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**Get Green or Get Out:  
Decoupling Environmental From Economic  
Objectives in Agricultural Regulation**

by

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# GET GREEN OR GET OUT: DECOUPLING ENVIRONMENTAL FROM ECONOMIC OBJECTIVES IN AGRICULTURAL REGULATION

JIM CHEN\*

## *I. This Land Is Shattered*

### *A. Agriculture and Ecology: A Misunderstood Relation<sup>1</sup>*

Agriculture, like the earth that feeds it, hangs in the balance.<sup>2</sup> In the six decades since the Supreme Court last invalidated a major federal agricultural statute,<sup>3</sup> the principal means of agricultural regulation and reform have been statutory. The comprehensive and monumentally ambitious Agricultural Adjustment Act of 1938 attempted to "conserv[e] national resources" and "prevent[] the wasteful use of soil fertility" even as it sought to "assist in the marketing of agricultural commodities for domestic consumption and for export," "assist[] farmers to obtain . . . parity prices for [their] commodities and parity of income, and assist[] consumers to obtain an adequate and steady supply of such commodities at fair prices."<sup>4</sup> Every periodic "farm bill" since the Agricultural Act of 1949<sup>5</sup> has attempted to "couple" environmental regulation of American agriculture with the New Deal's basic promise of

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1. Cf. *loosely* RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988).

2. Cf. AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (1992).

3. See *United States v. Butler*, 297 U.S. 1, 74-75 (1936) (invalidating the Agricultural Adjustment Act of 1933, Act of May 12, 1933, ch. 25, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601-626 (1994))); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594-98 (1935) (invalidating the first Frazier-Lemke Act, Act of June 28, 1934, ch. 869, 48 Stat. 1289); cf. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 540-41, 550 (1935) (invalidating the "Live Poultry Code" promulgated under the National Industrial Recovery Act of 1933). *But cf.* *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (repelling a commerce clause challenge to the 1938 Act as applied to a farmer who consumed his excess wheat harvest on his own farm); *Mulford v. Smith*, 307 U.S. 38, 47-51 (1939) (upholding the Agricultural Adjustment Act of 1938, Act of Feb. 16, 1938, ch. 30, 52 Stat. 31 (codified as amended at 7 U.S.C. §§ 1281-1393 (1994)) against a facial challenge); *Currin v. Wallace*, 306 U.S. 1, 11-12, 18 (1939) (holding that the Tobacco Inspection Act of Aug. 23, 1935, 49 Stat. 731) was a valid exercise of Congress's commerce clause powers and that the Act did not unlawfully delegate Congress's legislative authority); *Wright v. Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440 (1937) (upholding the second Frazier-Lemke Act, Act of Aug. 28, 1935, ch. 792, 49 Stat. 942, which had been amended in the wake of constitutional invalidation in *Louisville Joint Stock Land Bank*).

4. Act of Feb. 16, 1938, ch. 30, § 2, 52 Stat. 31, 31 (codified at 7 U.S.C. § 1282 (1994)).

5. Pub. L. No. 81-439, ch. 792, 63 Stat. 1051 (codified as amended in scattered sections of 7 U.S.C.).

price and income support for farmers. Just as the 1973 farm bill revolutionized the traditional commodity programs by replacing parity<sup>6</sup> with the "target price" and "deficiency payment" mechanisms,<sup>7</sup> the 1985<sup>8</sup> and 1990<sup>9</sup> farm bills expanded the environmental arsenal of federal agricultural law by adding conservation reserve,<sup>10</sup> wetland reserve,<sup>11</sup> acreage set-aside, and cross-compliance obligations under the Swampbuster and Sodbuster programs.<sup>12</sup>

Inside this witches' brew of contradictory policies lies a legacy of legislative failure. Market-oriented critics of the commodity programs criticize their harmful impact on export prices, farm management practices, and the federal budget.<sup>13</sup> Agrarian populists condemn the distribution of government payments, which go disproportionately to the largest, wealthiest farmers.<sup>14</sup> One constant remains: farmers are reinforcing their "legendary[] and . . . well deserved" "reputation for blind political resistance to environmental regulation."<sup>15</sup> Even the conventional view of farmers as "stewards of the land,"<sup>16</sup> a tradition so deeply rooted as to have

6. See 7 U.S.C. § 1301(a)(1) (1994) (defining parity). See generally LLOYD D. TEIGEN, *AGRICULTURAL PARITY: HISTORICAL REVIEW AND ALTERNATIVE CALCULATIONS* (1987) (USDA, Econ. Research Serv., Agric. Econ. Rep. No. 571).

7. See Agriculture and Consumer Protection Act of 1973, Pub. L. No. 93-86, 87 Stat. 221 (codified as amended in scattered sections of 7 U.S.C.); Claude T. Coffman, *Target Prices, Deficiency Payments, and the Agriculture and Consumer Protection Act of 1973*, 50 N.D. L. Rev. 299, 305-07 (1974).

8. Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (codified as amended in scattered sections of 7 U.S.C.).

9. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (codified as amended in scattered sections of 7 U.S.C.).

10. See Conservation Reserve Program, 16 U.S.C. §§ 3831-3836 (1994).

11. See Wetland Reserve Program, 16 U.S.C. §§ 3837-3837f (1994).

12. See 16 U.S.C. §§ 3821-3824 (1994). See generally, e.g., National Wildlife Fed'n v. Agricultural Stabilization & Conservation Serv., 955 F.2d 1199 (8th Cir. 1992) (clarifying the Swampbuster provisions of the 1985 farm bill); Peterson v. United States, 10 Cl. Ct. 194 (1986) (clarifying the acreage set-aside rules); Linda A. Malone, *An Historical Essay on the Conservation Provisions of the 1985 Farm Bill: Sodbuster, Swampbuster, and Conservation Reserve*, 34 KAN. L. REV. 822 (1986); Linda A. Malone, *Conservation at the Crossroads: Reauthorization of the 1985 Farm Bill Conservation Programs*, 8 VA. ENVTL. L.J. 215 (1989); Linda A. Malone, *The Renewed Concern over Soil Erosion: The Current Federal Programs and Proposals*, 10 J. AGRIC. TAX'N & L. 310 (1989).

13. See, e.g., DON PAARLBERG, *FARM AND FOOD POLICY: ISSUES OF THE 1980s*, at 23-42 (1980).

14. See, e.g., INGOLF VOGELER, *THE MYTH OF THE FAMILY FARM: AGRIBUSINESS DOMINANCE OF U.S. AGRICULTURE 173-79* (1981). For an overview of the principal arguments over contemporary farm policy, see Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659 (1994).

15. MARTY STRANGE, *FAMILY FARMING: A NEW ECONOMIC VISION 206* (1988); cf. JONI MITCHELL, *Big Yellow Taxi*, on *LADIES OF THE CANYON* (Warner Bros. Records, Inc. 1970) ("Hey farmer farmer / Put away that D.D.T. now / Give me spots on my apples / But leave me the birds and the bees / Please!").

16. See, e.g., IOWA CODE ANN. § 159.2 (1990) (establishing the Iowa Department of Agriculture and Land Stewardship); Hurd v. Commissioner, 37 T.C.M. (CCH) ¶ 499 (1978); Steven C. Bahls, *Judicial Approaches to Resolving Dissension Among Owners of the Family Farm*, 73 NEB. L. REV. 14, 16 (1994) ("The family farmers' historic commitment to long term stewardship of the land is increasingly valued by today's more environmentally-conscious society."); Carol Ann Eiden, *The Courts' Role in Preserving the Family Farm During Bankruptcy Proceedings Involving FmHA Loans*, 11 L. & INEQ. J.

religious significance,<sup>17</sup> has been captured and redefined by overt opponents of environmental protection in agriculture.<sup>18</sup>

Despite the confusing policy directions, American agriculture and its discontents<sup>19</sup> have reached a modest consensus: farming in the United States has become dirty business. But even those who express the most "urgent concern over the ecological aspects of agriculture" rarely, if ever, state it for its own sake.<sup>20</sup> True to their populist roots, today's agrarians are still fighting to preserve farm owners' and operators' real incomes in a world of higher yields and declining production costs — in other words, they are maximizing the returns on fixed human capital invested in farm entrepreneurship.<sup>21</sup> Earl Butz's most infamous proclamations — "adapt or die"<sup>22</sup> and "get big or get out"<sup>23</sup> — still leave a discordant ring in agrarian ears.

