

10-1995

Of Agriculture's First Disobedience and Its Fruit

Jim Chen

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Agriculture Law Commons](#)

Recommended Citation

Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 *Vanderbilt Law Review* 1261 (1995)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol48/iss5/1>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Of Agriculture's First Disobedience and Its Fruit*

*Jim Chen***

I. IN THE BEGINNING	1262
II. AMERICAN AGRICULTURE'S ORIGINAL SIN	1274
A. <i>Fiat Lex</i>	1274
B. <i>To Live and Die in Dixie</i>	1287
1. The Southern Crucible	1288
2. Agrarian Apotheosis.....	1290
3. Native Son	1299
4. Exodus	1302
5. The Song of the South	1312
C. <i>Agrarian Apocalypse</i>	1315
1. The Twilight of the Farm	1315
2. Stories of Origin, Songs of Experience	1324
III. REDEMPTION WITHOUT ROMANCE	1326

* Compare John Milton, *Paradise Lost*, Book 1, ll. 1-3 (London, 1667) ("Of Man's First Disobedience, and the Fruit / Of that Forbidden Tree, whose mortal taste / Brought Death into the World . . .").

** Associate Professor of Law, University of Minnesota Law School. Except where indicated otherwise, all scriptural references are to the Authorized (King James) Version. I thank Dan Farber, Dan Gifford, Neil Hamilton, Chris Kelley, Drew Kershen, Guadalupe Luna, John McGinnis, Mark Movsesian, and David Purnell for their helpful comments and suggestions. Tracey Chabala, Deanna Johnson, and Steffen Johnson provided able research assistance. Finally, I wish to acknowledge *Vanderbilt Law Review* editor Scott Smith, who went beyond the minimal demands of editing and lent me keen insights into Southern literature and Christian theology.

I. IN THE BEGINNING

What God has created, agrarian debate has torn asunder. As successors to the neolithic agrarian pioneers¹ who chose to secure the blessings of agriculture to themselves and their posterity,² we long to understand our common roots. But the deeper we dig, the more bitterly we dispute the exegesis of our shared stories of origins. Nothing has more explosive potential than a return to first principles, a quest for beginnings.

As the most palpable link between humanity and nature, agriculture often acts as a stark mirror of human values. American agricultural prescriptions frequently invoke the Book of Genesis, the grandest and most familiar story of origins in the Judeo-Christian tradition. One of the leading intellectual architects of New Deal farm policy, Secretary of Agriculture Henry A. Wallace, vividly portrayed the supply control strategy of the 1930s as a modern application of the "ever normal granary" that Joseph established as a brilliant advisor to the pharaoh of Egypt.³ More recently, pleas to preserve biodiversity through stringent enforcement of the Endangered Species Act,⁴

1. Recent archeological research suggests that foragers may have settled down and established agriculture in Turkey in order to raise pigs. Compare Constance Holden, *Bringing Home the Bacon*, 264 *Science* 1398 (1994) (observing that this evidence contradicts the long-standing anthropological belief that plant cultivation predated animal husbandry), with Genesis 4:1-2 (noting that the first-born Cain tilled the soil, while his younger brother Abel raised sheep). After being established around 8500 B.C., Eurasian agriculture spread from its Turkish base as agrarian populations diffused and interbred with foraging populations. See generally Albert J. Ammerman and Luigi L. Cavalli-Sforza, *The Neolithic Transition and the Genetics of Populations in Europe* 9-33 (Princeton, 1984); Susan A. Gregg, *Foragers and Farmers: Population Interaction and Agricultural Expansion in Prehistoric Europe* (U. Chi., 1988); Colin Renfrew, *Archaeology and Language: The Puzzle of Indo-European Origins* 145-77 (Cape, 1987); J.M. Howell, *Early Farming in Northwestern Europe*, 257 *Sci. Am.* 118 (1987); Robert R. Sokal, Neal L. Oden, and Chester Wilson, *Genetic Evidence for the Spread of Agriculture in Europe by Demic Diffusion*, 351 *Nature* 143, 144 (1991).

2. Compare U.S. Const., Preamble ("We the People of the United States, in Order to . . . secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America").

3. See Henry A. Wallace, *Definition of the Ever Normal Granary*, 14 *Agric. Situation* 9 (1937). Compare Joseph S. Davis, *The Economics of the Ever-Normal Granary*, 20 *J. Farm Econ.* 8 (1938); Genesis 41:46-57 (describing how Joseph managed Egypt's food supply through seven years of plenty and seven years of famine). See generally Harold F. Breimyer, *Agricultural Philosophies and Policies in the New Deal*, 68 *Minn. L. Rev.* 333, 346-47 (1983). Joseph's Egyptian exploits are recounted in chapters 39-50 of the Book of Genesis. For accounts of Wallace's legendary penchant for religion and mysticism, see Russell Lord, *The Wallaces of Iowa* 432-36 (Houghton Mifflin, 1947); Theodore Saloutos, *The American Farmer and the New Deal* 51-52 (Iowa St. U., 1982).

4. 16 U.S.C. §§ 1531-1543 (1988 & Supp. 1993). See generally *TVA v. Hill*, 437 U.S. 153, 173-93 (1978).

the Convention on International Trade in Endangered Species,⁵ and the Convention on Biological Diversity⁶ have drawn emotional strength from the story of Noah's Ark.⁷ And no wonder: throughout time and across cultures, tales of a Great Flood have gripped the human imagination.⁸ Beneath a firmament that reflects the pattern of divine handiwork,⁹ human voices have sung the glory of God.¹⁰ As we ponder how to navigate our agricultural ark across a troubled economic and ecological sea, we do well to consult the stars in that sky. Just as reliable food production sates material hunger, stories and songs of origins quench the spiritual thirst for enlightenment and understanding.

The contrasting images of the New Deal's ever normal granary and the Rio summit's biologically diverse ark symbolize distinct paradigms now battling for the intellectual soul of American agriculture.¹¹ Supply control as an essential complement to price supports and income deficiency payments emphasizes power and productivity. The commodity programs' very vocabulary—parity, countervailing power,

5. Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087, T.I.A.S. No. 8249 (1973) (entered into force, July 1, 1975).

6. Convention on Biological Diversity, United Nations Conference on Environment and Development, 31 I.L.M. 818 (1992) (entered into force Dec. 29, 1993).

7. See, for example, Albert Gore, *Earth in the Balance: Ecology and the Human Spirit* 244-45 (Houghton, Mifflin, 1992) (reducing the story of Noah's Ark to an implied commandment, "Thou shalt protect biological diversity"); Endangered Species Act Reauthorization: Hearings before the House Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries, 99th Cong., 1st Sess. 3 (1985) (statement of Rep. Claudine Schneider); Bruce Babbitt, *The Future Environmental Agenda for the United States*, 64 U. Colo. L. Rev. 513, 517 (1993) (calling the story of Noah's Ark an "argument for preservation of God's creation"); Julie B. Bloch, *Preserving Biological Diversity in the United States: The Case for Moving to an Ecosystems Approach to Protect the Nation's Biological Wealth*, 10 Pace Envtl. L. Rev. 175, 190-91 (1992) (arguing that the story of Noah's Ark teaches respect for divine creation); Kevin W. Grierson, *The Concept of Species and the Endangered Species Act*, 11 Va. Envtl. L. J. 463, 469 (1992) (describing the desire to protect wildlife and ecosystems for their own sake as the "Noah principle"); Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Colo. L. Rev. 277, 351 (1993) (referring to the Endangered Species Act as a "biological blueprint for Noah's Ark"); Eric Christensen, Note, *Genetic Ark: A Proposal to Preserve Genetic Diversity for Future Generations*, 40 Stan. L. Rev. 279 (1987). The story of Noah is told in chapters 6-9 of Genesis.

8. See, for example, *The Epic of Gilgamesh* 110 (N. Sanders intro., Penguin, 1960); James George Frazer, *Ancient Stories of a Great Flood* passim (1916).

9. Compare Psalms 19:1 ("The heavens declare the glory of God; and the firmament sheweth his handywork").

10. Hear, for example, Aaron Copland, *In the Beginning* (Hyperion, 1987), label no. CDA66219; Franz Joseph Haydn, *Die Schöpfung* (Accent, 1983), label no. ACC58228D.

11. See generally Curtis E. Beus and Riley E. Dunlap, *Conventional Versus Alternative Agriculture: The Paradigmatic Roots of the Debate*, 55 Rural Sociology 590 (1990).

target prices, demand enhancement, grain reserves—describes agriculture as the commercial enterprise of subjecting natural resources to the fulfillment of human needs.¹² By contrast, the preservation of biodiversity and the larger environmental agenda to which it belongs characterize agriculture as the charitable mission of subjecting human conduct to the rhythms of natural ecology.¹³ The Old Testament stories of Joseph and Noah—and the New World storytellers who justify their policy preferences in these biblical terms—thus reflect the debate between the increasingly divergent schools of conventional and alternative agriculture.¹⁴ Alternative agriculture, according to its advocates, “is a systems approach to farming that is more responsive to natural cycles and biological interactions than conventional farming methods.”¹⁵ Although this dispute largely rehashes the familiar historical struggle between the industrial and agrarian visions of farming, the alternative school brandishes its “urgent concern over the ecological aspects of agriculture” as a new and formidable rhetorical mace.¹⁶

The bipolar battle between conventional and alternative agriculture is no mere war of words. The rhetoric of the struggle over the proper relationship between human agriculture and the natural environment is no less strident than the language of “anti-diplomacy,” the fighting words of global geopolitics in the nuclear age: preemptive strikes, anticipatory responses, strategic and tactical arms. Even in the United States, a nation that has neither faced nor feared serious food shortages since it invented the atomic bomb, agricultural regulation is frequently defended as a form of national security.¹⁷ Fully aware that hostile states’ food supplies can become vulnerable during

12. Compare Lon L. Fuller, *The Morality of Law* 122 (Yale rev. ed. 1969) (describing law as “the enterprise of subjecting human conduct to the governance of rules”).

13. Hear Alberto Grau, *Kasar Mie La Gaji* (“The Earth Is Tired,” in the language of Africa’s Sahel) (Earthsongs, 1991) (subjecting the rhythms of natural ecology to human conduct—in the guise of choral music).

14. See Beus and Dunlap, 55 *Rural Sociology* at 593-94 (cited in note 11) (defining “conventional” and “alternative” agriculture).

15. National Research Council, *Alternative Agriculture* 135 (National Academy, 1989).

16. Beus and Dunlap, 55 *Rural Sociology* at 595 (cited in note 11).

17. See, for example, Farmland Protection Policy Act, 7 U.S.C. § 4201(a)(3) (1994) (declaring that a “continued decrease in the Nation’s farmland base may threaten the ability of the United States to produce food and fiber in sufficient quantities to meet domestic needs and the demands of our export markets”). Compare Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354, codified as amended in scattered sections of 7, 15, 16, and 21 U.S.C. (the title speaks for itself). But compare U.S. Soil Conservation Service, *National Agricultural Land Evaluation and Site Assessment Handbook* (1983) (casting doubt on the frequent claims that American farmland is being lost at a high rate to urbanization); Julian Simon, *The Ultimate Resource* 81-89 (Princeton, 1981) (same); Gregg Easterbrook, *Vanishing Land Reappears*, 258 *Atlantic* 17 (July 1986) (same).

war,¹⁸ nations and international organizations on the brink of war have often imposed or threatened agricultural trade sanctions.¹⁹ The United States has manipulated export enhancement²⁰ and food aid programs²¹ even in peacetime, with little regard for the supposed beneficiaries of its "food for peace" agenda.²² In a world determined to beat its "plowshares into swords,"²³ agriculture's war of words marks an epic struggle between the mystery of the earth and the mastery of its wealth.²⁴

The conventional and alternative perspectives collide head-on when their advocates offer two conflicting interpretations of a religious text with profound philosophical significance for agriculture: the story of Creation in Genesis. As disgruntled feminist legal scholars have observed,²⁵ the Book of Genesis actually tells two stories of Crea-

18. See Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* 115-16, 130 (Knopf, 6th ed. 1985).

19. See, for example, Michael P. Malloy, *Economic Sanctions and U.S. Trade* 213 (Little Brown, 1990) (describing the United States' use of a grain embargo to protest the Soviet Union's 1979 invasion of Afghanistan); Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime* 9 n.8 (Cambridge, 1988) (describing how the threat of food sanctions authorized by the League of Nations dissuaded Yugoslavia from seizing Albanian territory).

20. See Export Enhancement Act of 1988, Pub. L. No. 100-418, 102 Stat. 1325 (1988); Export Enhancement Act of 1992, Pub. L. No. 102-429, § 201, 106 Stat. 2186, 2199 (1992). See generally David R. Purnell, *A Critical Examination of the Targeted Export Assistance Program, Its Transformation into the Market Promotion Program, and Its Future*, 18 N.C. J. Intl. L. & Comm. Reg. 551 (1993).

21. See, for example, Agricultural Trade Development and Assistance Act of 1954, Pub. L. No. 83-480, 68 Stat. 454 (1954), codified as amended at 7 U.S.C. §§ 1691-1738r (1994).

22. See, for example, Theodore W. Schultz, *Value of U.S. Farm Surpluses to Undeveloped Countries*, 42 J. Farm Econ. 1019 (1960) (outlining evidence that American food aid had limited value for its foreign recipients), reprinted in Vernon W. Ruttan, ed., *Why Food Aid?* 53 (Johns Hopkins, 1993); Emma Rothschild, *Is It Time to End Food for Peace?*, N.Y. Times Mag. (March 13, 1977), reprinted in *Why Food Aid?* at 84 (suggesting that American food aid has inflicted affirmative damage on Third World economies); James Bovard, *How American Food Aid Keeps the Third World Hungry* (Heritage Found. Background Paper, Aug. 1, 1988) (same). The dubious record of American food aid programs abroad should come as no surprise, since they were designed principally as a relief valve for excessive domestic supplies. See, for example, Willard W. Cochrane, *Farm Technology, Foreign Surplus Disposal, and Domestic Supply Control*, 41 J. Farm Econ. 885 (1959), reprinted in *Why Food Aid?* at 39; Mordecai Ezekiel, *Apparent Results in Using Surplus Food for Financing Economic Development*, 40 J. Farm Econ. 915 (1958).

23. Joel 3:10. But compare Isaiah 2:4 ("[A]nd they shall beat their swords into plowshares . . . ; nation shall not lift up sword against nation, neither shall they learn war any more"); Micah 4:3 (same).

24. Compare Jim Chen, *The Mystery and the Mastery of the Judicial Power*, 59 Mo. L. Rev. 281, 283 (1994) (pondering how struggles between power and mysticism can make the participants "at once so awed and so reviled").

25. See, for example, Patricia A. Cain, *Feminism and the Limits of Equality*, 24 Ga. L. Rev. 803, 812, nn.26, 29 (1990).

tion. The first story spans all seven days from "the beginning" to the day on which the resting God "blesse[s]" and "sanctifie[s]" the work of Creation.²⁶ The second traces "the generations of the heavens and of the earth" in largely human terms, focusing on the creation of Adam and Eve and the events leading to their expulsion from Eden.²⁷ The dual nature of the biblical text suggests two alternative ways of envisioning the proper relationship between humanity and the environment: Does the farmer enjoy dominion over the natural world, or does the farmer owe a duty of stewardship to earth's legacy?

In Genesis' first account of Creation, the ascent of man culminates the six active days of Creation.²⁸ Only after placing other life in the seas, in the skies, and on the earth does God "create[] man in his own image."²⁹ God's blessing unmistakably sets the human race apart from the rest of nature:

Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth. . . . Behold, I have given you every herb bearing seed, which is upon the face of all the earth, and every tree, in the which is the fruit of a tree yielding seed; to you it shall be for meat. And to every beast of the earth, and to every fowl of the air, and to every thing that creepeth upon the earth, wherein there is life, I have given every green herb for meat³⁰

The first Creation story expresses the conventional *dominion ethic* of agriculture. This ethic defined the traditional "understanding of [humanity's] relationship to the environment and served to condone" the policies by which farmers "felled the forest, plowed the plains, drained the swamp, slaughtered the buffalo, shot the passenger pigeons, irrigated the desert, and dammed the rivers."³¹ In all fairness, however—and in an ecumenical spirit permitting free trade in tools of

26. See Genesis 1:1-2:3.

27. See Genesis 2:4-3:24.

28. Compare Charles Darwin, *The Descent of Man and Selection in Relation to Sex* 161-81 (Appleton, 2d ed. 1874) (describing the emergence of humans as the most recent stage in the evolution of mammals in general and primates in particular), with James Barr, *The Bible in the Modern World* 169 (Harper & Row, 1973) (noting that most "[m]odern conservative evangelicals" view Genesis' six days of Creation not as six 24-hour periods, but as "six geological ages" or, even more allegorically, "six stages, not in the actual Creation itself, but in the *revelation* of the truth of Creation"); Ernest Frederick Kevan, *The New Bible Commentary* 77 (Wm. B. Eerdmans Pub., 2d ed. 1954) (preferring a more conservative interpretation of the six days as "geological age[s]," but acknowledging an interpretation of the six days as "days of dramatic vision, the story being presented to Moses in a series of revelations spread over six days").

29. Genesis 1:27.

30. Genesis 1:28-30 (emphasis omitted).

31. Don Paarlberg, *Farm and Food Policy: Issues of the 1980s* at 119 (U. Neb., 1980).

statutory interpretation and tools of biblical exegesis³²—the presence of the conjunction “and” between the words “subdue” and “replenish” tempers the dominion ethic.³³ Humanity may have received license to subdue the earth, but the authority to subdue carries with it the responsibility to replenish.

In the three decades since the 1962 publication of Rachel Carson’s *Silent Spring* launched the modern environmental movement,³⁴ the alternative agriculture movement has condemned the dominion ethic as scientifically outmoded³⁵ or even immoral³⁶ for its description of agriculture as a mechanical process rather than an ecological one. These sentiments echo the somewhat different depiction of nature in Genesis’ second account of Creation. That story begins with the first reference to God as “LORD”—*Yahweh*—in the Bible: “These are the generations of the heavens and of the earth when they were created, in the day that the LORD God made the earth and the heavens.”³⁷

In one stroke the biblical narrative switches from the *material*, “I-It” account of the first Creation story and its dominion ethic to an unmistakably *relational*, “I-Thou” account.³⁸ God is no longer experiencing Creation alone; as LORD, God shares the phenomenon with the subjects of Creation. Humanity as the “thou” of this account takes center stage among those subjects; the second account of Creation immediately notes the absence of “rain upon the earth” and of “a man to till the ground.”³⁹ God fills both those voids: after sending “up a mist from the earth” to “water[] the whole face of the ground,”⁴⁰ God “formed man of the dust of the ground, and breathed

32. Compare *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (arguing that the highest legislative body of the United States as “a Christian nation” could not have “intended to make it a misdemeanor for a church . . . to contract for the services of a Christian minister residing in another nation”).

33. Compare *Chisom v. Roemer*, 501 U.S. 380, 397 (1991) (suggesting that the word “and” has a conjunctive rather than a disjunctive meaning, so that “[i]t would distort the plain meaning of [a] sentence to substitute the word ‘or’ for the word ‘and’”).

34. See Rachel Carson, *The Silent Spring* (Houghton Mifflin, 1962).

35. See, for example, J. Baird Callicott, *The Metaphysical Transition in Farming: From the Newtonian-Mechanical to the Eltonian-Ecological*, 3 *J. Agric. Ethics* 36, 47 (1990); John B. Cobb, Jr., *Theology, Perception, and Agriculture*, in Gordon K. Douglass, ed., *Agricultural Sustainability in A Changing World Order* 205, 210 (Westview, 1984).

36. See, for example, Robert Rodale, *Mother Nature Bats Last*, *Organic Gardening* 24, 24 (Oct. 1981).

37. Genesis 2:4.

38. See generally Martin Buber, *I and Thou* (Ronald Gregor Smith trans., T & T Clark, 1937) (distinguishing the material world of “experience,” as defined by the “primary word *I-It*,” from “the world of relation” defined by the “primary word *I-Thou*”).

39. Genesis 2:5.

40. Genesis 2:6.

into his nostrils the breath of life."⁴¹ The garden of Eden becomes man's personal legacy, for "the LORD God took the man, and put him into the garden of Eden *to dress it and to keep it*."⁴² The *stewardship ethic* thus stems from the second Creation story's description of Adam's obligation to dress and to keep God's garden. Though not explicitly used in the second story of Creation, the term "stewardship" now stands as perhaps the most succinct expression of the new environmental awareness in agriculture.⁴³

Despite their contradictions, the dominion ethic and the stewardship ethic are both fundamentally romantic visions of agriculture. Whereas dominion is the romance of mechanical power, stewardship is the romance of ecological love. Each school justifies its claims in passionate, almost religious terms:⁴⁴ advocates of the dominion ethic laud the wealth won through the scientific methods of conventional agriculture,⁴⁵ whereas advocates of stewardship praise a morally superior agrarian tradition that values "voluntary simplicity" over "consumerism, leisure, and delirious pursuit of novelty."⁴⁶ Both schools ascribe theological significance to the meager human acts of planting and harvesting: "Whoever owns land has . . . assumed, whether he knows it or not, the divine functions of creating and destroying plants."⁴⁷ At heart, both the dominion and the stewardship ethics embody an abiding faith in the perfectibility of agriculture as a human enterprise.

41. Genesis 2:7 (emphasis omitted).

42. Genesis 2:15 (emphasis added).

43. See generally Wendell Berry, *The Gift of Good Land* 267-81 (North Point, 1981) (linking on-farm stewardship with dispersed farm ownership and populist politics); Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 Neb. L. Rev. 210, 225-40 (1993) (describing various conceptions of "stewardship" under the common law of farm tenancy, legal programs fostering soil and water conservation, and complex systems of environmental regulation affecting agriculture).

44. Compare Donald N. McCloskey, *The Rhetoric of Economics* 57-62 (U. Wis., 1985) (demonstrating how economics proves even the most "scientific" of its so-called "laws" largely through literary conceits).

45. See, for example, Beus and Dunlap, 55 *Rural Sociology* at 608 (cited in note 11) (quoting former Secretary of Agriculture Earl Butz as crediting industrial agricultural production for "the 'fabulous standard of living in this nation'").

46. Gene Logsdon, *The Importance of Traditional Farming Practices for a Sustainable Modern Agriculture*, in Wes Jackson, Wendell Berry, and Bruce Coleman, eds., *Meeting the Expectations of the Land: Essays in Sustainable Agriculture and Stewardship* 3, 17-18 (North Point, 1984).

47. Aldo Leopold, *A Sand County Almanac and Sketches Here and There* 67 (Oxford, 1949). See also Thomas Moore, *The Care of the Soul: A Guide for Cultivating Depth and Sacredness in Everyday Life* 25-199 (Harper Perennial, 1994) (arguing that everyday activities have as much spiritual significance as "life-changing" events are alleged to have). Compare Ecclesiastes 9:10 ("Whatsoever thy hand findeth to do, do it with thy might").

We have cause, however, to beware "the celebration and romanticization of nature."⁴⁸ Romancing the earth presents at best a tricky drill in describing reality and at worst a treacherous exercise in tempting fate. By distinguishing between the two Creation stories in Genesis, feminist scholars have invited theological scrutiny of ecofeminism. That philosophy seeks to trace "men's mistreatment and subordination of women" and "environmental despoliation" to the same root of patriarchal, phallogocentric evil.⁴⁹ Ecofeminism combines nonecological feminism—in either its "cultural"⁵⁰ or its "radical"⁵¹ manifestation⁵²—with an environmentally sensitive consciousness of violence toward women and toward nature.⁵³ Despite the occasional clash between feminists and male agroecological writers,⁵⁴ ecofeminism stresses most of the "stewardship" themes found in contemporary environmental ethics.⁵⁵ Yet, ecofeminism finds little support in the story of Creation from which the stewardship ethic can be inferred. In the stewardship account of Creation, God creates Adam first, deciding to make Eve as "an help meet for him" only after

48. Elizabeth Mensch and Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 Ga. L. Rev. 923, 961 (1991).

49. Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 Vand. L. Rev. 1209, 1222 (1991). See generally Janet Biehl, *Rethinking Ecofeminist Politics* (South End, 1991); Carol J. Adams, ed., *Ecofeminism and the Sacred* (Continuum, 1993); Greta Gaard, ed., *Ecofeminism: Women, Animals, Nature* (Temple U., 1993); Maria Mies, *Ecofeminism* (Fernwood, 1993); Irene Diamond and Gloria Feman Orenstein, eds., *Reweaving the World: The Emergence of Ecofeminism* (Ed Brooks, 1990).

50. See, for example, Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 25-32 (Harvard U., 1982) (hypothesizing that men approach moral problems with mathematical precision and logical deduction, whereas women resolve like dilemmas by weaving narratives and resolving relationships over time); Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 15 (1988) (defining "cultural feminism" as the proposition that "women value intimacy, develop a capacity for nurturance, and an ethic of care for the 'other' with which [they] are connected," all in a way that men cannot and do not).

51. See, for example, Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 238 (Harvard U., 1989) (distinguishing sharply between women and "[t]hose with power"); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L. J. 1373, 1382 (1986) ("[T]he injustice of sexism is not irrationality, it is domination").

52. See generally (and with raised eyebrows) John J. Sciortino, *Sinistral Legal Studies*, 44 Syracuse L. Rev. 1103, 1105-14 (1993) (providing an excellent succinct survey of feminist legal literature in an attempt to outline the case for special legal treatment of the left-handed).

53. See Carolyn Merchant, *The Death of Nature: Women, Ecology, and the Scientific Revolution* 290-95 (Harper & Row, 1979).

54. See, for example, Wendell Berry, *What Are People For?* 170-183 (North Point, 1990) (taking offense at those who criticized the author for enlisting his wife's services as a typist).

