LEGAL TECHNIQUES FOR PROMOTING SOIL CONSERVATION

IN many of the southern and western states soil erosion has developed into an earth epidemic,[1] spreading at accelerating rates from the original sources of infection. Recent government studies indicate that more than half the total land area of the United States has already been damaged, with 50,000,000 acres rendered unfit for any future cultivation.[2] The direct cost to individual farmers in terms of reduced fertility alone is estimated at more than $400,000,000 a year.[3] In addition to the capital loss in the destruction or deterioration of irreplaceable natural resources,[4] erosion affects the nation as a whole by necessitating costly physical and social readjustments. The removal of top soil has increased the severity and frequency of floods,[5] forced the siltation of reservoirs and river channels, and led to the abandonment of large areas of land, with the consequent necessity of resettling displaced farmers.[6]

Because the physical causes of erosion are misuse and overworking of particular soil areas, an effective control program must be based upon regulation of the farming practices of individual occupants. But the traditional American land policy has been a fusion of incautious paternalism with doctrines of laissez-faire.[7] No attempt was made to control the use to which private land owners put their land, and the government distributed the public domain with a free hand,[8] without regard to the cultivation practices of vendees or home-

1. CHASE, RICH LAND, POOR LAND (1937) 111–54; LITTLE WATERS (U. S. Soil Cons. Serv. 1933); 3 DEP'T OF AGRIC. BUDGET ESTIMATES FOR FISCAL YEAR 1940, 566–7.

2. BENNETT, SOIL CONSERVATION (1939) 4.

3. *Id.* at 11.

4. New soil is formed only by weathering of underlying rock foundations. It takes about 500 years, under normal conditions, for weathering to produce one inch of soil. BENNETT, SOIL CONSERVATION (1939) 151.

5. Silting of river bottoms raises the normal channel, while the removal of the porous top soil reduces the ability of the ground to absorb spring run-off water. REPORT OF THE MISSISSIPPI VALLEY OF PWA (1934) 24–26.

6. The most conspicuous migrations have been those of the "Okies" and "Arkies," fleeing from the Southwestern dust bowl states. See STEINBECK, GRAPES OF WRATH (1939); TAYLOR, MEN ON THE MARCH (1939). But rural depopulation has occurred in all parts of the country. REP. N. Y. STATE PLANNING BD. (1937) 23–5.

7. Reporting to the President in 1936, the Great Plains Committee attributed much of the responsibility for the continued practice of destructive technique by American farmers to the prevalence of "inherited assumptions" . . . "regarding man's relations with nature" and . . . "the inexhaustible stock of our resources." GREAT PLAINS COMMITTEE, FUTURE OF THE GREAT PLAINS (1936) 3–7. See BLAISDELL, GOVERNMENT AND AGRICULTURE (1940) 103–7.

8. The administration of the Federal Homestead Act, 8 STAT. 313 (1862), 43 U. S. C. § 161 *et seq.* (1934), and its state analogues was considered to be a ministerial rather than a discretionary task. Consequently millions of acres of land unsuited for

steaders. The major shift in governmental policy to emphasis on control rather than indiscriminate assistance came only as an aftermath of the drought and dust storms of 1934. In succeeding years, the Federal Department of Agriculture has initiated and directly operated several conservation programs, primarily emphasizing retirement of submarginal land[9] or purchased compliance with schedules for reducing acreage devoted to soil-depleting crops.[10] In the same period, the individual states have introduced and carried forward a series of land control programs. Through rural zoning statutes, halting efforts have been made to restrict future land utilization in light of existing topographic characteristics and desired social relationships. Through the soil conservation district laws, the actual administration of federal conservation work programs has been extended to democratically selected local committees. At the same time, these committees have been delegated power to require individual land occupiers to operate their farms according to prescribed standards. Finally, attention has been centered upon the necessity for modifying land tenurial patterns to provide incentive for participation of the three million non-owning occupiers in the general conservation programs.[11]

Federal Control. Erosion control remained on the periphery of federal agricultural policy[12] until invalidation of the first AAA[13] hastened a shift in the means of federal farm regulation from emergency reduction of specific crop acreage[14] to a permanent program emphasizing improved land management. Under the Soil Conservation and Domestic Allotment Act of 1936,[15] an elaborate system of payments was devised to induce individual farmers

cultivation were distributed to aspiring farmers. HIBBARD, A HISTORY OF THE PUBLIC LANDS (1929) 404 *et seq.*; HEYNING, THE STATES AND CONSERVATION (1939) 7-17.

9. See BLAISDELL, GOVERNMENT AND AGRICULTURE (1940) 119.

10. 50 STAT. 246 (1936), 7 U. S. C. § 601 *et seq.* (Supp. 1938); 52 STAT. 819 (1938), 7 U. S. C. A. § 1282 *et seq.* (Supp. 1940).

11. In addition to the legislation discussed in the text, a number of other important auxiliary conservation programs have been initiated by the federal government. See 2 LYON & ABRAMSON, GOVERNMENT AND ECONOMIC LIFE (1940) 935-8; TO HOLD THIS SOIL (Misc. Pub. No. 321, U. S. Dep't of Agric. 1938) 179-191.

12. The first federal participation in the erosion control program—beyond the conduct of reconnaissance surveys and publication of conservation manuals for farmers—came as a result of the creation of the Soil Conservation Service in 1935. 49 STAT. 163 (1935), 16 U. S. C. § 590(a) (Supp. 1938). Until 1937, however, the Service was almost exclusively concerned with the operation of regional demonstration projects. See REPORT OF THE SOIL CONS. SERVICE FOR 1938, 1-2.

