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**Feudalism Unmodified:
Discourses on Farms and Firms**

Part 1

by

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FEUDALISM UNMODIFIED: DISCOURSES ON FARMS AND FIRMS¹

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1. Cf. loosely CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

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** Associate Professor of Law, University of Minnesota Law School. This paper is based in part on *La transmission des exploitations agricoles en droit américain*, a June 1, 1995, presentation by Professor Chen in Nantes, France, at a colloquium sponsored by the Faculté de Droit et des Sciences de l'Homme, Université de Nantes. Professor Chen gratefully acknowledges the financial support of the Conseil Général de Loire-Atlantique, France, which financed his research as a Visiting Professor at the Faculté de Droit et des Sciences Politiques of the Université de Nantes. He also thanks Neil D. Hamilton and Louis Lorvellec for their intellectual advice and moral support during the drafting of this paper. Tracey Chabala, Deanna Johnson, and Michael Schneider provided able research assistance.

I. THE PARABLE OF THE HITTITES²

*De mortuis nihil nisi bonum dixit.*³

The Hittites flourished briefly as a powerful, militaristic Iron Age civilization on the northern edge of the Fertile Crescent, occupying a territory in Anatolia and northern Mesopotamia. When the God of the Hebrews delivered them unto their Promised Land, the Hittites numbered first among the “seven nations greater and mightier” than the infant Jewish nation.⁴ But the Hittites are nowhere to be found today. Their fate might help explain why the Kurds, the Hittites’ geographic successors in interest, suffer perennial geopolitical anxiety. As the eminent Southern writer, Walker Percy, has mused:

Where are the Hittites?

Why does no one find it remarkable that in most world cities today there are Jews but not one single Hittite, even though the Hittites had a great flourishing civilization while the Jews nearby were a weak and obscure people?

When one meets a Jew in New York or New Orleans or Paris or Melbourne, it is remarkable that no one considers the event remarkable. What are they doing here? But it is even more remarkable to wonder, if there are Jews here, why are there not Hittites here?

Where are the Hittites? Show me one Hittite in New York City.⁵

What follows is a totally fanciful⁶ “imaginative reconstruction” of the last days of the Hittite Empire,⁷ loosely extracted from a priestly record com-

2. We dedicate Part I of this Article to our faculty colleagues Dan Farber and Suzanna Sherry, who taught us all that if you have to tell a story, make sure it’s a damn good one. See generally Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994); cf. Daniel A. Farber, *The Deconstructed Grocery List*, 7 CONST. COMMENTARY 213 (1990); Daniel A. Farber, *The Jurisprudential Cab Ride: A Socratic Dialogue*, 1992 BYU L. REV. 363; Daniel A. Farber, *Terminator 2½: The Constitution in an Alternate World*, 9 CONST. COMMENTARY 59 (1992).

3. “Of the dead say nothing but good.”

4. See *Deuteronomy* 7:1 (Revised Standard Version).

5. WALKER PERCY, *The Delta Factor*, in *THE MESSAGE IN THE BOTTLE: HOW QUEER MAN IS, HOW QUEER LANGUAGE IS, AND WHAT ONE HAS TO DO WITH THE OTHER* 3, 6 (1986).

6. Cf. generally RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286-93 (1985) (applying the method of “imaginative reconstruction” to the similarly daunting task of discerning the intentions underlying a bygone legislature’s statutory enactments).

7. Our account should not be mistaken for anything resembling a serious history of the Hittites. Such studies abound. See, e.g., OLIVER R. GURNEY, *THE HITTITES* (1962); E. NEUFELD, *THE HITTITE LAWS* (1951); MARTHA T. ROTH, *LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR* (Piotr Michalowski ed., 1995).

piled by a rival group from the same region,⁸ and influenced by the writings of a modern antitrust scholar⁹ with no discernable trace of Hittite ancestry.¹⁰

The reign of Beeri, the last Hittite emperor, was one of great prosperity. So great was the empire's wealth that the empire could afford to develop elaborate schemes of public law governing virtually every imaginable aspect of Hittite life. (Sadly, for reasons we are about to see, very few fragments of the Hittite Code Annotated have survived to the present day.)¹¹ Like most other governments then, as now, however, the Hittites had not solved the seemingly intractable problem of public corruption. The emperorship had room for only one, and Beeri's siblings had to find themselves some other form of gainful employment. His sister, Bashemath, married the Assyrian emperor, Grok. (The ancient Middle East had very limited employment opportunities for women of Bashemath's class.)¹² The emperor's brother, Elon, headed a cartel that dominated the iron trade. Indeed, Elon's grip on the iron market made him the richest man west of the Tigris.

One day in the twelfth and last year of Beeri's reign, Ephron, head of the Antitrust Division of the Hittite Ministry of Justice, decided that the Hittite consumers' growing demand for metals demanded action against the cartels in either the iron or the bronze markets. To curry favor with his superiors, Ephron would have liked to have crushed both cartels, but he knew that offending Elon would surely incur the wrath of the emperor as well. (Oddly enough, offending the emperor was thought to be highly dangerous to any government employee's health and well-being.) Besides, quick deconcentration of tin mine holdings would smash the bronze cartel's grip on that market. Not content to do simply nothing about the price of metals in the Hittite Empire, Ephron ordered ruthless antitrust enforcement against the bronze cartel. Suddenly, the price of bronze dropped from thirty ephahs per

8. See *Genesis* 25:9; *Genesis* 26:34; *Genesis* 36:2; *Genesis* 49:30; *Genesis* 50:13; *Exodus* 23:28; *Exodus* 33:2; *Exodus* 34:11; *Joshua* 9:1; *Joshua* 11:3; 1 *Samuel* 26:6; 2 *Samuel* 11:6, 21, 24; 2 *Samuel* 12:9-10; 2 *Samuel* 23:39; 1 *Kings* 15:5.

9. See HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* § 1.6, at 37-39 (1985).

10. *But cf.* *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) (arguing that "[t]he Court fail[ed] to address the difficulties, both practical and constitutional, with the task of defining members of racial groups that its decision will require"); *In re Storer Broadcasting Co.*, 87 F.C.C.2d 190 (1981) (tracing a broadcast license applicant's family history to 1492 to conclude that the applicant was "Hispanic" for purposes of a minority tax certificate policy); RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW: CASES AND NOTES* § 8-2.14, at 544 (4th ed. 1993) (noting that the 24 generations between 1492 and the date of the *Storer* case would have diluted the Hispanic portion of the disputed applicant's ancestry to one part in 16,777,216).

11. *Contra* James Lindren, *Measuring the Value of Slaves and Free Persons in Ancient Law*, 71 CHI.-KENT L. REV. 149, 166 (1995) ("The Hittites figure prominently in modern discussions of law because they left an elaborate law collection, as well as a range of treaties.").

12. *Cf.* Geoffrey P. Miller, *The Song of Deborah: A Legal-Economic Analysis*, 144 U. PA. L. REV. 2293, 2293 (1996) (noting that it was "unusual[]" to have a woman, Deborah, serve as a judge "very early in the history of the Israelite occupation of the Promised Land").

ton to a measly ten, while the price of iron remained a sky-high ninety ephahs per ton.

Meanwhile, Uriah, field commander of the Hittite Army, and husband of the renowned fashion model Bathsheba, was trying to decide how to spend that year's appropriation for military hardware. Recent high-tech developments made iron the metal of choice in the latest chariots, shields, swords, and spears; even those pesky Hebrews to the south had tried iron slingshots in the Philistine War. Uriah was so fond of iron weaponry that he was willing to pay up to three times the price of its bronze equivalent. Lately, though, the price for iron in the Hittite market was an astronomical nine times that of bronze. Besides, a sudden burst of bronze had flooded the Hittite economy, and Uriah didn't want to be blamed for the loss of copper mining jobs in his home province. He therefore issued the fateful Directive Number 1313, which ordered the Hittite Army to purchase bronze weapons that year.

Seeking to expand her husband's sphere of influence, Assyrian empress Bashemath began goading her husband, Grok, to launch a first strike against the Hittite Empire. Not that she resented her own people, but Bashemath was still peeved at the way Beeri mocked the hairy Assyrian genes her children had inherited. And Hattūsa was so much more cosmopolitan than Nineveh or Assur.¹³ When Grok finally accepted the empress's point of view, he ordered the Assyrian army to engage Beeri and Uriah's divisions fifty miles east of Hattūsa.

Observers from the *Chaldean Chronicle* described the battle as one of stunning decisiveness. "The Assyrian[s] came down like the wolf on the fold," and fold the Hittites did.¹⁴ Some speculated that Joshua, a Hebrew general of some renown, had become an Assyrian mercenary. Others attributed the Hittites' utter defeat to the Assyrians' superior equipment. The eastern horde glittered in the hot Mesopotamian sun, decked out in the latest iron armor and weaponry. "[T]he sheen of their spears was like stars on the sea / When the blue wave rolls nightly on deep Galilee."¹⁵ The Hittites' bronze hardware was simply no match.

The *Chronicle's* war correspondents were baffled by the Hittites' decision to rely on bronze weapons. Only when the legal desk uncovered Directive Number 1313 did the mystery begin to clear up

II. CHAOS, COCAINE, AND COMPETITION

The parable of the Hittites, of course, is a twice-told tale, an exhumation of old problems to put a new twist on R.G. Lipsey and Kelvin Lancaster's

13. Hattūsa was the Hittite capital, near the modern site of Boazköy, Turkey. Assur and Nineveh were major Assyrian cities.

14. GEORGE BYRON, *The Destruction of Sennacherib*, in CHILDE HAROLD'S PILGRIMAGE AND OTHER ROMANTIC POEMS 203, 203 (John D. Jump ed., John M. Dent & Sons Ltd. 1975) (1815).

15. *Id.*

“general theory of second best.”¹⁶ Though virtually unknown in American courts,¹⁷ the general theory of second best thrives in American legal scholarship. From its origins in traditional welfare economics, the general theory of second best has expanded its audience beyond microeconomic analysts of law.¹⁸ The theory has now conquered a vast academic territory stretching from tax to tort: the same idea that fuels the holy grail of tax simplification¹⁹ has been used to shatter the illusion of efficacy in risk regulation.²⁰

The theory teaches two basic points. First, the possible perversion that lurks in every second-best prescription means that sometimes half a loaf is worse than none. “The general theory of second best demonstrates that if there are distortions from competitive equilibrium throughout the economy due to taxes or monopoly, for example, a change that can be viewed as value maximizing in one small sector may actually decrease value overall.”²¹ In an economic world that is “normative to the core,”²² second-best solutions often

16. See generally R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

17. But see *State ex rel. Lambert v. West Virginia State Bd. of Educ.*, 447 S.E.2d 901, 911 n.1 (W. Va. 1994) (Neely, J., dissenting) (citing Lipsey & Lancaster, *supra* note 16, for the proposition that legislative solutions can rarely fulfill all conditions of first-best economic solutions).

18. For a legal application of the theory in its native environment, see David Gray Carlson, *On the Margins of Microeconomics*, 14 CARDOZO L. REV. 1867, 1884-90 (1993). Strictly speaking, the dominant school of “law and economics” is microeconomic, as opposed to the sort of macroeconomic analysis that legal scholars rarely perform. See Mark Kelman, *Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, 45 STAN. L. REV. 1215, 1216-23 (1993) (discussing the “historical exclusion of macroeconomics” from legal scholarship); cf. Jim Chen & Daniel G. Gifford, *Law as Industrial Policy: Economic Analysis of Law in a New Key*, 25 U. MEM. L. REV. 1315, 1318, 1347-61 (1995) [hereinafter *Law as Industrial Policy*] (urging macroeconomic analysis of law through a renewed focus on federal monetary policy and public finance in all its manifestations).

19. See Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1294 (“Tax . . . breeds its own internal logic and dynamic of efficiency. Once the income tax in general, or an individual tax rule in particular, creates deviations from free market results, the claims for efficiency open up in full force.”).

20. See, e.g., James A. Henderson, Jr., *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036 (1980); Stephen F. Williams, *Second Best: The Soft Underbelly of Deterrence Theory in Tort*, 106 HARV. L. REV. 932 (1993); see also Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 291-92 (1985) (arguing that a patchwork of judicially managed risk regulation is especially treacherous because even the efficient internalization of risk might push consumers toward cheaper but riskier substitutes); cf. Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795, 859-60 (1987) (concluding that user fees are unlikely to modify private behavior in a positive way because of the theory of second best).

21. Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 652 (1980) (footnote omitted).

22. Sidney S. Alexander, *Human Values and Economists' Values*, in HUMAN VALUES AND ECONOMIC POLICY 101, 108 (Sidney Hook ed., 1967); Bailey Kuklin, *The Gaps Between the Fingers of the Invisible Hand*, 58 BROOK. L. REV. 835, 874 (1992); cf. Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1094 n.30 (1995) (observing, with the help

offer little more than the illusion of improvement.²³ Lipsey and Lancaster's economic version of chaos theory²⁴ bodes especially ill for the "brave moo world" of modern agriculture:²⁵ any economic or environmental disturbance may bring to life the nightmare of an uncontrollable "Jurassic Farm."²⁶

The normative implications of the theory of second best are even more uncouth. The high priests of legal theory can summarize its lessons as a single commandment: "Thou Shalt Not Optimize in Piecemeal Fashion."²⁷ Expressions of the contrary view in the Supreme Court's equal protection jurisprudence²⁸ merely invite the extension of the theory of second best to constitutional law.²⁹ As the heart of a Critical Legal Studies approach to economic analysis of law,³⁰ the theory of second best exposes "the [r]adical [c]ontingency of [e]fficiency [a]nalysis."³¹ In a world in which "two wrongs can make a right,"³² everyone can trash—and easily.³³ Such an

and acquiescence of Dan Farber and Paul Campos, that "legal interpretation is 'normative all the way down'"). Donald N. McCloskey asserts that "prediction is not possible in economics." DONALD N. MCCLOSKEY, *THE RHETORIC OF ECONOMICS* 15-16 (1985). McCloskey suggests as Mark Tushnet does in constitutional law that "[c]ritique is all there is" in economics. MARK V. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 318 (1988).

23. See Rizzo, *supra* note 21, at 652-53.

24. See generally DIMITRIS N. CHORAFAS, *CHAOS THEORY IN THE FINANCIAL MARKETS: APPLYING FRACTALS, FUZZY LOGIC, GENETIC ALGORITHMS, SWARM SIMULATION AND THE MONTE CARLO METHOD TO MANAGE MARKET CHAOS AND VOLATILITY* (1994); *EVOLUTIONARY ECONOMICS AND CHAOS THEORY: NEW DIRECTIONS IN TECHNOLOGY STUDIES* (Loet Leydesdorff & Peter van den Besselaar eds., 1994).

25. Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 871 (1995) [hereinafter *American Ideology*].

26. See MICHAEL CRICHTON, *JURASSIC PARK* 312 (1990) ("[C]haos theory proves that unpredictability is built into our daily lives. It is as mundane as the rainstorm we cannot predict. And so the grand vision of science . . . —the dream of total control—has died . . ."). Crichton's mad mathematician, Ian Malcolm, is based on the late physicist and leading chaos theoretician, Heinz R. Pagels. *Id.* at Acknowledgments. Malcolm's pessimistic outlook on the role of science in society may more closely parallel the views of Jeremy Rifkin, an opponent of genetic engineering. Andrew A. Skolnick, *Jurassic Park*, 270 JAMA 1252, 1253 (1993) (book review).

27. Gregory S. Crespi, *Market Magic: Can the Invisible Hand Strangle Bigotry?*, 72 B.U. L. REV. 991, 1010-11 (1992).

28. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) ("[Legislative] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.").

29. See Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2 n.6, 3 (1994) (counseling a cautious approach to the discerning of good from evil in separation-of-powers jurisprudence).

30. See *Law as Industrial Policy*, *supra* note 18, at 1317 (describing "economic analysis of law [as] a critical theory so corrosive that it consumes itself").

31. Jerry L. Mashaw, *Against First Principles*, 31 SAN DIEGO L. REV. 211, 216 (1994).

32. Christopher R. Leslie, Comment, *Achieving Efficiency Through Collusion: A Market Failure Defense to Horizontal Price-Fixing*, 81 CAL. L. REV. 243, 268 (1993).

“ideological” use of the theory of second best raises “a fatal objection to economic analysis of real world markets.”³⁴ The theory strips any veneer of coherence from Ronald Coase’s prescription of step-by-step elimination of barriers to fully informed negotiation.³⁵ The prospect that a second-best legal solution will flounder thus enables “[m]arket failures [to] provide an efficiency rationale . . . anywhere in the economy—not simply in the market or industry in which the failures occur.”³⁶ No wonder traditional law-and-economics scholars dread the theory.³⁷ A theory that proves this much is sure to become the addictive cocaine of pragmatic legal scholarship.

Cocaine, alas, does not discriminate in its allure.³⁸ Skeptics of command-and-control regulation can also find comfort in the theory of second best. Even sensible free market advocates must eschew the temptation to convert the theory of second best into an all-purpose rhetorical mace against regulation. But it is far from sporting to assert that all forms of governmental intervention are more likely to generate perverse side effects than to cure an identified market defect. Rather, we will adopt what we consider a minimalist variant of the theory of second best as the foundation of a “Santa Claus” variant of normative legal analysis: make a list of possible objections to a legal regime, and check it twice. In response to the general theory of second best and other constraints on the prescriptive power of legal criticism,³⁹ this Article advocates the cautious use of a *third-best* approach to economic regulation. In a world full of economic imperfections, the soundest regulatory options more often than not consist simply of choosing “among alternative *general policies*” in an effort “to adopt the policy that *on average* has the most favorable resource allocation implications.”⁴⁰

33. Cf. Alan D. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230 (1981) (“[T]rashing is fun. I love trashing . . .”). See generally Mark Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

34. HOVENKAMP, *supra* note 9, § 1.6, at 39.

35. Compare Barbara White, *Coase and the Courts: Economics for the Common Man*, 72 IOWA L. REV. 577, 594 (1987) (criticizing incremental efforts to improve the efficiency of legal rules) with R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

36. John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 753 (1986) (emphasis added).

37. See, e.g., J.M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447, 1478 n.72 (1987) (noting the conspicuous absence of the theory from, *inter alia*, WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987)).

38. *But see* State v. Russell, 477 N.W.2d 886 (Minn. 1991) (invalidating a Minnesota statute that punished possession of crack cocaine more heavily than possession of cocaine powder because crack is predominantly trafficked and used by blacks).

39. See generally Daniel A. Farber, *Positive Theory as Normative Critique*, 68 S. CAL. L. REV. 1565 (1995) (providing an excellent succinct survey of public choice theory and the social choice literature inspired by Arrow’s Impossibility Theorem).

40. F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND MARKET PERFORMANCE* 37 (3d ed. 1990) (emphasis added); see also ANTHONY B. ATKINSON & JOSEPH E. STIGLITZ, *LECTURES ON PUBLIC ECONOMICS* 383 (1980) (suggesting that the problem of second best applies with less force in tax policy and other realms in which complex market forces and interwoven regulatory responses tend to cancel each other out); cf. ROBERT E. HALL & ALVIN

Economic analysis of law, especially when offered in hopes of enhancing societal welfare, should be prepared to answer the most impertinent and American of questions: "If you're so smart why ain't you rich?"⁴¹ Among the many policy options available to American lawmakers, we believe that a consistent, generalized preference for freedom of entry, exit, and firm organization assures the highest likely return on economic regulation. In "the larger economy's informal parliament of merchants, middlemen, and consumers,"⁴² a third-best approach excels. The approach nudges the economy toward full efficiency without the distortions caused by the internal contradictions that result from the pursuit of second-best policies. A third-best approach outperforms piecemeal regulation according to the cold tests used by "the largest players in the world's markets" to assess "national and local governments' economic policies": "gross domestic product, the ratio of gross domestic product to public debt, balance of payments, unemployment, [and] inflation."⁴³

We will develop our hypothesis by examining certain economic assumptions underlying the regulation of firm size and structure in the agricultural and industrial sectors. Structural regulation in American law, of course, takes numerous forms, including section 7 of the Clayton Act,⁴⁴ the Glass-Steagall Act,⁴⁵ the Public Utility Holding Company Act of 1935,⁴⁶ and numerous provisions of federal communications law.⁴⁷ These diverse statutes

RABUSHKA, *THE FLAT TAX* 23 (1985) (advocating a flat tax as an antidote to the diversionary "tax shelters" that "play havoc with efficiency in investment").