55. See Carol M. Reese, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 *Env'tl. L.* 1, 24-25 (1994).

concluding that "[i]t is not good that the man should be alone."⁵⁶ God shapes Eve from a rib removed from the lonesome Adam⁵⁷ and eventually subjects her to Adam's authority as punishment for her more prominent role in the Fall.⁵⁸ By contrast, Genesis' first story of Creation describes God as creating "male and female" on equal terms.⁵⁹ Thus, the sexually egalitarian account of Creation is the source of the dominion ethic in agriculture, whereas the sexually hierarchical version expresses the stewardship ethic. *Sic transit gloria ecofeministae*.

To be sure, the tension between ecofeminism and biblical exegesis may stem from the Hebrews' historical rivalry with the Canaanites, whose "principal divinity" consisted of a female Goddess and her consort, the serpent.⁶⁰ In rejecting the Canaanites' efforts to explain "the mystery of life" as a union of the serpent and the goddess Asherah,⁶¹ the Hebrews asserted the primacy of their male God, as though "to render an argument just the opposite" to that of the goddess-worshipping peoples they had displaced.⁶² The resulting "inversion of sense" represented a sharp break with "the mythology [of] earlier neolithic and Bronze Age civilizations," effecting a perfect reversal between Creation's "pictorial message to the heart" and its "verbal message . . . to the brain."⁶³ In almost any other primordial, agrarian creation story, the serpent as the animal closest to the earth and as a phallic emblem would have represented the male element of a divine creative force, not the embodiment of evil.⁶⁴

To resolve the conflict and thereby to reach a fuller understanding of Creation, we might consider the less politically contested

56. Genesis 2:18 (emphasis omitted).

57. See Genesis 2:21-22.

58. See Genesis 3:16 ("Unto the woman he said, I will greatly multiply thy sorrow and thy conception; in sorrow thou shalt bring forth children; and thy desire shall be to thy husband, and he shall rule over thee" (emphasis omitted)).

59. Genesis 1:27.

60. Joseph Campbell and Bill Moyers, *The Power of Myth* 48 (Doubleday, Betty Sue Flowers ed. 1988).

61. *Id.*

62. Joseph Campbell, *The Masks of God: Occidental Mythology* 17 (Viking, 1964). But compare *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992) (insisting that "[b]eliefs about [such] matters" as "one's own concept of existence, of meaning, of the universe, and of the mystery of human life" cannot "define the attributes of personhood were they formed under compulsion of the State").

63. Campbell, *Occidental Mythology* at 17 (cited in note 62).

64. See *id.* at 16-17. For a fuller discussion of the distinction between the Bible as historical narrative and the Bible as mythology, see James Barr, *The Scope and Authority of the Bible* 1-17 (Westminster, 1980). "[T]he entire (and supremely important) 'primeval story' of 'creation, . . . Noah and the flood, and so on' belong to the area of 'myth and legend' rather than the realm of 'history.'" *Id.* at 7.

story of the Flood. Genesis' story of the Flood restates both the dominion ethic and the stewardship ethic. God plans to flood the earth in response to the abiding "wickedness of man."⁶⁵ Destruction awaits all of Creation—"both man, and beast, and the creeping thing, and the fowls of the air"⁶⁶—but for one "just man," Noah, who "found grace in the eyes of the LORD."⁶⁷ After the waters recede and Noah's ark comes to a rest, God reaffirms the dominion ethic by telling Noah that "the fear of you and the dread of you shall be upon every beast of the earth, and upon every fowl of the air, upon all that moveth upon the earth, and upon all the fishes of the sea."⁶⁸ God also declares, however, that his covenant never to send a second "flood to destroy the earth"⁶⁹ covers not only Noah and his descendants,⁷⁰ but also "every [other] living creature[,] . . . every beast of the earth."⁷¹ In the context of biodiversity, advocates of the stewardship ethic have interpreted the "unnecessar[y]" extermination of species as an abuse of human dominion over nature and as a "crime against our Creator."⁷²

The Flood is more than recapitulation; it is continuation. The Flood can be seen as yet another creation story contained within Genesis, since "the world in which we live is a world that had its beginning with Noah and his times."⁷³ After creating "the first-formed father of the world," the wisdom of God—wisdom *as* God—"delivered him from his transgression, and gave him strength to rule all things."⁷⁴ When human transgression flooded the earth, "wisdom again saved it, steering the righteous man by a paltry piece of wood."⁷⁵ Neither dominion nor stewardship, neither "strength to rule all things" nor "righteous[ness]," could permit man to manipulate or to manage earth on his own. The Flood also ensures the continuity of nature, for God promises that "seedtime and harvest, and cold and

65. Genesis 6:5.

66. Genesis 6:7.

67. Genesis 6:9, 6:8.

68. Genesis 9:2 (emphasis omitted).

69. Genesis 9:11.

70. See Genesis 9:9 ("I establish my covenant with you, and with your seed after you . . .").

71. Genesis 9:10.

72. John B. Cobb, Jr., *A Christian View of Biodiversity*, in Edward O. Wilson, ed., *Biodiversity* 485, 485 (National Academy, 1988).

73. James Barr, *The Garden of Eden and the Hope of Immortality* 75 (Fortress, 1992).

74. Wisdom of Solomon 10:1-2 (New Revised Standard Version).

75. *Id.* at 10:4. Note that "wisdom" in these passages takes the female pronoun, as it does throughout the Hebrew Bible.

heat, and summer and winter, and day and night"—all of the cycles of nature—"shall not cease" as long as "the earth remaineth."⁷⁶

The theological error of romantic agricultural ethics, however, lies in *stopping* with the Flood. Man does not live by bread alone,⁷⁷ and the promise of the scriptures does not end upon the delivery of natural sustenance. Whether one awaits the coming of Elijah "before the coming of the great and dreadful day of the LORD"⁷⁸ or believes that "[w]e have found the Mes-si'-as,"⁷⁹ a faith that hinges solely upon material satisfaction is at best a faith in the natural world. To rest one's faith on either the dominion ethic or the stewardship ethic is to "suppose[] that either fire or wind or swift air, or the circle of the stars, or turbulent water, or the luminaries of heaven, were the gods that rule the world."⁸⁰

One further look at Creation is warranted, then, since neither the dominion ethic nor the stewardship ethic tells the whole story. Let us boldly go where no ethicist has gone before, for it is the asking of the impertinent question that produces paradigms,⁸¹ that unearths "the seed of a new intellectual harvest, to be reaped in the next season of the human understanding."⁸² In this instance, we need not look far. Both the conventional and the alternative schools of agricultural thought conveniently sidestep the conclusion to Genesis' account of humankind's first adventure in farming. Adam and Eve disobeyed the single explicit divine command regarding their behavior in Eden: not to eat "of the tree of the knowledge of good and evil."⁸³ This original sin thrust Adam and Eve out of innocence and into the world of opposites: male and female, human and divine, good and evil.⁸⁴ First disobedience thus introduced the duality that defines nature: the opposite conditions of life and death. Agriculture and every other natural process rely on this cycle; some must die that others might live. The earliest "planting villages" recognized as much in framing their "deeply moving, emotionally disturbing" religious rites around

76. Genesis 8:22.

77. See Deuteronomy 8:3; Matthew 4:4; Luke 4:4.

78. Malachi 4:5.

79. John 1:41.

80. Wisdom of Solomon at 13:2 (cited in note 75).

81. See Thomas S. Kuhn, *The Structure of Scientific Revolutions* 52 (U. Chi., 2d ed. 1970) (arguing that "fundamental novelties of fact and theory" are "a particularly effective way of inducing paradigm change").

82. Susanne K. Langer, *Philosophy in a New Key: A Study in the Symbolism of Reason, Rite, and Art* 25 (Harvard U., 3d ed. 1957).

83. Genesis 2:17.

84. See Campbell and Moyers, *The Power of Myth* at 48 (cited in note 60). Compare Genesis 3:7 ("And the eyes of them both were opened, and they knew that they were naked . . .").

“the interdependence of death and sex . . . and the necessity of killing—killing and eating—for the continuance” of life.⁸⁵

Adam and Eve’s disobedience was the crime of the ages; their appearance before the wrathful God, the primordial criminal trial. Adam raised the first entrapment defense;⁸⁶ Eve argued excuse.⁸⁷ In pronouncing judgment for the disobedience of Adam and Eve, God proclaimed a *third* and final vision of agriculture:

Because thou . . . hast eaten of the tree [of the knowledge of good and evil]: cursed is the ground for thy sake; in sorrow shalt thou eat of it all the days of thy life; Thorns also and thistles shall it bring forth to thee; and thou shalt eat the herb of the field; In the sweat of thy face shalt thou eat bread, till thou return unto the ground; for out of it was thou taken: for dust thou art, and unto dust shalt thou return.⁸⁸

Thereupon God expelled Adam and Eve, ordaining that they should “till the ground from whence [they were] taken.”⁸⁹

After the Fall, the agricultural mission is neither a demonstration of human dominion over nature nor the fulfillment of a divinely given duty of stewardship. The *survival ethic* treats agriculture as no more and no less than tilling cursed ground for physical sustenance. In a fallen, depraved world, neither dominion, stewardship, nor any other human deed can unilaterally reclaim the paradise lost by Man and the Mother of All Living.⁹⁰ Such is the bitter fruit of disobedience.

If neither dominion nor stewardship fully recounts the story of Creation as agriculture’s story of origins, we should not expect either model to provide a full explanation of complex agricultural systems built atop the religious and cultural traditions represented by Genesis. Though we hunger for the romance of dominion and stewardship, we shall all starve unless we confront the reality of survival. To be forewarned of the implications of the survival ethic is to be forearmed with the knowledge of good and evil.⁹¹ Such knowledge may have

85. Joseph Campbell, *The Masks of God: Primitive Mythology* 177 (Viking, 1959).

86. See Genesis 3:12 (“And the man said, The woman whom thou gavest to be with me, she gave me of the tree, and I did eat”).

87. See Genesis 3:13 (“And the LORD God said unto the woman, What is this that thou hast done? And the woman said, The serpent beguiled me, and I did eat”).

88. Genesis 3:17-19 (emphases omitted).

89. Genesis 3:23.

90. These titles come from the Hebrew words for Adam and Eve. See 1 *The Anchor Bible Dictionary* 62 (Doubleday, 1992); 2 *The Anchor Bible Dictionary* at 676.

91. Compare Genesis 2:17 (“But of the tree of the knowledge of good and evil, thou shalt not eat of it: for in the day that thou eatest thereof thou shalt surely die”).

been purchased at too great a price, but failing to use it will surely bring a different sort of damnation.

We who now live outside Eden know that "there is one story in the world, and only one."⁹² Like Genesis, American law has its own story of origins. And like the story of Creation, the story of the Constitution as the story of American origins speaks of agrarian ambitions, of original sin, of the quest for redemption. We have known this all along: "For every constitution there is an epic, for every decalogue a scripture."⁹³ I now tell the story of the Constitution's agricultural origins and of American agricultural law's constitutional origins.

II. AMERICAN AGRICULTURE'S ORIGINAL SIN

A. *Fiat Lex*

Most scholars trace the historical origins of American agricultural law to 1862,⁹⁴ when Congress enacted three major statutes that subsidized critical inputs used in the burgeoning farm economy. The Homestead Act provided land through 160-acre grants to individual settlers,⁹⁵ and the Morrill Land-Grant College Act endowed a nationwide network of public colleges charged with the primary mission of teaching agricultural and mechanical arts.⁹⁶ The Pacific Railway Act brought advanced transportation technology to the farm by authorizing and subsidizing a transcontinental railroad between the agrarian capitals of Omaha and Sacramento.⁹⁷ A fourth enactment perfected the developmental package by establishing the Department of Agriculture and commissioning it "to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, in the most general and comprehensive sense of that word, and to procure, propagate, and distribute among the people new

92. John Steinbeck, *East of Eden* 413 (Viking, 1952).

93. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 4 (1983).

94. See, for example, M.C. Hallberg, *Policy for American Agriculture: Choices and Consequences* 303-23 (Iowa State U., 1992) (chronicling federal legislation and executive orders affecting American agriculture since 1862).

95. See Act of May 20, 1862, ch. 75, 12 Stat. 392.

96. See Act of July 2, 1862, ch. 130, 12 Stat. 503, codified as amended at 7 U.S.C. §§ 301-308 (1994).

97. See Act of July 1, 1862, ch. 120, 12 Stat. 489.

and valuable seeds and plants."⁹⁸ These statutes launched what modern scholars call the "developmental" agenda in American agricultural policy: broadened landownership, cheap access to expansionary capital, and a political foothold within the federal government to protect these new entitlements.⁹⁹

But 1862's burst of agricultural legislation took place in a political milieu already shaped by four score and six years of agrarian influence after the Declaration of Independence. We are entitled to treat the 1862 statutes as the birth of modern American agricultural law only if we acknowledge the begetting of the beast in 1787 and the tumultuous nine decades that it spent in gestation.¹⁰⁰

America's first piece of agricultural law was by no means the Homestead Act. This story of origins began earlier, much earlier: In the beginning the Constitution created the United States of America. That Constitution addressed two subjects of enormous interest to late eighteenth-century farmers and, accordingly, must be regarded as the oldest example of American agricultural law.

An agrarian reinterpretation of federalism and the legislative representation of diverse states and diverse interests sheds new light on the "oldest question of constitutional law."¹⁰¹ The original Constitution so blessed agriculture that farm interests enjoyed nearly two centuries of political dominion through disproportionately favorable representation in virtually every national and state legislative body. The very idea of American union hung in the balance when the 1787 Convention reached its Great Compromise,¹⁰² which provided that seats in the House of Representatives would be apportioned roughly according to population¹⁰³ and that each state

98. Act of May 15, 1862, ch. 72, § 1, 12 Stat. 387, codified as amended at 7 U.S.C. § 2201 (1994). Later amendments expanded the Department's mission to include rural development, see Pub. L. No. 92-419, § 603(a), 86 Stat. 675 (1972), and aquaculture and human nutrition, see Pub. L. No. 95-113, § 1502(a), 91 Stat. 1021 (1977).

99. See Paarlberg, *Farm and Food Policy* at 14-15 (cited in note 31) (describing major agricultural policy breakthroughs during the Civil War); Jim Chen, *The American Ideology*, 48 Vand. L. Rev. 809, 830-33 (1995) (describing "the dawn of the developmental agenda" in American agricultural law).

100. Compare Rev. 13:1-18 (describing the birth of the Beast of the Apocalypse).

101. *New York v. United States*, 505 U.S. 144, 149 (1992). See generally H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633 (1993).

102. See Max Farrand, ed., 1 *The Records of the Federal Convention of 1787* at 193, 342-43, 461-62, 511 (Yale, 1911) (quoting Roger Sherman and William Samuel Johnson).

103. See U.S. Const., Art. I, § 2, cl. 3. The constitutional guarantee that "each State shall have at least one Representative," *id.*, deviates from the norm of perfectly proportional representation. See *Wesberry v. Sanders*, 376 U.S. 1, 28-29 (1964) (Harlan, J., dissenting) (rejecting

would be entitled to two senators.¹⁰⁴ More sparsely populated states—that is, relatively rural states—therefore enjoyed a lopsided advantage in the Senate, an edge sharpened further by the constitutional requirement of bicameralism and the Senate's special powers.¹⁰⁵

The original Constitution did soften the advantage granted to farm interests in one respect. It held out the Contract Clause¹⁰⁶ as a bulwark against the most dreaded form of legislation born of agrarian populism: general debt relief laws.¹⁰⁷ But the Contract Clause lost much of its power to invalidate debt relief laws at a relatively early stage in the Supreme Court's history,¹⁰⁸ and it never fully recovered.¹⁰⁹ In any event, farming interests have enjoyed great historical success in lobbying for debt relief legislation during times of financial distress.¹¹⁰ In the constitutional clash between land-based apportionment and the Contract Clause, the farm sector appears to have won a complete victory.

The original Constitution gave certain farm interests a second, nakedly economic boost: slavery. The Framers' formula for apportioning House seats and direct taxes counted three-fifths of each state's slave population.¹¹¹ One of the few substantive protections in the unamended Constitution shielded vested property rights in

the idea that equal representation in the House for equal numbers of people is embodied in Article I).

104. See U.S. Const., Art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State . . .").

105. See *id.* Art. I, § 1; Art. I, § 7, cl. 2-3; *INS v. Chadha*, 462 U.S. 919, 945-46, 948-51 (1983).

106. See U.S. Const., Art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

107. See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 205-06 (1819) (describing debt relief measures as the laws that "produced the loudest complaints" after the Revolutionary War); Benjamin Fletcher Wright, *The Contract Clause of the Constitution* 4-6 (Harvard U., 1938) (describing the unpopularity of debt relief laws); *id.* at 15-16, 32-33 (suggesting that the Contract Clause was meant to apply only to private contracts).

108. See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332, 337, 342-48 (1827).

109. See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934) (describing the need to "harmonize[] the constitutional prohibition" against debt relief laws "with [t]he necessary residuum of state power").

110. For merely one of many examples, consider the passage of the Frazier-Lemke Act, Act of June 28, 1934, ch. 869, 48 Stat. 1289, during the New Deal's first wave of legislative responses to the agricultural crisis of the Great Depression. See generally *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (invalidating the Frazier-Lemke Act as an uncompensated taking). For more modern examples, see generally David R. Papke, *Rhetoric and Retrenchment: Agrarian Ideology and American Bankruptcy Law*, 54 Mo. L. Rev. 871 (1989).

111. See U.S. Const., Art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the Several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons . . . three fifths of all other Persons").

fugitive slaves who escaped across state lines.¹¹² Slaveholding agrarian interests also demanded a minimum twenty-one-year window of opportunity to continue importing slaves without legislative interference.¹¹³ Not even the Confederacy was as solicitous of slaveholding interests; the Confederate constitution forbade outright the importation of slaves.¹¹⁴

In *Dred Scott v. Sandford*,¹¹⁵ the Taney Court interpreted the presence of the Fugitive Slave Clause and the Importation Clause as “conclusive[]” evidence that neither African slaves “nor their descendants[] were embraced” within America’s constitutional covenant.¹¹⁶ Having “been brought here as articles of merchandise,”¹¹⁷ blacks were thus forever barred from becoming “citizen[s] of the United States” and thereby deprived of “special privilege[s] . . . which, under the Constitution, no one but a citizen can claim.”¹¹⁸ Because American and European manufacturers rarely, if ever, exploited slave labor,¹¹⁹ the slavery provisions of the original Constitution must be regarded as an undiluted boondoggle for rich, landed farmers. “Slavery was always Commerce, and . . . Commerce is to some extent always slavery.”¹²⁰ To secure this benefit, the fundamental law of the new United States “made it plain that ‘we the people,’ for whose protection the Constitution was designed, did not include those whose skins were the wrong color.”¹²¹ Slavery, simply put, was American agriculture’s original sin.

The Constitution thus granted agricultural interests in the early Republic two forceful weapons: complete control of farm labor in

112. See *id.* Art. IV, § 2, cl. 3 (“No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall . . . be discharged from Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due”).

113. See *id.* Art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . .”).

114. See Confed. Const., Art. I, § 9, cl. 1 (“The importation of negroes of the African race, from any foreign country other than the slaveholding States or Territories of the United States of America, is hereby forbidden; and Congress is required to pass such laws as shall effectually prevent the same”), reprinted in Marshall L. Derosa, *The Confederate Constitution of 1861: An Inquiry into American Constitutionalism* (U. Missouri, 1991).

115. 60 U.S. (19 How.) 393 (1856).

116. *Id.* at 411.

117. *Id.*

118. *Id.* at 425.

119. See Nathan Rosenberg and L.E. Birdzell, Jr., *How the West Grew Rich: The Economic Transformation of the Industrial World* 18-20 (Basic Books, 1986).

120. John Jay Chapman, *William Lloyd Garrison* 268 (Atlantic Monthly, 2d ed. 1921).

121. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 389 (1978) (Marshall, J., concurring).

any state willing to sanction slavery and a procedural stranglehold on the Senate. The founding farmers so treasured these benefits that they curbed the power to amend the Constitution on both subjects.¹²² During the economically sophisticated nation-building season that witnessed the birth of these United States,¹²³ agriculture claimed the first and fattest fruits of the constitutional harvest.

Much of the political history of the nation's first seventy-five years consisted of domestic deadlock over two opposing blueprints for an agrarian economy: the New England-Midwestern model of small farms producing food crops and livestock for subsistence and local markets versus the Southern-Western model of plantations producing cash crops for distant markets.¹²⁴ The former relied on freehold labor; the latter, on slave labor or its California equivalent, landless migrant workers from Mexico. The constant need to maintain the balance of power between slave states and free states in the Senate dominated the debates on the political status of Vermont, Kentucky, Tennessee, Ohio, Louisiana, Indiana, Mississippi, Illinois, Maine, Missouri, Texas, California, Minnesota, Kansas, and Nebraska.¹²⁵ The politics of slavery even kept the United States from annexing Cuba (and thereby preempting by a century the need to choose sides in the fateful clash between Fulgencio Batista and Fidel Castro).¹²⁶

War and constitutional revolution eventually nullified the labor subsidy that slavery gave to the farm sector. Disproportionate legislative representation, however, persisted. In one sense, it is incurable. The two Dakotas will forever outvote New York four to two in the Senate, an advantage that savvy politicians in the unitary Da-

122. See U.S. Const., Art. V ("[N]o Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the [Slave Importation Clause of Art. I, § 9, cl. 1]; and . . . no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

123. See Jim Chen and Daniel J. Gifford, *Law as Industrial Policy: Economic Analysis of Law in a New Key*, 25 U. Memphis L. Rev. 1315, 1323-24 (1995) (describing the desire to break down interstate trade barriers as the impetus to political union at the time of the Constitution's framing).

124. See Paul S. Taylor, *Public Policy and the Shaping of Rural Society*, 20 S.D. L. Rev. 475, 476-80 (1975) (describing the alignment of the South and West against the North and East during the nineteenth century); Henry Nash Smith, *Virgin Land: The American West as Symbol and Myth* 145-55 (Harvard U., 1950) (same).

125. See generally *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 446-52 (1856) (invalidating the Missouri Compromise of 1820, Act of March 6, 1820, § 8, 3 Stat. 544).

126. The Ostend Manifesto declared the United States' intentions to purchase or annex Cuba, but President Franklin Pierce was forced to retract the Manifesto when it became clear that a divided Congress was not prepared to risk war with Spain, only to permit Cuba to enter the Union as a slave state. See Larry Gara, *The Presidency of Franklin Pierce* 149-55 (U. of Kan., 1991); Roy F. Nichols, *Franklin Pierce, Young Hickory of the Granite Hills* 366-71 (U. Penn., 2d ed. 1958).

kota Territory readily recognized.¹²⁷ In state legislatures and even the federal House of Representatives, Senate-like apportionment of seats by territory rather than population endured a century beyond the Civil War. Well into the twentieth century, "the rural bias . . . reinforced by a political system that overweigh[ed] the rural vote in federal and still more in state elections" yielded a rotten harvest of "[s]hips loaded with wheat, little metal gasometers filled with corn, mountains of rancid butter, all paid for by the taxpayer."¹²⁸ By the 1950s, an urban backlash gravely "threat[ened] . . . farmer political influence" by "demand[ing] that state legislatures and the House of Representatives be reapportioned on the basis of population rather than territory."¹²⁹ Perhaps lulled into a false sense of security by a 1946 decision denying federal jurisdiction over constitutional challenges to state apportionment laws,¹³⁰ farm interests absorbed a devastating blow when the Supreme Court crushed the tradition of geographic apportionment in cases such as *Baker v. Carr*,¹³¹ *Wesberry v. Sanders*,¹³² and *Reynolds v. Sims*.¹³³ These "one person, one vote" decisions "struck agriculture like a thunderbolt."¹³⁴ "[M]ost farmers and their representatives" had "assume[d] that one branch of the state legislature would always be based on land area."¹³⁵

One might argue that American agriculture has outgrown the era when its political economy could be described in terms of slaves and senators. No senator today defends the "peculiar institution" of slavery as an essential incident of Southern farm life.¹³⁶ Election law

127. For a particularly vivid depiction of how the expectation of doubling Senate votes on behalf of agrarian interests influenced the debate over whether Dakota Territory should divide itself into two states, see O.E. Rølvaag, *Peder Victorious* 122-34 (Nora O. Solum and O.E. Rølvaag trans., Harper & Bros., 1929).

128. D.W. Brogan, *The American Character* 96-97 (Vintage Books, 2d ed. 1956).

129. Gilbert Courtland Fite, *American Farmers: The New Minority* 138 (Ind. U., 1981).

130. See *Colgrove v. Green*, 328 U.S. 549, 552 (1946) (minority opinion of Frankfurter, J., announcing the judgment of the Court); *id.* at 566 (Rutledge, J., concurring in the result on equitable grounds). See generally Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 189-97 (1962) (extolling the passive virtues of *Colgrove* and decrying the aggressive vices of the one-person, one-vote cases that followed it).

131. 369 U.S. 186 (1961) (recognizing the justiciability of constitutional challenges to apportionment under state law).

132. 376 U.S. 1 (1964) (holding that apportionment of congressional seats by population is commanded by U.S. Const., Art. I, § 2, cl. 1).

133. 377 U.S. 533 (1964) (requiring numerically balanced representation in state legislatures as a matter of equal protection).

134. Fite, *American Farmers* at 150 (cited in note 129).

135. *Id.* at 151.

136. See generally Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Antebellum South* (Knopf, 1st ed. 1956).

has likewise left farming in the dust. The assertion that “[l]egislators represent people, not trees or acres,”¹³⁷ though once revolutionary, now seems somewhat banal in light of the passionate contemporary debate over race-conscious districting.¹³⁸ In 1940, on the eve of American entry into World War II, eighty-four of ninety-six Senators “represented states with farm populations of at least [twenty] percent of their total citizenry.”¹³⁹ More than half of the House represented similarly defined “farm districts.”¹⁴⁰ Today, fifty years after V-J Day, none of those forty-two “farm states” has a farm population comprising more than twenty percent of the state total. With a mere “25 percent of its population engaged in full-time farming,” Minnesota’s Second Congressional District is the nation’s “most ‘agricultural’ congressional district.”¹⁴¹

These changes have been sweeping America’s rural landscape for a long time. In the 1920 Census, the United States’ urban population surpassed its rural population for the first time.¹⁴² Before World War II, it nevertheless seemed “novel, disconcerting, improper” that “less than half of the American population should . . . live in rural areas, that much less than a quarter of the population should be living on farms.”¹⁴³ But the war changed everything. The industrial revolution that sparked America to victory against German Nazism, Italian fascism, and Japanese imperialism likewise paved the way for the rise of *agribusiness*, the unapologetically industrial system of integrating food and fiber production from the farmstead to the dinner table and the wardrobe.¹⁴⁴ As framed, the agricultural Constitution has seemingly collapsed under the weight of the social pressures in an industrialized America.

