HARVESTING THE LAW: PERSONAL REFLECTIONS ON THIRTY YEARS OF CHANGE IN AGRICULTURAL LEGISLATION

NEIL D. HAMILTON†

I. INTRODUCTION – WHY ANOTHER ARTICLE ABOUT AGRICULTURAL LAW?

Thirty years of teaching and writing about agricultural law have provided me with the opportunity to study the operation of hundreds of laws and legislative proposals relating to food and farming. The laws range from the periodic federal farm bills, encompassing hundreds of discrete topics in one piece of legislation,[1] to more narrowly drawn state statutes or local ordinances, designed to address legal questions unique or specific to an area or type of farming.[2] Over these thirty years, our agricultural sector has gone through a significant evolution in the types of crops raised, the scale of farm size, and the economic structure of farms and agricultural businesses. Perhaps more accurately these thirty years should be viewed as a period of contrasting changes because, unlike the linear direction of evolution, many changes in U.S. agriculture have been divergent. Just as the agricultural sector has changed so too have the nature and the role of law, in particular legislation relating to agriculture. Often legislation is proposed to respond to social forces and emerging needs, such as the FDA Food Safety Modernization Act of 2010,[3] while other acts are responses to fears or concerns held primarily by those in the agriculture community.[4] Regardless of the motivations behind any legislative idea, there is wide variation in the effectiveness and value of the laws we have considered or enacted.

---

† Dwight Opperman Distinguished Chair of Law, Director Agricultural Law Center, Drake University Law School, Des Moines, Iowa. The author is the chair of the Food and Agriculture Section of the American Association of Law Schools.

1. *See, e.g.*, Food Conservation and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923.

2. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 20, § 6C (West 2010) (creating the Massachusetts Food Policy Council).

3. Pub. L. No. 111-353, 124 Stat. 3885 (2010).

4. Right to farm laws, designed to protect farm operations from potential nuisance suits, fall into this category. *See generally* Neil D. Hamilton, *Right to Farm Laws Revisited: Judicial Consideration of Agricultural Nuisance Protections*, 14 J. AGRIC. TAX'N & L. 195 (1992); Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts To Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103 (1998).

This Article is an attempt to review the last thirty years of agricultural law development from both a personal and analytical perspective to understand how the law is used and to consider its effectiveness. This Article utilizes a historical perspective to characterize the types of legislation and their purpose in order to develop an understanding for how agricultural law has developed and evolved. This Article identifies how the shift in the economic and political structure of agriculture is changing how we use legislation. This is especially true for how the law frames the relation of individual farmers to society, especially in our views on food and on the environment. A historical approach provides a framework, not just for characterizing the effectiveness and purpose of agricultural legislation, but also for predicting the types of legal issues and the nature of legislation that may emerge in coming years. For readers involved in using and developing agricultural laws, the historical framework may help explain the variations in how lawyers, public officials, farmers, and others react to particular legislative ideas. Locating not just where the law is but also where the actors are on the historic arc of agricultural law development may make it possible to predict society's attitudes and reactions to new legislative proposals. In addition to a historic framework, the Article includes more personal observations drawn from over thirty years of teaching and from opportunities to engage in the public policy debate on many agricultural law topics. The observations offer an alternative path to examine how different attitudes towards legislation may be a reflection of the changing politics of agriculture and the generational differences of law students, professors, and farmers.

Before writing any article it is important to consider one's motivations for doing so—in other words why write another article? My answer is based on several observations. First, I have taught agricultural law classes for thirty-two years and another class on legislation for over twenty years. During that time I have written dozens of law review articles about agricultural law, many focusing on the details and workings of legislative acts. But I have never stepped back to examine agricultural laws as "legislation" and to think about what may explain contrasts in the effectiveness of laws or our reactions to these laws. Second, there is a cascade of agricultural legislation at the state and federal levels, but as any observer will admit, there is great variation in the effectiveness of the laws, in the quality of drafting, and even in the need for legislation. As a result, this Article is an interesting opportunity to examine agricultural law from a different perspective. Third, the analysis hopefully demonstrates that viewing agricultural law from a different perspective made it possible to identify rules and observations about agricultural law and the use

of legislation that may be helpful to those individuals considering future legislation. Finally, this Article is an opportunity to reflect on agricultural law, particularly as to what works, what does not, and why—at least from my vantage point. The explanation for how we use legislation is largely the result of changes in the structure of agriculture and where society and our debate over food and agricultural policy are located in that evolution.

II. FOUR HISTORICAL WAYS TO CLASSIFY AGRICULTURAL LEGISLATION

One way to organize and classify various laws is to consider the evolving stages of agriculture. The history of agricultural law can be divided into four relatively distinct yet overlapping periods. These stages are defined largely in regard to the economic structure of agriculture and society's relative understanding and support for farming. During each stage, legislation was enacted to promote desired societal goals. Even as we evolved to newer stages, for the most part the earlier legislation remained on the books and retained varying degrees of utility. To put this concept in geological terms, the law has grown by accretion rather than avulsion. The following discussion sets the context for the four historic stages of agricultural law development.

A. The Traditional Development Period

The traditional development period runs from the Civil War through the 1960s and is distinguished by the enactment of landmark laws, such as the Co-Operative Marketing Association Act[5] ("the Capper-Volstead Act") which protected agricultural producers from antitrust laws while these producers organized into cooperatives; and the periodic enactment of Farm Bills, which began with Depression era legislation of the 1930s such as the Soil Conservation and Domestic Allotment Act.[6] The foundation of American agriculture was, in large part, laid down in three laws enacted by the thirty-seventh Congress in 1862: the Homestead Act,[7] which made land available to individuals; the Morrill Act,[8] which created the land grant university system; and the Department of Agriculture Act,[9] which created the United States Department of Agriculture ("USDA"). The key objective of these laws was to promote the economic and social welfare of farmers be-

5. Ch. 57, 42 Stat. 388 (1922) (codified at 7 U.S.C. §§ 291-292 (2012)). *See generally* Neil D. Hamilton, *Cooperative Member Relations and Members Rights in Retained Equity—Setoffs and Other Approaches*, 6 J. Agric. Tax'n & L. 603 (1984).
6. Pub. L. No. 74-461, 49 Stat. 1148 (1936).
7. Pub. L. No. 37-75, 12 Stat. 392 (1862).
8. Ch. 130, 12 Stat. 503 (1862) (amended 2009).
9. Ch. 72, 12 Stat. 387 (1862) (amended 1889).

cause the organizing feature of agriculture at the time was the family farm. The political objective of "helping farmers" defined the role of agricultural laws during the traditional development period.

B. The Transitional Family Farm Period

The transitional family farm period spans from the early 1960s to the late 1990s, although for some issues and people this period continues today. The period is best defined by the changing structure and scale of agriculture, with farm operations becoming larger, production becoming more specialized as commodities were raised for export, and farms becoming more industrialized in their linkages and dependence on businesses.[10] The legal change of the transition, at least for some farmers, is best reflected in the growing use of production contracts in poultry and swine.[11] This period includes the farm debt crisis of the 1980s, when most states enacted debtor relief laws to protect farmers from lenders enforcing debts while farmland was depressed in value. The period also witnessed the continuing pressure on federal farm programs to achieve the traditional goals of supply control and price and income management. The key feature of much of the legislation enacted during this period was to "protect the family farm" from the larger, external forces inexorably changing the economics of agriculture.[12] Examples of legislation from this period include state laws to restrict corporate ownership of farmland enacted by states in the upper Midwest[13] and state laws to limit abusive practices in production contracts.[14] Whether the laws were effective in achieving these goals is open to debate.

---

10. Thomas N. Urban, *Agricultural Industrialization: It's Inevitable*, Choices, no. 4, 1991 at 4., *available at* http://ageconsearch.umn.edu/handle/130833.