13. United States v. Butler, 297 U. S. 1 (1936). For the effect of the decision on Department policy, see BLAISDELL, GOVERNMENT AND AGRICULTURE (1940) 48-9; AGRICULTURAL ADJUSTMENT 1937-38 (U. S. Dep't Agric. 1939) 30.

14. 49 STAT. 1148 (1936), 16 U. S. C. § 590 g-o (Supp. 1938) and 50 STAT. 246 (1937), 7 U. S. C. § 601 *et seq.* (Supp. 1938). The amended Agricultural Adjustment Act of 1938, 52 STAT. 819 (1938), 7 U. S. C. A. § 1282 *et seq.* (Supp. 1940), supplements benefit payments for conservation and erosion control with marketing regulation and parity payments.

15. 49 STAT. 1151 (1935), 16 U. S. C. § 590 *et seq.* (Supp. 1938).

to stop soil-depleting practices and carry out restorative work on their land. But the new AAA possesses only a limited effectiveness because of the atomistic nature of the control exercised over participants. The accrual of federal benefits is made dependent upon the performance of individual practices, without relation to the general conditions under which a farm is operated.[16]

Direct federal construction of erosion retarding projects is relied on to promote soil conservation in emergency situations. One of the most important examples is the "shelter-belt" project designed to control soil drifting on the treeless prairies.[17] The Forest Service, using WPA and CCC laborers, has planted windbreaks on farms in the "dust-bowl" states in an effort to curb the extent of sheet erosion. To take some of the most highly erosible land out of cultivation, a sub-marginal land purchase program has been initiated.[18] Originally started under the aegis of the emergency relief authorities, sub-marginal land retirement is now under the control of the Secretary of Agriculture. Efforts are being made to coordinate the purchase program with general conservation planning activities and to convert the newly acquired areas into forests, grazing reservations, or wild life refuges. Wherever possible, the dispossessed farmers are then aided by the Federal Security Administration to relocate themselves in better agricultural areas.[19]

Simultaneously efforts have been made to place under closer supervision the several hundred million acres of land which still remain in the public domain. Control systems have been operating in the National Forests since the beginning of the twentieth century.[20] The Taylor Grazing Act of 1934[21] extended similar control to unreserved and unappropriated public lands, previously overgrazed by private cattle raisers. Squatter sovereignty has been replaced by controlled entrance onto federal land. Cattle grazing is regulated through the issuance of limited licenses, restricting the area which any grazer may use and the number of cattle which may be placed on any portion of the range. The whole area is divided into control districts, and democratically elected local committees prepare rules for range practice.[22]

The present federal conservation techniques, while playing an important role in checking the spread of erosion and in securing the construction of individual remedial projects, are nevertheless insufficient to insure long run conservation. Lack of constitutional[23] power prevents the assumption of

16. 49 STAT. 1151 (1935), 16 U. S. C. § 590g-1 (Supp. 1938).

17. See BLAISDELL, GOVERNMENT AND AGRICULTURE (1940) 117–8.

18. *Id.* at 119; 2 LYON & ABRAMSON, GOVERNMENT AND ECONOMIC LIFE (1940) 933–36.

19. See REPORT OF THE FARM SECURITY ADMINISTRATION FOR 1939, 47–58.

20. 2 LYON & ABRAMSON, GOVERNMENT AND ECONOMIC LIFE (1940) 878–9.

21. See REP'T SEC'Y INT. FOR 1939, 31–7.

22. *Id.* at 46.

23. In the absence of an explicit grant of federal police power, coercive control of farm practices can be achieved only by the conditional grant technique, utilized under

authority to decree affirmative use regulations to control cultivation techniques of individual farms. The impossibility of centralizing control over 6,000,000 farmers — operating under extremely diverse physical conditions — makes supplementary state land use legislation an administrative as well as a legal necessity.

Rural Zoning. The utility of zoning statutes in curbing haphazard urban development and encouraging the growth of integrated neighborhood communities[24] has led many states in recent years to adopt general enabling acts, authorizing counties and townships to control rural land use.[25] But the introduction of effective land control has been retarded by overemphasis on short-run fiscal objectives. In most jurisdictions, existing regulations seek only to prevent farmers from settling in isolated sections of the state, in order to reduce rural road and education bills, and also to protect forest growth.[26] In the hands of far-sighted administrators, however, rural zoning ordinances could be related to broad schemes for regional planning.[27] The control of erosion and the adjustment of land use in the light of physical soil characteristics might then become explicit objectives of the local ordinances.

The elimination of existing non-conforming users has always been the most important legal problem confronting zoning agencies. Direct attempts by the city boards to compel dissident occupiers to alter their premises in conformity with land use regulations have generally been enjoined as arbitrary interferences with "vested rights."[28] Consequently many recent enabling acts in terms exempt present property holders and their successors in title or occupancy,[29] and rely on indirect techniques to secure their elimination. The conventional statutory technique to avoid the constitutional interdiction on direct elimination and to secure the gradual removal of non-conforming build-

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the first AAA. Consequently, the introduction of such a program is dependent upon reversal of United States v. Butler, 297 U. S. 1 (1936). See Steward Machine Co. v. Davis, 301 U. S. 548 (1937); Corwin, *The Spending Power of Congress* (1923) 36 HARV. L. REV. 548; Collier, *Judicial Bootstraps and the General Welfare Clause* (1936) 4 GEO. WASH. L. REV. 211, 219–242.

24. BASSETT, ZONING (1936) 1–11.

25. The first state-wide zoning enabling act was adopted in Wisconsin in 1929. Wis. Laws 1929, p. 468; WIS. STAT. (1939) § 59.97. Twenty-three counties have issued rural zoning ordinances under the act. Wertheimer, *Constitutionality of Rural Zoning* (1938) 26 CAL. L. REV. 175.

