

# AALA PRESIDENTIAL ADDRESS: CONTENTIOUS ISSUES IN AGRICULTURAL LAW

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## I. INTRODUCTION

A very special thanks to all who have been so supportive of the Association and my presidency. A very special thanks to the Board and Bill Babione and Donna Dunn for the smooth transition in leadership.

It is a daunting task to address professionals. What do I know or what do they want to hear me say? How many can remember anything from a past presidential address? I guess I need not worry that anything I say will be used against me.

My early education was on a Northern Indiana farm, Purdue University, and the University of Notre Dame. I had the good fortune of marrying a Virginian and spending as many years in Virginia as in Indiana. Six of those years were in Northern Virginia with the House Ag Committee, Miles Laboratories, and USDA.

I have spent many nights in Indianapolis—four in a hotel and more than twenty-four in State 4-H camp and the State Fair Hog Barn. Always close to agriculture, one of the first trips I remember was to the big city of South Bend and to the eighth floor of the Sherland building to the Agricultural Adjustment Administration (“AAA”) office. Not much has changed except the AAA office is now on the edge of town. We still farm the Government and call it the Farm

Service Agency. (I own several parcels of agricultural land at the edge of town and in the country.)

After graduation from Purdue, I followed Horace Greeley's advice—go east young man, go east. Thus, the subtitle to my remarks should be, "What I have learned since traveling east."

Just as all politics are local, so is all farming local. The following snapshot from Virginia Agricultural Statistics will provide you with a perspective on Virginia agriculture.<sup>1</sup>

Virginia has 49,000 farms with an average size of 178 acres, an average acre value for farmland and buildings of \$2,350, and around 10,000 full time farmers. We are fifth in turkey production; eighth in broilers; nineteenth in cattle, calves, and hogs; fifteenth in barley production; fifth in Flue cured tobacco; eighth in sweet potato production; twentieth in soybeans; twenty-third in corn production; sixth in peanuts; fourth in fresh tomatoes; and thirteenth in cotton production. We have a large greens industry. We have both the crops of the south and north—apples, peaches, potatoes, peanuts, tobacco and cotton. We are within a day's drive of seventy-five percent of the U.S. population, home of the East Coast Naval fleet, major Government institutions, and the influence of the I-95 corridor. Virginia is about producing food, fiber, the "weed," and the flower.

The invention of the modern reaper, which revolutionized agriculture, was done at Steeles Tavern, Virginia. I still have McCormicks, Carters (King Carter), and Monroes in the classroom, as well as descendents of the revolution and the war of Yankee aggression—the Civil War.

Now for the conclusion of my speech. There are lots of agricultural and food issues that should keep us busy as agricultural lawyers for another century.

Therefore, I have picked out a few of the contentious issues and will make comments about them. The only constant in life is change and that will keep agricultural lawyers busy. My selected issues are: farm policy; the role of food in delivering health to people; the future roles of farmers and professors in agricultural development; the family farm; the death of the death tax or have farmers been sold snake oil; value added agriculture; contract agriculture—the death of or preservation of farmers; farming the tax code with conservation easements; environment; rural growing pains and the internet; fox hounds; and fence law. Do not kill the provocateur or messenger.

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1. VIRGINIA AGRICULTURAL STATISTICS SERVICE, 2001 ANNUAL BULLETIN (2002), available at <http://www.nass.usda.gov/va/>.

## II. FARM POLICY

“George Washington maintained that the debts he had accumulated were not his fault. ‘Mischance rather than misconduct,’ he insisted, ‘hath been the cause of it.’ . . . Washington listed the excuses: bad weather, low tobacco prices, failure of his neighbors to pay their debts, and the unexpectedly high cost of new land and [inputs]. . . . Washington seemed to be saying, an honorable gentleman could not be held accountable for such ‘unlucky’ events.”<sup>2</sup> Farm policy is too important to be left to farmers. Willard Cochrane taught me the role of those who farm the farmers. Ag Lender quotes a 52-year-old Kansas wheat, soybean, and corn farmer as saying, “My banker and I love the new farm law. All I need to do is pop the seed in the ground and raise a crop. I don’t need to worry about marketing, weather, or any of the other risks that I have had in the past.”<sup>3</sup> “I love the new farm law. It assures lots of production and continued low commodity prices,” added a major flour miller and baker.<sup>4</sup> A one thousand acre corn/soybean/wheat producer will net an additional ten thousand dollars annually on the new law, according to a Doane economist.<sup>5</sup> And, it has already been capitalized into the land.

In *Catch 22*, Joseph Heller writes, “He was a long-limbed farmer, a God-fearing, freedom-loving, law-abiding rugged individualist who held that federal aid to anyone but farmers was creeping socialism.”<sup>6</sup> Milton Friedman has observed, “There’s only one place where inflation is made: that’s in Washington . . . in response to pressures from the people at large. . . . The voting public . . . ask their Congressmen to enact goodies in the form of spending, but they are unhappy about having taxes raised to pay for those goodies.”<sup>7</sup>

Farm programs will continue to change the structure, profitability and local landscape. The peanut program will move the production from the birthplace of presidents, west to Texas. Lentils, a crop so ancient that it was mentioned in Genesis, survived for years without Government assistance. Lentils have arrived. They now receive help from Congress and the President.<sup>8</sup> Chickpeas too.<sup>9</sup> It is

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2. T.H. BREEN, *TOBACCO CULTURE: THE MENTALITY OF THE GREAT TIDEWATER PLANTERS ON THE EVE OF THE REVOLUTION* 149 (Princeton Univ. Press 1985).

3. Lynn Henderson, *Leading Off*, *AG LENDER*, June 2002, at 3.

4. *Id.*

5. *Id.*

6. JOSEPH HELLER, *CATCH-22*, at 79 (Dell Publishing 1990) (1955).

7. Source on file with author.

8. See Robert Pear, ‘Freedom to Farm’ Law Becomes Freedom to Add Subsidies, *N.Y. TIMES*, June 6, 2002, at A24.

9. See *id.*

reported that they need subsidies to help compete with other “crops subsidized by the federal government, or with crops subsidized by foreign governments.”<sup>10</sup> Ginseng, onions, apples, and catfish were all added to the federal till.<sup>11</sup> I am waiting for shitake mushrooms, or did I miss that?

Some of our farm policy programs seem to depend on the rabbit’s foot. But, as R.E. Shay has stated, “Depend on the rabbit’s foot if you will; but remember, it didn’t work for the rabbit.”<sup>12</sup>

### III. ROLE OF FOOD AND HEALTH

The role of food, the promotion of health, and the cure for our ills are likely to be major issues in the future. The role of the Internet as a source of information and misinformation will, in fact, require more informed legal advice for the agricultural sector. MSN Health with WebMD states that one expert believes changing the diet of cows could cut cases of cancer.<sup>13</sup> “Hundreds of bottles of vitamins, aisles of exotic herbal remedies”<sup>14</sup> all promote “health in a bottle.” Can food deliver health or health services?

Food recalls by the major players, such as Pilgrim’s Pride recalling 27.4 million pounds ready-to-eat chicken and turkey products fearing that they may carry *Listeria Monocytogenes* bacteria and ConAgra’s recall of 19 million pounds of ground beef in July, are likely to bring forward calls for tougher penalties and added authority for USDA to inspect and recall food.<sup>15</sup>

The Centers for Disease Control and Prevention (“CDC”) estimate that foodborne diseases cause an estimated 76 million illnesses, 325,000 hospitalizations, and 5,200 deaths nationwide.<sup>16</sup> Although CDC states that the numbers are falling<sup>17</sup> like the cranberry scare of the 1960s, the impact on the food industry is

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10. *Id.*

11. *Id.*

12. R. E. Shay, *Cornerstones*, PROGRESSIVE FARMER, Feb. 2002, at 72.

13. Email from MSN Health with WebMD, FOOD & NUTRITION NEWSLETTER, to Leon Geyer, Professor, Dept. of Agric. and Applied Econ., Virginia Tech (Oct. 19, 2002) (on file with Author).