41. DONALD N. McCLOSKEY, *IF YOU'RE SO SMART* 111 (1990).

42. *American Ideology*, *supra* note 25, at 829.

43. *Law as Industrial Policy*, *supra* note 18, at 1318.

44. 15 U.S.C. § 18 (1994); *see, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (vertical mergers); *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) (horizontal mergers); *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967) (conglomerate mergers).

45. 12 U.S.C. §§ 24(7), 78, 377-78 (1994); *see, e.g.*, *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971); *Securities Indus. Ass'n v. Clarke*, 885 F.2d 1034 (2d Cir. 1989); *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 821 F.2d 810 (D.C. Cir. 1987); *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 839 F.2d 47 (2d Cir. 1988); *Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 807 F.2d 1052 (D.C. Cir. 1986).

46. 15 U.S.C. §§ 79a-79k (1994); *see, e.g.*, *SEC v. New England Elec. Sys.*, 390 U.S. 207 (1968); *SEC v. New England Elec. Sys.*, 384 U.S. 176 (1966). *See generally* Howard J. Trienens, *The Utility Act as a Solution to Sherman Act Problems*, 44 ILL. L. REV. 331 (1949) (describing the PUHCA as an attempt to combine the investor protection goals of the securities laws with the procompetitive objectives of the antitrust laws).

47. *See, e.g.*, *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (upholding 47 C.F.R. § 73.3555(c), the FCC's rule restricting cross-ownership of newspaper and broadcast facilities in the same market); *News Am. Publ'g, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988) (striking down a statute requiring the discriminatory consideration of applications for waivers from the newspaper-broadcast cross-ownership restriction); *U.S. West, Inc. v. United States*, 48 F.3d 1092, 1095 (9th Cir. 1994) (invalidating a now repealed ban on a common carrier from offering video programming services to subscribers in its telephone service area, either directly or by owning or operating a cable system), *vacated*, 116 S. Ct. 1037 (1996); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 202 (4th

share two core articles of faith. First, structural regulation of economic activity assumes that certain forms of market structure and industrial organization are economically or socially pernicious. Second, regulators believe that these evils can be effectively addressed by legal restrictions on the formation or structure of individual firms. The common legal strategy is the “incipiency” standard implicit in the Clayton Act’s proscriptions against conduct that may “substantially . . . lessen competition or tend to create a monopoly”:⁴⁸ certain situations present such “anticompetitive potential” that regulators should patrol the market “even in the absence of incipient monopoly,” and even when the “merging of resources” may lead to “efficiencies that benefit consumers.”⁴⁹ At heart, structural regulation exploits the connection between the internal organization of the firm and the overall structure of a market, a link widely recognized since Ronald Coase published *The Nature of the Firm* in 1937.⁵⁰

In a nation of shopkeepers, the principal objective of structural regulation is to obstruct the formation of large firms, especially firms whose size and scope of activities tend to favor sharp distinctions between labor, management, and capital. At one end of the economic spectrum is the sole proprietorship, which unifies labor, management, and capital in a single person. At the other end of the spectrum lies the publicly traded corporation, usually owned by a constantly shifting population of many shareholders and characterized by specialization and stark divisions of labor. In agriculture, one of the most rigorously regulated and structured economic sectors in the American economy, critics have begun calling such practices a modern incarnation of

Cir. 1994) (same), *vacated*, 116 S. Ct. 1036 (1996); *see also* 47 C.F.R. § 73.3555(a) (1995) (the “duopoly rule,” which limits the amount of overlap between the signals of commonly owned TV, AM, or FM stations); 47 C.F.R. § 73.3555(b) (1995) (the “one-to-a-market rule,” which limits any ownership group to one broadcast outlet of each type in a single market); *cf.* *Turner Broad. Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2449 (1994) (casting constitutional doubt on “must carry” rules, which require a cable operator to carry the signals of local television broadcasters); *National Broad. Co. v. United States*, 319 U.S. 190, 220 (1943) (upholding the FCC’s “chain broadcasting” rules, which were aimed at curbing network influence over local radio stations). *See generally* Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communication’s Regulation)*, 80 MINN. L. REV. 1415 (1996).

48. 15 U.S.C. §§ 13(a), 14, 15, 18 (1994).

49. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984); *accord* *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966); *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 362 (1963); *FTC v. Cement Inst.*, 333 U.S. 683, 693 (1948); *see also* S. REP. NO. 63-698, at 1 (1914) (“Broadly stated, the [Clayton Act], in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by [the Sherman Act], and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation.”).

50. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937), *reprinted in* *THE NATURE OF THE FIRM: ORIGINS, EVOLUTION, AND DEVELOPMENT* 18 (Oliver E. Williamson & Sidney G. Winter eds., 1991) [hereinafter *THE NATURE OF THE FIRM*].

"feudalism."⁵¹ Although the term "feudalism" is "merely a vague and general word describing the social structure of Western Europe from the tenth century onwards,"⁵² we shall borrow it as a term embodying the worst fears underlying the urge to impose rigid structural regulation on free enterprise.

In Parts III and IV of this Article, we will examine the regulation of feudalism in its native sector of the economy, the farm. Barriers to external investment and involvement in farming have not succeeded in shielding American agriculture from its natural tendency toward a feudal market structure. In Part V, we will study the law's frontal assault on the citadel of American industrial feudalism: anti-takeover statutes. Like their agrarian counterparts, these laws have succeeded in destroying wealth without significantly affecting the terms by which firms organize themselves and shape the larger economy.

Whether manifested on the farm or in the corporate boardroom, modern feudalism resists structural regulation. In an age of economies of scale and scope, in an age when big is better and, big is beautiful, corporate feudalism will triumph.⁵³ To the advocates of the unfettered free market, feudalism unmodified is a battle cry, a celebration of the inequality that makes economic progress possible. But feudalism unmodified also describes the dismal condition of capitalism and its discontents. Those who would protect disadvantaged *competitors* at the expense of *competition* have every reason to lament the failure of structural regulation.⁵⁴ Over the long run, no amount of legal resistance has preserved—or ever can preserve—small farms and small firms.⁵⁵ Feudalism endures, unmodified.

51. See, e.g., Dan Looker, *Hog Feeding on Contract: Safe Money or Servitude?*, DES MOINES REG., Aug. 15, 1989, at A1; Christopher Sullivan, *Chicken Growers Claim "Feudal" Contracts Keep Them from Riches*, DES MOINES REG., Nov. 25, 1990, at J1.

52. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 506 (1956). See generally MARC BLOCH, *LA SOCIÉTÉ FÉODALE* (1939).

53. See generally JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (3d ed. 1950).

54. *But cf.* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990) (noting that "[t]he antitrust laws were enacted for 'the protection of *competition*, not *competitors*'"); Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (same).

55. See Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111, 121 (1984) (noting that "regulatory attempts to influence the structure of an industry, perhaps seeking to increase the number of firms it contains, are often doomed to failure").

III. SERFING U.S.A.

A. *The Siamese Twins of American Agricultural Law*

First, the farm.⁵⁶ America has moved to the city, but the romantic imagination of its law still lives on the farm.⁵⁷ Amid the pantheon of idols in American agricultural law, the “family farm” is the golden calf—forged from taxes (or trinkets) extracted from all and worshipped despite an evident absence of divine power.⁵⁸ Federal and state lawmakers have deployed an impressive arsenal of legal weapons designed to preserve family ownership of farmsteads in the United States. The array of state laws banning or restricting corporate farming in the American heartland⁵⁹ attempts to preserve what the Homestead Act promised in 1862:⁶⁰ an agricultural economy driven by small, ostensibly family-owned farms.⁶¹ In today’s stunningly diverse agricultural economy, there is no good reason to assume that small farms are family-owned or that family farms are small. Although incorporated farms tend to be larger than farms held as sole proprietorships,⁶² this size differential

56. Cf. Karl Marx, *The German Ideology*, in THE MARX-ENGELS READER 110, 114 (Robert C. Tucker ed., 1972) (arguing that human civilization begins not in the realm of pure thought, but with the production of means to satisfy the need for physical sustenance).

57. Cf. RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 23 (1955) (“The United States was born in the country and has moved to the city.”).

58. See generally *Exodus* 32.

59. See IOWA CODE § 9H.1-.15 (1995); KAN. STAT. ANN. §§ 17-5902 to -5905 (1995); MINN. STAT. ANN. § 500.24 (West 1990 & Supp. 1996); MO. ANN. STAT. §§ 350.010-.030 (West 1991 & Supp. 1996); NEB. CONST. art. XII, § 8; N.D. CENT. CODE §§ 10-06.1-01 to -27 (1995); OKLA. STAT. ANN. tit. 18, §§ 951-956 (West 1986 & Supp. 1996); S.D. CODIFIED LAWS §§ 47-9A-1 to -23 (Michie 1991 & Supp. 1996); WIS. STAT. § 182.001 (1992). See generally Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts*, 41 DRAKE L. REV. 393 (1992); Fred L. Morrison, *State Corporate Farm Legislation*, 7 U. TOL. L. REV. 961 (1976); Richard F. Prim, *Saving the Family Farm: Is Minnesota’s Anti-Corporate Farm Statute the Answer?*, 14 HAMLINE J. PUB. L. & POL’Y 203 (1993); Brian F. Stayton, *A Legislative Experiment in Rural Culture: The Anticorporate Farming Statutes*, 59 UMKC L. REV. 679 (1991); Martin J. Troshynski, *Corporate Ownership Restrictions and the United States Constitution*, 24 IND. L. REV. 1657 (1991).

60. 43 U.S.C. §§ 161-302 (1994) (originally enacted as The Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392, partially repealed by Federal Land Policy and Management Act of 1976, Title VII, § 702, 90 Stat. 2744, 2787); see also 16 U.S.C. § 450u (1994) (authorizing the establishment of the Homestead National Monument on the tract in Gage County, Nebraska, where Daniel Freeman claimed the first homestead under the Act).

61. See generally *American Ideology*, *supra* note 25, at 830-37 (describing the “developmental agenda” in American agricultural law as a battery of policies favoring small farms and analyzing why this agenda was economically doomed to fail).

62. As shown by the following table of data derived from the 1992 Census of Agriculture, Table 16, farms held in sole proprietorship tend to cultivate less acreage than small corporate farms (corporate farms with fewer than 11 shareholders) and much less than large corporate farms (corporate farms with 11 or more shareholders). U.S. DEP’T OF COMMERCE, 1992 CENSUS OF AGRICULTURE, UNITED STATES DATA 22 (1993). Farms in sole proprietorship so vastly outnumber corporate farms, however, that “family farms” control

reflects nothing more than business decisions within a broad and diverse class of family farmers. A trivial proportion—less than half of one percent—of all American farms are owned by nonfamily-owned corporations.⁶³ Family farmers dominate American agriculture; even in the largest sales category (more than \$500,000 in annual sales), individual farm owners operate roughly nine-tenths of the farms.⁶⁴ We thus “have every reason to believe that independent farm operators would still provide the bulk of farm production” even if “small farms disappear.”⁶⁵

The true power of the family farm lies in its emotional grip on the American cultural imagination.⁶⁶ The romantic power of the family farm vastly exceeds its actual economic impact. The words “family” and “farm” are so hard to separate in American agricultural debates that they might as well be regarded as rhetorical Siamese twins—joined from the beginning and forever inseparable, even unto death.⁶⁷

The legendary stature of the family farm obstructs honest analysis of this institution. This Article will nevertheless try. Rather than attempt a thorough assessment of every legal and social institution designed to protect the family farm, this Article will exploit the efficiency implicit not only in fractal theory⁶⁸ but also in universalist theories of mythology.⁶⁹ because every

more than three-fifths of America's farm acreage and (perhaps more importantly) nearly 1.7 million votes. *Id.*

	<i>All Farms</i>	<i>Farm Proprietorships</i>	<i>Small Corp. Farms</i>	<i>Large Corp. Farms</i>
Avg. acres per farm				
1992	491	365	1563	4793
1987	462	347	1646	6251
% of all farm acreage				
1992		63.9%	11.5%	1.5%
1987		65.1%	11.1%	1.3%

Id. It bears remembering, too, that simple farm size comparisons mask differences among the “commodities produced . . . and the disparities of scale” attributable to geographic factors—so much so that many size comparisons are simply “silly.” WILLIAM P. BROWNE ET AL., SACRED COWS AND HOT POTATOES: AGRARIAN MYTHS IN AGRICULTURAL POLICY 38 (1992).

63. The 1992 *Census of Agriculture* reported a grand total of 8,039 corporate farms not owned by a family, .42% of America's 1,925,300 farms. Nonfamily-owned enterprises constituted a mere 11.1% of the 72,567 corporate farms in the United States. U.S. DEP'T OF COMMERCE, *supra* note 62, at 22.

64. See BROWNE ET AL., *supra* note 62, at 46.

65. *Id.*

66. Cf. Morrison, *supra* note 59, at 997 (“The significance of [corporate farm] laws . . . stands not in their specific provisions, but in their symbolic character.”).

67. Indeed, the last sixteen years of public debate over the market structure of American agriculture stem from the death throes of the Carter administration. As one of his last acts as Secretary of Agriculture before the Reagan administration took command of the White House, Bob Bergland issued U.S. DEP'T OF AGRIC., A TIME TO CHOOSE: SUMMARY REPORT ON THE STRUCTURE OF AGRICULTURE (1981). As we see it, Secretary Bergland's Parthian volley invites an Assyrian counterattack. Cf. generally Part 1.

68. See generally BENOIT B. MANDELBROT, THE FRACTAL GEOMETRY OF NATURE (1983); BENOIT B. MANDELBROT, FRACTALS: FORM, CHANCE, AND DIMENSION (1977).

microsystem contains the essential characteristics of its corresponding macro-system, one can detect and analyze most of the pertinent aspects of the family farm system by looking at the operational advantages and disadvantages of the individual family farm as a business enterprise.

B. *All Eyes on the Feudal Prize*

1. *All That the (Political) Traffic Will Bear*

"[A] page of history is worth a volume of logic."⁷⁰ The history of all hitherto existing agricultural law is the history of agrarian class struggle.⁷¹ The contemporary battle between farmers, agribusiness, and consumers in the United States merely extends the class struggle between peasants, feudal lords, and the bourgeoisie in medieval and early modern Europe. But if there is any place in the political economy of the United States that has resisted the tides of historical materialism, it is the farm.⁷² It is thus fitting that we should analyze American agricultural policy as a continuation of the transition from feudalism to capitalism.

The Homestead Act of 1862⁷³ is a natural launching pad for a historical discussion of the family farm within American agriculture's legal tradition.⁷⁴ Homesteading represented one of the most important legislative responses of the Civil War Congress to the agrarian struggle that had torn North from South.⁷⁵ In a very real sense, the Homestead Act, the Emancipation Proclamation,⁷⁶ and the Department of Agriculture's organic statute⁷⁷—all

69. See JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* 365 (1st ed. 1949) ("The mighty hero of extraordinary powers . . . is each of us: not the physical self visible in the mirror, but the king within.").

70. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921); cf. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1902) ("The life of the law has not been logic: it has been experience.").

71. Cf. KARL MARX AND FRIEDRICH ENGELS, *Manifesto of the Communist Party*, in *THE MARX-ENGELS READER*, *supra* note 56, at 331, 335.

72. See generally *American Ideology*, *supra* note 25, at 810-16.

73. The Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392 (codified as amended at 43 U.S.C. §§ 161-302 (1994) and partially repealed by Federal Land Management Act of 1976, Title VII, § 702, 90 Stat. 2744, 2787).

74. See, e.g., M.C. HALLBERG, *POLICY FOR AMERICAN AGRICULTURE: CHOICES AND CONSEQUENCES* 303-23 (1992) (beginning a chronicle of federal legislation and executive orders affecting American agriculture with the Homestead Act of 1862); *American Ideology*, *supra* note 25, at 831-33 (describing the Homestead Act as an integral part of the "developmental" agenda in American agricultural law); cf. Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1274-78 (1995) [hereinafter *Agriculture's First Disobedience*] (tracing the origins of American agricultural law to the framing of the Constitution).

75. See *American Ideology*, *supra* note 25, at 830-31; *Agriculture's First Disobedience*, *supra* note 74, at 1316-19.

76. ABRAHAM LINCOLN, *EMANCIPATION PROCLAMATION* (Jan. 1, 1863), reprinted in 6 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 28 (Roy P. Basler ed., 1953).

fashioned in 1862—completed the unfinished business that was interrupted by the slavery debate at the 1787 Constitutional Convention. The prospect of owning 160 acres in fee simple promised independence to European immigrants, many of whom were still peasants within the 19th century remnants of medieval feudalism.⁷⁸ The legislative effort to supplant the Southern slave culture with the “free labor” of “paupers from all parts of the globe” thus linked the American family farm with Europe’s final transition out of feudalism during the Industrial Revolution.⁷⁹

To this day, laws influenced by the desire to protect family farming are legion.⁸⁰ The developmental legacy of 1862 continues in the land-grant college system (including cooperative extension services and agricultural experiment stations),⁸¹ Western reclamation projects,⁸² and grazing subsidies.⁸³ Subsidized credit, delivered directly by the federal government, is the modern heir to the developmental tradition;⁸⁴ the Consolidated Farm Service

77. Act of May 15, 1862, ch. 72, § 1, 12 Stat. 387 (codified as amended at 7 U.S.C. § 2201 (1994)). See generally GLADYS L. BAKER ET AL., *CENTURY OF SERVICE: THE FIRST 100 YEARS OF THE UNITED STATES DEPARTMENT OF AGRICULTURE* (1963).

78. See, e.g., VILHELM MOBERG, *THE EMIGRANTS* (Gustaf Lannestock trans., 1951) (translation of the Swedish novel, *UTVANDRARNAN*, describing the voyage undertaken by many peasant families from the Swedish province of Småland during the mid-19th century).

79. BENJAMIN H. HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* 382 (1924) (quoting a sarcastic Southern opponent of antebellum homesteading proposals).

80. In addition to this discussion, see Steven C. Bahls, *Preservation of Family Farms—The Way Ahead*, 45 *DRAKE L. REV.* 311 (1997).

81. See Morrill Act of 1862, 7 U.S.C. §§ 301-308 (1994) (authorizing grants of public land to endow universities); Hatch Act of 1887, 7 U.S.C. §§ 361a-361i (1994) (authorizing agricultural experiment stations); Smith-Lever Act of 1914, 7 U.S.C. §§ 341-349 (1994) (authorizing the performance of cooperative extension work by land-grant universities); Bankhead-Jones Act of 1935, 7 U.S.C. §§ 427, 427i (1994) (setting forth the USDA’s basic agricultural research policy); Adams Act of 1906, 7 U.S.C. §§ 361c-e, 361g, 361i (1994) (authorizing agricultural experiment stations); Purnell Act of 1925, Act of Feb. 24, 1925, ch. 308, 43 Stat. 970; cf. Smith-Hughes Vocational Education Act of 1917, 20 U.S.C. §§ 11-28 (1994) (providing federal support for agriculturally oriented vocational education in high schools).

82. See, e.g., Reclamation Act of 1902, 43 U.S.C. §§ 371-616yyyy (1994).

83. See, e.g., Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315r (1994). See generally John S. Harbison, *Hohfeld and Herefords: The Concept of Property and the Law of the Range*, 22 *N.M. L. REV.* 459 (1992).

