FEUDALISM UNMODIFIED: DISCOURSES ON FARMS AND FIRMS

Jim Chen*
Edward S. Adams**

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

De mortuis nihil nisi bonum dixit.

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

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

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

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

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

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


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

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

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

8. See Genesis 25:9; Genesis 26:34; Genesis 36:2; Genesis 49:30; Genesis 50:13; Exodus 23:28; Exodus 33:2; Exodus 34:11; Joshua 9:1; Joshua 11:3; 1 Samuel 26:6; 2 Samuel 11:6, 21, 24; 2 Samuel 12:9-10; 2 Samuel 23:39; 1 Kings 15:5.
10. But cf. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) (arguing that "[t]he Court fail[ed] to address the difficulties, both practical and constitutional, with the task of defining members of racial groups that its decision will require"); In re Storer Broadcasting Co., 87 F.C.C.2d 190 (1981) (tracing a broadcast license applicant's family history to 1492 to conclude that the applicant was "Hispanic" for purposes of a minority tax certificate policy); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES § 8-2.14, at 544 (4th ed. 1993) (noting that the 24 generations between 1492 and the date of the Storer case would have diluted the Hispanic portion of the disputed applicant's ancestry to one part in 16,777,216).
11. Contra James Lindren, Measuring the Value of Slaves and Free Persons in Ancient Law, 71 CHI.-KENT L. REV. 149, 166 (1995) ("The Hittites figure prominently in modern discussions of law because they left an elaborate law collection, as well as a range of treaties.").
12. Cf. Geoffrey P. Miller, The Song of Deborah: A Legal-Economic Analysis, 144 U. PA. L. REV. 2293, 2293 (1996) (noting that it was "unusual[]" to have a woman, Deborah, serve as a judge "very early in the history of the Israelite occupation of the Promised Land").
ton to a measly ten, while the price of iron remained a sky-high ninety ephahs per ton.

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

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

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

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

II. CHAOS, COCAINE, AND COMPETITION

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

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


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

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


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


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

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

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

23. See Rizzo, supra note 21, at 652-53.
24. See generally DIMITRIS N. CHORAFAS, CHAOS THEORY IN THE FINANCIAL MARKETS: APPLYING FRACTALS, FUZZY LOGIC, GENETIC ALGORITHMS, SWARM SIMULATION AND THE MONTE CARLO METHOD TO MANAGE MARKET CHAOS AND VOLATILITY (1994); EVOLUTIONARY ECONOMICS AND CHAOS THEORY: NEW DIRECTIONS IN TECHNOLOGY STUDIES (Loet Leydesdorff & Peter van den Besselaar eds., 1994).
26. See MICHAEL CRICHTON, JURASSIC PARK 312 (1990) ("[C]haos theory proves that unpredictability is built into our daily lives. It is as mundane as the rainstorm we cannot predict. And so the grand vision of science . . . —the dream of total control—has died . . . ."). Crichton's mad mathematician, Ian Malcolm, is based on the late physicist and leading chaos theoretician, Heinz R. Pagels. Id. at Acknowledgments. Malcolm's pessimistic outlook on the role of science in society may more closely parallel the views of Jeremy Rifkin, an opponent of genetic engineering. Andrew A. Skolnick, Jurassic Park, 270 JAMA 1252, 1253 (1993) (book review).
28. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955) ("[L]egislative reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.").
30. See Law as Industrial Policy, supra note 18, at 1317 (describing "economic analysis of law [as] a critical theory so corrosive that it consumes itself").
"ideological" use of the theory of second best raises "a fatal objection to economic analysis of real world markets." The theory strips any veneer of coherence from Ronald Coase's prescription of step-by-step elimination of barriers to fully informed negotiation. The prospect that a second-best legal solution will flounder thus enables "[m]arket failures [to] provide an efficiency rationale . . . anywhere in the economy—not simply in the market or industry in which the failures occur." No wonder traditional law-and-economics scholars dread the theory. A theory that proves this much is sure to become the addictive cocna of pragmatic legal scholarship.

Cocaine, alas, does not discriminate in its allure. Skeptics of command-and-control regulation can also find comfort in the theory of second best. Even sensible free market advocates must eschew the temptation to convert the theory of second best into an all-purpose rhetorical mace against regulation. But it is far from sporting to assert that all forms of governmental intervention are more likely to generate perverse side effects than to cure an identified market defect. Rather, we will adopt what we consider a minimalist variant of the theory of second best as the foundation of a "Santa Claus" variant of normative legal analysis: make a list of possible objections to a legal regime, and check it twice. In response to the general theory of second best and other constraints on the prescriptive power of legal criticism, this Article advocates the cautious use of a third-best approach to economic regulation. In a world full of economic imperfections, the soundest regulatory options more often than not consist simply of choosing "among alternative general policies" in an effort "to adopt the policy that on average has the most favorable resource allocation implications."
Economic analysis of law, especially when offered in hopes of enhancing societal welfare, should be prepared to answer the most uninviting and American of questions: "If you’re so smart why ain’t you rich?" Among the many policy options available to American lawmakers, we believe that a consistent, generalized preference for freedom of entry, exit, and firm organization assures the highest likely return on economic regulation. In "the larger economy’s informal parliament of merchants, middlemen, and consumers," a third-best approach excels. The approach nudges the economy toward full efficiency without the distortions caused by the internal contradictions that result from the pursuit of second-best policies. A third-best approach outperforms piecemeal regulation according to the cold tests used by "the largest players in the world’s markets" to assess "national and local governments' economic policies": "gross domestic product, the ratio of gross domestic product to public debt, balance of payments, unemployment, [and] inflation." We will develop our hypothesis by examining certain economic assumptions underlying the regulation of firm size and structure in the agricultural and industrial sectors. Structural regulation in American law, of course, takes numerous forms, including section 7 of the Clayton Act, the Glass-Steagall Act, the Public Utility Holding Company Act of 1935, and numerous provisions of federal communications law. These diverse statutes

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


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

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


47. See, e.g., FCC v. National Citizens Comm. for Broad., 436 U.S. 775 (1978) (upholding 47 C.F.R. § 73.3555(c), the FCC’s rule restricting cross-ownership of newspaper and broadcast facilities in the same market); News Am. Publ’g, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988) (striking down a statute requiring the discriminatory consideration of applications for waivers from the newspaper-broadcast cross-ownership restriction); U.S. West, Inc. v. United States, 48 F.3d 1092, 1095 (9th Cir. 1994) (invalidating a now repealed ban on a common carrier from offering video programming services to subscribers in its telephone service area, either directly or by owning or operating a cable system), vacated, 116 S. Ct. 1037 (1996); Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, 202 (4th
share two core articles of faith. First, structural regulation of economic activity assumes that certain forms of market structure and industrial organization are economically or socially pernicious. Second, regulators believe that these evils can be effectively addressed by legal restrictions on the formation or structure of individual firms. The common legal strategy is the “incipiency” standard implicit in the Clayton Act’s proscriptions against conduct that may “substantially . . . lessen competition or tend to create a monopoly”:

48 certain situations present such “anticompetitive potential” that regulators should patrol the market “even in the absence of incipient monopoly,” and even when the “merging of resources” may lead to “efficiencies that benefit consumers.”

49 At heart, structural regulation exploits the connection between the internal organization of the firm and the overall structure of a market, a link widely recognized since Ronald Coase published The Nature of the Firm in 1937.

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

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

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

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


55. See Elizabeth B. Bailey & William J. Baumol, Deregulation and the Theory of Contestable Markets, 1 Yale J. on Reg. 111, 121 (1984) (noting that “regulatory attempts to influence the structure of an industry, perhaps seeking to increase the number of firms it contains, are often doomed to failure”).
III. SERFING U.S.A.

A. The Siamese Twins of American Agricultural Law

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

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

⁵⁷ Cf. Richard Hofstadter, The Age of Reform: From Bryan to F.D.R. 23 (1955) (“The United States was born in the country and has moved to the city.”).

⁵⁸ See generally Exodus 32.


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

⁶² As shown by the following table of data derived from the 1992 Census of Agriculture, Table 16, farms held in sole proprietorship tend to cultivate less acreage than small corporate farms (corporate farms with fewer than 11 shareholders) and much less than large corporate farms (corporate farms with 11 or more shareholders). U.S. Dep’t of Commerce, 1992 Census of Agriculture, United States Data 22 (1993). Farms in sole proprietorship so vastly outnumber corporate farms, however, that “family farms” control
reflects nothing more than business decisions within a broad and diverse class of family farmers. A trivial proportion—less than half of one percent—of all American farms are owned by nonfamily-owned corporations. Family farmers dominate American agriculture; even in the largest sales category (more than $500,000 in annual sales), individual farm owners operate roughly nine-tenths of the farms. We thus “have every reason to believe that independent farm operators would still provide the bulk of farm production” even if “small farms disappear.”

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

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

<table>
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<td>491</td>
<td>365</td>
<td>1563</td>
<td>4793</td>
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<tr>
<td>1987</td>
<td>462</td>
<td>347</td>
<td>1646</td>
<td>6251</td>
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<tr>
<td>1992</td>
<td>63.9%</td>
<td>11.5%</td>
<td>1.5%</td>
<td></td>
</tr>
<tr>
<td>1987</td>
<td>65.1%</td>
<td>11.1%</td>
<td></td>
<td>1.3%</td>
</tr>
</tbody>
</table>

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

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

64. See Browne et al., supra note 62, at 46.

65. Id.


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

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

B. All Eyes on the Feudal Prize

1. All That the (Political) Traffic Will Bear

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

The Homestead Act of 1862 is a natural launching pad for a historical
discussion of the family farm within American agriculture’s legal tradition.
Homesteading represented one of the most important legislative responses of
the Civil War Congress to the agrarian struggle that had torn North from
South. In a very real sense, the Homestead Act, the Emancipation Procla-
amion, and the Department of Agriculture’s organic statute—all

69. See JOSEPH CAMPBELL, THE HERO WITH A THOUSAND FACES 365 (1st ed. 1949) (“The
mighty hero of extraordinary powers . . . is each of us: not the physical self visible in the
mirror, but the king within.”).
70. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921); cf. OLIVER WENDELL
HOLMES, THE COMMON LAW 1 (1902) (“The life of the law has not been logic: it has been
experience.”).
71. Cf. KARL MARX AND FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY, IN
THE MARX–ENGELS READER, supra note 56, at 331, 335.
72. See generally AMERICAN IDEOLOGY, supra note 25, at 810-16.
73. The Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392 (codified as amended at
43 U.S.C. §§ 161-302 (1994) and partially repealed by Federal Land Management Act of 1976,
Title VII, § 702, 90 Stat. 2744, 2787).
74. See, e.g., M.C. HALLBERG, POLICY FOR AMERICAN AGRICULTURE: CHOICES AND
CONSEQUENCES 303-23 (1992) (beginning a chronicle of federal legislation and executive
orders affecting American agriculture with the Homestead Act of 1862); AMERICAN IDEOLOGY,
supra note 25, at 831-33 (describing the Homestead Act as an integral part of the
“developmental” agenda in American agricultural law); cf. Jim Chen, OF AGRICULTURE’S FIRST
FIRST DISOBEIDENCE] (tracing the origins of American agricultural law to the framing of the
Constitution).
75. See AMERICAN IDEOLOGY, supra note 25, at 830-31; AGRICULTURE’S FIRST DISOBEIDENCE,
supra note 74, at 1316-19.
76. ABRAHAM LINCOLN, EMANCIPATION PROCLAMATION (Jan. 1, 1863), reprinted in 6 THE
fashioned in 1862—completed the unfinished business that was interrupted by the slavery debate at the 1787 Constitutional Convention. The prospect of owning 160 acres in fee simple promised independence to European immigrants, many of whom were still peasants within the 19th century remnants of medieval feudalism. The legislative effort to supplant the Southern slave culture with the "free labor" of "paupers from all parts of the globe" thus linked the American family farm with Europe's final transition out of feudalism during the Industrial Revolution.

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


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


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


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

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

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

87. 7 C.F.R. § 1943.2 (1996) (authorizing loans to help eligible borrowers become family-farm owner-operators).
a larger economy bound by “the Magna Carta of free enterprise.”

Family farmers in particular enjoy an entire chapter of the Bankruptcy Code, in the latest variation on American public law’s longstanding theme of rescuing farmers from bad borrowing decisions.

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


97. See, e.g., Stephen Vincent Benét, The Devil and Daniel Webster (1937). This tradition stretches back beyond the framing of the Constitution, which attempted futilely to prevent the states from passing general debt relief legislation. See also U.S. Const. art. I, § 10, cl. 1 (“No State shall... pass any... Law impairing the Obligation of Contracts...”); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 205-06 (1819) (discussing whether the framers through Article I, Section 10, Clause 1 of the United States Constitution intended to forbid state bankruptcy laws which would nullify a loan contract); Benjamin F. Wright, Jr., The Contract Clause of the Constitution 4-6, 15-16, 32-33 (1938); cf. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 664-66 (1819) (invoking the contracts clause in repelling New Hampshire’s efforts to modify the charter of a private college). The contracts clause reasserts itself in times of financial crisis in the farm sector. See generally Agriculture’s First Disobedience, supra note 74, at 1276; David R. Papke, Rhetoric and Retrenchment: Agrarian Ideology and American Bankruptcy Law, 54 Mo. L. Rev. 871, 883-84 (1989).


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

100. See 29 U.S.C. § 152(3) (1994) (excluding farmworkers from the National Labor Relations Act’s definition of “employee”); see also Holly Farms Corp. v. NLRB, 116 S. Ct. 1396, 1399 (1996) (holding that “live-haul”... teams of chicken catchers, forklift operators, and truckdrivers” are not agricultural employees within the meaning of the exclusion from the National Labor Relations Act); Bayside Enters., Inc. v. NLRB, 429 U.S. 298, 300 (1977) (holding that farm truck drivers are not agricultural employees within the meaning of the exclusion from the National Labor Relations Act).
and legal protection against product handlers’ coercive practices.) Similarly, like many other environmental statutes, the Clean Water Act of 1977 contains a yawning chasm through which much on-farm pollution eludes the law; "point source[s]" under the Act do not include "agricultural stormwater discharges and return flows from irrigated agriculture." Many states in the union likewise frame the "right to farm" as a blanket exemption from nuisance law, the common law’s crudest tool for deterring environmentally destructive land uses.

