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## The Rise of Urban Agriculture: A Cautionary Tale – No Rules, Big Problems

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## THE RISE OF URBAN AGRICULTURE: A CAUTIONARY TALE—NO RULES, BIG PROBLEMS

### ABSTRACT

*This Note identifies the underlying cause of the collapse of the family farm, namely the failed effort of the U.S. Government to save it through the institution and ongoing promulgation of the Farm Bill. Through subsidy and direct payment regimes, federal legislation has enabled large commodity producers to enjoy protection from market risk while squeezing out smaller growers. Because of growing consumer distrust in large-scale agricultural production, the urban agriculture movement and nontraditional market systems continue to grow in popularity and footprint across the United States. Many municipalities have already recognized the vast benefits that an urban agriculture regime can provide by adopting regulations to support this worthwhile shift in the utility and usefulness of land. However, in the rapid passing of laws aimed at maximizing social utility, legislatures across the nation have ignored foundational laws relating to the sale and distribution of goods. These laws include inspection and labeling laws, labor and compensation laws, and in some instances, the creation and promotion of unconstitutional trade barriers. This Note analyzes these issues, raises a cautionary voice to government officials everywhere, and invites a thorough review of both the present benefits and the looming future consequences that may occur after the honeymoon with society's fascination with the urban agriculture movement has ended.*

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## INTRODUCTION

Beginning in the 1930s, the U.S. Government, in an effort to maintain the nation's agrarian foundation, passed legislation that ultimately led to the collapse of the family farm. Spawning from the demise of the family farm, urban agriculture legislation and nontraditional markets continue to grow in popularity and footprint across the United States. Many municipalities have recognized the vast benefits that urban agriculture can produce and have adopted legislation to support this worthwhile shift in the utility and usefulness of land, especially in urban areas. Farmers' markets and urban agriculture developments have provided a marketplace for the sale of locally cultivated food and have provided a lifeline to the under-sized grower in a market dominated by large, commercial producers. In the rapid passing of laws aimed at maximizing social utility, legislatures across the nation have ignored many foundational laws relating to the sale and distribution of goods, including inspection and labeling laws, labor and compensation laws, and, in some instances, have created and promoted unconstitutional trade barriers.

Part I of this Note will examine the history of the agriculture industry, the harmful policy choices made over the last century, and the ultimate collapse of the family farm structure. Part II will address the rise of farmers' markets and the urban agriculture regime and look at the potential benefits and consequences that exist as the urban agriculture movement takes an ever-expanding role in communities nationwide. Part III will analyze the potential market related legal issues that may arise after the honeymoon with society's fascination with the movement has ended. This Note was prepared to raise a cautionary voice to government officials everywhere and invite a thorough review of both the present benefits and the looming future legal consequences that may result from adopting pro-urban agriculture legislation.

## I. BACKGROUND: U.S. AGRICULTURE INDUSTRY OVERVIEW

Agriculture has always played a central role in American and world history.<sup>1</sup> Indeed, throughout history, no human enterprise has been more

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<sup>1</sup> See *Historical Timeline*, GROWING A NATION: THE STORY OF AMERICAN AGRICULTURE, <http://www.agclassroom.org/gan/timeline/index.htm> (last visited Feb. 2, 2013) (providing timelines for the advance of all things agriculture); see also Jodi Soyars Windham, *Putting Your Money Where Your Mouth Is: Perverse Food Subsidies, Social Responsibility & America's 2007 Farm Bill*, 31 ENVIRONS ENVTL. L. & POL'Y J. 1, 3 (Fall 2007) ("No other economic sector affects society more than agriculture—agricultural practices affect the food we eat, the land we live on, the air we breathe, and the water we drink.").

fundamentally important to the survival and welfare of societies.<sup>2</sup> Revered men throughout our nation's history hailed the value of farmers and the role agriculture plays in society.<sup>3</sup> Even today, the longstanding U.S. agricultural tradition influences public opinion and remains a driving force in the perception of domestic agriculture in the twenty-first century.<sup>4</sup> The "national agrarian identity" supported by Thomas Jefferson and others prevalent in political philosophy at the time of independence from England, "remains to this day an important component of our national rural identity and is embedded in farm politics and policies."<sup>5</sup>

Though crucial to our survival, agriculture was estimated to account for just 1.2 percent of the United States' gross domestic product (GDP) in 2011.<sup>6</sup> Worth noting, however, is that the agriculture sector GDP number fails to represent agricultural services, input industries, processing and marketing, and agriculture wholesale and retail trade (and other agribusiness) which under this expanded definition comprises a much larger proportion of U.S. gross domestic product.<sup>7</sup> American farmers and ranchers operate "one of the world's largest and most productive agricultural sectors ... [and]

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<sup>2</sup> Michael R. Taylor, *The Emerging Merger of Agricultural and Environmental Policy: Building A New Vision for the Future of American Agriculture*, 20 VA. ENVTL. L.J. 169, 170–71 (2001).

<sup>3</sup> See THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 8:426 (Barbara B. Oberg & J. Jefferson Looney eds., digital ed., Charlottesville: University of Virginia Press 2008), available at <http://rotunda.upress.virginia.edu/founders/TSJN-01-08-02-0333> ("Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent [sic], the most virtuous, and they are tied to their country and wedded to its liberty and interests by the most lasting bands."); Abraham Lincoln, Address before the Wisconsin State Agricultural Society in Milwaukee, Wisconsin (Sept. 30, 1859), available at [http://riley.nal.usda.gov/nal\\_display/index.php?info\\_center=8&tax\\_level=4&tax\\_subject=3&topic\\_id=1030&level3\\_id=6723&level4\\_id=11085](http://riley.nal.usda.gov/nal_display/index.php?info_center=8&tax_level=4&tax_subject=3&topic_id=1030&level3_id=6723&level4_id=11085) ("[N]o other human occupation opens so wide a field for the profitable and agreeable combination of labor with cultivated thought as agriculture.").

<sup>4</sup> William S. Eubanks II, *The Sustainable Farm Bill: A Proposal for Permanent Environmental Change*, 39 ENVTL. L. REP. NEWS & ANALYSIS 10,493, 10,494 (2009).

<sup>5</sup> Dennis Keeney & Loni Kemp, *A New Agricultural Policy for the United States*, MINN. PROJECT 6 (Nov. 6, 2002), <http://www.mnproject.org/pdf/A%20New%20Agriculture%20Policy%20for%20the%20U.S.%20by%20Dennis%20Keeney%20%20Lo..pdf>; see also DANIEL IMHOFF, FOOD FIGHT: THE CITIZEN'S GUIDE TO A FOOD AND FARM BILL 33 (2007) (pointing out that at the time Jefferson became President in 1801, ninety-five percent of the nation's population worked full-time in agriculture).

<sup>6</sup> *The World Factbook: The United States*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Feb. 2, 2013).

<sup>7</sup> Brian Dabson, *Visions of the Rural Milieu: United States 2* (Inter-Am. Inst. for Cooperation on Agric., Int'l Workshop of Experts, July 8–9, 2008), [http://www.rupri.org/Forms/Dabson\\_IICA\\_July08.pdf](http://www.rupri.org/Forms/Dabson_IICA_July08.pdf) ("This expanded definition of the agricultural sector accounts for about 4.8 percent of total U.S. gross domestic product.").

produce enough food and fiber to meet the needs of ... [the United States] and for export.”<sup>8</sup> Much of the esteem for the occupation, however, has been overrun in recent years by criticisms of the cultivation methods employed by ever expanding farming conglomerates and government subsidies granted to large commodity crop producers.<sup>9</sup> In order to understand the criticism being hurled at the agriculture industry, one must first comprehend how the trade has changed over time.

### *A. The Changing Landscape of Agriculture*

As a capitalistic U.S. economy took hold of the nation in the early twentieth century, a decreased proportion of Americans remained in the agriculture sector. At the time of the Great Depression, only one in four Americans still lived on a farm.<sup>10</sup> During this time of national hardship, poverty affected all sectors of society, but many scholars argue that the farming industry was the hardest hit because of woes both economic and meteorological in nature.<sup>11</sup> The “farm crisis,” however, was brought on “not by too little food, but too much.”<sup>12</sup> Advances in mechanization and overplanting in the years leading up to the Great Depression led to vast overproduction of commodity crops.<sup>13</sup> This drastic surplus pushed domestic and global crop prices below their respective cost of production,<sup>14</sup> leaving many farmers with no choice but to abandon the industry forever.

#### *1. Coming to the Rescue: Farm Subsidies and Policy Changes*

In an effort to save the family farm, the federal government took initiative and acted quickly in 1933 to enact the Farm Bill, aimed at temporarily

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<sup>8</sup> BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK 2000–2001 EDITION, available at <http://www.umsl.edu/services/govdocs/ooh20002001/210.htm>.

