1-1-1983

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Recommended Citation
Julian Conrad Juergensmeyer, The Future of Government Regulation of Agriculture: An Introduction, 3 N. Ill. U. L. Rev. 253 (1983).

AGRICULTURAL LAW SYMPOSIUM

The Future of Government Regulation of Agriculture: An Introduction*

By Julian Conrad Juergensmeyer**

American agriculture is in a sorry state. Production costs have risen while market prices have fallen (at least when measured in constant dollars). The volume of exports has declined. As a result, farm income in nearly all states has plummeted drastically. Farm to urban area migration which plagued our country several decades ago, but stabilized somewhat in the 1970's, is again on the increase.[1] A symposium devoted to agricultural law issues could focus on the current plight of American agriculture from numerous perspectives. One such important perspective is to view the current agricultural malaise and its future from the point of view of government regulation. The theory for doing so is that government regulation of agriculture is a common thread which runs through most, if not all, agricultural issues in the 1980's. "Government regulation" is used in this symposium as the equivalent to "government activity," whether the activity restricts, protects, subsidizes, confiscates, promotes or simply confuses agricultural activities.

The importance of government regulation to American agriculture should need little if any comment. From the very beginning of our republic, government policy toward agriculture has been of extreme importance to those who govern as well as those governed.[2]

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* Professor Juergensmeyer's article and the subsequent articles by Dean Looney and Professors Wadley and Harl were originally presented as speeches at an Agricultural Law Seminar for the dedication of Northern Illinois University's College of Law Building, March 18, 1983.

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1. For a discussion of the major issues currently facing American agriculture, see J. JUERGENSMEYER & J. WADLEY, AGRICULTURAL LAW § 1.4 (1982).

2. Some of the current policy concerns are discussed in Batie & Healy, *The*

Since the Supreme Court of the United States sustained government regulation of agriculture by upholding New Deal legislation in *Wickard v. Filburn*,[3] the American farmer has been subjected to more laws and regulations than the farmers of most other countries of the world, including those of many so-called totalitarian systems.

Whether this extreme amount of regulation is good, bad, inevitable, avoidable, or reversible involves value judgments that will no doubt vary the answer from person to person. One should note, however, that in recent months various proposals for so-called "deregulation" of American agriculture have raised the issues more than perhaps ever before. The complexities presented by deregulation and the difficulty of evaluating the effects of various deregulation proposals on farmers and on consumers are illustrated by a 1974 analysis of the potential effects of deregulating the produc-

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Future of American Agriculture, SCI. AM., Feb. 1983, at 45. The authors suggest that there is much disagreement over whether our major problem is over-production or long-term shortages:

> The debate over American agricultural policy should not await research findings, if for no other reason than that policy debates can help to identify areas of ignorance. With the present farm economy beset by production surpluses and cost and credit squeezes on the farmer, it may seem strange to suggest debating how the U.S. might confront possible long-term shortages. The urgency of short-term problems, however, must not obscure the importance of considering how to organize an agricultural sector that can survive and flourish for as long as we expect our society to endure.

Id. at 53.

3. 317 U.S. 111 (1942). In *Wickard*, the Supreme Court of the United States upheld regulation by the U.S. government of the size of the farmer's crop even though it was intended solely for on-farm consumption. The wheat acreage allotted the farmer (Filburn) was 11.1 acres. Agricultural Adjustment Act of 1938, 7 U.S.C. §§ 1281-1385 (Supp. IV 1981). However, he sowed 23 acres. From the excess planting, he harvested 239 bushels of wheat which under the terms of the Act constituted a farm marketing excess subject to a $.49 per bushel penalty.

In upholding the regulation and the penalty imposed on the farmer, the Supreme Court reiterated its view that the commerce power of the federal government "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." 317 U.S. at 124 (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

For a full discussion of the *Wickard* decision and its precedent-setting effect on federal regulation of agriculture, see J. JUERGENSMEYER & J. WADLEY, *supra* note 1, § 2.2.

tion of tobacco, peanuts, and fresh fruit and vegetables.[4]

