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Rhetoric and Retrenchment: Agrarian Ideology and American Bankruptcy Law

by

David Ray Papke

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RHETORIC AND RETRENCHMENT: AGRARIAN IDEOLOGY AND AMERICAN BANKRUPTCY LAW

David Ray Papke*

"Special bankruptcy legislation for the farmer is hardly new."[1]

INTRODUCTION

Beginning with the first comprehensive and enduring enactment of federal bankruptcy law in 1898,[2] American bankruptcy law has always paid special attention to and provided special protection for the American farmer. The pro-farmer bankruptcy legislation of the Great Depression[3] and the recent Family Farmer Bankruptcy Act of 1986[4] are the two most pronounced examples of this tendency. Bankruptcy is a disorienting socioeconomic experience for all Americans, but farmers, perhaps more so than any other recognizable American social group, can think of bankruptcy as a supportive and sensitive legal process.

Many specialized and specific factors have contributed to bankruptcy law's approach to farmers over time, but the most general and potent factor involves the highly valorized image of the farmer in the dominant American ideology. The term *ideology*, as employed here, does not refer to the capitalist structure of domination frequently stressed in traditional Marxist scholarship;[5] nor does the term necessarily invoke false, deceptive

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* Associate Professor of Law and American Studies, Indiana University School of Law—Indianapolis. A.B., Harvard College, 1969; J.D., Yale University, 1973; Ph.D. University of Michigan, 1984. The author thanks his research assistant Barbara M. Richards for her diligent research and valuable insights and his colleague Paul N. Cox for important conceptual refinements.

1. R. AARON, BANKRUPTCY LAW FUNDAMENTALS 15-2 (1987).

2. Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed as amended 1978).

3. Act of March 3, 1933, ch. 204, § 75, 47 Stat. 1467, 1470-73 (repealed as amended 1978).

4. Bankruptcy Judges, United States Trustees and Family Farmers Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified at 11 U.S.C. §§ 1201-1231 (1982 & Supp. IV 1986)).

5. For explorations of the Marxist understandings of ideology, see R. EYERMAN, FALSE CONSCIOUSNESS AND IDEOLOGY IN MARXIST THEORY (1981) and Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law*, 19 LAW & SOC'Y REV. 11 (1985).

or negative connotations.[6] *Ideology*, as employed in this Article, denotes generalized normative beliefs which are encoded in social institutions and relations. These normative beliefs are contested and fluid within any particular historical moment. Ideology also shifts over time in grander ways, especially as it collides with other ideologies and its social underpinnings change. Scholars and commentators in legal realism, radical criminology, sociological jurisprudence, the law and society movement, and—most significantly—critical legal studies have demonstrated in various ways that law interrelates with ideology.[7] Bankruptcy law in general and bankruptcy involving farmers in particular are not exceptions. The pronounced valorizing of farming in the dominant American ideology most certainly infuses American bankruptcy law. Farm-related bankruptcy law also, albeit in a lesser way, contributes to the dominant American ideology.

The ideological tendency to place the American farmer on a pedestal began even before the founding of the Republic. Drawing on the European tradition of pastoralism, on the Virgilian image of the good shepherd reveling in an idealized landscape, American writers and politicians of the eighteenth century praised the yeoman for his industriousness, honesty, independence and spirit of equality.[8] Lost in this imagery was a sense of how dirty and difficult agricultural labor could be. Nevertheless, in the Revolutionary Period, prominent figures such as Hugh Henry Brackenridge, Benjamin Franklin, Phillip Freneau, Thomas Jefferson and George Logan continued to propagate the American agrarian myth. Perhaps the fullest statement of the myth came from the French expatriate St. John de Crevecoeur, writing in his *Letters of an American Farmer*.[9] Cultivation of the soil, he argued, brought a farmer into harmony with nature while simultaneously permitting him to avoid the terrible living conditions found in the pure wilderness. Crevecoeur perceived farming as virtually a utopian undertaking, an enterprise in which families could grow in deeply human ways and through which they could serve as the foundation for a larger

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6. For a succinct contrast of ideology understood as false versus ideology understood as merely normative, see R. WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 126-30 (1976).

7. Recent articles that use the concept of ideology in ways generally analogous to this author's include Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Weissbourd & Mertz, *Rule-Centrism Versus Legal Creativity: The Skewing of Legal Ideology Through Language*, 19 LAW & SOC'Y REV. 623 (1985).

8. Eisinger, *The Freehold Concept in Eighteenth-Century American Letters*, 4 WM. & MARY Q. 42 (1947).

9. The original version of Crevecouer's book was published in London in 1782. For discussions of Crevecouer's life and writings, see E. HIGBEE, FARMS AND FARMERS IN AN URBAN AGE 78-79 (1963) and H. SMITH, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH 126-28 (1950).

society.[10] Even an urban adversary of the agrarian interests such as Alexander Hamilton showed his obeisance to the agrarian myth. He conceded in his *Report on Manufactures* that "the cultivation of the earth, as the primary and most certain source of national supply, . . . has intrinsically a strong claim to pre-eminence over every other kind of industry."[11]

In the early nineteenth century the agrarian myth hardly disappeared. Instead, the myth became central in American political folklore and nationalism. In the words of the premier American Studies scholar, Henry Nash Smith:

> The image of this vast and constantly growing agricultural society in the interiors of the continent became one of the dominant symbols of nineteenth-century American society—a collective representation, a poetic idea that defines the promise of American life. The master symbol of the garden embraced a cluster of metaphors expressing fecundity, growth, increase and blissful labor in the earth, all centering about the heroic figure of the idealized frontier farmer armed with the supreme agrarian weapon, the sacred plow.[12]

The yeoman became a symbol of the new nation which envisioned the settling of the trans-Allegheny region, at least outside the South,[13] as an internal empire of family farms. The Homestead Act of 1862 was further testimony to this vision,[14] and even more so was the manner in which the agrarian myth rode roughshod over the earliest image of a "Great American Desert." The premise of an uninhabitable desert to the east of the Rocky Mountains had been accepted by the American public since at least the time of Zebulon M. Pike's western expeditions, but the image crumbled when the frontier of agricultural settlement reached Kansas and Nebraska shortly before the Civil War. Suddenly, the desert was fertile after all, and farmers planted stakes, often with disastrous results, across the central plains.[15]

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10. For a spirited critique of Crevecouer and related writers, see R. SLOTKIN, REGENERATION THROUGH VIOLENCE: THE MYTHOLOGY OF THE AMERICAN FRONTIER, 1600-1860, at 332-48 (1973).

11. R. HOFSTADTER, THE AGE OF REFORM 27 (1955).

12. H. SMITH, *supra* note 9, at 123.

13. During the first quarter of the nineteenth century, southern agriculture also expanded rapidly, but in ways quite different than those of the North. Responding to the world cotton market, southern farmers developed slave-driven plantations throughout the southern states. While in the North, agrarian ideology revolved around the myth of the yeoman farmer, the agrarian ideology of the South stressed the idyllic image of the plantation. The contrast between the two agrarian ideologies became especially striking during the often bloody battles for control of the new territories. H. SMITH, *supra* note 9, at 145-51.

14. F. SHANNON, THE FARMER'S LAST FRONTIER: AGRICULTURE, 1860-1897, 53-58 (1945).

15. *See* Gregory, *What of the Desert?*, 41 CENTURY 796 (1891); Morris, *The Notion of a Great Desert East of the Rockies*, 13 MISS. VALLEY HIST. REV. 190 (1926); Smith, *Rain Follows the Plow: The Notion of Increased Rainfall for the Great Plains, 1844-1880*, 10 HUNTINGTON LIBR. Q. 169 (1947). For a standard treatment of pioneers on the plains, see W. WEBB, THE GREAT PLAINS (1931).

Bankruptcy law during the twentieth century has continued to manifest this special respect for and sensitivity to farmers. While not limited only to periods of economic distress, this bankruptcy law tendency is most evident during economic malfunctions. Bankruptcy as a socioeconomic phenomenon, of course, is no stranger in these periods, and bankruptcy law reform in these periods inevitably manifests rhetorical proclivities and, concomitantly, valorizes the farmer. Supporters of bankruptcy law reform and the resulting laws themselves selectively emphasize some aspects of social reality and neglect others; language grows ebullient, expressive and figurative in support of farmer-oriented schematic renderings of social order.

Pro-farming preferences in the bankruptcy law, however, are not so powerful and overwhelming as to preclude retrenchment. The selective focus gives way to what is allegedly more balanced and reasoned; ebullient, expressive and figurative language is in part supplanted by more moderate discourse. The bankruptcy law then manifests a skepticism and caution concerning preferential legal treatment of farmers. In particular, bankruptcy law attempts to certify that bankrupt farmers are truly farmers and not sprawling agri-businesses or wealthy individuals seeking tax shelters; it tries to guaranty that pro-farmer bankruptcy law provisions measure up to general constitutional standards and also to terminate pro-farmer provisions with sunset clauses.

