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A Regulatory Waste Land: Defining a Justified Federal Role in Crop Insurance

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A REGULATORY 'WASTE LAND': DEFINING A JUSTIFIED FEDERAL ROLE IN CROP INSURANCE

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Whan that Aprille with his shooures soote
The droghte of March hath perced to the roote,
And bathed every veyne in swich licour
Of which vertu engendred is the floyr . . . .

GEOFFREY CHAUCER, THE CANTERBURY TALES (1386)

April is the cruellest month, breeding
Lilacs out of the dead land, mixing
Memory and desire, stirring
Dull roots with spring rain.

T.S. ELIOT, THE WASTE LAND (1922)

I. INTRODUCTION

Farming is risky business. The greatest factor affecting agricultural production—the weather—is an occupational hazard over which farmers have no control. While in years past producers operated in a "hip pocket" fashion, from "year to year on money and resources saved from the previous year's operation,"[1] modern farms—highly leveraged and highly specialized—often depend on the success of a single crop in order to meet their debt obligations. When a natural disaster strikes, it can "wreak financial ruin" on whole farm communities "in a matter of days or even hours."[2]

When Congress passed the Federal Crop Insurance Act of 1980 (FCIA),[3] its stated objective was to make crop insurance the nation's primary means of agricultural disaster risk management.[4] Congress envisioned a crop insurance regime used widely enough to displace the pressure for *ad hoc* disaster relief, and sought to achieve this objective by removing limits on the program's expansion and by subsidizing premiums. Fifteen years later the FCIA had not met its goal. Despite widespread eligibility, participation never approached the Act's goal of

1. 126 CONG. REC. 2,737 (1980) (statement of Rep. Ed Jones).
2. *Id.*
3. Pub. L. No. 96-365, 94 Stat. 1312 (1980) (codified as amended in scattered sections of 7 U.S.C.).
4. H.R. REP. No. 649, 103d Cong., 2d Sess. 20 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2516, 2519.

50%,[5] and Congress soon found itself succumbing repeatedly to pressures for direct cash relief.

The FCIA's failures, along with a rash of midwestern floods and southeastern droughts, prompted Congress and the Clinton Administration to reexamine federal agricultural disaster assistance.[6] On March 2, 1994, former United States Department of Agriculture (USDA) Secretary Michael Espy proclaimed the need for a comprehensive reform of the FCIA—one designed to "provide 'insurance coverage as certain as disasters.'"[7] Shortly thereafter, in April 1994, legislation was introduced to eliminate the chronic lack of participation in the program, and thereby mitigate the pressure for *ad hoc* disaster relief, by making available to all farmers "free" catastrophic coverage against yield losses of greater than 50%, for a nominal fee of $50 per crop per county.[8] Sponsored by the Clinton Administration and introduced by Democratic Representatives de la Garza, Tim Johnson, and David Minge, the legislation also proposed to repeal then current legal authorities for *ad hoc* disaster relief.[9] Although other proposals ranged from greater subsidization of premiums, to complete privatization of the system, to the simple establishment of a permanent reserve for disaster relief, in the end it was the Administration's proposal, hailed as the Federal Crop Insurance Reform Act of 1994, was adopted.[10]

Setting aside for the moment the specific merits and demerits of the Federal Crop Insurance Reform Act (FCIRA), it is noteworthy that many of the various proposals placed on the table in 1994 focused primarily on the need for reforming the *type* of protection afforded farmers.[11] To

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5. *See* U.S. GEN. ACCOUNTING OFFICE, CROP INSURANCE: FEDERAL PROGRAM HAS BEEN UNABLE TO MEET OBJECTIVES OF 1980 ACT 5 (GAO/T-RCED-93-12, Mar. 3, 1993) (statement of John W. Harmon, Director, Food and Agricultural Issues Resources, Community, and Economic Development Division, United States General Accounting Office) [hereinafter GAO, 1980 ACT] ("The highest participation rate—40 percent—was achieved only in 1989 and 1990, when participation was mandatory for farmers who had received disaster payments during the previous year to be eligible for future payments. After the requirement was lifted, however, participation immediately fell back to 33 percent."); *see also* H.R. REP. NO. 430, 96th Cong., 1st Sess. 9 (1979).

6. H.R. REP. NO. 649, *supra* note 4, at 43, *reprinted in* 1994 U.S.C.C.A.N. at 2543.

7. *Id.* at 21, *reprinted in* 1994 U.S.C.C.A.N. at 2520 (quoting then-Secretary Espy).

8. *See* Richard Orr, *House Bill Would Reform Federal Crop Insurance Plan,* CHI. TRIB., May 2, 1994, at 3; Telephone Interview with Ralph Chite, Congressional Research Service (May 5, 1994).

9. Orr, *supra* note 8, at 3.

10. *See* Federal Crop Insurance Reform Act of 1994, Pub. L. 103-354, 108 Stat. 3178 (1994) (codified as amended at 7 U.S.C. §§ 1501-1521).

11. *See, e.g.,* U.S. GEN. ACCOUNTING OFFICE, CROP INSURANCE: PROGRAM HAS NOT FOSTERED SIGNIFICANT RISK SHARING BY INSURANCE COMPANIES 16 (GAO/RCED-92-25, Jan. 13, 1992) [hereinafter GAO, RISK SHARING]

> (In a series of reports over the past 11 years, we have criticized FCIC's management for (1) inaccurate price forecasting, (2) poor internal controls for creating new programs, (3) insufficient control over the reinsured companies, particularly for loss adjustment, (4) inadequate procedures to ensure accurate production guarantees, and (5) expanding the

be sure, the need for *particular* reform was substantial, and to an extent proposals for particular reform are *in practice* indistinguishable from those calling for *systemic* reform. For instance, it is difficult, other than conceptually, to separate the particular problem of low participation from the systemic problem of the dual provision of crop insurance and *ad hoc* relief. An examination of the censure typically leveled at the past system, however, suggests that the greatest inadequacy of federal crop insurance was not particular, but systemic.

The bulk of this criticism was directed at the Federal Crop Insurance Corporation's inability to ensure widespread participation by offering coverage that both flexibly and affordably met farmers' needs. As I have noted, these needs differ markedly from producers' needs just one-quarter of a century ago, when highly leveraged and highly specialized farms were less commonplace. Undoubtedly today's farmers' needs differ as much from the needs of the next millennium's growers. Hope, therefore, lay not simply in changing the types of protection available, but in creating a system that could itself respond to changing demands.

In this article I discuss whether the FCIRA creates such a system. More importantly, however, I suggest principles to govern the choice of future crop insurance proposals.[12] Specifically, federal crop insurance should follow certain basic principles governing all types of economic regulation. First, state intervention, both generally and in agriculture, is most justified where the government undertakes to provide a "public good," that is, a needed service that would otherwise be underprovided.[13] Second, where these needs go unmet as a result of individual

> program too rapidly without taking sufficient measures to ensure its fiscal integrity. In 1983, 1985, and 1987, we criticized FCIC's standard reinsurance agreement for being too generous to the reinsured companies. In addition, we have noted that the Congress' provision of emergency loans and disaster payments has undercut FCIC's ability to increase program participation. All of these factors . . . have contributed to FCIC's bleak financial condition.).

See generally COMMISSION FOR THE IMPROVEMENT OF THE FEDERAL CROP INSURANCE PROGRAM, RECOMMENDATIONS AND FINDINGS TO IMPROVE THE FEDERAL CROP INSURANCE PROGRAM (1989) [hereinafter USDA, RECOMMENDATIONS AND FINDINGS].

12. Some may agree with these principles, but not with the conclusions I draw from them. Others may agree with my policy conclusions, but quarrel with my assumptions. To this I can only respond that I will be satisfied if my postulates fuel the debate over crop insurance reform. I might add, however, that the principles I advance are flexible enough to accommodate a range of approaches. That is, I intend them as broad principles, not as narrow prescriptions.

13. This is not to say that government involvement is *only* justified where the need would go unmet, but only that the case for intervention is then strongest. Nor is it to say that state intervention is *always* justified where this is the case. I take no position about the frequency with which such needs arise. *See generally* ROY J. RUFFIN & PAUL R. GREGORY, PRINCIPLES OF ECONOMICS 876 (3d ed. 1988) (characterizing public goods as "another example of market failure because competitive markets will fail to supply or will undersupply them").

choices, and not due to variables beyond individual control, the state should not intervene on behalf of those individuals.

The public role in helping farmers absorb production risks is therefore quite narrow. Government intervention is justified to the extent that commercial insurers are unable to provide protection against natural risks beyond the control of individual producers. Moreover, there is an inverse relationship between the extent of state intervention to protect vulnerable producers and the justification for providing further relief to producers who opt not to utilize government crop insurance services in favor of a form of self insurance. These principles of "justified intervention," a form of "market failure" analysis,[14] provide a test for measuring the wisdom of particular crop insurance reform proposals.

In Part II of this article, I briefly detail the history of federal crop insurance and other agricultural disaster relief in the United States. In Part III, I discuss long-term difficulties of the crop insurance program. In Part IV, I analyze the strengths and weaknesses of the FCIRA, in comparison to my own reform proposal, according to the principles of justified intervention.

II. "PHASES OF HARDSHIP":[15] A BRIEF HISTORY OF FEDERAL CROP INSURANCE

A. PIONEERING EFFORTS

Federal delivery of agricultural disaster assistance began when Congress enacted the Federal Crop Insurance Act of 1938 (FCIA)[16] in response to a prolonged period of severe drought.[17] Private efforts to provide multiperil crop insurance "failed because the companies had inadequate data on how to set premiums, which caused them to set prices too low."[18] Unable to absorb the financial hazards of offering all-risk crop insurance, private insurers either abandoned or eschewed this

14. *Cf.* A. Michael Froomkin, *Reinventing the Government Corporation,* 1995 U. Ill. L. Rev. 543, 577 ("Congress often turns to [federal government corporations] when the mission, often viewed as necessary to fill a gap in the private sector, is basically commercial.").

15. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 383 (1947).

16. Federal Crop Insurance Act, ch. 30, 52 Stat. 72 (codified as amended at 7 U.S.C. §§ 1501-1521).

17. *See, e.g.,* JOHN STEINBECK, THE GRAPES OF WRATH 1 (1939) ("To the red country and part of the gray country of Oklahoma, the last rains came gently, and they did not cut the scarred earth. . . . The surface of the earth crusted, a thin hard crust, and as the sky became pale, so the earth became pale, pink in the red country, and white in the gray country.").

18. GAO, RISK SHARING, *supra* note 11, at 10. For a general discussion of the reasons why private involvement in multirisk crop insurance is unlikely absent government assistance, see *infra* text accompanying notes 199-210.

market.[19] Consequently, "the Government engaged in crop insurance as a pioneer."[20]

The FCIA created the Federal Crop Insurance Corporation (FCIC or Corporation), a wholly government-owned agency, "to promote the national welfare by improving the economic stability of agriculture through a sound system of crop insurance."[21] Initially the coverage of the FCIA was limited to wheat, but over time Congress amended the Act, extending its scope to cotton in 1941,[22] to flax in 1944, and to corn and tobacco in 1945.[23]

The FCIA evolved not only with respect to the extent of crop eligibility, but also in terms of the form of coverage.[24] Originally, the program sought to provide insurance "in kind"—the premiums, the losses, and the FCIC's obligations were all determined on a bushel basis[25] —in order to insulate farmers from price risks.[26] Over time, this approach evolved into an option-style "hedging operation" whereby the farmer paid a cash premium equal to then current market rates, which the Corporation would in turn use to buy wheat and cotton.[27] The Corporation would then sell these same commodities and use the proceeds to pay indemnities owed farmers.[28] Stated simply, the FCIC played the market, hoping to protect both itself and producers from price swings that might occur between the time of purchase and the time at which it sold commodities to pay indemnities.[29]

Not surprisingly, heavy losses plagued the early years of the program, causing Congress to appropriate money solely for liquidation in 1943, and to suspend insurance entirely in 1944 and early 1945.[30] A wave of legislation beginning in late 1944, however, cautiously reactivated it.[31] The initial round of this legislation provided for experimental

19. *See Federal Crop Ins., Hearings Before a Subcomm. of the Senate Comm. on Agric. Forestry on S. 1397*, 75th Cong. 1st Sess. 125, 185 (1937); H.R. REP. No. 1479, 75th Cong., 1st Sess. 2 (1937); PRESIDENT'S COMM. ON CROP INS., REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S COMM. ON CROP INSURANCE, H.R. DOC. No. 150, 75th Cong., 1st Sess. 2-4, 11-12 (1937); 81 CONG. REC. 2866-67, 2887, 2891, 2893, 2895 (1937).

20. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 383 n.1 (1947).

21. 7 U.S.C. § 1502 (1994); *see also* H.R. REP. No. 430, 96th Cong., 1st Sess. 26 (1979).

22. *See* Act of June 21, 1941, ch. 214, 55 Stat. 255.

23. H.R. REP. No. 430, *supra* note 21, at 26-27.

24. *Id.* at 27.

25. William H. Rowe & Leroy K. Smith, *Crop Insurance, in* THE YEARBOOK OF AGRICULTURE 1940: FARMERS IN A CHANGING WORLD 758-59 (Gove Hambridge ed., 1940).

26. H.R. REP. No. 430, *supra* note 21, at 27.

27. *Id.*

28. Rowe & Smith, *supra* note 25, at 759 ("Thus it has been the policy to invest in wheat the premiums received in cash equivalent and to pay losses by selling the wheat and giving the farmer a check for the cash equivalent.").

29. H.R. REP. No. 430, *supra* note 21, at 27.

30. *Id.*

31. *Id.; see also* Act of Aug. 1, 1947, ch. 440, 61 Stat. 718 (reinstating crop insurance for all

insurance on previously uncovered commodities, and legislation enacted in 1948 placed the entire program on an experimental basis, restricting the counties eligible for coverage, limiting increases in commodity eligibility to three annually, and capping coverage at the amount of producer investment.[32]

Congress used this period of restricted eligibility to experiment with other forms of insurance such as multiple crop coverage.[33] The 1947 amendments also authorized the FCIC to act as reinsurer, a provision not utilized significantly[34] until passage of the Federal Crop Insurance Act of 1980.[35] In 1949, only two years later, the Act was again amended, authorizing a period of further expansion into new counties.[36]

The FCIA underwent its next major revision in 1955, when Congress authorized the use of premium income for the payment of the direct cost of loss adjustment.[37] Just one year later Congress further extended this authority, allowing payment from the premium income of a limited portion of administrative and operating expenses.[38] Unfortunately, while Congress was authorizing further expenditures from premium income, no measures were being taken to replenish those monies by appropriations.[39] Instead, Congress, in following years and throughout the 1970s, repeatedly authorized the issuance of additional capital stock to cover producer claims, making it more and more difficult for the FCIC to fulfill the Act's requirement that premiums be scheduled at a rate "sufficient to cover claims for crop losses . . . and to establish as expeditiously as possible a reasonable reserve against unforeseen losses."[40] In catastrophic loss years, the FCIC relied heavily on these capital stock subscriptions.[41]

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commodities).