26. See (1931) OPS. ATT'Y GEN. WIS., 751; Wertheimer, *op. cit. supra* note 25, at 176–7.

27. See GREAT PLAINS COMMITTEE, THE FUTURE OF THE GREAT PLAINS (1936) 81; 7 SUPPLEMENTARY REPORT OF THE LAND PLANNING COMMITTEE OF THE NATIONAL RESOURCES BOARD (1935) 125–6.

28. Biscay v. Burlingame, 127 Cal. App. 213, 15 P. (2d) 784 (1932); People v. Miano, 234 App. Div. 94, 254 N. Y. Supp. 105 (1931); Bartkus v. Albers, 189 Wis. 539, 208 N. W. 260 (1926). See (1930) 39 YALE L. J. 735; Noel, *Retroactive Zoning And Nuisances* (1941) 41 COL. L. REV. 457, 473.

29. See BASSETT, ZONING (1936) 116.

ings in cities has been to prohibit reconstruction or substantial modification of existing structures. State courts have often vitiated these restrictive clauses by invocation of the "similar use" doctrine.[30] Another device for eliminating existing users has been frustrated by cases holding that abandonment, which might be construed to terminate constitutional exemption from general regulation, was to be determined by the intent of the occupier and not by the physical state of the premises.[31]

It is problematical whether these judicial glosses on urban statutes — designed to protect real estate investments — will be carried over into the rural scene. While the actual equity in crops necessitates no more than a one year period of protection, the farmer's investment in drainage ditches, terraces, and other forms of agricultural capital may well be accorded the same general exemption from subsequent zoning ordinances as urban buildings are. But the analogy between urban and rural statutes is limited,[32] because of the divergent consequences of permitting statutory exemptions. The perpetuation of non-conforming uses in rural areas presents a more serious problem than that created by the continued operation of garages or abattoirs in a residential neighborhood. Once gullying commences on an uphill farm or the integumentary roots of prairie grass are destroyed, it becomes almost impossible to protect even the most scientifically cultivated contiguous units.[33]

If the necessity for removing vested rural dissentients is accepted, it would seem desirable to secure their elimination by the direct grant of power to make retroactive regulations. The present "reconstruction" and "abandonment" rules, even if interpreted with unwonted judicial liberality, share the common defect of making elimination dependent upon fortuitous future events. A more effective technique is indicated by the Louisiana "period of amortization" doctrine,[34] under which non-conforming businesses within the territory of a zoning district must be terminated within one year after adoption of the restrictive regulation.

To permit equitable application of the Louisiana doctrine in the rural areas, the Zoning Boards of Appeal could be empowered to vary the individual farmer's amortization period in light of his estimated investment in improvements in the retired crop land. Where alternate profitable use of the land,

30. Lexington v. Bean, 272 Mass. 547, 172 N. E. 867 (1930); Wasserman v. Cooper, 201 Wis. 359, 230 N. W. 50 (1930). *Contra:* Werbelowsky & Lavine Realty Corp. v. Walsh, N. Y. L. J., Jan. 13, 1925, p. 127, col. 2 (N. Y. Sup. Ct.).

31. Comstock v. New Britain, 112 Conn. 25, 151 Atl. 335 (1930); Schaetz v. Manders, 206 Wis. 121, 238 N. W. 835 (1931).

32. See Wehrwein, *Enactment and Administration of Rural County Zoning Ordinances* (1936) 16 J. FARM. ECON. 508. Where the non-conforming use is a nuisance, it is always subject to abatement. Brown v. Grant, 2 S. W. (2d) 285 (Tex. Civ. App. 1928).

33. See note 1 *supra.*

34. See State v. McDonald, 168 La. 172, 121 So. 613 (1929); State v. Jacoby, 168 La. 752, 123 So. 314 (1929).

e.g., for dairying or grazing, was economically impossible, the county could make compensatory payments to the displaced farmer or exchange reverted tax-delinquent land for his old farm.

But neither alteration in the techniques of enforcement nor more imaginative adoption of control regulations can eliminate fundamental limitations on the usefulness of rural zoning as a technique for promoting rational land use. The equal protection clauses of the federal and state constitutions might conceivably be held to require uniformity of regulation over large land areas,[35] preventing control of innumerable splinter sub-marginal plots. More important, the zoning statutes — operating only by restraints — provide no method for compelling farmers to construct needed improvements, such as terraces or check dams, or to operate their farms pursuant to long range developmental plans. Despite these limitations, rural zoning retains a permanent place in conservation programs as the simplest and most effective technique for withdrawing highly erosible land from future cultivation and for encouraging diversion of such areas to sustained-yield forests[36] or recreational projects.

The Soil Conservation Districts. The most effective instruments yet devised for coordinated attack on the erosion problem are the Soil Conservation Districts, authorized by state statutes and created by local residents.[37] The impetus to the organization of the Districts was provided by the Secretary of Agriculture's administrative ruling in 1936 that Congressional appropriations for conservation work would thereafter be allocated exclusively to states which "adopted suitable land-use legislation."[38] The enabling acts now in force in thirty-eight states are patterned on the Standard Soil Conservation Districts Act, drafted by the Department of Agriculture.

Since the most efficient units for rural planning are homogeneous land areas, wholly located within a single watershed and devoted to the production of only one or two staple crops,[39] the Standard Act disregards the existing topographically heterogeneous agencies of local government and provides for the establishment of autonomous control districts within each state.[40] The formal executive and legislative powers of the District are exercised by the

35. See Millin Bd. of Public Works, 195 Cal. 477, 234 Pac. 381 (1925); 38 A. L. R. 1479.

36. See SEN. Doc. No. 12, 72d Cong., 3d Sess. (1933) 1532–6.

37. The establishment of a district is made conditional upon the approval of local residents or land occupiers at a special referendum. STANDARD SOIL CONSERVATION DISTRICTS LAW, § 5 (hereinafter cited as STAND. SOIL ACT). See note 42 *infra*.