On the other hand, what would we learn from a closer examination of the agricultural Constitution’s “evolving standards of de-

137. *Reynolds*, 377 U.S. at 562.

138. See, for example, *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *United States v. Hayes*, 115 S. Ct. 2431 (1995); *Holder v. Hall*, 114 S. Ct. 2581 (1994); *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994); *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

139. William P. Browne, *Agricultural Policy Can't Accommodate All Who Want In*, Choices 9, 9 (1st Q. 1989).

140. *Id.*

141. Willard W. Cochrane and C. Ford Runge, *Reforming Farm Policy: Toward a National Agenda* 21 (Iowa St. U., 1992). See also Browne, Choices at 9 (cited in note 139).

142. U.S. Dept of Commerce, Bureau of the Census, *The Fourteenth Census of Population in the United States: 1920* (Fed. Trade Information Service, 1920).

143. Brogan, *The American Character* at 97 (cited in note 128).

144. See John H. Davis and Ray A. Goldberg, *A Concept of Agribusiness* 2 (1957). Davis and Goldberg credited themselves for introducing the term “agribusiness” into the American language. See *id.* at 2 n.1.

agency"?¹⁴⁵ Today's agricultural employers still enjoy subsidized labor. The contemporary agricultural exemption from the Fair Labor Standards Act ("FLSA")¹⁴⁶ differs from the historical institution of slavery only in degree and not in kind. Originally envisioned as an administrative and legislative response to the judicial invalidation of the "Live Poultry Code" that prescribed labor standards for the poultry handling industry,¹⁴⁷ the FLSA ran afoul of Southern agrarian interests that sought to preserve cotton, tobacco, peanut, rice, and sugar cane farmers' supply of cheap black labor.¹⁴⁸ Unable to block the FLSA altogether,¹⁴⁹ Southern Democrats settled for an exemption that covered vast numbers of black workers in the South.¹⁵⁰ The FLSA's agricultural exemption undeniably appeased agrarian interests that otherwise would have mustered all their political strength to strangle federal wage-and-hour legislation inside its congressional womb.¹⁵¹

145. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

146. See 29 U.S.C. § 213(a)(6) (1988) (excluding agricultural employees from the minimum wage and maximum hour provisions of 29 U.S.C. §§ 206-207 (1988)). Compare id. § 152(3) (1988) (excluding farm laborers from the National Labor Relations Act).

147. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 523-25 (1935). Compare *Mississippi Poultry Ass'n, Inc. v. Madigan*, 31 F.3d 293, 311 (5th Cir. 1994) (en banc) (Higginbotham, J., dissenting) (criticizing the judicial interpretation of § 17(d) of the Poultry Products Inspection Act, 21 U.S.C. § 466(d) (1994), as a "protectionis[t]" measure "that would protect American poultry interests from the threat of foreign poultry that is superior because it is healthier for the consumer"). See generally Frances Perkins, *The Roosevelt I Knew* 246-56 (Viking, 1946) (describing the FLSA's origins as a set of rules issued by the Department of Labor).

148. See, for example, 81 Cong. Rec. 7786-89 (1937) (statement of Sen. Walter George, D-Ga.); 81 Cong. Rec. 7881-82 (1937) (statement of Rep. Ed Smith, D-S.C.); 82 Cong. Rec. 442 (1937) (statement of E.E. Cox, D-Ga.); 82 Cong. Rec. 1404 (1937) (statement of Rep. J. Mark Wilcox, D-Fla.). See, for example, C. Vann Woodward, *Origins of the New South, 1877-1913* at 208-09 (La. St. U., 1951) (describing the South's continued economic reliance on a supply of cheap black labor well after the Civil War).

149. See Irving Richter, *Four Years of the Fair Labor Standards Act of 1938: Some Problems of Enforcement*, 51 J. Pol. Econ. 95, 99 (1943) (noting how Southern legislators recognized that minimum wages in industries covered by the FLSA would also drive agricultural wages upward in the absence of an agricultural exception).

150. See Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 Tex. L. Rev. 1335, 1371-75 (1987) (describing the political compromise which engendered the racist agricultural policies of the New Deal). Compare Herbert Hill, *Black Labor and the American Legal System: Race, Work, and the Law* 97 (1977) (noting that both the National Recovery Administration of 1933 and the FLSA failed to govern wages and hours for agricultural and domestic labor, where more than 70% of black workers were concentrated).

151. See Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 Hamline L. Rev. 649, 652-57 (1989).

Nor has this story ended. The racially disparate impact of wage regulation in agriculture endures to this day.¹⁵² Even the farthest reaching federal legislation aimed at protecting migrant and seasonal workers¹⁵³—contemporary successors to the black sharecroppers and other landless farmworkers who were shortchanged by the New Deal—exempts certain “family farms.”¹⁵⁴ Though scaled back, the FLSA’s agricultural exemption continues to preserve part of the wage differential between agricultural and industrial labor. Agricultural employers enjoy their greatest advantage in markets where many potential workers lack the skills for seasonal or part-time urban employment, the likeliest source of competition for the farmers who hire migrant workers.¹⁵⁵ The continued subsidization of farm labor erases pressures to increase wages and improve working conditions within agriculture:¹⁵⁶ “[W]orkers with options quit farmwork,” thus helping to fulfill “the prophecy that ‘Americans won’t do seasonal farmwork.’”¹⁵⁷

Likewise, modern election law has blunted but not eliminated regional influences in agricultural lawmaking. The sweet promise of the one-person, one-vote decisions—to ensure that “[l]egislators are elected by voters, not farms or cities or economic interests”¹⁵⁸—routinely dissolves in the acid bath administered by congressional *Realpolitik*. Statutes providing price and income support for

152. See Linder, 65 Tex. L. Rev. at 1383-87 (cited in note 150).

153. See Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (1988).

154. See *id.* § 1803(a)(1); *Flores v. Rios*, 36 F.3d 507, 509-10 (6th Cir. 1994); *Bueno v. Mattner*, 829 F.2d 1380, 1383-84 (6th Cir. 1987); *Calderon v. Witvoet*, 764 F. Supp. 536, 538-39 (C.D. Ill. 1991); *Gonzales v. Puente*, 705 F. Supp. 331 (W.D. Tex. 1988). Compare *Farmer v. Employment Security Comm’n*, 4 F.3d 1274 (4th Cir. 1993) (discussing agricultural employers’ obligations to house farmworkers under the Fair Housing Act, 42 U.S.C. § 3604 (1988), and the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1188 (c)(4) (1994)). See generally Donald B. Pederson, *The Migrant and Seasonal Agricultural Workers Protection Act: A Preliminary Analysis*, 37 Ark. L. Rev. 253 (1984). For an analysis of the paternalistic motivations underlying legislation on migrant and seasonal farmworkers, see Marc Linder, *Paternalistic State Intervention: The Contradictions of the Legal Empowerment of Vulnerable Workers*, 23 U.C. Davis L. Rev. 733, 755-58 (1990). Moreover, the family and youth labor provisions of the FLSA’s agricultural exemption, see 29 U.S.C. § 213(a)(6)(B) & (D) (1988), create a safe harbor for the use of child labor. See generally Davin C. Curtiss, Note, *The Fair Labor Standards Act and Child Labor in Agriculture*, 20 J. Corp. L. 303 (1995).

155. See Philip L. Martin, *The Outlook for Agricultural Labor in the 1990s*, 23 U.C. Davis L. Rev. 499, 520-21 (1990).

156. Compare Marc Linder, *The Minimum Wage as Industrial Policy*, 16 J. Legis. 151, 156 (1990) (arguing that minimum wage laws force “inefficient employers either to nationalize or be driven out of business by more efficient competitors”).

157. Martin, 23 U.C. Davis L. Rev. at 523 (cited in note 155).

158. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

farmers epitomize the sort of legislation generated when the potential benefits are concentrated and the potential costs are distributed.¹⁵⁹

The federal sugar program is an especially egregious example.¹⁶⁰ Like most other agricultural commodity programs,¹⁶¹ the sugar program relies on nonrecourse loans as its primary price support mechanism.¹⁶² The loan rate through the 1997 crop year may not fall below eighteen cents a pound for raw cane sugar,¹⁶³ substantially higher than the usual world price of four to twelve cents per pound.¹⁶⁴ Any sugar imports would drive the domestic price down toward the world price and induce domestic producers to exercise their right to forfeit their crops to the Commodity Credit Corporation ("CCC") in lieu of repaying their nonrecourse price support loans.¹⁶⁵ By law, however, the federal government must "operate the sugar program . . . at no cost to [itself] by preventing the accumulation of sugar acquired" by the CCC.¹⁶⁶ The only way to prevent the accumulation of sugar stocks by the CCC is to exclude those cheap sugar imports. For decades the United States relied on strict quantitative import quotas for sugar.¹⁶⁷ In 1989, however, an

159. See Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 153-59 (Harvard U., 1971). See generally Michael T. Hayes, *Lobbyists and Legislators: A Theory of Political Markets* 64-92 (Rutgers, 1981); William N. Eskridge, Jr. and Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 52-61 (West, 2d ed. 1995).

160. For a more detailed description of the sugar program, see Katherine E. Monahan, *U.S. Sugar Policy: Domestic and International Repercussions of Sour Law*, 15 *Hastings Intl. & Comp. L. Rev.* 325, 338-40 (1992).

161. See 7 U.S.C. § 1421 (1994).

162. See id. § 1446g.

163. See id. § 1446g(b). Compare id. § 1446g(c) (pegging price support for sugar beets to the loan rate for domestically produced cane sugar).

164. See United States Department of Agriculture, National Agricultural Statistics Service, *Agricultural Statistics 1993* at 82 (1993) (reporting that the London spot price for sugar delivered to a Caribbean port hovered between 4.04 and 12.79 cents a pound between 1978 and 1992, except for a price spike that reached 29.02 cents a pound in 1980 and 1981).

165. Farmers accepting a "nonrecourse loan" ordinarily may default, deliver the crops securing that loan to the CCC, and incur no personal liability. See 7 U.S.C. § 1425(a) (1994). The nonrecourse loan rate thus establishes the effective minimum price of a supported commodity. See, for example, *St. Paul Fire & Marine Ins. Co. v. Commodity Credit Corp.*, 646 F.2d 1064, 1067 (5th Cir. 1981) (cotton program); J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 *Mercer L. Rev.* 763, 787-88 (1993).

166. Pub. L. No. 99-198, § 902, as amended, Pub. L. No. 101-624, tits. IX, XI, §§ 903, 1161(c), 104 Stat. 3488, 3521 (1990) (set forth as a note to 7 U.S.C. § 1446g (1994)).

167. See generally, for example, *United States Cane Sugar Refiners' Ass'n v. Block*, 69 C.C.P.A. 172, 683 F.2d 399 (1982) (describing the President's power to limit imports under § 201(a) of the Trade Expansion Act of 1962, 19 U.S.C. § 1821(a) (1988)). For older sources of United States law regarding the international sugar trade, see Jones-Costigan Act of

international panel constituted at Australia's request concluded that the American import quota was a quantitative trade restriction banned under Article XI of the General Agreement on Tariffs and Trade.¹⁶⁸ In response, the United States established a two-tiered tariff on sugar imports. The new Tariff Rate Quota imposed a relatively modest tariff of .625 cents a pound on the first 2.315 million tons of sugar imported into the United States each year.¹⁶⁹ Additional imports faced a stiff tariff of sixteen cents a pound, more than enough to raise the domestic price of sugar above the minimum nonrecourse loan rate.¹⁷⁰ This program, run at "no cost" to the American taxpayer, costs consumers \$1 to \$2 billion every year in higher sugar prices.¹⁷¹

Much of the blame for this legislative outrage falls upon the impotent and antidemocratic structure of the United States Congress. Legislators from the four states that produce sugar cane (Florida, Louisiana, Hawaii, and Texas) and the four that produce the bulk of sugar beets (Minnesota, California, North Dakota, and Idaho) bear primary responsibility for this infamous system of price supports and import restrictions. Because the price umbrella propped up by sugar supports incidentally shelters a generous market for high fructose corn syrup (an otherwise inferior sweetener),¹⁷² Corn Belt legislators dare not oppose the sugar program. Unite eight committed Senators and another dozen allies, and you have a bloc capable of thwarting virtually any legislative change in the United States.

The racial overtones of these special-interest statutes cannot be overlooked. The sugar program effectively eliminates access to the

1934, 48 Stat. 670; Sugar Act of 1937, 50 Stat. 903; Sugar Act of 1948, ch. 519, 61 Stat. 922; *Secretary of Agriculture v. Central Roig Ref. Co.*, 338 U.S. 604 (1950).

168. See United States Restrictions on Imports of Sugar, GATT Doc. L/6514, in Basic Instruments and Selected Documents ("BISD") 331 (36th Supp. 1989); GATT, Oct. 30, 1947, Art. XI, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 224 (1950).

169. See Proclamation No. 6179, 55 Fed. Reg. 38,293 (Sept. 13, 1990).

170. See *id.*

171. See Ralph Ives and John Hurley, eds., U.S. Dept. of Commerce, Intl. Trade Admin., *United States Sugar Policy: An Analysis* 10 (1988) (estimating consumer losses totaling \$1.9 billion per year); Rekha Mehra, *Winners and Losers in the U.S. Sugar Program*, 94 Resources 5, 7 (Winter, 1989) (estimating annual consumer-to-producer transfers of \$1 to \$1.5 billion).

172. See *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988) (conceding that "sugar and HFCS [high fructose corn syrup] are functionally interchangeable for all uses for which HFCS is suitable"); Monahan, 15 Hastings Intl. & Comp. L. Rev. at 342 (cited in note 160) (noting that HFCS "has already significantly displaced sugar as a sweetener in many industries"); Daniel A. Sumner, *Targeting Farm Programs*, 9 Contemp. Pol. Issues 93, 104 (1991) ("High sugar prices have allowed the high fructose corn syrup industry to expand. Corn producers face a higher demand . . . due to the increased price of a substitute in the integrated sweetener industry").

lucrative American sugar market for Third World cane farmers.¹⁷³ Among domestic producers, a disturbing racial pattern has emerged. Why are farm employers in lily-white North Dakota advised either to learn Spanish or to hire someone who speaks it?¹⁷⁴ Management is white; the unskilled labor is brown.

In twentieth-century America, as in eighteenth-century Europe, mistreatment of farm labor remains "the price of the sugar [we] eat."¹⁷⁵ At the turn of the century, United States Department of Agriculture experts realized that the "hardest problem" facing farmers in the fertile valley of the Red River of the North was a source of "labor to grow beets."¹⁷⁶ Mexican migrant workers thus "became the core of the agricultural proletariat in the Upper Midwest following World War I, and have remained so."¹⁷⁷ To this day, the United States is far more willing to import unskilled sugar-farming labor from Mexico than sugar itself.¹⁷⁸ The practice of importing foreign agricultural workers during farm labor shortages exposes just how readily the country's most formidable farmers can twist American immigration policy.¹⁷⁹ Seemingly welcome when fruit and vegetable farmers need cheap labor, Mexican immigrants are perceived as a net drain on the public fisc once the labor shortage evaporates.¹⁸⁰ Finally, this traffic in sweat complicates legal mandates to ensure "that the use of foreign workers will not adversely

173. See Monahan, 15 *Hastings Intl. & Comp. L. Rev.* at 355-58 (cited in note 160) (describing how the American sugar policy has contributed to the collapse of the sugar industry in many poorer countries).

174. See David M. Saxowsky, et. al., *Employing Migrant Agricultural Workers: Overcoming the Challenge of Complying with Employment Laws*, 69 *N.D. L. Rev.* 307, 307-08 (1993). See also Joel D. Medd, Note, *Legal Problems of Migrant Agricultural Workers in the Red River Valley of North Dakota and Minnesota*, 50 *N.D. L. Rev.* 459, 481 (1974) (illustrating the expansive travel patterns of seasonal migratory agricultural workers).

175. Voltaire, *Candide, or Optimism* 40 (Robert M. Adams trans. 2d ed., 1991).

176. Charles Saylor, *Progress of the Beet-Sugar Industry in the United States in 1904* at 38 (USDA, 1904).

177. Dennis Nodín Valdés, *Al Norte: Agricultural Workers in the Great Lakes Region, 1917-1970* at 3 (U. Tex., 1991).

178. See North American Free Trade Agreement, ch. 7, § A, ¶¶ 13-22, __ *U.S.T.* __, in 32 *I.L.M.* 296 (1993) (permitting the United States to impose barriers to Mexican sugar imports for at least 14 years after the ratification of the treaty).

179. See, for example, Special Agricultural Worker Program, 8 *U.S.C.* § 1160 (1994); Temporary Foreign Agricultural Worker Program, 8 *U.S.C.* § 1101(a)(15)(H)(ii)(a) (1994). See generally Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Immigration Control and Legalization Amendments Act of 1986, H.R. Rep. No. 99-682, 99th Cong. 2d Sess. (1986); Conf. Rep. on S. 1200, 99th Cong., 2nd Sess., 132 Cong. Rec. 10,583 (Oct. 16, 1986); Conf. Rep. on S. 1200, 99th Cong., 2nd Sess., 132 Cong. Rec. S16,611 (Oct. 15, 1986); Martin, 23 *U. C. Davis L. Rev.* at 504-17 (cited in note 155).

180. See Chen, 48 *Vand. L. Rev.* at 850-51 (cited in note 99).

affect the wages and working conditions of similarly employed U.S. farm workers."¹⁸¹

The division of agricultural labor in the United States has continued to follow an all-too familiar pattern: members of darker races, by and large, have never broken into the ranks of freehold farming, the rural embodiment of the American dream. Whereas the Constitution of 1787 countenanced the importation of involuntary agricultural laborers from a militarily vanquished Africa, the United States Code of 1994 at best oversees the importation of low-paid agricultural laborers from an economically distressed Latin America. American labor law systematically favors mostly Anglo farm owners at the expense of mostly Latino farmworkers. The exclusion of farmworkers from the National Labor Relations Act eliminates one hassle for farm employers,¹⁸² but the Agricultural Fair Practices Act of 1967¹⁸³ gives farm owners generous legal safeguards, including the freedom to organize against coercion by product handlers.¹⁸⁴ And among rough equals in the world's commodity markets, American law has mercilessly routed white American farmers' darker foreign competitors. Footnote four of *United States v. Carolene Products Co.*,¹⁸⁵ widely acclaimed as the font of modern constitutional theory and as the manifesto for the "discrete and insular minority" model of judicial review,¹⁸⁶ obscures a vicious campaign by the American dairy industry to defame their foreign, coconut-producing competitors "as lazy, ignorant, dark-skinned natives who had nothing to do all day but run up a tree and shake down a few nuts."¹⁸⁷

181. *NAACP, Jefferson County Branch v. U.S. Sec'y of Labor*, 865 F. Supp. 903, 907 (D. D.C. 1994); *NAACP, Jefferson County Branch v. U.S. Sec'y of Labor*, 846 F. Supp. 91, 93 (D. D.C. 1994). See also *Farmer v. Employment Security Comm'n*, 4 F.3d 1274, 1275 (4th Cir. 1993).

182. See 29 U.S.C. § 152(3) (1988) (excluding farmworkers from the NLRA's definition of "employee").

183. 7 U.S.C. §§ 2301-2305 (1994).

184. See *Michigan Cannery & Freezers Ass'n, Inc. v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 464-65 (1984); *Baldree v. Cargill, Inc.*, 758 F. Supp. 704, 707 (M.D. Fla. 1990). See generally Chen, 48 Vand. L. Rev. at 812-13 (cited in note 99) (outlining the differences between the legal treatment of farm labor and of farm proprietors in the United States).

185. 304 U.S. 144, 153 n.4 (1938).

186. See, for example, John H. Ely, *Democracy and Distrust* 75-104 (Harvard U., 1980) (grounding the "representation-reinforcing" theory of judicial review in *Carolene Products*); H. Jefferson Powell, *The Moral Tradition of American Constitutionalism: A Theological Interpretation* 289-91 (Duke U., 1993) (arguing that identifying the defense of discrete and insular minorities through judicial review is a *sine qua non* of Christian constitutionalism); Daniel A. Farber and Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 Cal. L. Rev. 685, 689-716 (1991) (arguing that contemporary political conditions warrant the preservation of the footnote four model of judicial review).

187. Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 S. Ct. Rev. 397, 422.

Certain questions remain unanswered. First, to put it rudely, why are the lowest levels in today's farm labor market brown and not black? In other words, how did the United States exchange its long-standing tradition of slave and black sharecropper labor for its modern equivalent, Hispanic migrant labor? The answer lies deep inside another conundrum that has eluded us thus far: *Where* did it all start, the depravity that twisted the United States even as it grew into the world's most productive agricultural nation? Which of the many lands west of Eden yielded the mature fruit of America's first disobedience?¹⁸⁸

Throughout the colonial era and the halcyon days of the young Republic, the notion of original sin in America seemed fancifully remote.¹⁸⁹ In stark contrast to the chaos and darkness of the Old World's enervating conflicts, the American stood as Adam reborn, a "fundamentally innocent" and "radically new personality" who—"emancipated from history, happily bereft of ancestry, untouched and undefiled by the usual inheritances of family and race"—could conquer the challenges of the world solely "with the aid of his own unique and inherent resources."¹⁹⁰ Before the new nation reached its hundredth birthday, the need to resolve the slavery debate by bloodshed showed how emphatically the American Adam had disappointed his promise. In America as in Eden, neither dominion nor stewardship could overcome original sin; the innocence of gardening had transmogrified itself into the reality of survivalist agriculture. Yet the Civil War was a symptom, not the cause. To diagnose young America's agrarian ailment, we must truly look away, look away, look away to Dixie Land.

B. *To Live and Die in Dixie*

[I]n speculating about what the future holds, one can't help but wonder what it was like to live in the South before the bad thing happened, however one might wish to express the bad thing: getting seduced by the economics of cotton and slavery, or, as Faulkner would have put it in

188. Compare Genesis 4:16 (noting that Cain moved to the land of Nod, east of Eden).

189. But see Jonathan Edwards, *Sinners in the Hands of an Angry God: A Sermon Preached at Enfield, July 8, 1741, at a Time of Great Awakenings and Attended with Remarkable Impressions on Many of the Hearts* (Samuel Etheridge, 4th ed. 1802) ("There is nothing that keeps wicked men, at any one moment, out of Hell, but the mere pleasure of God").

190. R.W.B. Lewis, *The American Adam: Innocence, Tragedy and Tradition in the Nineteenth Century* 8 (U. Chi., 1955).

stronger language, the country committing what amounted to its own Original Sin and suffering the commensurate curse.

Walker Percy¹⁹¹

1. The Southern Crucible

"The United States was born in the country and has moved to the city."¹⁹² If we sacrifice Richard Hofstadter's eloquence for greater geographic precision, we would find that this nation was born along the banks of the tidal James and has since moved its legal consciousness to the Tidal Basin of the Potomac. In making this progression from Jamestown, Williamsburg, and Richmond to Washington, the American people have performed over four centuries a transformative task that eluded the Grand Army of the Republic for four years. Not once but twice, the better angels of America's nature have molded an infant polity in Virginia into a mature nation.¹⁹³ By virtue of its Virginian cradle, America is a scion of the South. The Southern nation that America remains buries its greatest heroes on the former estate of Robert E. Lee.¹⁹⁴ "[F]rom the stink of the didie to the stench of the shroud," this nation has been Southern.¹⁹⁵ America's Southernness is more pervasive than non-Southerners care to admit, but less persuasive than Southerners wish to think. Well before the rage of reform swept America in the twentieth century, the South's agricultural origins had already foreordained a flawed Founding in the eighteenth century and a civil war in the nineteenth.¹⁹⁶

In the Eden that was America, the serpent was a cottonmouth. Throughout the early years "of our national history," "[t]here was never a moment . . . when the slavery issue was not a sleeping serpent."¹⁹⁷ In the very instant that the Southern planters espied the

191. Walker Percy, *Going Back to Georgia*, in Patrick Samway, ed., *Signposts in a Strange Land* 26, 33 (Farrar, Straus, and Giroux, 1991).

192. Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 23 (Knopf, 1955).

193. Compare Abraham Lincoln, *First Inaugural Address* (March 4, 1861), in Roy P. Basler, ed., 4 *The Collected Works of Abraham Lincoln* 262, 271 (Rutgers U., 1953) ("The mystic chords of memory, stretching [sic] from every battle-field, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature").

194. See *United States v. Lee*, 106 U.S. 196, 198-99 (1882) (describing how the United States acquired the Lee estate in Arlington after the family failed to pay a tax assessment in support of the Civil War effort).

195. Robert Penn Warren, *All the King's Men* 54 (Harcourt, Brace, 1946).

196. Compare John Calvin, *Concerning the Eternal Predestination of God* 56-58 (J.K.S. Reid trans. 1961) (outlining the theological theory of foreordination).

