



## An Agricultural Law Research Article

### **The Changing Landscape of America's Farmland: A Comparative Look at Policies Which Help Determine the Portrait of Our land –Are There Lessons We Can Learn from the EU?**

by

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 FARMLAND: A COMPARATIVE LOOK  
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 EU?

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## I. INTRODUCTION

Like a patchwork quilt, so goes the American landscape; meshed, woven, and dotted with farmland, urban centers, national forestry land, open space, toxic dumps, small towns, ghost towns, residential districts, water districts, and Indian reservations; to name but a few. Manifestly, there are countless ways that land, located within the forty-eight contiguous states, can be described or used. Coupled with these uses, not surprisingly, is a corresponding number of governing political bodies or agencies acting with some control over the land or its uses.<sup>1</sup> Some would even argue that there are more governing bodies than uses.<sup>2</sup> Yet, despite the temptation to lunge into the debate about the efficiency of overlapping regulatory authorities, this article politely abstains.

Instead, this article focuses on the use of land, particularly farmland<sup>3</sup> or land used for agricultural<sup>4</sup> purposes. Indeed, over the past twenty years preservation of agricultural land has been and continues to be the topic of much discussion.<sup>5</sup> Between 1945 and 1992, it was reported that approximately 4.2 million acres of farmland per year were being lost to development.<sup>6</sup> In partial response to this type of alarming statistic, Congress passed the Farmland Protection Policy Act<sup>7</sup> ("Farmland Protection Act") of 1981 which: (1) recognized farmland as an important and unique natural resource necessary to the sustenance and welfare of citizens;<sup>8</sup> and (2) attempted to "minimize the extent to which Federal Programs contribute to the

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1. See, e.g., 1 JULIAN C. JUERGENSMEYER & JAMES B. WADLEY, *AGRICULTURAL LAW* §§ 2.1, 4.1 (1982) (discussing the "extent" to which government regulates agriculture and land used for agriculture).

2. See, e.g., WILLIAM P. BROWNE, *PRIVATE INTERESTS, PUBLIC POLICY, AND AMERICAN AGRICULTURE* 4-5, 38 (1988) (noting that successful lobbying of any one land policy issue often entails lobbying a number of political groups and various pieces of proposed legislation).

3. Farmland can be defined as land capable of sustaining food and fiber production needs. See Teri E. Popp, *A Survey of Agricultural Zoning: State Responses to the Farmland Crisis*, 24 *REAL PROP. PROB. & TR. J.* 371, 372 n.1 (1989).

4. Agriculture can be defined in terms of activities which are either included in a per se definition of agriculture, such as growing crops, raising hogs, or dairying, or are performed in conjunction with a farming operation. See SAM BROWNBACK & JAMES B. WADLEY, *KANSAS AGRICULTURE LAW* 8-14 (2d ed. 1994).

5. See Vivian Quinn, *Preserving Farmland With Conservation Easements: Public Benefit or Burden?*, 1992/1993 *ANN. SURV. AM. L.* 235, 236 (1994).

6. See David L. Szlanfucht, Note, *How To Save America's Depleting Supply of Farmland*, 4 *DRAKE J. AGRIC. L.* 333, 336 (1999).

7. See 7 U.S.C. §§ 4201-4209 (1999).

8. See *id.* § 4201(a)(1).

unnecessary and irreversible conversion of farmland to nonagricultural uses.”<sup>9</sup> Arguably, the Farmland Protection Act ventured to forestall farmland losses by relating farmland, essential to production, to citizen welfare. The enactment was designed to balance a citizen’s obvious need for food and fiber with the apparent need of the farmer.<sup>10</sup>

This type of legislative rationalization, designed to balance or resolve tensions, is symbolic of many U.S. agricultural policies.<sup>11</sup> Yet, some would argue that many of the legislative enactments have failed to resolve the very tensions for which they were designed.<sup>12</sup> Without discussing every Act, this article identifies and discusses two differing tensions as they relate to current or future agricultural policies within the context of America’s farmland.

In the process of identifying these tensions, this introduction will define certain key terms to ease uniformity of discussion. For example, farmland has been defined as land “consisting of a fixed number of acres which is used primarily to raise or produce agricultural products” or commodities.<sup>13</sup> Agricultural lands have been defined as “lands currently used to produce agricultural commodities, including forest products or lands that have the potential for such production.”<sup>14</sup> Both definitions inherently include lands which (1) may be unsuitable for crops but used for other agricultural pursuits including forestry, (2) are capable of production of food and fiber or agriculture, regardless of use, and (3) shall be used synonymously.<sup>15</sup> Thus, land being used for nonagricultural purposes may or may not be considered farmland.<sup>16</sup>

The distinction is important because it gives rise to the first tension beset in farmland itself. Specifically, whether agricultural production<sup>17</sup> is necessarily dependant on the preservation of farmland. Part II of this article explores, in greater detail, this question in the face of two disparate trends, development and conservation, which both contribute to farmland depletion.

Entwined with the policies to preserve farmland is the survival of the family farm.<sup>18</sup> Indeed, the importance of the family farm throughout U.S. agricultural history

9. *Id.* § 4201(b).

10. *See id.* § 4201(a).

11. *See id.*; *see also id.* at § 4202 (a); *see also* Szlanfucht, *supra* note 6, at 334-35.

12. *See* Szlanfucht, *supra* note 6, at 335 (discussing Congress’ inability to enact legislation to preserve farmland, and noting that this task has largely “been left to state legislatures and local governments”).

13. JUERGENSMEYER & WADLEY, *supra* note 1, § 4.2, at 72.

14. *Id.*

15. *See id.* § 4.2, at 71-72.

16. *See id.*

17. *See generally* Martin D. Begleiter, *Material Participation Under Section 2032A: It Didn't Save the Family Farm But It Sure Got Me Tenure*, 94 DICK. L. REV. 561, 567 n. 34 (1990) (noting that the Internal Revenue Service defines “production” as physical work and resources used in producing a commodity; a definition which differs from this author’s definition, which refers to “production” as output of crops, livestock, or dairy products as they contribute to production of food and fiber).

18. *See* DAVID D. DANBOM, *BORN IN THE COUNTRY A HISTORY OF RURAL AMERICA* 87 (1995).

cannot be overstated. The roots of the family farm are deeply embedded in our society.<sup>19</sup> Barns-full of scholarly literature discussing the family farm fill our libraries and databases.<sup>20</sup> Yet, there are jurisdictionally differing standards by which to formally define the term.<sup>21</sup> Simply and generically put, the family farm describes a farming operation which is principally managed by a family.<sup>22</sup> These farms are engaged at some level in the production of food and fiber and range from large to small-scale operations.<sup>23</sup> Thus, a family engaged in the production of food and fiber, or in other words, agriculture,<sup>24</sup> would qualify under this definition as a family farm.<sup>25</sup>

More importantly, the case for the preservation of the family farm has, at least in theory, strengthened over the past twenty years almost coincidentally with “the increased attention paid to issues of farmland preservation.”<sup>26</sup> Herein lies the second tension—is it necessary to preserve farmland in order to preserve the family farm? Stated another way, is saving the family farm justified if food and fiber production is in no way compromised? Part III discusses, in further detail, this question in relation to a current USDA effort to “save the family farm.” Part IV goes on to compare agricultural policies of the EU to discern what lessons, if any, can be learned from this emerging international geopolitical body. Part V concludes by offering suggestions to improve policy decisions within the context of our changing society.

## II. THE CASE FOR FARMLAND PRESERVATION AS A FUNCTION OF PRODUCTION

As one scholar noted, “no other area of agricultural law has been as widely written and published upon [than farmland preservation].”<sup>27</sup> Still, until 1976 farmland preservation was not a national concern.<sup>28</sup> However, since then, numerous initiatives

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19. See *id.* at 86-100 (discussing rural growth, agricultural development, and the family). “The foundation of rural America was the nuclear family.” *Id.* at 87.

20. See *id.* at 86-108. See generally UNITED STATES DEPARTMENT OF AGRICULTURE, A TIME TO ACT (1998) [hereinafter USDA REPORT] (describing the USDA’s vision for small farms in the 21st century).

21. See SUZANNE VAUPEL, SMALL FAMILY FARMS IN CALIFORNIA: THE DEFINITION DILEMMA 2 (1986) (noting that conflicting IRS and USDA definitions often contribute to the confusion).

22. See Barbara J. Greaver, *Corporate Farming Restrictions in California: False Hope for the Family Farm*, 2 SAN JOAQUIN AGRIC. L. REV. 67, 69 (1992).

23. See *USDA Farm Report*, at <http://www.nass.usda.gov/census/census97.html>.

24. See E.F. ROBERTS, THE LAW AND PRESERVATION OF AGRICULTURAL LAND 73 (1982) (defining agriculture as more than farming; but rather “a complex economic structure akin to an industry”).

25. See WASHINGTON 1997 ANNUAL BULLETIN, INCOME, EXPENSES, & LAND VALUE (1997), <http://www.nass.usda.gov/wa/annual197/price697.htm>. [hereinafter 1997 ANNUAL BULLETIN] (describing that in 1997, the USDA defined a farm as any place from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold during the reference year).