11. *See, e.g.*, Neil D. Hamilton, *Why Own the Farm if You Can Own the Farmer (and the Crop)?: Contract Production and Intellectual Property Protections for Grain Crops*, 73 Neb. L. Rev. 48 (1994) [hereinafter *Why Own the Farm*]; Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. Mem. L. Rev. 1051 (1985).

12. For a discussion of the historic role of the family farm, see Marty Strange, Family Farming: A New Economic Vision (Univ. Neb. Press ed. 1988).

13. *See, e.g.*, Neb. Const. art. XII, § 8(1), *found unconstitutional by* Jones v. Gale, 470 F.3d 1261 (8th Cir. 2006) (providing a constitutional amendment adopted in 1982 by popular initiative, Initiative 300, that has since been invalidated); *see also* Anthony Schutz, *Nebraska's Corporate-Farming Law and Discriminatory Effects under the Dormant Commerce Clause*, 88 Neb. L. Rev. 50 (2009).

14. 1990 Minn. Laws 517 (codified at Minn. Stat. § 17.90 (2012)). For a general discussion of contracting, see, e.g., Neil D. Hamilton, *A Current Broiler Contract Analysis Addressing Legal Issues and Grower Concerns*, 7 Drake J. Agric. L. 43 (2002); Neil D. Hamilton, *State Regulation of Agricultural Production Contracts*, 25 U. Mem. L. Rev. 1051 (1995).

C. The Industrial "Big Ag" Period

The industrial "Big Ag" period began in earnest in the early 1980s and continues today in the continuing industrialization of much of American agriculture.[15] One can see the changes in the increasing size of farms, the relations between businesses and producers, and in the crops raised and their uses. The rapid change in the use of farm products is best reflected by the use of over forty percent of the U.S. corn crop for ethanol to burn as vehicle fuel.[16] In this period, the central purpose and goal of most legislation is to facilitate the continued growth in the scale of farm operations. For example, eliminating the estate tax, a key political goal of most farm organizations, has the potential to allow unrestrained consolidation and accumulation of land and increases in farm size.[17] Similarly, removing payment limitations or caps from federal farm program payments and from access to subsidized crop insurance, also the goal of most national farm groups, will mean federal subsidies may drive further farm consolidation.

Laws designed to limit the application of environmental laws to large-scale livestock feeding operations and to facilitate integrated contract production also promote larger operations. For example, integrators may limit their exposure to regulatory compliance costs because individual livestock production sites are able to be "licensed" or permitted in the names of growers, rather than the integrators who own the animals.[18] Intellectual property protections and patent laws allow farm input providers, the seed and chemical companies, to create enforceable restraints on the ability of farmers to save and replant seeds.[19] From a legal perspective, the ability to patent products and

---

15. *See generally* 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 (1994).

16. *See* Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007) (codified as amended at scattered sections of 2 U.S.C., 15 U.S.C., 40 U.S.C., 42 U.S.C., and 46 U.S.C.). For a general discussion of renewable energy and agriculture, see Neil D. Hamilton, *Farming an Uncertain Climate Future: What COP 15 Means for Agriculture*, 2011 U. Ill. L. Rev. 341 (2011).

17. *See generally* American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, §§ 101-104, 126 Stat. 2313, 2316-2322 (providing Title I–General Extensions).

18. *See, e.g.*, Animal Agriculture Compliance Act, Iowa Code § 459.301(1) (2012); Iowa Admin. Code r. 567-65.1 (2012). Under the Animal Agriculture Compliance Act and the regulations implementing the Act, the definition of "animal feeding operation" only requires facilities to be considered as one integrated unit if there is "common ownership and management."

19. For a discussion of these issues, see generally *Why Own the Farm*, *supra* note 11; Neil D. Hamilton, *Who Owns Dinner: Evolving Legal Mechanisms for Ownership of Plant Genetic Resources*, 28 Tulsa L. J. 587 (1993); Neil D. Hamilton, Asgrow v. Winterboer *Case Tests Interpretation of Controversial PVPA Farmer Exemption*, Diversity, no. 1 & 2, 1993, at 48.

to enforce rights against farmers is largely settled,[20] although the United States Supreme Court heard arguments in a case involving Monsanto on May 13, 2013.[21] In its unanimous ruling written by Justice Kagan, the Court upheld Monsanto's patent, ruling the doctrine of patent exhaustion does not allow a farmer to grow self-replicating seeds for future plantings.[22]

During the Big Ag period, the key objective of legislation has shifted from protecting the interests of family farmers to protecting the economic interests of agricultural businesses in promoting efficiency and maximum production. As a result, legislative initiatives that limit the growth of farms and businesses, such as federal anti-trust laws, payment limitations, anti-corporate farming laws, and even some environmental protections, are suspect or considered no longer needed. We are now well into the period of agricultural industrialization, though possibly nearing its apex. As agriculture and farming have changed, society's views of farmers have also changed. The shift in societal views from the transitional family farm period to the industrial Big Ag period is perhaps best reflected in the Department of Justice's much-heralded 2010 series of field hearings and investigations into anti-trust concerns in agriculture. The investigation began with much fanfare when the United States Secretary of Agriculture and the United States Attorney General came to Iowa promising action to protect farmers from the impacts of consolidation in the agricultural sector.[23] But two years later, in late 2012, the investigation ended with hardly a whimper as the Department of Justice ("DOJ") announced it was dropping the anti-trust investigation of Monsanto.[24] One of the many reasons why the DOJ dropped the investigation may have been the shift in the politics of agriculture.

The problem—and perhaps the lesson—from the DOJ investigation is not that anti-trust laws are not needed, but that the federal

---

20. Dan Piller, *Soybean seeds face Pioneer patent police*, DES MOINES REGISTER, Nov. 30, 2012, at 1A. While the rights of the companies to sue farmers are clear, the fights between major players are still real, as demonstrated by the one billion dollars a federal court jury awarded Monsanto in a suit against Pioneer in August 2012. *See* Dan Piller, *Judge: Pioneer misled court*, DES MOINES REGISTER, Dec. 18, 2012, at 7B.

21. *See* Monsanto Co. v. Bowman, 657 F.3d 1341 (Fed. Cir. 2011), *cert. granted*, 133 S. Ct. 420 (U.S. Oct. 5, 2012); Mark Sherman, *High Court to hear farmer, Monsanto seed Dispute*, SEATTLE TIMES (Oct. 5, 2012), http://seattletimes.com/html/politics/20193513 30_apussupremecourtseeddispute.html.

22. Bowman v. Monsanto Co., 133 S. Ct. 1761, 1769 (2013).

23. For an exceptionally well written history of the DOJ and the USDA actions, see Lina Khan, *Obama's Game of Chicken*, WASH. MONTHLY, Nov.-Dec. 2012, at 32, *available at* http://www.washingtonmonthly.com/magazine/november_december_2012/features/obamas_game_of_chicken041108.php (providing an exceptionally well-written history of DOJ and USDA actions).

24. Christopher Doering & Dan Piller, *DOJ drops antitrust probe against Monsanto*, DES MOINES REGISTER, Nov. 25, 2012, at 4D.

action came fifteen to twenty years too late to do any good. The changing nature and scale of farming, the generational shift in farm leaders, and the growing dominance of industry as the voice of agriculture all contributed to changing the politics of industrial agriculture. These factors eroded the political support for the role of government and laws to address the problem.

