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Of Agriculture's First Disobedience and Its Fruit*

Jim Chen**

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* 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 Authorised (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.

1261
I. IN THE BEGINNING

What God has created, agrarian debate has torn asunder. As successors to the neolithic agrarian pioneers who chose to secure the blessings of agriculture to themselves and their posterity, 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. More recently, pleas to preserve biodiversity through stringent enforcement of the Endangered Species Act,

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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 146-77 (Cape, 1987); J.M. Howell, Early Farming in Northwestern Europe, 257 Sci. Am. 113 (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").


the Convention on International Trade in Endangered Species, and the Convention on Biological Diversity have drawn emotional strength from the story of Noah's Ark. And no wonder: throughout time and across cultures, tales of a Great Flood have gripped the human imagination. Beneath a firmament that reflects the pattern of divine handiwork, human voices have sung the glory of God. 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. 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,


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. CDA66819; Franz Joseph Haydn, Die Schöpfung (Accent, 1983), label no. ACC59229D.

target prices, demand enhancement, grain reserves—describes agriculture as the commercial enterprise of subjecting natural resources to the fulfillment of human needs.\footnote{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.\footnote{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.\footnote{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."\footnote{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.\footnote{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.\footnote{17} Fully aware that hostile states' food supplies can become vulnerable during

\begin{footnotes}
\item[12] Compare Lon L. Fuller, \textit{The Morality of Law} 122 (Yale rev. ed. 1969) (describing law as "the enterprise of subjecting human conduct to the governance of rules").
\item[14] See Beus and Dunlap, 55 Rural Sociology at 593-94 (cited in note 11) (defining "conventional" and "alternative" agriculture).
\item[16] Beus and Dunlap, 55 Rural Sociology at 595 (cited in note 11).
\end{footnotes}
nations and international organizations on the brink of war have often imposed or threatened agricultural trade sanctions. The United States has manipulated export enhancement\(^{20}\) and food aid programs\(^{21}\) 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," agriculture's war of words marks an epic struggle between the mystery of the earth and the mastery of its wealth.\(^{23}\)

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,\(^{24}\) the Book of Genesis actually tells two stories of Crea-

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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").

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 culmi-
nates 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 meat ... .

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 pi-
geons, irrigated the desert, and dammed the rivers."30 In all fairness,
however—and in an ecumenical spirit permitting free trade in tools of

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, 1979) (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 (Win. B. Ferdman's
Pub., 2d ed. 1984) (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.
statutory interpretation and tools of biblical exegesis— the presence of the conjunction “and” between the words “subdue” and “replenish” tempers the dominion ethic. 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, the alternative agriculture movement has condemned the dominion ethic as scientifically outmoded or even immoral 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.”

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. 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.” God fills both those voids: after sending “up a mist from the earth” to “water[] the whole face of the ground,” 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’ ”).
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”).
into his nostrils the breath of life." 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." 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.

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: advocates of the dominion ethic laud the wealth won through the scientific methods of conventional agriculture, whereas advocates of stewardship praise a morally superior agrarian tradition that values "voluntary simplicity" over "consumerism, leisure, and delirious pursuit of novelty." 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." 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).
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' ").
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." 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, phallocentric evil. Ecofeminism combines nonecological feminism—in either its "cultural" or its "radical" manifestation—with an environmentally sensitive consciousness of violence toward women and toward nature. Despite the occasional clash between feminists and male agroecological writers, ecofeminism stresses most of the "stewardship" themes found in contemporary environmental ethics. 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

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, 56 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).
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. Rose, Given-ness and Gift: Property and the Quest for Environmental Ethics, 24 Env'l. L. 1, 24-25 (1994).
concluding that “it is not good that the man should be alone.”\textsuperscript{56} God shapes Eve from a rib removed from the lonesome Adam\textsuperscript{57} and eventually subjects her to Adam’s authority as punishment for her more prominent role in the Fall.\textsuperscript{58} By contrast, Genesis’ first story of Creation describes God as creating “male and female” on equal terms.\textsuperscript{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. \textit{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.\textsuperscript{60} In rejecting the Canaanites’ efforts to explain “the mystery of life” as a union of the serpent and the goddess Ashtoreth,\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{64}