26. Quinn, *supra* note 5, at 235.

27. JUERGENSMEYER & WADLEY, *supra* note 1, § 4.1, at 66 n.1.

28. See *id.* § 4.4, at 78 (noting that two federal agencies, the USDA and the Council on

materialized to address farmland loss within various competing contexts.<sup>29</sup> While many of the initiatives are beyond the scope of this article, two of the important issues, as they relate to diminished farmland, will be briefly addressed.

A. *Rural Development, Urban Expansion and/or the Problem of Suburban Sprawl*

Urbanization and suburban migration are perhaps the largest contributors to farmland loss. At increasing rates, farmland is converted into commercial and residential development.<sup>30</sup> In Atlanta, 2000 acres per month are being plowed under for growth.<sup>31</sup> Development originates in an urban or city center and proliferates to the neighboring countryside. Yet, development is not unique to urban centers.<sup>32</sup> Iowa's rural areas, though rich in abundant farmland, have given way to increased pockets of commercial development.<sup>33</sup> Ohio claims to be losing ten acres of farmland per hour.<sup>34</sup> An eight county area in Pennsylvania reports losing fifty-two acres per day to development.<sup>35</sup> Without doubt, development is contributing to farmland loss.<sup>36</sup>

Moreover, as development mixes with farmland, installation of public services to support built-up areas contributes to the demise of non-developed farmland, often rendering the land unproductive.<sup>37</sup> The effect can be seen as almost cyclical; as one farmer gives way to development, others are not far behind.<sup>38</sup>

Environmental Quality both issued similar policy statements aimed at decreasing conversion of prime farmland to other uses); *see also id.* § 4.2, at 72 (noting that there is a difference between what has been called prime farmland and farmland). Prime farmland represents land that has "best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops, and [more importantly] is also available for these uses . . ." *Id.* Even so, this article will not address the distinction between loss of the "best" or prime farmland and farmland in general. However, it should be recognized that some prime farmland is made unavailable for use as farmland because of proximity to urban development. *See id.* §§ 4.1-4.4.

29. *See Szlanfucht, supra note 6, at 334.*

30. Development shall include installation of structures, highways, reservoirs, gas stations, strip malls, billboards, etc. . . . Developers target flat, well drained farmland for its suitability for development. *See JUERGENSMEYER & WADLEY, supra note 1, § 4.1, at 66-67.*

31. *See Szlanfucht, supra note 6, at 334.*

32. *See generally* Mryl L. Duncan, *High Noon on the Ogallala Aquifer: Agriculture Does Not Live by Farmland Preservation Alone*, 27 WASHBURN L.J. 16 (1987) (discussing the impact of development in rural communities in relation to water use). In his article, Professor Duncan expanded the farmland debate to include rural communities. *Id.*

33. *See Szlanfucht, supra note 6, at 337.*

34. *See id.* at 336-37 (noting that although statistics can be quoted from numerous sources, many of the statistics, even those compiled from the USDA, are conflicting. For instance, estimates of farmland loss range from 1 million acres per year, to 4.2 million acres per year to 15 million acres lost in the past 10 years).

35. *See* John M. Hartzell, *Agricultural and Rural Zoning in Pennsylvania: Can You Get There From Here?*, 10 VILL. ENVTL. L.J. 245, 246 (1999).

36. *See id.* at 247.

37. *See* Neil D. Hamilton, *Plowing New Ground: Emerging Policy Issues in a Changing*

## B. Conservation and Biodiversity

Increased development has also led to increased conservation concerns.<sup>39</sup> Agriculture itself, considered the leading cause of water quality impairment, has also been the subject of much trepidation.<sup>40</sup> Yet, traditional agricultural conservation, a function of USDA regulatory oversight under the Conservation Reserve Program (“CRP”), focused on preservation of highly erodible or environmentally sensitive cropland, not water quality.<sup>41</sup> The EPA, on the other hand, traditionally scrutinizes water quality under the Clean Water Act.<sup>42</sup> Thus, agriculture, subject to competing federal agency regulation, often with separate agendas, has frequently been the target of excessive oversight.<sup>43</sup>

Ergo, regulation itself has been criticized because of its decentralized nature and lack of requisite focus on the “greater” issue at hand.<sup>44</sup> For example, consider the Endangered Species Act (“ESA”). The ESA employs a species-by-species approach to protect endangered animal and plant forms but does not require protection of “ecosystem diversity, genetic diversity within species, or nonlisted species.”<sup>45</sup> Efforts to save one species may encroach on habitats or ecosystems involving other species yielding, in some cases, a negative net biodiversity benefit.<sup>46</sup> Even so, the ESA does ban adverse habitat modification, which, in turn, has proved a “powerful club to hold

*Agriculture*, 2 DRAKE J. AGRIC. L. 181, 192 (1997).

38. See 1997 ANNUAL BULLETIN, *supra* note 25 (showing that increases in the value of farm real estate have significantly contributed to farmer decisions to sell as national average prices rose from \$632/acre to \$942/acre from 1988-1997 (with California experiencing a \$1000 per acre increase)).

39. See generally Edward J. Heisel, *Biodiversity and Federal Land Ownership: Mapping a Strategy for the Future*, 25 ECOLOGY L.Q. 229 (1998) (discussing the impact of development and population growth on ecosystems).

40. See Jan Lewandrowski & Kevin Ingram, *Policy Considerations for Increasing Compatibilities Between Agriculture and Wildlife*, 39 NAT. RESOURCES J. 229, 230 (1999) (explaining that chemical and sediment runoff have been classified as the highest nonpoint source contributor of water pollution threatening aquatic species diversity, deterioration of habitats, and decreases in population, among other things).

41. See 16 U.S.C. § 3831 (2000).

42. See 33 U.S.C. §§ 1251-1376 (1994 & Supp. 2001); see, e.g., *Sierra Club v. Glickman*, 156 F.3d 606, 617-18 (5th Cir. 1998) (holding the USDA must consult the U.S. Fish & Wildlife Service in Endangered Species Act (“ESA”)).

43. See JUERGENSEMEYER & WADLEY, *supra* note 1, §§ 3.1-3.5, 23.1-23.4 (discussing generally the roles of competing agency regulation at various levels of government, and certain environmental programs).

44. See *id.* § 3.1.

45. Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 19 (1997).

46. See *id.* (giving the example that the Forest Service, in an effort to save the timber wolf in Wisconsin, encouraged logging in national forests to clear pastures for feeding grounds which was supposed to attract the wolf’s prey, the white-tailed deer. However, the cleared forestlands upset other ecosystems in the area).

over the heads of would-be developers and local officials, in order to induce their participation in 'voluntary' biodiversity conservation planning efforts."<sup>47</sup>

Indeed, biodiversity conservation has become one of the leading goals of policy makers over the past four to five years.<sup>48</sup> Scientists are predicting that many U.S. ecosystems, already nearing extinction, are being lost at faster rates than those in the Amazon rain forests.<sup>49</sup> So, in order to promote ecosystem preservation, Congress turned to the USDA and its regulatory control over farmland.<sup>50</sup>

For instance, in 1996 when Congress enacted the Federal Agricultural Improvement and Reform Act ("FAIR"), it increased economic incentives to farmers with eligible lands to participate in programs such as the Conservation Reserve Program, the Environmental Quality Incentive Program, the Wildlife Habitat Incentive Program, and the Wetlands Reserve Program.<sup>51</sup> If farmland is preserved, ecosystem and biodiversity conservation will be easier to attain.

Accordingly, the FAIR Act revised the eligibility requirements for participation in the CRP. The revisions now require land to "meet certain criteria indicating potential benefits related to wildlife, water quality, [and]/or soil erosion."<sup>52</sup> The revisions represent a shift in policy focus in two inter-related respects: (1) the USDA has gained increased ability to monitor and control water quality, because (2) incentives to improve water quality were built into the program rather than being separated out and left to other agency supervision.<sup>53</sup> Arguably, this type of inter-agency integration may actually reduce wasteful government oversight while accomplishing common agency goals.

Yet, while the USDA's effort to increase biodiversity is certainly commendable, it nevertheless equates to increased farmland loss.<sup>54</sup> Statistically, farmers have voluntarily enrolled approximately 118.7 million acres in conservation programs.<sup>55</sup> To elicit program participation, the USDA has continued its willingness to compensate the farmer or landowner.<sup>56</sup> However, the opportunity cost of shifting

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47. *Id.* at 60-61 (explaining that habitat conservation planning was used successfully to save miles of coastal scrub sage ecosystems, and the California gnatcatcher in the face of tremendous developmental pressures in Southern California Orange and San Diego Counties).

48. *See id.* at 2 (noting biodiversity has become both an international and domestic concern).

49. *See id.* at 3-4.

50. *See* Lewandrowski & Ingram, *supra* note 40, at 231-32.

51. *See id.* (explaining the economic incentives have been cast as the Secretary's authority to restrict farm program payments to farmers or ranchers who do not protect wetlands). Since 1985, Swampbuster provisions have allowed the Secretary to preserve wetlands and thus restrict productive use of farmland. *See id.* Additionally, the Wildlife Habitat Incentives Program, is the first ever program "designed solely to protect and restore wildlife habitat." *Id.* at 258.

52. *Id.* at 258.

