VANISHING FARMLAND: A LEGAL SOLUTION FOR THE STATES, by Sarah E. Redfield. Lexington, MA. Lexington Books, D.C. Heath Company 1984. Pp. xxii, 196.

Much publicity has recently been focused on the plight of our nation s farmers. Burdened by loan payments they cannot meet, many farmers are faced with the very real threat of foreclosure and the concomitant loss of their farmland. While the current media emphasis is on the short-term consequences of the farm crisis, a related, but potentially farther-reaching problem is slowly beginning to come to light—the loss of productive agricultural land. In an era of large agricultural surpluses, concerns over the loss of agricultural land may appear overstated. A close look at the dimensions of the problem, however indicates that there may be cause for real concern.

Between 1967 and 1975, some 23.2 million acres of agricultural land were converted to non-agricultural use. Each year approximately one-third of the nearly three million acres developed in this country comes from prime farmland.[1] While these figures are relatively small when compared with the large agricultural landbase of the United States (approx. 1.36 billion acres[2]), the real concern is that a continued depletion of this fixed resource, when coupled with estimates of future demand for agricultural products (an estimated sixty to eighty-five percent increase over 1980 levels in the next twenty years)[3] may spell trouble for the future. While not everyone agrees that the problem of agricultural land loss is of crisis proportions,[4] it is important to recognize that prime farmland is a finite resource, the preservation of which concerns us all.

This emerging problem, the loss of our nation s agricultural land, is the focus of *Vanishing Farmland: A Legal Solution for the States*, by Sarah E. Redfield, Assistant Professor of Law at the Franklin Pierce Law Center in Concord, N.H. Rather than taking sides in the debate over the severity of the problem, Prof. Redfield merely presents a brief summary of the controversy She

1. *See generally* NATIONAL AGRICULTURAL LANDS STUDY (NALS), FINAL REPORT 1981, 35-36.

2. *Id.* at 29.

3. *Id.* at 55.

4. *See generally* Rose, *Farmland Preservation Policy and Programs*, 24 NAT. RESOURCES J. 591, 591-98 (1984).

concludes that there is at least some basis for concern, particularly on a regional level (p.5). The states have shown an increased interest in local food production, a desire to preserve jobs related to agriculture (both farming and infrastructure operations), and a desire to preserve the scenic beauty of the countryside and the farming way of life. These concerns have mobilized state efforts to retain precious farmland. As a consequence, many states have adopted various farmland preservation plans, ranging from strict agricultural zoning laws to programs intended to induce farmers to remain on the farm (e.g., through tax credits and other incentives).

In *Vanishing Farmland*, Prof. Redfield concentrates on regulatory control, the most troublesome aspect of state attempts to retain private agricultural land. The bulk of *Vanishing Farmland* (Chapter Two) contains an analysis of the constitutional limitations on the regulation of land use. In that chapter Prof. Redfield asserts that while some state regulatory measures may exceed the limits of constitutionality a carefully drafted statute will pass constitutional scrutiny Chapter Three contains a survey of the various techniques which states have utilized to address the problem of agricultural land loss. Prof. Redfield concludes by proposing a model statute which she believes to be both effective and constitutionally sound.

The takings[5] and due process[6] clauses of the U.S. Constitution control the constitutionality of state and local regulatory programs. Prof. Redfield analyzes these constitutional limitations on regulatory action by discussing, in relative detail, the three grounds generally used by courts to invalidate regulatory schemes: (1) it is a taking of property· (2) it is arbitrary capricious, or not reasonably related to a legitimate governmental purpose; or (3) it is exclusionary (p. 19). Thus, a governmental regulatory action which is not a taking, and is neither arbitrary nor exclusionary will likely be held constitutional.

Relatively few state cases have specifically reviewed governmental programs that regulate the use of agricultural land on constitutional takings standards. Therefore, Prof. Redfield analyzes the takings issue in terms of general principles, and then considers the likely result of their application to governmental

5. U.S. CONST. amend. V
6. U.S. CONST. amend. XIV

regulations to preserve agricultural land. Prof. Redfield begins her analysis with a general discussion of the U.S. Supreme Court decisions in *Pennsylvania Coal Co. v. Mahon*[7] *Penn Central Transportation Co. v. New York City*[8] and *Agins v. City of Tiburon*[9] While these cases make it clear that the takings issue does not lend itself to simplistic answers, the Court *has* laid down some general guidelines concerning the permissible reach of governmental regulation. Specifically two factors are of particular significance in determining whether a regulation has gone so far as to be considered a taking: the character of the governmental action involved; and the regulation s impact on the value of the property particularly on the objective expectations of the owner (p.23).