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

\begin{itemize}
\item \textsuperscript{56} Genesis 2:18 (emphasis omitted).
\item \textsuperscript{57} See Genesis 2:21-22.
\item \textsuperscript{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)).
\item \textsuperscript{59} Genesis 1:27.
\item \textsuperscript{60} Joseph Campbell and Bill Moyers, \textit{The Power of Myth} \textit{48} (Doubleday, Betty Sue Flowers ed. 1988).
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Joseph Campbell, \textit{The Masks of God: Occidental Mythology} \textit{17} (Viking, 1964). But compare \textit{Planned Parenthood v. Casey}, \textit{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”).
\item \textsuperscript{63} Campbell, \textit{Occidental Mythology} at \textit{17} (cited in note \textsuperscript{62}).
\item \textsuperscript{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, \textit{The Scope and Authority of the Bible} \textit{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 \textit{7}. 
\end{itemize}
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 "unnecessary" 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

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\(^{65}\) 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.
\(^{73}\) James Barr, The Garden of Eden and the Hope of Immortality 75 (Fortress, 1992).
\(^{75}\) 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.”

The theological error of romantic agricultural ethics, however, lies in stopping with the Flood. Man does not live by bread alone, 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” or believes that “[w]e have found the Mes-si’-as,” 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.”

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, that unearths “the seed of a new intellectual harvest, to be reaped in the next season of the human understanding.” 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.” 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. 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.
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”).
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

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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").
89. Genesis 3:23.
90. These titles come from the Hebrew words for Adam and Eve. See 1 The Anchor Bible Dictionary 82 (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

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.
97. See Act of July 1, 1862, ch. 120, 12 Stat. 489.
and valuable seeds and plants. 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

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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. 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.

The original Constitution did soften the advantage granted to farm interests in one respect. It held out the Contract Clause as a bulwark against the most dreaded form of legislation born of agrarian populism: general debt relief laws. 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, and it never fully recovered. In any event, farming interests have enjoyed great historical success in lobbying for debt relief legislation during times of financial distress. 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. 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...").
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 16-17, 32-33 (suggesting that the Contract Clause was meant to apply only to private contracts).
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 [the] necessary residuum of state power").
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.\textsuperscript{112} Slaveholding agrarian interests also demanded a minimum twenty-one-year window of opportunity to continue importing slaves without legislative interference.\textsuperscript{113} Not even the Confederacy was as solicitous of slaveholding interests; the Confederate constitution forbade outright the importation of slaves.\textsuperscript{114}

In \textit{Dred Scott v. Sandford},\textsuperscript{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.\textsuperscript{116} Having "been brought here as articles of merchandise,"\textsuperscript{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."\textsuperscript{118} Because American and European manufacturers rarely, if ever, exploited slave labor,\textsuperscript{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."\textsuperscript{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."\textsuperscript{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
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.\textsuperscript{122} During the economically sophisticated nation-building season that witnessed the birth of these United States,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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-
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kota Territory readily recognized. 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." 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." Perhaps lulled into a false sense of security by a 1946 decision denying federal jurisdiction over constitutional challenges to state apportionment laws, farm interests absorbed a devastating blow when the Supreme Court crushed the tradition of geographic apportionment in cases such as Baker v. Carr, Wesberry v. Sanders, and Reynolds v. Sims. These "one person, one vote" decisions "struck agriculture like a thunderbolt." Most farmers and their representatives" had “assume[d] that one branch of the state legislature would always be based on land area.”

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. Election law

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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).


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.

has likewise left farming in the dust. The assertion that "[legislators represent people, not trees or acres,"\textsuperscript{137} though once revolutionary, now seems somewhat banal in light of the passionate contemporary debate over race-conscious districting.\textsuperscript{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."\textsuperscript{139} More than half of the House represented similarly defined "farm districts."\textsuperscript{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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-

\textsuperscript{137} Reynolds, 377 U.S. at 562.
\textsuperscript{139} William P. Browne, Agricultural Policy Can't Accommodate All Who Want In, Choices 9, 9 (1st Q. 1989).
\textsuperscript{140} Id.
\textsuperscript{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).
\textsuperscript{143} Brogan, The American Character at 97 (cited in note 128).
\textsuperscript{144} See John H. Davis and Ray A. Goldberg, A Concept of Agribusiness 2 (1967). Davis and Goldberg credited themselves for introducing the term "agribusiness" into the American language. See id. at 2 n.1.
Today's agricultural employers still enjoy subsidized labor. The contemporary agricultural exemption from the Fair Labor Standards Act (“FLSA”) 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, 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. Unable to block the FLSA altogether, Southern Democrats settled for an exemption that covered vast numbers of black workers in the South. 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.