53. *See id.* at 256.

54. *See id.* at 237.

55. *See id.* at 244-59.

56. *See* Lewandrowski & Ingram, *supra* note 40, at 244. It should be noted that biodiversity conservation is essentially at odds with farmland production. Farmer's viable concerns for production profits demand that consideration be given in exchange for lost opportunity benefits. Compensation is

land and water resources into habitat preservation should not be equated with or to the acreage reduction programs or market transition payments which the FAIR Act eliminated.<sup>57</sup> Moreover, a biodiversity justification for farmland reduction is tenably more digestible to citizens when seen as an environmental concern rather than as a subsidy to farmer income.

In any event, it remains that farmland is being lost to both development and conservation even though the two concepts are wholly divergent. For example, conservation seeks to preserve nature at the expense of farmland<sup>58</sup>, while development seeks to convert farmland into other uses.<sup>59</sup> Development then, like agriculture, also places ecosystems in jeopardy and contributes to other natural resource depletion.<sup>60</sup> To combat development, federal, state, and local authorities have employed a variety of weapons ranging from conservation easements,<sup>61</sup> zoning regulations,<sup>62</sup> purchase or transfer of development rights,<sup>63</sup> to “use” value taxation,<sup>64</sup> in an effort to manage development and control farmland loss. However, many of these efforts are

the only means available to solicit participation.

57. See *id.* at 249 (noting the acreage reduction programs did little to preserve or protect habitats because in many cases lands were returned to production fairly quickly). *But see generally* Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127 (1999) (discussing economics and pollution and concluding that legislation, particularly the ESA, fails to promote and preserve vital ecosystems). However, I disagree with the conclusions of the article by Thompson and would instead support the findings of Lewandrowski and Ingram, who have linked increased waterfowl reproduction in the Northern Plains to conversion of nine million acres of cropland to vegetation under the CRP. See Lewandrowski & Ingram, *supra* note 40, at 248.

58. See Lewandrowski & Ingram, *supra* note 40, at 259.

59. See Heisel, *supra* note 39, at 231 n.3.

60. See *id.* at 231-32.

61. See generally Ruth S. Flynn & H. Kay Cross, *A Home Where Bighorn Roam*, LEGAL TIMES, Apr. 14, 1997, at S38 (defining conservation easements as “restrictions on private land use designed to preserve open spaces and other environmental resources or to preserve historically significant structures”), *cited in* Stephanie L. Sandre, *Conservation Easements: Minimizing Taxes and Maximizing Land*, DRAKE J. AGRIC. L. 357 at n. 36 (1999).

62. See generally TOM DANIELS & DEBORAH BOWERS, HOLDING OUR GROUND PROTECTING AMERICA’S FARMS AND FARMLAND 105-31 (1997) (discussing agricultural zoning purposes and effects in depth).

63. See, e.g., *id.* at 145-91 (discussing that the purchase of development rights allows land to be restricted in perpetuity); see generally Edward Thompson, Jr., “Hybrid” Farmland Protection Programs: *A New Paradigm for Growth Management?*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 831 (discussing, specifically, growth management in Montgomery County, Maryland and the use of transfer development rights as the ideal “carrot and stick” to successfully preserve farmland and a twenty-eight million dollars per year agricultural revenue source).

64. See generally Roger A. McEowen, *Recent Caselaw and Legislative Developments Concerning Special Use Valuation of Farm and Ranch Property*, 3 DRAKE J. AGRIC. L. 119 (1998) (discussing implementation of “use” value taxation).

fragmented and have proved ineffective to prevent farmland loss in the face of "unmanageable urban growth"<sup>65</sup> and rural development.<sup>66</sup>

Thus, the problem of farmland loss remains mostly unsolved. Moreover, in the United States, where public sentiment drives the political process, citizens will usually not become concerned unless a crisis is pending. Arguably, unless farmland loss equates to a significant increase in food prices or supply shortages, citizens will be unmotivated to question the political process and its land management policies. So, will production be hindered by farmland loss?

### C. *Farmland Loss and Production*

Likely, farmland loss will not adversely affect food and fiber production. First, "for several years farm productivity has been increasing at a rate of three to four percent annually."<sup>67</sup> Second, biotechnology and genetic engineering have provided mechanisms to (1) increase production yields, (2) lower costs in labor and agricultural inputs, (3) maintain or increase food quality, and (4) reduce pollutants through benign methods of weed and pesticide control.<sup>68</sup> Third, agriculture has become industrialized and thus economic efficiency has contributed to increased productivity.<sup>69</sup>

As farmland is shifted out of production, a corresponding number of farms have gone out of operation.<sup>70</sup> Regardless, the decline of operating farms has also not

65. Szlanfucht, *supra* note 6, at 333, *but see* Luther Tweeten, *Food Security and Farmland Preservation*, 3 DRAKE J. AGRIC. L. 237, 240-43 (1998) (arguing that the lack of farm economic viability is the principal reason for farmland loss, not urban encroachment).

66. *See, e.g.*, Heisel, *supra* note 39, at 231 (noting the increased development pressure "is particularly evident in regions of the country where vacation homes and other residential developments are emerging [on private lands] that once served as de facto wildlife refuges. Commercial and residential sprawl, while most prevalent at the urban fringe, has even spread into more remote [areas] . . . as Americans have become more mobile and recreational outposts have sprouted into full-fledged cities.").

67. Dale E. McNiel, *Furthering the Reforms of Agricultural Policies in the Millennium Round*, 9 MINN. J. GLOBAL TRADE 41, 42 (2000) (attributing increased production to the FAIR Act, (also known as the "Freedom to Farm" Act) of 1996 which terminated acreage reduction programs and federal government subsidy payments tied to farm production. As a result of these policy changes fifteen million acres have been put back into production). *But see* Christopher R. Kelly, *Recent Federal Farm Program Developments*, 4 DRAKE J. AGRIC. L. 93, 95-110 (1999) (discussing how the production flexibility contract has replaced the deficiency payment mechanism and noting that in 1995-1996 when the FAIR Act was passed, commodity prices were comparatively high, thus creating incentive for production).

68. *See* SHeldon KRIMSKY & ROGER WRUBEL, *AGRICULTURAL BIOTECHNOLOGY AND THE ENVIRONMENT* 3-4 (1996).

69. *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, 613 (1994) (noting that industrialization has been described "as the process whereby the production of goods is restructured under the pressure of increasing levels of capital and technology in a manner which allows for a management system to integrate 'each step in the economic process to achieve increasing efficiencies in the use of capital, labor, and technology'." The article goes on to discuss the "new" era of agriculture).

70. *See* 1997 ANNUAL BULLETIN, *supra* note 25 (showing that from 1969 to 1997, the total

affected production.<sup>71</sup> Currently, agricultural surpluses run quite high while commodity prices have “collapsed to levels lower than in the past decade.”<sup>72</sup> In a recent study, U.S. commodity production outputs were shown to have steadily increased from 1986 to 1996.<sup>73</sup> Moreover, these gains have been made during corresponding periods of farm and farmland reduction. Consequently, it is reasonable to assume that declining participation in farming, generally will not, at least presently, adversely affect food supplies<sup>74</sup> or cause drastic increases in retail prices.

More importantly, as noted by one leading agricultural scholar, Professor James B. Wadley, “what Americans want most is an abundance of cheap, healthy food.”<sup>75</sup> Hence, if food supplies, price, and quality are not threatened, there will be little public interest in saving farms or farmland. “Most Americans have little to no understanding of the food production process anyway.”<sup>76</sup> Indeed, our nation has “transform[ed] from a predominately rural society into a highly urbanized society.”<sup>77</sup> Thus, “urbanites”<sup>78</sup> and their urban views now dominate the representative political process and are shaping the countryside from their perspective with their own vision of rural America.<sup>79</sup> Does that vision include the “family farm?”

number of farms has decreased from approximately 2.7 to 2.0 million farms).

71. See Hamilton, *supra* note 69, at 615. “In reality, most of the nation’s food and fiber is produced on 600,000 full-time commercial farms, the large majority of which are still family operations in the Midwest.” *Id.*

72. See McNiel, *supra* note 67, at 42-43.

73. See Donald Buckingham, *World Production Update: Why Agricultural Lawyers Need to Know About International Trade Law*, 4 DRAKE J. AGRIC. L. 5, 27-30 (1999).

74. *But see* Tweeten, *supra* note 65, at 241-50 (predicting that world population growth will place increased demands on food supplies by 2040).

75. Interview with Professor James Wadley, Professor of Law, Washburn University, in Topeka, Kan. (May 11, 2000).

76. *Id.*; see also JUERGENSMEYER & WADLEY, *supra* note 1, § 1.2 (explaining that the average American takes his food and fiber supply very much for granted. He gives little, if any thought to the process by which foods and fiber make their seemingly miraculous appearance in supermarkets and boutiques).

77. James B. Wadley & Pamela Falk, *Lucas and Environmental Land Use Controls in Rural Areas: Whose Land Is it Anyway?*, 19 WM. MITCHELL L. REV. 331, 335 (1993).

78. It should be noted that while there are statistics indicating rates at which metropolitan areas have been populated, there are equal statistics indicating the rate at which populations are “fleeing” to the neighboring countryside. The phenomena are in a sense responsible for suburban sprawl and the cause of decay of many inner city centers.