14. *Id.*

15. Elizabeth Becker, *Parents of Sickened Children Ask for Tighter Rules on Food*, N.Y. TIMES, Oct. 17, 2002, at A22.

16. CDC, *FOODBORNE ILLNESS*, at [http://www.cdc.gov/ncidod/dbmd/diseaseinfo/foodborneinfections\\_t.htm](http://www.cdc.gov/ncidod/dbmd/diseaseinfo/foodborneinfections_t.htm) (last reviewed Mar. 6, 2003).

17. CDC, *FOODBORNE-DISEASE OUTBREAKS REPORTED TO CDC: JANUARY 1, 1990 THROUGH MARCH 15, 2002*, at [http://www.cdc.gov/foodborneoutbreaks/report\\_pub.htm](http://www.cdc.gov/foodborneoutbreaks/report_pub.htm) (last visited

unknown. For the direct farmer marketer—the value added farmer—the concern over product liability has to be explored both as to the cost of compliance with regulations and the impact on the demand at the public market place. Unless these issues are resolved, the problems will give way to charges of “terror at the dinner table.”<sup>18</sup>

It is reported that “12 agencies in the USDA, the EPA and the Department of Health and Human Services spend \$1 billion a year overseeing 35 food-safety laws.”<sup>19</sup> Adding the state dollars on food safety, one must ask if we feel secure that our lunch was not contaminated by bio-terroism or some food borne disease from home or abroad. Who will pay for contamination and or the fear of contamination?

Along with food borne issues will be concern over GMOs. Recently, I was informed about a case where a potential conservation easement donor wants to prohibit planting of “genetically engineered” crops on the land.<sup>20</sup> Imagine a conservation easement in the 1930s that would have prevented the planting of hybrid corn. Enforcement issues, accidental mating of neighbor’s crops, and future science that would allow GMO food to be cancer preventative, will continue to provide work for agricultural lawyers. Imagine your pharmaceuticals being grown in a tobacco plant.

Or, are issues of GMO’s and other forms of biotechnology an impediment to trade? Are they non-tariff barriers to allow countries to prevent the importation of food products? What are the science and the policy issues, the regulatory barriers, and the role of the private sector and the Government in resolution of these issues? The hungry might not care. Yet, it is reported that Zimbabwe, starved for food, rejected U.S. biotech corn.<sup>21</sup> But this only shows us the public dialogue that is needed over the “scientific and political controversy over the risks and benefits of gene-altered food.”<sup>22</sup> What will be the impact of seeds planted in the international environment?

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Apr. 24, 2003) (available under “Outbreak Reporting” link).

18. Becker, *supra* note 15.

19. Dan Miller, *Bioterrorism: Your New War*, PROGRESSIVE FARMER, Dec. 2001, at 24.

20. Posting of Pat Pregmon, Pregmon Law Offices, to landtrust@indiana.edu (Oct. 16, 2002) (copy on file with Author).

21. See Rick Weiss, *Starved for Food, Zimbabwe Rejects U.S. Biotech Corn*, WASH. POST, July 31, 2002, at A12.

22. See *id.*

Will issues like *StarLink* controversies shrink the willingness of consumers to support plant and animal research?<sup>23</sup> Average consumers may see agriculture research as creating problems that did not exist.<sup>24</sup> GMOs were banned in New Zealand, however eight-hundred plants were found contaminated with insect or herbicide resistant genes.<sup>25</sup> But, as the Farm Press<sup>26</sup> headlined, “biotech genie not going back into bottle.” The battle of pesticides and the risk associated with them will also continue.<sup>27</sup> In short, scientific issues will be with us forever. Food safety,<sup>28</sup> bio-terrorism, and GMOs will remain issues and how farmers plug into them from a regulatory and liability standpoint will remain on the agenda.

In Brazil, GMOs are an issue in the presidential election with one of the candidates openly opposed to GMOs. Not war or the economy, but GMOs are the political issues.<sup>29</sup>

#### IV. ROLES OF FARMERS AND PROFESSORS

The role of science and farming was a concern of the early founders of our society.<sup>30</sup> Using science to “penetrat[e] some of the hidden laws of nature, and tracing the useful purposes to which they may be made subservient”<sup>31</sup> was a goal of Madison and Jefferson among others.

“[Will] universities [be] for sale” as cuts in state and federal funding force universities to look elsewhere for dollars?<sup>32</sup> Who will be the honest broker of information? Professors? Or will they be hired guns?

Our own conference will be followed with “the Mecca of non-toxic farming” December 12-14, 2003 here in Indianapolis.<sup>33</sup> One of the organizers

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23. David Debertin, *Yo Quiero Taco Bell Amarillo*, CHOICES, Spring 2002, at 31.

24. *Id.*

25. Wayne Wenzel, *New Zealand Unwittingly Grows GM Corn*, FARM INDUS. NEWS, Oct. 18, 2002, available at [http://farindustrynews.com/ar/farming\\_new\\_zealand\\_unwittingly/index.htm](http://farindustrynews.com/ar/farming_new_zealand_unwittingly/index.htm).

26. Harry Cline, *Biotech Genie Not Going Back Into Bottle*, WESTERN FARM PRESS, Oct. 21, 2002, available at [http://westernfarmpress.com/ar/farming\\_biotech\\_genie\\_not/index.htm](http://westernfarmpress.com/ar/farming_biotech_genie_not/index.htm).

27. Hembree Brandon, *Pesticide Alarmists Don't Present Full Picture, Author Says*, WESTERN FARM PRESS, Oct. 18, 2002, available at [http://westernfarmpress.com/ar/farming\\_pesticide\\_alarmists\\_dont/](http://westernfarmpress.com/ar/farming_pesticide_alarmists_dont/).

28. See generally <http://www.foodsafety.gov> (last updated Feb. 28, 2003).

29. Wayne Wenzel, *Brazil's GM Seed Fiasco*, FARM INDUS. NEWS, Oct. 18, 2002, available at [http://farindustrynews.com/ar/farming\\_brazils\\_gm\\_seed/index.htm](http://farindustrynews.com/ar/farming_brazils_gm_seed/index.htm).

30. See THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 351 (Marvin Meyers ed., Univ. Press of New England 1981) (1973).

31. *Id.* at 352-53.

32. Jim Patrico, *Universities for Sale?*, PROGRESSIVE FARMER, Nov. 2001, at 22.

states that “every input of conventional agriculture is now under fire—water use, chemical use, genetically modified crops.”<sup>34</sup> Will conventional farmers seek to tap this knowledge? Will conventional farmers become organic farmers? What is the role of the legal profession in this area?

#### V. THE FAMILY FARM

What is a family farm and should we preserve it? “Those who labor in the earth are the chosen people of [G]od, if ever [H]e had a chosen people, whose breasts [H]e has made [H]is peculiar deposit for substantial and genuine virtue.”<sup>35</sup> “Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, [and] they are tied to their country [and] wedded to its liberty [and] interest by the most lasting bands.”<sup>36</sup>

Willie Nelson says:

A family farm is one where the farmer, living and working on his or her own land, makes all the decisions about what to grow and how to grow it, and most of the work is done by the farmer and his or her family. This is different from a farm where production decisions are made by people not connected to the land and the community.<sup>37</sup>

Leland Swenson of the Farmers Union says a family farm is “a unit using land and other capital investments operated by one farm operator and his or her family who provide the management. But . . . what really separates a family farm from other farms is that it is not vertically integrated. . . .”<sup>38</sup> Does this mean that those who direct market to the consumer—vertical integration—are not family farmers?<sup>39</sup> There are many definitions of a family farmer, but does it matter in this day and age? As a national policy, we have not been able to save the

33. Posting of Office@strauscom.com to Conference@strauscom.com (Oct. 5, 2002) (copy on file with Author).

34. *Id.*

35. JOHN P. KAMINSKI, *CITIZEN JEFFERSON: THE WIT AND WISDOM OF AN AMERICAN SAGE* 4 (John P. Kaminski ed., Madison House 1994) (quoting Thomas Jefferson from Notes on the State of Virginia, 1782).