<sup>9</sup> See Kathryn A. Peters, *Creating a Sustainable Urban Agriculture Revolution*, 25(1) J. ENVTL. L. & LITIG. 203, 207 (2010) (“These farming methods are further encouraged through government subsidies, which operate to affect the supply and price of agricultural commodities. Government subsidies have tended to benefit large agribusinesses and have encouraged the use of chemical inputs and unsound farming practices.”); Windham, *supra* note 1, at 5 (“This Article addresses the impact perverse U.S. farm subsidies and programs have on America’s agribusinesses and how these policies prevent America’s conscientious consumers from rewarding socially responsible behavior in U.S. agriculture.”).

<sup>10</sup> IMHOFF, *supra* note 5, at 33. Compare to the more than ninety-five percent of the nation’s population who worked full-time in agriculture in 1801. *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 34.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (noting that by 1933, the price of corn fell to zero and grain elevators refused to buy any surplus).

protecting small farming operations.<sup>15</sup> The result of this legislative action was the passing of the Agricultural Adjustment Act of 1933.<sup>16</sup> The goals of the act were numerous and included stabilizing crop prices by controlling overproduction, utilizing surplus crops, combating widespread hunger and social inequalities, providing crop insurance and credit assurances, and implementing strategies to prevent the deterioration of farmland.<sup>17</sup> Since the 1933 Farm Bill, Congress has passed a new Farm Bill every five to seven years; each has purportedly maintained the same underlying purpose as the initial bill.<sup>18</sup>

The foundational guiding principle behind the implementation of these laws has been to maintain farm income and keep small farms in business by insulating farmers from market risks, principally in the form of low prices.<sup>19</sup> The initial program established a target price based upon the cost of production for each specified commodity crop.<sup>20</sup> If the market price for the specified crop fell below the target price, the farmer could then use his crop as collateral for a government loan in lieu of dumping the commodity into an already oversaturated and weakened market.<sup>21</sup> The loan provided the farmer a safety net by allowing the farmer to store the crop until the market recovered, when he could then turn and sell his crop for a profit.<sup>22</sup> In the alternative, if the market did not recover, the farmer could elect to keep the borrowed money and tender the crop as the collateral provided to the government as repayment on the loan.<sup>23</sup> At the time of the enactment of the law, “most Americans hailed the Farm Bill as a great success.”<sup>24</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (codified in various sections of 7 U.S.C.), available at <http://www.nationalaglawcenter.org/assets/farmbills/1933.pdf>.

<sup>17</sup> IMHOFF, *supra* note 5, at 34–36.

<sup>18</sup> Eubanks, *supra* note 4, at 10,495. It has been argued that though the bills have had various differences over time, they have maintained a consistency in the underlying policy and have served as the “core conceptual framework for U.S. agricultural policy.” Taylor, *supra* note 2, at 173; U.S. DEP’T OF AGRIC., HISTORY OF AGRICULTURAL PRICE-SUPPORT AND ADJUSTMENT PROGRAMS, 1933–84, ECONOMIC RESEARCH SERVICE, AGRIC. INFO. BULL. NO. 485, at 44 [hereinafter HISTORY OF AGRICULTURAL PRICE-SUPPORT]. See generally WILLARD WESLEY COCHRANE, THE DEVELOPMENT OF AMERICAN AGRICULTURE: AN HISTORICAL ANALYSIS (1979).

<sup>19</sup> Taylor, *supra* note 2, at 173.

<sup>20</sup> Windham, *supra* note 1, at 6–7.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Eubanks, *supra* note 4, at 10,494–95 (“Farmers, even those who had criticized the bill initially, were delighted when ‘[g]ross farm income increased by 50%’ within three years of the Farm Bill’s enactment. This increase, however, did not come without a price; most

Over time, the government has experimented with various methods to support and protect the agriculture industry. Beginning in the 1970s and continuing today, producers of certain commodity crops (predominantly corn, wheat, and cotton) have received income directly through a system of deficiency payments.<sup>25</sup> Under this program, the government directly pays farmers the difference between the price their crops bring in the open market and the government-set target price.<sup>26</sup> One critic argues that “[w]hat began in the 1930s as a limited safety net for working farmers has swollen into a far-flung infrastructure of entitlements” which paid out \$172 billion between 1997 and 2006.<sup>27</sup>

These subsidies are defended under both economic and political rationales.<sup>28</sup> The traditional economic argument is based on the nature of farming and how it differs from other businesses. Farmers are uniquely vulnerable to meteorological threats as well as extreme volatility in market price between initial planting and the time the crops are ultimately sold.<sup>29</sup> Further, in relatively wealthy countries such as the United States, the demand for commodity crops is inelastic and generally unresponsive to price changes.<sup>30</sup> Farmers are also forced to sell after cultivation, as feasible methods of long-term storage are limited.<sup>31</sup> “If farmers are left completely exposed to the risk of low prices, so the argument goes, many will not be able to stay in business, and the prosperity of the farm economy and our stable supply of low cost food will be in jeopardy.”<sup>32</sup>

Though “[t]he demographics of agriculture have changed drastically .... Americans continue to culturally identify themselves with farms and farmers.”<sup>33</sup> Currently, only two percent of Americans live on farms; however, “over half of the U.S. Senate comes from largely rural states in

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of the farm income increases were artificial market supports in the form of government subsidies.”); *see also* ALAN BRINKLEY, *AMERICAN HISTORY: A SURVEY* 404 (10th ed. 1999).

<sup>25</sup> Taylor, *supra* note 2, at 173 (“The government has also attempted to limit the supply, and thereby bolster the price, of certain commodities through, for example, acreage reduction programs for major crops, acreage allotments (as on tobacco), and marketing quotas (for peanuts), or by limiting deficiency payments to crops grown on some percentage of the farmer’s ‘base’ acres in that crop.”); *see also infra* notes 47–53 and accompanying text.

<sup>26</sup> Taylor, *supra* note 2, at 173.

<sup>27</sup> Dan Morgan et al., *Farm Program Pays \$1.3 Billion to People Who Don’t Farm*, WASH. POST, July 2, 2006, at A01.

<sup>28</sup> Taylor, *supra* note 2, at 174–75.

<sup>29</sup> *Id.* at 174.

<sup>30</sup> *See id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 175.

which agriculture is a key element of the economy and culture.”<sup>34</sup> This disproportionate representation may explain the lasting power of the direct subsidy program despite its questionable theoretical foundation. Of the subsidies paid out, “[m]ore than one-half[,] ... equaling nearly \$13 billion each year, go to seven states that heavily produce the five predominant commodity crops.”<sup>35</sup> Further, the federal government paid at least \$1.3 billion in subsidies for rice and other crops from 2000 to 2006 to individuals who were not farming at all.<sup>36</sup>

The debate over whether direct subsidy systems or subsidized crop insurance programs should remain a part of U.S. agricultural policy is not easily settled. By many important measures, U.S. agricultural policy has been, and continues to be, a great success. American agriculture produces basic commodities, the cornerstones for most of our processed foods and animal feeds, and does so efficiently and at a relatively low cost to the consumer.<sup>37</sup> The existing system produces high quality protein and other food products at a lower cost to the consumer than would otherwise be possible.<sup>38</sup> As with any policy, however, one must consider at what cost have these benefits come?<sup>39</sup>

#### *a. The Collapse of the Family Farm*

Many scholars have pointed to the system of deficiency payments for corn, wheat, rice, and cotton producers as a major contributor for the diminishing number of farmers.<sup>40</sup> One such scholar noted: “[a]lthough

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<sup>34</sup> *Id.*

<sup>35</sup> Eubanks, *supra* note 4, at 10,497 (noting also that “with the exception of Texas and Illinois, these states tend to be sparsely populated, which gives the politically active agribusiness industry amplified congressional power”).

<sup>36</sup> Morgan et al., *supra* note 27, at A01.

<sup>37</sup> See generally *Food Price Comparisons Around the World*, DAILYFINANCE (July 10, 2012), <http://www.dailyfinance.com/photos/food-price-comparison-around-the-world> (illustrating relatively lower food prices in the United States in comparison to other developed countries).

<sup>38</sup> *Id.*

<sup>39</sup> One scholar has noted that the subsidy program has “transformed rural America into a wasteland of large commercialized farms and abandoned fields that once served as symbols of hope to the families that depended on their plentiful yields.” Eubanks, *supra* note 4, at 10,495.