This Article explores the rhythm of rhetoric and retrenchment in the process of American bankruptcy law enactment, adjudication and interpretation. In particular, this Article will consider the prohibition of involuntary farmer bankruptcies in the Bankruptcy Act of 1898, the attempts to protect farmers in the Frazier-Lemke Acts of 1934 and 1935, and the concern for family farmers in the Family Farmer Bankruptcy Act of 1986. In sequence, these three developments span almost 100 years and illustrate a progression from defensive protection to special extensions and moratoria to an entire bankruptcy chapter. These illustrative developments demonstrate the interplay of ebullience and moderation within a relatively specific legal-ideological area. An awareness of what has come before might contribute to our understanding of what lies ahead in the same area and also contribute to a greater appreciation of ideology and law's interrelationships in other areas as well.

A Bankruptcy Shield for the American Farmer

The Bankruptcy Act of 1898, following several short-lived pieces of federal bankruptcy legislation,[16] was the first enduring federal bankruptcy

16. Three bankruptcy acts preceded the 1898 legislation. The first was enacted in 1800 and repealed in 1803. The second was enacted in 1841 and repealed in 1843. The third was enacted in 1867 and repealed in 1878. Each of these acts and

law.[17] The Act's most striking farmer-related feature was a special protection for farmers against involuntary bankruptcies,[18] a protection not afforded by the bankruptcy law of 1867.[19] No single individual or factor explains this special protection; rather, a variety of agricultural, political and general economic developments interacted with the dominant agrarian ideology to produce the legislative ban on involuntary bankruptcy proceedings against farmers. The farmer's protection against creditor-initiated bankruptcies, meanwhile, was tempered when in the years after 1898 federal courts more carefully and restrictively defined the meaning of "farmer."

Even before the agricultural extension onto the Great Plains in the years following the Civil War, the American agrarian image which was so much a part of the dominant ideology, had lost congruence with the realities of American farming.[20] To be sure, the imagery had helped fuel continental expansion. It also served as a placebo when eastern cities, bulging with immigrants, were convulsed by rioting.[21] But the imagery notwithstanding, American farms during the nineteenth century grew larger, more mechanized, and more entrepreneurial. The ranks of "hired hands," that is, non-proprietary agricultural laborers, increased,[22] and farmers found it increasingly necessary to master railroad shipping rates, complicated loan agreements, and international commodity markets. More so than ever before, American farming was a commercial rather than self-sufficient enterprise, and the American farmer was frequently a harassed businessman and speculator.

Certain developments on the federal level reflected an awareness of these changes. Recognizing commercial farmers' increased need for scientific expertise and managerial training, Congress in 1889 passed the Hatch Act, which established a network of agricultural experiment stations.[23] Culminating an effort that had begun in the antebellum years,[24] President Cleveland in February of 1887 elevated the Secretary of Agriculture to cabinet

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all subsequent federal bankruptcy legislation as well were enacted under the authority granted by Article I, Section 8 of the Constitution. *See* Hanna, *Agriculture and the Bankruptcy Act*, 19 MINN. L. REV. 1, 1-3 (1934); Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223 (1918); Olmstead, *Bankruptcy, A Commercial Regulation*, 15 HARV. L. REV. 829 (1902).

17. The legislation was commonly called the Nelson Act.

18. 11 U.S.C. § 22 (1898).

19. Act of March 2, 1867, ch. 176, 14 Stat. 517 (repealed as amended 1978).

20. R. HOFSTADTER, *supra* note 11, at 36-46.

21. Between 1830 and 1860 alone, thirty-five major riots occurred in Baltimore, Philadelphia, New York and Boston. During the same years, Cincinnati experienced four equally violent riots. D. PAPKE, FRAMING THE CRIMINAL: CRIME, CULTURAL WORK AND THE LOSS OF CRITICAL PERSPECTIVE 1830-1900, at 5 (1987).

22. F. SHANNON, *supra* note 14, at 359-67.

23. R. WEIBE, THE SEARCH FOR ORDER, 1877-1920, at 126 (1967).

24. R. GATES, THE FARMER'S AGE: AGRICULTURE, 1815-1860, at 336-37 (1960).

rank and named Norman J. Coleman to fill the position.[25] With the federal government's support, farming continued to grow. During the 1890s the number of farms increased by one million, the total acreage by two hundred million, and the total value of farm property by four billion dollars.[26]

Yet, all was not well in the agricultural sector. Especially in the areas newly opened to farming, many family farms failed, and mortgages multiplied far beyond reasonable limits.[27] Regional crop specialization increasingly subordinated farmers to the urban banker and merchant.[28] These socioeconomic phenomena in addition to the dissonance between the image of philosophical, happy yeoman and the precarious, draining experience of many farmers contributed to the populist crusades of the 1880s and 1890s. Concluding with the unsuccessful but nevertheless forceful presidential campaign of William Jennings Bryan in 1896, Populism as a political movement created a new awareness of farmers and their condition, especially in the South and Midwest. A century earlier, few would have distinguished farmers from other American citizens, but in the late nineteenth century occupational and social differentiation continued. Farmers could now be seen and, indeed, saw themselves as a distinct social group.[29]

While farming grew increasingly specialized and precarious, generating a grumpy political activism, the newly interdependent American economy suffered between 1893 and 1899 from the nation's worst economic depression to that point in history. During the first half of 1893, thirty-two steel companies failed, and in the same year five hundred banks and sixteen thousand businesses tumbled into insolvency.[30] Nearly twenty percent of the labor force was unemployed, and in 1894 alone there were over thirteen hundred strikes and riots.[31] Almost as if to underscore the severe economic disarray, various symbols of the American nation teetered or faced challenges. President Cleveland struggled to carry on despite mouth cancer, and Jacob Coxey, a frustrated Ohio businessman, led a ragtag army of five hundred unemployed workers on a march to Washington, D.C., where the mounted police clubbed the marchers on the Capitol grounds. Sociopolitical disequilibrium was palpable, and highly rhetorical ideological

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25. F. SHANNON, *supra* note 14, at 270-71.

26. H. FAULKNER, POLITICS, REFORM AND EXPANSION, 1890-1900, at 60 (1959).

27. In 1890, one mortgage existed for every two people in Kansas and North Dakota and one for every three in Nebraska, South Dakota and Minnesota. J. HICKS, THE POPULIST REVOLT 24 (1931).

28. F. SHANNON, *supra* note 14, at 125-267.

29. Important historians return time and again to the question of the Populists' political identity and program. *See, e.g.*, N. POLLACK, THE JUST POLITY: POPULISM, LAW AND HUMAN WELFARE (1987); N. POLLACK, THE POPULIST RESPONSE TO INDUSTRIAL AMERICA (1962).

30. 2 M. NORTON, D. KATZMAN, P. ESCOTT, H. CHUDACOFF, T. PATERSON & W. TUTTLE, A PEOPLE AND A NATION 576 (1986).

31. *Id.* at 577.

expressions both critical and supportive of the American system multiplied.

As in prior less pronounced periods of economic difficulty and ideological uncertainty, Congress began to reform bankruptcy law,[32] and in particular chose to protect that special loam for "grass-roots democracy"—farmers. The statutory provision protecting farmers from involuntary bankruptcy was a straightforward part of the Bankruptcy Act of 1898.[33] The new law shielded any person engaged in farming or tillage of the soil from creditor-initiated bankruptcy, and this basic provision remained unchanged for forty years.[34] Even in 1898, the notion of "tillage" carried archaic connotations, but connotations of this sort linked nicely to traditional images of yeomanry. A ban on involuntary farmer bankruptcies could not prevent farmers from overextending themselves financially and from becoming insolvent, but due to the provision farmers could only by their own volition enter into bankruptcy proceedings. This special group of Americans was to have its integrity, dignity and independence preserved even in the midst of bankruptcy, the darkest moment of American economic life.

A treatise literature on the new bankruptcy law appeared almost as soon as the law itself, but the literature hardly mentioned the unique farmer provision. Henry Campbell Black, for example, who was destined to win the race for prominence among compilers of legal dictionaries, produced a bankruptcy treatise in 1898.[35] The treatise provided extensive annotations for "wage earner" and other phrases, and it reflected almost dejectedly on the Bankruptcy Act's failure: "It may be expected that difficulties will arise in [the Act's] construction, in view of the complex conditions of modern business life and the manifold nature of the relation of employer and employed."[36] Yet, the volume merely restated, without significant

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32. The bankruptcy law enacted in 1800, Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed as amended 1978), followed the depression of 1798, and the law of 1841 followed the severe banking crisis of 1837. The Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (repealed as amended 1978), was enacted in the midst of the severe economic disarray following the Civil War.

33. Act of July 1, 1898, ch. 541, § 46, 30 Stat. 544, 547 (repealed as amended 1978), provided at the time of its 1898 enactment:

> Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.

34. In the Act of June 22, 1938, ch. 575, § 1(17), 52 Stat. 840, 841 (repealed as amended), Congress more extensively defined "farmer" for bankruptcy purposes.

35. H. BLACK, A HANDBOOK OF BANKRUPTCY (1898).

36. *Id.* at 35-36.

discussion, the farmer provision.[37] For his part, William Miller Collier, who would claim his mantel as the nation's premier bankruptcy law commentator, warned in the preface to his treatise that the new law would be "a matter of statutory construction" and promised to provide and construe "copious cross-references."[38] True to his promise, Collier went on to discuss virtually every key word in the involuntary bankruptcy section, only to leave unaddressed the definition of farmer.[39] Turn-of-the-century farmers were increasingly becoming specialized businessmen; they were, like classic small businessmen, diversifying their economic pursuits. Yet, the first treatise writers took little notice. Farmers were farmers. While the treatises explored complexities in many other areas, their fix on the yeoman was naively steady.