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*, 55 Tex. L. Rev. 1335, 1371-75 (1977) (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).
Nor has this story ended. The racially disparate impact of wage regulation in agriculture endures to this day.\textsuperscript{152} Even the farthest reaching federal legislation aimed at protecting migrant and seasonal workers\textsuperscript{153}—contemporary successors to the black sharecroppers and other landless farmworkers who were shortchanged by the New Deal—exempts certain “family farms.”\textsuperscript{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.\textsuperscript{155} The continued subsidization of farm labor erases pressures to increase wages and improve working conditions within agriculture: \textsuperscript{156} “[W]orkers with options quit farmwork,” thus helping to fulfill “the prophecy that ‘Americans won’t do seasonal farmwork.’” \textsuperscript{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”\textsuperscript{158}—routinely dissolves in the acid bath administered by congressional \textit{Realpolitik}. Statutes providing price and income support for

\begin{itemize}
\item \textsuperscript{152} See Linder, 65 Tex. L. Rev. at 1383-87 (cited in note 150).
\item \textsuperscript{153} See Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (1988).
\item \textsuperscript{155} See Philip L. Martin, \textit{The Outlook for Agricultural Labor in the 1990s}, 23 U.C. Davis L. Rev. 499, 520-21 (1990).
\item \textsuperscript{156} Compare Marc Linder, \textit{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”).
\item \textsuperscript{157} Martin, 23 U.C. Davis L. Rev. at 523 (cited in note 155).
\item \textsuperscript{158} Reynolds v. Sims, 377 U.S. 533, 562 (1964).
\end{itemize}

The federal sugar program is an especially egregious example.\footnote{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. 326, 338-40 (1992).} Like most other agricultural commodity programs,\footnote{161. See 7 U.S.C. § 1421 (1994).} the sugar program relies on nonrecourse loans as its primary price support mechanism.\footnote{162. See id. § 1446g.} The loan rate through the 1997 crop year may not fall below eighteen cents a pound for raw cane sugar,\footnote{163. See id. § 1446g(b). Compare id. § 1446g(c) (pegging price support for sugar beets to the loan rate for domestically produced cane sugar).} substantially higher than the usual world price of four to twelve cents per pound.\footnote{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).} 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.\footnote{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).} 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.\footnote{166. Pub. L. No. 99-198, § 902, as amended, Pub. L. No. 101-624, tits. IX, XI, §§ 903, 1161(c), 104 Stat. 3438, 3521 (1990) (set forth as a note to 7 U.S.C. § 1446g (1994)).} 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.\footnote{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. 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. 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. This program, run at "no cost" to the American taxpayer, costs consumers $1 to $2 billion every year in higher sugar prices.

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), 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
lucrative American sugar market for Third World cane farmers.\textsuperscript{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?\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{176} Mexican migrant workers thus “became the core of the agricultural proletariat in the Upper Midwest following World War I, and have remained so.”\textsuperscript{177} To this day, the United States is far more willing to import unskilled sugar-farming labor from Mexico than sugar itself.\textsuperscript{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.\textsuperscript{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.\textsuperscript{180} Finally, this traffic in sweat complicates legal mandates to ensure “that the use of foreign workers will not adversely

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\textsuperscript{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).


\textsuperscript{175} Voltaire, Candide, or Optimism 40 (Robert M. Adams trans. 2d ed., 1991).

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


\textsuperscript{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


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


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?88

Throughout the colonial era and the halcyon days of the young Republic, the notion of original sin in America seemed fancifully remote.89 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.”90 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

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

Walker Percy

1. The Southern Crucible

“The United States was born in the country and has moved to the city.” 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. 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. “[F]rom the stink of the didie to the stench of the shroud,” this nation has been Southern. America’s Southerness 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.