What *has* changed is the nature of the rhetoric. Agricultural production and environmental protection, once thought to be poorly related or even contradictory, are now equated. One by one, voices once committed to agricultural fundamentalism in its purely economic form are beginning to extol the farm, especially the small family farm, as an engine of environmental protection.<sup>24</sup> Even the definition of sustainable agriculture reflects a subtle blending of environmentalism with agrarian economic philosophy. Strictly defined, "[s]ustainable agriculture" consists simply of "processes involving biological activities of growth or reproduction intended to produce crops, which do not undermine our future capacity to

417, 423 (1993); N. William Hines, *The Land Ethic and American Agriculture*, 27 *LOY. L.A. L. REV.* 841 (1994).

17. See generally Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 *VAND. L. REV.* 1261, 1265-74 (1995) (describing the agrarian "stewardship" ethic as an outgrowth of the Judeo-Christian story of Creation in the Book of Genesis).

18. See, e.g., *Slawson v. Alabama Forestry Comm'n*, 631 So. 2d 953, 955 (Ala. 1994) (describing the so-called Stewards of Family Farms, Ranches, and Forests as an organization committed to "promot[ing] stewardship among private landowners, to protect these landowners' private property rights 'by confronting environmental and political extremism in the public and/or political arena,' and to develop and implement 'a national strategy designed to confront actions which threaten private property rights of family farm, ranch, and forest owners'"). For a criticism of farmers' increasing affinity for "property rights" rhetoric and takings clause litigation, see Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 *NEB. L. REV.* 210, 240-44 (1993).

19. Compare THEODORE SALOUTOS & JOHN D. HICKS, *AGRICULTURAL DISCONTENT IN THE MIDDLE WEST, 1900-1939* (1951) (describing episodes of unrest among American agriculture's losers throughout the early twentieth century) with JIM SCHWAB, *RAISING LESS CORN AND MORE HELL* (1988) (collecting angry stories by farmers who were hurt or bankrupted by the debt crisis of the 1980s).

20. Curtis E. Beus & Riley E. Dunlap, *Conventional Versus Alternative Agriculture: The Paradigmatic Roots of the Debate*, 55 *RURAL SOCIOL.* 590, 595 (1990).

21. See generally Jim Chen, *The American Ideology*, 48 *VAND. L. REV.* 809 (1995).

22. Earl L. Butz, as quoted in *The Record Stockman*, Mar. 10, 1955.

23. See A.V. KREBS, *THE CORPORATE REAPERS: THE BOOK OF AGRIBUSINESS* 404, 428 (1992) (describing "get big or get out" as the slogan of "the Earl Butz school" of agribusiness); cf. JACK DOYLE, *ALTERED HARVEST* 127 (1985) (revising Butz's slogan to "Get sophisticated or get out" in an agricultural world increasingly driven by advanced biotechnology).

24. See Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 *DRAKE L. REV.* (forthcoming 1995).

successfully practice agriculture" and which do not "exhaust any irreplaceable resources which are essential to agriculture."<sup>25</sup> It is a purely ecological concept. But self-described sustainability advocates who are primarily concerned about "farm size" have begun arguing that "the goal of sustainable agriculture programs should be to serve small or family farmers instead of large corporate farms."<sup>26</sup>

### B. Macroecology and Microecology

So rises the *agroecological movement*, the latest manifestation of the "new agenda" in American agricultural policy, the latest battalion in the "zealous coalition" that has advocated "food stamps, environmental programs, consumer issues, and rural development" since the 1960s.<sup>27</sup> Agroecological reasoning follows either or both of two distinct lines.<sup>28</sup> From a *macroecological* perspective, farming *per se* is environmentally benign or even ameliorative. At the very least, agriculture is environmentally superior to alternative land uses. Characterizing the agricultural system as a complete, biologically driven organism, macroecological rhetoric describes farmland, albeit privately owned, as a public good in itself. Stripped of its food security aspects, the macroecological argument at heart suggests that production agriculture is an affirmative environmental amenity.

A more fearsome fallacy may not exist in all of agricultural law. Together with mineral extraction, agriculture is one of the most resource-depleting economic activities.<sup>29</sup> Even in its milder form, as an assertion that incumbent farmers provide valuable "open space" and other unspecified "environmental benefits,"<sup>30</sup> macroecological rhetoric fails to explain why the complete abandonment of farming in a region might not be an environmentally preferable outcome.<sup>31</sup>

A second, "microecological" variation on the agroecological theme focuses on the difference between large and small farms. According to agroecological dogma, not every farmer is an equally capable steward, and not every farm deserves the same measure of environmental trust. Small farms are better, and small family farms are best. Reducing farm sizes and dispersing farm ownership puts the fate of the agricultural environment in the hands of self-employed managers rather than uninspired farm employees. Agroecological integrity, in other words, depends on the "eyes to acres ratio."<sup>32</sup>

25. Hugh Lehman et al., *Clarifying the Definition of Sustainable Agriculture*, 6 J. AGRIC. & ENVTL. ETHICS 127, 139 (1993).

26. COUNCIL FOR AGRIC. SCIENCE & TECHNOLOGY, *SUSTAINABLE AGRICULTURE AND THE 1995 FARM BILL 9-10* (Special Pub. No. 18, Apr. 1995).

27. PAARLBERG, *supra* note 13, at 63.

28. See generally Chen & Adams, *supra* note 24.

29. See, e.g., Frank J. Popper, *The Reinvention of the American Frontier*, AMICUS J., Summer 1991, at 5.

30. *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2217 n.20 (1994).

31. See *id.* ("Dairy farms are enclosed by fences, and the decline of farming may well lead to less rather than more intensive land use.")

32. WES JACKSON, *ALTARS OF UNHEWN STONE* 37 (1987).

Family ownership completes the microecological package by tapping the power of intrafamilial, intergenerational love: more so than bloodless corporate entities, family owners conserve "natural, human, and financial resources . . . for [their] heirs."<sup>33</sup> Unlike Macduff, Shakespeare's virtuous Scotsman, the corporation "has no children."<sup>34</sup> The unshakable faith in independent farm operators thinly conceals a fear and loathing of corporate farm employees as "hireling[s]" who may and should "be dealt with differently than those who [farm] on their own."<sup>35</sup> Neil Hamilton states the microecological argument favoring family farms in no uncertain terms: "It is the farmers *and their families* who care about preserving the quality of the land they farm and building an economically viable operation, through which to accumulate wealth and acquire the resources with which to live."<sup>36</sup>

Such a pity, really, that none of this is true. Economic theory and substantial empirical evidence subvert virtually every agroecological claim, especially those based on farm size and ownership structure. Uninformed consumers have been made to swallow the agroecological opium of the masses; the public forgets the simple truth that "[f]arming is not an environmentally benign activity."<sup>37</sup> Genuine friends of the earth should ask whether sugar cultivation anywhere in the United States confers so much as one environmental benefit. Agriculture's vintage — its sheer age as a human activity — obscures its long-term effects on the environment.<sup>38</sup> Confronted with miscarriages and other tragedies attributable to polluted (and unregulated) runoff, agriculture's likeliest victims blithely assume that "[t]he ground filters everything out."<sup>39</sup> The "small farm" variant of the agroecological ideology is especially misleading, for "[s]mall-scale communities are seldom as humane and ecologically sound" as microecological rhetoricians "portray them to be."<sup>40</sup> If anything, smallness and family ownership bear a *negative* correlation to environmental protection; nonfamily corporations outperform family landowners in soil conservation and erosion control.<sup>41</sup>

33. STRANGE, *supra* note 15, at 35.

34. WILLIAM SHAKESPEARE, *MACBETH* act IV, sc. 3, l. 216 ("He has no children. All my pretty ones? / Did you say all? O hell-kite! All? / What! all my pretty chickens and their dam. / At one fell swoop?").

35. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 115 (1949) (Jackson, J., concurring).

36. 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, 645 (1994) (emphasis added).

