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After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm"

by

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AFTER DEREGULATION: CONSTRUCTING AGRICULTURAL POLICY IN THE AGE OF "FREEDOM TO FARM"

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I. INTRODUCTION

Economic misery in rural America prompted the adoption of large-scale government programs in the 1930s to regulate agricultural production.[1] The sweeping legislation, according to one historian, "regulated the daily economic lives of millions of farmers to an unprecedented degree. . . ."[2] While always somewhat controversial, the core components of the farm program persisted into the 1990s, well after the exhaustion of public support for many New Deal economic policies.[3] But in 1996, two years after the Republican party had captured both houses of Congress for only the second time since the 1930s, the farm program became part of the Republican agenda for "rolling back the New Deal" once and for all.[4] When advocating deregulation, Senator Charles Grassley alluded to the origins of agricultural regulation in the 1930s, describing the 1996 farm legislation as the "most fundamental change of farm policy in the past sixty years."[5] In the final Senate debate on the legislation, Senator Richard Lugar, chairman of the Senate Agriculture Committee, "began the six-hour Senate debate by recalling that his father had to destroy part of his corn crop and some of his hogs because of 'supply and control dictates of the New Deal.'"[6]

While the 1996 legislation was a bold attempt to modernize agricultural policy and promote budget discipline, it proceeded on questionable assumptions and failed to weigh important considerations. First, Congress relied too heavily on the future demand for American agricultural exports and assumed a greater willingness among trading partners to revise policies that distort the world agricultural trade. Second, Congress failed to consider the functionality of domestic agricultural markets, which have become extremely unbalanced in recent years due to the rapid concentration of the agricultural processing sector. Third, Congress failed to consider the economic independence of farmers, who are increasingly at risk of being folded into vertical production chains managed by the processing sector.

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1. *See* ANTHONY BADGER, THE NEW DEAL: THE DEPRESSION YEARS, 1933-1940 147 (1989). In 1933 the plight of farmers was of more immediate concern to New Deal policy-makers than the problems of industrial workers. Farmers still constituted 30 percent of the nation's workforce. . . . Their demands for immediate action to rescue farmers from rock-bottom prices and from crushing indebtedness were endorsed vociferously by businessmen whose success in insurance, banking, and the mail-order business depended on farm prosperity.

Id.

2. *Id.*

3. *See* Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659, 661-63 (1994) (noting the persistent criticism of farm programs).

4. Gina Piccalo, *Jesse Jackson Rallies in Dekalb County to Bolster Youth Vote*, ASSOCIATED PRESS POLITICAL SERVICE, June 2, 1996, *available in* 1996 WL 5385698.

5. Charles E. Grassley & James J. Jochum, *The Federal Agriculture Improvement and Reform Act of 1996: Reflections on the 1996 Farm Bill*, 1 DRAKE J. AGRIC. L. 1, 1 (1996).

6. LII CONG. Q. ALMANAC 3-26 (1996)[hereinafter ALMANAC].

Part I of this article reviews the original justifications for the regulation of agriculture, the early implementation of the farm commodity programs, and the modifications to these programs in subsequent decades.[7] Part II outlines the legislative rationale for de-regulating agriculture in the 1990s.[8] Part III explains the questionable assumptions that underlie the deregulatory movement and notes key factors which policymakers failed to consider.[9] Part IV outlines policies, based on more reasonable assumptions, which should be adopted before moving to the final stages of market-based agriculture.[10]

II. THE REGULATION OF AGRICULTURE

A. *Agricultural Market Failure*

1. *Repealing the Law of Supply*

Market gluts are commonplace in American agricultural history. Economists have explained that agricultural markets respond poorly to such conditions.[11] Instead of adjusting supply when prices sink to unsustainable levels, farmers often maintain production levels—believing that they need to operate at full-capacity in order to make up for lower prices—or increase their production. In recent decades, some farmers believed they could make up for lower prices by increasing yields and acres under cultivation, which was possible due to emerging technologies. The race to make up for lower-per-acre prices with higher yields and more production was run on the "technological treadmill."[12] The famous treadmill metaphor explains how

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7. *See* discussion *infra* Part I.
8. *See* discussion *infra* Part II.
9. *See* discussion *infra* Part III.
10. *See* discussion *infra* Part IV.
11. *See* RICHARD A. LEVINS, WILLARD COCHRANE AND THE AMERICAN FAMILY FARM 34 (2000) (explaining the work of the agricultural economist Willard Cochrane on supply inelasticity).

> [I]n times of overproduction for most industries, labor and capital would be diverted to other industries and the oversupply would be corrected. Instead, 'agriculture represents a water-tight compartment within which there is considerable fluidity, but the connective valve between the agricultural compartment and the rest of the economy works poorly and sometimes not at all.' There was no way for system-wide adjustments of the type required for a well-functioning free market to occur. The result, in technical terms, was the aggregate supply of food production was almost completely inelastic. In other writing, [Cochrane] said the same thing in a more descriptive way by comparing the supply of food to Old Man River: it just went rolling along, regardless of product prices.

Id.

12. *See* WILLARD W. COCHRANE, THE DEVELOPMENT OF AMERICAN AGRICULTURE 429 (2d ed. 1993) (explaining that the "aggressive, innovative farmer is on a treadmill with regard to the adoption of new and improved technologies on his farm").

> As he rushes to adopt a new and improved technology when it first becomes available, he at first reaps a gain. But, as others after him run to adopt the technology, the treadmill speeds up and grinds out an increased supply of the

farmers sought greater production through more technology to make up for low prices and therefore compounded the low price problem, creating the need for even more productivity improvements.[13] Since agricultural markets do not adjust to low prices with less production, commentators have concluded that agriculture suffers from overproduction and "excessive competition."[14] Unlike other industries, where firms and their productive capacity exit the market when prices decline, farms continue to produce commodities, further depressing prices.[15] Rules governing market entry and exit, which have been prominent in regulatory regimes governing such industries as telecommunications and trucking, have not been a component of federal agricultural regulation.[16] The number of "firms" in the market is equivalent

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> product. The increased supply of the product drives the price of the product down to where the early adopter and all his fellow adopters are back in a no-profit situation. Farm technological advance in a free market situation forces the participants to run on a treadmill.

Id.

13. *See id. See also Review of the Government Acreage Idling Provisions and Their Impact on Program Commodity Crops: Hearing Before the Subcomm. on Gen. Farm Commodities of the House Comm. on Agric.*, 104th Cong. 102 (1995) (statement of Daryll E. Ray, Professor and Blasingame Chair of Excellence in Agricultural Policy). "Since farmers cannot influence price, the only way to increase per-unit net returns is to cut costs. This competitive struggle forces farmers into a continual cycle of new technology adoption." *Id.*

14. SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, REGULATORY LAW AND POLICY: CASES AND MATERIALS 378 (2d ed. 1998) (concluding that "excessive competition . . . remains the justification for the expensive farm programs supported by the federal government"). *See also* Jim Chen, *Regulatory Education and Its Reform*, 16 YALE J. ON REG. 145, 148-49 (1999) (noting, with reference to agriculture, the "prevailing regulatory dogma that excessive competition might be as destructive as monopoly"); Richard Cudahy, *The Folklore of Deregulation (with apologies to Thurmond Arnold)*, 15 YALE J. ON REG. 427, 431 (1998) (correctly noting that economists "have a hard time with the concept that there can be such a thing as too much competition"). *See generally* Laurie Schoder, *Flying the Unfriendly Skies: The Effect of Airline Deregulation on Labor Relations*, 22 TRANSP. L.J. 105 (1994) (providing a recent example of excessive competition as a policy rationale). "[M]any of the problems in the airline industry have been due to *cut-throat competition* among carriers, which has resulted in mergers, bankruptcies, and increased foreign investment." *Id.* at 107 (emphasis added).

15. *See Review of the Government Acreage Idling Provisions and Their Impact on Program Commodity Crops: Hearing Before the Subcomm. on Gen. Farm Commodities of the House Comm. on Agric.*, 104th Cong. 102 (1995) (statement of Daryll E. Ray, Professor and Blasingame Chair of Excellence in Agricultural Policy).

> [W]hen farmers go out of business, output is not necessarily reduced. Transferring agricultural assets to another industry – such as converting rural farmland to high-rise office buildings – usually is not possible. Land, buildings, machinery, and other resources which would be pressured out of nonfarm industries tend to remain in agriculture. . . . This lack of production response to declines in output price (what economists call agriculture's low price elasticity of supply) is one of the most important reasons that U.S. agriculture has chronic price and income problems. This fixity of resources violates a key assumption of economics' perfectly competitive model.

Id.

16. *See* Thomas J. Hall, *FCC and the Telecom Act of 1996: Necessary Steps to Achieve Substantial Deregulation*, 11 HARV. J.L. & TECH. 797, 797 (1998). The Telecommunications Act of

to the number of farms. When these firms fail, however, their productive capacity is not eliminated but acquired by another firm.[17]

As a result of the massive increases in agricultural productivity after World War II, the need for the production controls that many farmers resisted increased further. Agricultural chemicals, animal genetics, plant varieties, and new cultivation methods added to the surplus problem the economic planners at USDA were trying to solve.[18] According to the agricultural historian Gilbert Fite, the "cumulative effects of science and technology in agriculture defeated all of the policy makers' efforts to control price-depressing surpluses."[19]

1996 was passed in the same year and spirit as the Freedom to Farm Act. It also sought to repeal a significant New Deal statute, "tearing down the regulatory framework of the Communications Act of 1934 that created the local exchange monopolies." *Id.* The New Deal regulation of trucking came in the form of the Motor Carrier Act of 1935, which "limited entry into the motor carrier industry in response to claims that entry oversight was necessary to maintain a stable transportation industry." Nicole Fradelk et al., *The Impact of Deregulation in the Trucking Industry*, 47 ADMIN. L. REV. 527, 530 (1995). New entrants were required to demonstrate that they were "fit, willing and able to provide the transportation" and that new operations were "required by the present or future public convenience and necessity." *Id.* (quoting Motor Carrier Act of 1935, ch. 498, sec. 201-22, 49 Stat. 543, 543-67 (codified as amended in scattered sections of 49 U.S.C.)).

17. *See Review of the Government Acreage Idling Provisions and Their Impact on Program Commodity Crops: Hearing Before the Subcomm. on Gen. Farm Commodities of the House Comm. on Agric.*, 104th Cong. 101 (1995) (statement of Daryll E. Ray, Professor and Blasingame Chair of Excellence in Agricultural Policy).

> [I]t's very difficult to get the resources out of agriculture compared to other industries. Other industries might use a plant for one thing today, next year they'll use it for something else. The land out in Kansas is probably going to be used for agriculture today, five years from now and ten years from now as well.

Id. However, some states have adopted corporate farming laws that regulate the *form* of entry in agriculture. *See* Jon Lauck, *The Corporate Farming Debate in the Post-World War II Midwest*, 18 GREAT PLAINS Q. 139, 140 (1998); Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anti-corporate Farming Statutes and Production Contracts*, 41 DRAKE L. REV. 393, 402 (1992).

18. *See* SALLY H. CLARKE, REGULATION AND THE REVOLUTION IN UNITED STATES FARM PRODUCTIVITY 204 (1994) (noting the "productivity revolution that transformed American farming after the Great Depression").

> From the end of World War II to 1970, farmers doubled and tripled crop yields while they reduced the amount of labor to one-third the time spent in 1930. These gains in productivity had been accomplished with large investments in fertilizers, pesticides, fungicides, hybrid seeds, and farm machinery and equipment.

Id. at 229-30. *See also* Helen C. Farnsworth, *Imbalance in the World Wheat Economy*, 66 J. POL. ECON. 1, 9-10 (1958) (explaining the adoption of technology from the 1930s to the 1950s).

> The amount of cropland has remained virtually unchanged since 1935-39, and both the number of man-hours of labor and the number of draft animals devoted to farm work have declined sharply. However, the number of farm tractors and motor trucks has tripled, the amount of commercial fertilizer used has quadrupled, and the number of grain combines has increased tenfold.

Id.

19. GILBERT FITE, AMERICAN FARMERS: THE NEW MINORITY 110 (1981).

2. *Inequality of Bargaining Power*

Another justification for intervention in agricultural markets is the bargaining power disparity between farmers and large-scale food processors.[20] As a result of the structural disparity between the producing and processing sectors, farmers and processors did not meet as equals at the bargaining table and therefore farmers received prices lower than they would have received in a more balanced bargaining regime.[21] Such concerns were expressed in the earliest forms of statute-based regulation. The Interstate Commerce Commission was created in 1887 in response to farmer concerns about the economic domination of the railroads, which hauled farmers' grain and cattle to eastern markets.[22] Farmers also bolstered the case for the Sherman Act of 1890, which sought to limit the power of "economic titans" with which farmers had dealings.[23] In subsequent decades, Congress enacted additional laws to alleviate the power differential between farmers and processors. The Clayton Act of 1914, which sought to limit corporate mergers that increased economic concentration levels, exempted farmer cooperatives, which Congress hoped would counter-balance the power of corporations.[24] The exemption was strengthened in 1922 with passage of the Capper-Volstead Act.[25] Continued concern with the bargaining power imbalance between farmers and processors prompted passage of the Agricultural Fair Practices Act of 1967.[26] The inequality of bargaining power, a persistent theme in agricultural policy debates for over a century, did not receive attention during the legislative debate over the Freedom to Farm act.

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20. *See* J. W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 MERCER L. REV. 763, 768 (1993) (noting the "drastically inferior bargaining position" of farmers). *See also* DON PAARLBERG, AMERICAN FARM POLICY 83-89 (1964) (explaining the concern over bargaining power disparities).

21. *See* E.C. PASOUR, AGRICULTURE AND THE STATE 62 (1990). *See also* JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 159-61 (1952) (offering the first popular explanation of the concept). Galbraith concluded that the "farmer was often made to pay dearly for his lack of market power." *Id.* at 150.

22. *See* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO FDR 231-33 (1955) (noting the "long-range trend toward federal regulation, which found its beginnings in the Interstate Commerce Act of 1887 and the Sherman Act of 1890").

23. *See* National Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 829 (1978) (Brennan, J., concurring) (holding that the "Sherman Act was the first legislation to deal with the problems of participation of small economic units in an economy increasingly dominated by economic titans"). *See also* Gary D. Libecap, *The Rise of the Chicago Packers and the Origins of Meat Inspection and Antitrust*, 30 ECON. INQUIRY 242, 242 (1992) (noting the "widespread concern about the market power of Chicago meat packers").

24. *See generally* 15 U.S.C. §§ 12-27 (1994) (counter-balancing the power of corporations by seeking to limit corporate mergers except for farmer cooperatives).

25. *See generally* 7 U.S.C. § 291 (1994) (providing that persons engaged in farming may collectively organize their marketing).

26. *See id.* §§ 2301-2306 (1994).

B. *The Origins of Agricultural Regulation*

1. *The Farm Board Experience*

After he was elected President in 1928, Herbert Hoover launched an effort to stabilize agricultural prices through the Federal Farm Board, which sought to coordinate production and marketing through large-scale cooperatives.[27] In addition to providing loans to budding cooperative enterprises, the legislation creating the Farm Board authorized stabilization corporations that would buy and sell commodities as a method of mitigating large price fluctuations.[28] The goals of the Farm Board were to develop cooperatives powerful enough to *regulate* farmers' production and to encourage marketing through centralized commodity associations that eliminated competition among cooperatives.[29]

Many who served on the board were not convinced Hoover's plans would work and many cooperatives resisted "amalgamation," preferring to remain independent of a national commodity association.[30] Many joined only to take advantage of cheap credit—three and one-half percent instead of the going market

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27. *See* DAVID E. HAMILTON, FROM NEW DAY TO NEW DEAL: AMERICAN FARM POLICY FROM HOOVER TO ROOSEVELT, 1928-1933 47 (1991).

> The board was directed to educate farmers and the public in the practices and principles of cooperative marketing, to encourage the formation of cooperatives, to make reports on commodity principles of cooperative marketing, to make reports on commodity prices and market conditions, to investigate and advise on the prevention of overproduction, and to investigate and issue reports on foreign markets, land utilization, and other subjects.

Id.

28. *See id.*

> The Farm Board was granted a $500,000,000 revolving fund with which it was to make low-interest loans to cooperatives for the purposes of acquisition of physical facilities, larger commodity advances to their members, or stabilization operations. And it was authorized to organize clearinghouses and stabilization corporations, these organizations to be initiated only on the recommendation of a commodity advisory committee made up of cooperative officials and two private handlers or processors.

Id.

29. *Id.* at 47 (emphasis added).

> The building of centralized cooperatives was one of two Farm Board goals; the other was the development of the capacity among farmers for production control. The centralized commodity associations would serve as intermediaries linking together local cooperatives and their farmer members. The nationals, once they were established as strong associations, would administer commodity advances, disseminate market information, and encourage restraint in production.

Id. at 55-56.

30. *Id.* at 59. "Not surprisingly, [cooperatives] resisted the board's amalgamation policy, since it meant sacrificing control over sales decisions and operating policies. Many of the cooperatives, moreover, had long vied for patrons, and their managers and directors often found cooperation with former competitors an unpleasant possibility." *Id.*

rate of six to eight percent.[31] In 1929, only 1,400 of the 3,400 cooperative grain elevators joined their commodity association, known as the Farmers National Grain Corporation.[32] Despite the pleas of the Farm Board, farmers did not curtail production—they planted the same amount in 1930 as they had in 1929, ignoring the Board's "Grow Less, Get More" campaign, confirming the collective action problem that limits the ability of farmers to organize.[33]

From 1929 to 1932 the Farm Board loaned $360 million to cooperatives and continued to emphasize the importance of cooperative marketing.[34] The amount of commodities marketed through a cooperative increased fifteen percent from 1930-1931 to 1931-1932 and more local cooperatives joined regional and national marketing associations.[35] By 1932, 1,700 local cooperative elevators were members of the twenty-seven regional cooperatives affiliated with the Farmers National Grain Corporation and the National Livestock Marketing Association was also growing.[36] Much of this progress can be attributed to the generosity of the Farm Board, however, as many problems inhibiting cooperative organization persisted. Rivalries among cooperatives remained intense; cooperatives affiliated with the Farmers National continued to market through private channels which were more profitable; and too few farmers understood the workings of the organization or considered the national associations "farmer-controlled."[37] Organizations such as the National Livestock Marketing Association, which did not rely on Farm Board funds to remain profitable, were more successful when they allowed greater autonomy to local affiliates, a deviation from Farm Board policy.[38] The top-down control of the national associations was a fundamental flaw of the Farm Board's cooperative promotion policy.[39]

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31. *See id.* at 63.