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

2. Every Man a King

The family farm retains its romantic image as the bulwark of the American declaration of independence from feudal Europe. To this day, the very flow of the debate in American agricultural circles stresses the primacy of the family farm. Tenant farming, the most common and fastest growing method of business organization in contemporary European agriculture, is the yardstick by which failure is measured in American agriculture and American agricultural policy. For example, fifty-six percent of French farmers are tenants, and only forty-three percent are owner-operators. These figures represent a rough reversal of the tenure pattern in 1970, when fifty-two percent of French farmers were owner-operators and forty-six percent were tenants. In stark contrast, tenancy rates in American agriculture have hovered between twelve percent to twelve and one half percent of the total farm population throughout the 1970s and 1980s. Among small farmers,
defined as those farming fewer than 180 acres, seventy-five percent were full owners in 1987, and fewer than ten percent were tenants. The 1992 Census of Agriculture reported a nationwide tenancy rate of merely eleven percent; even the notoriously feudal state of Hawaii reported a tenancy rate of only thirty-one percent.

Ownership of farmland is an essential tenet of the traditional agrarian creed in the United States: "The land should be owned by the man who tills it." Indeed, two of the other planks of the agrarian creed stem directly

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

110. See AREI UPDATES, supra note 109.

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

Farmers are good citizens and a high percentage of our population should be farmers.
Farming is not only a business but a way of life.
Farming should be a family enterprise.
The land should be owned by the man who tills it.
It is good "to make two blades of grass grow where only one grew before."
Anyone who wants to farm should be free to do so.
A farmer should be his own boss.
from the doctrine of farm ownership; without land ownership, a farmer could
hardly "be his own boss"113 or ensure that farming is "a family enter-
prise."114 A tenant farmer who does not "graduate" to proprietary
entrepreneurship115 is not only a personal failure, but also a disappointment
for the mightiest agricultural policymakers in the United States. Americans
have historically evaluated the success of their agricultural policies according
to the incidence of farm tenancy.116

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

FARM AND FOOD POLICY, supra, at 7.

For a modernized restatement of the creed, see Neil D. Hamilton, Agriculture Without
Farmers: Is Industrialization Restructuring American Food Production and Threatening the
Future of Sustainable Agriculture?, 14 N. ILL. U. L. REV. 613, 639 (1994) [hereinafter
Agriculture Without Farmers]. The following statement of the farmer's "catechism" proved
worthy of a Pulitzer Prize:

What is a farmer?
A farmer is a man who feeds the world.
What is a farmer's first duty?
To grow more food.
What is a farmer's second duty?
To buy more land.
What are the signs of a good farm?
Clean fields, neatly painted buildings, breakfast at six, no debts, no
standing water.
How will you know a good farmer when you meet him?
He will not ask you for any favors.


113. See FARM POLICY, supra note 112, at 3.
114. FARM AND FOOD POLICY, supra note 112, at 7.
115. The "graduation" requirement in loans administered by the former Farmers Home
Administration (FmHA) offers a useful comparison. Once a farmer is able to "obtain sufficient
credit elsewhere," he or she is no longer eligible to borrow on a needs-tested or emergency
basis from the FmHA's successor agency, the Consolidated Farm Service Agency. See 7 U.S.C.
§ 1922(a) (1994); 7 C.F.R. § 1951.261 (1996); United States v. Anderson, 542 F.2d 516, 517
(9th Cir. 1976); United States v. City of Girard, 806 F. Supp. 196, 197 (C.D. Ill. 1992). See
generally Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of

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

117. See Agriculture's First Disobedience, supra note 74, at 1287-1315 (discussing the
Southern agrarian tradition and the moral dilemma that this tradition poses for American
agriculture at large); cf. The Civil Rights Cases, 109 U.S. 3, 20 (1883) (acknowledging
Congress's the power under the Thirteenth Amendment to define and abolish "all badges and
incidents of slavery in the United States"); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441
(1968) (defining barriers to alienation and acquisition of property as such a badge or incident
of slavery).
crop lien, and other [tenacious] systems of farm tenancy” extended feudal cotton cultivation in the South well beyond the Civil War, as (mostly white) “landowners and creditors insisted” that their sharecroppers and debtors grow a crop that “always had a cash market and . . . could not be pilfered or eaten by the farmer.”118 Although the distinctly Southern streak in American agrarianism has mostly eluded scholars who are more familiar and perhaps more comfortable with the romantic Midwestern myth of family farming,119 the cotton-blended fabric of American agricultural law manifests the true colors of Dixie’s feudal inclinations. Even the Agricultural Fair Practices Act of 1967,120 the Magna Carta of organizational freedom for contract farmers, expressly excludes producers of “cotton or tobacco or their products,”121 The Southern states, “where the majority of contract production is occurring,” have offered “virtually no [legislative] protection” to the peons of the poultry industry.122 Nothing testifies as strongly to the enduring grip of feudal agriculture as the spectacle of rents on peanut and tobacco quotas,123 flowing quietly but steadily to passive quota holders throughout the South.124

The birth of the family farm myth as American agriculture’s Siamese twins thus represents the rhetorical death of feudalism in the United States. Agrarian entrepreneurship symbolizes independence, no less in the 1990s than in the 1290s. Freedom to alienate property snapped the chains of feudal tenure in medieval England, and freedom to farm likewise enabled several generations of eighteenth- and nineteenth-century immigrants to establish a new life in America, free of their ancestral links.125 What the Statute of Quia

119. See Agriculture’s First Disobedience, supra note 74, at 1316-17.
121. Id. § 2302(c).
124. For exemplary tobacco cases, see McLamb v. Pope, 657 F.2d 77 (4th Cir. 1981); Davis v. Stewart, 625 F.2d 1143 (4th Cir. 1980); Price v. Block, 535 F. Supp. 1239 (E.D.N.C. 1982). For cases illustrating the use of export and processing controls under the peanut program, see Gold Kist, Inc. v. USDA, 741 F.2d 344 (11th Cir. 1984); Tom’s Foods, Inc. v. Lyng, 703 F. Supp. 1562 (M.D. Ga. 1989).
125. See R.W.B. LEWIS, THE AMERICAN ADAM: INNOCENCE, TRAGEDY AND TRADITION IN THE NINETEENTH CENTURY 8 (1955). Lewis describes the nineteenth-century American as an Adam, a “fundamentally innocent” and “radically new personality” who stood apart from the Old World’s enervating conflicts. Emancipated from history, happily bereft of ancestry,
Emptores promised in the late thirteenth century, however, may be threatened by the economic developments of the late twentieth century. Soon after victory in World War II, which gave the United States its domineering position in the world’s agricultural marketplace, scholars at the Harvard Business School recognized the emergence of agribusiness, an industrialized, fully integrated system of food and fiber delivery that spelled the end of agriculture as an independent sector of the American economy. The cult of economic and social independence, so essential to the American farmer’s sense of well-being, has absorbed several blows from an economy that, in two generations, slashed the farm population from twenty-five percent to less than two percent of the United States’ overall population.

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

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

126. 18 Edw. 1 (1290); see Sir Frederick Pollock & Frederic William Maitland, The History of English Law 337 (2d ed. 1923).

127. See John H. Davis & Ray A. Goldberg, A Concept of Agribusiness 2 (1957) (defining agribusiness as “the sum total of all operations involved in the manufacture and distribution of farm supplies; production operations on the farm; and the storage, processing, and distribution of farm commodities and items made from them” (emphasis added)).


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

130. Plucknett, supra note 52, at 507.

131. Id. at 508. In time, of course, Catholic Europe converted the Norse and exported feudal institutions to the farthest reaches of the Vikings' maritime empire. See generally Islebæk Fornrit: Íslendingabók og Landnámabók (Jakob Benediktsson ed., 1968).

132. Id. at 509.
shortages have inspired widespread nostalgia for the extinct *Deutsche Demokratische Republik.*

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

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


137. *Cf. American Ideology,* supra note 25, at 822 (“I do not accuse American agriculture of being too Marxist. My complaint is that American agriculture is not Marxist enough.”).
to farmers in the United States. These are tasks still performed by farmers in less developed countries. "Economic progress, however, is characterized
by a progressive division of labor and separation of function." Progress
moves successive tasks off the farm and into the hands of economically inde-
pendent entities; inputs such as tools, fertilizer, and mechanical power and
virtually all value-added processing become the domain of nonfarm agribusi-
nesses. Unchecked, the continued specialization of agricultural production
reduces any one farm's ability to compete without turning to off-farm suppli
ers and processors—and hence reduces the farm's ability to rely on itself.

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

139. Id.
140. Cf. George J. Stigler, The Division of Labor Is Limited by the Extent of the
Market, 59 J. POL. ECON. 1, 85 (1951) (observing that a firm's decision to expand or maintain
an internal division of labor is contingent upon the market price of substitute labor, materials,
or management).
824-30 (discussing the decline of agriculture as an autonomous enterprise).
142. See CODE RURAL, art. L. 411-417 (Fr.). See generally Louis Lorvellec, Droit
Rural 65-113 (1988) (discussing the computation of rents under the statut du fermage et du métayage);
François Collart-Duttilell, Quelle Evolution pour les Baux Ruraux?, 234 REVUE DE
DROIT RURAL 306-07 (June-July 1995) (discussing possible changes in the computation of
rents under the statut du fermage et du métayage).
143. See Louis Lorvellec, Rapport de Synthèse, 233 REVUE DE DROIT RURAL 251, 252
(May 1995); Louis Lorvellec, French Agricultural Law and Diversification, 45 DRAKE L. REV.
455 (1997); cf. Isabelle Couturier, Remarques d'actualité sur la définition de l'activité agricole,
249 REVUE DE DROIT RURAL 15 (1997) (noting how the transformation of the rural economy has
forced French law to redefine agricultural activities).
145. Agricultural Holdings Act, 16 March 1986, ch. 5 (U.K.). See generally
Christopher P. Rodgers, Diversifying the Farm Enterprise: Alternative Land Use and Land
Tenure Law in the U.K., 45 DRAKE L. REV. 471, 472 (1997) (describing the "considerable
security of tenure and additional statutory rights" granted to tenants under the Agricultural
Holdings Act of 1986 and contrasting that system with the relatively deregulated scheme
imposed by the Agricultural Tenancies Act of 1995).
A quick glance at the American agricultural landscape discloses a deeply ingrained (and arguably justified) fear of the new feudalism. The practice of coordinating multiple producers by contract, well established in the American poultry industry\textsuperscript{146} and en route to becoming a way of life for pork producers, is drawing increasingly vocal criticism in rural communities as a form of modern "feudalism."\textsuperscript{147} A long line of production contract disputes dating back to the poultry antitrust litigation of the 1970s has established that an integrator effectively "owns" the contract farmer in many of the ways in which the feudal lord "owned" the serf.\textsuperscript{148} "Us folks in the chicken business," complained one poultry producer at the height of the corporate wars to conquer the broiler market, "are the only slaves left in this country."\textsuperscript{149}

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


\textsuperscript{147} See, e.g., Looker, supra note 51, at A1; Sullivan, supra note 51, at J1, J2.


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


\textsuperscript{152} See FEEDING OUR FUTURE, supra note 129, at 219. For a discussion of tenancy rates and their significance, see supra notes 106-11 and accompanying text.
gerial independence. Some contract farmers have miscalculated the degree to which their agribusiness bosses have shifted market risks on producers as a class.\footnote{See, e.g., Myron Soll & Sons, Inc. v. Stokely USA, Inc., 498 N.W.2d 897 (Wis. Ct. App.) (involving a passed acreage clause under which an agribusiness purchaser could decline to take a corn crop that was otherwise fit for harvest).} Although production contracts do give farmers a more predictable income stream and superior access to capital and nonfarm inputs, they exact a price in managerial freedom. Moreover, agribusiness contractors often invite or induce their producers to invest heavily in specialized equipment, only to terminate the contractual relationship before the producers can recoup this sunk investment.\footnote{See, e.g., Smith v. Central Soya of Athens, Inc., 604 F. Supp. 518 (E.D.N.C. 1985). In Smith, the plaintiffs alleged that the defendants induced them to build four poultry houses by representing that the defendants would supply chickens for the houses. Id. at 521. The plaintiff’s amended complaint alleged that the defendants later refused to provide additional chickens, thereby breaching their promise and damaging the plaintiffs. Id. The court dismissed the plaintiff’s complaint for failing to refute the presumption created by the merger clause in the contract and for failing to state a claim of violation under North Carolina Unfair and Deceptive Trade Practices Act. See id. at 531.} Some states thus regulate the termination of the feudal farming relationship,\footnote{See, e.g., MINN. STAT. ANN. § 17.92 (West Supp. 1996) (restricting the ability of contractors to “terminate or cancel a contract that requires a producer of agricultural commodities to make a capital investment in buildings or equipment that cost $100,000 or more and have a useful life of five or more years”).} as if the contract farm were a public utility\footnote{Cf. Stephen Breyer, Regulation and Its Reform 15-20, 29-32 (1982) (identifying these arguments as components of traditional arguments over the natural monopoly and excessive competition rationales for regulation).} or a retail franchisee.\footnote{Cf. Ark. Code ANN. §§ 4-72-302 to 4-72-309 (Michie 1987) (protecting retail franchisees); Wash. Rev. Code Ann. §§ 19.100.010 to .940 (West 1995 & Supp. 1996) (protecting franchisees’ investments from early or fraudulent termination by franchisers). See generally New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978) (upholding a state-law franchisee protection scheme against procedural due process and Sherman Act challenges).}

