 U.S.C. § 3831 (1988), *amended by* § 1431, 104 Stat. at 3576 (conservation reserve); the Agriculture Act of 1949, 7 U.S.C. §§ 1421-1471j (1988) (price supports and payments); the Commodity Credit Corporation Charter Act, 15 U.S.C. §§ 714-714p (1988) (farm storage facility loan); the Agricultural Credit Act of 1978, 16 U.S.C. §§ 2201-2202 (1988) (loans and credit support); the Federal Crop Insurance Act of 1980, 7 U.S.C. §§ 1501-1520 (crop insurance); and the Consolidated Farm and Rural Development Act, 7 U.S.C. §§ 1921-2006 (loans, loan insurance and guarantees).

11. For a detailed discussion of federal agricultural land management policies, see *infra* part IV.A.2.

12. *See* 16 U.S.C. § 3811. Subchapter II of the Erodible Land and Wetland Conservation and Reserve Program, entitled "Highly Erodible Land Conservation," provides in pertinent part:

> Except as provided . . . , any person who in any crop year produces an agricultural commodity on a field on which highly erodible land is predominate . . . shall be ineligible for
>
> . . .
>
> (2) a payment made under section 4 or 5 of the Commodity Credit Corporation Charter Act (15 U.S.C. 714b or 714c) during such crop year for the storage of an agricultural commodity acquired by the Commodity Credit Corporation . . . .

Id.; *see also* NATIONAL PROGRAM UPDATE, supra note 3, at 23.

For a listing of specific income, credit, and commodity programs, see *supra* note 10.

13. Jeffery A. Zinn, *Conservation in the 1990 Farm Bill: The Revolution Continues*, 46 J. SOIL & WATER CONSERVATION, Jan.-Feb. 1991, at 45, 48; *see also* Wendy L. Cohen et al., *FACTA 1990: Conservation and Environmental Highlights*, 46 J. SOIL & WATER CONSERVATION, Jan.-Feb. 1991, at 20. For the effectiveness of CCP, see *supra* note 10. For discussion on reducing soil erosion in a highly erodible area of Ohio, see Ted L. Napier & Anthony S. Napier, *Perceptions of Conservation Compliance Among Farmers in a Highly Erodible Area of Ohio*, 46 J. SOIL & WATER CONSERVATION, May-June 1991, at 220-24.

14. 7 U.S.C. §§ 4201-4209 (1988), *amended by* §§ 1465-1470, 104 Stat. 3359, 3316-3319. The amendments themselves are entitled the "Farms For The Future Act of 1990." Pub. L. No. 101-624, § 1465(a), 104 Stat. 3359, 3616.

15. The amendments state, in pertinent part:

> The Secretary, acting through the Farmers Home Administration, shall establish and

farmland by purchasing development rights, easements, or the fee simple.[16] The use of these trusts, however, does not obligate the state to coordinate farmland, environmental, and land management policies. Nonetheless, coordination remains the policy underlying land management programs such as soil conservation and farm production. Given Congress' reluctance to impose land use regulations on nonfederal land,[17] and the force and success of CCP land management policies,[18] it is expected that FPPA regulations for guaranteed preservation loans could eventually require states to coordinate farmland preservation and land management programs, at least on erodible agricultural land.[19]

B. Environmental and Water Quality Policy

Although FSA helped improve water quality both on and off the farm, the reduction of nonpoint source pollution from agricultural land was neither the primary congressional intent of FSA nor of the United States Department of Agriculture (USDA) in implementing FSA provisions.[20] To improve environmental quality as well as farm

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implement a program, to be known as the "Agricultural Resource Conservation Demonstration Program," to provide Federal guarantees and interest rate assistance for loans made by lending institutions to State trust funds.

Farms for the Future Act § 1466(a)(1), 104 Stat. at 3617.

16. Chapter 2 of Subtitle E, entitled the "Watershed Protection and Flood Prevention Act; Farmland Protection," provides, in pertinent part:

> It is the purpose of this chapter to promote a national farmland protection effort to preserve our vital farmland resources for the future generations.
>
> . . . .
>
> The term "eligible State" means—
>
> (A) the State of Vermont; and
>
> (B) at the option of the Secretary and subject to appropriations, any State that on or before August 1, 1991—
>
> (i) operates or administers a land preservation fund that invests funds in the protection or preservation of farmland for agricultural purposes; and Farms for the Future Act

§§ 1465(c)(3)(A)-(B)(i), 104 Stat. at 3616.

17. LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE 8-36 (1990).

18. *See supra* notes 7-13 and accompanying text.

19. For a discussion of state and local coordination, see James E. Holloway & Donald C. Guy, *Rethinking Local and State Agricultural Land Use and Natural Resource Policies: Coordinating Programs to Address the Interdependency and Combined Losses of Farms, Soils, and Farmland*, 5 J. LAND USE & ENVTL. L. 379 (1990).

20. NATIONAL PROGRAM UPDATE, *supra* note 3, at 8-11; SENATE COMM. ON AGRICULTURE, NUTRITION, AND FORESTRY, FOOD, AGRICULTURE, CONSERVATION, AND TRADE ACT OF 1990, S. REP. No. 357, 101st Cong., 2d Sess. 200, *reprinted in* 1990 U.S.C.C.A.N. 4656 [hereinafter SENATE REPORT ON FACT]. The major legislation guiding soil conservation during the last 50 years is the Soil Conservation Act of 1935, ch. 85, §1, 49 Stat. 163 (codified as amended at 16 U.S.C. § 590(a)-(q) (1988)). Charles Benbrook and others recognized that FSA did not adequately protect

productivity, FACT has as a major goal the reduction of nonpoint source pollution or agricultural runoff, thereby improving water quality on and off the farm.[21] FACT created Agricultural Water Quality Incentives (AWQI)[22] as part of an overall Agricultural Water Quality Protection Program (AWQPP)[23] "to assist owners and operators of a farm in developing and implementing a water quality protection plan."[24] Moreover, FACT amended existing land reserve programs, and added new ones to emphasize water quality. For example, the Conservation Reserve[25] was renamed the Agricultural Resources Conservation Program (ARCP).[26] FACT also amended the Conservation Reserve Program (CRP)[27] and added the Environmental Conservation Acreage Reserve Program (ECARP).[28] These programs allow the set aside of highly erodible agricultural land in order to protect water quality.[29] In some instances, erodible agricultural land enrolled in AWQI can remain in production,[30] since the program seeks to main-

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water quality when he noted that "[t]he most pressing environmental objective for the 1990 farm bill will be to do for water quality protection what the 1985 farm bill did for soil erosion control." Charles H. Benbrook, *The Environment and the 1990 Farm Bill*, 43 J. SOIL & WATER CONSERVATION, Nov.-Dec. 1988, at 440, 440.

21. The portion of FACT enunciating the goal of water quality improvement states, in pertinent part:

> The policy of Congress is that water quality protection, including source reduction of agricultural pollutants, henceforth shall be an important goal of the programs and policies of the Department of Agriculture. Furthermore, agricultural producers in environmentally sensitive areas should request assistance to develop and implement on-farm water quality protection plans in order to assist in compliance with State and Federal environmental laws and to enhance the environment.

16 U.S.C. § 3838; *see also* SENATE REPORT ON FACT, *supra* note 20, at 200, 203, 206, 267.

22. 16 U.S.C. § 3838.

23. *Id.*

24. *Id.*

25. 16 U.S.C. §§ 3831-3836.

26. § 1431(1), 104 Stat. at 3576 (codified at 16 U.S.C.§§ 3830-3839d).

27. §§ 1431-37, 104 Stat. at 3576 (amending 16 U.S.C. §§ 3831-3836 (1988)); *see also* §§ 1481-85, 104 Stat. at 3622 (codified at 7 U.S.C. §§ 5501-5505).

28. § 1431(2), 104 Stat. at 3577 (codified at 16 U.S.C. §§ 3830-3836).

29. § 1432, 104 Stat. at 3577 (codified at 16 U.S.C. § 3831).

30. § 1439, 104 Stat. at 3590 (codified at 16 U.S.C. § 3838). Under AWQI, the Secretary of Agriculture will provide incentives to reduce nonpoint source pollution caused by agricultural production. The statute provides, in pertinent part:

> In order to receive annual incentive payments, an owner or operator of a farm must agree—
>
> (A) to implement a water quality protection plan approved by the Secretary subject to the agreement established under this chapter;
>
> (B) not to conduct any practices on the farm that would tend to defeat the purposes of this chapter;
>
> (C) to comply with such additional provisions as the Secretary determines are desirable and are included in the agreement to carry out the water quality protection plan or to facilitate the practical administration of the program.

Id.

tain production while reducing runoff.[31] ECARP, implemented through CRP, improves water quality by retiring or setting aside millions of acres of highly erodible farmland not needed for the production of food and fibers.[32]

C. *Conservation Compliance for Water Quality and Farmland Protection*

To help reduce agricultural runoff, farmers participating in federal production programs must comply with CCP water quality goals.[33] In general, land management practices reduce soil erosion and can improve water quality.[34] Other conservation practices can be implemented to maintain productivity.[35] In many instances, however, environmental standards to improve water quality may be more stringent than those practices required to maintain productivity.[36] Despite the difference in practices and standards, CCP is the most effective provision to advance water quality goals, especially when land management, production and erosion control measures are the same as or similar to environmental practices that reduce agricultural runoff and improve water quality.[37] Therefore, it is safe to assume that water quality programs are well within the federal policy for the coordination of land management and production programs.

It is irrational to require farmers who participate in federally subsidized production programs to comply with CCP while not requiring farmers who participate in federal water quality and federally guaranteed state preservation programs to do the same. This inconsistency is evident in that both production subsidies and preservation loan guar-

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31. 16 U.S.C. § 3838.

32. *Id.* § 3830.

33. *Id.* § 3831.

34. *See* Holloway & Guy, *supra* note 19, at 398-400 nn.98-104. Under FACT, practices to improve water quality are defined broadly enough to include many conservation treatments and land uses that will also protect and sustain productivity on cultivable farmland.

The definitional section of AWQI provides, in pertinent part:

> The term 'agricultural water quality protection practice' means a farm-level practice or a system of practices designed to protect water quality by mitigating or reducing the release of agricultural pollutants, including nutrients, pesticides, animal waste, sediment, salts, biological contaminants, and other materials, into the environment.
>
> . . . The term 'source reduction' means minimizing the generation, emission, or discharge of agricultural pollutants or wastes through the modification of agricultural production systems and practices.

16 U.S.C. § 3838a.

35. Holloway & Guy, *supra* note 19, at 390.

36. *Id.* at 388 n.41.

37. *See* 16 U.S.C. § 3838a. *Contra* David G. Abler & James S. Shortle, *Cross Compliance and Water Quality Protection*, 43 J. SOIL & WATER CONSERVATION, Sept.-Oct. 1989, at 453, 454.

antees support agricultural land productivity. Both federal land management and state farmland preservation policies embrace productivity as a primary goal.[38]

III. THE NATURE OF THE REGULATORY PROGRAM AND THE CONSTITUTIONAL CONFLICT

Congress has required state and local governments to promulgate more effective mechanisms for implementing land use and environmental programs and for coordinating and implementing agricultural land management programs.[39] It is reasonable to assume that these three programs will be coordinated to maintain consistency among the objectives of the programs, since these measures often regulate the same farmland. Under CCP-like mechanisms, as landowners elect to participate or enroll in one program, they will often be required to participate in other programs or else forfeit benefits.[40]

These mechanisms may place the landowner in a difficult position. If onerous program requirements are rejected, the result could be a loss of benefits necessary to remain in production. This would raise the issue of whether the government is making the farmer what might be called "an offer that can't be refused."[41]

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38. Holloway & Guy, *supra* note 19, at 390-91.

39. The NATIONAL PROGRAM UPDATE sets forth national objectives and priorities for land management. It also identifies the relationship between federal and state resource goals and priorities:

> In most States, State priorities correspond to the national priorities of soil erosion reduction and water quality protection. In some States and in some local areas within States, erosion and water pollution are not the problems that are of greatest concern to citizens . . . .
>
> Under the updated NCP, USDA encouraged States to adopt new programs and fund them from State revenues. Many States responded; State and local funds for cost-share programs have increased from about $50 million in 1983 to $159 million in 1987 (constant 1987 dollars). The 1987 figure includes some funds that are to be used over several years or are in revolving funds. State and local governments employed more than 7,600 employees to assist in conservation efforts during 1987.
>
> Under the updated NCP, USDA will not only encourage State and local governments to increase their conservation funding but also coordinate its programs with and provide support for State efforts. Under the 1982 NCP, USDA redirected some of its technical and financial assistance to focus on national priorities. In fiscal year 1981, USDA directed almost 54 percent of its conservation funds to the national priorities of erosion control, water conservation, and flood-damage reduction. In 1984, the last year for which detailed information is available, 71 percent of conservation funds were directed to the national priorities. USDA will assist States and local governments in addressing State and local priorities to the extent possible, recognizing resource limitations.

NATIONAL PROGRAM UPDATE, *supra* note 3, at 15-16.

40. For a discussion of federal assistance and benefits given to landowners under various farm and farm related programs, see *infra* part IV.A.

41. FACT and FSA include forfeiture provisions, *see, e.g.*, 16 U.S.C. § 3832(a) (1988),

A. Coordination Under Cross or Conservation Compliance

Coordination should eventually become a more widely implemented and enforceable scheme for the regulation of farms, farmland, and related natural resources.[42] These schemes, as implemented under CCP or cross-compliance, effectively require farmers and landowners who voluntarily accept government assistance to comply with land management and environmental restrictions.[43] Coordinating these programs results in consistent federal policies for land use, land management, and environmental protection on and near agricultural land.

Until the enactment of the Conservation Title of the FSA, cross-compliance of land management policies, including soil conservation and farm production, was not a widely used mechanism for the coordination of federal policies.[44] Under CCP, however, FSA has become an effective regulatory tool for local and state soil conservation programs. FSA uses economic incentives and forfeitures to increase participation, and in turn relies on landowner economic needs to induce compliance.[45]

1. Regulating Natural and Economic Resources

FACT increases consistency between support programs by explicitly including farmland protection and expanding coordinated land man-

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which provide, in pertinent part:

> (a) Terms of contract. Under the terms of a contract entered into under this chapter, during the term of such contract, an owner or operator of a farm or ranch must agree —
>
> (1) to implement a plan approved by the local conservation district (or in an area not located within a conservation district, a plan approved by the Secretary) for converting highly erodible cropland normally devoted to the production of an agricultural commodity on the farm or ranch to a less intensive use (as defined by the Secretary)
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> . . . .
>
> (5) on the violation of a term or condition of the contract at any time the owner or operator has control of such land—
>
> (A) to forfeit all rights to receive rental payments and cost sharing payments under the contract and to refund to the Secretary any rental payments and cost sharing payments received by the owner or operator under the contract, together with interest thereon as determined by the Secretary, if the Secretary, after considering the recommendations of the soil conservation district and the Soil Conservation Service, determines that such violation is of such nature as to warrant termination of the contract.

Id. Landowners that do not comply with CCP requirements could forfeit agriculture credit, insurance, and commodity benefits. *See supra* notes 10, 12.

42. *See supra* part II.C.

43. *See supra* notes 10-12 and accompanying text.

44. Zinn, *supra* note 13, at 46.

45. *Conservation Districts Challenged*, 46 J. SOIL & WATER CONSERVATION, Jan.-Feb. 1991, at 50. For a discussion of the effectiveness of CCP or cross-compliance, see *supra* note 13 and accompanying text.

agement and environmental programs.[46] These policies and programs maintain protection for natural and economic resources. Thus, coordination concerns can be achieved through the regulation of economic and natural resources.