84. See Wayne D. Rasmussen, *New Deal Agricultural Policies After Fifty Years*, 68 *MINN. L. REV.* 353, 364-68 (1983) (describing the Farmers Home Administration as the statutory successor to the Resettlement Administration and the Farm Security Administration). See generally SIDNEY BALDWIN, *POVERTY AND POLITICS: THE RISE AND DECLINE OF THE FARM SECURITY ADMINISTRATION* (1968); Rexford G. Tugwell, *The Resettlement Idea*, 33 *AGRIC. HIST.* 159 (1959). For the statutory and administrative sources creating these New Deal agencies, see Emergency Relief Appropriation Act, ch. 48, 49 Stat. 115 (1935); Exec. Order No. 7027 (April 30, 1935) (Resettlement Administration); Bankhead-Jones Farm Tenant Act, ch. 517, 50 Stat. 522 (1937) (Farm Security Administration); Farmers Home Administration Act, ch. 964, 60 Stat. 1062 (1946); cf. Exec. Order No. 7041 (May 15, 1935) (establishing, on the 73d anniversary of the original Homestead Act, a subsistence homestead program under the authority of the National Industry Recovery Act, ch. 90, § 208, 48 Stat. 195, 205 (1933)), a

Agency delivers "basic,"⁸⁵ "limited resource,"⁸⁶ and "ownership" loans⁸⁷—the contemporary equivalent of preemption rights on 160- and 320-acre homesteads. The \$10 billion annual investment in the post-New Deal commodity programs⁸⁸ sends so many contradictory repercussions throughout the economy that no one dares to count this item as an unequivocal bonus for family farmers.⁸⁹

What Congress has declined to give by way of direct spending, it freely gives through tax expenditures.⁹⁰ Dead family farmers benefit from special federal estate tax rules.⁹¹ And what Congress will not spare in appropriations or forgone revenues, it will often confer by changing the rules by which American capitalism operates. Farm cooperatives hail the Capper-Volstead Act⁹² and section 6 of the Clayton Act⁹³ as the "Magna Carta of Cooperative Marketing,"⁹⁴ even as the Supreme Court applies the federal antitrust laws to

statute that was invalidated two weeks later in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

85. See 7 U.S.C. § 1922(a) (1994) (authorizing loans for small or family farmers).

86. See 7 U.S.C. § 1934 (1994) (authorizing loans for low income small or family farms who do not qualify for a loan under 7 U.S.C. § 1922).

87. 7 C.F.R. § 1943.2 (1996) (authorizing loans to help eligible borrowers become family-farm owner-operators).

88. The \$10 billion figure is most commonly given as the best estimate of the sum of income deficiency payments, incentive payments, conservation reserve payments, and the like. See, e.g., BUDGET OF THE UNITED STATES: APPENDIX—FISCAL YEAR 1995, at 149 (1995) (reporting a total of \$12,787,712,000 spent by the Commodity Credit Corporation on direct income support, price support, and supply control programs in 1993); ECONOMIC RESEARCH SERV., U.S. DEP'T OF AGRIC., ECONOMIC INDICATORS OF THE FARM SECTOR (1991); Gordon C. Rausser & David Nielson, *Looking Ahead: Agricultural Policy in the 1990s*, 23 U.C. DAVIS L. REV. 415, 422-23 (1990).

89. For two studies of impediments to delivering commodity program benefits to the intended recipient class, see Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659 (1994); Daniel A. Sumner, *Targeting Farm Programs*, CONTEMP. POL'Y ISSUES, Jan. 1991, at 93. Even agrarian populists decry the commodity programs. See, e.g., MARTY STRANGE, *FAMILY FARMING: A NEW ECONOMIC VISION* 131-34, 184-98 (1988); INGOLF VOGELER, *THE MYTH OF THE FAMILY FARM: AGRIBUSINESS DOMINANCE OF U.S. AGRICULTURE* 173-79 (1981).

90. A decision to forgo revenue is theoretically indistinguishable from a decision to subsidize through an affirmative appropriation. See generally *Tax Subsidies as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, Hearings Before the Subcomm. on Priorities and Economy in Government of the Joint Economic Comm.*, 92d Cong., 1st Sess. 48-59 (1972) (statement of Stanley S. Surrey); Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244 (1969).

91. See I.R.C. § 2032A (1994) (permitting "special use" valuation of real property held by the heir of a family farmer for federal estate tax purposes); cf. I.R.C. § 170(h) (1994); Rev. Rul. 77-414, 1977-2 C.B. 299 (1977) (establishing rules that enable family farmers to reduce their federal estate tax obligations by making contributions of farmland for qualified conservation uses).

92. 7 U.S.C. §§ 291-292 (1994).

93. 15 U.S.C. § 17 (1994).

94. THEODORE SALOUTOS, *THE AMERICAN FARMER AND THE NEW DEAL* 27 (1982).

a larger economy bound by "the Magna Carta of free enterprise."⁹⁵ Family farmers in particular enjoy an entire chapter of the Bankruptcy Code,⁹⁶ in the latest variation on American public law's longstanding theme of rescuing farmers from bad borrowing decisions.⁹⁷

At its most extreme, agrarian supremacy excuses the farm from minimum levels of workplace and ecological decency. Labor and environmental standards, so critical to the political success of the North American Free Trade Agreement,⁹⁸ by and large do not apply to the farm. Agricultural exclusions from the Fair Labor Standards Act⁹⁹ and the National Labor Relations Act¹⁰⁰ effectively grant farmers a privilege over other employers. (Of course, when farmers are themselves independent contractors within an agribusiness system, the Agricultural Fair Practices Act grants them full organizational privileges

95. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). *See generally American Ideology*, *supra* note 25, at 811-12 (discussing the benefits conferred by federal antitrust laws upon agricultural cooperatives).

96. *See* 11 U.S.C. §§ 1201-1231 (1994).

97. *See, e.g.,* STEPHEN VINCENT BENÉT, *THE DEVIL AND DANIEL WEBSTER* (1937). This tradition stretches back beyond the framing of the Constitution, which attempted futilely to prevent the states from passing general debt relief legislation. *See also* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 205-06 (1819) (discussing whether the Framers through Article I, Section 10, Clause 1 of the United States Constitution intended to forbid state bankruptcy laws which would nullify a loan contract); BENJAMIN F. WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* 4-6, 15-16, 32-33 (1938); *cf. Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 664-66 (1819) (invoking the contracts clause in repelling New Hampshire's efforts to modify the charter of a private college). The contracts clause reasserts itself in times of financial crisis in the farm sector. *See generally Agriculture's First Disobedience*, *supra* note 74, at 1276; David R. Papke, *Rhetoric and Retrenchment: Agrarian Ideology and American Bankruptcy Law*, 54 *MO. L. REV.* 871, 883-84 (1989).

98. *See* North American Agreement on Environmental Cooperation, Sept. 14, 1993, 32 *I.L.M.* 1480; North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 *I.L.M.* 1499; 19 U.S.C. § 3311(b)(2) (1994) (incorporating these so-called side agreements on environmental protection and labor standards into NAFTA); *id.* § 3471 (labor standards); *id.* § 3472 (environmental standards); Exec. Order No. 12,915, 59 *Fed. Reg.* 25,775 (1994) (implementing NAFTA's environmental side agreement).

99. *See* 29 U.S.C. § 213(a)(6) (1994) (exempting certain farm employers from the minimum wage and maximum hour provisions of the Fair Labor Standards Act); *see also* *Maneja v. Waiialua Agric. Co.*, 349 U.S. 254, 260-62 (1955) (holding that railroad workers are exempt from the Fair Labor Standards Act when the employees haul sugar cane from fields to the processing plant and transport farming supplies and farm labor throughout a plantation); *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 769 (1949) (holding that agricultural employees are not exempt from the Fair Labor Standards Act when the employees are not employed as farmers).

100. *See* 29 U.S.C. § 152(3) (1994) (excluding farmworkers from the National Labor Relation Act's definition of "employee"); *see also* *Holly Farms Corp. v. NLRB*, 116 S. Ct. 1396, 1399 (1996) (holding that "'live-haul' . . . teams of chicken catchers, forklift operators, and truckdrivers" are not agricultural employees within the meaning of the exclusion from the National Labor Relations Act); *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 300 (1977) (holding that farm truck drivers are not agricultural employees within the meaning of the exclusion from the National Labor Relations Act).

and legal protection against product handlers' coercive practices.)¹⁰¹ Similarly, like many other environmental statutes, the Clean Water Act of 1977¹⁰² contains a yawning chasm through which much on-farm pollution eludes the law; "point source[s]" under the Act do not include "agricultural stormwater discharges and return flows from irrigated agriculture."¹⁰³ Many states in the union likewise frame the "right to farm" as a blanket exemption from nuisance law, the common law's crudest tool for deterring environmentally destructive land uses.¹⁰⁴

"Since the beginning," therefore, "American agriculture has received the fattest fruits of the legislative harvest."¹⁰⁵ A farm sector fed so rich a diet of rents and statutory favors must have been training for a battle of epic dimensions. And so it has: America has fattened its farms for the fight against feudalism.

2. *Every Man a King*

The family farm retains its romantic image as the bulwark of the American declaration of independence from feudal Europe. To this day, the very flow of the debate in American agricultural circles stresses the primacy of the family farm. Tenant farming, the most common and fastest growing method of business organization in contemporary European agriculture, is the yardstick by which *failure* is measured in American agriculture and American agricultural policy.¹⁰⁶ For example, fifty-six percent of French farmers are tenants, and only forty-three percent are owner-operators.¹⁰⁷ These figures represent a rough reversal of the tenure pattern in 1970, when fifty-two percent of French farmers were owner-operators and forty-six percent were tenants.¹⁰⁸ In stark contrast, tenancy rates in American agriculture have hovered between eleven percent to twelve and one half percent of the total farm population throughout the 1970s and 1980s.¹⁰⁹ Among small farmers,

101. See Agricultural Fair Practices Act of 1967, 7 U.S.C. §§ 2301-2305 (1994); Michigan Cannery & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 464-65 (1984); Baldree v. Cargill, Inc., 758 F. Supp. 704, 707 (M.D. Fla. 1990), *aff'd without opinion*, 925 F.2d 1474 (11th Cir. 1991).

102. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.).

103. 33 U.S.C. § 1362(14) (1994); *see, e.g.*, Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 117 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995).

104. *See, e.g.*, N.C. GEN. STAT. § 106-701(d) (1995); 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).

105. *American Ideology*, *supra* note 25, at 830.

106. *See, e.g.*, Paul S. Taylor, *Public Policy and the Shaping of Rural Society*, 20 S.D. L. REV. 475, 481 n.22 (1975).

107. MINISTÈRE DE L'AGRICULTURE ET DE LA PÊCHE, GRAPH AGRI FRANCE 94, at 13 (1994).

108. *Id.* French law distinguishes between tenants and sharecroppers, who have not constituted more than two percent of that country's total farm population since 1970.

109. *See* U.S. DEP'T OF COMMERCE, ECONOMICS & STATISTICS ADMIN., BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 661 (116th ed. 1996) (reporting that tenancy rates ranged between 11.3 and 12.4 percent from 1974 to 1992). If the "tenancy rate"

defined as those farming fewer than 180 acres, seventy-five percent were *full* owners in 1987, and fewer than ten percent were tenants.¹¹⁰ The 1992 Census of Agriculture reported a nationwide tenancy rate of merely eleven percent; even the notoriously feudal state of Hawaii reported a tenancy rate of only thirty-one percent.¹¹¹

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."¹¹² Indeed, two of the other planks of the agrarian creed stem directly

is defined according to the percentage of productive farmland that is leased, then the specter of tenancy looms somewhat larger over the American agricultural horizon. Rates of farmland leasing in the United States have never dipped below 31.6 percent since the turn of the century and actually rose to a 50-year high of 42.8 percent in the *1992 Census of Agriculture*. See U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., NATURAL RESOURCES AND ENV'T DIV., AREI UPDATES: FARMLAND TENURE (1995) [hereinafter AREI UPDATES] (table 1). "Most of the leased farmland is rented to part owners," however. *Id.* Moreover, to the extent that agrarian fundamentalism is concerned with "maximiz[ing] demand for the labor of the farm sector's entrepreneurial class," the tenancy rate should be measured according to the number of tenant farmers, not the number of leased acres. *American Ideology*, *supra* note 25, at 873; see *infra* Part IV (discussing family farm protection as a full employment policy for rural America).

110. See AREI UPDATES, *supra* note 109.

111. See U.S. DEP'T OF COMMERCE, *supra* note 62, at 22. The original Polynesian settlers of the Hawaiian Islands established a feudal land tenure system, and American colonization did little to temper the feudal tendencies of Hawaiian agriculture. Cf. *Maneja v. Waialua Agric. Co.*, 349 U.S. 254 (1955) (denying the benefit of the agricultural exemption from the Fair Labor Standards Act, 29 U.S.C. § 213(a)(6), for many functions performed on a thoroughly integrated and industrialized sugar cane plantation in the Hawaii Territory). Hawaiian feudalism so tenaciously resisted change that Hawaii eventually resorted to widespread condemnation, subdivision, and resale of massive land holdings. See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 232-33 (1984). Whether the federal government owes a trust obligation to native Hawaiians, comparable to the Native American trust obligation recognized in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 591-92 (1823), remains unclear. See, e.g., *Rice v. Casetano*, 941 F. Supp. 1529, 1549-50 (D. Haw. 1996). See generally Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996) (discussing the constitutional status of native Hawaiians); U.S. GENERAL ACCOUNTING OFFICE, GAO/RCED-94-24, HAWAIIAN HOMELANDS: HAWAII'S EFFORTS TO ADDRESS LAND USE ISSUES (1994) (documenting the legal position asserted by the Interior and Justice Departments with the contradictory position asserted by Hawaiian officials).

112. DON PAARLBERG, AMERICAN FARM POLICY 3 (1964) [hereinafter FARM POLICY]; DON PAARLBERG, FARM AND FOOD POLICY, ISSUES OF THE 1980S, at 7 (1980) [hereinafter FARM AND FOOD POLICY]. See generally *American Ideology*, *supra* note 25, at 824-25 (outlining and discussing the traditional agrarian creed). As stated by Paarlberg, America's traditional agrarian creed consisted of the following tenets:

Farmers are good citizens and a high percentage of our population should be farmers.

Farming is not only a business but a way of life.

Farming should be a family enterprise.

The land should be owned by the man who tills it.

It is good "to make two blades of grass grow where only one grew before."

Anyone who wants to farm should be free to do so.

A farmer should be his own boss.

from the doctrine of farm ownership; without land ownership, a farmer could hardly “be his own boss”¹¹³ or ensure that farming is “a family enterprise.”¹¹⁴ A tenant farmer who does not “graduate” to proprietary entrepreneurship¹¹⁵ is not only a personal failure, but also a disappointment for 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.¹¹⁶

Finally, and not insignificantly, farm tenancy wears the badges and incidents of traditional Southern agriculture, a system that has not yet outgrown the legacy of slavery and sharecropping.¹¹⁷ For instance, “sharecropping,

FARM AND FOOD POLICY, *supra*, at 7.

For a modernized restatement of the creed, 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, 639 (1994) [hereinafter *Agriculture Without Farmers*]. The following statement of the farmer’s “catechism” proved worthy of a Pulitzer Prize:

What is a farmer?

A farmer is a man who feeds the world.

What is a farmer’s first duty?

To grow more food.

What is a farmer’s second duty?

To buy more land.

What are the signs of a good farm?

Clean fields, neatly painted buildings, breakfast at six, no debts, no standing water.

How will you know a good farmer when you meet him?

He will not ask you for any favors.

JANE SMILEY, *A THOUSAND ACRES* 45 (1991).

113. See FARM POLICY, *supra* note 112, at 3.

114. FARM AND FOOD POLICY, *supra* note 112, at 7.

115. The “graduation” requirement in loans administered by the former Farmers Home Administration (FmHA) offers a useful comparison. Once a farmer is able to “obtain sufficient credit elsewhere,” he or she is no longer eligible to borrow on a needs-tested or emergency basis from the FmHA’s successor agency, the Consolidated Farm Service Agency. See 7 U.S.C. § 1922(a) (1994); 7 C.F.R. § 1951.261 (1996); *United States v. Anderson*, 542 F.2d 516, 517 (9th Cir. 1976); *United States v. City of Girard*, 806 F. Supp. 196, 197 (C.D. Ill. 1992). See generally *Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994*, Pub. L. No. 103-354, § 226, 108 Stat. 3178, 3214 (codified at 7 U.S.C. § 6932 (1994)).

116. See, e.g., H.R. REP. NO. 75-149, at 96 (1937) (reporting that farm tenancy grew from 25.6 percent in 1880 to 42.1 percent in 1935, as a measure of the Homestead Act’s ineffectiveness); cf. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 598-601 nn.32-36 (1935) (documenting the growth in rates of farm tenancy in some regions during periods of low prices for farm commodities coupled with high prices for land and other agricultural inputs).

117. See *Agriculture’s First Disobedience*, *supra* note 74, at 1287-1315 (discussing the Southern agrarian tradition and the moral dilemma that this tradition poses for American agriculture at large); cf. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (acknowledging Congress’s the power under the Thirteenth Amendment to define and abolish “all badges and incidents of slavery in the United States”); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968) (defining barriers to alienation and acquisition of property as such a badge or incident of slavery).

crop lien, and other [tenacious] systems of farm tenancy" extended feudal cotton cultivation in the South well beyond the Civil War, as (mostly white) "landowners and creditors insisted" that their sharecroppers and debtors grow a crop that "always had a cash market and . . . could not be pilfered or eaten by the farmer."¹¹⁸ Although the distinctly Southern streak in American agrarianism has mostly eluded scholars who are more familiar and perhaps more comfortable with the romantic Midwestern myth of family farming,¹¹⁹ the cotton-blended fabric of American agricultural law manifests the true colors of Dixie's feudal inclinations. Even the Agricultural Fair Practices Act of 1967,¹²⁰ the Magna Carta of organizational freedom for contract farmers, expressly excludes producers of "cotton or tobacco or their products."¹²¹ The Southern states, "where the majority of contract production is occurring," have offered "virtually no [legislative] protection" to the peons of the poultry industry.¹²² Nothing testifies as strongly to the enduring grip of feudal agriculture as the spectacle of rents on peanut and tobacco quotas,¹²³ flowing quietly but steadily to passive quota holders throughout the South.¹²⁴

The birth of the family farm myth as American agriculture's Siamese twins thus represents the rhetorical death of feudalism in the United States. Agrarian entrepreneurship symbolizes *independence*, no less in the 1990s than 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 nineteenth-century immigrants to establish a new life in America, free of their ancestral links.¹²⁵ What the Statute of *Quia*

118. GILBERT C. FITE, *AMERICAN FARMERS: THE NEW MINORITY* 23-24 (1981).

119. See *Agriculture's First Disobedience*, *supra* note 74, at 1316-17.

120. 7 U.S.C. §§ 2301-2305 (1994).

121. *Id.* § 2302(e).

122. Clay Fulcher, *Vertical Integration in the Poultry Industry: The Contractual Relationship*, *AGRIC. L. UPDATE*, Jan. 1992, at 4, 6.

123. See Verner N. Grise, *The Tobacco Program and Its Effects*, *NAT'L FOOD REV.*, Jan.-Mar. 1990, at 66, 70 (reporting that tobacco quota holders commanded an average rent of 25-30 cents per pound as of 1990); James Schaub, *The Peanut Program and Its Effects*, 13 *NAT'L FOOD REV.*, Jan.-Mar. 1990, at 37, 39, 40 (reporting that peanut quota holders commanded an average rent of \$150 per ton, or 7.5 cents per pound, as of 1990); Daniel A. Sumner, *Targeting Farm Programs*, 9 *CONTEMP. POL'Y ISSUES* 93, 104 (1991) (calculating an average annual income of \$4,000 for the 100,000 holders of tobacco quotas). Peanut and tobacco program benefits continue to flow under the Federal Agricultural and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996).