32. *See id.* at 60.

33. *See id.* at 84. "Production control, the administration also believed, was essentially a matter of education. Once farmers realized the advantages of limiting output, they would cooperate on a collective basis to do so." *Id.* at 84-85.

> In the end, the barnstorming [for acreage reductions] was of no avail: the amount of land planted in wheat remained almost unchanged from the year before. The campaign failed for the same reason that all previous attempts at voluntary collective action had failed—namely, that there was no logic to the form of collective action being urged on farmers. Since no single producer could expect to affect prices, there was no tangible incentive to cut production. The Farm Board, as one economist noted, had confused what was rational for agriculture as a collective entity with what was rational for an individual farmer. As other critics pointed out, a single farmer with fixed debts and taxes to pay, and relying on family labor, was not remotely analogous to U.S. Steel.

Id. at 87.

34. *See id.* at 132.

35. *See id.*

36. *See id.* at 133.

37. *See id.* at 134-35.

38. *See id.* at 142.

39. *See id.* at 135.

With the onset of the Great Depression, the building of marketing cooperatives as a remedy to the farm problem competed with several other legislative proposals and was overshadowed by the production control efforts of the New Deal.[40] The disastrous economic collapse of 1929 should not be allowed to completely discredit some of the underlying principles of the Farm Board experiment, however. While its top-down approach and its embrace of centralized control deserve criticism, its efforts to promote the self-organization of farmers provides an important principle for policy-makers in the post-Freedom to Farm de-regulatory era.

2. *The New Deal*

Overproduction and the collective action problem—which undermined the efforts of the Farm Board—explain the origins of the federal farm program in the 1930s. One of the lessons of the Farm Board experience, it seemed to many observers, was the inability of farmers to organize to control their production.[41] Farmers thus turned to organizing through the state, using a federal regulatory regime to restrict output. In the desperation of the early 1930s, many farmers accepted state coercion in order to effectively restrict production, raise prices, and overcome their organizational problems during a severe economic crisis.[42] Throughout the grain belt, "rural lawmakers who opposed organized agriculture, already a scarce breed, were pushed even further toward extinction."[43] While the state proved to be a useful organizational tool at times, its coercive power also angered and alienated many farmers.[44] The resulting ambiguity and the variety of farmer opinions limited the ability of the state's efforts, fed criticism of the farm program, and finally culminated in the demise of the farm programs in 1996.[45]

> In reality, the nationals were built from the top down. They had no genuine support from the nation's farmers, and control was concentrated in the hands of a few managers or directors. . . . Farmers in general saw no difference between the nationals and larger dealers such as the cotton firm of Anderson and Clayton. This was hardly surprising, since the nationals were organized as corporations chartered in Delaware and their staffs came almost entirely from private firms.

Id. Critics of the Farm Board such as E.G. Nourse, a Brookings Institution economist, argued that the board undermined traditional cooperative principles such as democratic control, jeopardizing their "distinctive characteristic as contrasted with ordinary commercial business." *Id.* at 145.

40. *See id.* at 241-43.

41. *See* MURRAY R. BENEDICT, FARM POLICIES OF THE UNITED STATES, 1790-1950 283 (1953). "Long before the demise of the Farm Board, its members had become convinced that marketing procedures alone could not accomplish the ends they sought. Production would have to be adjusted if farmers were to receive adequate prices for their products." *Id.*

42. *See* discussion *infra* Part I.C.3.-D.

43. JOHN MARK HANSEN, GAINING ACCESS: CONGRESS AND THE FARM LOBBY, 1919-1981, at 88 (1991).

44. *Id.* at 89.

45. *See* discussion *infra* Parts III-IV.

While campaigning in September of 1932 in Topeka, Kansas, New York Governor Franklin Roosevelt endorsed the idea of federal production controls and blamed President Hoover and the Republicans for the farm problem.[46] In May of 1933, Congress adopted the Agricultural Adjustment Act (AAA), which created the authority for the regulation of production.[47] Because the legislation passed so late in the spring, farmers who had already planted their cotton crops were asked to uproot them.[48] Six million little pigs and two-hundred thousand sows were killed to boost hog prices, leaving the country "horrified by the mass matricide and infanticide."[49] One historian concluded that the "cotton plowup and the slaughter of the little pigs fixed the image of the AAA in the minds of millions of Americans, who forever after believed that this was the agency's annual operation."[50] When advocating passage of Freedom to Farm in 1996, Senator Lugar noted this history and recalled his father's experience with crop destruction and hog killing during the New Deal.[51]

Secretary of Agriculture Henry Wallace and AAA-administrator George Peek battled over the issue of production control almost immediately, Peek resisting the idea of "regimenting production," a disagreement which created a "virtual state of civil war" within the AAA.[52] In a 1935 "purge," Wallace was able to eliminate many within the USDA who opposed production controls and favored other policy alternatives. But in the first week of 1936 the Supreme Court struck down the AAA as unconstitutional.[53] After an interlude with the Soil Conservation and Domestic Allotment Act of 1936, the farm program was reorganized in the AAA of 1938 and withstood constitutional challenge.[54] Most importantly to the three-fourths of farmers who did not lose their farms during the Depression, the various versions of

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46. *See* HANSEN, *supra* note 43, at 71 (noting FDR's endorsement of production controls).

47. *See* WILLIAM E. LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940 51-52 (1963).

48. *See id.* at 72-73.

49. *Id.* at 73.

50. *Id.*

51. *See* ALMANAC, *supra* note 6, at 3-26.

52. THEODORE SALOUTOS, THE AMERICAN FARMER AND THE NEW DEAL 88 (1982). One of Peek's most bitter foes was Jerome Frank, the AAA's general counsel. Frank assembled an impressive legal team that included Thurman Arnold, Adolf Berle, Abe Fortas, Alger Hiss, Lee Pressman, and Adlai Stevenson. *Id.* at 92; LEUCHTENBERG, *supra* note 47, at 76.

> These men wanted to exploit the sense of crisis to push through long-needed reforms to relieve the poverty of sharecroppers, tenant farmers, and farm laborers, and to crack down on packers, millers, and big milk distributors to make sure that increased farm prices came out of middlemen and not the consumer.

LEUCHTENBERG, *supra* note 47, at 76. Old USDA hands were skeptical of the "strange crew of urban intellectuals whose knowledge of agriculture, such as it was, came not from tilling the upper forty but from books. According to one tale, Lee Pressman, at a meeting on the macaroni code, truculently asked what the code would do for the macaroni growers." *Id.*

53. *See* United States v. Butler, 297 U.S. 1, 3 (1936).

54. *See* Wickard v. Filburn, 317 U.S. 111, 133 (1942).

the farm program helped to double cash receipts on the farm between 1932 and 1937.[55]

Production control and USDA management took a variety of forms. In addition to the production restrictions prominent in the early 1930s, the farm program involved marketing loans and quotas. The 1938 AAA, for example, made available marketing loans to wheat farmers if they agreed to an overall production quota in a referendum.[56] If they approved the quota, they were eligible for a non-recourse loan on their wheat that supported the overall price level at somewhere between 52-75 percent of parity, depending on where the Secretary of Agriculture set it based on the estimates of USDA economists.[57] If prices fell below the loan rate then farmers could forfeit their wheat to the government's Commodity Credit Corporation.[58] If prices rose above the loan rate farmers could sell their grain and repay the loan.[59] As the price support functions became more deeply entrenched in the late 1930s, especially the non-recourse loan, farm-state politicians were tempted to maintain high support levels while weakening production restrictions. When World War II erupted production restrictions were lifted and price support levels were fixed at ninety percent of parity for dozens of commodities and were to be continued by law at ninety percent of parity until two years after hostilities ceased.[60]

C. *Postwar Farm Politics*

1. *The Truman Years*

As the war-time price support program was ending in 1948 the major parties involved in farm policy coalesced around the idea of returning to the farm program of the late 1930s, when price supports were "flexible."[61] Many, including President Truman, believed support prices should move between sixty to ninety percent of parity, allowing for adjustments by the Secretary during periods of surplus or shortage. During the summer of 1948, however, when slackening postwar world demand became noticeable in farm prices, many Democrats abandoned the flexible support program and went on the attack.[62] Although President Truman had earlier supported the flexible system, he blamed the Republicans for the problems in the

55. *See* BENEDICT, *supra* note 41, at 314.

56. *See* LUTHER G. TWEETEN, FOUNDATIONS OF FARM POLICY 460 (2d ed. 1970).

57. *See id.* Parity is a measure of what prices would be if they were equivalent to the purchasing power of farmers in the years 1910-1914. *See id.*

58. *See id.* at 458.

59. *See id.* at 460.

60. *See* BENEDICT, *supra* note 41, at 416.

61. *See* ALLEN J. MATUSOW, FARM POLICIES AND POLITICS IN THE TRUMAN YEARS 135-144 (1967).

62. *See id.* at 181.

farm program during the 1948 campaign.[63] Echoing FDR's Topeka speech, Truman told an audience in Dexter, Iowa that Republicans had "stuck a pitchfork in the farmer's back" and wanted "a return to the Wall Street economic dictatorship."[64] After trailing Dewey in Iowa by close to thirty points during the summer, Truman went on to win the state and the election in November.[65]

After Truman's surprising victory in 1948, Secretary of Agriculture Charles Brannan advanced a new plan to deal with the farm problem.[66] Instead of continuing price supports based on pre-World War I parity prices, Brannan wanted to base the farm program on the level of farm income during World War II.[67] Brannan wanted to allow the prices of perishable commodities like hogs and cattle to fluctuate with the market, but proposed to offer farmers government payments if prices did not maintain farmers' income at the designated level.[68] If the government payments became too expensive the Secretary of Agriculture was given the authority to impose production controls to reduce supply and increase prices.[69] But with the coming of the Korean War in 1950, the Brannan Plan, which was unpopular in Congress, was shelved and supports were again fixed at ninety percent parity and were to be continued until two years after the war.[70]

2 *Eisenhower the First Incarnation of "Freedom to Farm"*

In 1952, Illinois Governor Adlai Stevenson went to Fort Dodge, Iowa as the Democratic Presidential nominee and told the crowd that his Republican opponent, Dwight Eisenhower, was actually for flexible price supports.[71] Campaigning for Stevenson in Fargo, North Dakota, Truman told his audience "you'd better 'look out neighbor.' The last time you had a Republican Administration, farm mortgages were being foreclosed so fast you couldn't count them," echoing FDR's remarks in Topeka in 1932.[72] Eisenhower promised to support the farm law currently "on the books," which could have meant ninety percent parity or flexible supports since the war-time support levels were to expire in 1954.[73] After winning the election, the

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63. *See id.* at 172-73 (noting Truman's "pleading for enactment of flexible prices supports" in early 1948).

64. *Id.* at 181.

65. *See id.* at 186-87. "Its traditional Republicanism having reasserted itself after 1936, Iowa was supposed to cast its eleven votes resoundingly for Dewey. But as the nation's leading corn state with a particularly serious storage problem, Iowa lent a ready ear to Truman's campaign warnings." *Id.*

66. *See id.* at 191-95.

67. *See id.* at 196.

68. *See id.* at 198. "Rather than attempt to store and perhaps waste perishables, he proposed that a free market set prices, with direct government payments ('production payments') making up the difference between actual and support prices." *Id.*

69. *See id.* The Brannan Plan would only make payments to the "family-sized farm." *See id.*

70. *See id.* at 218, 220.

71. *See id.* at 247.

72. *Id.* at 248.

73. *See* HANSEN, *supra* note 43, at 127.

Eisenhower administration made an explicit decision to embrace flexible price supports, a move designed to check what Secretary of Agriculture Ezra Taft Benson called a "rapid drift toward a regimented agriculture" and grant farmers the "Freedom to Farm."[74]

"The nub of our present problem[,]" Secretary Benson argued, "is unrealistic support prices and futile attempts to control production."[75] As high supports and minimal production controls persisted, government stocks of commodities and storage costs grew. Wheat farmers could have foregone the harvest of 1954 entirely since more than a year's supply of wheat had been forfeited to the government through the price support program, nearly 900 million bushels.[76] The fixed minimum national allotment for wheat was 55 million acres (down from 78 million from 1945-1949), but the annual needs of American consumers could have been provided on 19 million acres.[77] Despite the disparity between supply and demand, Benson was still under pressure from Congress to lift allotment restrictions and to allow the planting of other crops on the diverted acres.[78] "Members of Congress," Benson's biographers wrote, "were happy to take credit for USDA funds going into their district but were quick to disassociate themselves from government-imposed restraints."[79] Despite his efforts, Benson was not able to restructure or terminate the farm program.

3. *The Kennedy Program: Farming as a Public Utility*

During the election of 1960, Senator John Kennedy listed low farm prices as "our no. 1 [number one] domestic problem."[80] In order to increase farm prices, the Kennedy administration announced an ambitious program of supply management.[81]

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74. EDWARD L. SCHAPSMEIER AND FREDERICK H. SCHAPSMEIER, EZRA TAFT BENSON AND THE POLITICS OF AGRICULTURE 88 (1975). *See also* Giglio, *New Frontier Agricultural Policy: The Commodity Side, 1961-1963*, 61 AGRIC. HIST. 53, 54 (1987) (explaining the adoption of flexible supports).

> But by 1954 Congress agreed to drop the Democratic fixed price support of 90 percent of parity to a lower, flexible level on the assumption that less federal price assistance would encourage farmers to reduce production, thereby causing farm prices and income to rise. Benson's program notwithstanding, farmers increased yields to compensate for the reduced governmental support. With little production or marketing controls, surpluses mounted and farm prices fell.

Id.

75. EZRA TAFT BENSON, FREEDOM TO FARM 23 (1960).

76. *See* SCHAPSMEIR & SCHAPSMEIR, *supra* note 74, at 78.

77. *See id.* at 92.

78. *See id.* at 94.

79. *Id.*

80. *See* Giglio, *supra* note 74, at 53 (quoting Kennedy's speech in Des Moines, Iowa on August 21, 1960).

81. *See generally* DON F. HADWIGER & ROSS B. TALBOT, PRESSURES AND PROTESTS: THE KENNEDY FARM PROGRAM AND THE WHEAT REFERENDUM OF 1963 (1965) (discussing the farm policy debates during the Kennedy years).

Part of the new program proposed giving the Secretary of Agriculture extraordinary powers over the writing of the farm program, eliminating the Congressional tendency dating from at least 1938 to bid up price supports to budget-busting levels.[82] In the new proposal, the Secretary would instead seek advice from commodity committees, two-thirds of which would be selected from the committees making up the USDA's Agricultural and Conservation Service and one-third of which would be selected by the Secretary from the different farm organizations.[83] After consulting with the commodity committees, the Secretary would design a commodity's farm program, then seek approval from the President and from farmers through a referendum (Congress had sixty days to veto a particular program before the program became law).[84] Under the Kennedy plan, Congress would endorse the general policy principles of supply management but would leave the USDA to design a particular program, a policy-making strategy which spawned federal regulatory agencies such as the Environmental Protection Agency.[85]

To limit the rising costs of the farm program and to increase farm prices, Kennedy's agricultural advisor Willard Cochrane proposed a program of strict scarcity through government-coordinated supply management, embracing "regulation [that] would have to be as thorough as that of a public utility."[86] Cochrane believed what was "lacking [was] the courage on the part of politicians, farm leaders, farmers themselves and farm economists who serve as advisors to place in operation any one, or combination, of the alternatives that has the capacity, but which hurts someone, to cope with the excess capacity problem."[87] During the 1960 campaign, Kennedy told farmers his plan would require "work and sacrifice and discipline."[88] Kennedy was attempting to solve the collective action problem among farmers by invoking government-coordinated production controls.[89] He argued that "to circumscribe to

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82. *See* Giglio, *supra* note 74, at 60.

83. *See id.* at 61.

84. *See id.*

85. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 180 (2d ed. 1996) (noting the discretionary authority of environmental agencies).

> To translate the environmental laws into regulations, administrative agencies must choose a regulatory alternative within the policy space established by law and develop, propose, and promulgate regulations. The Administrative Procedure Act and the environmental laws under whose authority the agency acts outline the ground rules for agency action, but *agencies generally have considerable discretion* over both the substance of regulatory policy and the procedures used to formulate it.

Id. (italics added).

86. HADWIGER & TALBOT, *supra* note 81, at 19.

87. Willard Cochrane, *Some Observations of an Ex Economic Advisor: Or What I Learned in Washington* 15 (June 30, 1964) (unpublished, on file with the author).

88. HADWIGER & TALBOT, *supra* note 81, at 25 (quoting Kennedy speech to farmers in Sioux Falls, South Dakota on Aug. 21, 1960).

89. *See id.*

some degree complete freedom to act in one field, to achieve a highly prized and generally accepted goal is, I repeat, the act of rational and civilized men."[90]

Additional controls were not popular in Congress and received limited support from farm groups.[91] When the Kennedy administration submitted the Food and Agriculture Act of 1962 to Congress, a measure that included mandatory supply management programs for wheat, corn, and other commodities, only the wheat program survived.[92] Since the legislation was not passed until September of 1962 and planning for the 1963 wheat crop was underway, the program would not begin until 1964.[93] The farmer referendum for wheat was then set for May 1963.[94] If farmers voted yes they would be accepting stricter mandatory production controls and higher support prices in lieu of the existing program's weaker restrictions and less generous supports.[95] For the first time, wheat farmers rejected a government program in a referendum.[96]

D. *Farm Policy, 1963-1996*

The scramble for a new wheat program involved calls for new legislation based on the "emergency" feed grains bill of 1961, the temporary legislation passed when the supply management approach could not be prepared in time.[97] Instead of forcing farmers to participate in a mandatory program, the 1961 law was voluntary. If farmers volunteered to reduce production by a certain amount they would be eligible for price supports and payments on the amount of land taken out of production.[98] Unlike the supply management plan, which relied on dramatic reductions in supply to boost farm prices, the voluntary plan relied on direct government payments to farmers, which cost the federal government more money.[99] The supply management proposal for corn was abandoned in favor of continuing the

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90. WILLARD W. COCHRANE & MARY E. RYAN, AMERICAN FARM POLICY 40 (1976) (citing in relevant portion JOHN F. KENNEDY, AGRICULTURAL POLICY FOR THE NEW FRONTIER, 12-13).