In many instances, federal and state courts have held that the regulation of farmland to prevent farmland conversion,[47] reduce soil erosion,[48] and improve water quality[49] does not effect a regulatory taking. This fact alone, however, does not mean that the coordination of these policies under many natural resource and economic conditions would not effect a regulatory taking. With coordinated regulatory schemes, degradable and erodible agricultural land under one natural resource program, such as land management, does not remain free of other programs, such as those addressing nonpoint source pollution. A simple illustration makes this clear. Suppose that a tract of erodible land is a needed economic resource in a community. If the land is subject only to land management controls under CCP, it could remain free of all other environmental and farmland preservation controls. Consequently, such regulation would allow agricultural runoff to pollute surface and subsurface waters. Moreover, farmland conversion would deplete the community's needed economic base. These environmental and economic costs are spread over the entire community. Regulating natural resource uses and harmful effects, however, would impose multiple burdens on individual landowners and farmers, creating burdens not borne by the public.

2. *Burdens Borne by Landowners*

Multiple burdens are borne by landowners and farmers through induced or mandated compliance with land use, land management, and environmental programs. Shifting such burdens to farmers and landowners seems quite distinct from the single, constitutionally valid burden borne through compliance with the restrictions imposed by one

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46. *See* 16 U.S.C. §§ 3811-3812 (addressing highly erodible land), 3821-3824 (wetlands conservation), 3830-3836 (conservation reserve contracts), 3837g (wetlands reserve easements), 3838-3838d (water quality).

47. For a discussion of the takings clause and its limitations on farmland preservation programs, see SARAH E. REDFIELD, VANISHING FARMLAND: A LEGAL SOLUTION FOR THE STATES 19-44 (1984). Redfield's discussion preceded the Court's 1987 takings trilogy. For a discussion of preservation of farmland and open space, see MALONE, *supra* note 17, at 14-1 to 14-35.

48. The Iowa Supreme Court held that soil and water conservation regulations that require mandatory participation by landowners do not effect a taking. Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276 (Iowa 1979). For a discussion of *Ortner*, see *infra* notes 316-23 and accompanying text.

49. *See infra* part IV.A.3-4. For a discussion of the difficulty in regulating nonpoint source pollution, see MALONE, *supra* note 17, at 8-35 to 8-61.

program. Although farmers and landowners receive numerous reciprocal benefits and assistance, multiple burdens may still raise a regulatory takings issue.[50] The validity of multiple burdens depends on such factors as the government's simultaneous enforcement of related public interests, the economic impact on farm operations, transfer and development, and the unwieldy nature of governmental regulation. Regulating resource conditions which do not constitute a resource problem does not "substantially advance legitimate state interests,"[51] and therefore may constitute a regulatory taking of private property.[52]

3. *Past Regulation of Land Use and Land Management*

Historically, farm regulation primarily employed voluntary single-purpose controls and techniques. Past policy did not favor the collective enforcement or coordination of land use, land management, and environmental programs and their controls. Federal planning and objectives for soil and water resources and productivity are saving requirements in coordinating land use, land management, and environmental programs.[53] Furthermore, federal planning helps tailor coordination to the economic and natural resource conditions of a particular locale, together with its farms and farmland.[54] Within local and state areas, resource planning and program tailoring insure that CCP maintains a causal nexus between coordination and legitimate state interests. As coordination seeks to balance farmland uses against natural resource conditions, CCP avoids the counterproductive effects that occur between conflicting and competing policies and programs.[55]

In the context of regulation and its impact on economic enterprises, much work remains to be done before coordination becomes a workable regulatory scheme of local and state governments, independent of an overriding federal control. As applied to farms and farmland, coordination requires much specificity, because of the dissimilarities among natural resource conditions, social needs, and the economic constraints of various local areas.

B. The Constitutional Issue Under The Takings Clause

Generally, neither land use, land management, nor environmental programs are takings per se. These programs have been found to sub-

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50. *See infra* part IV.A.4.

51. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

52. *See infra* part V.B.1.

53. For a discussion of national soil and water resource objectives and priorities, see NATIONAL PROGRAM UPDATE, *supra* note 3, at 7-9; *see also infra* note 158.

54. *See infra* part V.B.3.

55. *See supra* notes 3, 12 and accompanying text.

stantially advance legitimate state interest.[56] Nonetheless, although each program may individually withstand constitutional challenge under the Takings Clause, the coordination of land use, land management, and environmental policies still raises a fundamental constitutional issue. Since CCP and cross-compliance mandate coordination through voluntary participation in land use, land management, or environmental programs with subsequent mandatory enrollment in the remaining programs, these programs may affect a regulatory taking.[57] Coordination imposes restrictions on the development, use, and management of farms by attracting landowners and farmers with government economic incentives and assistance in exchange for compliance with program requirements.[58] As state and local governments identify natural resource conditions that must be regulated under CCP or cross-compliance, the economic incentives and assistance given to farmers for their participation will rapidly diminish.

Thus, farmers and landowners could face increasing restrictions on, and interferences with, more than one property right. Coordination could impose multiple burdens on treatment, productivity, and development. These multiple burdens may exceed the burdens borne by the public unless coordination schemes are carefully tailored to insure a reciprocity of benefits and mitigation of burdens. Coordination must assure that the benefits to farm owners adequately cover or offset the costs and effects they must internalize. Examples of internalized costs and effects include: (1) losses resulting from restrictions placed on either use or on economic development; (2) costs for compliance with either changed production, land use, or treatment requirements; (3) losses resulting from failure to comply with either voluntary treatments or production; and (4) losses for refusal to participate in coordinated land management and environmental planning.[59] It does not logically follow that the burden borne by farmers and landowners for their voluntary participation in one regulatory program is equivalent to the multiple burdens borne by farmers and landowners for their voluntary participation in two or more coordinated programs.

The federal government seeks to further several legitimate federal and state interests through coordinated programs to implement consis-

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56. *See infra* part V.B.

57. Galen Fountain, Comment, *Land Use Related Restrictions and the Conservation Provisions of the Food Security Act of 1985: Sodbuster and Swampbuster*, 11 U. ARK. LITTLE ROCK L.J. 553, 564 (1988-89) ("The restrictive nature of the Act might suggest an unlawful taking of private property without just compensation.").

58. *See supra* notes 3, 12 and accompanying text.

59. *See infra* parts IV.B.2-3, IV.C.

tent land use, land management, and environmental goals.[60] Coordination under CCP allows government to subject farmers' and landowners' property rights to more than one restriction and interference simply by stating that the concomitant multiple burdens caused by coordination were voluntarily accepted by the landowners and farmers.[61] The federal and state governments undoubtedly will argue that such self-imposed burdens do not differ from burdens imposed under separate programs. When challenges do arise under the Takings Clause, state and federal governments will argue that such voluntary impositions are not the same as mandated restrictions and interferences that constitute a regulatory taking.

The Supreme Court's recent opinion in *Yee v. City of Escondido*[62] lends some authority to this argument. In *Yee*, the Court reviewed claims by mobile home park owners that the combined effect of local rent control ordinances and mobile home residency laws prevented them from increasing rent.[63] The park owners alleged that this amounted to a government sanctioned physical invasion of their property by park tenants, entitling them to just compensation. The Court declined to find a taking in part because the affected landowners *voluntarily* invited the tenants onto their land.[64] The park owners' claims, therefore, lacked the mandated acquiescence in a government program that might amount to a taking.[65] It would appear from *Yee* that voluntary government programs do not, in and of themselves, amount to takings.

State and federal governments facing taking challenges to policy coordination can rely on *Yee*'s language regarding voluntary participation. True, landowners can either take it or leave it.[66] Those farmers and landowners who choose to take it, however, are first saddled with a single burden, such as a use restriction, followed by either an increase in that burden or the imposition of additional burdens, such as development, management, or transfer restrictions.[67] Obviously, simply focusing on the voluntary nature of policy coordination does not yield a satisfactory answer.

Ultimately, coordination should meet constitutional muster. The success of the government's argument, however, does not rest on vol-

60. *See supra* note 3.
61. 16 U.S.C. § 3811 (1988); *see supra* notes 3, 10, 12.
62. 112 S. Ct. 1522 (1992).
63. *Id.* at 1526-27.
64. *Id.* at 1528.
65. *Id.* at 1528 (quoting FCC v. Florida Power Corp., 480 U.S. 245 (1987)).
66. *See* 16 U.S.C. § 3811.
67. *Id.*

untary participation, followed by self-imposed obligations of coordination. Arguments focused on the distinction between mandated restrictions and voluntary participation do not address the crux of the regulatory takings conflict: an initially voluntary obligation subsequently multiplied by coordination. An argument for the constitutionality of farm policy coordination, therefore, must be rooted in a weighing of benefits and burdens.

C. *Coordination With Multiple Burdens and Conflict*

Coordination can impose on land multiple burdens not borne by the public. Instead, burdens are shouldered solely by farmers and landowners who often must willingly agree to coordination requirements because it may be their only way of qualifying for federal and state funds, assistance, or subsidies.[68] Since land management, land use, and environmental programs all impose forfeitures and penalties to effect coordination through CCP,[69] the costs and denial of program incentives and assistance can only lead to a landowner-government conflict. This conflict begins with a takings question, which must be closely examined in light of existing takings jurisprudence.[70]

Later portions of this article discuss how takings jurisprudence should be viewed when landowners mount a facial challenge against coordination's potential to cause unwanted, self-imposed multiple burdens.[71] In an earlier article, we suggested that the coordination of consistent natural resource goals under separate land use and land management programs would survive scrutiny under existing takings jurisprudence.[72] In light of FACT and its expanded farmland protection policy, increased environmental emphasis, and retained coordination of land management,[73] we now offer a more detailed analysis of this timely and essential constitutional question. FSA, FACT, and late 1980's national resource program goals point to a policy that recognizes heightened natural resource and environmental concerns.[74] This concern ultimately increases farm and farm related regulations that impact landowners' property rights. Since FACT expanded CCP,[75] the takings question is not an aberration. Such expansive regulatory provisions point toward planning and regulation of land use, land manage-

68. *Id.*
69. *See supra* note 41 and accompanying text.
70. *See infra* part V.A.
71. *See infra* part V.A.2.
72. Holloway & Guy, *supra* note 19, at 412-28.
73. *See supra* note 46 and accompanying text.
74. *See id.*
75. *See supra* part III.A.

ment, and environmental programs through the coordination of mutually consistent farm and natural resource objectives.[76] By increasing emphasis on state and local government planning and controls, the federal government effectively prompts states to employ various mechanisms that simultaneously implement coordinated programs and impose multiple burdens.[77] As federal, state, and local governments seek to jointly implement coordinated programs, either through multipurpose mechanisms or single-purpose mechanisms, landowners and farmers still must bear multiple burdens. Inevitably, the multiple burdens imposed by coordinated programs will lead to takings challenges by landowners.

IV. LAND MANAGEMENT, ENVIRONMENTAL, AND LAND USE RESTRICTIONS AND REQUIREMENTS

State and federal governments have implemented various single-purpose mechanisms, controls, and techniques to protect agricultural land, as well as farming, soil, and water resources. Agricultural land policy is currently implemented through environmental, land management, and land use regulation.[78] Similarly, regulation provides use restrictions, program incentives, contracts, and tax relief, but depends primarily on voluntary participation by farmers and landowners.[79] Many of these programs do not induce meaningful or long-term natural resource preservation. Additionally, many land management, environmental, and farmland preservation policies are not backed up by effective programs.

A. State Interests and Corresponding Requirements and Restrictions

To fully appreciate the need for coordination, it is necessary to review the ever expanding role of land use, land management, and environmental regulation. Additionally, an understanding of the scope of current regulation practices shows how coordination may lead to a takings challenge.

1. Farmland Protection

All states have established agricultural land preservation programs.[80] Essentially, participation remains voluntary.[81] Agricultural land preser-

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76. *See supra* note 3.

77. *See supra* note 39.

78. *See supra* notes 3, 7-10.

79. *Id.*

80. *See* NATIONAL AGRICULTURAL LAND STUDY—THE PROTECTION OF FARM LAND 11-20 (1980) [hereinafter NALS—PROTECTION OF FARMLAND]; MALONE, *supra* note 17, at 6-5 to 6-6.

81. NALS—PROTECTION OF FARMLAND, *supra* note 80, at 30-31; REDFIELD, *supra* note 47, at 108-09.

vation controls and techniques consist of permits for use,[82] agricultural districts,[83] agricultural zoning,[84] differential tax assessment,[85] purchase[86] and transfer[87] of development rights, and right-to-farm statutes.[88] These controls and techniques provide financial incentives, restrictions on use, preferences for use, and security for farmers and landowners.[89] Since these programs generally hinge on voluntary participation, they are inadequate to control the individualistic economic incentives for farmland conversion and idleness.[90] Nevertheless, the policies and objectives of farmland preservation programs remain important goals for the states.[91]

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82. NALS—PROTECTION OF FARMLAND, *supra* note 80, at 14; REDFIELD, *supra* note 47, at 100-01.

83. Agricultural districts are composed of farmers who voluntarily have agreed to preserve their farmland for a term of years in return for the receipt of specific rights and benefits, such as tax relief, protection from certain legal actions, and other protection. NALS—PROTECTION OF FARMLAND, *supra* note 80, at 18; REDFIELD, *supra* note 47, at 103-07; MALONE, *supra* note 17, at 6-51 to 6-59.

84. Agricultural zoning is "[a] legally binding designation of the uses to which land may be put, including the type, amount, and the location of development." NALS—PROTECTION OF FARMLAND, *supra* note 80, at 13. Often a large minimum lot size (20-160 acres) is stipulated in an agricultural zone. *Id. See also* REDFIELD, *supra* note 47, at 101-03; MALONE, *supra* note 17, at 6-38 to 6-39.

85. Differential assessment of farmland allows the local government to assess farmland based on the farm use value of the land rather than on its market value. There are three major types of differential assessment: pure preferential assessment with full abatement; deferred taxation with partial or no abatement; and restrictive agreement, under which a farmland owner contracts to maintain his land in farm uses in return for a lower assessment. NALS—PROTECTION OF FARMLAND, *supra* note 80, at 14; MALONE, *supra* note 17, at 6-59 to 6-65.

86. Purchase of Development Rights (PDR) programs permit the government or private parties to purchase the development rights from farmland owners, but leave them all other ownership rights. The price of the rights is the diminution in the market value of the farmland resulting from of the removal of the development rights. The remaining value of the land is the agricultural or use value. NALS—PROTECTION OF FARMLAND, *supra* note 80, at 13; REDFIELD, *supra* note 47, at 99; MALONE, *supra* note 17, at 6-66 to 6-70.

87. Some state and local governments have established Transfer of Development Rights programs. Farmland owners are given the power to transfer development rights to another area or parcel of land having a more restricted use. The developer pays the owner for the development rights, and the public avoids the cost of purchasing the development rights. NALS—PROTECTION OF FARMLAND, *supra* note 80, at 24-26; REDFIELD, *supra* note 47, at 98-99; MALONE, *supra* note 17, at 6-70 to 6-74.

88. Right-to-farm laws are statutes that prohibit local governments from enacting local ordinances that restrict normal farming practices unless the practices endanger public health or safety; these laws also provide farmers with some protection against private nuisance laws. NALS—PROTECTION OF FARMLAND, *supra* note 80, at 13, 18; REDFIELD, *supra* note 47, at 97-98; MALONE, *supra* note 17, at 6-22 to 6-38.