79. See Wadley & Falk, *supra* note 77, at 335-39 (discussing the transformation of our society and how the respective urban and rural views have changed and impacted policy development; noting that under-representation of the farmer at the voting booth has forced farmer groups to rely on lobbying efforts); see also JOHN MARK HANSEN, GAINING ACCESS 112-63, (Benjamin I. Page ed., 1991) (discussing the relationship of the farm lobby and Congress).

### III. THE ROLE OF THE FAMILY FARM IN RURAL AMERICA

So what is the vision of the family farm; is it real or a myth? Or is it that quaint picturesque farm, set among rolling green pastures dotted with Hereford, Angus, and spotted Jersey cows, barnyard hens, lush green cornfields, golden brown seas of wheat, a plump pink pig, rich black soil, an endless stream of water, a bright red barn, a silvery shiny grain silo and milk shed, with home cooked meals and hot apple pie?<sup>80</sup> Is this our collective vision of the American family farm or have we been deceived? Perhaps and perhaps not. It likely depends on whose eyes are looking at the vision. "While such places do exist, urban refugees [and farmers and ranchers] are the only politically significant group[s] that, for the most part, live there. The typical urban dweller no longer understands [farm life], and reality is replaced by the imagination."<sup>81</sup>

Arguably, the foregoing statements represent what once was and what is true about a declining rural America. Though one might ask, what does all of this have to do with the family farm and farmland loss? As has been shown, statistical data indicates an irreversible trend of farm and farmland loss without current significant change in agricultural production. So, why should anyone be concerned about these lost lands or quaint visions?

In part, the answers lie in our rich heritage. After all, this nation was founded by those in pursuit of land.<sup>82</sup> At inception, America was primarily an agrarian society.<sup>83</sup> Back then, farming was a "way of life."<sup>84</sup> Survival followed by wealth precipitated the agricultural development of this growing nation,<sup>85</sup> and thus, land ownership and farming were integral in defining this American "way of life."<sup>86</sup>

In the post-revolution era, Thomas Jefferson envisioned a nation of family farmers producing food.<sup>87</sup> He believed that "[c]ultivators of the earth [were] the most valuable citizens. . . . [They] [were] tied to their country, and wedded to its liberty

80. As envisioned by this author and, perhaps, many others.

81. Wadley & Falk, *supra* note 77, at 339.

82. See W.E. WOODWARD, *A NEW AMERICAN HISTORY* 13-31 (1938) (discussing generally the reach of the Roman and English Empires and their effect on modern civilization and noting that the early colonists, comprised mostly of English people, brought with them English notions of landownership and a quest for wealth).

83. See Matthew M. Harbur, *Anti-Corporate, Agricultural Cooperative Laws and the Family Farm*, 4 *DRAKE J. AGRIC. L.* 385, 386 (1999). "At the time of the American Revolution, ninety-five percent of the population was rural and engaged in agriculture." *Id.*

84. See Steven C. Bahls, *Preservation of Family Farms--The Way Ahead*, 45 *DRAKE L. REV.* 311, 323-24 (1997) (noting, among other things, that Thomas Jefferson possessed a vision that family farming was central to a way of life).

85. See WILLARD W. COCHRANE, *THE DEVELOPMENT OF AMERICAN AGRICULTURE A HISTORICAL ANALYSIS* 7-8 (1979) (noting the early colonists who struggled to survive in 1607 were likely to have reached subsistence levels by 1640 and were producing surpluses and amassing wealth by 1780).

86. See *id.* at 3-4.

87. See DON PAARLBERG, *FARM AND FOOD POLICY: ISSUES OF THE 1980'S* 5 (1980).

and interests by the most lasting bonds."<sup>88</sup> While so much may be true, family farm structure has changed over the past 200 years.

For example, whereas once ninety-five percent<sup>89</sup> of the nation's populous lived and worked on farms, that number decreased to one in four Americans by the 1930s.<sup>90</sup> Now, less than two percent of our population live and work on farms.<sup>91</sup> Consequently, fewer people are involved in the food production process at the farm level. The Jeffersonian ideal,<sup>92</sup> that of small subsistence farming, has been, over time, altered at least in terms of the number of citizens involved in the farming practice. Not surprisingly, a decreased percentage of people living and working on farms corresponds with the dwindling number of farms and farmland loss.<sup>93</sup> Has the "yeoman" farmer been replaced?

Not entirely. There are still plenty of families engaged in farming. Only now, as evidenced by the decrease in the number of farmers, fewer families participate in agriculture,<sup>94</sup> and the number of large sized farms has increased.<sup>95</sup> Moreover, as farming becomes more industrialized, fewer farms account for a larger percentage of the gross food sale receipts.<sup>96</sup> In its 1997 Census of Agriculture, the USDA calculated that only 26,000 farms nationwide, 1.4 percent of total, accounted for 41.7 percent of the value of products sold from only 9.6 percent of the land farmed.<sup>97</sup>

88. WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE* 143 (1986) (pointing out that Thomas Jefferson recognized the negative effects of migratory or "strip and waste" soil farming; thus, he believed that soil preservation and land management were best left to those who were devoted to it—the well-educated farmer.).

89. See Harbur, *supra* note 83, at 386.

90. See DON E. ALBRECHT & STEVE H. MURDOCK, *THE SOCIOLOGY OF U.S. AGRICULTURE* 3 (1990).

91. See Carol Ann Eiden, *The Courts' Role in Preserving the Family Farm During Bankruptcy Proceedings Involving FMHA Loans*, 11 *LAW & INEQ. J.* 417, 419-20 (1993).

92. Jefferson championed the "yeoman" farmer. Perhaps now a mythical character, but one that Jefferson believed grew out of his independence, virtue, and vigor. See Richard Hofstadter, *THE AGE OF REFORM* 23-24 (1995) (noting writers like Jefferson admire yeoman farmers "for his honest industry, his independence, his frank spirit of equality, his ability to produce and enjoy a simple abundance").

93. Interestingly, from 1960 to 1990 the United States increased in population by approximately 65 million people—urban area populations rose by 57.5 million, while rural area populations only rose by 7.5 million. See U.S. Census Bureau, *Statistical Abstract of the United States: 1999*, Table No. 46 (119th ed.) Washington D.C. (1999) [hereinafter 1999 Census]; but see Wadley & Falk, *supra* note 77, at 335 (noting the flight from urban centers). Perhaps the city has just moved to the country?

94. See Eiden, *supra* note 91, at 420 (quoting that as "family farms fail, their lands are [often] incorporated into larger corporate farms.") *Id.* It should be noted that the FAIR Act, which essentially seeks to place the farm in the same position as any other economic enterprise and eliminates price supports by 2002, will likely have an increased negative effect on an already declining number of farmers.

95. See *id.* "The average size of these corporate farms is six times that of the average family farm." *Id.* See also 1999 Census, *supra* note 93, at 886 (the average size of a farm, nationally, rose from 175 acres in 1940 to 435 acres in 1998).

96. See 1999 Census, *supra* note 93, at 676.

97. See *id.*

However, as alarming as this statistic is, it cannot be said that the family farm does not contribute to the food production process. After all, approximately seventy percent of all farmland is owned by individuals and families<sup>98</sup> and the remaining farmland is owned by family-held partnerships and close corporations.<sup>99</sup> What can be said is that the structure of farming is constantly changing,<sup>100</sup> and thus, policy must also change to accommodate the different or transmutating variables defined within the farming industry.<sup>101</sup> This is especially so when policy decisions depend on structure, and structure is reliant on definition which is conditioned by data.

Indeed, how can we regulate that which we cannot understand? Put another way, how can we save the family farm, if the term "family farm" cannot be defined? Although this article set forth a generic explanation, "[l]ike pornography and patriotism, the term 'family farm' eludes definition."<sup>102</sup> Arguably then, if this prophecy is true, then the discourse about saving the family farm is spurious at best. Policy makers need to decide if it is the farm, or the vision of that farm in rural America that should be saved.

#### A. "A Time to Choose"

Deciding whether to save the farm or the vision is not that simple. Statistical data, crucially important to decision making, can be interpreted in many ways and is often discounted in the political process. For example, over fifty years ago, Walter Goldschmidt conducted a socio-economic study which analyzed "how land tenure and farm size affect the quality of community life in small towns (popularly known as the Arvin and Dinuba study)."<sup>103</sup> The study "compared two [small] towns: one

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98. See Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. ILL. U. L. REV. 659, 681 (1994).

99. Compare Harbur, *supra* note 83, with 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). There has been much debate over the use of anti-corporate statutes as a means to preserve the family farm. While this debate is beyond the scope of this article, it should be noted that there are advantages and disadvantages to the use of corporations or limited liability companies to further agricultural pursuits within or outside of the family farm. Arguments in support of the corporation range from efficiency, production opportunities, to estate planning (taxation). On the other hand, corporations represent loss of socio-economic growth in the rural sector to a decrease in land stewardship.

100. See DANIELS & BOWERS, *supra* note 62, at 59-74 (discussing the business of farming in America, its structural changes and noting that "the agriculturalist of today and tomorrow has become as sophisticated as any urbanite") (quoting Robert West Howard, *THE VANISHING LAND* 281 (1985)).