D. The Post-Industrial Food Democracy Period

The newest period of agricultural law, the post-industrial food democracy period, has been developing since the late 1990s. This period is marked by a stronger emphasis on food and the development of new farms and businesses; many of these businesses emerging out of local food production.[25] This period involves new methods of producing food, for example the growth of organics, and more reliance on relational marketing, often on a local basis in activities such as direct farm marketing, farmers markets, and community supported agriculture ("CSA"). But the new period is also defined by new legal and political controversies over animal welfare, food safety, and mandatory disclosures on food labels[26]—consumer trends that make agriculture respond and that open opportunities for farmers willing to do so. In many ways the ethos of the period may best be captured by the term "sustainability," suggesting greater attention to the health of the people, land, animals and communities involved. One important dimension of this newest period of agriculture is the interest of new people in becoming farmers. There are legions of young people longing for careers in farming and food production, many of whom did not grow up on farms and who see this path as a way to serve the public.[27]

Another important aspect of this period is the new use of legislation, for example, state ballot initiatives to restrict livestock practices such as the size of laying cages and the use of swine gestation crates.[28] Books like those by Michael Pollan and documentary films like *Food,*

---

25. For a discussion of these emerging trends in the mid-1990s, see generally Neil D. Hamilton, *Tending the Seeds: The Emergence of a New Agriculture in the U.S.*, 1 Drake J. Agric. L. 7 (1996); *see also* Neil D. Hamilton, *Greening Our Garden: Public Policies to Support the New Agriculture*, 2 Drake J. Agric. L. 357 (1997).

26. I have written about these developments and described them as reflective of "food democracy." *See generally* Neil D. Hamilton, *Moving Toward Food Democracy: Better Food, New Farmers, and the Myth of Feeding the World*, 16 Drake J. Agric. L. 117 (2011) [hereinafter *Moving Toward*]; *see also* Neil D. Hamilton, *Food Democracy II: Revolution or Restoration?*, 1 U. Ark. J. Food L. & Pol'y 13 (2005); Neil D. Hamilton, *Food Democracy and the Future of American Values*, 9 Drake J. Agric. L. 9 (2004).

27. *See* Neil D. Hamilton, *America's New Agrarians: Policy Opportunities and Legal Innovations to Support New Farmers*, 22 Fordham Envtl. L. Rev. 523 (2011).

28. *See, e.g.*, Prevention of Farm Animal Cruelty Act, Cal. Health & Safety Code §§ 25990-25994 (West 2008) (effective Jan. 1, 2015); Assemb. B. 1437, Gen. Assemb., Reg. Sess. (Cal. 2011-12). *See generally Moving Toward*, *supra* note 26, at 141-42.

Inc. have driven public attention and awareness of the issues relating to food and health. The public involvement and concern over food issues is increasingly mobilized through social media. This was seen in the 2012 brouhaha over "pink slime," also known as "lean, finely textured beef" as the manufacturer labeled the industrial byproduct.[29] In this period, the roles of traditional agricultural institutions and groups have come under pressure as more consumers question how food is raised and as organized opposition challenges agriculture's traditional political power. As a result, groups like the American Farm Bureau Federation ("AFBF") and the National Pork Producers Council ("NPPC") find themselves spending more time defending agriculture and practices, such as feeding antibiotics to livestock to promote growth, from "misguided" attacks by those who just do not appreciate farmers or "understand" agriculture. Of course, the irony is that the attacks come from the same people who, as consumers, depend on farmers for food and who farmers depend on as consumers. As I tell my students in my class Food and the Law, you can choose what to eat but you cannot choose not to eat—at least for very long.

The four overlapping periods described above and the legal issues defining them may not be exact, but they provide a way to consider the development of agricultural legislation. These periods offer a way to characterize laws and to help identify where parties and institutions involved in lawmaking are located on a changing legal and social landscape.

III. CONSIDERING THE GENERATIONAL ASPECTS OF AGRICULTURAL LEGISLATION

One benefit of teaching for many years is the opportunity to meet hundreds of students. One danger in working with a changing array of students who never age is assuming you do not either, but the mirror quickly ends any confusion. A second danger is assuming the experiences and views of today's students are similar to your own. In this regard, a class discussion about farm politics may end this confusion because today's students, most of whom were born after the 1980s farm crisis, may have a much different understanding and "take" on agriculture and the role of law. Reflecting on the changes in agriculture and how society has used legislation led me to recognize how our differences in attitudes may be explained as generational and a function of childhood experiences. For example, most of the first generation of agricultural law professors who began teaching in the 1970s and 80s—Jake Looney, Keith Meyer, Phil Harris, Neil Harl, Susan

29. Kristi Eaton, *ABC News asks for 'pink slime' suit dismissal*, DES MOINES REGISTER, Nov. 1, 2012, at 3.

Schneider, and myself—were raised on traditional family farms. No one used the terms "small farm" or "production agriculture" when we were growing up because our families' farms were all pretty much the same and farming was our parents' occupations.

We came of age during the post-war era when there were real political divisions of power, wealth, and influence in agriculture because family farmers were largely at the mercy of bigger, more powerful economic forces: the grain elevators, the shippers, and commodity markets. One result of these political divisions was a belief that the role of agricultural laws and the government was to protect less powerful people like family farmers from those with influence such as bankers, marketers, and companies who "farmed the farmers," as my father liked to say. The role of the law was to level the playing field and protect those who might not be represented by lawyers or who had less economic power, political influence, or business sophistication. For example, the farm products rule, which treats farmers differently than other sellers in the course of business, reflects this protective instinct.[30] Another example is the 1960s amendment of the Packers and Stockyards Act[31] to include a statutory trust provision to protect cattle feeders from losing everything if the packer filed for bankruptcy while the cattle feeders were still holding uncashed checks.[32] Legislation was enacted to protect farmers in a variety of settings: producers organizing cooperatives, farmers having trouble paying debts, poultry growers facing unfair contracts, and farm tenants fearing lease terminations. The farm kids who grew up to become agricultural law professors had a respect and appreciation for what the law had done for their families and neighbors. The work of these professors reflects a respect for the power of legislation and an expectation for an active role of government. It is no surprise that much of the writing and advising done by this generation of agriculturalists was aimed at farmers and their lawyers rather than agricultural businesses. The premise behind this trend was that it was the farmers who needed assistance and the protection of legislation because the businesses could afford their own lawyers and in many cases the legal rules were written in their favor.

The experiences of the agricultural law professors who grew up before the late 1970s can be in sharp contrast to the experiences and attitudes of many of today's agricultural law students, most of whom are the children of the industrial age of farming. If a student grew up on a farm, it was more likely one of the "winners" in the increasingly

30. *See* U.C.C. § 9-307(1) (1972).
31. 7 U.S.C. §§ 181-229c (2012).
32. *See* 7 U.S.C. § 196 (establishing the statutory trust for livestock).

concentrated system of agriculture. It is not uncommon to have students whose families raise 40,000 hogs a year, a size of operation not contemplated or even imaginable in my youth. Understandably these students view their farms to be as much "family farms" as my family's 200 acres. But from an economic and political perspective, these students are more likely to identify with the political objectives and attitudes of industrialized agriculture that is common today rather than with small farmers. These students may have difficulty appreciating or understanding the historic role law played in shaping agriculture and may not agree with legislative efforts designed to restrain industrialization. Their worldviews are not just different than the professors; these students may have a more conservative, even anti-governmental philosophy towards the use of law, as is common among many farm and commodity organizations today.

A second way of thinking about the generational and societal shift in attitudes towards agricultural legislation is to consider how farm politics has changed. In the 1980s and 1990s the "social justice" dimension of farm politics and promoting legislation to benefit farmers drove progressive farm activist groups like Iowa's Prairie Fire, the Farmers Legal Action Group of Minnesota, and Nebraska's Center for Rural Affairs. Today the "production agriculture" and "feeding the world" mantras voiced by the Farm Bureau, commodity organizations, and the companies selling new technologies have largely replaced these concerns. Rather than seeing debates over farm policy as a class struggle between family farmers and the forces controlling prices, costs, and income, farm politics today is more often premised on the view that "we are all partners in feeding the world."