89. REDFIELD, *supra* note 47, at 95; NALS—PROTECTION OF FARMLAND, *supra* note 80, at 27-32.

90. REDFIELD, *supra* note 47, at 108-09; NALS—PROTECTION OF FARMLAND, *supra* note 80, at 31.

91. *See* NALS—PROTECTION OF FARMLAND, *supra* note 80.

Most state farmland preservation programs are voluntary. Landowners are not required to participate in agricultural land use programs. This permits noncompliance with land use regulations.[92] These programs do not overcome the individual economic incentives for conversion,[93] independence associated with land ownership,[94] and the divisiveness of attracting only a portion of the tract owners.[95] Yet these programs are politically safe and easy to enact.[96] Although most states have preserved some agricultural land, conversion still threatens many acres of agricultural land.[97]

2. *Land Management*

Federal land management programs include production controls as well as soil and water conservation policies. Although production and conservation policies and programs directly affect farmland uses, they primarily address agronomic concerns such as cultivation and conservation treatment.[98] Agronomic and related restrictions insure the proper management of agricultural land for desired production purposes and cultivation practices, such as cropland and its erodibility. State agencies such as local soil and water conservation districts assist in the implementation of federal production and conservation programs.[99]

a. Soil and water conservation

All states have established at least some soil and water conservation program, but the controls and techniques in these programs usually make participation voluntary.[100] Controls and techniques in soil con-

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92. *See, e.g.*, NALS—PROTECTION OF FARMLAND, *supra* note 80, at 31; REDFIELD, *supra* note 47, at xvii.

93. REDFIELD, *supra* note 47, at 108-09; NALS—PROTECTION OF FARMLAND, *supra* note 80, at 31.

94. JOHN OPIE, THE LAW OF THE LAND 186 (1987).

95. *See* NALS—PROTECTION OF FARMLAND, *supra* note 80, at 31.

96. *Id.* at 30.

97. UNITED STATES DEPARTMENT OF AGRICULTURE, THE SECOND RCA APPRAISAL: SOIL, WATER, AND RELATED RESOURCES ON NONFEDERAL LAND IN THE UNITED STATES—ANALYSIS OF CONDITIONS AND TRENDS 24-25 (1989) [hereinafter SECOND RCA APPRAISAL].

98. *E.g.*, 16 U.S.C. §§ 3831-36 (1988 & Supp. II 1990).

99. *See supra* note 39.

100. *See, e.g.*, NATIONAL PROGRAM UPDATE, *supra* note 3, at 12-14; UNITED STATES DEPARTMENT OF AGRICULTURE, 1980 APPRAISAL PART II—SOIL, WATER, AND RELATED RESOURCES IN THE UNITED STATES: ANALYSIS OF RESOURCE TRENDS 9 (1980) [hereinafter 1980 APPRAISAL—PART II]; SANDRA BATIE, CRISIS IN AMERICA'S CROPLANDS? xv (1983).

servation programs are initiated by soil conservation district acts,[101] and include land use regulations,[102] conservation contracts,[103] nonpoint source pollution control plans, as well as regulations,[104] tax incentives,[105] and sediment and erosion control regulations.[106] Federal, state, and local governments have generally not required compliance with controls and techniques, even when government cost sharing is provided to reduce the financial burden.[107] Moreover, voluntary controls and techniques have not sufficiently induced owners to restrict the exercise of their property rights, or forced owners to incur the expense of installing or applying soil conservation practices.[108] Prior to FSA and FACT, voluntary controls and techniques under most federal, state, and local soil conservation programs failed to control soil erosion.[109]

b. Farm commodity programs: income, price supports, and credits

Various farm commodity programs have been enacted in an effort to stabilize agricultural prices and farm income.[110] Under FACT and

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101. Soil and water conservation district acts are state enabling statutes that create soil and water conservation districts, provide for district organization and grant the district powers to enhance soil and water conservation. *See, e.g.*, N.C. GEN. STAT. §§ 139-1 to 139-15 (1983 & Supp. 1991); IOWA CODE ANN. §§ 467A.2-A.75 (West 1971 & Supp. 1989). "All [soil conservation districts] have entered into memoranda of understanding with the Secretary of Agriculture wherein each agrees to develop a program that outlines conservation priorities. The Secretary agrees to assist the [districts] in carrying out their programs." 1980 APPRAISAL—PART II, *supra* note 100, at 236-37.

102. Some conservation districts can adopt land use regulations to control and to prevent soil erosion as well as to require the use of other conservation practices and land uses. 1980 APPRAISAL—PART II, *supra* note 100, at 248-49, 252-53. Many conservation districts have refused to adopt land use regulations to control soil erosion. James L. Arts & William L. Church, *Soil Erosion—The Next Crisis?*, 1982 WIS. L. REV. 535, 579.

103. The land conservation contract is an agreement between the district and the landowner. The districts agree to provide cost-sharing and technical assistance to landowners who participate in soil and water conservation planning. The land owner agrees to implement conservation planning and to apply conservation land uses or practices or both. *See* 1980 APPRAISAL—PART II, *supra* note 100, at 236-37.

104. For a discussion of nonpoint source pollution programs, see *infra* part IV.A.3.

105. Income tax incentives are also allowed by the federal and state governments. Some states allow income tax deductions and credits for the application of conservation measures and purchase of conservation tillage equipment. *See, e.g.*, N.C. GEN. STAT. §§ 105-151.13 (1989).

106. Soil erosion and sediment control has been recognized as a serious environmental problem on agricultural and non-agricultural land, but an acceleration of soil erosion and sedimentation has occurred because of changes in land use from agricultural to urban uses and residential, industrial, and commercial developments, and other land disturbing activities. Consequently, state policy was formulated to establish laws to control and prevent soil erosion and sedimentation on urban lands, especially those under construction. 1980 APPRAISAL—PART II, *supra* note 100, at 237.

107. *See supra* note 100.

108. *Id.*

109. *See supra* part IV.A.2.a.

110. SENATE REPORT ON FACT, *supra* note 20, at 25. For a history and analysis of federal

FSA, these programs are also intended to preserve "our abundant natural resources, the United States' role in world trade, our ability to provide food at reasonable prices to consumers, and to assist the needy at home and abroad."[111] These goals are accomplished through price supports, target prices, loans and credit support, export programs, storage facility loans, and other programs.[112]

FSA and FACT hold farm commodity and resource conservation policies as major goals.[113] Under section 1211 of FSA,[114] and its amendment through section 1411 of FACT,[115] CCP applies to landowners participating in commodity programs such as the Agriculture Act of 1949,[116] which provides price supports and payments, the Commodity Credit Corporation Charter Act,[117] which provides farm storage facility loans, and the Agricultural Credit Act of 1978,[118] which provides loans and credit support.

3. *Environmental Quality: Nonpoint Source Pollution*

The Clean Water Act of 1977[119] gives the states the opportunity to identify, regulate, and control nonpoint source pollution from farmland.[120] The Water Quality Act of 1987[121] places increased emphasis on controlling nonpoint source pollution to improve and protect ground and surface water. Under federal water quality legislation,[122] the states are required to implement, with the assistance of federal agencies, programs identifying and controlling agricultural runoff from agricultural or rural land.[123] Provisions of FACT will improve water quality when

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farm commodity programs and their impact, see generally LUTHER TWEETEN, FARM POLICY ANALYSIS 323-88 (1989).

111. SENATE REPORT ON FACT, *supra* note 20, at 19.

112. *Id.* at 19-26; BATIE, *supra* note 100, at 99-101.

113. SENATE REPORT ON FACT, *supra* note 20, at 25-26.

114. 16 U.S.C. § 3811 (1988).

115. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, § 1401, 104 Stat. 3359-3632.

116. 7 U.S.C. § 1421 (1988).

117. 15 U.S.C. § 714b(h) (1988). Other provisions of the Commodity Credit Corporation Charter Act also apply under CCP. 7 U.S.C. § 1421.

118. 16 U.S.C. §§ 2201, 2202 (1988).

119. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)).

120. 33 U.S.C. § 1288(j).

121. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (codified as amended at 33 U.S.C. §§ 1251-1387).

122. *See supra* notes 119-21. For an analysis of the federal nonpoint source pollution regulations that pertain to agricultural runoff, see MALONE, *supra* note 17, at 8-35 to 8-47.

123. NATIONAL PROGRAM UPDATE, *supra* note 3, at 11-14.

fully implemented.[124] Through FACT, Congress and the President have placed renewed emphasis on water quality.[125]

Farmers are encouraged to use "best management practices" (BMP) under areawide waste treatment management in order to control soil erosion that causes agricultural runoff.[126] Under the 1980 appraisal of land and water resources, the United States Department of Agriculture (USDA) defined a "[B]est [M]anagement [P]ractice (BMP) as a practice or a combination of practices that a state or designated areawide planning agency considers the most effective and practicable means of controlling the amount of nonpoint source pollution to meet water quality goals."[127] USDA and Environmental Protection Agency (EPA) guidelines for definitions of BMP have been unsuccessful in controlling nonpoint source pollution.[128]

The Rural Clean Water Program[129] (RCWP) is a temporary program established by the Rural Development and Related Agencies Appropriations Act. The RCWP amended section 208 of the Clean Water Act of 1972.[130] It is administered by the USDA and the EPA. The RCWP provides financial and technical assistance to farm operators in order to assist in installing BMPs to control and prevent nonpoint source pollution.[131] RCWP was initiated to study the use of BMPs to control nonpoint source pollution from agricultural land.[132] Projects initiated under the RCWP have yielded some benefits, but further study and better program design are needed.

4. *Effectiveness Of Natural Resource Programs*

Land use and production regulation such as incentives, use restrictions, and contracts implement agricultural land preservation, land management, and environmental programs. In some instances, land-

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124. *See supra* part II.B.

125. *Id.*

126. 33 U.S.C. § 1288(j).

127. 1980 APPRAISAL—PART II, *supra* note 100, at 291.

128. As Linda Malone points out:

> Both sections 208 and 319 require the use of "best management practices" (BMP) for control of nonpoint pollution. EPA's regulations define best management practices as "methods, measures or practices selected by an agency to meet its nonpoint source control needs." This generally unhelpful definition provides little guidance to states as to what constitutes BMP's. As a result, it is doubtful whether section 319 will have any greater success than section 208 in controlling nonpoint source pollution.

MALONE, *supra* note 17, at 8-36.

129. Pub. L. No. 96-108, 93 Stat. 821, 835 (codified at 33 U.S.C. § 1288(j) (1988)); *see also* 7 C.F.R. §§ 700.1-.43 (1991).

130. *Id.*

131. 33 U.S.C. § 1288(j)(1).

132. *Id.*

owners can receive legal benefits, payments, and incentives from two or more programs at once under federal and state natural resource policy.[133] But voluntary programs are not sufficient to support either federal or state natural resource goals and policies. Federal and state policies provide more protection under FSA and FACT, but these protections only apply to erodible or highly erodible farmland voluntarily enrolled in federal commodity programs.[134] Thus, these natural resource regulations do not comprehensively address federal and state policies.

But farmland preservation programs are ineffective for reasons other than voluntary participation. For example, although land preservation benefits and incentives help preserve agricultural land, they only indirectly reduce the financial burden on farmers.[135] Tax credits and incentives alone are not sufficient to prevent conversion or idleness.[136] Other programs admit to similar shortcomings. Although contracts for the purchase of development rights and for participation in agricultural districts are enforceable at law,[137] they are not perpetual between state or local governments and landowners.[138] Moreover, obligations under such contracts might not support land use policy when nonagricultural gains exceed the benefits received from land use contracts.[139] Other land use regulations, such as zoning and land use permits, are subject to exceptions and exclusions, such as variances and special use permits.[140]

Soil conservation and nonpoint source pollution programs utilize similar controls and techniques, and likewise fail to effectively control soil erosion. Furthermore, land use regulations are seldom promulgated and rarely enforced by local governments.[141] Although this inactivity avoids interference with the landowner's property rights, it does make for effective resource programs.[142]

Despite the failure of other measures, some resource programs have enjoyed modest success. Prior to the FSA, conservation contracts were

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133. *See infra* note 145 and accompanying text.
134. *See supra* notes 10, 12 and accompanying text.
135. *See supra* part IV.A.1.
136. *Id.*
137. *Id.*
138. *See id.*
139. *Id.*
140. REDFIELD, *supra* note 47, at 103.
141. *See supra* part IV.A.2.a.
142. *But see supra* note 102; IOWA CODE ANN. § 467A.44 (West 1971 & Supp. 1989); S.D. CODIFIED LAWS ANN. § 38-8A-6 (1985 & Supp. 1985). Iowa and South Dakota have mandatory soil and water conservation regulations.

rarely enforced by Districts.[143] Under FSA and FACT, however, conservation and environmental AWQI contracts can be enforced. For a failure to comply, the federal government can now terminate farm subsidies and credits[144] and demand repayment of past incentives and cost sharing.[145] It remains to be seen how effective conservation contracts will be in furthering resource conservation goals. Similarly, tax credits and deductions are partially successful. Tax incentives are usually effective in inducing compliance with soil erosion regulations.[146] Nonetheless, they are insufficient to offset the costs needed to install conservation practices.

As a whole, current soil conservation and nonpoint source pollution programs reflect a regulatory compromise among conflicting landowner property interests, land management policy, and environmental policy.[147] Federal and state natural resource programs fail to effectively induce participation, to provide adequate benefits and incentives, and to encourage management of the land. Because of these problems, land management programs have failed to control soil erosion, nonpoint source pollution programs have not protected water quality, and farmland preservation programs have failed to halt conversion.

B. Coordinating Environmental, Economic, and Natural Resource Policies and Programs

FSA and FACT implement CCP or cross-compliance. Natural resource and agricultural land policies and programs under FSA and

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143. *See supra* part IV.A.2.a.

144. 16 U.S.C. § 3811 (1988); *supra* notes 10, 12 and accompanying text.

145. Forfeitures are not the only penalty. *See supra* note 41. Landowners can be forced to repay funds if they terminate their contract before the expiration period. *See, e.g.*, § 1439, 104 Stat. 3359, 3590-3593 (codified at 16 U.S.C. § 3838b (1988)). It provides, in pertinent part:

> In order to receive annual incentive payments, an owner or operator of a farm must agree—
>
> (A) to implement a water quality protection plan approved by the Secretary subject to the agreement established under this chapter;
>
> . . . .
>
> (D) on the violation a term or condition of the agreement at any time the owner or operator has control of the land to refund any incentive or cost share payment received with interest and forfeit any such future payments as determined by the Secretary;
>
> . . . .
>
> (8) Termination.— The Secretary may terminate an agreement entered into with a participant under this chapter if —
>
> (A)(i) the producer agrees to such termination; or
>
> (ii) the producer violates the terms and conditions of the agreement; and
>
> (B) the Secretary determines that such termination would be in the public interest.
>
> (9) REFUNDS.— The Secretary shall obtain refunds of incentive and cost share payments with interest, to the extent determined by the Secretary to be in the public interest, if an agreement is terminated or violated.

Id.

146. *See supra* notes 104-06 and accompanying text.

147. *See infra* part IV.C.