101. See 1999 Census, *supra* note 93 (the number of non-owner operators has not decreased significantly when compared to owner-operator and total farmer decreases). It must be noted that the composition of farms has also changed. Family landowners who once farmed, may now be more content with allowing someone else to farm for a share of the profits.

102. MARTY STRANGE, *FAMILY FARMING* 32 (1988).

103. *Id.* at 57. Walter Goldschmidt received his Ph.D. in anthropology from the University of California at Berkeley in 1942. His study formed the basis of his dissertation and was later published in a book titled "AS YOU SOW," published in 1947.

surrounded by small owner-operator farms,<sup>104</sup> the other surrounded by larger, industrial farms,<sup>105</sup> and concluded that the small-farm town better supported business, schools, and generally, quality of life.<sup>106</sup> "Since Goldschmidt's study drew negative conclusions about agribusiness . . . it was politically suppressed [and] he was drummed out of the agency."<sup>107</sup> Arguably, Mr. Goldschmidt's study foretold the current picture of a declining rural America.<sup>108</sup>

Some thirty years later, against a backdrop of changing agricultural practices, the Secretary of Agriculture Bob Bergland published a similar report in 1981 called "A Time to Choose."<sup>109</sup> The reports were similar in that Mr. Bergland, like Mr. Goldschmidt, recognized the negative effects that concentration of agricultural production had on the small to medium sized farms.<sup>110</sup> As a result of two years of research, *A Time to Choose* concluded that:

1. Tax policy was biased toward larger farms and wealthy investors;
2. The marketing system was increasingly oriented to serve larger producers;
3. Commodity price-support programs and credit services were of more benefit to larger producers and landlords; and
4. That there was little or no efficiency gain to be had from further expansion of large farms.<sup>111</sup>

The report categorized farms by size based on gross product sales, and became known as the "three farms"<sup>112</sup> approach to analysis. This approach examined

104. 11999 Census, *supra* note 93.

105. Harbur, *supra* note 83, at 386-87.

106. *See id.* at 387.

107. STRANGE, *supra* note 102, at 57. During the era of New Deal legislation, President Franklin Roosevelt instituted a Bureau of Agricultural Economics to study socio-economic problems in agriculture. Walter Goldschmidt worked at the Bureau of Agricultural Economics. The agency was dismantled shortly after his study was rejected.

108. *See* Bahls, *supra* note 84, at 327-29 (discussing the desolation of the High Plains of Montana along Highway 200, and noting that the once numerous homesteads have been replaced by large farms and rangeland).

109. *See* STRANGE, *supra* note 102, at 56-77.

110. *See id.* (describing how in the 1970's, corporate farming was growing, farmers threatened to strike, and a newly formed agricultural group, the American Agricultural Movement ("AMA") organized a protest and an angry march on Washington D.C. calling for agricultural reform). Mr. Bergland initially defended USDA policies but then changed his mind and said: "Price and income-support programs for farmers must be re-evaluated to determine if they have worked to the disadvantage of the small and medium-sized farms. . . . Evidence indicated that [USDA] programs were responsible for the undesirable trend towards concentration." *Id.*

111. STRANGE, *supra* note 102, at 61.

112. *See id.* at 56-77 (describing that the "three farms" approach divided farms into small (sales from \$5,000 to \$40,000), medium (\$40,000 to \$250,000), and large (over \$250,000) and this eventually

the effect of national policy on each individual farm-size group.<sup>113</sup> The report recognized that the needs of each group were different and thus, to its credit, the report showed that changed agricultural structure demanded mutable and flexible agricultural policy as the only means to meet the needs of competing and incompatible farm structures.<sup>114</sup>

"One policy for all of agriculture was [no longer] reasonable."<sup>115</sup> Farms, now, do not all look alike.<sup>116</sup> As such, public policy which once uniformly addressed issues like efficiency, productivity, and income, must now face the dynamics of "fair competition, economic opportunity, growth, and the exercise of economic power."<sup>117</sup>

At the crux of impending policy concerns lies the future welfare of the medium size farm—a farm with sales between \$40,000 to \$250,000.<sup>118</sup> However, the report would eventually have little influence on policy decisions which could have proven helpful to the well being of medium size farmers because, unfortunately, *A Time to Choose* was considered controversial by some in that it recommended that "critical changes were necessary to reflect new realities in agriculture."<sup>119</sup>

Moreover, the report was completed and released at the end of President Carter's administration and was withdrawn by the succeeding administration.<sup>120</sup> Thus, any controversial socio-economic or political issues raised by the report's study of the structure of agriculture as a fluid means to integrate policy became, essentially, a non-issue.<sup>121</sup> Thus, "the time to choose" which agricultural policies could best assist the plight of the family farmer passed.<sup>122</sup> Will there be another time?

became known as the conventional approach and was used to analyze agricultural policy through 1992); see also DANIELS & BOWERS, *supra* note 62, at 59-74. See also 1999 Census, *supra* note 93 (supporting that the 1997 Census now only separates farms by sales under and over \$10,000, and has increased the number of variables which are used to classify and examine farm structure. See also 1997 ANNUAL BULLETIN, *supra* note 25.

113. See STRANGE, *supra* note 102, at 56-77.

114. See *id.* at 68-77.

115. *Id.* at 76.

116. See *id.* at 76-77.

117. *Id.*

118. See *id.* at 65-67.

119. *Id.* at 60-66.

120. See Gerald Torres, *Symposium: Changing Structures and Expectations in Agriculture, Luncheon Address*, 14 N. ILL. U. L. REV. 799, 799-800 (1994).

121. See Neil D. Hamilton, *supra* note 69, at 616.

122. See generally National Commission on Small Farms, 62 Fed. Reg. 37,190, 37,190-91 (July 11, 1997) (introducing the National Commission on Small Farms to gather and evaluate information relating to small farms).

## B. "A Time to Act"

Perhaps another time has come. In 1997, Secretary of Agriculture Dan Glickman established the National Commission on Small Farms ("Commission").<sup>123</sup> A thirty-member commission was established to examine the status of small farms in the United States, and to determine a course of action for the USDA to recognize, respect, and respond to their needs.<sup>124</sup> The Commission published its report, *A Time to Act*,<sup>125</sup> based in part, on a compiled statistical analysis of the structure of farm operations.<sup>126</sup>

Interestingly, *A Time to Act* was dedicated to Secretary Bergland's previous efforts to change policy as reflected in his 1981 report *A Time to Choose*.<sup>127</sup> In its executive summary, *A Time to Act* acknowledged Secretary Bergland's warning that "unless present policies and programs are changed to counter instead of reinforce or accelerate trends towards . . . large farming operations, the result will be [only] a few large farms controlling food production."<sup>128</sup> The Commission concluded that the warning was not heeded and was "now even more convinced of the necessity to recognize the small farm as the cornerstone of our agricultural and rural economy."<sup>129</sup>

To its credit, by making this statement the Commission has placed emphasis on both the continued viability of the small farm and on rural America.<sup>130</sup> More importantly, the statistical approach in analyzing data went much further than the "three farm" approach used by Secretary Bergland.<sup>131</sup> For example, the "family" is now used as a category for examination of farm operations.<sup>132</sup>

The Commission, using agricultural data, categorized farms as small family farms, large family farms, and nonfamily farms.<sup>133</sup> Small family farms were further evaluated and characterized as belonging to one of the four following major groups: (1) limited-resource farms; (2) retirement farms; (3) residential lifestyle farms; and (4)

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123. See National Commission on Small Farms, 62 Fed. Reg. at 37,190-91.

124. See National Commission on Small Farms, 62 Fed. Reg. at 37,190-91.

125. See generally USDA Report, *supra* note 20 (reporting the status of small farms in America and introducing new goals and recommendations for the future).

126. See *id.* at 28-29.

127. See *id.* at 8; see *supra*, this report § III, A, *A Time to Choose*. Interestingly, a Westlaw electronic search only listed three law review articles which mentioned this report.

128. USDA Report, *supra* note 20, at 8.

129. *Id.* at 8.

130. See *id.* at 53.

131. See generally *id.* (discussing National Agriculture Statistics Service data).

132. See, e.g., 1999 Census, *supra* note 93, at 666, Tables 1103, 1104. The 1997 Census actually broke down the total number of farms by individual or family, partnership, and corporation. Within the corporation category, the statistics recognized the distinction between family held and other corporations.

133. See generally USDA Report, *supra* note 20 (assessing the data of small, large and non-family farms).

primary occupation farms.<sup>134</sup> Restructuring the categories of farms allowed the Commission to directly discuss the effects of policy on the family farm to determine that, in reality, it is the loss of small farm operations, whether family owned or not, that have had the most devastating effect on rural America.<sup>135</sup> Moreover, in formulating policy goals and recommendations to assist small farms, the Commission targeted farms with less than \$250,000 annual gross sales because it found that those farms were unable to produce net incomes comparable to nonfarmers and were therefore among the farms most endangered.<sup>136</sup> Secretary Bergland made similar predictions about the under \$250,000 farms almost twenty years ago.<sup>137</sup> Yet, it still remains to be seen whether policy changes can reverse the trend.