C. Onward Agrarian Soldiers

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

Economic theory, backed by the verdict of history, dictates a negative answer. Strictly defined, “sustainable agriculture” consists of “processes involving biological activities of growth or reproduction intended to produce crops, which do not undermine our future capacity to successfully practice agriculture” and which do not “exhaust any irreplaceable resources which
are essential to agriculture."\(^{158}\) As a strictly ecological goal, sustainable agriculture does not necessarily favor "small or family farmers instead of large corporate farms."\(^{159}\) At best, the confused and confusing merger of environmental objectives with concerns over farm size testifies to the intellectual bankruptcy of American farm policy.\(^{160}\) At worst, the "considerable political support and federal funding" for sustainable agriculture may signal yet another obnoxious instance of political capture, a revival of "agricultural fundamentalism" in quasi-environmental garb.\(^{161}\)

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

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

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

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


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

\(^{163}\) See, e.g., MSM Farms, Inc. v. Spire, 927 F.2d 330, 332-33 (8th Cir. 1991) (arguing that the decline of the family farmer might "lead to absentee landowners and tenant operation of farms," "would adversely affect the rural social and economic structure, and would result in decreased stewardship and preservation of soil, water, and other natural resources"); United Family Farmers, Inc. v. Kleppe, 418 F. Supp. 591, 594 n.4 (D. S.D. 1976) (quoting a family farm organization’s mission statement, which equated "the continued health and vitality of the family farm unit" with "the future of . . . our natural environment and resources"); Hurd v. Commissioner, 37 T.C.M. (CCH) 499 (1978) (describing the owner of a family-held ranch as having "a lifelong interest in conservation" and as holding a "belief[f] that he is merely the ‘steward’ of his land, not the owner, and that he has an obligation to return his land in better condition than when he received it"); (emphasis added). MINN. STAT. ANN. § 500.24(1) (West 1990) (describing "the family farm" as "the most socially desirable mode of agricultural production" and the font of all "well-being of rural society in Minnesota"); Struckhoff v. Echo Ridge Farm, Inc., 833 S.W.2d 463, 466 (Mo. Ct. App. 1992) (arguing that the preservation of
tection are capturing and redefining the nebulous terms “family farming” and “stewardship.” 164  Till “God’s in his heaven”165 and “all’s right with the world,” however, legal experts do well to shun unrhymed, unmetered romantic poetry in favor of critical scholarship. “[W]hen everyone is wonderful, what is needed is a quest for evil”166—or at least a realistic quest to unlock both the mystery and the mastery of the family farm.167 Thus, in order to predict the fortunes of the family farm, we now turn from ecology to economics—of the “dismal sciences” of the modern era.168

IV. FAMILY MATTERS

A. The Family That Tills Together

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

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

a family farm “would benefit the public through high production and profitability”); Steven C. Bahls, Judicial Approaches to Resolving Dissension Among Owners of the Family Farm, 73 Neb. L. Rev. 14, 16 (1994) (“The family farmers’ historic commitment to long term stewardship of the land is increasingly valued by today’s more environmentally-conscious society.”); Carol Ann Eiden, The Courts’ Role in Preserving the Family Farm During Bankruptcy Proceedings Involving FmHA Loans, 11 LAW & INEQ. J. 417, 423 (1993) (arguing that industrial farms, in contrast with family farms, lack a personal link to the land). See generally Feeding Our Future, supra note 129, at 225-40 (describing the origins of “stewardship” duties that are attached to the ownership and use of farmland).

164. See, e.g., Slawson v. Alabama Forestry Comm’n, 631 So. 2d 953, 955 (Ala. 1994) (describing the so-called Stewards of Family Farms, Ranches, and Forests as an organization committed to “promot[ing] stewardship among private landowners, to protect these landowners’ private property rights ‘by confronting environmental and political extremism in the public and/or political arena,’ and to develop and implement ‘a national strategy designed to confront actions which threaten private property rights of family farm, ranch, and forest owners’”).

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

166. WALKER PERCY, LANCELOT 138 (1977).


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

169. See Bahls, supra note 80, at 328 (“One of the reasons for the general ineffectiveness of [family farm] policies is the lack of clarity about why governments should protect the family farm.”).
President’s romantic vision of yeoman farmers as the foundation of what we now call Jeffersonian democracy. 170 "Those who labour in the earth are the chosen people of God," wrote Jefferson, who saw in the "breasts" of the yeoman a "peculiar deposit" of "substantial and genuine virtue." 171 According to Jefferson's vision, if each farm could be a self-sustaining enterprise, and if a substantial portion of the populace could find gainful employment as independent farmers, the newborn country's political scene would never fall victim to the power-seeking schemes of massive economic concerns. Hence another crucial element of the traditional agrarian creed: "Farmers are good citizens and a high percentage of our population should be on farms." 172

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


172. Farm Policy, supra note 112, at 3; Farm and Food Policy, supra note 112, at 7.

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

174. See, e.g., Earl O. Heady, Public Policies in Relation to Farm Size and Structure, 23 S.D. L. Rev. 608, 611 (1978) ("The American public, particularly its rural sector, has long professed faith in the family farm and the belief that its policies restrained farm size, thus providing an opportunity for more families to engage in farming.").
to attract new farmers or keep old ones, land ownership allows farmers to capitalize long-run growth in one form of durable, marketable property. Possession may be nine-tenths of the law, but landownership is almost three-fourths of the farm: seventy-four percent of the American farm business balance sheet is reflected in the value of real estate. \(^{175}\) Not surprisingly, family farm advocates characterize land as “the central issue” in economic discussions of agriculture. \(^{176}\)

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

Case law decided under the Uniform Commercial Code speaks volumes of American law’s paternalistic attitude toward the farmer. \(^{179}\) The Code’s definition of a “merchant,” which controls several crucial issues in the law of sales, \(^{180}\) broadly includes any “person who deals in goods of the kind or oth-

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176. Strange, supra note 89, at 43.
179. See Bahls, supra note 80, at 318 (noting how “[a]t state court judges . . . display a tendency to protect the family farm,” especially in times of financial crisis); cf. Marc Linder, Paternalistic State Intervention: The Contradictions of the Legal Empowerment of Vulnerable Workers, 23 U.C. Davis L. Rev. 733, 755-58 (1990) (analyzing the paternalistic motivations that underlie legislation on migrant and seasonal farmworkers).
erwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in [a sales] transaction." 181 A shockingly large number of courts presented with this issue have concluded that farmers are, as a matter of law, "tillers of the soil" rather than merchants. 182 Agrarians cannot have it both ways: either the freehold farmer is an inherently superior manager, subject to all of the rights and obligations of full-fledged membership in the mercantile community of commerce, or the farmer is a judicially protected ward in one of the common law's various categories of individuals who are considered incompetent to enter binding contracts. 183 Suffice it to say that America has treated agricultural entrepreneurship as the economic refuge of the scoundrel—and this in a nation assembled from the rest of the world's tired, poor, huddled, and wretched outcasts. 184 No wonder American agricultural policies are often criticized as obsessively "focused on losers." 185

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

184. EMMA LAZARUS, The New Colossus, in 1 THE POEMS OF EMMA LAZARUS 202, 203 (1895) ("Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore.").
the aggregate, however, such policies also strain individual farms’ access to new, external sources of financial and human capital. We now consider whether this loss undermines the stated purposes of family farm protection.

B. A Capital Offense

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

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

\textsuperscript{186} Bertrand Russell, Education and the Good Life 306 (1926).
\textsuperscript{187} Id.
\textsuperscript{188} Id. at 307.
\textsuperscript{189} Id.
\textsuperscript{191} See generally Plucknett, supra note 52, at 527-30, 714.
\textsuperscript{192} Susan A. Schneider, Who Owns the Family Farm? The Struggle to Determine the Property Rights of Farm Wives, 14 N. Ill. U. L. Rev. 689, 691-92 n.12 (1994); see also Rachel A. Rosenfeld, Farm Women 269-71 (1985) (surveying women’s participation in day-to-day farm operations); cf. Wisconsin v. Yoder, 406 U.S. 205, 211 (1972) (describing the agrarian Amish culture as one marked by a strict division of labor between farmers and housewives); Helen E. Fisher, Anatomy of Love: The Natural History of Monogamy, Adultery, and Divorce 274-91 (1992). Fisher links the origins of modern gender inequality with the invention of the plow and the emergence of agriculture: “The Plow. There is probably no single tool in human history that wreaked such havoc between women and men....” Id. at 278.
side, but it is hardly a formula for equitable or efficient allocation of professional talents.

Moreover, fixing professional status by blood offends the idea of what it means to be American. Although “something very worth while largely disappeared from our national life when the once prevalent familial system” of business “went out and was replaced by the highly impersonal corporate system[,]” that loss cannot legitimately “be repaired . . . by legislation framed or administered to perpetuate family monopolies of . . . private occupations.” Such discrimination may not “be consciously racial in character,” but it does bear noting that family farm preferences in a nation whose farm operators are roughly ninety-eight percent white “create in their aggregate a de facto preference for white enterprise.”

Regardless of the degree to which racial disparities pollute American farm policy, many of the objections to a hierarchy “founded on blood relationship” draw their power from the morality that opposes race-based caste systems. In this regard, the morality of American agricultural law is peculiar, perhaps unique. Alumni preferences in university admissions, the academic equivalent of family farm preferences, have been justly condemned as affirmative action for well-to-do white elites. “[P]olite society” today simply “does not tolerate a ‘family farm’ approach to law faculty hiring or civil service job testing.”


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


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

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

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


201. Agriculture’s First Disobedience, supra note 74, at 1308.
On the other hand, if we cast family farming protection in its most benign light, we might see that the system is designed to shelter something intangible in our agriculture, some mysterious human factors intermingled with tilled soil and spilled animal blood. Agrarian scholars have long awarded rhetorical primacy to "cultural" knowledge (which is transmitted primarily within families) over "scientific" knowledge (which is freely transmitted within networks defined by common intellectual ties rather than blood kinship). The title of Wendell Berry’s anti-industrialist magnum opus says it all—The Unsettling of America: Culture and Agriculture. As bastions of “learning by doing,” 4-H Clubs and land-grant universities are sometimes regarded as rural counterweights to the “book learning” treasured by the urban elite.

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

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


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

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

agricultural development in the United States—the oldest\textsuperscript{206} and perhaps most successful\textsuperscript{207} element of American agricultural policy—has always stressed the importance of broad-based agricultural education and the dissemination of agricultural knowledge outside family-based social networks. Whether transmitted through land-grant universities,\textsuperscript{208} the extension service,\textsuperscript{209} or the USDA as a whole,\textsuperscript{210} the culture of American agriculture thrives off the farm. America’s reluctance to rely exclusively on a blood-based, land-bound system for transmitting agricultural knowledge suggests that family farming is not the structural panacea of its most ardent supporters’ fantasies.\textsuperscript{211}


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


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


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

211. Of course, to the extent that land-grant university graduates tend \textit{not} to choose farm management as a career, agricultural education effectively transfers on-farm human capital to the agribusinesses that employ the lion’s share of land-grant university graduates. See \textit{HIGHTOWER,} supra note 177, at 19-20; \textit{American Ideology,} supra note 25, at 845.
The problems plaguing family-based ownership of farms extend well beyond barriers to information acquisition and technology adoption. Smallness, in more ways than many are willing to admit, is its own punishment. Although the gains from American agriculture's regulated market structure are hard to measure and therefore open to politicized debate, the very content of American agricultural law strongly suggests that small, family-owned farms face significant operational disadvantages. The economic threats to the family farm are legion; the legal threats seem far less numerous. State laws and federal statutes designed to alleviate the small farm's "economic disadvantage"—whether "natural" or induced by governmental intervention in the agricultural marketplace—contradict the economic and ecological claims made by small farm advocates. Let us therefore borrow a crucial analytical tool used in American constitutional law. Constitutional cases applying a standard of intermediate scrutiny have shown time and again that the fastest way to contradict a legal policy's asserted justification is to find contradictory legislation within that jurisdiction.\textsuperscript{212}

Chief among the disadvantages of family farms is limited access to capital. For the moment, let us set aside Ronald Coase\textsuperscript{213} in favor of federal campaign finance law.\textsuperscript{214} The connection between agriculture and campaign finance is not as far-fetched as it might seem; both are highly regulated industries,\textsuperscript{215} the law governing both activities exhibits a hostility toward corporations,\textsuperscript{216} and both deal with commodities—either food or votes—that are perishable, consumed on a roughly per capita basis, and intrinsically unrewarding except as a means for acquiring other goods.\textsuperscript{217} If family farming is indeed a cornerstone of Jeffersonian democracy, the regulation of democracy \textit{qua} democracy should teach us much about the regulation of agriculture. Let us further assume that there is a coherent distinction between expending your own money and convincing other people to lend it to you (whether in exchange for a stream of payments or for relatively intangible

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

\textsuperscript{213} See THE NATURE OF THE FIRM, supra note 50.


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

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

\textsuperscript{217} Cf. Agriculture's First Disobedience, supra note 74, at 1278-80, 1309-10 (discussing apportionment and other election law issues as a branch of agricultural law); Jim Chen, \textit{Law as a Species of Language Acquisition}, 73 WASH. U. L.Q. 1263, 1278 n.99 (1995) ("In a Darwinian world, there are two and only two forces that matter. One of them is food. The other is sex. Language is how most of us get both.").
political favors). Small, family-owned farms are crippled in both respects. Their owners, by design, do not bring massive amounts of personal wealth to the business. Nor have small-scale farmers historically excelled in persuading urban commercial lenders to back their high-risk, low-return businesses.

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

Extensive federal involvement in agricultural credit—whether in chartering the privately owned Farm Credit System or subsidizing the loan programs managed by the former Farmers Home Administration—testifies to the relative difficulty that small, family-owned farms face in seeking and obtaining credit. An entire chapter of the Bankruptcy Code is devoted to family farm bankruptcies, largely because many financially troubled family farms have less than the ideal amount of debt for restructuring under Chapter 11, but more debt than permitted by the restrictive eligibility requirements for small business bankruptcies under Chapter 13. Farm finance is further complicated by the classic farm business profile: unreliable cash flow, combined with a large capital investment in relatively illiquid assets.