With respect to the character of governmental action, there are basically three types of programs likely to raise constitutional objections: (1) condemnation, (2) physical invasion, and (3) regulation. The author observes that although governmental condemnation and physical invasion require government compensation, these types of governmental action are neither appropriate nor necessary for farmland preservation, and hence are not likely to arise (p.27). Consequently Prof. Redfield focuses her primary attention on governmental regulation. She concludes that regulations which impose singularized burdens or extreme restrictions on usage are more likely to be found unconstitutional than are regulations which arbitrate between legitimate private interests in order to achieve the public interest. The task of state legislators then, is to draft a regulatory program which does not impose excessive burdens on agricultural landowners, but at the same time is not so weak as to be ineffective in preventing the conversion of agricultural land.

Prof. Redfield maintains that one must balance the character of the governmental action involved against the extent of interfer ence with owner expectation. Restrictions on land usage which depress the value of the land (as when the value of the land for development purposes exceeds its value for agricultural pur poses) may amount to a taking, and so require government compensation. However the fact that a landowner is not allowed the most beneficial use of her property is not in itself determinative. "The constraining principle," Prof. Redfield asserts, "is that in

7 260 U.S. 393 (1922).
8. 438 U.S. 104 (1978).
9. 447 U.S. 255 (1980).

almost all cases some reasonable economic return must remain for the landowner" (p.35). Thus, it makes no difference whether agricultural land would be worth more if its use were not restricted to agriculture, so long as the landowner is able to obtain a reasonable return on farming or farm-related operations. This points to a further difficulty in drafting a suitable regulatory scheme—providing profit opportunities for landowners whose property is restricted to agricultural use.

To the extent that state courts have addressed the constitutionality of government regulations designed to retard the depletion of agricultural land, their findings are largely consistent with Prof. Redfield's analysis. The state courts, the author concludes, have generally found that it is not a taking where agricultural zoning (1) denies the highest and best use of zoned property (2) diminishes the value of the property or (3) contemplates that the existing agricultural use continue (p.36).

Prof. Redfield next addresses the second ground commonly used to invalidate regulatory schemes—that it is arbitrary capricious, or not reasonably related to a legitimate governmental pur pose. In determining whether a given regulatory scheme violates the accepted due process standard, the courts inquire into whether· (1) the action legitimately serves the health, safety morals and welfare of the people; (2) there is a substantial relationship between the regulation s purpose and means; and (3) the imposition on the individual is fairly balanced against the government s interest and action.[10]

Drawing upon a general analysis of the requirements of due process, as well as a substantial amount of state court precedent, Redfield concludes that a well-defined regulatory scheme will be sustained against a due process challenge (p.55). Such a regulatory scheme should first include a declaration of intent, since courts will usually defer to a legislative judgment concerning what is necessary for the public good. Moreover state courts have generally shown a willingness to accept agricultural land preser vation as a legitimate concern of government. Secondly the regulatory scheme should be tailored to meet the specific objectives desired. If the regulations are applied inappropriately or are a ruse for a purpose unrelated to restricting agricultural use, they will likely be invalidated by the courts (p.50). Finally the regula-

10. Lawton v. Steele, 152 U.S. 133, 137 (1894).

tory program must not be so restrictive as to leave individual landowners with no reasonable use for their land. In this respect, the courts analyses are similar to those in the takings cases. Thus, if a plaintiff landowner can prove that a restriction leaves no reasonable use for his land, the courts will generally invalidate the regulation as it affects that plaintiff (p.51).

The third ground commonly used to invalidate governmental regulatory schemes is that such a program is unconstitutionally exclusionary That is, the land use control regulations have the effect of excluding persons of low or moderate income from the zoning municipality Although the lack of uniformity in state standards complicates the analysis, Prof. Redfield suggests that even in the most stringent states, the existence of a comprehensive zoning program will be of central importance in supporting what otherwise might be found to be an unconstitutionally exclusionary ordinance (p.67). Further the more specific the program, the better it will withstand exclusionary challenges. For instance, large-lot size ordinances are probably less secure than ordinances based on soil type or existing agricultural use (p.67).