91. *See* Giglio, *supra* note 74, at 61-65.

92. *See id.* at 62-63.

93. *See id.* at 65.

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.* at 66-67.

98. *See id.* at 67.

99. *See id.*

> The bill provided increased price supports to farmers who reduced their acreage 20 percent below their 1959-1960 acreage. The diverted land would go into a conservation program in which farmers would receive 60 percent of the gross value of a year's normal production for that acreage. If farmers reduced their acreage an additional 20 percent, they would obtain additional payments in cash or in-kind to reduce government stocks. Noncooperating farmers could grow as much as they wanted, but only at the open-market price. The government would keep that price down by dumping surplus grain into the market to induce farmers to participate.

Id.

voluntary program and the same program was ultimately accepted by wheat producers.[100]

The passage of the Food and Agriculture Act of 1965 "marked the end of vociferous, and often inflammatory, congressional debates" dating back to the Brannan plan.[101] The 1965 legislation embodied the voluntary approach, partially obviating the control and regimentation issue, and was more bipartisan. In 1968 a coalition of farm groups coalesced around the task of extending the act, which was to expire in 1969.[102] Given the impending Presidential election, the act was extended for one year to give the new administration some say in the final legislation and was again extended in the Agricultural Act of 1970 and the Agriculture and Consumer Protection Act of 1973.[103] In the 1973 Act, government payments were designed to make up the difference between the market price and a "target price," and came to be known as "deficiency payments."[104] The Food and Agricultural Act of 1977, passed during the Carter Administration, maintained this system but increased loan rates and target prices slightly.[105]

In 1981, the Reagan administration advanced a plan to sharply reduce farm program support, but the program stalled in Congress.[106] The Agriculture and Food

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100. *See id.* at 69.

101. COCHRANE & RYAN, *supra* note 90, at 47.

> After the heated disputes began in 1948 over the Brannan Plan, a storm of controversy about farm programs raged in the Congress and in farm communities throughout the nation; but following enactment of the 1965 act the protagonists in the grueling farm policy debate relaxed to some extent, perhaps more exhausted than contented.

Id. at 49.

102. *See id.* at 54-55.

103. *See id.* at 55. During the 1968 Presidential campaign, neither Richard Nixon nor Hubert Humphrey gave a major farm speech, which had been a standard event in earlier Presidential campaigns. *See id.* The 1970 law also limited total payments to farmers to $55,000 and introduced the generic "set-aside," as opposed to a specific restriction on growing a particular crop. *See id.* at 83.The set-aside provision allowed farmers greater flexibility to plant non-quota crops. *See id.* The 1973 law repealed the certificate program and replaced it with the target price system. *See id.*

104. *See* Claude T. Coffman, *Target Prices, Deficiency Payments, and the Agriculture and Consumer Protection Act of 1973*, 50 N.D. L. REV. 299, 305 (1974).

> No longer would the government guarantee a minimum payment at a time when market prices are high, as was the case under the Agriculture Act of 1970. Instead, a target or guaranteed price is established for each of the commodities, wheat, feed grains, and cotton, which is deemed to be a fair market price to the farmer. Any government payments that are made will be in the amount needed to make up the difference between the average market price and the so-called target price.

Id. (offering a positive assessment of the act). "It is flexible with regard to the use of production controls. It drops the antiquated parity price goal. And it moves forthrightly into a deficiency payments scheme for protecting farm income." *Id.*

105. *See* WILLARD W. COCHRANE & C. FORD RUNGE, REFORMING FARM POLICY 50 (1992).

106. *See* DAVID ORDEN ET AL., POLICY REFORM IN AMERICAN AGRICULTURE 72 (1999). "The Reagan administration proposed an outright elimination of income support through target prices and deficiency payments, and it sought discretionary authority to lower, not raise, price-support loan rates.

Act of 1981 continued the policies of previous decades.[107] After a severe economic recession hit the farm sector in the early 1980s, several proposals were advanced to restructure the farm program. The most widely debated program became known as the Harkin-Gephardt Act, which embraced the supply control agenda advanced during the early years of the Kennedy administration.[108] Such a sharp break in farm policy was rejected, however, in favor of the continuation of the existing program. Target prices were maintained in the 1985 legislation, but Acreage Reduction Programs (ARPs) were also necessary to alleviate the budget drain of the program.[109] The 1985 legislation also allowed wheat and feed grain producers to plant any crops on their "base acres."[110] This planting "flexibility" program was extended in the 1990 farm bill also.[111] Flexibility was also a prominent issue during the debate over the 1996 farm legislation.[112]

III. THE DEREGULATION OF AGRICULTURE

A. *The Origins of Their Discontent*

Contrary to current belief, the wisdom of a control-oriented farm program was always far from unanimous among farmers. During the 1938 elections, after the adoption of what would be the core postwar farm program, "GOP candidates fanned agrarian resentment against the strict new production controls of the 1938 AAA," defeating New Deal Senators in Wisconsin, Kansas, and Ohio and reclaiming twelve grain belt Congressional seats.[113] At a meeting of the Corn Belt Liberty League in the 1930s, one man warned that the "whole setup of the crop-control bill is designed to establish a dictatorship over agriculture. . . . Every day the New Deal bites off a little of the freedom of the American people. Unless this is checked we will be in the same boat with Russia."[114] Such comments reflected a broader critique of the New

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This was a stark cutout proposal, one that Republican as well as Democratic agriculturalists in Congress refused to accept." *Id.*

107. *See* COCHRANE & RUNGE, *supra* note 105, at 51 (explaining that the legislation "contained all the major elements of the farm programs of the 1970s: target prices and deficiency payments, nonrecourse loans to support prices, acreage reduction programs, [and] the continuance of the farmer-owned reserve. . . .").

108. *See* ORDEN ET AL., *supra* note 106, at 82.

109. *See* COCHRANE & RUNGE, *supra* note 105, at 82.

110. *See id.* at 55 (explaining that the program was designed to allow "wheat and feed grain producers to change all or a portion of their permitted acreage to conserving uses while continuing to receive deficiency payments for a maximum of 92 percent of their permitted acreage").

111. *See id.* at 57.

112. *See* ORDEN ET AL., *supra* note 106, at 129.

113. HANSEN, *supra* note 43, at 90.

114. Lynitta Aldridge Sommer, *Illinois Farmers in Revolt: The Corn Belt Liberty League*, 88 ILL. HIST. REV. 222, 228 (1995).

> Letters to the [Corn Belt Liberty] league from hundreds of independent farmers who bitterly opposed government intervention in their lives indicate that rural America did not passively accept the provisions of the act. . . . Farmers nationwide protested

Deal, as one historian has explained, by those who feared the "dead hand of government" and the "bureaucratic, socialistic, spendthrift schemes, which were shackling the energies and undermining the confidence of liberty-loving Americans."[115]

The criticism persisted well after the New Deal. In the 1940s, one Kansas farmer criticized the Brannan Plan for creating "regimented peasants out of the farmer."[116] In the 1960s farm policy debate, the Kennedy supply management legislation was attacked as promoting a policy of "cheap food produced by docile, licensed, and properly managed farmers."[117] "[T]he [Kennedy] administration's insistence on strict, mandatory production controls jeopardized the Democrats' recent gains in the Middle West," according to John Mark Hansen, and in political debates over farm policy, the "Republicans' most telling issue [was] coercion."[118] When Indianapolis Mayor Richard Lugar was campaigning for the Senate in 1974, he echoed these themes and attacked the "liberal farm policies of Senators [Birch] Bayh, [George] McGovern and [Hubert] Humphrey [during which] the family farmer was driven off his farm by big brother in Washington," presaging the Indiana Senators' advocacy of Freedom to Farm in the mid-1990s.[119]

> the new agricultural program. They were not only disgusted with state and national Farm Bureau advocates of the act, but also they were angry with President Franklin Delano Roosevelt and the United States Secretary of Agriculture Henry Agard Wallace.

Id.

115. James Holt, *The New Deal and the American Anti-Statist Tradition, in* 1 THE NEW DEAL: THE NATIONAL LEVEL 27, 27 (John Braeman et al. eds., 1975).

> At times, [New Dealers] admitted that their programs did involve placing restrictions on the freedom of individuals to do as they chose, but denied that any truly important freedom had been abridged by such restrictions. What the conservatives called freedom, they argued, was really 'antisocial license,' the kind of freedom 'one takes in running by a red traffic light in an automobile.' [citation omitted] In the modern world, the complexity of life demanded greater restrictions on individual action to protect the common interests of the community. 'No civilized community ever existed without restraints,' Joseph Kennedy argued. The president 'is merely continuing a long established evolutionary trend of balance between individualism and social control.'

Id. at 42-43. The same arguments were used by Ambassador Kennedy's son when he campaigned in favor of supply controls in agriculture in 1960. *See* discussion *infra* Part I.C.3.

116. Virgil W. Dean, *The Farm Policy Debate of 1949-1950: Plains State Reaction to the Brannan Plan*, 13 GREAT PLAINS Q. 33, 40 (1993). One Kansas newspaper editor argued that if the Brannan Plan was adopted the "farmer of America will be the most regimented group our country has ever seen. . . . If the plan goes through it will be just another step toward socialization." *Id.*

117. HANSEN, *supra* note 43, at 148.

118. *Id.* at 153.

119. Press Release from Earl Butz, Secretary of Agriculture, *Save Family Farm Through Free Market Policy, Lugar Says*, (Sept. 14, 1974) (on file with *Purdue University* - Archives, File Folder Republican Correspondence - September 1974, Document Box H).

B. *The Contemporary Politics of Freedom to Farm*

In the mid-1990s Congress sought to overhaul federal agricultural support programs. During the first half of 1995, when the new Republican Congressional majorities were rapidly advancing their agenda, the House Agriculture Committee and its Subcommittee on General Farm Commodities held nineteen different hearings.[120] Legislation was written during the summer of 1995 and, without hearings on the specifics of the legislation, a vote of the House Agriculture Committee was taken in September. The House Committee failed to approve the legislation because it could not garner the support of southern law-makers.[121] The farm legislation was then folded into the overall budget bill, which President Clinton vetoed in December 1995, setting the stage for the now famous government "shutdown."[122] The House Agriculture committee finally approved the "Freedom to Farm" plan 29-17 on February 9, 1996.[123] The full House passed the legislation on February 29 after defeating amendments designed to eliminate the peanut and sugar programs.[124] After the House legislation was reconciled with the Senate bill, the House adopted the final measure 318-89.[125]

Senator Lugar, Chairman of the Senate Agriculture Committee, by-passed his committee and took the legislation directly to the Senate floor where he added provisions relating to trade and credit.[126] To prevent a Democratic filibuster, Lugar agreed to include new conservation and rural development programs and reauthorize the food stamp program.[127] To avoid defeat of the measure, Senate Majority Leader

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120. *See* H.R. 2854 CONF. REP. NO. 104-494, at 41 (1996), *reprinted in* 1996 U.S.C.C.A.N. 611, 613.

121. *See 'Freedom to Farm' Plan Stumbles in House Committee*, STATE J. REG. (Springfield, Ill.), Sept. 28, 1995, at 3 (noting that every Democrat and four cotton-state Republicans voted against the bill); George Anthan, *Farm Policy Among Hot Issues*, DES MOINES REG., Oct. 22, 1995, at 5A (explaining that "[s]ome Southern Republicans . . . are balking at crossing their cotton and rice constituents, who oppose Freedom to Farm.").

122. *See* ALMANAC, *supra* note 6, at 3-17; *'Freedom to Farm' Plan Stumbles in House Committee, supra* note 121, at 3 (noting that Chairman Roberts thought the Budget Committee would be a more favorable forum because its "members are less concerned about rural constituents and more focused on Republican promises to balance the federal budget by 2002.").

123. *See* H.R. 2854 CONF. REP. NO. 104-494, at 41 (1996), *reprinted in* 1996 U.S.C.C.A.N. 611, 613.

124. *See* ALMANAC, *supra* note 6, at 3-16.

125. *See id.* at 3-26.

> [T]he one hour debate began after 11 p.m. and was far more subdued [than the Senate] . . . certain of victory, a smiling [Congressman Pat] Roberts declined to use all the time on his side. Instead, even though he had given hundreds of speeches over the previous few months defending the proposal, he asked a little after midnight that his prepared remarks merely be added to the record.

Id.

126. *See* ALMANAC, *supra* note 6, at 3-19 (1996).

127. *See* George Anthan, *Freedom to Farm Fairy Tale Ends and Midwestern Democrats Are Crowing 'We Told You So,'* DES MOINES REG., July 4, 1999, at 2AA. "It was a Democrat who broke the

Robert Dole agreed to delay the vote to allow more time to organize additional support.[128] The amended legislation finally passed on March 12, 1996.[129] When members of the House and Senate met to reconcile the two pieces of legislation, they also responded to Democratic demands that the permanent, underlying legislation from 1938 and 1949 remain in place.[130] As a result, unless additional legislation is passed, the farm program will automatically revert to the old New Deal-era legislation in 2002.[131] The reconciliation bill passed the Senate 74-26 on March 28, 1996.[132]

Given all the doubts expressed by the administration, many believed President Clinton would veto Freedom to Farm.[133] Secretary Glickman had said after House passage that legislators "must make improvements in both the Senate and the House bill before I can recommend the president sign the legislation."[134] After voicing his "very serious reservations" about the legislation and threatening to veto the legislation three times,[135] Clinton signed it into law on April 4, 1996.[136] At the

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logjam. Vermont's Patrick Leahy, the ranking Democrat on the Agriculture Committee, abandoned his Midwestern colleagues and made a deal to support Freedom to Farm in return for GOP concessions on dairy and conservation programs." *Id. See also* ALMANAC, *supra* note 6, at 3-16.

128. *See id.* at 3-24.

129. *See* CIS/ANNUAL 1996, LEGISLATIVE HISTORIES OF U.S. PUBLICATIONS 116 (1996).

130. *See* James Bovard, *Plowing Deeper: The New Farm Law Continues the Freedom to Farm the Government*, BARRONS, Apr. 15, 1996, at 58 (terming the reversion to the older statute the "nuclear bomb" to be used by farm policymakers). "For decades, farm policy makers have been haunted by the specter of the 1949 Farm Act—an idiotic law that would impose massive production cutbacks and compel the U.S. Department of Agriculture to boost major crop prices by 50% or more." *Id. See* ALMANAC, *supra* note 6, at 3-16.

131. *See* ALMANAC, *supra* note 6, at 3-16 (1996).

132. *See id.* at 3-26.

133. *See* George Anthan, *Senate Oks Freedom to Farm*, DES MOINES REG., Feb. 8, 1996, at A1 (reporting that Senator Daschle "allud[ed] to a presidential veto that many farm-state Democrats clearly expect" when he said: "This fight isn't over"). Senator Harkin of Iowa, who was about to accompany President Clinton on a trip to Iowa, said he would "advise the President to veto it." *Id.* It should be noted that in the first years of the Clinton administration, a broad agricultural policy was not advanced, partly because the Secretary of Agriculture was distracted. David Johnston, *Agriculture Chief Quits as Scrutiny of Conduct Grows; New Disclosure Hurts*, N.Y. TIMES, Oct. 4, 1999, at A1 (explaining the resignation of Mike Espy, the Clinton administration's first Secretary of Agriculture). Espy did seek a "reorganization" of the USDA and attempted to improve food safety standards. *Agriculture Secretary Says He'll Be Cleared*, N.Y. TIMES, Aug. 11, 1994, at A19. President Clinton presided over the "Farm Summit" in Ames, Iowa in April of 1995 in hopes of setting an agenda for agricultural policy. George Anthan, *Agriculture's Future on Table at Iowa Summit*, DES MOINES REG., Aug. 15, 1994, at A1 (explaining the different policy considerations to be weighed at the summit).

134. *'Freedom to Farm' Bill Approved by the House: Critic Says GOP 'Stabbed Consumers in the Back,'* BALTIMORE SUN, Mar. 1, 1996, at A3.

135. *Congress Approves Historic Farm Bill*, ST. LOUIS POST-DISPATCH, Mar. 29, 1996, at 1; Charles Abbott, *Freedom to Farm Law Now Seems Unassailable*, DES MOINES REG., Dec. 28, 1997, at 4G; Anthan, *supra* note 121, at 3A (explaining that Clinton, in an Iowa speech during the spring of 1995, declared that "I don't believe that we ought to destroy the farm support program if we want to keep the family farm.").

signing ceremony he committed "to submitting legislation and working with the Congress next year to strengthen the farm safety net."[137] In 1997, the Clinton administration made no concerted effort to amend the farm legislation.[138] In early 1998, after a year of strong agricultural prices, the Clinton administration embraced Freedom to Farm.[139]

C. *The Budget Imperative*

The passage of Freedom to Farm was driven to a large extent by budgetary concerns.[140] In their successful effort to capture both houses of Congress in 1994, Republican leaders placed balancing the budget high on the list of priorities set forth in the famous Contract with America, the document outlining their legislative agenda.[141] The new Republican Congress adhered to their agenda and adopted a budget resolution that would balance the federal budget by 2002.[142] Under the budget resolution, spending on agriculture was to be reduced over a seven-year period.[143] Congressional reports on farm legislation openly conceded that the

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136. *See* Anthan, *supra* note 127, at 2AA. "The Clinton administration, too, sought sort of half-heartedly to retain the old programs, leaving it to the GOP to take the political heat for any agriculture cuts." *Id.* This strategy was a classic example of Clintonian triangulation, the strategy of assuming a middle position between Congressional Republicans and Democrats as a method of maintaining the Presidential popularity. *See generally* DICK MORRIS, BEHIND THE OVAL OFFICE 79 (1997) (explaining triangulation).

137. Bovard, *supra* note 130, at 58.

138. *See* Charles Abbott, *'Freedom to Farm' Law Now Seems Unassailable*, DES MOINES REG., Dec. 28, 1997, at 4G (explaining that "administration proposals for minor changes in 'Freedom to Farm' disappeared unmourned in Congress [in 1997]"). "Glickman said his department would monitor 'the adequacy of the safety net' in the farm program but gave no hint of new proposals to alter the law." *Id.*

139. *See* George Anthan, *Growers Find a Windfall in Freedom to Farm Act*, SAN ANTONIO EXPRESS-NEWS, Jan. 13, 1998, at 1F.

> The Clinton administration initially opposed the Freedom to Farm plan on grounds farm programs should be limited to being a safety net during tough times. Now, however, the administration accepts the new law and is quick to emphasize that booming exports, low worldwide reserves of major commodities and government payments have combined to boost income to near-record levels.