218. C.f. Buckley v. Valeo, 424 U.S. at 12-59 (distinguishing sharply between the First Amendment status of campaign expenditures of a candidate’s own funds and campaign contributions received by a candidate).
220. See id. § 2266(b).
221. Id. §§ 1922(a), 1941(a).
225. See id. §§ 1101-1174.
226. See id. §§ 1301-1330. To be eligible for Chapter 13 restructuring, a firm’s secured debt cannot exceed $750,000, and its unsecured debt cannot exceed $250,000. Id. § 109(e).
Finally, to a large extent, the agricultural credit and bankruptcy systems in the United States are at war with each other: generous credit policies have led to excessive leverage during temporary boom periods, while the American farmer’s longstanding obsession with debt relief has historically undermined or even destroyed agricultural credit markets.

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


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

230. See U.S. Dep’t of Commerce, Bureau of the Census, Abstract of the Fourteenth Census of the United States: 1920, at 75 (1923). In 1910 the United States’ urban population was 42,166,120 (45.8%); its rural population was 49,806,146 (54.2%). By 1920 American urbanites outnumbered their rural counterparts 51.4% to 48.6%, 54,304,603 to 51,406,017. Id.; see also 2 U.S. Dep’t of Commerce, Bureau of the Census, Census of Population: 1950, at 12 (1953) (detailing trends in United States rural and urban population from 1970 to 1950).

231. See 7 U.S.C. § 1301(a)(1)(c) (1994) (defining the “parity index,” as of any date, as “the ratio of (i) the general level of prices for articles and services that farmers buy” as of that date “to (ii) the general level of such prices ... during the period January 1910 to December 1914, inclusive”); Agricultural Adjustment Act of 1938, 7 U.S.C. § 1282 (1994) (“It is declared to be the policy of Congress to ... assist[] farmers to obtain ... parity prices for [certain] commodities and parity of income . . . .”); 7 U.S.C. §§ 601, 602, 608c, 1310, 1445, 1446, 1736j (1994) (establishing rural/urban parity in farm prices and incomes as the regulatory objective of certain federal farm programs); 22 U.S.C. § 2354(e) (1994) (prohibiting government procurement of any agricultural commodity or product outside the United States when the domestic price is below parity). Regulatory reliance on parity has been widely condemned as an awkward and normatively indefensible policy. See, e.g., LLOYD D. TEGEN, U.S. DEP’T OF AGRIC., AGRICULTURAL PARITY: HISTORICAL REVIEW AND ALTERNATIVE CALCULATIONS 62 (1987); Eric Van Chantfort, Parity Concept: A Flawed Policy Tool?, Farmlines, Sept. 1987, at 8 (“There is no equity, no fairness, no parity in parity prices.”); American Farm Economics Association, Outline of a Price Policy for American Agriculture for the Postwar Period, 28 J. Farm Econ. 380 (1946); American Farm Economics Association, Committee on Parity Concepts, On the Redefinition of Parity Price and Parity Income, 29 J. Farm Econ. 1358 (1947); William H. Nicholls & D. Gale Johnson, The Farm Price Policy Awards, 1945: A Topical Digest of the Winning Essays, 28 J. Farm Econ. 267 (1946); K.T.
for more changes in the number of farms, farm acreage, and farm population than all other causes put together.\textsuperscript{232} Between 1920 and 1930, boll weevil infestation eliminated as many as 55,000 farms in Georgia and 34,000 farms in South Carolina, “and these two states alone accounted for more than a third of the 1.2 million-person decrease in the nation’s farm population during that decade.”\textsuperscript{233} Within a generation, physical devastation, New Deal farm policy, and mechanization had sparked the great exodus that moved six million American blacks from the countryside to the cities and from South to North.\textsuperscript{234} King Cotton bled profusely, having been buffeted by the Grand Army of the Republic, but mortally wounded by the beetle called \textit{Anthonomus grandis}.

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

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

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


237. \textit{See H.R. REP. NO. 96-430, at 8-9 (1979), reprinted in 1980 U.S.C.C.A.N. 3068, 3070-71 (noting how the displacement of “‘hip pocket’ financing” with highly capitalized and leveraged farming operations has exposed “an individual farmer or perhaps an entire rural community” to “financial ruin” in “a matter of days or even hours” during times of “drought, flood, insects, disease or other natural disaster”).}
or private financial intermediaries, would be a very significant component of farm finance. The architects of New Deal farm policy certainly thought so; they made crop insurance an essential element of the monumental Agricultural Adjustment Act of 1938.\textsuperscript{238} They were overly optimistic. Despite half a century of reforms,\textsuperscript{239} crop insurance never became a significant fixture in federal agricultural regulation. This phenomenon arises partly out of the federal government’s historic tendency to offer ad hoc disaster assistance, which undermines incentives to purchase crop insurance ahead of time.\textsuperscript{240} But twenty-three percent of American farmers in a recent General Accounting Office survey reported they preferred self-insurance and other methods of internal finance over government-sponsored crop insurance programs.\textsuperscript{241} The extent of self-insurance against naturally induced crop failure suggests a very high degree of capitalization in American agriculture.

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


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

\textsuperscript{241} See U.S. GEN. ACCOUNTING OFFICE, May 1993, supra note 239, at 5.

\textsuperscript{242} See American Ideology, supra note 25, at 845 n.193 (finding that only 5.6% of graduates from the University of Minnesota’s College of Agriculture between 1989 and 1993 entered farming or farm management within a year of graduation).
The prospects for would-be entrants with less training are surely even more grim. Mastery of modern agriculture "require[s] an almost universal knowledge ranging from geology, biology, chemistry and medicine to the niceties of the legislative, judicial and administrative processes of government."243 The profit-driven orientation and sheer weight of the research generated by the federally chartered and financed land-grant college system244 have put a premium on high technology and skilled farm management.245 At least in the United States, research and educational subsidies thought too mild to deserve scrutiny under international trade law246 have dramatically raised the level of human and financial capital—so much so that small-farm activists waged a long247 and losing248 battle to force changes in

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


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

248. See California Agrarian Action Project, Inc. v. University of Cal., 258 Cal. Rptr. 769 (Cl. App. 1989); cf. Marcia Baringa, A Bold New Program at Berkeley Runs into Trouble, 263 SCIENCE 1367 (1994) (reporting that reformers who wish to tackle broader issues in all phases of natural resource use and conservation are drawing the ire of agrarian traditionalists who wish to focus the University of California's "land-grant" research on production agriculture).
the land-grant system’s research agenda. Thanks to “green box” treatment under the Uruguay Round of world trade talks, which proclaims that research and extension subsidies are welfare enhancing and minimally distor-
tive, public support for agricultural technology will likely increase and may supplant certain traditional price and income subsidies. The realities of farming in a global, competition-driven agricultural system impart a hollow ring to the old-fashioned agrarian battle cry that “[a]nyone who wants to farm should be free to do so.”

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

C. Lean, Mean . . . and Clean

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

249. For further discussion of the land grant university litigation, see American Ideology, supra note 25, at 837-44; Looney, supra note 235, at 813-19.
251. Farm Policy, supra note 112, at 3; Farm and Food Policy, supra note 112, at 7.
254. Susanne K. Langer, Philosophy in a New Key: A Study in the Symbolism of Reason, Rite and Art 25 (3d ed. 1957); see also Agriculture’s First Disobedience, supra note 74, at 1272.
1.  **Families Without Foundation**

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

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

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255.  See *The Nature of the Firm*, supra note 50.
256.  See generally id. (collecting essays responding to Coase’s original hypothesis).
259.  See generally American Ideology, supra note 25, at 851-59.
260.  For an example of this viewpoint, see Vogeler, supra note 89, at 90 (concluding that large-scale farmers achieve an illusory measure of efficiency by consuming more land).
261.  Cf. American Ideology, supra note 25, at 849 (“Traditional agriculturalists exhibit a ‘land fetish’—they assume that available acreage is the only relevant constraint on productive capacity.”).
262.  Cf. id. at 833 (describing how the environmental restraints on farming in the arid West have historically prompted the relaxation of acreage restraints that accompanied the federal government’s original grants of land and reclamation water for agricultural purposes); Paul S. Taylor, *Public Policy and the Shaping of Rural Society*, 20 S.D. L. REV. 475, 480-83 (1975).
263.  See DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 69-71 (Piero Sraffa ed., 1970) (1821) (describing differences in productivity as the basis for
Parmland markets reflect factors that populist critics have chosen to overlook: average farmland prices range from $149 per acre in Wyoming to $4,894 in Rhode Island because of differences in productivity and differences in the profitability of competing land uses.\textsuperscript{264} Greater value lies in examining the evidence that farms have smaller economies of scale than many other firms and, more important, exhibit substantial diseconomies of scale.\textsuperscript{265} Much of this evidence, however, is based on socialist experiments in Eastern Europe, Latin America, and Africa that sought to modernize traditional agricultural systems by coupling large, collective, or state ownership with a single, centralized management scheme. Maximizing gross domestic product may be the ultimate economic objective of any legal system,\textsuperscript{266} but efforts to dictate the outcome through central planning have historically failed. America, it must be remembered, really did win the Cold War.\textsuperscript{267}

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

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

\textsuperscript{264} See U.S. DEP’T OF AGRIC., supra note 129, at 351.
\textsuperscript{266} See Law as Industrial Policy, supra note 18, at 1317-18.
\textsuperscript{267} But see American Ideology, supra note 25, at 810 (“America, so the world supposes, won the Cold War.”).
\textsuperscript{268} See, e.g., Looney, supra note 235, at 792-96.
\textsuperscript{269} See Thomas W. Hertel et al., Economywide Effects of Unilateral Trade and Policy Liberalization in U.S. Agriculture, in MACROECONOMIC CONSEQUENCES OF FARM SUPPORT POLICIES 260, 261 (Andrew B. Stoeckel et al. eds., 1989); Steinle, supra note 250, at 340-41.
supply control mechanisms have failed to curb chronic overproduction. As
an engine for rural development, an overemphasis on agriculture merely ex-
acerbates many rural areas’ crippling “reliance on a single, often natural-
resource industry.” After thirteen decades of homesteading and other
farm-first policies in the states west of the thirteen colonies, the rapid
“[d]epopulation of the rural Great Plains” has led to a most embarrassing
question: “Is North Dakota necessary?” Moreover, in an economic land-
scape where full-time agriculture provides a mere quarter of the jobs in the
nation’s “most ‘agricultural’ congressional district, Minnesota’s second,”
when even Iowa boasts “more school teachers, health care workers, [and]
business executives and managers . . . than farmers,” structural regulation
of agriculture arguably has less impact on American employment policy than
day-to-day gossip about the Federal Reserve System’s Board of Governors
or the New York Stock Exchange’s “big board.”

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

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

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

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


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

under the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, based on the
manipulation of stock prices through the Wall Street Journal’s “Heard on the Street” column).
2. **Wendell and the Green Knight**  

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

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

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


283. VOGELER, supra note 89, at vii.

284. KREBS, supra note 170, at 3.


286. See, e.g., *Hurd v. Commissioner*, 37 T.C.M. (CCH) 499 (1978); *Iowa Code § 159.2* (1995) (describing the purpose of the Iowa Department of Agriculture and Land
religious significance. Hopeful observers envision a “new agriculture” led by “farmers who will sell wholesomeness and the traditional image of American agriculture and who will reap a larger share of the consumer food dollar by doing so.” Unlike his counterparts of the past, today’s agricultural fundamentalist is an agroecologically correct Green Knight, dispatched to save the earth from the big, the bad, and the ugly. And what a wonder he is to behold:

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

There are two distinct lines of agroecological reasoning, neither of which ultimately justifies structural regulation in agriculture. First, farm advocates sometimes contend that farming is itself an environmentally benign activity, or at least environmentally superior to alternative land uses. Because of its emphasis on the agricultural system as an organic whole and on the environment at large, such reasoning may be properly called the “macroecological” variation of the agroecological argument. The macroecological argument characterizes farmland itself, especially if held as numerous, small family farms, as a public good in itself. This is an old tactic; deceptively describing a farm income program as an environmental program arguably launched the modern era in American agricultural law. In the wake of United States v. Butler, the Supreme Court decision that invalidated the Agricultural Adjustment Act of 1933, Congress passed the Soil Conservation Act of 1936. That statute restricted the cultivation of wheat, a “soil-eroding” crop, while encouraging the cultivation of soybeans, a “soil-conserving” crop, in apparent defiance of agronomy but conveniently in accord with the supply control needs of the moment. During the late 1970s and


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


293. See Harold F. Breimer, Agricultural Philosophies and Policies in the New Deal, 68 MINN. L. REV. 333, 348-49 & n.65 (1983) (“[W]heat, a soil-conserving crop, was due for acreage reduction [under the Soil Conservation Act] while soybeans, probably the most soil damaging of all crops, was omitted from the program.”).
early 1980s, various farmland protection initiatives characterized the privately owned “farmland base” as an essential element of the nation’s “ability ... to produce food and fiber in sufficient quantities to meet domestic needs and the demands of our export markets.” More sober assessments cast doubt on the claim that American farmland was being rapidly consumed by urbanization.