Overall, Prof. Redfield's analysis of the regulation problem is excellent. *Vanishing Farmland* addresses this rather complicated issue in a comprehensive and balanced manner Rather than simply stating a case for the constitutionality of land preservation programs, the author proceeds cautiously well aware of the legal pitfalls which such programs may encounter Instead of ignoring the problem areas, *Vanishing Farmland* recognizes them and offers concrete solutions for avoiding such troubles in the future.

If there is a drawback to Prof. Redfield's analysis, it is that her focus is not state specific. While the general rules may be the same from state to state, each state has its own distinct legislative and judicial history which will necessarily play a role in shaping the specifics of any regulatory program concerning farmland preservation. Thus, one must be careful about applying Prof. Redfield's analysis too strictly to any particular state. Despite this lack of specific local emphasis, however the general analysis is, richly supplemented with state law precedents.[11] In addition to supporting Prof. Redfield's thesis, the references to state law also serve to illustrate the diversity of views and approaches taken in dealing with the farmland preservation problem.

11. *See, e.g.*, pp. 36, 48, 105 of text.

In Chapter Three of *Vanishing Farmland*, Prof. Redfield follows her regulatory analysis with a brief discussion of existing agricultural land preservation programs, noting both their practical and legal implications. In her analysis, Prof. Redfield draws distinc tion between programs that offset farmers financial burdens (i.e., tax benefits, right-to-farm statutes and various compensatory benefits), planning and permitting for development (e.g., zoning), and the use of combined techniques such as agricultural districting. From her analysis of these various state initiatives, Prof. Redfield concludes that "single-faceted approaches, and even multifaceted programs that remain voluntary or that are administered solely at the local level, are likely to prove inadequate" (p.108). So long as state programs remain voluntary farmers may succumb to the lure of gold at the end of the developer s rainbow

Although more effective than voluntary programs, even such mandatory programs as agricultural zoning suffer from a lack of state-wide coordination. Additionally various factors such as landowner opposition and lower property values discourage zoning at the local level. The result is often a patchwork of local zoning ordinances which do not adequately address the problem of agricultural land loss. It is primarily for this reason that Prof. Redfield suggests that agricultural zoning be administered, or at least coordinated, at the state level.

Finally true to its subtitle, *Vanishing Farmland* concludes with a proposal for state action. It is here that the author transforms the results of her analysis into a single unified model statute. Rather than offering a compilation of disparate proposals, Redfield offers what she feels is a comprehensive proposal designed to address a multitude of land-related problems (pp.131-65). Although the Model Statute primarily focuses on the preservation of prime agricultural land, it also seeks to address other problems, including soil erosion, the economic viability of farming and the preservation of farming infrastructures. Within the author s suggested constitutional confines, the Model Statute proposes the use of a wide range of governmental powers.

The basic governmental tool of the Model Statute is regulation. Despite the relative unpopularity of restrictive zoning programs, Prof. Redfield is reasonable in her choice of zoning as the corner stone of her proposal. The general lack of success of voluntary programs all but mandates the use of involuntary restraints.

Under the Model Statute, planning and zoning are done on a local level—subject to minimum state standards and state review State participation assures uniformity of application and serves to deflect constitutional challenges, because courts increasingly look to comprehensive plans as a basis for upholding stringent land use controls (p.131). Local participation, on the other hand, is necessary to identify the land areas which are appropriate for regulation. This balance of state and local participation serves to remedy the deficiencies encountered when regulation is effected exclusively by either level of government. For instance, state par ticipation serves to remedy some of the problems associated with exclusive local regulation. These include local political opposition by the affected landowners, and the prospect of reduced local property tax revenues which result from a reduction in land values caused by zoning. On the other hand, state zoning statutes would be difficult to administer without local assistance. Moreover local officials are in a better position to accurately determine which land is suitable for agricultural zoning. If untillable land is zoned agricultural, the affected landowner left without a "reasonable use," may have a remedy in the courts.

The Model Statute also contemplates granting state benefits to landowners whose property is zoned for agricultural use. These benefits include a restriction on eminent domain and other public acquisition (p.156), exemption from special assessments (p.158), preferential tax treatment (p.159), the enactment of right-to-farm ordinances (p.160), financing assistance (p.160) and technical assistance (p.161). The inclusion of these benefits in the Model Statute helps solidify the constitutionality of the proposal. The existence of recriprocal benefits better allow the affected landowner to make profitable use of her land, thus deflecting a possible takings or due process challenge.