Many farmers today share a unifying belief of being misunderstood by those who question genetically modified organisms ("GMOs"), the use of swine crates or other technologies needed to feed the "coming 9 billion." The "feeding the world" viewpoint is a powerful organizing concept, but it changes the perception of the role of law and its value in addressing other concerns such as resource conservation and healthy food.[33] To the extent the social justice energy still exists in agriculture, much of it has shifted to other issues and audiences like what I described above as the "food democracy" issues. These issues include food access, community food security, farm worker justice, and animal welfare. In an interesting twist, many of the new generation of law professors who teach food and agricultural law classes are drawn to these issues. For the most part the new professors, many of

33. I have written about what I call the myth of feeding the world and how it can be used to short circuit debate over the impact of agricultural practices. *See, e.g.*, *Moving Toward*, *supra* note 26, at 134-35.

whom are women, did not grow up on farms but are interested in how the law can address concerns with health, food, and sustainability.[34]

As I look back now over this time span, it is clear the shifts in the structure of agriculture are reflected in the topics of my own writings over the last fifteen years. In many ways the "new farmers" of tomorrow, the people I wrote about in the "New Agrarians," and the issues of food access and informed choice (i.e., "food democracy"), are the focus of today's food activists. This shift occurred in part because it is not clear today's "real" farmers involved in "production agriculture"—their term of choice for identification—want or need the assistance of government and legislation. Nor is it clear that they agree with the agenda if it is premised on an active role for government regulation and appropriate restraints on businesses or markets. Today many farm groups take an anti-regulatory stance, arguing that voluntary programs are sufficient to protect soil and water, even though seventy years of experience belies the fallacy in this thinking. One related side effect of this shifting landscape is how it may impact agencies developed during the historic period of concern for family farmers and fairness, such as the USDA Grain Inspection Packers and Stockyards Administration ("GIPSA"). Government programs to support small farmers, such as USDA farm loans, and political organizations created to serve farmers, such as the Farmers Union, appear to face a diminished role and declining support.

A third illustration of the generational and political shifts in attitude towards the role of the law is to consider several examples of the institutional politicization of the College of Agriculture at Iowa State University ("ISU") around agricultural law. Consider the following three examples. First, ISU was the long-time home of Dr. Neil E. Harl, one of the nation's most important figures in agricultural law[35] and in developing legislation to protect agricultural interests. Some of his most important work was in the late 1980s developing federal legislative responses to the economic difficulties of the farm crisis.[36] His work on this and related topics helped identify ISU as a leading institution in agricultural law. But when Dr. Harl retired, the College of

34. *See, e.g.*, Margaret Sova McCabe, *Superweeds and Suspect Seeds: Does the Genetically-Engineered Crop Deregulation Process Put American Agriculture at Risk?*, 1 U. BALT. J. LAND & DEV. 109 (2012); Alison Peck, *Revisiting the Original "Tea Party": The Historical Roots of Regulating Food Consumption in America*, 80 UMKC L. REV. 1 (2011).

35. *See generally* NEIL E. HARL, AGRICULTURAL LAW (1990) (providing a comprehensive 14-volume treatise covering every aspect of agricultural law, from regulation to estate planning).

36. *See, e.g.*, NEIL E. HARL, THE FARM DEBT CRISIS OF THE 1980S (1991). Harl's book was published by Iowa State Press as part of the Henry A. Wallace Series on Agricultural History and Rural Studies.

Agriculture experienced a nasty internal fight over his eventual replacement. While his successor maintains an active schedule addressing tax and estate issues, ISU's national reach and policy agenda of work on agricultural law has diminished and poses little threat to the economic interests driving the industrial agriculture agenda.

A second example is the Leopold Center for Sustainable Agriculture ("the Leopold Center"). From the time of its creation by the Iowa legislature in 1987, the Leopold Center served as the nation's leading institution in promoting environmental and social sustainability—decades before the concept swept the rest of the economy.[37] But in the late 2000s the Leopold Center went through a series of leadership changes and a major controversy in which a widely respected national figure in the sustainability community was recruited and then publicly rejected— twice— by University leaders. This sad outcome, largely considered the bidding of Iowa Farm Bureau leaders, was the subject of unwelcomed front-page coverage in the Chronicle of Higher Education.[38] While a new leader was ultimately hired, the Center's prestige was tarnished, research momentum faded, and ISU's reputation as a leader in sustainable agriculture was lost in the process.

The third and final example is a current dispute concerning the Harkin Institute for Public Policy ("the Institute") and Senator Tom Harkin's plan to donate his papers to his alma mater. Creating the institute was politically controversial from its initiation in 2010 when Republicans on the Iowa Board of Regents, led by the Iowa Farm Bureau Federation president, who happened to be the chair for the Iowa board. While unsuccessful in blocking creation of the Institute, the opponents to the donation worked with College of Agriculture leaders to draft a memorandum of understanding to prevent the Institute from working on agriculture and food topics, even though these topics were central to the Senator's career—having chaired the passage of two farm bills.[39] The memorandum, adopted without the knowledge of the Senator or the Institute's advisors, has yet to be fully disavowed by the President of ISU, though it was modified to allow such research if it coordinated with another ISU agriculture center. The limitation was justified by supporters, notably the former Farm Bureau head, as

37. *See generally* Neil D. Hamilton, *Feeding Our Green Future: Legal Responsibilities and Sustainable Land Tenure*, 13 DRAKE J. AGRIC. L. 377 (2008) [hereinafter *Green Future*]; Neil D. Hamilton, *The Role of Law in Promoting Sustainable Agriculture*, 3 DRAKE J. AGRIC. L. 423 (1998); Neil. D. Hamilton, *Sustainable Agriculture: The Role of the Attorney*, 20 ENVTL. L. REP. 10021 (1990).

38. Thomas Bartlett, *Field of Discord*, CHRON. HIGHER EDUC., June 27, 2010, at 55, *available at* http://chronicle.com/article/At-Public-Colleges/66044/.

39. Michael G. Gartner, *Academic Freedom: The controversy surrounding the Harkin Institute is about trying to shackle ag research at ISU*, DES MOINES REGISTER, Dec. 11, 2012 at 9.

necessary for the University to speak with one voice on agricultural policy issues. That University leaders would agree with such a patently transparent effort to restrict academic research and promote institutional hegemony shows how strong industrial agriculture has grown and the control its proponents exert over once-independent bodies. All three examples reflect not just a decline in academic integrity and aspirations but a collective illustration of how the shifting structure of agriculture influences how we study and use legislation and knowledge as forces for shaping agriculture's future.

IV. EIGHT WAYS TO CHARACTERIZE AGRICULTURAL LEGISLATION

The preceding discussion provides several perspectives for thinking about how legislation is used in agriculture. Another way to classify and examine agricultural legislation is by considering the effectiveness and purpose of the ideas the laws reflect. Let me first acknowledge that any effort to do so, even in the most "objective" manner, will reflect the subjective views of the observer. So, in full openness, the following classification reveals my own views and biases and should be accepted and criticized as such. Even so, the classifications are an opportunity to reflect on whether or not readers agree. If not—they are free to write their own articles.

A. Laws that Have Worked Well and Still Serve a Purpose

Good examples of laws in this category can be found in many of the farm crisis debtor relief legislation enacted in the 1980s, such as Iowa's Chapter 654A[40] mandatory debt enforcement mediation requirements. Another example is the previously mentioned Capper-Volstead Act[41] that gave antitrust protections to cooperatives of agricultural producers. While times and circumstances may have changed, these laws maintain relevance and utility.

B. Laws that Worked at One Time but Which May No Longer Serve a Purpose

Examples of laws in this category may, unfortunately, include state restrictions on aspects of corporate farming[42] and related restrictions on land ownership by non-resident aliens.[43] The problem

40. Iowa Code § 654A (2013).
41. Ch. 57, 42 Stat. 388 (1922) (codified at 7 U.S.C. §§ 291-292 (2012)).
42. *See, e.g.*, Iowa Code § 9H (2013). Nine Midwestern states enacted corporate farming laws in the 1970s: Iowa, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Minnesota, Missouri, and Wisconsin.
43. *See, e.g.*, Iowa Code § 9I (2013).

may be that as the structure of agriculture has shifted, the purpose — and audience—for the laws may have disappeared.