In formulating policy, among other things, the Commission recognized two important trends in today's farming culture: (1) that the average age of farmers is increasing, i.e., fewer young people are entering farming;<sup>138</sup> and (2) that small farms are becoming more dependant on off-farm income as a means of support.<sup>139</sup> Additionally, the Report recognized that as the ownership and control of agricultural assets becomes more concentrated into fewer hands, the small farms will lack competitive advantage to remain viable in the marketplace.<sup>140</sup> This trend will likely be strengthened by the FAIR Act's commitment to eliminate "government intervention in commodity markets as a means for providing income and price stability in the farming sector."<sup>141</sup>

Thus, in order to promote its "Vision for Small Farms in the 21st Century," *A Time to Act* outlined eight policy goals and made 146 recommendations designed to continue small farm contribution "to the Nation's food supply while fueling local economies and energizing rural communities."<sup>142</sup> The Commission reasoned that "[i]n the process of flourishing, small farms will contribute to the strengthening of society, providing communities and the Nation with opportunities for self-employment and ownership of land, and providing a cultural and traditional way of life as well as nurturing places to raise families"<sup>143</sup>—lofty, but, arguably, necessary purposes.

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134. See *id.* at 18, 28 (describing how primary occupation farms are further broken down by farms with gross sales of less than \$100,000 and those between \$100,000 and \$250,000).

135. See *id.* at 14-15.

136. See *id.* at 28.

137. An interesting comparison may be made if the two reports were studied side by side.

138. See, e.g., 1999 Census, *supra* note 93, at 675, Tables 1102 (showing from 1992 to 1997, 69,000 farmers between the age of eighteen and forty-four were lost.). See also *id.* at Appendix I; cf. discussion *infra* Part IV.B (discussing the EU program designed to promote young farmers—there are lessons to be learned, but they likely will not fly in the face of U.S. politics, because they involve direct payment programs).

139. See USDA Report, *supra* note 20, at 18.

140. See *id.* at 22.

141. *Id.*

142. *Id.* at 26.

143. *Id.*

*A Time to Act* detailed eight policy goals, set forth below, which have been incorporated as part of what is now known as the “Small Farm Initiative” (“Initiative”).<sup>144</sup> To fulfill *A Time to Act*’s vision, the Initiative endeavors to:

1. Recognize the Importance and Cultivate the Strengths of Small Farms.<sup>145</sup>
2. Create a Framework of Support and Responsibility for Small Farms.<sup>146</sup>
3. Promote, Develop, and Enforce Fair, Competitive, and Open Markets for Small Farms.<sup>147</sup>
4. Conduct Appropriate Outreach Through Partnerships to Serve Small Farm and Ranch Operators.<sup>148</sup>
5. Establish Future Generations of Farmers.<sup>149</sup>
6. Emphasize Sustainable Agriculture as a Profitable, Ecological and Socially Sound Strategy for Small Farms.<sup>150</sup>
7. Dedicate Budget Resources to Strengthen the Competitive Position of Small Farms in American Agriculture.<sup>151</sup>
8. Provide Just and Humane Working Conditions for All People Engaged in Production Agriculture.<sup>152</sup>

While the Initiative, armed with these policy goals, undertakes to renew interest in the small farm venture,<sup>153</sup> little can yet be said about its effectiveness. That “tangible” will depend on congressional commitment and speed of executing program development at the USDA field office level. Still, what can be said is that the USDA has solidly identified and defined what group of farmers it intends to assist in the context of an overriding public policy issue.<sup>154</sup> In plain English, the USDA no longer need concern itself with the elusive undefined term “family farm,”<sup>155</sup> instead the

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144. Telephone interview with Dan Kugler, USDA Advisor to the Small Farm Initiative (May 24, 2000).

145. See USDA Report, *supra* note 20, at 30.

146. See *id.* at 50.

147. See *id.* at 55.

148. See *id.* at 80.

149. See *id.* at 89.

150. See *id.* at 98.

151. See *id.* at 105.

152. See *id.* at 109.

153. See *id.* at 26.

154. See *id.* at 24-29.

155. Part of the problem with tying policy to a term like “family farm” is that while at one time, everybody had roots on the farm, those number are decreasing as the older generations are dying and

USDA can focus on the small farm, as it has been newly defined,<sup>156</sup> as a means to rejuvenate a degenerating rural America and in the process "save the family farm." The question is, will it work?

#### IV. WHAT CAN WE LEARN FROM THE EU?

Perhaps, some of the answers can be found by a comparative study of agricultural policies which have been instituted by the European Union ("EU"). After all, American agriculture was,<sup>157</sup> and to some extent still is,<sup>158</sup> rooted in European agrarian culture.<sup>159</sup> Thus, arguably, there is much to learn from the type of legislation which the EU has adopted to further their own agricultural and economic policy goals. However, in order to adequately discern EU policy, it is important to understand some of the history and legal structure under which the EU operates. After all, it is likely that not enough is known about the EU legislative process, especially in light of its continued and transforming development. On the other hand, probably not enough is known about our own U.S. legislative process!

##### A. *EU Legislative Process*

The EU, as a legislative body, adopts regulation through a complex political process which dates its beginnings to, as early as, 1951 when European countries began working towards economic and political unity.<sup>160</sup> By 1957, the Treaties of Rome ("EEC Treaty") created the European Economic Community ("EEC"),<sup>161</sup> which aimed at developing "an internal market (also known as the Common Market) characterized by the abolition, as between member states, of obstacles to the free movement of goods, persons, services, and capital."<sup>162</sup> In order to accomplish this

Americans tend to only see things through the eyes of money. In other words, it is likely far easier to sell a program today, if it is profitable somehow rather than "just" nostalgic.

156. See USDA Report, *supra* note 20, at 28.

157. See Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anti-Corporate Farming Statutes and Production Contracts*, 41 *DRAKE L. REV.* 393, 398 (1992).

158. Although research indicates differences in agriculture depending on which side of the Mississippi River one is, East or West, the importance of where one farms, in my opinion, cannot be understated. The size of farms and density of population in the East make those farms more alike the European model.

159. See *id.* (discussing two views of the family farm: economic and agrarian).

160. PASCAL FONTAIN, *EUROPEAN COMMISSION, EUROPE IN TEN POINTS; A BRIEF HISTORY OF EUROPEAN INTEGRATION* 5 (2d ed. 1995). The Treaty of Paris, signed by France, Germany, Belgium, the Netherlands, Italy, and Luxembourg established the European Coal and Steel Community ("ECSC").

161. See Treaty of Rome, Mar. 25, 1957, art. 2, 298 U.N.T.S. 11.

162. Treaty of Amsterdam, May 1, 1999, art. 3(c) (incorporating all of the existing treaties). See also Treaty of Rome, *supra* note 162, at 11 (giving the Community the task of promoting the harmonious development of economic activities, continued and balanced expansion, increased stability,

goal, the EEC developed a centralized legislative process comprised of a Council, a Commission, and later a Parliament.<sup>163</sup> While legislative procedure at the EC is beyond the scope of this article, it is important insofar as it pertains to an understanding of how the EC hoped to accomplish integration of varying political, social, economic, legal, and cultural systems. Indeed, a formidable task. The EEC recognized that in order for Community goals to be advanced, *harmonization* of those systems must take place.<sup>164</sup>

To accomplish this harmonization process, the Council of the European Economic Communities (now known as the Council of the European Union, hereinafter "Council") was empowered to enact two forms of binding law, (1) regulations, and (2) directives.<sup>165</sup> Regulations have general application to Member States and are automatically binding without the need for implementation of national or domestic legislation.<sup>166</sup> On the other hand, "*directives* are binding only as to their stated ends, with discretion given to member states to select the means of implementation."<sup>167</sup> Thus, what laws are implemented within Member States to accomplish a directive can be tailored to meet an individual Member State's needs, so long as those laws do not have a direct affect on or inhibit the Common Market.

The power to enact laws in pursuit of the free movement of goods, persons, services, and capital, or in other words the Common Market, was granted to the Council in Articles 3(h) and 100 (now 100a of the TEU) of the EEC Treaty.<sup>168</sup> These

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raised living standards and closer relations between member states).

163. See Louis F. Del Duca, *Teachings of the European Community Experience for Developing Regional Organizations*, 11 DICK. J. INT'L L. 485, 490-515 (1993). It should also be noted that while the European Countries developed an economic community, the Council of Europe which was formed in 1949 and now numbers forty-two countries, set about the task of creating the European Convention on Human Rights ("ECHR"). The ECHR remains as a separate source of law and all Member States to the Council of Europe have agreed to abide by its provisions. It is postured that the ECHR has increased harmonization.

164. See *id.* (discussing the development of the EC and harmonization). The EEC recognized that harmonization would not entirely be accomplished under the 1957 Treaty of Rome. See *id.* at 493-96. Hence, the EEC has since entered into three important subsequent agreements, which have transformed the old EEC to the new European Union. See *id.* at 492-93. The transformation that took place is important because of the language used to describe the various legal documents, which bind the union together. See *id.* With all of the different acronyms, it is difficult to keep the terminology straight. For instance, the Single European Act ("SEA") of 1986, amended the EEC Treaty, which in turn was amended by the Treaty of Masstricht, which entered into force in 1993, was also designated as the Treaty of the European Union ("TEU"). *Id.* at 496-511. The TEU established the EC. All of these documents were consolidated, renumbered, and even amended by the Treaty of Amsterdam, in 1999. The term EU was established under the TEU.