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.” In the very instant that the Southern planters espied the

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”).
195. Robert Penn Warren, All the King’s Men 54 (Harcourt, Brace, 1946).
dazzling whiteness of their cotton empire, the seduction of slavery bruised the heel of the land.\textsuperscript{198} In 1619, one year before the Pilgrims landed at Plymouth Rock, a ship ironically named \textit{Jesus} unloaded twenty black slaves at Jamestown.\textsuperscript{199} American Adam fell long before Pierre Beauregard besieged Sumter; tempted by the fruit of Southern soil, he did eat.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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 \textit{Gossypium hirsutum}, proved unusually addictive and bittersweet.\textsuperscript{203} "In the Belt—Black, Cotton, or Bible—cotton [was] Religion, Politics, Law, Economics, and Art."\textsuperscript{204} Cotton so defined the South, the "Land of Cotton" where old times are

\textsuperscript{198} Compare Genesis 3:15 (prophecying that the serpent would "bruise [the] heel" of Eve's posterity after the Fall).
\textsuperscript{200} Compare Genesis 3:12.
\textsuperscript{201} See Anthony E. Cook, \textit{Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.}, 103 Harv. L. Rev. 985, 1016-17 (1990).
\textsuperscript{202} Genesis 9:25 (emphasis omitted).
\textsuperscript{203} See, for example, \textit{Frost v. Corporation Comm'n}, 278 U.S. 515, 548-50 (1929) (Brandeis, J., dissenting) (noting how commercial gins frequently "charged" extortionate prices to the farmer for inferior ginning service" even as they profited from crushing the separated seed into cottonseed oil); \textit{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).
\textsuperscript{204} Rupert Bayless Vance, \textit{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, that the Confederacy pinned all of its hopes for international diplomatic recognition and European intervention in the Civil War on cotton. 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.” 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. As dust swept across the “red country . . . of Oklahoma,” 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, Allen

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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”).


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 14,798,850 in the United States’ urban population. See U.S. Dept of Commerce, Bureau of the Census, 2 Census of Population: 1930 at 12 (1933) (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.


211. Margaret Mitchell, Gone with the Wind (Macmillan, 1936).
Tate's *The Fathers*,\textsuperscript{212} Caroline Gordon's *None Shall Look Back*,\textsuperscript{213} and Stark Young's *So Red the Rose*\textsuperscript{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*.\textsuperscript{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*.\textsuperscript{216} In this collection of essays, twelve prominent Southern\textsuperscript{217} 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."\textsuperscript{218} The Agrarians declared a war not merely between states, but also between states of mind: they would squarely pit "Agrarian versus Industrial."\textsuperscript{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."\textsuperscript{220} Agrarianism, by contrast, posited "that the culture of the soil is the best and most sensitive of vocations,

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\item Allen Tate, *The Fathers* (G.P. Putnam's Sons, 1938).
\item Caroline Gordon, *None Shall Look Back* (Charles Scribner's Sons, 1937).
\item Stark Young, *So Red the Rose* (Charles Scribner's Sons, 1934).
\item 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.
\item I use the term "Southern" somewhat loosely, for Stark Young "prefer[ed] 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").
\item 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").
\item *Introduction to *I'll Take My Stand* at xi (cited in note 218).
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and that therefore it should have the economic preference and enlist the maximum number of workers.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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,\textsuperscript{224} a seemingly unrelated intellectual crisis was stifling Dixie. In March of that year, Tennessee passed its notorious Anti-Evolution Bill.\textsuperscript{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.\textsuperscript{226} Not quite three decades after his finest moment at the Democratic Party Convention of 1896,\textsuperscript{227} the prairie populist who had denounced the financial "crown of thorns" pressed "upon the brow of labor"\textsuperscript{228} was himself crucified upon a Cross of Reason.\textsuperscript{229} At the close of the 19th

\textsuperscript{221} Id. at xix.

\textsuperscript{222} Stewart, The Burden of Time at 3 (cited in note 217).

\textsuperscript{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).

\textsuperscript{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).


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


\textsuperscript{228} Id. at 189.

\textsuperscript{229} Scopes was convicted on Tuesday, July 21, 1925; Bryan died that Sunday, July 26, 1925. See Louis S. Koenig, A Political Biography of William Jennings Bryan 667-58 (1971).
First Disobedience

In the 19th 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. 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.

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.” 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.” 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. 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.”

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


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.


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


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.”

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,” directly in its state codes. Critics such as H.L. Mencken inflicted such deep wounds on the South's intellectual reputation that the scars remain visible to this day. 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.”

Unable and unwilling to defend religious fundamentalism on its own terms, 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,” 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.” 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.”

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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”).
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”).


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)).

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.”