FACT include restrictions and requirements for coordination that affect use and management of agricultural land. These programs and policies either require or provide for the following: (1) tying individual obligations through coordination and uses to government benefits and incentives;[148] (2) individualized planning to concurrently protect uses, water quality, and resources;[149] (3) establishment of interagency cooperation and communications among separate programs and schemes;[150] (4) forcible requirements for landowners who own finite, degradable resources with economic and ecological value;[151] and (5) creation of effective multipurpose mechanisms to implement and enforce management, natural resource, and land use obligations.[152] These provisions of FACT and FSA are now included in farm policy that creates consistent natural resource objectives and supports land management, environmental, and production programs.[153] Such policy now requires landowners to implement, through multipurpose mechanisms, planning, plans, and management for natural resource objectives.[154] These re-

148. *See supra* notes 10, 12 and accompanying text.

149. *See supra* part IV.A.2.a; 16 U.S.C. §§ 3832, 3812 (1988) (requiring that conservation plans be developed for erodible farmland enrolled in CRP and subject to CCP).

150. *See supra* notes 10, 12 and accompanying text.

151. 16 U.S.C. § 3811 (1988); *see supra* notes 10, 12 and accompanying text.

152. *See infra* note 154 and accompanying text; *infra* part V.B.3.

153. *See supra* part IV.B.

154. With respect to multipurpose mechanisms, FACT created a new, broader resource management plan. Holloway & Guy, *supra* note 19, at 442-44. It is a voluntary farm management mechanism that implements land use, land management, and environmental objectives and strategies for a farm. FACT states the following:

> Sec. 1451. INTEGRATED FARM MANAGEMENT PROGRAM OPTION.
>
> (a) ESTABLISHMENT.— The Secretary of Agriculture (hereinafter in this section referred to as the "Secretary") shall, by regulation, establish a voluntary program, to be known as the "Integrated Farm Management Program Option" (hereinafter referred to in this section as the "program"), designed to assist producers of agricultural commodities in adopting integrated, multiyear, site-specific farm management plans by reducing farm program barriers to resource stewardship practices and systems.
>
> (b) DEFINITIONS.—
>
> (1) IN GENERAL.— For purposes of this section—
>
> . . . .
>
> (C) The term "farming operations and practices" includes the integration of crops and crop-plant variety selection, rotation practices, tillage systems, soil conserving and soil building practices, nutrient management strategies, biological control and integrated pest management strategies, livestock production and management systems, animal waste management systems, water and energy conservation measures, and health and safety considerations.
>
> (D) The term "integrated farm management plan" means a comprehensive, multiyear, site-specific plan that meets the requirements of subsection (e).
>
> (d) ACREAGE.— In accepting contracts for the program, the Secretary, to the extent practicable, shall enroll not more than 3,000,000, nor more than 5,000,000, acre of cropland in the calendar years 1991 through 1995.
>
> (e) CONTRACTS.— The Secretary shall enter into contracts with producers to enroll

quirements also make programs sensitive to the interdependency of farming, soil and water resources, and farmland. Finally, such requirements help to establish consistent objectives and to provide for the timely and consistent implementation of farm and related agricultural land policies.[155]

1. Furthering Legitimate State Interests

Even though farmland preservation, land management, and environmental programs do not fully advance declared policies, FACT, FSA, and other legislation make some progress.[156] Farmland, soil, and water are interdependent natural resources, and their natural qualities and economic uses justify coordinated programs protecting their use and conditions.[157] In addition, the federal government established and updates its consistent and prioritized objectives.[158] Under FACT, FSA,

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acreage in the program. Such contracts shall be for a period of not less than 3 years, but may, at the producer's option, be for a longer period of time (up to 5 years) and may be renewed upon mutual agreement between the Secretary and the producer.

(f) REQUIREMENTS OF THE PLANS.— Each plan approved by the Secretary shall—

(4) describe the farming operations and practices to be implemented on such acreage and how such operations and practices could reasonably be expected to result in—

(B) the prevention of the degradation of farmland soils, the long-term improvement of the fertility and physical properties of such soils; and

(C) the protection of water supplies from contamination by managing or minimizing agricultural pollutants if their management or minimization results in positive economic and environmental benefits;

Pub. L. No. 101-624, § 1451, 104 Stat. 3359, 3604 (to be codified at 7 U.S.C. § 5822 (1988)).

It is also required under FSA and FACT that landowners enrolling in CRP and participating in CCP prepare and implement, with the assistance of the U.S.D.A. Soil Conservation Service (hereinafter SCS), soil and water conservation plans. 16 U.S.C. § 3832 (CRP); *id.* § 3812 (CCP).

Anderson and Baum propose a planning process that should work for all major resources and ownerships within a specific area and/or resolve specific conflicts. E. William Anderson & Robert C. Baum, *How To Do Coordinated Resource Management Planning*, 43 J. SOIL & WATER CONSERVATION, May-June 1988, at 216, 216. They state that "[t]he CRMP [Coordinated Resource Management Planning] process can be conducted in various ways, but certain basic elements must be observed . . . . Coordination must be achieved between major resources and uses made of them and among the various ownerships within the planned area or associated with resolving a specific conflict. . . ." *Id.* at 220.

155. *See supra* notes 148-52.

156. *See supra* part IV.A.4.

157. Holloway & Guy, *supra* note 19, at 383-85.

158. *See supra* part IV.A.4. The NATIONAL PROGRAM UPDATE as required by the Soil and Water Resource Conservation Act of 1977, 16 U.S.C. §§ 2001-09 (1988), establishes the national resource goals and objectives:

PURPOSE

The Soil and Water Resources Conservation Act directs that the programs administered by the Secretary of Agriculture for the conservation of soil, water, and related resources on the non-Federal lands of the United States be responsive to the long-term

and the USDA's National Program for Soil and Water Conservation,[159] the federal government has implemented a cooperative regulatory framework that seeks consistency in farmland preservation, production, water quality, and soil conservation programs. Coordination under federal auspices means the concurrent advancement of several policies and objectives.[160] Each program is forcefully implemented through CCP that requires a *quid pro quo* for a needed benefit[161] while requiring localized planning, use, production, and treatment on farmland.[162]

2. *The Policies and Purposes for Coordinating Farm and Related Agricultural Land Programs*

When the policies of farmland preservation, land management, and environmental programs are advanced consistently together under coordinated regulatory programs and schemes such as FSA and its CCP, conflicting policies and programs cease to counteract each other. FSA and FACT change natural resources policies and give greater support to these policies through CCP. FSA and FACT advance farm and related natural resource policies by giving recognition to the following: (1) the effects of the combined losses of farmland, soil, water quality, and farming;[163] (2) the need to cross-comply or tie benefits and incentives to production and use;[164] (3) off-the-farm effects of farming and the use of farmland;[165] (4) the need to strengthen recognized landowner

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needs of the Nation. To serve the long-term needs of the Nation, USDA programs assist land owners and land users to:

* Maintain and enhance the quality of the resource base for sustained use.
* Improve and protect the quality of the environment to provide attractive and satisfying places to live and opportunities for orderly growth.
* Improve the standard of living and quality of life in rural communities.

OBJECTIVES

As part of the National Conservation Program (NCP) established in 1982, USDA defined six long-term objectives of the Department's conservation activities for the 1988-97 NCP. These objectives are to:

* Reduce excessive soil erosion;
* Reduce agricultural nonpoint source pollution of water;
* Improve irrigation efficiency;
* Make more effective use of water;
* Reduce upstream flood damages; and
* Improve range in poor or fair ecological condition to good condition.

NATIONAL PROGRAM UPDATE, *supra* note 3, at 7.

159. *See supra* notes 3, 8, 9.
160. *See supra* notes 3, 10, 12 and accompanying text.
161. *See supra* note 10.
162. *See supra* part III.A.
163. *See supra* notes 3, 10, 12 and accompanying text.
164. *Id.*
165. *See supra* part II.B.

duties for planning, use, and preservation of natural resources;[166] and (5) the need for coordinated regulatory programs implementing natural resource decisions on agricultural land.[167] These recognitions advance natural resource policies by insuring consistent and prioritized objectives among conflicting policies and related programs. Consistent objectives look to advance simultaneously the declared policies of separate programs. Under FACT and FSA, owners and lessors voluntarily subject themselves to forceful CCP-imposed land use obligations.

3. *The Contingent, Forceful Obligation Under CCP*

The obligations of CCP are contingent upon the desired and inescapable need for government assistance and benefits. These obligations require landowners to comply with regulatory schemes requiring use, treatment, and planning. Such schemes are multipurpose mechanisms that implement the consistent objectives of land management, farmland preservation and environmental programs. Under FACT and FSA, coordination advances policies only because CCP imposes contingent, forceful obligations upon owners and lessors of farms and farmland.

Existing farmland preservation, land management, and environmental programs are still separate. Participation is usually voluntary; thus, constitutional challenges to those programs are not the issue. In designing effective programs, the constitutional challenge lies in the exercise of police power to coordinate schemes and programs when coordination consists of contingent obligations on private property. Coordination simply means that landowners and lessors have a contingent obligation to comply with regulations for farmland preservation, land management, and the environment.

Undoubtedly, coordination of the programs does not, in many instances, allow owners and lessors to make the highest and best use of their land. Coordination also prevents owners from indefinitely deferring investments and costs for agronomic use changes and other practices and treatment required of erodible farmland. Owners and lessors may, consequently, challenge use restrictions and operational requirements that provide off-the-farm benefits to the public. Of contingent obligations, those requirements and restrictions burden rights of private property owners for the benefit of the public. Since contingent

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166. *See supra* notes 10, 12 and accompanying text. CCP requires participation in conservation programs.

167. *Id.*; *see supra* note 3.

obligations are permanent until discharged, they raise a question as to whether coordination constitutes a regulatory taking under properly designed regulatory schemes.[168]

C. *Regulatory Program Requirements and Restrictions*

When landowners voluntarily give the *quid pro quo* for federal assistance, coordination requires natural resource planning, farm production management and practices, and agronomic use restrictions and environmental treatments to further the requirements of environmental, land use, and land management policies on erodible cropland, pastureland, rangeland, and forestland.[169] Requirements, standards, and restrictions on these lands, whether highly erodible or not, are determined by the natural and economic conditions on- and off-the-farm, such as soil capabilities, economic needs, farmland productivity, and water quality.[170] Farmland that is subject to one or more economic or natural limitations such as improper use, inadequate treatment, imprudent conversion or idling, and reduced surface and ground water quality, is likely to be burdened by restrictions and requirements.[171] Planning, conservation and production requirements, and use restrictions take place under the regulation of farming and agricultural land through coordination.[172]

Beyond restrictions on agricultural and nonagricultural uses and land practices, another restriction is needed to insure that economic and natural resources and conditions are considered in changing land use and practices. The use or treatment of erodible farmland will not be changed or converted if such changes reduce aesthetic and environmental qualities and substantially threaten social and economic conditions.[173] Notwithstanding restrictions and requirements under FSA and FACT, exceptions may be needed when economic and natural conditions, availability of funds, and other exogenous factors cause financial hardships on a farm.[174]

Coordination establishes requirements and restrictions on the use and operations of farms and erodible farmland in production.[175] Under FSA and FACT, coordination consists of reciprocal benefits and rights

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168. *See infra* part V.
169. *See supra* note 3; part II.A-B.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *See supra* note 10.

to substitute for restrictions on property rights.[176] Nevertheless, even with reciprocal benefits and voluntary participation under FSA and FACT, use restrictions and planning and operations requirements could eventually be challenged as a regulatory taking of private property for public use. Because coordination is implemented through CCP or cross-compliance, it is necessary to consider whether a facial challenge to CCP of FACT and FSA can pass constitutional muster under the Takings Clause of the Fifth Amendment.[177]

V. A FACIAL CHALLENGE UNDER THE COURT'S "AD HOC" TAKING ANALYSIS

The Takings Clause serves as a limitation to regulations that further the public interest by addressing destructive environmental and economic impacts on and off the farm.[178] The foregoing discussion of farm policies raises a question as to whether coordination initiated through voluntary participation exceeds this constitutional limitation. Answering this question requires a focus on the voluntary nature of participation in programs promoting land management, land use, and environmental quality. Notwithstanding landowners' contingent self-imposed obligations under cross-compliance mechanisms like CCP, the fairness and constitutionality of such multiple burdens bears discussion.

A. Doctrine, Basic Principles, and Rules

The Fifth Amendment requires just compensation when private property is taken for public use.[179] The Supreme Court has interpreted this provision as a guarantee that governments may not impose regulations that force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[180] The Court has refused to articulate any definite test for when a regulation runs afoul of the Fifth Amendment's guarantee, preferring instead to base such a determination on the facts and circumstances of each case.[181]

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176. *See supra* notes 8, 9.

177. Fountain, *supra* note 57, at 563-64 (stating FSA provisions do not constitute a regulatory taking).

178. *See infra* part V.A.1.

179. *See* U.S. CONST. amend. V.

180. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978).

181. United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958); *Penn Central*, 438 U.S. at 124.

1. The Ad Hoc, Factual Inquiries

Although indefinite, the ad hoc, factual inquiry[182] of a takings analysis focuses on specific factors: (1) the economic impact of the regulation; (2) the extent of interference with investment-backed expectations; and (3) the nature of government action.[183] These factors constitute, in part, the Court's test to balance conflicting public and private interests.[184] In a general sense, public and private interests come into play as governments impose use restrictions on private property to secure public needs and wants, such as open space and curtailing urban growth.[185]

In developing this balancing test, the Supreme Court has recognized that a "land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"[186] The Court recognizes that a variety of regulations substantially advance legitimate state interests and therefore are not takings.[187] For example, zoning laws that prohibit in-

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182. *Penn Central*, 438 U.S. at 125.

183. *Id.* at 124.

184. Agins v. City of Tiburon, 447 U.S. 255, 261-62 (1980).

185. *Id.*; *see also* Armstrong v. United States, 364 U.S. 40, 49 (1960).

186. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987). *Nollan*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), and First English Evangelical Lutheran Church v. City of Los Angeles, 482 U.S. 304 (1987) have generated much scholarly analysis of takings jurisprudence. For an analysis of land use and environmental policy in light of *Keystone*, *Nollan*, and *First English*, see MALONE, *supra* note 17, at 14-10 to 14-35. For a collection of articles discussing this trilogy, see MALONE, *supra* note 17, at 14-20 n.55; Charles L. Siemon, *Who Owns Cross Creek?*, 5 J. LAND USE & ENVTL. L. 323, 325-26 n.10 (1990).

For other relevant dicussion of the Court's takings trilogy, see generally Jerry L. Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights*, 37 KAN. L. REV. 529 (1989); Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285 (1990); Robert Meltz, *Federal Regulation of the Environment and the Taking Issue*, 37 FED. B. NEWS & J. 95 (1990); David A. Myers, *Some Observations on the Analysis of Regulatory Takings in the Rehnquist Court*, 23 VAL. U. L. REV. 527 (1989); Gene R. Rankin, *The First Bite at the Apple: State Supreme Court Takings Jurisprudence Antedating* First English, 22 URB. LAW 417 (1990); Randall T. Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH. U.L. REV. 847 (1989); Richard G. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 NOTRE DAME L. REV. 1 (1989); Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System With Integrity*, 63 ST. JOHN'S L. REV. 433 (1989); Susan J. Krueger, Note, Keystone Bituminous Coal Association v. DeBenedictis: *Toward Redefining Takings Law*, 64 N.Y.U. L. REV. 877 (1989); Lane Horder, Note, *Where is the Supreme Court Heading in Its Taking Analysis and What Impact Will This Direction Have on Municipalities?*, 28 NAT. RESOURCES J. 585 (1988); Anne R. Pramaggiore, Note, *The Supreme Court's Trilogy of Regulatory Takings:* Keystone, Glendale, *and* Nollan, 38 DEPAUL L. REV. 441 (1989). Other sources in this analysis are listed *infra* notes 266, 423.