In regard to tobacco, the study concluded that deregulation by the government would release the tobacco farmers from any acreage or poundage restrictions and almost certainly would result in larger, mechanized tobacco farms which would have a drastic effect on the tobacco farmers but little effect on the consumer. A shift to larger, mechanized farms eventually would result in a complete relocation of tobacco farms; they would shift from their hilly, small tracts to large, flat coastal plains better suited to tobacco cultivation. This complete uprooting of tobacco farming would be offset by little or no benefit to the consumer. Aside from the fact that tobacco is not an important good for consumption, the cost of the tobacco leaf itself is a very small part of the cost of cigars and cigarettes, since most of the cost of tobacco products is the labor required to produce them.[5]

Peanuts are another crop that was examined for the varying effects of government deregulation. Peanuts have high acreage allotments and high price supports that along with increasing yields have combined to create a surplus of edible peanuts and have encouraged the production of an inferior, inedible product. This led those conducting the study to conclude that the price of peanuts to consumers would be largely the same with or without regulation.[6]

Finally, an analysis of the fresh fruit and vegetable sector of agriculture was made to illustrate potential effects of deregulation. Import restrictions have proved to be the most significant regulation affecting fresh fruit and vegetable production. Mexico and other temperate areas close to the United States could be competition for America's fresh fruit and vegetable industry because of their plentiful supply of cheap labor. If import restrictions were removed, the fresh fruit and vegetable sector could become unstable. The increased supply of goods, especially during harvest, would drive the price down. This might seem to benefit consumers, but the fluctuation and range of prices, normally limited because of supply controls, would be wide. The variety of products available also would fluctuate widely, and this, too, would be of questionable benefit to the consumer.[7]

The dubious benefits to the consumer discussed above should

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4. Sundquist, *Removing Legal Constraints on Agriculture*, 19 S.D.L. REV. 512 (1974).

5. *Id.* at 531.

6. *Id.* at 533.

7. *Id.* at 536.

be compared to the farmers' dislocation, another result of the relaxing of regulations. To remain competitive with the cheap labor areas abroad, American farmers in this sector most surely would move toward increased mechanization of large land areas, a move that would affect property values and employment.

In general, the three examples cited indicate that consumers would benefit from deregulation indirectly rather than directly, that is, through reduced federal program costs rather than lower prices at the grocery store. Even in the one instance where the price surely would go down (halting import restrictions for fresh fruit and vegetables), the advantages of deregulation would be offset by prices that would fluctuate throughout the year and by a decrease in the variety of products available at any one time. The indirect benefit to consumers also must be measured against the dislocation of farmers and the arguable misallocation of time and capital that would arise from effecting the various change-overs. It seems that any deregulation should be carefully considered and examined before wholesale changes are effected.

A further factor to consider in the deregulation calculus is the indirect harm to consumers that results from the sale of more and more of America's farmlands. One of the main reasons farmers are selling their lands is that they can acquire more lucrative positions elsewhere. One aid to keep farmers farming would be for government programs to continue. Alternatively, if deregulation occurred, the amount of farmland would continue to shrink and the supply of agricultural products, as well as their variety, could be reduced; the end result could be unfortunate for the consumers, with prices rising and diet choices diminishing.[8]

The complexity of the issues inherent in government regulation makes any attempt at comprehensive coverage impossible. Consequently, this symposium, in addition to this segment, will concentrate on three specific topics: the recent federal taxation developments, an analysis of farm credit and bankruptcy problems, and an examination of United States Department of Agriculture programs as they impact on small farms and small farm communities. This part of the symposium involves a brief examination of the present and predicted future of U.S. government activity relating to the export of American agricultural commodities.

If this symposium were to be held in many states, it would be necessary to justify choosing international trade of agricultural

8. J. JUERGENSMEYER & J. WADLEY, *supra* note 1, § 2.6.

commodities as a topic of primary concern to American agriculture. No such necessity should exist in Illinois, since this state ranks first in the dollar value of agricultural exports. In 1980, the total value of agricultural exports from Illinois was $3.64 billion. This figure represented nine percent of the total U.S. agricultural exports for that fiscal year.[9] Nationally, the importance of agricultural exports is clear, as they are responsible for more than one million jobs within the United States—about one-half million on the farm and over 630,000 off-farm jobs relating to assembling, processing, and distribution of agricultural products for exports. United States agricultural exports for fiscal 1980 represented the output of approximately 138 million of the slightly more than 400 million United States cropland acres.[10]

Since our focus is on governmental activity, it should be noted at the outset that international trade of agricultural commodities is an area in which government activity is essential and unavoidable. From the very basic fact that international activities are involved, the individual American farmer, cooperative, or agribusiness concern must have the United States as a partner. In fact, it is submitted that in the years to come, more and more government activity and concern will and should occur in regard to the import and export of agricultural commodities.