The federal courts, meanwhile, found living annotations to the treatises gathering on the courthouse steps. In one representative case, a South Carolinian sought to avoid an involuntary proceeding because of his farmer status. He cultivated 630 acres of cotton, bought and sold mules, and was also a partner in a buggy and wagon dealership.[40] The appellate court held that farming was the bankrupt's chief business; however, the Columbus Buggy Company which had initiated the involuntary proceeding could justifiably have questioned the ruling. In another case, the alleged bankrupt not only ran three country stores but also was a member of four distinct partnerships each of which cultivated a separate farm.[41] What for purposes of bankruptcy law were the defining characteristics of a farmer? Who really was a farmer? The questions were difficult to answer, if only because economic activity in the agricultural sector did not lend itself to simple characterizations.

Traversing a largely unmarked course, courts had no reliable legal standards to guide them, and general sentiments and bridled skepticism were influential in their decisions. Some decisions appeared to rest largely on the courts' perceptions of genuine agrarian histories or sensitivities on the bankrupt's part. If the bankrupt and his family had a history of farming or if he appreciated farming and held it close to his heart, then he could claim protection from an involuntary proceeding.

Note in this regard both *Sutherland v. Rich & Bailey*[42] and *In re Hoy*.[43] In the former, a Georgian referee seemed particularly impressed that a supposed farmer grew up on a nearby farm and knew how to assess the

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37. *Id.* at 25.

38. W. COLLIER, THE LAW OF BANKRUPTCY AND THE NATIONAL BANKRUPTCY ACT OF 1898, at iv (1898).

39. *Id.* at 51-56.

40. Counts v. Columbus Buggy Co., 210 F. 748 (4th Cir. 1913).

41. American Agric. Chem. Co. v. Brinkley, 194 F. 411 (4th Cir. 1912).

42. 22 Am. Bankr. Rpts. 85 (1909).

43. 137 F. 175 (N.D. Iowa 1905).

levelness of a certain plot. To be sure, the man and his partner also rented the plot to "fifteen colored families," ran a commissary at which the tenants shopped with trade checks, sold fertilizer and John Deere plows, and in the partner's case served as the local justice of the peace. Yet when a cyclone blew through the county scattering the goods, trade checks and fertilizer and demolishing the commissary itself, the referee determined that the partners were farmers and dismissed the involuntary bankruptcy proceeding. In *In re Hoy*, the bankrupt, William Hoy, had grown up on an Iowa farm, taught school for a number of years, read law, and then conducted a legal practice and collections business in Mason City. Hoy owned five rental farms, and paid particular attention to the 470-acre farm on which his brother-in-law was the tenant. They co-stocked the farm, Hoy participated in management decisions, and Hoy himself lived on the farm. The district court judge tried to unravel the financial affairs of this prototypical Midwestern agrarian entrepreneur and professional to determine if his creditors could force Hoy into an involuntary bankruptcy. Acknowledging the difficulty of his task, Judge Reed referred to the ledger sheets and determined that the costs and benefits of Hoy's farms exceeded the comparable figures for Hoy's professional and collections activities. Hoy was, therefore, for bankruptcy purposes, adjudged a farmer. If any doubts lingered about the bankrupt's competing affiliation with the legal profession, the court noted, "He has not kept up his library for some two or three years, has only partial sets of the Iowa Reports, the Northwestern and Northeastern Reporters, and about 25 volumes of miscellaneous text-books, and has offered these for sale prior to 1903."[44]

Impressionistic decisions of this sort might suggest a judicial inclination to accept claims of farming status, but there was also detectable judicial skepticism. Beyond an awareness that American farming was an increasingly complex and sophisticated business, judges likely appreciated the real improvements in the farm economy that began roughly in 1897 and continued until World War I.[45] This prosperity may have contributed to a judicial inclination to limit the definition of "farmer" within the bankruptcy laws, and thereby to prevent overutilization of the protection from involuntary bankruptcy proceedings.

Countless decisions betray a recognizable skepticism as the new century began to unfold. One court prevented an individual who had become insolvent while conducting a boot and shoe business from then fleeing into the safe harbor of farming.[46] Another court held that ownership of a residence on a farm leased to another was insufficient to protect one from

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44. *Id.* at 177-78.

45. H. FAULKNER, *supra* note 26, at 61; R. HOFSTADTER, *supra* note 11, at 95; F. SHANNON, AMERICAN FARMERS' MOVEMENTS 74-75 (1957).

46. *In re* Luckhardt, 101 F. 807, 809-10 (D. Kan. 1900).

involuntary bankruptcy.[47] Still another court distinguished between an agrarian farmer on the one hand and a person who bought and sold cattle on the other.[48] Finally, one court held that the conveyance of a farm to a wife who was not truly engaged in farming was insufficient to protect the farm property from the creditors' grasp in an involuntary proceeding.[49] To be sure, many of those who claimed farmer status to avoid creditor-initiated bankruptcies successfully sustained their claims, but generally speaking, the simplicity of the initial legislative provision was moderated by both impressionistic searching and especially by a cautious skepticism.

At the least, the federal courts established general parameters. On one extreme, agricultural corporations were not deemed farmers,[50] and, on the other, an individual bankrupt's lack of affiliation with any other business or occupation did not mean he was by default a farmer.[51] But, disdain for corporations and the acknowledgment that the turn-of-the-century American everyman was not automatically a farmer hardly established anything approaching firm rules. As the court stated in *Bank of Dearborn v. Matney*,[52] there was "no hard and fast rule."[53] While several United States Circuit Courts addressed the question of the definition of a farmer under the bankruptcy law,[54] the United States Supreme Court did not consider the definition and left determinations on the myriad of hybrid cases to local judges. The case law considered the sources of indebtedness[55] and struggled genuinely and, on occasion, disingenuously to determine if farming was of "paramount importance" to a debtor's welfare,[56] but clear standards failed to emerge. While a judicial consensus that the question of farming status had to be considered eventually emerged, judges in the first decade of the twentieth century appeared faithful to ideological premises of the 1898 Bankruptcy Act. While propagating a judicial retrenchment from the legislative rhetoric, the judges themselves referred to an ideological image of the yeoman and attempted to gauge the highly variable and decidedly

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47. *In re* Matson, 123 F. 743, 743-44 (M.D. Penn. 1903).
48. *In re* Brown, 132 F. 706, 707 (S.D. Iowa 1904).
49. *In re* Johnson, 149 F. 864, 869 (N.D.N.Y. 1907).
50. *In re* Lake Jackson Sugar Co., 129 F. 640, 643 (S.D. Tex. 1904).
51. *In re* Leland, 185 F. 830, 832 (W.D. Mich. 1910).
52. 132 F. 75 (W.D. Mo. 1904).
53. *Id.* at 77.
54. Counts v. Columbus Buggy Co., 210 F. 748 (4th Cir. 1913). *See also* Olive v. Armour & Co., 167 F. 517 (5th Cir. 1909); Gregg v. Mitchell, 166 F. 725 (6th Cir. 1909); Flickinger v. First Nat'l Bank, 145 F. 162 (6th Cir.), *cert. denied*, 203 U.S. 595 (1906); Beach v. Macon Grocery Co., 120 F. 736 (5th Cir. 1903); Wulbern v. Drake, 120 F. 493 (4th Cir. 1903); *In re* Dwyer, 184 F. 880 (7th Cir. 1901).
55. *In re* Brown, 132 F. 706 (S.D. Iowa 1904); Bank of Dearborn v. Matney, 132 F. 75 (W.D. Mo. 1904).
56. *In re* Mackey, 110 F. 355, 359 (D. Del. 1901).

more commercial realities of American agriculture against this image *qua* standard.

A commentator on the question of who was a farmer for purposes of twentieth-century bankruptcy law need not narrow his or her focus to pre-World War I cases. Indeed, there is an abundance of cases revolving around this question from later periods.[57] However, the treatment at hand suggests the variable interactions of agrarianism and American bankruptcy law. Working in a period of sociopolitical disequilibrium, Congress enacted a comprehensive bankruptcy law which shielded farmers from involuntary bankruptcy proceedings. The pro-farming provision respected the increasingly precarious position of farmers in the interdependent economy, and it also reiterated a traditional ideological premise in a time of national uncertainty. After the legislative overture, a modulating cacophony became audible, one which echoed not the initial flourish but rather the variegated sounds of economic diversity, specialization and hybridization. Ideology and law are never separate and distinct, but as subsequent discussions will further confirm, the actual interrelationship of ideology and law is hardly static. In bankruptcy law initial pronouncements may be perceived as one-half of a dialectic with more quotidian sociolegal tinkering.