36. *Id.* (quoting Thomas Jefferson to John Jay, Paris, Aug. 23, 1785).

37. Jack Odle & Jim Phillips, *What is a Family Farm?*, *PROGRESSIVE FARMER*, Dec. 2001, at 21.

38. *Id.*

39. *See id.* at 21-22.

family farm, as we have lost half of the farms since 1960.<sup>40</sup> Maybe we should just admit that agriculture will be a mosaic that includes lifestyle, investment, profit, large farms, value added, niche farming, and contract farmers. Declare all are agricultural and declare victory and move to real issues, not rhetorical issues.

## VI. DEATH TAX

As the Wall Street Journal stated, “Surely, labeling it ‘the death tax helped some,’ . . . Even if you don’t have an ‘estate,’ you can’t help but think that a ‘death tax’ will hit you.”<sup>41</sup>

The death tax is not dead, just in slumber. The bread and butter of many rural practices is alive, well, and in more need of assistance as the states react to the federal steps and missteps. If it is repealed, maybe farmers and land grant educators can focus on the real issues relating to the ability to financially survive. It is reported that in Virginia, seventy percent of the farmland will change hands in the next ten to fifteen years.<sup>42</sup> Three-fourths of the farms sold for development are sold because the family cannot agree on how to divide the estate, not estate taxes.<sup>43</sup> Although IRS data indicates that only a small portion of the tax comes from business and farm assets, the issues of estate taxes date back to 1797.<sup>44</sup>

### A. *The Risk of Premature Death and the Repeal of the Estate Tax*

The Economic Growth and Tax Relief Reconciliation Act has created risk for those who do not plan their death carefully. For example, Katharine Graham, former publisher of the Washington Post, had an estate valued at \$359 million.<sup>45</sup> Assuming charitable gifts, the FOBD exemption, and allowable chari-

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40. *Id.* at 22.

41. Jackie Calmes, *Republicans Discover Appeal of Killing ‘Death Tax’: Good Times Help Make it Politically Acceptable to Support Repeal*, WALL ST. J., Feb. 2, 2000, at B2.

42. Mary Heinrich, *Farmland Protection Could Bring New Federal Funding to Virginia Localities – If We’re Ready*, AMERICAN FARMLAND TRUST, available at [http://www.farmland.org/news\\_2002/061002\\_va\\_oped.htm](http://www.farmland.org/news_2002/061002_va_oped.htm) (last visited Apr. 10, 2003).

43. Press Release, American Farmland Trust, *Farmland Protection Could Bring New Federal Funding to Virginia Localities – If We’re Ready* (June 17, 2002), available at [http://www.farmland.org/news\\_2002/061002\\_va\\_oped.htm](http://www.farmland.org/news_2002/061002_va_oped.htm) (last visited Apr. 10, 2003).

44. Dan Ackman, *Death and Taxes – Still United*, FORBES, June 13, 2002, available at <http://www.forbes.com/2002/06/13/0613topnews.html> (last visited Apr. 10, 2003).

45. Steve Twomey & Christopher Stern, *Mrs. Graham Leaves Art to Freer, Other Galleries*, WASH. POST, July 28, 2001, at B1.

table deduction of \$59 million, her estate tax by year of death is shown in Example 1.

Example 1. Guestimated Estate Tax of Katharine Graham

<u>Calendar Year</u>	<u>Estate Tax Applicable Exclusion Amount</u>	<u>Highest Estate Tax Rate</u>	<u>Taxes Owed</u>
2001	\$675,000	55%	\$164,220,250
2002	\$1 million	50%	\$149,445,000
2003	\$1 million	49%	\$146,475,000
2004	\$1.5 million	48%	\$143,395,000
2005	\$1.5 million	47%	\$140,425,000
2006	\$2 million	46%	\$137,130,000
2007	\$2 million	45%	\$134,160,000
2008	\$2 million	45%	\$134,160,000
2009	\$3.5 million	45%	\$133,425,000
2010	N/A (taxes repealed)	0%	\$ 00.00
2011	\$1 million	50%	\$149,445,000

What lesson do we learn from this information? Conclusion: Ms. Graham should have postponed death until age 93. Bill Gates should die in 2010. If the death tax is wrong as policy in 2010, why is it not wrong as public policy in 2001 or 2011? Is this not an irrational policy? A political lie? Or an unresolved policy issue?

B. *History of the Estate Tax—Revenue Generator or Anti-Primogenitor*

The elimination of the estate tax, or death tax, was a key issue in the past presidential election campaign. Then Governor George W. Bush and Steve Forbes promised to endorse legislation ending estate taxes. Senator John McCain's plan called for the current \$675,000 personal exemption limit to be raised to \$5 million and \$10 million for Ma and Pa. Ignored in the presidential debate and of greater interest to the average farmer and rancher was the issue of a step-up in basis.

The pledge to end the death tax became reality as part of President Bush's first legislative issues.<sup>46</sup> Even with the passage of the estate tax changes,

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46. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 2001 U.S.C.A.N. (115 Stat. 38) 38.

estate taxes are an issue that will continue to be debated. The death tax meets the sunset in 2011. Death to the death tax?

C. *Why an Estate Tax: Revenue, Expedients, Moral Judgment*

Death, inheritance, and estate taxes have been around in some form since 654 B.C.<sup>47</sup> Although many countries impose such taxes, the United States has had one of the highest rates in the world: fifty-five percent on estates over three million dollars.<sup>48</sup> As Barbara Houser writes, society imposes such taxes for a number of reasons.<sup>49</sup> It is politically expedient—the deceased do not complain about its imposition. The taxes produce tax revenue, even if not a lot. Our belief and moral judgment is that income gained from work is better than inherited wealth—or title by primogenitor. We think egalitarianism or equality for all is good. We recognize that, without government, wealth could not be accumulated. We wanted to prevent the massing of large fortunes (robber barons were, in part, the incentive for the 1916 imposition of current estate taxes and to pay for the Civil War, its earliest use). Adam Smith viewed it as a fair tax. Some believe it encourages philanthropy. Resentment and moral values may have helped generate our current estate tax system, whereas “[s]ocial attitudes may now suggest less resentment towards accumulated wealth.”<sup>50</sup> Thomas Jefferson recognized the right of the state to impose such a tax.<sup>51</sup>

D. *Why Be Concerned About Estate Taxes?*

As the debate over estate or death taxes proceeds, a need continues for more information on the impact of the current estate tax system. Estate tax considerations may be an important key to successful transfer of business ownership to the next generation. For those individuals that fail to plan, estate taxes could become an unanticipated cost that prevents their last wishes from being carried out. And without proper information, many farmers and small-scale businesspersons may be overestimating their potential estate tax burden. They may invest in unnecessary insurance and make inefficient use of other estate planning tools.

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47. See Barbara R. Hauser, *Death Duties and Immortality: Why Civilization Needs Inheritances*, 34 REAL PROP. PROB. & TR. J. 363, 366 (1999).

48. See I.R.C. § 2001(c)(1) (West 2000).

49. See Hauser, *supra* note 47, at 363.

50. *Id.* at 401.

51. See *id.* at 390.

On the other hand, some people may be underestimating the effect of estate taxes on their estates and not planning adequately. For those who plan effectively and use some of the many tools available, estate taxes can be managed, and for most farmers, ranchers, and individuals be avoided completely. Change in the estate tax system should be monitored closely and incorporated into a revised plan of action for the estate.