Id.

140. *See* Grassley & Jochum, *supra* note 5, at 1 (noting that the Republican capture of Congress "ushered in a new spirit in Washington characterized by the desire to diminish the influence of the federal government, balance the budget, and reform many long standing programs").

141. *See* REP. NEWT GINGRICH & REP. DICK ARMEY, CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 23-36 (Ed Gillespie & Bob Schellhas eds., 1994); LYLE P. SCHERTZ & OTTO C. DOERING III, THE MAKING OF THE 1996 FARM ACT 8 (1999) (noting that the contract "led to a series of steps that forced the Agriculture Committees to seriously examine ways that would generate the budget savings required by the concurrent budget resolution managed by the Budget Committees").

142. *See* ORDEN ET AL., *supra* note 106, at 131.

143. *See id.*

"[f]ederal budget [had become] the driving force for agricultural program policy."[144] Congress feared that the budget cutbacks necessary under their budget-balancing plan would make the farm program unworkable, creating an "emasculated remnant of an out-of-date 1930's-era program which [would] no longer serve[] the people it was originally intended to benefit."[145] Senator Lugar, a long-time proponent of legislation similar to Freedom to Farm, openly wondered about the budget priority and questioned whether the legislation is "based upon what is probably best for strengthening American agriculture, farm incomes, the better lot of American farmers, or is it based upon the necessity, under the gun, of trying to find how we can make some [budget] changes."[146]

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144. H.R. 2854 CONF. REP. NO. 104-494, at 40 (1996), *reprinted in* 1996 U.S.C.C.A.N. 611, 613. The new Republican majority in Congress in 1995 passed budget legislation that required $13.4 billion in cuts in agriculture spending over the subsequent seven years. *Id. See also Market Effects of Federal Farm Policy: Hearing Before the Comm. on Agriculture, Nutrition, and Forestry United States Senate*, 104th Cong. 54 (1995) (statement of Martin E. Abel, executive vice president of Abel, Daft, Early & Ward International) (concluding that the level of support to American agriculture "is going to be determined outside this particular committee"); *Review of the Government Acreage Idling Provisions and Their Impact on Program Commodity Crops: Hearing Before the Subcomm. on Annual Farm Commodities of the Comm. on Agric. House of Representatives*, 104th Cong. 2 (1995) (statement of Congressman Charlie Stenholm) (concluding that "this farm bill is going to be budget driven").

> So no matter how much we might agree on the philosophical nuances of ARPs [acreage reduction programs] and acreage controls, we have a slight problem. As a member of the Budget Committee I'm very cognizant of the problem that we're going to have doing everything that everybody wants to do, and doing it within the confines of the budget.

Id. "Our farm bill will be budget-driven. Many options will be floated in order to fit our current programs into the budget matrix. Changes may be needed in order to remain within our budget parameters." *Id.* at 10 (statement of Congressman Saxby Chambliss); *See also Formulation of the 1995 Farm Bill: The Administration's View, Hearings Before Comm. on Agric., House of Representatives* 104th Cong. 53 (1995) (statement of Congressman Nick Smith) (noting that "we've got ourselves in a predicament where members of the Democrat and Republican parties, and especially the press, have said 'Look, if you're serious about balancing the budget, you're really going to hit agriculture"). Secretary of Agriculture Dan Glickman acknowledged the budget-driven nature of the Freedom to Farm bill and argued that USDA had advanced a "farm bill, not simply a budget bill." *Id.* at 26 (statement of Secretary of Agriculture Dan Glickman); *Commodity Policy; Hearing Before the Subcomm. on Production and Price Competitiveness of the Comm. on Agric., Nutrition, and Forestry United States Senate*, 104th Cong. 44 (1995) (statement of Senator Robert Dole) (explaining that "USDA programs face severe budget pressures as Congress works to balance the books. American farmers realize that some sacrifice is necessary if we are to succeed in balancing the budget"); *Id.* at 3 (statement of Senator Paul Coverdell) (arguing that "if we do not get our financial house in order . . . there will be no money to spend on farm programs").

145. H.R. 2854 CONF. REP. NO. 104-494, at 42 (1996), *reprinted in* 1996 U.S.C.C.A.N. 611, 615.

146. *Market Effects of Federal Farm Policy: Hearing Before the Comm. on Agriculture, Nutrition, and Forestry United States Senate*, 104th Cong. 56 (1995) (statement of Senator Richard Lugar, Chairman).

D. *The Horse Trade*

After the fall elections of 1994, Congress endorsed the North American Free Trade Agreement (NAFTA) and the most recent trade agreements negotiated under the General Agreement on Tariffs and Trade (GATT), which created the World Trade Organization (WTO).[147] Both agreements symbolized a greater commitment on the part of the United States to promote liberalized trade. Agriculture was a key item in the agreements, as indicated by the adoption of the Agreement on Agriculture.[148] The United States had long sought the liberalization of world agricultural markets, which it believed would create more opportunities for efficient American farmers to sell their commodities to once-protected markets and thereby boost their income.[149]

Such hopes heavily influenced advocates of the Freedom to Farm legislation. In light of GATT and NAFTA, according to Senator Grassley, "Congress recognized that reform in federal farm policy must include measures to move agriculture toward the global economy that will dominate the 21st century."[150] Senator Lugar expressed optimism about the trend toward greater agricultural trade liberalization and cited the abolition of the Canadian railroad subsidy, which had lowered the transportation costs of Canadian farmers and therefore gave them a cost advantage over American farmers.[151] Secretary Glickman noted that in his meetings with agricultural groups, the "discussions have turned immediately to how we ought to be writing our farm

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147. *See generally* Michael Duffy, *Trickery Wins Over Trade: Business Leaders Have Dreams of Conquering New Markets, But They Bridle as Newt Gingrich Delays One of History's Most Ambitious Act of Economic Legislation*, TIME, Oct. 17, 1994, at 34 (explaining how the passage of GATT was delayed until after the November elections).

> Agribusiness favored passage. A ConAgra official said: "We're going to grow more grain. We're going to grow more beef . . . We're going to grow more poultry. We're gonna get that European market!" Dwayne Andreas, then chairman of Archer-Daniels-Midland, said "This is the opportunity of the century. This is the biggest step toward free trade that has ever been taken in the history of the world."

Id.

148. *See* Jeffrey J. Steinle, *The Problem Child of World Trade: Reform School for Agriculture*, 4 MINN. J. GLOBAL TRADE 333, 333-34 (1995). *See generally* Lianne L. Heggy, *Free Trade Meets U.S. Farm Policy: Life After the Uruguay Round*, 25 LAW & POL'Y INT'L BUS. 1367 (1994) (explaining the background of agricultural trade in the context of U.S. production and international agreements to expand free markets for agricultural products).

149. *See generally* Dale McNiel, *Furthering the Reforms of Agricultural Policies in the Millennium Round*, 9 MINN. J. GLOBAL TRADE 41 (2000) (discussing the importance of open markets globally to the future success of the American farmer and the WTO policies being sought to further open markets).

150. Grassley & Jochum, *supra* note 5, at 3.

151. *See Market Effects of Federal Farm Policy: Hearing Before the Comm. on Agriculture, Nutrition, and Forestry United States Senate*, 104th Cong. 54 (1995) (statement of Senator Richard Lugar, Chairman). "Canada has stopped the transportation subsidy cold, in 1 year—unthinkable—something has gone on for 100 years, and is 40 cents a bushel in wheat." *Id.*

policies to fit into a much broader global context."[152] The policy expert representing the Heritage Foundation, a think-tank which carried great weight in the new Republican Congress, argued that:

> Government planners have tended to overlook the potential growth in international demand for food and thus the export growth potential for U.S. farmers. Rather than encourage farmers to increase production to take advantage of this huge market, they force them to think small and focus on the limited U.S. market.[153]

Some groups emphasized the dangers of production control programs that, they believed, cost American farmers potential export markets.[154] Over one-hundred agribusinesses, for example, formed the Coalition for Competitive Agriculture and advocated an end to acreage set-asides which they thought undermined American export potential.[155]

Many participants were particularly hopeful about the potential for growth in Asian demand for American agricultural exports. Secretary Glickman best represents the high expectations. He told the House Agriculture Committee:

> [T]he fastest growing markets in the world will be in Asia, particularly with high value products leading the way in Japan, Korea, Hong Kong, and Singapore. But I must tell you that export of bulk commodities, particularly wheat, corn, cotton, and meat, look very promising in China, Indonesia, Malaysia, and Thailand. We believe that this is sustainable over the long turn. . . . We have 20 or 30 or 40 countries out there that are ready to explode in terms of economic development and economic strength, and they are looking to us, the United States of America, as the most reliable supplier in the world.[156]

He told the Senate Agriculture Committee: "All I can tell you is if things go well and there isn't a cataclysmic event in China, the demand in East Asia for our farm

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152. *Commodity Policy: Hearing Before the Comm. on Agriculture, Nutrition, and Forestry United States Senate,* 104th Cong. 6 (1995) (statement of Secretary of Agriculture Dan Glickman).

153. *Review of the Government Acreage Idling Provisions and Their Impact on Program Commodity Crops: Hearing Before the Subcomm. on Gen. Farm Commodities of the House Comm. on Agric.*, 104th Cong. 174-75 (1995) (statement of John E. Frydenlund, Senior Fellow and Director of the Agricultural Policy Project).

154. *See* POLICY MATTERS, *Agricultural Policy Questions: How Have Crop Exports Performed With the Price and Income Farm Policy Changes of the Last Two Decades?*, (Agric. Policy Analysis Ctr.), Nov. 1999, at 1-2.

155. *See* George Anthan, *Freedom to Farm, from Bill to Act*, DES MOINES REG., Apr. 21, 1996, at 2AA.

156. *Formulation of the 1995 Farm Bill, The Administrative View: Hearings Before the House Comm. on Agric.*, 104th Cong. 195-96 (1995) (statement of Secretary of Agriculture Dan Glickman).

products will be overwhelming, and there is no Nation in the world that can respond except us because we have the acreage to do it."[157]

Increasing global demand for farm goods seemed to make the deregulation of agriculture less risky.[158] Many observers concluded that farmers were making a logical tradeoff—a degree of price stability was exchanged for a government commitment to aggressively pursue export markets.[159] Congressman Pat Roberts of Kansas, then the new Chairman of the House Agriculture Committee (now a Senator), explicitly agreed to the deregulation of agriculture—planting flexibility, regulatory relief, export promotion—in exchange for a reduction in government spending on farm programs.[160] Some farmers agreed: "If you can aggressively go after export sales and liberalize trade—and the numbers look to me like we can double export sales—that infusion of income into the agricultural economy, not one dollar of it would come from Washington, D.C., or from the taxpayer. So I am willing to horse trade with you."[161]

E. *The Critique of Regulation*

Many of the doubts about the farm program that had been expressed in recent decades surfaced during the Freedom to Farm debate.[162] Congress concluded, for example, that attempting to reduce program expenditures by reducing the amount of production covered by the farm program undermined the program's goal of limiting production in order to increase prices.[163] Such circumstances made the farm program "less effective, both as a means of increasing farm income and as a means to manage production, with each successive modification."[164] Congress also concluded that the program skewed production incentives, "encouraging production based on potential government benefits, not on markets prices."[165] By restricting production to a certain number of acres, the program also encouraged the "over-use of fertilizers and pesticides in order to get the most production from the acres the

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157. *Commodity Policy: Hearing Before the Comm. on Agriculture, Nutrition, and Forestry United States Senate,* 104th Cong. 28 (1995) (statement of Secretary of Agriculture Dan Glickman).

158. *See* Anthan, *supra* note 155, at 46.

159. *See id.*

160. *See Formulation of the 1995 Farm Bill, The Administration's View: Hearings Before the Comm. on Agric. House of Representatives,* 104th Cong. 47 (1995) (statement of Congressman Pat Roberts, Chairman). "[I]f we are able to achieve regulatory relief, tax policy changes, certainly a more consistent and aggressive export policy, and streamlining the farm bill as we would go through those efforts in a bipartisan way, that hopefully we could rely less on federal dollars." *Id.*

161. *Market Effects of Federal Farm Policy: Hearing Before the Comm. on Agriculture, Nutrition, and Forestry United States Senate,* 104th Cong. 57 (1995) (statement of Robert Amstrup, farmer from the Red River Valley).

162. *See* H.R. 2854 CONF. REP. NO. 104-494, at 40 (1996), *reprinted in* 1996 U.S.C.C.A.N 611, 611-12.

163. *See id.*

164. *Id.*

165. *Id.* at 41.

government is allowing the farmer to plant that year."[166] Congress noted that such an incentive was at cross-purposes with government efforts to make farming more environmentally friendly,[167] concluding that "[i]t would be hard to imagine a program which creates more inconsistent incentives than the existing commodity programs."[168]

In the hearings leading up to the Freedom to Farm legislation, some legislators noted the economic distortions created by the farm program. Senator Lugar, a long-time skeptic of commodity programs, criticized the price leveling effect of the farm program, which denied producers the benefits of price peaks.[169] The program also reduced the number of acres available for production, which reduced the number of acres on which farmers could spread their fixed costs.[170] Reduced production also allowed other nations to fill the production void, as best indicated by the "close relationship between U.S. production sacrificed to set-asides and the increase in European grain exports."[171] Senator Lugar also explained how the farm program limited the flexibility of farmers and thereby skewed production decisions, a core complaint of those who sought to give farmers more "freedom to farm."[172]

IV. THE LIMITS OF DEREGULATION

A. *The Asian Flu*

Part of the rationale for passing Freedom to Farm was the belief that foreign demand for American agricultural products would grow. In order to take advantage of this growing demand, it became imperative that the United States completely embrace international agreements designed to liberalize trade. To continue a large-scale agricultural support program, Congress believed, "ignore[d] the realities of a post-GATT and NAFTA world."[173] Congress argued that managing the supply of American production only created market opportunities for foreign producers.[174] By continuing the farm program, Congress feared production limits would restrain the

166. *Id.*

167. *See id.* Congress noted the "greater and greater bureaucratic controls on producers over the last ten years in order to minimize environmental damage by requiring conservation compliance plans, compliance with wetlands protection provisions, and compliance with many other land-use statutes." *Id.*

168. *Id.*

169. *See Market Effects of Federal Farm Policy: Hearing Before the Comm. on Agriculture, Nutrition, and Forestry United States Senate,* 104th Cong. 2 (1995) (statement of Senator Richard Lugar, Chairman).

170. *See id.* at 57.

171. *Id.*

172. *Id.*

173. H.R. 2854 CONF. REP. NO. 104-494, at 42 (1996), *reprinted in* 1996 U.S.C.C.A.N. 611, 614.

174. *See id.*

American ability to meet foreign demand for American agricultural goods and thereby limit producer earnings.[175]

Congress concluded, quite wrongly, that when the New Deal program was established, "world markets were not a major factor in determining agricultural policy."[176] To the contrary, agricultural policy-makers struggled throughout the 1920s to adjust to the post-World War I collapse in foreign demand for American farm products.[177] The most prominent piece of agricultural legislation debated in the 1920s was the McNary-Haugen Act, which would have created a corporation to buy American farm surpluses and dump them overseas while American farmers were protected behind a high tariff wall.[178] Some experts ultimately embraced the idea of production controls only after they became convinced that the long-debated export promotion policy was unworkable.[179] In 1932, when FDR announced his principles for constructing agricultural policy, he required that the legislation adopted not trigger a retaliatory response from Europe, indicating the prominent place of trade in

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175. *See id.*

176. *Id.*

177. *See* H. THOMAS JOHNSON, AGRICULTURAL DEPRESSION IN THE 1920S 13 (1985) (noting the common perception that the "need to supply troops and citizens of the Allied powers created an enlarged demand for staple commodities overseas, a demand which was augmented in 1917-1918 by the United States' own war effort at home and abroad.").

> This export market enhanced the incomes of American farmers but could not be depended on when peace returned and European production and Atlantic shipping resumed prewar levels. Although Europe's demand for American farm output remained at wartime levels for more than eighteen months after the armistice, reduction of this demand in 1920 is regarded as a major cause of the sharp drop in farm prices that year.

Id.

178. *See* KENNETH FINEGOLD & THEDA SKOCPOL, STATE AND PARTY IN AMERICA'S NEW DEAL 77 (1995) (noting that the "movement that mobilized the most farmers and, for a time, united farmers of different organizations, sections, and ideologies was McNary-Haugenism").

> The McNary-Haugen movement had its origin in the pamphlet 'Equality for Agriculture,' published by George N. Peek and Hugh S. Johnson in January 1922. Agriculture, Peek and Johnson argued, needed the same protection industry received from the tariff, but agricultural tariffs alone were insufficient. Production, they pointed out, was set by six million individual farmers and subject to weather conditions. No matter how high agricultural tariffs were set, farmers would produce a surplus, which would have to be sold on the world market, and the world price would determine the domestic price. To 'make the tariff effective for agriculture,' Peek and Johnson proposed establishing a corporation to purchase the domestic surplus at the domestic price and dump it abroad at the world price. This market segregation, financed by an 'equalization fee' on producers, would keep domestic prices high.

Id. at 75-76. The proposal was approved by Congress twice and President Coolidge responded with two vetoes. *See id.* at 76.

179. *See id.* at 77 (noting that the assistant chief economist at the Farm Board, Mordecai Ezekial, endorsed acreage controls "after a European trip convinced him that foreign markets would remain closed to American farmers").

New Deal policy-making.[180] In 1933, Secretary Wallace had to squelch an early dumping plan by AAA-administrator Peek, who thought the AAA would be used to promote McNary-Haugenism, instead of production controls.[181]

Even after the New Dealers embraced the production control strategy, they understood the global economic context of the policy and attempted to make supply management a global program.[182] In a 1933 meeting in London, leaders from several nations negotiated the World Wheat Agreement, which restricted production in several different countries in order raise the world price of wheat.[183] The Wheat Agreement was short-lived and generally unsuccessful, however, as were post-World War II efforts to revive the Agreement.[184] Postwar planners did attempt to include agriculture in the effort to promote trade liberalization, but agriculture proved to be a very intransigent sector and resisted such efforts.[185] When negotiators finally reached an agreement to liberalize the agricultural trade in 1993, the high expectations for increased agricultural exports spilled over into Congress, where Freedom to Farm was about to be debated.[186]

The long history of the interaction between agricultural and trade policy should have been more prominent in the 1996 policy debate and the potential volatility of export markets better understood. When the once-booming Asian economies collapsed in the late 1990s, so did Asian demand for American farm goods.[187] The loss of this important export market contributed to the decline in farm prices in 1998 and the loss of support for the Freedom to Farm Act.[188] The price collapse resulted in large-scale federal bailouts in 1998 and 1999, largely obviating the budget-saving prerogatives of the Freedom to Farm legislation.[189] Senator

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180. *See id.* at 81. *See also* LEUCHTENBURG, *supra* note 47, at 49 (noting that FDR "disliked dumping"); AUSTIN A. DOWELL & OSCAR B. JESNESS, THE AMERICAN FARMER AND THE EXPORT MARKET 1 (1934) (noting the growth of protectionism in agricultural markets and the need to "examine critically what export markets mean to the American farmer and what effect nationalistic policies have upon these outlets").