C. Laws That Sound Good in Theory but Have Not Been Effective at Achieving Their Goals

A prime example in this category is the Agricultural Fair Practices Act,[44] which appears to protect farmers and growers from the sharp practices of integrators, but that for the most part have been unenforced or unenforceable.[45] In a similar vein, many of the state laws relating to agricultural contracting, such as the Iowa law allowing growers to file a production lien against the integrator,[46] have seen little use or have been too easy to avoid. A final example in this category might be the Iowa law requiring notice to terminate a farm tenancy be provided by September 1st.[47] While the historical law does provide a limited form of protection for tenants, the practical effect may be automatic termination notices sent every August, even when the relation may continue, in order to protect the landlord's ability to negotiate a higher rental fee.

D. Laws That Worked, Perhaps Too Well, but Which Now Restrain "Modern" Farming

Good examples in this category are the payment limitations[48] and the conservation cross compliance requirements[49] found in federal

---

44. Pub. L. No. 90-288, 82 Stat. 93 (1968) (codified as amended at 7 U.S.C. §§ 2301-2306 (2012)).

45. *See, e.g.*, Mims v. Cagle Foods JV, LLC, 148 F. App'x 762 (11th Cir. 2005).

46. *See, e.g.*, Iowa Code §§ 579B.1(7), 579B.2, 579B.3 (2013).

47. *See* Iowa Code §§ 562.6 to 526.7 (2013). For a discussion of Iowa's farm tenancy law, see generally Neil D. Hamilton, *Legal Aspects of Farm Tenancy in Iowa*, 34 Drake L. Rev. 267 (1985).

48. Payment limits were first introduced into federal farm programs in the 1970s and were designed to limit the impact of the programs in driving farm consolidation and to limit public criticism of program largesse, with the limits fluctuating over time but typically being around $50,000 per entity. The legal issues related to payment limitations are multiple and include such issues as the three-entity rule and various business arrangements to maximize the number of eligible entities. *See generally* 7 U.S.C. § 1308 (2012); Food Conservation and Energy Act of 2008, Pub. L. No. 110-234, § 1603, 122 Stat. 923.

49. The conservation cross compliance provisions, first enacted in 1985 as part of the Conservation Title of the 1985 farm bill, have played the essential role of integrating compliance with conservation requirements such as swampbuster (limiting the draining of new wetlands) and sodbuster (limiting the plowing of new lands) for purposes of entering the farm programs.Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1506 (codified as amended at scattered sections of 7 U.S.C., 15 U.S.C., 16 U.S.C., and 21U.S.C.). For a discussion of the provision in the context of soil stewardship, see generally *Green Future*, *supra* note 37; Neil D. Hamilton, *Legal Issues in Enforcing Federal Soil Conservation Programs: An Introduction and Preliminary Review*, 23 U.C. Davis L. Rev. 637 (1990).

farm programs, with the exception of subsidized crop insurance. These two progressive "reforms" were designed to prevent farm subsidies from driving further consolidation in farm size and to protect the public interest in conservation soil and water, in exchange for the billions of dollars in public subsidies provided to agriculture every year. But these restraints on the operation of federal farm programs are threatened and may disappear if direct farm payments end and Congress does not re-link the limitations with federally subsidized crop insurance. Predictably, throughout 2012 most agricultural groups opposes both payment limits and linking conservation with crop insurance,[50] arguing such requirements are unfair to farmers and will limit the farmers' ability to be efficient and feed the coming nine billion people the world expects by 2050.

E. Laws that Could be Effective if Officials were Willing to Enforce Them

A good example to fit this category is the Iowa law imposing a duty of soil stewardship on all landowners[51] that the Iowa Supreme Court held constitutional in 1979.[52] A second example is the laws relating to livestock feeding permit requirements and compliance with manure management plans.[53] Many livestock feeding operations large enough to require permits have never obtained them, and the level of scrutiny applied to manure management plans once they are filed with the state depends on whether sufficient funds are provided to hire inspectors for the purpose.

F. Laws Based on Reasonable Ideas but Which Were Extended Beyond the Original Purpose

The best examples of this category are many state "right to farm" nuisance suit protections.[54] In their original conception, the laws were designed to codify the "coming to the nuisance" defense and pro-

50. *Compare* Register's Editorial, *Farmers Need the Carrot, and the Stick*, Des Moines Register, Dec. 21, 2012, at 12A (stating that Iowa stats show excessive ag pollution; farm bill needs to include conservation tie-in), *with* Craig Hill, *More regulations not the answer to soil conservation*, Des Moines Register, Dec. 30, 2012, at 1OP.

51. *See* Iowa Code §161A.44 (2013).

52. Woodbury Cnty. Soil Conservation Dist. v. Ortner, 279 N.W.2d 276 (Iowa 1979).

53. *See, e.g.*, Iowa Code § 459.312 (2013) (requiring livestock producers to develop and submit to state officials a manure management plan).

54. I have written extensively about right to farm laws over the years, beginning in the late 1980s. *See, e.g.*, Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty State Analysis*, 10 J. Agric. Tax'n & L. 99 (1988); *see also, e.g.*, Nebraska Right to Farm Act, Neb. Rev. Stat. §§ 2-4401 to -4404 (2012).

tect farms that existed prior to a change in the neighborhood, for example when a person moved next door, or before existence of the zoning which typically comes with annexation. But the reality is that many states took the idea and applied it much broadly to protect any livestock facility meeting regulatory requirements, even those in existence after the neighboring homes. This action, in effect, turned the laws into a "right to commit nuisance" rather than a right to farm. The concern about the impact of such legislative rebalancing of neighboring property rights led the Iowa Supreme Court in 1999 to strike down as unconstitutional one of the state's three right to farm laws.[55]

Another legislative idea that may, in some contexts, have outlived its usefulness is the exemption under the Clean Water Act[56] for nonpoint source pollution. The reality is that many agricultural activities considered to be nonpoint sources, such as run-off from farm fields, can be found in identifiable "point sources," such as the outlets for field drainage tile and the nozzles of spray rigs or manure injectors.

G. Activities Now Treated as "Private" or Unregulated Which May Need Legislation

In this regard, two categories of land-related activity common in farm country are not typically subject to either recording or regulation. The first is the signing of wind easements that can encumber farmland for generations.[57] The second is the installation of field tile that significantly increase the quantity and speed with which rainfall is discharged into streams and rivers.[58]

H. Foolish Ideas Designed to Protect Agriculture but Typically Used to Silence Critics

In this category there are a variety of ideas that have been developed in recent decades to protect agriculture from what is perceived to be unfair attention or scrutiny. These ideas include the following: a) food product disparagement laws, b) cheeseburger, obesity shield legislation, c) laws expanding the retail sale of raw milk,[59] and d) "ag

55. Bormann v. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1988), *cert denied*, Girres v. Bormann, 119 S. Ct. 1096 (1999).

56. 33 U.S.C. § 1251 (2012).

57. In 2004, Kansas enacted a provision to record wind agreements. *See* Kan. Stat. Ann. § 58-2272 (2012).

58. Todd Neeley, *Minnesota Urged to End Tiling Exemption*, DTN Progressive Farmer (Oct. 29, 2012), http://www.dtnprogressivefarmer.com/dtnag/common/link.do;jsessionid=F00B215C0944A74A8F4DB3D29F8C053E.agfreejvm2?symbolicName=/free/news/template1&product=/ag/news/bestofdtnpf&vendorReference=0cf7aea6-4215-4d9a-a056-582066285d77__1351539257152&paneContentId=88&paneParentId=0.