<sup>40</sup> Taylor, *supra* note 2, at 176 (“By limiting payments to a specified acreage planting base, it is argued, the system tied farmers to planting the same crop year after year and made ever-increasing yield per acre important to income growth .... This drive for efficiency places a premium on capital-intensive, high-volume, high-tech production techniques, which in turn requires larger and larger farm sizes over which to spread the cost. Farmers who have had the opportunity and resources to invest in technology and

well-intentioned at the outset, the Farm Bill's subsidy program has gradually snowballed into a legislative package of subsidized commodities that increasingly benefits the largest of agricultural producers."<sup>41</sup> While the Farm Bill was considered a success in its early stages, the landscape for the family farm weakened again by the time of the Second World War.<sup>42</sup> Again, because of advancements in technology, including new pesticides and herbicides and agricultural mechanization, overproduction and depressed market prices plagued the agricultural industry.<sup>43</sup> The government, however, in contrast to its response during the Great Depression, elected not to step in and save the family farm.<sup>44</sup> Rather, the government sought to capitalize on the excess by selling the overproduced commodity crops to foreign markets.<sup>45</sup> As those with the most economic and political power began to make policy decisions, the slow and painful death of the family farm in the United States ensued.<sup>46</sup>

As discussed previously, the farm subsidy program was largely reshaped again in the early 1970s under the Nixon administration and Earl Butz, Nixon's second Secretary of Agriculture.<sup>47</sup> Secretary Butz, largely through the Agriculture and Consumer Protection Act of 1973, developed a new approach using target prices to replace the former price support system.<sup>48</sup> Under the new system, deficiency payments were made to farmers at rates equal to the amount by which market prices fell below the target prices.<sup>49</sup> The new deficiency payments were paid directly to the farmer, which encouraged farmers to sell their commodity crops at any price as

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expand their operations have generally done well. Others have found it difficult to compete with the more efficient, large-scale operations and have been left behind economically or been forced off the farm. While many social and economic factors have affected the exodus from the farm, U.S. farm policies have played an important role." (footnotes omitted)); *see also* Melanie Wender, *Goodbye Family Farms and Hello Agribusiness: The Story of How Agricultural Policy Is Destroying the Family Farm and the Environment*, 22 VILL. ENVTL. L.J. 141, 147 (2011) (noting that "[a]s time went on, things only worsened for small, family farms. Agribusiness grew and created an incredibly powerful lobby that crafted favorable federal farm policies." (footnote omitted)).

<sup>41</sup> Eubanks, *supra* note 4, at 10,495.

<sup>42</sup> Wender, *supra* note 40, at 146.

<sup>43</sup> *Id.*

<sup>44</sup> *See* Eubanks, *supra* note 4, at 10,495 (distinguishing the governmental actions taken during the Great Depression from those during post-World War II farm crisis).

<sup>45</sup> Windham, *supra* note 1, at 9 (pointing out that businessmen and the federal government swept in not to save farms, but to capitalize on overproduction by selling crops to foreign markets, including Russia who was suffering from multiple bad harvests).

<sup>46</sup> Eubanks, *supra* note 4, at 10,495.

<sup>47</sup> IMHOFF, *supra* note 5, at 38.

<sup>48</sup> HISTORY OF AGRICULTURAL PRICE-SUPPORT, *supra* note 18, at 29.

<sup>49</sup> *Id.*

the government would make up the difference between the market price and the government-set target price.<sup>50</sup> Payments were tied directly to the yield so the more commodity crop produced the more subsidies the farmer would receive.<sup>51</sup> This system gave little incentive to rotate nonsubsidized crops such as grass and alfalfa, or to engage in other soil-conserving uses.<sup>52</sup> Instead, the farm's focus was to maintain its base acreage in order to retain eligibility for future deficiency payments.<sup>53</sup>

The ideology of Secretary Butz called on American farmers to become large-scale operations in contrast to the agrarian foundation from which our country was established, and the direct intentions of the initial Farm Bill in 1933.<sup>54</sup> Secretary Butz urged farmers to “plant from fencerow to fencerow” and to maximize yields without considering the consequences of those policies.<sup>55</sup> Secretary Butz was not shy about his position proclaiming that agriculture was “a big business” and the family farm “must adapt or die.”<sup>56</sup> Secretary Butz, who held the position over the U.S. Department of Agriculture (USDA) for only five years, “transformed both the agricultural system and the rural landscape once healthfully dotted by profitable small farms.”<sup>57</sup> With a new type of subsidy program in place that emphasized crop yield, many smaller farms began to give way to larger farms that overran marginally productive operations.<sup>58</sup> During this period of change and since, many family farms have been unable to survive, instead realizing the harsh reality of Secretary Butz's adaptation theory. Many small farmers who lack the financial resources to compete with large producers are forced to fight to survive in a political arena where the odds are stacked against them and where many small producers have already experienced a “painful death.”<sup>59</sup>

<sup>50</sup> Windham, *supra* note 1, at 10.

<sup>51</sup> *Id.*

<sup>52</sup> CLIVE POTTER, *AGAINST THE GRAIN: AGRICULTURAL REFORM IN THE UNITED STATES AND THE EUROPEAN UNION* 22 (1998) (further stating, “[g]iven that over two-thirds of all cropland was enrolled in commodity programmes by the late 1980s, this bureaucratic requirement had a decisive land use effect, preserving the area of cropland and preventing farmers putting land to fallow or into a non-subsidized break crop”).

<sup>53</sup> *Id.*

<sup>54</sup> See IMHOFF, *supra* note 5, at 38.

<sup>55</sup> Eubanks, *supra* note 4, at 10,496; see also Julius Duscha, *Up, Up, Up: Butz Makes Hay Down on the Farm*, N.Y. TIMES, Apr. 16, 1972, § 6, at 34 (further noting that the nation needed to maximize the growth of “agribusinessmen” rather than farmers).

<sup>56</sup> *U.S. Agriculture Secretary Ousted over Racist Joke*, L.A. TIMES, Feb. 3, 2008, at B9, available at <http://articles.latimes.com/2008/feb/03/local/me-butz3>.

<sup>57</sup> Eubanks, *supra* note 4, at 10,496.

<sup>58</sup> *See id.*

<sup>59</sup> *Id.* (“As part of this painful death, foreclosures and bankruptcy skyrocketed, rural suicides increased, and a farm exodus paralyzed the nation's agricultural regions.” (footnote omitted)).

Continuing the philosophy behind the Secretary Butz approach and epitomizing the power of lobbyists, in 2008 Congress passed the Food, Conservation, and Energy Act.<sup>60</sup> Of the \$307 billion cost over five years that the bill approved for various programs, roughly \$35 billion went to the subsidy program for commodity crops.<sup>61</sup> Critics disapproved of the lack of reform in the bill and believed lawmakers should have made cuts to the \$5 billion a year in direct payments disbursed based on acreage, regardless of current market conditions or whether the land was actually farmed.<sup>62</sup> President George W. Bush vetoed the bill for many reasons, but Congress overrode the veto.<sup>63</sup> Despite efforts to bring to light the faults in these programs, the American public continues to have “a false perception that the government provides financial support to family farms.”<sup>64</sup> Indeed, it is estimated that “three in five farmers receive no subsidies while the richest 5% of farmers each receive a[n] ... average of \$470,000 annually.”<sup>65</sup>

Summer 2012 brought the most recent effort to “reform” current agriculture policy and sparked several debates over the next chapter of U.S. agriculture.<sup>66</sup> While everyone seems to agree that direct subsidies need to be a program of the past, the current “reform” efforts likely only compound the existing problems. The proposed Farm Bill does away with the direct subsidy program and replaces it with the Agricultural Risk Coverage Program

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<sup>60</sup> Food, Conservation, and Energy Act of 2008, 7 U.S.C.A. § 8701 (West 2008).

<sup>61</sup> David M. Herszenhorn, *Reaching Well Beyond the Farm Bill*, N.Y. TIMES, May 20, 2008, at A18, available at <http://www.nytimes.com/2008/05/20/washington/20farm.html>.

<sup>62</sup> *Id.*

<sup>63</sup> Delta Farm Press, *Congress Overrides Bush Farm Bill Veto—Again*, DELTA FARM PRESS BLOG (June 19, 2008, 10:01 AM), <http://deltafarmpress.com/congress-overrides-bush-farm-bill-veto-again>; see H.R. Doc. No. 110-115 (2008) (noting that the proposed legislation was inconsistent with objectives in international trade negotiations, needlessly expanded the size and scope of government, violated their duty and commitment to taxpayers, and was not sound policy for farmers or the nation); see also Herszenhorn, *supra* note 61, at A18 (elaborating on the reasons President Bush opposed the bill, including the fact that it was “bloated and expensive, filled with gimmicks that hide its true cost” and further that it failed to “limit subsidy payments to wealthy farmers or owners of farmland”). The bill included \$209 billion for programs to feed the poor, including a substantial increase in food stamps and other nutrition programs. It further aids fruit and vegetable growers for the first time.

<sup>64</sup> Eubanks, *supra* note 4, at 10,497.