32. H.R. REP. No. 430, *supra* note 21, at 27.

33. *Id.* at 28.

34. *Id.* For a brief period between 1968 and 1972 the FCIC reinsured a portion of the Puerto Rico Farm Insurance. *Id.* at 29.

35. *See infra* notes 52-69 and accompanying text.

36. H.R. REP. No. 430, *supra* note 21, at 28.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* The substantive equivalent of this provision persists today. *See* 7 U.S.C. § 1508(d)(2)(A) (1994). For a discussion of the related problem of crop loss valuation, see Mann v. Federal Crop Ins. Corp., 710 F.2d 144, 146 (4th Cir. 1983) (discussing valuation of harvested peanuts "under a federal crop insurance policy"), *cert. denied*, 465 U.S. 1005 (1984), and A.W.G. Farms, Inc. v. Federal Crop Ins. Corp., 757 F.2d 720, 728-29 (8th Cir. 1985) (stating that, where FCIC led Red River Valley sugar beet farmers "down a primrose path, which would ultimately defeat their claim for indemnity," "basic principles of good faith and fairness" suggested that processors need not outright reject beets from farmers to invoke loss-determination method that applied to harvested beets not accepted under processor's contract with growers).

41. H.R. REP. No. 430, *supra* note 21, at 28.

These problems, coupled with congressional wariness about expanding the program's scope, had the unfortunate side effect of leaving a substantial portion of United States agricultural production uncovered by crop insurance.[42] As of 1980, the FCIC offered coverage for only 30 crops in one-half of U.S. counties.[43] Moreover, participation was low even where coverage was available: only "about 10% of the eligible crop acreage was insured in 1980—about 7% of total planted acreage."[44] This state of affairs caused Congress to rely on disaster assistance and emergency loan programs as a means of protecting agriculture from natural risks.[45] During the years 1974 to 1980 alone, the USDA paid an average of $436 million annually in direct cash payments to farmers, in the form of *ad hoc* relief and emergency loans.[46] During the period 1970 to 1979, the USDA averaged $965 million in emergency loans.[47] In short, a two-tier system had developed: crop insurance availability remained limited, but the pressure for other forms of relief remained strong.[48]

Meanwhile, structural changes in American agriculture had significantly increased levels of risk and leverage among American farmers.[49] It therefore came as little surprise when Congress enacted the 1980 reforms to federal crop insurance on the eve of a farm credit crisis already set in motion by the borrowing and marketing excesses of the 1970s.[50] In summary, two types of problems hampered the effectiveness of federal crop insurance: an actuarial problem arising from the FCIC's use of premium income to cover a growing range of expenses; and a participation problem due in part to limited eligibility and in part to the availability of other forms of relief. Although forty years of amendments had incrementally increased program eligibility, a "common complaint" remained that the FCIA "never became more than a pilot

42. *Id.*

43. GAO, RISK SHARING, *supra* note 11, at 11.

44. *Id.*

45. Disaster relief and crop insurance remain practically related today. *See generally* Wilson v. United States Dep't of Agric., 991 F.2d 1211, 1216 (5th Cir. 1993) (noting that participation in disaster relief program requires, like crop insurance, threshold showing that crop loss was caused by an "'eligible disaster,'" i.e., not by "improper farming techniques"), *cert. denied*, 114 S. Ct. 1296 (1994).

46. GAO, RISK SHARING, *supra* note 11, at 11.

47. *Id.*

48. *Id.*

49. *See generally* INGOLF VOGELER, THE MYTH OF THE FAMILY FARM: AGRIBUSINESS DOMINANCE OF U.S. AGRICULTURE (1981) (discussing the changes from an agrarian populist's perspective); Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 824-30 (1995) (describing the changes, from a "Consumerist's" perspective, as "The Decline of Agriculture as an Autonomous Enterprise").

50. *See generally* MARTY STRANGE, FAMILY FARMING: A NEW ECONOMIC VISION (1988) (discussing agricultural industrialization and its effects on the family farm).

program."[51] Congress set out to correct this situation at the end of the 1970s.

B. THE FEDERAL CROP INSURANCE ACT OF 1980

The difficulties and cost of operating this two-tiered system led Congress to pass the Federal Crop Insurance Act of 1980. Hailed as a "major overhaul,"[52] this legislation, the basic structure of which remains intact even after the 1994 Act, set out to achieve the following six objectives:[53]

- First, access and participation sufficient to eliminate the need for *ad hoc* relief;
- Second, utilization of private sector expertise "to the maximum extent possible"[54] in the risk-bearing, sales, and servicing of federal crop insurance;
- Third, operation on an "actuarially sound basis" with premium income sufficient both to cover claims and to establish a reserve equal to 10% of premiums;
- Fourth, operation within a budget through better prediction of program costs;
- Fifth, subsidization of premium costs to ensure affordability for farmers; and
- Sixth, distribution of private insurance company risk through federal reinsurance.

Many of these goals are related. Actuarial soundness nicely complements the goal of operation within a budget, and federal reinsurance plainly facilitates the effective solicitation and utilization of "the sales talents and experience of private sector commissioned agents and insurance companies."[55] Most importantly, however, Congress understood its chief goal, widespread participation, as directly related to affordability. Congress determined that a premium subsidy would achieve the desired effect. Accordingly, the Act provided, "[f]or the purpose of encouraging the broadest possible participation in the insurance program," that 30% of each producer's premium would be paid by the Corporation.[56]

The goal of widespread participation is also integrally related to that of actuarial soundness, defined by the Act as a program which sets rates

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51. *See* H.R. REP. No. 649, *supra* note 4, at 19, *reprinted in* 1994 U.S.C.C.A.N. at 2518.
52. *Id.*, *reprinted in* 1994 U.S.C.C.A.N. at 2519.
53. GAO, RISK SHARING, *supra* note 11, at 12.
54. 7 U.S.C. § 1507(c) (1994).
55. H.R. REP. No. 430, *supra* note 21, at 12-13.
56. 7 U.S.C. § 1508(b)(3) (1988) (amended 1994).

at a level "sufficient to cover claims for losses on such insurance and to establish as expeditiously as possible a reasonable reserve against unforeseen losses."[57] In terms of variable costs, actuarial soundness exists where, in the long run, premiums cover the cost of indemnities.[58] In simple terms, where an insurer has a large pool among which to spread the risk of crop loss, the chances of doing so profitably are greater.

As of 1994, the FCIA had achieved just two of these six objectives: increased commercial involvement and widespread access to crop insurance. On the positive side, private sector participation did increase markedly and, by then, commercial insurers in one form or another administered the overwhelming majority of the program to the farm level.[59] Furthermore, between 1980 and 1990 the Corporation successfully increased availability from 30 to 51 crops, and from 39 to 50 states.[60] The number of county program crops correspondingly expanded from 4,632 in 1980 to 21,373 in 1991.[61] While *eligibility* had vastly expanded, however, by 1994 "only about one-third of eligible acreage ha[d] been enrolled."[62] Participation rates varied significantly due to factors such as fluctuating weather patterns, program promotion, education efforts, and the particular crop insured.[63]

The problem of low participation had several side effects, chief of which was the Act's failure to achieve participation sufficient to eliminate the political pressure for *ad hoc* disaster relief. By 1992, "the federal government ha[d] . . . spent over $19 billion, or 76 % of total disaster funds spent, in programs that [we]re alternatives to federal crop insurance."[64] In addition to the roughly $6.2 billion outlayed for crop insurance, the federal government also consumed $8.9 billion for

57. *Id.* § 1508(b)(1). This provision traces to the early years of the program. *See supra* text accompanying note 40.

58. *See* ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAW § 8.4(a) (1971) (explaining:

> Enlightened insurance rating is aimed at developing rates that are adequate and neither excessive nor unfairly discriminatory. This threefold set of objectives is more often stated, however, in twofold form—first, assuring that rates are adequate to provide funds for paying losses, costs of administration, and reasonable profits and, second, assuring that rates are neither excessive (with the result of unreasonable profits or costs) nor unfairly discriminatory (with the result of unreasonably high rates to some policyholders and unreasonably low rates to others).

(footnote omitted)).

59. *See infra* notes 127-28 and accompanying text.

60. GEN. ACCOUNTING OFFICE, CROP INSURANCE: FEDERAL PROGRAM FACES INSURABILITY AND DESIGN PROBLEMS II (GAO/RCED - 93-98, May 1993) [hereinafter GAO, CROP INSURANCE PROBLEMS]. For a discussion of the limits of eligibility, see Parks v. Federal Crop Ins. Corp., 416 F.2d 833, 838 (7th Cir. 1969) (notwithstanding lack of ownership interest in the crop, tenant farmers who "bore a risk of loss . . . on their crops" had an "insurable interest" within the meaning of the FCIA).

61. GAO, RISK SHARING, *supra* note 11, at 17.

62. H.R. REP. NO. 649, *supra* note 4, at 20, *reprinted in* 1994 U.S.C.C.A.N. at 2519.

63. GAO, RISK SHARING, *supra* note 11, at 20.

64. *Id.*

disaster relief, and $10.1 billion in emergency loans, for a total of more than $25 billion in disaster assistance during the 1980s. Unfortunately, these numbers showed no sign of decreasing.[65] Between 1987 and 1994, the federal government spent $16 billion in combined outlays for crop insurance and *ad hoc* disaster relief—over $10 billion for disaster relief and $6 billion for crop insurance.

As one might expect, the FCIA of 1980 also failed to achieve actuarial soundness, a fact attributable in part to the rapid expansion of the program, but also to low participation and the simple fact that the FCIC charged insufficient premiums to cover indemnities.[66] As a result, the program incurred losses in each year from its creation, though the amounts varied by crop, region, and in cases of catastrophic losses.[67]

Finally, although the Act achieved its goal of involving the private sector in the *administration* and *profitability* of the program, commercial insurers had not, as of 1994, assumed a commensurate level of *risk* and *responsibility* for its failures, even where the privates participated as reinsureds.[68] Because private insurers would not likely offer multi-peril coverage absent reinsurance, the FCIC provided it on more generous terms than would a commercial reinsurer.[69] Although provisions of the 1990 Farm Bill attempted to cure this imbalance, they were largely insufficient.

C. THE 1990 FARM BILL

The Food, Agriculture, Conservation, and Trade Act of 1990 (the 1990 Farm Bill)[70] left the structure of federal crop insurance largely in place. It made a few noteworthy changes, only one of which is relevant here: the attempt to shift a greater level of risk to reinsured companies by modifying the standard reinsurance agreement.

Standard reinsurance agreements are the documents that govern the relationship between the FCIC and reinsured companies offering crop insurance under FCIA.[71] Under the terms of the standard reinsurance

65. *See id.* (noting that programs costs have continued to increase).

66. *See infra* text accompanying notes 180-84.

67. GAO, RISK SHARING, *supra* note 11, at 25.

68. *See generally* GAO, RISK SHARING, *supra* note 11.

69. *See infra* text accompanying notes 71-82.

70. *See* Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (1990) (codified as amended at scattered sections of 7 U.S.C.).

71. *See* 7 C.F.R. §§ 400.161-.177 (1996) (discussing reinsurance agreements). The legal status of the farmer under a direct contract is distinct. *See* Old Republic Ins. Co. v. Federal Crop Ins. Corp., 947 F.2d 269, 276 (7th Cir. 1991) ("The contracts Old Republic has with its farmer-insureds are 'totally distinct and disconnected' from the contracts it has with the FCIC, its reinsurer. . . . [The reinsurer] cannot involve the farmer-insureds in the liability determination because no privity exists between the insureds and the FCIC." (citation omitted)). For a discussion of the differences between the FCIC roles as direct insurer and reinsurer, see *infra* notes 72-77 and accompanying text.

agreements in effect during the 1980s, reinsured companies could purchase "proportional" reinsurance through four distinct provisions—respectively denominated assigned risk, quota share, surplus share, and portfolio exchange—each containing its own ceding limits, thereby separating their business into different risk categories and ceding to the FCIC an amount inversely related to the degree of risk they elected to assume.[72] If, for example, a company ceded 75% of its business to the FCIC as reinsurer, it would bear only the other 25% of indemnities on claims.[73] Correspondingly, the portion not ceded to the FCIC was eligible for "nonproportional" reinsurance (or, "stop-loss" reinsurance), which further limited private losses.[74] In short, the standard reinsurance agreements in effect in the 1980s allowed reinsured companies to share proportionally in the gains while shifting a disproportionate risk of loss to the FCIC[75]—to take the sweet without the bitter. In the words of Representative George Miller, federal crop insurance was "a classic program in which the profits [were] privatized and the losses we[re] socialized."[76] Although this was due in part to the difficulty of "finding the balancing point between the government's desire to leave as much risk as possible to the private sector while providing the insurance companies with sufficient incentive to participate in the program,"[77] the 1990 Farm Bill nonetheless attempted to correct the problem.

The 1990 Farm Bill mandated a revision of the standard reinsurance agreement to ensure that reinsured companies would take greater responsibility for loss thereunder, while considering factors such as the avail-

72. GAO, RISK SHARING, *supra* note 11, at 26-27.

73. *Id.* at 27 n.1

(Under the 1986-89 standard reinsurance agreements' assigned-risk provisions, companies might cede up to 95 percent of their premium and liability for losses for designated policies (generally the highest risk policies) to FCIC. Quota share requires companies to cede 5 percent of their remaining premium and liability for losses to FCIC. Under the surplus share provision, companies designate an amount of premium and then cede to FCIC 80 percent of all premium and associated liability above the designated amount. Under portfolio exchange, companies with business concentrated in three or fewer states may exchange a portion of their business with FCIC, thereby spreading the companies' risk across all states where FCIC provides insurance.).

74. *Id.* at 27 ("For a negotiated fee, the reinsurance company agrees to reimburse the insurance company for all indemnity payments above a predetermined amount. Stop-loss reinsurance protects an insurance company from financial ruin if catastrophic losses occur.").

75. *See generally id.* at 26-37. These agreements are distinct from private reinsurance agreements in several respects: First, FCIC makes available reinsurance for all crops, whereas private reinsurers choose their markets; second, the concept of a *standard* reinsurance agreement is foreign to private reinsurers, who operate on a case-by-case basis resulting in as many unique compromises between the parties involved; third, both losses and profits are shared proportionally in private agreements; and fourth, several factors resulting from the unique nature of environmental agricultural risks make the FCIC's responsibility especially high.

76. 136 CONG. REC. H5,613 (daily ed. July 25, 1990) (statement of Rep. George Miller).