E. *The Political "Death Tax" Debate Masks Real Issues/Problems*

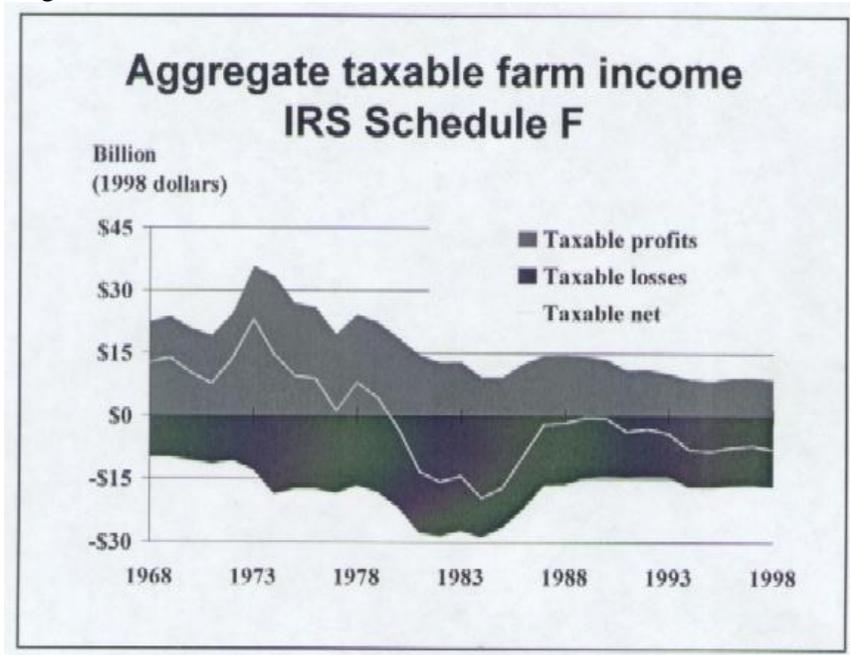
1. *Real Issue #1: Heirs Can't Afford to Buy the Farm*

For most farmers and ranchers estate taxes are not the real problem. For many farmers, the ability to transfer a viable farm to the next generation may be the real problem. For example, assume that Ma and Pa Farmer have a family farm worth two million dollars. Ma and Pa have four children. Jill has stayed on the farm. Bill, Mary, and Jack have been assisted with education and live away from the farm. If Ma and Pa have correctly planned their estate, they will be able to pass the total estate without estate taxes now and in the future. However, if they leave their assets equally to the four children, Jill will have to generate \$112,500 income per year just to pay 7.5% interest on Bill's, Mary's, and Jack's interests in the farm.

The inability of many farms to generate that type of income is more of a problem to farmers than are estate taxes. Even a more modest farm estate of \$900,000 with a family of three children leaves the on-farm heir with an interest bill of \$45,000 per year. When the cost of buying out the non-farm heirs is amortized, the burden increases. Estate planning tools such as insurance or gifts of non-farm assets may assist the farmer in providing some equity to non-farm heirs, but they may not allow for equal treatment of children and the survival of a viable farm operation.

2. *Real Issue #2: Lack of Farm and Ranch Profitability*

Figure 1 is a graphical depiction of the lack of aggregate taxable farm income as show on Schedule F. This may not include the income from Form 4979, which is a major source of income to dairy and beef operations.

Figure 1.<sup>52</sup>

In the year 2000, direct government payments exceeded \$22 billion.<sup>53</sup> These payments represented nearly thirty-one percent of net cash income to farm operators, contractors and landlords.<sup>54</sup> Farmer asset value is likely to be lowered by sixty-nine percent in the Northern Plains and thirty percent in the Corn Belt if government program payments are eliminated.<sup>55</sup>

52. Ron Durst & Jim Monke, *Federal Tax Policy and the Farm Sector*, Agricultural Outlook Forum 2001, Feb. 22, 2001, available at <http://www.ers.usda.gov/Briefing/FederalTaxes/DurstMonkeAgOutlook2001.pdf> (last visited Apr. 22, 2003).

53. James Ryan et al., *Government Payments to Farmers Contribute to Rising Land Values*, AGRIC. OUTLOOK, June-July 2001, at 26.

54. *Id.*

55. *Id.* at 25.

### 3. *Real Issue #3: Nobody Pays Estate Tax Anyway*

As a percent of the federal budget, estate taxes have ranged from two percent in 1968 to three percent in 1972, down to one percent by 1981, and have remained stable at one percent since then.<sup>56</sup> This compares to fifty percent of revenue from individual income taxes, thirty three percent from employment taxes, three percent from excise taxes, and thirteen percent from corporate income and profit.<sup>57</sup>

Estate taxes do not affect that many estates. As a result of the current \$1 million personal exemption for all individuals<sup>58</sup> and the myriad planning tools available, most of the population has little chance that their estates will be required to file, much less pay, estate taxes when they die. As shown in Table 2, from 1989 to 1996, less than 3.5% of adults who died left estates that qualified for estate tax review. Of that 3.5%, slightly less than half have been required to pay an estate tax after deductions and exemptions. On average between 1989 and 1996, only 1.3% of deceased adults left estates that were required to pay an estate tax.

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56. W. Taylor Hudson & L. Leon Geyer, *Estate Tax or Death Tax?*, HORIZONS, Jan./Feb. 2000, available at <http://www.reap.vt.edu/publications/horizons/hor12-1.html> (see Figure 1).

57. W. Taylor Hudson & L. Leon Geyer, *Estate Tax or Death Tax?*, HORIZONS, Jan./Feb. 2000, available at <http://www.reap.vt.edu/publications/horizons/hor12-1.html> (see Figure 2).

58. I.R.C. § 2010(c) (for years 2000 and 2001, the personal exemption amount was \$675,000).

Table 2. Percent of taxed and not taxed estates

Year	Adult Deaths	Estates filing	Estates not taxed	Estates taxed
	-----%-----			
1989	2,079,035	2.4	1.3	1.1
1990	2,079,034	2.4	1.3	1.1
1991	2,101,746	2.6	1.4	1.2
1992	2,111,617	2.8	1.5	1.3
1993	2,168,120	2.8	1.5	1.3
1994	2,216,736	3.1	1.6	1.4
1995	2,252,471	3.1	1.7	1.4
1996	2,322,000	3.4	1.8	1.6

Source: Internal Revenue Service

Historically, the percentage of people whose estates were required to pay estate taxes has not always been as small. From 1953 to 1982, the percentage rose to almost 8.5%. Following legislative changes to credit and exemption levels, the percentage having to pay estate tax again fell below two percent where it has remained.<sup>59</sup>

a. *Where Do Farmers Fit? Do They Pay the "Death Tax?"*

Unfortunately, no source of data exists for the number of farm operators who die each year or for those whose estates were large enough to result in estate tax liabilities for the beneficiaries. Thus, the number of those who fall into the family farm category must be determined indirectly by examining listings of taxable gross estates. Assuming that a deceased farmer's gross estate would include at least a minor amount of farm assets, individuals who listed farm assets were considered to be farmers.

As shown in Table 3, from 1989 to 1996, an average of only 6.4% of taxable estates listed farm assets as part of their gross estate. Since taxable estates averaged only 1.3% over the same time period, a national average of 0.08%

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59. W. Taylor Hudson & L. Leon Geyer, *Estate Tax or Death Tax?*, HORIZONS, Jan./Feb. 2000, available at <http://www.reap.vt.edu/publications/horizons/hor12-1.html> (see Figure 1).

of decedents were farmers having estates required to pay estate taxes.<sup>60</sup> More importantly, the statistic does not reveal how many of these farmers were actually full-time farm operators. Since the deceased of some taxable estates listing farm assets undoubtedly were not full-time operators, the percentage of those taxed that were engaged in full-time agricultural production may be lower than 6.4%.