37. Chen, *supra* note 21, at 872; Jim Chen, *The Agroecological Opium of the Masses*, CHOICES, 4th Q. 1995, at 16, 20.

38. See William Howarth, *Legal Approaches to the Prevention of Agricultural Water Pollution in England and Wales*, 45 DRAKE L. REV. (forthcoming 1996) ("Until fairly recent times there was a common belief that farming, as an activity conducted since the dawn of humanity, must be an environmentally benign operation, since if it were not, the adverse effects would have been noticed long ago.").

39. JANE SMILEY, *A THOUSAND ACRES* 259 (1991).

40. MARTIN W. LEWIS, *GREEN DELUSIONS: AN ENVIRONMENTALIST CRITIQUE OF RADICAL ENVIRONMENTALISM* 91 (1992).

41. See Linda K. Lee, *The Impact of Landownership Factors on Soil Conservation*, 62 AM. J. AGRIC. ECON. 1070, 1073 (1980); Luther Tweeten, *The Economics of Small Farms*, 219 SCIENCE 1037, 1038

As a matter of political economy, the illicit allure of the agroecological argument exposes "sustainable agriculture" and other alternatives to the Green Revolution to the vilest form of political capture,<sup>42</sup> to the risk of being corrupted into the most recent variant of agricultural fundamentalism.<sup>43</sup> At the very best, the rise of an agroecological movement inhibits thoughtful analysis of agricultural policy. At the very worst, fallacious agroecological reasoning poses a serious menace to greening of American agriculture. "Unless we can decouple" sustainable resource management and environmental protection "from issues of farm income and economic viability," we will surely "make environmentalism contingent upon the pecuniary [and political] preferences of [certain] environmentalists."<sup>44</sup> Even without the environmental dimension, the "family farm" objective at the heart of economic regulation of agriculture is scarcely coherent.<sup>45</sup> Complex law demands and deserves complex analysis: only by distinguishing agricultural regulation's *economic* and *environmental* objectives can we hope to discern whether the law is succeeding. This Article turns now to that task.

## II. A Different Kind of Decoupling

There is no small irony in the use of federal farm bills to reform American agriculture's environmental record. Price and income support for farmers have harmed significant economic *and* environmental interests in agriculture. "It does not require very sophisticated economic logic to show that [aid] provided directly to farmers can actually reduce farm incomes and the demand for farm labor when demand is inelastic."<sup>46</sup> Direct economic aid accelerates the infamous "agricultural treadmill"<sup>47</sup> on which farmers continually adapt in a doomed race to economic extinction.<sup>48</sup> Likewise, the coupling of farm price and income supports to

(1983).

42. Cf. JANE SMILEY, MOO 340 (1995) (quoting an out-of-control horticulture chairman at a fictional land grant university: "Admit it! Admit it! Admit the Green Revolution was evil! Admit cocaine is the ultimate cash crop! Admit your life is a bankrupt evil waste!").

43. See Donald E. Voth, *A Brief History and Assessment of Federal Rural Development Programs and Policies*, 25 U. MEMPHIS L. REV. 1265, 1287 (1995) (stating that "[i]t is too early to know exactly" whether the "considerable political support and federal funding" for sustainable agriculture will merely "result in another form of 'agricultural fundamentalism'"). On sustainable agriculture and other forms of "alternative agriculture," see generally NATIONAL RESEARCH COUNCIL, *ALTERNATIVE AGRICULTURE* (1989).

44. Chen, *supra* note 37, at 16.

45. See Steven C. Bahls, *Preservation of Family Farms — The Way Ahead*, 45 DRAKE L. REV. (forthcoming 1996); cf. J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 MERCER L. REV. 763 (1993) (conceding the possibility of contradictions within a regulatory agenda of unprecedented scale and scope in American agricultural law).

46. Robert E. Evenson, *Intellectual Property Rights and Agribusiness Research and Development: Implications for the Public Agricultural Research System*, 65 AM. J. AGRIC. ECON. 967, 975 (1983).

47. See generally WILLARD W. COCHRANE, *FARM PRICES: MYTH AND REALITY* 85-107 (1958); WILLARD W. COCHRANE, *THE DEVELOPMENT OF AMERICAN AGRICULTURE: A HISTORICAL ANALYSIS* 378-95 (1979).

48. See generally Chen, *supra* note 21, at 851-59.

production levels has pushed many farmers into monoculture and generally into a habit of maximizing yield at any cost. Coupling thus distorts the distribution of government benefits toward the rich and the allocation of natural resources in farming beyond the limits of unsustainable use.<sup>49</sup> The link between production and levels of governmental support has even driven farm lobbyists to organize themselves along commodity-specific lines, in order better to defend their entitlements.<sup>50</sup> These are not uniquely American phenomena. The European Union's notoriously generous and protectionist Common Agricultural Policy<sup>51</sup> has given Europe soil nitrogen levels three times those of the United States.<sup>52</sup>

Recent federal farm program reforms have introduced the term "decoupling" into American agricultural law.<sup>53</sup> The 50/92 and 0/92 provisions of the 1985 and 1990 farm bills stealthily effected a form of decoupling by allowing producers to collect ninety-two percent of their expected benefits despite withholding program crops from half or all of their enrolled acres.<sup>54</sup> "[F]ew nonspecialists discerned" how a program that "paid volunteers 92 percent of their benefits to plant [nothing] at all" moved American farm policy toward "direct[] support [of] producer incomes, undisguised by the complexities of loan rates and target prices."<sup>55</sup> The failed Boren/Boschwitz decoupling proposals of the 1980s articulated decoupling's regulatory vision in more direct terms: separating federal farm income support from

49. See Gordon C. Rausser & David Nielson, *Looking Ahead: Agricultural Policy in the 1990s*, 23 U.C. DAVIS L. REV. 415, 420-21 (1990); cf. WENDELL BERRY, *THE GIFT OF GOOD LAND* 116-17 (1981) (arguing that a production-based approach to agriculture will automatically fail because it is based on industrial assumptions without regard to "biology" and "human culture").

50. See Rausser & Nielson, *supra* note 49, at 420 (noting how "individual commodity organizations [have] gradually replaced the more general, and previously predominant, farm advocacy organizations as the primary vehicles for effective political expression" in the coupled political economy of American agriculture).

51. See EUROPEAN COMMUNITY COMMISSION, *THE COMMON AGRICULTURAL POLICY AND ITS REFORM* (Eur. Doc. 1/1987); EUROPEAN COMMUNITY COMMISSION, *A COMMON AGRICULTURAL POLICY FOR THE 1990S* (Eur. Doc. 5/1989); see also TIMOTHY BAINBRIDGE & ANTHONY TEASDALE, *THE PENGUIN COMPANION TO EUROPEAN UNION* 48 (1995) (describing the Common Agricultural Policy as "the most important . . . policy" of the European Union "in terms of the number of people directly affected, its share of the [Union's] Budget and the extent of the powers transferred from national to European level").

52. See C. FORD RUNGE, *FREER TRADE, PROTECTED ENVIRONMENT: BALANCING TRADE LIBERALIZATION AND ENVIRONMENTAL INTERESTS* 46 (1994); Monika Hartmann & Alan Matthews, *Sustainable Agriculture in the European Community: The Role of Policy*, 8 F. APP. RES. & PUB. POL'Y 11 (1993). Denmark, Germany, and the Benelux countries reported nitrogen levels as high as *ten* times those of the United States.

53. See generally Tim T. Phipps et al., *Decoupling and Related Farm Policy Options*, in *AGRICULTURAL POLICIES IN A NEW DECADE* 101 (Kristen Allen ed. 1990).

54. See, e.g., 7 U.S.C. § 1444f(c)(1)(E) (1994) (permitting a farmer who "devote[s] a portion of the maximum payment acres for feed grains . . . to conservation uses" to receive 85 percent of the deficiency payments attributable to those acres). Note that a 1993 amendment changed the 0/92 program to a "0/85" program. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 1103(1), 107 Stat. 312, 315 (1993).