77. GAO, RISK SHARING, *supra* note 11, at 47.

ability of private reinsurance and the financial condition of the reinsured companies. The FCIC responded by revising the standard reinsurance agreement to require greater risk retention by reinsured companies and to decrease the level of stop-loss insurance offered. The agreement created three reinsurance funds—assigned risk (for the riskiest policies), developmental (potentially profitable but not yet actuarially sound policies), and commercial (the safest policies)—for different levels of risk, while decreasing the ratio of potential gains to losses to reflect more closely the companies' actual experience.[78]

These changes represented an improvement, but private companies' risk was still modest relative to that retained by the government.[79] Under catastrophic loss scenarios, the 1992 standard reinsurance agreement left up to 75% of potential losses on the shoulders of the FCIC.[80] The greater lesson, however, was that tinkering with the ratios and particulars of the agreements is only effective to the extent that the underlying crop insurance policy supporting them is sound and producer-responsive, as "the agreement by itself cannot fundamentally alter the risk-sharing relationship between the federal government and the private sector."[81] When coupled with problems of poor correlation between FCIC pricing policies and risks covered, as well as the effects of adverse selection and moral hazard, discussed below,[82] transferring a commensurate level of risk to the private sector proved a difficult proposition. In sum, where the FCIC changed the 1992 standard reinsurance agreement, it changed too little. Fundamental reform was necessary.

D. THE FEDERAL CROP INSURANCE REFORM ACT OF 1994

The Federal Crop Insurance Reform Act of 1994 (FCIRA or the 1994 Act) was hailed as such a reform, and in many respects it is. The centerpiece of the Act is the "free" provision of catastrophic coverage (CAT)—for an administrative fee of $50 per crop per county—against yield losses of greater than 50%, indemnified at 60% of expected market price.[83] Lest the nominal fee prove insufficient to encourage participation, the FCIRA contained two other carrots to entice producers to

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78. The agreement also required companies to retain 20% of the liability risk for assigned risk policies, 35% for developmental policies, and between 50 and 100% for commercial policies. While companies could only allocate 20% of their business to the assigned risk fund, there were no limits on the amount of funds they could allocate to developmental and commercial funds.

79. GAO, RISK SHARING, *supra* note 11, at 47.

80. *Id.*

81. *Id.*

82. *See infra* text accompanying notes 143-179.

83. 7 U.S.C. §§ 1508(b)(2)(a), 1508 (b)(5)(a) (1994). The FCIC fully subsidizes the premiums for catastrophic coverage. *See* 7 U.S.C. §§ 1508(d)(2)(A), 1508(e)(2) (1994) (discussing payment of premium by FCIC).

purchase coverage. First, the FCIRA eliminates the legal authority for *ad hoc* relief as to crops covered by federal insurance. The Act establishes permanent authority for non-insured assistance payments (NAP) at levels comparable to catastrophic coverage, whereunder 35% area and individual losses together trigger NAP relief for individual producers.[84] Second, the FCIRA conditioned eligibility for participation in other departmental programs upon the purchase of at least catastrophic coverage.[85] The collective emphasis of the 1994 Act is widespread enrollment in CAT through heavy subsidization of premiums and the elimination of unbudgeted disaster relief.

The 1994 Act also increases the range of additional (or, "buy-up") coverage. Whereas previous policy permitted participating farmers to elect yield guarantee levels of 50%, 65%, or a maximum of 75% of their actual production history (APH)[86] yield,[87] present law authorizes coverage up to a maximum of 85% of individual yield or 95% of area yield.[88] Like previous policy, however, the FCIRA retains premium subsidies for such coverage in hopes "of encouraging the broadest possible participation" in the program.[89]

The 1994 Act resembles previous law in other respects as well. Consider, for example, its declared objectives: "(1) to improve the crop insurance program so as to protect farmers from crop losses caused by natural disasters and (2) eliminate the need for ad hoc disaster assistance legislation."[90] Like its predecessor, the FCIRA evinces a policy commitment to crop insurance over *ad hoc* disaster relief, and seeks to achieve its goal by making crop insurance affordable. As Kenneth Ackerman, Manager of the FCIC, explained during the debate leading to the Act's passage, "[c]atastrophic coverage, the way we envision it, is basically a replacement for a disaster payment."[91] To be sure, the nominal fee, coupled with the since-modified linkage of crop insurance with eligibili-

84. *See* 7 U.S.C. § 1519 (1994) (discussing non-insured crop disaster assistance).

85. *Id.* § 1508(b)(7)(A); 7 C.F.R. § 400.656 (1996). The 1996 Farm Bill, however, eliminated this "linkage" component of the 1994 Act in favor of a policy of permitting farmers to waive eligibility for future disaster relief. *See infra* text accompanying notes 102-03.

86. *See infra* text accompanying notes 109-16 (discussing how the program operates in practice and explaining the various provisions for calculating yields).

87. *See* 7 U.S.C.A. § 1508(a) (1988) (amended 1994) (prohibiting the Corporation from offering "any level of coverage in excess of 75 per centum of the recorded or appraised average yield, as adjusted").

88. 7 U.S.C. § 1508(c)(4) (1994).

89. *Id.* § 1508(e)(1).

90. H.R. REP. No. 649, *supra* note 4, at 17, *reprinted in* 1994 U.S.C.C.A.N. at 2517.

91. *Review of the Administration's Federal Crop Insurance Reform Proposal: Hearings Before the Subcomm. on Env't, Credit, and Rural Dev. of the Comm. on Agric. House of Representatives*, 103d Cong., 2d Sess. 13 (1994) [hereinafter *Reform Proposal*] (statement of Kenneth Ackerman, Manager, FCIC).

ty for farm programs generally, make the 1994 Act more likely than its predecessor to succeed in increasing participation. Still, it is interesting that Congress remains committed to the basic premises of the FCIA of 1980. Likewise, although the FCIRA again pays lipservice to using the private sector "to the maximum extent possible,"[92] it actually more closely resembles the pre-1980 "dual delivery" system of employing *both* the public and private sectors to sell its services. In short, while the 1994 reforms substantially altered the *types* of coverage available to farmers, it kept the underlying system and, in the case of delivery, retreated from exclusive private sector sales.

Finally, the 1994 Act signaled certain changes in the way the FCIC does business. As its "alternate" title—"The Department of Agriculture Reorganization Act"—suggests,[93] the 1994 Act contemplates substantial internal reorganization within USDA.[94] Indeed, according to President Clinton's statements upon its signing, the FCIRA "sets the standard" for future proposals to "reinvent[ ] the Federal Government."[95] Many of the Act's provisions are discretionary, however, and the actual results of the ambitious plans to reorganize will have to be worked out over time.[96] Nonetheless, among the provisions relevant to crop insurance are the authorization of the Secretary to establish the Consolidated Farm Service Agency (CFSA),[97] and the requirement that he establish the Office of Risk Management and Cost-Benefit Analysis.[98] The Act further authorizes the Secretary to assign to the CFSA the general supervision of the FCIC,[99] and—up until this May, when the 1996 Farm Bill worked further administrative reforms—the first signs were that the primary changes wrought by the FCIRA were moving forward. By Spring 1995, the FCIC and Agricultural Stabilization and Conservation Service (ASCS) had already merged into the CFSA.[100]

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92. *Compare* 7 U.S.C. §1507(c) (1988) *with* 7 U.S.C. §1506(c) (1994).

93. I say "alternate" because commentators tend to refer to the 1994 Act by one name or the other, depending upon whether they are discussing its effects on crop insurance or on agriculture generally. The Act's complete title is "Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994." Pub. L. No. 103-354, 108 Stat. 3178 (1994).

94. *See* 7 U.S.C.A. §§ 6901-7014 (Supp. 1996) (codifying reorganization of Department of Agriculture).

95. Statement by President William J. Clinton upon signing H.R. 4217, 30 WEEKLY COMP. PRES. DOC. 2005 (Oct. 17, 1994).

96. *See generally* Alan R. Malasky & William E. Penn, *USDA Reorganization—Fact or Fiction?*, 25 U. MEM. L. REV. 1161, 1165 (1995) (noting that the Act "contains more statements that 'the Secretary is authorized' to do something than statements that the Secretary 'shall' do something").

97. 7 U.S.C. § 6932(a) (1994).

98. Federal Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 194, 110 Stat. 888, 945-46 (to be codified at 7 U.S.C. § 6933).

99. *See* 7 U.S.C. § 6932(b)(2) (1994).

100. *See Federal Crop Insurance Reform Act of 1994, Hearings Before the Subcomm. on Risk Management and Specialty Crops of the Comm. on Agric. House of Representatives*, 104th Cong., 1st

E. THE 1996 FARM BILL

Just one full growing season after enactment of the FCIRA, Congress enacted the Federal Agricultural Improvement and Reform Act of 1996 (1996 Farm Bill).[101] In the brief interim, however, some farm groups expressed concern that making the acquisition of crop insurance a "mandatory" prerequisite for participation in other farm programs would discourage participation in both crop insurance and the other programs. Accordingly, Congress traded in the mandatory linkage component of the 1994 Act[102] for a policy of permitting producers not to purchase CAT provided they waive, in writing, their eligibility for any future disaster payments.[103] Thus, there remains an added incentive to purchase crop insurance, but farmers are free to self-insure while participating in farm programs generally.

The 1996 Farm Bill made other significant changes as well. First, while it permits the USDA to continue offering CAT coverage directly in states or regions that have an insufficient number of approved private insurance providers, the 1996 Act requires the USDA to shift policies to private companies when private coverage becomes "sufficiently available," as determined by the Secretary.[104] This provision represents a compromise between the advocates of dual delivery, who argued that direct USDA delivery ensures widespread availability and coordination between crop insurance and price support programs, and the advocates of exclusively private delivery, who argued that a "single-point" delivery system would ensure maximum participation and "one-stop shopping" for farmers, since buy-up coverage is only available privately and those who purchase CAT coverage directly from the USDA might be less likely to purchase additional coverage.[105] Second, the 1996 Farm Bill establishes the Office of Risk Management (ORM).[106] Whereas the 1994 Act subjected the FCIC to the jurisdiction of the CFSA, the 1996 Act

Sess. 12 (1995) [hereinafter *1995 Risk Management Hearings*] (statement of Grant B. Buntrock, Acting Administrator, CFSA).

101. Federal Agricultural Improvement and Reform Act, Pub. L. No. 104-127, 110 Stat. 888 (1996) (to be codified at various sections of 7 U.S.C.).

102. 7 U.S.C. § 1508(b)(7)(A) (1994); 7 C.F.R. § 400.656 (1996).

103. § 193, 110 Stat. at 944 (to be codified at 7 U.S.C. § 1508(b)(7)(A)). *See generally* CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS, CROP INSURANCE AND RISK MANAGEMENT: PROVISIONS IN THE ENACTED 1996 FARM BILL (Ralph M. Chite) (1996) [hereinafter 1996 CRS REPORT] (on file with author).

104. *See* § 193, 110 Stat. at 943 (to be codified at 7 U.S.C. § 1508(b)(4)(C)).

105. *See* 1996 CRS REPORT, *supra* note 103, at 3.

106. § 194, 110 Stat. at 945-96 (to be codified at 7 U.S.C. § 6933).

places the FCIC under the authority of the ORM.[107] The CFSA will continue to oversee the operation of NAP.[108]

F. MECHANICS OF THE CURRENT REGIME

As the previous sections demonstrate, federal crop insurance has experienced substantial changes in recent years. These broad policy shifts make most sense when viewed in the context of the particular provisions designed to carry them out. Indeed, as one government report expressed the point: federal crop insurance is "relatively simple in concept but highly complex in implementation."[109] Thus, this section explains the program as it now operates.

1. *The Terms of Coverage*

The terms of coverage are largely chosen by the participating farmer.[110] In addition to catastrophic coverage, she may elect yield-guarantee coverage of up to 85% of her actual production history (APH) yield[111] over the past 10 years, if relevant data are available,[112] and a commodity price level ranging up to 100% of the crop's expected market value.[113] Naturally, premiums vary with the level of protection and market price chosen, as well as other factors including the crop, the

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107. *Id.*

108. The 1996 Farm Bill also instituted separate pilot programs for insect infestation, nursery crop insurance coverage, futures and options trading, and revenue insurances. § 193, 110 Stat. at 944-45 (to be codified at 7 U.S.C. § 1508). It terminated the provisions that permanently authorized assistance to livestock producers upon loss of a significant portion of their on-farm feed to a natural disaster. *Id.*

109. U.S. GEN. ACCOUNTING OFFICE, CROP INSURANCE: ADDITIONAL ACTIONS COULD FURTHER IMPROVE PROGRAM'S FINANCIAL CONDITION 12 (GAO/RCED-95-269, Sept. 28, 1995) [hereinafter GAO, ADDITIONAL ACTIONS].

110. *See* 7 C.F.R. § 401.3(b) (1996) ("At the time the application for insurance is made, the applicant will elect an amount of insurance or a coverage level and price from among those contained in the actuarial table for the crop year."). Of course, this is not to say that even the most sophisticated farmers can easily comprehend the language of the regulations that govern their contract. Judge Myron Bright, of the United States Court of Appeals for the Eighth Circuit, has denounced federal crop insurance regulations as representative of "the unfortunate tendency of some administrative agencies to write in a form of bureaucratic language that is the antithesis of clear, succinct, and understandable English." Citizens Bank v. Federal Crop Ins. Corp., 547 F.2d 59, 62 (8th Cir. 1976).

111. *See* 7 C.F.R. § 400.52(b) (1996) ("*Actual yield*—The yield per acre for a crop year calculated from the production records or claims for indemnities. The actual yield is determined by dividing total production (which includes harvested and appraised production) by planted acres for annual crops or by insurable acres for perennial crops.").

112. Where such information is unavailable, the FCIC may assign the producer a substitute yield level based on data that are not producer-specific. *See* 7 U.S.C. § 1508(g)(2)(B) (1994) (stating that, absent satisfactory evidence of APH, "the producer shall be assigned a yield that is not less than 65 percent of the transitional yield of the producer"); *see also id.* § 1508(g)(2)(C) (stating that the FCIC "may offer a crop insurance plan based on an area yield"); *id.* § 1508(c)(3) ("A producer shall have the option of purchasing additional coverage based on an individual yield and loss basis or on an area yield and loss basis, if both options are offered by the Corporation."); 7 C.F.R. § 400.52 (1996) (listing definitions); GAO, CROP INSURANCE PROBLEMS, *supra* note 60, at 19 (discussing yield estimates).

113. 7 U.S.C. § 1508(d)(2)(B) (1994).

location of the farm, particular farming practices employed (such as irrigation or non irrigation), and yield level.[114] Upon payment of a claim, the insured receives a per-unit indemnity equal to the selected market price multiplied by the number of bushels by which her yield fell short of her chosen coverage level.[115] These terms are embodied in a contract between the grower and a commercial insurer or, in the case of a direct policy, the FCIC itself.[116]

An example is instructive: Suppose farmer Joe's 800-acre wheat farm yields, on average, 100 bushels of wheat per acre. Further suppose he chooses a 75% level of coverage at 90% of the projected market price (which I shall stipulate to be $3.50/bushel). To the extent that Joe's production falls below 75 bushels per acre, he qualifies for an indemnity payment of that amount multiplied by 90% of the market price ($3.15). If we further stipulate that Joe's production falls to 50% of his APH (to 50 bushels/ acre), we can conclude that he would receive payments of $78.75/acre (25 bushels multiplied by $3.15), for a total of $63,000.