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

302. Id.
A second "microecological" variation on the agroecological theme focuses on the difference between large and small farms. According to agroecological dogma, not every farmer is an equally capable steward, and not every farm deserves the same measure of environmental trust. Small farms are better, and small family farms are best. Reducing farm sizes and dispersing farm ownership puts the fate of the agricultural environment in the hands of self-employed managers rather than uninspired farm employees. Agroecological integrity, in other words, depends on the "eyes to acres ratio."\footnote{303}

Family ownership completes the microecological package by tapping the power of intrafamilial, intergenerational love: more so than bloodless corporate entities, family owners conserve "natural, human, and financial resources ... for [their] heirs."\footnote{304} Unlike Macduff, Shakespeare's virtuous Scotsman, the corporation "has no children."\footnote{305} The unshakable faith in independent farm operators thinly conceals a fear and loathing of corporate farm employees as "hireling[s]" who may and should "be dealt with differently than those who [farm] on their own."\footnote{306} Leading agricultural law scholar Neil Hamilton states the microecological argument favoring family farms in no uncertain terms: "It is the farmers and their families who care about preserving the quality of the land they farm and building an economically viable operation, through which to accumulate wealth and acquire the resources with which to live."\footnote{307}

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

\footnotesize{303. Wes Jackson, Altars of Unhewn Stone 37 (1987).}
\footnotesize{304. Strange, supra note 89, at 35.}
\footnotesize{305. William Shakespeare, Macbeth act 4, sc. 3, l. 249-252 (Ronald Watkins & Jeremy Lemmon eds., 1964) ("He has no children. All my pretty ones? / Did you say all? O hell-kite! All? / What, all my pretty chickens and their dam / At one fell swoop?").}
\footnotesize{307. Agriculture Without Farmers, supra note 112, at 645 (emphasis added).}
\footnotesize{308. Linda K. Lee, The Impact of Landownership Factors on Soil Conservation, 62 Am. J. Agric. Econ. 1070, 1073 (1980).}
ownership correlates with a tendency to engage in poorer conservation practices.309

The Endangered Species Act310 provides yet another setting in which farming, especially of the small-scale variety, quite obviously comes into conflict with environmental protection. In 1989, the Supreme Court decided to forgo its first opportunity to address whether the Endangered Species Act effected a “regulatory taking” by effectively disarming a rancher who wished to shoot a grizzly bear that had been killing his sheep.311 Farmers and farm advocates have been divided over whether to celebrate the reinvigoration of the Takings Clause312 in such recent decisions as Lucas v. South Carolina Coastal Council313 and Dolan v. City of Tigard.314 Some family farmers have favored aggressive responses to “environmental and political extremism in the public . . . arena,” a phenomena thought to “threaten [the] property rights of family farm, ranch, and forest owners.”315 For his part, Neil Hamilton has urged the farm community to forswear the temptations of the “property rights” movement316 whose anti-environmentalist posture does little to support “traditional claims of farmers’ commitment to stewardship.”317

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

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


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


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

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

3. The Political Economy of Agricultural Ecology

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

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

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

319. Id. at 2421 (Scalia, J., dissenting).
321. Looney, supra note 235, at 767.
323. See generally Bailey & Baumol, supra note 55 (urging an academic focus on costs of exit, including elements of value not recoverable in the purchase price paid by a business successor, rather than costs of entry).
324. See Robbin Shoemaker et al., Commodity Payments and Farmland Values, AGRIC. OUTLOOK, June 1995, at 15, 16.
325. Lee, supra note 308, at 1073.
326. See id.
supplement to Social Security or a source of future job and food security. It all depends on the beholder’s place in the human life cycle.

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

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

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

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

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

\footnote{329} Agriculture’s First Disobedience, supra note 74, at 1331.


\footnote{331} Get Green or Get Out, supra note 161, at 352.

\footnote{332} FARM AND FOOD POLICY, supra note 112, at 213.
landscape. Dairy farmers, the surreptitious "discrete and insular minorit[y]" of *United States v. Carolene Products Co.*,333 have perfected the technique of plowing the federal fish and the consumer for all the rents that the political traffic will bear.334 Reinforced by the perpetually undemocratic Senate335 and a territorial tradition in state and federal legislative districting not corrected until the apportionment cases of the early 1960s,336 "rural bias" in the American political system charged the taxpayer for "[s]hips loaded with wheat, little metal gasometers filled with corn, [and] mountains of rancid butter."337 In a political tradition in which the "right to farm" is framed as "a blanket exemption from nuisance law, a mild and basic common law tool for protecting the public against environmentally destructive uses of land,"338 farmers' political actions speak louder than a few words uttered opportunistically on behalf of the government. Thanks in no small part to a regulatory agenda that has preserved a relatively large class of polluters who have everything to lose and little to gain from environmental protection,339 farmers have acquired a "legendary, and . . . well deserved" "reputation for blind political resistance to environmental regulation."340 The regulatory effort to structure American agriculture bodes ill not only for the consumer economy, but also for the greater ecology. Half a loaf is dirtier than none. Alas, alas that great city Hattusa.1341

335. See William N. Eskridge, Jr., *The One Senator, One Vote Clause*, 12 CONST. COMMENTARY 159 (1995); Suzanna Sherry, *Our Unconstitutional Senate*, 12 CONST. COMMENTARY 213 (1995); see also U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.").
341. Compare *Revelations* 18:10 (King James Version) ("Alas, alas that great city Babylon . . .!") with *supra* Part I (recounting the parable of the Hittites, amid the splendor of that great city Hattusa).
V. FROM THE FARM TO THE FIRM

A. Anti-Takeover Legislation: A Notion That Big Business Ain't Good Business

As in the agricultural sector, legal barriers to limit feudalism in the form of anti-takeover legislation were erected in the private business context by many state legislatures in the 1980s and early 1990s. The intent of anti-takeover legislation was to prevent, or at the very least inhibit, hostile mergers and acquisitions. In a real sense, this legislation was a product of the transformation that occurred in the nature and scope of corporate control transactions in the 1980s. Until that point, shareholders of large public corporations provided corporate directors with significant autonomy, enabling directors to manage the corporation for what they viewed as the long-term benefit of all corporate constituencies. In the 1980s, however, such “hands off” treatment of corporate directors by shareholders abruptly ended. Large institutional investors, whose investment decisions were typically controlled by aggressive portfolio managers interested in short-term performance, became a powerful voice in the area of corporate control.\(^{342}\) Arbitrageurs, with access to vast sums of capital, played an increasing role in pressuring corporate management to adopt governance strategies aimed at short-term, quick-fix results. Moreover, corporate raiders and even mainstream corporate acquirers, through hostile takeovers and tender offers,\(^{343}\) were able to circumvent boards of directors and proxy machinery and take their proposals for a change of control directly to the shareholders.\(^{344}\)

While many commentators hailed this phenomenon arguing that capital markets efficiently reflect the true value of a corporation’s underlying assets, many policy analysts argued that unfettered takeover activity was harmful to

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342. Investment banks volunteered to purchase equity positions in many hostile takeovers and offered temporary (“bridge loan”) acquisition financing. In this type of financing, investment banks provided short-term acquisition funds to acquiring companies that intended to quickly refinance the bridge loan with permanent capital, funded by bank loans, the sale of bonds or notes, or the sale of the target company’s assets. See Martin Lipton, Corporate Governance in the Age of Finance Corporatism, 136 U. Pa. L. Rev. 1, 13-15 (1987); Stanley Penn, Raiding Parties: Friends and Relatives Hitch Their Wagon to Carl Ichan’s Star, WALL ST. J., Oct. 2, 1985, at A1.

343. A “tender offer” has been defined as:

[A]n offer to stockholders of a publicly owned corporation to exchange their shares for cash or securities at a price above the quoted market price

... [A cash tender offer] is an offer to an individual shareholder to purchase that person’s shares at a price well above the market price, but which is open for a limited time only. Stock being easily replaceable by other stock, the shareholders ordinarily will accept the offer. ... [T]ender offers entail certain costs to bidders. They are riskier than the negotiated purchase of a company because surprises often await the bidder. ... [T]he hostile bidder flies blind, without an opportunity to learn about the target from the inside.


shareholders, other corporate constituencies, and the economy as a whole. Moreover, policy analysts argued that a board of directors should be provided with the tools to resist a takeover attempt which it deemed not to be in the best interest of such constituent groups. These analysts stressed the need for federal and state government regulation to adjust to the changing nature of takeover activity. Responding to these outrages, many state legislatures modified the corporate governance provisions of their state corporation laws to allow directors to consider the effect that a takeover may have on corporate constituencies other than shareholders: corporate stakeholders.

345. One scholar concisely framed the economic aspects of this issue:
Thus, the central question is whether the shareholders who are the big winners are enjoying the premiums they do because bidders with better ideas are willing to share the wealth (which is fine), or whether premiums sometimes (or even often) are paid out of savings expected to be generated by the acquirer's reneging on contracts with managers, suppliers, customers, or employees (which may not be fine).


346. See Lipton et al., supra note 344, at 205.


Other states provide a statutory presumption as to the validity of directors' determinations. See Ind. Code Ann. § 23-1-35-1(f), (g) (Michie 1995) (A board's determination "shall conclusively be presumed to be valid unless it can be demonstrated that the determination was not made in good faith after reasonable investigation."); see also 15 Pa. Cons. Stat. Ann. § 515(d) (West 1995) ("Absent breach of fiduciary duty, lack of good faith or self-dealing, any act as the board of directors, a committee of the board or an individual director shall be presumed to be in the best interests of the corporation.").

Wyoming also permits corporations to protect bondholders by charter. See Wyo. Stat. Ann. § 17-18-201 (1989). Qualified corporations (large publicly-traded Wyoming corporations) may by charter provide for bondholder approval of mergers or acquisitions, replacement of more than 24% of directors, sale or disposition of specified percentages of assets, or an acquisition of debt above specified percentages of assets and/or net worth. See id.

Professors Johnson and Millon state that the goal of anti-takeover laws is "not to maximize share values for target company investors, whether by eliminating coercion or
Ohio’s statute is representative of this form of anti-takeover legislation—so-called stakeholder constituency statutes—that persists today:

[A] director, in determining what he reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation’s shareholders and, in his discretion, may consider any of the following:

(1) The interests of the corporation’s employees, suppliers, creditors, and customers;
(2) The economy of the state and nation;
(3) Community and societal considerations;
(4) The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.\(^{348}\)

In many states, directors may consider either the best interests of the corporation or stakeholders’ interests in connection with any decision submitted to them. Some states, however, limit the application of their statutes to acquisition proposals.\(^{349}\) Generally, most of the statutes enumerate specific groups that directors may consider.\(^{350} \) New York’s statute,\(^{351}\) for example,

otherwise, and no apology can alter that fact. Instead, their chief purpose is to protect nonshareholders from the disruptive impact of the corporate restructurings that are thought typically to result from hostile takeovers.” Lyman Johnson & David Millon, Missing the Point About State Takeover Statutes, 87 Mich. L. Rev. 846, 848 (1989); see also David Millon, State Takeover Laws: A Rebirth of Corporation Law?, 45 Wash. & Lee L. Rev. 903, 904 (1988) (“While state takeover legislation often pays lip service to shareholder welfare, such legislation actually has a different purpose, a purpose fundamentally antithetical to the shareholder primacy norm of present corporation law.”); Lyman Johnson, The Eventual Clash Between Judicial and Legislative Notions of Target Management Conduct, 14 J. Corp. L. 35, 67 (1988) (“[S]tates also saw a different side of the rampant takeover activity—the social responsibility side—and began to question whether attaining takeover benefits for shareholders was as consistent with other important interests as economic and legal orthodoxy presumed.”). But see Booth, supra note 345, at 127 (suggesting that there might be hidden benefits to shareholders from control share statutes even though the statutes may support some stakeholders’ interests); Richard A. Booth, The Promise of State Takeover Statutes, 86 Mich. L. Rev. 1635, 1681 (1988) (claiming that control share acquisition takeover statutes represent a “remarkably intelligent approach to the problem of fairness in tender offers” and may aid shareholders in realizing value through tender offers). 348. OHIO REV. CODE ANN. § 1701.59(E) (Anderson 1992 & Supp. 1995).
350. Because anti-takeover statutes are designed to prevent “high unemployment and erosion of the State and local economy and tax base,” 1987 N.C. Sess. Laws 124, reprinted in Johnson & Millon, supra note 347, at 849, it is logical to assume that they would be supported by a coalition of local interests, including labor and community groups.
Apparently, this was found not to be the case in Connecticut. One scholar has noted that the state’s “second-generation” anti-takeover statute was not generally supported by broad coalitions of local interests, including labor and local community groups, but was supported by one particular corporation. See Roberta Romano, The Political Economy of Takeover Statutes, 73 Va. L. Rev. 111, 122-23 (1987). Romano claims that:
allows directors to consider the short- and long-term effects that their decisions may have upon the corporation's current employees, retired employees, customers, creditors, and its ability "to provide, as a going concern, goods, services, employment opportunities and employment benefits and otherwise to contribute to the communities in which it does business." The groups most frequently listed in stakeholder constituency statutes are employees, suppliers, customers and local communities. Problematically, none of the statutes provide a coherent framework to guide

The spur behind the passage of the Connecticut [second-generation anti-takeover] statute was not a broad-based political coalition. Rather, the bill was promoted by a corporation incorporated in Connecticut, the Aetna Life and Casualty Insurance Company, which enlisted the support of the most important business association in the state, the Connecticut Business and Industry Association....

Id.

On the other hand, Wisconsin's experience in adopting anti-takeover laws in 1987 was found to be consistent with a coalition theory in which state labor groups and other nonbusiness interest groups actively supported the legislation. See Kenneth B. Davis, Jr., Epilogue: The Role of the Hostile Takeover and the Role of the States, 1988 Wis. L. Rev. 491, 496-97. Even though nonshareholder interest groups, such as organized labor or municipalities, may not be the actual sponsors of anti-takeover legislation, they may actively support such legislation once it has been proposed. See John C. Coffee, Jr., The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-Ups, 1988 Wis. L. Rev. 435, 437 n.8 (noting the current debate over the nature of the political coalition supporting anti-takeover legislation and arguing that the silence of labor groups and communities may actually imply consent).

351. New York entities corporate directors "[i]n taking action... to consider, without limitation, (1) both long-term and short-term interests of the corporation and its shareholders and (2) the effects that the corporation's actions may have in the short-term or in the long-term upon [enumerated constituencies]." N.Y. BUS. CORP. LAW § 717(b) (McKinney Supp. 1996).

352. The statute includes "retired employees and other beneficiaries receiving or entitled to receive retirement, welfare or similar benefits from or pursuant to any plan sponsored, or agreement entered into, by the corporation." Id. § 717(b)(iii).

353. Id. § 717(b)(v) In addition, the statute also allows directors to consider "the prospects for potential growth, development, productivity and profitability of the corporation." Id. § 717(b)(i).

354. Employees are mentioned in all of the mixed and specific constituency statutes and are always the first group to be listed in these statutes. See supra note 347 and accompanying text.