55. WILLARD W. COCHRANE & C. FORD RUNGE, *REFORMING FARM POLICY: TOWARD A NATIONAL AGENDA* 72 (1992).



farm output will limit the market-distorting and environmentally harmful side effects of the traditional commodity programs.<sup>56</sup> The Agricultural Market Transition Act of 1996, which had passed the Senate and was awaiting action in the House as this Article went to press, would implement the decoupling strategy in the wheat, feed grain, and cotton programs.<sup>57</sup>

The continuing debate over decoupled income support has broadened to include the notion of "green payments," or income support payments that are "recoupled" with specific environmental duties.<sup>58</sup> Agricultural policymakers on both sides of the Atlantic have hungrily eyed the prospect of using green payments as a substitute for traditional price and income support.<sup>59</sup> Green payments figure prominently in European plans to reform "the inherent conflict between agriculture and the environment" in a body of "agricultural policy . . . focused primarily on price supports."<sup>60</sup> Under the Agreement on Agriculture accompanying the recently concluded Uruguay Round of world trade talks,<sup>61</sup> decoupled income support and green payments are exempted from signatory states' obligations to reduce the Aggregate Measure of Support to farmers,<sup>62</sup> or "the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general."<sup>63</sup>

The time has come to recognize a different sort of "decoupling" in agricultural regulation. The common practice of mixing environmental and economic objectives in agricultural regulation frequently yields perverse legal outcomes. This politically popular combination is often accompanied by a wickedly deceptive fallacy: the belief that cultivation or animal husbandry is environmental protection. At the heart

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56. See, e.g., Family Farm Protection and Full Production Act of 1985, S. 1041, 99th Cong. 1st Sess.; 131 Cong. Rec. 5142 (May 1, 1985) (statement of Sen. Boschwitz, R.-Minn.).

57. See Agricultural Reform and Improvement Act, S. 1541, 104th Cong., 2d Sess., 142 CONG. REC. 1191 (Feb. 9, 1996).

58. Cf. Karen R. Hansen, *Agricultural Nonpoint Source Pollution: The Need for an American Farm Policy Based on an Integrated Systems Approach Recoupled to Ecological Stewardship*, 15 *HAMLIN J. PUB. L. & POL'Y* 303, 305 n.14 (1994) (invoking the term "recoupling" . . . in an effort to redirect" the concept of "decoupling" "away from world trade and international competitiveness to a policy decision regarding the proper conduct of the United States in terms of global environmental responsibility and stewardship").

59. See, e.g., George Gunset, *New GOP Leadership sharpens sickle with eye on farm aid*, CHI. TRIB., Nov. 22, 1994, at 1; Alison Maitland, *Call for "green" payments to replace CAP subsidies*, FINANCIAL TIMES, Jan. 6, 1995, at 5.

60. Margaret Rosso Grossman, *Agro-Environmental Measures in the Common Agricultural Policy*, 25 *U. MEMPHIS L. REV.* 927, 929 (1995).

61. See Agreement on Agriculture, opened for signature Apr. 15, 1994, in GATT SECRETARIAT, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 39 (1994) (GATT Sales No. 1994-4).

62. See *id.* annex 4:6 (decoupled income support payments); annex 4:12 (environmental payments).

63. *Id.* art. 1(a). See generally Norman W. Thorson, *Protecting the Rural Environment — Is the Grass Greener on the Other Side of the GATT?*, 45 *DRAKE L. REV.* (forthcoming 1996); Jeffrey J. Steidle, Note, *The Problem Child of World Trade: Reform School for Agriculture*, 4 *MINN. J. GLOBAL TRADE* 333 (1995).

of every agroecological fallacy is the frequently invoked but rarely tested assumption that small farm size and family ownership guarantee sound stewardship.<sup>64</sup> Time and again, however, the American experience with structural regulation of agricultural markets has shown that "mere landownership does not automatically give rise to 'stewardship.'"<sup>65</sup> The environmental performance of agriculture is dictated by "the forces of the market" to the same degree as are the structural characteristics of any industry, such as the "number of firms[,] . . . the degree of their integration, . . . and the dispersion in the sizes of the enterprises."<sup>66</sup> "[R]egulatory attempts to influence" agriculture's environmental efficiency by sustaining or even "increas[ing] the number of firms" in the industry are thus "doomed to failure."<sup>67</sup> It is no longer sound legal analysis to assume that an "agriculturally correct" market structure will also deliver the optimal package of environmental amenities associated with agriculture.

Like most other types of economic and social legislation, regulation that blends agricultural policy and environmental protection routinely eludes meaningful judicial scrutiny. Thanks to the extremely deferential posture of rational basis review under the due process<sup>68</sup> and equal protection clauses,<sup>69</sup> an economically and environmentally foolish statute may nevertheless be constitutional.<sup>70</sup> Thus, state laws restricting corporate ownership and operation of farms have withstood constitutional challenges,<sup>71</sup> despite mounting empirical evidence that such laws accomplish none of their stated structural objectives<sup>72</sup> and may actually harm a state's farming interests by encouraging capital to migrate to less restrictive states.<sup>73</sup>

As a result, judicial approval signals little (if anything) about the environmental impact of laws affecting agriculture. Lobbyists, legal critics, and other players in the predominantly legislative arena where agricultural policy is shaped need a more

64. See, e.g., STRANGE, *supra* note 15, at 35, 38 (contrasting the "resource conserving" model of family farming with the "resource consumptive" model of industrial agribusiness); Bahls, *supra* note 16, at 17-18 ("[F]amily ownership of agricultural land . . . promotes responsible stewardship of soil, water, and other resources."); Eiden, *supra* note 16, at 423; cf. Looney, *supra* note 45, at 793 n.175 (describing family farming as an emblem "of 'moral virtue' and as a 'symbol' of independence and self-reliance").

65. Chen, *supra* note 21, at 835.

66. Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111, 121 (1984).

67. *Id.*

68. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963).

69. See, e.g., *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101-03 (1993).

70. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 96-97 (1987) (Scalia, J., concurring in part and concurring in the judgment) ("[A] law can be both economic folly and constitutional.")

71. See, e.g., *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 332-33 (8th Cir.), *cert. denied*, 502 U.S. 814 (1991); *State ex rel. Webster v. Lehndorff Geneva, Inc.*, 744 S.W.2d 801, 805-06 (Mo. 1988); *Omaha Nat'l Bank v. Spire*, 389 N.W.2d 269, 282-83 (Neb. 1986).

72. See, e.g., MINN. STAT. ANN. § 500.24 subd. 1 (1990) ("[I]t is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family.")

73. See Chen & Adams, *supra* note 24; Richard F. Prim, *Saving the Family Farm: Is Minnesota's Anti-Corporate Farm Statute the Answer?*, 14 HAMLIN J. PUB. L. & POL'Y 203 (1993).

realistic guidepost by which to measure the effectiveness of agroecological regulation. We may profitably adapt the first amendment standard for judicial review of laws restricting expressive conduct, commonly known as the *O'Brien* test.<sup>74</sup> The "apparently limitless variety of [agricultural] conduct" cannot legitimately qualify as environmental protection "whenever the person engaging in the conduct intends thereby" to affect the environment.<sup>75</sup> Rather, just as every expressive act combines "'speech' and 'nonspeech' elements,"<sup>76</sup> every agricultural structure and practice combines economic exploitation with environmental alteration. All farmers and some agricultural regulators understand this inherent dualism: the "proprietary interest" in farmland represents "the bulk of [private] wealth" in farmers' hands,<sup>77</sup> but the greater society enjoys no corresponding legal mechanism for safeguarding its interest in agricultural land as a renewable natural resource. The farmer as proprietor fully capitalizes all gains into the land's resale value. Absent extraordinary legal measures, however, the very same farmer need not — and will not — internalize the costs of environmental damage due to his or her farming activities.

No matter how attractive the image of farmers as "stewards of the land" may seem, we simply cannot expect any private actor to protect social interests in the environment. Nor can the delicate project of environmental protection be blithely entrusted to lawmakers and law enforcement agents, for "[p]oliticians and bureaucrats have incentives that do not always correspond to the public interest."<sup>78</sup> This is especially true within an agricultural community with a long history of reflexively favoring on-farm interests over all others.<sup>79</sup>

In order to overcome private greed and political corruption, "green" scrutiny of agricultural statutes must be quite skeptical of claims that structural, economic measures will improve the environment. An agricultural statute must "target[] and eliminate[]" no more than the exact [economic] source of the [ecological] 'evil' it seeks to remedy.<sup>80</sup> Often the environmental advocate can expose a fatal inconsistency in the scrutinized statute. Time and again, constitutional cases applying a standard of intermediate scrutiny have shown that contradictory legislation is the fastest way to undermine a legal policy's asserted justification.<sup>81</sup> To state the point

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74. See *United States v. O'Brien*, 391 U.S. 367 (1968).