FARMER BANKRUPTCY IN THE GREAT DEPRESSION

The Great Depression came early to American farms. For most sectors of the economy, the stock market crash of 1929 marked the beginning of severe economic decline, but American agriculture never emerged from the economic downturn of the early 1920s. Farm prices fell throughout the decade, and by 1929 the per capita income of American farmers was only thirty-six percent of that for all Americans.[58] Farmers' difficulties derived from many factors, not the least of which was chronic overproduction. Mechanization and specialization contributed to this overproduction, and, as the tractor replaced the horse and mule, farmers were able to cultivate land that formerly had been pasture. In addition, farmers had greatly increased their debt burdens starting with the prosperity of the war years and continuing into the agricultural depression of the 1920s; thus, mortgage foreclosure became common when prices fell and international markets were unable to absorb American agricultural surpluses.[59]

When the Great Depression began in force, conditions in the agricultural sector grew even worse. On a single day in April of 1932, one-fourth of

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57. To cite one basis for research in a later period, see 1 H. REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 68 (1950), which contains six full pages of case annotations concerning who may qualify as a farmer.

58. R. MCELVAINE, THE GREAT DEPRESSION: AMERICA, 1929-1941, at 21 (1984).

59. *Id.* at 35-36.

all the land in Mississippi was sold at foreclosure auctions.[60] In some areas farmers took direct action, refusing to grow or ship crops, menacing judges, and holding foreclosure bidding to a pittance. "Penny auctions" and other forms of resistance never became common, but they in part prompted quick action from the newly installed Roosevelt Administration. The Agricultural Adjustment Act, Emergency Farm Mortgage Act, and other pieces of federal legislation followed.[61] Certain members of the Congress, in fact, favored greater reforms than the Roosevelt Administration. One proposal surfaced to have the government issue three billion dollars in fiat money to buy farm mortgages, a proposal which one legal commentator found truly ominous.[62] This proposal failed to attract supporters in Congress, but throughout the 1930s farmers were the Great Depression's greatest victims. Envisioned schematically, the sad and unfortunate plight of American farmers during the 1920s and 1930s was an especially dark circle in a large field which was already black.

In Congress, changes in bankruptcy laws emerged as one remedy for farmers. On the simplest level, many farmers were facing insolvency and consequently the loss of their family farms. Hence, lawmakers could understandably have hoped to alleviate farmers' distress and preserve their dignity by reforming bankruptcy law. More generally, however, the nation as a whole was under stress; options and directions were uncertain. In a situation such as this, there was a tendency to refer to traditional ideological preferences for guidance. To wit, the valorization of farming—the tendency to treat farmers as veritable icons of Americanism—provided some orientation. In the bankruptcy area as in others, protecting farmers through law reform symbolically and psycho-politically protected America. However, after ebullient and expressive rhetoric in Congress led to pronounced pro-farmer enactments, the United States Supreme Court and lower courts took upon themselves the task of moderating and redirecting these highly impassioned legislative initiatives. Congress in turn responded to the Supreme Court, and the dialectic of rhetoric and retrenchment resulted in much more limited legislative action.

Congress' Depression-era bankruptcy legislation involving farmers was section 75 of the Bankruptcy Code.[63] Enacted in 1933, section 75 expanded troubled farmers' opportunities to rehabilitate through composition and extension agreements. This reform met with little success, however, since under the original terms of section 75 farmers' creditors maintained the

60. W. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940, at 23 (1963).

61. M. BENEDICT, FARM POLICIES OF THE UNITED STATES, 1790-1950: A STUDY OF THEIR ORIGINS AND DEVELOPMENTS 276-401 (1953).

62. Hanna, *supra* note 16, at 7.

63. Act of March 3, 1933, ch. 204, § 75, 47 Stat. 1467, 1470-73 (repealed as amended 1978).

power to approve or disapprove proposed compositions or extensions. If the creditors did not approve, the farmer still faced liquidation. The best indicator of the law's limited impact is that during the eight months following its enactment only forty debtors in the country filed petitions under section 75.[64]

Because of the failure of section 75, Lynn Frazier and William Lemke introduced a bill to amend section 75. Because the bill granted farmers more extended foreclosure moratoria, it was an even more pronounced pro-farmer gesture. The Frazier-Lemke Act may be viewed as a product of the Northern Plains and of the particularly depressed condition of grain farmers of that region. Frazier and Lemke were veterans of the rambunctious Nonpartisan League campaigns of the 1920s and, respectively, Senator and Congressman from North Dakota.[65] Lemke rode promises of mortgage and bankruptcy law reform for farmers into office in 1932, and the Frazier-Lemke Act was one of his attempts to deliver on his campaign promises. Certain eastern senators vigorously opposed the Act,[66] but Senator Huey Long, his own populist colors waving, successfully maneuvered the bill through the Senate and through conference. Although the Roosevelt Administration did nothing to block the legislation,[67] there was discomfort in liberal and urbane New Deal circles with Lemke's more aggressive and agrarian politics. Lemke eventually undertook a national speaking tour attacking the New Deal, and he became a favorite of militant anti-Roosevelt groups. Nominated by the newly-organized Union Party, Lemke ran for President in 1936, receiving almost 900,000 votes in an ill-fated third-party campaign.[68]

The Frazier-Lemke Act itself was a bold attempt to save the farms of bankrupt farmers. The Act provided, among other things, that a farmer who failed to receive creditor consent for a composition under the Bankruptcy Act could, nevertheless, upon being adjudged a bankrupt, take other steps to save his mortgaged property. The bankrupt farmer could, if the mortgagee assented, purchase the farm at appraised value, acquiring title

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64. Hanna, *supra* note 16, at 6.

65. T. SALOUTOS & J. HICKS, TWENTIETH-CENTURY POPULISM: AGRICULTURAL DISCONTENT IN THE MIDDLE WEST, 1900-1939, at 149-218 (1951).

66. Senator Herbert of Rhode Island and Senator Lonergan of Connecticut were especially outspoken critics of the Act. Senator Lonergan deplored the Act for its "repudiation of obligations" and "taking property without due process of law." "I am satisfied as a lawyer," Lonegran added, "that there is not any court in the land that would uphold this bill if it should be enacted as law." *See* Hanna, *supra* note 16, at 8 (quoting Senator Lonergan).

67. When signing the Frazier-Lemke Act into law ten days after Congress adjourned in 1934, President Roosevelt characterized it as "loosely drawn." N.Y. Times, May 28, 1935, at 1, col. 7. However, he did defend the Act by saying, "I have sufficient faith in the honesty of the overwhelming majority of farmers to believe that they will not evade payment of just debts." *Id.*

68. W. LEUCHTENBURG, *supra* note 60, at 195.

and immediate possession by agreeing to make deferred payments at modest interest rates.[69] If the mortgagee refused to assent to the purchase on these terms, the bankrupt farmer could ask the court to stay all proceedings for five years. During that period the farmer could retain possession by paying a reasonable rental fee which would be distributed periodically among secured and unsecured interests. At any point during the five years, the farmer could acquire the farm by paying the appraised price in full.[70]

Real estate lenders greeted the Act with dismay, but distressed farmers were delighted. Self-styled spokesmen for the latter were especially prone to the highly figurative and emphatic language which is evident in periods of social strain. Congressman Charles U. Truax showed a special knack for rhetorical invective. Vigorously supporting the Frazier-Lemke Act, Truax said:

> When this law becomes effective, I can but wonder what will become of the ruthless money lender when the breath of gold leaves his feculent body and a financial death stops the rattling of his grasping brain, for he is unfit for the higher realm of life and too foul for the one below. He cannot be buried in the earth, lest he provoke a pestilence; nor in the sea, lest he poison the fish; nor waving in space like Mahomet's coffin, lest the circling worlds, in trying to avoid contamination, crash together, wreck the universe and bring again the noisome reign of chaos and Satan.[71]

Within a year, a test case was argued before the Supreme Court of the United States. The case revolved around the Radfords, a farming couple from Kentucky who had defaulted on their mortgages to the Louisville Joint Stock Land Bank. The latter commenced a suit in the Christian County Circuit Court to foreclose the mortgage. The Radfords then attempted to obtain the approval of creditors for a composition, but the requisite number failed to assent. Only the passage of the Frazier-Lemke Act two days prior to the Court's order enabled the Radfords to continue attempts to save their farm. The Radfords filed amended petitions and obtained a five-year stay from the bankruptcy referee.

After approval of the referee's order by the federal district court[72] and an affirmation of the district court's decree by the Circuit Court of Appeals for the Sixth Circuit,[73] the United States Supreme Court granted certiorari. Any assumption that the case concerned only a farming couple from Kentucky evaporated in view of the luminaries who wrote briefs and made oral arguments. John W. Davis, among others, was on brief for the petitioners. The Democratic Party's Presidential nominee in 1924, Davis

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69. Act of June 28, 1934, ch. 869, § 75(s)(3), 48 Stat. 1289, 1290 (repealed as amended 1978).

70. *Id.* § 75(s)(7), at 1291.

71. 78 CONG. REC. 11,923 (1933) (statement of Representative Truax).

72. *In re* Radford, 8 F. Supp. 489 (W.D. Ky. 1934).