355. Suppliers and customers of the corporation are often mentioned together. See supra note 347.

356. Several of the statutes limit consideration of community interests to those areas in which offices or other establishments of the corporation are located or where the corporation "conducts its business." See, e.g., Mo. ANN. STAT. § 351.347.1(4) (West 1995); 15 PA. CONS. STAT. ANN. § 515(a)(1) (West 1995). Other statutes have a broader scope. Kentucky, for example, allows directors to consider the interests of the "economy of the state and nation [and] [c]ommunity and societal considerations." KY. REV. STAT. ANN. § 271B.12-210(4) (Michie Supp. 1996). Creditors are not specifically mentioned in a majority of statutes. See, e.g., Booth, supra note 345, at 126 ("Could it be that the only stakeholders who have been targeted in this campaign to project responsibility are those who have relatively little bargaining power and are being exploited by the stake itself?").
directors in satisfying their duties to these constituencies. Corporate directors are left to their own devices to determine the correct balances between the best interests of the stockholders, the corporation, and other constituencies. Conflicting interests have made this determination inherently difficult: in a typical takeover situation, the best interests of nonshareholders, such as employee groups, may be the continued independence of the corporation, while the best interests of stockholders may be a sale or liquidation. One might speculate that because the best interests of stakeholders have not been defined per se, these statutes do nothing more than present directors with an avenue for compensating stakeholders for losses incurred through decisions supporting shareholder wealth maximization.

Importantly, case law interpreting nonshareholder constituency statutes is nonexistent. In related contexts, however, courts have recognized that directors may consider stakeholders' interests. For example, Delaware courts, although Delaware does not have a nonshareholder constituency statute on its books, have considered the issue in a series of cases. In the first of these, Unocal Corp. v. Mesa Petroleum Co., the Delaware Supreme Court, in upholding a target's self-tender that excluded a raid from participation, stated that a target's board of directors may consider "the impact [of a hostile bid] on 'constituencies' other than shareholders (i.e., creditors, customers, 357. Outside the legislative arena, several corporations have adopted charter amendments that allow directors to consider stakeholders' interests when making decisions related to a change of control. See James J. Hanks, Jr., Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification, 43 BUS. LAW. 1207, 1228 (1988) (noting that these charter amendments were the origin of nonstockholder constituency statutes); see also Lipton, supra note 342, at 41 n.188 ("For example, Control Data Corp. and McDonald's have recently amended their charters in this fashion."). The provisions allow, and in some cases require, that directors consider nonmonetary factors when deciding upon a hostile tender offer, exchange offer, or business combination. The nonmonetary factors often include the social and economic effects of an acquisition on the target's employees, suppliers, customers, and others. Unlike the statutory context, directors in these corporations have been given a basis for decision making that has been approved by the shareholders. This effectively mitigates against any conflict that directors might encounter when making major decisions because the shareholders have already approved a charter amendment explicitly allowing the directors to consider "other interests." See 1 SHARK REPELLENTS AND GOLDEN PARACHUTES: A HANDBOOK FOR THE PRACTITIONER 194-211 (Robert H. Winter et al. eds., 1983) (reprinting the provisions of Nortek, Inc., Control Data Corp., Central Bancshares of the South, Inc., McDonald's Corp., and Anchor Hocking Corp.);

358. See Hanks, supra note 357, at 1229.

359. This may, in part, be a product of corporate activity, or lack thereof, in the states that have adopted the provisions. In addition, New York, a state with a high amount of takeover activity, originally adopted a "watered down" nonshareholder constituency statute which allowed directors to consider the "long-term interests" of the corporation. Only recently, New York amended its statute to enumerate specific stakeholder groups. See N.Y. BUS. CORP. LAW § 717 (McKinney Supp. 1996). See generally Kenneth B. Davis, Jr., Discretion of Corporate Management to Do Good at the Expense of Shareholder Gain—A Survey of, and Commentary on, the U.S. Corporate Law, 13 CANADA-U.S. L.J. 7, 20-48 (1988) (outlining various sources for management's discretion to consider nonshareholder interests, including the business judgment rule and enlightened self-interest doctrine).

employees, and perhaps even the community generally)."361 However, one year later, the Delaware Supreme Court held in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,362 that a takeover target’s board of directors may not consider the interests of noteholders after a decision has been made to sell the company. The court declared that once the sale of the company had become inevitable, the directors’ duty changed from “defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders.”363 The court did recognize that “[a] board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.”364 Thus, the Delaware Supreme Court reaffirmed that the primary objective of directors conducting an auction must be to obtain the highest price for shareholders, and that consideration of the impact of a takeover on corporate constituencies may be examined, “provided that it bears some reasonable relationship to . . . basic stockholder interests at stake.”365 If one examines the Unocal and Revlon decisions together, it seems apparent that directors may consider the interests of nonshareholders before an auction has begun, but any decision related to consideration of nonshareholders must result in some benefit to stockholders, for it is to them that the target’s board of directors owe a primary duty.

A handful of decisions in other states have more strongly defended the consideration of nonshareholder interests by directors.366 Herald Co. v. Seawell367 may be the most frequently cited source of authority to support the

361. Id. at 955.
363. Id. at 182. “[C]oncern for non-stockholder interests is inappropriate when an auction among active bidders is in progress . . . .” Id.
364. Id. (citing Unocal v. Mesa Petroleum Co., 493 A.2d at 955).
366. See Baron v. Strawbridge & Clothier, 646 F. Supp. 690, 697 (E.D. Pa. 1986) (holding that “[i]t was proper for the company to consider the effects of . . . tender offer would have, if successful, on the Company’s employees, customers and community. The Company concluded those effects would be detrimental to its success.”) (citations omitted); Enterra Corp. v. SGS Assoc., 600 F. Supp. 678, 689 (E.D. Pa. 1985) (asserting that management might consider the takeover concerns of suppliers, customers, lenders, and the stability of the company when considering takeover bids). In upholding defensive measures used by Union Carbide to avoid a bust-up bid by GAF Corporation, Judge Pollack of the Southern District of New York stated:

A corporation with a perceived threat of dismemberment of large divisions of the enterprise, employing thousands of employees, owes substantial regard for their pension benefits, and in the case of loyal management, severance benefits . . . . The exercise of independent, honest business judgment . . . is the traditional and appropriate way to deal fairly and evenhandedly with both the protection of investors, on the one hand, and the legitimate concerns and interests of employees and management of a corporation who service the interests of investors, on the other.

consideration of takeover effects on stakeholders by directors.\textsuperscript{368} In \textit{Herald}, the Tenth Circuit held that the \textit{Denver Post} legitimately used defensive maneuvers against a hostile bid by Samuel I. Newhouse, owner of one of the nation’s largest newspaper chains and an owner with a history of labor difficulties.\textsuperscript{369} In response to the \textit{Post}’s concerns for its nonshareholder constituencies, the court stated:

\begin{quote}
We are fully cognizant of the well established corporate rule of law which places corporate officers and directors in the position of fiduciaries for the stockholders. . . . In this case we have a corporation engaged chiefly in the publication of a large metropolitan newspaper, whose obligation and duty is something more than the making of corporate profits. Its obligation is threefold: to the stockholders, . . . employees, and . . . public.\textsuperscript{370}
\end{quote}

First amendment and free-press concerns aside,\textsuperscript{371} it is important to note that the court found that the \textit{Post}’s establishment of the “Employees Stock Trust Plan” was legitimate, legal, “clearly within the power and authority granted by [state] statute to the corporation,”\textsuperscript{372} and was not malevolently motivated.\textsuperscript{373} The \textit{Post}’s use of the plan was to “benefit the public, the corporation and the employees.”\textsuperscript{374}

The directors of the \textit{Post} desired to develop a plan which would provide an opportunity for its employees to participate in stock ownership.\textsuperscript{375} In fact, the \textit{Post}’s directors “personally investigated other employee stock ownership


\textsuperscript{369} The \textit{Denver Post} is a large newspaper with a long tradition of local ownership through the Bonfils family. See \textit{Herald Co. v. Seawell}, 472 F.2d at 1084. In May 1960, Samuel I. Newhouse purchased 18 percent of the outstanding shares of the \textit{Post} with an intent to acquire the entire newspaper. \textit{Id}. On July 7, 1960, the \textit{Post} purchased about 21 percent of its outstanding stock held by the Denver U.S. National Bank as trustee for the Children’s Hospital Association. \textit{Id}. For several years before the purchase, the board of directors of the \textit{Post} considered establishing an employee stock ownership plan. \textit{Id}. After the purchase of the Children’s Hospital shares, the board implemented such a plan and transferred 5,000 treasury shares to the plan’s trust. \textit{Id}. at 1085. A member of the Bonfils family also donated a number of shares to the trust. \textit{Id}. As of December 1969, 415 of the eligible 1,159 employees had purchased shares from the trust. \textit{Id}. More than eight years after the purchase of the Children’s Hospital stock by the \textit{Post}, Newhouse brought a derivative action on behalf of the \textit{Post}. \textit{Id}. at 1088. The suit was against the \textit{Post}’s officers and directors for alleged misconduct, breach of trust, and misuse of assets. \textit{Id}. Newhouse claimed that the board and trustee of the employee stock trust had conspired to acquire a sufficient number of shares to vest control of the \textit{Post} in the Bonfils family and employees under its domination. \textit{Id}.

\textsuperscript{370} \textit{Id}. at 1091.

\textsuperscript{371} The court stated that “[s]uch a newspaper is endowed with an important public interest. It must adhere to the ethics of the great profession of journalism.” \textit{Id}. at 1095. The court also described the newspaper as a “quasi-public institution.” \textit{Id}.

\textsuperscript{372} \textit{Id}. at 1093.

\textsuperscript{373} \textit{Id}. at 1092.

\textsuperscript{374} \textit{Id}. at 1095.

\textsuperscript{375} \textit{Id}. at 1084.
plans” at other newspapers. Apparently, the directors sincerely believed that “employee stock ownership would promote a better employee-employer relationship.” The directors also believed that “employee stock ownership would eventually lock control of the corporation in the employees and eliminate . . . outsider . . . control of stock.” The court held that because the plan was approved by a substantial majority of stockholders, it would not impose its business judgment on the directors. In addition, the motives for establishing the plan were found to be firmly grounded in the Post’s concern for its employees and their benefits, and not in thwarting hostile advances by Newhouse. Furthermore, the plan was conceived well before any takeover events had developed.

B. “Big Is Beautiful” Versus “Big Is Ugly”

While anti-takeover legislation varies in form and operation, it serves a common purpose: to dissuade takeovers, unless certain requirements are met. The immediate question, of course, is why? Why do states seek to dissuade takeovers? What interest does a state have in dissuading takeovers? Why have states enacted legislation which seeks to inhibit corporate “largeness” in a manner that hurts so many of us, from every socioeconomic class, as shareholders?

Essentially, two competing theories exist regarding the promulgation of anti-takeover statutes. One theory, usually promoted by those who favor such statutes, posits that the statutes exist in order to protect shareholders and stakeholders. The second competing theory, primarily promoted by those who disfavor anti-takeover statutes, contends the statutes exist not to protect shareholders, but rather as a result of political pressures imposed by incumbent management. As this theory contends, anti-takeover statutes exist to protect and insulate incumbent management from takeovers and ultimately preserve their management jobs.

Proponents of the first theory posit that the interests of stockholders are promoted by anti-takeover statutes. As they argue, anti-takeover statutes protect shareholders in a number of ways. Statutes which include “supermajority/fair price” provisions, for example, protect shareholders by combating perceived inequities resulting from front-end loaded partial tender offers by regulating the second step of a two-tier transaction. Control share acquisition statutes, which allow shareholders to decide whether a merger is to occur, protect shareholders by giving them the ability to restrict an acquirer’s voting rights. Fair value statutes, proponents assert, provide that shareholders must be paid a fair value for their shares, thus eliminating low-priced freeze

376. Id.
377. Id.
378. Id.
379. Id. at 1096.
380. Id.
381. See id. at 1095-97.
382. Shareholders increasingly include even the lowest employee ranks through profit-sharing, pension, and discounted stock purchase plans.
out mergers. Finally, statutes imposing limitations on certain business combinations protect shareholders by assuring that no business combination is possible with an interested shareholder unless, as these statutes typically provide, the board of directors approves the combination or unless additional shares are purchased at a fair price or in a fashion prescribed by statute.

Proponents of anti-takeover legislation generally, and stakeholder constituency statutes specifically, argue that such legislation also protects stakeholders. As proponents contend, anti-takeover legislation often prevents corporations from being dissolved or merged into an acquirer with a corresponding loss in jobs which is likely to accompany such an action. Proponents of anti-takeover legislation also advance four other rationales in support of their view. First, they maintain that shareholder wealth is not synonymous with social wealth in the takeover context. Rather, a premium paid to shareholders in a takeover usually consists of a transfer payment from other groups (stakeholders) to the shareholders. Second, they assert that such statutes are needed because contingent contracts do not protect stakeholders. As they insist, this is because: (a) stakeholders often lack bargaining power; and (b) it is impossible to devise contracts which adequately address every contingency. Third, they assert that stakeholders frequently suffer from a collective action problem. They cannot organize to address problems resulting from a takeover, and therefore, a board should have an opportunity to address such issues. Finally, they suggest that if economic efficiency is the goal in the takeover context, it should be Pareto efficiency that is sought, not Kaldor-Hicks efficiency. Characteristically, economic efficiency is measured in two ways: (a) Kaldor-Hicks efficiency and (b) Pareto efficiency. A change is Kaldor-Hicks efficient where winners win more than losers lose. A change is Pareto efficient if it makes someone better off and no one worse off. As proponents of anti-takeover legislation maintain, Pareto efficiency should be the goal. Thus, a board should reject a proposal that is Kaldor-Hicks efficient and seek to convert Kaldor-Hicks efficient proposals into Pareto efficient ones.

Opponents of anti-takeover statutes disagree with these conclusions. As they contend, anti-takeover statutes are adopted with but one purpose in mind: to protect incumbent managers. The purpose of such statutes is not to protect shareholders or even stakeholders but to assure incumbent managers that their positions are not put in jeopardy as the result of a merger.