197. Chapman, *William Lloyd Garrison* at 9 (cited in note 120).

dazzling whiteness of their cotton empire, the seduction of slavery bruised the heel of the land.¹⁹⁸ In 1619, one year before the Pilgrims landed at Plymouth Rock, a ship ironically named *Jesus* unloaded twenty black slaves at Jamestown.¹⁹⁹ American Adam fell long before Pierre Beauregard besieged Sumter; tempted by the fruit of Southern soil, he did eat.²⁰⁰

Shockingly, the South sought scriptural support for its slave culture. Southern whites frequently cited the story of Noah and Ham as biblical justification for enslaving blacks.²⁰¹ In that story, Noah drank to excess after the Great Flood and fell naked in his tent. Ham, the biblical forefather of African tribes, saw his father in this condition. For this indiscretion, Noah condemned Ham's son Canaan to a life of slavery: "Cursed be Canaan; a servant of servants shall he be unto his brethren."²⁰² But whereas Noah became intoxicated by the fruit of the vine, the South quickly became addicted to the fruit of the boll.

The fruit of the South's agricultural disobedience, the fibrous boll and oil-packed seed of *Gossypium hirsutum*, proved unusually addictive and bittersweet.²⁰³ "In the Belt—Black, Cotton, or Bible—cotton [was] Religion, Politics, Law, Economics, and Art."²⁰⁴ Cotton so defined the South, the "Land of Cotton" where old times are

198. Compare Genesis 3:15 (prophesying that the serpent would "bruise [the] heel" of Eve's posterity after the Fall).

199. See Robert Penn Warren, *The Legacy of the Civil War: Meditations on the Centennial* 2 (Random House, 1961). According to John Rolfe's records, the Dutch man-of-war had taken 20 Africans prisoner after raiding a Spanish ship. The Africans were then traded at Jamestown for food and supplies. See Lerone Bennett, Jr., *Before the Mayflower: A History of the Negro in America* 29-30 (Johnson Pub., 1962). Another account reports that the African prisoners were auctioned off. See William T. Alexander, *History of the Colored Race in America* 166 (Negro Universities, 1968). For a definitive study of the ensuing 300-year history of blacks in Southern agriculture from slavery to sharecropping, see Victor Perlo, *The Negro in Southern Agriculture* (Intl. Pub., 1953).

200. Compare Genesis 3:12.

201. See Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 Harv. L. Rev. 985, 1016-17 (1990).

202. Genesis 9:25 (emphasis omitted).

203. See, for example, *Frost v. Corporation Comm'n*, 278 U.S. 515, 548-50 (1929) (Brandeis, J., dissenting) (noting how commercial gins frequently "charg[ed] extortionate prices to the farmer for inferior ginning service" even as they profited from crushing the separated seed into cottonseed oil); *Crescent Cotton Oil Co. v. Mississippi*, 257 U.S. 129, 133-34 (1921) (noting how commercial gins seemed able to leverage their power over the market for ginning services into the market for cottonseed).

204. Rupert Bayless Vance, *Human Factors in Cotton Culture: A Study in the Social Geography of the American South* vii (U. N.C., 1929) (attributing the statement to "a flippant journalist").

not forgotten,²⁰⁵ that the Confederacy pinned all of its hopes for international diplomatic recognition and European intervention in the Civil War on cotton.²⁰⁶ The South had fallen into an economic trap that imprisoned the region's tenant farmers well into the twentieth century. Southern agriculture experienced firsthand the hazards of cotton cultivation, a way and means of life with all "the doubleness that all jobs have by which one stays alive and in which one's life is made a cheated ruin."²⁰⁷ As late as 1932, the Supreme Court characterized cotton production in Oklahoma as an industry "of such paramount importance . . . that the general welfare and prosperity of the state in a very large and real sense depend upon its maintenance."²⁰⁸ By the Roarin' Twenties, however, America's urban residents had already attained numerical parity with their rural counterparts and were beginning to assert their cultural dominance.²⁰⁹ As dust swept across the "red country . . . of Oklahoma,"²¹⁰ radical social changes threatened to render agrarianism—in the South and beyond—gone with the wind.

2. Agrarian Apotheosis

The decade of the Depression and the Dust Bowl witnessed a vigorous second battle for the mind of the South. In the 1930s, romantic epics such as Margaret Mitchell's *Gone with the Wind*,²¹¹ Allen

205. Whistle *Dixie*, on *The Civil War* (Elektra Entertainment, 1990) ("How I wish I was in the land of cotton / Old times there are not forgotten").

206. See Shelby Foote, *The Civil War a Narrative: From Sumter to Perryville* 134-39 (Random House, 1958) ("[T]he South said plainly to all Europe: 'To get cotton you must swallow slavery'").

207. James Agee and Walker Evans, *Let Us Now Praise Famous Men* 326 (Houghton Mifflin, 2d ed. 1960).

208. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 276 (1932). Compare *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 312 (1940) (describing a Florida statute "declaring that the production of citrus fruit is a paramount industry of the state, upon which the prosperity of the State largely depends").

209. The decade between 1920 and 1930 witnessed an unprecedented increase of 14,796,850 in the United States' urban population. See U.S. Dept of Commerce, Bureau of the Census, *2 Census of Population: 1950 at 12* (1953) (Characteristics of the Population/Number of Inhabitants, General and Detailed Characteristics of the Population/United States Summary). As the Census Bureau recognized in the first decennial census after World War II:

In 1790, 1 out of every 20 of the 3,929,213 inhabitants of the United States was living in urban territory. In every decade thereafter, with the exception of that from 1810 to 1820, the rate of growth of the urban population exceeded that of the rural population. By 1860, one out of five persons was included in the urban population. The process of urbanization continued in the following decades, and by 1920 the urban population exceeded the rural population.

Id.

210. John Steinbeck, *The Grapes of Wrath* 3 (1939; Viking Penguin, reprint 1986).

211. Margaret Mitchell, *Gone with the Wind* (Macmillan, 1936).

Tate's *The Fathers*,²¹² Caroline Gordon's *None Shall Look Back*,²¹³ and Stark Young's *So Red the Rose*²¹⁴ fully exploited the legend of the Old South as an aristocratic agrarian paradise. *So Red the Rose*, in particular, so glamorized the Confederate war effort that, in retrospect, it is hard to imagine that Young shared citizenship in any meaningful sense with the author of *The Red Badge of Courage*.²¹⁵

In 1930, sixty-five years after the end of the Civil War, a group of self-described Agrarians published *I'll Take My Stand*.²¹⁶ In this collection of essays, twelve prominent Southern²¹⁷ men of letters—John Crowe Ransom, Donald Davidson, Frank Lawrence Owsley, John Gould Fletcher, Lyle H. Lanier, Allen Tate, Herman Clarence Nixon, Andrew Nelson Lytle, Robert Penn Warren, John Donald Wade, Henry Blue Kline, and Stark Young—delivered a literary defense of agrarian values that rivaled the military statement cut short by U.S. Grant's triumph at Appomattox Court House. Banding together as "Twelve Southerners," the Agrarians defended the "Southern way of life against what may be called the American or prevailing way."²¹⁸ The Agrarians declared a war not merely between states, but also between states of mind: they would squarely pit "Agrarian *versus* Industrial."²¹⁹ According to the Twelve Southerners, industrialism as "the economic organization of the collective American society" rested on a grave social decision "to invest its economic resources in the applied sciences."²²⁰ Agrarianism, by contrast, posited "that the culture of the soil is the best and most sensitive of vocations,

212. Allen Tate, *The Fathers* (G.P. Putnam's Sons, 1938).

213. Caroline Gordon, *None Shall Look Back* (Charles Scribner's Sons, 1937).

214. Stark Young, *So Red the Rose* (Charles Scribner's Sons, 1934).

215. See Stephen Crane, *The Red Badge of Courage* (Appleton, 1952). Compare Stephen Crane, *War Is Kind* (Frederick A. Stokes Co., 1899) (a sarcastic elegy on the supposed virtues of war).

216. Twelve Southerners, *I'll Take My Stand: The South and the Agrarian Tradition* (Harper Bros., 1930; Peter Smith, reprint 1951). Readers not familiar with the origin of this title might whistle the source cited in note 205.

217. I use the term "Southern" somewhat loosely, for Stark Young "prefer[red] to live in New York" and "serve[d] the *New Republic* as drama critic." W.J. Cash, *The Mind of the South* 392-93 (Knopf, 1941). Young was "an Agrarian by remote control, as it were," a sojourner on the information superhighway of the 1930s and in practice a shining example of the industrialist values that the Agrarians decried. Id. See also John L. Stewart, *The Burden of Time: The Fugitives and Agrarians* 173 n.1 (Princeton, 1965) (noting that several of the contributors to *I'll Take My Stand* "did no more than mail in their essays").

218. Introduction: *A Statement of Principles*, in Twelve Southerners, *I'll Take My Stand* ix, ix ("Introduction to *I'll Take My Stand*") (cited in note 216).

219. Id. Compare Genesis 4:2 (contrasting Abel as the virtuous "keeper of sheep" with Cain as the more aggressive but divinely repudiated "tiller of the soil").

220. Introduction to *I'll Take My Stand* at xi (cited in note 218).

and that therefore it should have the economic preference and enlist the maximum number of workers."²²¹

The presence of Ransom, Davidson, Tate, and Warren linked the Agrarians to the Fugitives, the highly influential group "who foregathered long ago in Nashville, Tennessee, to talk about poetry, criticize each others' verses, and publish the nineteen issues of a tiny magazine called *The Fugitive*."²²² Before they became overt Agrarians, these four poets championed a distinct and unapologetic regionalism in response to the dominant urban and Northern literary culture of the 1920s.²²³ The Fugitives' flowering presaged the full bloom of Southern literature in the decades to come and instantly placed Vanderbilt University on the cultural map of the United States.

But even as the preeminent Southern literary magazine of its day was breathing its last in 1925,²²⁴ a seemingly unrelated intellectual crisis was stifling Dixie. In March of that year, Tennessee passed its notorious Anti-Evolution Bill.²²⁵ The "Monkey Law" led in due course to the "Monkey Trial" of biology teacher John T. Scopes. Scopes was convicted, but his defense built Clarence Darrow's courtroom reputation and delivered a final, humiliating blow to the agricultural and biblical fundamentalist, William Jennings Bryan.²²⁶ Not quite three decades after his finest moment at the Democratic Party Convention of 1896,²²⁷ the prairie populist who had denounced the financial "crown of thorns" pressed "upon the brow of labor"²²⁸ was himself crucified upon a Cross of Reason.²²⁹ At the close of the 19th

221. *Id.* at xix.

222. Stewart, *The Burden of Time* at 3 (cited in note 217).

223. America had experienced traumatic demographic changes in the wake of World War I. See notes 142 and 209 and accompanying text. For one of many literary depictions of this tumultuous age, see John Dos Passos's U.S.A. trilogy: *The 42nd Parallel* (Harper & Bros., 1930); *1919* (Constable, 1932); *The Big Money* (Harcourt Brace, 1936). Perhaps no other writer captured the literary spirit of the age as well as the Minnesota-born husband of Zelda Sayre, a Montgomery society girl. See, for example, F. Scott Fitzgerald, *The Great Gatsby* (1925); F. Scott Fitzgerald, *Tender Is the Night* (1934). See generally, Sara Mayfield, *Exiles from Paradise: Zelda and Scott Fitzgerald* (Delacorte, 1971).

224. See *Announcement*, 4:4 Fugitive 1 (December 1925). See generally Louise Cowan, *The Fugitive Group: A Literary History 189-221* (La. St. U., 1959) (recounting the events leading to the demise of *The Fugitive*).

225. Tennessee Anti-Evolution Act, 1925 Tenn. Pub. Acts, ch. 27 (repealed by 1967 Tenn. Pub. Acts, ch. 237).

226. Watch, for example, Sidney Kramer, *Inherit the Wind* (United Artists, 1960) (movie adapted from the play by Jerome Lawrence and Robert E. Lee).

227. See William Jennings Bryan, *The Cross of Gold Speech*, in Carl G. Brandt and Edward M. Shafter, Jr., eds., *Selected American Speeches on Basic Issues (1850-1950)* 182 (Houghton Mifflin, 1960) (delivered in Chicago at the Democratic Convention on July 9, 1896).

228. *Id.* at 189.

229. Scopes was convicted on Tuesday, July 21, 1925; Bryan died that Sunday, July 26, 1925. See Louis S. Koernig, *A Political Biography of William Jennings Bryan* 657-58 (1971).

century, Bryan had spearheaded an almost successful populist uprising against the tight-fisted credit policies of the Eastern financial establishment. His inauspicious tenure as President Wilson's ultra-pacifist Secretary of War, however, showed how irrelevant Bryan had become.²³⁰ Well into the 20th century, and in the heart of the South, Bryan, as Tennessee's special prosecutor in the Monkey Trial, took his stand against modern science.²³¹

The "progressive and liberal leaders" of Vanderbilt University "saw in the [Monkey Trial's] fight against [Christian] Fundamentalism an opportunity to deal a sturdy blow against superstition and ignorance."²³² The purging of Southern distinctiveness from Vanderbilt would fulfill the school's inaugural promise not only to become the South's premier university, but also to serve as a bulwark "against all sectionalism."²³³ These aspirations also suited the industrial ambitions of Henry Grady's "New South," an anti-agrarian, reconstructed region risen phoenix-like from the ashes of the Confederacy.²³⁴ But others at the Methodist school, inspired by their "understanding of the deeply religious structure of life in the Tennessee hills," only grew stronger in the moral certitude that would lead to the writing of *I'll Take My Stand* as an "overt defense of the South."²³⁵

Seen in this fuller historical context, *I'll Take My Stand* represented the Fugitives' and the Agrarians' intellectual defense of the South's "old time religion" in all its dimensions—the Southern-accented variant of agricultural fundamentalism, the myth of the Lost Cause, and even fundamentalism itself. For "[i]f there is any [American] region in which God not only exists but defies all normal

Darwinism lost the battle but won the war. Compare *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927) (upholding Scopes's conviction and the Anti-Evolution Act), with *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) (striking down a Louisiana law requiring the teaching of "creation science" on an equal-time basis with Darwinian evolution); *Eppson v. Arkansas*, 393 U.S. 97, 107-09 (1968) (striking down an Arkansas statute that banned outright the teaching of Darwinism).

230. Compare Koenig, *A Political Biography* at 656 (cited in note 229) ("The portrayal of Bryan that is cemented [in the modern consciousness] is that of a bigoted, ill informed, hopelessly outdated old man").

231. See generally *id.* at 629-60.

232. Cowan, *The Fugitive Group* at 206 (cited in note 224).

233. Edwin Mims, *History of Vanderbilt University* 64 (Vand. U., 1946) (quoting the speech of Andrew Lipscomb at Vanderbilt's inaugural ceremonies in 1873).

234. See Joel Chandler Harris, *Life of Henry W. Grady* 83 (Cassel, 1890) (reproducing Grady's Dec. 21, 1886 speech on "The New South" to the New England Society of New York). See generally Woodward, *Origins of the New South* 145-47 (cited in note 148) (discussing Henry Grady's prominent role as an Atlanta journalist in promoting the vision of the "New South").

235. Cowan, *The Fugitive Group* at 240 (cited in note 224).

laws of geriatrics it is in and around Atlanta, radiating out in a vast geography of eroded hills and clotted gullies, of wire grass and pine trees, red clay and cotton stubble, up through the Great Smokies and west past the Sabine River."²³⁶ But the South's piety masked too many contradictions; the nation's most openly religious region took care to contradict the commandment, "love thy neighbor as thyself,"²³⁷ directly in its state codes.²³⁸ Critics such as H.L. Mencken inflicted such deep wounds on the South's intellectual reputation that the scars remain visible to this day.²³⁹ Worst of all, the complete separation of "the white world [from] the black world" effectively suggested the separate existence of "a white God and a Black God."²⁴⁰

Unable and unwilling to defend religious fundamentalism on its own terms,²⁴¹ the Agrarians resorted instead to a more intellectually respectable ideology, *agricultural* fundamentalism. Despite lamenting that "[r]eligion can hardly be expected to flourish in an industrial society,"²⁴² the Agrarians were not prepared to include religion *qua* religion within their brand of fundamentalism. Rather, the Agrarians reduced religion to a sense of "submission to the general intention of a nature that is fairly inscrutable . . . the sense of our rôle as creatures within nature."²⁴³ As a definition of religion, the Agrarian formula was no more coherent than a definition of Christianity as a vague faith in which "men and women who believe in a benevolent, omnipotent Creator and Ruler of the world, are known to differ" on "the divinity of Christ."²⁴⁴

236. Robert Sherrill, *Gothic Politics in the Deep South* 234 (Ballantine, rev. ed. 1969).

237. Leviticus 19:18; Matthew 5:43, 19:19, 22:39; Mark 12:31; Luke 10:27; Romans 13:9; Galatians 5:14; James 2:8.

238. See, for example, the school codes cited in *Brown v. Board of Education*, 347 U.S. 483, 486 n.1 (1954) and the miscegenation statutes cited in *Loving v. Virginia*, 388 U.S. 1, 4-7, nn. 3-5, 7-10 (1967). Compare the electoral codes and practices discussed in *South Carolina v. Katzenbach*, 383 U.S. 301, 310-313 (1966).

239. See, for example, H.L. Mencken, *The Sahara of the Bozart*, in *Prejudices*, Second Series, Part III, 136, 136 (Knopf, 1924) ("If the whole of the late Confederacy were to be engulfed by a tidal wave tomorrow, the effect on the civilized minority of men in the world would be but little greater than of a flood on the Yang-tse-Kiang").

240. Richard Wright, *How "Bigger" Was Born*, in Arnold Rampersad, ed., *Richard Wright, Early Works* 851, 857 (1991).

241. Compare *Bob Jones Univ. v. United States*, 461 U.S. 574, 580-81, 583 n.6 (1983) (describing racial segregation as a tenet of fundamentalist Christianity); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 734-35 (1974) (same).

242. *Introduction to I'll Take My Stand* at xiv (cited in note 218).

243. *Id.*

244. *Lee v. Weisman*, 112 S. Ct. 2649, 2684 (1992) (Scalia, J., dissenting). This remarkable passage from *Lee v. Weisman*, written by the Supreme Court's most prominent Catholic jurist—see generally George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 Yale L. J. 1297 (1990)—commemorates the hundredth anniversary of the Court's description of the

Yet the Agrarians were true to other fundamentalist tenets. Within their definition of agricultural virtue, they included the most romantic elements of the dominion and stewardship ethics. In promoting agriculture as “the leading vocation” for “an agrarian society,” *I’ll Take My Stand* regarded farming as a means to an end and revered the material benefits delivered by bountiful harvests.²⁴⁵ By the same token, the Agrarians decried “nature . . . transformed into cities and artificial habitations, manufactured into commodities” because “nature industrialized” gives the deceitful “illusion of having power over nature” and destroys “the sense of nature as something mysterious and contingent.”²⁴⁶ This image of farmers as stewards of nature is unmistakably reminiscent of Thomas Jefferson’s claim that “[t]hose who labour in the earth are the chosen people of God, . . . whose breasts he has made his peculiar deposit for substantial and genuine virtue.”²⁴⁷ “The modern Southerner inherits the Jeffersonian formula,” wrote Allen Tate, confident that “[t]he South would not have been defeated had it possessed a sufficient faith in its own kind of God.”²⁴⁸ To the extent that slaveholding and rebellion might have tarnished the South’s claim to agrarian virtue, John Crowe Ransom restored Dixie’s honor by blaming “[i]ndustrialism, the latest form of pioneering and the worst,” for the North’s arrogant triumph in the Civil War and the South’s subsequent economic crisis.²⁴⁹ In a more

United States as “a Christian nation,” *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892), by turning America into an Arian nation.

245. *Introduction to I’ll Take My Stand* at xix (cited in note 218).

246. *Id.* at xiv. Compare Bryan, *The Cross of Gold Speech* at 189 (cited in note 227) (“You come to us and tell us that the great cities are in favor of the gold standard; we reply that the great cities rest upon our broad and fertile prairies. Burn down your cities and leave our farms, and your cities will spring up again as if by magic; but destroy our farms and the grass will grow in the streets of every city in the country”).

247. Thomas Jefferson, *Notes on the State of Virginia* 164-65 (William Peden ed. 1955). Compare Act of Dec. 3, 1943, ch. 333, 57 Stat. 595 (establishing the National Agricultural Jefferson Bicentenary Committee in honor of Jefferson’s contributions to agriculture); 36 U.S.C. § 149 (1988) (authorizing the celebration of Jefferson’s birthday, April 13). See generally Linda A. Malone, *Reflections on the Jeffersonian Ideal of an Agrarian Democracy and the Emergence of an Agricultural and Environmental Ethic in the 1990 Farm Bill*, 12 *Stan. Envtl. L. J.* 3, 4-7 (1993) (describing Jefferson’s agrarian philosophy, particularly the political organization of his ideal agrarian democracy).

248. Allen Tate, *Remarks on the Southern Religion*, in *Twelve Southerners, I’ll Take My Stand* 155, 174 (cited in note 216). See also Allen Tate, *Religion and the Old South*, in *Reactionary Essays on Poetry and Ideas* 167, 189 (1936) (altering this statement to personify the South as a female: “The South would not have been defeated had she possessed a sufficient faith in her own kind of God” (emphasis added)).

249. John Crowe Ransom, *Reconstructed but Unregenerate*, in *Twelve Southerners, I’ll Take My Stand* 1, 15 (cited in note 216). See also *id.* at 15-22 (outlining the precise nature of industrialism’s threat to Southern culture).

lyrical moment, Ransom might well have written, "In America's house divided we were sternly stopped, to say we were vexed at Reconstruction, its black senates so plainly propped."²⁵⁰

Despite their self-conscious regionalism, the Agrarians were far more representative of the entire country's agricultural attitudes. There was nothing uniquely Southern about their portrayal of the conflict between the agrarian and the industrial. The Agrarians' advocacy of "anti-industrial measures" "championed by the powerful agrarians in the Senate of the United States" reflected the economic and political agenda of the New Deal's agricultural fundamentalists,²⁵¹ who argued that wealth transfers to agriculture enjoyed a seven-to-one multiplier effect.²⁵² The accelerating technological change that the Agrarians condemned as creeping, dehumanizing "industrialism" coincided with the extraordinary rise of agrarian political power coast-to-coast.²⁵³ As illustrated by *The Cobweb Theorem*,²⁵⁴ the landmark article in which Department of Agriculture economist Mordecai Ezekiel grimly prophesied drastic swings between overproduction and starvation, the New Deal rejected the United States' longstanding policy of "rely[ing] on the market" as "the best possible way to allocate resources, guide consumption, and reward behavior."²⁵⁵

Indeed, the Agrarians expressed in literary terms the basic premises of the cobweb theorem. In 1938, Ezekiel condensed the leading economic literature into a succinct statement of his theorem:

Classical economic theory rests upon the assumption that price and production, if disturbed from their equilibrium, tend to gravitate back toward that normal. The cobweb theory demonstrates that even under static conditions, this result will not necessarily follow. On the contrary, prices and production of some commodities might tend to fluctuate indefinitely, or even to diverge further and further from equilibrium.²⁵⁶

250. Compare John Crowe Ransom, *Bells for John Whiteside's Daughter* ll. 18-20, in *Selected Poems* 7, 7 (Knopf, 3d ed. 1969) ("In one house we are sternly stopped / To say we are vexed at her brown study, / Lying so primly propped.").

251. *Introduction to I'll Take My Stand* at xix (cited in note 218).

252. See Saloutos, *The American Farmer and the New Deal* at 63 (cited in note 3); 1949 Extension of the Reciprocal Trade Agreements Act, Hearings before the House Committee on Ways and Means on H.R. 1211, 81st Cong., 1st Sess. 377 (1949) (testimony of Carl H. Wilken). See generally Chen, 48 Vand. L. Rev. at 819-20 (cited in note 99).

253. See generally Fite, *American Farmers* at 37-79 (cited in note 129).

254. Mordecai Ezekiel, *The Cobweb Theorem*, 52 Q.J. Econ. 255 (1938).

255. Paarlberg, *Farm and Food Policy* at 20 (cited in note 31).

256. Ezekiel, 52 Q.J. Econ. at 278-79 (cited in note 254).

Eight years earlier, at least one Agrarian had already emphasized farm-level anxiety over leverage and productive excess.²⁵⁷ In an essay whose “bluster and exaggeration” apparently inflicted “incalculable damage” on “the Agrarian cause,”²⁵⁸ Andrew Nelson Lytle not only expressed the essence of the cobweb theorem but also captured the dominant anti-capitalist mood of mainstream agricultural policymakers during the New Deal:

When the farmer doubles his crop, he doubles his seed, his fertilizer, his work, his anxiety . . . all his costs, while the industrial product reduces in inverse ratio its costs and labor as it multiplies. Industrialism is multiplication. Agrarianism is addition and subtraction. The one by attempting to reach infinity must become self-destructive; the other by fixing arbitrarily its limits upon nature will stand. An agrarian stepping across his limits will be lost.²⁵⁹

True to Allen Tate’s conclusion that “violence” was the only means by which “the Southerner [could] take hold of his Tradition,” the New Deal farm lobby launched a legislative offensive.²⁶⁰ No longer content to accept the ancient creed that “agrarian plagues of pest and drought were . . . God’s punishment for His children’s misdeeds,”²⁶¹ agricultural supremacists throughout the country demanded a strong governmental response. Congress responded with the Agricultural Adjustment Act of 1933,²⁶² “the most drastic and far-reaching piece of farm legislation proposed in time of peace.”²⁶³ The invalidation of the 1933 Act in 1936 proved to be a merely temporary setback,²⁶⁴ within

257. This was and remains a justifiable concern in the sense that capital-intense, high-production agriculture exposes farmers to greater risk. See generally David A. Lins, *Credit Availability Effects on the Structure of Farming*, in *Structure Issues of American Agriculture* 134, 134-41 (1979) (USDA Econ., Stat., & Coop. Serv., Agric. Econ. Rep. No. 438).

258. Stewart, *The Burden of Time* at 167-68 (cited in note 217).

259. Andrew Nelson Lytle, *The Hind Tit*, in *Twelve Southerners, I’ll Take My Stand* 201, 241-42 (cited in note 216).

260. Tate, *Remarks on the Southern Religion* at 174 (cited in note 248); Tate, *Religion and the Old South* at 189 (cited in note 248).