181. *See* SALOUTOS, *supra* note 52, at 49. An internal USDA memorandum in 1933 noted that "[t]his practice has been condemned in every international conference; it was the subject of special treatment in our recent tariff truce agreement; it is recognized as provocative of retaliation . . . a sound foreign trade must be based on equal exchange between countries." *Id.*

182. *See* Jon Lauck, *Against the Grain: The North Dakota Wheat Pooling Plan and the Liberalization Trend in World Agricultural Markets*, 8 MINN. J. GLOBAL TRADE 289, 297 (1999).

183. *See id.*

184. *See id.* at 300-01.

185. *See* Steinle, *supra* note 148, at 342-44.

186. *See* Duffy, *supra* note 147, at 34.

187. *See* Anthan, *supra* note 127, at 2A.

188. *See* EDWARD G. SMITH ET AL., AGRIC. AND FOOD POLICY CENTER, FARM LEVEL COMPARISON OF THE FAIR ACT TO THE 1990 FARM BILL 8 (1999). "[T]he success of the FAIR Act—in the eyes of farmers, was dependent on the maintenance of a strong export market. When the strength of that market disappeared in the last half of 1998, economic and farm level support for FAIR declined dramatically." *Id.*

189. *See* Editorial, *Folly on the Farm*, WASH. POST, Nov. 11, 1999, at A42 (criticizing the $8.7 billion Congressional appropriation of 1999).

Grassley conceded the decline in export demand and its connection to the current economic stress in the farm sector: "The transition turned out to be more difficult than we anticipated."[190] The economic problems in the agricultural sector led to proposals to reform Freedom to Farm and will certainly dominate the House hearings on the farm program scheduled for the spring of 2000.[191] As the debate over the construction of future farm policy proceeds, it is important that policymakers realistically assess the potential for export-led increases in demand for farm goods.

B. *The Market Concentration Oversight*

In 1999, three economists published the book *Policy Reform in American Agriculture*, describing the passage of the Freedom to Farm Act and prescribing methods for finally ending government involvement in agriculture.[192] The authors view the "central policy reform problem in American agriculture" as the termination of agricultural commodity programs.[193] In order to solve this problem, the authors advocate an "ambitious squeeze out," or a "slow, uncompensated diminution" of support for farmers.[194] The authors do not address the market conditions that would greet farmers after the termination of government programs, however. In particular, the authors make no mention of the growing levels of concentration in the agricultural processing sector and the negative impact such concentration has on the bargaining power of farmers. It is an unfortunate but understandable oversight given the distinct worlds of regulatory and antitrust law.[195] The segregation is evidenced by the legislative debates surrounding the Freedom to Farm Act, in which policy-

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190. David E. Rosenbaum, *Senate Approves $8.7 Billion for Emergency Aid to Farmers*, N.Y. TIMES, Oct. 14, 1999, at A18. "The problem, Mr. Grassley said, was not the principle of the law but the fact that its authors did not anticipate such events as the devaluation of Brazilian currency and the crash in Asian economies, which had a devastating effect on American farm exports." *Id.*

191. *See* William C. Mann, *Clinton Pushes Revised Farm Laws*, AP ONLINE, July 31, 1999, *available in* 1999 WL 22028990.

192. *See* ORDEN ET AL., *supra* note 106, at 1-3.

193. *Id.* at 2.

194. *Id.* at 8, 11.

195. *See* Chen, *supra* note 14, at 148-49 (noting the unfortunate separation of the study of regulated industry law from antitrust law, "courses on two related but distinct legal strategies for correcting the perceived defects of capitalistic competition"); Stephen Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CAL. L. REV. 1005, 1007 (1987) (explaining the faith that advocates of deregulation place in antitrust law). *See generally* A. Douglas Melamed, *International Antitrust in an Age of International Deregulation*, 6 GEO. MASON L. REV. 437 (1998) (offering an explanation, by the Principal Deputy Assistant Attorney General, of how regulators sometimes defer to antitrusters).

> After more than a hundred years, antitrust commands widespread respect in this country. Other agencies of our government—agencies whose own agendas might sometimes lead them to support policies or favor outcomes that are inconsistent with those that would be favored by antitrust principles—are regularly tempered in what might otherwise be enthusiasm for anticompetitive policies.

Id. at 444.

makers made no concerted effort to address the competitive conditions in agricultural markets, the relative bargaining power between farmers and processing firms, and the ability of antitrust laws to address these concerns.[196]

Since the passage of Freedom to Farm, however, the most prevalent concern in agricultural circles has been growing concentration in the processing sector.[197] The first stirrings of the contemporary concentration concern came from cattle producers in the early 1990s.[198] In response, Congress mandated a large-scale study of concentration in the meatpacking sector that was finally published in 1996.[199] The study was released about the time that Archer-Daniels-Midland was implicated in three international price fixing conspiracies (lysine, citric acid, and corn sweeteners) and paid the then-largest antitrust fine in American history, an episode that further contributed to growing concerns about anticompetitive agribusiness practices.[200] The large-scale agribusiness mergers of 1998 and 1999—including the ongoing battle against the Cargill-Continental Grain merger—also prompted enormous farmer protest and the introduction of federal legislation to freeze all large-scale agribusiness mergers for eighteen months or until federal legislation addressing the concentration issue could be passed.[201] Additional legislation has been introduced in 2000, including a bill that would allow the Department of Agriculture to review agribusiness mergers and would require that strict judicial scrutiny be applied to such mergers.[202] Another bill would outlaw meatpacker ownership of livestock, reflecting the great concern about the merger of Smithfield Foods, the nation's largest pork packer, and Murphy Farms, the nation's largest pork producer.[203]

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196. *See supra* notes 13, 114 and accompanying text.

197. *See* Jon Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law* 75 N.D. L. REV. 449, 454-56 (1999).

198. *See supra* notes 151-55 and accompanying text.

199. *Concentration in the Red Meat Packing Industry*, Grain Inspection, Packers and Stockyards Administration, USDA (Feb. 1996), at iii (explaining the 1992 Congressional appropriation for a "study of concentration in the red meat packing industry"). "Both the Senate and House Committee reports expressed concerns about concentration in the meatpacking industry." *Id.*

200. *See* JOHN M. CONNOR, ARCHER DANIELS MIDLAND: PRICE-FIXER TO THE WORLD 1 (Apr. 1997) (Staff Paper 97-4) (Purdue University).

201. *See* Agribusiness Merger Moratorium Act, H.R. 3759, 106th Cong. (1999) (proposed version *available in* 1999 Cong. U.S. HR 3759).

202. *See* Farmers and Ranchers Fair Competition Act of 2000, S. 2411, 106th Cong. (2000). The main sponsor of this legislation is Tom Daschle (D, SD). Co-sponsors include Senators Leahy (D, VT), Harkin (D, IA), Conrad (D, ND), Dorgan (D, ND), Johnson (D, SD), Feingold (D, WI), Kohl (D, WI), Kerrey (D, NE), Baucus (D, MT), Rockefeller (D, WV), Wellstone (D, MN), Levin (D, MI), and Jeffords (R, VT). The author commented on several drafts of the Daschle legislation. Senator Charles Grassley (R, IA) has also introduced the Agriculture Competition Enhancement Act, S. 2252, 106th Cong. (2000). On the House side, see Agriculture Competition Enhancement Act of 2000, H.R. 4339, 106th Cong. (2000). The main sponsor is John Thune (R, SD). See also Antitrust Enforcement Improvement Act of 2000, H.R. 4321, 106th Cong. (2000). The main sponsor is David Minge (D, MN). The author discussed the latter legislation with Congressman Minge.

203. *See* A Bill to Amend the Packers and Stockyards Act, 1921, to make it unlawful for a packer to own, feed, or control livestock intended for slaughter, S. 1738, 106th Cong. (1999). The main

Policy-makers advocating a greater market orientation for agriculture did not consider the workability of markets in which farmers would be selling their products.[204] Policy-makers should have fully considered the growing levels of concentration in agricultural markets and learned from other deregulatory experiences. Regulators could have learned from the airline industry, which provides a good example of the potential pitfalls of deregulation. The Civil Aeronautics Board Sunset Act of 1984 transferred the review of airline mergers to the Department of Transportation.[205] In 1989 the merger review authority was transferred the Department of Justice.[206] "Unlike the DOT, which could block a merger" administratively, the DOJ is required to seek an injunction in federal court.[207] As a result of the disorganized merger review process and the invocation of permissive antitrust ideologies,[208] the level of concentration in the airline industry has increased dramatically.[209] A recent study concluded that Northwest Airlines'

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sponsor of this legislation is Tim Johnson (D, SD). Co-sponsors included Senators Kerrey (D, NE), Grassley (R, IA), and Thomas (R, WY); David Barboza, *Goliath of the Hog World; Fast Rise of Smithfield Foods Makes Regulators Wary*, N.Y. TIMES, Apr. 7, 2000, at C1.

> By aggressively acquiring its larger rivals over the last two years and using precision genetics, huge hog farms and giant meatpacking plants to control every stage of production, Smithfield has ballooned into a $5 billion company that accounts for more than a fifth of the nation's pork. But in so doing, it has come under intense scrutiny from regulators who say that agricultural giants may wield too much control over the food supply. After Smithfield announced in September that it would acquire Murphy Family Farms, the giant hog producer, the Agriculture Department called the company 'absurdly big,' and asked the Justice Department's antitrust division to review the deal. More recently, the attorney general in Iowa, a big pork producing state, challenged the merger in state court, arguing that Smithfield is trying to skirt a state law that forbids a meatpacking company to operate hog farms.

Id.

204. *See supra* notes 192-203 and accompanying text.

205. *See* Schoder, *supra* note 14, at 115.

206. *See id.* at 115-16.

207. *Id.* at 116.

208. *See id.*

> When DOJ analyzes a merger between two competing companies, one factor it looks at is the Herfindahl-Hirschman Index (HHI), which is used to measure market concentration before and after a merger. This is done by measuring an airline's share of enplanements against total industry enplanements, regardless of where it operates and who its competitors are. It is *immaterial that an airline dominates a particular hub*, as long as there are other airlines which could theoretically compete with it. If the HHI comes up too high, indicating a heavy concentration, DOJ will not recommend the merger be approved without mitigating circumstances. However, according to Margaret Guerin-Calvert, a former Justice Department economist, 'unless there is a case of clearcut, overlapping hubs and there are major barriers to entry for a replacement of the merged carrier, the DOJ won't intervene.'

Id. (italics added). Airlines were regulated in 1938, the same year that the reconstituted AAA was adopted.

209. *See* Richard D. Cudahy, *The Coming Demise of Deregulation*, 10 YALE J. ON REG. 1 (1993). "We now have what appears to be a potentially oligopolistic industry structure with a quickly

concentrated control of the Minneapolis-St. Paul market resulted in fares that were almost forty percent higher than they would be in a competitive market.[210] After deregulation, enforcement authorities had allowed Northwest to acquire the only other significant competitor in the Minneapolis-St. Paul market, Republic Airlines. After the merger, fares increased.[211]

Justice Stephen G. Breyer once noted that it might be wise to consider a uniquely tailored merger policy for particular industries. In the late 1980s, he believed that "[a]irline mergers do warrant unusual scrutiny . . . because empirical generalizations that support current merger policy do not necessarily reflect the special circumstances of the deregulated carriers."[212] Breyer noted the optimism among enforcement officials about the likelihood of potential competitors entering a

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shrinking base of huge surviving 'competitors' (American, United, and Delta Airlines come first to mind) and a handful of smaller lines, some of which seem to have found niches (such as Alaska and Southwest)." *Id.* at 3-4. "Heightened concentration, through merger, bankruptcy and otherwise, increasingly characterizes the airline industry and makes one wonder about the widely accepted premise that airlines are not decreasing cost industries with significant natural monopoly characteristics." *Id.* at 5. Judge Cudahy explains that even Alfred Kahn, who advocated and oversaw the deregulation of the airline industry, has explained "how the big airlines have eliminated the low-cost, low-price competition that appeared on the scene after deregulation (but has now largely disappeared) through 'predatory' pricing practices." *Id.* at 7. *See also* Laurence E. Gesell & Martin T. Farris, *Airline Deregulation: An Evaluation of Goals and Objectives*, 21 TRANSP. L.J. 105, 119 (1992) ("Kahn submits that two of the 'surprises of deregulation' were: (1) the reconcentration of the industry, and (2) the intensification of price discrimination and monopolistic exploitation"); Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 347 (1990) (conceding the "return of monopoly power to the airline industry . . .").

210. *See* Mike Meyers, *An Eye on Twin Cities Airport Competition; Northwest Disputes GAO Report on Alliance with Continental*, N.Y. TIMES, Feb. 3, 1999, at D1 (reporting that "[a]ir travel through Minnesota, at last count, cost thirty-seven percent more than the national average for trips of comparable length in cities without a dominant airline, according to research by University of California-Berkeley economist Severin Borenstein.").

211. *Id.* (noting that the "estimated 1997 hub premium was six times as high as the variation over national fares at Minneapolis-St. Paul in 1985, the year before Northwest gained supremacy in Twin Cities air travel by buying rival Republic Airlines. Borenstein estimated that in 1985 the hub premium at Minneapolis-St. Paul was 6 percent over the national average cost"). The attorney general of Minnesota has announced that he will closely scrutinize Northwest's behavior toward the small upstart airline Sun Country. *See* Laurence Zuckerman, *Sun Tries to Rise in Northwest*, NAT'L POST, Aug. 27, 1999, at C19.

> Northwest now controls 54 of 70 gates at the main terminal in Minneapolis-St. Paul International Airport, forcing Sun Country to use the Hubert H. Humphrey Terminal, a converted hangar on the opposite side of the tarmac. That and Sun Country's limited schedule make it difficult for it to attract business travelers. Sun Country executives say Northwest has matched its low fares on routes where the two compete and has even added flights on some competing routes. They also say Northwest has threatened to retaliate against travel agents who book flights on the airline and has even stopped sharing spare parts with Sun Country, a courtesy commonly extended among airlines.

Id.

212. Breyer, *supra* note 195, at 1012.

market that was behaving anticompetitively.[213] The reliance on the actions of potential competitors meant that "every *unnecessary* removal of a significant carrier as an independent entry-threatening entity gratuitously raises the probability of unwarranted price increases."[214] As a result, Breyer believed it was critical to consider the "special circumstances of the airline industry" when policing mergers.[215] Similar arguments have been made about the need to develop a unique level of scrutiny for agribusiness mergers since every merger results in the loss of a potential buyer of farm goods and a further deterioration of marketing conditions for farmers.[216]

In addition to the post-regulatory relationship between farmers and the processing sectors, concerns also exist about the competitiveness of the transportation industry that moves farm goods.[217] Specifically, concerns have been expressed about the growing level of concentration among railroads after deregulation.[218] The Staggers Rail Act of 1980 ended the Interstate Commerce Commission's long-time practice of regulating railroad rates, a practice that began with farmer protests against the monopoly power of railroads in the late 19th century.[219] Struggling railroads, which expected to be able to raise rates after deregulation, actually lowered them, but became profitable by significantly reducing their labor costs.[220] They also reduced costs by using units trains, which transport a single commodity—such as grain—to a single destination.[221] Uninhibited by the "rate equalization" provisions of the pre-Staggers pricing system, railroads offered

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213. *See id.* at 1013-14. Whether or not one should be optimistic or pessimistic about the ability of potential competitors to check anticompetitive behavior is "notoriously difficult to determine empirically." *Id.* at 1014.

214. *Id.* at 1015. Given that the airline industry had recently emerged from a regulatory structure, Breyer believed that certain industry restructuring would be inevitable and therefore counseled greater appreciation of merger defenses which defended mergers as increasing efficiency or as salvaging a "failing company." *Id.* at 1017.

215. *Id.* at 1018.

216. *See* Lauck, *supra* note 197, at 495-96.

217. *See* Paul Stephen Dempsey, *Antitrust Law and Policy in Transportation: Monopoly Is the Name of the Game,* 21 GA. L. REV. 505, 569 (1987).

218. *See id.* at 564-69 (1987).

219. *See id.* at 569. The author noted the ICC was created in 1887 to "shield the public against the monopoly abuse of the railroads." *Id. See also* Paul Stephen Dempsey, *The Interstate Commerce Commission: Disintegration of an American Legal Institution,* 34 AM. U. L. REV. 1, 45 (1984); Larry Fruhling, *Railroads at the Crossroads,* DES MOINES REG., Oct. 29, 1995, at 2A (reporting the views of an Iowa Department of Transportation official who believes the "national situation is ripe for the rate gouging by rail monopolies that led to formation of the Interstate Commerce Commission a century ago"). "If we get down to a few railroads we could have a revival of the 1880s." Fruhling, *supra* note 219, at 2A.

220. *See* James MacDonald & Linda C. Cavalluzzo, *Railroad Deregulation: Pricing Reforms, Shipper Responses, and the Effects on Labor,* 50 INDUS. & LAB. REL. REV. 80, 81 (1996).