In addition to this mix of regulatory action and state benefits, Prof. Redfield includes in her Model Statute a number of optional provisions which may be utilized to further the objectives of the program. These include additional state benefits (to be used if the core benefits prove to be politically or economically unsatisfactory), such as transfer development rights, the purchase of development rights and additional financing schemes. However one must bear in mind the potentially large cost of these supplemantary provisions.

Overall, the provisions of the Model Statute are consistent with Prof. Redfield's earlier analysis and findings. One must be wary however of accepting her proposal at first glance. Such a wide-ranging program is likely to impact individuals and localities in subtle but important ways. Prof. Redfield, however spends little time dwelling on the practical impact of her proposal. For instance, she does not discuss the Model Statute s effect on population growth and distribution. The zoning of large areas of land for agricultural use will likely have a significant impact on demographics, with consequent implications for economic activity within a state. An issue as important as this surely merits attention. Another unanswered question is the effect of the Model Statute on the state treasury Can fiscally strapped states afford such a program— even if it is in their best long-term interests? While Prof. Redfield acknowledges that money may pose a problem, she gives no hint as to how much her program may end up costing and where the money will come from.

Significantly Prof. Redfield places little emphasis on the possible role of the federal government. While *Vanishing Farmland* is ostensibly directed towards state and local action, the exclusion of possible federal initiatives appears short-sighted. Since the federal government has recently shown an interest in farmland preservation[12] one might take a closer look at possible federal initiatives (such as lower federal inheritance taxes for farmowners) and the prospects for state-federal coordination. Moreover many of the causes of farmland depletion are directly attributable to the federal government. For instance, federal highway construction programs are major consumers of prime agricultural land. In addition, federal tax considerations often serve to spur rural development.[13] More significantly the federal government may well play an important role in coordinating interstate land preservation efforts. Since the loss of prime agricultural land tends to be a regional (as opposed to a state-specific) problem, federal coordination may prove to be more efficient and effective than individual state efforts.

12. *See generally* Duncan, *Toward Theory of Broad-based Planning for the Preservation of Agricultural Land*, 24 NAT. RESOURCES J. 61, 62-72 (1984); Schnidman, *The Evolving Federal Role in Agricultural Land Preservation*, 18 URBAN LAWYER 423 (1986).

13. *See* Freilich & Davis, *Saving the Land: The Utilization of Modern Techniques of Growth Management to Preserve Rural and Agricultural America*, 13 URBAN LAWYER 27 28-29 (1981).

Finally given the current sentiment concerning the wisdom of governmental intervention, one may wonder whether government involvement is either necessary or appropriate. While all agree that the amount of available farmland in the United States is decreasing, some argue that market forces will, by themselves, efficiently determine the proper allocation of land.[14] Consequently it is argued, governmental intervention should be kept at a minimum. While there may be significant externalities which compromise the free market view *Vanishing Farmland* does not attempt to address this issue. Instead, the author identifies the problem (farmland depletion) and provides a solution (government intervention) without adequately surveying the possible alternatives.

Assuming, however that governmental intervention is desirable, Prof. Redfield presents a fine analysis in *Vanishing Farmland*. She discusses the problems faced by governmental land retention programs in a balanced and thorough manner The proposed Model Statute follows easily from the preceeding analysis. As a result, the reader is not left wondering about the basis of any part of her Model Statute. *Vanishing Farmland* is an excellent source book for anyone interested in land retention issues, and may prove to be a useful guide for state legislators in search of solutions for the growing problem of agricultural land loss.

As a final note, it should be stressed that land loss is but one of many problems facing our nation s farmers. As summarized by one scholar of agricultural policy·

> Great expectations should not be aroused with regard to the ability of these techniques to preserve prime agricultural lands unless they are part of an overall economic and social policy that is responsive to the causes of the agricultural-land-disappearance syndrome. In short, if farming is not economically profitable, no approach or combination of approaches to farmland preservation will be successful.[15]

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14. *See* NALS, FINAL REPORT *supra* note 1, at 26.

15. Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's*, 21 WASHBURN L.J. 443, 446 (1982).