In short, "deregulation," if that term means no activity, is not possible as far as international trade is concerned. What is needed is not less activity by the U.S. government but more enlightened government activity. For example, the use of American food exports as a weapon of international diplomacy has accomplished little, if anything, by way of attaining foreign policy goals but has been extremely harmful to American farmers. Recent anti-embargo and sanctity of export contract legislation is a step in the right direction.[11] Further steps need to be taken to guarantee the relia-

9. USDA (FAS), THE U.S. AGRICULTURAL TRADE BOOK (1981). The total dollar value of all agricultural exports in fiscal 1980 was $40.48 billion.

10. NATIONAL AGRICULTURAL LANDS STUDY, FINAL REPORT 7 (1981).

11. In the last few years the controversial embargoes have been directed toward the Soviet Union and Eastern Europe. The first controversy was over the embargo of soybeans to Japan. The Japanese embargo and its unfortunate consequences is analyzed in considerable detail in E. CASTLE & K. HEMMI, U.S.-JAPANESE AGRICULTURAL TRADE RELATIONS (1982).

A few statistics serve to highlight the effect of the recent Russian and Polish embargoes. In 1980, the dollar value of U.S. agricultural exports to the Soviet Union was approximately $1.5 billion. This figure rose to $1.7 billion in 1981, and to nearly $3.3 billion in 1982, but will probably tumble back to $1.7 billion for bility of the United States as an exporter. The current inadequacy

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fiscal 1983. The value of exports of agricultural commodities to Eastern Europe in 1980 was nearly $2.5 billion but dropped to $2 billion in 1981 and plummeted to $900 million in 1982 where it will probably remain in 1983. USDA (FAS), THE U.S. AGRICULTURAL TRADE BOOK (1981).

The drastic drop in exports to Eastern Europe is easy to understand when it is realized that Poland was the biggest importer of U.S. agricultural products in Eastern Europe. The entire Polish poultry industry, for example, was based on feed imported from this country. Embargoes and punitive measures, such as the lifting of Poland's Most Favored Nation trade status, plus the increased value of the U.S. dollar in international monetary markets, created a drop in demand which will be difficult, if not impossible, to restore in the foreseeable future.

A degree of embargo protection was extended to American farmers by the Farm Bill of 1981. Agriculture and Food Act of 1981, 7 U.S.C. § 1281 (Supp. V 1981). Section 1736(j) provides:

> Notwithstanding any other provision of law-
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> (a) If the President or other member of the executive branch of the Federal Government causes the export of any agricultural commodity to any country or area of the world to be suspended or restricted for reasons of national security or foreign policy under the Export Administration Act of 1979 or any other provision of law, and if such suspension or restriction of the export of such agricultural commodity is imposed other than in connection with a suspension or restriction of all exports from the United States to such country or area of the world, and if sales of such agricultural commodity for export from the United States to such country or area of the world during the year preceding the year in which the suspension or restriction is imposed exceed 3 per centum of the total sales of such commodity for export from the United States to all foreign countries during the year preceding the year in which the suspension or restriction is in effect, the Secretary of Agriculture shall compensate producers of the commodity involved by-
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> (1) making payments available to such producers, as provided in subsection (b) of this section;
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> (2) on the date on which the suspension or restriction is imposed, establishing the loan level for such commodity under the Agricultural Act of 1949, if a loan program is in effect for the commodity, at 100 per centum of the parity price for the commodity, as determined by the Secretary on the date of the imposition of the suspension or restriction; or
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> (3) undertaking any combination of the measures described in clauses (1) and (2) of this subsection.