2. *The Delivery System*

One component of the 1980 Act that has become increasingly important over time is the enrollment of the private sector in the sales, service, and risk-sharing entailed in delivering federal crop insurance.[117] In order to facilitate this shift of responsibility, the 1980 FCIA provided for the FCIC to set the prices and terms of insurance, to regulate the private companies, to provide them administrative support, and, most importantly, to reinsure them.[118] Initially, private companies were invited to participate in two capacities: as "master marketers" and as reinsured companies.[119] Commercial insurers acting simply as agents or brokers for the FCIC were known as master marketers.[120] Master mar-

114. *See, e.g.*, 7 C.F.R. § 401.8 (5.a.) (1996) (General Crop Insurance Policy) ("The annual premium is computed by multiplying the production guarantee times the price election, times the premium rate, times the insured acreage, times your share at the time insurance attaches, and where applicable, times any applicable, premium adjustment factor shown on the actuarial table."); *see also* 7 U.S.C. § 1508(d), (e) (1994) (discussing premiums).

115. *See, e.g.*, 7 C.F.R. § 401.101(7)(a) (1996) (Wheat endorsement) ("The indemnity will be determined on each unit by: (1) Multiplying the insured acreage by the production guarantee; (2) Subtracting therefrom the total production of wheat to be counted . . . ; (3) Multiplying the remainder by the price election; and (4) Multiplying this result by your share.").

116. *See infra* notes 117-36 and accompanying text. If "unavailable privately," additional coverage may be obtained directly from the FCIC. 7 U.S.C. § 1508(c)(1)(B) (1994).

117. *See* 7 U.S.C. § 1507(c) (1994).

118. *Id.* § 1508(e). The 1980 Act also provided for direct provision of insurance by the FCIC, as it had in years past. *See id.* § 1508(a).

119. GAO, RISK SHARING, *supra* note 11, at 13-14.

120. *See, e.g.*, 7 C.F.R. § 400.201 (1994) (discussing relationship between FCIC and private entities). Although one searches Title 7 of the Code of Federal Regulations in vain for hints of the phrase "master marketing," the FCIC relied on § 400.201, which refers to "Sales and Service Contract[ors],"

keters bore no risk on policies they marketed; the government both retained the premiums and paid the indemnities on these policies.[121] This was the more direct form of private marketing authorized by the FCIC,[122] and the terms of such policies were between the FCIC and the farmer.[123]

The sale of reinsured policies, which is the only form of private delivery remaining today, was distinct from master marketing.[124] Private companies sold, serviced, settled, and bore a degree of the risk of claims against such policies. Their entitlement to reinsurance, embodied in the standard reinsurance agreement discussed above, shifted a portion of the gains and losses from these policies to the FCIC.[125] Accordingly, what distinguished master marketers from reinsured companies was not *who* delivered the policy—in both cases commercial entities—but the relationship between the private company and the government. In both cases, the FCIC subsidized premiums and paid the administrative costs of the program.[126] Thus, from the farmer's point of view, the terms of the policies were nearly identical. In the case of master marketing, however, private companies selling the policies acted simply as administrative conduits that bore no risk of loss; in the case of reinsured delivery, private companies sold their *own* policies and bore risk on them. What protected reinsured companies was the purchase of reinsurance from the government.

Over time, the reinsurance provisions of the 1980 Act succeeded in turning over to private companies an increasingly larger percentage of the sales of multi-risk policies. Whereas reinsured companies sold only about 3% of policy premiums in 1981, they accounted for nearly 89% of such sales in 1990.[127] These numbers continued to increase, causing the FCIC to phase out master marketing entirely during the 1994 crop season.[128] Thus, to the extent that private companies are currently

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as an authorization for such arrangements. *See id.*

121. GAO, RISK SHARING, *supra* note 11, at 13.

122. *See* 7 C.F.R. § 401.2(b) (1993) (noting alternate crop insurance methods).

123. *See* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) (finding that error of agent did not bind FCIC, as it is not a private insurance company).

124. *See supra* note 121.

125. For an explanation of the standard reinsurance agreement as modified by 1990 Farm Bill legislation, see *supra* notes 71-82 and accompanying text.

126. 7 U.S.C. § 1508(e) (1994).

127. GAO, RISK SHARING, *supra* note 11, at 16-17. As discussed below, present law provides that basic catastrophic coverage "may be offered by—(i) approved insurance providers, if available in an area; and (ii) at the option of the Secretary that is based on considerations of need, local offices of the Department." 7 U.S.C. § 1508(b)(4)(A) (1994). The same is roughly true for purchases of additional, or "buy up," coverage. *Id.* § 1508(c)(1)(B).

128. Telephone conversation with Hayward Baker, Director, Reinsured Services Division, FCIC (June 24, 1996).

responsible for delivery of federal crop insurance, they assume that responsibility as reinsureds, not as master marketers.

The private sector's dominance of sales notwithstanding, the FCIRA retained a dual delivery system.[129] In practice, however, the FCIRA can only be described as a retreat from private delivery. Whereas reinsured companies accounted for more than 90% of all crop insurance sales in the early 1990s, they closed just 61% of such sales in 1995.[130] Although the government did not enter the market for buy-up coverage, it directly delivered 68% of all CAT policies,[131] which alone comprised 58% of total sales.[132]

As discussed above, however, the 1996 Farm Bill moved a step closer to single delivery by requiring the use of approved private providers where "sufficiently available."[133] Since the determination of "sufficiently available" private insurance is left to the Secretary, it remains to be seen what effect the 1996 changes will have.[134] Nonetheless, they represent at least a symbolic shift toward more responsive delivery.[135] Moreover, given past responses to seemingly symbolic shifts

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129. *See* 7 U.S.C. §§ 1508(b)(4)(i) (1994) (authorizing private sales of catastrophic coverage), 1508(b)(4)(ii) (authorizing direct USDA sales of catastrophic coverage "at the option of the Secretary that is based on considerations of need"), 1508(c)(1)(B) (authorizing private sales of additional coverage and, if "unavailable privately," by the USDA), 1508(k) (authorizing reinsurance of private companies).

130. *See* FARM SERVICE AGENCY, FEDERAL CROP INSURANCE CORPORATION: SUMMARY OF BUSINESS REPORT (June 24, 1996) (on file with author). In terms of raw numbers for 1995, reinsured companies sold 1,242,447 policies whereas the government, through CFSA, sold 806,521 policies, for a total of 2,048,968 policies. *Id.*

131. In 1995, the CFSA sold 806,521 CAT policies, compared with 372,031 for reinsured companies, for a total of 1,178,552 CAT policies. *Id.*

132. *Id.*

133. §193, 110 Stat. at 943 (to be codified at 7 U.S.C. § 1508(b)(4)(C)(ii)).

134. *Id.*

135. Given recent developments, perhaps banks soon will enter the business of selling crop insurance. *See* 12 C.F.R. § 618.8040(b)(8) (1996)

> (The banks may, only by agreement with an insurer, offer services traditionally furnished by insurers to the Farm Credit System. This shall include master marketers when considering the sale of Federal crop insurance. The banks shall not underwrite insurance, adjust claims payments or settlements, or train and school or service adjusters or insurance agents.);

Barnett Bank v. Nelson, 116 S. Ct. 1103 (1996) (federal law permitting bank sales of insurance preempts conflicting state law); Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 115 S. Ct. 810 (1995) (upholding as reasonable the determination of the Comptroller of Currency that National Bank Act permits bank sales of annuities); *see also* Jonathan B. Cleveland, Comment, *Variable Annuity Life Insurance Company v. Clarke: A Second Look at National Bank Annuity Sales and 12 U.S.C. § 92*, 78 MINN. L. REV. 911, 930-42 (1994) (advocating broad power for banks to sell insurance). Moreover, crop insurance is important to many agricultural bankers as a means of protecting collateral on operating loans. *See generally Reform Proposal*, *supra* note 92, at 237-39 (statement of James F. Hart, President & CEO, Hand County State Bank, Miller, South Dakota, on Behalf of the Independent Bankers Association of America).

in policy, one might reasonably expect the Secretary to perceive its congressional authorization as a mandate to rein in direct delivery.[136]

III. THE EYE OF THE STORM

The present system is not without its shortcomings, some of which are unique to current law. Others, though, are seemingly perennial limitations on the federal crop insurance program. What follows in this section is an analysis of such long-term difficulties.

A. A PROBLEM NATIVE TO AGRICULTURE: THE NON-INDEPENDENCE OF CROP LOSS RISK

Crop insurance holders are insuring against bad weather. Like other typically insured risks, weather is not something over which the policy holder has control. Indeed, as then-Representative Leon Panetta opined prior to passage of the 1980 Act, "[p]erhaps more than any other profession, farming involves risks and uncertainties completely beyond the control of the farmer. An entire season's work and investment can be washed away in a matter of days."[137] Unlike other typically insured risks, however, weather typically strikes more than one policy holder at a time. Many such weather-related or environmental hazards can reduce crop yields over large regions of the country, and this bears directly on the number of policies that will require indemnification in a given year.[138] In the 1988 drought, for example, 92% of the nearly 35,000 North Dakota and Montana wheat policies, as well as 58% of the roughly 65,000 Minnesota, Iowa, and Illinois corn policies, required indemnification.[139] Similarly, in the 1993 floods, the FCIC made payments on 72% of the approximately 71,000 Minnesota and Iowa corn policies, and on 56% of nearly 55,000 soybean policies.[140] In the crop insurance office as in the field, the old and familiar adage, "When it rains, it pours," holds true.

The widespread impact of environmental risks makes high participation particularly valuable for crop insurers. Actuarial soundness and ultimate profitability depend upon the principle of risk pooling: the

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136. *Cf.* Iowa *ex rel.* Miller v. Block, 771 F.2d 347, 352 (8th Cir. 1985)

(It is not the business of this Court to order the Secretary to make payments under the [Special Disaster Payments Program] to specific farmers. But when Congress has created a program which contemplates that such payments will be made in appropriate circumstances, it is the clear duty of the Secretary to promulgate regulations which carry out the intent of Congress.).

137. 126 CONG. REC. 2,741 (1980).

138. GAO, CROP INSURANCE PROBLEMS, *supra* note 60, at 15.

139. GAO, ADDITIONAL ACTIONS, *supra* note 109, at 20.

140. *Id.*

greater the pool of premium payers, the greater the effectiveness of insurance.[141] A strong advantage thus accrues to a federal, or at least national, crop insurance program, and this advantage increases with each additional crop and region insured.

B. PROBLEMS DUE TO LACK OF INFORMATION

1. *Mixing Apples and Oranges: The Problem of Adverse Selection*

One significant problem related to lack of accurate data is that of adverse selection.[142] When crop insurance premiums reflect average risk, and not individual risk, high-risk farmers are more likely to find participation attractive simply because they are less likely to consider the premiums—which are based on the farmer of average risk—too high for their own level of risk. By contrast, low-risk farmers know their likelihood of crop failure to be less, and thus are unwilling to pay a premium that incorporates a level of risk higher than their own—even if it is simply the average. Currently, actual production history (APH) average yields are the primary basis relied upon in determining farm-level risk. Stated simply, APH average yields are a producer's mean level of production over the last ten years. Unfortunately, current methods of computing these yields often "yield" inaccurate results.[143]

At least two limitations upon current methods of computing APH average yields contribute to this phenomenon. First, APH computations do not sufficiently reflect yield variability. Suppose, for example, that both farmer Joe and farmer Jane have an APH average yield of 100 bushels per acre for the past ten years. But further suppose that while Jane has harvested exactly 100 bushels per acre during each of these years, Joe's yields during the same period have varied widely, such that one year he harvested 50 bushels per acre, the next 150 bushels per acre, and so on. Although it is clear from the statistics that there is a far greater risk that Joe will have an exceptionally bad (or good) year, even wild fluctuations such as these are left unfactored into Joe's APH aver-

141. *See* KEETON, *supra* note 58, § 1.2(b)(2) ("Like other concepts based on probability, the concept of risk is a rational device for managing ignorance. So too is insurance, since it is founded on the concept of risk." (footnotes omitted)).

142. *See id.* § 1.2(b)(7)

> (Whenever a large group of potential insureds are treated alike irrespective of some factor that differentiates them as insurance risks, a disproportionately high percentage of applications for such insurance tends to come from the less desirable applicants because they get the better bargain. This is the principle of adverse selection.).

143. For an in-depth economic analysis of this problem, see Jerry R. Skees & Michael R. Reed, *Rate Making for Farm-Level Crop Insurance: Implications for Adverse Selection*, 68 AM. J. AGRIC. ECON. 653 (1986).

age yield, and thus have no bearing on his premium. The effect is that bad yields must be covered and are *not* offset with gains from good yields—a losing proposition for the insurer.

Many producers, in contrast, criticize current computation methods as unfair precisely because they do incorporate a farmer's bad years. For them the suggestion that rates should incorporate yield variability, for example, would only worsen their coverage, for they perceive their bad years as unrelated to their own performance. In the words of Representative Richard Ray, one problem is that "it is unfair to include a producer's yields in good and bad years to get an average yield on which to base the insurance payments."[144] This complaint, of course, is a problem endemic to the operation of an actuarially sound crop insurance program.

Second, APH average yield computations do not adequately account for trends in production. To continue the example, recall that in the relevant ten-year period Farmer Jane maintained a consistent yield of 100 bushels per acre. But suppose that Farmer Joe, rather than producing wildly variant yields, initially produces a modest 55 bushels per acre, but annually increases his yield by 10 bushels per acre, such that his production in the final year assessed is 145 bushels per acre. Both farmer Jane and farmer Joe have APH average yields of 100 bushels per acre, and Jane is likely to produce that amount. But unless there is a severe break in the pattern, farmer Joe is likely to produce a yield significantly greater than 100 bushels per acre. Yet current FCIC methodology does not account for trends. Consequently, farmer Joe will think twice before insuring. If the yield he really expects is greater than 100 bushels per acre, he will have to incur significant losses to begin receiving payments, even if he insures at or above the 75% level.

The statistics given are highly unrealistic, of course. Most farmers' yields increase over time, unlike Jane's, and never are they perfectly stable. Indeed, one wonders why farmer Jane would even consider purchasing crop insurance, given the rare stability of her production. Still, the examples illustrate the point that basing rates on an average yield over a period of years may be a highly inaccurate method of incorporating risk into the rate, depending on the current patterns of yield variability and other production trends. When coupled with the fact that producers are often unable to provide ten years of data[145] (which necessitates the use of substitute data),[146] the failure to account

144. *Federal Crop Insurance Program: Hearings Before the Subcomm. on Energy and Agriculture of the Comm. on Small Business House of Representatives*, 100th Cong., 2d Sess. 2 (1988).

145. The practice of crop rotation frequently exacerbates this problem.

146. *See supra* note 112.

for yield variability and production trends has a significant impact on FCIC's accuracy in assessing risk.[147]

2. *Moral Hazard*

A related but distinct problem in the administration of a sound crop insurance program is that of moral hazard. In the crop insurance context, moral hazard is the susceptibility of actual yields to the influence of producer actions.[148] As a result of the nature of these actions (or inactions), it may be extremely difficult for the insurer to isolate the cause of a farmer's crop loss. For example, a given crop loss may be due to infestation of a certain insect, but perhaps this infestation is equally attributable to the producer's failure to apply pesticides. Or a crop failure might be characterized as the result of either drought or the farmer's improper irrigation practices. What makes the hazard a "moral" one is the element of voluntariness attributed to farmer action causing the loss. A crop might truly have failed due to the weather, but at times it is hard to deny the possibility that it might have resulted from risks taken with the knowledge that a safety net of insurance would break the fall.