38. 2 LYON & ABRAMSON, GOVERNMENT AND ECONOMIC LIFE (1940) 920.

39. REP. OF CHIEF OF SOIL CONS. SERVICE (U. S. Dep't of Agric. 1937); (1940) 50 YALE L. J. 134, 142–3. *Contra:* Walker & Johnston, *Centralization of Police Power for Land Conservation* (1941) 17 J. LAND P. U. ECON. 17, 20–24.

40. New York is the only state where the creation of new types of governmental subdivisions is interdicted. Miller v. Canava, 223 N. Y. 601, 119 N. E. 1059 (1918); People *ex rel.* Yost v. Becker, 203 N. Y. 201, 96 N. E. 381 (1911).

Board of Supervisors. The majority of this Board is usually elected in each District,[41] with the State Soil Conservation Committee,[42] a general coordinating agency, empowered to name one or two additional members.

Once the District machinery has been established, the Supervisors are empowered to enact compulsory land-use regulations.[43] Except for a few districts in the dust bowl states which have prohibited the plowing of grassland, however, the ordinance-making power has so far gone unused. To a considerable extent, this policy is justified by the desire to demonstrate the advantages of governmental land control through cooperation with individual farmers, before experimenting with coercive procedures and risking adverse litigation. Another reason for not using compulsory regulation arises from a rigid interpretation of the statutory and constitutional requirement that rules be uniform throughout the district. Such an interpretation would appear unwarranted, however, in view of Section 9 of the Standard Act which authorizes the Boards of Supervisors to "provide regulations varying with the type or class of land affected." This seems to permit classification of the land within the district on a sufficiently minute scale to control all of the varying topographical areas and to comply with the constitutional shibboleth. There has also been an unfortunate tendency to consider the ordinance-making power of the Districts as no greater than that of an ordinary zoning district.[44] This restrictive definition, which ignores the specific grant of power to issue affirmative construction orders,[45] has permitted soil depletion by a minority of uncooperative landowners to continue unchecked.

In practice most districts have sought to control farm practices only by voluntary agreements with farmers. To induce individual farmers to sign these agreements, the Department of Agriculture now grants subsidies for conservation work on farms only through the medium of the Districts and makes its grants conditional upon the prior signing of a land-use contract.[46] Belief in the desirability of "economic self-government"[47] has led the Department to allocate the responsibility for the initiation and planning of local projects to the district supervisors. But the Department retains the negative control embodied in the power to refuse to allot funds from its general appro-

41. The individual statutes introduce many variations in suffrage requirements.

42. The State Committee has the final voice in determining whether to establish districts in particular areas and in delineating the boundaries. STAND. SOIL ACT § 4.

43. *Id.* at § 9. The Act also provides for the establishment of Boards of Adjustment to permit variance from the regulations, where strict enforcement would create undue hardship. § 12.

44. See *Ex parte* Elam, 6 Cal. App. 233, 91 Pac. 811 (1907); Glick, *State Legislation for Erosion Control* (1937) 3 SOIL CONS. 120, 122.

45. STAND. SOIL ACT § 9(1)(2)(3).

46. See BLAISDELL, GOVERNMENT AND AGRICULTURE (1940) 120–1; STAND. SOIL ACT § 8(11).

47. See WILSON, DEMOCRACY HAS ROOTS (1939) (the author formerly was Under-Secretary of Agriculture and is now Director of the Extension Service); Currin v. Wallace, 306 U. S. 1 (1939).

priation when it disapproves of specific local projects.[48] Since the exercise of administrative fiscal discretion is not generally subject to judicial review,[49] the extent to which the avowed aim of democratic local control of the conservation program is attained depends upon the self-restraint of the federal officials and especially of the field agents.[50]

The present district-farmer contracts regulate the operation of each field in the beneficiary's farm for a five year period and provide for the construction of any necessary check projects. The effectiveness of private contracts as techniques for erosion control manifestly depends upon judicial willingness to provide effective sanctions by the issuance of injunctions and decrees of specific performance. The terms of the standard contracts raise a number of traditional objections to the grant of equitable remedies, including the absence of "mutuality," the possibility of securing relief at law, and the possible implication of a requirement of personal performance by the obligor. But courts cognizant of the urgent need for erosion control can readily by-pass these objections.

The alleged absence of mutuality — because of the non-amenability of a local governmental official to suit when acting as an administrative agent for the state[51] — may be obviated by making the equity decree conditional upon performance or tender by the District. Alternatively, courts may adopt the doctrine, previously used in eminent domain actions[52] and suits by unions to enforce collective bargaining agreements,[53] that mutuality of "duty" may exist even where effective remedies are available to only one of the obligees.[54]

Moreover, while the right to sue at law for damages is theoretically available, such a remedy would be inadequate.[55] Part of the consideration for

48. The actual procedure is for the Supervisors to transmit recommendations to field agents of the Soil Conservation Service, who in turn forward plans to their Washington office. Payments are then made by the Federal Government.

49. See Miguel v. McCarl, 291 U. S. 442 (1934); Frothingham v. Massachusetts, 262 U. S. 447 (1923); Lukens Steel Co. v. Perkins, 310 U. S. 113 (1940).

50. See Bradley, J., dissenting in Chicago, M. & St. P. Ry. v. Minnesota, 174 U. S. 418, 427 (1890).

51. This limitation operates only insofar as the Districts are direct administrative subdivisions of the state. If the Districts are considered as municipal corporations, however, the transient agency relationship would not create immunity from civil liability. 6 McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1937) § 2652.