75. *Id.* at 376.

76. *Id.*

77. Looney, *supra* note 45, at 767; cf. PAARLBERG, *supra* note 13, at 40 (noting that "large landowning [farm] operators" have enjoyed the greatest success in "capitaliz[ing] [federal] program benefits into land values").

78. Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L.A. L. REV. 791, 806 (1994); see also Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59 (1992).

79. Cf. Chen, *supra* note 21, at 815 ("Why, despite the triumph of consumer welfare model in virtually every other facet of American economic thought, does producer welfare continue to dominate agricultural policy in the United States?").

80. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 804 (1989) (Marshall, J., dissenting) (criticizing the Supreme Court's evident decision to eliminate a narrow tailoring requirement of this sort from intermediate scrutiny under the first amendment).

81. See, e.g., *Craig v. Boren*, 429 U.S. 190, 204 (1976) (comparing a ban on male purchases of beer

somewhat differently, we should subject agroecological policies to the same sort of searching environmental assessment prescribed under the National Environmental Policy Act (NEPA) for major federal actions.<sup>82</sup>

### III. Four Agroecological Fallacies

American law exhibits no fewer than four distinct types of "agroecological fallacies." Each fallacy is rooted in a tendency to confuse environmental and economic goals in agricultural regulation. And each fallacy is readily exposed by a straightforward application of the *O'Brien* test as adapted to this regulatory context.

#### A. Money for Nothing

*First*, statutes that are putatively designed to protect the environment are often more honestly described as programs for boosting commodity prices and farm incomes by restricting output. For example, the Soil Conservation Act of 1936<sup>83</sup> described wheat as a "soil-eroding" crop and soybeans as a "soil-conserving" crop,<sup>84</sup> in apparent defiance of agronomy but conveniently in accord with the income-support provisions of the invalidated Agricultural Adjustment Act of 1933.<sup>85</sup>

More recently, paeans to the Conservation Reserve Program (CRP)<sup>86</sup> and to related conservation initiatives<sup>87</sup> as measures for retiring marginal farmland and restoring wildlife habitat have blunted more realistic assessment of the CRP as a cost-ineffective means of farm income support.<sup>88</sup> Between 1987 and 2003, the much-vaunted CRP will have spent \$19.5 billion in rental payments on temporarily retired farmland, in exchange for environmental benefits valued between \$6 billion and \$13.6 billion.<sup>89</sup> Under the unforgiving standard of "a social welfare stand-

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with Oklahoma's failure to ban male possession or consumption of beer, even of beer purchased by 18- to 20-year-old females); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982) (concluding that an all-female nursing program's educational rationale was undermined by the state university's failure to prevent men from auditing courses).

82. See 42 U.S.C. §§ 4321-4370d (1988 & Supp. V 1993).

83. Ch. 104, 49 Stat. 1148 (1936).

84. *Id.* §§ 7-8.

85. Act of May 12, 1933, ch. 25, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601-626 (1994)), invalidated by *United States v. Butler*, 297 U.S. 1 (1936); see Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333, 348-49 & n.65 (1983) ("The connection between surpluses and soil depletion [under the Soil Conservation Act] was far from direct. For example, wheat, a soil-conserving crop, was due for acreage reduction while soybeans, probably the most soil damaging of all crops, was omitted from the program.").

86. 16 U.S.C. §§ 3831-3836 (1994).

87. See Wetland Reserve Program, 16 U.S.C. §§ 3837-3837f (1994); Erodible Land and Wetland Conservation and Reserve Program, 16 U.S.C. §§ 3821-3824 (1994).

88. See generally Raymond J. Watson, Jr., *Conservation Reserve Program: What Happens to the Land After the Contracts End?*, 14 N. ILL. U. L. REV. 733 (1994).

89. See U.S. GEN. ACCOUNTING OFFICE, CONSERVATION RESERVE PROGRAM: COST-EFFECTIVENESS IS UNCERTAIN 3, 5 (GAO/RCED-93-132, 1993).

point," CRP is a failure: it has failed to "produce[] benefits sufficient to cover its costs."<sup>90</sup> To be sure, neither the environmental benefits<sup>91</sup> nor the fiscal costs<sup>92</sup> of the CRP can be quantified with an absolute degree of confidence. What is certain is that the program excels at putting money in farmers' pockets. Individual CRP contracts pay as much as \$5.6 million, and the program broadens its legislative support by spreading benefits across numerous states and congressional districts.<sup>93</sup> In areas of high CRP enrollment, land values increased by \$62 to \$132 per acre.<sup>94</sup> If indeed farmers are "stewards" of the land, they are among the most richly bribed guardians of environmental integrity.<sup>95</sup>

Like their tort law predecessors, the right-to-farm statutes now in force in all fifty states,<sup>96</sup> "green payments" such as those made under the CRP violate the "polluter pays" principle, the foundational bedrock of economically sensitive approaches to tort law and environmental regulation.<sup>97</sup> Freehold farmers know precisely the balance between productivity and erodibility on their own land; the commodity program phenomenon known as "slippage" shows how farmers retire their least productive acres when ordered to set aside acreage for conservation or supply control purposes.<sup>98</sup> As the cheapest cost avoiders, farmers should bear the initial brunt of environmental compliance costs.<sup>99</sup> When they are bribed to avoid impairing the productive capacity of their own land, the law is plainly defining the "right" to farm as the superior entitlement.

### B. The Milky Way

*Second*, explicit farm income support programs are frequently justified as environmental measures. Farm advocates ascribe affirmative "green" power to

90. COUNCIL FOR AGRIC. SCIENCE & TECHNOLOGY, *THE CONSERVATION RESERVE: A SURVEY OF RESEARCH AND INTEREST GROUPS* 14 (Special Pub. No. 19, July 1995).

91. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 89, at 3.

92. See *id.* at 4 n.3.

93. See KENNETH A. COOK, *SO LONG, CRP* 1-2 (1994).

94. See Robbin Shoemaker, *The Conservation Reserve Program and Its Effects on Land Values* (1989) (USDA, Econ. Research Serv., Agric. Info. Bull. No. 554).

95. See Chen, *supra* note 17, at 1330.

96. See, e.g., GA. CODE ANN. § 41-1-7 (1994); N.C. GEN. STAT. § 106-701(d) (1994); TENN. CODE ANN. § 43-26-103 (1993). See generally Neil D. Hamilton, *Right-to-Farm Laws Revisited: Judicial Consideration of Agricultural Nuisance Protections*, 14 J. AGRIC. TAX'N & L. 195 (1992); Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & L. 99 (1988).

97. See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (justifying the imposition of liability on polluters because polluters tend to be "cheapest cost avoiders" or "best bribers"). Cf. Jim Chen, *The Constitutional Law Songbook*, 11 CONST. COMMENTARY 263, 264 (1994) ("Public goods? Let's subsidize! / 'Polluter pays': Those words are wise.") (singing "The Coasean Creed" to the tune of "Jesus Loves Me").

98. See PAARLBERG, *supra* note 13, at 38-39.

99. *But see* Thorson, *supra* note 63 (supporting the GATT-endorsed regime of "green payments" despite conceding that such payments probably "violate the 'polluter pays' principle, arguably the most important and widely accepted canon of international environmental law").

transparently economic measures. In its more general manifestation, this agroecological fallacy asserts that farming preserves open space and the nation's farmland base as a food production reserve. Thus the Farmland Protection Policy Act<sup>100</sup> imposes NEPA-like procedural obligations on the federal government, ostensibly because a country hyperproductive enough to use food as a foreign policy weapon<sup>101</sup> may otherwise lose its "ability . . . to produce food and fiber in sufficient quantities to meet domestic needs."<sup>102</sup> This defense of farming as a Maginot line against suburban sprawl usually overstates the extent to which "open space" is disappearing<sup>103</sup> and may well reflect little besides the pastoral lifestyle preferences of agricultural analysts fortunate enough to be living in the exurbs.