124. For exemplary tobacco cases, see *McLamb v. Pope*, 657 F.2d 77 (4th Cir. 1981); *Davis v. Stewart*, 625 F.2d 1143 (4th Cir. 1980); *Price v. Block*, 535 F. Supp. 1239 (E.D.N.C. 1982). For cases illustrating the use of export and processing controls under the peanut program, see *Gold Kist, Inc. v. USDA*, 741 F.2d 344 (11th Cir. 1984); *Tom's Foods, Inc. v. Lyng*, 703 F. Supp. 1562 (M.D. Ga. 1989).

125. See R.W.B. LEWIS, *THE AMERICAN ADAM: INNOCENCE, TRAGEDY AND TRADITION IN THE NINETEENTH CENTURY* 8 (1955). Lewis describes the nineteenth-century American as an Adam, a "fundamentally innocent" and "radically new personality" who stood apart from the Old World's enervating conflicts. Emancipated from history, happily bereft of ancestry,

Emptores promised in the late thirteenth century,¹²⁶ however, may be threatened by the economic developments of the late twentieth century. Soon after victory in World War II, which gave the United States its domineering position in the world's agricultural marketplace, scholars at the Harvard Business School recognized the emergence of *agribusiness*, an industrialized, fully integrated system of food and fiber delivery that spelled the end of agriculture as an independent sector of the American economy.¹²⁷ The cult of economic and social independence, so essential to the American farmer's sense of well-being,¹²⁸ has absorbed several blows from an economy that, in two generations, slashed the farm population from twenty-five percent to less than two percent of the United States' overall population.¹²⁹

Feudalism flourishes in the presence of risk and in the absence of independence. In its European cradle, feudalism imposed "obligations of mutual aid and support" that were "absolutely necessary to the preservation of society" in the Middle Ages, in a society debilitated by the organizational difficulties of mobilizing "a small and scattered populace."¹³⁰ The institution of feudalism "arose largely out of military necessity;" Catholic Europe needed to thwart the "grave" military threat posed by the pagan Norse.¹³¹ Medieval Europe paid a high price for the "precarious security" that feudalism afforded, for city life found little succor "in the feudal system, while the peasantry had no alternative but to accept serfdom."¹³² To this day, serfdom remains a way of life in many corners of European society—a treasured way of life at that. In reunited Germany, crime, unemployment, and consumer

untouched and undefiled by the usual inheritances of family and race, American Adam could conquer the challenges of the world on his own. *Id.* at 5, 7, 9.

126. 18 Edw. I (1290); see SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 337 (2d ed. 1923).

127. See JOHN H. DAVIS & RAY A. GOLDBERG, *A CONCEPT OF AGRIBUSINESS* 2 (1957) (defining agribusiness as "the sum total of all operations involved in the manufacture and distribution of farm supplies; production operations on the farm; and the storage, processing, and distribution of farm commodities and items made from them" (emphasis added)).

128. See Curtis E. Beus & Riley E. Dunlap, *Conventional Versus Alternative Agriculture: The Paradigmatic Roots of the Debate*, 55 *RURAL SOC.* 590, 602-05 (1990) (describing the paradigmatic conflict between economic "dependence" and "independence" in agriculture).

129. Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 *NEB. L. REV.* 210, 218-20 (1993) [hereinafter *Feeding Our Future*]. As of 1992, 4,665,000 people in an overall civilian population of 253,497,000 lived on farms. U.S. DEP'T OF AGRIC., *AGRICULTURAL STATISTICS* 1993, at 353 (1993). This statistic may actually overstate the American farm population, thanks to a very lenient definition of farms. See *American Ideology*, *supra* note 25, at 822 n.66 (noting that the official definition of a farm is a place from which at least \$1,000 of agricultural products are sold in any given year); cf. BROWNE ET AL., *supra* note 62, at 38 (noting that the definition of a farm focuses on farm sales, not farm income).

130. PLUCKNETT, *supra* note 52, at 507.

131. *Id.* at 508. In time, of course, Catholic Europe converted the Norse and exported feudal institutions to the farthest reaches of the Vikings' maritime empire. See generally ÍSLENZK FORNTRIT: ÍSLENDINGABÓK OG LANDNÁMABÓK (Jakob Benediktsson ed., 1968).

132. *Id.* at 509.

shortages have inspired widespread nostalgia for the extinct *Deutsche Demokratische Republik*.¹³³

Although the Minuteman missile has replaced the medieval militia, today's United States provides a fertile breeding ground for feudalism. Internal threats have replaced the Viking menace. Universal suffrage and relative freedom of contract have supplanted villeinage and peonage. In certain respects, however, the average American finds herself no freer than her medieval counterpart. Sharp divisions separate labor, management, and capital in virtually every field of productive endeavor. Mutual dependence, not agrarian independence, is the way of all flesh in a society dominated by "shufflers of paper."¹³⁴ The difference, of course, is that all of us now have serfs. Widespread stock ownership has diffused control of the means of production over a large swath of the American population. Three of every eight American households own stocks either directly or indirectly;¹³⁵ in the fifteen years between 1980 and 1995, the percentage of American households owning mutual funds rose from six to thirty-one percent.¹³⁶ Serfdom today lies not in the individual's inability to fend off military threats on her own, but in any impediment to the acquisition and maintenance of personal wealth in a capitalistic society. In a nation of employees, economic injury does not arise from structural impediments to owning a personal business. Rather, the real economic threat—the genuine root of twenty-first-century serfdom—lies in high prices, chronic unemployment, stagflation, and tax-driven distortions. Bluntly put, it is better to be rich than to be free.

In a novel twist on the Marxist theory of history, the new feudalism is a direct outgrowth of the industrial revolution.¹³⁷ "Integration," defined as the coordination or combination of formerly separate elements of economic activity, is the practical and metaphysical opposite of "independence." Progress and integration breed each other, and together they have battered agricultural independence. Generally, the degree of economic development in any society is inversely related to the economic significance of its farmers. "The fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples" were tasks historically committed

133. See *Das Ost-Gefühl: Heimweh nach der alten Ordnung*, DER SPIEGEL, July 3, 1995, at 40 ("Stolz aufs Eigene Leben"); see also Alan Cowell, *Only Economic Jitters Unite Germans Now*, N.Y. TIMES, Oct. 3, 1995, at A10 (describing the cultural divide between East and West Germans in a period of economic retrenchment after German reunification); cf. Nathaniel C. Nash, *Little Car That Couldn't Find Love*, N.Y. TIMES, Oct. 7, 1995, at 4 (describing a renewed longing for the Trabant automobile, "a clattering, bone-rattling heap of socialist technology that was the principal mode of transportation . . . in East Germany," as a symptom of "a desire for the simpler life as [it was known] in Communist times").

134. Donald McCloskey, *Bourgeois Virtue*, 63 AM. SCHOLAR 177, 177 (1994).

135. See Shelly Branch, *Helpful Advice for the Four Groups of Novice Investors*, BUFFALO NEWS, June 20, 1994, at A11.

136. See *Mutual Funds Outnumber Stocks Trading on 2 Big Exchanges*, CHI. TRIB., April 9, 1995, at C9.

137. Cf. *American Ideology*, *supra* note 25, at 822 ("I do not accuse American agriculture of being too Marxist. My complaint is that American agriculture is not Marxist enough.")

to farmers in the United States.¹³⁸ These are tasks still performed by farmers in less developed countries. "Economic progress, however, is characterized by a progressive division of labor and separation of function."¹³⁹ Progress moves successive tasks off the farm and into the hands of economically independent entities; inputs such as tools, fertilizer, and mechanical power and virtually all value-added processing become the domain of nonfarm agribusinesses. Unchecked, the continued specialization of agricultural production reduces any one farm's ability to compete without turning to off-farm suppliers and processors—and hence reduces the farm's ability to rely on itself.¹⁴⁰

This is precisely the sense in which modernization has accelerated the decline of agriculture as an autonomous enterprise.¹⁴¹ The phenomenon embraces the entire industrialized world. Even in France, the European bastion of agricultural fundamentalism, where the *statut du fermage et du métayage* (Law of Tenant Farming and Sharecropping) jealously guards tenant farmers' rights vis-à-vis landlords,¹⁴² agriculture has progressively evolved from a simple, land-based activity regulated solely by the law of contract and property to a capital-intensive enterprise regulated like most other for-profit businesses.¹⁴³ Other members of the European Union are outstripping the French in overhauling their obsolete laws protecting tenant farmers. For instance, the United Kingdom's recent adoption of the Agricultural Tenancies Act,¹⁴⁴ represents a stark departure from the tenant-friendly *ancien régime* represented by the Agricultural Holdings Act.¹⁴⁵

138. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 761 (1957).

139. *Id.*

140. Cf. George J. Stigler, *The Division of Labor Is Limited by the Extent of the Market*, 59 J. POL. ECON. 1, 85 (1951) (observing that a firm's decision to expand or maintain an internal division of labor is contingent upon the market price of substitute labor, materials, or management).

141. Cf. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987). See generally *American Ideology*, *supra* note 25, at 824-30 (discussing the decline of agriculture as an autonomous enterprise).

142. See CODE RURAL, art. L. 411-417 (Fr.). See generally LOUIS LORVELLEC, DROIT RURAL 65-113 (1988) (discussing the computation of rents under the *statut du fermage et du métayage*); François Collart-Dutilleul, *Quelle Evolution pour les Baux Ruraux?*, 234 REVUE DE DROIT RURAL 306-07 (June-July 1995) (discussing possible changes in the computation of rents under the *statut du fermage et du métayage*).

143. See Louis Lorvellec, *Rapport de Synthèse*, 233 REVUE DE DROIT RURAL 251, 252 (May 1995); Louis Lorvellec, *French Agricultural Law and Diversification*, 45 DRAKE L. REV. 455 (1997); cf. Isabelle Couturier, *Remarques d'actualité sur la définition de l'activité agricole*, 249 REVUE DE DROIT RURAL 15 (1997) (noting how the transformation of the rural economy has forced French law to redefine agricultural activities).

144. Agricultural Tenancies Act, 9 May 1995, ch. 8 (U.K.).

145. Agricultural Holdings Act, 16 March 1986, ch. 5 (U.K.). See generally Christopher P. Rodgers, *Diversifying the Farm Enterprise: Alternative Land Use and Land Tenure Law in the U.K.*, 45 DRAKE L. REV. 471, 472 (1997) (describing the "considerable security of tenure and additional statutory rights" granted to tenants under the Agricultural Holdings Act of 1986 and contrasting that system with the relatively deregulated scheme imposed by the Agricultural Tenancies Act of 1995).

A quick glance at the American agricultural landscape discloses a deeply ingrained (and arguably justified) fear of the new feudalism. The practice of coordinating multiple producers by contract, well established in the American poultry industry¹⁴⁶ and en route to becoming a way of life for pork producers, is drawing increasingly vocal criticism in rural communities as a form of modern "feudalism."¹⁴⁷ A long line of production contract disputes dating back to the poultry antitrust litigation of the 1970s has established that an integrator effectively "owns" the contract farmer in many of the ways in which the feudal lord "owned" the serf.¹⁴⁸ "Us folks in the chicken business," complained one poultry producer at the height of the corporate wars to conquer the broiler market, "are the only slaves left in this country."¹⁴⁹

The new crop of state statutes regulating contract production acknowledges the ongoing class war between agribusiness giants and their indentured farmers.¹⁵⁰ If realized, the prospect that new forms of patented biotechnology will accelerate the "industrialization" of agriculture would represent a declaration of war on grain production, one of the last bastions of economic independence in American agriculture.¹⁵¹ Farm tenancy (at least as measured by leased acres), the classic indicator of agrarian nonindependence, has been rising slowly but steadily.¹⁵² At the level of individual farm management, production contract disputes have rudely disrupted agrarian dreams of mana-

146. See, e.g., Floyd A. Lasley et al., THE U.S. BROILER INDUSTRY (U.S. Dep't of Agric., Econ. Research Serv. Rep. No. 591 1988); Clay Fulcher, *Vertical Integration in the Poultry Industry: The Contractual Relationship*, AGRIC. L. UPDATE, Jan. 1992, at 4.

147. See, e.g., Looker, *supra* note 51, at A1; Sullivan, *supra* note 51, at J1, J2.

148. See National Broiler Mktg. Ass'n v. United States, 436 U.S. 816 (1978); see also Braswell v. ConAgra, Inc., 936 F.2d 1169 (11th Cir. 1991); Baldree v. Cargill, Inc., 758 F. Supp. 704 (M.D. Fla. 1990), *aff'd*, 925 F.2d 1474 (11th Cir. 1991); Smith v. Central Soya of Athens, Inc., 604 F. Supp. 518 (E.D.N.C. 1985). Concerning the antitrust litigation of the 1970s, see generally Charles Gordon Brown, United States v. National Broiler Marketing Association: *Will the Chicken Lickin' Stand*, 56 N.C. L. REV. 29 (1978). For further discussion of the production contract litigation of the 1980s and 1990s, see generally Randi Ilyse Roth, *Redressing Unfairness in the New Agricultural Labor Arrangements: An Overview of Litigation Seeking Remedies for Contract Poultry Growers*, 25 U. MEM. L. REV. 1207 (1995).

149. HARRISON WELLFORD, SOWING THE WIND 101 (1972) (quoting Crawford Smith, an "Alabama contract farmer").

150. IOWA CODE § 9H.2 (1995) (restricting livestock processors' ability to own and operate feedlots). See, e.g., MINN. STAT. ANN. §§ 17.90-98, 514.945 (West 1990 & Supp. 1996) (attempting to protect contract farmers by requiring agricultural contractors to participate in alternative dispute resolution, to guarantee the recovery of capital invested by a contract farmer, to be exposed to parent company liability, and to honor an implied promise of good faith). See generally Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. MEM. L. REV. 1051 (1995).

151. See Neil D. Hamilton, *Why Own the Farm When You Can Own the Farmer (and the Crop)?: Contract Production and Intellectual Protection of Grain Crops*, 73 NEB. L. REV. 48 (1994); Neil D. Hamilton, *Who Owns Dinner: Evolving Legal Mechanisms for Ownership of Plant Genetic Resources*, 28 TULSA L.J. 587 (1993).

152. See *Feeding Our Future*, *supra* note 129, at 219. For a discussion of tenancy rates and their significance, see *supra* notes 106-11 and accompanying text.

gerial independence. Some contract farmers have miscalculated the degree to which their agribusiness bosses have shifted market risks on producers as a class.¹⁵³ Although production contracts do give farmers a more predictable income stream and superior access to capital and nonfarm inputs, they exact a price in managerial freedom. Moreover, agribusiness contractors often invite or induce their producers to invest heavily in specialized equipment, only to terminate the contractual relationship before the producers can recoup this sunk investment.¹⁵⁴ Some states thus regulate the termination of the feudal farming relationship,¹⁵⁵ as if the contract farm were a public utility¹⁵⁶ or a retail franchisee.¹⁵⁷

C. Onward Agrarian Soldiers

Fear of feudalism is thus the prime mover in American agricultural policy, and the family farmer has become our happy warrior. Let us now, any contrary evidence notwithstanding, indulge the assumption that family farms are small farms. We may have assumed our truth, but can we keep it? In other words, is a family farm system—an agricultural system in which a substantial portion of farms will remain small and hence susceptible to family ownership and management—“sustainable” in any meaningful sense?

Economic theory, backed by the verdict of history, dictates a negative answer. Strictly defined, “sustainable agriculture” consists of “processes involving biological activities of growth or reproduction intended to produce crops, which do not undermine our future capacity to successfully practice agriculture” and which do not “exhaust any irreplaceable resources which

153. See, e.g., *Myron Soik & Sons, Inc. v. Stokely USA, Inc.*, 498 N.W.2d 897 (Wis. Ct. App.) (involving a passed acreage clause under which an agribusiness purchaser could decline to take a corn crop that was otherwise fit for harvest).

154. See, e.g., *Smith v. Central Soya of Athens, Inc.*, 604 F. Supp. 518 (E.D.N.C. 1985). In *Smith*, the plaintiffs alleged that the defendants induced them to build four poultry houses by representing that the defendants would supply chickens for the houses. *Id.* at 521. The plaintiff's amended complaint alleged that the defendants later refused to provide additional chickens, thereby breaching their promise and damaging the plaintiffs. *Id.* The court dismissed the plaintiff's complaint for failing to rebut the presumption created by the merger clause in the contract and for failing to state a claim of violation under North Carolina Unfair and Deceptive Trade Practices Act. See *id.* at 531.

155. See, e.g., MINN. STAT. ANN. § 17.92 (West Supp. 1996) (restricting the ability of contractors to “terminate or cancel a contract that requires a producer of agricultural commodities to make a capital investment in buildings or equipment that cost \$100,000 or more and have a useful life of five or more years”).

156. Cf. STEPHEN BREYER, *REGULATION AND ITS REFORM* 15-20, 29-32 (1982) (identifying these arguments as components of traditional arguments over the natural monopoly and excessive competition rationales for regulation).

157. Cf. ARK. CODE ANN. §§ 4-72-302 to 4-72-309 (Michie 1987) (protecting retail franchisees); WASH. REV. CODE ANN. §§ 19.100.010 to .940 (West 1995 & Supp. 1996) (protecting franchisees' investments from early or fraudulent termination by franchisers). See generally *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (upholding a state-law franchisee protection scheme against procedural due process and Sherman Act challenges).

are essential to agriculture."¹⁵⁸ As a strictly ecological goal, sustainable agriculture does not necessarily favor "small or family farmers instead of large corporate farms."¹⁵⁹ At best, the confused and confusing merger of environmental objectives with concerns over farm size testifies to the intellectual bankruptcy of American farm policy.¹⁶⁰ At worst, the "considerable political support and federal funding" for sustainable agriculture may signal yet another obnoxious instance of political capture, a revival of "agricultural fundamentalism" in quasi-environmental garb.¹⁶¹

For too long, the agriculturally illiterate public has succumbed to the deceptively "soft-focus," romantic view of agriculture as a bucolic landscape of "little houses on the prairie."¹⁶² For this tragedy, we may blame agricultural policymakers: legislative, judicial, and scholarly paeans to the virtues of the family farm are legion,¹⁶³ even as overt opponents of environmental pro-

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

159. COUNCIL FOR AGRIC. SCIENCE AND TECH., SUSTAINABLE AGRICULTURE AND THE 1995 FARM BILL 9-10 (Special Pub. No. 18, April 1995). *But cf. Agriculture Without Farmers*, *supra* note 112, at 645-46 (arguing that the definition of sustainable agriculture "must also consider the farmers, their families, and the rural communities which make up the cultural structure of an agrarian system").

160. *Cf. Agriculture Without Farmers*, *supra* note 112, at 623 (asking whether standard defenses of current farm policy rest on "nothing more than inertia and familiarity").

161. Donald E. Voth, *A Brief History and Assessment of Federal Rural Development Programs and Policies*, 25 U. MEM. L. REV. 1265, 1287 (1995) (stating that "[i]t is too early to know exactly" whether sustainable agriculture will merely "result in another form of agricultural fundamentalism"). For more extensive criticisms of the unthinking use of economic regulation of agriculture as a backhanded method for making environmental policy, see *American Ideology*, *supra* note 25, at 863-73; Jim Chen, *The Agroecological Opium of the Masses*, 10:4 CHOICES 16 (1995) [hereinafter *Agroecological Opium*]; Jim Chen, *Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation*, 48 OKLA. L. REV. 333 (1995) [hereinafter *Get Green or Get Out*].

162. WILLARD W. COCHRANE & C. FORD RUNGE, REFORMING FARM POLICY: TOWARD A NATIONAL AGENDA 21 (1992). For a more realistic taste of the social upheavals underlying *The Little House on the Prairie*, consider that book's cold statement of social priorities in the age of homesteading: "When white settlers come into a country, the Indians have to move on. . . . White people are going to settle all this country, and we get the best land because we get here first and take our pick." LAURA INGALLS WILDER, *THE LITTLE HOUSE ON THE PRAIRIE* 237 (1953).