52. *Ex parte* Pocono Pines Assembly Hotels Co., 285 U. S. 526 (1932); Comment (1933) 46 HARV. L. REV. 677. Since there is no way of compelling Congress to appropriate funds to pay judgments recovered against the United States in suits brought under the Tucker Act, the United States would be unable to secure equitable enforcement of contracts, unless courts impliedly accepted the view stated above.

53. Schlesinger v. Quinto, 201 App. Div. 487, 194 N. Y. Supp. 401 (1922); Weber v. Nasser, 281 Pac. 1074 (Cal. App. 1930); Witmer, *Collective Bargaining Agreements in the Courts* (1938) 48 YALE L. J. 188, 195–202.

54. See WALSH, EQUITY (1930) c. 14; RESTATEMENT, CONTRACTS (1932) § 372.

55. The judgment for damage will probably cover very few of the incidental effects of the farmer's breach. RESTATEMENT, CONTRACTS (1932) § 376.

an individual owner's consent to submit his land to district control is the expectation that the fertility of his farm will be enhanced by the exercise of similar control over contiguous units. Damage to a neighboring farmer or to the district as a whole from one occupier's failure to perform will rarely be susceptible of exact pecuniary estimation. It would, therefore, seem essential to enforce these rural land use agreements in equity, as has long been customary in the case of private urban building schemes.[56]

Nor should the award of specific performance be barred under the *Lumley v. Wagner* rule,[57] because of the probability that the obligor-farmer will himself have to do any necessary restorative work. The contract merely recites the owner's agreement to have specified work performed, and it may readily be interpreted — by analogy to a trade union's liability under collective bargaining agreements[58] — to create an obligor's option to secure performance by any other capable individual.

Crucial to the long-term success of any contractual scheme for promoting land conservation is the possibility of obtaining effective sanctions against succeeding owners. Since only a few of the Soil Conservation Districts own or lease any land, the sale of farms whose operation has been restricted by contracts will raise another legalistic objection to enforcement, because of the general judicial refusal to run the burden of covenants in gross against assignees.[59] Most Districts have sought to avoid raising these problems by the inclusion of a proviso in the original contracts giving subsequent vendees the right to terminate the utilization agreements.[60] But clearly governmental appropriations are wasted and long term conservation planning is rendered impossible unless the covenant provisions bind all subsequent takers of the land. In view of the development of modern recording statutes, limitations on the enforcement of servitudes in gross are no longer necessary to prevent hidden encumbrances on title. It would seem both logical and socially desirable to make the presence or absence of a dominant tenement as unnecessary to enforcement of servitudes as privity of estate has been since the decision

56. Shoyer v. Mermelstein, 93 N. J. Eq. 57, 114 Atl. 788 (1921); 1 CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND (1929) 150-9.

57. 1 DeG. M. & G., 604 (G. B. Chan. 1852); see St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701 (1906); RESTATEMENT, CONTRACTS (1932) § 371.

58. See Mississippi Theatres Corp. v. Hattiesburg Local Union, 174 Miss. 439, 448, 164 So. 887 (1936).

59. This rule operates in almost all jurisdictions as a limitation on the enforceability of both covenants and equitable servitudes. 2 TIFFANY, REAL PROPERTY (1937 ed.) § 1441. *Contra:* Van Sant v. Rose, 260 Ill. 401, 103 N. E. 194 (1912); Stone, *Equitable Enforcement of Covenants with Strangers* (1918) 18 COL. L. REV. 313. An attempt to enforce covenants in gross made with municipal corporations was "regretfully" dismissed in London County v. Allen, 3 K. B. 642 (1914).

60. In fact the office of the Solicitor, United States Dep't of Agriculture, recommends that assignee clauses be omitted from these contracts.

in *Tulk v. Moxhay*,[61] provided notice of the provisions was available before the purchase of the land.[62] Recognition of the identity of interest between the District and cooperating farmers should prove sufficient to make the covenants appurtenant and, therefore, enforceable interests,[63] in those jurisdictions where modernized property concepts have not yet won acceptance. Precedent for this interpretation is provided by the recent decision of the New York Court of Appeals in the *Neponsit* case[64] that a private developmental association, which itself owned no land, was nevertheless not a covenantee in gross because of privity with its land-holding members.[65]

A number of other expedients are available to make the District agreements run against transferees. Assignment of state-owned tax-reverted land to the Districts as tenants at will[66] would make these agencies "property-holders." If the Districts' holdings were widely enough scattered, it should be simple to urge that the necessity for protecting publicly-held land within a common watershed made the covenants appurtenant rights.[67] A possible drafting device to secure enforcement would be to label the original promises "easements" rather than "covenants,"[68] to take advantage of the greater willingness of courts to run the burden of the former class of limitations against third parties.[69] It is true that only simple affirmative obligations,[70] such as agreements to maintain party walls or irrigation ditches, have hitherto been framed and enforced as easements. But whether labelled easements or covenants, neither the affirmative character nor the detail of the promises should preclude their enforcement against transferees with notice. The importance of enforcing these large scale co-operative agreements, combined with the numerous decisions enforcing private land planning schemes, should suffice to outweigh anachronistic dogmas of property law.[71]

61. 2 Phillips 774 (1848).

62. See CLARK, *op. cit. supra* note 56, at 148-55.

63. Other "indirect property" interests have already been enforced, despite the ordinary limitations on covenants in gross. See CLARK, *op. cit. supra* note 56, at 85-6.