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, who argued that wealth transfers to agriculture enjoyed a seven-to-one multiplier effect. The accelerating technological change that the Agrarians condemned as creeping, dehumanizing “industrialism” coincided with the extraordinary rise of agrarian political power coast-to-coast. As illustrated by The Cobweb Theorem, 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.”

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.

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).


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


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. In an essay whose “bluster and exaggeration” apparently inflicted “incalculable damage” on “the Agrarian cause,” 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.

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. No longer content to accept the ancient creed that “agrarian plagues of pest and drought were . . . God’s punishment for His children’s misdeeds,” agricultural supremacists throughout the country demanded a strong governmental response. Congress responded with the Agricultural Adjustment Act of 1933, “the most drastic and far-reaching piece of farm legislation proposed in time of peace.” The invalidation of the 1933 Act in 1936 proved to be a merely temporary setback, within


260. Tate, Remarks on the Southern Religion at 174 (cited in note 249); Tate, Religion and the Old South at 189 (cited in note 248).


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

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.” 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. 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, an agrarian Congress fulfilled the prophecy he had proclaimed in Chicago so long ago.

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


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.

The agrarians made straight the path of the law, 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 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, the appearance of two agricultural polemics by a son of Georgia 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 1865.279 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").


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").

of... the underdog proper, the tenants and sharecroppers, industrial labor, and the Negroes as a group. 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."

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?—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." 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." 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."

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." 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

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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").
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." 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.

Race ipsa loquitur. *I'll Take My Stand's* future three-time Pulitzer Prize winner and poet laureate of the United States had un-equivocally 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.

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, neither spotted the economic and technological changes that were
foreordaining a massive movement of black labor and black culture.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{301} The deployment of the mechanical cotton picker in the period between the World Wars delivered the final blow to King Cotton,\textsuperscript{302} rendering “obsolete the sharecropper system” that had replaced the antebellum plantation culture.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{305}

Although history has yet to judge the ultimate success of America’s black exodus,\textsuperscript{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

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\item \textsuperscript{299} See U.S. Dept of Commerce, Bureau of the Census, \textit{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).
\item \textsuperscript{300} Id. at 12.
\item \textsuperscript{301} See id.
\item \textsuperscript{302} See, for example, \textit{King Cotton’s Scepter Falls to Machinery}, Chicago Trib. (Oct. 10, 1944).
\item \textsuperscript{303} Nicholas Lemann, \textit{The Promised Land: The Great Black Migration and How It Changed America} 5 (Knopf, 1991).
\item \textsuperscript{304} Id. at 6.
\item \textsuperscript{305} Id. See generally Conrad Taeuber and Irene B. Taeuber, \textit{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, \textit{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 1980).
\item \textsuperscript{306} Compare Reed, \textit{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).
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helped break “the old servile relationship between those who owned only labor and those who owned land but did not labor.” 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. 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. “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.” But the agricultural establishment of the day valued “the whites more . . . than the blacks, and the landowning farmers than the tenants and sharecroppers.” 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 “fell in love with [the] city” upon escaping the dreariness of their previous lives on the farm.

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.


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, 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. 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, 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


can still be heard in the musical progression from Dixieland jazz to blues, from New Orleans to Memphis to Saint Louis to Chicago.

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. 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. Out of 1,925,300 operators in 1992, 43,487 were non-white, including 18,816 blacks. American agriculture's entrepreneurial class is roughly ninety-eight percent white—a higher concentration of whites than in almost any other economic endeavor.

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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).
in the United States. 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. Language has replaced race as the dividing line between el padrone and el peon.

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 meaningful or merely precatory, 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. Congress almost surely supports the farm "in spite of" rather than "because of" the disparity. 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).


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(b)(3) (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. 106 (1994) ("The 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).


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. This failure to heed the broader effects of agricultural policies on jobs and consumer prices betrays the very essence of economic progressivism.

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. 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.

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331. See Daniel A. Farber, Missing the "Play of Intelligence," 36 Win. & 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 Disension Among Owners of the Family Farm, 73 Neb. L. Rev. 14 (1994); Ryan D. Downs, A Proposal to Amend Section 2033A 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 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.’” 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.

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. In Gray v. Sanders, the Court intimated that Georgia’s county unit voting system offended the racial equality principle underlying the fifteenth amendment; in Wesberry v. Sanders, 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. 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, three arose in the former slave states of the Delmarva Peninsula. 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
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

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\(^{346}\) 113 S. Ct. 2816 (1993).