163. See, e.g., *MSM Farms, Inc. v. Spire*, 927 F.2d 330, 332-33 (8th Cir. 1991) (arguing that the decline of the family farmer might "lead to absentee landowners and tenant operation of farms," "would adversely affect the rural social and economic structure, and would result in decreased stewardship and preservation of soil, water, and other natural resources"); *United Family Farmers, Inc. v. Kleppe*, 418 F. Supp. 591, 594 n.4 (D. S.D. 1976) (quoting a family farm organization's mission statement, which equated "the continued health and vitality of the family farm unit" with "the future of . . . our natural environment and resources"); *Hurd v. Commissioner*, 37 T.C.M. (CCH) 499 (1978) (describing the owner of a family-held ranch as having "a lifelong interest in conservation" and as holding a "belie[f] that he is merely the 'steward' of his land, not the owner, and that he has an obligation to return his land in better condition than when he received it"); (emphasis added). MINN. STAT. ANN. § 500.24(1) (West 1990) (describing "the family farm" as "the most socially desirable mode of agricultural production" and the font of all "well-being of rural society in Minnesota"); *Struckhoff v. Echo Ridge Farm, Inc.*, 833 S.W.2d 463, 466 (Mo. Ct. App. 1992) (arguing that the preservation of

tection are capturing and redefining the nebulous terms “family farming” and “stewardship.”¹⁶⁴ Till “God’s in his heaven”¹⁶⁵ and “all’s right with the world,” however, legal experts do well to shun unrhymed, unmetered romantic poetry in favor of critical scholarship. “[W]hen everyone is wonderful, what is needed is a quest for evil”¹⁶⁶—or at least a realistic quest to unlock both the mystery and the mastery of the family farm.¹⁶⁷ Thus, in order to predict the fortunes of the family farm, we now turn from ecology to economics—of the “dismal sciences” of the modern era.¹⁶⁸

IV. FAMILY MATTERS

A. *The Family That Tills Together*

The ideology of the family farm posits that the scale and scope of individual farms should be determined by factors within a family, not dictated by extrinsic economic factors. From the perspective of an individual family, the private benefits of such freedom are clear. What the public stands to gain from a system of small, family-owned farms, however, is very poorly articulated.¹⁶⁹

Ideally, a family farm system delivers both political and economic autonomy. Although Thomas Jefferson owned slaves and planted tobacco in a distinctly feudal fashion, agrarian commentators routinely invoke the third

a family farm “would benefit the public through high production and profitability”); 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 LAW & INEQ. J. 417, 423 (1993) (arguing that industrial farms, in contrast with family farms, lack a personal link to the land). See generally *Feeding Our Future*, *supra* note 129, at 225-40 (describing the origins of “stewardship” duties that are attached to the ownership and use of farmland).

164. 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’”).

165. ROBERT BROWNING, *Pippa Passes*, in *PIPPA PASSES, AND OTHER POETIC DRAMAS* 257, 273 (1833-1842).

166. WALKER PERCY, *Lancelot* 138 (1977).

167. Cf. Jim Chen, *The Mystery and the Mastery of the Judicial Power*, 59 MO. L. REV. 281, 294 (1994) (urging the use of “new divining tools” in the quest to predict how courts and other interpreters of law will behave).

168. See DONALD WORSTER, *NATURE’S ECONOMY: A HISTORY OF ECOLOGICAL IDEAS* 114, 150 (2d ed. 1985) (describing economics after Thomas Malthus and ecology after Charles Darwin as “the dismal science[s]”).

169. See Bahls, *supra* note 80, at 328 (“One of the reasons for the general ineffectiveness of [family farm] policies is the lack of clarity about why governments should protect the family farm.”).

President's romantic vision of yeoman farmers as the foundation of what we now call Jeffersonian democracy.¹⁷⁰ "Those who labour in the earth are the chosen people of God," wrote Jefferson, who saw in the "breasts" of the yeoman a "peculiar deposit" of "substantial and genuine virtue."¹⁷¹ According to Jefferson's vision, if each farm could be a self-sustaining enterprise, and if a substantial portion of the populace could find gainful employment as independent farmers, the newborn country's political scene would never fall victim to the power-seeking schemes of massive economic concerns. Hence another crucial element of the traditional agrarian creed: "Farmers are good citizens and a high percentage of our population should be on farms."¹⁷²

Critically, keeping farms small tends to maximize certain jobs, especially of the entrepreneurial variety. Full employment is an essential element of left-of-center political agendas. Indeed, for those who "weigh gains for the relatively disadvantaged quite heavily, while believing that gains for the relatively prosperous have few real utility effects," any degree of "unemployment is *the* economic problem."¹⁷³ Because available acreage is the ultimate constraint on farm size, limiting farm size maximizes entrepreneurial opportunities in agriculture.¹⁷⁴ But farm entrepreneurship is a peculiar form of employment, and thus, in many eyes, a peculiarly desirable form of employment. The individual *farm* as a self-standing *firm* unites labor and management under one umbrella; an independent farmer is by definition his or her own boss. Finally, as if entrepreneurial independence were not enough

170. See, e.g., A.V. KREBS, *THE CORPORATE REAPERS: THE BOOK OF AGRIBUSINESS* 241-52, 399-403 (1992) (invoking Jefferson as the inspiration for a vision of "farmers as barriers to the destructuring of democracy"); WILLIAM B. WHEELER, *Jeffersonian Thought in an Urban Society*, in *THE AGRARIAN TRADITION IN AMERICAN SOCIETY* 36-49 (1976); Neil D. Hamilton, *Reaping What We Have Sown: Public Policy Consequences of Agricultural Industrialization and the Legal Implications of a Changing Production System*, 45 *DRAKE L. REV.* 289, 309 & n.81 (1997) (urging public support for policies "closest to the Jeffersonian agrarian ideals which historically shaped American agriculture"); Linda A. Malone, *Reflections on the Jeffersonian Ideal of an Agrarian Democracy and the Emergence of an Agricultural and Environmental Ethic in the 1990 Farm Bill*, 12 *STAN. ENVTL. L.J.* 3, 4-7 (1993) (describing Jefferson's agrarian philosophy, particularly the political organization of his ideal agrarian democracy); David Myers, *Farmland Preservation in a Democratic Society: Looking to the Future*, 1981-82 *AGRIC. L.J.* 605, 607 ("Although we remain predominantly an urban society, a nostalgia persists for those Jeffersonian notions about the good life in Rural America . . .").

171. See THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 164-65 (William Peden ed., 1954).

172. *FARM POLICY*, *supra* note 112, at 3; *FARM AND FOOD POLICY*, *supra* note 112, at 7.

173. Kelman, *supra* note 18, at 1224-25 (footnotes omitted) (emphasis in original); cf. *Law As Industrial Policy*, *supra* note 18, at 1333-35, 1352-54 (arguing that American policymakers' rigid view of the labor union movement has obstructed creative solutions to traditional labor-management disputes and prevented an honest assessment of wage-push inflation).

174. See, e.g., Earl O. Heady, *Public Policies in Relation to Farm Size and Structure*, 23 *S.D. L. REV.* 608, 611 (1978) ("The American public, particularly its rural sector, has long professed faith in the family farm and the belief that its policies restrained farm size, thus providing an opportunity for more families to engage in farming.").

to attract new farmers or keep old ones, land ownership allows farmers to capitalize long-run growth in one form of durable, marketable property. Possession may be nine-tenths of the law, but landownership is almost three-fourths of the farm: seventy-four percent of the American farm business balance sheet is reflected in the value of real estate.¹⁷⁵ Not surprisingly, family farm advocates characterize land as "the central issue" in economic discussions of agriculture.¹⁷⁶

As a program for maximizing employment, small farm policy is profoundly snobbish. Jim Hightower, former Texas Commissioner of Agriculture and one of America's fiercest agrarian firebrands, argues that sheltering small farms from economic harm preserves one sure-fire form of gainful employment for those who are either unable or unwilling to complete college.¹⁷⁷ You don't need a P-h-D to do the j-o-b, says the Texas populist. Underneath the romanticism, however, lurks a deep disrespect for farming. The American agricultural tradition rests on the assumption that "[a]nyone . . . could farm:" wherever and whenever farming is "not viewed as a profession, but as a round of drudgery and monotony . . . to avoid," the only person stupid enough to take up farming will be regarded as "a blockhead or a dunce."¹⁷⁸

Case law decided under the Uniform Commercial Code speaks volumes of American law's paternalistic attitude toward the farmer.¹⁷⁹ The Code's definition of a "merchant," which controls several crucial issues in the law of sales,¹⁸⁰ broadly includes any "person who deals in goods of the kind or oth-

175. See ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., *Agricultural Income and Finance: Situation and Outcome Report No. AIS-57*, app. at table 9 (June 1995).

176. STRANGE, *supra* note 89, at 43.

177. See JIM HIGHTOWER, *HARD TOMATOES, HARD TIMES* (2d ed. 1978). For secondhand reports on Hightower's traveling populist show, see Fred Bruning, *High-Spirited Hightower Rides the Waves: Liberal Texan Shares Populist View Via Radio*, HOUSTON CHRON., March 31, 1993, at 3D; Ronald B. Taylor, *Texas' New-Style Agriculture Commissioner: Jim Hightower Carries His Message of a New Populist Movement Nationwide*, L.A. TIMES, Dec. 19, 1985, § 5, at 40.

178. FITE, *supra* note 118, at 11. See generally H.L. MENCKEN, *PREJUDICES: FOURTH SERIES 43-60* (1924) (unleashing perhaps the most vicious attack on farmers in the history of American letters).

179. See Bahls, *supra* note 80, at 318 (noting how "[s]tate court judges . . . display a tendency to protect the family farm," especially in times of financial crisis); cf. Marc Linder, *Paternalistic State Intervention: The Contradictions of the Legal Empowerment of Vulnerable Workers*, 23 U.C. DAVIS L. REV. 733, 755-58 (1990) (analyzing the paternalistic motivations that underlie legislation on migrant and seasonal farmworkers).

180. See, e.g., U.C.C. § 2-103(1)(b) (duty of good faith), § 2-201(2) (statute of frauds), § 2-205 (firm offers), § 2-207 (additional terms in confirmatory memoranda), § 2-209 (modifications), § 2-314(1) (warranty of merchantability), § 2-327(1)(c) (duty to follow instructions when returning goods sold on approval), § 2-603 (duties as to rightfully rejected goods), § 2-605 (waiver of buyer's objections by failure to particularize), § 2-609(2) (right to adequate assurance of performance). See generally Jim Chen, *Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant*, 27 TEX. INT'L L.J. 91, 106-07 (1992); Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve The Good, The True, The Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1144-46 (1985).

erwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in [a sales] transaction."¹⁸¹ A shockingly large number of courts presented with this issue have concluded that farmers are, as a matter of law, "tillers of the soil" rather than merchants.¹⁸² Agrarians cannot have it both ways: either the freehold farmer is an inherently superior manager, subject to all of the rights and obligations of full-fledged membership in the mercantile community of commerce, or the farmer is a judicially protected ward in one of the common law's various categories of individuals who are considered incompetent to enter binding contracts.¹⁸³ Suffice it to say that America has treated agricultural entrepreneurship as the economic refuge of the scoundrel—and this in a nation assembled from the rest of the world's tired, poor, huddled, and wretched outcasts.¹⁸⁴ No wonder American agricultural policies are often criticized as obsessively "focused on losers."¹⁸⁵

In order to regulate the number of entrepreneurial jobs in agriculture in an economy that would otherwise compress such jobs within a feudal system of agribusiness, the federal government and the states have turned to their battery of programs for protecting the family farm against external competition. To the extent that these policies have successfully met their objectives, they have reduced the size of individual farms in the United States and enhanced the prospects that each family-owned farm will continue to be owned and operated by a member of the family for another generation. In

181. U.C.C. § 2-104(1) (1989).

182. See *Pierson v. Arnst*, 534 F. Supp. 360 (D. Mont. 1982); *Cook Grains, Inc. v. Fallis*, 395 S.W.2d 555 (Ark. 1965); *Loeb & Co., Inc. v. Schreiner*, 321 So. 2d 199 (Ala. 1975); *Oloffson v. Coomer*, 296 N.E.2d 871 (Ill. App. Ct. 1973); *Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n*, 555 S.W.2d 61 (Mo. Ct. App. 1977); *Terminal Grain Corp. v. Freeman*, 270 N.W.2d 806 (S.D. 1978); *Lish v. Compton*, 547 P.2d 233 (Utah 1976) (all cases holding that farmers are *not* "merchants" under the UCC). *But see* *Continental Grain Co. v. Harbach*, 400 F. Supp. 695 (N.D. Ill. 1975); *Bradford v. Northwest Ala. Livestock Ass'n*, 379 So. 2d 609 (Ala. Civ. App. 1980); *Colorado-Kansas Grain Co. v. Reifschneider*, 817 P.2d 637 (Colo. Ct. App. 1991); *Sierens v. Clawson*, 328 N.E.2d 559 (Ill. 1975); *Campbell v. Yokel*, 313 N.E.2d 628 (Ill. App. Ct. 1974); *Ohio Grain Co. v. Swisshelm*, 318 N.E.2d 428 (Ohio Ct. App. 1973); *Cargill, Inc. v. Gaard*, 267 N.W.2d 22 (Wis. 1978) (all cases holding that farmers are "merchants" under the UCC). The Iowa Supreme Court has managed to straddle both sides of the debate. *Compare* *Sand Seed Serv., Inc. v. Poeckes*, 249 N.W.2d 663 (Iowa 1977) (holding that farmers are not merchants) *with* *Dotts v. Bennett*, 382 N.W.2d 85 (Iowa 1986) (stating that farmers may be merchants). Kansas courts have differed as well. *Compare* *Decatur Coop. Ass'n v. Urban*, 547 P.2d 323 (Kan. 1976) (holding that farmers are not merchants) *with* *Musil v. Hendrich*, 627 P.2d 367 (Kan. 1981) (holding that farmers may be merchants). See generally Jan W. Henkel & Peter J. Shedd, *Article 2 of the Uniform Commercial Code: Is a Farmer a "Merchant" or a "Tiller of the Soil"?*, 18 AM. BUS. L.J. 323 (1980).

183. See RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981) (describing mental illness or defect as a basis for voiding contractual duties).

184. EMMA LAZARUS, *The New Colossus*, in 1 THE POEMS OF EMMA LAZARUS 202, 203 (1895) ("Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore.")

185. D. Gale Johnson, *U.S. Agricultural Programs as Industrial Policy*, in INDUSTRIAL POLICY FOR AGRICULTURE IN THE GLOBAL ECONOMY 307, 308 (S.R. Johnson & S.A. Martin eds., 1993).

the aggregate, however, such policies also strain individual farms' access to new, external sources of financial and human capital. We now consider whether this loss undermines the stated purposes of family farm protection.

B. A Capital Offense

Seven decades ago, Bertrand Russell condemned the existence of a "social and hereditary" system for allocating professional opportunities as "a deplorable waste of talent."¹⁸⁶ He described agriculture as the paradigmatic profession that operates according to such a hereditary "principle of selection."¹⁸⁷ Russell wrote, "Farmers are selected mainly by heredity: as a rule, they are the sons of farmers."¹⁸⁸ Russell's criticism, of course, presumes that "a diploma in scientific agriculture" is more valuable than the human capital that is accumulated and transmitted within farm families.¹⁸⁹ Nevertheless, his resistance to the hereditary allocation of agricultural jobs reinforces American society's general preference for competition over incumbent protection.¹⁹⁰

At bottom, public protection of family farming represents an attempt to assign entrepreneurial opportunities by blood ties. If the truth be told, the family farming ethos is but degrees removed from the feudal institution of male primogeniture;¹⁹¹ a substantial number of farm women continue to "perform[] the 'traditional' farm wife tasks of running farm related errands and bookkeeping in addition to their [conventional] role in the family."¹⁹² Reserving entrepreneurial farm jobs for farmers' sons and sons-in-law may help preserve the "tourist-oriented charm" of a farm-dominated country-

186. BERTRAND RUSSELL, *EDUCATION AND THE GOOD LIFE* 306 (1926).

187. *Id.*

188. *Id.* at 307.

189. *Id.*

190. *See, e.g.,* *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) ("Plainly it is not the purpose of the [Communications Act of 1934] to protect a [broadcast] licensee against competition but to protect the public."); *cf. U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1843, 1871 (1995) (acknowledging that periodic occupational turnovers "may provide for the infusion of fresh ideas and new perspectives" in the election of public officials).

191. *See generally* PLUCKNETT, *supra* note 52, at 527-30, 714.

192. Susan A. Schneider, *Who Owns the Family Farm? The Struggle to Determine the Property Rights of Farm Wives*, 14 N. ILL. U. L. REV. 689, 691-92 n.12 (1994); *see also* RACHEL A. ROSENFELD, *FARM WOMEN* 269-71 (1985) (surveying women's participation in day-to-day farm operations); *cf. Wisconsin v. Yoder*, 406 U.S. 205, 211 (1972) (describing the agrarian Amish culture as one marked by a strict division of labor between farmers and housewives); HELEN E. FISHER, *ANATOMY OF LOVE: THE NATURAL HISTORY OF MONOGAMY, ADULTERY, AND DIVORCE* 274-91 (1992). Fisher links the origins of modern gender inequality with the invention of the plow and the emergence of agriculture: "The Plow. There is probably no single tool in human history that wreaked such havoc between women and men . . ." *Id.* at 278.

side,¹⁹³ but it is hardly a formula for equitable or efficient allocation of professional talents.¹⁹⁴

Moreover, fixing professional status by blood offends the idea of what it means to be American. Although "something very worth while largely disappeared from our national life when the once prevalent familial system" of business "went out and was replaced by the highly impersonal corporate system[,] that loss cannot legitimately "be repaired . . . by legislation framed or administered to perpetuate family monopolies of . . . private occupations."¹⁹⁵ Such discrimination may not "be consciously racial in character,"¹⁹⁶ but it does bear noting that family farm preferences in a nation whose farm operators are roughly ninety-eight percent white¹⁹⁷ "create in their aggregate a *de facto* preference for white enterprise."¹⁹⁸ Regardless of the degree to which racial disparities pollute American farm policy, many of the objections to a hierarchy "founded on blood relationship" draw their power from the morality that opposes race-based caste systems.¹⁹⁹ In this regard, the morality of American agricultural law is peculiar, perhaps unique. Alumni preferences in university admissions, the academic equivalent of family farm preferences, have been justly condemned as affirmative action for well-to-do white elites.²⁰⁰ "[P]olite society" today simply "does not tolerate a 'family farm' approach to law faculty hiring or civil service job testing."²⁰¹

193. *City of New Orleans v. Dukes*, 427 U.S. 297, 303-06 (1976) (per curiam) (upholding a "grandfather clause" that prevented newcomers from challenging established pushcart vendors in the French Quarter of New Orleans).

194. *Cf. Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding a statute that prohibited any woman from working as a bartender unless she was the wife or daughter of the bar owner on the following rationale: "[O]versight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight."), *overruled*, *Craig v. Boren*, 429 U.S. 190, 210 n.23 (1976).

195. *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 566 (1947) (Rutledge, J., dissenting). See generally DANIEL J. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 20-34 (3d ed. 1966) (describing the rise of a distinctly American system of manufacturing and industry, especially in New England, based on interchangeability and flexibility rather than European-style craftsmanship).

196. *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. at 566 (Rutledge, J., dissenting); *cf. Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). *But cf. Agriculture's First Disobedience*, *supra* note 74, at 1282-86, 1306-08, 1320-26 (arguing that agricultural policy in an economy whose farmers are 98% white cannot be expunged of all racial overtones); *American Ideology*, *supra* note 25, at 827-28, 843, 850-51 (same).

197. U.S. DEP'T OF COMMERCE, *supra* note 62, at 22 (reporting 43,487 nonwhites among 1,925,300 farm operators in the United States in 1992); *American Ideology*, *supra* note 25, at 843 n.186; *Agriculture's First Disobedience*, *supra* note 74, at 1306-07.