59. A debate is raging in many states over legislation to legalize the sale of raw milk. *See, e.g.*, *Cow Share Agreements Will Start Raw Milk Flow in Wyoming*, Food

gag" laws to prohibit people from filming farming practices and relating disclosures.[60] Two popular examples of such laws are the food product disparagement acts adopted by eleven states, and the laws enacted by three states to protect livestock producers from "undercover" filming by animal activists who obtain employment to search for inhumane acts.[61] Food product disparagement laws are back in the public's attention in connection with the 2012 controversy over "pink slime" or lean, finely textured beef ("LFTB"). The controversy led the company producing LFTB to sue ABC News and others under the South Dakota Food Product Disparagement Act.[62] The politics and emotions involved in these issues, food quality and animal welfare reforms and livestock production, are real and cannot be minimized. However, it is legitimate to ask whether using the law to limit the ability of citizens to raise concerns about the safety of food products or the ethics of production practices, laws that may raise First Amendment issues such as chilled speech and open public debate, are really the wisest approach to "defend" the interests of agriculture. As my students often observe, "Doesn't the need for such laws indicate people have something they want to hide?"

V. CONSIDERING THE CHARACTERISTICS AND VALUES OF AGRICULTURAL LEGISLATION

A third way to classify and analyze agricultural legislation is to consider the values and motivation of the parties proposing the laws. Your reaction may be, "How is this possible? The statute books don't tell you who proposed or supported most laws?" This may be true, but

---

SAFETY NEWS (Sept. 21, 2012), http://www.foodsafetynews.com/2012/09/cow-share-agreements-will-start-raw-milk-flow-in-wyoming/#.URbAukRQ3cG; *Minnesota Jury Says Egg Farmer Who Delivered Raw Milk Is Not Guilty*, FOOD SAFETY NEWS (Sept. 20, 2012), http://www.foodsafetynews.com/2012/09/minnesota-jury-says-egg-farmer-who-delivered-raw-milk-is-not-guilty/#.URbAgERQ3cE. For a discussion of the legal issues involving raw milk, see FARM-TO-CONSUMER LEGAL DEF. FUND, http://www.farmtoconsumer.org/ (last visited May 26, 2013).

60. A. G. Sulzberger, *States Look to Ban Efforts to Reveal Farm Abuse*, N.Y. TIMES (Apr. 13, 2011), http://www.nytimes.com/2011/04/14/us/14video.html?_r=0.

61. *See, e.g.*, MO. REV. STAT. §§ 578.005, 578.013 (2012); IOWA CODE § 717A (2012); Kevin C. Adam, Note, *Shooting the Messenger: A Common-Sense Analysis of State "Ag-Gag" Legislation under the First Amendment*, 45 SUFFOLK U. L. REV. 1129 (2012); Dan Flynn, *Common Element for 2013's "Ag-Gag" Bills: Quick Reporting*, FOOD SAFETY NEWS (Jan. 28. 2013), www.foodsafetynews.com/2013/01/quick-reporting-only-common-element-for-this-years-ag-gag-bills/#.URbEnERQ3cE (noting the bills introduced in New Hampshire, Wyoming, and Nebraska in 2013 focus more on requiring notification of evidence of animal cruelty, as opposed to the laws passed in 2012 in Utah, Iowa, and Missouri, which focus more on criminalizing the conduct of the employees who went undercover).

62. *See* S.D. CODIFIED LAWS § 20-10A (2012); Grant Schulte & Chet Brokaw, *Lawyers say 'Pink slime' lawsuit uphill climb*, AP (Sept. 14, 2012), http://bigstory.ap.org/article/lawyers-pink-slime-lawsuit-uphill-climb.

as students in my Legislation class learn, it is always important to consider the values reflected in any legislative idea. Whether you do so in considering the mischief rule, i.e. when legislation is proposed to address conduct someone finds problematic, or in asking whose behavior the law impacts, asking why a bill was proposed is always helpful. That is why the discussion is in the form of the questions most helpful to consider.

A. What or who Is the Source of the Legislative Idea?

Is it a model bill being promoted by a special interest group like the food products disparagement acts of the 1990s? Or is the idea the product of a legislative committee or bill drafter and designed to respond to a specific issue, such as legislative reforms developed through the state bar associations?

B. Is the Legislative Change Narrowly Drawn and Addressed to a Discrete Legal Issue or Is it Broader?

Is the legislation narrowly drawn, such as the Iowa law changing whether the landowner or the tenant owns stover (corn stocks) under a farm lease?[63] Or is the legislation more complex and involved, such as the recently considered California Proposition 37 on GMOs labeling? Rather than being the straightforward idea suggested by the press coverage, the language of Proposition 37 was over five pages and included a variety of semi-related topics such as who can use "natural" labels on foods.[64] It is fair to ask whether trying to address so many issues, resulting in complex legislation, contributed to the campaign to defeat it? If there is a lesson for other states, such as Washington

63. The amendment to Iowa Code §562.5A (2013), occurred in 2010 as a result of interest in producing cellulosic ethanol and the growing market for corn stalks. The provision, which flipped the traditional common law ownership of crop residue in Iowa, read: "Unless otherwise agreed to in writing by a lessor and farm tenant, a farm tenant may take any part of the aboveground part of a plant associated with a crop, at the time of harvest or after the harvest, until the farm tenancy terminates as provided in this chapter." For a discussion of the provision and its impact, see Jack W. Leverentz, Note, *Corn Flakes Aren't Just for Kellogg's: A Look at Corn Stover and Its Effect on Leasing in the Landlord-Tenant Relationship*, 17 Drake J. Agric. L. 511 (2012).

64. *See* Stephanie Stro, *Uneasy Allies in the Grocery Aisle*, N.Y. Times, Sept. 14, 2012, at B1, *available at* http://www.nytimes.com/2012/09/14/business/california-referendum-pits-organic-brands-against-corporate-parents.html?pagewanted=all&_r=0; Julie Jargon & Ian Berry, *Dough Rolls Out to Fight 'Engineered' Label on Food*, Wall St. J., Oct. 25, 2012, at B1, *available at* http://www.popbuzz.me/us/p/702942/; *Prop 37: Genetically Engineered Foods Labeling. Initiative Statute*, Calif. General Election, http://voterguide.sos.ca.gov/propositions/37/index.htm (last visited May 26, 2013).

where the next GMOs initiative may take place,[65] it is keep the message and the legislation simple, or risk losing the fight.

C. Does the Law Address a Specific Legal Dispute or Social Issue?

The farm crisis of the 1980s resulted in the passage of many different laws designed to protect farm debtors and to alter the procedures for enforcing farm debts. Some of the laws made significant changes in the existing legal rules. For example, requiring mediation was proposed as a way to prevent banks from automatically foreclosing on farmers without first negotiating. But even though some changes were significant, the political and social support, even from the banking industry, was substantial. There was wide spread recognition that flooding the courts with farm foreclosures was a serious problem that required the state to act.

D. Is the Law Procedural in Nature, Such as Adding a Right to Cure Defaults or is the Law More Substantive?

If the law changes the parties' rights or status, such as allowing a separate redemption of a homestead at fair market value, it is going to be harder to enact. In situations where the law simply changes a procedure, the ability to generate political support is enhanced and the possible due process concerns, especially if the change is made retroactive, are diminished. Conversely, if the legislation proposes a substantive change, such as a rebalancing of the party's rights or interests, for example expanding the size of homestead exempt from foreclosure, then the political fight can be predictably sharp and the due process concerns real.

E. How Does the Law Change the Status Quo of the Existing Law?

If the legislation creates a new right or procedure, such as a right of first refusal to repurchase land previously subject to foreclosure, or alters the previous law, such as codifying a right to farm protection, it creates winners and losers. If legislation is viewed as created winners and losers then the political lines over its consideration—or subsequent judicial challenge—are easy to predict. The potential success of the legislation will, in part, be a function of the political and legislative influence of the groups affected. When you pit farmers against

65. For a general discussion of the Washington Initiative 522, see *Campaign to Label GM Foods Moves to Washington State*, Food Safety News (Jan. 4, 2013), http://www.foodsafetynews.com/2013/01/campaign-to-label-gm-foods-moves-to-washington-state/#.URdAoWeGPtg.

bankers, the result may be different than pitting farmers against farm workers or environmentalists, depending on the nature of the issue involved.