\(^{349}\) 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).
Today there are more dentists than white Democrats in Georgia's congressional delegation. 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. The food and nutrition issues that most concern urban representatives—food stamps, school lunches, and the Women, Infants, Children program—find little support among the 104th Congress's new crop of conservative representatives. 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.

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." 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").


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

seemed unthinkable for a half-century: the 1995 reauthorization of the 1949 Agricultural Act may be the last quintennial “farm bill” in American history. 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.” 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.

The North, so our myth supposes, won the Civil War. 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.” A fallen, unredeemed America has never lost its need for a scapegoat and may never find one as convenient as the antebellum South. 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.” 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.

361. See Tim Penny, 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).
363. Id.
364. Compare Chen, 48 Vand. L. Rev. at 810 (cited in note 99) (“America, so the world supposes, won the Cold War”).
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.\textsuperscript{369} Its corresponding sense of history both inspires and oppresses like no other.\textsuperscript{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.\textsuperscript{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. Dahlonega gold, found in them thar hills, sparked the land’s first gold rush for some and blazed a trail of tears for others.\textsuperscript{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 crépemyrtles 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.\textsuperscript{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

\textsuperscript{369} See generally, for example, John Reed Shelton, The Enduring South: Subcultural Persistence in Mass Society 83-90 (Lexington, 1972).
\textsuperscript{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).
\textsuperscript{371} Compare John Brown’s Body (Columbia, 1953), label no. MLA90-4691 with The Battle Hymn of the Republic, on The Civil War (cited in note 205) (same tune, different words, similar sentiment).
\textsuperscript{372} See, for example, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831) (Marshall, C.J.) (noting how, immediately after the Dahlonega 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).
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

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374. Id. at 147.
375. Sidney Lanier, Song of the Chattahoochee, ll. 11-12, 16, 18, in Poems (Charles Scribner’s Sons, 1877).
378. Id. at 3.
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." 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." 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."

C. Agrarian Apocalypse

1. The Twilight of the Farm

In his *Letters from an American Farmer*, Hector St. John de Crèvecœur lauded the nascent United States as a budding multiethnic utopia, a Creole Republic capable of resisting the Old World's penchant for ethnic warfare. 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 alike favor legal rules and social circles that "balkanize us into competing racial factions." 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

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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").

their entitlements as though there were no life outside the farm. 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.’”

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? 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. 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, President Lincoln also issued the Emancipation Proclamation.

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?
dominated agricultural law scholarship in the United States.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{398} Just how much of the public domain opened to homesteading was wrested from Indian hands through military might and sharp dealing?\textsuperscript{399} An otherwise virtuous homesteader expressed the sentiment most succinctly:

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

\textsuperscript{396} \textit{Emancipation Proclamation} (Jan. 1, 1863 version), in \textit{6 The Collected Works} at 29 (cited in note 385).

\textsuperscript{397} See id. ("The 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, \textit{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).


\textsuperscript{399} See, for example, Marion Clawson, \textit{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 . . . accumulated[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).


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); Rovelag, *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.


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


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. Moreover, like the water that Congress would later attempt to deliver through the Reclamation Act of 1902, money invariably sought its own level. 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, lands meant as small homesteads became part of massive private empires.

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, when the glitter of bimetallism promised financial relief to these regions’ highly leveraged and export-dependent farmers. 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.


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 286) (“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 agenda 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 borders and may now be resurrecting itself in a "Son of Sagebrush" uprising against all forms of federal authority over Western lands and natural resources. Born of the agrarian and antidemocratic institution of the Senate, Sagebrush society now commands the balance of power in these United States.

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, 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).


419. See, for example, William N. Eskridge, Jr., The One Senator, One Vote Clause, 12 Const. Commentary 159, 160 (1986) ("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?").

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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{426} Back in the Mississippi Delta, the heart of the plantation South, a

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


\textsuperscript{424} \textit{The Slaughter-House Cases}, 83 U.S. (16 Wall.) 36, 72 (1873).


\textsuperscript{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, \textit{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, only to become pawns in an early and inconclusive skirmish over school desegregation. 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 citizenship and, eventually, involuntary wartime internment.