73. Louisville Joint Stock Land Bank v. Radford, 74 F.2d 576 (6th Cir. 1935).

was a Wall Street lawyer who headed the prestigious Davis, Polk & Wardwell firm. His clients included J. P. Morgan and Standard Oil, and in the 1920s he earned over $400,000 annually, at that point a virtually unheard of income for an attorney.[74] During the 1930s, Davis became a member of the National Lawyers' Committee of the American Liberty League, a fierce anti-New Deal group whose "assault against the administration was prompted by political opposition reinforced by professional displacement."[75] In keeping with his conservative and even reactionary political leanings, Davis argued that the Frazier-Lemke Act was outside the realm of bankruptcy and deprived mortgagees of their property rights without due process. Elaborately outlined and professionally composed, Davis' brief bemoaned the trampling of mortgagees' rights and even included a lengthy appendix providing the full range of state mortgage moratorium laws.[76]

Combinations of private lawyers, the Attorneys General of Minnesota and North Dakota, and none other than William Lemke acting as Special Assistant Attorney General of North Dakota submitted a half dozen briefs for the Radfords. Lemke was not Davis' equal in professionalism and legal argument, but Lemke's images of noble farmers were bolder and more graphic than those Davis could craft for secured creditors. Lemke deplored Davis for contending that Congress "cannot extend to a class of citizens who formed the Republic, defended it, and for a century and a half have been regarded as its backbone, the right at this time, to so reorganize their financial affairs that they may remain as the dependable, stable and conservative bulwark of the nation."[77] Bursting with rhetorical vigor, Lemke went on to add that the situation prior to the enactment of the Frazier-Lemke Act "tended to convert our home owning farmers into mere tenants and homeless, impoverished citizens."[78] Only the Act saved the farmer "from being reduced to a beggar, a mendicant, a mere homeless man in search of home and a place to rent at the mercy of his landlord."[79]

Given this aggressive juxtaposition of positive and negative references and the unusually contentious character of the advocates and briefs on both sides of the case, it is hardly surprising that the actual oral argument was a rough-and-tumble affair. Edwin A. Krauthoff's arguments for the Radfords, stating that the banking system was a "favorite child of the law" and a "device to enable men with capital to lend money to farmers without paying an income tax," elicited sharp rebuke from Justice

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74. J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 136-43 (1976).

75. *Id.* at 193.

76. Brief of Petitioner at 4, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935), in 295 RECORDS AND BRIEFS OF CASES DECIDED BY SUPREME COURT OF THE UNITED STATES 495-632 (1935).

77. *Id.*

78. *Id.* at 42.

79. *Id.*

McReynolds, one of the Court's most conservative members.[80] Krauthoff apologized, but insisted there was a question "whether bankers shall be allowed to dispossess farmers and make them peasants and tenants."[81]

Surprisingly, the Radford case did not produce fractious discord among the members of the United States Supreme Court. In a unanimous opinion handled down on May 27, 1935, the Court declared the Frazier-Lemke Act unconstitutional.[82] While another unanimous decision of the same day which struck down the National Industrial Recovery Act[83] overshadowed it, the ruling in *Louisville Joint Stock Land Bank v. Radford* was nonetheless forceful. As if to underscore the Court's unanimity, Justice Brandeis, one of the most recognizable "liberals" on the Court and a man with a demonstrated sympathy for the underdog and common man,[84] authored the opinion.

As a legal-cultural artifact, Brandeis' opinion is a mixed bag full of curious and misleading items. The opinion, for example, consists of seven sequentially ordered sections, but on closer examination the sections lack substantive distinctiveness. The opinion includes an elaborately crafted historical summary of legislation protecting "necessitous mortgagors" and narrower exploration of American bankruptcy legislation, which concludes that the Frazier-Lemke Act was *sui generis*.[85] But then, with the opinion apparently building toward the conclusion that the Act exceeded the Congressional power in the bankruptcy area, Brandeis switched to other topics. In its final pages, the opinion even includes an unanticipated and largely quantitative disquisition on the social phenomenon of farm tenancies,[86] a disquisition reminiscent of the fabled "Brandeis brief" but designed in the case at hand to counter impassioned suggestions by the Radfords' counsel that American farmers were becoming peasants.

The charitable critic might credit Brandeis with an erudite thoroughness or, perhaps, a misdirecting caginess, but it is more likely that a hurried Justice in the swirl of the Great Depression had difficulty focusing sharply. Disregarding the various curiosities in the opinion, the heart of the matter was that Brandeis and the Court felt that Congress had gone too far in attempting to aid farmers. The issue was not Congressional authority under the bankruptcy clause but rather the manner in which Congress exercised

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80. N.Y. Times, Apr. 3, 1935, at 11, col. 3.
81. *Id.*
82. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).
83. Schechter Poultry Corp. v. United States, 295 U.S. 553 (1935).
84. President Roosevelt counted Justices Brandeis, Cardozo and Stone as his most reliable allies on the Court. When he learned that Brandeis had joined the majority in invalidating the National Industrial Relations Act in *Schechter Poultry*, Roosevelt blurted, "And what about old Isaiah?" (Brandeis' friends called him Isaiah.). E. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 99 (1958).
85. *Radford*, 295 U.S. at 581-86.
86. *Id.* at 599-601.

its power. The "avowed object" of the Act, Brandeis said, was "to take from the mortgagee rights in the specific property held as security."[87] Did the Act go too far in taking property rights without compensation? Speaking for a unanimous Court, Brandeis concluded that it had. The Act's unraveling of the mortgagee's bundle of property rights was a violation of the fifth amendment and therefore void.[88]

While law journal editors hurriedly published articles analyzing and interpreting *Radford* into print,[89] Frazier and Lemke apparently had little difficulty grasping what had troubled the Court. Congress, in the Court's opinion, had been too exuberant and reckless; doctrinal refinements and fifth amendment proscriptions notwithstanding, the Court wanted Congress to moderate its agrarianism. Frazier and Lemke abided. They carefully redrafted their act and again shepherded it through Congress. The Frazier-Lemke Act II went before both Judiciary Committees, which in turn relied on subcommittees to gauge the compliance of the new act with *Radford.* After amendments were added by the subcommittees, the revised bill went before the committees of the House and the Senate and then to both chambers in which it passed without a single dissent. The reenactment of the Act was so rapid as to leave observers' heads spinning, but the resulting legislation was highly sensitive to the reservations which Brandeis and the Court had expressed just three months earlier.[90] In particular, the Frazier-Lemke Act II provided for (1) the unqualified retention of the mortgagee's lien with reference to appraised value, (2) a public sale at the request of the mortgagee, and (3) an unqualified right of the mortgagee to bid at the sale.[91] Pro-farmer rhetoric gave way to moderation, as Frazier, Lemke, and the Congress in general strove visibly for a piece of bankruptcy legislature that could pass constitutional muster.[92]

As was the case with the original Frazier-Lemke Act, cases challenging the legislation sprouted like weeds in the farmer's field. Results in the circuit courts conflicted,[93] and the Supreme Court quickly granted certiorari

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87. *Id.* at 594.

88. *Id.* at 602.

89. Note, *Constitutional Law—Due Process Clause—Frazier-Lemke Act: Louisville Joint Stock Land Bank v. Radford*, 15 B.U.L. REV. 818 (1935); Case Comment, *Constitutional Law—Fifth Amendment—Invalidity of Frazier-Lemke Amendment to the Bankruptcy Act*, 35 COLUM. L. REV. 1136 (1935); Note, *Bankruptcy—Constitutional Law—Mortgages*, 10 ST. JOHN'S L. REV. 111 (1935).

90. Wright v. Vinton Branch, 300 U.S. 440, 458 (1937).

91. Act of August 28, 1935, ch. 792, § 75(s)(1)-(6), 49 Stat. 942, 943-45 (repealed as amended 1978).

92. *See* 79 CONG. REC. 13,413, 13,633-34, 13,641-42 (1935) (statements of Senators Ashhurst, Borah and Frazier).

93. The Seventh and Eighth Circuits held the Frazier-Lemke Act II invalid in, respectively, Lafayette Life Insurance Co. v. Lowmon, 79 F.2d 887 (7th Cir. 1935), and United States National Bank v. Pamp, 83 F.2d 493 (8th Cir. 1936), but the Fifth Circuit found the Act valid in Dallas Joint Stock Land Bank v. Davis, 83 F.2d 322 (5th Cir. 1936).

to a Virginia case to resolve the conflicts and to determine if the Frazier-Lemke Act II was constitutional. Robert Wright, a farmer from Bedford County, Virginia, had proceeded under the Frazier-Lemke Act II. His petition was dismissed in the lower court, and the Circuit Court of Appeals for the Fourth Circuit affirmed the dismissal.[94] Brandeis again wrote for the unanimous Court in his distinctive style, but this time with assorted Court-packing plans in the wind.[95] The Court held that the pro-farmer bankruptcy legislation was constitutionally valid.[96] Yes, Brandeis acknowledged, there was some impairment of the mortgagee's property rights under the new legislation, but the central legal question was whether the legislation affected the mortgagee's right "to such an extent as to deny the due process of law guaranteed by the fifth amendment."[97] The amended legislation in his opinion created no unreasonable modification of the mortgagee's right and was therefore valid.[98] Three years later Justice Douglas, writing for a unanimous Court, not only reiterated Brandeis' general holding but also, in effect, resolved specific lingering ambiguities in the farmers' favor.[99]

Did the Frazier-Lemke Act II prove a savior for American farmers? Did it to any significant extent save the family farm? Two scholars launched an ambitious quantitative study in hopes of answering those questions,[100] but a new agricultural prosperity deriving from the United States' entry into World War II made any definitive appraisal of the legislation's impact impossible. However, the question in interest relates not to social impact, but rather to the ebb and flow of agrarian rhetoric in American bankruptcy law. A full generation after assorted courts attempted to determine who fit the definition of a farmer for purposes of the Bankruptcy Act of 1898, frequent and extensive litigation concerning farmer bankruptcy again convulsed the federal courts. The specific focal concern had changed and indeed grown more troubling from the farmers' perspective. The question was no longer immunity from involuntary bankruptcy but rather concerted emergency efforts to save the family farm. Yet, in both periods a pattern of rhetoric and retrenchment emerged. Imbued with pro-agrarian ideology, legislators vigorously valorized the American farmer in the context of the bankruptcy law only to see more cautious courts prompt legal rollbacks.