7 U.S.C. § 1736(j) (Supp. V 1981).

A sanctity of agricultural export contracts provision was added to the Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2294 (1983). Section 238 of the Act prohibits the President from prohibiting the export of agricultural commodities covered by an export sales contract: (1) if the contract was made prior to the announcement of the embargo, (2) if the contract calls for delivery within 270 days after the embargo is announced. 96 Stat. 2326. *See* Juergensmeyer, *International Trade Developments*, 5 J. AGRIC. TAX'N & L. 70 (1983).

of U.S. government policy toward agricultural exports was recently summarized and highlighted by a leading American agribusiness executive in a speech delivered to the American Agricultural Law Association. The speaker, Thomas N. Urban, noted:

> We lack a clear policy that recognizes the new realities of food production, allowing it to make its maximum contribution to the economy of this country and to the world economy that is a tragedy. We are in danger of squandering our food production advantages because our political system seems unable to recognize change.
>
> An example of what happens when such a policy void exists is the attitude of certain government officials regarding agricultural embargoes. Although admitting that embargoes have failed as an instrument of foreign policy, a State Department official recently declared that he believes we must apply an embargo occasionally to show the world that we are willing to use such means. That kind of a statement doesn't make sense and destroys whatever food policy there might be in this country. I doubt if the official had any idea at all of the impact of his statement on food and agricultural economic health.[12]

An example of positive action that the United States government has taken recently to encourage foreign purchases of American farm products is to arrange so-called blended credits for foreign purchasers. Such arrangements have already provided significant results.[13] The interrelationship and complexity of United States government programs is demonstrated by the parallel controversy which has arisen in connection with the exports made possible by the blended credits—namely the problem of cargo preference. In short, the Cargo Preference Act of 1954[14] mandates that one-half of all farm commodity exports from stocks owned by the government or sales subsidized by the U.S. government must be transported by ships flying the United States flag.[15] Due to the various economic factors, shipping agricultural commodities on American vessels costs as much as 150% more than shipping them on foreign vessels. For example, in the recent blended credit financed sale of wheat flour to Egypt, the cost for

12. Urban, *Wanted: A New Coalition to Develop Food and Agriculture Policies*, 2 AGRIC. L. NEWSLETTER 1, 2 (1983).

13. *Cargo Preference Could Sink Bigger Export Sales*, 98 PROGRESSIVE FARMER: MIDMONTH SOYBEAN EDITION 1, 4 (No. 4) (Apr. 1983).

14. 46 U.S.C. §§ 1241 to 1244 (1976).

15. *Id.* § 1241(b)(1).

freight per metric ton for bagged wheat flour from Beaumont, Texas, to Alexandria, Egypt, was $108 on American registered ships and only $42.50 on foreign registered ships.[16] This cost differential means that the price advantage created by blended credit arrangements can be completely or largely eliminated by the extra shipping cost necessitated by requiring the use of American flag ships.

The cost differential is not the only problem posed by the Cargo Preference Act. Very few U.S. flag-flying ships are equipped to carry agricultural commodity cargoes. Thus, even if the government paid the extra freight costs—which is of course *not* the current policy—the requirements of the Act would still hamper U.S. exporters.

The applicability of the cargo preference principle to sales financed by the United States government is harmful enough to American farmers; in addition, there are proposals in Congress to expand the concept even to private export arrangements. The Competitive Shipping and Shipbuilding Act of 1983[17] would mandate that five percent of United States dry and liquid bulk exports be carried by U.S. ships. The mandated percentage would climb one percent per year to a total of twenty percent.[18] The U.S. shipping and shipbuilding industry may need and deserve assistance, but to so subsidize at the expense of farm commodity exports could be economically disastrous to American agriculture. Cargo preference, like the grain embargoes, is an example of government regulation that can only be labeled harmful interference.

In short, the U.S. government must and should participate in and regulate the importation and exportation of agricultural commodities. Government activity should promote, not discourage, exports and should seek to guarantee that American agribusiness is treated fairly in international markets. At times it seems that the key trade war is the conflict between American farmers and their

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16. *See* PROGRESSIVE FARMER, *supra* note 13, at 4.
17. H.R. 1242, 98th Cong., 1st Sess. (1983).
18. Section 4(a) of H.R. 1242 provides:

> In the calendar year following the year of enactment of this Act, each importer or exporter of bulk cargoes shall transport at least 5 per centum of these bulk cargoes in United States-flag ships. In each calendar year thereafter the percentage of bulk cargoes required to be transported in United States-flag ships shall increase by 1 per centum until the percentage of the bulk cargoes required to be transported in United States-flag ships during each calendar year is at least 20 per centum.

own government. If the agricultural segment of our economy is to win any of the international trade wars and the fight against domestic surpluses, the U.S. government must make peace with American agriculture.