261. Breimyer, 68 Minn. L. Rev. at 340 (cited in note 3). Compare O.E. Rølvaag, *Giants in the Earth* 349-50 (Harper & Bros., Lincoln Colcord and O.E. Rølvaag trans. 1927) (“[N]ow had begun a seemingly endless struggle between man’s fortitude in adversity . . . and the power of evil in high places . . . [T]he plague of locusts proved as certain as the seasons. . . [And] [w]ho would dare affirm that this plague was not of supernatural origin?”).

262. Act of May 12, 1933, ch. 25, 48 Stat. 31, codified as amended at 7 U.S.C. §§ 601-624 (1994).

263. Franklin D. Roosevelt, *New Means to Rescue Agriculture—The Agricultural Adjustment Act*, in 2 *The Public Papers and Addresses of Franklin D. Roosevelt* 74, 79 (Random House, 1938).

264. See *United States v. Butler*, 297 U.S. 1, 77 (1936) (holding that the Congress in the 1933 Act had, “under the pretext of exercising [its] taxing power, in reality accomplish[ed] prohibited ends”).

two years, Congress filled the judicially created vacuum with the Soil Conservation and Domestic Allotment Act of 1936,²⁶⁵ the Agricultural Marketing Agreement Act of 1937,²⁶⁶ and the monumental Agricultural Adjustment Act of 1938.²⁶⁷ This statutory bundle withstood various constitutional attacks²⁶⁸ and continues to define the basic structure of the federal commodity programs. Just as statutes authorizing homesteading, land-grant college endowment, and railroad subsidization sparked the *developmental* phase in American agricultural law, these New Deal statutes catapulted the nation's agricultural policymakers into a new *regulatory* agenda: resource conservation and supply management, private-public cooperation in commodity marketing, and price-and-income regulation in numerous facets of the farm economy.

Its interests jealously guarded by its Senators-for-life, the one-party Solid South reaped a disproportionate share of the New Deal's legislative cornucopia. Three of the region's leading crops—cotton, rice, and tobacco—were defined as “basic agricultural commodities” under the 1933 Act.²⁶⁹ The tobacco and peanut programs historically enjoyed the most stringent complex of acreage allotments and marketing quotas,²⁷⁰ even after other commodity programs abandoned these regulatory tools. By raising the price of land on which tobacco or peanuts are grown, these supply control mechanisms guaranteed that incumbent landowners in the South would capture all rents generated by the tobacco and peanut programs. The substantial rents thus delivered to the owners of tobacco and peanut quotas became the post-New Deal, legislative equivalent of the rents paid by Southern landlords' tenant farmers (both black and white) in the era between Reconstruction and Depression—freely alienable among planters within

265. Act of February 29, 1936, ch. 104, 49 Stat. 1148.

266. Act of June 3, 1937, ch. 296, 50 Stat. 246, codified as amended at 7 U.S.C. §§ 601-624, 671-674 (1994).

267. Act of February 16, 1938, ch. 30, 52 Stat. 31, codified as amended at 7 U.S.C. §§ 1281-1393 (1994). See generally U.S. Dept of Agric., Economic Research Serv., *History of Agricultural Price-Support and Adjustment Programs 1933-84* at 12-13 (1985) (Agric. Info. Bull. No. 485) (describing the ambitious scope of the 1938 Act).

268. See *Currin v. Wallace*, 306 U.S. 1 (1939) (upholding a legally mandated tobacco growers' referendum against commerce clause and nondelegation doctrine challenges); *Mulford v. Smith*, 307 U.S. 38 (1939) (upholding tobacco marketing quotas against commerce clause, nondelegation doctrine, and takings clause challenges); *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the “aggregate effect” of on-farm consumption of wheat justified statutory and administrative sanctions enacted under Congress's authority to regulate interstate commerce).

269. See Agricultural Adjustment Act of 1933, Act of May 12, 1933, ch. 25, § 11, 48 Stat. 31, codified as amended at 7 U.S.C. § 611 (1994); *Butler*, 297 U.S. at 54 n.2.

270. See generally David Westfall, *Agricultural Allotments as Property*, 79 Harv. L. Rev. 1180 (1966).

an exclusive market controlled by them, but remarkably resistant to “trickling-down” for the benefit of their tenants.²⁷¹ To this day, the rice, cotton, peanut, and tobacco programs placate the “regional interests [that] give farm policy a strong southern flavor.”²⁷²

3. Native Son

If we cast the story of the South’s agrarian ideology as a heroic allegory for the larger legal history of American agriculture, we would see that the story has completed the cosmic cycle of “a separation from the world, a penetration to some source of power, and a life-enhancing return.”²⁷³ In 1861 the South seceded, claiming for itself the political fruits that the farmer-dominated Constitutional Convention had not delivered. No wonder some deranged Southerners have regarded the Civil War as the “Second Revolution” in which their “nation” became embroiled.²⁷⁴ Sixty-five years after the Confederacy’s defeat, Vanderbilt’s Agrarians articulated the philosophical formula that secured the South’s legislative triumph. A decade after Bryan’s ignoble death in Dayton, Tennessee,²⁷⁵ an agrarian Congress fulfilled the prophecy he had proclaimed in Chicago so long ago.

271. Despite substantial reforms of the tobacco program, tobacco quota holders commanded an average rent of 25-30 cents per pound as of 1990. See Verner N. Grise, *The Tobacco Program and Its Effects*, 13 Natl. Food Rev. 66, 70 (1990). Stated differently, the 100,000 holders of tobacco quotas enjoy an average of \$4,000 in rents every year. See Sumner, 9 Contemp. Pol. Issues at 104 (cited in note 172). Holders of peanut quotas collect an average rent of \$150 per ton in the Southeastern states. See James Schaub, *The Peanut Program and Its Effects*, 13 Natl. Food Rev. 37, 40 (1990). For exemplary cases illustrating private incentives to evade production controls on tobacco, see *McLamb v. Pope*, 657 F.2d 77 (4th Cir. 1981); *Davis v. Stewart*, 625 F.2d 1143 (4th Cir. 1980); *Price v. Block*, 535 F. Supp. 1239 (E.D. N.C. 1982).

272. Cochrane and Runge, *Reforming Farm Policy* at 80 (cited in note 141).

273. Joseph Campbell, *The Hero with a Thousand Faces* 35 (Princeton, 2d ed. 1968).

274. See, for example, Walker Percy, *Lancelot* 157 (Farrar, Straus, and Giroux, 1977) (“The First Revolution in 1776 against the stupid British succeeded. The Second Revolution in 1861 against the money-grubbing North failed. . . . The Third Revolution will succeed”). The protagonist in Walker Percy’s novel is, in the words of one German critic, “ein amerikanischer Nazi,” Rainulf A. Stelzmann, *Das Schwert Christi: Zwei Versuche Walker Percys*, 1959 *Stimmen der Zeit* 641, 641 (Sept. 1977), and his “Third Revolution” is unmistakably a plan for ethnic and sexual cleansing of the “great whorehouse and fagdom of America,” patterned after the Third Reich’s Final Solution, Percy, *Lancelot* at 189.

275. See Koenig, *A Political Biography* at 657-58 (cited in note 229).

The agrarians made straight the path of the law,²⁷⁶ and the New Deal triumphantly followed.²⁷⁷

This Article marks the passage of yet another sixty-five years, from the 1930 publication of *I'll Take My Stand* by the Vanderbilt-based Agrarians to the 1995 publication of *The American Ideology*²⁷⁸ and *Of Agriculture's First Disobedience and Its Fruit* in the *Vanderbilt Law Review*. As unsuccessful as *I'll Take My Stand* ultimately proved in its effort to revive the legend of the Old South among a broad readership,²⁷⁹ the appearance of two agricultural polemics by a son of Georgia²⁸⁰ in the *Vanderbilt Law Review* must be anticlimactic indeed. Nothing mere mortals write or say, after all, can eclipse the cataclysmic significance of the American experience between 1861 and 1865.²⁸¹ Having looked homeward, however, and finding myself figuratively in Nashville amid the flow of time and the river, I have discovered that, indeed, you can't go home again. Sixty-five years of Agrarianism are enough.²⁸² The time has come to retire Agrarianism, once and for all.

Agrarianism, at Vanderbilt or elsewhere, has historically claimed the moral power of populism.²⁸³ If the Twelve Southerners' philosophy can be called "populism," it was surely the most patrician populism ever to stalk the earth. "[T]he majority of the contributors to *I'll Take My Stand* were primarily occupied with the aristocratic notion . . . of the Old South."²⁸⁴ The Agrarians "took little account

276. Compare Isaiah 40:3 ("The voice of him that crieth in the wilderness, Prepare ye the way of the LORD, make straight in the desert a highway for our God"); Matthew 3:3 ("The voice of one crying in the wilderness, Prepare ye the way of the Lord, make his paths straight"); Mark 1:3 (same); Luke 3:4 (same); John 1:23 ("I am the voice of one crying in the wilderness, Make straight the way of the Lord").

277. Compare Matthew 21:1-17 (describing Jesus' entrance into Jerusalem); Mark 11:1-19 (same); Luke 19:28-46 (same); John 12:12-15 (same). See also Zechariah 9:9 (prophesying that the king of Jerusalem would come "lowly, and riding upon an ass, and upon a colt the foal of an ass").

278. Chen, 48 Vand. L. Rev. 809 (cited in note 99).

279. Within six years, the collection of essays was out of print. See Tate, *Reactionary Essays on Poetry and Ideas* at vii (cited in note 248).

280. See Jim Chen, *Unloving*, 80 Iowa L. Rev. 145, 145 (1994) ("As a son of Georgia, I imagined that better wisdom, justice, and moderation had obliterated the allure of racial segregation").

281. Compare Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg* (Nov. 19, 1863), in P. Basler, ed., 7 *The Collected Works of Abraham Lincoln* 22, 23 (Rutgers U., 1953) ("The world will little note, nor long remember what we say here, but it can never forget what they did here").

282. Compare *Buck v. Bell*, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles are enough").

283. See, for example, Ingolf Vogeler, *The Myth of the Family Farm: Agribusiness Dominance of U.S. Agriculture* vii (Westview, 1981) (dedicating a paean to the American family farmer in hopes of "a new Populism in our lifetime").

284. Cash, *The Mind of the South* at 392 (cited in note 217).

of . . . the underdog proper, the tenants and sharecroppers, industrial labor, and the Negroes as a group."²⁸⁵ In agriculture, an activity that every person shapes by acting upon his or her consumer preferences, the only legitimate brand of populism is a "bourgeois populism."²⁸⁶

To accuse all of the Agrarians of stunning racial insensitivity—how could one look at the American South in 1930 and not see the black population?²⁸⁷—may not be entirely fair. Both Herman Clarence Nixon and Robert Penn Warren took special care in their essays to address the role of black Southerners in the Agrarian revival. Nixon solemnly concluded that "[t]he chief activity of the negro since slavery has been in agriculture, and his chief place in agriculture has been in cotton production."²⁸⁸ After "testify[ing]" personally to the difficulty of urging a negro 'cropper' with a mule to the successful production of anything but cotton," Nixon urged his fellow "Southerners" to "praise . . . Booker T. Washington for the persistency with which he urged his people to . . . grow something besides cotton."²⁸⁹ Nixon envisioned a Southern economy based once again on production agriculture, but he plainly regarded a group that (by his own count) accounted for one-fourth of the region's cotton production as something other than "Southerners."²⁹⁰

Warren devoted his entire essay to the question of blacks. *The Briar Patch* described the newly emancipated slave as unequipped "to live again, with spear and breech-clout, in the Sudan or Bantu country."²⁹¹ Warren defended his "emphasis on vocational education for the negro"—in lieu of a program of universal black literacy—against charges that such a preference represented "a piece of white man's

285. Id.

286. Chen, 48 Vand. L. Rev. at 874 (cited in note 99) ("We need a bourgeois populism, a populism that reflects the values of the middle-class masses whose consumer expenditures and tax payments have financed the American Dream for farmers and factory workers alike").

287. But compare U.S. Const., Art. I, § 2, cl. 3 (seeing just three-fifths of the blacks for the purpose of apportioning seats in the House of Representatives). See generally Gunnar Myrdal, 1 *An American Dilemma: The Negro Problem and Modern Democracy* 230-78, 452-504 (Harper, 9th ed. 1944) (analyzing the "Negro problem" as a predominantly Southern issue).

288. Herman Clarence Nixon, *Whither Southern Economy?*, in *Twelve Southerners, I'll Take My Stand* 176, 190 (cited in note 216).

289. Id. at 190. See generally Booker T. Washington, *Up From Slavery: An Autobiography* (Doubleday, 1901).

290. See Nixon, *Whither Southern Economy?* at 190 (cited in note 288).

291. Robert Penn Warren, *The Briar Patch*, in *Twelve Southerners, I'll Take My Stand* 246, 247 (cited in note 216).

snobbery.”²⁹² He refused to bless the northward migration of blacks, arguing that the black laborer’s role as “an ideal scab in time of trouble” and “the related fact of the negro’s lower standard of living have been largely responsible for the race riots which . . . occurred in the North since the days of the war.”²⁹³ Rather, he urged “the Southern negro” to heed his or her roots as “a creature of the small town and farm”:

That is where [“the Southern negro”] still chiefly belongs, by temperament and capacity; there he has less the character of a “problem” and more the status of a human being who is likely to find in agricultural and domestic pursuits the happiness that his good nature and easy ways incline him to as an ordinary function of his being.²⁹⁴

Race ipsa loquitur. *I’ll Take My Stand’s* future three-time Pulitzer Prize winner²⁹⁵ and poet laureate of the United States²⁹⁶ had unequivocally articulated the bedrock principle of Jim Crow’s “creed of racial relations”: “Negroes are necessary to the South, and it is desirable that they should stay there and not migrate to the North.”²⁹⁷

4. Exodus

A charitably predisposed modern observer might confine his or her criticism of *I’ll Take My Stand’s* racial commentaries to a single, morally neutral objection: myopia. Although both Nixon and Warren recognized that a black exodus from the South had already begun,²⁹⁸ neither spotted the economic and technological changes that were

292. *Id.* at 250-51. Compare *id.* at 249 (“For what is the negro to be educated? It is a question that must be answered unless one believes that the capacity to read and write, as some believed concerning the franchise, carries with it a blind magic to insure success”).

293. *Id.* at 256.

294. *Id.* at 260-61.

295. For *All the King’s Men* (cited in note 195) in 1947, and twice for poetry—*Promises: Poems 1954 to 1956* (Random House, 1957) in 1958 and *Now and Then: Poems 1976-1978* (Random House, 1st ed. 1978) in 1979.

296. See 2 U.S.C. § 177 (1994) (authorizing the Librarian of Congress to appoint a poet laureate as a “consultant in poetry”); 132 Cong. Rec. S1804 (Feb. 27, 1986) (statement of Sen. Dodd congratulating Warren on his selection as the first poet laureate); 132 Cong. Rec. S2543 (March 12, 1986) (statement of Sen. Matsunaga congratulating Warren). See generally *Remarks at a Luncheon for Recipients of the National Medal of Arts*, 23 Weekly Comp. Pres. Doc. 701 (June 18, 1987) (surveying Warren’s public accolades).

297. Hortense Powdermaker, *After Freedom: A Cultural Study of the Deep South* 23 (Russell & Russell, 1968).

298. Warren, in particular, acknowledged that since the end of the Civil War, “pillars of smoke from Northern factory chimneys [had] summoned the Southern negro out of the land of Egypt.” Warren, *The Briar Patch* at 256-57 (cited in note 291). Compare Exodus 3:10 (“Come now therefore, and I will send thee unto Pharaoh, that thou mayest bring forth my people the children of Israel out of Egypt”).

foreordaining a massive movement of black labor and black culture.²⁹⁹ The cotton boll weevil “was probably responsible for more changes in the number of farms, farm acreage, and farm population than all other causes put together.”³⁰⁰ The Census Bureau attributed the loss of as many as 55,000 farms in Georgia and 34,000 farms in South Carolina between 1920 and 1930 to the boll weevil infestation, and these two states alone accounted for more than a third of the 1.2 million-person decrease in the nation’s farm population during that decade.³⁰¹ The deployment of the mechanical cotton picker in the period between the World Wars delivered the final blow to King Cotton,³⁰² rendering “obsolete the sharecropper system” that had replaced the antebellum plantation culture.³⁰³ The mechanics of mass production and the economics of exploitation thus came full circle: as the cotton gin had enabled cotton planting and its system of slave labor to sweep across the South, the mechanical cotton picker “made the maintenance of segregation no longer a matter of necessity for the economic establishment of the South.”³⁰⁴ In six decades, America’s black migration transported six and a half million individuals from South to North, thereby effecting “one of the largest and most rapid mass internal movements of people in history.”³⁰⁵

Although history has yet to judge the ultimate success of America’s black exodus,³⁰⁶ the practical death of the Agrarian’s patrician populism was surely a liberating moment in American history. As so often happens in agriculture, technological progress

299. See U.S. Dept of Commerce, Bureau of the Census, *4 Fifteenth Census of the United States: 1930* at 11 (1932) (Agriculture/ General Report/ Statistics by Subjects) (attributing the decrease in the number of farms between 1910 and 1920 to a scarcity of labor, the consolidation of farms, oil and mining development, extension of city areas, abandonment of low-grade farms, and cotton boll weevil infestation).

300. *Id.* at 12.

301. See *id.*

302. See, for example, *King Cotton’s Scepter Falls to Machinery*, Chicago Trib. (Oct. 10, 1944).

303. Nicholas Lemann, *The Promised Land: The Great Black Migration and How It Changed America* 5 (Knopf, 1991).

304. *Id.* at 6.

305. *Id.* See generally Conrad Taeuber and Irene B. Taeuber, *The Changing Population of the United States* 109-11 (Wiley, 1958) (discussing the internal migration “of Negroes from the South to the other parts of the country,” especially “urban areas,” as a phenomenon that had increased with “dramatic speed”); John Shelton Reed, *My Tears Spoiled My Aim and Other Reflections on Southern Culture* 104-18 (U. Mo., 1993) (offering thoughts on “the Southern Diaspora” that dispersed the region’s residents, especially black ones, throughout the rest of the United States between 1877 and 1960).

306. Compare Reed, *My Tears Spoiled My Aim* at 105 (cited in note 305) (describing how, in the early 1970s, more blacks entered the South than left it, for the first time in a century).

helped break "the old servile relationship between those who owned only labor and those who owned land but did not labor."³⁰⁷ Neither emancipation, Reconstruction, nor the industrial revolution had brought prosperity to Southern blacks. The black farmer's predicament deepened during the 1930s. Few farms in the resource-poor South, much less the spartan tenant farms on which most black farmers toiled, could overcome the decade's double burden of worldwide depression and soil depletion. On a single day in April 1932, foreclosure auctions moved one-quarter of all the land in Mississippi.³⁰⁸ Farm reorganization brought on by debt, depression, and displacement hammered Southern black sharecroppers hardest of all: entire sharecropper families lined country roads near the South's richest farmland.³⁰⁹ "The burden of over-population, in the form of both unemployment and extreme poverty among those retained in agricultural employment," had fallen "much more heavily on the negro population than on the whites."³¹⁰ But the agricultural establishment of the day valued "the whites more . . . than the blacks, and the landowning farmers than the tenants and sharecroppers."³¹¹ These matters were survivalist realities that eluded men like the Agrarians and the Fugitives, Nashville denizens who indulged a romantic love affair with antebellum country squires and their lost lifestyle. By contrast, the *black* fugitives of early twentieth-century America were mostly "country people" who "[f]ell in love with [the] city" upon escaping the dreariness of their previous lives on the farm.³¹²

Every story of origins conceals an even more powerful story of destinies. Let us now heed the same call that led the children and grandchildren of slaves out of Dixie. In the South, restricted access to landownership, education, and the legal system had raised virtually insurmountable barriers to widespread black ownership of farms.

307. Vernon W. Ruttan, *Agricultural Scientists as Reluctant Revolutionaries*, 7 *Interdiscip. Sci. Revs.* 170, 170 (1982). Compare Chen, 48 *Vand. L. Rev.* at 863 (cited in note 99) (celebrating the way in which agricultural technology and education "emancipate[]" entire generations "from the acres where the grapes of wrath are grown").

308. See William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932-1940* at 23 (Harper & Row, 1963).

309. See Louis Cantor, *A Prologue to the Protest Movement: The Missouri Sharecropper Roadside Demonstration 64-66* (Duke U., 1969); Fite, *American Farmers* at 74-75 (cited in note 129).

310. Myrdal, 1 *An American Dilemma* at 265 (cited in note 287).

311. Saloutos, *The American Farmer* at 50 (cited in note 3).

312. Toni Morrison, *Jazz* 33 (Knopf, 1992). Compare Langston Hughes, *The Negro Speaks of Rivers*, in Arnold Rampersad, ed., *The Collected Poems of Langston Hughes* 23 (Knopf, 1994) (describing the Mississippi as the most recent river to have witnessed the progression of black history from the Old World to the New).

Ironically, the South's insistence on excluding agricultural labor from the FLSA's wage-and-hour provisions probably accelerated the disintegration of its feudal farm economy. To the extent that minimum wage obligations in other sectors of the economy suppressed industrial employers' demand for labor,³¹³ the FLSA's agricultural exemption promised to help farm employers exploit a captive labor market. Factories newly obliged to pay minimum wages hardly seemed likely to expand their hiring. Jim Crow's creed of racial relations in the South rested on the assumption that white America could confine the descendants of African slaves to the South. But massive resistance to wage-and-hour regulation of agricultural labor eliminated whatever economic advantage that Southern blacks might have kept by working farm-related jobs instead of seeking industrial employment opportunities in other regions. Under any economic conditions, the prevailing nonfarm wage rate is the opportunity cost implicit in any decision to perform an equivalent on-farm task.³¹⁴ After the New Deal, that wage was no less than the legal minimum wage in any industry covered by the FLSA, and wartime economic expansion yielded a bumper crop of nonagricultural jobs not foreseen during the Great Depression. The jobs were there, the wages were better, and black America was ready to move. Although travel in the segregated South was a daunting task for blacks,³¹⁵ the prospect of city jobs lured former sharecroppers and field hands out of the old cotton-farming "Black Belt." The mass northward migration of the Mississippi Delta

313. See generally, for example, Charles Brown, Curtis Gilroy, and Andrew Kohen, *The Effect of the Minimum Wage on Employment and Unemployment*, 20 J. Econ. Lit. 487, 488-96 (1982) (documenting how minimum wage laws suppress overall employment); George Stigler, *The Economics of Minimum Wage Legislation*, 36 Am. Econ. Rev. 358 (1946) (same); Finis Welch, *Minimum Wages: Issues and Evidence* 34-45 (Am. Enterprise Institute, 1978) (same). But see David Card, *Using Regional Variation in Wages to Measure the Effects of the Federal Minimum Wage*, 46 Indus. Lab. Rel. Rev. 22 (1992) (disputing the traditional link between minimum wage laws and reduced employment); Lawrence F. Katz and Alan B. Krueger, *The Effect of the Minimum Wage on the Fast-Food Industry*, 46 Indus. Lab. Rel. Rev. 6 (1992) (same).

314. See Andrew P. Barkley, *The Determinants of the Migration of Labor Out of Agriculture in the United States, 1940-84*, 72 Am. J. Agric. Econ. 567, 571 (1990); Chen, 48 Vand. L. Rev. at 851 (cited in note 99); Wallace E. Huffman, *Farm and Off-Farm Work Decisions: The Role of Human Capital*, 62 Rev. Econ. & Statistics 14, 22-23 (1980); Yoav Kislev and Willis Peterson, *Prices, Technology, and Farm Size*, 90 J. Pol. Econ. 578, 579 (1982).

315. See, for example, Sen. Rep. No. 872, 88th Cong., 2d Sess., § 1732 (1964). During the Senate hearings on the Civil Rights Act of 1964, Attorney General Robert Kennedy testified that one hotel in Montgomery, Alabama, and none in Danville, Virginia, served blacks, while a dog traveling with a white person could choose from five hotels in Montgomery and four in Danville. See John Brauer, *John F. Kennedy and the Second Reconstruction* 279 (Columbia U., 1977).

can still be heard in the musical progression from Dixieland jazz to blues, from New Orleans³¹⁶ to Memphis³¹⁷ to Saint Louis³¹⁸ to Chicago.³¹⁹

Slow migration as a simple but undeniably heroic response to Jim Crow brought greater economic opportunity to blacks than perhaps any other event in American history. The identification of black labor as the lowest form of farm labor—whether under slavery or sharecropping—was forever shattered; no longer would one race or ethnic group in America be trapped in one and only one line of work. Neither the economic vagaries of a single industry nor the cultural peculiarities of a single region would again dictate racial destinies of the United States.³²⁰ Furthermore, by accelerating the integration of blacks into the American economic mainstream, the black exodus catapulted the United States a long way toward its ethnically integrated future.

Back on the farm, the black exodus helped turn the managerial ranks of American agriculture into an almost exclusively white enclave. Racial exclusivity in farming was a predictable and perhaps unavoidable effect of agricultural policies geared toward protecting the economic interests of incumbent, landowning farmers. Together, the black exodus and the cumulative effect of American agricultural policies have turned farm management into a virtually all-white profession. Of America's 2,088,000 farm operators in 1987, all but 45,000 were white.³²¹ Out of 1,925,300 operators in 1992, 43,487 were non-white, including 18,816 blacks.³²² American agriculture's entrepreneurial class is roughly ninety-eight percent white³²³—a higher concentration of whites than in almost any other economic endeavor

316. Hear, for example, The Preservation Hall Jazz Band, *New Orleans*, vol. 1 (CBS Records, 1977).

317. Hear, for example, B.B. King, *Heart and Soul: A Collection of Blues Ballads* (Virgin Records, 1992).

318. Hear, for example, Miles Davis, *The Best of Miles Davis* (Toshiba/Blue Note, 1958); Albert King, *Born Under a Bad Sign* (STAX, 1968).