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94. Wright v. Vinton Branch, 85 F.2d 973 (4th Cir. 1936), *rev'd*, 300 U.S. 440 (1937).

95. LEUCHTENBURG, *supra* note 60, at 231-38.

96. *Wright*, 300 U.S. at 470.

97. *Id.*

98. *Id.*

99. Wright v. Union Cent. Life Ins. Co., 311 U.S. 273 (1940). The case involved the same bankrupt farmer.

100. J. MUNGER & E. FEDER, THE FRAZIER-LEMKE ACT: ITS IMPACT ON FARMERS AND LENDERS (1957).

A NEW CHAPTER IN FARMER BANKRUPTCY LAW

Between the expiration of the Frazier-Lemke Act II and the present,[101] Congress undertook the most extensive revision of bankruptcy law in American history.[102] The revision maintained the ban on involuntary proceedings against farmers[103] and ultimately gave certain farmers new standing in the distribution of the assets of a liquidated estate.[104] However, in the opinion of most, the Bankruptcy Reform Act was woefully inadequate for the agricultural crisis of the 1980s.[105] In the midst of this crisis, friends of the farmer prompted Congress not merely to provide special protections for the financially troubled farmer but also to enact an entire bankruptcy chapter aimed at farmers.[106] This extraordinary legislative action would have been impossible without the continuing vitality of American agrarian ideology, but the pattern of rhetoric and retrenchment also reappears. Indeed, Chapter 12 itself incorporated from the start certain of the modified definitions and stances which came about after the enactments of the Bankruptcy Act of 1898 and the original Frazier-Lemke Act. In addition, the courts have begun interpreting Chapter 12 in ways which show a caution regarding farmer bankruptcy. Is Chapter 12 a genuine and valuable attempt to save the family farm? To save the farmer's image? To save a national premise? A familiarity with the history of American agrarian ideology's interrelations with bankruptcy law prompts affirmative answers to all these questions.

The crisis in American agriculture during the 1980s, like the agricultural crisis which began in the 1920s and continued through the Great Depression, did not spring from a single source. Beyond endemic worries about weather conditions, American farmers during the 1980s faced a two-headed monster of higher production costs and lower commodity prices caused by the 1980

101. Due to various extensions, the Frazier-Lemke Act II, originally scheduled to terminate in 1944, remained operative until 1949. Anderson & Rainach, *Farm Reorganization Under the New Bankruptcy Code*, 28 LOY. L. REV. 439 (1982).

102. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1320 (1982 & Supp. IV 1986)).

103. 11 U.S.C. § 303 (1982 & Supp. II 1984).

104. Farmers encountered problems with failing grain elevators in the late 1970s and early 1980s. As a result, Congress in 1984 gave grain farmers a new priority in the distribution stage of a bankruptcy proceeding. 11 U.S.C. § 507(a)(5)(A) (1982 & Supp. IV 1986). For discussions of farmers' problems with grain elevators, see Culhane, *And When She Got There, The Cupboard Was Bare: The Producer's Plight in Grain Warehouse Insolvency*, 17 CREIGHTON L. REV. 699 (1984) and Dewey, *Grain Elevator Bankruptcies*, 30 S.D.L. REV. 326 (1985).

105. *See* Anderson & Rainach, *supra* note 101.

106. Bankruptcy Judges, United States Trustees and Family Farmers Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified at 11 U.S.C. §§ 1201-1231 (1982 & Supp. IV 1986)).

grain embargo and several consecutive years of unusually large harvests.[107] Even more importantly for bankruptcy filing purposes, the value of farmland began to plummet in 1981. This drop came immediately after a period during which the value of farm land rose rapidly and many speculative farmers borrowed heavily against their land in order to expand. The sudden turnaround left many farmers with a highly unfavorable debt/asset ratio and actual or de facto insolvency.[108] According to one commentator, one-third of all American farms were in severe economic distress by 1985.[109] With a high number of mortgage foreclosures "a state of emergency for farmers" existed;[110] farmers stood at "the edge of a financial cliff."[111]

As it had previously in American history, the image of farmers in trouble tugged on American heartstrings. In 1985, for example, Willie Nelson and a group of popular singers organized a twelve-hour "Farm Aid" concert to benefit farmers.[112] Illinois Governor Jim Thompson volunteered the University of Illinois football stadium as a concert venue, and 78,000 tickets sold out in two days. Admittedly, the amount raised by the concert could barely satisfy one day's interest on farmers' collective debt, but the power of agrarianism as an American ideological strain manifested itself again. The members of Congress, one hopes less naively, felt similar ideological tugs, and, as in the past, bankruptcy law emerged as one potential reform to help farmers.

To be sure, options for insolvent farmers were already available within the existing bankruptcy law, but each of these options was far less than ideal. Under Chapter 7, the liquidation chapter, a bankrupt farmer could obtain the much valued "fresh start," but he or she would have to allow foreclosure of the farm mortgage.[113] Bankruptcy at the expense of losing the family farm was hardly desirable. Alternatively, the farmer could have turned to Chapter 13,[114] the reorganization chapter for individuals with regular income, but, strange as it may have seemed to a turn-of-the-century farmer like William Hoy or to the Depression-era Radfords, most con-

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107. *See* Harl, *The Architecture of Public Policy: The Crisis in Agriculture*, 34 U. KAN. L. REV. 425 (1986); Massey, *Farmers in Crisis: A Challenge to Legal Services*, 18 CLEARINGHOUSE REV. 702 (1984).

108. Flaccus & Dixon, *The New Bankruptcy Chapter 12: A Computer Analysis of If and When a Farmer Can Successfully Reorganize*, 41 ARK. L. REV. 263, 263-64 (1988).

109. Kotis, *Chapter 13 and the Family Farm*, 3 BANKR. DEV. J. 599, 599 (1986).

110. Comment, *Bankruptcy: Can It Save the Family Farm?*, 11 WM. MITCHELL L. REV. 1019, 1019 (1985).

111. Ryan, *The Changing Standards of Adequate Protection in Farm Bankruptcy Reorganizations*, 37 DRAKE L. REV. 323, 323 (1987-88).

112. *Harvest Song—Willie Plans a Benefit*, TIME, Sept. 23, 1985, at 32; McCormick, *Next: We Are the Farm*, NEWSWEEK, Sept. 23, 1985, at 33.

113. 11 U.S.C. § 701-766 (1982 & Supp. IV 1986).

114. *Id.* §§ 1301-1330.

temporary farmers were ineligible for Chapter 13 because of debt ceilings of $100,000 for unsecured claims and $350,000 for secured claims.[115] In addition, Chapter 13 precludes corporations,[116] and not only agri-business but also genuine family farms are frequently incorporated. Chapter 11,[117] the final option for bankrupt farmers prior to enactment of Chapter 12, was perhaps the preferred option of farmers hoping to keep the farm, but it also is fraught with difficulties. Chapter 11 is time-consuming and expensive, it extends to creditors significant power to block reorganization plans, and it can even lead to involuntary liquidations.[118]

Members of Congress began responding to the agricultural crisis and the inadequacy of existing bankruptcy options in 1985. In the House, proponents of new legislation envisioned raising debt limits in Chapter 13 for farmers and also giving farmers more time to submit plans and make payments under plans.[119] In the Senate, farm-block Senators proposed an entirely new bankruptcy chapter,[120] an idea partially inspired by a prototype submitted by North Carolina Bankruptcy Judges Small and Moore.[121] Despite Senator Helms' objections,[122] the Chapter 12 bill passed the Senate easily and then prevailed over House legislation in conference.[123] According to the Conference Committee, the new law gave "family farmers facing bankruptcy a fighting chance to reorganize their debts and keep their land."[124] The House and Senate adopted the Conference Report in early October, 1986, and President Reagan signed Chapter 12 into law on October 27, 1986.

The ease with which the conferees agreed and the speed with which Congress acted are testimony to the continuing vitality of American agrarian ideology. Chapter 12—as a new and full chapter specifically for farmers—might even be seen as the most excessive outburst of agrarianism in American bankruptcy law to date. But, at the same time, the initial legislation itself incorporates perspectives and modifications that earlier bankruptcy law drafters and judges adopted only after struggle and reconsideration. Farming is still close to the American heart, even though only a small percentage

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115. *Id.* § 109(e).

116. Chapter 13 is available only to an *individual* with regular income. *See id.* §§ 1301-1331.

117. *Id.* §§ 1101-1174.

118. Comment, *The New Chapter 12 of the Bankruptcy Code: A More Efficient Approach for Family Farmer Reorganization*, 57 MISS. L.J. 185, 185-86 (1987).