F. Does the Law Create a New Right or Duty That Didn't Exist Before?

When legislation makes an incremental change in existing law, the task of explaining the need for the action may be relatively simple. Often the idea will be to improve the effectiveness of the law or to remove an unintended impact of the original act. But when the legislation creates a new obligation or program, the political effort may be much harder to achieve. Consider the difficult history of the Conservation Security Program ("CSP"), a major achievement by Senate Agricultural Committee Chair Tom Harkin in the Farm Security and Rural Investment Act[66] ("the Farm Bill of 2002"). While the program was included in the law, the subsequent actions of Congress to limit its funding and of the USDA to complicate its development greatly delayed the program's implementation to this day. A similar story can be seen in implementing the federal rules for organic food. While organic foods are one of the most successful parts of today's food system, federal regulations for organic foods remain spotty. The federal law was enacted by Congress in 1992, but the program languished for almost a decade because the USDA leadership at the time was not interested in developing an alternative food supply. To this day, the USDA considers organics to be simply a marketing issue rather than a food safety concern as most consumers view the organic label.

G. Does the Law Limit Access to the Courts or Restrict What People Can Say or Do?

Agriculture has been the subject of many laws which fall into these restrictive categories. For example, right to farm laws enacted in all fifty states only work by making other landowners live with activities, which but for the laws, would be ruled a nuisance by the court. Similar ideas to limit the access to the courts are found in the common sense consumption laws, designed to limit lawsuits against food companies based on obesity or related health issues, aka cheeseburger obesity shield laws. The United States House of Representatives actually passed a version of such a law that failed in the Senate. However, the idea of "commonsense consumption" designed to prevent litigation involving food is still considered at the state level. For example, the Minnesota Legislature passed such a bill in 2011 only to

66. Pub. L. No. 107-170, 116 Stat. 134 (2002).

see it vetoed by the state's governor.[67] Such legislative action raises due process concerns.

H. Does the Law Create a Right or Remedy Capable of Enforcement?

Given the dominant role of legislation as the source of law in society and our increasing resort to it to achieve our goals, it can be expected that many people believe "let's pass a law" is the answer to most questions. However, the fact that a law can be enacted does not mean it will be effective or even enforceable. Issues of preemption may come into play, as is the current situation with the struggle between the growing number of states passing laws to legalize medical—and even recreational—use of cannabis. These states face the unyielding view of the federal authorities that the plant is a Schedule One drug under federal law, and all local efforts to legalize its use are illegal.[68] A similar exercise in legislative futility can be seen in the effort by several Maine communities to enact what are referred to as food sovereignty ordinances, purporting to prevent the application of federal food safety laws in their jurisdiction.[69] While such actions may be effective in making a statement, these actions ignore the structure of our legal system, and the ideas of supremacy and preemption that control the interplay of laws created by different jurisdictions of government.

VI. CONTRASTING PERSPECTIVES ON THE FUTURE OF AGRICULTURE AND LEGISLATION

One important question emerging from the evolution of farming concerns is the appropriate role of government and law, and the related question of whose interests are being served. During his time in office, Secretary of Agriculture Tom Vilsack has courageously, if somewhat naively, taken the view that the USDA should serve all farmers regardless of their size, and all eaters regardless of their means. Programs such as the Know Your Farmer Know Your Food initiative and the Secretary's constant message to USDA employees to expand rural economic opportunities through local and regional food production

67. *See* Personal Responsibility in Food Consumption Act, H.F. 264, 87th Leg., 2d. Reg. Sess. (Minn. 2011) (vetoed on May 27, 2011).

68. *See generally, e.g.*, Doug Fine, Too High to Fail: Cannabis and the New Green Economic Revolution (Gotham ed. 2012); Greg Campbell, Pot, Inc.: Inside Medical Marijuana, America's Most Outlaw Industry (Sterling ed. 2012).

69. *See, e.g.*, Beth Quimby, *A Growing Concern: As Small Farms Once Again Take Root Across Maine's Agricultural Landscape, Some People Wonder: Are State and Federal Food Safety Laws Standing in their Way?*, Portland Press Herald (Apr. 24, 2011), http://www.pressherald.com/news/growing_2011-04-24.html?pagenum=full.

have earned the Secretary the criticism and the wrath of Big Ag which is threatened by the diversion of attention. The success of "industrial agriculture" is reflected in the agenda that many farm groups adopt, especially the willingness to adopt the anti-regulation and anti-government messages of those who want to be free from public obligations,[70] but still expect the public to continue providing subsidies, such as crop insurance.

As 2012 came to a close, several events provided a coda to the contrasting perspectives on the future of agriculture, the legislation shaping it, and the shifting nature of farm and food politics. First, as part of the tax reform compromise negotiated to avoid —at least temporarily—the fiscal cliff, Congress included a nine-month extension of the 2008 farm bill, which had expired at the end of September 2012.[71] The failure of Congress to extend existing farm programs before they expired in September was unprecedented and set up a potential return to the 1949 dairy program support prices in early 2013—a factor ultimately leading Congress to act. But the real lesson and surprise from this episode was the inability of the agriculture community to get the House Republican leadership to even schedule a vote on the bill when it was passed by the full agriculture committee in June. House action was needed because the Senate had already passed its version of a bill in July. Because no House vote ever took place, the result was last minute efforts by the committee leaders on both sides to craft an extension to include in the fiscal cliff negotiations.[72] But to the surprise of committee leaders and the dismay of most observers, the farm bill extension included was drafted by Senate Minority Leader Mitch McConnell without involvement of committee leaders and without reference to the reforms the committees had crafted during their own legislative mark-ups. The impotency of the agriculture sector and the willingness of House leaders to ignore their concerns were bitter pills, and perhaps lessons in a new political reality of whether farm issues are respected by Congress.

A second post-election event that continues to reverberate is a speech Secretary Vilsack made on to the 2012 Farm Journal Forum in

---

70. *See, e.g.*, John M. Broder, *Bashing E.P.A. Is New Theme in G.O.P. Race*, N.Y. TIMES, Aug. 18, 2011 at A1, *available at* http://www.nytimes.com/2011/08/18/us/politics/18epa.html?_r=0.

71. *See, e.g.*, Christopher Doering, *Partial Farm Bill Extension Included in Package*, DES MOINES REGISTER, Jan. 2, 2013 at 6A; Christopher Doering, *Farm Bill: Extension Leaves Farmers with an 'Era of Uncertainty'*, DES MOINES REGISTER, Jan. 3, 2013 at p8B; *see also* American Taxpayer Relief Act of 2012, Pub. L. 112-240, 126 Stat. 2313.

72. *See, e.g.*, Ron Nixon, *Stalled Farm Bill Is Pushed for Its Savings*, N.Y. TIMES (Dec. 5, 2012), http://www.nytimes.com/2012/12/06/us/politics/stalled-farm-bill-could-help-with-deficit-reduction.html?_r=0.

Washington D.C.[73] The key message of his speech was to warn rural and agricultural interests of the need to be more strategic in picking political fights or risk losing relevancy in a changing political environment. He suggested that rather than engage in politicized campaigns over dubious concerns such as EPA regulating dust, new child labor rules, and fights over animal welfare, agriculture needed a positive message, one to bring new people into agriculture. While the main theme of the Secretary's speech was agriculture's continuing importance, the press coverage varied greatly depending, it appears, on whether reporters read the Secretary's remarks. Some press coverage portrayed the Secretary as declaring rural America was becoming irrelevant[74]—a theme Republican farm state politicians were quick to criticize, even if it required mischaracterizing his remarks. Other reporters focused on his political theme and saw his remarks as an effort to encourage agriculture to be more strategic.[75] One revealing response to the Secretary's talk came in an opinion piece posted to the Brownfield Agriculture News site by Steve Kopperud, a leader in the agricultural feed industry, perhaps most famous legislatively as the author and force promoting state food product defamation laws in the late 1990s. In his article, "Relevant advice, Mr. Secretary," Kopperud began by noting his general agreement with the Secretary's statements about the importance of agriculture and the message it has to market.[76] But he proceeded to suggest that the Secretary and the USDA are largely responsible for any problems conventional agriculture has in terms of public appreciation. Kopperud noted,

> Perhaps someone's trying to redress their perception of an imbalance, but it's apparent to me that based upon the amount of time, manpower, ink, paper and electrons USDA expends promoting organic production, natural production, farmers markets, local production, and unpopular school lunch mandates and just about any system that isn't conventional agriculture the majority of U.S. farmers and ranchers

73. *See* Tom Vilsack, Sec'y, USDA, Remarks at 2012 Farm Journal Forum as Capstone Keynote Speaker (Dec. 6, 2012), *available at* http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2012/12/0357.xml.