319. Hear, for example, Muddy Waters, *The Complete Plantation Recordings* (MCA Records, 1993).

320. Compare Chen and Gifford, 25 U. Memphis L. Rev. at 1334 (cited in note 123) (noting how European labor unions can frequently overcome downturns in individual industries because their membership crosses the sharp boundaries that separate industry-specific labor unions in the United States).

321. See U. S. Dept of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 1994*, at 666 (114th ed.).

322. See U.S. Dept of Commerce, Bureau of the Census, *1992 Census of Agriculture 23* (1994).

323. Chen, 48 Vand. L. Rev. at 843 n.186 (cited in note 99).

in the United States.³²⁴ At the opposite end of the farm labor hierarchy, landless Latin American migrants have filled the jobs that black farmworkers fled just two generations ago.³²⁵ Language has replaced race as the dividing line between *el padrone* and *el peon*.³²⁶

In light of the racial composition of America's agricultural labor force, legally mandated economic assistance to farm proprietors operates as an almost perfectly race-matched system of affirmative action for whites. Legislative statements favoring "family farms," whether meaningful³²⁷ or merely precatory,³²⁸ create in their aggregate a *de facto* preference for white enterprise. To be sure, no constitutional crisis looms merely because whites receive a disproportionate share of farm subsidies.³²⁹ Congress almost surely supports the farm "in spite of" rather than "because of" the disparity.³³⁰ It is

324. The civilian occupations with the most comparable racial profiles are geologists and geodesists (1.0 percent black, 2.1 percent Hispanic in 1993) and dental hygienists (0.4 percent black, 2.0 percent Hispanic). Blacks constituted 10.2 percent of the United States' total civilian labor force in 1993; Hispanics, 7.8 percent. See U. S. Dept of Commerce, *Statistical Abstract* at 407-09 (cited in note 321).

325. See, for example, M. Leif Jensen and Marta Tienda, *Nonmetropolitan Minority Families in the United States: Trends in Racial and Economic Stratification, 1959-1986*, 54 *Rural Sociology* 509 (1989).

326. Compare Genesis 11:1-9 (noting how God stopped construction on the Tower of Babel by confounding the workers' tongues); Harold J. Berman, *Law and Logos*, 44 *DePaul L. Rev.* 143, 145-46, 165 (1994) (contrasting the chaos of Babel with the promise of Pentecost, see Acts 2:1-13, at which diverse nationalists could speak their own languages and yet be mutually understood); Jim Chen, *Law as a Species of Language Acquisition*, 73 *Wash. U. L. Q.* 1265, 1286-88 (1995) (describing language as the ultimate unifying factor within a society and the sharpest point of division between communities).

327. See, for example, I.R.C. § 2032A (1988) (offering special valuation for the estates of dead family farmers); 29 U.S.C. § 1803(a)(1) (1988) (exempting "family farms" from the Migrant and Seasonal Agricultural Worker Protection Act, id. §§ 1801-1872). Compare 7 U.S.C. § 1941(a) (1994) (limiting eligibility for loans under the Consolidated Farm and Rural Development Act, id. §§ 1921-2006, to "operators of not larger than family farms").

328. See, for example, 7 U.S.C. § 2266(a) (1994) (expressing a general policy that no agricultural or agriculture-related program "be administered in a manner that will place the family farm operation at an unfair economic disadvantage"); id. § 2266(b) (requiring the Secretary of Agriculture to submit an annual report on the status of the family farm); 7 U.S.C. § 3101(8)(j) (1988) (finding a need for "more intensive agricultural research and extension programs oriented to the needs of small farmers and their families and the family farm system"), repealed, Pub. L. No. 101-624, 104 *Stat.* 3704 (1990). But compare Pub. L. No. 103-224, 108 *Stat.* 105 (1994) ("[T]he plight of the small family farmer has been in jeopardy in recent times"). For further background on legislative preferences favoring the family farm, see generally Looney, 44 *Mercer L. Rev.* at 792-96 (cited in note 165).

329. See *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (holding that official action will not be held unconstitutional solely because it results in a racially disproportionate impact); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (same).

330. *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

nevertheless striking how the entire debate over the "structure" of American agriculture, which is most properly viewed as a struggle over the quantity and quality of managerial jobs on American farms, has sidestepped the racial divide within this country's agricultural labor force. It is striking, too, how a predominantly "progressive" community of legal scholars has largely ignored the racial distribution of jobs within agriculture, even as that same community has debated all other forms of affirmative action into oblivion.³³¹ This failure to heed the broader effects of agricultural policies on jobs and consumer prices betrays the very essence of economic progressivism.³³² It is striking, finally, how many otherwise "progressive" pundits express an affirmative preference for assigning entrepreneurial opportunities in agriculture to those whose parents are already farmers.³³³ Sixty-five years after the apex of Southern Agrarianism, polite society does not tolerate a "family farm" approach to law faculty hiring or civil service job testing. Alumni preferences do represent a "family farm" approach to university admissions, but unlike their counterparts in farm policy, these odious relics are readily recognized as affirmative action for whites.³³⁴

331. See Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 Wm. & Mary L. Rev. 147, 159 (1994) ("We seem to have worn deep grooves repeating the same basic arguments and counter arguments [on affirmative action] over and over"). See generally Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 Cal. L. Rev. 893, 912-30 (1994) (documenting the decreasing relevance of affirmative action to contemporary racial problems).

332. See Mark Kelman, *Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, 45 Stan. L. Rev. 1215, 1224 (1993) (defining economic and social progressives as those "whose implicit social welfare functions . . . weigh gains for the relatively disadvantaged quite heavily, while believing that gains for the relatively prosperous have few real utility effects").

333. See, for example, *Williamson v. Commissioner*, 974 F.2d 1525, 1536 (9th Cir. 1992) (Reinhardt, J., dissenting) ("The 'special use valuation' was enacted by Congress during our nation's Bicentennial in order to keep the family farm, an all-too-rapidly-vanishing remnant of our nation's rural past, alive and well in our complex modern economy"); Steven C. Bahls, *Judicial Approaches to Resolving Dissension Among Owners of the Family Farm*, 73 Neb. L. Rev. 14 (1994); Ryan D. Downs, *A Proposal to Amend Section 2032A to Reduce Restrictions on Cash Leasing of Farm Property*, 73 Neb. L. Rev. 342 (1994); Carol Ann Eiden, *The Courts' Role in Preserving the Family Farm During Bankruptcy Proceedings Involving FmHA Loans*, 11 Law & Ineq. J. 417 (1993).

334. See, for example, *Bakke v. Board of Regents of the Univ. of Cal.*, 438 U.S. 265, 404 (1978) (Blackmun, J., dissenting) (arguing that affirmative action in university admissions is no more objectionable than preferences awarded to the children of alumni and donors); Willie L. Brown, Jr., *Race Relations in the U.S., Circa 1992*, 36 How. L. J. 227, 229 (1993) (arguing that there are more whites who have entered college on the strength of alumni preferences than there are blacks who have entered college under affirmative action). Compare Bertrand Russell, *Education and the Good Life* 186 (Boni & Liveright, 1926) (criticizing the allocation of farm jobs according to a "hereditary" selection principle: "as a rule, farmers are the sons of farmers").

Throughout the country, but especially in the South, the black exodus also altered the political element of the old "slaves and senators" formula. By "1970, when the migration ended, black America was . . . less than a quarter rural; 'urban' had become a euphemism for 'black.'"³³⁵ When civil rights reform finally asserted its place on the nation's political and legal agendas, it arose in the cities, not in the Southern countryside where most American blacks had lived as recently as World War II.³³⁶

Thanks to the emergence of large black populations throughout the urban South, the Supreme Court's original battery of malapportionment cases acquired the subtle flavor of racial gerrymandering. Territorially based voting systems in Georgia, Tennessee, and Alabama yielded four of the Court's landmark "one person, one vote" decisions.³³⁷ In *Gray v. Sanders*,³³⁸ the Court intimated that Georgia's county unit voting system offended the racial equality principle underlying the fifteenth amendment;³³⁹ in *Wesberry v. Sanders*,³⁴⁰ the Court expressly condemned Georgia's decision to give rural votes as much as "two to three times" the weight of votes in the Atlanta-based Fifth Congressional District.³⁴¹ Of the five other cases decided June 15, 1964, the day on which *Reynolds v. Sims* held that Alabama's legislative apportionment scheme violated the "one person, one vote" principle implicit in the equal protection clause,³⁴² three arose in the former slave states of the Delmarva Peninsula.³⁴³ In an older South where blacks and whites alike tended to live outside the cities, land-based legislative districting was arguably race-neutral. By the 1960s, however, with the intraregional black migration from countryside to city in full swing, the county unit system and other election schemes favoring rural voters was arguably "being maintained for the purpose

335. Lemann, *The Promised Land* at 6 (cited in note 303).

336. Compare Taeuber and Taeuber, *The Changing Population* at 110 (cited in note 305) ("The migration of Negroes has been very largely to urban areas. In 1950 the New York-New Jersey Standard Metropolitan Area had a larger Negro population than any State except North Carolina and Georgia.")

337. See *Wesberry v. Sanders*, 376 U.S. 1 (1964) (Georgia); *Reynolds v. Sims*, 377 U.S. 533 (1964) (Alabama); *Gray v. Sanders*, 372 U.S. 368 (1963) (Georgia); *Baker v. Carr*, 369 U.S. 186 (1962) (Tennessee).

338. 372 U.S. 368 (1963).

339. See *id.* at 379-80.

340. 376 U.S. 1 (1964).

341. *Id.* at 2, 7.

342. *Reynolds v. Sims*, 377 U.S. 533, 558, 587-88, 593 (1964).

343. See *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964) (Maryland); *Davis v. Mann*, 377 U.S. 678 (1964) (Virginia); *Roman v. Sincock*, 377 U.S. 695 (1964) (Delaware).

of denying blacks equal access to the political process[.]"³⁴⁴ The geographic distribution of these one-person, one-vote cases bore an uncanny resemblance to the July 2, 1976, series of Supreme Court decisions on another Southern institution: the death penalty.³⁴⁵

Three decades later, the black migration was complete, and so was the Court's voting rights jurisprudence. In *Shaw v. Reno*,³⁴⁶ the Court cast grave constitutional doubt on a "majority-minority" district carved out of urban and suburban areas along Interstate 85 in North Carolina's Piedmont. What Herman Clarence Nixon had said of North Carolina's economic geography in 1930 remained largely true six decades later: "The most highly industrialized Southern state of North Carolina contains only small-sized cities."³⁴⁷ Contemporary congressional districting in North Carolina straddles not only the state's geography, but also its history: one majority-minority district represents the post-exodus black population in the "Piedmont Urban Crescent," while another represents the older, more agriculturally oriented black population of North Carolina's Coastal Plain.³⁴⁸

Modern agricultural election law vividly illustrates the collapse of Agrarianism. The Solid South is dead:³⁴⁹ by and large, Southern whites are Republican, and Southern Democrats are black. "White Democratic primaries," once a fixture of the Southern political landscape and of federal constitutional law,³⁵⁰ are now a figment of

344. *Rogers v. Lodge*, 458 U.S. 613, 627 (1982).

345. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

346. 113 S. Ct. 2816 (1993).

347. Nixon, *Whither Southern Economy?* at 180 (cited in note 288). See also Hugh Lefler and Albert Newsom, *North Carolina: The History of a Southern State* 18-22 (U. N.C., 3d ed. 1973), cited in *Shaw*, 113 S. Ct. at 2820.

348. See *Shaw v. Hunt*, 861 F.Supp. 408, 459 (E.D. N.C. 1995) (three-judge court), prob. juris. noted, 115 S. Ct. 2639 (June 29, 1995) (Nos. 94-923, 94-924).

349. Compare *Introduction to I'll Take My Stand* at xxix (cited in note 218) ("Should the agrarian forces try to capture the Democratic party, which historically is so closely affiliated with the defense of individualism, the small community, the state, the South? Or must the agrarians—even the Southern ones—abandon the Democratic party to its fate and try a new one?"), with John Shelton Reed, *One South: An Ethnic Approach to Regional Culture* 162 (La. St. U., 1982) ("If ever a society can be said to have repudiated agrarianism, the South, to all appearances, is it").

350. See *Nixon v. Herndon*, 273 U.S. 536 (1927) (holding that states may not bar blacks from voting in primary elections); *Nixon v. Condon*, 286 U.S. 73 (1932) (holding that permitting political parties to exclude blacks from primary elections is state action in violation of the Fourteenth Amendment); *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that a party rule excluding blacks from voting in primaries violates the Fifteenth Amendment); *Terry v. Adams*, 345 U.S. 461 (1953) (invalidating a party nomination based on an all-white election conducted by the putatively private and openly discriminatory "Jaybird Association"). See generally Joseph L. Rauh, Kenneth A. Bode, and David S. Fishback, *National Convention Apportionment: The Politics and the Law*, 23 Am. U. L. Rev. 1, 3-11 (1973) (discussing the "white primary" cases).

the imagination.³⁵¹ Today there are more dentists than white Democrats in Georgia's congressional delegation.³⁵² The few rural black representatives in Congress have no reason to perpetuate farm programs that historically paid little heed to the needs of black farmers and farmworkers; rural representatives of all colors and political leanings are beginning to favor broader approaches to rural development over the narrow agricultural fundamentalism of the New Deal.³⁵³ The food and nutrition issues that most concern urban representatives—food stamps,³⁵⁴ school lunches,³⁵⁵ and the Women, Infants, Children program³⁵⁶—find little support among the 104th Congress's new crop of conservative representatives.³⁵⁷ Thus the traditional "marriage of convenience" between the "hunger lobby" and supporters of "the big farm commodity programs" will face greater strain as each side accuses the other of alienation of affection.³⁵⁸

Perhaps most important of all, the black exodus from the South has been repeated on a smaller scale, throughout other regions of the country and among other ethnic groups. For example, after the farm financial crisis of the 1980s, Iowa lost a quarter of its farmers and more than a third of its overall farm population; there are now "more school teachers, health care workers, or business executives and managers in the state than farmers."³⁵⁹ The across-the board erosion of agrarian political power suggests a possibility that has

351. Republicans outnumber Democrats in the congressional delegations of the eleven states that belonged to the Confederacy, 13 to 9 in the Senate and 65 to 60 in the House. See Michael Barone and Grant Ujifusa, *The Almanac of American Politics, 1996* at vi-xii (Dutton, 1995) ("Congress At-a-Glance" tables).

352. Two Republican dentists, John Linder of the 4th District and Charlie Norwood of the 10th, represent Georgia in the House, while Democrat Sam Nunn is the state's senior Senator. All three Democrats in Georgia's eleven-member House delegation—Sanford D. Bishop, Jr., John Lewis, and Cynthia A. McKinney—are blacks representing majority-minority districts created by the redistricting plan that was throttled in *Miller v. Johnson*, 115 S. Ct. 2475 (1995). See Barone and Ujifusa, *American Politics* at 349-86 (cited in note 351).

353. Compare Donald E. Voth, *A Brief History and Assessment of Federal Rural Development Programs and Policies*, 25 U. Memphis L. Rev. 1265, 1287 (1995) (expressing a fear that contemporary rural development initiatives could dissolve in a revival "of 'agricultural fundamentalism,' which simply reasserts the conventional definition of the USDA family's responsibility for rural areas to be exclusively agricultural").

354. See Food Stamp Program, 7 U.S.C. §§ 2011-2032 (1994).

355. See, for example, 7 U.S.C. §§ 1431-1431e (1994) (covering the distribution of commodities, including assistance programs); 7 CFR § 250.49 (1995).

356. See 7 U.S.C. §§ 1431-1431e (1994); 7 CFR § 250.51 (1995).

357. See, for example, *Freshman Class Boasts Resumés to Back Up "Outsider" Image*, Cong. Q. 9, 9 (Nov. 12, 1994) ("Of the new class of 87 members [in the House], an astounding 73 are Republicans").

358. Paarlberg, *Farm and Food Policy* at 102 (cited in note 31).

359. Hamilton, 72 Neb. L. Rev. at 217 (cited in note 43).

seemed unthinkable for a half-century: the 1995 reauthorization of the 1949 Agricultural Act³⁶⁰ may be the last quintennial "farm bill" in American history.³⁶¹ The sun is finally setting on America's agrarian empire.

5. The Song of the South

"The Garden of Eden is a metaphor for the innocence that is innocent of time, innocent of opposites."³⁶² In the beginning America was the world's novice, innocent of the Old World's corruption. Having acquired in the first moment of its agrarian avarice the knowledge of good and evil, America took on the obligation that binds all who are human, the responsibility to "become[] aware of the changes" wrought by original sin and the quest for redemption.³⁶³

The North, so our myth supposes, won the Civil War.³⁶⁴ Among its many legacies, the Civil War bequeathed to the North the "Treasury of Virtue," by which any Northerner (or any other American with a colorable claim *not* to be Southern) "feels redeemed by history, automatically redeemed."³⁶⁵ A fallen, unredeemed America has never lost its need for a scapegoat and may never find one as convenient as the antebellum South.³⁶⁶ The Northern claim to agrarian virtue deserves to be examined on its own merits, and it will be, in due time. For the moment, the lessons of the Southern experience command our full attention. "[E]very man is, in the end, a sacrifice for every other man."³⁶⁷ Every American bears the full legacies of rebel and slave alike. "The gentle serpent, green in the mulberry bush," not only keeps watch in the cemetery that holds the Confederate dead, but also reminds us of America's fall from grace in the Eden that was Dixie.³⁶⁸

360. Act of Oct. 31, 1949, ch. 792, 63 Stat. 1051, codified as amended in scattered sections of 7 U.S.C.

361. See Tim Pemy, *The Last Farm Bill*, presented at a symposium called "Issues and Options for the '95 Farm Bill," sponsored by the Hubert H. Humphrey Institute of Public Affairs, held at the Earle Brown Continuing Education Center, University of Minnesota (Nov. 8, 1994) (on file with the Author).

362. Campbell and Moyers, *The Power of Myth* at 50 (cited in note 60).

363. *Id.*

364. Compare Chen, 48 Vand. L. Rev. at 810 (cited in note 99) ("America, so the world supposes, won the Cold War").

365. Warren, *The Legacy of the Civil War* at 59 (cited in note 199).

366. See C. Vann Woodward, *From the First Reconstruction to the Second*, in Willie Morris, ed., *The South Today: 100 Years After Appomattox* 1, 14 (Harper Colophon, 1966). Compare Lev. 16:7-34 (describing the role of the scapegoat in Israel's ritual of atonement).

367. Robert Penn Warren, *Wilderness: A Tale of the Civil War* 302 (Random House, 1961).

368. Allen Tate, *Ode to the Confederate Dead*, in *Poems* 19, 23 (Scribner, 1960).

It is often said, with ample justification, that the South has a sense of place like no other in America.³⁶⁹ Its corresponding sense of history both inspires and oppresses like no other.³⁷⁰ A brief and admittedly eclectic survey of Southern geography and history illustrates the point. In the valley where the Shenandoah meets the Potomac, John Brown and Robert E. Lee confronted each other in what was in lore (if not in fact) the first battle of the Civil War.³⁷¹ An automotive journey from Norfolk to Williamsburg to Richmond to Fredericksburg to Washington cuts a four-hour arc across eastern Virginia—and the better part of four centuries in one of the world's youngest countries. Dahlenega gold, found in them thar hills, sparked the land's first gold rush for some and blazed a trail of tears for others.³⁷² No moon shines on the often muddy and sometimes bloody surface of the Mississippi in the Crescent City, though abundant light and laughter illuminate the Louisianan crossroads of American history. To be a Southerner is to be an American, but to an extreme.

In the South, the natural beauty of the unspoiled marsh, bayou, plateau, or Blue Ridge is liable to ensnare an unsuspecting passenger on a train to New Orleans:

To the left of the siding was a cottage flanked by crêpe-myrtles cut back to make a hedge, now in full bloom, with blossoms scattered on the grass. In the night, spiders had spun webs over the hedge, which had caught and held dew, and . . . the sun came up between two trees, slanting the cabin with its light and turning the drenched webs into fire. Then a cow bell sounded from a field a long way off and a bird repeated, three times, a single note that was incredibly liquid and moving.³⁷³

In one instant such a place can “take[] on a meaning beyond the scattered blossoms, the blazing cobwebs or the slow note of the bird” and

369. See generally, for example, John Reed Shelton, *The Enduring South: Subcultural Persistence in Mass Society* 83-90 (Lexington, 1972).

370. See, for example, William Faulkner, *Absalom, Absalom!* 378 (Random House, 1936) (Quentin's obsessed ranting of “I dont hate it” in response to the Southern burden of time).

371. Compare *John Brown's Body* (Columbia, 1953), label no. ML4690-4691 with *The Battle Hymn of the Republic*, on *The Civil War* (cited in note 205) (same tune, different words, similar sentiment).

372. See, for example, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831) (Marshall, C.J.) (noting how, immediately after the Dahlenega gold rush, Georgia enacted laws designed “to annihilate the Cherokee as a political society, and to seize . . . the lands of [that] nation”). The federal government's solution, of course, was forced relocation of the Cherokee to Oklahoma. See generally Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 Stan. L. Rev. 500 (1969).

373. William March, *Happy Jack*, in Rosemary M. Canfield-Roisfield, ed., *Trial Balance: The Collected Stories of William March* 141, 146-47 (U. of Alabama, 1987).

seize the observer with an inexplicable thought: "Some day I'm coming back to this place. This is where I want to spend my life."³⁷⁴ "All down the hills of Habersham, / All through the valleys of Hall, / The ferns and the fondling grass said *Stay*, / . . . And the little reeds sighed *Abide, abide*."³⁷⁵ Yet this is also the very same place where jack-booted thugs can mercilessly castrate a black man "with a bone-handled pocket knife" for sleeping with a white woman, only to suggest later that they should have "take[n] a big needle and a piece of copper wire and sew[n] up [the] sorry . . . woman" instead.³⁷⁶

On any afternoon in the Southern countryside, history and geography can swallow you whole. Like William Faulkner's Isaac McCaslin, the unwary sojourner may find herself behind "a tall and endless wall of dense November woods under the dissolving afternoon of the year's death, sombre, impenetrable."³⁷⁷ In her most innocent of hearts, our sojourner may follow Ike's spiritual footsteps; she may "love[] the woods . . . own[] no property and never desire[] to since the earth [is] no man's but all men's, as light and rain and weather" are.³⁷⁸ And when confronted with the devastating ugliness of the South's cultural and agricultural heritage, she, like Ike, may "disavow[] [her] tainted heritage, remove[] [her]self from a corrupt moral order, and live[] instead in a realm of ideals."³⁷⁹ Such a stark "decision to break with the past by repudiating [one's] inheritance" represents a "profound separation from a society composed of incomplete and inhumane relationships."³⁸⁰ But fleeing like a fugitive from the sound and the fury of this world can be a cowardly retreat from a necessary confrontation with evil. In Faulkner's works as in the material world, "idealism is more often than not a mere hiding place from the ugliness of the real world."³⁸¹

374. *Id.* at 147.

375. Sidney Lanier, *Song of the Chattahoochee*, ll. 11-12, 16, 18, in *Poems* (Charles Scribner's Sons, 1877).

376. March, *Happy Jack* at 143, 145 (cited in note 373). Southern literature abounds with startling juxtapositions of images of fertility with depictions of life-destroying castration. Compare, for example, William Faulkner, *Light in August* 3-26, 433-44 (N. Smith & R. Haas, 1932) (depicting the carefree and thoroughly pregnant Lena Grove), with *id.* at 394-407 (depicting Percy Grimm's castration of Joe Christmas).

377. William Faulkner, *Go Down Moses* 194-95 (1940; Vintage, reprint 1973).

378. *Id.* at 3.

379. Brian C. Murchison, *The Concept of Independence in Public Law*, 41 *Emory L. J.* 961, 966 (1992) (interpreting *Go Down, Moses*). See also Faulkner, *Go Down Moses* at 256 (cited in note 377).

380. Murchison, 41 *Emory L. J.* at 1041 (cited in note 379).

381. André Bleikasten, *For/Against an Ideological Reading of Faulkner's Novels*, in Michael Gresset and Patrick H. Samway, ed., *Faulkner and Idealism: Perspectives from Paris* 27, 38 (U. of Miss., 1983).

The romantic legacy of the South cannot be severed from the region's record of extreme depravity. The reverse is also true. Agriculture in the South combines the profound and the profane as no other activity in any other place could do. Plunging into the Southern heart of darkness teaches all too well "what time would be like without seasons and what heat would be like without light and what man would be like without salvation."³⁸² And to learn its lessons is to feel "the action of mercy" upon one's head, a miracle that grows "out of agony," that covers "pride like a flame and consume[s] it."³⁸³ To sing without hesitation every note in the song of the South, however discordant, is to confront the truth, to discharge faithfully the "awful responsibility of time."³⁸⁴

C. Agrarian Apocalypse

1. The Twilight of the Farm

In his *Letters from an American Farmer*, Hector St. John de Crèvecoeur lauded the nascent United States as a budding multiethnic utopia, a Creole Republic capable of resisting the Old World's penchant for ethnic warfare.³⁸⁵ Two centuries later, due in no small part to the most divisive and self-dealing aspects of the American agricultural legacy, the children of slaves and senators alike³⁸⁶ favor legal rules and social circles that "balkanize us into competing racial factions."³⁸⁷ In the face of the ever-widening chasm that separates rich from poor in the United States, in the countryside and in the cities alike, American agrarian absolutists have howled to preserve

382. Flannery O'Connor, *The Artificial Nigger*, in *A Good Man Is Hard to Find and Other Stories* 102, 127 (1981). Compare Job 10:22 ("A land of darkness, as darkness itself; and of the shadow of death, without any order, and where the light is as darkness."); J.R.R. Tolkien, *The Lord of the Rings*, frontispiece (Houghton Mifflin, 2d ed. 1965) ("In the land of Mordor where the shadows lie").