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., Alexandra Le Tellier, *Does the Farm Bill Care More About Big Business Than People?*, L.A. TIMES OPINION BLOG (June 14, 2012, 1:20 PM), <http://www.latimes.com/news/opinion/opinion-la/la-ol-farm-bill-big-business-20120614,0,2829499.story>; Ron Nixon, *Split Among House Republicans over How Deeply to Cut May Delay Farm Bill*, N.Y. TIMES, July 12, 2012, <http://www.nytimes.com/2012/07/13/us/politics/house-agriculture-committee-agrees-on-farm-bill.html>.

also called “shallow loss.”<sup>67</sup> The Heritage Foundation has explained that the shallow loss program would shield farmers from smaller (shallower) revenue losses than under the current federal insurance programs.<sup>68</sup> The Congressional Budget Office has estimated that spending under the proposed Farm Bill would result in savings when compared to the existing program.<sup>69</sup> This assumes, however, that crop prices will remain at, or near, current levels.<sup>70</sup> Critics of the proposed Farm Bill have expressed doubt about the Congressional Budget Office’s estimates.<sup>71</sup> These critics argue that if commodity crop prices remain at, or near, current levels, then the shallow loss program would cost slightly more than \$3 billion a year, which is less than the current \$5 billion a year price tag under the 2008 Farm Bill.<sup>72</sup> The report concludes, however, that shallow loss programs will likely cost on average “as much as \$8 billion to \$14 billion a year over the next five years” as crop prices recede from their near record levels.<sup>73</sup> What ultimately will result from this effort at reform remains to be seen. Regardless, under either proposed regime, the political forces behind the mechanics of the law have led to many adverse consequences for the family farm, the very entity it once aimed to protect.<sup>74</sup>

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<sup>67</sup> Emily Goff, *Shallow Loss: The 2012 Farm Bill’s New Subsidy Program* (Heritage Found., Issue Brief No. 3662, July 10, 2012), available at [http://thf\\_media.s3.amazonaws.com/2012/pdf/ib3662.pdf](http://thf_media.s3.amazonaws.com/2012/pdf/ib3662.pdf) (noting that the new proposed program “would provide yet another layer of subsidized insurance to farmers .... At a time of tight budgets and record high crop prices and farm revenue, it is especially poor policy and irresponsible budgeting to expand an already lavish safety net”).

<sup>68</sup> *Id.* (“[Shallow loss] would be triggered when a farmer of eligible crops sees revenues fall below 90 percent of the previous five years’ average level. This rolling average would be artificially high, though, because of recent record-high crop prices.”).

<sup>69</sup> Vincent H. Smith et al., *Field of Schemes: The Taxpayer and Economic Welfare Costs of Shallow-Loss Farming Programs* 29 (Am. Enter. Inst. for Pub. Policy Research, Working Paper No. 2012-01), available at [http://www.aei.org/files/2012/05/29/-field-of-schemes-the-taxpayer-and-economic-welfare-costs-of-shallowloss-farming-programs\\_173428924992.pdf](http://www.aei.org/files/2012/05/29/-field-of-schemes-the-taxpayer-and-economic-welfare-costs-of-shallowloss-farming-programs_173428924992.pdf); see also Stett Holbrook, *Crop Insurance a Boon to Farmers—and Insurers, Too*, MSNBC.COM (June 18, 2012, 7:41 AM), [http://bottomline.msnbc.msn.com/\\_news/2012/06/18/12240997-crop-insurance-a-boon-to-farmers-and-insurers-too#.T9\\_QmoHVL6Y.email](http://bottomline.msnbc.msn.com/_news/2012/06/18/12240997-crop-insurance-a-boon-to-farmers-and-insurers-too#.T9_QmoHVL6Y.email) (noting that “the government covers nearly 60 percent of farmers’ premiums and subsidizes the costs of private insurance companies ... to write the coverage for farmers”). As with any form of insurance moral hazard is a risk. Subsidized insurance programs like the existing or proposed program incentivize moral hazard from both the farmers and the insurers, as each know there is a level of security built into the market.

<sup>70</sup> Smith et al., *supra* note 69, at 29.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* (noting that “these programs could cost the taxpayer as much or considerably more than the direct payments program these initiatives would replace”).

<sup>74</sup> See IMHOFF, *supra* note 5, at 59 (noting that “equating the farm bill with ‘saving the family farm’ adds insult to injury [for small] farmers who receive no payments at all”); see

*b. The Implications of Losing the Family Farm*

The importance of losing the family farm can best be realized by looking into the lives of those it has directly affected. Such an inquiry, however, is difficult to accomplish and ultimately impossible to equate to statistical and therefore politically meaningful measurements.

For those who have first-hand experience watching the impact of policy destroy their heritage, the vast impact cannot be explained in terms of a harmless shift from small family operations to large commercial production. The shift in agricultural policy, through its encouragement of large industrial mega-farms, has not only served to erode small family farms to the direct benefit of large producers, but also has resulted in a slew of legal and environmental issues.<sup>75</sup> Further, “implicit in the changes in the structure of agriculture are innumerable social and political issues” such as how food is produced and marketed, how land is treated, and how technology is developed and employed.<sup>76</sup>

The monoculture approach to farming encouraged by past U.S. agricultural policy has resulted in an undisputable increase in the use of chemicals in the form of fertilizers, pest control, and weed control.<sup>77</sup> The environmental effects of these farming practices will not be discussed at length here; suffice it to say, these practices have been at the forefront of the factors leading to the shift in society’s desire for an organic, locally grown food

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also 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, 623 (1994) (“Issues important to our nation—food safety, environmental protection, rural development, and international trade—are not adequately addressed by current programs. In other words, the programs may be intellectually bankrupt, but our attachment to them and fear of the future may be preventing us from considering possible reforms.”).

<sup>75</sup> See Katherine Hessler & Tanith Balaban, *Agriculture Animals and the Law*, GPSOLO, July/Aug. 2009, 59 (“What is not open for debate is that the shift from small to large farms has been dramatic and has led to a panoply of legal issues. These include habitat loss and degradation; soil erosion and sedimentation; water resources depletion; soil and water salinization; agrochemical releases; nonpoint water pollution through runoff from fields and livestock operations; chemical air pollution; antibiotic resistant bacteria; salmonella, E. Coli, and Pfiesteria outbreaks; increased injury to workers; and the development of inhumane animal management practices.”); see also Eubanks, *supra* note 4, at 10,497–505 (explaining many of the environmental impacts of subsidized commercial agriculture); Hamilton, *supra* note 74, at 618 (“Questions of agriculture’s impact on the environment and about the safety of our food supply are altering how the public sees farming, diminishing generations of good will and public support.”).

<sup>76</sup> Hamilton, *supra* note 74, at 615.

<sup>77</sup> See Taylor, *supra* note 2, at 177 (adding that from a policy perspective, the current U.S. agriculture system does not internalize the full environmental costs of producing food, using nitrogen run-off as an example of failing to internalize all costs).

supply.<sup>78</sup> Food safety fears, interest in organically grown products, attention to nutritional value, and a desire to support local farmers are some of the reasons consumers decide to purchase products produced and marketed in nontraditional ways.<sup>79</sup> Consumers are looking for “better food,” though the meaning of the term is highly subjective to each consumer.<sup>80</sup> While the perceived added nutritional value in organic versus nonorganic foods has been questioned,<sup>81</sup> there is no doubt that consumer perception is driving the organic (or natural) food market.<sup>82</sup>

## II. THE RISE OF THE FARMERS’ MARKET AND URBAN AGRICULTURE

### A. *Farmers’ Markets*

Whether founded in reality or not, the consumer perception that superior food can be obtained through farmers’ markets drives a growing consumer base looking to buy its food from local suppliers.<sup>83</sup> As of mid-2011, there were 7,175 farmers’ markets operating throughout the United States, which represented a 17 percent increase from 2010 and a 309 percent increase since 1994.<sup>84</sup> Farmers’ markets contribute to the food system on both the producer and consumer side of the equation. For the consumer, farmers’ markets offer opportunities for residents to buy fresh local food and interact

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<sup>78</sup> See Neil D. Hamilton, *Farms, Foods, and the Future: Legal Issues and Fifteen Years of the “New Agriculture,”* 26 J. ENVTL. L. & LITIG. 1, 10 (2011) (discussing the consumer’s interest in better food as one of the eight factors shaping our future food and farming systems).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Organic Food Not Nutritionally Better than Conventionally-Produced Food, Review of Literature Shows*, SCIENCE DAILY (July 29, 2009), <http://www.sciencedaily.com/releases/2009/07/090729103728.htm>; see also *Organic Foods: Are They Safer? More Nutritious?*, MAYO CLINIC, <http://www.mayoclinic.com/health/organic-food/NU00255/> (last visited Feb. 2, 2013).

<sup>82</sup> See generally Benjamin M. Onyango et al., *Purchasing Organic Food in US Food Systems: A Study of Attitudes and Practice*, 109 BRIT. FOOD J. 399 (2007), available at <http://ageconsearch.umn.edu/bitstream/21060/1/sp06on01.pdf>. While scientific research may illustrate only minimal nutritional differences between organic and nonorganic foods, any observation of consumers at the local grocery store or community farmers’ market should serve as anecdotal evidence to the reader of the perceived differences.