74. *See, e.g.*, Christopher Doering, *Vilsack Says Slide in Rural Relevance Is Impeding Progress on Farm Bill*, DES MOINES REGISTER (Dec. 7, 2012), http://discussions.agweb.com/showthread.php?16812-Vilsack-says-slide-in-rural-relevance-is-impeding-progress-on-farm-bill).

75. *See, e.g.*, Mary Clare Jalonick, *Tom Vilsack, USDA Chief: Rural America Becoming Less Relevant*, HUFFINGTON POST (Dec. 8, 2012), http://www.huffingtonpost.com/2012/12/08/tom-vilsack-rural-america_n_2263568.html?utm_hp_ref=politics.

76. *See* Steve Kopperud, *Relevant Advice, Mr. Secretary*, BROWNFIELD AG NEWS FOR AM. (Dec. 14, 2012), http://brownfieldagnews.com/2012/12/14/relevant-advice-mr-secretary/.

> also may lack certain relevance with USDA's and the Administration's "proactive" messaging agenda.[77]

He acknowledged that the USDA's constituency includes all the American public, no matter their dietary habits or philosophy, but he concluded by saying the Secretary and the USDA should be doing the same kind of "cheerleading" for conventional agriculture as they do for "buy local" and organics.

That, in a nutshell, may explain how the shift in the structure of agriculture impacts politics and legislation and illustrates how the stages of agricultural legislation are playing out in real time. Rather than be concerned that the politicians supported by most farmers and farm groups were unable to even obtain a House vote on the most important national law to shape agriculture, the real fear of Big Ag is that the Secretary and the USDA may support the post-industrial "real food" agenda rather than be cheerleading for the continued growth in industrial farms.[78]

VII. CONCLUSIONS – OBSERVATIONS ABOUT LEGISLATION AND SUGGESTIONS FOR LAWS WE NEED

This Article has been an opportunity to consider the scope and impact of agricultural legislation and to reflect on the changing political environment for how we use legislation. As a student of the law and a practitioner of lawmaking, I never cease to be awed by the power of legislative drafting. I try to impress on students in my Legislation class that the power and potential of lawmaking rests in our ability to take a blank piece of paper and harness the creative power of law and the technologies of justice to address society's needs. This potential is timeless and in many ways unlimited; even our constitutions began as legislation and can be amended by it. In closing I want to share my observations about legislation and its use, and to suggest a series of social issues that lend themselves to legislative action. First, here are my observations:

---

77. *Id.*

78. The pace of change in the shift in food politics and legislation may require patience. *See, e.g.*, Mark Bittman, *Fixing Our Food Problem*, N.Y. TIMES, Jan. 2, 2013 at A19 (providing an argument that the sustainable food movement is in the early stages of organization and needs a sense of history and patience). Bittman equates the movement to change our dangerous diet—resulting from a hyper-industrial agriculture and food system to a more sustainable one that respects the welfare of animals, the stewardship of natural resources, and the health of people—with earlier movements to abolish slavery, gain the vote for women, and advance gay rights. *Id.* He notes that each of these efforts took decades so rather than be concerned with slow progress the healthy food movement needs to be patient and be more specific in the battles it fights. *Id.* He suggests the two issues that "will have the greatest reverberations in agriculture, health and the environment are reducing the consumption of sugar-laden beverages and improving the living conditions of livestock." *Id.*

1. Laws can be used to support and promote good practices, such as using mediation and having a written lease, and can change people's behavior. The purpose of legislation is to change someone's behavior, otherwise it wouldn't be needed. Therefore one must assume there will be resistance to any idea.

2. Laws cannot modify or stop all oppressive actions by others, such as in contracts, if social forces such as economic domination, unequal bargaining power, or intimidation exist. The law cannot always make unequal parties equal.

3. Laws cannot necessarily overcome all forces, such as the short-term economics making the costs of soil conservation a challenge, or the risks in selling land to new farmers. The law further cannot change the culture or traditions in farming, such as the use of short-term leases or the reluctance of landowners to sell while they are alive.

4. Legislation can be used as a tool to achieve goals, such as permanently protecting wetlands, or as a shield to block actions, such as right to farm protections and exempting farm families from child labor rules.

5. Society's trust and acceptance of law and regulation can ebb and flow over time as a function of the nature of social events and politics. The farm crisis of the 1980s led to legislative protections for farm debtors, and the recent gains of Tea Party like conservatives has strengthened anti-regulation, pro-voluntary arguments.

6. Some laws function at a higher order of preemption and can operate like trump cards with respect to society and the legal system. The idea of private property rights and the Fifth Amendment is a powerful claim frequently wielded to resist land use restrictions, such as protecting habitat for endangered species or restrictions on fertilizer use. Similarly, intellectual property rights for Roundup Ready soybeans can trump traditional farmer rights to save seeds for replanting.

7. Most laws are created by and utilized by non-lawyers, so the critical element in legislative drafting is to provide clear and understandable rules and procedures.

8. The law does not provide an answer to everything. For example, it has been difficult to codify Leopold's idea of a land ethic, or a landowner's duty of stewardship.

9. Legislation is enacted by elected representatives using procedures replete with checks and balances, meaning law does not usually get ahead of society but instead articulates our values. Regulations do not fall from the sky but are the good faith efforts of administrative agencies delegated the power to implement the laws.

10. The representativeness and transparency of the lawmaking function, including judicial interpretation and administrative rulemaking, give citizens confidence in the legitimacy of legislation and is what helps make us a nation of law abiders. To the extent the representativeness of the legislative process or the legitimacy of the government as the source of law is brought into question then the respect for all laws is tarnished. When laws are not followed or enforced, society's respect for law and the integrity of the legal enterprise is corroded.

As the discussion shows, there are various ways to classify and evaluate agricultural legislation. While some laws may be ineffective or of dubious merit, that does not mean legislative tools do not play an important role in building the body of agricultural law. Even more importantly, given the nature of our society's resort to legislation as the preferred method of addressing important societal issues, legislative ideas will play a critical role in the years ahead. To give you some idea of the needs and opportunities that still remain for developing important agricultural legislation, let me conclude with a list of issues important to the future of agricultural law.

1. How to promote longer terms in farm leases to create more stable land tenure.

2. How to encourage landowners to sell land during their lifetimes to new farmers, under favorable terms, rather than waiting until death for any transfers to occur.

3. How to link soil conservation and water quality protection to federal subsidies for crop insurance so some public benefit is reflected in the farm programs.

4. How to increase the protection for contract poultry and livestock growers to provide fair and equitable treatment and how to limit the use of "independent contractor" claims by integrators to avoid legal responsibilities.

5. How to increase the opportunities for on-farm training and apprentice programs so potential "new farmers" can gain ex-

perience, without having the existing farmers who offer the training running afoul of state and federal labor laws.

6. How to increase the opportunities for public recreation and use on private lands, such as trails and hunting and the "open fields" approach, while limiting the liability of landowners and respecting their property interests.

7. How to harness the economic potential in the legalization of medical marijuana and cannabis production so farmers and rural communities can share in the profits and income produced in providing society this valuable medicine.

8. How to promote farming and food production so all citizens, urban homeowners to rural residents alike, have the freedom to use their land, whether a front yard or a back forty or an available public space, to raise food to feed their families.