221. *See id.* at 83.

volume discounts for unit trains.[222] Deregulation also allowed railroads to abandon smaller routes that often served grain shippers in rural areas.[223] In the agricultural areas of the Dakotas and Montana, for example, large grain elevators with unit train capacity drew a greater supply of grain because their lowered transportation costs could allow them to offer a higher price for grain.[224]

The changes in the railroad industry present dangers, especially for shippers such as farmers, "who are relatively dependent on railroad transportation [and] have few competitive alternatives and face poorer service."[225] In a scenario cited by one author, Iowa corn farmers could face higher transportation costs due to railroad concentration and could have access to a buyer foreclosed to them because the buyer chooses to do business with a seller who has lower costs.[226] The problems faced by an isolated shipper are evident. The same author noted that "shippers' claim that the savings from deregulation are not shared, with captive shippers paying 20 to 30% higher rates than shippers who can choose between railroad carriers or even another form of transportation, such as barges."[227]

As in other sectors, antitrust enforcers have failed to protect farmers from dangerous consolidation in the railroad industry. After the abolition of the Interstate Commerce Commission (ICC)[228]—another deregulatory measure passed by the Freedom to Farm Congress—the Surface Transportation Board (STB) was given the power to review mergers under a "public interest" standard, not the merger standards

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222. *Id.* "Deregulated pricing structures provided incentives to shippers to consolidate traffic onto high-density routes between fewer terminals, and into larger shipment sizes and longer trains carrying uniform products. Cost savings from consolidation appear to come in large part from reduced labor requirements, and labor costs, per freight tonmile." *Id.* at 84. As a result of deregulation, "prices fell for low-cost shipment methods, and increased for high-cost shipment methods." *Id.* at 90. *See also* Kahn, *supra* note 209, at 347 (noting increased price discrimination and efficiency).

> [T]he instances of sharply increased price discrimination that deregulation has made possible in airlines and railroads are both a competitive and a monopolistic phenomenon. They reflect intense competition for the traffic most likely to be attracted by price differences among competitors. They have also promoted economic efficiency in very important ways. The ability of the railroads to price down toward incremental cost has improved the distribution of the transportation function among the competing modes; their ability to charge rates for demand-inelastic traffic incorporating wider margins above variable costs has contributed to an improvement in their financial condition, which has helped them to finance major improvements in trackage, equipment and service, without yielding excessive returns in the aggregate.

Id.

223. *See* MacDonald & Cavalluzzo, *supra* note 220, at 81.

224. *See id.*

225. Salvatore Massa, *Injecting Competition in the Railroad Industry Through Access*, 26 TRANSP. L.J. 283, 284 (1999).

226. *See id.* at 285.

227. *Id.* at 292-93.

228. ICC Termination Act, Pub. L. No. 104-88, tit. I, § 101, 109 Stat. 804 (1995).

of the antitrust laws,[229] and the STB has elected to "pursue[] a policy of granting mergers."[230] Since the passage of the Staggers Act in 1980, regulators have approved twelve of the thirteen railroad merger applications they reviewed.[231] At present, regulators must address the proposed merger of the Canadian National railroad and the Burlington Northern Santa Fe railroad.[232]

Instead of the restrictive regulations of the ICC era, the STB now attempts to determine the "reasonableness" of rates. To meet this standard, a railroad must prove that a rate "results in a revenue-variable cost percentage for such transportation that is less than 180 percent."[233] But the court in *Burlington Northern v. I.C.C.*,[234] a case initiated by Montana farmers who shipped their wheat to western ports, allowed the STB discretion to set railroad rates in excess of the 180 percent guideline.[235] Before the STB will review the reasonableness of the rate, it must determine whether a railroad is "market dominant."[236] This threshold determination makes little difference, however, if the rate review standard is so flimsy. In the *McCarty Farms*[237] case, for example, Burlington Northern railroad served ninety-

229. 49 C.F.R. § 1180.1 (1996).

230. Massa, *supra* note 225, at 296.

231. *See id.* at 431 & n.96.

232. *See* Anthony DePalma, *All Aboard for a Big Rail Deal?* N.Y. TIMES, Feb. 22, 2000, at C1 (explaining the resulting "behemoth would have 50,000 miles of track, combined annual revenue of $12.5 billion, freight service to 32 states and 8 Canadian provinces, and cross-border access from Halifax, Nova Scotia, to Mexico City to Long Beach, Calif.").

> Not everyone is willing to accept the vision of the new railroad or the changes it represents. In the United States, shippers and unions, burned by service disruptions after other big rail mergers, oppose the deal, a cashless transaction that would create a new holding company, North American Railways. Competing railroads have warned that another merger at this time would push the industry into a final round of consolidations that would end with just two enormous networks to serve the entire continent of North America. . . . In 1980, 26 such freight railroads operated in the United States, according to the Association of American Railroads. Today, just seven are left.

Id. at C6.

233. 49 U.S.C. § 10707(d)(1)(A) (Supp. III 1997).

234. Burlington N. R.R. v. I.C.C., 985 F.2d 589 (D.C. Cir. 1993).

235. *See id.* at 600.

236. *See id.* The Railroad Revitalization and Regulatory Reform Act of 1976 limited the jurisdiction of the ICC, the precursor to the STB, to situations where the railroad had "market dominance." In the Staggers Rail Act of 1980,

> Congress set a quantitative floor for the Commission's jurisdiction over rates, and established that the Commission could not find market dominance if the disputed rate yielded an R/VC [revenue to variable cost ratio] lower than a specified figure - which started at 160% in the first year, rose in increments of 5% a year, and stabilized at 180% in the fifth.

49 U.S.C. § 10709(d)(2)(A)-(E) (1994). *See also Market Dominance Determinations*, Ex Parte No. 627, Surface Trans. Bd., Dec. 21, 1998, *available in* 1998 WL 887185 (establishing the current rule, which determines market dominance by considering two factors, intramodal and intermodal competition).

237. *See* McCarty Farms v. Burlington Northern, Inc., 3 I.C.C.2d 822 (1987).

eight percent of Montana's grain elevators and controlled close to eighty percent of the grain transportation market.[238] Despite this dominance, the STB approved a revenue-variable cost ratio of 230 percent.[239] Concentration and the potential for competitive problems has prompted some critics to call for new methods of insuring competition in the railroad industry.[240] Just prior to this publication, the STB announced a fifteen month moratorium on rail mergers because they feared that another "merger at this time was likely to set off a wild round of deal making and consolidations that would limit competition and end, eventually, with just two huge rail systems left to serve all of North America."[241]

C. *Farm Policy as Social Regulation*

By focusing on budget matters and market freedoms, Congress failed to take seriously social and ideological considerations that have long played a role in agricultural policy. Agrarianism, which posits that the strongest republics would be organized around independent, family-based agricultural units, was an ascendant ideology during the American founding.[242] Agrarian beliefs and a legislative desire

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238. *See id.* at 828, 830.

239. *See id.* at 828. Although the agency had used a Ramsey pricing model in previous decisions, in the McCarty case the agency used the R/VC method. *See id.* at 828, 843-44. After the agency reverted to the older pricing model, it still approved the rate increase. *See* George Anthan, *Rail Mergers Rattle Shippers: Will Competition Rein in Rates?*, DES MOINES REG., Oct. 29, 1995, at 2G (noting that the "National Grain and Feed Association estimates that 20 percent of rail rates on farm products now exceed [the 180 percent] yardstick, and some rates in North Dakota are up to 400 percent of railroads' variable costs").

240. *See* Massa, *supra* note 225, at 305-18.

241 Anthony DePalma, *U.S. Regulators Impose 15-month Moratorium on All Rail Mergers*, N.Y. TIMES, March 18, 2000, at C1. The enormous potential consequences of the Burlington Northern and Santa Fe Railway-Canadian National merger had earlier prompted the STB to "consider not only the *direct impacts* of that combination, but also evidence of the *cumulative impacts and crossover effects* that would likely occur as other railroads developed strategic responses in reaction to the proposed combined new system." Testimony of Linda Morgan (Chair of STB), Senate Committee on Commerce, Science, and Transportation, March 17, 2000 (italics added) <http://www.stb.dot.newsrels.nsf/>. In its decision on the moratorium, the STB announced that "[o]ne change that we definitely intend to propose is elimination of the 'one case at a time' rule at 49 CFR 1180.1(g). . . . [T]he idea of modifying our rules to that effect for all future major rail consolidation proposals received broad support at the hearing." Surface Transportation Board Decision, STB Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures, March 31, 2000. <http://www.stb.dot.gov/decisions>.

242. *See* DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA 62 (1980) (reviewing, inter alia, Benjamin Franklin's views).

> Franklin believed, in short, that the combination of abundant land and the absence of a corrupt political system meant that America might be a 'Land of Labour,' where free men worked diligently on their farms to produce real wealth, in contrast to Europe, which was cursed with a plethora of men who, for demographic or political reasons, were mischievous sychophants or producers of frivolous 'superfluities.'

Id. at 63. *See also* JAMES MONTMARQUET, THE IDEA OF AGRARIANISM 87 (1989) (explaining that "in the New World, [Jefferson] perceived the possibility of a more socially valuable agriculture of mostly small operators"). "Because this agriculture was small-scale, it could employ the vast majority of the new

to protect rural life shaped the earliest, pre-New Deal components of farm policy,[243] which were driven by a pro-independent producer ideology.[244] The industrial challenge to the American agrarian order prompted the large-scale political movements of the late nineteenth century and gave rise to the jurisprudential endorsement of government interference in the economy in order to protect the wider public, circumscribing the scope of juris privati, the uses of private property outside the public interest.[245]

Agrarianism holds economic independence in high regard. The agrarianism of Thomas Jefferson, for example, abhorred economic dependence, which "begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the

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nation's citizens, thus realizing Aristotle's ancient dictum that the class of small farmers was the best foundation for democracy." *Id.*

243. *See* Donald E. Voth, *A Brief History and Assessment of Federal Rural Development Programs and Policies*, 25 U. MEM. L. REV. 1265, 1271-72 (1995) (noting the policies adopted prior to New Deal agricultural regulation).

> The first period of what was apparently strong interest in rural development extended from the Civil War until the turn of the century and is characterized by at least three major events: the establishment of the USDA; the passage of the Morrill Act in 1862; and Theodore Roosevelt's Country Life Commission of 1908, which was led by Liberty Hyde Bailey of Cornell University. The Morrill Act, significantly passed during the Civil War when Southern opposition to federal initiatives was excluded, signified an initial step toward federal involvement in local affairs. The Country Life Commission Report, forty years later, is the major document characterizing rural conditions, and it laid the groundwork for special programs and policies focusing upon rural areas that followed. During the ten years following, a whole series of its recommendations were enacted, including a parcel post system for rural areas, a postal saving system, the Smith-Lever Act establishing the Cooperative Extension Service of 1914, and a land bank credit system.

Id.

244. *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 15 (1970) (quoting Daniel Webster's praise of the "laboring people of the North, [those who] till their own farms with their own hands; freeholders, educated men, independent men").

245. *See* Munn v. Illinois, 94 U.S. 113, 126 (1876) (quoting the seventeenth century work of Lord Chief Justice Hale, who concluded that when private property is "affected with a public interest, it ceases to be juris privati only," while upholding an Illinois statute limiting warehouse charges for the storage of grain). The court also noted the monopoly problems present in the Chicago grain warehouse market:

> [I]t must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such 'as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication.' Thus it is apparent through which these vast productions 'of seven or eight great States of the West' must pass on the way 'to four or five of the States on the seashore' may be a *'virtual' monopoly.*

Id. at 131 (italics added).

designs of ambition."[246] The Jeffersonian policies of promoting widespread land ownership were designed to promote producer independence.[247] Economic historians have confirmed that the Jeffersonian vision, to a large extent, was realized in the rural north.[248] To this day, many farmers and legislators invoke this vision, viewing the agricultural sector as one of the final bastions of independent economic producers and the "industrialization" of agriculture as the final culmination of nineteenth century economic development.[249]

Agrarianism is closely linked to the ideology of republicanism, which heavily influenced the writing of the American constitution.[250] In recent years scholars have started to focus on republicanism, the broad set of political beliefs that, along with the tenets of classical liberalism, shaped the founding of the American republic.[251] The republican revival offers another reason to rethink the policy rationale underlying agricultural regulation.[252] In particular, the republican emphasis

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246. THOMAS JEFFERSON, *Notes on Virginia* (1784), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 187, 280 (Adrienne Koch and William Peden eds., 1944).

247. *Id.* at 279-281

248. *See* JEREMY ATACK & FRED BATEMAN, TO THEIR OWN SOIL: AGRICULTURE IN THE ANTEBELLUM NORTH 269 (Richard S. Kirkendall ed., 1987).

> Equality was a nineteenth-century American watchword. Nowhere were conditions riper for attaining the egalitarian ideal than in the antebellum rural North. Was it achieved? Probably. Although not perfect, compared with the South or the northern cities at that time wealth was diffused rather equally. Relative to the rest of the nation and perhaps to the world, this was an egalitarian society in terms of wealth holdings. Compared with the modern economy within these terms it would seem even more economically egalitarian than within its own temporal framework. This aspect of the Jeffersonian vision would appear to have been at least attainable in the rural areas of the 1850s and 1860s.

Id.

249. *See* Neil D. Hamilton, *Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?*, 14 N. ILL. U. L. REV. 613, 633-635 (1994) (explaining the elements of industrialization); Jon Lauck, *"The Silent Artillery of Time": Understanding Social Change in the Rural Midwest*, 19 GREAT PLAINS Q. 245, 246 (1999) (noting the persistence of republican and agrarian ideology). *See generally* MARTY STRANGE, FAMILY FARMING: A NEW ECONOMIC VISION (1988) (discussing the industrialization of farming).

250. *See* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 46-90 (1969).

251. *See generally* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975) (explaining that in the new American republic an infinite supply of land, ready for occupation by an armed and self-directing yeomanry, meant an infinite supply of virtue, and it could even be argued that no agrarian law was necessary; the safety valve was open, and all pressures making for dependence and corruption would right themselves); PAUL RAHE, REPUBLICS ANCIENT AND MODERN (1992) (tracing the history of republics).

252. *See* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1540-41 (1988). "Recent work in law has started to explore the place of republican theory in the American constitutional tradition. The republican revival is now firmly in place, in legal scholarship if not in legal doctrine." *Id.* Republican ideology is also the basis of legislation which expresses agrarian concerns about economic concentration. *See* David Millon, *The Sherman Act and the Balance of Power*, 61 S.

on community and civic virtue offers another justification for policies that tend to stabilize and preserve small towns and rural communities, once thought crucial to the functioning of the American republic.[253] Most importantly, like agrarianism, republicanism embraced the "common belief that political corruption and constitutional decay festered most readily in societies where individuals had *lost their economic interdependence* and moral integrity."[254]

By not fully considering the agrarian and republican heritage of American agricultural policy, Congress failed to reinforce the long-standing policy of promoting producer independence. By deregulating agricultural prices, Congress left many farmers with stark choices about the marketing of their goods. Many farmers now feel compelled to become part of an integrated production system in which they operate under contract to large processing entities.[255] The contracts are often very specific and tightly regulate the daily activities of the farmer. Many farmers, especially in the Midwest, feel that their future will be that of chicken producers in the South, who have become little more than "wage slaves,"[256] as republicans would argue, subject to the directives of Tyson and Perdue.[257] The imagery is often feudal,

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CAL. L. REV. 1219, 1247 (1988) (explaining "republicanism's contribution to the ideology of the Sherman Act").

253. *See generally* Paul Stephen Dempsey, *The Dark Side of Deregulation: Its Impact on Small Communities*, 39 ADMIN. L. REV. 445 (1987) (noting that small towns in particular are adversely affected by deregulation).

254. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 169 (1996) (noting the long-standing republican conviction that economic independence is essential to citizenship). "Those, like the propertyless European proletariat, who must subsist on wages paid by employers were likely to lack to moral and political independence to judge for themselves as free citizens. Jefferson once thought that only yeoman farmers possessed the virtue and independence that made sturdy republican citizens." *Id.*

255. *See* discussion *infra* Part IV.D.

256. SANDEL, *supra* note 254, at 172.

> Labor leaders dramatized their case against wage labor by equating it with Southern slavery-'wage slavery,' as they called it. Working for wages was tantamount to slavery not only in the sense that it left workers impoverished but also in the sense that it denied them the economic and political independence essential to republican citizenship.

Id.

257. *See* Jedediah Purdy, *The New Culture of Rural America*, AM. PROSPECT, Dec. 20, 1999, at 29.

> The change began in poultry farming, long a part of family farm operations. In the 1960s, meat-processing companies began contracting with farmers to raise chickens in large metal barns, becoming an integrated step in a single production chain. The chickens were delivered to the farmers as chicks and were retrieved as broilers; they never left the company's ownership. By 1980, except for a few specialty products, there was no place for independent chicken farmers to sell their birds. The poultry industry has become notorious for the low pay and dangerous work conditions of the employees who manhandle the birds, and for stream-killing pollution. In the early 1990s, new technology made the same kind of confinement possible for hogs. With antibiotic injections and climate control, raising animals suddenly required none of the skill and attention farmers had always maintained. As in poultry, tending pigs could become a low-wage job. Some meat-processing companies began contracting

with independent farmers being forced into peasant servitude, losing their craft, and sacrificing a life of dignified work.[258]

Pursuing a policy of promoting an independent, family-based agricultural system is a worthy goal, as state legislatures and courts have fully recognized. South Dakota law notes the "importance of the family farm to the economic and moral stability of the state" and Minnesota law notes the importance of promoting the "stability and well-being of rural society."[259] The Eighth Circuit has recognized the legitimacy of corporate farming statutes designed to promote an "agriculture where families own and work the land."[260] When upholding Missouri's corporate farming

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> out hogs on the model of chickens, while others built their own massive barns. The pressure on small operators was intense. Between 1993 and 1998, more than 104,000 farmers raising 500 hogs or fewer gave up pigs or left farming altogether—a 55-percent reduction in six years. . . . By 1998 the five largest pork companies raised about 19 million hogs, nearly a third of the number produced that year.

Id. at 28-29.

258. See Dick Johnson, *Leaving the Farm for the Other Real World*, N.Y. TIMES, Nov. 7, 1999, at WK3 (quoting an expert on the psychological consequences of leaving the farm).

> Its not just about making money, but about having a life that is meaningful,' said Dr. Michael Rosmann, a farmer and psychologist who counsels farmers. 'For most of them, that grieving lasts for the rest of their lives. To make the decision to quit farming, to do what's best for the family, takes an awful lot of courage.

Id. *See generally* CHRISTOPHER LASCH, THE TRUE AND ONLY HEAVEN (1991) (noting the importance of work and the small producer ethic, the moral discipline of a calling, the competence conferred by a craft, and the community cohesion of democratic proprietorship, which fade with the coming of industrialism and cannot be replaced by the gaudy attractions of consumerism). Lasch explains that the "[p]opulists inherited from earlier political traditions, liberal as well as republican, the principle that property ownership and the personal independence it confers are absolutely preconditions of citizenship. In the nineteenth century, the validity of this principle was still widely acknowledged, both in England and in the United States." *Id.* at 30; DANIEL T. RODGERS, THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920 30 (1974) (noting that the "simple fact of employment [] deeply disturbed [] many Americans").