198. *Agriculture's First Disobedience*, *supra* note 74, at 1307.

199. *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. at 566 (Rutledge, J., dissenting).

200. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 404 (1978) (Blackmun, J., concurring in the judgment in part and dissenting in part); Willie L. Brown, Jr., *Race Relations in the U.S., Circa 1992*, 36 HOW. L.J. 227, 229 (1993).

201. *Agriculture's First Disobedience*, *supra* note 74, at 1308.

On the other hand, if we cast family farming protection in its most benign light, we might see that the system is designed to shelter something intangible in our agriculture, some mysterious human factors intermingled with tilled soil and spilled animal blood. Agrarian scholars have long awarded rhetorical primacy to “cultural” knowledge (which is transmitted primarily within families) over “scientific” knowledge (which is freely transmitted within networks defined by common intellectual ties rather than blood kinship).²⁰² The title of Wendell Berry’s anti-industrialist *magnum opus* says it all—*The Unsettling of America: Culture and Agriculture*.²⁰³ As bastions of “learning by doing,” 4-H Clubs and land-grant universities are sometimes regarded as rural counterweights to the “book learning” treasured by the urban elite.²⁰⁴

To profit from Russell’s criticism of professional selection by heredity, however, we need not resolve all at once the long-running debate over the relative merits of cultural and scientific knowledge.²⁰⁵ It suffices to note that

202. Cf. *Agriculture Without Farmers*, *supra* note 112, at 645 (“It is the people in an agricultural system who act as the transfer agents for knowledge and wisdom across generations.”).

203. WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE* (1977).

204. See, e.g., HENRY S. BRUNNER, *LAND-GRANT COLLEGES AND UNIVERSITIES: 1862-1962*, at 3 (1966) (arguing that the Morrill Act and its legislative history envisioned college-level “instruction relating to the practical activities of life” as “[a] protest against the then characteristic dominance of the classics in higher education”). But cf. 7 U.S.C. § 304 (1994) (explicitly directing land-grant universities *not* to “exclud[e] other scientific and classical studies” outside their core mandate “to teach such branches of learning as are related to agriculture and the mechanic arts”); *American Ideology*, *supra* note 25, at 862 (arguing that 7 U.S.C. § 304 effectively charges land-grant universities to promote the consumer interests of the “industrial classes” over the “subordinate goal” of “[p]reserving returns on the agricultural sector’s human capital”).

205. That debate has already generated more heat than light in the “Seed Wars” for control of the world’s plant genetic resources. Roughly speaking, scientific knowledge in agriculture stems from deliberate human modifications of natural processes and is readily protected as intellectual property in the capitalist legal regimes of Northern and Western nations. See, e.g., 17 U.S.C. §§ 101-1101 (1994). On the other hand, cultural knowledge in agriculture usually resides in communal traditions and is favored by agrarian advocates who (1) fear economic and cultural dominance by the industrialized North and West and (2) seek to ensure that Third World farmers retain control of their accumulated cultural knowledge.

The International Convention for the Protection of New Varieties of Plants (UPOV Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) of the Uruguay Round typify international regimes for protecting scientific agricultural knowledge. See UPOV Convention, as revised at Geneva on March 19, 1991, UPOV Pub. No. 221(E); TRIPs Agreement, *opened for signature*, April 15, 1994, Annex 1C to the General Agreement on Tariffs and Trade, in GATT Secretariat, *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS*, GATT Sales No. 1994-4 (1994). The notions of “farmers’ rights” under the Biodiversity Convention and the International Undertaking on Plant Genetic Resources seek to safeguard “cultural” agricultural knowledge. See United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818; *International Undertaking on Plant Genetic Resources, Report of the Conference of the Food and Agriculture Organization of the United Nations*, 22d Sess., U.N. Doc. C/83/REP (1985); *Interpretation of the International Undertaking on Plant Genetic*

agricultural development in the United States—the oldest²⁰⁶ and perhaps most successful²⁰⁷ element of American agricultural policy—has always stressed the importance of broad-based agricultural education and the dissemination of agricultural knowledge *outside* family-based social networks. Whether transmitted through land-grant universities,²⁰⁸ the extension service,²⁰⁹ or the USDA as a whole,²¹⁰ the culture of American agriculture thrives off the farm. America's reluctance to rely exclusively on a blood-based, land-bound system for transmitting agricultural knowledge suggests that family farming is not the structural panacea of its most ardent supporters' fantasies.²¹¹

Resources, Food and Agriculture Organization of the United Nations, 25th Sess., U.N. Doc. C/89/24 (1989). See generally, e.g., Carlos M. Correa, *Sovereign and Property Rights over Plant Genetic Resources*, Commission on Plant Genetic Resources, Food and Agriculture Organization of the United Nations (Rome, Nov. 7-11, 1994) (Background Study Paper No. 2); Harold J. Bordwin, *The Legal and Political Implications of the International Undertaking on Plant Genetic Resources*, 12 *ECOLOGY L.Q.* 1053 (1985); Neil D. Hamilton, *Who Owns Dinner: Evolving Legal Mechanisms for Ownership of Plant Genetic Resources*, 28 *TULSA L.J.* 587, 600-31 (1993); Lester I. Yano, Comment, *Protection of the Ethnobiological Knowledge of Indigenous Peoples*, 41 *UCLA L. REV.* 443 (1993).

206. See generally FARM AND FOOD POLICY, *supra* note 112, at 14-19 (describing "research and education" as the heart of the developmental agenda that dominated American agricultural policy before 1933); *American Ideology*, *supra* note 25, at 832-33, 838-44 (describing agricultural education, agricultural research, and cooperative extension as the most enduring legacies of the "developmental agenda" in American agricultural law).

207. See, e.g., Earl O. Heady, *The Agriculture of the U.S.*, *SCI. AM.*, Sept. 1976, at 107, 107 (describing American agricultural development as "the best, the most logical and most successful" program of its kind "anywhere in the world"); cf. Gordon C. Rausser & David Nielson, *Looking Ahead: Agricultural Policy in the 1990s*, 23 *U.C. DAVIS L. REV.* 415, 422 (1990) (arguing that agricultural education, research, and extension "potentially pareto improving and welfare enhancing from a societal perspective"). Heady's praise for the education-based elements of American agricultural policy is all the more significant because of his prominence as a critic of technology-driven collateral damage to agricultural labor interests. See, e.g., Earl O. Heady, *Externalities of American Agricultural Policy*, 7 *U. TOL. L. REV.* 795, 795 (1976).

208. See, e.g., Morrill Land-Grant College Act § 4, 7 U.S.C. § 304 (1994) (charging federally endowed land grant colleges to teach agriculture and the mechanic arts "without excluding other scientific and classical studies . . . in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life").

209. See Smith-Lever Act of 1914, 7 U.S.C. §§ 341-349 (1994) (authorizing federal support for extension work that diffuses useful and practical information on agriculture related subjects among the people of the United States); see also *Bazemore v. Friday*, 478 U.S. 385, 389 (1986) (Brennan, J., concurring in part) (describing the work of the "Extension Service . . . in four major areas: home economics, agriculture, 4-H and youth, and community resource development").

210. See 7 U.S.C. § 2201 (1994) (establishing the United States Department of Agriculture and commissioning it "to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture . . . in the most general and comprehensive sense of those terms").

211. Of course, to the extent that land-grant university graduates tend *not* to choose farm management as a career, agricultural education effectively transfers on-farm human capital to the agribusinesses that employ the lion's share of land-grant university graduates. See *HIGHTOWER*, *supra* note 177, at 19-20; *American Ideology*, *supra* note 25, at 845.

The problems plaguing family-based ownership of farms extend well beyond barriers to information acquisition and technology adoption. Smallness, in more ways than many are willing to admit, is its own punishment. Although the gains from American agriculture's regulated market structure are hard to measure and therefore open to politicized debate, the very content of American agricultural law strongly suggests that small, family-owned farms face significant operational disadvantages. The economic threats to the family farm are legion; the legal threats seem far less numerous. State laws and federal statutes designed to alleviate the small farm's "economic disadvantage"—whether "natural" or induced by governmental intervention in the agricultural marketplace—contradict the economic and ecological claims made by small farm advocates. Let us therefore borrow a crucial analytical tool used in American constitutional law. Constitutional cases applying a standard of intermediate scrutiny have shown time and again that the fastest way to contradict a legal policy's asserted justification is to find contradictory legislation within that jurisdiction.²¹²

Chief among the disadvantages of family farms is limited access to capital. For the moment, let us set aside Ronald Coase²¹³ in favor of federal campaign finance law.²¹⁴ The connection between agriculture and campaign finance is not as far-fetched as it might seem; both are highly regulated industries,²¹⁵ the law governing both activities exhibits a hostility toward corporations,²¹⁶ and both deal with commodities—either food or votes—that are perishable, consumed on a roughly per capita basis, and intrinsically unrewarding except as a means for acquiring other goods.²¹⁷ If family farming is indeed a cornerstone of Jeffersonian democracy, the regulation of democracy *qua* democracy should teach us much about the regulation of agriculture. Let us further assume that there is a coherent distinction between expending your own money and convincing other people to lend it to you (whether in exchange for a stream of payments or for relatively intangible

212. See, e.g., *Craig v. Boren*, 429 U.S. 190, 204 (1976) (comparing a ban on male purchases of beer with Oklahoma's failure to ban male possession or consumption of beer, and the purchase of beer by 18- to 20-year-old females); cf. *Get Green or Get Out*, *supra* note 161, at 342-43 (advocating the adaptation of the intermediate scrutiny standard announced in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), as a means of analyzing the economic and environmental impact of agricultural regulation).

213. See *THE NATURE OF THE FIRM*, *supra* note 50.

214. See, e.g., *Colorado Republican Fed. Campaign Comm. v. FEC*, 116 S. Ct. 2309 (1996); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*).

215. Compare 7 C.F.R. (federal farm program regulations) with 11 C.F.R. (federal campaign finance regulations).

216. Compare sources cited *supra* note 59 (documenting state-law efforts to vanquish corporate farming) with *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) (upholding a Michigan law that prohibited corporations from using corporate treasury funds to make independent expenditures supporting or opposing any candidate for state office).

217. Cf. *Agriculture's First Disobedience*, *supra* note 74, at 1278-80, 1309-10 (discussing apportionment and other election law issues as a branch of agricultural law); Jim Chen, *Law as a Species of Language Acquisition*, 73 WASH. U. L.Q. 1263, 1278 n.99 (1995) ("In a Darwinian world, there are two and only two forces that matter. One of them is food. The other is sex. Language is how most of us get both.").

political favors).²¹⁸ Small, family-owned farms are crippled in both respects. Their owners, by design, do not bring massive amounts of personal wealth to the business. Nor have small-scale farmers historically excelled in persuading urban commercial lenders to back their high-risk, low-return businesses.

It therefore comes as no surprise that the federal government's most explicit statement of statutory policy favoring the family farm comes in the context of agricultural credit. The Consolidated Farm and Rural Development Act (CFRDA) exhorts the government to ensure that no agricultural or agriculture-related program "be administered in a manner that will place the family farm operation at an unfair economic disadvantage."²¹⁹ This mandate, however, imposes only one substantive obligation; it requires the Secretary of Agriculture to submit an annual report on the status of the family farm.²²⁰ By contrast, several provisions authorizing the extension of federally guaranteed or subsidized loans carry more than mere hortatory weight; they restrict eligibility to borrowers who are or will become "owner-operators of not larger than family farms."²²¹ Note how even this brief statutory formula expresses the two most crucial elements of the family farming ideology: farmland should be owned by the farm operator, and family ownership represents a limitation on farm size.

Extensive federal involvement in agricultural credit—whether in chartering the privately owned Farm Credit System²²² or subsidizing the loan programs managed by the former Farmers Home Administration²²³—testifies to the relative difficulty that small, family-owned farms face in seeking and obtaining credit. An entire chapter of the Bankruptcy Code is devoted to family farm bankruptcies,²²⁴ largely because many financially troubled family farms have less than the ideal amount of debt for restructuring under Chapter 11,²²⁵ but more debt than permitted by the restrictive eligibility requirements for small business bankruptcies under Chapter 13.²²⁶ Farm finance is further complicated by the classic farm business profile: unreliable cash flow, combined with a large capital investment in relatively illiquid assets.

218. *Cf.* Buckley v. Valeo, 424 U.S. at 12-59 (distinguishing sharply between the First Amendment status of campaign expenditures of a candidate's own funds and campaign contributions received by a candidate).

219. 7 U.S.C. § 2266(a) (1994).

220. *See id.* § 2266(b).

221. *Id.* §§ 1922(a), 1941(a).

222. *See* 12 U.S.C. §§ 2001-2279 (1994). Until 1987, when commercial banks captured a lion's share of the agricultural credit market, the Farm Credit System was the "largest single provider of credit to farmers, ranchers, and their cooperatives." H.R. REP. NO. 100-295, pt. 1 at 54 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2723, 2726.

223. *See, e.g.*, 7 U.S.C. § 1934 (1994) (establishing the "limited resource" program for farm ownership loans). The FmHA was abolished in 1994 and replaced by the Consolidated Farm Service Agency. *See* Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, 7 U.S.C. § 6932 (1994).

224. *See* 11 U.S.C. §§ 1201-1231 (1994). Eligibility for financial restructuring under Chapter 12 is limited to "family farmer[s]." *See id.* § 101(18).

225. *See id.* §§ 1101-1174.

226. *See id.* §§ 1301-1330. To be eligible for Chapter 13 restructuring, a firm's secured debt cannot exceed \$750,000, and its unsecured debt cannot exceed \$250,000. *Id.* § 109(e).

Finally, to a large extent, the agricultural credit and bankruptcy systems in the United States are at war with each other: generous credit policies have led to excessive leverage during temporary boom periods,²²⁷ while the American farmer's longstanding obsession with debt relief has historically undermined or even destroyed agricultural credit markets.²²⁸

A slightly different face of farm finance offers an additional measure of capital intensity in farming. On a traditional, family-owned and family-operated farm with little or no outside income, there is no greater terror than natural disaster.²²⁹ In the crucial decade between 1910 and 1920—the decade in which the United States' urban population eclipsed its rural population²³⁰ and in which American farmers attained and lost purchasing power parity with their urban counterparts²³¹—a single insect pest “was probably responsible

227. See, e.g., Jeffrey R. Kayl, *Farm Credit Amendments Act of 1985: Congressional Intent, FCA Implementation, and Courts' Interpretation*, 37 *DRAKE L. REV.* 271, 279-83 (1987-88).

228. See, e.g., *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 595 (1935).

229. See, e.g., Ivor Elrifi, *A Comparison of Crop Insurance in the United States and Canada*, 13 *J. AGRIC. TAX'N & L.* 99, 99 (1991) (“Land and equipment purchases are extremely capital-intensive, yet food prices offered to the grower are sufficiently low to make the profit margin slim for the farmer. Farming is hard work and is often frustrating and financially crippling for the grower in times of unfavorable weather conditions.”). For a particularly vivid fictional account of locusts sweeping the Great Plains, see O.E. RÖLVAAG, *GIANTS IN THE EARTH* 341-46, 349-50 (Lincoln Colcord & O.E. Rølvaag trans., 1929) (1927).

230. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *ABSTRACT OF THE FOURTEENTH CENSUS OF THE UNITED STATES: 1920*, at 75 (1923). In 1910 the United States' urban population was 42,166,120 (45.8%); its rural population was 49,806,146 (54.2%). By 1920 American urbanites outnumbered their rural counterparts 51.4% to 48.6%, 54,304,603 to 51,406,017. *Id.*; see also 2 U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *CENSUS OF POPULATION: 1950*, at 12 (1953) (detailing trends in United States rural and urban population from 1790 to 1950).

231. See 7 U.S.C. § 1301(a)(1)(c) (1994) (defining the “parity index,” as of any date, as “the ratio of (i) the general level of prices for articles and services that farmers buy” as of that date “to (ii) the general level of such prices . . . during the period January 1910 to December 1914, inclusive”); Agricultural Adjustment Act of 1938, 7 U.S.C. § 1282 (1994) (“It is declared to be the policy of Congress to . . . assist[] farmers to obtain . . . parity prices for [certain] commodities and parity of income”); 7 U.S.C. §§ 601, 602, 608c, 1310, 1445, 1446, 1736j (1994) (establishing rural/urban parity in farm prices and incomes as the regulatory objective of certain federal farm programs); 22 U.S.C. § 2354(e) (1994) (prohibiting government procurement of any agricultural commodity or product outside the United States when the domestic price is below parity). Regulatory reliance on parity has been widely condemned as an awkward and normatively indefensible policy. See, e.g., LLOYD D. TEIGEN, U.S. DEP'T OF AGRIC., *AGRICULTURAL PARITY: HISTORICAL REVIEW AND ALTERNATIVE CALCULATIONS* 62 (1987); Eric Van Chantfort, *Parity Concept: A Flawed Policy Tool?*, *FARMLINE*, Sept. 1987, at 8 (“There is no equity, no fairness, no parity in parity prices.”); American Farm Economics Association, *Outline of a Price Policy for American Agriculture for the Postwar Period*, 28 *J. FARM ECON.* 380 (1946); American Farm Economics Association, Committee on Parity Concepts, *On the Redefinition of Parity Price and Parity Income*, 29 *J. FARM ECON.* 1358 (1947); William H. Nicholls & D. Gale Johnson, *The Farm Price Policy Awards, 1945: A Topical Digest of the Winning Essays*, 28 *J. FARM ECON.* 267 (1946); K.T.

for more changes in the number of farms, farm acreage, and farm population than all other causes put together."²³² Between 1920 and 1930, boll weevil infestation eliminated as many as 55,000 farms in Georgia and 34,000 farms in South Carolina, "and these two states alone accounted for more than a third of the 1.2 million-person decrease in the nation's farm population during that decade."²³³ Within a generation, physical devastation, New Deal farm policy, and mechanization had sparked the great exodus that moved six million American blacks from the countryside to the cities and from South to North.²³⁴ King Cotton bled profusely, having been buffeted by the Grand Army of the Republic, but mortally wounded by the beetle called *Anthonomus grandis*.

The story of the boll weevil is but one harsh reminder that farming is a biological business and that biological business is risky business. Crop failures and other natural disasters place a heavier burden on agricultural producers than on nonagricultural firms.²³⁵ Industrialization has increased gross ratios in agriculture: modern farms operate with a much higher ratio between gross income and expenses.²³⁶ Expenses, especially those due to farm lenders, remain fixed while a natural disaster may impair or eliminate the farm's ability to generate gross income. Small farm size diminishes the ability of each farmer and of the farm sector at large to manage risk.²³⁷ No investment banker on Wall Street would advise a client to place all-or-nothing reliance on a single stream of expected income. (Of course, this is precisely the sort of behavior that the family farming ethic and agrarian-influenced farm policy have encouraged.)

In the abstract, the risk profile of production agriculture suggests that crop insurance supplied by an external source, either the federal government

Wright, *Basic Weaknesses of the Parity Price Formula for a Period of Extensive Adjustments in Agriculture*, 28 J. FARM ECON. 294 (1946).

232. 4 U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, at 12 (1932) (comparing the impact of boll weevil infestation with other socioeconomic phenomena between 1910 and 1920, including a scarcity of labor, the consolidation of farms, oil and mining development, the extension of city areas, and the abandonment of low-grade farms).

233. *Agriculture's First Disobedience*, *supra* note 74, at 1303; see 4 U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, at 12 (1932).

234. See *Agriculture's First Disobedience*, *supra* note 74, at 1302-12. The definitive work on the black exodus is NICOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991).

235. See, e.g., J.W. Looney, *The Changing Focus of Governmental Regulation of Agriculture in the United States*, 44 MERCER L. REV. 763, 767-78 (1993).