A more aggressive variation on this agroecological theme portrays farmers as peculiarly talented and caring stewards of natural resources. The smaller the farmer, the cleaner she supposedly is. Defenders of farm income support, especially for smaller farm entrepreneurs, routinely argue that farming produces an enormous amount of positive environmental externalities.<sup>104</sup> "Family farm" rhetoric abounds; empirical environmental evidence does not.

State-law support for dairy producers represents the most extreme instances of this agroecological fallacy. Milking the public fisc in the name of environmental and consumer protection is a long but rather tawdry American tradition.<sup>105</sup> The Filled Milk Act, which sparked the controversy that generated the "discrete and insular minorities" theory of constitutional review,<sup>106</sup> was defended in its time as a statute that "preserved the 'fertility of American soil,'" despite the complete lack of "evidence that the fertility of soil would suffer a whit by a marginal decrease in the number of dairy cows due to competition" from coconut-based filled milk.<sup>107</sup> States have so often resorted to similarly flawed defenses of their local dairy

100. 7 U.S.C. §§ 4201-4209 (1994). See generally William L. Church, *Farmland Conversion: The View from 1986*, 1986 U. ILL. L. REV. 521; Valerie M. Fogleman, *The Farmland Protection Policy Act: Stillbirth of a Policy?*, 1986 U. ILL. L. REV. 563.

101. See, e.g., Export Enhancement Act of 1988, Pub. L. No. 100-418, 102 Stat. 1325; Export Enhancement Act of 1992, Pub. L. No. 102-429, 106 Stat. 2186; Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, 68 Stat. 454 (codified at 7 U.S.C. §§ 1691-1738r (1994)).

102. 7 U.S.C. § 4201(a)(3) (1994).

103. See U.S. SOIL CONSERVATION SERVICE, NATIONAL AGRICULTURAL LAND EVALUATION AND SITE ASSESSMENT HANDBOOK (1983) (casting doubt on the frequent claims that American farmland is being lost at a high rate to urbanization); JULIAN SIMON, THE ULTIMATE RESOURCE (1981) (same); Gregg Easterbrook, *Vanishing Land Reappears*, 258 ATLANTIC 17 (July 1986) (same).

104. See Chen & Adams, *supra* note 24.

105. See generally, e.g., ALTON LEE, A HISTORY OF REGULATORY TAXATION 12-27 (1973) (surveying the history of the dairy industry's efforts to portray rival products as "adulterated" and therefore fit to be banned from grocery shelves); Geoffrey Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989) (documenting the extent to which dairy interests greased Congress and state legislators during the New Deal era); Geoffrey Miller, *The Industrial Organization of Political Production: A Case Study*, 149 J. INST. & THEORET. ECON. 769 (1993).

106. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

107. Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 421.

industries that much of the Supreme Court's dormant commerce clause jurisprudence can be written in milk.<sup>108</sup>

To this day, "dairy regulation . . . levies the heaviest taxes against poorer people to subsidize mainly richer farmers."<sup>109</sup> Agroecological ideology adds intellectual insult to this pecuniary injury. For example, in *West Lynn Creamery v. Healy*,<sup>110</sup> Massachusetts levied a tax on all wholesale milk but impounded the proceeds for the benefit of an income-enhancement program limited to in-state dairy producers.<sup>111</sup> The Commonwealth defended its discriminatory tax scheme by citing "the 'local benefits' of preserving the Massachusetts dairy industry," including the protection of "unique open space."<sup>112</sup> Even if Massachusetts had been able to marshal evidence of environmental benefits, it could not have justified such overt discrimination against interstate commerce.<sup>113</sup> In this case, the Supreme Court found reason to doubt the link between dairying in Massachusetts and the preservation of open space; Justice Stevens noted evidence suggesting that "the decline of farming may well lead to less rather than more intensive land use."<sup>114</sup> The Court thus exposed how Massachusetts' agroecological argument rested on not one, but two faulty presuppositions: (1) that dairy farming is a benign and, indeed, affirmatively desirable form of land use and (2) that any alternative to the preservation of lands currently committed to dairying would harm the environment.

### C. An Unthinking CAAP

*Third*, whenever a law threatens the economic interests of certain subclasses of farmers, particularly smaller freehold farmers, the law's opponents decry the law as primarily a threat to the environment and only secondarily (if at all) as an economic menace. Whereas the dairy advocates in *West Lynn Creamery* had wielded the agroecological argument as a sword in favor of farmer-friendly legislation, this strategy consists of using agroecological rhetoric as a shield against external legal pressure. The California Agrarian Action Project's (CAAP) assault on farm mechanization research during the late 1980s epitomizes this strategy.<sup>115</sup> As an

108. See, e.g., *West Lynn Creamery v. Healy*, 114 S. Ct. 2205 (1994); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Great Atlantic & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949); *Milk Control Bd. v. Eisenberg Farm Prods.*, 306 U.S. 346 (1939); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898); cf. *Nebbia v. New York*, 291 U.S. 504 (1934) (repelling a substantive due process attack on state-law regulation of milk prices).

109. Robert Tempest Masson & Philip M. Eisenstat, *The Pricing Policies and Goals of Federal Milk Order Regulations: Time for Reevaluation*, 23 S.D. L. REV. 662, 663 (1978).

110. 114 S. Ct. 2205 (1994).

111. See *id.* at 2209-11.

112. *Id.* at 2217 & n.20.

113. See *id.* at 2217 n.20; *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-27 (1978).

114. *Healy*, 114 S. Ct. at 2217 n.20 (citing J. FOSTER & W. MACCONNELL, AGRICULTURAL LAND USE CHANGE IN MASSACHUSETTS 1951-1971, at 5 (Research Bull. No. 640, Jan. 1977); A. DAUGHERTY, MAJOR USES OF LAND IN THE UNITED STATES: 1987, at 4, 13 (Agric. Econ. Rep. No. 643, 1991)).

115. See *California Agrarian Action Project, Inc. v. University of California*, 210 Cal. App. 3d 1245

exercise in persuasive reasoning and rhetoric, CAAP's lawsuit to stop farm mechanization research at the University of California backfired; it undermined the agroecological claim to coherence as perhaps nothing else could. The CAAP litigation effectively revived a decade-old argument that land grant universities' research decisions were subject to NEPA review.<sup>116</sup> In "equat[ing] small farmers' economic viability with environmental protection,"<sup>117</sup> the CAAP argument ran squarely into the teeth of the well established NEPA principle that socioeconomic consequences on farm labor does not constitute a "primary impact on the physical environment."<sup>118</sup>

As farm mechanization was in Earl Butz's time, so advanced biotechnology is today.<sup>119</sup> The vicious agrarian campaign to prevent and, later, to reverse the Food and Drug Administration's (FDA) approval of recombinant bovine somatotropin (rbST) represented a paradigmatic application of agroecological rhetoric as a shield for farm interests.<sup>120</sup> Although the FDA, a notoriously slow and conservative agency blamed for the deaths of human patients awaiting drug approvals,<sup>121</sup> had studied rbST over the course of a decade, Congress and several state legislatures second-guessed the federal government's food and drug safety experts by passing statutes designed to delay or discourage the use of this drug.<sup>122</sup> This episode is especially disturbing because the agroecological objections to this form of biotechnology obscured the palpable environmental benefits of rbST use.<sup>123</sup> To

(Ct. App. 1989); Chen, *supra* note 21, at 839-41; Looney, *supra* note 45, at 815-16.

116. See Robert S. Catz, *Land Grant Colleges and Mechanization: A Need for Environmental Assessment*, 47 GEO. WASH. L. REV. 740 (1979); Howard S. Scher et al., *USDA: Agriculture at the Expense of Small Farmers and Farmworkers*, 7 TOLEDO L. REV. 837 (1976); Lawrence A. Haun, Comment, *The Public Purpose Doctrine and University of California Mechanization Research*, 11 U.C. DAVIS L. REV. 599 (1978).

117. Chen, *supra* note 21, at 840.

118. *Image of Greater San Antonio v. Brown*, 570 F.2d 517, 522-23 (5th Cir. 1978).

119. See generally Neil D. Hamilton, *Who Owns Dinner: Evolving Legal Mechanisms for Ownership of Plant Genetic Resources*, 28 TULSA L.J. 587 (1993); Hamilton, *supra* note 18, at 249-57; Looney, *supra* note 45, at 813-19.