187. *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (to establish urban zoning); *Agins*, 447 U.S. at 261 (to preserve open space in an urban setting); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978) (to preserve a historic landmark); *Keystone*, 480 U.S. at 486-87 (to prevent subsidence damages by subsurface mining operations).

dustrial use, preserve open space, and control urbanization may require owners to forego certain beneficial residential and commercial uses.[188]

In addressing the impact of the government action on the owner's parcel, the Court considers the nature and value of the interest that was allegedly taken or restricted.[189] The inquiry turns, however, on the total interests and rights in a tract or parcel rather than on any specific right or interest to determine whether a government action effects a taking.[190] A variety of restrictions on use and development do not necessarily amount to a taking. Facial and as applied challenges demonstrate that coordination, notwithstanding forfeitures and penalties, should withstand scrutiny under the Court's ad hoc, factual inquires.

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188. *See, e.g., Euclid*, 272 U.S. at 383-85; *Agins*, 447 U.S. at 262-63. In those instances, owners were not denied an economically viable use, but the permitted use was not the one contemplated by the owner. Likewise, historic preservation laws that limit alteration and development of historic structures and sites do not allow owners to make the most beneficial use. *See Penn Central*, 438 U.S. at 168. As in *Penn Central*, owners are not allowed to fully develop the property to its maximum economic potential. *Id.* at 131. Such restrictions on use and development, however, generally do not deny a reasonable beneficial or economically viable use. *See id.* at 136-38.

Other government actions have restricted or denied existing beneficial use and resulted in individualized harm to the owners' property interest. These circumstances are unlike zoning and other land use regulations that broadly affect local landowners who share the burden. For example, in Miller v. Schoene, 276 U.S. 272 (1928), the Court held that Virginia could use its police power to destroy one class of property in order to protect others. *Miller*, 276 U.S. at 279-80. Under this holding, Virginia did not have to pay for trees felled when it ordered Miller to destroy his diseased cedar trees in order to protect other orchard owners. *Id.* at 277, 279-80. As in *Miller*, when property rights are restricted, the burden can fall solely upon one landowner for the benefit of the general public.

189. *See* cases cite *supra* note 188.

190. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 n.8 (1992); *Penn Central*, 438 U.S. at 130-31. The Court compares the "value that has been taken with value that remains." *Keystone*, 480 U.S. at 497. In several instances, such as *Euclid*, *Penn Central*, and *Agins*, the Court's decisions demonstrate that reasonable restrictions on the right to use and develop air and surface rights do not effect taking in a variety of circumstances, even though those restrictions affect the owner's right to transfer or sell the property.

In *Keystone*, the Court found that the support estate was not such a valuable right that to burden it would constitute a taking. *Keystone*, 480 U.S. at 500-01.

In Hodel v. Irving, 481 U. S. 704 (1987), the Court found the right of devise and descent of property interest is of such Anglo-American historical importance that to abolish it effects a taking. *Hodel*, 481 U. S. at 717. The Court reaffirmed in Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987), that the right to exclude others is one of the most essential rights in the "bundle of rights." The Court's decisions demonstrate that some rights in the bundle of rights are more fundamental or essential than others, but none are supposedly sacrosanct, particularly use and development of the land.

The Court's recent opinion in *Lucas* does not alter these variables in the takings equation. In *Lucas*, the Court examined the narrow circumstance where a land use regulation deprives the owner of all economically beneficial use. The Court held that such a destructive regulation constituted a per se taking, unless the prohibited use inheres in the title of land itself in light of the state's common law of property and nuisance. *Lucas*, 112 S. Ct. at 2900.

2. *Facial Challenges Under the Takings Clause*

In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[191] the Court observed that:

> The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation.[192]

This distinction between facial and as applied challenges, however, does not affect a constitutional analysis of coordination since CCP does not seek to apply FSA and FACT to any specific farms or tracts of farmland. Clearly, CCP is facially constitutional.

This much is confirmed by reference to instances where the Court has reviewed the facial validity of a regulation. As the Court observed, the test of a statute's validity is fairly straight forward.[193] A statute regulating the use of land works an impermissible taking if it "denies an owner economically viable use of his land."[194] The denial of viable use is not the only yardstick against which regulations are measured.[195] The Court has also held that a regulation "can effect a taking if it does not substantially advance a legitimate state interest."[196] This "essential nexus" requirement may seem to pose a problem for coordination since it advances a variety of goals through separate powers and regulations.[197] Although policy coordination pursues a variety of ends, it nonetheless represents a rational means of accomplishing land use goals.

In *Keystone*, the Court found a *de minimis* taking when commercial mine owners or miners were forced to leave only two percent of the

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191. 480 U.S. 470, 493 (1987).

192. *Id.*

193. *Id.* (quoting *Agins*, 447 U.S. at 260); *see also Penn Central*; Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1980).

194. *Agins*, 447 U.S. at 260. The Court recently stated that regulations denying all economically beneficial use constitute a discrete category of per se takings. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). To be upheld, such regulations must enact common law limitations on property, inherent in the title itself. *Id.* at 2900.

Undeniably, coordinated programs do impose restrictions and requirements. *See supra* part IV.A.4. Such requirements do impact cultivation, treatment, and practices, as land use and land management. *See supra* part IV.A. For purposes of reviewing the constitutionality of coordination, however, the issue is not the denial of "all economically viable use," but the burdens imposed for permitted uses, and in some instances, subsidized uses. We do not mean to say that coordination could never deny "economically viable use" in some circumstances.

195. *See Keystone*, 480 U.S. at 485.

196. *Id.* (citing *Agins*, 447 U.S. at 260).

197. *See supra* parts IV.A.2.a, IV.A.3.

coal in the ground.[198] Pennsylvania's Antisubsidence Act[199] was held not to effect a taking under a facial challenge[200] because not all of the coal could be extracted before passage of the regulation.[201] The Court further reasoned that the act only required the owners to leave a small amount of the coal in the ground and that the regulation did not interfere with economically viable use.[202] Facial challenges, therefore, involve at least the following three elements: (1) a test of whether the statute in all instances denies economically viable use of the property; (2) an examination of the means and ends underlying the regulation; and (3) an evaluation of the remaining property value.

3. *As Applied Challenges Under the Takings Clause*

As applied challenges involve similar inquiries, but place them in the context of the facts of each case. Perhaps the best known example of an as applied challenge is the opinion in *Penn Central Transportation Co. v. City of New York*. In *Penn Central*, the city enacted a landmark preservation law to protect historic landmarks and structures.[203] The designation of a landmark was made by the Landmark Preservation Commission and thereafter modified or approved by the Board of Estimate.[204] Under the preservation act, owners were provided judicial review as of right after the final designation of a their building or property.[205] Designated landmarks could not be altered or destroyed without prior commission approval.[206] Under other ordinances, an affected owner could transfer development rights to other structures in the vicinity.

The Grand Central Terminal was designated a landmark, and the city block it occupied was designated a landmark site.[207] The terminal was owned by the Penn Central Transportation Company and its affil-

198. *Keystone*, 480 U.S. at 498.

199. PA. STAT. ANN. tit. 52, § 1406.1 (1966 & Supp. 1991).

200. *Keystone*, 480 U.S. at 501-02. An example of an applied taking is Penn Centr. Transp. Co. v. City of New York, 438 U.S. 104 (1978), in which the Court found that the Landmark Law interfered with neither existing terminal operations nor investment-backed expectation from existing operations. 438 U.S. at 136-38. But restrictions on existing operations were not the owner's primary concern; the owner of the terminal was pursuing or contemplating the exploitation of air space above the existing terminal. *Id.* The Court held that the Landmark Law did not prohibit all development of air space which in turn meant that the owner could not make the contemplated use of the air space nor make the expected profit from its on-site development. *Id.* at 136.

201. *Keystone*, 480 U.S. at 499.

202. *Id.* at 502.

203. *Penn Central*, 438 U.S. at 109.

204. *Id.* at 110.

205. *Id.* at 110-13.

206. *Id.*

207. *Id.* at 115-16.

iate. Penn Central entered into a lease with UGP Properties to construct a multistory office building over the terminal.[208] The commission rejected the plans for the building, however, because they would have destroyed the terminal's historic and aesthetic features.[209]

Penn Central then brought an action in the state court claiming that the landmark law was a regulatory taking of private property without just compensation.[210] The New York Court of Appeals concluded that the landmark law did not effect a taking,[211] and Penn Central appealed.[212] The U.S. Supreme Court found that the Landmark Law interfered with neither existing terminal operations nor investment-backed expectation from existing operations.[213] Restrictions on existing operations, however, were not the owner's primary concern; rather, the owner of the terminal was pursuing or contemplating the exploitation of air space above the existing terminal.[214] The Court held that the Landmark Law did not prohibit all development of air space,[215] which in turn meant that the owner could neither make the contemplated use of the air space nor make the expected profit from its on-site development.[216]

Thus, in this as applied challenge, the Court found that the application of New York City's landmark preservation regulations did not effect a taking. As with facial challenges, the Court inquired into a number of factors, including the continued economic viability of the property, the means and ends of the regulation (here assumed to be appropriate), and the value left in the regulated property. *Penn Central* and other as applied challenges illustrate the breadth of the Court's ad hoc approach.

B. The Character of Natural Resource Policy

Coordination furthers consistent and prioritized federal goals for the use, treatment, and protection of economic and natural resources on and off the farm.[217] Federal policy requires state and local governments, with the support of federal funds and technical assistance, to establish objectives that do not conflict with federal goals and poli-

208. *Id.* at 116.
209. *Id.* at 117-19.
210. *Id.* at 119.
211. *Id.* at 119-20.
212. *Id.*
213. *Id.* at 136-38.
214. *Id.*
215. *Id.* at 136.
216. *Id.*
217. NATIONAL PROGRAM UPDATE, *supra* note 3.

cies.[218] In addition, coordination requires state and local governments to balance the public interests in protecting natural resources against the private interests of property rights holders.[219]

1. Legitimate State Interest

The coordination of land management, farmland preservation, and environmental quality programs help advance the declared policies of each program. Farmland preservation policies protect a variety of public interests, such as open space, productive agricultural land, and farming.[220] Similarly, land management policies protect interests, such as agricultural productivity and soil and water resources.[221] Likewise, environmental policies for water protect both surface and ground water quality on and off the farm.[222] In coordinating policies, program coordination protects public interests by implementing consistent objectives, considering on and off the farm natural conditions, and promoting cooperative regulatory schemes.[223] The question remains, however, whether the purposes, benefits, and goals of coordination[224] constitute "legitimate state interests." In ascertaining whether those interests exist, in most instances, the Court has examined the declared policies and purposes of legislative acts.[225] Generally, the Court has required that a regulation represent a legitimate state interest, and that the means have some rational nexus to the end. An analysis of this two part requirement follows.

a. Distinct but interdependent state interests

Federal and state courts already have had opportunities to review the legitimacy of state interests embodied in farmland protection and preservation regulations.[226] Additionally, the U.S. Supreme Court has enumerated a variety of purposes that represent legitimate state interests.[227] For example, the Court in *Agins v. City of Tiburon*[228] found that a state policy to preserve open space in an urban setting was

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218. *Id.*
219. *Id.*; *see also supra* notes 3, 7-12.
220. *See supra* part IV.A.1.
221. *See supra* part IV.A.2.
222. *See supra* part IV.A.3.
223. *See supra* part IV.B.
224. *See supra* notes 3, 21, 33 and accompanying text.
225. *See* Nollan v. California Coastal Comm'n, 483 U.S. 125 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124-27 (1978).
226. *See infra* notes 230-31 and accompanying text.
227. *See supra* part V.A.1.
228. 447 U.S. 255 (1988).

a legitimate state interest[229] because the regulation protected local residents "from the ill effects of urbanization."[230] In urban, rural, and farm communities, farmland preservation policies protect open space for aesthetic purposes and preserves agricultural land and farming in the path of urban sprawl.[231] It is likely, therefore, that under *Agins*, farmland policies aimed at open space preservation embrace legitimate state interests.

With respect to farmland protection, federal policy to reclaim prime farmland has been held a legitimate federal interest.[232] The Court in *Hodel v. Indiana*[233] held that Congress could enact, under the Commerce Clause,[234] the Surfacing Mining Control and Reclamation Act of 1977 (Reclamation Act)[235] that mandates surface mine operators to reclaim surface mined land.[236] Moreover, the Court held that Congress could, under provisions of the Reclamation Act,[237] mandate that mine operators restore the topsoil on prime farmland to its original condition after surface mining the land.[238] The Court thereby recognized that preserving open space and preserving prime farmland represented legitimate state interests.[239] Likewise, some state courts have found that preserving farmland substantially serves the public's interest.[240]

In water quality and land management regulation, the state and federal courts have heard very few cases challenging the validity of soil conservation policies. The Iowa Supreme Court, however, has found

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229. *Id.* at 261.

230. *Id.* For discussion of the taking issue and its effect on farmland protection policy prior to *Nollan*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), and First English Evangelical Lutheran Church v. City of Los Angeles, 482 U.S. 304 (1987), see REDFIELD, *supra* note 47, at 19-36.

231. Many of the purposes for farmland preservation programs have been found to be legitimate state interests, *see supra* part V.A.1, but the constitutionality of farmland protection programs and techniques such as zoning and districting, raise substantial constitutional questions for many state and federal courts. *See generally* REDFIELD, *supra* note 47, at 36-55 (takings and due process challenges); Edward Thompson, Jr., *Temporary Takings and Farmland Protection: The Limited Import of* First Lutheran Church, *in* 1982 ZONING AND PLANNING LAW HANDBOOK 364, 372-74 nn.27-31 (Fredric A. Strom ed., 1982) (takings challenges).

232. *See generally supra* part III.B.

233. 452 U.S. 314 (1981).

234. U.S. CONST. art. I, cl. 8.

235. 30 U.S.C. §§ 1201-1328 (1988).

236. Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981).

237. 30 U.S.C. §§ 1257(d), 1265(a), (b)(7) (1988).

238. Hodel v. Indiana, 452 U.S. 314, 321-25 (1981).

239. *Id.* at 324 ("In our view, Congress was entitled to find that the protection of prime farmland is a federal interest that may be addressed through Commerce Clause legislation.").

240. A discussion of state court determinations of legitimacy is beyond the scope of this article. *See generally* 1 ARDEN H. RATHKOPF & DARREN A. RATHKOPF, THE LAW OF PLANNING & ZONING § 6.07, at 6-60 to 6-63 nn.121-129 (1957); REDFIELD, *supra* note 47, at 45-50.

soil and water conservation to be a legitimate state interest.[241] The state court's seminal soil conservation cases are *Iowa Natural Resources Council v. Van Zee*[242] and *Woodbury County Soil Conservation District v. Ortner*.[243] In these cases, the Iowa Supreme Court affirmed that "the state has a vital interest in protecting its soil."[244] As other federal and state courts address this issue, the nature and purpose of soil and water conservation policies and programs would lead one to believe that courts will follow *Van Zee* and *Ortner*.