236. See, e.g., David A. Lins, *Credit Availability Effects on the Structure of Farming*, in ECONOMICS, STATISTICS, AND COOPERATIVES SERVICE, U.S. DEP'T. OF AGRIC., *STRUCTURE ISSUES OF AMERICAN AGRICULTURE* 134, 137 (1979).

237. See H.R. REP. NO. 96-430, at 8-9 (1979), *reprinted in* 1980 U.S.C.C.A.N. 3068, 3070-71 (noting how the displacement of "'hip pocket' financing" with highly capitalized and leveraged farming operations has exposed "an individual farmer or perhaps an entire rural community" to "financial ruin" in "a matter of days or even hours" during times of "drought, flood, insects, disease or other natural disaster").

or private financial intermediaries, would be a very significant component of farm finance. The architects of New Deal farm policy certainly thought so; they made crop insurance an essential element of the monumental Agricultural Adjustment Act of 1938.²³⁸ They were overly optimistic. Despite half a century of reforms,²³⁹ crop insurance never became a significant fixture in federal agricultural regulation. This phenomenon arises partly out of the federal government's historic tendency to offer ad hoc disaster assistance, which undermines incentives to purchase crop insurance ahead of time.²⁴⁰ But twenty-three percent of American farmers in a recent General Accounting Office survey reported they preferred self-insurance and other methods of internal finance over government-sponsored crop insurance programs.²⁴¹ The extent of self-insurance against naturally induced crop failure suggests a very high degree of capitalization in American agriculture.

Contrary to traditional agrarian ideology, not everyone can farm. The regulation and rigors of farm finance prove as much. Barriers to entry in farming are actually quite high, and the opportunities for entrants and incumbents alike are rather limited. An informal survey of recent college graduates with agricultural degrees suggests that even the best trained young adults are entering farming at a rate of roughly five percent²⁴²—hardly enough to distinguish this group from a larger society that allocates less than two percent of its labor pool to agricultural entrepreneurship.

238. See Agricultural Adjustment Act of 1938, ch. 30, §§ 501-518, 52 Stat. 31, 72-77 (codified as amended at 7 U.S.C. §§ 1501-1521 (1994)); see also *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383 n.1 (1947) (noting that because “[p]rivate insurance companies apparently deemed all-risk crop insurance too great a commercial hazard,” the federal “[g]overnment engaged in crop insurance as a pioneer”).

239. See, e.g., Federal Crop Insurance and Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, 108 Stat. 3178 (attempting another comprehensive redesign of the crop insurance program). Federal Crop Insurance Act of 1980, Pub. L. No. 96-365, 94 Stat. 1312 (attempting a redesign of the crop insurance program); Act of Aug. 1, 1947, ch. 440, 61 Stat. 719 (reinstating the crop insurance program for all agricultural commodities after a three-year hiatus induced by massive operating losses); Act of June 21, 1941, ch. 214, 55 Stat. 255 (expanding the original crop insurance program from wheat to cotton). See generally Steffen N. Johnson, *A Regulatory “Waste Land”: Defining a Justified Federal Role in Crop Insurance*, 72 N.D. L. REV. 505 (1996); U.S. GEN. ACCOUNTING OFFICE, No. GAO/RCED-93-98, CROP INSURANCE: FEDERAL PROGRAM FACES INSURABILITY AND DESIGN PROBLEMS (May 1993) [hereinafter U.S. GEN. ACCOUNTING OFFICE, May 1993]; U.S. GEN. ACCOUNTING OFFICE, No. GAO/RCED-93-12, CROP INSURANCE: FEDERAL PROGRAM HAS BEEN UNABLE TO MEET OBJECTIVES OF 1980 ACT (Mar. 1993).

240. See, e.g., Johnson, *supra* note 239, at 513, 534-35; H.R. REP. NO. 96-430, at 11 (1979), reprinted in 1980 U.S.C.C.A.N. 3068, 3073 (acknowledging “the existence of . . . competing disaster assistance programs” as a barrier to high participation rates in publicly sponsored crop insurance programs); cf. *Wilson v. USDA*, 991 F.2d 1211 (5th Cir. 1993) (involving a crop loss for which rice farmers claimed both ad hoc disaster assistance and indemnity under their federal crop insurance policies), cert. denied, 510 U.S. 1192 (1994).

241. See U.S. GEN. ACCOUNTING OFFICE, May 1993, *supra* note 239, at 5.

242. See *American Ideology*, *supra* note 25, at 845 n.193 (finding that only 5.6% of graduates from the University of Minnesota's College of Agriculture between 1989 and 1993 entered farming or farm management within a year of graduation).

The prospects for would-be entrants with less training are surely even more grim. Mastery of modern agriculture "require[s] an almost universal knowledge ranging from geology, biology, chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government."²⁴³ The profit-driven orientation and sheer weight of the research generated by the federally chartered and financed land-grant college system²⁴⁴ have put a premium on high technology and skilled farm management.²⁴⁵ At least in the United States, research and educational subsidies thought too mild to deserve scrutiny under international trade law²⁴⁶ have dramatically raised the level of human and financial capital—so much so that small-farm activists waged a long²⁴⁷ and losing²⁴⁸ battle to force changes in

243. *Queensboro Farm Prods., Inc. v. Wickard*, 137 F.2d 969, 975 (2d Cir. 1943).

244. See Morrill Land-Grant College Act of 1862, ch. 130, 12 Stat. 503 (codified as amended at 7 U.S.C. §§ 301-308 (1994)); Morrill Land-Grant College Act of 1890, ch. 841, 26 Stat. 417 (codified as amended at 7 U.S.C. §§ 321-328 (1994)); Hatch Act of 1887, ch. 314, 24 Stat. 440 (codified as amended at 7 U.S.C. §§ 361a-361i (1994)); Adams Act of 1906, ch. 951, 34 Stat. 63; Smith-Lever Act of 1914, ch. 79, 38 Stat. 372 (codified as amended at 7 U.S.C. §§ 341-348 (1994)); Purnell Act of 1925, ch. 308, 43 Stat. 970; Bankhead-Jones Act of 1935, ch. 338, 49 Stat. 436 (codified as amended at 7 U.S.C. §§ 427, 427i (1994)); cf. Smith-Hughes Vocational Education Act of 1917, ch. 114, 39 Stat. 929 (codified as amended at 20 U.S.C. §§ 11-28 (1994)) (providing federal support for agriculturally oriented vocational education in high schools).

245. Compare Hamilton, *supra* note 170, at 306 n.67 (mocking an emerging body of "precision farming" technology as "a sure fire [sales] winner" in the "portion of agriculture [that] fits an increasingly industrialized system") with John Holusha, *Down on the Farm with R2D2: Mobile Robots Leaving Factory Cousins in Dust*, N.Y. TIMES, Oct. 7, 1995, at 35 (describing a new generation of "driverless harvesters" and other robots designed to replace humans who perform the simultaneously "demanding and boring" tasks in agriculture). See generally Wallace E. Huffman & Robert E. Evenson, *The Effects of R&D on Farm Size, Specialization, and Productivity*, in INDUSTRIAL POLICY FOR AGRICULTURE IN THE GLOBAL ECONOMY, *supra* note 185, at 41.

246. See Agreement on Agriculture, opened for signature Apr. 15, 1994, GATT Secretariat, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, Annex 2.1, 2.2(a), 2.2(d), GATT Sales No. 1994-4 (1994).

247. See Robert S. Catz, *Land Grant Colleges and Mechanization: A Need for Environmental Assessment*, 47 GEO. WASH. L. REV. 740 (1979) (encouraging stringent judicial review of land-grant research decisions for their impact on farm labor markets in general and on small farm entrepreneurship opportunities in particular); Howard S. Scher et al., *USDA: Agriculture at the Expense of Small Farmers and Farmworkers*, 7 TOL. L. REV. 837 (1975) (criticizing the USDA's bias in favor of corporate agribusiness at the expense of others); Lawrence A. Haun, Comment, *The Public Purpose Doctrine and University of California Farm Mechanization Research*, 11 U.C. DAVIS L. REV. 599 (1978) (suggesting judicial regulation of research under the public purpose doctrine is a good way to resolve controversy).

248. See California Agrarian Action Project, Inc. v. University of Cal., 258 Cal. Rptr. 769 (Ct. App. 1989); cf. Marcia Barinaga, *A Bold New Program at Berkeley Runs into Trouble*, 263 SCIENCE 1367 (1994) (reporting that reformers who wish to tackle broader issues in all phases of natural resource use and conservation are drawing the ire of agrarian traditionalists who wish to focus the University of California's "land-grant" research on production agriculture).

the land-grant system's research agenda.²⁴⁹ Thanks to "green box" treatment under the Uruguay Round of world trade talks, which proclaims that research and extension subsidies are welfare enhancing and minimally distortive,²⁵⁰ public support for agricultural technology will likely increase and may supplant certain traditional price and income subsidies. The realities of farming in a global, competition-driven agricultural system impart a hollow ring to the old-fashioned agrarian battle cry that "[a]nyone who wants to farm should be free to do so."²⁵¹

Multiple failings stem from the law's lingering affinity for the family farm. An industry based on family ownership is, at bottom, an industry built on little more than the bones of its departed founders. An agricultural system that allocates leadership positions according to the professional status of dead farmers is economically doomed and morally bankrupt. As Thomas Jefferson himself said, "the earth belongs to the living."²⁵² The patron saint of American agriculture has spoken; she who has ears to hear, let her hear.

C. *Lean, Mean . . . and Clean*

Farming, like all other industries affected by economies of scale and of scope, tends toward concentration, capital-driven growth, and leverage. The American farm landscape has lurched toward feudalism despite the law's best efforts to fight this tendency. In one sense, the economic conclusions drawn in this Article regarding small farms are scarcely novel; agricultural economist Luther Tweeten long ago terrorized traditional agrarians by systematically disproving virtually every "conventional assertion[] concerning small farms."²⁵³ We would make our mark in the posing of the impertinent question, the paradigm-generating planting of "the seed of a new intellectual harvest, to be reaped in the next season of the human understanding."²⁵⁴ Why modify feudalism? Why expend so much as one regulatory dollar fighting what comes naturally, fighting the farm sector's own capitalistic tendencies?

249. For further discussion of the land grant university litigation, see *American Ideology*, *supra* note 25, at 837-44; Looney, *supra* note 235, at 813-19.

250. See Agreement on Agriculture, *opened for signature* Apr. 15, 1994, GATT Secretariat, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, Annex 2.1, GATT Sales No. 1994-4 (1994) (exempting all "green box" programs from the GATT signatories' agreement to reduce domestic agricultural support). *But cf.* Jeffrey J. Steinle, Note, *The Problem Child of World Trade: Reform School for Agriculture*, 4 MINN. J. GLOBAL TRADE 333, 356-57 (1995) (casting doubt on the wisdom of having exceptions to Aggregate Measure of Support obligations under the Uruguay Round's Agreement on Agriculture).

251. FARM POLICY, *supra* note 112, at 3; FARM AND FOOD POLICY, *supra* note 112, at 7.

252. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 392 (Julian P. Boyd et al. eds., 1958).

253. Luther Tweeten, *The Economics of Small Farms*, 219 SCIENCE 1037, 1037 (1983).

254. SUSANNE K. LANGER, PHILOSOPHY IN A NEW KEY: A STUDY IN THE SYMBOLISM OF REASON, RITE AND ART 25 (3d ed. 1957); see also *Agriculture's First Disobedience*, *supra* note 74, at 1272.

1. *Families Without Foundation*

In the six decades since Ronald Coase published his monumental article, *The Nature of the Firm*,²⁵⁵ Western economists have sought to understand why there is ever more than a single firm in any economy.²⁵⁶ Economies of scale push firms toward expansion or merger as an alternative to horizontal competition; economies of scope invite expansion into related lines of business. (Firms pursuing scale economies are desperately seeking size, whereas firms pursuing scope economies are desperately seeking synergy.) Ever since Joseph Schumpeter declared big really is better,²⁵⁷ we might well ask why there should be multiple firms, why a commitment to maximizing consumer welfare should worry about farm size or firm size.²⁵⁸ Most rhetorical questions, of course, come with prepared answers, and ours is no exception. None of the standard arguments favoring structural regulation of agriculture can withstand the mounting evidence that a feudalized farm sector will nevertheless protect the full range of social interests served by the United States' food production system.

Unless we can justify the bias favoring small farms within laws that regulate agricultural market structure, these laws deserve the fate that befalls the farm sector at large: adapt and die.²⁵⁹ Small, undercapitalized farms are simply inefficient, and an agricultural system populated by such farms is scarcely likely to succeed. We can readily dismiss the populist argument that larger farm operations achieve lower yields per acre.²⁶⁰ This fetish-like obsession with land and with acreage-based yield measurements²⁶¹ overlooks the fact that many large American farms are located on some of the least productive land in the country.²⁶² (Alas, poor Ricardo, we knew you well.)²⁶³

255. See *THE NATURE OF THE FIRM*, *supra* note 50.

256. See generally *id.* (collecting essays responding to Coase's original hypothesis).

257. See SCHUMPETER, *supra* note 53. For explorations of the "Schumpeterian hypothesis," see, e.g., Franklin M. Fisher & Peter Temin, *Returns to Scale in Research and Development: What Does the Schumpeterian Hypothesis Imply?*, in *INDUSTRIAL ORGANIZATION, ECONOMICS, AND THE LAW* 172 (John Monz ed., 1991); Franklin M. Fisher & Peter Temin, *The Schumpeterian Hypothesis: Reply*, in *INDUSTRIAL ORGANIZATION, ECONOMICS, AND THE LAW* 189 (John Monz ed., 1991).

258. Cf. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

259. See generally *American Ideology*, *supra* note 25, at 851-59.

260. For an example of this viewpoint, see VOGELER, *supra* note 89, at 90 (concluding that large-scale farmers achieve an illusory measure of efficiency by consuming more land).

261. Cf. *American Ideology*, *supra* note 25, at 849 ("Traditional agriculturalists exhibit a 'land fetish'—they assume that available acreage is the only relevant constraint on productive capacity.").

262. Cf. *id.* at 833 (describing how the environmental restraints on farming in the arid West have historically prompted the relaxation of acreage restraints that accompanied the federal government's original grants of land and reclamation water for agricultural purposes); Paul S. Taylor, *Public Policy and the Shaping of Rural Society*, 20 S.D. L. REV. 475, 480-83 (1975).

263. See DAVID RICARDO, *ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 69-71 (Piero Sraffa ed., 1970) (1821) (describing differences in productivity as the basis for

Farmland markets reflect factors that populist critics have chosen to overlook: average farmland prices range from \$149 per acre in Wyoming to \$4,894 in Rhode Island because of differences in productivity and differences in the profitability of competing land uses.²⁶⁴ Greater value lies in examining the evidence that farms have smaller economies of scale than many other firms and, more important, exhibit substantial *diseconomies* of scale.²⁶⁵ Much of this evidence, however, is based on socialist experiments in Eastern Europe, Latin America, and Africa that sought to modernize traditional agricultural systems by coupling large, collective, or state ownership with a single, centralized management scheme. Maximizing gross domestic product may be the ultimate economic objective of any legal system,²⁶⁶ but efforts to dictate the outcome through central planning have historically failed. America, it must be remembered, really did win the Cold War.²⁶⁷

On the other hand, failure in the realm of regulating agricultural market structure is not limited to the socialist world. To the extent that the United States has sought to shelter small farms in general and family farms in particular from market forces,²⁶⁸ American policy has collapsed. The American ideology of using family farms as engines of full employment invites scrutiny of the system's "fuel efficiency." In other words, does the United States profit—in economic terms or otherwise—for the amount that it spends on preserving the family farm? In light of the federal government's staggering annual bill of \$80,500 for each farm job saved,²⁶⁹ the family farm looks like an Edsel: thirsty for fuel, slow of foot, and obsolete in every respect.

The truth is that virtually every traditional argument marshaled in favor of small farm and family farm protection lacks a sound economic foundation. As a policy justification, food security is a fraud. Indeed, the plea "food security" is practically obscene when uttered in a country able to manipulate agricultural surpluses as international "food aid"²⁷⁰ when all other domestic

differences in farmland rents); *see also* DAVID RICARDO, ON PROTECTION TO AGRICULTURE (2d ed. 1822) (arguing, perhaps without peer, how trade protection for agriculture hurts practically everyone and ultimately helps no one); *cf.* WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK act 5, sc. 1 ("Alas, poor Yorick! I knew him, Horatio: a fellow of infinite jest, of most excellent fancy . . .").

264. *See* U.S. DEP'T OF AGRIC., *supra* note 129, at 351.

265. *See* Nancy L. Johnson & Vernon W. Ruttan, *Why Are Farms So Small?*, 22 WORLD DEV. 691, 692-93 (1994).

266. *See Law as Industrial Policy*, *supra* note 18, at 1317-18.

267. *But see American Ideology*, *supra* note 25, at 810 ("America, so the world supposes, won the Cold War.").

268. *See, e.g.,* Looney, *supra* note 235, at 792-96.

269. *See* Thomas W. Hertel et al., *Economywide Effects of Unilateral Trade and Policy Liberalization in U.S. Agriculture*, in MACROECONOMIC CONSEQUENCES OF FARM SUPPORT POLICIES 260, 261 (Andrew B. Stoeckel et al. eds., 1989); Steinle, *supra* note 250, at 340-41.

270. *See, e.g.,* Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, 68 Stat. 454 (codified as amended at 7 U.S.C. §§ 1691-1738r (1994)); Export Enhancement Act of 1988, Pub. L. No. 100-418, 102 Stat. 1325 (codified as amended at 15 U.S.C. § 4701 (1994)); Export Enhancement Act of 1992, Pub. L. No. 102-429, § 201, 106 Stat. 2186, 2199 (codified as amended at 15 U.S.C. § 4721 (1994)).

supply control mechanisms have failed to curb chronic overproduction.²⁷¹ As an engine for rural development, an overemphasis on agriculture merely exacerbates many rural areas' crippling "reliance on a single, often natural-resource industry."²⁷² After thirteen decades of homesteading and other farm-first policies in the states west of the thirteen colonies, the rapid "[d]epopulation of the rural Great Plains" has led to a most embarrassing question: "Is North Dakota necessary?"²⁷³ Moreover, in an economic landscape where full-time agriculture provides a mere quarter of the jobs in the nation's "most 'agricultural' congressional district, Minnesota's second,"²⁷⁴ when even Iowa boasts "more school teachers, health care workers, [and] business executives and managers . . . than farmers,"²⁷⁵ structural regulation of agriculture arguably has less impact on American employment policy than day-to-day gossip about the Federal Reserve System's Board of Governors²⁷⁶ or the New York Stock Exchange's "big board."²⁷⁷

271. See generally Willard W. Cochrane, *Farm Technology, Foreign Surplus Disposal, and Domestic Supply Control*, 41 J. FARM ECON. 885 (1959) (describing international food aid as a relief valve for excessive agricultural supplies at home); Mordecai Ezekiel, *Apparent Results in Using Surplus Food for Financing Economic Development*, 40 J. FARM ECON. 915 (1958) (describing international food aid as a means for allowing developing countries to expand other industries).

272. U.S. GEN. ACCT. OFFICE, GAO/RCED 94-165, RURAL DEVELOPMENT: PATCHWORK OF FEDERAL PROGRAMS NEEDS TO BE REAPPRAISED 21 (1994).

273. Jon Margolis, *The Reopening of the Frontier*, N.Y. TIMES, Oct. 15, 1995, § 6, at 51; see also Frank J. Popper & Deborah Epstein Popper, *The Great Plains: From Dust to Dust*, PLANNING Dec. 1987, at 12, 17-18 (proposing the creation of a "buffalo commons" from 139,000 square miles of economically and ecologically exhausted turf on the Great Plains). Later writers have even more aggressively advocated the extremely controversial "buffalo commons" proposal. See, e.g., WARD CHURCHILL, STRUGGLE FOR THE LAND: INDIGENOUS RESISTANCE TO GENOCIDE, ECOCIDE AND EXPROPRIATION IN CONTEMPORARY NORTH AMERICA 421-33 (1993) (proposing the restoration of the "buffalo commons" region to the indigenous peoples who occupied the Great Plains before White settlement); ANNE MATTHEWS, WHERE THE BUFFALO ROAM (1992) (proposing the creation of a "buffalo commons" and creative ways to pay for it); Winano LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 127, 144-45 (1994) (suggesting the allocation of the "buffalo commons" region to indigenous peoples).