120. See Approval of Sterile Somatitrobo Zinc Suspension (Posilac®), 58 Fed. Reg. 59,946 (1993) (codified at 21 C.F.R. §§ 51.600, 522.2112).

121. See, e.g., HENRY G. GRABOWSKI & JOHN M. VERNON, *THE REGULATION OF PHARMACEUTICALS: BALANCING THE BENEFITS AND RISKS* 9 (1983); David Leo Weimer, *Safe-and-Available Drugs*, in *INSTEAD OF REGULATION* 239, 241 (Robert W. Poole, Jr., ed. 1982). Under the FDA's painstaking review process, the average human drug takes ten years and \$87 million to develop. See NATIONAL COMM'N ON ORPHAN DISEASES, FINAL DRAFT REPORT 97 (Feb. 24, 1989); Cynthia A. Thomas, *Reassessing the Orphan Drug Act*, 23 COLUM. J.L. & SOC. PROBS. 413, 420 (1990).

122. See, e.g., Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 1105(c)(2), 107 Stat. 312, 317 (1993) (set forth as a note to 7 U.S.C. § 1446e (1994)) (imposing a 90-day moratorium on rbST sales and suspending a previously scheduled reduction in federal milk price subsidies); Act of May 10, 1994, ch. 632, S.F. No. 2913, art. 2, §§ 13-14, 1994 Minn. Laws 1911-13 (amending MINN. STAT. § 32.013 (1992) and adding MINN. STAT. § 32.75 (1994)) (authorizing the voluntary labeling of milk from cows not treated with rbST).

123. See Dale E. Bauman, *Bovine Somatotropin: Review of an Emerging Animal Technology*, 75 J. DAIRY SCI. 3432, 3447 (1992); Chen, *supra* note 21, at 868-71; D.E. Johnson et al., *The Environmental Impact of Bovine Somatotropin Use in Dairy Cattle*, 21 J. ENVTL. QUAL. 157 (1992).



argue, as rbST's opponents did, that milk is in surplus is also to concede surpluses in two other categories: dairy cows and dairy farmers. Cows are pollution, pure and simple — walking, cud-chewing emitters of manure, urine, and methane. The environmental benefits from a reduction in the U.S. dairy herd are substantial, albeit at the expense of some dairy farming jobs. An environmentalist approach focuses on the reduction in pollutants and plant protein consumed by dairy cows; an agroecological approach decries the loss of dairy farming jobs.<sup>124</sup>

Again, NEPA supplies the needed dose of proper environmentalism. In approving rbST, the FDA followed its established policy of disregarding socioeconomic impact in fulfilling its NEPA obligations.<sup>125</sup> This posture, consistent with prevailing NEPA regulations governing the content of environmental impact statements,<sup>126</sup> best advances the larger societal interest in the environment. In a political culture that values threatened jobs over all else, giving substantial weight to short-term socioeconomic disturbances is tantamount to abdicating the imperative of environmental protection. When proposed governmental action will aid or at least avoid harming the environment, neither NEPA nor good ecological sense warrants a consideration of purely socioeconomic concerns.<sup>127</sup> Whether any particular "technological advance" might be "worth its attendant risks" to incumbent farming interests is "quite different" and quite distant from the environmental inquiry into whether the gains from a projected technological advance "are worth a given level alteration of our physical environment or depletion of our natural resources."<sup>128</sup> It may well be that employment is, especially from a left-of-center perspective on the macroeconomic dimensions of the law, "the economic problem."<sup>129</sup> When technology comes to the farm, however, we ought not overlook potential gains in production agriculture's environmental performance merely because change threatens some farming jobs.

#### D. All Wet

*Fourth*, agrarian lobbyists frequently wield environmental arguments to justify agricultural exceptions from a generally applicable system of economic regulation. The Reclamation Act of 1902,<sup>130</sup> one of the most spectacular failures in the history of American agricultural law, supplies a stunning case study of this agroecological fallacy. The Act's attempt to limit acres irrigated by federally sponsored reclamation

124. For a complete analysis of the rbST controversy, see Chen, *supra* note 21; Chen, *supra* note 37.

125. See National Environmental Policy Act: Policies and Procedures: Final Rule, 50 Fed. Reg. 16,636, 16,648 (FDA Apr. 26, 1985).

126. See 40 C.F.R. § 1508.14 (1995) (providing that "economic or social effects are not intended by themselves to require preparation of [an] environmental impact statement" under NEPA).

127. See *Missouri Coalition for the Env't. v. Corps of Eng'rs*, 866 F.2d 1025, 1031-32 (8th Cir.), *cert. denied*, 493 U.S. 820 (1989); *Stauber v. Shalala*, 895 F. Supp. 1178, 1194 (W.D. Wis. 1995) (upholding the FDA's decision to approve rbST without preparing an environmental impact statement).

128. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983).

129. Mark Kelman, *Could Lawyers Stop Recession? Speculations on Law and Macroeconomics*, 45 STAN. L. REV. 1215, 1224-25 (1993) (emphasis in original).

130. 43 U.S.C. §§ 371-616yyyy (1988 & Supp. V 1993).

projects to 160 acres per holding failed miserably.<sup>131</sup> Eighty years after the passage of the original Act, Congress finally resorted to market-based pricing of reclamation water,<sup>132</sup> but only as a "hammer" to prompt compliance with a relaxed acreage limitation.<sup>133</sup>

The Central Valley Project Improvements Act of 1992 (CVPIA)<sup>134</sup> targeted yet another fatal flaw in the original Reclamation Act: the "use it or lose it" rule embodied in the 1902 Act's provision that "the right to the use of water acquired under the . . . Act shall be appurtenant to the land irrigated."<sup>135</sup> Section 3405(a) of the CVPIA authorizes recipients of federal reclamation water "to transfer all or a portion of [their] water . . . to any other California water user or water agency, State or Federal agency, Indian tribe, or private nonprofit organization."<sup>136</sup> By providing "the least costly way of meeting new demands for water," the CVPIA promised "sizeable benefits from market transfers."<sup>137</sup> The CVPIA also took a second market-oriented step toward reclamation reform: the introduction of a three-tiered pricing system based on the full cost of reclamation and the denial of automatic renewals of 40-year water delivery contracts.

These strides toward market-based pricing of water, however, stopped cold at the farm. During the lobbying season that preceded passage of the CVPIA, a new coalition of "environmentalists and rice producers realized that rice growing results in both environmental benefits and degradation": rice production provides "[w]aterfowl habitat and groundwater recharge," but it also generates "air pollution from burning, pesticide contamination of urban drinking water and water diversion at certain critical times of the year."<sup>138</sup> One would never know the mixed environmental impact of irrigated rice cultivation in the Central Valley from the CVPIA, for the statute effectively exempts rice farmers from the three-tiered pricing scheme:

The Secretary [of the Interior] shall waive application of [the three-tiered pricing scheme] as it relates to any project water delivered to

131. See 43 U.S.C. § 431 (1988) ("No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land . . ."); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 285-86, 297 (1958).

132. See Reclamation Reform Act of 1982, 43 U.S.C. §§ 373(a), 390aa to 390zz-1, 422e, 425b, 485h, 502 (1988 & Supp. V 1993).

133. See *id.* § 390cc(b); *Peterson v. United States Dep't of the Interior*, 899 F.2d 799, 806-14 (9th Cir.), *cert. denied*, 498 U.S. 1003 (1990). See generally Hamilton Candee, *The Broken Promise of Reclamation Reform*, 40 HASTINGS L.J. 657 (1989).

134. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, §§ 3401-3412, 106 Stat. 4600, 4706-31 [hereinafter CVPIA].

135. 43 U.S.C. §§ 372, 383 (1988).

136. CVPIA, *supra* note 134, § 3405(a), 106 Stat. at 4709-10.

137. B. Delworth Gardner & John E. Warner, *The Central Valley Project Improvement Act and Water Markets: Two Steps Forward — One Step Back*, CHOICES, 1st Q. 1994, at 4, 6.