119. Note, *An Analysis of the Family Farmer Bankruptcy Act of 1986*, 15 HOFSTRA L. REV. 353, 367 (1987).

120. Aiken, *Chapter 12 Family Farmer Bankruptcy*, 66 NEB. L. REV. 632, 668 (1987).

121. Note, *supra* note 119, at 369.

122. 132 CONG. REC. S3,529, S5,618 (1986).

123. *Id.* at H8,986, H8,991-94.

124. *Id.* at H8,999.

of Americans actually work as farmers and the tenor of American life is overwhelmingly urban. But Americans and their elected officials have also developed a penchant for quantitative measurement and managerial caution, and this penchant cuts against the easy and confident conceptualizations of farming which were dominant a century ago.

The best example of this change within bankruptcy law concerns the issue of who is a farmer for purposes of Chapter 12, an issue discussed with reference to involuntary bankruptcy in the first section of this Article. While turn-of-the-century judges had little statutory guidance in determining who was a farmer for purposes of protection against involuntary proceedings, the drafters of Chapter 12 benefited from an intervening refinement. Under the 1978 Bankruptcy Reform Act, the definition of a farmer became more precise and quantitative;[125] the definition of a farmer became a "person that received more than 80 percent of such person's gross income during the taxable year of such person immediately preceding the taxable year of such person during which the case under this title concerning such person was commenced from a farming operation owned or operated by such person."[126] The 80 percent requirement replaced the prior "principal part of income test" and undoubtedly allowed farmers, lawyers and judges to determine with greater confidence who was a farmer. However, several commentators noted that the great majority of American farmers could not meet the 80 percent test because of off-farm income.[127] Agri-businesses, meanwhile, were able to find shelter from involuntary proceedings quite routinely,[128] especially since the 1978 legislation, unlike preceding legislation, used the term "person" rather than the phrase "individual personally engaged in" when defining farmer. In keeping with other long-standing prescriptions of the bankruptcy law, a "person" may be not only an individual but also a partnership, a corporation and even a multinational conglomerate.[129]

Congress might have accepted these definitions when drafting Chapter 12, but the goal was to protect genuine family farmers rather than to provide still another protection for sprawling and faceless agri-business. Hence, Congress, for purposes of Chapter 12, legally defined the term "family farmer" and also provided a legally concomitant notion of a "farming operation."[130] Congress also developed both an income and a

125. *See* Marsh, *Farmers' Exemption from Involuntary Bankruptcy*, 15 U.C.C. L.J. 162 (1982); Pearson, *Is a Man Out Standing in His Field a Farmer for Bankruptcy Purposes?*, 5 J. AGRIC. TAX'N & L. 305 (1984).

126. 11 U.S.C. § 101(17) (1982 & Supp. IV 1986).

127. Note, *supra* note 119, at 358; *see also* Kunkel, *Farmers' Relief Under the Bankruptcy Code: Preserving the Farmers' Property*, 29 S.D.L. REV. 303, 304 (1984).

128. Marsh, *supra* note 125, at 166-67.

129. 11 U.S.C. § 101(35) (1982 & Supp. IV 1986).

130. *Id.* § 101(17), (20).

debt test for the new Chapter. To make the Chapter available even in light of significant off-farm income, Congress stipulated that only 50 percent of the gross income from the preceding year need come from the farming operation.[131] In addition, not less than 80 percent of the debts must arise from the farming operation and the aggregate debt must not exceed $1.5 million.[132] The magnitude of the latter figure might at first give one pause, but the financial dimensions of even family-operated farms have changed radically in recent decades. Indeed, creditors contesting a Chapter 12 filing routinely attempt to show that a farmer's debts exceed $1.5 million, and frequently succeed. Farmers, in turn, may preserve their Chapter 12 option by paying off one or more of their debts in order to get beneath the debt ceiling and then waiting out the preference period before filing.[133]

What about family farms which conduct their operations as partnerships or corporations? While Congress intended the $1.5 million debt limit to eliminate the truly huge agri-businesses, Congress also recognized that the modern farming family has often legally redefined itself via a formal partnership agreement or incorporation. Hence, farming partnerships or corporations may qualify for Chapter 12 if more than 50 percent of the equity or stock is held by one family or relatives of the family conducting the farm business and if there is no public trading of stock.[134] With such an operation, the standard debt limitations apply, that is, 80 percent of the debts must arise from the farming operation, and the debt as a whole may not exceed the $1.5 million figure.[135]

While these definitions of farming and standards for Chapter 12 eligibility in their multidirectional quantitativeness constitute in and of themselves a retrenchment from unbridled rhetoric, an expanding case law adds refinement. Law review articles surveying and cataloguing this case law will no doubt appear,[136] but for purposes of this Article, a brief sketch of its major factors will suffice. One line of cases has wrestled with the definition of a "family farmer," a new characterization created by Chapter 12. The chief question in this line of cases concerns the nature of the "farming operation" which demonstrates that a party is indeed a "family farmer."[137] A court, in this regard, might see a kennel or a game farm as a "farming operation," but view custom harvesting or training show

131. *Id.*

132. *Id.*

133. Pelzer, *Chapter 12: A One-Year Assessment of the New Farm Bankruptcy Law*, AGRI FINANCE, Nov. 1987, at 52, 54.

134. 11 U.S.C. § 101(17)(B) (1982 & Supp. IV 1986).

135. *Id.* § 101(17)(B)(ii).

136. *See* Note, *Chapter 12 After the First Year: An Analysis of the Issues*, 27 WASHBURN L.J. 495, 506-12 (1988) (contains discussion of the emerging case law).

137. *Id.* at 507; *see also* Wilder, *Some Observations on the Chapter 12 "Family Farmer" Concept*, AGRIC. L. UPDATE, Feb. 1988, at 4.

horses, by contrast, as outside the scope of Chapter 12.[138] Related lines of cases have spoken to the income and debt requirements set forth by the Code. Few appellate opinions exist concerning the requirement that 50 percent of the gross income from the preceding year derive from the farming operation.[139] However, a larger and more coherent case law concerning the debt limits has emerged. Tentative commentaries suggest that courts considering the debt criteria for Chapter 12 eligibility have adopted a "totality-of-the-circumstances evaluation" specific to the case at hand in determining which debts arise from the farming operation.[140]

Resting on eligibility, of course, is the entire edifice of Chapter 12. Compared to other contemporary bankruptcy options, Chapter 12 most resembles Chapter 13. The debtor in each chapter remains in possession of his or her property and devises a court-approved plan which pays a portion of the debts in light of available disposable income. In each chapter, creditors may not force the debtor to involuntarily submit a plan, and creditors also do not have the power to vote the plan up or down. Despite these basic similarities, however, Chapter 12 and 13 are not carbon copies. Chapter 12 has a much higher debt limit, to wit, $1.5 million as compared to the total of $450,000 from secured and unsecured debts under Chapter 13. Chapter 12 gives the debtor a longer time to file a plan,[141] and it also does not incorporate the three to five year limit on repaying secured claims which is a feature of Chapter 13.[142] All of these features make Chapter 12 significantly more appealing than Chapter 13 for many distressed farmers.

Even more appealing to farmers are the ways in which Chapter 12: (1) reduces the debtor's burden of providing adequate protection to the undersecured creditor during the initial stay; and (2) allows the debtor to "write down" the farm mortgage to the value of the property. In the former case, Chapter 12 explicitly eliminates the obligation to pay lost opportunity costs.[143] The debtor may adequately protect the creditor by paying "the reasonable rent customary in the community where the property is located, based upon rental value, net income and earning capacity of the property."[144] This is particularly desirable when, in a period of declining farmland values, many farmers simply cannot pay lost post-petition in-

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138. Martin, *Chapter 12 After Almost One Year in the Bankruptcy Courts*, 37 DRAKE L. REV. 211, 215, 215 n.19 (1987).

139. *See In re* Rott, 73 Bankr. 366 (1987-88).

140. Kershen, *Chapter 12 and Debts Arising from a Farming Operation*, AGRIC. L. UPDATE, June 1988, at 4.

141. A Chapter 13 debtor has only 15 days to file a plan, but a farmer proceeding in Chapter 12 has 90 days. 11 U.S.C. § 1221 (1982 & Supp. IV 1986).

142. 11 U.S.C. § 1322(c) (1982 & Supp. IV 1986).

143. *Id.* § 1205(a).

144. *Id.* § 1205(b)(3). For a discussion of the Chapter 12 approach to adequate protection, see Ryan, *supra* note 111.

terest.[145] The "write down" option in Chapter 12[146] allows the debtor to reduce the secured debt to the current appraised value of the security. The adequate protection and "write down" provisions have prompted several commentators to compare Chapter 12 to the Frazier-Lemke Acts.[147]

There is little evidence that Congress itself considered Chapter 12 a latter-day version of the Frazier-Lemke Act.[148] However, Professor James J. White, the most influential academic commentator to have addressed Chapter 12, argues convincingly that Frazier-Lemke rulings effectively insulate Chapter 12 from any sweeping invalidation on constitutional grounds.[149] The previously discussed *Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke*[150] and its most important progeny[151] appear to give mortgagees protection only at a level of appraised value; a "taking" of value above that as, for example, through a Chapter 12 plan will apparently be tolerable.