383. O'Connor, *The Artificial Nigger* at 128-29 (cited in note 382).

384. Warren, *All the King's Men* at 464 (cited in note 195).

385. See J. Hector St. John de Crèvecoeur, *Letters from an American Farmer* 69-71 (1782; The Franklin Library ed. 1982). For a fuller explanation and defense of the idea of a Creole Republic, see Chen, 80 Iowa L. Rev. at 149-54 (cited in note 280).

386. Contrast Martin Luther King, Jr., *I Have a Dream*, in James M. Washington, ed., *I Have a Dream: Writings and Speeches that Changed the World* 101, 105 (1986) ("I have a dream that one day on the red hills of Georgia, the sons of former slaves and the sons of former slave-owners will be able to sit down together at the table of brotherhood").

387. *Shaw*, 113 S. Ct. at 2832. *Accord Holder v. Hall*, 114 S. Ct. 2581, 2592 (1994) (Thomas, J., concurring in the judgment).

their entitlements as though there were no life outside the farm.³⁸⁸ The vicious rebirth of tribal, economic, and regional separatism repudiates the unifying American faith of an earlier age, when even a Confederate veteran "who had ridden three years with Forrest, and never regretted that fact, [would] say that he would have sadly regretted the sight of this country 'Balkanized.'"³⁸⁹

Is there balm in Gilead for the grievous wound that agricultural supremacy has inflicted upon American life, for all the consequences of American agriculture's first disobedience?³⁹⁰ Wherever such sweet succor might be found, it surely does not live in the legislative class of 1862. Despite being born of a romantic, Civil War-inspired desire to reform an agricultural system twisted by slavery, the developmental statutes of 1862 also succumbed to American agriculture's original sin. During the antebellum period, slaveholder opposition and the structure of the Senate retarded reform based on the social experiment of homesteading; as late as 1860, Southern farming interests defeated homesteading proposals on the reasoning that the "free labor" of "paupers from all parts of the globe" could never adequately replace the profitable practice of slavery.³⁹¹ Congress hoped that the opportunity to acquire small parcels of land in former Indian country could induce a westward flood of freehold farmers, whose labor would replace that of slaves and whose votes would crack the slave lobby's stranglehold on the Senate. Remarkably, just as the Homestead Act took effect on New Year's Day, 1863,³⁹² President Lincoln also issued the Emancipation Proclamation.³⁹³

The idea of populating the plains with virtuous little homesteads, each owned in fee simple and purchased solely by the sweat of farmers' brows, touches something deep within the American soul. Historically, Midwesterners and Midwestern institutions have

388. Compare Chen, 48 Vand. L. Rev. at 817 (cited in note 99) ("The American Ideology is the fallacy that civilization *ends* upon the acquisition of food, fiber, and fuel, that life necessarily begins and properly ends on the farm").

389. Warren, *The Legacy of the Civil War* at 6 (cited in note 199). Nathan Bedford Forrest was the founder of the Ku Klux Klan.

390. Compare Jeremiah 8:21-22:

For the hurt of the daughter of my people am I hurt; I am black; astonishment hath taken hold on me. *Is there* no balm in Gil'-e-ad; *is there* no physician there? Why then is not the health of the daughter of my people recovered?

391. Benjamin H. Hubbard, *A History of the Public Land Policies* 382 (Macmillan, 1924). See generally *id.* at 368-83 (documenting Southern opposition to homesteading proposals).

392. See Homestead Act of May 20, 1862, ch. 75, § 1, 12 Stat. 392, 392.

393. See *Preliminary Emancipation Proclamation* (Sept. 22, 1862) (reissued Jan. 1, 1863), in Roy P. Basler, ed., 5 *The Collected Works of Abraham Lincoln* 433-36 (Rutgers U., 1953) and *Emancipation Proclamation*, in 6 *Collected Works* 28-30.

dominated agricultural law scholarship in the United States.³⁹⁴ This Midwestern tradition is another legacy of the Civil War. The image of farming in the American Heartland seems relentlessly romantic, bathed in far more sweetness and light than its morally dubious Southern and Western counterparts. Exposing the soft moral underbelly of the American farm is a cold reminder that the legal map of American agriculture also covers lands west of the hundredth meridian and lands south of the Mason-Dixon line.³⁹⁵

Even on its own terms, the Midwestern tradition cannot claim moral purity. It bears remembering that the Emancipation Proclamation, by its own terms, did not purport to end slavery throughout the United States; instead, it limited itself to "States and parts of States wherein the people thereof" were "in rebellion against the United States."³⁹⁶ Had the seceding states returned to the Union before the Proclamation's effective date of January 1, 1863, the executive order would have had no effect.³⁹⁷ Likewise, the Homestead Act may be seen as another piece of expedient legislation passed during wartime—the Indian wars. It bears remembering that the Dakota War in Minnesota flared at the height of the Civil War.³⁹⁸ Just how much of the public domain opened to homesteading was wrenched from Indian hands through military might and sharp dealing?³⁹⁹ An otherwise virtuous homesteader expressed the sentiment most succinctly:

394. Compare Neil D. Hamilton, *The Study of Agricultural Law in the United States: Education, Organization and Practice*, 43 Ark. L. Rev. 503, 509-18 (1990) (identifying substantial efforts to teach or study agricultural law at Iowa, Iowa State, Drake, Oklahoma, South Dakota, Minnesota, Kansas, Nebraska, Alabama, Arkansas, Hamline, and Washburn). There is, generally speaking, a relative shortage of legal scholarship on the South. See Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. Rev. 77, 78-83 (1985) (arguing that most American legal historians ignore the South).

395. See Chen, 48 Vand. L. Rev. at 830-31 (cited in note 99) (describing the two-line map of American agriculture).

396. *Emancipation Proclamation* (Jan. 1, 1863 version), in 6 *The Collected Works* at 29 (cited in note 393).

397. See *id.* ("[T]he fact that any State or the people thereof shall on [January 1, 1863] be in good faith represented in the Congress of the United States . . . shall, in the absence of strong countervailing testimony, be deemed conclusive evidence that such State and the people thereof are not then in rebellion against the United States"). See generally Warren, *The Legacy of the Civil War* at 60-63 (cited in note 199) (documenting the moral incongruities surrounding the manipulation of the slavery issue during the Civil War).

398. See Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 Stan. L. Rev. 13, 15-22 (1990); Vilhelm Moberg, *Last Letter Home* 309-35 (Gustaf Lannestock trans. 1961) (describing the Dakota War as the local "civil war" of "the young state of Minnesota").

399. See, for example, Marion Clawson, *Uncle Sam's Acres* 69-70 (Greenwood, 1970) (describing how "sooners" took the best land from under the noses of the 36,000 law-abiding

When white settlers come into a country, the Indians have to move on. The government is going to move these Indians farther west, any time now. That's why we're here White people are going to settle all this country, and we get the best land because we get here first and take our pick.⁴⁰⁰

Whatever its merits as agricultural policy, homesteading apparently succeeded as "a method of enforcing white property rights in disputed territory."⁴⁰¹

Stripping the Homestead Act of its irresistible romance⁴⁰² exposes a harsh undercoat of legislative failure. "[I]n spite of every measure yet devised, the nation's resources in land . . . accumul[at]ed in large tracts owned by a few wealthy individuals and corporations."⁴⁰³ Of the trillion acres of public land dispensed by the federal government after 1862, only one quarter found its way into farming homesteads.⁴⁰⁴ And despite homesteading, rates of farm tenancy increased dramatically.⁴⁰⁵ The romantic impulses underlying the Homestead Act fell victim not only to the environmental vagaries of the ground cursed for Adam's sake, but also to the deadly sin of avarice. Scant, unreliable rainfall west of the hundredth meridian precluded agrarian subsistence on 160-acre homesteads.⁴⁰⁶ Later legislation mandated 320-acre and 640-acre caps on homesteads,⁴⁰⁷ but

settlers who heeded the starting line and starting time for the 1889 "Oklahoma Opening" of formerly Indian lands to white settlement).

400. Laura Ingalls Wilder, *Little House on the Prairie* 237 (Harper, 1953) (attributing these words to Charles Ingalls, the semi-fictionalized alter ego of Wilder's father).

401. Douglas W. Allen, *Homesteading and Property Rights; or, "How the West Was Really Won,"* 34 J. L. & Econ. 1, 12 (1991).

402. See, for example, 16 U.S.C. § 450u (1988) (authorizing the establishment of the Homestead National Monument on the tract in Gage County, Nebraska, where Daniel Freeman claimed the first homestead under the General Homestead Act); Rølvaag, *Giants in the Earth* at 110 (cited in note 261) ("How could [Per Hansa] steal the time to rest, these days? Was he not owner of a hundred and sixty acres of the best land in the world? . . . Such soil had been especially created by the good Lord to bear [wheat, the king of all grains]; and here was Per Hansa, walking around on a hundred sixty acres of it, all his very own!"). See generally Smith, *Virgin Land* at 164-173 (cited in note 124) (describing the Homestead Act as "the agrarian utopia in [the] politics" of the mid-19th century).

403. Arthur B. Darling, *Irrigation*, in Arthur B. Darling, ed., 1 *The Public Papers of Francis G. Newlands* 50, 54-55 (Houghton Mifflin, 1932).

404. See Clawson, *Uncle Sam's Acres* at 94 (cited in note 399).

405. See H.R. Rep. No. 75-149, 75th Cong., 1st Sess. 96 (1937) (reporting that farm tenancy grew from 25.6 percent in 1880 to 42.1 percent in 1935). See generally *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555, 598-601, nn. 32-36 (1935) (documenting the growth in rates of farm tenancy during periods of low prices for farm commodities coupled with high prices for land and other agricultural inputs).

406. See Taylor, 20 S.D. L. Rev. at 481 (cited in note 124). Compare *California v. United States*, 438 U.S. 645, 648 (1978) (describing "the arid lands beyond the hundredth meridian . . . as the 'Great American Desert'").

407. See, for example, Stock Raising Act, Act of Dec. 29, 1916, 39 Stat. 862 (formerly codified at 43 U.S.C. §§ 219-301) (raising the acreage limitation on homesteads to 640 acres),

“[t]hese acreages were too small and came too late to meet the needs” of the new generation of ranchers.⁴⁰⁸ Moreover, like the water that Congress would later attempt to deliver through the Reclamation Act of 1902,⁴⁰⁹ money invariably sought its own level.⁴¹⁰ Because the Homestead Act allowed settlers who paid full price to acquire full ownership in less than five years and the statute placed no limits on homesteaders’ rights to resell their property,⁴¹¹ lands meant as small homesteads became part of massive private empires.⁴¹²

The North fought the South, and the West won. For want of dominion over the arid desert and for want of stewardship by the newly enriched farmers, the legislative triumph of Northern and Midwestern policies could not redeem American agriculture. The Southern plantation was reborn as the Western ranch. The traditional alliance between “Southern and . . . Western agrarians” reached its pinnacle during William Jennings Bryan’s ill-fated 1896 presidential campaign,⁴¹³ when the glitter of bimetallism promised financial relief to these regions’ highly leveraged and export-dependent farmers.⁴¹⁴ Far from being crucified on William McKinley’s Cross of Gold, the Southern-Western axis in American agriculture retained so much influence in the twentieth century that these regions’ senators nearly smothered the civil rights movement in its legislative infancy.⁴¹⁵

repealed, Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787.

408. Marion Clawson, *The Federal Lands Revisited* 23 (Johns Hopkins, 1983).

409. 43 U.S.C. §§ 371-616yyyy (1988).

410. Compare R.H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960) (positing an economic law that money seeks its own level), with *California v. United States*, 438 U.S. at 648-49 (recognizing the natural law that water seeks its own level).

411. See Act of May 20, 1862, ch. 75, § 8, 12 Stat. 392, 393.

412. See Darling, *Irrigation* at 52 (cited in note 403); Taylor, 20 S.D. L. Rev. at 481 (cited in note 124). Compare *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 253-56 (1992) (describing how the experiment of promoting Indian autonomy by allotting Indian lands in fee to individual tribal members collapsed when allottees sold their land on unfavorable terms to sharp buyers who did not hesitate to exploit or even to defraud the new landowners).

413. *Introduction to I’ll Take My Stand* at xxix (cited in note 218). See also Nixon, *Whither Southern Economy?* at 194 (cited in note 288) (“Industrialization in the South has become greater as a fact, and industrialism has become greater as a social force, since . . . World War [I], . . . with the hopes of a Southern-Western agrarian protest much weaker than in the days of Jefferson or Bryan”).

414. See Fite, *American Farmers* at 15-16 (cited in note 129). The Southern-Western predilection for Bryan’s inflationary policy was significant because Northeastern and Midwestern farmers “saw no particular advantage in free silver” and therefore cast a majority of their votes for William McKinley, “the gold standard candidate.” *Id.* at 16.

415. See, for example, Charles Whalen and Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* 201 (Seven Locks, 1985) (describing how Southern

The South may have lost its war against civil rights, but the West is again preparing to bite the federal hand that has fed it. The slow federal effort to curb the excessive generosity of the early developmental agenda⁴¹⁶ has met massive resistance in the West. The Sagebrush Rebellion of the late 1970s and early 1980s reached its pinnacle during Nevada's abortive effort to claim title to federal lands within its borders⁴¹⁷ and may now be resurrecting itself in a "Son of Sagebrush" uprising against all forms of federal authority over Western lands and natural resources.⁴¹⁸ Born of the agrarian and antidemocratic institution of the Senate, Sagebrush society now commands the balance of power in these United States.⁴¹⁹

One final glance west, not unlike the cotton planters' lustful gaze across the Mississippi Delta toward the Republic of Texas and the Imperial Valley, completes the picture of American agriculture's racial legacy. Asian America, so frequently studied as a predominantly or exclusively urban phenomenon,⁴²⁰ arose from yet another

senators traditionally voted in favor of Western water projects in exchange for their Western colleagues' assistance in opposing civil rights legislation); Eskridge and Frickey, *Cases and Materials on Legislation* at 22-23 (cited in note 159) (same).

416. See, for example, Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269, codified as amended at 43 U.S.C. §§ 315-315r (1988) (closing federally held public lands by imposing permit requirements and grazing fees on Western ranchers); Federal Land Policy and Management Act of 1976, Pub. L. No. 95-514, 92 Stat. 1806, 1808, codified as amended at 43 U.S.C. § 1752 (1988) (reforming further the federal system of grazing permits and fees); Reclamation Reform Act of 1982, Pub. L. No. 97-293, § 209, 96 Stat. 1263, 1267, codified as amended at 43 U.S.C. §§ 390cc(b) (1988) (threatening to remove federal reclamation subsidies from local water districts that deliver water to land holdings exceeding 960 acres); Central Valley Project Improvement Act of 1992, Pub. L. No. 102-575, § 3408, 106 Stat. 4600, 4726 (scaling back federal subsidies for reclamation water).

417. See *Nevada ex rel. Nevada State Bd. of Agric. v. United States*, 512 F. Supp. 166 (D. Nev. 1981), *aff'd*, 699 F.2d 486 (9th Cir. 1983). On the Sagebrush Rebellion, see generally Richard D. Clayton, *The Sagebrush Rebellion: Who Should Control the Public Lands?*, 1980 Utah L. Rev. 505; John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. Davis L. Rev. 317 (1980); A. Constandina Titus, *The Nevada "Sagebrush Rebellion" Act: A Question of Constitutionality*, 23 Ariz. L. Rev. 263 (1981).

418. See, for example, Dale Goeble, *Stormy Weather over the Management of Federal Public Lands and the Federal and State Regulation of Agricultural Pollution*, 30 Idaho L. Rev. 433, 437 (1993/94); Theodore Blank, Comment, *Grazing Rights on Public Lands: Wayne Hage Complains of a Taking*, 30 Idaho L. Rev. 603, 605 (1993/1994); Karl Hess Jr., *Storm over the Rockies: The West at War with Itself*, Reason 18, 20 (June 1995).

419. See, for example, William N. Eskridge, Jr., *The One Senator, One Vote Clause*, 12 Const. Commentary 159, 160 (1995) ("The one Senator, one Vote clause systematically skews national policy towards sagebrush values"); Suzanna Sherry, *Our Unconstitutional Senate*, 12 Const. Commentary 213, 213 (1995) ("How . . . can a democratic nation tolerate a Senate in which the largest state has more than 65 times the population of the smallest and yet each has two Senators?").

420. See, for example, Sucheng Chan, *Asian Americans: An Interpretive History* 168-69 (Twayne, 1991) (discussing census data and statistics about Asian Americans); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 Cal. L. Rev. 1243, 1262 n.91 (1993). Compare Ronald Takaki, *Strangers*

ugly corner of America's agricultural origins. The New World's cash crops—cane, cotton, and coffee—needed cheap hands, and the European masters of West Indian and South American plantations patronized a ruthless “coolie trade” in human flesh from China.⁴²¹ North American railroad barons merely followed the example that their agrarian predecessors had set. In California, Chinese newcomers penetrated all aspects of the labor market, including the farm, until the federal government banned further Chinese immigration in 1888.⁴²² The economic interests of agriculture's entrepreneurial class marked a crucial tipping point; Chinese immigration apparently became politically intolerable when the new arrivals “came in competition with our artisans and mechanics, as well as our laborers in the field.”⁴²³ In a single generation, the Supreme Court of the United States ceased extolling the Thirteenth Amendment as a safeguard against “slavery of . . . the Chinese race within our territory.”⁴²⁴ Instead, even the lone Justice who rejected the “separate but equal” doctrine “allud[ed] to the Chinese race” as “a race so different from our own that we do not permit those belonging to it to become citizens of the United States.”⁴²⁵

When a new wave of Asian immigration, this time from Japan, swept ashore, California and other Western states responded by banning alien ownership of farmland and alien involvement in agriculture. The Supreme Court upheld these statutes in cases involving Japanese immigrants who merely sought to farm as tenants.⁴²⁶ Back in the Mississippi Delta, the heart of the plantation South, a

from a Different Shore: A History of Asian Americans 475 (Little Brown, 1989) (noting the relatively high concentration of Americans of Asian descent in California, Hawaii, and New York). Contrast Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 Cal. L. Rev. 1053, 1059-60 (1994) (recognizing that the first Chinese immigrants to America arrived as farmworkers in Hawaii).

421. See Anthony B. Chan, *Gold Mountain: The Chinese in the New World* 39-42 (New Star Books, 1983); Ching Ruji, 1 *Meiguo qinhua shi* (*A History of American Aggression Against China*) 97-98 (1956). The English word “coolie” is derived from the Cantonese words “kok lat,” which mean “bitter labor.” See *Oxford English Dictionary* 891 (2d ed. 1989).

422. See Martin, 23 U.C. Davis L. Rev. at 501 (cited in note 155).

423. *The Chinese Exclusion Case*, 130 U.S. 581, 594 (1889). See generally Cletus E. Daniel, *Bitter Harvest: A History of California Farmworkers, 1870-1941* (Cornell, 1981) (documenting the creation of a Chinese peasant class by California's commercial farmers).

424. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873).

425. *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting).

426. See *Frick v. Webb*, 263 U.S. 326, 332 (1923); *Webb v. O'Brien*, 263 U.S. 313, 320 (1923); *Porterfield v. Webb*, 263 U.S. 225, 231 (1923); *Terrace v. Thompson*, 263 U.S. 197, 211 (1923). Compare Warren, *The Briar Patch* at 263 (cited in note 291) (arguing that technological and managerial improvements in black-owned farms in the South might lead to the “condition . . . which existed in California between the white and Japanese growers”).

persevering population of Chinese immigrants served as grocers to black sharecroppers who "were finally being paid in cash" and "acquir[ing] the purchasing power that allowed them to patronize . . . stores" not controlled by the white planters,⁴²⁷ only to become pawns in an early and inconclusive skirmish over school desegregation.⁴²⁸ Racial segregation in the primordial profession of agriculture has persistently accompanied other race-based insults, for the anti-Asian sentiment of the alien farming statutes extended to race-based limitations on eligibility for America citizenship⁴²⁹ and, eventually, involuntary wartime internment.⁴³⁰

Even the land grant college system, founded as the educational salvation of America's "industrial classes"⁴³¹ and described by some as agricultural law's greatest, public-regarding achievement,⁴³² cannot shake the legacy of slavery. In 1890, the second Morrill Act authorized states to "establish[] and maint[ain] [agricultural] colleges separately for white and colored students."⁴³³ The resulting network of seventeen historically black agricultural colleges, all located in Southern or Border states, continues to vex a legal system that supposedly repudiated the noxious doctrine of "separate but equal" forty years ago.⁴³⁴ Deciphering the legal status of the "1890 institutions"—as the

427. Jeannie Rhee, *In Black and White: Chinese in the Mississippi Delta*, 1994 J. Sup. Ct. Hist. 117, 119.

428. See *Gong Lum v. Rice*, 275 U.S. 78, 85 (1927) (summarily rejecting the claim that "a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black"). For comprehensive studies of the Chinese experience in the Delta during the ascendancy of Jim Crow, see James Lowen, *Mississippi Chinese: Between Black and White* (1971); Robert Seto Quan, *Lotus Among the Magnolias: The Mississippi Chinese* (U. Miss. 1982).

429. See *United States v. Thind*, 261 U.S. 204 (1923) (holding that persons of Asian Indian descent could not attain citizenship under an immigration statute limiting naturalization to "free white persons" and "persons of African nativity or descent"); *Ozawa v. United States*, 260 U.S. 178 (1922) (holding that persons of Japanese descent were similarly barred).

430. See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). Compare *Ex parte Endo*, 323 U.S. 283 (1944) (ending the wartime internment of Japanese Americans). See generally Peter Irons, ed., *Justice Delayed: The Record of the Japanese American Internment Cases* (Oxford U., 1989); Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases* (Oxford U., 1983).

431. 7 U.S.C. § 304 (1994).

432. See Gordon C. Rausser and David Nielson, *Looking Ahead: Agricultural Policy in the 1990s*, 23 U.C. Davis L. Rev. 415, 422 (1990). Compare Chen, 48 Vand. L. Rev. at 837-38, 862-63 (cited in note 99) (arguing that the research and education subsidies for American agriculture have benefited the public at large by subjugating the pecuniary interests of farmers, the intended beneficiaries of such programs). But see Jim Hightower, *Hard Tomatoes, Hard Times* passim (Schenkman, 1973; reprint 1978) (assaulting the land grant college system for every imaginable perceived failure to help farmers).

433. Act of Aug. 30, 1890, ch. 841, § 1, 26 Stat. 417, codified at 7 U.S.C. § 323 (1994).

434. See *Brown*, 347 U.S. at 495.

black land grant colleges are euphemistically called⁴³⁵—requires the reconciliation of *United States v. Fordice*,⁴³⁶ which prescribes the measures that states must take to remedy historical *de jure* segregation of public colleges, with *Adarand Constructors, Inc. v. Pena*⁴³⁷ which mandates strict scrutiny of “all racial classification, imposed by whatever federal, state, or local governmental actor.”⁴³⁸ Any realistic solution to this legal problem must “combat [the] vestiges” of segregation without destroying the very “institutions that sustained blacks during” the ascendancy of Jim Crow.⁴³⁹ This monstrous legal knot, which no one has successfully unraveled,⁴⁴⁰ is gnarled further by the political culture that motivated Congress to authorize the segregation of land grant colleges in 1890, six years before *Plessy v. Ferguson* first sanctified the phrase “separate but equal.”⁴⁴¹

By one man sin entered the world, and by sin death passed unto all.⁴⁴² So too by one farm agenda, original legal sin polluted the founding of the American Republic, and through that original sin the curse of racism withered the nation. In demanding legal protection for slavery, the Southern farmer as Jeffersonian democrat forsook love for gold.⁴⁴³ The ensuing clash of gods and heavenly principles engulf us still.

435. See, for example, H.R. Rep. No. 569, 101st Cong., 2d Sess. 390 (1990).

436. 112 S. Ct. 2727, 2735-37 (1992).

437. 115 S. Ct. 2097 (1995).

438. *Id.* at 2113.

439. *Fordice*, 112 S. Ct. at 2746 (Thomas, J., concurring). See also *Missouri v. Jenkins*, 115 S. Ct. 2038, 2065 (1995) (Thomas, J., concurring) (“Despite their origins in ‘the shameful history of state-enforced segregation,’ [historically black educational] institutions . . . can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement.” (quoting *Fordice*, 112 S. Ct. at 2746 (Thomas, J., concurring))).

440. See generally *Ayers v. Fordice*, 879 F. Supp. 1419 (N.D. Miss. 1995) (discussing measures for reallocating and coordinating resources among Mississippi’s formerly segregated public colleges and universities).

441. 163 U.S. at 552 (Harlan, J., dissenting). For an introduction to the voluminous literature on the black land grant colleges, see William Payne, *The Negro Land-Grant Colleges*, 3 Civil Rights Dig. 12 (Spring 1970), and Symposium, *Anachronisms or Rising Stars: The Black Land Grant System in Perspective*, 9 Agric. & Human Values 1 (Winter 1992).

442. Compare Romans 5:12 (“Wherefore, as by one man sin entered into the world, and death by sin; and so death passed upon all men, for that all have sinned . . .”).

443. Compare Richard Wagner, *Das Rheingold* sc. 1 (depicting how Alberich the Nibelung seized the Rhine’s almighty gold by forsaking love) (libretto translated and printed in Nicholas John, ed., *Das Rheingold: Bilingual Libretto* 35 (1985)).

2. Stories of Origin, Songs of Experience

Like Genesis' story of Creation, the story of America's agricultural and constitutional origins is a good story, one worth telling and hearing many times over. But like Creation, the Founding is also a complex story, as intricately layered as Joseph's coat was colorful.⁴⁴⁴ No genuine story of agricultural origins, religious or civic, can afford to omit any of the voices or elements that have built the story.⁴⁴⁵ The incompleteness of the romantic account of America's agricultural origins exposes the historical and moral perils of divining legal destinies "from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."⁴⁴⁶

Among "all nations at any time upon the earth," we Americans "have probably the fullest poetical nature."⁴⁴⁷ But when we as Americans celebrate ourselves and sing ourselves as the stanzas in the world's "greatest poem,"⁴⁴⁸ we might remind ourselves of the multiplicity of voices in the chorus. Within the song that made this land for you and me,⁴⁴⁹ we hear not only the strains of the white homesteader "cast[ing] a wishful eye to Canaan's fair and happy land[,] bound for the promised land,"⁴⁵⁰ but also the rueful yet defiant refrain of the Negro spiritual, "Set my people free!"⁴⁵¹ Among its many pitfalls, the fraudulently romantic view of an agrarian utopia built solely by the labor of virtuous farmers blurs the very real atrocities committed in the name of bolstering agriculture. In our comfortable academic and

444. Compare Genesis 37:3, 37:9.

445. See Milner S. Ball, *Legal Storytelling: Stories of Origin and Constitutional Possibilities*, 87 Mich. L. Rev. 2280, 2281 (1989).

446. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). See also Joseph P. Verdon, Note, *The Vesting Clauses, the Nixon Test, and the Pharaoh's Dreams*, 78 Va. L. Rev. 1253, 1253 (1992) (comparing the elusiveness of the vesting clauses to the dreams of Joseph). The moral of the story: Not everyone who yearns for Joseph's gifts shall receive. Compare Genesis 39:1-20 (describing Potiphar's wife's unrequited lust for Joseph).

447. Walt Whitman, *Preface*, in John Valente, ed., *Leaves of Grass* (MacMillan, 1928).

448. Compare Walt Whitman, *Song of Myself*, in *Leaves of Grass* 24 l. 1 ("I celebrate myself, and sing myself/ And what I assume you shall assume . . ."), with Walt Whitman, *Preface*, in *Leaves of Grass* 475 ("The United States themselves are essentially the greatest poem. In the history of the earth hitherto the largest and most stirring appear tame and orderly to their ampler largeness and stir").

449. Hear Woody Guthrie, *This Land Is Your Land* (Ludlow Music, 1956, 1958) ("This land is your land, this land is my land, from California to the New York island, from the redwood forest to the Gulf Stream waters; this land was made for you and me"), on Woody Guthrie, *Greatest Songs* (Vanguard, 1964).

450. *Bound for the Promised Land*, in Margaret Bradford Boni, ed., *Favorite American Songs* (Simon & Schuster, 1956).

451. *Go Down Moses*, in James Weldon Johnson, ed., *The Book of American Negro Spirituals* 51-53 (Viking, 1925).

law firm offices, “[we] don’t plant taters,” and we “don’t plant cotton,” but we often stand idly by while “dem dat plant ’em is soon forgotten.”⁴⁵² No less than any other economic endeavor, agriculture bears its share of responsibility for America’s sorry legacy of race-based oppression.

The history of racial injustice in the United States can be succinctly stated in agricultural terms:⁴⁵³ Whites took the Indians’ land in order to farm it. Having displaced the continent’s native peoples, whites shoved the Indians onto worthless land unsuited either for the Indians’ traditional foraging culture or for the European model of agrarian food production.⁴⁵⁴ Whites enslaved blacks to work antebellum plantations. White America annexed half of Mexico to expand its agricultural land base⁴⁵⁵ and continues to import low-wage Latin American workers to work post-industrial plantations. America during the golden age of immigration and industrialization shoved Asian newcomers off the farm and into the sea. Conquest and agrarian supremacy have left us all to resolve “the ongoing, and probably never-ending, dilemmas of constitutionalism in [the] colonial societ[ies]” of North and South America.⁴⁵⁶ And lest advocates of agrarian stewardship absolve themselves of all responsibility for American agriculture’s tragic racial legacy, we should recall the sanctimoniousness with which Southern slaveowners described their station as one of personal stewardship: having removed blacks from pagan Africa, masters could oversee their slaves’ progression toward Christian salvation.⁴⁵⁷ Strange indeed are the contradictions that

452. Jerome Kern and Oscar Hammerstein, *Ol’ Man River*, on *Show Boat* (T.B. Harms Music Co., 1927).

453. See Paarlberg, *Farm and Food Policy* at 229 (cited in note 31) (discussing American agriculture’s “strong white tradition”).

454. See, for example, *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 590-91 (1823) (Marshall, C.J.) (justifying the elimination of property claims stemming from native American civilizations consisting of “fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest” in favor of the new polity built by European agriculturalists whose lust for land drove their rivals “into thicker and more unbroken forests”).

455. See Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 929. See generally Richard Griswold del Castillo, *The Treaty of Guadalupe Hidalgo: A Legacy of Conflict* (U. Okla., 1990).

456. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 440 (1993).

457. See Anne C. Loveland, *Southern Evangelicals and the Social Order, 1800-1860* at 206 (La. St. U., 1980); Cook, 103 Harv. L. Rev. at 1017-18, n.99 (cited in note 201). Compare Stamp, *The Peculiar Institution* at 156-62 (cited in note 136) (documenting the use of religion by owners as a means of controlling their slaves), with Loveland at 371-77 (“In short, the religion of the slaves was . . . strikingly similar to that of the poor, illiterate white men of the ante-bellum South”).

arise when "men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces."⁴⁵⁸ As the Alabamian writer William March might have observed, this reasoning has all the consistency of a moral code by which a man can murder in cold blood but refuse to report the "crime on the Sabbath, God's day of rest."⁴⁵⁹

We are told that these times forebode changing structures and expectations in agriculture.⁴⁶⁰ We can contemplate tomorrow's system of industrialized food production without farmers,⁴⁶¹ and we have begun rethinking the equities of the federal commodity programs.⁴⁶² We might even broaden our field of vision to include the contributions of farm women⁴⁶³ and of the landless farm workers who have labored under the sun.⁴⁶⁴ All these musings, we rightly surmise, will help feed our future.⁴⁶⁵ But a backward glance across the "fearful symmetry" of American agricultural history,⁴⁶⁶ a return to the story of our agrarian origins, shows that "there is no new thing under the sun."⁴⁶⁷ Even more fearful is the prospect that we, striding blindly toward agriculture's uncertain future, will have "no remembrance of former things."⁴⁶⁸

III. REDEMPTION WITHOUT ROMANCE

There is no such thing as agrarian virtue. Those who place their faith in any romantic agrarian ethic—premised on an expectation of enlightened dominion or benign stewardship over the land—will surely be disappointed. A system of agriculture that has

458. Abraham Lincoln, *Second Inaugural Address* (March 4, 1865), in Roy P. Basler, ed., 8 *The Collected Works of Abraham Lincoln* 332, 333 (Rutgers U., 1953). Compare Genesis 3:19 ("In the sweat of thy face shalt thou eat bread").

459. William March, *The Murderer and His Moral Code*, in William T. Geing, ed., *Ninety-Nine Fables* 110, 111 (U. Ala., 1960).

460. See Guadalupe T. Luna, *Foreword: Changing Structures and Expectations in Agriculture*, 14 N. Ill. L. Rev. 609 (1994).

461. See Neil D. Hamilton, *Agriculture Without Farmers: How Industrialization Is Restructuring American Food Production*, 14 N. Ill. U. L. Rev. 613 (1994).

462. See Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 N. Ill. U. L. Rev. 659 (1994).

463. See Susan A. Schneider, *Who Owns the Family Farm? The Struggle to Determine the Property Rights of Farm Wives*, 14 N. Ill. U. L. Rev. 689 (1994).

464. See Guadalupe T. Luna, *Agriculture, Rural Workers and Free Trade*, 14 N. Ill. L. Rev. 789 (1994).

465. See Hamilton, 72 Neb. L. Rev. at 210 (cited in note 43).

466. William Blake, *The Tyger*, in *Songs of Experience* 9 (Minton Balch, 1927).

467. Ecclesiastes 1:9 (emphasis omitted).

468. Ecclesiastes 1:11 (emphasis omitted).

yet to shake its legacy of human exploitation can hardly will itself into environmental righteousness. Well before Thomas Jefferson's and Laura Ingalls Wilder's agrarian myths captivated the American imagination, the story of Cain and Abel shook sensibilities throughout the world. The first murderer was "a tiller of the ground"; the first victim, "a keeper of sheep."⁴⁶⁹ American agriculture lives not in bucolic tales about little houses on the prairie, but rather in the cold equations implicit in the butchering of "five hundred animals per day" at the Crescent City Slaughter-House.⁴⁷⁰ In a fallen agrarian world where no one is descended from Abel, we will surely find that farmers, agribusinesses, and consumers behave less like actors in a morality play pitting dominion against stewardship and more like the ruthless parasites, predators, and competitors that drive evolutionary biology.⁴⁷¹ Farmers are not created; they evolve in a constant struggle for survival. Most adapt; many die.⁴⁷²

Ironically, by portraying terrestrial ecology as a perfectible pastoral paradise and by putting human agency at the center of the natural and moral universe, agrarian romanticism's selective retelling of Creation defies both *The Origin of Species*⁴⁷³ and the Book of Genesis. The romantic schools of agrarian dominion and stewardship deceptively shroud economic and ecological science in religious garb.⁴⁷⁴ Their faith virtually deifies the farmer. Deifying the products of human agency is nothing new, of course; legal positivists routinely "deify the state," natural lawyers "deify the mind," and historicists "deify the people, the nation."⁴⁷⁵ Nor does agricultural advocacy enjoy a monopoly on the longstanding and theologically pernicious practice of enlisting God in the secular struggles of the day.⁴⁷⁶ Whether the

469. Genesis 4:2.

470. *Slaughter-House Cases*, 83 U.S. at 59.

471. See Matt Ridley, *The Red Queen: Sex and the Evolution of Human Nature* 65 (Viking, 1993); Richard R. Nelson and Sidney G. Winter, *An Evolutionary Theory of Economic Change* 23-48, 206-45 (Belknap, 1982).

472. See generally Chen, 48 Vand. L. Rev. at 851-59 (cited in note 99) ("Adapt and Die").

473. Charles Darwin, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* (Appleton, 1860).

474. Compare *Edwards v. Aguillard*, 482 U.S. 578, 591-92 (1987) (describing "creation science" as an attempt to shroud religious doctrine in scientific garb).

475. Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 Cal. L. Rev. 779, 783 (1988).

476. See, for example, *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (arguing that "[c]ondemnation of [homosexual conduct] is firmly rooted in Judaeo-Christian moral and ethical standards"); *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting a Virginia trial judge who argued that "Almighty God" had "separated the races" and therefore "did not intend for the races to mix"). Compare Stephen L. Carter, *The Culture of Disbelief:*

church aspires to transmogrify itself into the state (in the tradition of Western Christianity) or the state aspires to be transfigured into the church (in the Eastern tradition),⁴⁷⁷ the Jeffersonian tradition of American agricultural romanticism explicitly describes farmers as “the chosen people of God,” a flawless “mass of cultivators” wholly incapable of “[c]orruption of morals.”⁴⁷⁸ Not even the Torah makes such a claim for the sons and daughters of Abraham.

Agrarian romanticism thus commits the theological errors common to most encounters between law and religion: by invoking sacred texts as justification for the deification of the human farmer, romantic observers of agriculture compound the sin of idolatry with the sin of blasphemy. Romanticism “elevate[s] man to the position of diety, ehminate[s] conflict, and cast[s] over all a benign air.”⁴⁷⁹ Ascribing the divine to the agricultural is but one step removed from the most profoundly antitheistic act of all: attributing to God a bundle of qualities that “are nothing else than the essential qualities of man himself.”⁴⁸⁰

Driven by the survival ethic, American farmers have successfully lobbied and litigated for parity,⁴⁸¹ countervailing power,⁴⁸² barri-

How American Law and Politics Trivialize Religious Devotion 44-82 (Basic Books, 1993) (arguing that using religious rhetoric for political purposes cheapens the significance and richness of Scripture); Powell, *The Moral Tradition of American Constitutionalism* at 266 (cited in note 186) (mocking “[t]he heedless subservience of much of American fundamentalist Christianity to nineteenth-century secular ideology”).

477. See Fyodor Dostoyevsky, *The Brothers Karamazov* 66 (Constance Garnett trans. 1968) (“[T]he Church is not to be transformed into the State. That is Rome and its dream. . . . On the contrary, the state is transformed into the Church, will ascend and become a Church over the whole world—which is . . . only the glorious destiny ordained for the Orthodox Church. This star will arise in the east!”); Jim Chen, Book Review, 11 *Const. Commentary* 599, 612 (1994-95) (reviewing Powell, cited in note 186).

478. Jefferson, *Notes* at 174-75 (cited in note 247).

479. Randall Stewart, *American Literature and Christian Doctrine* 53 (La. St. U., 1958).

480. Ludwig Feuerbach, *The Essence of Christianity* 19-20 (Harper, George Eliot trans. 1957). Compare Karl Marx, *Contribution to the Critique of Hegel's "Philosophy of Right": Introduction*, in Robert C. Tucker, ed., *The Marx-Engels Reader* 11 (Norton, 1972) (“The basis of irreligious criticism is this: *man makes religion*; religion does not make man”).

481. See 7 U.S.C. § 1301(a)(1) (1994) (defining parity); Agricultural Adjustment Act of 1938, ch. 30, § 2, 52 Stat. 31, codified at 7 U.S.C. § 1282 (1988 & Supp. 1993) (“It is declared to be the policy of Congress to . . . assist[] farmers to obtain . . . parity prices for [certain] commodities and parity of income . . .”); 7 U.S.C. §§ 601, 602, 608c, 1445, 1446, 1310, 1736j (1994) (declaring rural/urban parity in farm prices and incomes to be the regulatory objective of certain federal farm programs); 22 U.S.C. § 2354 (1988 & Supp. 1993) (prohibiting government procurement of any agricultural commodity or product outside the United States when the domestic price is below parity).

482. See, for example, Clayton Act of 1914, § 6, 15 U.S.C. § 17 (1988) (insulating some agricultural cooperatives from antitrust liability); Capper-Volstead Act of 1922, 7 U.S.C. §§ 291-92 (1994) (conferring broad exemption from the antitrust laws on virtually all agricultural cooperatives).

ers to corporate control of farmland,⁴⁸³ and judicial protection of discrete and insular minorities.⁴⁸⁴ These momentary triumphs presaged disparities in the agricultural economy,⁴⁸⁵ monopolization of the citrus market,⁴⁸⁶ the “new feudalism,”⁴⁸⁷ and, perhaps worst of all, the trampling of wealth and democracy in the special-interest state.⁴⁸⁸ The agrarian populist’s much-vaunted “eyes to acres ratio”⁴⁸⁹ has invariably yielded to the industrial economist’s yardstick for correlating heads to dollars: per capita income.⁴⁹⁰ Aldo Leopold, the oft-honored father of the environmentalist movement’s “land ethic,”⁴⁹¹ recognized that “[m]ere landownership does not automatically give rise to ‘stewardship.’”⁴⁹² Leopold complained bitterly that Wisconsin’s 1937 soil conservation district law⁴⁹³ lay dormant for a decade even though

483. See, for example, Minn. Stat. Ann. § 500.24 (West 1993).

484. See *Carolene Products*, 304 U.S. at 153 n.4 (1938) (alluding to the possibility of more exacting judicial scrutiny for certain types of legislation).

485. See, for example, Lloyd D. Teigen, *Agricultural Parity: Historical Review and Alternative Calculations* 62 (USDA, Econ. Research Serv., Agric. Econ. Rep. No. 571, 1987); Eric Van Chantfort, *Parity Concept: A Flawed Policy Tool?*, 8:9 *Farmline* 8 (1987) (“There is no equity, no fairness, no parity in parity prices”). For examples of the post-World War II literature that launched the victorious intellectual strike against parity, see American Farm Economics Association, Committee on Parity Concepts, *Outline of a Price Policy for American Agriculture for the Postwar Period*, 28 *J. Farm Econ.* 380 (1946); American Farm Economics Association, Committee on Parity Concepts, *On the Redefinition of Parity Price and Parity Income*, 29 *J. Farm Econ.* 1358 (1947); W.H. Nicholls and D.G. Johnson, *The Farm Price Policy Awards, 1945: A Topical Digest of the Winning Essays*, 28 *J. Farm Econ.* 267 (1946); K.T. Wright, *Basic Weaknesses of the Parity Price Formula for a Period of Extensive Adjustments in Agriculture*, 28 *J. Farm Econ.* 294 (1946).

486. See *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 388 (1967) (noting that a citrus growers’ association had come to control 70% of the oranges grown in California and Arizona and 67% of oranges used for juice and other processed foods).

487. This is a common derogatory term for the process of vertical integration that is now redefining poultry and pork production. See, for example, Dan Looker, *Hog Feeding on Contract: Safe Money or Servitude?*, *Des Moines Reg.* 1A (Aug. 15, 1989); Christopher Sullivan, *Chicken Growers Claim “Feudal” Contracts Keep Them from Riches*, *Des Moines Reg.* J1 (Nov. 25, 1990).

488. See generally, for example, Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 12-37 (U. Chi., 1991); Bruce A. Ackerman, *Beyond Carolene Products*, 98 *Harv. L. Rev.* 713 (1985); Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 *Cal. L. Rev.* 83 (1989); Miller, 1987 *S. Ct. Rev.* at 422-23 (cited in note 187).

489. Wes Jackson, *Altars of Unhewn Stone* 37 (North Point, 1987).

490. See generally Bruce Gardner, *Demythologizing Farm Income*, *Choices* 22 (1st Q. 1993).

491. See, for example, James P. Karp, *Aldo Leopold’s Land Ethic: Is an Ecological Conscience Evolving in Land Development Law?*, 19 *Envtl. L.* 737 (1989); Eric T. Freyfogle, *The Land Ethic and Pilgrim Leopold*, 61 *U. Colo. L. Rev.* 217 (1990).

492. Chen, 48 *Vand. L. Rev.* at 835 (cited in note 99).

493. State Soil Conservation Act of 1937, 1937 *Wis. Laws* ch. 92, § 20.605 (establishing a statewide soil conservation committee, funding soil conservation districts, and authorizing the appointment of district supervisors who would implement soil conservation regulations throughout Wisconsin), current version at *Wis. Stat. Ann.* §§ 92.01-92.34 (West 1990). See

the state had given farmers generous incentives to engage in self-regulation.⁴⁹⁴ "The farmers," it seems, "selected those remedial [soil conservation] practices which were profitable anyhow, and ignored those which were profitable to the community, but not clearly profitable to themselves."⁴⁹⁵ Farmers as putative "stewards" appear less deserving of the right to set their own rules than the unapologetically profit-driven community of merchants who nevertheless heed the commercial customs of global buyers and sellers.⁴⁹⁶ And if indeed farmers are "stewards," they are surely the most richly bribed stewards among us.⁴⁹⁷

If the positive state must reconcile "the relation of love to power" before acquiring any natural momentum, agricultural regulation as a "legal enterprise" would grind to a halt.⁴⁹⁸ No less than any other means for putting bread into empty mouths, "the noblest and most ancient of the arts"⁴⁹⁹ is motivated principally by hunger and secondarily, if at all, by love. The central institution of American agrarian romanticism, the family farm, rests on the shakiest of foun-

generally United States Department of Agriculture, Soil Conservation Service, *A Standard State Soil Conservation Districts Law* (1936).

494. See Leopold, *A Sand County Almanac* at 208 (cited in note 47).

495. *Id.*

496. Compare *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (Hand, J.) (reserving the judicial prerogative to override commercial custom and to mandate "precautions so imperative that even their universal disregard will not excuse their omission"). See generally Jim Chen, *Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant*, 27 *Tex. Int'l L. J.* 91, 95-98, 119-12, 118-35 (1992) (discussing the various manifestations of commercial custom and trade usage in tort law and sales law).

497. See, for example, Conservation Reserve Program, 16 U.S.C. §§ 3831-3836 (1994) (offering ten- to fifteen-year contracts under which farmers retire erosion-prone cropland in exchange for annual rental payments); Wetland Reserve Program, 16 U.S.C. §§ 3837-3837f (1988 & Supp. 1993); Erodible Land and Wetland Conservation and Reserve Program, 16 U.S.C. §§ 3821-3824 (1988 & Supp. 1993) (conditioning the receipt of federal income support payments on compliance with conservation standards regarding wetlands). See generally Chen, 48 *Vand. L. Rev.* at 835-36 (cited in note 99) (describing how states and the federal government have been forced to buy agricultural "stewardship").

Between 1987 and 2003, the much exalted Conservation Reserve Program will have spent \$19.5 billion in rental payments on temporarily retired farmland, in exchange for environmental benefits valued between \$6 and \$13.6 billion. See United States General Accounting Office, *Conservation Reserve Program: Cost-Effectiveness Is Uncertain* 3, 5 (GAO/RCED-93-132 1993). Neither the environmental benefits, see *id.* at 3, nor the fiscal costs, see *id.* at 4 n.3, of the CRP can be quantified with an absolute degree of confidence. See also Raymond J. Watson, Jr., *Conservation Reserve Program: What Happens to the Land After the Contracts End?*, 14 *N. Ill. L. Rev.* 733 (1994). The program does excel, however, at putting money in farmers' pockets. See Kenneth A. Cook, *So Long, CRP* 1-2 (1994) (describing the magnitude of CRP payments in terms of individual contracts, which pay as much as \$5.6 million, and in terms of economic impact on states and congressional districts).

498. John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* xii (Farrar, Straus, and Giroux, 1976).

499. William Aiken, *The Goals of Agriculture*, in Richard Haynes and Ray Lanier, eds., *Agriculture, Change, and Human Values* 29, 51-52 (1982).

dations, the implausible assumption that family owners conserve "natural, human, and financial resources . . . for [their] heirs."⁵⁰⁰ The cold, hard reality of survival in this depraved world is that most people, "[l]eft to their own devices . . . will not save enough for their [own] old age," much less leave a legacy for their supposedly beloved heirs.⁵⁰¹ We will have a sustainable system of family farms on the snowy day in Satan's domain when the taxpayers of America decide to stop retiring on the backs of other people's grandchildren and to lobby Congress for the wholesale demolition of the Social Security Administration. "Man is conceived in sin and born in corruption."⁵⁰² "Not natural goodness but natural badness is what we have to work with."⁵⁰³ Such is the plodding, unromantic reality of the survival ethic.

The love of money is the root of all evil.⁵⁰⁴ But it is folly to expect that love for the land will be an effective moral herbicide. However sinners might follow it into temptation, money is also the most common temporal vehicle by which God answers the prayer, "Give us this day our daily bread."⁵⁰⁵ By contrast, agricultural fundamentalism perversely justifies the ways of man as God,⁵⁰⁶ preferring to labor for the meat which perishes rather than for the meat that endures unto everlasting life.⁵⁰⁷ The gravest danger—economic, environmental, or ecclesiastical—"lies in forgetting that we live . . . in a 'fallen world.'"⁵⁰⁸

Agriculture's stories of origins have much to teach us, if we are willing to learn.⁵⁰⁹ No romantic agrarian ethic—rooted as it must be in an expectation of salvation through virtuous human conduct—can redeem agriculture, its practitioners, or its beneficiaries of first dis-

500. Marty Strange, *Family Farming: A New Economic Vision* 35 (U. Neb., 1988).

501. Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. Chi. L. Rev. 1275, 1275 (1991).

502. Warren, *All the King's Men* at 49 (cited in note 195).

503. Stewart, *The Burden of Time* at 143 (cited in note 217).

504. See 1 Timothy 6:10.

505. Matthew 6:11. Compare Luke 11:3 ("Give us day by day our daily bread").

506. Compare Milton, *Paradise Lost*, Book I at ll. 24-26 (cited in note *) ("That to the highth of this great Argument / I may assert Eternal Providence / And justify the ways of God to men").

507. Compare John 6:27 ("Labour not for the meat which perisheth, but for that meat which endureth unto everlasting life, which the Son of man shall give unto you").

508. Mensch and Freeman, 25 Ga. L. Rev. at 961 (cited in note 48). See also Donald Worster, *Nature's Economy: A History of Ecological Ideas* 115-29 (Cambridge, 1988) (noting how ecological observers such as Darwin, Melville, and Thoreau recognized the moral ambivalence of nature).

509. "He that hath ears to hear, let him hear." Matthew 11:15, 13:9, 13:43; Mark 4:9, 4:23, 7:16; Luke 8:8, 14:35.

obedience. So it was in the first days after Eden, when "the fruit of the ground [as] an offering unto the LORD" won no divine respect, when the first "tiller of the ground" was "cursed from the earth."⁵¹⁰ And so it shall be, even unto the end of the world, for sin and forgiveness are but the indispensable opposites of one other.⁵¹¹ Their resolution belongs squarely in the domain of the divine. Neither twenty centuries of Roman civilianism nor twenty decades of American constitutionalism have brought the positive state any closer to answering Pontius Pilate's question, "What is truth?"⁵¹² As a strictly human institution, law can at most alleviate some of the misery of tilling cursed ground.⁵¹³ Hand in hand, with wandering steps and slow, let us through Eden take our solitary way.⁵¹⁴ To aspire to any greater ambition is to succumb once again to the deceit that merely opening our eyes to the knowledge of good and evil will make us "as gods."⁵¹⁵ So sweet the temptation, so bitter the fruit.

510. See Genesis 4:2-16 (recounting the story of Cain and Abel).

511. Compare Matthew 28:20 ("[A]nd, lo, I am with you always, *even* unto the end of the world").

512. John 18:38. See Chen, 11 *Const. Commentary* at 613 (cited in note 477). Compare Milner S. Ball, *The Word and the Law* 138 (U. of Chi., 1993) (arguing that judges "are not to follow the example of Pontius Pilate, whose washing of his hands has, for two thousand years, held central place as the condemnable paradigm of terminal leave from judgment").

513. Compare Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* 313 (Scholars, 1993) ("[L]aw, understood in a Christian perspective, is a process of creating conditions in which sacrificial love, the kind of love personified by Jesus Christ, can take root in society and grow"); Harold J. Berman, 56 *Episcopal Theological School Bull.* 11, 11 (1964) (same).

514. Compare Milton, *Paradise Lost*, Book XII at ll. 648-49 (cited in note *) ("They hand in hand with wand'ring steps and slow, / Through Eden took thir solitary way").

515. Genesis 3:5.