This trend removes any doubt that the purposes of farmland preservation, land management, and environmental regulation serve legitimate state interests. Coordination does not change the purposes of these programs. Rather, it enhances their effectiveness, prioritizes their objectives, and promotes consistency.

b. The nexus requirement of *Nollan*

The legitimate state interests in farm regulation are enforced primarily through voluntary participation. Strict mandatory participation is not urged. Tying landowner obligations to the use of local, state, and federal funds and assistance,[245] as well as the priority of state and federal objectives,[246] provides the better strategy. Many landowners are subject to a greater burden,[247] especially owners of erodible land, because they are required to comply with environmental standards, use restrictions, and management requirements.[248] Such regulations are more enforceable since landowner needs and wants are directly tied to government assistance and objectives.[249] Linking government benefits to natural resource regulation provides a better balancing of the burdens on the landowner and the public.[250] Moreover, forceful soil con-

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241. For a discussion of the types of conservation measures imposed by CCP, see generally *supra* Part III.A.

242. 158 N.W.2d 111 (Iowa 1968).

243. 279 N.W.2d 276 (Iowa 1979).

244. *Van Zee*, 158 N.W.2d at 118.

245. *See supra* notes 10, 12 and accompanying text (discussing CCP provisions that make landowners ineligible to participate in federal farm programs).

246. *See* NATIONAL PROGRAM UPDATE, *supra* note 3, at 7.

247. NATIONAL PROGRAM UPDATE, *supra* note 3; *see also supra* notes 38, 158 and accompanying text (purposes of coordination and the mandate for setting soil and water conservation goals).

248. Individuals other than landowners and lessors could be affected by the provisions of FSA and FACT. "The realization that those direct payments or guarantee may be suddenly, and without warning, withdrawn will require a close monitoring of farm operators so that the bank's interest will be protected." Fountain, *supra* note 57, at 567.

249. BATIE, *supra* note 100, at 117-18; *see also supra* note 10 and accompanying text.

250. Classifying owners to determine eligibility for participation in natural resource programs is determined by resource qualities, land capabilities, and non-natural criteria. Classifying owners

servation obligations are necessary to further the objectives of farmland preservation programs that preserve erodible land.[251]

Coordination, whether state or federal, imposes obligations that seek the efficient use of public funds and assistance to benefit both landowners and the public.[252] If productive farmland is not threatened by two or more degrading qualities such as erosion, conversion, or nonpoint source pollution, it is not subject to coordination.[253] Most farmland, however, can have one or more degrading qualities, including vertical leaching and lateral movement of water and contaminants. When one or more of these qualities are found on farmland and landowners seek and accept price supports and other federal assistance, CCP then subjects them to enforceable use restrictions and requirements.[254] Such regulations create contingent obligations that are enforced by forfeitures and refunds for noncompliance.[255]

Coordination directly advances the protection and management of finite natural resources. Given that coordination "substantially advances" the same legitimate state interests advanced by separate pro-

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to participate in the CRP is based upon the duration of ownership of highly erodible land as well as other criteria. 16 U.S.C. § 3835 (1988), *as amended by* Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, § 1432, 104 Stat. 3359, Title XIV.

Land use and land management are determined by land capability on the farm and water quality off the farm. Such capability and quality makes farmland either suitable or unsuitable for cropland or other agricultural land. For example, class V thru VI lands are not suitable for cultivation, and much of class III and IV lands require intensive management. NATIONAL AGRICULTURAL LAND STUDY, SOIL DEGRADATION: EFFECTS ON AGRICULTURAL PRODUCTIVITY 47 (1980) [hereinafter NALS—SOIL DEGRADATION]. On these lands, owners will be forced to change their uses from crop land to either pasture land, forest land, or range land. Those uses are not as profitable as cropland and do not always provide an immediate return on invested capital.

In Hodel v. Indiana, 452 U.S. 314 (1981), the Court held that the prime farmland provisions under the Surface Mining and Reclamation Act of 1977, 30 U.S.C. § 1201 (1988), did not violate the equal protection and substantive due process guarantees of the Fifth Amendment. The Court found that reclamation requirements to protect prime farmland differ form state to state based upon the "lay of the land," flat or steep. *Hodel*, 452 U.S. at 331-33.

Under agricultural land use regulation, a similar situation might arise within a state. When land characteristics and qualities differ from owner to owner and from county to county, land use requirements might appear to be applied arbitrarily or discriminately across a state or county. However, conservation practices and changes in land use are needed and are imposed because land characteristics make farmland susceptible to natural and man-made degradation and conversion. When all land with similar characteristics, such as highly erodible land in production, is subject to the same land use regulations, arbitrary use restrictions and standards should, in most instances, be avoided. Moreover, in *Hodel* the Court recognized that land use requirements and exceptions based upon natural properties or lay of the land are not necessarily irrational or arbitrary. *Id.* at 332.

251. Holloway & Guy, *supra* note 19, at 444-45.

252. *See* NATIONAL PROGRAM UPDATE, *supra* note 3, at 23.

253. *Id.*

254. For the list of government programs that are listed under the CCP of the FSA and FACT, see *supra* note 10 and accompanying text.

255. *See supra* part IV.B.2.

grams for land use, land management, and environmental protection,[256] there still remains the question of whether coordination, as a legitimate state interest, "substantially advances" consistency among these conflicting natural resource programs.[257] This question may have been partially answered by the United States Supreme Court in *Nollan v. California Coastal Commission*.[258]

The Nollans had leased and purchased a beachfront lot in Ventura County, California.[259] In their agreement to purchase, the Nollans promised to remove and replace a small bungalow that was on the lot.[260] In order to do so, the Nollans needed a permit from the California Coastal Commission.[261] The commission issued a permit granting the Nollans approval to demolish the bungalow and construct a new house on the condition that the Nollans grant a public easement running parallel with the ocean.[262] The Nollans objected, but the commission overruled.[263] The Nollans filed an action in the state trial court claiming that the construction of a house on the beach front would adversely effect beach access. Later, the Nollans supplemented their complaint with a takings claim, alleging that the required easement violated the Takings Clause of the Fifth and Fourteenth Amendments.[264]

The Supreme Court held that the permit condition was in fact confiscatory.[265] The Court found that there was no essential nexus between the legitimate state interest and the condition imposed by the Commission.[266] The Court did not agree that beach access, though found to be a legitimate state interest,[267] could be "substantially advance[d]" by use restrictions in the nature of a condition that mandates the granting

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256. *See supra* part IV.B.1.

257. *Id.*

258. 483 U.S. 825 (1987).

259. *Id.* at 827-31.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. The trial court invalidated the condition on statutory grounds. The California Court of Appeals reversed the trial court in holding that there was not a violation of the takings clause. The Nollans appealed. *Id.* at 829-30.

265. *Id.* at 841.

266. *Id.* In the Court's ad hoc approach, the nexus test applied in *Nollan* has led to much scholarly debate. *See generally* Note, *Staring Down the Barrel of* Nollan: *Can the Coastal Commission Dodge the Bullet?*, 9 WHITTIER L. REV. 579 (1987); Note, *Taking a Step Back: a Reconsideration of the Takings Test of* Nollan v. California Coastal Commission, 102 HARV. L. REV. 448 (1988); William A. Falik & Anna C. Shimko, *The Takings Nexus: the Supreme Court Forges a New Direction in Land-use Jurisprudence*, 23 REAL PROP. PROB. & TR. J. 1 (1988); Steven J. Lemon et al., Note, *The First Applications of the* Nollan *Nexus Test; Observations and Comments*, 13 HARV. ENVTL. L. REV. 585 (1989).

267. *Nollan*, 483 U.S. at 841.

of an easement in return for a construction permit.[268] Since the commission did not seek a later easement,[269] it could not prove that public access from the highway would be affected.[270]

In contrast with the condition in *Nollan*, coordination directly furthers several state policies, including the prevention of soil erosion, farmland conversion, and nonpoint source pollution.[271] These policies are advanced by their respective programs as coordination imposes regulatory consistency and administrative efficiency on the use of government resources.[272] Coordination, therefore, represents no more than an administrative guideline attached to government resources. Coordination assures the efficacy of several programs that have potentially conflicting objectives and goals. In short, coordination recognizes the ineffectiveness of natural resource programs and reflects a government effort to make earlier voluntary programs enforceable.

2. *Coordinating Existing Policies*

The coordination of land management, land use, and environmental policies responds to rapidly changing farm, environmental, and natural resource conditions. These conditions raise concerns that lead to government action to control private interests and protect finite economic and natural resources.[273] As water quality, farmland, and agricultural productivity are affected by improper land use and management, forceful government action is needed to regulate land use and farm practices.[274] Prior to FSA and FACT, this use and management was a private concern, leaving agronomic practices and treatments under the control of farmland owners. FSA and FACT made public the enforcement of land use, treatment, and management.

a. Environmental and natural resource concerns

Past private concerns of landowners do not prevent regulation if future circumstances prove to be harmful to a legitimate state interest.[275] *Block v. Hirsh*[276] illustrates this point. In *Block*, a District of Columbia

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268. *Id.* at 839-40.
269. *Id.* at 840-41.
270. *Id.* at 841.
271. *See supra* notes 3, 7-12.
272. NATIONAL PROGRAM UPDATE, *supra* note 3.
273. *See supra* part III.A. The Conservation Titles of FSA and FACT are excellent legislative strategies, implementing farm and related resource policies for a fixed term of years. These titles are regulation to meet public concerns about natural resource and environmental conditions.
274. *See supra* notes 3, 7-12.
275. *See supra* part V.B.2.a.
276. 256 U.S. 135 (1921).

law prohibited owners and lessors from evicting tenants after the expiration of the lease.[277] Instead, the law made tenancies subject to regulations of a District commission.[278] Owners challenged the law as a taking of private property without just compensation.[279] The Court held, however, that a temporary District law enacted by Congress to regulate the leasing of buildings was not a taking.[280] It found that World War I conditions created a shortage of housing in the District.[281] This exigency created a legitimate state interest that justified the temporary regulation of rights to use property and to make contracts.[282] In its rationale, the Court noted that "[p]lainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern."[283] Thus, under limited circumstances, government can restrict what otherwise would be a private concern in order to protect the public interest.

In *Keystone*,[284] the Court used the same line of reasoning to hold that the legislation in question furthered the public, not the private, interest.[285] In *Pennsylvania Coal Co.*, the Court had, under similar facts, previously found that there was no public interest, finding only the protection of a private interest.[286] The Court reasoned that private interests cannot always be regulated for the public good by taking property rights without just compensation.[287] As Justice Holmes said, "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[288] In *Keystone*, the Court found that similar antisubsidence legislation did protect a public interest.[289] To distinguish *Keystone* from *Pennsylvania Coal Co.*, the Court invoked a line of reasoning used in *Block v. Hirsh* to justify its finding that there was a public interest in the regulation of subsurface mining.[290] The Court reasoned that Pennsylvania could not be estopped to permanently restrict mining opera-

277. *Id.* at 153-58.
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *Id.* at 157.
283. *Id.* at 155.
284. 480 U.S. 470 (1987).
285. *Id.*
286. Pennsylvania Coal Co. v. Mahon, 260 U.S. at 413-14.
287. *Id.* at 415.
288. *Id.*
289. *Id.* at 413.
290. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488-89 (1987).

tions that cause subsidence of surface estates.[291] The Court observed that surface owners did not acquire private rights or interests to protect themselves from a mining operation that was akin to a nuisance.[292]

b. Degradation and landowner inactivity

Changing circumstances on and off the farm reflect less private concern and need for more enforceable government regulation of natural resources and the environment. Increased water pollution and land degradation caused by farming and farm operations threaten natural resources and the environment. Though this pollution and degradation are not national emergencies, the degradation is contrary to the public interest. Not surprisingly, there exists an urgency to curtail further degradation caused by farming and farm operations. Many landowners have yet to recognize that they should exercise more responsibility to prevent environmental and land degradation.[293] Coordination mandates management requirements, pollution control standards, and use restrictions on farmland only after landowners voluntarily agree to accept government benefits. Through regulation, coordination protects farmland, farming, water quality, and agricultural productivity by simultaneously enforcing land use, land management, and environmental programs.[294]

3. Coordination Through Multipurpose Mechanisms

Enforcement mechanisms such as CCP require that landowners enter into a plan for use, management, and treatment. Planning, use, and treatment are designed, implemented, and monitored through single-purpose controls and techniques. Under farmland preservation, land management, and environmental regulation, many single-purpose techniques and controls have been found to be valid under the United

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291. *Id.* at 485-88.

292. *Id.*

293. NATIONAL PROGRAM UPDATE, *supra* note 3, at 8. The USDA believes that conservation is the responsibility of the landowner:

> This Update is based on the concept that individuals have an important ethical obligation to conserve and protect soil and water resources. It also acknowledges private property rights and responsibilities and that land owners are ultimately responsible for how their land will be used and treated. The Update recognizes agriculture as a strategic resource and encourages producers to implement environmentally sustainable resource management systems. The updated NCP seeks both to improve the profitability and competitive advantage of U.S. agriculture in the global marketplace and also to enhance the quality of life in rural America.

Id.

294. *See supra* part IV.B.

States Constitution.[295] Coordination, however, requires the enforcement of more than one of these controls and techniques to concurrently advance environmental, land use, and land management policies. Such enforcement uses multipurpose regulatory mechanisms to implement the purposes of these policies.

a. Supporting the public interest

Land use, environmental, and land management programs undeniably further legitimate state interests.[296] These programs further declared policies of Congress and state legislatures. In enforcing such policies, multipurpose mechanisms regulate treatment, use, and management by requiring planning. These mechanisms also impose programs, standards, restrictions, and requirements through single-purpose controls and techniques. In contrast with agricultural zoning and districting, multipurpose mechanisms control water pollution, farmland conversion, and soil erosion; they also make participation voluntary, take into consideration land capability, and require compliance with land use and natural resource objectives and planning.[297] Multipurpose mechanisms balance the objectives, priorities, and goals of each program, and then use the programs' single-purpose controls and techniques to implement each program.

b. Natural resource planning and analysis

Resource planning and analysis, such as farm management and area-wide plans,[298] identify land capabilities and then design management and treatment consistent with those capabilities.[299] Such identification

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295. *See supra* part V.B.1.

296. *Id.*

297. *See* Pub. L. 101-624, 104 Stat 3359, 3607 (1990). This subtitle establishes the "Integrated Farm Management Program Option." The program is "designed to assist producers of agricultural commodities in adopting integrated, multiyear, site-specific farm management plans by reducing farm program barriers to resource stewardship practices and systems." *Id.* A more detailed discussion of multipurpose resource management mechanisms is given *supra* part IV.A.2.a.

298. 104 Stat. at 3607.

299. *See id.*; NATIONAL PROGRAM UPDATE, *supra* note 3; *see also supra* notes 38, 158 and accompanying text (resource management and its purposes and objectives).

Land capability is essential in land use decisions to conserve, manage, and preserve farmland. Federal and state courts have recognized that land capabilities are factors to be considered in regulating land and its uses. Therefore, soil limitations that severely limit productivity could prevent farmland from being preserved under a farmland preservation program. Smeja v. County of Boone, 339 N.E.2d 452 (Ill. App. Ct. 1975) (holding that restrictions imposed by zoning ordinance did not advance a legitimate state interest where agricultural zoning was not allowed on part of farm that included submarginal soil). On the other hand, unsuitable cultivation and inade-

makes certain that farmland which is not degradable, producing runoff, or threatened by conversion is not subject to coordination. In regulating farmland, natural resource and management planning and analysis avoid the application of standards, restrictions, and requirements from coordinated programs. Enforcing more than one program creates an imminent danger that failure to plan for and analyze resource conditions could lead to the enforcement of restrictions and requirements on farmland not subject to conversion, runoff, or erosion. For example, requiring conservation treatments to control soil erosion on nonerodible land is an unnecessary burden on landowners in that such treatment is not required by resource conditions. The vertical movement of agricultural chemicals, however, such as pesticides, herbicides, and fertilizers, could pollute the ground water, a source of drinking water.[300] Additionally, farmland preservation for highly to moderately erodible cropland is potentially inconsistent with land management and water quality goals. Much of this cropland is not suitable for producing commodities, and agricultural runoff from this cropland reduces water quality.[301] In preserving erodible farmland, conservation treatments and use restrictions further farmland preservation and land management policies by protecting soils, water quality, and farmland. When farmland is not suitable for cultivation, however, these treatments and restrictions could be inconsistent with water quality and production policies where erodible land is protected by regulation.