One scholar, Ivor Elrifi, has criticized this assumption about producer behavior as "morally unacceptable and offensive in contemporary society,"[149] but it seems far more absurd to suggest that crop insurance purchasers are in this regard different from other insureds. Insurance typically influences risk-taking behavior—an effect which, in a well-functioning system, is incorporated into the rate-making process. Consider the case of a farmer faced with the choice of whether to plant on a tract of marginal land. In a no-insurance world, the farmer will bear any loss

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147. The FCIC has recently instituted a Nonstandard Classification System (NCS) to target high-risk participants. GAO, ADDITIONAL ACTIONS, *supra* note 109, 44-45. These efforts, also known as the "high-risk" and "modified high-risk" programs, identify farmers with substantial claims in order to increase their premiums and/or reduce the production levels they are permitted to insure. *Id.* Producers who (i) "have received claims payments in at least three years," or, if data for more than five years are available, in 60% of those years; (ii) have a cumulative adjusted loss ratio (claims to premiums paid) of 4.0 or more; and (iii) "require a rate increase of at least 10 percent from the previous year," are placed in the high-risk program. *Id.* The modified high-risk program is identical except that it targets farmers with adjusted loss ratios between 2.25 and 4.0. *Id.* Available data suggest that these programs have resulted in some savings for USDA, although less than half as much as USDA had predicted. *Id.* Unfortunately, the NCS does not account for the specific problems discussed here, and it is limited in scope. *See* GAO, CROP INSURANCE PROBLEMS, *supra* note 60, at 25 (discussing NCS).

148. In insurance literature generally, moral hazard is defined as the increased probability of loss caused where an insured has less incentive to take loss-preventive measures. For a more thorough analysis, see, for example, A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 53-56 (1983).

149. Ivor Elrifi, *A Comparison of Crop Insurance in the United States and Canada*, 13 J. AGRIC. TAX'N & L. 99, 100-101 (1991).

incurred as a result of that tract's failure. She will thus think twice before planting. But where a farmer can expect assistance upon its failure, she stands only to gain by planting. Whether the tract produces a good yield or fails is no longer relevant; she bears the loss only to the extent of her premium.

Perhaps it is "'agriculturally incorrect'"[150] to say that moral hazard is consistent with human nature,[151] but one need not rely on speculation to support her claim that the problem plagues the federal crop insurance system. Recent data indicate that moral hazard is a large contributor to the FCIC's history of losses. The results of one study, for example, suggest it may be responsible for up to 20% of yield losses for crops such as wheat and sorghum,[152] and common sense suggests that these empirical data are only likely to grow as other crops are studied. In a similar vein, a General Accounting Office (GAO) report recently noted that during the years 1981 to 1989, about 6% of crop insurance policies reaped 28% of the total claims paid.[153] As Professor Jim Chen has stated in rejoinder to Elrifi: "The inexorable proclivity of all insurance markets to cluster into two pools, an expensive one filled with high-risk insureds and a cheap one filled with their low-risk counterparts, firmly proves the existence of the 'moral hazard' problem that Elrifi urges policymakers to ignore."[154]

The federal crop insurance program does not completely ignore the problem of moral hazard. To an extent, the system contains a built-in safeguard against abuse, in that coverage extends only to losses caused by "drought, flood, or other natural disaster,"[155] not to those due to "the neglect or malfeasance of the producer,"[156] the "failure . . . to reseed" when "customary,"[157] or "the failure . . . to follow good farming practices . . . ."[158] In the words of Judge Edith Hollan Jones, federal crop insurance "insure[s] against acts of God and nature but expressly disclaim[s] any liability for losses attributable to man."[159]

150. Chen, *supra* note 49, at 811.

151. Perhaps agriculture reflects tendencies of human nature *more* than other insurable human activities. *Cf.* Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261, 1262 (1995) ("As the most palpable link between humanity and nature, agriculture often acts as a stark mirror of human values.").

152. *See* GAO, ADDITIONAL ACTIONS, *supra* note 109, at 43.

153. *Id.*

154. JIM CHEN, AGRICULTURAL PUBLIC LAW 319 (unpublished manuscript on file with author).

155. 7 U.S.C. § 1508(a)(1) (1994).

156. *Id.* § 1508(a)(3)(A).

157. *Id.* § 1508(a)(3)(B).

158. *Id.* § 1508(a)(3)(C).

159. R & R Farm Enters., Inc. v. Federal Crop Ins. Corp., 788 F.2d 1148, 1149 (5th Cir. 1986) (footnote omitted).

Determining whether a farmer has used "good farming practices" often involves close evidentiary questions. Consider the case of *Bartmess v. Federal Crop Insurance Corp.*,[160] in which George Bartmess and his wife, Helen, Louisiana rice farmers, sought to recover losses arising out of flood damage to their crop.[161] When the FCIC denied coverage on the basis that Bartmess, by planting into flood waters, triggered the policy's exclusion for failure to follow good farming practices, Bartmess sued and introduced substantial testimony—that of his son, a field hand, a neighboring farmer, and a local bank vice president who also served as president of the local levee board—that, although his planting was delayed by earlier rains, his field was not actually inundated by the flood until after the rice had been planted.[162]

The FCIC, by contrast, introduced a hydraulic engineer's "educated guess" that, based on gauge readings taken along the local Red River and Bartmess's levee, the flood waters would have "overtopped" Bartmess's field prior to his completion of planting.[163] Bartmess, the levee board president, and a geologist all testified in reply that, according to their predictions, it would have taken ten days to three weeks for that to happen—an estimate the engineer admitted was consistent with his conclusion—sufficient time for Bartmess to finish seeding his crop.[164] An FCIC exhibit, however, indicated that, were Bartmess's estimate to be credited, flood waters still would have overtopped his levee before he completed planting.[165] The FCIC also introduced evidence that Bartmess had switched to a cheaper seed midway through planting, but that he had denied as much when first interviewed by the claims adjuster.[166]

The district court concluded that Bartmess failed to carry his burden of proving that his crop failure was an "unavoidable loss of production," reasoning that Bartmess planted his crop after he knew, or should have known, it was "a vain endeavor."[167] The Fifth Circuit affirmed, noting that "[t]he district court was not bound to believe the FCIC witnesses," since "the evidence supporting Bartmess's claim was ample."[168] Instead, the court acknowledged, the district court "might well have credited the argument that Bartmess could not have anticipated

160. 845 F.2d 1258 (5th Cir. 1988).
161. Bartmess v. Federal Crop Ins. Corp., 845 F.2d 1258, 1259 (5th Cir. 1988).
162. *Id.* at 1259-60.
163. *Id.* at 1261.
164. *Id.*
165. *Id.*
166. *Bartmess*, 845 F.2d at 1261-62. Given the Fifth Circuit's conclusion that the case turned on the credibility of the testimony, one may reasonably surmise that this fact was central to the district court's findings.
167. *Id.* at 1262.
168. *Id.*

being flooded because the flood waters eventually topped his levee by only inches, and because Bartmess had testified that, when he finished planting, the waters were 2 1/2 feet below the top of the levees," or "the argument that, had the rise been only slightly less, the levees would have held, and the crop would have been harvested."[169] As an appellate court, however, it "read only typed words on a cold, white page," and it was therefore inappropriate to re-strike the "balance of proof" by "counting witnesses or weighing words."[170] The FCIC thus "emerged" the victor, leaving Bartmess with only a field of spoils.[171]

Notwithstanding FCIC attempts at enforcing the "good farming practices" provisions, the difficulty of monitoring individual farmers' practices and isolating specific causes of crop loss persists. Farmers make all sorts of discrete, even imperceptible decisions that increase or decrease their risks.[172] Indeed, the same study to suggest that moral hazard is responsible for so great a part of current losses also concluded that monitoring difficulties may preclude the possibility of eliminating it.[173] Current FCIC methods have by and large been unsuccessful in detecting moral hazard, and the costs of acquiring these data, if their acquisition is feasible, may outweigh the gains in loss prevention.

This is not to say moral hazard is an entirely intractable problem, however, for the present regime fails even to encourage loss-prevention. Farmers who take such measures pay the same premiums as those who fail to do so, and, notwithstanding recent FCIC efforts to identify

169. *Id.*

170. *Id.*

171. This is the typical outcome. In fact, I found no federal case reporting a finding for the producer that was allowed to stand. *See, e.g.*, Wilson v. United States Dep't of Agric., 991 F.2d 1211, 1215 (5th Cir. 1993) (finding sufficient evidence in administrative record to uphold ASCS's determination that plaintiff's rice farming practices were improper, notwithstanding testimony of six local farmers, where Extension Service materials indicated that rice properly cared for should have grown faster than plaintiff's); R & R Farm Enters., Inc. v. Federal Crop Ins. Corp., 788 F.2d 1148, 1151 (5th Cir. 1986) (vacating holding for producer where district court failed to place upon it the burden of proof "to show that, for that portion of its loss for which it seeks indemnification, the loss was directly caused by one or more of the perils insured against"); Berry v. United States Dep't of Agric., 766 F.2d 886, 890 (5th Cir. 1985) (notwithstanding producer's testimony that harvesting was impossible after certain date, neighboring farmer's and FCIC adjuster's testimony that area land was harvestable until later date supported finding that producer did not suffer "unavoidable loss of production"); Hill v. Federal Crop Ins. Corp., 669 F. Supp. 928, 929 (E.D. Ark. 1987) (finding that, given "windy and dry conditions after Plaintiffs planted, recognized good farming practices would have caused Plaintiffs to flush the rice fields at issue to provide necessary moisture" and "to replant"); Royalty v. Federal Crop Ins. Corp., 618 F. Supp. 650, 652 (W.D. Ky. 1985) (denying coverage for failure to follow good farming practices where an otherwise "competent farmer . . . simply strained his capabilities to the breaking point" by leaving "insufficient time to prepare the land and to plant the crop properly," given the "rainy spring"); *see also* Federal Crop Ins. Corp. v. Hester, 765 F.2d 723, 728 (8th Cir. 1985) (upholding, in False Claims Act case, admission of neighboring farmers' testimonial estimates of defendant's probable yield where they "had for years grown corn . . . on similar land").

172. *See supra* the text accompanying note 148.

173. *See* GAO, CROP INSURANCE PROBLEMS, *supra* note 60, at 23.

high-risk purchasers—which, incidentally, only target farmers "known to represent extreme risks"[174]—even the riskiest farmers remain "entitled" to federal crop insurance.[175] Furthermore, not all methods of crop loss prevention are difficult to monitor. A grower susceptible to drought, for example, might plant special drought-resistant strains, and an examination of the damaged crop will reveal whether he did. Although this is a simple example, it illustrates the untapped potential for reform.

In summary, both adverse selection and moral hazard are characterizable as problems of inadequate information. Adverse selection results from too little data on the differences in risk among farmers; moral hazard results from insufficient information due to the difficulties of isolating the specific causes of a given crop's failure.[176] Adjustments to the current system can decrease the effects of both, though at some point the costs of these monitoring adjustments, particularly for moral hazard, may offset the resultant savings.[177] Notwithstanding the limits of our "cost-benefit state,"[178] however, such possibilities must be considered.

C. WORKING AT CROSS-PURPOSES

1. *Achieving Competing Goals of Widespread Participation and Actuarial Soundness*

The success of federal crop insurance has also been hampered by certain internal inconsistencies. Consider, for example, the competing goals of widespread participation and actuarial soundness. At first glance, these objectives appear complementary. As noted earlier, there is a direct correlation between participation and the likelihood of achieving actuarial soundness and ultimate profitability. As the Clinton Administration has aptly expressed the point: "The more farmers buy higher levels of coverage, the more fiscally sound the system will be."[179]

This analysis is incomplete as applied to the U.S. crop insurance regime, however, which seeks to achieve widespread participation through the subsidization of premiums. Indeed, the subsection of

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174. *Id.* at 25.

175. Although the FCIC recently has begun tying crop insurance premiums to risk through its NCS, its efforts remain modest. *See* GAO, ADDITIONAL ACTIONS, *supra* note 109, at 43 (discussing NCS system).

176. To an extent, moral hazard involves insufficient data of both types. Yield variability, for example, may result from a particular farmer's growing practices.

177. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

178. *See generally* Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247 (1996).

179. H.R. REP. NO. 649, *supra* note 4, at 50, *reprinted in* 1994 U.S.C.C.A.N. at 2550.

current law that establishes the actuarial "soundness" requirements of the federal crop insurance program also contains two subsections setting forth the program's "projected loss ratio."[180] According to a GAO study published prior to the 1994 Act, four elements of federal crop insurance policy designed to increase participation have the side-effect of inhibiting actuarial soundness: farmers' entitlement to purchase crop insurance regardless of their risk; the use of assigned yields at the farmer's option for determining normal crop production; legislative limits on rate increases; and late sales closing dates, which allow farmers to assess growing conditions before deciding whether to buy insurance.[181] These provisions undoubtedly increase participation, but at the expense of operating within a budget. Unfortunately, as a more recent GAO study verifies, each remains more or less intact today.[182] In order to achieve its goal of profitability, or at least its goal of reducing its expected loss ratio to 1.1,[183] the FCIC will have to establish insurance rates commensurate with risk. To the present date, anyway, participation has taken precedence over profitability. Thus, what appear to be mutually reinforcing goals have in practice worked against each other.

2. *The Philosophical Conflict Between Crop Insurance and Ad Hoc Disaster Relief*

A second way in which the federal disaster assistance strategy has operated in an internally inconsistent manner is a result of Congress' historic tendency to provide *both* crop insurance and *ad hoc* disaster relief. From 1988 to 1994, the federal government funded an annual average of $1.5 billion in unbudgeted disaster payments. In 1993 alone, the amount exceeded $2 billion. Meanwhile, the federal government's crop insurance program continued to pay nearly 1.5 times as many indemnities as it received in premiums,[184] and between 1981 and 1994

180. *See* 7 U.S.C. § 1506(o)(1)-(2) (1994).

181. GAO, CROP INSURANCE PROBLEMS, *supra* note 60, at 30-34.

182. GAO, ADDITIONAL ACTIONS, *supra* note 109, at 20.

183. The 1994 Act required federal crop insurance to achieve, by October 1, 1995, an overall projected loss ratio of not greater than 1.1. 7 U.S.C. § 1506(o)(1) (1994). The Act further requires that ratio to be reduced to 1.075 by October 1, 1998. *Id.* § 1506(o)(2).

184. *See* GAO, ADDITIONAL ACTIONS, *supra* note 110, at 17

> ([T]he claims paid per $1 of premium (including the government's subsidy) for crop years 1981 through 1994 varied greatly from year to year, averaging $1.41. During this period, claims exceeded premiums by a total of $3.3 billion. The highest claims payments in relation to premiums were in 3 catastrophic years—resulting from severe droughts in 1983 and 1988 and excessive moisture and severe flooding in 1993. Excluding the 3 catastrophic years, the average claim per dollar in premiums was $1.22. *Thus, even in years without catastrophic losses, the program consistently operated at a loss; catastrophic years just made the situation worse.* (emphasis added));

see also ORR, *supra* note 8, at 3.

losses exceeded claims by $3.3 billion. As discussed below, there is plainly a relationship between the two programs' losses.