Even the land grant college system, founded as the educational salvation of America’s “industrial classes” and described by some as agricultural law’s greatest, public-regarding achievement, 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.” 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. Deciphering the legal status of the “1890 institutions”—as the

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).
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).
434. See Brown, 347 U.S. at 485.
black land grant colleges are euphemistically called requires the reconciliation of United States v. Fordice, which prescribes the measures that states must take to remedy historical de jure segregation of public colleges, with Adarand Constructors, Inc. v. Pena which mandates strict scrutiny of “all racial classification, imposed by whatever federal, state, or local governmental actor.” 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. This monstrous legal knot, which no one has successfully unraveled, 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.”

By one man sin entered the world, and by sin death passed unto all. 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. The ensuing clash of gods and heavenly principles engulf us still.

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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)).
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)).
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. No genuine story of agricultural origins, religious or civic, can afford to omit any of the voices or elements that have built the story. 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.”

Among “all nations at any time upon the earth,” we Americans “have probably the fullest poetical nature.” But when we as Americans celebrate ourselves and sing ourselves as the stanzas in the world’s “greatest poem,” we might remind ourselves of the multiplicity of voices in the chorus. Within the song that made this land for you and me, 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,” but also the rueful yet defiant refrain of the Negro spiritual, “Set my people free!”

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

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).
law firm offices, "[w]e don't plant taters," and we "don't plant cotton," but we often stand idly by while "dem dat plant 'em is soon forgotten." 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: 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. Whites enslaved blacks to work antebellum plantations. White America annexed half of Mexico to expand its agricultural land base 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 society[ies]" of North and South America. 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. Strange indeed are the contradictions that

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").
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 *Stampp, The Peculiar Institution* at 159-62 (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.” 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.”

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

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

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.”

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. 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. Farmers are not created; they evolve in a constant struggle for survival. Most adapt; many die.

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* and the Book of Genesis. The romantic schools of agrarian dominion and stewardship deceptively shroud economic and ecological science in religious garb. 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.” Nor does agricultural advocacy enjoy a monopoly on the longstanding and theologically pernicious practice of enlisting God in the secular struggles of the day.

469. Genesis 4:2.
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), 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." 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 deity, eliminate[s] conflict, and cast[s] over all a benign air." 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."

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

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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).


ers to corporate control of farmland, and judicial protection of discrete and insular minorities. These momentary triumphs presaged disparities in the agricultural economy, monopolization of the citrus market, the "new feudalism," and, perhaps worst of all, the trampling of wealth and democracy in the special-interest state. The agrarian populist's much-vaunted "eyes to acres ratio" has invariably yielded to the industrial economist's yardstick for correlating heads to dollars: per capita income. Aldo Leopold, the oft-lionized father of the environmentalist movement's "land ethic," recognized that "mere landownership does not automatically give rise to 'stewardship.' " Leopold complained bitterly that Wisconsin's 1937 soil conservation district law lay dormant for a decade even though

483. See, for example, Minn. Stat. Ann. § 500.24 (West 1993).
484. See Caroleine Products, 304 U.S. at 153 n.4 (1938) (alluding to the possibility of more exacting judicial scrutiny for certain types of legislation).
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. JI (Nov. 25, 1990).
490. See generally Bruce Gardner, Demythologizing Farm Income, Choices 22 (1st Q. 1993).
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 found-
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-

502. Warren, All the King’s Men at 49 (cited in note 195).
504. See 1 Timothy 6:10.
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”).
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.”\footnote{510}
And so it shall be, even unto the end of the world, for sin and for-
giveness are but the indispensable opposites of one other.\footnote{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?”\footnote{512} As a
strictly human institution, law can at most alleviate some of the
misery of tilling cursed ground.\footnote{513} Hand in hand, with wandering
steps and slow, let us through Eden take our solitary way.\footnote{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.”\footnote{515} So sweet the temptation, so bitter the fruit.

\footnote{510. See Genesis 4:2-16 (recounting the story of Cain and Abel).}
\footnote{511. Compare Matthew 28:20 (“[And, lo, I am with you always, even unto the end of the
world”).}
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”).}
\footnote{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).}
\footnote{514. Compare Milton, Paradise Lost, Book XII at ll. 648-49 (cited in note 516) (“They hand in
hand with wand’ring steps and slow, / Through Eden took thir solitary way”).}
\footnote{515. Genesis 3:5.}