165. See *id.* at 489-90.

166. See *id.*

167. *Id.* at 495.

168. See Hans Claudius Taschner, *Harmonization of Products Liability Law in the European Community*, 34 TEX. INT'L L.J. 21, 23-25 (1999).

articles direct the Council to "approximate" laws,<sup>169</sup> which is a technical way of avoiding strict imposition of Community law on already existing and corresponding national laws. The effect, though, slowed down the process of eliminating barriers where, for instance, product standards were not uniform, thus hindering the free movement of goods between Member States.<sup>170</sup> Perhaps, the most significant aspect of the establishment of the Common Market was the elimination of all tariffs and trade barriers as between Member States.<sup>171</sup>

### B. *EU Agricultural Policy*

With this background in mind, under its law making authority, the EU<sup>172</sup> first provided for the establishment of a Common Agricultural Policy ("CAP") under the Treaty of Rome.<sup>173</sup> One of the most integral public policies underlining CAP posturing was "[t]he need to avoid desertification."<sup>174</sup> In other words, to canvass support for the farm sector from nonfarm citizens, CAP undertook to sustain viable rural communities under the auspices that they are to be "valued for their own sake because of the cultural and social values they embrace."<sup>175</sup> Moreover, when the Treaty of Rome was negotiated, farmers were thought of as "the custodians of the countryside," and thus environmental concerns were merged with agriculture despite no clear expression of such policy intent.<sup>176</sup> In summary, the CAP delineated five basic objectives: (1) to increase productivity; (2) to ensure a fair standard of living for the agricultural community; (3) to stabilize markets; (4) to assure food supplies; and (5) to provide consumers with food at reasonable prices.<sup>177</sup>

Since then, the Council, acting through its Council of Agricultural Ministers<sup>178</sup> has promulgated a number of agricultural policy directives.<sup>179</sup> For example, the

169. Del Duca, *supra* note 163, at 500 (discussing the reasons why harmonization was difficult given the inability of the EEC to override national law).

170. *See id.* (discussing the reasons why harmonization was difficult given the inability of the EEC to override national law). *See also* Taschner *supra* note 168, at 22-23 (discussing the effects of disproportionate laws which lead to unequal economic burdens that distort competition and ultimately the free movement of goods, persons, services, and capital).

171. *See* Taschner, *supra* note 168, at 23-25.

172. Then known as the EEC. *See* Del Duca, *supra* note 164, at 493.

173. *See* ALAN SWINBANK & CAROLYN TANNER, FARM POLICY AND TRADE CONFLICT x, xi, 61 (1996). Although Article 39(1) of the EEC provided for the CAP, the CAP was really a construct of the 1960s, reflecting the national farm policies it displaced. *Id.* at 35. For an excellent discussion on the EU decision-making process, *see id.* at 47-61.

174. *Id.* at 34. Arguably, the landscape of rural America has already been desertified.

175. *Id.*

176. *Id.* Although if Article 39(1) was drafted today, environmentalists would undoubtedly demand explicit policy objectives.

177. *See id.* at 33.

178. A separate Council consisting of experts in a particular field will serve as the "Council" responsible for directives involved in its area of expertise.

179. *See* P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN LAW 35 (Sweet & Maxwell 6th ed.

Council of Agricultural Ministers adopted a number of radical reforms in June of 1992, now known as the “New CAP,” which redirected Community farm policy.<sup>180</sup> The New CAP recommitted the EU farm sector to: (1) ensure the competitiveness of EU production in world markets; (2) preserve economic viability of farmers through support payment programs; (3) fund a “set-aside” (extensification) land program; and (4) promote agri-environment, afforestation, and early retirement measures.<sup>181</sup> Interestingly, the early retirement program, since its implementation, has served to develop a younger farm sector by making more opportunities available to young people.<sup>182</sup>

As part of the New CAP, the Council formulated and adopted the EU’s Agri-Environmental Programme (“AEP”) of 1992.<sup>183</sup> The AEP’s design vests farmers, in consideration of income payments, with the management of the European countryside from an environmentalist perspective.<sup>184</sup> The AEP’s reach is extensive and covers everything from water quality, reduction in fertilizers and conversion to organic farming, to upkeep and maintenance of woodlands and designated environmentally sensitive areas (“ESA”).<sup>185</sup> Under the AEP, farmers serve two functions: (1) producers, and (2) protectors of the environment.<sup>186</sup>

Moreover, the AEP formally instituted the “stewardship principle” in EU farm policy and has worked equally as well to help eliminate environmental and structural problems within the EU.<sup>187</sup> Arguably, CAP and New CAP measures have both contributed to a healthy countryside and helped maintain rural farm sector economies.

Still the EU has gone beyond the CAP to promote development of rural areas.<sup>188</sup> Since 1988, the EU has implemented a formal rural development policy.<sup>189</sup> At the core of that policy is the appreciation of maintaining a diversified and competitive agricultural or farm sector economy.<sup>190</sup> In 1993, Article 130A of the

1995).

180. *See id.* at 73.

181. *See id.* at 274-75.

182. *See The New CAP*; at [http://europa.eu.int/pol/agr/newcap\\_en.htm](http://europa.eu.int/pol/agr/newcap_en.htm) (last visited May 17, 2000).

183. *See* CEC Directive No. 2078/92.

184. *See* CLIVE POTTER, AGAINST THE GRAIN AGRI-ENVIRONMENTAL REFORM IN THE U.S. AND THE EUROPEAN UNION 1-8, 105-27 (1998).

185. *See id.*

186. *See id.* at 1-8, 115-18.

187. *See id.* at 1-8, 105-27 (explaining that biodiversity, for example, is considered a top priority of EU farm policy according to the AEP). Additionally, farm structure, which varies radically within Member-States, has been reconciled under AEP. *Id.*

188. *See Reform of the Common Agricultural Policy: Support for the Rural Development*, at <http://europa.eu.int/scadplus/leg/en/lvb/160006.html>.

189. *See Reform of the Common Agricultural Policy: Support for the Rural Development*, at <http://europa.eu.int/scadplus/leg/en/lvb/160006.html> [hereinafter *Reform of Agriculture*].

190. *See European Commission Directorate General for Agriculture*, at [http://www.europa.eu.int/comm/agriculture/publi/pac2000/rd/rd\\_en.pdf](http://www.europa.eu.int/comm/agriculture/publi/pac2000/rd/rd_en.pdf).

Treaty of Maastricht<sup>191</sup> identified rural development policy goals in terms of: (1) promoting social and economic cohesion; (2) development, diversification, and exploiting new technologies in rural areas; (3) increasing quality of life by increasing access to services; (4) promoting tourism; and (5) maintaining viable communities while preserving their culture and traditions.<sup>192</sup>

Since 1993, the scope of the Rural Development Policy has broadened and "real money" is being spent to (1) encourage tourist and craft investment; (2) renovate and develop villages; (3) protect cultural heritage; (4) protect the environment; (5) maintain the countryside; and (6) restore landscapes.<sup>193</sup> As one can see, AEP and Rural Development Policy goals have been environmentally integrated. Arguably, this fosters growth and facilitates policy implementation and participation. Integration coupled with direct payments derived from solid policy-driven budgetary commitments should produce rural sector economic growth and succeeding economic self-sufficiency.<sup>194</sup>

Yet, while the EU does report improved farm and rural sector economic growth as a result of agricultural and rural development policies, implementation has been slow.<sup>195</sup> This can be partially attributed to the logistics of policy negotiation and administration. For instance, at every stage of development, policy must be translated into twelve different languages,<sup>196</sup> although consideration is currently being given to reducing translation to just the English and French languages.<sup>197</sup> Not surprisingly, the Germans have lodged a heavy protest!<sup>198</sup>

191. See Del Duca, *supra* note 163, at 505.

192. See European Commission Directorate General for Agriculture at [http://www.europa.eu.int/comm/agriculture/publi/pac2000/rd/rd\\_en.pdf](http://www.europa.eu.int/comm/agriculture/publi/pac2000/rd/rd_en.pdf).

193. See European Commission Directorate General for Agriculture at [http://www.europa.eu.int/comm/agriculture/publi/pac2000/rd/rd\\_en.pdf](http://www.europa.eu.int/comm/agriculture/publi/pac2000/rd/rd_en.pdf). One-third of the EU Budget is being devoted to the combined programs that have been discussed thus far.

194. See generally *Rural Development: The New Rural Development Policy and Its Principles*, at [http://europa.eu.int/comm/agriculture/rur/back/index\\_hm](http://europa.eu.int/comm/agriculture/rur/back/index_hm) (describing the features of the Rural Development Policy as "strengthening the agricultural and forestry sector, improving the competitiveness of rural areas, and preserving the environment and rural heritage"). See also *Reform of the Common Agricultural Policy: Support for the Rural Development*, at <http://europa.eu.int/scadplus/leg/en/lvb/160006.html>. (explaining that the Rural Development Policy aims to "develop complimentary and alternative activities that generate employment, with a view to slowing the depopulation of the countryside and strengthening the economic and social fabric of rural areas . . .")