At the root of the government's unplanned budgetary outlays lay chronically low participation in the crop insurance program. Although a USDA study reports that only a nominal 4% of farmers attribute their nonparticipation primarily to the prospect of *ad hoc* disaster relief,[185] a significantly higher proportion, about 37%, cite the prospect as a secondary reason for not enrolling.[186] According to crop insurance industry executives, farmers historically have believed that, if conditions get "really bad," Congress will come to their aid.[187] Accordingly, as of 1994, Congress had not yet succeeded in achieving a level of participation in crop insurance sufficient to ward off political pressure for *ad hoc* relief.[188] Thus, it came as little surprise when, at the various field hearings held prior to the 1994 Act, there was "unanimous agreement" that federal crop insurance and disaster relief, "two programs purportedly working side-by-side to help producers, [we]re in actuality working at cross purposes."[189] Insofar as the FCIRA repeals the legal authority for *ad hoc* disaster relief, it represents a major step toward eliminating this "inherent conflict in the program."[190] The real test of congressional determination, however, will come with the country's next natural disaster of catastrophic proportions. Then, and only then, will it be clear whether Congress has abandoned this internal conflict for good.

D. POOR PARTICIPATION AND POOR COVERAGE CHOICES

A final factor contributing to the historically low level of participation in the crop insurance program is the lack of coverage options. Indeed, the same USDA study to conclude that the availability of *ad hoc* disaster relief has discouraged participation also found that the principal reason for low enrollment—cited by 24.8% of those surveyed as the most important factor in their decision—was the lack of sufficient protection against the particular risks they commonly faced.[191] When considered in light of the fact that 23% of those surveyed—the third-highest response—choose not to participate primarily because they prefer to absorb the risks attending self-insurance,[192] this demonstrates that roughly one-third of all producers who would otherwise consider

185. USDA, RECOMMENDATIONS AND FINDINGS, *supra* note 11, at 57.
186. GAO, CROP INSURANCE PROBLEMS, *supra* note 60, at 36.
187. *Id.*
188. *See* CHEN, *supra* note 154, at 319.
189. H.R. REP. NO. 649, supra note 4, at 40, *reprinted in* 1994 U.S.C.C.A.N. at 2540.
190. GAO, ADDITIONAL ACTION, *supra* note 109, at 21.
191. USDA, RECOMMENDATIONS AND FINDINGS, *supra* note 11, at 57.
192. *Id.*

buying crop insurance choose not to do so because coverage options are insufficient. Even these figures may understate the significance of insufficient coverage, as the second-rated reason for nonparticipat ion—cited by 23.3%—was that the premiums are too high.[193] One interpretation of these data is that the premiums are too high for what farmers get in return. Thus, it might be said that this group, too, chooses not to enroll due to lack of sufficient coverage. If so, the implications are that, of those farmers who would prefer to buy insurance, 62% elect self-insurance because sufficient coverage is unavailable.[194] Regardless of one's characterization of the data, however, these figures are simply too large to ignore.

Although reinsured companies are free to suggest alternative coverage arrangements, these arrangements are subject to FCIC approval and, historically, the Corporation has been reluctant to authorize them.[195] As a result, many farmers criticize the program for not offering coverage levels high enough to justify payment of the premium.

IV. PRAYERS FOR RELIEF

A. THE THRESHOLD QUESTION: IS GOVERNMENT INTERVENTION IN DISASTER ASSISTANCE JUSTIFIED?

In 1978, on the eve of the congressional debate that led to the 1980 crop insurance reforms, then-Secretary of Agriculture Robert Bergland stated that, "Unquestionably, the government must protect farmers against natural disasters. Consequently, the policy choice precludes consideration of anything other than the type of response we will have."[196] Like many politicians, Bergland stated unequivocally what is subject to serious debate. Historically, an overwhelming majority of farmers have self-insured, and in a survey conducted as recently as 1989, 23% of farmers expressed a preference for self-insurance regardless of

193. *Id.*

194. I arrived at this figure by adding the percentages of the top two stated reasons for not enrolling (24.8 + 23.3) and dividing the sum by the total percentage of persons who are willing to consider buying insurance (100 - 23).

195. *But cf.* 7 U.S.C. § 1508(e)(3) (1994)

> (If an approved insurance provider determines that the provider may provide insurance more efficiently than the expense reimbursement amount established by the Corporation, the approved insurance provider may reduce, subject to the approval of the Corporation, the premium charged the insured by an amount corresponding to the efficiency. The approved insurance provider shall apply to the Corporation for authority to reduce the premium before making such a reduction, and the reduction shall be subject to the rules, limitations, and procedures established by the Corporation.).

This provision does not, however, authorize experimentation with different products, only premiums.

196. H.R. REP. NO. 649, *supra* note 4, at 22, *reprinted in* 1994 U.S.C.C.A.N. at 2521.

the availability of federal crop insurance.[197] Nonetheless, certain factors suggest that federal crop insurance is a beneficial use of federal tax dollars.

At the outset of this article, I proposed that federal crop insurance should follow certain basic principles governing all types of economic regulation. Accordingly, in order for *any* crop insurance proposal to warrant federal intervention in the market for agricultural risk allocation services, it must be shown that the private sector, acting alone, cannot adequately provide that service. Although then-Secretary Bergland overstated the case in contending that the federal government's place in the crop insurance market is "unquestionable," three related factors prevent private forces from entering the market to provide multi-risk crop insurance absent some form of federal intervention: (1) the non-independence of agricultural risk; (2) the difficulty of gathering actuarial data on the interaction of multiple perils; and (3) the overwhelming fiscal outlay necessary to insure against the loss of crops. Independently, each of these factors might or might not be sufficient to derail private efforts to provide crop insurance. Collectively, however, they present insurmountable hurdles for commercial insurers.

1. The Non-Independence of Crop Loss Risk

The first roadblock inhibiting a wholly private crop insurance regime is the non-independence of agricultural risk. As discussed above, agricultural risks are *environmental*, which distinguishes them from most other insured risks.[198] A person applying for health insurance, for example, is typically neither more nor less subject to contract cancer simply because her neighbor does—unless of course the environment spawns or transmits the carcinogenic influence, such as the health hazards posed by Chernobyl.[199] Likewise, an auto insurance policy holder is neither more nor less likely to be involved in a car accident because he lives next-door to a crazy driver—unless of course his neighbor crashes into him.

Crop insurance risks are far less independent. When farmer Jane experiences flooding, there is a strong possibility adjacent farmer Joe will, too. When farmer Joe loses his crop to fruit flies, it is quite likely that farmer Jane, who employs similar farming practices in producing

197. USDA, RECOMMENDATIONS AND FINDINGS, *supra* note 11, at 57.

198. Whereas most federal commodity programs are designed to limit market risk, *i.e.*, price fluctuations, federal crop insurance is designed to limit the effects of environmental risks. It is nonetheless difficult to overstate the impact of the weather on market risk.

199. I have chosen cancer because I understand its causes to be related primarily to individual behavior choices and heredity. By contrast, an epidemic that spreads throughout a community bears much greater similarity to the nature of agricultural risk.

the same crop next door, will suffer a similar loss. To cite an empirical example, consider the effect of *Anthonomous grandis*, a one-quarter inch beetle known as the "boll weevil," on cotton farmers in the South during the early part of this century. The boll weevil is (dis)credited with having eliminated as many as 55,000 Georgia farms and another 34,000 in South Carolina during the 1920s,[200] and during the preceding decade that same "pest was probably responsible for more changes in the number of farms, farm acreage, and farm population than all other causes put together."[201] Stated simply, insects and weather patterns—be they droughts, floods, hailstorms, or the like—pay no respect to lot lines or county borders. In consequence, whole regions of the country are subject to simultaneous crop damage, much as an epidemic sweeping through a community threatens home after home with sickness.[202] Especially for specialized producers, this means the loss of an entire season's income. Indeed, for growers of tree and vine crops, a natural disaster signals "not just the loss of one season's crop, but perhaps three or four years' income in addition to the cost of tree removal and replacement."[203] The debilitating impact on the surrounding community is also disproportionately severe.

The non-independence of agricultural crop losses makes it difficult for private insurers, particularly small ones, to enter the crop insurance business profitably. The whole premise of insurance is to spread risk among a pool of premium payers.[204] Yet if the entire pool of premium payers can potentially file claims simultaneously, the principle of risk sharing loses its meaning. In the event of a flood of catastrophic pro-

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200. 4 U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, FIFTEENTH CENSUS OF THE UNITED STATES: 1930 AGRICULTURE 12 (1932).

201. *Id.*

202. For a delightful fictional account of the effect of natural disaster on a farm family and community, see O.E. RÖLVAAG, GIANTS IN THE EARTH 339-50 (1927). For a colorful account of the effects of the grasshopper on a Minnesota farm family, *see* LAURA INGALLS WILDER, ON THE BANKS OF PLUM CREEK 196, 202 (1937)

> ('The wheat!' Pa shouted. He dashed out the back door and ran toward the wheat-field.
>
> The grasshoppers were eating. You could not hear one grasshopper eat, unless you listened very carefully while you held him and fed him grass. Millions and millions of grasshoppers were eating now. You could hear the millions of jaws biting and chewing.
>
> . . .
>
> The whole prairie was changed. The grasses did not wave; they had fallen in ridges. The rising sun made all the prairie rough with shadows where the tall grasses had sunk against each other.
>
> The willow trees were bare. In the plum thickets only a few plumpits hung to the leafless branches. The ripping, clicking, gnawing sound of the grasshoppers' eating was still going on.).

203. H.R. REP. NO. 430, *supra* note 21, at 10.

204. *See* KEETON, *supra* note 58, § 1.2(b)(2) (noting that insurance "is founded on the concept of risk").

portions, for example, a regional commercial insurer might be likened to a "piggy-bank" whose purpose is solely to save the farmers' money for a rainy day. By contrast, federalizing certain aspects of the crop insurance business enables national cost-shifting, which mitigates the regional nature of natural disasters and prevents a run on the local insurance company.

2. *The Difficulty of Gathering Actuarial Data*

Second among the barriers to private entry into the crop insurance market is the difficulty of gathering sufficient actuarial data to forecast agriculture-related risks. The profitable provision of insurance requires more than a knowledge of individual farmers' risk propensities, their competitive advantages, and regional soil qualities; it also requires substantial data and an understanding of weather patterns and other environmental risks. This, in turn, requires not only a large capital outlay, but substantial expertise of a non-financial nature, neither of which commercial insurers have at their disposal. In theory, nothing is preventing commercial entities from acquiring such meteorological expertise—insurance companies routinely develop expertise in other arcane fields, ranging from complex medical problems to workplace hazards, prior to entering those markets. Nonetheless, the problem of limited resources remains. Unlike other sorts of insurance, where risk related information is more readily available from private sources, broad-scale data on agricultural risks—especially as those risks relate to each other—are not sufficiently available absent federal forecasting. Consequently, a federal role in information gathering is proper. The USDA currently fulfills that role as to risks about which private companies lack complete data.[205] Insofar as this data, once acquired, remain current, one may reasonably argue that the justification for federal involvement diminishes. The tendency of risks, such as insect infestation to form new, pesticide-resistant strains, for example, suggests an ongoing federal role is at least somewhat justified.

205. *See* 7 U.S.C. § 1508(m)(1) (1994) (authorizing "research, surveys, pilot programs, and investigations relating to crop insurance and agriculture-related risks and losses"); *id.* § 1508(m)(2) ("No action may be undertaken with respect to a risk under paragraph (1) if insurance protection against the risk is generally available from private companies."); *see also id.* § 1506(h) (authorizing the Corporation to "assemble data for the purpose of establishing sound actuarial bases for insurance on agricultural commodities"). For a discussion of the related topic of how FCIC price forecasting could be improved, see U.S. GEN. ACCOUNTING OFFICE, CROP INSURANCE: INACCURATE FCIC PRICE FORECASTS INCREASE PROGRAM COSTS 7-8 (GAO/PEMD-92-4, Dec. 13, 1991).

3. *The Size of Agricultural Risk and Economies of Scale*

It might be said that the non-independence of agricultural risk and the difficulty of gathering sufficient actuarial data are simply necessary consequences of a third and final factor impeding the success of a purely private crop insurance regime: the sheer size of agricultural risk in need of management. Arguably, no commercial insurer could generate the start-up funds necessary to do business on a large enough scale to manage this risk profitably. Indeed, even private insurance companies—which historically have resisted direct federal provision of crop insurance where privately available—have testified that, "[w]ithout reinsurance from the Federal Government on supplemental products, they will not be made available on as wide a scale as is justified or needed."[206] The current lack of independent private activity in the multi-peril sector testifies convincingly to the existence of economies of scale precluding the private provision of such insurance.[207]

This is not to say there is no role for commercial insurers in the federal effort to provide disaster assistance. The principles presented at the outset of this article express a preference for private sector solutions wherever possible. My comments about the limits of commercial provision of crop insurance therefore apply only to the sales of multi-peril coverage. There is no place for federal provision of hail, lightning, and fire coverage, which "is provided by the private sector in over 3100 counties in the United States and has been provided for over 65 years."[208] But to suggest that private forces acting alone can provide multiple-peril coverage is also inaccurate.[209] In summary, although policymakers historically have tended to exaggerate the need for government intervention in crop insurance, available information indicates that there is an appropriate federal role. Accordingly, the following section attempts to define that role, and the corresponding role that commercial insurers might serve in providing federal crop insurance.

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206. *Eg., Reform Proposal, supra* note 91, at 305 (statement of John H. Joyce, Chairman, & Robert W. Post, Jr., Vice Chairman on behalf of the American Association of Crop Insurers).

207. *See also supra* text accompanying note 18-19.

208. H.R. REP. NO. 430, *supra* note 21, at 68 (dissenting views of Hon. William C. Wampler et al.). *See also* Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 383 n.1 (1947) ("[T]he government engaged in crop insurance as a pioneer. Private insurance companies apparently deemed all-risk crop insurance too great a commercial hazard.").

209. Indeed, even the present system is built upon the premise that private involvement is necessary, but not sufficient. *See* Old Republic Ins. Co. v. Federal Crop Ins. Corp., 947 F.2d 269 (7th Cir. 1991) (discussing the role of reinsured companies in federal crop insurance).

B. DEFINING A JUSTIFIED FEDERAL ROLE IN CROP INSURANCE

According to the principles delineated at the outset of this article, government action generally is most justified where, due to reasons beyond the control of society's members acting in private capacities, an important need is left unprovided for. I have suggested there exists such a need when a natural disaster destroys the fruit of agricultural labor. The conclusion that government provision of disaster assistance is justified generally, however, begs a posterior question: What form should that intervention take?