64. Neponsit Realty Corp. v. Clark, 179 N. Y. 504, 204 N. E. 1103 (1938).

65. See Comment (1938) 38 COL. L. REV. 1021.

66. See 1 TIFFANY, REAL PROPERTY (3d ed. 1937) §14; 2 BL. COMM. No. 67-70; Co. LITT. Nos. 76a, 91a.

67. Ownership of a single plot might not suffice in a District coterminous with a county, because of the geographical remoteness of this unit from some obligors' farms.

68. The minor differences between the effects of covenants and easements are traceable to anachronistic metaphysical definitions. See HOLMES, THE COMMON LAW (1881) 382-6. Since their ordinary functions are the same, courts should approve free substitution of the verbal symbols when social policy may be promoted thereby. See Middlefield v. Church Mills Knitting Co., 160 Mass. 267, 35 N. E. 780 (1894).

69. See HOLMES, THE COMMON LAW (1881) 382-6; CLARK, *op. cit. supra* note 56, at 52-3, 72, 115, 155.

70. 3 TIFFANY, REAL PROPERTY (3d ed. 1939) §810; Note (1927) 50 A. L. R. 1024.

71. Although the British courts have refused to extend the doctrine of Tulk v. Moxhay to affirmative agreements, Haywood v. Brunswick Bldg. Soc., 8 Q. B. 902 (1881), many American courts have been willing to enforce these servitudes. Murphy

In addition to these enforcement problems, another impediment to the use of private agreements as the dominant method of enlisting individual farmers in the conservation program has resulted from the inadequate procedures now used in selecting beneficiary farms.[72] Federal assistance has been made unnecessarily dependent upon the financial status of an individual farmer. Since the conservation subventions, like other federal grants-in-aid,[73] are based on the "matching payment" principle,[74] they are available only to farmers who can earn or borrow funds adequate to defray their aliquot share of the construction costs. The most impecunious occupiers are generally able to secure long term loans at low interest rates from the Farm Security Administration.[75] But inability to procure the necessary funds has barred many marginal farmers from full participation in the conservation program.

Furthermore, many Boards of Supervisors have haphazardly allocated federal grants to applicants, without relation to the danger of erosion in specific areas. It would seem desirable to survey all privately owned land within the territory of a district[76] and then issue priority ratings to individual occupiers, in light of specific soil conditions. Grants could then be made in order of technical need. Modification of existing farm credit statutes to augment funds available for long term improvement loans would enable marginal farmers to take advantage of their preference ratings and participate in the control program.

Another obstacle to district land planning by individual contracts results from inability to compel recalcitrant owners to sign the private agreements. Coordination of the administration of the AAA and federal Soil Conservation subsidy programs can strengthen the incentive to an individual farmer's participation in District activities. A partial step in this direction has recently been made in Alabama.[77] Since January 1, 1941, receipt of AAA payments for carrying out specified individual restorative practices has been made conditional upon preparation of five year schedules for alternating fields between depleting and forage crops.[78] After further experimentation, it may become

v. Kerr, 5 F. (2d) 908 (C. C. A. 8th, 1925); Lloyd, *Enforcement of Affirmative Agreements* (1928) 14 VA. L. REV. 419; Note (1928) 57 A. L. R. 358.

72. The views expressed in the next two paragraphs are based on examination of fifty of the biennial District Reports, filed with the Soil Conservation Service, U. S. Dep't of Agric.

73. KEY, FEDERAL GRANTS-IN-AID (1937); GAUS & WOLCOTT, PUBLIC ADMINISTRATION AND THE DEPARTMENT OF AGRICULTURE (1941) 155–61.

74. Within some limits, farmers may make their contributions by labor or the provision of equipment.

75. See Murray, *Government Farm Credit and Tenancy* (1937) 4 LAW & CONTEMP. PROB. 489.

76. Such surveys have already been carried out in many counties by the Land Use Planning Committees or by autonomous state conservation agencies.

77. The State AAA Administrator and the State AAA Committee apparently are jointly responsible for the introduction of the "Alabama plan."

78. See U. S. Dep't of Agric. Press Release, Jan. 3, 1941, *The Alabama Plan.*

feasible to condition both the AAA conservation and the crop restriction payments upon prior consummation of an acceptable farm planning agreement with the local Board of Supervisors.[79]

The difficulties of enforcement arising under individual farm contracts and the threat to the entire district program because of the refusal of a minority of owners to cooperate would be largely removed by wider use of the power to make compulsory land-use regulations. For enforcing compliance with regulations, the supervisors possess an armory of sanctions.[80] Since open fields are not protected by the "search and seizure clauses" of most state constitutions,[81] farm land may be entered and inspected at any time. Violation of the regulations is made a misdemeanor, punishable by fine. The Supervisors are empowered to supplement the ordinary tort actions for negligent use of the land[82] by creating a special cause of action[83] to recoup for the damage resulting from erosive practices. Contiguous owners, or the Supervisors acting in a representative capacity, could presumably also sue[84] to abate a proscribed practice as a rural nuisance. When an individual farmer neglects or refuses to construct required check projects, an order of compliance may be issued by the local *nisi prius* court.[85] This decree empowers the Supervisors to enter upon the land and "perform any necessary operations" if non-compliance continues beyond a stated period. The district's expenditures are then recouped by adding the cost of construction to the farmer's annual property tax.[86]

Coordination of the Conservation Program. Zoning and Soil Conservation District legislation will probably prove inadequate as methods of controlling erosion, unless accompanied by modification of the existing tenurial system. There is a simple reciprocal relationship between the growth of farm tenancy

79. Amendment of the Agricultural Marketing Act of 1938 would be a prerequisite to the introduction of this coordinated subsidy-control program.