With local and site-specific resource analysis and planning, coordination "substantially advance[s]" local and state land use, land management, and environmental policies.[302] Under multipurpose mechanisms, coordination insures that controls and techniques of these programs enforce only standards, restrictions, and requirements needed to treat and manage natural resource conditions. Even though it substantially advances legitimate state interests, coordination has an economic impact that is at the heart of any takings analysis.

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quate treatments are, at times, improper land management decisions. On much farmland in land capabilities classes I and II, improper decisions should not be grounds to declare farmland preservation regulations invalid or to refuse to treat and preserve the land. *See* Eck v. City of Bismarck, 302 N.W.2d 739 (N.D. 1981) (soil capabilities would produce average to above average yields). Legal challenges such as takings occur when farmland is changed from a more productive and profitable use to a less profitable but productive use, such as a change from crop land and pasture land.

The Court in Hodel v. Indiana, 452 U.S. 314 (1981), found that land characteristics, such as natural properties and the lay of the land, are not necessarily irrational or arbitrary in making natural resource regulations. *Id.* at 331-33.

300. SECOND RCA APPRAISAL, *supra* note 97, at 111-13.

301. For an analysis of the influence of land capability on land use, land management, and environmental regulation, see *supra* note 299.

302. *See supra* notes 3, 7-12.

VI. THE ECONOMIC AND PROPERTIED IMPACT ON LANDOWNERS

Although landowner participation is voluntary, coordination requires many landowners of erodible and degradable land in production to comply with farmland preservation, water quality, and land management regulations. Such regulations often may prohibit landowners from making the highest and best uses of their farmland. Moreover, the opportunity and practice of deferring or not applying water quality and conservation treatments on erodible land is denied. Landowners may, consequently, argue that use restrictions on their farmland constitute a regulatory taking.[303]

Use restrictions, conservation treatments, and management practices on farmland are determined by land and resource capabilities,[304] and are influenced by social factors[305] and economic conditions[306] on- and off-the-farm. Land and natural resource capabilities are determined by the characteristics of land, availability and need for farmland, and condition of water resources. Not all use restrictions, environmental standards, and management requirements required by coordination affect every other acre of farmland. Principally, regulations being complied with by landowners will depend upon whether affected farmland, or any part thereof, is improperly managed, is inadequately treated, is imprudently converted, or substantially reduces water quality.

A. The Economic Impact of Coordination

Coordination of land use, land management, and environmental programs make consistent the use, treatment, and management of farmland possessing degradable qualities where natural characteristics and current management are decreasing productivity, reducing water quality, and destroying aesthetic values. Under the coordination imposed by FSA and FACT, each program and its regulatory scheme provides reciprocal benefits and rights to substitute for economic losses from, and changes in, the use of private property rights that result from regulations under FSA, FACT, and state land use and environmental programs. With government giving landowners financial assistance and other economic incentives and benefits, regulatory standards, requirements, and restrictions of coordinated programs are

303. U.S. CONST. amend. V. The Takings Clause of the Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." *Id.* The Fifth Amendment Takings Clause applies to the states through the Fourteenth Amendment, U.S. CONST. amend. XIV. Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 236 (1897).

304. *See supra* part V.B.

305. Holloway & Guy, *supra* note 19, at 431-33.

306. *Id.* at 429-31.

lesser "private burdens."[307] Still, landowners must pay part of the cost for installing conservation treatments, complying with water quality standards, and changing land uses.[308]

Coordination requires changes in farmland treatment, use, and management. These changes result when natural and man-made conditions reduce the productivity and quality of natural resources and the environment. It is these degradable conditions and qualities that determined use restrictions, environmental standards, and management requirements. These regulatory means prevent and reduce environmental, economic, and natural resource losses. The extent of natural resource harm and losses under existing conditions and qualities determines the economic impact of coordination.

1. Economic Interests of Landowners—Hardship

Notwithstanding restrictions on property rights and land use, farm regulations that foreclose economic opportunities and reduce economic expectations do not constitute a taking.[309] When the land owner is not denied all "economically viable use," the Court has generally found that the diminution in value alone cannot establish a taking.[310] Moreover, the loss of profits and income in determining economically viable use does not always constitute a taking. In *Pennsylvania Coal Co.*, the Court found that Pennsylvania antisubsidence legislation made it commercially impracticable to conduct profitable mining operations.[311] The Court held that such legislation constitutes a taking because it effectively "appropriates or destroys the owner's right to mine coal."[312] Later, in *Keystone*, the Court found a *de minimis* taking of property rights in commercial mining operations when the landowners were forced to leave two percent of the coal in the ground to comply with antisubsidence legislation.[313] Under a facial challenge, the Court held that the antisubsidence legislation did not effect a taking.[314] Agronomic use restrictions and conservation treatments do not generally constitute

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307. *See supra* notes 3, 7-12.

308. *See, e.g.*, NATIONAL PROGRAM UPDATE, *supra* note 3, at 15-16; Holloway & Guy, *supra* note 19, at 400 n.105; *supra* note 30 (cost sharing incentive payments for AWQI), 41 (cost sharing for CRP).

309. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

310. *Id.*; *cf.* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (holding that denial of all economic use constitutes a per se taking).

311. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1922).

312. *Id.* at 414.

313. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987).

314. *Id.* at 501-02.

a taking, though they may impose costs that landowners did not contemplate and that reduce profits.[315]

Both state and federal courts have found that economic hardships, such as increased costs and eventual expenses, imposed by land use regulations that are not unreasonably burdensome do not constitute a taking under either an as applied or a facial challenge.[316] For example, Iowa's soil loss limit regulations mandate soil conservation to control and prevent soil movement by wind and water.[317] The Iowa soil loss limit regulation[318] was challenged as a taking of private property, but the Iowa Supreme Court held that the regulation was a proper exercise of Iowa's police power.[319] Although Iowa agreed to pay three-fourths of the cost of installing soil conservation measures on the defendant's land,[320] the defendant argued that the remaining cost was unreasonable.[321] The Court did not find the cost an unreasonable hardship, but the Court did recognize that the defendant's cost was substantial and constituted an extra financial burden.[322] Iowa's soil loss limit regulations evidences that mandatory soil conservation treatment and land use regulations are enforceable and should withstand a takings challenge if the state is willing to bear part of the initial burden of installing conservation treatments and land use changes.[323]

In finding historic preservation regulations not to be a taking, one federal court of appeals agreed in principle with the Iowa Supreme Court decision that out-of-pocket expenses do not constitute a taking.[324] In *Maher v. The City of New Orleans*,[325] Maher challenged a

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315. In *Penn Central*, the Court found that the Landmark Law interfered with neither existing terminal operations nor investment-backed expectation from existing operations. *Penn Central*, 438 U.S. at 136-38. But restrictions on existing operations was not the owner's primary concern, the owner of the terminal was pursuing or contemplating the exploitation of air space above the existing terminal. The Court held that the landmark law did not prohibit all development of air space which in turn meant that the owner could not make the contemplated use of the air space nor make the expected profit from its on-site development. *Id.* at 136.

316. *See infra* notes 319-20.

317. IOWA CODE ANN. § 467A.44 (West 1971 & Supp. 1989).

318. *Id.*

319. Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 279 (Iowa 1979). In an earlier case, the Iowa Supreme Court had recognized that soil is an important natural resource needed for the welfare of the state. Iowa Natural Resources Council v. Van Zee, 158 N.W.2d 111, 118 (Iowa 1968). For comments on *Ortner* and its implications, see Wade R. Hauser III, Comment, *Regulatory Authority to Mandate Soil Conservation in Iowa After* Ortner, 65 IOWA L. REV. 1035 (1980); Jeffrey R. Mohrhauser, Note, Woodbury County Soil Conservation District v. Ortner: *New Authority for Required Soil Conservation*, 25 S.D. L. REV. 614 (1980).

320. IOWA CODE ANN. § 467A.48 (West 1971 & Supp. 1989).

321. *Ortner*, 279 N.W.2d at 279.

322. *Id.*

323. *Id.* at 277-79.

324. *See infra* part VI.A.2.

325. 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

City of New Orleans ordinance that was enacted for the preservation and maintenance of buildings in the historic Vieux Carré section, or French Quarter, of the City.[326] Provisions of the historic preservation ordinance required that a permit be acquired from the Vieux Carré Commission to perform construction, demolition, and alteration work on any buildings in the French Quarter.[327] The ordinance required owners to preserve historic buildings against decay and deterioration.[328] Consequently, if a property owner could not destroy and then rebuild, the owner was obligated to preserve the building until a permit to demolish was granted.[329] Maher owned a victorian cottage in the French Quarter, but he wanted to demolish the cottage and replace it with an apartment complex.[330] The commission gave Maher a permit, but it denied several requests that would authorize him to demolish the cottage.[331] The City Council of New Orleans overruled the commission and revoked the permit.[332] Maher then challenged the authority of the city to make and enforce the ordinance.[333] Being unsuccessful in state court, Maher then turned to the federal courts, challenging the ordinance as constituting a taking of property in violation of the Fifth and Fourteenth Amendments.[334]

In addition to challenging the restrictions on use, Maher asserted that the ordinance required him to pay for the cost of maintenance and thus was a taking.[335] Specifically, he asserted that "the city may not permissibly impose an affirmative maintenance duty upon a property owner without taking the property under the power of eminent domain."[336] The district court held that the ordinance did not effect a taking.[337] On review, the court of appeals found that the requirement "to make out-of-pocket expenditures in order to remain in compliance with the ordinance does not per se render the ordinance a taking."[338] It then recognized that similar requirements have been broadly established in the interests of safety and health, such as a regulation that

326. *Id.* at 1053-55.
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.* at 1054.
335. *Id.* at 1064-65.
336. *Id.* at 1065.
337. Maher v. City of New Orleans, 371 F. Supp. 653 (E.D. La. 1974), *aff'd*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).
338. *Maher*, 516 F.2d at 1067.

requires buildings to have fire sprinklers.[339] The court then stated that, "if the purpose be legitimate and the means reasonably consistent with the objective, the ordinance can withstand a frontal attack of invalidity."[340] The court held "that the ordinance provision necessitating reasonable maintenance" is not a taking.[341]

Returning to coordination, landowners who are required to apply conservation treatments and to change land uses will incur out-of-pocket expenses. As Iowa did in the enforcement of its soil loss regulations, the federal government also pays part of the cost of conservation treatments, provides funds to subsidize farm production, or purchases conservation and farmland preservation rights and easements.[342] Where the government pays a reasonable part of the costs or where the landowners' expenses for maintenance are not unreasonable, one can infer that such costs do not constitute a taking, either as applied or facially.

Indeed, mandating that landowners pay out-of-pocket expenses could constitute a taking. As the appeals court in *Maher* noted, "even a generally constitutional regulation may become a taking in an isolated application if 'unduly oppressive' to a property owner."[343] Thus, on farmland that is neither degradable nor threatened by conversion, coordination requiring out-of-pocket expenses could be a taking since these expenses do not further the objectives of coordination.[344] On farms and farming operations, when there is no capital for changing to alternative land uses, or if out-of-pocket expenses exceed revenue generated from production, such circumstances could be so burdensome that to require landowners to pay expenses or incur costs could constitute a taking by unreasonably interfering with economically viable use.[345]

2. *Weighing Reciprocal Benefits*

In weighing public and private interests, the Court considers the burdens and benefits bestowed upon landowners by the government action.[346] Economic and social benefits are to be considered in weighing landowners' burden since these benefits mitigate landowner losses and

339. *Id.*
340. *Id.*
341. *Id.*
342. *See supra* notes 3, 7-12.
343. *Maher*, 516 F.2d at 1067 (quoting Goldblatt v. Hempstead, 369 U.S. 590, 595 (1962)).
344. *See id.*
345. *See Maher*, 516 F.2d at 1067.
346. Agins v. City of Tiburon, 447 U.S. 255 (1980).

provide reciprocal advantages.[347] In *Penn Central*, the Court found that New York City's transferable developments rights programs allowed the owner to transfer air rights to other buildings in the vicinity of the Terminal and that the transferable developments rights were valuable.[348] The Court concluded that those "rights nevertheless undoubtedly mitigate whatever financial burden the law has imposed on appellants."[349] In *Agins*, the Court observed that owners subject to land use or zoning ordinances benefit upon the assured orderly development,[350] and then concluded that, "these benefits must be considered along with any diminution in market value that the appellants might suffer."[351] As reciprocal benefits are awarded through government regulation, the weight of a landowner's burden diminishes relative to the public benefits gained by regulation.[352]

Coordination currently is made effective by the transfer of government assistance and benefits. Coordination, under federal programs, requires that landowners voluntarily agree to participate in production programs such as credit, income, and price supports,[353] before they are required to comply with land management and environmental regulations.

When coordinated regulatory schemes for farming and farmland are challenged as a taking, the Court will weigh the mitigating factors[354] and reciprocal advantages.[355] Benefits are usually given to landowners who voluntary participate in farm, environmental, and land use programs.[356] Under erosion control and nonpoint source pollution control

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347. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *Agins*, 447 U.S. at 262. For a discussion of the reciprocity of advantages and its role in takings jurisprudence, see generally Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297 (1990).

348. *Penn Central*, 438 U.S. at 137.

349. *Id.* According to the concurring and dissenting opinions, the issue of whether "[transferable development rights] . . . constitute a 'full and perfect equivalent for the property taken'" remains open. *Penn Central*, 438 U.S. at 137 (Brennan, J., concurring), 151-52 (Rehnquist, J., dissenting).

350. *Agins*, 447 U.S. at 261.

351. *Id.* In Hodel v. Irving, 481 U.S. 704 (1987), the Court found that the consolidation of fractional interests in indian land would make that land more productive. The Court reasoned that as the tribe gains escheatable interests, the members of the tribe, as owners of escheatable interests, would benefit: "The whole benefit gained is greater than the sum of the burden imposed." 481 U.S. at 716.

352. *See supra* notes 271-74.

353. *See supra* notes 10, 12 and accompanying text.

354. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978).

355. *See Irving*, 481 U.S. at 716.

356. *See supra* part IV.A.4.

programs, technical assistance,[357] differential property assessment,[358] cost sharing,[359] and tax deductions and credits[360] offset part of the cost of changes in land uses and installation of conservation and environmental treatments.[361] Such benefits and assistance reduce out-of-pocket expenses for technical assistance, material, and other services. Financial benefits and technical assistance mitigate the loss of profits.[362] Such losses result from mandated expenses that are imposed on landowners. Moreover, landowners receive cash benefits from farmland preservation[363] and from farm production programs.[364] In coordinating land management, environmental, and farmland preservation programs that have been already implemented, there is no effort to provide a "full and perfect equivalent for property taken"[365] since coordination is not a taking. "It is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question of whether it is a taking."[366] Returning to "an average reciprocity of advantages,"[367] landowners also receive the same life-sustaining benefits from government regulation as do every other member of the public: clean water, clean air, aesthetic qualities, and an abundant food supply.[368]

Right-to-farm laws remain reciprocal advantages under a coordinated scheme that includes farmland preservation.[369] These laws limit the legal actions that the public can bring against farm operators and farmers.[370] Under right-to-farm laws, landowners and the public receive reciprocal benefits, but as the public preserves farming and farmland, its members must often forego their right to challenge unwanted farming operations.[371] This privilege allows landowners and farmers to

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357. *See supra* note 103 and accompanying text.