<sup>83</sup> *Farmers Markets and Local Food Marketing*, USDA, <http://www.ams.usda.gov/AMSV1.0/FARMERSMARKETS> (last updated Dec. 31, 2012) [hereinafter *Farmers Markets*].

<sup>84</sup> *Id.*; see also *National Count of Farmers Market Directory Listing*, USDA, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateS&leftNav=WholesaleandFarmersMarkets&page=WFMFarmersMarketGrowth&description=Farmers%20Market%20Growth&acct=fmrdirnkt> (last updated Aug. 3, 2012).

with the farmer who produced what they are buying.<sup>85</sup> For the producer, farmers' markets provide relatively low-cost methods to access large numbers of consumers and to sell at prices otherwise unachievable by following traditional distribution methods.<sup>86</sup> This nontraditional system "help[s] feed millions of citizens and support[s] thousands of family farms."<sup>87</sup>

In consideration of the policies currently promulgated to decrease obesity and increase the consumption of healthy food, Farm Bill spending in the United States has not changed to match the rhetoric. Though the perception is that healthier food is found at farmers' markets, \$15 to \$23 billion was spent annually on subsidy payments for commodity crops during the 2002 Farm Bill, while "less than \$1 million—not even a thousandth of a percent of that sum—was spent to promote the country's 3,700 farmers' markets" in 2005.<sup>88</sup> The government continues to fail to promote food choice reform through the Farm Bill, as healthy foods remain relatively more expensive.<sup>89</sup> This disparity illustrates a greater need for policy reform (and matching government spending) aimed at incentivizing healthy eating through whatever market medium from which it is obtained.<sup>90</sup>

### *B. Urban Agriculture Regime*

"Urban agriculture is a system that ensures food security by providing access to land and resources to support urban farming efforts."<sup>91</sup> With the growing demand for perceived healthier food and community sustainability,

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<sup>85</sup> See *Farmers Markets*, *supra* note 83.

<sup>86</sup> See Terry E. Poole, *Selling Your Farm Products* 1 (Md. Coop. Extension Fact Sheet 804, 2004), available at <http://extension.umd.edu/publications/pdfs/fs804.pdf> (discussing direct marketing savings in packaging, handling, and transportation and the ability for farmers to make higher profits due to being able to cut out the middleman).

<sup>87</sup> Hamilton, *supra* note 78, at 9.

<sup>88</sup> IMHOFF, *supra* note 5, at 92.

<sup>89</sup> See *id.* at 94 (presenting a graph published by the USDA that highlights the price change over a fifteen year period from 1985 to 2000, which illustrates that fresh fruits and vegetables have experienced a 38% price increase versus a 15%–23% price decrease over the same time period to higher caloric foods). This price differentiation, especially during times of relatively depressed economic times, may have lasting unwanted consequences. Further, the Food Stamp Program (SNAP) is also fully contained within the boundaries of the Farm Bill. One suggestion for reform would be a monthly allocation similar to that of the Women Infant Child Program that provides for a defined allocation towards specific products, such as fruits and vegetables per family. This could help cut down on frivolous spending on high-calorie, high-sugar foods and promote healthy eating choices among those receiving government assistance.

<sup>90</sup> *Id.*

<sup>91</sup> Peters, *supra* note 9, at 214. See generally *What Is Urban Agriculture?*, RUAF FOUND., <http://www.ruaf.org/node/512>.

local legislatures have made efforts to increase inner-city means of producing and consuming food.<sup>92</sup> Municipalities nationwide are embracing urban agriculture for various purposes including combating “hunger, air pollution and the proliferation of derelict, crime-ridden abandoned properties.”<sup>93</sup> Urban agriculture is especially prevalent in “shrinking cities” such as Detroit, Michigan, and Cleveland, Ohio, which have been “hollowed out by dramatic population loss.”<sup>94</sup> The urban agriculture movement, however, has not been limited to redevelopment efforts, as it continues to spread nationwide with regulations being passed from Seattle to New York City.<sup>95</sup> “Across the nation, thousands of urban gardens and farms are sprouting on empty lots, on parkland [sic] and in schoolyards. Food is being grown on rooftops, on traffic strips, even in containers hung on the sunny sides of buildings.”<sup>96</sup> While it is unclear whether the urban agriculture boom is driven by a hard hit U.S. economy in recent years and will be a short-term phenomenon or a permanent and lasting fixture in urban communities, it is clear that many U.S. cities are making changes to their legal landscape to support long-term urban sustainability.<sup>97</sup>

<sup>92</sup> Peters, *supra* note 9, at 215 (discussing many of the benefits of a sustainable urban agricultural system including that “urban gardening provides low-income urban residents with a supply of fresh and healthy organic food”).

<sup>93</sup> Kristin Choo, *Plowing Over: Can Urban Farming Save Detroit and Other Declining Cities? Will the Law Allow It?*, A.B.A. J., Aug. 2011, at 42, 44.

<sup>94</sup> Catherine J. LaCroix, *Urban Agriculture and Other Green Uses: Remaking the Shrinking City*, 42 URB. LAW. 225, 228 (2010) (noting the cause being related to the exodus in industries “such as steel and auto-making [that] are gone and not expected to return”).

<sup>95</sup> See Hamilton, *supra* note 78, at 7 (discussing a city ordinance in Seattle that addresses urban farms and community gardens, permits city residents to sell food grown on their property, authorizes rooftop greenhouses and backyard farm animals, and expands the potential locations for farmers markets); see also Will Giron, *New York City Council Passes Two Bills to Encourage Urban Farming & Rooftop Greenhouses*, INHABITAT BLOG (Aug. 2, 2011), <http://inhabitat.com/nyc/new-york-city-council-passes-two-bills-to-encourage-urban-farming-rooftop-greenhouses/> (discussing recent laws passed to open up land for urban farming purposes and authorizing rooftop greenhouses).

<sup>96</sup> Choo, *supra* note 93, at 44 (further adding that it is not just produce but “pigs, goats, bees and chickens are becoming city residents in growing numbers”); see also Hamilton, *supra* note 78, at 12 (“[M]any communities are working to support urban agriculture by amending local zoning ordinances to remove obstacles which might prevent the growth of urban farming.”).

<sup>97</sup> Kathryn Colasanti et al., *Growing Food in the City: The Production Potential of Detroit’s Vacant Land*, C.S. MOTT GROUP 1, at 9 (June 2010), <http://www.mottgroup.msu.edu/uploads/files/59/Growing%20Food%20in%20the%20City%20-%20Colasanti%20Litjens%20Hamm.pdf> (“The question of urban agriculture as a permanent or a transitional land use also speaks to the need for a larger vision for the role of urban agriculture in the city.” Colasanti further notes that some believe urban gardens “simply represent a good way to use land until there is a stronger market for traditional forms of development.”).

### 1. *Urban Agriculture: Sustainability Analysis*

Sustainability is a big picture concept driven by a belief that our individual actions, as well as local, state, and federal policies, have a tangible impact on the world today and on future generations.<sup>98</sup> Sustainability may be best described as the concept of making informed decisions that balances three major facets—“environment, economy, and social equity.”<sup>99</sup> Each of these three prongs of sustainability will be touched on briefly to illuminate the policy considerations supporting each.

### 2. *Environmental Sustainability*

Many critics point to the ability of farmers to “pollute the environment, deplete clean water and soil, and promote social inequity without having to account for these harms when calculating profits.”<sup>100</sup> This argument posits that the externalization of these costs discourages farmers from taking steps to operate in environmentally sound ways.<sup>101</sup> A recent study, however, showed that while the amount of pesticides used in the agriculture sector “has decreased over the past twenty years,” the use of residential lawn and garden pesticides is on the rise.<sup>102</sup> Indeed, residential pesticide use is the one sector of the pesticide market that is growing.<sup>103</sup> Those focused on the amount of damage farm pesticides cause to the environment should take a good, hard look at their own backyard before launching criticism on current agricultural practices. One thing is certain, the incentives created by the current Farm Bill promote farmers to forego crop rotation and persuades many growers not to implement environmentally sound practices, as to do so would cause them to lose their current subsidy payments.

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<sup>98</sup> Peters, *supra* note 9, at 216 (adding that “to create a truly sustainable world, all of our decisions ... must consider [their respective] impact on the environment, economy, society, and national security”). While the word “sustainability” has become part of our everyday and political vocabulary, there is no clear definition of the term. The connotation of the word, however, drives us to introspection of our individual and societal practices to determine if we could continue them indefinitely.

<sup>99</sup> *Id.* at 215–16.

<sup>100</sup> *Id.* at 218–19; *see* Eubanks, *supra* note 4, at 10,497–505 (providing an overview of commercial agriculture’s impact on the environment).

<sup>101</sup> JENNIFER KENT & NORMAN MYERS, *PERVERSE SUBSIDIES: HOW TAX DOLLARS CAN UNDERCUT THE ENVIRONMENT AND THE ECONOMY* 53 (2001) (noting that “runoff of agricultural chemicals causes an annual \$9 billion worth of damage to surface waters”).