In 2001, an owner of a farm could have individually passed up to \$1.425 million dollars of farm estate assets without being taxed. The \$1.425 million is comprised of an individual's \$675,000 exemption and a \$750,000 special-use valuation if it can be shown that the assets were used in an agricultural operation.<sup>61</sup>

Table 3. Number of taxable returns, returns listing farm assets and percent of returns with farm assets

Year	Number of taxable returns	Number listing farm assets	% of taxable returns
1989	23,158	1,534	6.6
1990	23,104	1,480	6.4
1991	24,781	1,577	6.4
1992	27,397	1,813	6.6
1993	27,506	1,898	6.9
1994	31,918	1,743	5.5
1995	31,563	2,104	6.7
1996	37,736	2,441	6.5

Source: Internal Revenue Service

If farm assets are held without joint ownership between spouses, and if each spouse qualifies, each spouse could have passed on \$1.425 million in farm estate to the next generation.<sup>62</sup> Between a farming couple, a \$2.85 million estate could be passed to the heirs using only special use valuation and estate exemp-

60. See W. Taylor Hudson & L. Leon Geyer, *Estate Tax or Death Tax?*, HORIZONS, Jan./Feb. 2000, available at <http://www.reap.vt.edu/publications/horizons/hor12-1.html>.

61. I.R.C. §§ 2010 & 2032A (West 2001). The exemption under I.R.C. § 2010 is now \$1 million. I.R.C. § 2010(c) (2002).

62. I.R.C. §§ 2040, 2032A, 2010 (West 2001).

tions. If, however, the property was held jointly, only \$1.425 million could be passed to heirs without an estate tax being incurred.<sup>63</sup>

Under current law, with special planning, many farmers and ranchers can pass \$5 million of assets now and avoid the death tax. Over time, inflation increases the value of farm assets. However, in 2006, with the increase in the estate tax exemption to \$2 million per person,<sup>64</sup> the indexing of the special use valuation (the \$750,000 Sec. 2032A exemption<sup>65</sup>), deduction for transferring development rights (\$500,000<sup>66</sup>), and the use of minority interest valuation in closely held farm and other small business, Ma and Pa Farmer can pass over \$5,000,000 to the next generation without estate tax consequences. This requires planning. Based on 1997 values, that would leave few farmers with estate tax problems. With gifts of ten thousand dollars per person per year, an even larger estate can be passed without payment of estate taxes. Combined with conservation easements outlined below, the estate tax issue is perhaps the wrong issue for the average farmer or rancher.

This observation is further confirmed by reviewing the 1997 Census of Agriculture.<sup>67</sup> The information contained in Appendix A, shows that few “family farmers” have an estate tax problem.<sup>68</sup> ERS, USDA, ARMS data “suggest that the non-farm portion of farm estates was only about seventeen percent with land and buildings accounting for about seventy-five percent and other business property accounting for the remaining portion.”<sup>69</sup> In a given year, only about two hundred farm estates are larger than \$3 million.<sup>70</sup>

#### b. *Mixed Review*

In reporting on the repeal of the estate tax, the National Cattlemen’s Beef Association reported as follows:

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63. *Id.*

64. I.R.C. § 2010 (2002).

65. I.R.C. § 2032A (2002).

66. I.R.C. § 2031(c) (2002).

67. *See* NAT’L AGRIC. STATISTICS SERVICE, USDA, 1997 CENSUS OF AGRICULTURE, available at <http://www.nass.usda.gov/census/> (last visited Apr. 22, 2003).

68. *See id.* (Appendix A available under “Agricultural Economics & Land Ownership Survey” link).

69. Email from Ron Durst, Senior Economist, USDA, to L. Leon Geyer, Professor, Dept. of Agric. & Applied Econ., Virginia Tech (Oct. 17, 2000, 11:23:33 EST) (on file with author).

70. Michael Compson & Ron Durst, *Agricultural Economy: Tax Provisions to Benefit Farm & Rural Economy*, AGRICULTURAL OUTLOOK, Oct. 1993, at 4.

A ranch with 270 to 280 mother cows, worth approximately \$1 million, after annual business expenses are paid, nets about an estimated \$11,000.00 from the annual sales of calves. This same ranch would be liable for an estate tax of an estimated \$125,000 - more than [ten]-fold the annual ranch income. With repeal of the death tax, money currently spent to pay the tax or life insurance premiums can be re-invested in the business and ranch land and open spaces can be maintained. According to the U.S. Treasury, individuals with farm assets or liabilities account for 16.3 percent of all "Death Tax" liability. Repeal brings total saving for American agriculture. Since most ranches are family owned businesses, a major portion of these savings will be America's cattle producers.<sup>71</sup>

See Table 4 for type and size of cattle operations that are really impacted by the estate tax.

Ironically, the Cattlemen's press release emphasizes Real Issues 1, 2, and 3 above. The million dollar farmer has no estate taxes now, is marginally profitable, and one child cannot afford to buy out one or more siblings. Assuming Ma and Pa farmer or rancher do minimal planning, under today's estate rules, less than three percent have any worries about the death tax. Under 2009 rules, less than one percent will have any worries about estate taxes.

Table 4 Twenty-Five Largest Cow-Calf Operations (2001)<sup>72</sup>

Rank/Name	Owner	Number of Cows	Ranches/Acreage	Ranch Location
Desert Cattle and Citrus	Church of Jesus Christ of Latter Day Saints	40,000	1/confidential	Florida
J.R. Simplot Co.	Simplot Family	32,500	20/3.4 Million	California, Idaho, Utah, Oregon, Nevada, Washington
King Ranch Inc.	Private	25,000	4/835,000	Texas

71. Press Release, National Cattlemen's Beef Association, NCBH Successful in Helping Repeal Death Tax for Cattlemen (June 1, 2001), available at <http://www.beef.org> (available under Advanced Search link using "Death Tax" as search term) (last visited Apr. 25, 2003).

72. 2001 25 Largest Cow-Calf Operations, NAT'L CATTLEMEN, June-July 2001, at 60-61

<b>Rank/Name</b>	<b>Owner</b>	<b>Number of Cows</b>	<b>Ranches/Acreage</b>	<b>Ranch Location</b>
Lykes Bros. Inc.	Lykes Bros. Inc.	20,550	1/confidential	Florida
Parker Ranch Inc.	Parker Ranch Foundation Trust	18,000	1/210,000	Hawaii
Briscoe Ranch Inc.	Janey and Dolph Briscoe	17,000	10/670,000	Texas
Matador Cattle Co.	Koch Industries	15,000	Confidential	Kansas, Texas, Montana
Silver Spur Land and Cattle, LLC	John and Leslie Malone	15,000	10/312/753	Wyoming, Colorado, New Mexico
Rollins Ranch	LOR, Inc.	Confidential	9/confidential	Florida, Georgia, Texas
Padlock Ranch Co.	Homer Scott Family	13,500	3/440,000	Montana, Wyoming
Singleton Group	Caroline Singleton	13,200	6/1 million	California, New Mexico
W.T. Waggoner Estate	A.B. Wharton and Electra	12,324	1/520,000	Texas
True Ranches	True Family Waggoner Biggs and Family Trust	Confidential	7/confidential	Wyoming
Seminole Tribe	N/A	10,500	2/confidential	Florida
Burnett Ranches, Ltd.	Anne Burnett Windfohr	Confidential	3/350,000	Texas, Montana

<b>Rank/Name</b>	<b>Owner</b>	<b>Number of Cows</b>	<b>Ranches/Acreage</b>	<b>Ranch Location</b>
Denny Cattle Company	Denny Family	10,250	7/confidential	California, Nevada, Oregon
Cholla Livestock, LLC	Harvey Dietrich	9,800	2/860,000	Arizona
Adams Ranch, Inc.	Adams Family	8,200	4/55,000	Florida
Spade Ranches	Chappell and Marlene Martin	7,000	6/325,000	Texas, New Mexico
Duane Martin Livestock	Duane and Marlene Martin	6,450	Confidential	California, Oregon, Colorado
Broseco Ranches	Broventure Co. Inc.	6,400	1/confidential	Texas
Ponoholo Ranch, Ltd.	Von Holt Family	5,800	1/15,800	Hawaii, Oregon
Agri Beef	Rebholtz Family	5,800	1/1.2 million	Nevada
Pitchfork Ranch	Williams Family	5,200	2/180,000	Texas, Kansas
Vermillion Ranch	Pat Goggins Family	4,800	5/86,210	Montana

Only the states of Wyoming (184), Nevada (69), California (2,747), and Arizona (227) have two percent of farmers with more than \$5 million in farm or ranch values. Therefore, an estate tax at \$5 million per family would essentially leave farmers and ranchers untaxed. Estate taxes are not the real issues of most farmers and ranchers. Selected state comparisons follow in Table 5.