In order to answer that question satisfactorily, it is helpful to distinguish between two types of reform: particular and systemic. Particular efforts to reform, which I have defined to mean changes in the *types* (and terms) of coverage available to producers, might include phasing in an area yield concept,[210] eliminating the 20% limit on rate increases,[211] modifying the deficiency payment program to minimize moral hazard,[212] or initiating the use of databases, a change implemented as recently as 1994. Efforts to make particular changes to improve the federal crop insurance system are to be applauded.

The more important purpose of this article, however, is to examine proposals for systemic reform, which I have defined to mean fundamental changes in the means of delivering and ensuring responsive, affordable, actuarially-informed crop insurance. Since policy proposals for systemic reform, like those for particular reform, number as many as do the problems plaguing federal crop insurance, I propose not to review such proposals exhaustively, but to discuss two distinct approaches to reform: (1) the FCIRA, a policy that expresses a preference for crop insurance by providing inexpensive catastrophic coverage and eliminating the authority for *ad hoc* relief; and (2) limiting the federal role to that of information provider and reinsurer, a policy that expresses a preference for crop insurance by leaving the private market to develop

210. *See* 7 U.S.C. § 1508(e)(4) (1994) (permitting "approved insurance providers to offer a plan of insurance to producers that combines both individual yield coverage and area yield coverage at a premium rate determined by the provider" under certain conditions); *but cf.* Jeffrey R. Williams et al., *Crop Insurance and Disaster Assistance Designs for Wheat and Grain Sorghum*, 75 AM. J. AGRIC. ECON. 435, 445 (1993) (concluding that individual crop insurance is preferable to area crop insurance).

211. *See* 7 U.S.C. § 1508(i) (1994) ("The Corporation shall adopt, as soon as practicable, rates and coverages that will improve the actuarial soundness of the insurance operations of the Corporation . . . , except that no rate may be increased by an amount of more than 20 percent over the comparable rate of the preceding crop year.").

212. *See generally* Mario J. Miranda & Joseph W. Glauber, *Providing Crop Disaster Assistance Through a Modified Deficiency Payment Program*, 73 AM. J. AGRIC. ECON. 1733 (1991); *cf.* A.W.G. Farms, Inc. v. Federal Crop Ins. Corp., 757 F.2d 720, 729 (8th Cir. 1985) (holding effectively matching insurance proceeds with federal price supports).

and react according to the particular insurance needs of farmers and the marketing zeal of commercial insurers. While each approach has advantages and disadvantages discussed below,[213] I shall also focus on whether they comport with the ideals of justified economic regulation generally.[214]

1. *Merits and Demerits of the Federal Crop Insurance Reform Act of 1994*

a. FCIRA's Merits

The primary aims of the 1994 federal crop insurance reforms are the provision of "free" CAT coverage and the elimination of the legal authority for *ad hoc* disaster relief, the appeals of which one can hardly deny. Indeed, the enduring lesson of this country's recent midwestern flooding, southeastern droughts, and Californian fires may well be that the most important type of insurance is coverage against the debilitating effects of the *largest* disasters. In addition to its intuitive appeal, however, a primary policy emphasis on CAT coverage accords with sound economics as well. In economic terms, the marginal utility of each incremental increase in coverage decreases as the amount of risk insured increases. The first dollar a farmer receives for his lost crop is therefore the most valuable, and the rational farming actor is more concerned with yield losses of 50% than with losses of 10%—a principle embodied in the use of deductibles.[215] If the FCIRA is problematic, it is certainly not on account of this emphasis.

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213. The environmental externalities of crop insurance are beyond the scope of this article. For a discussion of how agricultural and environmental objectives generally relate, see *American Agricultural Law Association Educational Conference Symposium*, 48 OKLA. L. REV. 189 (1995). *But cf.* Jim Chen, *Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation*, 48 OKLA. L. REV. 333 (1995).

214. A third policy proposal, and one that received significant attention during the Bush Administration, is the replacement of the crop insurance program with a permanent disaster assistance fund. *See* CONGRESSIONAL RESEARCH SERVICE, CRS REPORT FOR CONGRESS, FEDERAL CROP INSURANCE: CURRENT ISSUES AND OPTIONS FOR REFORM 11 n.4 (Ralph M. Chite) (1992) (noting that permanent disaster assistance was proposed in 1990). Among the advantages of this approach are simplicity of administration as compared to the current crop insurance program, which is highly complex. *Id.* at 11. Proponents argue that such an approach would save money, but this simply depends on the amount budgeted for relief. *Id.* The chief disadvantages of this proposal are its lack of flexibility and, most importantly, its inequitable nature, as equally deserving farmers possess no guarantee of equal payments under disaster relief regimes. *Id.* Conversely, a policy of providing accessible and *individualized* crop insurance by definition provides coverage commensurate with premiums paid, and limits government involvement to identifiable percentages. *See id.* (discussing combination of crop insurance and disaster payments).

215. *But cf.* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) (arguing that decisions such as whether to purchase insurance are less a function of rationality than of "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done").

A second and related advantage of the FCIRA is its probable effect on participation. Indeed, even as modified by the 1996 Farm Bill, the 1994 Act offers three enticements for producers to purchase crop insurance. The first is simply the cost of enrollment, as it is hard to imagine why a farmer would choose self-insurance on half of her crop when she could insure it at 60% of expected market value for "free" (a nominal $50 filing fee).

In addition, however, the FCIRA dispenses with the legal authority for *ad hoc* disaster relief. One might argue that putting hope in such a provision is premature given today's political climate; a natural disaster of catastrophic proportions might cause Congress to repeal its repeal. Still, that Congress demonstrated a willingness to bind itself in this regard is at least somewhat encouraging. Although only a small percentage of farmers cite the availability of disaster relief as a principal reason for declining to participate in federal crop insurance, the FCIRA makes an important policy statement that planning through risk management is preferable to unpredictable, and therefore inequitable, "band-aid" relief. The importance of this message should not be underestimated, since, as discussed above, the provision of both *ad hoc* relief and crop insurance not only is counterproductive in practice, but as a matter of principle suggests to farmers that crop insurance is not something about which the government is serious. Furthermore, the *perception* among farmers that Congress is serious about making crop insurance the exclusive form of agricultural disaster assistance might lessen the political pressure for an *ad hoc* measure, while providing a needed justification for legislators responding to any remaining pressure by reminding farmers that they assumed the risk of self-insurance. Stated simply, the elimination of the authority for *ad hoc* disaster relief is one of the most plainly admirable stipulations of the FCIRA.

A third and powerful means by which the FCIRA seeks to increase participation in crop insurance is through the "linkage" of crop insurance enrollment with eligibility for other agricultural assistance. While the FCIRA made the purchase of CAT coverage a "mandatory" condition of farm program participation, the 1996 Farm Bill wisely tempered this provision to permit farmers to qualify by waiving in writing their eligibility for future disaster relief. The 1996 Farm Bill provision represents an improvement simply because it recognizes the importance of retaining self-insurance as a viable option for some farmers. Many producers can and do manage risk effectively through savings and diversification, without government assistance. These efforts should be praised. Farmers should not, however, be "free" to self-insure if self-insuring also means receiving disaster relief at the taxpayer's expense.[216]

The contingency requirement has the added advantage of aligning crop protection with the terms of other insurance. Just as banks regularly require the purchase of home insurance to protect their investment as mortgagee, and just as agricultural banks condition eligibility for operating loans on the purchase of crop insurance,[217] so should Congress protect its investment of tax dollars.[218]

The FCIRA thus contains three provisions that hold significant promise for increasing participation in federal crop insurance. Although data on the effects of the 1996 Farm Bill's retreat from mandatory linkage are not yet available, roughly 80% of eligible producers purchased crop insurance in 1995.[219] Fifteen years after enactment of the FCIA of 1980, the FCIRA is finally beginning to achieve Congress's goal of widespread participation in federal crop insurance.

One might nonetheless respond that these benefits are not without their costs. For example, the USDA has projected that the FCIRA will cost approximately $8.1 billion for Fiscal Years 1995-1999 (which is more than current FCIC measures), but that the net effect will be savings of $750 million over the next five years due to offsets in money not spent on *ad hoc* disaster relief.[220] Thereafter, USDA projects that the FCIRA's cost will be equivalent to the cost of current programs.[221] A savings of $750 million might itself justify reform. The FCIRA's long-run costs, however, are projected to equal those of current programs. Nearly the entire justification for eliminating disaster relief is budgetary, so if neither alternative promises savings in the long run, one could argue that eliminating the crop insurance program, not disaster

216. *See generally* RUFFIN & GREGORY, *supra* note 13, at 878 (defining "free rider" as "anyone who enjoys the benefits of a good or service without paying the cost").

217. *See generally Reform Proposal, supra* note 92, at 237-39 (statement of James F. Hart, President & CEO, Hand County State Bank, Miller, South Dakota, on Behalf of the Independent Bankers Association of America).

218. Subject to the doctrine of unconstitutional conditions, the principle that the government may "regulate that which it subsidizes" is well settled. Wickard v. Filburn, 317 U.S. 111, 131 (1942) (finding that the federal government may regulate even on-farm use of wheat under Commerce Clause where farmer participates in acreage allotment program). *Cf., e.g.*, Rosenberger v. University of Virginia, 115 S. Ct. 2510 (1995) (finding state university's denial of funding to publication espousing religious viewpoint is subject to the free speech clause).

219. *See Fiscal Year 1997 Agriculture and Related Agencies Appropriations: Hearings Before the Subcomm. on Agriculture, Rural Development, and Related Agencies of the Senate Appropriations Comm.*, 104th Cong., 2d Sess. (1996) *available in* WESTLAW, 1996 WL 228881 [hereinafter *1997 Senate Appropriations*] (statement of Eugene Moos, Under Secretary, Farm and Foreign Agricultural Services, USDA).

220. *Reform Proposal, supra* note 91, at 41-42 (statement of Eugene Moos, Under Secretary, International Affairs and Commodity Programs, USDA & Kenneth D. Ackerman, Manager, FCIC).

221. *Id.* at 42.

relief, would save an equivalent amount in administrative costs. If the financial savings turn out to be a wash, would not prudence counsel for maintaining the *status quo*?

The answer to this question is "no," but primarily for nonfinancial reasons. That is, a third significant advantage of the FCIRA over previous policy is that crop insurance is simply more *equitable* than *ad hoc* disaster relief. Producers left to depend primarily on *ad hoc* relief have no way of knowing in advance whether Congress will bail them out. Yet even assuming, *arguendo*, they could predict that aid would be forthcoming, that aid would most certainly not be fairly distributed. Consider, for instance, the disparity between the aid given to victims of 1992's Hurricane Andrew and that given to victims of the 1993 midwestern floods: while Florida agriculturists were reimbursed at a rate of 50.04% of their losses, Midwesterners were "indemnified" for no less than 100% of theirs.[222] Similarly, farmers facing tremendous losses, but in states not located in targeted regions, "found that congressional decisions affecting their livelihoods were being based upon factors totally unconnected to their circumstances."[223] In short, *ad hoc* disaster relief is anything but predictable for either farmers or those footing the bill. Crop insurance, in contrast, protects those who purchase coverage to an extent commensurate with the premiums they pay. Can it seriously be contended that "hit or miss" relief is preferable to crop insurance?[224]

b. FCIRA's Demerits

The FCIRA's principal weakness lies in its retention of a dual delivery system.[225] Although the literal terms of the FCIRA authorized delivery of CAT coverage by *either* reinsured companies or, "at the option of the Secretary that is based on considerations of need,"[226] by the USDA, the Secretary interpreted the Act as a mandate to provide CAT coverage directly.[227] The FCIRA authorizes the provision of buy-up coverage on only slightly different terms: producers must apply to reinsured companies to purchase such coverage, and only "[i]f additional coverage is unavailable privately" may the FCIC provide it

222. *Review of the Administration's Federal Crop Insurance Reform Proposal: Joint Hearing Before the Subcomm. on Env't, Credit, and Rural Dev. and the Subcomm. on Specialty Crops and Natural Resources of the Comm. on Agric. House of Representatives*, 103rd Cong., 2d Sess. 70 (1994) (statement of Kenneth Ackerman, Manager, FCIC).

223. *Id.*

224. *See* 140 CONG. REC. S1,264 (daily ed. Feb. 9, 1994) (statement of Senator Durenburger) ("Insurance is often the fairer way of allocating costs. The problem is getting the people at risk to subscribe so long as they have good reason to think the government will bail them out anyway.").

225. 7 U.S.C. § 1508(b)(4) (1994); *id.* § 1508(c)(B).

226. 7 U.S.C. § 1508(b)(4)(ii).

227. *See supra* notes 129-32 and accompanying text.

directly.[228] One might justifiably wonder whether there is a substantive difference between these two provisions: each provides for direct governmental delivery, but only if the Secretary determines that there is a need. Notwithstanding the nominal differences in their texts, however, the Secretary has interpreted only the buy-up provision to suggest that direct delivery is unnecessary.[229]

While the 1996 Farm Bill purports to move a step closer to single-point delivery, its terms leave ample room for doubt. The language of the Farm Bill merely provides that, to the extent CAT coverage is "sufficiently available . . . as determined by the Secretary," only private insurance entities may provide it.[230] Conversely, "if the Secretary determines that there is an insufficient number of approved insurance providers," he "may continue to offer catastrophic risk protection."[231] Perhaps those trained in the nuances of legal hermeneutics appreciate the fine distinctions between these provisions and previous law, which permitted government delivery in cases where the Secretary determined that there existed a "need." And perhaps Secretary of Agriculture Daniel Glickman will perceive Congress as having given him a mandate to interpret "sufficiently available" broadly.[232] Still, it is hard to resist the conclusion that Congress simply lacks the political will to remove the delivery of federal crop insurance from the control of USDA. During the debate that led to the 1994 reforms, FCIC Manager Kenneth Ackerman testified that farmers elected reinsured coverage at a rate expected to reach 100% by the end of 1994.[233] Nevertheless, the Clinton Administration advocated, and Congress retained, dual delivery. Even applying the most charitable principles of statutory interpretation, it would be better entirely to do away with government delivery.

The abolition of direct USDA delivery of crop insurance would have several advantages. First and foremost, private companies have a far greater incentive to develop innovative policies that are responsive to the needs of farmers. Whereas the maintenance of direct delivery

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228. 7 U.S.C. § 1508(c)(1)(B).

229. *See* FARM SERVICE AGENCY, *supra* note 130 (recording no government sales of additional coverage).

230. § 193, 110 Stat. 888, 943 (1996) (to be codified at 7 U.S.C. § 1508(c)(ii)).

231. *Id.* (to be codified at 7 U.S.C. § 1508(c)(i)).

232. If Secretary Glickman were to choose to maintain the present policy of direct delivery, Congress would probably have to remove his statutory discretion to reverse his decision. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984) (reviewing court must accept agency's "reasonable" interpretations of gap or ambiguity in statute the agency is charged with administering). *Compare* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516-17 (defending *Chevron*) *with* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 377 (1986) (criticizing *Chevron*).