138. Richard Howitt, *Water Markets, Individual Incentives and Environmental Goals*, CHOICES, 1st Q. 1994, at 10, 11.

produce a crop which the Secretary determines will provide significant and quantifiable habitat values for waterfowl in fields where the water is used and crops are produced.<sup>139</sup>

In short, agroecological interests successfully lobbied to keep an uninterrupted flow of irrigation subsidies for rice farmers. The putative ecological justification — preservation of waterfowl habitat — effectively presupposes a definition of environmental protection under which "wildlife" includes only those animals that humans may legally kill.<sup>140</sup>

#### IV. A Transparent Solution

A final and utterly debilitating agroecological fallacy remains to be explored. Antonio Carrozza, arguably the founder of modern agricultural legal scholarship in Europe, unwittingly hints at the nature of the fallacy and of the underlying fear that motivates this final rhetorical stance. In his special address to the 1995 congress of the Comité Européen de Droit Rural, Professor Carrozza described "the introduction of environmental law into agricultural law" as perhaps "the announcement of the destruction of the structures on which traditional agricultural law is founded."<sup>141</sup> In a more defensive posture, he asked:

[E]ven the industrial entrepreneur must confront the particular liabilities that limit his production in the name of provisions imposed for the protection of the environment and of human health. And strict preventive . . . measures are imposed principally on the industries that are dangerous by definition. If that is true, and it is indisputably the case, one must ask why there are no legal conferences organized and no books written about the introduction of the concept of environmental protection into the realm of industry and, more generally, the realm of commercial law. Why are we always concentrating on the agricultural and rural environment? Why aren't manufacturers put to the task as is the case with farmers?<sup>142</sup>

The answer, of course, is that the industrial sector has long borne the brunt of command-and-control environmental regulation. Unlike agriculture, which enjoys environmental exemptions both explicit and implicit,<sup>143</sup> virtually every other

139. CVPIA, *supra* note 134, § 3405(d), 106 Stat. at 4713.

140. *Contra* Convention on International Trade in Endangered Species of Wild Fauna and Flora, *entered into force*, Jul 1, 1975, 27 U.S.T. 1087, T.I.A.S. No. 8249 (1973); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995); *TVA v. Hill*, 437 U.S. 153 (1978).

141. Antonio Carrozza, Speech Before the 18th Congress of the Comité Européen de Droit Rural (CEDR), St. Catherine's College, Oxford, England (Sept. 20, 1995) (on file with the author). Professor Carrozza delivered his speech in French; what appears in text is my translation of the paper circulated by Professor Carrozza at the CEDR congress.

142. *Id.*

143. Compare, for instance, the several states' right-to-farm statutes with the backhanded definition

industry in the United States must face a comprehensive battery of environmental obligations. To the extent that generally applicable environmental laws are fully enforced on the farm, the resulting expansion in the capital intensity of farming as a business will simply accelerate the modern trend toward greater scale and greater concentration in agriculture. Adapt *and* die: the big get bigger, and the small get city jobs.<sup>144</sup> Get green or get out.

We thus confront our final agroecological fallacy, the notion that farms deserve to be exempt from laws protecting the environment. Proponents of this fallacy cannot protect it against the devastation wreaked by a single question: If farming is so clean, why aren't farmers bound by the environmental laws applicable to the rest of us? Even *Congress* is forsaking its exemptions from generally applicable laws.<sup>145</sup> Why can't farmers meet even Congress's low standards of civic responsibility?<sup>146</sup>

Traditional agriculture quakes at the idea that environmental law will come to the farm, decoupled from a commitment to preserving some semblance of an agricultural market dominated by numerous small farms. Hence the drive to articulate and defend a coherent body of *agroecological* law, a legal system that promotes environmental integrity only to an extent that preserves existing farm jobs, and no more. But the linkage of environmental and economic issues in agricultural regulation impedes the honest resolution of both types of problems. Damage to natural resources does not depend on the identity of the tortfeasor, but these agroecological fallacies encourage separate and unequal solutions to the environmental challenges posed by agriculture. The frequently unsupported presumption that farming affirmatively benefits the environment cripples efforts to find scientific justifications for an entire host of laws regulating the health, safety, and environmental impact of agriculture and agribusiness.

Existing mechanisms in American and international law can cure the disease that is agroecological reasoning. The dormant commerce clause analysis typified by *West Lynn Creamery*<sup>147</sup> insists that states (1) justify protectionist legislation on verifiable environmental grounds and (2) identify quantifiable costs and benefits so that judicial reviewers can meaningfully assess whether legislation's burden on trade justifies the benefits attained through the agroecological legislation.<sup>148</sup> The Uruguay Round's new Sanitary and Phytosanitary Standards agreement (SPS)

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of agriculture as nonpoint source pollution under the federal Clean Water Act. Of course, a concentrated animal feedlot operation will be regulated under the Act's point source pollution provisions. *See generally* Concerned Area Residents for the Env't. v. Southview Farm, 34 F.3d 114 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995).

144. *See* Chen, *supra* note 21, at 857 ("Onward roll the inexorable trends toward overproduction, toward human exodus from farming, toward concentration of productive resources within the food system.").

145. *See generally* Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3.

146. *Cf.* Luther Tweeten, *Sector as Personality: The Case of Farm Protest Movements*, AGRIC. & HUMAN VALUES, Winter 1987, at 67 (exploring the psychological pathology of agrarian self-dealing).

147. *See* *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994).

148. *See id.* at 2214-18.

requires a similar type of judicial review.<sup>149</sup> There is, in fact, growing reason to believe that the domestic legal standard expressed in the Supreme Court's dormant commerce clause cases and the international standard governing the SPS accord are effectively alike.<sup>150</sup> What drives both legal regimes is the concept of *transparency*, the idea that economic protectionism ought to be exposed for voters and consumers at home and all the world to see.<sup>151</sup> How strange it must seem to the agroecologist, this notion of using science rather than supposition to make the world safe not only for agriculture, but also for health, safety, and environmental regulation.

Agrarians everywhere, whether staid traditionalists or suave agroecologists, are allied in their opposition to "agricultural industrialization," an unequivocal evil that I have been accused of advocating.<sup>152</sup> My line of argument, so it is asserted, makes "little claim farmers will be better off, or the land will be better treated, or rural communities will be [economically] healthier."<sup>153</sup> Farm jobs be damned, but the land *will* be cleaner. When proponents of conventional agrarian thought are prepared to embrace my agenda of bringing the long arm and iron fist of environmental law to the farm, they will have standing to preach a "greener than thou" gospel.

Millions for environmental defense, but not one dime in agrarian tribute. Confronted with a constantly shrinking federal fisc and an increasingly polluted natural world, we can no longer afford to condition environmental protection on such luxuries as subsidies for entrepreneurial opportunities in farming. We can no longer afford to couple environmental *protection* with agricultural *protectionism*. The urge to disguise the economic regulation of agriculture as environmental protection is understandable, for it obscures the otherwise undeniable "welfare law" flavor of most schemes for enhancing farm incomes. As with food stamps, general assistance, and every other form of interclass wealth transfers, however, the public deserves an opportunity to debate agricultural regulation on its full economic and ecological merits.<sup>154</sup> This is the reform that "decoupling" promises the much-maligned federal commodity programs. In an age of increasing pressures on the federal fisc and the terrestrial ecosystem, we ought to approach the entire body of agricultural law with greater respect for economic and environmental interests alike.

149. See Agreement on the Application of Sanitary and Phytosanitary Measures, *opened for signature*, Apr. 15, 1994, in GATT SECRETARIAT, *supra* note 61, at II-A-1.

150. See Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1431-40 (1994).

151. See generally, e.g., IN WHOSE INTEREST? DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE (Michael M. Hart & Debra P. Steger eds. 1992).

152. See George Anthon, *Prof advances his radical view*, DES MOINES REG., Jan. 14, 1996, at J1 (quoting and criticizing Chen, *The American Ideology*, *supra* note 21; Chen, *Of Agriculture's First Disobedience and Its Fruit*, *supra* note 17; and Chen, *The Agroecological Opium of the Masses*, *supra* note 37).

153. *Id.* (quoting Neil Hamilton, the author of, *inter alia*, works cited in notes 18, 36, 96, and 119, *supra*).

154. Cf. Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. 22 (1971) (describing and analyzing cross-subsidization of public utility services through "internal subsidies" as a species of taxation and public finance).