274. COCHRANE & RUNGE, *supra* note 162, at 21; see also William P. Browne, *Agricultural Policy Can't Accommodate All Who Want In*, CHOICES, 1st Q. 1989, at 9.

275. *Feeding Our Future*, *supra* note 129, at 218.

276. Cf. *Law as Industrial Policy*, *supra* note 18, at 1348-56 (discussing the monumentally important role of the Federal Reserve System in the formulation of American industrial policy).

277. Cf. *Carpenter v. United States*, 484 U.S. 19, 27-28 (1987) (upholding a conviction under the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, based on the manipulation of stock prices through the *Wall Street Journal's* "Heard on the Street" column).

2. *Wendell and the Green Knight*²⁷⁸

Amid the economic ruins of agricultural fundamentalism, a new environmental agenda has given family farm advocates a powerful new rhetorical mace.²⁷⁹ Environmental appeals drive a new “green revolution” in agricultural thinking,²⁸⁰ as family farm advocates attempt to hitch their falling economic star to an ascendant and increasing militant offshoot of the environmentalist movement.²⁸¹ During the 1980s, the decade not only of Reaganomics and Milkenesque merger-mania but also of conservation reserve and Farm Aid, the dominant rhetoric of agrarian populism reinvented itself in quasi-environmentalist terms.²⁸² We need not look further than the difference between the dedication pages of two agrarian manifestoes published eleven years apart. In 1981, Ingolf Vogeler dedicated *The Myth of the Family Farm: Agribusiness Dominance of U.S. Agriculture*, “[t]o a new Populism in our lifetime.”²⁸³ In 1992, by contrast, A.V. Krebs dedicated *The Corporate Reapers: The Book of Agribusiness*, “to the stewards of the land: those men, women, and children who plant, nurture and harvest nature’s bounty of food.”²⁸⁴

Following the new technique heralded by Krebs, the “alternative” agriculture movement has permitted—indeed, encouraged—small farm traditionalists to express an “urgent concern over the ecological aspects of agriculture.”²⁸⁵ This agroecological ideology exploits the traditional view of farmers as “stewards of the land,”²⁸⁶ a tradition so deeply rooted as to have

278. See WENDELL BERRY, *THE GIFT OF GOOD LAND* (1981) (linking good husbandry and sound cultivation with an agricultural system populated by small farmers).

279. Compare FARM AND FOOD POLICY, *supra* note 112, at 62-63, 119-40 (describing the rise of agricultural environmentalism as part of the “new agenda” in American agricultural policy during the 1960s and 1970s) with *American Ideology*, *supra* note 25, at 863-72 (attacking the assumption that policies supporting small farms necessarily yield environmental benefits).

280. 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!”).

281. Cf. generally MARTIN W. LEWIS, *GREEN DELUSIONS: AN ENVIRONMENTALIST CRITIQUE OF RADICAL ENVIRONMENTALISM* (1992) (urging a wholesale abandonment of a radical environmentalism agenda based on local self-sufficiency and a general retreat from technology in favor of environmental protection through global economic integration and aggressive investment in technological infrastructure).

282. Cf. Frank J. Popper, *Understanding American Land Use Regulation Since 1970: A Revisionist Interpretation*, 54 J. AM. PLANNING ASS’N 291 (1988) (describing a similar trend in land use regulation as “not in my back yard” NIMBYists began to portray strictly local undesirable land uses, or “LULUs,” as environmental problems of greater global significance and hence as problems more deserving of local regulatory response).

283. VOGELER, *supra* note 89, at vii.

284. KREBS, *supra* note 170, at 3.

285. Beus & Dunlap, *supra* note 128, at 595. See generally NATIONAL RESEARCH COUNCIL, *ALTERNATIVE AGRICULTURE* (1989).

286. See, e.g., *Hurd v. Commissioner*, 37 T.C.M. (CCH) 499 (1978); IOWA CODE § 159.2 (1995) (describing the purpose of the Iowa Department of Agriculture and Land

religious significance.²⁸⁷ Hopeful observers envision a “new agriculture” led by “farmers who will sell wholesomeness and the traditional image of American agriculture and who will reap a larger share of the consumer food dollar by doing so.”²⁸⁸ Unlike his counterparts of the past, today’s agricultural fundamentalist is an agroecologically correct Green Knight, dispatched to save the earth from the big, the bad, and the ugly. And what a wonder he is to behold:

Great wonder grew in hall
At his hue most strange to see,
For man and gear and all
Were green as green could be.²⁸⁹

There are two distinct lines of agroecological reasoning, neither of which ultimately justifies structural regulation in agriculture. First, farm advocates sometimes contend that farming is itself an environmentally benign activity, or at least environmentally superior to alternative land uses. Because of its emphasis on the agricultural system as an organic whole and on the environment at large, such reasoning may be properly called the “macroecological” variation of the agroecological argument. The macroecological argument characterizes farmland itself, especially if held as numerous, small family farms, as a public good in itself. This is an old tactic; deceptively describing a farm income program as an environmental program arguably launched the modern era in American agricultural law. In the wake of *United States v. Butler*,²⁹⁰ the Supreme Court decision that invalidated the Agricultural Adjustment Act of 1933,²⁹¹ Congress passed the Soil Conservation Act of 1936.²⁹² That statute restricted the cultivation of wheat, a “soil-eroding” crop, while encouraging the cultivation of soybeans, a “soil-conserving” crop, in apparent defiance of agronomy but conveniently in accord with the supply control needs of the moment.²⁹³ During the late 1970s and

Stewardship); Bahls, *supra* note 163, at 16; Eiden, *supra* note 163, at 423; N. William Hines, *The Land Ethic and American Agriculture*, 27 LOY. L.A. L. REV. 841 (1994). See generally *Feeding Our Future*, *supra* note 129, at 225-40 (describing the origins of the legal duties of “stewardship” attached to the ownership and use of farmland).

287. See generally *Agriculture’s First Disobedience*, *supra* note 74, at 1267-68 (describing the agrarian “stewardship” ethic as an outgrowth of the Judeo-Christian story of Creation in the Book of Genesis).

288. Hamilton, *supra* note 170, at 307.

289. GAWAIN AND THE GREEN KNIGHT 4 (Marie Borroff trans., 1967).

290. *United States v. Butler*, 297 U.S. 1 (1936).

291. Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601-624 (1994)).

292. Soil Conservation and Domestic Allotment Act of 1936, ch. 104, 49 Stat. 1148.

293. See Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 MINN. L. REV. 333, 348-49 & n.65 (1983) (“[W]heat, a soil-conserving crop, was due for acreage reduction [under the Soil Conservation Act] while soybeans, probably the most soil damaging of all crops, was omitted from the program.”).

early 1980s, various farmland protection initiatives²⁹⁴ characterized the privately owned "farmland base" as an essential element of the nation's "ability . . . to produce food and fiber in sufficient quantities to meet domestic needs and the demands of our export markets."²⁹⁵ More sober assessments cast doubt on the claim that American farmland was being rapidly consumed by urbanization.²⁹⁶

Stripped of its food security aspects, the macroecological argument suggests at heart that production agriculture is itself an environmental amenity. This argument is too extravagant to be entertained.²⁹⁷ Traditionally, "there was a common belief that farming, as an activity conducted since the dawn of humanity, must be an environmentally benign operation" whose "adverse effects," if any, "would have been noticed long ago."²⁹⁸ A more fearsome fallacy may not exist in all of agricultural law. Along with mineral extraction, agriculture is one of the most resource-depleting economic activities.²⁹⁹ Incidental environmental benefits from certain types of agricultural production, such as creation of a waterfowl habitat in irrigated rice fields, are often so vigorously overstated that the law effectively defines environmental protection according to the animal species that humans may legally hunt and kill.³⁰⁰ Even when reduced to an unsupported assertion that incumbent farmers provide valuable "open space" and other unspecified "environmental benefits,"³⁰¹ macroecological rhetoric fails to explain why the complete decline of farming in a region might not be an environmentally preferable outcome. As the Supreme Court recently noted in repulsing Massachusetts' effort to shield its dairy farmers from interstate competition, "[d]airy farms are enclosed by fences, and the decline of farming may well lead to less rather than more intensive land use."³⁰²

294. See generally Farmland Protection Policy Act, Pub. L. No. 97-98, §§ 1540-1548, 95 Stat. 1341, 1341-44 (1981) (codified as amended at 7 U.S.C. §§ 4201-4209 (1994)); William L. Church, *Farmland Conversion: The View from 1986*, 1986 U. ILL. L. REV. 521; Corwin W. Johnson & Valerie M. Fogleman, *The Farmland Protection Policy Act: Stillbirth of a Policy?*, 1986 U. ILL. L. REV. 563.

295. 7 U.S.C. § 4201(a)(3) (1994).

296. See generally U.S. DEP'T OF AGRIC., SOIL CONSERVATION SERV., NATIONAL AGRICULTURAL LAND EVALUATION AND SITE ASSESSMENT HANDBOOK (1983) (providing an analytical tool to determine the quality and viability of agricultural land sites); JULIAN SIMON, *THE ULTIMATE RESOURCE* (1981); Gregg Easterbrook, *Vanishing Land Reappears*, ATLANTIC, July 1986, at 17.

297. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179 (1803).

298. William Howarth, *Legal Approaches to the Prevention of Agricultural Water Pollution in England and Wales*, 45 DRAKE L. REV. 197 (1997).

299. See, e.g., Frank J. Popper & Deborah E. Popper, *The Reinvention of the American Frontier*, AMICUS J., Summer 1991, at 4.

300. See *Get Green or Get Out*, *supra* note 161, at 348-50 (discussing the agroecological hyperbole that resulted in the wholesale exemption of rice farmers from the Central Valley Project Improvements Act, enacted as title 34 of the Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, §§ 3401-3412, 106 Stat. 4600, 4706-31 (1994)).

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

302. *Id.*

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."³⁰³

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."³⁰⁴ Unlike Macduff, Shakespeare's virtuous Scotsman, the corporation "has no children."³⁰⁵ 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."³⁰⁶ Leading agricultural law scholar 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."³⁰⁷

Cleanliness, however, has its costs. Not that environmental integrity as such imposes costs on society, but it usually takes a substantial expenditure of greenbacks to get the green back into the agricultural landscape. If, as we have seen, family farms are barely able to finance themselves without massive federal assistance, small farm size and family ownership represent absolutely no guarantee of agroecological integrity. Indeed, inadequate capital may well prevent a farmer from complying with potentially costly obligations imposed by environmental laws. Studies of soil conservation in practice have confirmed what economic theory predicts: land held by "family landowners [who are] smaller, less affluent, and have more problems obtaining capital for conservation investments [are] more susceptible to erosion than land owned by nonfamily corporations."³⁰⁸ By contrast, neither tenancy nor corporate

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

304. STRANGE, *supra* note 89, at 35.

305. WILLIAM SHAKESPEARE, *MACBETH* act 4, sc. 3, l. 249-252 (Ronald Watkins & Jeremy Lemmon eds., 1964) ("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?").

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

307. *Agriculture Without Farmers*, *supra* note 112, at 645 (emphasis added).

308. Linda K. Lee, *The Impact of Landownership Factors on Soil Conservation*, 62 AM. J. AGRIC. ECON. 1070, 1073 (1980).

ownership correlates with a tendency to engage in poorer conservation practices.³⁰⁹

The Endangered Species Act³¹⁰ provides yet another setting in which farming, especially of the small-scale variety, quite obviously comes into conflict with environmental protection. In 1989, the Supreme Court decided to forgo its first opportunity to address whether the Endangered Species Act effected a “regulatory taking” by effectively disarming a rancher who wished to shoot a grizzly bear that had been killing his sheep.³¹¹ Farmers and farm advocates have been divided over whether to celebrate the reinvigoration of the Takings Clause³¹² in such recent decisions as *Lucas v. South Carolina Coastal Council*³¹³ and *Dolan v. City of Tigard*.³¹⁴ Some family farmers have favored aggressive responses to “environmental and political extremism in the public . . . arena,” a phenomena thought to “threaten [the] property rights of family farm, ranch, and forest owners.”³¹⁵ For his part, Neil Hamilton has urged the farm community to forswear the temptations of the “property rights” movement,³¹⁶ whose anti-environmentalist posture does little to support “traditional claims of farmers’ commitment to stewardship.”³¹⁷

Whatever the outcome of this rhetorical battle among farmers, one thing is clear. Endangered species protection is costlier and more economically dangerous for the small farmer. In his dissent from *Babbitt v. Sweet Home Chapter of Communities*,³¹⁸ Justice Antonin Scalia inadvertently but succinctly stated the agrarian fear sparked by the expansive interpretation and enforcement of the Endangered Species Act: “The Court’s holding that the hunting and killing prohibition [of the Act] incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoo-

309. See *id.* at 1072-73, 1075; see also Tweeten, *supra* note 253, at 1038 (arguing that there is “no basis to conclude that tenants have more soil losses than full- or part-owner operators”).

310. 16 U.S.C. §§ 1531-1544 (1994).

311. See *Christy v. Lujan*, 490 U.S. 1114, 1114-16 (1989) (White, J., dissenting from denial of certiorari), *denying cert. to* 857 F.2d 1324 (9th Cir. 1988). For extensive discussions of “regulatory takings”—the idea that “if regulation [of property] goes too far taking it will be recognized as a taking,” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)—see Jerry L. Anderson, *Takings and Expectations: Toward a “Broader Vision” of Property Rights*, 37 KAN. L. REV. 529 (1989); John S. Harbison, *Constitutional Jurisprudence in the Eyes of the Beholder: Preventing Harms and Providing Benefits in American Takings Law*, 45 DRAKE L. REV. 51 (1997).

312. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use without just compensation.”).

313. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

314. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

315. *Slawson v. Alabama Forestry Comm’n*, 631 So. 2d 953, 955 (Ala. 1994).

316. See, e.g., *Feeding Our Future*, *supra* note 129, at 240-45; Neil D. Hamilton, *Property Rights, Takings Issue Oversold to Agriculture*, FEEDSTUFFS, Jan. 23, 1995, at 14.

317. *Feeding Our Future*, *supra* note 129, at 228.

318. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407 (1995).

logical use.”³¹⁹ Structural regulation of agriculture is all about conserving entrepreneurial farm jobs, and distinct concerns such as environmental protection, consumer health, and food prices are purely collateral. Far from being “legitimate component[s] of societal interest in agriculture,” these matters are “inconvenient detail[s] in a futile campaign to maximize demand for the labor of the farm sector’s entrepreneurial class.”³²⁰

3. *The Political Economy of Agricultural Ecology*

In the end, discussions of agriculture as an industry based on natural resource exploitation should heed the difference between laws that “protect[] [a natural] resource” as such and laws that shield “the farmer’s proprietary interest in the asset.”³²¹ “[M]ere landownership does not automatically give rise to stewardship.”³²² Farmers can be counted upon, like any other rational economic actors, to protect their proprietary interests, if only to sell their land at full price to a subsequent purchaser.³²³ For instance, a change in a farmer’s expected stream of commodity payments—like any other change in the legal or financial landscape—will have an immediate impact on asset values.³²⁴ This purely pecuniary interest is just as readily advanced by an integrated agribusiness as by a family farmer. Of course, land ownership gives a family farmer an extra measure of entrepreneurial control and job security. In this sense, the protection of individual farmers’ proprietary interests in farmland serves many of the same purposes expressed in labor and pension law, with no particular impact on environmental values.

On the other hand, the often costly enterprise of preserving the long-run integrity of natural resources is a task that often eludes farmers with “shorter planning horizons and higher discount rates for conservation investments” and other environmental expenditures.³²⁵ These are the very economic characteristics associated with family ownership.³²⁶ To the extent that protecting farmland *qua* farmland is a function of access to capital and the economic ability to comply with environmental obligations, there is every reason to favor the farm size, whether small or feudal in its dimensions, that best facilitates the farmer’s access to capital.

Farmland represents two very different things. It is both the war chest that stores the wealth won by past generations and the hope chest that promises wealth to generations yet to come. The gift of good land is either a

319. *Id.* at 2421 (Scalia, J., dissenting).

320. *Agroecological Opium*, *supra* note 161, at 20.

321. Looney, *supra* note 235, at 767.

322. *American Ideology*, *supra* note 25, at 835.

323. See generally Bailey & Baumol, *supra* note 55 (urging an academic focus on costs of *exit*, including elements of value not recoverable in the purchase price paid by a business successor, rather than costs of *entry*).

324. See Robbin Shoemaker et al., *Commodity Payments and Farmland Values*, AGRIC. OUTLOOK, June 1995, at 15, 16.

325. Lee, *supra* note 308, at 1073.

326. See *id.*

supplement to Social Security or a source of future job and food security. It all depends on the beholder's place in the human life cycle.

Which of these two visions is foreordained by the political economy of American agriculture? The answer, once again, is in the family.³²⁷ In a farm sector where the average age of farm operators has been creeping upward from 48.7 to 53 since the end of World War II,³²⁸ propping up farmland values effectively finances retirement for the current generation of older farmers at the expense of would-be entrants. The older farm generation has everything to lose from a decline in farmland prices and will vote accordingly; the disenfranchised youth who are deterred by high farmland prices will find it easier to seek alternative markets for their labor than to organize against their politically powerful elders. For this very reason, if for no other, America will "have a sustainable system of family farms on the snowy day in Satan's domain when [its] taxpayers . . . decide to stop retiring on the backs of other people's grandchildren and to lobby Congress for the wholesale demolition of the Social Security Administration."³²⁹ "Agricultural ethics" based on fairness to the future, a notion of "sustainability" motivated by a desire not to mortgage unborn generations' legacy of food production are lofty goals that routinely dissolve in the face of more pressing demands by the agricultural system's contemporary constituents.³³⁰

We have not even begun to take into account the enforcement costs of environmental regulation in a farming system comprised principally of small family farms as opposed to the costs in a farming system dominated by integrated agribusinesses. The astonishing degree of sympathy for family farmers in the public eye may well impose unacceptable political costs on those who would extend "the long arm and iron fist of environmental law to the farm."³³¹ By contrast, agribusiness firms have historically endured an "extraordinary amount of inquiry and criticism," primarily because "politicians, farm leaders, and consumer advocates" cannot resist the allure of a game that "gives gratification to the many and offense to the few."³³² Environmental enforcement on the farm is politically easier, and thus cheaper, when the target of the law's green wrath is a nonfamily corporation rather than a family-owned farm.

The electoral power of the farm has long scarred the American political landscape and now threatens to inflict like damage on our nation's natural

327. Cf. Maureen L. Cropper et al., *Discounting Human Lives*, 73 AM. J. AGRIC. ECON. 1410, 1412-13 (1991) (suggesting that members of the current generation value the lives of their children and, perhaps, their grandchildren far more than subsequent generations).

328. Compare U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 465 (reporting that American farm operators had an average age of 48.7 as of 1945) with U.S. DEP'T OF COMMERCE, *supra* note 62, at 8 (reporting the average age of farm operators as 53 as of 1992).

329. *Agriculture's First Disobedience*, *supra* note 74, at 1331.

330. See generally Daniel A. Farber & Paul A. Hemmersbaugh, *The Shadow of the Future: Discount Rates, Later Generations, and the Environment*, 46 VAND. L. REV. 267, 289-300 (1993) (defining and discussing the notion of equity toward future generations).

331. *Get Green or Get Out*, *supra* note 161, at 352.

332. FARM AND FOOD POLICY, *supra* note 112, at 213.