Table 5

1997 U.S. Farms by Asset Value, Land, and Buildings <sup>73</sup>		
Value	Number	Total Farms %
Less than 500,000	1,498,517	78.4
500,000 to 999,999	227,047	11.9
1,000,000 to 1,999,999	117,896	6.2
2,000,000 to 4,999,999	55,664	2.9
5,000,000 or more	12,699	0.7

1997 Minnesota Farms by Asset Value, Land, and Buildings <sup>74</sup>		
Value	Number	Total Farms %
less than 500,000	56,503	77.0
500,000 to 999,999	9,667	13.2
1,000,000 to 1,999,999	5,148	7.0
2,000,000 to 4,999,999	1,875	2.6
5,000,000 or more	182	0.2

1997 Virginia Farms by Asset Value, Land, and Buildings <sup>75</sup>		
Value	Number	Total Farms %
less than 500,000	33,006	80.4
500,000 to 999,999	4,951	12.1
1,000,000 to 1,999,999	2,014	4.9
2,000,000 to 4,999,999	940	2.3
5,000,000 or more	164	0.4

73. NAT'L AGRIC. STATISTICS SERVICE, USDA, 1997 CENSUS OF AGRICULTURE: UNITED STATES SUMMARY AND STATE DATA, at 22, tbl. 11 (1999), available at <http://www.nass.usda.gov/census/> (available under "Complete Volume" link).

74. NAT'L AGRIC. STATISTICS SERVICE, USDA, 1997 CENSUS OF AGRICULTURE: MINNESOTA STATE AND COUNTY DATA, at 22, tbl. 11 (1999), available at <http://www.nass.usda.gov/census/> (available under "Complete Volume" link).

75. NAT'L AGRIC. STATISTICS SERVICE, USDA, 1997 CENSUS OF AGRICULTURE: VIRGINIA COUNTY AND STATE DATA, at 22, tbl. 11 (1999), available at <http://www.nass.usda.gov/census/> (available under "Complete Volume" link).

#### 4. *Real Issue #4: Basis in Estate Planning*

Congress generally allows a "step-up" in basis to the fair market value of the property, when the property is acquired from a decedent.<sup>76</sup> The step-up in basis is not allowed where the decedent has benefited from a qualified conservation easement.<sup>77</sup> Congress intended to prevent the "beneficiaries of land subject to a qualified conservation easement from benefiting from both the exclusion and the basis step-up rule."<sup>78</sup> The beneficiaries' basis in the property will be the same as the basis of the property in the hands of the decedent.<sup>79</sup> Any loss of step up in basis on small estates would be detrimental to many more than would the repeal of estate taxes.

#### 5. *Real Issue #5: Repeal of the "Death Tax"—The Impact on State Revenues*

A hidden impact of the alleged repeal of the estate tax is the impact on state revenue. Current law allows taxable estates to clam a credit against federal estate taxes owed for estate or inheritance tax paid to the states.<sup>80</sup> The "Economic Growth Act"—or as I refer to it, the State Revenue Reduction by Implication Act—states that for deaths in 2002, the state death tax credit allowed under I.R.C. § 2011(d) is not to exceed seventy-five percent of the credit otherwise available, fifty percent for deaths in 2003, and twenty-five percent for deaths in 2004.<sup>81</sup> In 2005 the credit is replaced with a deduction.<sup>82</sup> In 2010 there will be no deduction or credit for state estate or inheritance taxes.<sup>83</sup> By implication, state revenues will be reduced in 2002, 2003, 2004, and no revenue in 2005 and beyond for states with a "pickup tax."<sup>84</sup>

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76. I.R.C. § 1014(a)(1) (2002).

77. I.R.C. §§ 1014(a)(4), 2031(c) (2002).

78. Nancy A. McLaughlin, *Tax Benefits of Conservation Easements*, 23 TAX MGMT. EST., GIFTS & TR. J. 253, 259 (1998).

79. I.R.C. § 1014(a)(4).

80. I.R.C. § 2011(a) (2002).

81. *See id.* § 2011(d).

82. *Id.*

83. *Id.*

84. The state sets its estate tax equal to the amount of the Federal Credit allowed for state estate taxes. Thus for the decedent, the estate sends two checks, but the total tax burden is essentially the same as the federal estate tax would be if the state had no estate or inheritance tax.

I am not sure if the estate tax generates a tremendous amount of revenue for the states, but any revenue impact will cause some adjustment downward in state spending or tax increases. Revenue reductions seem to come at the expense of state universities—see the North Carolina, Tennessee, and Virginia Higher Education Budgets in the past several years—or will come at the expense of sales tax or income tax increases. The former is a transfer of the state estate or inheritance tax burden to the poor.

Table 6 indicates the current revenue status of estate and inheritance tax collection by selected states.<sup>85</sup>

Table 6

State	Fiscal Year	Total Tax Collection [in thousands]	Estate Tax Revenue [in thousands]	%
Washington <sup>86</sup>	2000	10,431,599	82,705	0.8
	1999	9,772,810	69,570	0.7
Wisconsin <sup>87</sup>	1999	9,508,274	116,820	1.2
	1998	9,107,906	80,046	0.9
Ohio <sup>88</sup>	2000	19,345,324	434,700	2.7
	1999	18,041,225	408,500	2.7

85. Virginia, Ohio, Wisconsin were selected because of the speaker's states of residence. Washington was selected to complete the geographical march across the country. Indiana and Iowa were looked at, but the data was not readily available. An interesting exercise would be to determine a state-by-state impact.

86. DEPT. OF REVENUE, STATE OF WASHINGTON, TAX STATISTICS 2000: SECTION I, at tbl. 4, available at [http://dor.wa.gov/docs/reports/2000/Tax\\_Statistics\\_2000/stats\\_sectionI.asp](http://dor.wa.gov/docs/reports/2000/Tax_Statistics_2000/stats_sectionI.asp).

87. WISC. DEP'T. OF REVENUE, IS&E DIV. ANN. REP.: STRATEGIC AND OPERATIONAL DATA 12, available at <http://www.dor.state.wi.us/ise/isedar02.pdf> (last visited Apr. 13, 2003) (citing to Table 1).

88. OHIO DEP'T OF TAX'N, 2000 ANN. REP. 12, available at [http://www.state.oh.us/tax/Publications/2000\\_Annual\\_Report/8-revenue.pdf](http://www.state.oh.us/tax/Publications/2000_Annual_Report/8-revenue.pdf) (citing Table 6, Net Tax Collections) (last visited Apr. 13, 2003); OHIO DEP'T OF TAX'N, 2002 OHIO'S TAXES: A BRIEF SUMMARY OF MAJOR STATE AND LOCAL TAXES IN OHIO 29, available at [http://www.state.oh.us/tax/publications\\_brief\\_summary\\_2002.html](http://www.state.oh.us/tax/publications_brief_summary_2002.html) (last visited Apr. 13, 2003).