<sup>102</sup> Matthew Wilson & Jay Rasku, *Refuse to Use ChemLawn Be Truly Green*, TOXICS ACTION CENTER 1 (Mar. 2005), <http://www.toxicsaction.org/sites/default/files/tac/information/refuse-to-use-chemlawn.pdf>.

<sup>103</sup> *Id.*

Whether the environmental argument is overindulged by media and critics or not, the perception has led consumers to seek organic or natural substitutes. Many of the perceived advantages of buying organic find footing in urban agriculture schemes. Due to the smaller plots of land utilized and the inability to use commercialized farming procedures, urban agriculture relies on organic farming techniques that protect water resources, decrease waste, and improve soil fertility.<sup>104</sup> Urban agriculture also reduces the amount of waste deposited in landfills, lowers greenhouse gas emissions, and eliminates the use of packaging plastics and fossil fuels used to transport product to market.<sup>105</sup>

### 3. *Economic Sustainability*

Economic sustainability requires that economic growth and development be integrated with efforts to protect the environment and should “promote both intergenerational and intragenerational equity.”<sup>106</sup> As a profit maximizing operation, so the argument posits, large farming operations are not economically sustainable, as they do not balance economic growth with environmental protection and equity.<sup>107</sup>

Urban agriculture offers the framework to increase urban economic productivity. By providing opportunities for urban residents to acquire and develop skills, the urban agriculture movement promotes economic growth by providing residents the ability to supplement their income through selling their produce (and other goods) through farmers’ markets and other local market methods.<sup>108</sup> The promotion of urban agriculture could also have a substantial impact on other social service programs like food stamps.<sup>109</sup>

### 4. *Social Equity and Sustainability*

Social equity posits that all members of society “should have a satisfactory quality of life, particularly with respect to access to resources and

<sup>104</sup> Peters, *supra* note 9, at 220–21.

<sup>105</sup> *Id.* at 220–21 (noting that “[u]rban agriculture presents an opportunity to reverse the decline of urban areas”).

<sup>106</sup> *Id.* at 222.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 223.

<sup>109</sup> *Id.* at 223–24 (“[I]mplementing an urban agricultural system in which food stamp recipients would be able to obtain fresh fruits and vegetables directly from community food-bank gardens where they contribute labor would reduce government food stamp benefit payouts. Such a system would give low-income residents additional benefits including access to more nutritious food, acquisition of farming skills and practices, increased social connectedness, and pride in ‘ownership.’” (footnote omitted)).

development opportunities.”<sup>110</sup> Social equity also requires that the actions taken to meet current development needs do not inhibit future generations from meeting their own development needs.<sup>111</sup> A society that maintains a level of overconsumption damages not only the current generation’s development, but negatively impacts future generations as well. The establishment of a well-planned urban agricultural system advances socioeconomic equality, promotes natural resources sustainability, and improves the quality of life of its residents by promoting self-sufficiency.<sup>112</sup>

### C. Case Study: Detroit, Michigan

The standard by which to gauge the overall success of the urban agriculture movement is not, and likely cannot be, well defined. What do we look at to determine success? Profitability for low and middle class socioeconomic growers? Land use coverage and blighted refurbishment? Percentage of organic or locally grown food available? For each municipality adopting legislation to change the legal environment, these questions and more will have to be answered in an effort to create the landscape where the above-mentioned sustainability goals can be met. Looking at Detroit’s efforts may help to illustrate the potential for success in a well-planned effort.

Detroit has seen its population shrink from 951,000 in 2000 to 713,000 in 2010, according to census data.<sup>113</sup> The difficult dilemma has become what to do with all the land that can support three times the current population.<sup>114</sup> A recent study performed by Michigan State University concluded that the city of Detroit had over 31,000 vacant lots (3,589 acres of vacant land).<sup>115</sup> The study estimated that through maximizing the growing season, proper crop management, and prudent land use, it would be possible to supply roughly three-fourths of the vegetables and nearly one-half of the fruits consumed annually in Detroit.<sup>116</sup>

With or without the entire proper legal regime in place, many urban farming organizations, both for-profit and non-profit, are working tirelessly

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<sup>110</sup> Sheila R. Foster, *From Harlem to Havana: Sustainable Urban Development*, 16 TUL. ENVTL. L.J. 783, 790 (2003).

<sup>111</sup> *Id.*

<sup>112</sup> Peters, *supra* note 9, at 226.

<sup>113</sup> Choo, *supra* note 93, at 49 (further noting that in 1950 Detroit was the fifth largest city in the nation, while now it ranks eighteenth).

<sup>114</sup> See David Whitford, *Can Farming Save Detroit?*, FORTUNE, Jan. 18, 2010, at 78, 80, available at [http://money.cnn.com/2009/12/29/news/economy/farming\\_detroit.fortune/index.htm](http://money.cnn.com/2009/12/29/news/economy/farming_detroit.fortune/index.htm) (discussing the plan of John Hantz to create “[a] large-scale for-profit agricultural enterprise, wholly contained within the city limits of Detroit”).

<sup>115</sup> Colasanti et al., *supra* note 97, at 3.

<sup>116</sup> *Id.* at 5–6.

to expand the movement in Detroit.<sup>117</sup> Hantz Farms, for example, is on a mission to rejuvenate Detroit by “transforming blight to beauty as vacant, abandoned properties are converted to fields for new agricultural production.”<sup>118</sup> It was estimated in late 2010 that more than 400 community farms and gardens were operating within the city limits.<sup>119</sup>

Local government plays a vital role in the ultimate success or failure of any urban agriculture movement. The Michigan State study relates four key things that local government officials can do in support of the movement: improve the process of vacant lot disposition and reuse; facilitate the creation of a community vision; redesign policy and zoning requirements to allow for urban farm/garden operation within the city; and approve a process to ensure the safety of food cultivation on remediated soil.<sup>120</sup>

### III. LOOKING FORWARD: LEGALITY OF URBAN AGRICULTURE

Without the proper legal framework in place, municipalities face potentially devastating results. The threat is apparent in places like Detroit where one expert worries that “the city is sitting on a time bomb” by not implementing the proper changes to the law.<sup>121</sup> Understandably, the most discussed implication of an urban agriculture plan is its impact on local zoning and environmental issues; however, market related concerns should not be ignored.

#### *A. Agriculture and Food Laws: A World of Regulation*

The Federal Food and Drug Administration (FDA) traces its origins to 1906 and the passage of the Federal Food and Drugs Act.<sup>122</sup> During that time,

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<sup>117</sup> Amber Hunt, *Urban Farming in Detroit*, QUICKEN LOANS BLOG (Oct. 16, 2011), <http://www.quickenloans.com/blog/urban-farming-detroit> (noting that organizations such as the Detroit Black Community Food Security Network and Hantz Farms have sought to capitalize on the availability of land in Detroit).

<sup>118</sup> *Introduction*, HANTZ FARMS, <http://www.hantzfarmsdetroit.com/introduction.html> (last visited Feb. 2, 2013) (Hantz Farms desires to create the world’s largest urban farm).

<sup>119</sup> Hunt, *supra* note 117.

<sup>120</sup> Colasanti et al., *supra* note 97, at 11 (noting that “as interest in farms and gardens widens, the push to cultivate on formerly industrial or otherwise potentially contaminated areas may intensify,” increasing the risk of consumption of unhealthy foods).

<sup>121</sup> Choo, *supra* note 93, at 49 (discussing Detroit’s lack of amendments to its local code, creating an environment where they may violate the legal doctrine of laches, which would result in a waiver to landowners who may then obtain and assert a right to farm within the city, though still not approved by legislation).

<sup>122</sup> John P. Swann, *FDA’s Origin*, FDA, <http://www.fda.gov/AboutFDA/WhatWeDo/History/Origin/ucm124403.htm> (last visited Feb. 2, 2013).

legitimate producers and manufacturers became more concerned that their trade practices were being undermined by “purveyors of deceitful goods.”<sup>123</sup> In response to these worries, and since that time, regulations by the FDA and USDA concerning the production, inspection, labeling, and distribution of food have worked to improve and control the market landscape under which producers operate.<sup>124</sup> These regulations have made it more difficult for small agriculture producers to survive, which has led to a market filled with relatively large producers and growing consumer dissatisfaction.<sup>125</sup>

Perhaps, though, what has resulted as an unintended consequence of the urban agriculture movement is an illustration of society’s greater desire to govern itself. More than an effort to be more environmentally sound in our food producing process, the movement is also driven by free-spirited citizens who are simply seeking ways to escape the effects of over-regulation in their daily lives.<sup>126</sup> One critic has noted: “[o]ver-regulation has turned the country once hailed as the [l]and of [o]ppportunity into a place where opportunity only happens in your dreams.”<sup>127</sup> The environmental impact argument, together with the free enterprise argument, illustrates what is driving the support for the urban agriculture movement from both sides of the aisle.