Opponents of anti-takeover legislation trace their arguments to theory-of-the-firm literature that first made its appearance over sixty years ago in a famous article written by Berle and Means. Berle and Means argued that the corporation as it existed was in serious trouble because of a separation of ownership and control. This separation of ownership and control was, they believed, the result of 1) widely diversified risk bearers who did not have the incentive to monitor managers in the firm in which they were invested, and 2) corporate managers who owned very little of the stock of their own corporation and only wanted to maximize their own utility. This separation, in turn,
resulted in managers and shareholders having widely divergent interests, with managers having both the opportunity and incentive to exploit stockholder wealth. As Berle and Means reasoned, outside regulation was necessary to halt this exploitation.

The modern theory of the firm views the corporation as a different being than Berle and Means suggested. To modern theorists the corporation is essentially an agency relationship in which shareholders are the principals, who are to receive the benefits of the firm’s profits, growth, and management, with managers acting as their agents.384

Under this theory, shareholders are the risk bearers, while managers run the corporation. The advantages of this separation are substantial. Through this separation, skilled managers are able to run the corporation, although lacking the capital to finance the firms’ investment decisions, and shareholders can invest in the corporation, although lacking managerial skills. Additionally, this specialization of functions allows investors to diversify their portfolios, thereby reducing risk and making investment more attractive.

While this separation allows risk bearers to capture benefits of specialization, it also exposes them to the risk that managers will use investors’ funds for their own benefit. The costs incurred in reducing those risks are agency costs—the costs paid by the principals to obtain faithful and effective performance by their agents. From this perspective, the problems of corporate governance are viewed as those of reducing agency costs that shareholders must incur to monitor their agents and prevent either fiduciary abuse or indolent “shirking.”

Jensen and Meckling hypothesize that the owners of the firm can align management’s interests with their own through contractual devices—such as performance-based compensation or stock options—so as to give management a strong incentive to maximize the value of the firm.385 More recently, however, Eugene Fama has argued that this fractional ownership by managers does not alone solve the conflict of interest occasioned by the separation of ownership and control.386 Viewing the firm as a nexus of contracts, Fama argues that market forces, such as competition in labor markets, production markets and, importantly, the market for corporate control, limit the manager’s ability to engage in nonwealth—maximizing behavior.387

The importance of Fama’s view cannot be understated. It suggests, as others have recognized, that the market for corporate control provides the

385. Id. at 323-38.
387. Fama, supra note 386, at 292-93; see also William A. Klein, The Modern Business Organization: Bargaining Under Constraints, 91 YALE L.J. 1521 (1982). Klein does not see managers as the agents of shareholders but rather views them both as coventurers. Id. at 1525.
optimal mechanism for reducing agency costs. According to the market for corporate control theory, whenever a corporation’s value sinks below its potential value under existing management, an incentive arises for a superior management to purchase the company at this discounted price and realize the turnaround profit. The constant search for these discounted bargains, it is argued, both motivates the managements of marginal firms toward increased performances, lest they become targets, and deters conduct injurious to shareholders—all without the need for any type of regulatory reform.

In short, as proponents of this theory argue, the market for corporate control performs a desirable disciplinary function by replacing inefficient management, deterring fiduciary abuse, and enforcing greater sensitivity on the part of management to the market’s judgment. As noted by Jensen and Ruback, “competition among managerial teams for the right to manage resources limits divergence from shareholder wealth maximization by managers and provides the mechanism through which economies of scale or other synergies available from combining or reorganizing control and management of corporate resources are realized.”

By forcing the efficient use of corporate resources, the market for corporate control can also provide substantial benefits to consumers. Efficient management of society’s resources insures that the real cost of the goods and services consumers purchase are as low as possible and thus, in this sense, maximizes consumer welfare.

Not unexpectedly, critics of the market for corporate control do exist. Takeover critics generally posit six, not necessarily competing, explanations for takeovers. First, they argue takeovers are the result of corporate raiding in which the firm is purchased by raiders and its assets are expropriated without giving shareholders a fair return on their capital. Second, proponents of antitakeover legislation view takeovers as simply corporate empire building, with managers seeking to buy up other firms, whether such a purchase is efficient or not, to increase the size of their own corporate structures and thus expand their influence. Third, under the “hubris theory,” managers engage in take-

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388. Easterbrook and Fischel contend unqualifiedly that tender offers can discipline inadequate performance and self-dealing. Frank H. Easterbrook & Daniel R. Fischel, The Proper Role of Target Management in Responding to a Tender Offer, 94 HARV. L. REV. 1161, 1169-71 (1981). In their analysis, Easterbrook and Fischel explicitly use the term “agency costs,” and view the primary motivation for takeover activity to be the expected “reduction in agency costs, which makes the firm’s assets worth more in the hands of the acquirer than they were worth in the hands of the firm’s managers.” Id. at 1173. They argue that both shareholder monitoring and intra-firm monitors, such as independent directors, are inadequate to reduce such costs. Id. Thus, they conclude that a hostile bidder is the best monitor because it can surmount the free rider problem that leaves individual shareholders without substantial incentives to expend resources on monitoring and enforcing. Id.

389. The root source of the notion of a market for corporate control is the classic article by Henry Manne, written over 30 years ago, which identified the market for corporate control as a major constraining force on managerial discretion and inefficiency. Henry G. Manne, Mergers and the Market for Corporate Control, 73 J. POL. ECON. 110 (1965).

overs because they overestimate their ability to add value to a target. In short, excessive pride on the part of managers leads to a corresponding overestimation of their ability to add value to the target and therefore leads to unproductive acquisitions. Fourth, takeover opponents argue that takeovers are not done to achieve economies of scale or other efficiencies but for tax purposes. Fifth, opponents often contend that takeovers lead to an inefficient creation of market power by which firms, through a near monopoly, control the entire market. Finally, opponents argue that takeovers are the result of market myopia. The market myopia theory is based on three plausible premises if considered separately: a) the majority of corporate stock is held by institutional investors; b) institutional investors are short term oriented; and c) investor myopia requires managers to concentrate on short-term profits, sacrificing long-term value. From these premises, the market myopia theory concludes that firms which do not maximize short-term profits are not favored by investors and thus become takeover targets—a result bad for the economy as a whole because it is precisely these firms that are often economically most sound.

Proponents of takeovers advance numerous arguments in support of takeovers. First, they argue that takeovers assure that undervalued resources are purchased by the corporation that can use them most efficiently. Second, takeovers lead to asset or financial restructuring for the benefit of the target and the acquirer. Third, takeovers result in the replacement of inefficient management. Finally, proponents of takeovers argue that synergies result from mergers. In short, as they maintain, the market for corporate control assures that inefficient managers are replaced and resources are used to their optimal potential both for the benefit of shareholders and consumers.

Empirical studies lend great support to the view of takeover proponents. A powerful and elaborated study by Bradley, Desai, and Kim,\(^\text{391}\) for example, finds compelling proof that takeovers are beneficial. The Bradley study found that takeovers create important synergistic gains.\(^\text{392}\) They may result from more efficient management, economies of scale, improved production techniques, or any number of value-creating mechanisms that result from the combination of firms. According to the Bradley study, synergistic gains are not the mere result of wealth transfers but are the result of value-creating combinations. The empirical data generated by the Bradley study supports the notion that takeovers are beneficial, particularly for the shareholders of the target firm.

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For example, from the period of 1963-1984, takeovers led to a cumulative abnormal return to target shareholders over preoffer prices of the targets’ shares of over 31%, with 95% of the targets receiving positive gains and an average change in the preoffer market value of the target equity of a positive $107.08.\textsuperscript{393} Moreover, the synergistic gains of tender offers for both targets and acquirers have averaged 7.43% from 1963-1984\textsuperscript{394}—indicating that both society, and especially target shareholders, benefit from takeovers.

The empirical evidence equally demonstrates that legislation which hampers takeovers, such as stakeholder constituency statutes, deprives shareholders of the discipline the market for corporate control imposes on corporate management. Moreover, affirmative defensive actions may have even more drastic effects on shareholder wealth. As Easterbrook and Fischel suggest, “[t]he detriment to shareholders is fairly clear where defensive tactics result in a defeat of a takeover, causing shareholders to lose the tender premium. Even where resistance leads to a higher price paid for the firm’s shares, however, shareholders as a whole do not necessarily benefit.”\textsuperscript{395} Easterbrook and Fischel then add:

The value of any stock can be understood as the sum of two components: the price that will prevail in the market if there is no successful offer (multiplied by the likelihood that there will be none) and the price that will be paid in a future tender offer (multiplied by the likelihood that some offer will succeed). A shareholder’s welfare is maximized by a legal rule that enables the sum of these two components to reach its highest value. Any approach that looks only at the way in which managers can augment the tender offeror’s bid, given that a tender offer has already been made, but disregards the effect of a defensive strategy on the number of offers that will be made in the future and the way in which the number of offers affects the efficiency with which corporations are managed, ignores much that is relevant to shareholder’s welfare.\textsuperscript{396}

Notwithstanding the Bradley study, proponents of defensive tactics argue that shareholders often benefit from the increased ability of management to resist a takeover that defensive tactics and legislation afford. Proponents contend that such tactics give management the required leverage to negotiate a higher price, for example, in a control contest. Poison pills, for instance, may enable incumbent management to delay a bid and begin an auction contest for their firm. Defensive stock repurchases may also serve a useful function.\textsuperscript{397} There may, indeed, be some substance to this argument.

Bradley and Rosenzweig concluded that so long as defensive stock repurchases are regulated to preserve a competitive balance, with the same

\textsuperscript{393} See infra Table 1 in Appendix.  
\textsuperscript{394} Id.  
\textsuperscript{395} Easterbrook & Fischel, supra note 388, at 1164.  
\textsuperscript{396} Id.  
\textsuperscript{397} See generally Michael Bradley & Michael Rosenzweig, Defensive Stock Repurchases, 99 Harv. L. Rev. 1377 (1986).
pro-rata and delay requirements as interfirm tender offers, they will: 1) eliminate corporate raiders who would take without competition and at a blended price below the preoffer market price; 2) allow target managers who can effect leveraged buyouts at a lower cost than the bidder to do so; and 3) assure that an efficient value-increasing allocation of resources takes place.398 The negotiating power in the hands of management as a result of poison pills or the ability to engage in defensive stock repurchases and other defensive measures means shareholders have an agent who can “act collectively” for them, thus avoiding the prisoner’s dilemma they often face when an acquirer seeks them out to tender their shares.399 Proponents also argue that by providing some safety from hostile takeovers, defensive tactics allow management to concentrate on business and not on takeovers, which can divert management’s attention, thus creating inefficiency and waste.400

In addition to these arguments concerning defensive measures, two different hypotheses exist regarding who benefits and who loses from state incorporation codes and changes in those codes. Dodd and Leftwich argue that state incorporation codes are designed to advance the interests of shareholders because states compete in their incorporation codes to attract firms to their states.401 Because the motivation for investment is wealth maximization, this argument implies that the purpose of corporate law is to increase, or at least not decrease, the value of a corporation’s stock price.402 Therefore, statutory changes to corporate codes, including restrictions on takeovers, should not decrease stock prices of firms chartered in that state but, as the argument suggests, increase them.

Alternatively, Romano has argued, using a public choice framework, that state anti-takeover legislation can favor incumbent management to the detriment of their shareholders.403 As she reasons, incumbent managers have a high probability of being displaced in takeovers and thus they have a strong incentive to press for laws which serve to impede the takeover process.404 Romano concludes that the impetus for passage of takeover legislation in a state is frequently “the concern of a local firm that it might be acquired.”405 Thus, passage of a state takeover law would in all likelihood lower stock prices of firms chartered in that state.

398. Id.
399. Id.
402. Dodd and Leftwich found that when firms changed their state of incorporation the change itself was only associated with a small positive excess return. Id. at 277. They concluded that “[t]he evidence is consistent with our [cost avoidance] hypothesis that managers of a firm take advantage of the competition among states to locate in a state which offers an efficient set of restrictions on the firm, given the firm’s anticipated production-investment and financing decisions.” Id. at 282.
403. See Romano, supra note 350, at 116.
404. Id. at 119.
405. Id. at 137.
Once again, empirical studies reveal some powerful evidence regarding the welfare effects of poison pills and defensive measures in general, and more specifically, the welfare effects of anti-takeover legislation. Two widely accepted studies concerning the welfare effects of poison pills are the Easterbrook and Jarrell study and the Jarrell and Poulsen study.\footnote{406} Easterbrook and Jarrell begin by citing three recent studies of postoffere movements in prices of target stocks which show that successful defensive tactics by management have deprived target shareholders of appreciation gains worth between fifteen and fifty-two percent.\footnote{407} They then introduced the results of their own study which shows that had these gains been realized and reinvested in equity securities, shareholders would have fared considerably better during the past decade.\footnote{408} Finally, the authors argue that a similar study by Kidder, Peabody & Co. reaches a seemingly contrary result because it erroneously compares the postofferee performance of these target stocks to the rate of inflation rather than to the equity market.\footnote{409} In short, Easterbrook and Jarrell stress that the cost of defensive tactics is very real. Even the most conservative estimate, in the authors’ minds, places the loss to shareholders at fifteen percent which the authors conclude “represents an enormous loss in shareholders’ equity.”\footnote{410}

The Jarrell and Poulsen study, similar to the Easterbrook study, finds that stockholders “experienced a significant wealth loss, on average, when management proposed the adoption of poison pills as well as certain (though not all) forms of antitakeover amendments.”\footnote{411} In their study, Jarrell and Poulsen examine the effects of both “shark repellents,” which is the “popular term for amendments to corporate charters that condition and restrict the transfer of managerial control,” and poison pills on shareholder welfare.\footnote{412} Their study examines the market reaction to the adoption of takeover amendments by over 600 companies, and the adoption of poison pills by thirty-seven companies, during the period 1979-1985.\footnote{413} From their study, they conclude, regarding “shark repellents,” that as a general rule fair price amendments do not appear to reduce stockholder value (the subsample of 408 fair price amendments had an average return of negative 0.65%, a result not statistically significant from zero),\footnote{414} while some of the other anti-takeover amendments, especially the supermajority with a board-out clause, seemed to provoke a pronounced negative market reaction (the