Virginia <sup>89</sup>	2000	10,339,752	150,121	1.2
	<u>1999</u>	<u>9,302,899</u>	<u>154,079</u>	<u>1.3</u>

## 6. Summary of Estate Taxes

### a. Concerns and Research and Educational Opportunities Created by the Repeal of the Estate Tax

Repeal may discourage farm and ranch families from doing estate planning. It is reported that approximately fifty percent of citizens die intestate.<sup>90</sup> The challenge to extension educators will be the need for business transition planning, with or without the “death tax”. The new step up in basis rules will require even more “asset” transition planning. As Roger McEowen has stated, “what has been accomplished [with “repeal” of estate taxes] has been an injection of tremendous uncertainty in estate planning for perhaps the next ten years”<sup>91</sup> Step up in basis rules will not encourage the timely transfer of farm assets from one generation to the next. For modest estates—less than \$1.3 million—appreciated land is not likely to transfer until death. For large estates, highly appreciated land never will transfer due to large capital gain taxes. Is this socially desirable? The repeal masks the real issues of profitability or the lack thereof in agriculture, low returns to non-farm heirs if their shares of assets are kept in agriculture, and the inability of on-farm heirs to buy out siblings due to the value of farm assets versus the return on those assets. Fairness dictates immediate repeal or drawing a line at a dollar amount, index and let it be. Time of death should not be a factor.

Recently, billionaire John Kluge gave the University of Virginia a seven thousand acre farm within development of Charlottesville and Thomas Jefferson’s Monticello. Is this what estate tax is about? Recently, a student reported to

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89. VIRGINIA DEPT. OF TAXATION, ANNUAL REPORT: FISCAL YEAR 2000, at 1, 31 tbl. 4.2, available at [http://www.tax.state.va.us/Web\\_PDFs/annualReport\\_00.pdf](http://www.tax.state.va.us/Web_PDFs/annualReport_00.pdf).

90. Kris Bulcroft & Phyllis Johnson, *A Cross-National Study of the Laws of Succession and Inheritance: Implications for Family Dynamics*, 2 J.L. & FAMILY STUDIES 1, 24 (2000).

91. Roger McEowen, *Economic Growth & Tax Relief Reconciliation Act of 2001, H.R. 1836: Summary of Selected Provisions*, AGRICULTURAL LAW UPDATE, June 2001, at 6.

me that grandma died leaving a \$600,000 farm to three daughters. Can the one farmer's daughter buy out the other two and be profitable? No. That is the issue.

#### VII. VALUE ADDED AGRICULTURE

The Nash Alliance, in Nash County, North Carolina, promises to produce uniform calves with similar genetics, vaccinating them on quality assurances program and commingling cattle to make more marketable calves.<sup>92</sup> What happens when a farmer does not follow the vaccination schedule and harm happens?

As the nation changes ethnically and economically, what alternatives can we help our farmers with to earn money? Corn mazes are the rage in our part of Virginia. But have we prepared our farmers for the potential liability of such activities? Production of goats, sheep, and other specialty products open up new potential for liability.

“With no subsidies and no middle men, farmers’ markets have increased by 79 percent since 1994, to 3,137 markets in all 50 states.”<sup>93</sup> Sixty-seven thousand farmers sell \$1 billion at farmers’ markets, as compared to \$200 billion in overall farm revenue.<sup>94</sup> This compares to the \$19 billion of federal subsidies to commodity crops. Whether we like it or not, value added agriculture will be a positive source of income for full and part-time farmers. Value added agriculture will include home stays and more, as well. In short, value added agriculture will assist rural and transition communities to remain vital and financially healthy.

#### VIII. CONTRACT AGRICULTURE: THE DEATH OR PRESERVATION OF FARMERS?

Eighty percent of Virginia tobacco went to contract farming within two years after changes in the farm program.<sup>95</sup> One of our state statisticians does not believe there will be any non-contracted tobacco next year, *i.e.*, there will be no buyers for market provided tobacco. Contracts allow for quality control and cradle-to-grave control of the product. This is one answer to passport agriculture, an

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92. Boyd Kidwell, *Homegrown Cattle Alliance*, PROGRESSIVE FARMER, Dec. 2001, at 42.

93. Timothy Egan, *Growers and Shoppers Crowd Farmers’ Markets*, N.Y. TIMES, Sept. 29, 2002, § 1, at 28.

94. *Id.*

95. See Eric Miller, *What Will Grow from Changes in Tobacco Farming?*, VIRGINIA FARM BUREAU FEDERATION, Mar. 2001, available at [http://www.vafb.com/magazines/2001/mar/0301\\_9.htm](http://www.vafb.com/magazines/2001/mar/0301_9.htm) (last visited Apr. 13, 2003).

issue that Eluned Jones addressed last year.<sup>96</sup> Yet, if the surviving tobacco farmers go to contract growing, do we have a policy interest in buying out the tobacco quota or allow the value to be a tax write off or a worthless asset?<sup>97</sup> As the Progressive Farmer asks, “First chickens, then hogs, now cattle?”<sup>98</sup> From genetics to the meat case, will a few companies reshape the entire industry?

Twenty-five of seventy five pages of most Progressive Farmer magazines are devoted to hunting, eating, and shopping. Will rural areas be hunting preserves? Contract agriculture allows for part time, stay at home mothers, and life style farming. Contract agriculture changes risk issues and is more in line with the ability of many who handle risk to survive financially. Then there are the banks. They might prefer to lend to farmers with contracts. Contract agriculture allows for economies of scale and places a premium on quality control and use of information. Good or bad, it is alternative to passport agriculture.

McDonald’s, Wal-Mart, Burger King and others want to control the type and quality of inputs. Contracts with chicken producers allow the next generation dairy farmers to join the “family farm”. Otherwise, there are not enough dollars to support the son or daughter’s return to the family farm. Farmers have long depended on tobacco, peanuts, and other government programs that lend themselves to contract production, as these farmers have not needed to make market price decisions in the past. They have not been risk takers, but production managers. Or as one wag has said, they are chicken janitors.

At the land grants, what do we teach and what do we tell our farmers? What impact will web-based E-Commerce have on the farm and agribusiness sector?<sup>99</sup> Will we have farmers, employees, or survivors? Will we have legislative solutions, contract solutions, or market solutions?

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96. See Eluned Jones, *Entity Preservation and Passport Agriculture: EU vs. USA*, 7 DRAKE J. AGRIC. L. 381 (2002).

97. E-mail from Les Myers to Virginia Tech Agric. Econ. Faculty (Oct. 1, 2002, 10:23 EST) (copy on file with author).

98. Karl Wolfshohl, *First Chickens, Then Hogs, Now Cattle?*, PROGRESSIVE FARMER, Feb. 2002, at 20.

99. See Scott E. McFarland, *Web Based eCommerce and the Farm and Agribusiness Sector*, in 2001 AMERICAN AGRIC. LAW ASSOC. MATERIALS K-1-1 (presentation made at the 2001 AALA Conference).

IX. ENVIRONMENT, CONSERVATION EASEMENTS, PASSPORT AGRICULTURE,  
AND ORGANIC RULES

The farm bill is doing its share for the environment. As a former USDA executive said, “lenders and their ag producers need to become very familiar with the new conservation payments in the new farm law. The [regulations] are just now being written, but there will be a lot of money, beyond the commodity payments, available to them.”<sup>100</sup> A 1,500-page law will bring opportunities for lawyers as well.

USDA’s Natural Resources Conservation Service has unveiled a new electronic office guide to make timely technical information available to each farmer down on the farm.<sup>101</sup> It will allow integration of practice standards and case reports down on the farm.

Environmental issues will remain at the front of issues that our farmers and rural areas will be participating in. Just think of all of the issues that will be created by conservation easements. Some conservation easements now contain provisions that the farmland will only be used for growing organic crops.<sup>102</sup> How will this be enforced as the definition of organic changes over time? Is this a good idea in the first place to tie up future land use?

Rails to trails and access to railroad lands abandoned or in use will continue to provide legal employment for practitioners as we bring the outside into rural communities for “Lake Wobegon Trail” rides<sup>103</sup> in rural areas. Will these activities create community connections for our rural residents and our urban and suburban neighbors, or will they bring in conflict of values and land use? I have experienced both.