### *B. Labeling and Inspection Laws*

Consumers have relied on the creation and enforcement of food laws in order to maintain a safe food supply.<sup>128</sup> Consumers have grown accustom

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See generally Hamilton, *supra* note 74.

<sup>126</sup> See *Urban Farming Advocates*, CITY FARMER NEWS, <http://www.cityfarmer.info/2009/11/08/group-formed-to-legalize-urban-farming-in-the-city-of-l-a/> (last visited Feb. 2, 2013) (noting that the mission of the organization is to “challenge outdated ordinances that restrict people’s freedom to use residential land for urban agriculture and self-reliance ... in Los Angeles”). Like organizations with similar missions are innumerable.

<sup>127</sup> Susan Stamper Brown, *Over-Regulation Is Choking the Life out of Business*, SUSANSTAMPERBROWN.COM (Jan. 16, 2012), <http://www.susanstamperbrown.com/2012/01/over-regulation-is-choking-the-life-out-of-business/>; see also James Gattuso & Diane Katz, *Red Tape Rising: A 2011 Mid-Year Report 3* (Heritage Found., Publication No. 2586, July 25, 2011), [http://thf\\_media.s3.amazonaws.com/2011/pdf/bg2586.pdf](http://thf_media.s3.amazonaws.com/2011/pdf/bg2586.pdf) (in discussing the regulations passed under President Obama, it states that “[n]o other President has burdened businesses and individuals with a higher number and larger cost of regulations in a comparable time period”).

<sup>128</sup> W.A. Anderson, *The Future Relationship Between the Media, the Food Industry and the Consumer*, 56 BRIT. MED. BULL. 254, 258 (2000) (“Consumers are now reliant on the food industry from farm-to-fork and have little control over the safety of the food they eat.”).

to recalls and notices of adulterated food as we all rely heavily on a regulatory system that protects us from risks outside of our individual knowledge or control.

Farmers' markets threaten this established market landscape. Accountability and enforcement of consumer controls, such as labeling and inspection laws, are hard to rationalize given the quantity of sales that take place in any one farmers' market. The administrative costs in assuring transfer of safe food products and proper market management increase the costs for all market participants.<sup>129</sup> This increased regulation may strip the producer of potential profit and deny the consumer of the subjective benefits gained through this alternative market system, killing the advantages to the farmers' market regime. California, for example, who operates a certified farmers' market system, has been working to combat rising problems with enforcement, which has not only threatened the quality of the food sold but also brought serious threats to the profitability of food producers.<sup>130</sup> Poor local regulation of labeling and inspection laws at farmers' markets, if taken in the aggregate and assuming rising potential production capacity in urban agriculture areas, may pose a serious threat to maintaining a trusted food supply.

Product labeling is required for most prepared foods under regulations provided by the FDA.<sup>131</sup> Raw produce and fish labeling, however, is voluntary and, given the cost, is generally of little or no concern for the typical farmers' market participant.<sup>132</sup> While not at the forefront of the discussion, the labeling of products sold at farmers' markets remains of secondary concern, stemming from the greater concerns surrounding the inspection and enforcement of the product sold.<sup>133</sup> By statute, vendor permits for farmers' markets participants should only be granted by local health departments

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<sup>129</sup> See John M. Antle, *Benefits and Costs of Food Safety Regulation*, 24 FOOD POL'Y 605, 609–10 (1999), available at <http://www.globalcitizen.net/data/topic/knowledge/uploads/20110905104117579.pdf>.

<sup>130</sup> Kate Campbell, *Farmers Market Enforcement Fees Could Increase*, AGALERT, Mar. 16, 2011, available at <http://www.agalert.com/story/?id=1889> (discussing California's effort to combat a growing problem of sellers not being the producers of food sold at markets, which violates current law and proposed legislation supporting a more than 500 percent increase in stall fees in order to hire special market investigators to combat growing enforcement issues); see also CAL. FOOD & AGRIC. CODE §§ 47020–47022.7 (2005).

<sup>131</sup> See generally 21 C.F.R. § 101.9.

<sup>132</sup> See 21 C.F.R. § 101.9(j); see also 21 C.F.R. § 101.42.

<sup>133</sup> See Christa Hoffman et al., *Food Safety Regulations for Farmers' Markets*, at 2 (Purdue Extension Ser. No. EC-740, Oct. 3, 2007), <https://www.extension.purdue.edu/extmedia/EC/EC-740.pdf> (discussing Indiana's requirements for labeling of packaged food at farmers' markets that consists of two or more ingredients).

after the operation and product have been inspected to ensure compliance with that state's food code.<sup>134</sup>

Inspection and enforcement laws are a creature of both state and federal law. At the federal level and under the authority of federal meat, poultry, and egg product inspection acts, the Food Safety and Inspection Service and the FDA's Office of Regulatory Affairs inspect and monitor all qualified products in interstate and foreign commerce to ensure compliance with mandatory U.S. food safety standards and inspection legislation.<sup>135</sup> At the state level, forty-nine of the fifty states have adopted codes patterned after the FDA model codes promulgated in the past two decades.<sup>136</sup> Such standardization should create a stable legal environment and predictability, but with the rapid expansion of the urban agriculture movement, inspection and enforcement remains an issue not yet controlled at a local level.<sup>137</sup>

### *C. Labor and Compensation of Workers*

Another issue facing the urban agriculture movement is the classification of "workers" who labor on urban farms. The main problem comes in determining what paradigm should govern the movement: should this be considered "standard labor" governed by the Fair Labor Standards Act (FLSA) and subject to employment taxation like all other wage earners, or should this be considered "traditional agriculture" and governed by the exemptions provided in the FLSA for agricultural labor?<sup>138</sup>

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<sup>134</sup> *Id.* at 1 (further noting that "[v]endors should not consider food permits as something they automatically receive upon paying the fee" but noting that "some local health departments operate this way"). In any permitting operation, the administration function breaks down, whether due to the lack of oversight of front line employees or administrative indifference. The incentives and administrative cost to ensure proper permitting and inspecting are tremendous, and errors are undoubtedly made.

<sup>135</sup> See *Food Safety and Inspection Service*, USDA, [http://www.fsis.usda.gov/regulations/federal\\_inspection\\_programs/index.asp](http://www.fsis.usda.gov/regulations/federal_inspection_programs/index.asp) (last updated Sept. 23, 2010); see also *About the Office of Regulatory Affairs*, USFDA, <http://www.fda.gov/AboutFDA/CentersOffices/OfficeofGlobalRegulatoryOperationsandPolicy/OR/default.htm> (last updated July 27, 2012).

<sup>136</sup> *Real Progress in Food Code Adoptions*, USFDA, <http://www.fda.gov/Food/FoodSafety/RetailFoodProtection/FederalStateCooperativePrograms/ucm108156.htm> (last updated July 1, 2011).

<sup>137</sup> Joel Grover & Matt Goldberg, *Who's Minding the Market?*, NBC L.A. (Sept. 30, 2010), [http://www.nbclosangeles.com/news/local/Farmers\\_market\\_investigation\\_part2-104043714.html](http://www.nbclosangeles.com/news/local/Farmers_market_investigation_part2-104043714.html) (noting that an undercover investigation revealed that some farmers at these markets lie and make false claims about their produce, and government inspectors admit they are failing to stop these cheaters and protect consumers).

<sup>138</sup> See Fair Labor Standards Act, 29 U.S.C.A. § 213(a)(6) (West 2004) (noting that "any employee employed in agriculture" is exempt from the minimum wage and maximum hour requirements of the FLSA).

Arguments cut both ways, as it is not inherently clear which category ought to include workers on urban farms. On the one hand, enforcement of the FLSA would require each (usually small) producer to incur operation costs for all labor and potentially strip the operation of all profit, which argues for exempt status.<sup>139</sup> Much of the social appeal, however, of the movement is to teach life skills and develop communities not solely to produce crops for profit in interstate commerce, which in turn argues for non-exempt status.<sup>140</sup> Adding to the latter argument, it is hard to argue that the legislative intent for FLSA exemptions would include urban workers in this “nontraditional” agricultural setting.<sup>141</sup>

Along with the quandary that exists with classifying workers, another potential problem is that of volunteer workers receiving in-kind payment for their work. Special exemptions exist for persons who would otherwise be categorized as “employees” but for their relationship with the “employer.”<sup>142</sup> These exemptions extend to persons who volunteer under certain conditions, but the statute is narrowly constructed as to exclude the average urban agriculture worker or volunteer.<sup>143</sup> Urban agriculture workers have an incentive to provide their services in order to receive in-kind compensation in the form of raw food products, and by so doing they can enjoy the savings on their grocery bill exchanged for their time.<sup>144</sup> The enforcement costs involved in ensuring that workers are not being utilized and compensated illegally for their work per the FLSA would be extremely high and any manner of administration of the enforcement would be seemingly impractical. However, in a time where ways to expand the federal income tax base are

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<sup>139</sup> See Rachel Armstrong, *Will Work for Food, Paying Minimum Wage with Farm Food and Housing*, NAT’L YOUNG FARMERS COALITION (Sept. 20, 2011), <http://www.youngfarmers.org/news/2011/09/20/will-work-for-food-paying-minimum-wage-with-farm-food-and-housing/#comments> (discussing small farmers’ options of avoiding the unaffordable minimum wage due to low cash flow).