Given the complexity and relative innovativeness of Chapter 12, it is perhaps too early to appraise its effectiveness. However, a large number of farmers are prepared to use Chapter 12.[152] Perhaps more significantly, Chapter 12 has apparently given farmers more leverage in informal negotiations regarding their indebtedness.[153] Farmers in effect possess Chapter 12 as an ultimate trump card, and banks and other lenders are more willing to provide and accept arrangements favorable to farmers. In particular, creditors are (1) accepting shared-appreciation agreements under which the debt being serviced is reduced to the value of the real estate and the parties share in any subsequent increase in value, (2) approving interest rate reductions which enable farmers to meet operating expenses and make

145. Ryan, *supra* note 111, at 337.

146. 11 U.S.C. § 1225(a)(5) (1982 & Supp. IV 1986). For a discussion of the "write down" provision, see Comment, *supra* note 118, at 198.

147. *See* Hahn, *Chapter 12—The Long Road Back*, 66 NEB. L. REV. 726, 728 (1987); Ryan, *supra* note 111, at 338; Note, *supra* note 136, at 496.

148. Judge Small made a passing reference to the Frazier-Lemke Act during his testimony before a Congressional subcommittee, but James J. White has said comparisons to the Frazier-Lemke Act were for the most part "carefully avoided." White, *Taking From Farm Lenders and Farm Debtors: Chapter 12 of the Bankruptcy Code*, 13 J. CORP. L. 1, 4 n.7 (1987).

149. *Id.* at 2.

150. Wright v. Vinton Branch, 300 U.S. 440 (1937).

151. Wright v. Union Cent. Life Ins. Co., 311 U.S. 273 (1940).

152. Bankruptcy Judge Martin of the United States Bankruptcy Court for the Western District of Wisconsin reports that in the north central region of the United States (Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin) 2,728 Chapter 12 petitions were filed during the ten months following enactment. Martin, *supra* note 138, at 211 n.3. Judge Martin characterizes the number of filings as "staggering." *Id.* at 211.

153. Bromley, *The Effects of the Chapter 12 Legislation on Informed Resolution of Farm Debt Problems*, 37 DRAKE L. REV. 197, 197 (1987-88).

interest payments, and (3) tolerating the surrender of real estate which is surplus to the actual farming and crediting the farmer's account for the value of the surplus real estate.[154] Indeed, Chapter 12 provides not only an incentive for creditors but also a gauge by which debtors and creditors might measure proposed debt restructurings.

For purposes at hand, reactions to Chapter 12 and its ramifications are as intriguing as Chapter 12 itself. On one extreme, a Nebraska lawyer has praised Chapter 12 as "a viable option for those family farmers who desire to stay on the farm, work hard, and take the long road back to increased income, equity, and a better way of life."[155] On the other extreme, the venerated but crotchety White, echoing his proud commitment to personal property security,[156] has suggested that Chapter 12 may be restated as follows: "It shall be a violation of the law for a creditor to take a mortgage on the value of a farm in excess of the value found by bankruptcy court."[157] White also vigorously criticizes possible efficiency-oriented, paternalistic and moralistic justifications for the legislation,[158] finally concluding that Chapter 12 is designed primarily to accomplish a redistribution of wealth by taking money from creditors and giving it to debtors.[159] This conclusion mystifies White because the legislation was "fostered by two Republican Senators, one an arch conservative, passed by a Republican Senate, and signed by a conservative President."[160] "In Chapter 12," White says with his head shaking, "we have a depression bill taking money out of the pockets of the creditors and putting it into the pockets of the debtors, fostered and signed by those who are thought to represent the creditors' interest."[161]

What White failed to grasp is what this Article has demonstrated: The agrarianism of the American dominant ideology is not political-party based, but rather is a vital, potent mythology which can have impact on bankruptcy law. Such an impact is possible in any period, but it is particularly likely in periods of economic stress for the farmer or for the country generally. Hence, we have in our law farmer bankruptcy provisions enacted during the conservative "Reagan Revolution" which in several important ways resemble farmer bankruptcy provisions enacted during the liberal insurgency of the 1930s. This is politically incongruent unless one understands the

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154. *Id.* at 198.

155. Hahn, *supra* note 147, at 733.

156. White, *Efficiency Justifications for Personal Property Security*, 37 VAND. L. REV. 473 (1984).

157. White, *supra* note 148, at 17. For a direct response to White, see Bauer, *Where You Stand Depends on Where You Sit: A Response to Professor White's Sortie Against Chapter 12*, 13 J. CORP. L. 33 (1987).

158. White, *supra* note 148, at 17-22.

159. *Id.* at 22-29.

160. *Id.* at 30.

161. *Id.* at 31.

power of American agrarianism to cross party lines and to jump the perceived divide between conservatism and liberalism.

Chapter 12 also shares with the Frazier-Lemke Acts and the original 1898 Act certain tensions and tendencies. From its enactment in 1986, Chapter 12 has included refined and elaborate quantitative definitions of the farmer as well as constitutionally inspired restraints. It also contains a sunset provision,[162] and the trend in the emerging case law in the "farming operation" area and others is to disdain bold, unbridled rhetoric. While imbued with and in large part prompted by modern American agrarianism, Chapter 12 from the outset and in increasingly evident ways also manifests the reccurring pattern of rhetoric and retrenchment that has historically reigned in farmer-related bankruptcy law.

CONCLUSION

Provisions giving special attention and treatment to farmers have been a part of the American Bankruptcy Code for over ninety years. The first of these provisions barred involuntary farmer bankruptcy and remains a part of the law today. In addition, special extensions and foreclosure moratoria for farmers were added to the law in the 1930s, and although these provisions have expired, they, in a sense, served as prototypes for the modern Chapter 12, an entire bankruptcy proceeding available only to farmers. No one relishes bankruptcy, but more so than any other sector of the American population, farmers receive special treatment in the law of bankruptcy.

To a certain extent, the special standing of farmers in American bankruptcy law can be understood with reference to the unpredictable, precarious nature of farming as an economic enterprise. But thoughtful appraisals of farming's risks and pitfalls and concomitant policy determinations do not alone explain the history and present form of bankruptcy legislation concerning farmers. Of equal and, indeed, more importance is the long-standing valorization of the farmer in the dominant American ideology. If understood with this factor in mind, the forms of farmer-related bankruptcy considered in this Article grow more distinctive. The 1898 prohibition of involuntary farmer bankruptcies was a general favoring of especially respected Americans. The Frazier-Lemke Acts of the Great Depression constituted truly special protections for symbolically important, arguably prototypical Americans in a period of national crisis. The current Chapter 12 amounts to nervous protection for what might be a vanishing breed; it constitutes a group-specific balkanization of the Bankruptcy Code. Ideology infused farmer-related bankruptcy law, and it continues to provide its conceptual subtleties.

The interrelationship of agrarian ideology and bankruptcy law has never been static. In each of three historical periods explored in this Article, the

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162. Chapter 12 expires automatically in 1993. 11 U.S.C. § 1331 (1982 & Supp. IV).

initial rhetorical entry and manifestation of agrarianism has been followed by judicial and legislative retrenchment. There is, in other words, a recognizable pattern within the legal-ideological area, and this pattern appears in different historical periods, albeit with somewhat variable specifics. The pattern of rhetoric and retrenchment, of course, is hardly a binding rule for farmer-related bankruptcy law, much less for other areas, but the pattern illustrates that the interrelationship of ideology and law itself is dynamic. Agrarianism infuses bankruptcy law, but that infusion is only part of a more complicated pattern.

What is the future of farmer-related American bankruptcy law? As recent calls to extend Chapter 12 beyond 1993 suggest,[163] a crisp and final break between agrarianism and bankruptcy law is unlikely in the near future. The agrarianism of the dominant ideology is—grudgingly, haltingly and ever so slowly—in decline, and a newer belief in quantitativeness, efficiency and expertise cuts against it. The genuine family farm is disappearing and declining in economic significance, and at some point this structural change will presumably affect both agrarianism itself and its infusion into bankruptcy law. However, for the time being, farmers maintain both their shield against involuntary bankruptcy and the Chapter 12 option, and additional efforts to protect farmers through bankruptcy law are conceivable. When these efforts are launched, one can expect the pattern of rhetoric and retrenchment to reemerge.

Outside the areas of farmer-related bankruptcy law and bankruptcy law generally, the interrelationships of ideology and law deserve further attention. Important work has distinguished the various levels on which law might be said to have an ideological character,[164] but the study of ideology's impact on law is in an early stage. Beyond farming, certain other elements of the dominant American ideology—hard work, Old Glory, veterans, the family—are highly valorized. Law is never separate and distinct from ideology, but legislation and case law related to these elements is likely to be particularly rhetorical. Raising this phenomenon to the level of consciousness facilitates either supporting or opposing legal change. Additionally, even with law related to traditionally valorized elements, ideological input is hardly routine and static, and recognizing patterns of rhetoric and retrenchment as well as other shifts is illuminating. Lawmakers and critical commentators cannot step fully outside of ideology, but they can more consciously and intelligently appreciate patterns of ideological and legal interaction.

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163. Aiken, *supra* note 120, at 632; Note, *supra* note 136, at 525.

164. Ideological elements are present in the substance of legislation, in the legal form in which the legislation is cast and in the way substance and form of particular legislation are parts of the norms and premises of the overall legal system. Hunt, *supra* note 5, at 32.