> Part of what gave labor its immense value to the keepers of the mid-nineteenth work ethic was the assumption that the worker owned his own toil—that a man's efforts were his to exert and the successes his to be reaped. Puritans could still talk of a hierarchy of servants leading up to God, but when mid-nineteenth century moralists urged the dignity of work their minds habitually ran first to those who were their own masters: farmers, self-employed craftsmen, shopkeepers, and small businessmen. It was hard, in fact, to find a positive label for all the others.

Id.

259. S.D. CODIFIED LAWS § 47-9A-1 (Michie 1991 & Supp. 1999); MINN. STAT. ANN. § 500.24(1) (West 1990 & Supp. 2000). "The Legislature of the State of South Dakota recognizes the importance of the family farm to the economic and moral stability of the state, and the Legislature recognizes that the existence of the family farm is threatened by conglomerates in farming." S.D. CODIFIED LAWS § 47-9A-1 (Michie 1991 & Supp. 1999). "[I]t is in the interest of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society." MINN. STAT. ANN. § 500.24(1) (West 1990 & Supp. 2000).

260. MSM Farms, Inc. v. Spire, 927 F.2d 330, 333 (8th Cir. 1991) (upholding a Nebraska corporate farming amendment against an equal protection challenge because the "people of Nebraska could rationally have decided that prohibiting non-family farm corporations might protect an *agriculture*

statute, the Supreme Court of Missouri noted the state legislature's fear of a "detrimental impact on *traditional farming entities*."[261] As the formation of federal agricultural policy proceeds, the agrarian and republican basis of past policy-making needs to be recalled as a basis for objecting to the slide into a feudal agricultural order.

V. FARM POLICY AFTER DEREGULATION

In passing Freedom to Farm, Congress addressed long-time farmer concerns about the onerous controls that sometimes accompany farm programs and recognized the greater role that international markets would play in the future of agriculture.[262] Congress also addressed public alarm at its inability to tackle chronic budget deficits that were rapidly adding to the national debt.[263] At the same time, however, Congress did not take enough steps to prepare agriculture for a transition to greater market reliance. It is time for Congress to take those steps.

A. *Beyond the Regulatory Model*

The politics of western democracies is increasingly constrained. The once wide-ranging debate about the proper economic policy for the industrial age—one including socialistic planners of the British Labor Party and the free market ideologues of Hayekian stripe—has been narrowed into a debate about the proper form of capitalism.[264] While free marketeers are still fully engaged in the debate, the energy of the old left has been drained and its public support has withered. Increasingly, the left is defined by those politicians and thinkers who advocate a Third Way, a middle ground between completely free markets and models of social democracy, in which government tweaks the economy but rejects full-scale regulatory regimes such as the Agricultural Adjustment Act.[265] After President Clinton's declaration that the "era of big government is over,"[266] reformers now emphasis modest programs to deal with social problems on a micro level.[267] Leaders

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where families own and work the land") (italics added). The Eighth Circuit concluded that large-scale, corporate farms would "adversely affect the rural social and economic structure [and undermine] this country's historical reliance on family or dispersed farm ownership." *Id.*

261. Webster v. Lehndorff Geneva, Inc., 744 S.W.2d 801, 805-06 (Mo. 1988) (italics added).

262. *See infra* discussion notes 265-68 and accompanying text.

263. *See* discussion *supra* Part II.C-E.

264. *See infra* discussion notes 266-69 and accompanying text.

265. *See* Roger Cohen, *Triumphant, the Left Asks What Else It Is*, N.Y. TIMES, Nov. 21, 1999, at WK 5. "Leaders from Bill Clinton to Gerhard Schroeder like to declare themselves newfound allies in championing market-friendly governments that still look out for the less fortunate. Out with tax-and-spend, state-heavy irresponsibility—in with the new culture of fiscal conservatism and opportunity." *Id.*

266. *See Europe's New Left: Free to Bloom*, ECONOMIST, Feb. 12, 2000, at 19 (explaining that the parties of the European left are "adopting policies more friendly to the free market").

267. *See* Richard W. Stevenson, *It's No Longer Just the Economy, Stupid*, N.Y. TIMES, Nov. 7, 1999, sec. 4, at 1 (noting the "trend toward small-scale solutions that look to market forces and

of the Republican Party, instead of advocating measures to defang government, have also emphasized the importance of making government small but effective.[268]

A small-scale policy approach is increasingly wise given the obsolescence of national regulatory regimes in an increasingly integrated global economy.[269] Congress was wise to address the global implications of national farm policy, but the specific policies adopted to replace the national regulatory model require adjustment. In particular, it is critical that government policy promote functional markets which are open to competition and resist the development of structures which foster anticompetitive practices. Government policy also needs to promote the economic independence of farmers by aiding their efforts to self-organize and actively participate in the marketing of their products, giving them a greater stake in the economy and society, a goal which comports with the emergence of the microenterprise economy.[270] By aiding the entrepreneurial energies of farmers and their ability to organize, policymakers will increase the chances of economic success among farmers and accomplish their goal of allowing market forces to shape the agricultural sector, an approach similar to that of the pre-New Deal Farm Board. By adopting certain government policies to supplement this approach, policymakers can also assure farmers that the market process is not rigged against them. By pursuing policies that are non-coercive and do not involve numerous regulations and production restrictions, policymakers will also address one of the core criticisms of

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individuals rather than big government"); Sean Wilentz, *For Voters, the 60's Never Died*, N.Y. TIMES, Nov. 16, 1999, at A27 (arguing that there is "abundant evidence that Americans are embracing sensible activist government").

268. *See* Editorial, *Republican Family Squabbles*, N.Y. TIMES, Dec. 4, 1999, at A16 (reviewing the rhetoric of a Republican presidential debate).

> The uncertainty about government among the candidates may reflect a general uncertainty among the voters. The polls show that past antipathy toward government programs has lessened in recent years. The candidates' oratory in the debate paid tribute to that old attitude of government-is-the-problem, but their specific words suggested that the election will turn on how to make government effective, not how to cut it back drastically.

Id.

269. *See* Sara Dillion, *Fuji-Kodak, the WTO, and the Death of Domestic Political Constituencies*, 8 MINN. J. GLOBAL TRADE 197, 198 (1999) (noting how WTO panel decisions "have shown little concern for domestic regulation, regardless of the sensitivity of the local politics surrounding the regulation in question").

270. *See Worker Capitalists*, WALL ST. J., Nov. 30, 1999, at A26 (noting the rise of the mutual fund and the social benefits of widespread ownership of corporate stocks). "Today some 80 million Americans, or 52% of households, own stocks, either directly or through their retirement plans." *Id.*

> The seeds of an economy of microenterprises are everywhere. Dr. [Thomas] Malone sees them in the surge in outsourcing; in the popularity of telecommuting; in the proliferation of virtual companies; in the erosion of the Fortune 500 as the premier employer; in the legions of people who opt for freelance or part-time work. He sees the same trajectory inside large companies, which increasingly work through project teams, joint ventures, ad hoc alliances, internal markets and independent business units.

Fred Andrews, *Merger Mania Got You Down? Start Thinking Small*, N.Y. TIMES, Dec. 1, 1999, at C14.

the New Deal regulatory regime established during the Great Depression. And by pursuing policies that consider the importance of economic independence, policymakers will honor the social underpinnings of agricultural policy.

B. *Against Feudalism*

An organizing principle for future agricultural policies should be the deterrence of forms of economic subservience, often thought of in terms of feudalism. In the Midwestern corporate farming debates of the 1960s and 1970s, agrarian critics often invoked fears of farming being transformed into a structure similar to southern chicken production, where farmers were forced to live lives of "poultry peonage" under corporations such as Tyson.[271] They also invoked the image of migrant California farm workers and the peasants of Latin America who were forced to work for landed Caudillos.[272] Even those unconcerned with such an economic condition concede the power of the notion of economic independence and recognize that the "family farm retains its romantic image as the bulwark of the American declaration of independence from feudal Europe."[273]

A reference point for a policy designed to promote economic independence and squelch feudalism is the "free labor" debates of the nineteenth century.[274] The coming of industrial market structures meant the coming of industrial workers, a fearful development for many 19th century observers.[275] The existence of a large working class—the "social problem" debated by many nineteenth century

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271. *See* Lauck, *supra* note 17, at 144.

272. *See id.* at 144-45.

273. Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 DRAKE L. REV. 361, 378 (1997).

> Ownership of farmland is an essential tenet of the traditional agrarian creed in the United States: 'The land should be owned by the man who tills it.' Indeed, two of the other planks of the agrarian creed stem directly from the doctrine of farm ownership; without land ownership, a farmer could hardly 'be his own boss' or ensure that farming is 'a family enterprise.' A tenant farmer who does not 'graduate' to proprietary entrepreneurship is not only a personal failure, but also a disappointment to the mightiest agricultural policymakers in the United States. Americans have historically evaluated the success of their agricultural policies according to the incidence of farm tenancy. (notes deleted)

Id. at 378-79.

> Agrarian entrepreneurship symbolizes independence, no less in the 1990s then in the 1290s. Freedom to alienate property snapped the chains of feudal tenure in medieval England, and freedom to farm likewise enabled several generations of eighteenth- and twentieth-century immigrants to establish a new life in America, free of their ancestral links. What the Statute of Quia Emptores promised in the late thirteenth century, however, may be threatened by the economic developments of the late twentieth.

Id. at 380-81.

274. *See* RODGERS, *supra* note 258, 30-31.

275. *See* LASCH, *supra* note 258, at 203. (noting the "nearly universal condemnation of wage labor in the 19th century").

commentators—meant that more and more citizens would not be economically independent, an unhealthy development for a republic dependent on a vibrant and virtuous citizenry. The problem, according to John Commerford, was that the wage system made republican citizens "the willing tools of other men."[276]

The distaste for such a proposition, at least outside of agricultural circles, may be less than obvious. Some economists actively urge farmers to sign contracts with large-scale agricultural processors, believing that such a choice will reduce producer risk and give the producer the best chance to save the farming operation.[277] When embracing the feudal model, commentators reject any agrarian claims about the unique importance of producer independence.[278] They argue that "in an age when big is better and, big is beautiful, corporate feudalism will triumph. To the advocates of the unfettered free market, feudalism unmodified is a battle cry, a celebration of the inequality that makes economic progress possible."[279] They viewed the family farm system as "a splash of rubbing alcohol, [a system which has] served its brief purpose and since evaporated."[280]

Despite such sentiment, the United States has long maintained a regime of laws designed to promote the family farm system of agriculture. From the economic development policies of the nineteenth century, to the regulatory regime adopted in the 1930s, to the more recent efforts to restrict corporate ownership of farmland and regulate contracting between farmers and processors, statutes adopted by legislators indicate the political and social preference for producer independence.[281] Such legislation reflects the sentiments of the republic's founders.[282] It is time to revisit these sentiments and develop contemporary mechanisms for expressing their intent.

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276. SEAN WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY & THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850 245 (1984) (quoting Commerford, who was President of the General Trades Union of New York City).

277. *See, e.g.*, Chen & Adams, supra note 273, at 429-30.

278. *See id.* at 370.

279. *Id.*

280. *Id.* at 431.

281. *See generally* Looney, *supra* note 20, at 781 (explaining the economic protections afforded producers); Richard F. Prim, *Saving the Family Farm: Is Minnesota's Ant-Corporate Farm Statute the Answer?*, 14 HAMLINE J. PUB. L. & POL'Y 203 (1993) (reviewing the rationale and language of Minnesota's statute restricting corporate farming); Steven C. Bahls, *Preservation of Family Farms—The Way Ahead*, 45 DRAKE L. REV. 311 (1997) (reviewing the basis for some producer preference statutes).

282. *See* MCCOY, *supra* note 242, at 66-67.

> American society was to be revolutionary, in short, precisely because it would not repeat the familiar eighteenth-century pattern of a stark and widening division between the propertied few and the masses of laboring, unpropertied poor. [Adam] Smith's analysis of modern society could lead only to a despairing acceptance of the unavoidable presence of a subhuman rabble in the advanced areas of Europe.

Id.

C. *The Role of Agricultural Trade*

When constructing agriculture policy in the near future, it is critical that the prospects of agricultural export growth be assessed realistically. During the debate over the Freedom to Farm Act, some policymakers based their decisions on inflated expectations about the potential for growth in export demand.[283] While the productivity of American farmers creates enormous potential export growth, it is not wise to base policy solely on this unpredictable factor. The dangers of such a proposition have been fully realized after the collapse of the Asian market for American farm goods.[284] A shift in foreign preferences is also a danger.[285] Currently, a movement is growing in Europe to constrain the spread of American food products, especially those which offend the European palate—such as the Big Mac—and those which have been or could have been produced using some form of genetically modified material.[286] Senator Lugar, a proponent of Freedom to Farm and a believer

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283. *See* Giglio, *supra* note 74, at 54 (noting that after the supply management battles of the 1960s, the "Johnson administration placed less emphasis on production controls in voluntary programs and instead focused on expanding exports as *the* way to deal with problems of farm surplus and supply management"); COCHRANE & RYAN, *supra* note 90, at 64.

> [The] Nixon administration adopted this expansion of agricultural exports as the cornerstone of its farm policy. A sustained increase in farm commodity exports would, it was argued, place an effective support under farm prices in the form of a strong market demand and eliminate the need for traditional price supports and production controls. It was, and remains, an attractive policy package.

Id.

284. *See* Robert Scott, *Exported to Death: The Failure of Agricultural Deregulation*, 9 MINN. J. GLOBAL TRADE 87, 88 (2000) (arguing that the "export-led growth strategy" of Freedom to Farm "has been a massive failure"). *See also Agricultural Policy Questions: How Have Crop Exports Performed With the Price and Income Farm Policy Changes of the Last Two Decades,* POLICY MATTERS, Nov. 1999, at 1 (a publication of the Agricultural Policy Analysis Center in the Department of Agricultural Economics and Rural Sociology at the University of Tennessee Institute of Agriculture).

> Since the mid-eighties, grain demand has been driven by domestic demand, not exports. Does that necessarily mean that exports could not take off again like they did in the 1970s? No, but the fundamentals that drive world-wide grain supply and demand do not point to exponential growth of grain exports in the next few years, although in ten to thirty years they may. Of course, a series of weather or other events could provide relatively short-lived surges in export demand at any time. Clearly, changes in farm legislation beginning in 1985 did not offset the tangle of political, sociological, and economic factors that influence the U.S. grain export market.

Id. at 3.

285. Susan Hogan/Albach, *Ag Secretary Calls for New Approach to Farm Supports*, STAR TRIB. (Minneapolis), Feb. 25, 2000, at A10 (explaining how "[b]iotechnology issues are clouding international markets").

286. Suzanne Daley, *French See a Hero in War on 'McDomination,'* N.Y. TIMES, Oct. 12, 1999, at A1 (explaining the protests of French farmer Jose Bove, who drove his tractor through a McDonald's under construction).

> Hardly a day goes by that French newspapers fail to mention Mr. Bove, lauding him for his refusal to bow to globalization, publishing photographs of him with his

in the potential for greater farm exports, now concedes that "Europe seems to be gripped right now by a collective madness."[287] The movement even shows signs of gaining adherents in the United States.[288] In November of 1999, the Food and Drug Administration held its first hearings about genetically modified organisms (GMOs) and in the spring of 2000 the FDA announced new regulations on GMOs.[289] Concerned about the ability to sell American GMO crops, Archer-Daniels-Midland recently required that GMO crops be stored separately from non-GMO crops, a move that contributed to the recent drop in GMO seeds sales for the 2000 planting season.[290] The agricultural trade may also be constrained by the recent signing of the Biosafety Protocol, which requires exporters to label GMO-based products and allows importers to block GMO-based imports on a precautionary basis.[291]

> hands clenched above his head and his wrists cuffed, and suggesting that he may be the only man left in France willing to go to jail for the republic. He has been praised by France's highest officials, including President Jacques Chirac, who has declared that he, too, 'detests McDonald's food.' Prime Minister Lionel Jospin has also weighed in, comparing Mr. Bove with other noted leaders who have emerged from grass-roots movements in recent years.

Id.

287. Michael Pollan, *Feeding Frenzy; Americans are Suddenly Outraged About Biotech Food; What Took So Long?*, N.Y. TIMES. MAG., Dec. 12, 1999, at 43-44. *See* Steve Stecklow, *How a U.S. Gadfly And a Green Activist Started a Food Fight; Antibiotech Effort Bloomed Despite Little Funding And Lack of Consensus*, WALL ST. J., Nov. 30, 1999, at A1 (explaining the efforts of the activist Jeremy Rifkin to stifle the genetic food industry). *See generally* Sara M. Dunn, *From Flav'r Sav'r to Environmental Saver? Biotechnology and the Future of Agriculture, International Trade, and the Environment*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 145 (1998) (taking a positive view of GMOs).

288. *See* Lucette Lagnado, *Group Sows Seeds of Revolt Against Genetically Altered Foods in U.S.*, WALL ST. J., Oct. 12, 1999, at B1.

289. *See* Pollan, *supra* note 287, at 43-44. See also Melody Peterson, *U.S. to Keep a Closer Watch On Genetically Altered Crops*, N.Y. TIMES, May 4, 2000, at A23 (reporting on the Food and Drug Administration's announcement that "it would tighten its review of [GMOs] and develop guidelines for companies wanting to label them"). "The food and drug agency's announcement is part of a broader plan by the Clinton administration that includes increased financing of studies on the potential risks of genetically engineered plants and a review of environmental regulations." *Id. See also* Carol Kaesuk Yoon and Melody Peterson, *Cautious Support on Biotech Foods by Science Panel*, N.Y. TIMES, April 6, 2000, at A1 (reporting on the latest scientific debate over GMOs). "Saying that genetically engineered crops have the potential to pose food safety risks and harm the environment, the National Academy of Sciences yesterday cautiously endorsed the safety of biotech foods now on the market but called for stronger regulation of the novel plants." *Id.*

290. *See* Scott Kilman, *Once Quick Converts, Farmers Begin to Lose Faith in Biotech Crops; DuPont and Others, Mindful of Their R&D Billions, Struggle to Hold Ground; Prospects for Labeling Law?* WALL ST. J., Nov. 19, 1999, at A1.