233. 1995 *Risk Management Hearings*, *supra* note 100, (statement of Kenneth Ackerman, Manager, FCIC).

requires substantial fixed-cost expenditures for the maintenance of FCIC offices—without regard to their performance—reimbursements of commercial insurers—if properly managed by well-negotiated standard reinsurance agreements—are commensurate with the degree of risk they assume and limited to the number of sales they produce. Given appropriate government backing through reinsurance, recent testimony before Congress indicates that granting reinsured companies a greater degree of latitude to innovate would result in an "explosion of crop insurance products."[234]

One example of such an innovation is a product known as a disappearing deductible.[235] This type of endorsement would increase farmers' indemnity per bushel as their losses increased, to the point that a total crop failure would result in a 100% indemnity, at potential savings for the government and a reasonable premium—one lower than the current rate for 85% coverage—for farmers.[236] At present, commercial entities lack both the authority and the incentive to develop such products, as current coverage tops out at 85% and the FCIC bears the responsibility for the generation of new products. Yet the primary reason for non-enrollment is a lack of coverage both sufficient and flexible enough to justify the premium.[237] A policy that eliminates the government's role as deliverer and product designer holds the potential to eliminate this incongruity.

Apart from their incentive to create affordable and effective products, commercial insurers also possess greater knowledge of both the needs of their constituent communities and insurance products generally, which naturally enables them to provide better service. A related and somewhat frequent criticism of government delivery offices, by contrast—even among advocates of dual delivery—is that public employees lack sufficient training and incentive to understand the complexities of federal crop insurance and to provide complete counseling.[238] This

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234. *Reform Proposal*, *supra* note 91, at 305 (statement of John H. Joyce, Chairman, & Robert W. Post, Jr., Vice Chairman, on behalf of the American Association of Crop Insurers). Ackerman testified that reinsured coverage was expected to reach 100 percent by the end of 1994. Yet the FCIRA retained a dual delivery system.

235. *Id.*

236. *Id.*; *see also id.* at 239 (testimony of James F. Hart, President & CEO, Hand County State Bank, Miller, South Dakota, on Behalf of the Independent Bankers Association of America) (discussing disappearing deductibles).

237. *See supra* notes 193-97 and accompanying text.

238. *See generally Fiscal Year 1997 Agriculture and Related Agencies Appropriations: Hearings Before the Subcomm. on Agric., Rural Dev., and Related Agencies of the House Appropriations Comm.*, 104th Cong., 2d Sess. (1996), *available in* WESTLAW, 1996 WL 188769 [hereinafter *1997 House Appropriations*] (statement of Katherine Ozer, Director, National Family Farm Coalition); *Reform Proposal*, *supra* note 92, at 238 (testimony of James F. Hart, President & CEO, Hand County State Bank, Miller, South Dakota, on Behalf of the Independent Bankers Association of America).

problem has been exacerbated by the fact that, while CAT coverage has been delivered primarily through USDA offices, buy-up coverage has been delivered mainly by commercial entities. While private insurers' livelihood depends upon their competent delivery of both types of coverage, USDA employees, often overburdened with the administration of several other farm programs, possess "neither the expertise nor the incentive to deliver these products in an efficient, conscientious manner."[239] This is not the fault of individual USDA employees, of course, but of the system as a whole. In some instances USDA employees admit a lack of understanding of the program's nuances and refer producers to independent agents.[240] Other times, however, misinformation or otherwise inadequate guidance inhibits more extensive participation in the buy-up portion of the program. Moreover, since actuarial soundness depends largely upon the effective solicitation of buy-up coverage (as opposed to "free" CAT coverage, which is simply a more predictable substitute for *ad hoc* relief), dual delivery ultimately hinders the fiscal soundness of federal crop insurance. Indeed, one of the primary disadvantages of the FCIRA is its failure to achieve actuarial soundness.[241] This is attributable in part to the system's failure to create an *incentive* to align risk with premiums—an incentive built in to the system when private entities are entitled to determine rates and forms of coverage. That said, however, the lack of actuarial soundness is also attributable to the effects of dual delivery on participation in additional coverage. And, although one could argue that private delivery is relatively unprofitable where the coverage is free, fostering private delivery of the free coverage would give reinsured companies an opportunity to market and increase sales of buy-up coverage.

Most importantly, however, a system of exclusive private delivery would help align federal crop insurance with other forms of economic regulation and government contracting.[242] The delivery of insurance—from the sales and service to the processing of data and claims—is traditionally a private sector function.[243] The infrastructure necessary to

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239. *1997 House Appropriations*, *supra* note 238 (statement of Katherine Ozer, Director, National Family Farm Coalition).

240. *1995 Risk Management Hearings*, *supra* note 100, at 103-04 (statement of Sharon K. Heaton, Vice President, National Association of Professional Insurance Agents).

241. *See* GAO, ADDITIONAL ACTIONS, *supra* note 109.

242. Agricultural policy generally, in keeping with its mandate to protect the original "discrete and insular minorit[y]," United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), tends not to conform to the ideals of economic regulation generally, but more closely adheres to the ideals of special interest legislation. *See* Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 404-06 (detailing "[t]he politics of filled milk" and the Filled Milk Act at issue in the case).

243. *Cf.* Office of Management & Budget, Circular A-76 OMB (Revised) (1983); *see also* Office of Management & Budget Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. 45,096-103 (Sept. 30, 1992) (clarifying OMB circular A-76).

deliver federal crop insurance is in place across the country, and eliminating USDA delivery could be expected to result in substantial savings in fixed costs and paperwork, since federal appropriations would be limited to those necessary to support contracting with reinsured companies and engaging in forecasting research. Even assuming these savings were only modest, simplicity is preferable where feasible, *ceteris paribus*, especially in an era of reinvented government.

Critics might rejoin, as well they should, that single-point delivery would benefit only private insurers,[244] given the disproportionate benefit current FCIC management has already delivered to private firms in recent years. Even granting—as past experience suggests—that this is a genuine concern, the solution is not to limit private involvement in the program. Rather, the FCIC might continue to modify its standard reinsurance agreements to ensure that private companies share a proportion of risk commensurate with their potential for profit.[245] Government contracting generally is premised on the notion that arms-length bargaining and competitive bidding produces a reasonably efficient provision of services, and there is no reason to think the provision of crop insurance is uniquely prone to inefficiencies or bargaining difficulties. Furthermore, it is hard to deny that producers stand much to gain from greater coverage flexibility, particularly given the fact that low participation in the current system is due in large part to the absence of coverage sufficient to justify the premiums charged.[246]

2. *Government as Facilitator*

The FCIRA took a step in the right direction. In emphasizing the importance of a base level of crop protection, providing strong incentives for increased participation, and eliminating the "hit or miss" tendencies of *ad hoc* relief, the 1994 reforms made three beneficial changes. Unfortunately, however, the FCIRA left in place certain other provisions of previous law that desperately needed reform. Most importantly, while the FCIRA wisely shifted the emphasis of federal disaster assistance from *ad hoc* relief to crop insurance, it did little to make the *system* of providing crop insurance more responsive to producers' shifting needs.[247] Rather, the FCIRA retained a system of dual delivery

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244. *See* CHEN, *supra* note 154, at 320.

245. The FCIC has already begun to make efforts in this regard. See *1997 Senate Appropriations*, *supra* note 219, at 4 (statement of Eugene Moos, Under Secretary, Farm and Foreign Agricultural Services, USDA) (noting that "reimbursements to private companies for delivery expenses will be limited to 29 percent of premiums").

246. *See supra* notes 193-97 and accompanying text.

247. This is not a rejection of CAT coverage *per se*, but a rejection of CAT coverage as an end unto itself. Congress might adopt a fundamentally more responsive system while encouraging deliver

and left the primary responsibility for innovative coverage designs on the shoulders of a governmental entity with little incentive and insufficient training to make crop insurance "farmer-friendly." It follows, from what I have argued, that the federal role in crop insurance is more narrow than Congress has thus far recognized. Limiting the government's role to efforts to *facilitate* a private crop insurance regime would better achieve federal crop insurance's objectives of actuarial soundness.

Implementing a program of government as facilitator would primarily entail two changes from current policy: first, eliminating direct delivery in favor of a system of exclusive private delivery by reinsured companies, while maintaining a federal role as reinsurer for multi-peril policies; and second, retaining federal responsibility for information gathering, distribution, and forecasting. Like the FCIRA, such a policy would necessarily eliminate the authority for all *ad hoc* disaster relief. Since I have already discussed the need to eliminate dual delivery in Part IV.B.1 and the need for federal provision of reinsurance and information provision in Part IV.A., the following section will focus on the value of a system of government as facilitator according to the principles of justified intervention set forth in Part I.

In addition to the advantages of encouraging innovation, efficiency, and maximum flexibility, a federal role in crop insurance, in the capacity of reinsurer and forecaster, also withstands scrutiny under principles governing economic regulation generally. As I have noted, government market intervention is most justified to provide a public good in cases of market failure. Relatedly, where a need is left unprovided for as a result of factors within an individual's control, the state is unjustified in intervening. Naturally, these principles apply not only to the threshold issue of *whether* the government should enter a market, but also to the posterior issue of *the extent to which* it should intervene. It follows that forms of government involvement that effectively utilize private actors are preferable to those that fail to do so.

Federal assistance in providing affordable and accessible crop insurance is therefore appropriate. The debilitating effects of natural phenomena are not factors over which producers have control and, absent federal intervention in the form of reinsurance and data collection, farmers would remain largely unable to protect themselves against such disasters. By the same token, however, the provision of crop insurance also eliminates the justification for *ad hoc* disaster relief, as there is an inverse relationship between the extent that producers are

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ers to promote CAT coverage. Nor have I characterized the FCIRA as particular in an overall sense, as certain provisions of the 1994 Act, viz. the elimination of the authority for *ad hoc* disaster relief, have a comprehensive flavor.

eligible for crop insurance and the justification for other forms of assistance. *Ad hoc* relief has no place in a universal crop insurance program, for "[a] natural disaster is no excuse for a fiscal disaster."[248]

Critics of such a narrow federal role might argue that it would increase premiums,[249] in turn decreasing participation and increasing the pressure for *ad hoc* relief. This criticism has merit insofar as actuarial soundness is dependent upon participation and, to be sure, the two are closely related. Yet the present system emphasizes participation at the expense of profitability and realistic rate setting, which also are closely related to actuarial soundness. Relatedly, consider the implications of this claim under the criteria set forth in Part I.

First, it is important to remember that commercial insurers do have an incentive to provide crop insurance at rates agreeable to farmers.[250] Given the absence of substantial barriers to entry into the insurance market, the presence of price competition can be expected not only to generate a variety of innovative products, but to serve as a check against excessive rates. Second, one must consider rate levels not in the abstract, but *relative to* rates established through a system of direct government delivery. An increase in the cost of insurance does not compel the conclusion that the program is less efficient or more costly overall, but rather that the price now reflects the *true* cost of insurance—the amount the market will bear.[251] Finally, this criticism might simply be characterized as a question of the proper level of subsidization. Higher rates are not, in and of themselves, a sufficient basis for rejecting reinsured delivery of crop insurance, for the government may still subsidize premiums either directly or through other methods.[252]

From the perspective of the principles governing the validity of economic regulation generally, the government is only required to

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248. 140 CONG. REC. S1265 (daily ed., Feb. 9, 1994) (statement of Sen. Durenburger).

249. *See, e.g.*, Elrifi, *supra* note 149 (comparing crop insurance in the United States and Canada).

250. Recall, for example, how resistant farmers are to premiums, even when subsidized, as discussed in Part III, *supra*. For a discussion of the lengths to which private actors generally are willing to go to compete, see ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 144-48 (1978), Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

251. *See generally* POSNER, *supra* note 177.

252. Although a full discussion of crop insurance subsidization is beyond the scope of this article, I note that the perceived fairness of the federal crop insurance system depends in part upon its success in providing accessible and affordable insurance. Although I take no position on whether Congress should subsidize the purchase of crop insurance, it may be the case that some subsidization is necessary to achieve desired levels of affordability. To that extent, subsidization is not incompatible with my proposal. In a system of maximum private participation, however, commercial insurers possess an incentive to increase enrollment, and the government can reasonably expect to get better mileage from its subsidies. In a properly functioning system there should be a direct and sensitive relation between subsidization and desired participation.

provide accessible and affordable insurance. Participation may be an indirect measure of the fairness of the system, but only to the extent that it reflects the program's affordability. Theoretically, the government could provide an affordable system of crop insurance, and many might choose not to enroll. Lack of enrollment, however, does not make the government's provision of insurance inequitable. So long as the system is reasonably affordable, the government has fulfilled its role and is under no obligation to provide further relief.

V. CONCLUSION

During the congressional debate that led to the enactment of the Federal Crop Insurance Act of 1980, several members of the House Agriculture Committee dissented from the Committee Report's recommendation that the Act be adopted.[253] Their stated objection was that the Act, as written, threatened to interfere with private efforts to provide certain forms of crop insurance coverage. In support, they marshaled the wisdom of President Abraham Lincoln, who once said of government intervention:

> The legitimate object of government is to do for a community of people what they need to have done, but cannot do at all, or cannot so well do, for themselves, in their separate and individual capacities. *In all that the people can individually do as well for themselves, government ought not to interfere.*[254]

Significantly, Lincoln did not say that government should do for the people what they can but fail to do for themselves. Despite the passage of more than 130 years, President Lincoln's statement provides a helpful perspective on issues of economic regulation generally, and on crop insurance in particular.

Barring a prophetic influence on the weather,[255] agricultural producers cannot adequately insure themselves against the risks of crop failure without some form of governmental assistance—at least, that is, until agriculture has become so utterly concentrated that all producers are large enough to self insure.[256] Until that day arrives, however, it is appropriate to ask whether, and how, the government should intervene to protect them. I have argued that the role best assumed by the federal

253. H.R. REP. No. 430, *supra* note 21, at 67-74 (dissenting views of Rep. Bill Wampler et al.).

254. *Id.* at 68.

255. 1 *Kings* 18:41-46.

256. Several agricultural corporations and cooperatives number among the Fortune 500. As of 1996, they included: Philip Morris (10), ConAgra (26), Sara Lee (50), Archer Daniels Midland (92), General Mills (156), Farmland Industries (178), Ralston Purina (180). *The Fortune 500 Largest U.S. Corporations*, FORTUNE, April 29, 1996, at F1, F1-F20.

government is one that facilitates a private regime of crop insurance. If I am correct in arguing that government intervention is legitimate where it serves to protect interests left otherwise unprotected by the market, the federal government is completely justified in serving the roles of reinsurer and forecaster. By the same token, there is no justification for governmental provisions of disaster relief to farmers who could have purchased insurance, provided that insurance meets minimum requirements of accessibility and affordability.

Despite its imperfections, a federally chartered but privately-held regime like that employed in the lending context represents the best available means of ensuring that farmers can opt to protect themselves.[257] Should producers opt for self-insurance or another form of risk assumption, Congress is under no obligation, moral or otherwise, to come to their aid. Should they opt for participation in the federal scheme, the program will have achieved a large part of its objective.

257. *Cf.* 12 U.S.C. §§ 2001-2279 (1994) (chartering the privately-owned Farm Credit System).