<sup>140</sup> See Choo, *supra* note 93, at 46.

<sup>141</sup> See generally Fair Labor Standards Act, 29 U.S.C.A. §§ 201–212 (West 1974). Taking the argument a step further, one may ask a deeper philosophical question as to whether or not society wants the FLSA enforced at all when it comes to an urban agriculture program.

<sup>142</sup> See *id.* § 203(e)(3) (noting that “[employee] does not include any individual employed by an employer engaged in agriculture if such [an] individual is the parent, spouse, child, or other member of the employer’s immediate family”).

<sup>143</sup> *Id.* § 203(e)(4)–(5) (the closest exception noting that “employee does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries”).

<sup>144</sup> See KATHLEEN BUBINAS, *URBAN AGRICULTURE: A STUDY OF COMMUNITY GARDENS AS SUSTAINABLE PATHWAYS TO FOOD SECURITY IN THE CITY* 19 (Univ. of Wis.–Waukesha 2011), <http://www.waukesha.uwc.edu/Faculty---Staff/Directory/Faculty-Staff-A-C/Kathleen-Bubinas/Urban-Agriculture-Report.pdf> (noting that a large number of active community gardeners save money on grocery bills).

always being considered, urban agriculture may become a target for more meticulous enforcement in order to track unreported or underreported income, both by sellers and workers.

*D. Unconstitutional Trade Barriers: The Dormant Commerce Clause Revisited*

Congress alone has the power to regulate interstate commerce.<sup>145</sup> The scope of the Commerce Clause is a source of never-ending debate, though the reach has undoubtedly continued to widen since early Commerce Clause jurisprudence.<sup>146</sup> The question in relation to urban agriculture, however, revolves around the voice of the Dormant Commerce Clause Doctrine. The central premise of the Dormant Commerce Clause is a “centralization of commercial regulatory authority in Congress implied judicially enforceable restraints on the states’ regulation of interstate commerce.”<sup>147</sup> For those state or local laws that discriminate against the flow of interstate commerce or against interstate commercial actors, a strict scrutiny review is performed by the court.<sup>148</sup> Strict scrutiny requires the government to demonstrate a legitimate purpose for the law and that there are no less discriminatory means to effectuate that interest.<sup>149</sup>

The fundamental limitation on Congress’s power explained in *Gibbons v. Ogden* discusses that “laws for regulating the internal commerce of a State ... are not within the power granted to Congress.”<sup>150</sup> Arguably, urban agriculture and the localized farmers’ markets regimes are geographically limited to activities that would fall within an intrastate rather than an interstate classification. The Supreme Court, however, in its continued expansion of the scope of the Commerce Clause, found in *Wickard v. Filburn* that the impact of many similarly situated local growers could have a substantial influence on the nationwide wheat market and therefore fell within the scope of federal regulation.<sup>151</sup> In like manner, the impact on the overall market by any

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<sup>145</sup> U.S. CONST. art. I, § 8, cl. 3 (“To regulate Commerce with foreign Nations, and among the several States ....”).

<sup>146</sup> For an excellent synopsis on the development of the widening scope of the Commerce Clause, see Richard E. Epstein, *Obamacare vs. the Commerce Clause*, DEFINING IDEAS BLOG (Nov. 21, 2011), <http://www.hoover.org/publications/defining-ideas/article/100456>.

<sup>147</sup> Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 421 (2008).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Gibbons v. Ogden*, 22 U.S. 1, 3 (1824).

<sup>151</sup> *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) (“The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove

one urban producer may be small but if taken in the aggregate could have a substantial impact on the overall food market. Does that mean we should expect urban agriculture to be federally regulated under the Commerce Clause?<sup>152</sup>

When states, or more likely local municipalities, make affirmative decisions to favor locally grown or urban produced food over that of other states or traditional commercial markets, an issue arises as to the creation of an unconstitutional trade barrier. While it is otherwise hard to argue participants in urban agriculture gain any advantage over traditional farmers who also have access (though often for higher transactional costs) to these non-traditional markets, when state and local legislatures create incentives or public quotas for urban food purchases, it undoubtedly impacts the nationwide market when considered under the *Wickard* aggregation theory.

A recent example of creating potentially unconstitutional trade barriers through local law can be found in recent New York City Council legislation. On August 17, 2011, the Council implemented a number of laws that required city agencies to procure more food products grown, produced, and harvested in New York State.<sup>153</sup> Mayor Bloomberg acknowledged the risks inherent to shunning other states' goods in saying, "I can only hope that people outside the state will not stop buying New York State products.... That's the old trade-war issue."<sup>154</sup> While it is still unclear what the outcome will be in New York City, the danger and unconstitutional nature of shunning out-of-state goods or creating local benchmarks for the procurement of locally grown food remains a danger of the urban agriculture and traditional market system as the movement moves forward.

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him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."). The extent of this "aggregation" principle was limited to economic activities in *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>152</sup> The scope of the Commerce Clause continues to receive great attention from legal scholars, judges, and the media. In 2012, Supreme Court Justice Scalia questioned the reach of the Commerce Clause in a lawsuit challenging the constitutionality of the Affordable Care Act. See Bryon Tao, *Scalia Wonders About a Broccoli Mandate*, POLITICO (Mar. 27, 2012), <http://www.politico.com/politico44/2012/03/scalia-wonders-about-a-broccoli-mandate-118823.html>. The breadth of the Commerce Clause is an ongoing debate that will likely never be fully settled. The aggregation principle in *Wickard*, however, would undoubtedly apply to the urban agriculture movement based upon the growing number of small-scale producers and the potential impact they have on the nationwide food market.

<sup>153</sup> For a brief overview of the laws passed, see Nevin Cohen, *Update on NYC FoodWorks Legislation*, URBAN FOOD POLICY BLOG (Oct. 12, 2011), <http://www.urbanfoodpolicy.com/2011/10/update-on-foodworks-legislation.html>. For more insight to the FoodWorks program in New York, see Sarah Brannen, *FoodWorks*, THE N.Y. CITY COUNCIL, <http://www.scribd.com/doc/48501847/foodworks-fullreport-11-22-10> (last visited Feb. 2, 2013) (further discussing legal changes made to urban agriculture regime).

<sup>154</sup> Matt Flegenheimer, *Buy Local, the Mayor Says*, N.Y. TIMES CITY ROOM BLOG (Aug. 17, 2011), <http://cityroom.blogs.nytimes.com/2011/08/17/buy-local-the-mayor-says/>.

## CONCLUSION

What began in the 1930s as an effort to save the family farm has, over time, caused exactly what it was intended to prevent—the collapse of the family farm. Through regulation, the landscape of agriculture has been irreversibly altered, leaving in many instances only large producers left to control the commercial food market. Consumer trust in this food supply has diminished over time, along with the number of small producers. The commercial agriculture industry has been impacted by criticism over cultivation practices and food quality concerns driving consumers to seek more locally grown foods.

Legislatures in response to this consumer paradigm shift and the perceived social utility of promoting the urban agriculture movement have failed to keep pace with the rapid spread of the nationwide movement. This outpacing effect has led to holes in the legislative fabric that threaten the sustainability of the movement going forward. Though the movement shows no signs of slowing, legislatures must take a deep breath and a step back before jumping at an opportunity to throw law on the books. While undoubtedly the benefits of the movement can (and should) outweigh any adverse consequences created by it, the legislative process must be sound if it is to be lasting and beneficial in the long run.

The major concerns of the movement focus on the use and disposition of the land involved and the environmental advantages that can be realized through urban revitalization methods. Enforcement regulation, however, such as laws relating to labeling, inspection, and the use of labor, must be taken into consideration to preserve the benefits for both the consumer and the producer. Further, local law must avoid the unconstitutional discrimination of out-of-state food products and stay away from recreating the trade wars that gave rise to the Commerce Clause in the U.S. Constitution. The violation of these long held legal standards in the agriculture industry may create an inevitable and unpalatable result for society and ultimately generate more harm than good.

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\* J.D. Candidate, 2013, College of William & Mary Law School. B.S. Business Management, 2009, Brigham Young University. First and foremost I would like to thank my wife, Kim, and children, Karlee & Colton, for their patience and unwavering support through law school and more particularly this Note process. I would also like to thank my parents, Terry & Ann Bradshaw, for instilling in me, on our family farm, a strong and enduring work ethic and an understanding of the agriculture industry. Finally, I want to thank the members of the *William & Mary Business Law Review* for their hard work in preparing this Note for publication.