358. *See supra* note 81 and accompanying text.

359. *See supra* note 103 and accompanying text.

360. *See supra* note 105 and accompanying text.

361. Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276 (Iowa 1979), is a taking challenge in which Iowa, through its soil conservation cost sharing program, paid part of the cost of installing conservation treatment.

362. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978); *Ortner*, 279 N.W.2d at 279.

363. *See supra* notes 85-87 and accompanying text.

364. *See supra* note 10 and accompanying text.

365. Mononagehela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

366. United States v. Causby, 328 U.S. 256, 266 (1946). On the question of compensation for a temporary regulatory taking, see *infra* part VI.B.1.

367. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978).

368. *See* Agins v. City of Tiburon, 447 U.S. 225, 262 (1980).

369. *See supra* note 85 and accompanying text.

370. *See supra* note 85 and accompanying text.

371. *See supra* note 85 and accompanying text.

be free of many nuisance claims and other challenges, thus protecting farmers from harassing litigation. It is this type of litigation that could eventually terminate farming and other agricultural operations, ending farm life in many communities.[372] Still, right-to-farm laws reduce some of the burden that is imposed by farmland preservation in coordinated regulatory schemes.[373]

B. The Nature of the Property Interest

Coordination is a regulatory scheme for implementing several programs, and as such it affects many property interests. Particularly affected are the property interests involved in farm operations. The requirements of coordination impose on landowners development and use restrictions and interferences with management, transfer, and profits.[374]

Without addressing whether recent Court decisions favor any particular property right or create a hierarchy of property rights,[375] the effects of coordination on property interests depend on the dominant programs in the coordinated scheme, and the natural conditions of the farmland.[376] If farmland preservation dominates but the farmland is prime with little or no runoff, the restrictions will be primarily on development rights.[377] If the farmland is highly erodible with high to moderate runoff, then restrictions could be placed on management, use, development, and transfer.[378] Even though property interests are private concerns and may not have been forcefully regulated in the past, a change in the public interest could justify new regulation including the creation of a new type of land use restriction. Coordination represents such a change, since the government regulation of private interests, though voluntary, has not been historically restricted.

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372. MALONE, *supra* note 17, at 6-22 to 6-23.

373. *See supra* part VI.A.1-2.

374. *See, e.g., supra* part V.A; Agins v. City of Tiburon, 447 U.S. 225, 260-61 (1980) (interference with the right to develop); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498-500 (1987) (interference with income producing property and support estate); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136-38 (1978) (restrictions on use and development of air rights); Nollan v. California Coastal Comm'n, 483 U.S. 825, 831-32 (1987) (restrictions on development and right to exclude others); Hodel v. Irving, 481 U.S. 704, 713-15 (1987) (interference with right to devise).

375. *But see* MALONE, *supra* note 17, at 14-20. Professor Malone suggests the Court is moving toward a hierarchy of property rights. The right to develop is at the top of the hierarchy.

376. *See supra* part V.3.

377. *See supra* part V.3. Since prime farmland requires fewer chemical additives but may require herbicides and pesticides, vertical leaching is a concern for ground water quality. *See* SECOND RCA APPRAISAL, *supra* note 97, at 111-13.

378. *See supra* part V.3.

On farmland, voluntary participation recognizes that farmland preservation, environmental protection, and land management are private concerns. Thus, they are obligations of landowners; but landowners have been inconsistent in implementing voluntary programs. The combined losses of economic, natural, and environmental resources threaten water quality, farm life, and farming. These losses are irreversible. As they damage resources on- and off-the-farm, they bring about increased public concern. Coordination addresses these concerns.

Currently, federal and state governments exercise greater authority in order to protect the public against landowner decisions and actions that could eventually harm the public interest under new and different circumstances. In *Keystone*, the Court found that harm caused by a private interest—surface mining—posed a threat to the public welfare, health, and safety.[379] The Court then reasoned that the government was not estopped to regulate what was once a purely private concern.[380] In *Block v. Hirsh*, the Court observed that the changed circumstances caused by war justified the regulation of the right to lease.[381] In coordination, the government responds to the need to limit land degradation and water pollution caused by a lack of private concern.[382] In actuality, the better view is that landowners are not performing their obligations to manage the land, other than those imposed by law. Such breaches are manifested in the combined losses of soils, farming and farmland, and water quality. In addition, they externalize the cost of decontaminating drinking water and cleaning up rivers and streams.[383] Unlike the regulations in *Block* and *Keystone*, participation through coordination uses voluntary means to advance what has proven to be legitimate state interests: the protection of economic, natural, and environmental resources.[384]

C. *Extent of Investment-Backed Expectations*

Another relevant principle of takings law to be considered here is the economic impact of these newly imposed requirements and their interference with investment-backed expectations. A forceful obligation requires owners and users to comply with use restrictions, management

379. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987).

380. *Id.*

381. Block v. Hirsh, 256 U.S. 135, 157 (1921).

382. For discussion of regulating a private interest that has become a public interest, see *supra* part V.B.2.

383. *See* SECOND RCA APPRAISAL, *supra* note 97, at 101 (estimated cost is six billion dollars annually).

384. *See supra* notes 3, 7-12.

requirements, and environmental standards, even though they restrict landowners' expected or planned use and development. For example, in *Agins*,[385] the Agins' acquired five acres of unimproved land in the City of Tiburon for residential development.[386] Afterward, and by order of California land use laws, the city adopted zoning ordinances and placed the Agins' land in a residential zone. The Agins' land could have been used for single-family dwellings, accessory buildings, and open space, with the density of the single-family residences limited to one to five residences.[387] Before seeking approval for development, Agins initiated an action against the city in state court alleging that the city had taken the property without just compensation in violation of the Fifth and Fourteenth Amendments.[388] The Agins' made a facial challenge requesting a declaration that the ordinance was unconstitutional on its face.[389] The trial court ruled that Agins' complaint failed to state a cause of action, and the California Supreme Court affirmed.[390] The Agins' appealed.[391] The United States Supreme Court held that the land use regulation did not effect a taking under a facial challenge.[392]

The Court noted that the Agins' had not experienced a direct financial loss or an "outflow of cash."[393] Their financial loss was merely the lower expected return on capital investment in the acquisition and maintenance of their tract.[394] In *Agins*, as in *Penn Central*,[395] the Court held that "[a]t this juncture, the appellants are free to pursue their reasonable investment expectations by submitting a development plan to local officials."[396] The Court found that restrictions "limit[ing] development to maintain open space"[397] did not unreasonably interfere with investment-backed expectations.[398]

The Court returned to an analysis of investment-backed expectations most recently in *Lucas v. South Carolina Coastal Council*.[399] In *Lucas*, the Court applied, without questioning, a trial court determination

385. 447 U.S. 255 (1980).
386. *Id.* at 257-59.
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.* at 263.
393. *See id.* at 257-59.
394. *Id.*
395. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136-37 (1978).
396. *Agins*, 447 U.S. at 262.
397. *Id.*
398. *Id.*
399. 112 S. Ct. 2886 (1992).

that the application of a coastal management regulation deprived the subject property of all economic value.[400] This loss in economic viability convinced the Court that the regulation constituted a taking. *Lucas* stands for the narrow proposition that restrictions destroying all economic value in property constitute takings. Although important to the land use community in general, the opinion does not threaten coordination programs, which generally only reduce some economic potential in farmland in exchange for certain benefits.

As a regulatory tool, coordination cannot deny the owner "economically viable use."[401] Financial hardships alone, however, do not constitute a taking.[402] Cross-compliance is a means of enforcing use restrictions and other requirements to effectuate the purposes of farmland preservation, land management, and environmental regulations.[403] Such restrictions change the use of erodible land, requiring the application of environmental, production, and conservation programs. Through coordination, these programs do not deny "economically viable use" because much farmland still remains in production and agricultural use.[404]

When land is held primarily for speculative purposes, owners might argue that restricting the use and imposing environmental and land management obligations could cause a diminution in value. Yet the "[Court's] decisions sustaining other land use regulations . . . uniformly reject the proposition that diminution in property value, standing alone, can establish a taking."[405] As the Court explained, "[e]conomically viable use" does not mean the highest and best use.[406]

Thus, future changes in value are business risks associated with many land investments. Landowners purchase land with the expectation of its value appreciating so they can sell it and maximize their returns. Landowners may still do so, but the land is subject to compliance with use restrictions.[407] Though coordination, like other regula-

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400. *Id.* at 2890.

401. *Agins*, 447 U.S. at 260.

402. *See Penn Central*, 438 U.S. at 131; Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 279 (Iowa 1979).

403. *See supra* notes 3, 7-12.

404. FSA and FACT limit farmland that can be diverted from agricultural use through enrollment in CRP. 7 U.S.C. § 3831 (1988) (amended by Pub. L. 101-624, § 1432, 104 Stat 3359, 3577 Title XIV (1990)).

405. *Penn Central*, 438 U.S. at 131 (quoting Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)) (75% diminution in value caused by zoning regulations); Hadacheck v. Sebastain, 239 U.S. 394 (1915) (87% diminution in value).

406. *See Penn Central*, 438 U.S. at 124-27 (owners do not have the unrestricted right to exploit property interests).

407. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (land use regulations to protect open space and thus limit development).

tions, may reduce investment-backed expectations, land owners still retain "economically viable use" of farmland for farming and other agricultural uses.[408]

D. Increased Financial Risk For Government

As Justice Holmes observed in *Pennsylvania Coal Co.*, "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[409] Half a century later, the Court addressed the question whether the government must pay just compensation when land use regulation constitutes a temporary regulatory taking.[410]

1. Just Compensation for a Temporary Taking

State and federal coordination creates an increased financial risk for policy makers, and as such could be challenged as a regulatory taking. If such a challenge was held by the Court to be a taking, the government would be required to compensate many landowners. In *First English Evangelical Lutheran Church of Glendale v. City of Los Angeles*,[411] the First English Evangelical Lutheran Church owned a twenty-one acre tract of land along the banks on the Mill Fork of Mill Creek in the Angeles National Forest.[412] Twelve of the acres contained buildings and structures that were used by the church for recreational and other activities, known as Lutherglen.[413] In February of 1978, the church's buildings and other structures at Lutherglen were destroyed by runoff from the denuded hills, upstream from Lutherglen.[414] As a result of the flooding, the City of Los Angeles enacted an ordinance prohibiting the construction, reconstruction, placement, or enlargement of any building or structure within the flood protection area located in the Mill Creek Canyon, which included the site of Lutherglen.[415] The church initiated an action against the city in state court alleging that the ordinance denied it all use of the land and seeking damages for inverse condemnation.[416] The trial court struck the allegation that the ordinance denied all use because the church sought

408. *Id.* at 262.
409. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
410. First English Evangelical Lutheran Church v. City of Los Angeles, 482 U.S. 304, 321 (1987).
411. 482 U.S. 304 (1987).
412. *Id.* at 307-11.
413. *Id.*
414. *Id.*
415. *Id.*
416. *Id.*

only monetary damages as a remedy.[417] Both the trial and appellate courts relied on *Agins v. City of Tiburon*,[418] in which the California Supreme Court had held that an inverse condemnation suit for monetary damages was not an appropriate action for a regulatory taking.[419] The relief for a challenge to a regulatory taking is mandamus or declaratory relief.[420] When the California Supreme Court denied review,[421] the church appealed,[422] and the United States Supreme Court held that monetary relief was an appropriate remedy for temporary regulatory takings.[423] It is this relief that could make local governments hesitant about enacting coordinated schemes.[424]

2. *Impact on Land Use Regulations*

In *First English*, the Court made two significant observations, one on the merits of the case and another on the impact of the case on land use policy making.[425] First, the Court assumed for the sake of argument that a temporary regulatory taking had occurred.[426] It found no need to determine the merits of the taking claim in order to decide whether monetary relief was available as a remedy for a temporary regulatory taking.[427] The Court found that the California court had rejected the appellant's claim solely because it believed that monetary relief was not the appropriate remedy under state law.[428] Next, the Court observed that the discretion of land use policy makers and planners would be lessened when enacting land use regulations.[429] It then

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417. *Id.*

418. 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

419. *Id.* at 29-31.

420. *Id.*

421. *Id.*

422. First English Evangelical Lutheran Church v. City of Los Angeles, 482 U.S. at 304, 310 (1987).

423. *Id.* at 321. For a scholarly analysis of compensatory damages under *First English Evangelical*, see generally, Gideon Kanner, *Measure of Damages in Nonphysical Inverse Condemnation Cases*, 1989 INST. ON PLAN. ZONING & EMINENT DOMAIN 12.1; Cynthia J. Barnes, Note, *Just Compensation or Just Damages: the Measure of Damages for Temporary Regulatory Takings in* Wheeler v. City of Pleasant Grove, 74 IOWA L. REV. 1243 (1989).

424. *First English* could have a limited effect on farmland preservation planning and regulation. Thompson, *supra* note 231 (recognizing that some non-farm development must be permitted). *But see* MALONE, *supra* note 17, at 14-27, 14-35 (recognizing that farmland preservation can restrict non-farm development rights that the Court now seems to favor).

425. *First English*, 482 U.S. at 311-22.

426. *Id.* at 321. The Court stated that "[h]ere we must assume that the Los Angeles County ordinances have denied appellant all use of its property for a considerable period of years." *Id.*

427. *Id.* at 312-13.

428. *Id.*

429. *Id.* at 321. "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land use planners and governing bodies of municipal corporations when enacting land-use regulations." *Id.*

recognized that the Constitution has always limited the government's exercise of its powers.[430] *First English* fosters the concept that land use policy makers and planners must be careful to consider whether the design and implementation of natural resource and land use programs could deny owners "economically viable use." Such increased consideration reflects, as the Court stated, an old condition: the Takings Clause.[431]

VII. CONCLUSION

Regulation under either state or federal power has accomplished the preservation of historic sites and open space, the control of urban growth, and the alteration of surface and subsurface mining practices. The state police power has been validly exercised even when these land use regulations benefit the holder of a different property interest, impose a financial burden on the land owner, burden the owner's economic expectations, or restrict use and intensity. The federal government has used its commerce power to protect farmland through land management and water quality policies and regulation. This regulation imposes no obligations for the protection of farmland, soil resources, and water quality. With the enactment of FSA and its amendment by FACT, many federal regulations do impose obligations on landowners when they voluntarily join federal commodity, credit, and insurance programs.

Both federal and state courts have decided that federal and state governments can exercise their respective powers to make regulations that protect the environment, soil and water resources, farmland, farming, and agricultural productivity. Notwithstanding *Hodel v. Irving*,[432] *Nollan*, *First English*, and *Keystone*, coordination under FSA, FACT, and state regulatory schemes that require self-imposed obligations but work a forfeiture and other penalties to protect environmental and natural resources should withstand a facial takings challenge and, in many instances, an as applied challenge. Of course, *First English* demands that policy makers and resource planners give more attention to programs that interfere with and invade a landowner's property rights.

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430. *Id.* "[M]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them." *Id.*

431. *Id.* at 311-17.

432. 481 U.S. 704 (1987).