80. STAND. SOIL ACT § 7(1).

81. Noscielski v. State, 199 Ind. 546, 158 N. E. 902 (1927); State v. Quinn, 111 S. C. 174, 97 S. E. 62 (1918). However, the curtilage—the area immediately adjacent to the dwelling house—may be entered and examined only upon production of a search warrant. Mullen v. Commonwealth, 220 Ky. 656, 295 S. W. 987 (1928); Welch v. State, 154 Tenn. 60, 289 S. W. 510 (1926).

82. See Harrisonville v. Dickey Clay Mfg. Co., 289 U. S. 334 (1933).

83. Provided they apply to all cases of statutory violation, this administrative creation of an additional right of civil redress is not a violation of the separation of powers doctrine. United States v. Grimaud, 220 U. S. 506 (1911); Musgrove v. Parker, 84 N. H. 550, 153 Atl. 320 (1931); Comment (1922) 35 HARV. L. REV. 952.

84. Violation of an ordinance would seem to be prima facie evidence in this action. See HARPER, TORTS § 78. But see Schumer v. Caplin, 241 N. Y. 346, 150 N. E. 139 (1925).

85. STAND. SOIL ACT § 11. See Lawton v. Steele, 152 U. S. 133 (1894); Eccles v. Ditto, 23 N. M. 235, 167 Pac. 726 (1917); First Nat. Bank of Sutherlin v. Kendall Timber Corp., 107 Ore. 1, 213 Pac. 142 (1923) (authorizing public entrance onto the land to carry out conservation work).

86. STAND. SOIL ACT § 11.

and the spread of erosion.[87] Since their occupancy is terminable at the option of the owner at the expiration of the customary one year lease,[88] tenants generally are exclusively concerned with the maximization of immediate cash income and have no interest in preserving soil resources. As a result, the over-all rate of erosion on tenant-operated farms is almost double that of contiguous owner-operated units.[89] The prevalence of "land-mining," in its turn, plays an important role in converting erstwhile independent farmers into tenants. As land fertility diminishes, unit productivity and income tend to decline concomitantly and the rate of foreclosure rises.[90]

Because of the assumption that tenancy was an intermediate stage between day labor and farm ownership, the traditional American policy has been confined to assisting tenants only by provision of cheap credit for land purchase.[91] Only in the last few years has realization that the alleged ladder of tenancy[92] has in fact become a treadmill[93] created widespread recognition of the necessity for changing the legal relations between landlord and tenant[94] to give non-possessory occupiers an incentive to participate in the general conservation program.

Such participation might be achieved by reforms similar to those adopted in England[95] and other mature agricultural countries.[96] Longer patterns of tenancy — with the resultant interest in the preservation of fertility of individual plots of land — can be fostered by requiring owners to make com-

87. REP. OF PRESIDENT'S COMM. ON FARM TENANCY (1937) 6; SMITH, THE SOCIOLOGY OF RURAL LIFE (1940) 278-9.

88. SPIEGEL, LAND TENURE POLICIES AT HOME AND ABROAD (1941) 71.

89. SCHICKELE, FARM TENURE IN IOWA (1937) 262; Schickele, *Tenure Problems and Research Needs in the Middle West* (1937) 19 J. FARM ECON. 118-9. For criticism of the statistical methods of these studies, see Schultz, *Capital Rationing and Tenancy Reform* (1940) 48 J. POL. ECON. 309.

90. Tenancy has increased from 25% of all farmers in 1880 to 42% in 1935. REP. OF PRESIDENT'S COMM. ON FARM TENANCY (1937) 13. In addition to soil depletion, other factors contributing to the increase in tenancy are the secular decline in the ratio of agricultural to industrial prices, the loss of export markets with consequent reduction in aggregate demand, and the frequent practice of capitalizing land values — at the time of farm purchase or mortgage flotation — on the basis of temporary boom values. See Wickard, *The Future of the Farm* (1941) 102 NEW REP. 177; MILLS, PRICES IN RECESSION AND RECOVERY (1938) 66-8; Tolley, *Agriculture in the American Economy* (1941) 30 PROC. AM. ECON. ASSO. 108; GARVER & HANSEN, PRINCIPLES OF ECONOMICS (2d ed. 1937) 540-7.

91. The most recent and comprehensive credit bill is the Bankhead-Jones Farm Tenant Act, 50 STAT. 522 (1937), 7 U. S. C. § 1000 *et seq.* (Supp. 1938).

92. SPIEGEL, *op. cit. supra* note 88, at 59-62; CHAMBER OF COMMERCE OF THE U. S., FARM TENANCY IN THE UNITED STATES (1937) 40; ROSCHER, NATIONALOKONOMIK DES ACKERBAUES (10th ed. 1882) 171.

93. See Wehrwein, *Place of Tenancy in a System of Farm Land Tenure* (1925) 1 J. LAND P. U. ECON. 83.

94. See Cotton, *Legal Relations Between Landlord and Tenant* (1937) 4 LAW & CONTEMP. PROB. 508, 539; Note (1937) 25 GEO. L. J. 387.

95. Agricultural Holdings Act, 13 & 14 GEO. V. c. 9 (1923).

96. See REPORT, *op. cit. supra* note 90, at 70-85.

pensation payments, if tenants are dismissed "without cause,"[97] or by providing minimum lease periods.[98] Tenants can also be encouraged to construct needed improvements by guaranteeing them the right to recover the unexhausted value of these projects before new occupiers are permitted to enter the land.[99]

Another obstacle to completely effective soil conservation lies in the lack of integration of local systems of control. To coordinate the various local conservation programs, a network of county and state land-use planning committees[100] has been developed in the past two years. Responsibility for organization of these over-all planning units is vested in the state land-grant colleges. Despite the creation of this elaborate administrative superstructure, there has been an unfortunate tendency on the part of many officials to slight economic considerations in formulating land control programs and thereby to impede effective administration of these programs. Thus, insofar as enhanced fertility increases acreage yields,[101] the conservation program has nullified the simultaneous efforts of the AAA to curtail the production of many crops. While direct federal marketing control, permitted by the far-reaching decision in *Mulford v. Smith*,[102] may shore up the agricultural price structure temporarily,[103] it seems undesirable to increase farm productivity until domestic consumption can be increased.