\footnotesize{\begin{itemize}
  \item \footnote{407} Easterbrook & Jarrell, supra note 406, at 283.
  \item \footnote{408} Id. at 288-91.
  \item \footnote{409} Id. at 287-88.
  \item \footnote{410} Id. at 292.
  \item \footnote{411} Jarrell & Poulsen, supra note 406, at 40.
  \item \footnote{412} Id. at 39.
  \item \footnote{413} Id.
  \item \footnote{414} Id. at 44.
\end{itemize}}
negative return was 4.92%—indicating that such measures are viewed by the market as signs of managerial entrenchment and, as a consequence, lower shareholder wealth.\footnote{Id. at 45.}

As Jarrell and Poulsen anticipated, poison pills also had a negative effect on shareholder welfare. Using a sample of thirty-seven firms that had implemented poison pills, Jarrell and Poulsen studied the average net-of-market stock return over the two-day period surrounding the public announcement of poison pills.\footnote{Id.} They found, first, that the two-day excess return over all firms averaged a negative 0.93% following the adoption of a poison pill, which was not statistically significant from zero.\footnote{Id.} They then removed five cases from the sample which had other pertinent events occurring during the window period, such as bid increases.\footnote{Id.} When they did this, they were left with thirty-two poison pills, with an average excess return of negative 1.42%, which was significantly different from zero.\footnote{Id.} Finally, because they expected poison pills to have the largest effect in cases of firms subject to takeover speculation, they computed net-of-market returns for just the twenty companies subject to takeover speculation.\footnote{Id.} For this smaller sample of twenty firms, the average excess net return was a negative 2.39%, again highly significant.\footnote{Id.}

The results of the Jarrell and Poulsen study are important. The fact that the net-of-market stock return averaged over the entire sample of anti-takeover amendments was a negative 1.25%, while poison pills adopted by firms subject to takeover speculation were associated with an average 2.39% drop in stock prices, lends statistical support to the argument that such defensive measures harm target shareholders by deterring valuable takeover bids. Studies done to determine specifically the empirical effects of anti-takeover legislation reach similar conclusions.

Two leading studies have explored the shareholder welfare effects of anti-takeover legislation. Schumann explored the wealth effects of New York anti-takeover legislation\footnote{Laurence Schumann, Federal Trade Comm’n, State Regulation of Takeovers and Shareholder Wealth: The Effects of New York’s 1985 Takeover Statutes (1987).} and Ryngaert investigated the wealth effects of Ohio anti-takeover legislation.\footnote{Office of the Chief Economist, SEC, Shareholder Wealth Effects of Ohio Legislation Affecting Takeovers (1987) [hereinafter Ryngaert Study].} Schumann examined the shareholder welfare effects of 1985 New York legislation which regulated “corporate combinations.”\footnote{Id.} Using an event study method, a method whereby capital market return data is employed to measure the impact of events which may affect the value of securities, the effects of a legislation announcement were explored

\begin{itemize}
\item \footnote{Laurence Schumann, Federal Trade Comm’n, State Regulation of Takeovers and Shareholder Wealth: The Effects of New York’s 1985 Takeover Statutes (1987).}
\item \footnote{Office of the Chief Economist, SEC, Shareholder Wealth Effects of Ohio Legislation Affecting Takeovers (1987) [hereinafter Ryngaert Study].}
\item \footnote{Schumann, supra note 423.}
\end{itemize}
over a three-day window on the stock prices of firms potentially affected by the legislation.\textsuperscript{426} The results, while not overwhelming, are significant. Over the three-day window encompassing the announcement of the New York statute, the value of the firms sampled fell by approximately one percent—a decline indicating a capital loss to shareholders of $1.2 billion.\textsuperscript{427} From this evidence, Schumann concluded that “[d]espite the political rhetoric advocating the regulation of takeovers on behalf of stockholders, the evidence presented here indicates that on average this very strong statute does not protect shareholders; rather, the law protects managers at the expense of shareholders.”\textsuperscript{428}

Rynagert’s study methodology was similar to that employed in the Schumann study. Using a sample of thirty-seven firms that were incorporated in Ohio and met other selection criteria, the study concluded that “[t]he passage of the Ohio takeover law resulted in a wealth decrease to shareholders of firms incorporated in Ohio.”\textsuperscript{429} As the study demonstrated, “the passage of the Ohio takeover law was accompanied by a net-of-market decrease in the share prices of Ohio firms of approximately 1.68 to 3.24 percent.”\textsuperscript{430}

\textbf{C. Big Is Unavoidable, Inevitable, and Desirable}

What does all this mean? In short, the empirical studies indicate conclusively that anti-takeover legislation destroys wealth. Feudalism in the corporate setting, like in the agricultural setting, is a good thing. Big, often, is better. The empirical evidence demonstrates statistically that defensive measures and takeover legislation, in particular, rather than aiding shareholders, seems to harm them. These results are compelling. Indeed, if anything, they actually ignore the even greater potential negative wealth effects legislation may have on shareholders. That is, the possibility that legislation may decrease takeover activity to the detriment of all shareholders—a potentially enormous cost. In addition to these empirical arguments, we might advance other equally imperious arguments against stakeholder constituency statutes.

Foremost, we maintain that such legislation is contrary to generations of corporation law, which has directed shareholders to serve one goal—the maximization of shareholder wealth. Moreover, if, as their proponents maintain, these statutes are so useful, we question why these statutes are only generally operative in the takeover setting. Surely, wealth-redistribution arguments can be made as to events in a corporation’s life other than takeovers—for example, discontinuation of a product line. If so, do not the proponents’ arguments create a slippery slope where in every business decision, the interests of stakeholders must be considered?

It is also difficult to understand why proponents of such legislation are convinced that stakeholders need such protection. Most significant nonstock-

\textsuperscript{426} Id.
\textsuperscript{427} Id. at 40.
\textsuperscript{428} Id. at 46.
\textsuperscript{429} RYNAGERT STUDY, supra note 424, at 22.
\textsuperscript{430} Id.
holder constituencies can and do protect themselves by contract—for example, loan documents, collective bargaining agreements, and the like. Creditors know very well how to contract for equity participation (for example, equity kickers) and so do employees (for example, profit-sharing plans). Moreover, it does not make sense to ignore the shareholders' contract—the charter—according to which the shareholders are entitled to the residual wealth of the corporation. If we fail to require stakeholders to seek a contractual resolution to their dilemma, do we not distort their behavior, causing them to seek to achieve through pressure on the board of directors goals which they might otherwise have sought to achieve through other means—for example, contractual or increased performance?

Even accepting proponents’ arguments, we contend that these statutes are difficult, if not impossible, to comprehend on a practical, or implementation, level. How, exactly, are directors supposed to consider the interests of constituencies other than shareholders, including groups whose interests will be adverse to shareholders? What is the balancing test that should be employed? Should directors take nonshareholder constituencies into account if their interests (1) promote shareholder interests; (2) are not inconsistent with shareholder interests; (3) conflict with shareholder interests? Does the “may consider” language used in most of these statutes mean that the board can try to obtain benefits for a nonshareholder constituency group, but does not have to disapprove of the entire transaction? Or does “may consider” mean the board may reject the entire transaction if it cannot achieve the same or a positive level of benefits for nonshareholder constituencies, even though the transaction would have been in the shareholders’ interests? Additionally, most statutes do not provide standards for determining how to “consider” nonstockholder constituencies’ interests. Should the directors appoint a committee, create constituency directorships, retain experts, conduct public surveys, or engage in impact statements? The possibility that such ambiguous statutes may expose shareholders to liability by plausibly giving nonstockholder groups standing to sue directors creates another problem: why would anyone want to serve as a director if they are thereby exposed to liability on this basis? Obviously, this is likely to make it even more difficult to find directors because of the real or perceived fears of a lawsuit.

Directors are usually chosen and well-equipped to maximize shareholder profits. As a rule, we anticipate they are ill-suited to make decisions regarding which, if any, stakeholder group should benefit or how that group might be harmed. If anyone is equipped for such a task, it is politicians who are more suited to assuring that wealth redistribution takes place (the wisdom of which we certainly dispute) and better situated to adopt external measures designed to eliminate takeover externalities. In short, we believe enhanced shareholder wealth inures to the benefit of all the various corporate constituencies—this is particularly true when many employees of the corporation are, in fact, shareholders. Moreover, we contend that allowing corporate takeovers is merely a recognition that bows to the inexorable march of time. Corporate feudalism is inevitable. Efforts to thwart it are likely to do nothing more than harm shareholder wealth.
VI. THE ROAD TO SERFDOM

Like a splash of rubbing alcohol, the family farm system in America has already served its brief purpose and since evaporated. The industrialization and subsequent integration of agriculture into the larger American economy suggest that the family farm system envisioned in 1862 will not be capable of surviving in the economic biosphere of the twenty-first century. The temporal niche of the family farm in American agricultural law was, in retrospect, that of a single, generously apportioned human lifespan. In the seventy-one years between 1862 and the onset of the New Deal, America’s family farm policy drove a certain view of Western settlement and territorial consolidation. Regardless of the success or normative assessment of that effort: the myths of the family farm and of the family firm have outlived their usefulness. It is time to expunge the final vestiges of nepotistic protectionism from American law.

Much the same can be said for anti-takeover legislation. Statutes of this ilk arose during a moment of perceived crisis in corporate America, only to shackle this nation’s capital markets in a future of increasing capital mobility worldwide. Unlike the agricultural setting, where the complex economic, environmental, and social factors at stake elude easy measurement, publicly traded corporations (and their numerous stakeholders) can assess corporate performance according to share prices reported on the stock exchanges. In this setting, a rich bank of empirical data has confirmed the prevalence of feudalism throughout all phases of American life. The descriptive case for the inevitability of feudalism stands on its own. It is but a short step thence to our normative battle cry: Let feudalism reign, unmodified, from sea to shining sea.

In our Republic’s third century, the designers of American industrial policy face a clear choice. The United States, the world’s leading economic power, may choose to adapt and thrive.\textsuperscript{431} That decision will likely accelerate the extinction to which the publicly shielded, family-owned farm is already doomed. Moreover, it all but foreordains a restoration of the 1980s’ ancien régime, when greed was good and mergers were the mania of the moment. On the other hand, any resistance to economic evolution tempts the fate that swallowed whole the mighty Hittite Empire of our fanciful parable. But this much is clear: continued coddling of small enterprise for smallness’ sake—whether the family farm or the corporation targeted in a hostile takeover—is an indulgence no society can long spare in a fiercely competitive world of diminishing resources and increasing expectations. That way lies penury, for the road to serfdom is paved with misplaced compassion.\textsuperscript{432}

Against the corrosive forces of competition, the regulation of market structure in specific industries can do little. Let us march instead toward an

\textsuperscript{431} Cf. American Ideology, supra note 25, at 857 (describing the central but unspoken slogan of agricultural production as “Adapt and die”).

\textsuperscript{432} See generally F.A. HAYEK, THE ROAD TO SERFDOM (Milton Friedman intro., 1994).
industrialist theory of the state. We need and ask little: give us freedom of entry and freedom of exit, and we shall feed the world. Among the many dazzling constellations of the economic firmament, competition is the lone fixed star. Beneath that star the "sea of competitive behavior" rolls on:

Roll on, thou deep and dark blue Ocean — roll!
Ten thousand [laws] sweep over thee in vain;
[Far ms] mark[] the earth with ruin — [their] control
Stops with the shore. . .


434. Cf. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

435. WILLARD W. COCHRANE, FARM PRICES: MYTH AND REALITY 106 (1958); cf. American Ideology, supra note 25, at 876 ("Full fathom five the farmer lies; of his bones are fortunes made. Let this, then, be the requiem for the American Ideology: home is the farmer, home at sea." (footnotes omitted)).

APPENDIX

Table 1*

Mean percentage and dollar synergistic gains to 236 successful tender offer contests effected between 1963 and 1984 for combined, target, and acquiring firms. All dollar figures are stated in millions of 1984 dollars.\(^b\)

<table>
<thead>
<tr>
<th>No. of Contests</th>
<th>Subperiod</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>7/63—6/68</td>
<td>7/68—12/80</td>
</tr>
<tr>
<td><strong>Combined</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% CARC</td>
<td>7.78</td>
<td>7.08</td>
</tr>
<tr>
<td>$ \Delta\Pi$</td>
<td>91.08</td>
<td>87.45</td>
</tr>
<tr>
<td>% Positive</td>
<td>78</td>
<td>74</td>
</tr>
<tr>
<td><strong>Targets</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% CART</td>
<td>18.92</td>
<td>35.29</td>
</tr>
<tr>
<td>$ \Delta W_T$</td>
<td>70.71</td>
<td>71.59</td>
</tr>
<tr>
<td>% Positive</td>
<td>94</td>
<td>98</td>
</tr>
<tr>
<td><strong>Acquirers</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% CARA</td>
<td>4.09</td>
<td>1.30</td>
</tr>
<tr>
<td>$ \Delta W_A$</td>
<td>24.96</td>
<td>31.80</td>
</tr>
<tr>
<td>% Positive</td>
<td>59</td>
<td>48</td>
</tr>
</tbody>
</table>

a. This table was borrowed from Bradley et al., supra note 391, at 11.

b. $\Delta W_T = W_T \cdot CART; \Delta W_A = W_A \cdot CARA; \text{ and } \Delta \Pi = (W_T + W_A) \cdot CARC; \text{ where } W_T = \text{ preoffer market value of target equity, excluding shares held by the acquirer; } W_A = \text{ preoffer market value of equity of acquiring firm; } CART = \text{ cumulative abnormal return from five days before the first offer to five days after the last offer made for this target; } CARA = \text{ cumulative abnormal return from five days before the first offer to five days after the last offer made by this bidding firm; } CARC = \text{ cumulative abnormal return to the value-weighted portfolio of the target and the acquiring firm, measured over the same interval as CART.}$