291. *See Caution Needed*, ECONOMIST, Feb. 5, 2000, at 69 (explaining the adoption of the protocol on January 29, 2000, in Montreal).

> The big worry is that the Biosafety Protocol opens up a loophole for protectionists. European governments, for instance, could use it to protect inefficient farmers from American competition on the pretext of protecting consumer health. Disputes about the health standards that restrict trade are currently adjudicated according to WTO rules. These stipulate that food-safety standards must be based on scientific evidence of a possible health risk.

In addition to growing resistance to American food exports, the prospects for greater degrees of agricultural trade liberalization, which many hoped would open previously closed markets to American products, are no longer so bright. The Freedom to Farm legislation passed in the wake of Congressional approval of the NAFTA and the WTO.[292] Such agreements created great expectations about future efforts to reduce foreign barriers to American farm exports. Some commentators at the time, however, wisely counseled caution given the history of agricultural protectionism[293] and the enormous political resistance to greater liberalization.[294] Since that time, the public support for free trade has dwindled and the Clinton administration has failed to secure Congressional support for fast-track negotiating authority.[295] The recent agreement paving the way for Chinese entry into the WTO—which was delayed six months due to domestic political realities—still faces resistance in Congress and in other nations, which have not yet agreed to Chinese membership.[296]

Id. The Biosafety Protocol is a derivation of the Convention on Biological Diversity of 1992, which the United States has not signed.

> Admittedly, the protocol does not supersede WTO law. And since America is not a party to the umbrella agreement of which the protocol is a part [the Diversity Treaty], it could in the future claim not to be bound by it. But in practice, thinks Steve Charnovitz, an expert on environment-related law, if America ever challenged an EU ban on GMOs, the WTO would have no choice but to take account of a multilateral agreement such as the Biosafety Protocol.

Id. at 70. The U.S. agreement to comply with the protocol drew was criticized by Senator John Ashcroft of Missouri, who noted that future WTO decisions are often shaped by a country's past conduct. *See* Bill Lambrecht, *In a Hearing, Ashcroft Assails New Accord on Gene-Altered Food; He Says Biosafety Protocol Gives Europe Too Much Clout on Trade Restrictions*, ST. LOUIS POST-DISPATCH, Feb. 9, 2000, at A14. The treaty specifically requires the labeling of commodities like wheat and corn during international shipment, but "does not address whether food containing genetically altered ingredients, like corn flakes made with bio-engineered corn, should be labeled as such on store shelves." Andrew Pollack, *Nations Agree on Safety Rules for Biotech Food*, N.Y. TIMES, Jan. 30, 2000, section 1, at 1.

292. *See generally* Federal Agriculture Improvement Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996) (codified at 7 U.S.C. 7201 et. seq.).

293. A Brookings Institution study once concluded that "[a]gricultural protection was the rock on which some of the best . . . interwar efforts to reduce trade barriers were wrecked." Lauck, *supra* note 182, at 298, n. 48 (quoting Brookings Institution Study).

294. *See* Jon G. Filapek, *Agriculture in a World of Comparative Advantage: The Prospects for Farm Trade Liberalization in the Uruguay Round of GATT Negotiations*, 30 HARV. INT'L L.J. 123, 162-63 (1989); Steinle, *supra* note 148, at 337-38.

295. *See* Nancy Dunne, *Common Ground Elusive as Clinton Seeks Trade Unity*, FINANCIAL TIMES, Jan. 22, 1999, at 7 (noting that "58 percent of Americans believe trade has been bad for the U.S. economy").

296. *See* Joseph Kahn, *Trade Path Is Not Clear; Congress and China Itself Provide Hurdles After 13-Year Effort for Sweeping Accord*, N.Y. TIMES, Nov. 17, 1999, at A1. "[L]abor union leaders were equally vigorous yesterday in their vows to block approval in Congress, with some predicting that they could stop this deal, as they have blocked other administration trade initiatives." *Id.* at A15; Steven Greenhouse, *After Seattle, Unions Point to Sustained Fight on Trade*, N.Y. TIMES, Dec. 6, 1999, at A28 (noting the "emergence of a new and vocal coalition that will make it far harder for the Clinton

But perhaps the greatest reason to doubt the prospects for greater trade liberalization is the Battle in Seattle. In November and December of 1999, over five-hundred different non-governmental organizations descended upon Seattle, Washington for the WTO ministerial meeting, which was to set the agenda for the next round of global trade talks.[297] These groups protested the social and environmental costs of "globalization" and brought widespread public scrutiny to bear on the relatively unknown WTO and its process for resolving trade disputes.[298] The trade talks ultimately collapsed and the parties could not agree to an agenda for a new round of negotiations.[299]

Delegates have agreed to continue meeting in Geneva in 2000. Negotiations on the future of the agricultural trade are to proceed since a new set of agricultural talks were actually built into the Uruguay Round agreement and since some progress was made in Seattle.[300] The United States agreed to drop demands related to access for genetically modified crops and place anti-dumping laws on the table and the European Union agreed to consider the elimination of export subsidies.[301] Despite

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administration to move ahead with its plans for freer trade"). *But see* John B. Judis, *China's Going to Enter the WTO. Deal with It.*, NEW REPUBLIC, Dec. 20, 1999, at 18-21.

297. *See* Kenneth Klee, *The Siege of Seattle*, NEWSWEEK, Dec. 13, 1999, at 30-35.

298. *See* Steven Pearstein, *Seattle Protests Open Up the Globalization Debate*, INT. HERALD TRIB., Dec. 4, 1999, at 9.

299. *See* Editorial, *The Collapse in Seattle*, N.Y. TIMES, Dec. 6, 1999, at A30.

> Many trade experts warned that a new round of global trade talks was premature. The world, they said, needed more time to absorb the trade opening measures that were adopted five years ago. A week of protests in Seattle and, more important, the embarrassing refusal of the W.T.O. to endorse President Clinton's trade-liberalization program proved that the warnings were prescient.

Id.

300. *See* Joseph Kahn & David E. Sanger, *Impasse on Trade Delivers a Stinging Blow to Clinton: Major Foreign Policy Goal Rejected at Talks*, N.Y. TIMES, Dec. 5, 1999, at A1 (Sunday Edition).

> The trade group will now take up negotiations on some narrow aspects of agriculture and services as part of its regular duties. The failure of the talks will disappoint many American companies. Agricultural companies had counted on tariff reductions and an end to trade-distorting subsidies to give a big lift to exports.

Id. See also Elizabeth Olson, *After Seattle, Trade Group Scales Back Its Agenda*, N.Y. TIMES, Feb. 8, 2000, at C4 (explaining that the WTO, "seeking to move beyond its highly publicized failure in Seattle to start a new round of global trade negotiations, has agreed to begin negotiations limited to opening markets in agriculture and services").

301. *See* Joseph Kahn & David E. Sanger, *Trade Obstacles Unmoved, Seattle Talks End in Failure: A Blow for Clinton and Trade Organizations*, N.Y. TIMES, Dec. 4, 1999, at A6.

> This evening, negotiators at the World Trade Organization meeting appeared to be forging only a modest mandate for trade negotiations to begin the millennium. The United States persuaded Europe and Japan to agree on talks that could eventually eliminate subsidies on farm goods. But that appeared to come at the price of sacrificing two firmly held American positions. One is against reviewing rules for preventing 'dumping,' the practice of undercutting domestic commodity sales with a flood of below-cost imports. The other is in favor of widening markets for genetically modified foods. . . . The administration did seem to make solid progress

these tentative negotiating positions, it would be unwise for policymakers to rely completely on farm exports as a method of boosting farm income in coming years.[302] Deprived of a reliable export safety valve, it is critical that domestic policy-makers fully address the workability and fairness of the domestic markets into which farmers sell their products.

D. *Reforming Agricultural Markets*

1. *Promoting an Agrarian Antitrust*

When Freedom to Farm was passed, little thought was given to the structure of agricultural markets. Although farmers were asked to move toward a greater market orientation, Congress did not consider the competitive conditions of the agricultural markets in which farmers operated. But the growing consolidation in agricultural markets and the continuing number of agribusiness mergers in recent years has placed concentration in the processing industry high on the political agenda.[303] The pace of mergers became so fast that Senator Paul Wellstone (D, MN) advocated a complete freeze on all agribusiness mergers for eighteen months, a measure which received twenty-seven votes in the U.S. Senate, indicating the level of concern among many lawmakers.[304]

If farmers are to market their products in the absence of government commodity programs, the competition among the buyers to which they sell their products must be assured. One method of promoting such competition among buyers is to insure that a large number of buyers exist in a market. The most efficient method of slowing the disappearance of buyers is to limit agribusiness mergers. By maintaining a larger number of buyers, farmers can be assured of more marketing options for their products, more competition for their product, and therefore a more

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> on including a reference to eliminating various subsidies in a draft framework for negotiations on farm goods. Europe and Japan, among the leading users of subsidies to protect their inefficient farmers from competition, had strongly opposed ending subsidies altogether. Australia, Brazil, Canada and the United States, as well as several other major agricultural exporters had insisted on working toward ending all subsidies on farm goods. But the wording on the framework for agricultural talks fell well short of the original goal of the United States. Negotiators were unable to agree on a time frame for eliminating subsidies. The European Union and Japan also managed to obtain concessions to let them consider agriculture and family farms as needing special protection, so they can be treated as much as an environmental resource and a way of life as a commodity for trade.

Id.

302. *See* Susan Hogan/Albach, *Farmers See Their Future in WTO Talks: But Farm Bureau Members Fear it Won't Be Bright*, STAR TRIB. (Minneapolis), Dec. 1, 1999, at D1 (reviewing comments of expert who believes it "could be three or more years before anything substantial occurs to help U.S. farmers").

303. *See* Rob Hotakainen, *Senate Refuses to Stop Agribusiness Mergers*, STAR TRIB. (Minneapolis) Nov. 18, 1999, at D1.

304. *See id.*

balanced level of bargaining power with their buyers. Courts can invoke the existing agricultural and antitrust statutes and case law and begin to apply a strict level of scrutiny to agribusiness mergers in order to insure a more balanced economic bargaining arrangement between farmers and processors.[305] If courts fail to apply strict scrutiny to such mergers, Congress should pass legislation requiring such scrutiny. Senator Patrick Leahy (D, VT) is currently advancing such a proposal, requiring courts to specifically consider the impact of a merger on producers, producers' ability to bargain with processors, and the overall impact of the merger on rural communities.[306]

2. *Organizing Farmers*

A greater market orientation for American agriculture also requires farmers to be better organized when marketing their products. Although the original farm program was passed in part because farmers had difficulty organizing their marketing, conditions have changed. Fewer farmers now means that there are fewer potential "free riders" to police and therefore a greater likelihood of success.[307] In addition, the advancements in telecommunications and computer technology can make the organizational effort easier. Efforts will also be aided by institutions which exist to foster the development of farmer cooperatives and existing farmer knowledge and experience with such efforts.

In addition to pooling farm products for sale to processors—a process with which many existing cooperatives are familiar—farmers can also process their commodities on their own and enter the upstream markets currently dominated by corporate processors. While processing has always been a small part of the American cooperative movement, the rapid growth of "New Generation Cooperatives" in recent years has increased the faith in producer-based processing.[308]

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305. This proposal has been fully explained elsewhere. *See* discussion *infra* Part III.B.; Lauck, *supra* note 197, at 495-508.

306. *See* Agribusiness Merger Moratorium and Antitrust Review Act, S. 1739, 106th Cong. (1999).

307. *See* MANCUR OLSON, J.R., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 127 (1965) (explaining the difficulties of collective action when a large number of individuals are involved).

> [Some theorists] have assumed that, if a group had some reason or incentive to organize to further its interest, the rational individuals in that group would also have a reason or an incentive to support an organization working in their mutual interest. But this is logically fallacious, at least for large, latent groups with economic interests.

Id. Olson was from the farming areas of eastern North Dakota.

308. *See* Randall Torgerson, *Co-op Fever: Cooperative Renaissance Blooming on Northern Plains*, 61 FARMER COOP., Sept. 1994, at 2; Randall E. Torgerson et al., *Evolution of Cooperative Thought, Theory, and Purpose, in* AMERICAN COOPERATION 1998 YEARBOOK 11-13 (1998); William Patrie, *Fever Pitch: A First-Hand Report From the Man Who Helped Spark Co-op Fever in the Northern Plains*, 65 RURAL COOP. 18, 20-21 (1998).

Now farmers in North Dakota manufacture their own pasta; farmers in South Dakota manufacture their own soybean oil; and farmers in Minnesota manufacturer their own sugar. Rural development programs of the U.S. Department of Agriculture (USDA) have also provided funds for the building of a farmer-owned pork processing plant in Dawson, Minnesota.[309] For the first time, the USDA guaranteed the loans of farmers who wanted to buy equity in the new facility.[310] The National Pork Producers Council has recently advanced a plan for a new farmer-owned cooperative to build three pork packing plants that could slaughter $3 million pigs annually.[311] Farmers in Bradley County, Arkansas, who were once forced to market their tomatoes through two larger farms, have recently formed the Hermitage Tomato Co-operative to market their products.[312] The cooperative will receive a $4.8 million loan from the USDA to build processing and packaging plants.[313] Farmers around Madison, South Dakota are forming a cooperative to build a $43.8 million ethanol plant to process their corn.[314]

Participation in such activities can involve significant preliminary investments by farmers. To promote the growth of such producer-based processing, Congress should provide tax credits to farmers for their initial contribution to the venture or bolster the funding of the USDA program that aids farmers interested in purchasing equity in new generation cooperatives.[315] Congress should also take steps to insure that new generation cooperatives are not forced to comply with the federal securities laws, which would significantly increase the cost of such ventures and thereby undermine their economic viability.[316] Congress should also clarify the cooperative tax exemption, which is limited by certain qualifications.[317] Such initiatives would foster the development of farmer cooperatives and the self-

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309. *See* Liz Fedor, *Prairie Farmers Co-op Plans to Break Ground for Pork Processing Plant: Hog Raisers Seek to Increase Income*, STAR TRIB. (Minneapolis), Nov. 18, 1999, at D3.

310. *See id.* The USDA guaranteed $2.4 million of the $3 million loan provided by Stearns Bank of St. Cloud. Farmers had to buy at least 400 of the $40 shares in the facility but could not buy more than 2,000. Additional help was provided by the Minnesota Department of Agriculture and the Minnesota Department of Trade and Economic Development. *See id.*

311. *See* Mary Neubauer, *Iowa Hog Farmers Propose Co-op; Pork Producers Would Build Three Meatpacking Plants to Help Boost Prices*, ARGUS LEADER (Sioux Falls), June 11, 1999, at 1C.

312. *See What's Red and Shiny?* ECONOMIST, Nov. 13, 1999, at 33. In 1998, the cooperative produced 570,000 20 pound boxes of tomatoes with sales of $3.9 million. Burger King recently agreed to buy 88,000 boxes of tomatoes. *See id.*

313. *See id.*

314. *See* Rob Swenson, *Co-op Plans Big Ethanol Plant; Group Hopes to Gain Investors in $43.8M Deal*, ARGUS LEADER (Sioux Falls), July 25, 1999, at D1.

315. *See* Jill Long Thompson, *Solving Rural Problems Through Cooperatives*, RURAL COOP., Sept.-Oct. 1999, at 2 (explaining that the USDA Rural Business-Cooperative Service is seeking additional funding for its program offering loan guarantees to farmers for the purchase of stock in new cooperatives).

316. *See* Jon Lauck & Edward Adams, *Farmer Cooperatives and the Federal Securities Laws: The Case for Non-Application*, 45 S.D. L. REV. 62, 62-93 (2000).

317. *Id.*

organization of farmers and better prepare farmers to operate in a market-oriented agriculture.

To coordinate the development of new farmer cooperatives, Congress should significantly expand the USDA's Rural Business-Cooperative Service. Coupled with the Freedom to Farm Act, such a move would symbolize the obsolescence of national regulatory regimes in a global economy and indicate a return to the pre-New Deal policies of aggressively promoting the economic organization of farmers. Federal policy-makers could reinvent the Farm Board, which sought to avoid "putting the Government into business" and sought "to help farmers who [were] willing to help themselves,"[318] creating and fostering cooperatives which had "bargaining power" with the processing sector.[319] A new Farm Board could heed cooperative history and avoid its predecessor's coercive tactics and seek to promote the *local* organization of farmers into effective bargaining and processing cooperatives, which will help protect their status as independent producers and entrepreneurs and substantially advance the ambitious designs of nineteenth century advocates of cooperative organization, who launched the modern cooperative movement.[320]

VI. CONCLUSION

In 1996, with passage of the Freedom to Farm Act, Congress dismantled the large-scale regulatory regime that had governed agriculture since the New Deal. In so doing, Congress sought to address long-standing complaints about the coercive elements of the farm program, its costs, and its alleged incompatibility with a broader free trade agenda, and move agriculture toward a greater market orientation.[321] Congress failed to consider, however, the workability of agricultural markets, the unpredictability of export markets, and long-standing political and social preferences for maintaining the economic independence of farmers.[322] As Congress begins to debate farm legislation as the expiration of the Freedom to Farm Act approaches, it should embrace policies that promote competitiveness in agricultural markets, aid the economic organization of farmers, and encourage the maintenance of an independent, family-based system of agricultural production.[323]

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318. HAMILTON, *supra* note 27, at 57 (quoting Farm Board literature and Alexander Legge, head of the Farm Board and former president of International Harvester).

319. *See id.*

320. *See* LASCH, *supra* note 235, 224 (noting that the nineteenth century populists believed that the "substance of proprietorship could be restored only through the agency of farmers' and artisans' cooperatives").

321. *See* discussion *infra* Part I.A.

322. *See* discussion *infra* Parts II-III.

323. *See generally* Adam Clymer, *Both Parties Expect the Democrats to Gain Some Ground*, N.Y. TIMES, March 19, 2000, at A32 (noting the importance of farm politics in the fall 2000 elections).

> [Senator Ashcroft] faces one of the most formidable Democratic challengers this year, Gov. Mel Carnahan, and his steadfast support of the 1996 Freedom to Farm

Act, which phased out crop subsidies, is hurting him with one of the few issues that extend beyond a single state this year: the problems of grain farmers. . . . Finally, Democrats think they have a chance for a real upset in Indiana . . . Democrats have been doing better in Indiana in recent years, and are trying to use Mr. Lugar's chairmanship of the Agriculture Committee to hang the Freedom to Farm Act around his neck.

Id.