Tax credits in Colorado and Virginia have been created to make it more profitable for farmers to donate conservation easements.<sup>104</sup> Credit against state income tax can equal up to fifty percent of the value of the donation.<sup>105</sup> Since

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100. Henderson, *supra* note 3.

101. *NRCS Unveils New Conservation E-guides*, DELTA FARM PRESS, Sept. 26, 2002, available at [http://deltafarmpress.com/ar/farming\\_nrce\\_unveils\\_new/index.htm](http://deltafarmpress.com/ar/farming_nrce_unveils_new/index.htm).

102. See PCC NATURAL MARKETS, PCC FARMLAND FUND (2002), available at <http://www.pccnaturalmarkets.com/info/farmland.html>.

103. See *Community Connections*, RAILS TO TRAILS, Winter 1999, at 20 (discussing the opening and dedication of the Lake Wobegon Regional Trail in Stearns County, Minnesota).

104. *Tax Credit to Help Less-Affluent Easement Donors*, VISION (Valley Conservation Council, Stanton, VA), Summer 2002, at 2.

105. *Id.*

farmers often do not pay many dollars to state income taxes, in some cases the credit can be sold to those who owe state income taxes.<sup>106</sup>

#### A. *Passport Agriculture*

The new organic rules are the first step towards passport agriculture that Eluned Jones described at our meetings last year.<sup>107</sup> Passport agriculture will be here before your clients are ready.

#### B. *Organic*

Even the new rules on organic farming are met with mixed reviews from original supporters in the organic community.<sup>108</sup> And big brand name agriculture, such as General Mills, is getting involved.<sup>109</sup> The new rules will give rise to new opportunities for agricultural lawyers.<sup>110</sup>

### X. WEB ACCESS AND THE RURAL AREAS: INFORMATION INFRASTRUCTURE

Our ability to live in rural areas and participate in the economic and cultural life of the country may depend on our access to the web. A recent exchange between the ABA staff and attorneys was all about connection speed. No DSL, no cable—28,800 bands may separate the uniform from the winning attorneys.<sup>111</sup> Satellite access may determine your access to timely information for your clients. Many traditional farm magazines are now on the web, with information sent to the clients on a daily basis. For example, AgWeb.com,<sup>112</sup> Delta Farm Press,<sup>113</sup> ERS news,<sup>114</sup> and AgriClick,<sup>115</sup> deliver daily prices, weather, articles, and infor-

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106. *Id.*

107. *See* Jones, *supra* note 96.

108. *See* Elizabeth Becker, *Organic Gets an Additive: A U.S.D.A. Seal*, N.Y. TIMES, Oct. 21, 2002, at A10.

109. *See A New Organic Era*, N.Y. TIMES, Oct. 21, 2002, at A18.

110. *See A Guide to New Organic Terminology*, WASH. POST, Oct. 9, 2002, at F2 (discussing organic certification requirements).

111. Posting of Bill Brown to 3DT@MAIL.ABANET.ORG (Oct. 8, 2002) (copy on file with author).

112. <http://www.agweb.com> (last visited Apr. 13, 2003).

113. <http://www.deltafarmpress.com> (last visited Apr. 13, 2003).

114. <http://www.ers.usda.gov> (last visited Apr. 13, 2003).

115. <http://www.agriclick.com> (last visited Apr. 13, 2003).

mation on the government programs to your farmer clients. How are you wired—for the future or the past?

Our first year students come to the university from rural areas with increased computer sophistication but not high-speed access. From a survey of first year students, twenty percent have grandparents on line, ten percent are on cable or DSL, eighty-five percent are on phone modems, and five percent are without computer access. Games, education, ag market information, shopping, entertainment, news, e-mail, farm records, stock checking, check writing, auctions (eBay down on the farm), and information on disease and chemicals are reported as uses of the net by the students. The impact of the net on rural employment is emphasized by our congressman's re-election campaign. His ads claim that he was instrumental in bringing eight new businesses to the area—one was a federal prison and the rest were computer technology based.

Our local value added farmers are selling cheese to Wisconsin on the net. Now think of the liability issues and business planning needs of these types of clients. Your clients are likely to be connected in new ways and this will have an impact upon legal advice needed, but not readily purchased. Also, with internet access, your clients will all have been to government and other websites before they come to your office. Will this be positive and provide informed clients or misinformed clients? Will this result in more do-it-yourself law and more potential lawsuits?

## XI. RURAL AMERICA

Rural America is where many of us live. But rural America is not just farming. It is a source of off-farm jobs for our clients. In some cases, it is a life style issue. USDA reports that the rural population rebound has leveled off.<sup>116</sup> After losses in the 1980's, net migration from metro areas and increases in immigrants accounted for two-thirds of the increase. Rural areas grew by 10.3% versus a 13.9% growth rate in metro areas.<sup>117</sup> Some of us rural areas became metro areas.

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116. ECON. RESEARCH SERV., USDA, RURAL AMERICA AT A GLANCE (Sept. 2002), available at <http://www.ers.usda.gov/Publications/rdr94-1/rdr94-1.pdf>.

117. *Id.*

## XII. FOX HUNTING: THE FATE OF THE HOUND

Just so one does not think that the United States has a lock on rural problems, we should visit England. No, not mad cow disease, but fox hunting. Is it cruel and unnecessary<sup>118</sup> or a property right to rid the countryside of that noxious beast, the fox? Is fox hunting an effective means of controlling foxes and reducing the attack on farm animals?<sup>119</sup> We need a study. The hue and cry in England over the foxhunt may be centered on the perception of an “onslaught that threatens man of the green and pleasant qualities that define Britain.”<sup>120</sup> The moral for those of us in the east is the foxhunt, too, defines a portion of the social fabric of our rural society. It is also a euphemism for rural versus urban and property rights and property rights assumptions. Will it soon be a contentious issue here? We have many hunts in Virginia. Ride with the hounds.

## XIII. FENCE LAW

I could not end without a comment on one of my favorite topics. Fence law: The duty to fence in or fence out. In a modern society in which fences are tax deductible by cattle and other farmers, but not by non-farming adjoining landowners, many states require the neighbor to pay for half of the fence. Many states still act as if we are in the Wild West and have fence out statutes for some or all of the state. In short, the rules of liability for livestock trespass and negligence still cause lawsuits, bitter neighbors, and property damage to farmers and non-farmers alike. This issue alone will add to litigation, laws, and dispute, for many years to come. And that is without a discussion of dogs.<sup>121</sup>

## XIV. CONCLUSION

One day an old farmer and a boy were walking with a donkey. They met a man who asked why the farmer made the boy walk. So the farmer put the boy on the donkey. Further down the road they met another man who asked why the

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118. Wendy Lochner, Editorial, *Fox Hunting and the Fate of England*, N.Y. TIMES, Sept. 30, 2002, at A24.

119. Henry Fountain, *Fox Hunting's Supposed Benefits Dismissed*, N.Y. TIMES, Oct. 8, 2002, at F3.

120. Sarah Lyall, *Grumbles Grow Louder in Quiet Rural Britain*, N.Y. TIMES, Oct. 2, 2002, at F3.

121. Roger A. McEowen, *Trespassing Livestock and Murder Convictions: Could a Deficient Fence Lead to a Prison Term for a Livestock Owner?*, AGRIC. L. UPDATE, Aug. 1999, at 4.

boy was on the donkey and the old man was walking. So the farmer got on the donkey. As they approached a bridge, another man approached them and asked why the poor donkey was carrying the farmer. So the farmer put the donkey on his back. As he walked across the bridge, he slipped and the donkey went overboard and was lost. There are several morals to the story. Farmers who listen to many may lose their ass.

There are lots of contentious issues in agriculture and lots of needs and opportunities for lawyers. In short, lots of needs to keep the donkey off the farmers back.