To some extent, these operating conflicts are inevitable results of the simultaneous initiation of long and short-run agricultural programs. Presumably the AAA is still considered "emergency" legislation.[104] The Department of Agriculture's "permanent program" is based upon the emergence of an expanded market for farm commodities,[105] resulting from the reduction of distribution[106] costs and the restoration of full industrial employment.

97. 13 & 14 GEO. V, c. 9, §§ 12–14 (1923). See Business Tenants Disturbance Compensation Bill, 17 & 18 GEO. V. c. 36 (1927).

98. See Cotton, *Regulations of Farm Landlord-Tenant Relationships* (1937) 4 LAW & CONTEMP. PROB. 508, 523–3; LANDIS, RURAL LIFE (1940) 70.

99. 13 & 14 GEO. V, c. 9, §§ 1–12 (1923).

100. GAUS & WOLCOTT, PUBLIC ADMINISTRATION AND THE DEPARTMENT OF AGRICULTURE (1940) 157–159. The office of land-use coordination and the Bureau of Agriculture and Economics are the federal super-planning agencies in this field.

101. See New Haven Register, Jan. 10, 1939, p. 11, col. 1; Saunders, *Revolution in the Deep South* (1937) 186 THE NATION 264, 265; Tolley, *Agriculture in the American Economy* (1941) 30 PROC. AM. ECON. ASSO. 108, 112; Schultz, *Economic Effect of Agricultural Programs, id.* 127, at 139.

102. 306 U. S. 515 (1939).

103. CASH FARM INCOME AND GOVERNMENT PAYMENTS IN 1939 (U. S. Dep't of Agric. 1940).

104. See REP. SEC'Y AGRIC. (1937) 1–2, 3, 5, 8.

105. *Id.* at 12.

106. The Anti-Trust Division of the Department of Justice recently initiated a campaign designed to reduce marketing costs. ARNOLD, BOTTLENECKS OF BUSINESS (1940) 213–39.

Apparently the demand curve for most agricultural products is negatively sloped, and a lowering in retail prices will greatly expand sales. See 1 *Hearings before Temp.*

Until this enlarged domestic market can be tapped, there appears to be no method of maintaining an adequate cash income for marginal farmers except by continual subsidies and the withholding of surpluses.[107] At the same time, so long as the eventual goal is the distribution of an as yet unascertained greater volume of agricultural products, it is impossible to carry through a permanent sub-marginal land retirement program.

Overemphasis on administrative decentralization and the formulation of operating plans by local committees presents another major obstacle to the long-range success of the conservation program.[108] Land planning can be successful only when closely related to marketing programs;[109] decisions to alter utilization patterns must be based on joint consideration of physical soil characteristics and probable future demand schedules. It seems improbable that the average AAA County Committee or Conservation District Board can possess the technical competence to assume executive responsibilities[110] in the basic transition of American agriculture apparently necessitated by continuous technical advance[111] and the destruction of export markets.[112] It would seem expedient to convert these local agencies into consultative and enforcement agencies and to allocate the control of AAA subsidies and of the construction of erosion check projects to federal officials. Such a realignment of administrative functions would eliminate the barriers to land planning now created by local self-interest and facilitate the development of a nationwide conservation program.[113]

Nat. Econ. Comm. on P. R. 113, 75th Cong. (1938) 157–183. Despite much talk about "over-production," American farmers never have produced large enough quantities of any commodity, save wheat and cotton, to satisfy the real technical needs of the consuming public. PERKINS, THE CHALLENGE OF UNDERCONSUMPTION (1940).

107. Some academic critics of the subsidization policy have suggested that excess farmers be forced to leave the land. See SNYDER, CAPITALISM THE CREATOR (1940) 299–311; ROBEY, ROOSEVELT V. RECOVERY (1935) 214. This would seem to be both politically impossible and economically undesirable in an era of industrial unemployment.

108. For factual background see GAUS & WOLCOTT, *op. cit. supra* note 73, at 150–9, 382-6.

109. ADAMS, NATIONAL ECONOMIC SECURITY (1936) 167–8; Schultz, *Economic Effect of Agricultural Programs* (1941) 30 PROC. AM. ECON. ASSOC. 127, 152–3.

110. See note 108 *supra*. But see BAKER, BORSODI & WILSON, AGRICULTURE IN MODERN LIFE (1939) 266.

111. See NAT. RES. COMM., TECHNOLOGICAL TRENDS AND NATIONAL PROGRESS (1937) 115–29; 2 REP. OF PRESIDENT'S COMM. ON RECENT ECONOMIC CHANGES (1929) 514–36.

112. The primary factor here is the lower cost of production in newer agricultural countries such as Canada, the Argentine Republic and the Anglo-Egyptian Sudan. HACKER, THE FARMER IS DOOMED (1934).

113. State and local officials will continue to assume important administrative responsibilities in the conservation program, because zoning and tenancy reform are based on exercise of the state police power. It will accordingly become desirable to develop techniques of cooperation between state agencies and local boards in different states. See NAT. RES. COMM., REGIONAL FACTORS IN NATIONAL PLANNING (1935) 12–14, 21–23, 34–44, 53–69, 182–191; Frankfurter & Landis, *The Compact Clause of the Constitution* (1925) 34 YALE L. J. 695.