195. See *Cap Reform - A Policy for the Future*, at [http://europa.eu.int/comm/agriculture/publi/policy/future\\_en.pdf](http://europa.eu.int/comm/agriculture/publi/policy/future_en.pdf).

196. See Dinah Shelton, *Reconcilable Differences? The Interpretation of Multilingual Treaties*, HASTINGS INT'L & COMP. L. REV. 611, 617 (1997).

197. See Stephen Castle, *Berlin Poses EU Tongue-Twister*, THE INDEPENDENT-LONDON, Feb. 16, 2001, at 15 (explaining that French and English are currently the only languages used for certain meetings, but that all official languages are still translated in ministerial meetings).

198. See *id.* See also Ian Traynor & Martin Walker, *Language Snub Infuriates Berlin: Finnish Presidency Set for Bad Start as Germans Boycott EU Meetings Until Their Tongue is Put on Equal Footing with English and French*, THE GUARDIAN, July 2, 1999, available at 1999 WL 21228662.

Furthermore, after a directive is passed, Member States are given a number of years, often three years,<sup>199</sup> with which to pass national legislation to bring national policies in compliance with EU policies. Finally, the legislative process may be slowed further by the 1999 Treaty of Amsterdam's grant of additional decision making powers to the EU Parliament.<sup>200</sup> Increased parliamentary authority is a relatively new phenomena in the EU, thus its effects have not been fully measured.<sup>201</sup> Overall though, especially when considered in light of the difficulties of operating across transnational and cross-cultural borders, the EU has been successful in implementing effective farm policy.<sup>202</sup>

## V. CONCLUSION

Comparatively speaking, the same cannot be said about U.S. farm policy. There are at least two reasons which may provide some explanation for this concern. First, U.S. agricultural policy is subject to complete change brought about through changed political representation. Hence, *A Time to Act*—like *A Time to Choose* was twenty years ago—may be scrapped by a succeeding administration.<sup>203</sup> Representation in the Congress and Cabinets is always subject to change. On the other hand the Council and Commission of the EU have a Committee of Permanent Representatives, a permanent group of civil servants, who are in place to assure continuity of policy application.<sup>204</sup> Second, there is a cultural bias in favor of small rural communities in Europe which is lacking here in the United States.<sup>205</sup>

More importantly though, it is the level of socio-economic commitment to rural communities made by the EU which keeps the tractor in the fields even though the EU's problems are the same as those in the United States.<sup>206</sup> Both the United

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199. See, e.g., Commission Directive 2001/631EC of August 17, 2001, O.J. 227/41, available at [http://europa.eu.int/eur-lex/en/dat/2001/1\\_227/1\\_22720010823en00410043.pdf](http://europa.eu.int/eur-lex/en/dat/2001/1_227/1_22720010823en00410043.pdf). (directive requiring member states to comply within one year).

200. See generally Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Nov. 10, 1997, 1997 O.J. (C 340) 1, available at <http://europa.eu.int/eur-lex/en/treaties/livre54S.html> (describing the Treaty of Amsterdam's powers).

201. See generally Mathijssen, *supra* note 179, at 28 (describing the increased powers of the EU).

202. See generally Swinbank & Tanner, *supra* note 173, at 58-61 (discussing surpluses, budget overspends, and CAP Reform).

203. See Torres, *supra* note 120, at 799-800.

204. See generally Mathijssen, *supra* note 179, at 55-56 (describing the EU's Committee of Permanent Representatives).

205. See generally Terence C. Centner, *Preserving Rural-Urban Fringe Areas and Enhancing the Rural Environment: Looking at Selected German Institutional Responses*, 11 ARIZ. J. INT'L & COMP. L. 27, 29-30, 44 (1994) (describing Germany's preservation efforts and institutional responses); but see DANIELS & BOWERS, *supra* note 62, at 133-134 (discussing the rise of sprawl in the U.S.).

206. See *CAP Reform—Policy for the Future*, at [http://europa.eu.int/comm/agriculture/public/fact/policy/future\\_en.pdf](http://europa.eu.int/comm/agriculture/public/fact/policy/future_en.pdf).

States and EU face exodus from rural areas, aging farmer populations, remoteness, and weakness of infrastructure and services in rural areas.<sup>207</sup> Yet, the EU has chosen to codify and recognize small farm economic well being as essential to maintaining viable rural communities.<sup>208</sup> Arguably, it is the key element to their policy success. Perhaps the EU took to heart what Professor Wadley stated when he noted "that the primary reasons for preserving small family farms are largely non-economic and relate to the quality of life made possible by rural communities."<sup>209</sup>

In a sense, *A Time to Act* has also proposed policies to commit to small farms as a mechanism for redeveloping rural communities.<sup>210</sup> However, there is one major difference between EU policy and *A Time to Act*. EU policy has been reduced to legislation<sup>211</sup> whereas *A Time to Act* was born out of an agency action operating under USDA control,<sup>212</sup> and thus outside of traditional political representative commitment.<sup>213</sup>

Even so, the United States is making progress. Some states are recognizing the value of ameliorating farmlands and reconditioning rural landscapes in to order to promote tourism, or agritourism.<sup>214</sup> The small farm bed and breakfast is becoming popular in the face of declining attachment to rural communities.<sup>215</sup> As a result, tourists are becoming more interested in staying and learning about farm operations. Historic preservation has become fashionable in American culture.<sup>216</sup> Some states, like Arizona, are even trying to revitalize rural communities under the guise of cultural heritage claims.<sup>217</sup>

207. See *European Commission Directorate General for Agriculture*, at [http://www.europa.eu.int/comm/agriculture/publi/pac2000/rd/rd\\_en.pdf](http://www.europa.eu.int/comm/agriculture/publi/pac2000/rd/rd_en.pdf). (concerning the European Union); SWINBANK & TANNER, *supra* note 173, at 56 (supporting the view that there is an exodus from rural areas in the European Union); USDA Report, *supra* note 20; DANBOM, *supra* note 18, at 266-267 (supporting the statement that the population of rural areas in the United States has decreased).

208. See *Reform of the Common Agricultural Policy: Support for the Rural Development*, at <http://europa.eu.int/scadplus/leg/en/lvb/160006.html>.

209. Brian F. Stayton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes*, 59 UMKC L. REV. 679, 688 (1991).

210. See USDA Report, *supra* note 20, at 35, 48.

211. See, e.g., Treaty of Maastricht, Feb. 7, 1992, 31 I.L.M. 247; Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 11.

212. See USDA Report, *supra* note 20, at 8.

213. See *id.* at \_\_\_\_.

214. See, *New York Agritourism—Farms and Markets*, at <http://comingsteuben.com>. See generally Coming and the Finger Lakes, *Farms and Markets*, available at [http://comingsteuben.com/cs/farms\\_markets.tpl?cart=32109296191239674](http://comingsteuben.com/cs/farms_markets.tpl?cart=32109296191239674) (providing a listing of local farmers markets open to the public).

215. See, e.g., Environmental News Network, *Small Farms Seeking Tourism Dollars* (Aug. 12, 1998), available at [http://www.enn.com/news/enn-stories/1998/08/08\\_1298/farm\\_22978.asp](http://www.enn.com/news/enn-stories/1998/08/08_1298/farm_22978.asp) (discussing agritourism and the USDA's Fund for Rural America which provided a \$200,000 grant to promote agritourism in California).

216. See NATIONAL TRUST FOR HISTORIC PRESERVATION, SMART STATE, BETTER COMMUNICATIONS I (1996).

217. See e.g., Dan Tarlock, *Can Cowboys Become Indians? Protecting Western Communities*

In comparison though, these efforts lag behind those of the EU.<sup>218</sup> The efforts are fragmented and lack central policy focus. What is needed is a strong national policy that emphasizes development of rural communities beyond the farm issue, because until food security becomes an issue,<sup>219</sup> Americans will likely have little concern over the small versus big farm debate.<sup>220</sup> Emphasis should be shifted towards masking the policy debate under the cloak of environment, culture, and tourism. Though much will depend on whether and how we “choose to act.”

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*As Endangered Cultural Remnants*, 31 ARIZ. ST. L.J. 539 (1999).

218. Compare Pierre Antoine Barthelemy & Claude Vidal, *Rural Realities in the European Union*, at [http://europa.eu.int/comm/agriculture/envir/report/en/rur\\_en/report\\_en.htm](http://europa.eu.int/comm/agriculture/envir/report/en/rur_en/report_en.htm), with USDA Report, *supra* note 20, at 10-12.

219. In light of the unfortunate events of September 11, 2001, national security issues and perhaps the need for decentralization of assets and populous may spurn rural revitalization; development of rural communities may take on a new meaning. Certainly those lost will be missed and our hearts go out to all Americans during this time of tragedy

220. In support of this statement, I ask the reader to consider the difficulties the USDA has in trying to allocate funds to programs like the Small Farm Initiative. Congress controls those funds, and the people elect Congress. Interestingly, though, traditional big farm countries like Russia and China are looking towards the small farm as central to farm economic vitality. Have the roles reversed?