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Of Agriculture's First Disobedience and Its Fruit

Part 1

by

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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 . . .").

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I. IN THE BEGINNING

What God has created, agrarian debate has torn asunder. As successors to the neolithic agrarian pioneers[1] who chose to secure the blessings of agriculture to themselves and their posterity,[2] we long to understand our common roots. But the deeper we dig, the more bitterly we dispute the exegesis of our shared stories of origins. Nothing has more explosive potential than a return to first principles, a quest for beginnings.

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

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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* 145-77 (Cape, 1987); J.M. Howell, *Early Farming in Northwestern Europe*, 257 Sci. Am. 118 (1987); Robert R. Sokal, Neal L. Oden, and Chester Wilson, *Genetic Evidence for the Spread of Agriculture in Europe by Demic Diffusion*, 351 Nature 143, 144 (1991).

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

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

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

the Convention on International Trade in Endangered Species,[5] and the Convention on Biological Diversity[6] have drawn emotional strength from the story of Noah's Ark.[7] And no wonder: throughout time and across cultures, tales of a Great Flood have gripped the human imagination.[8] Beneath a firmament that reflects the pattern of divine handiwork,[9] human voices have sung the glory of God.[10] As we ponder how to navigate our agricultural ark across a troubled economic and ecological sea, we do well to consult the stars in that sky. Just as reliable food production sates material hunger, stories and songs of origins quench the spiritual thirst for enlightenment and understanding.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

war,[18] nations and international organizations on the brink of war have often imposed or threatened agricultural trade sanctions.[19] The United States has manipulated export 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,"[23] agriculture's war of words marks an epic struggle between the mystery of the earth and the mastery of its wealth.[24]

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

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

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

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

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

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

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

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

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

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

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

> Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth. . . . Behold, I have given you every herb bearing seed, which is upon the face of all the earth, and every tree, in the which is the fruit of a tree yielding seed; to you it shall be for meat. And to every beast of the earth, and to every fowl of the air, and to every thing that creepeth upon the earth, wherein there is life, I have given every green herb for meat . . . .[30]

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

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

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

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

29. Genesis 1:27.

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

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

statutory interpretation and tools of biblical exegesis[32]—the presence of the conjunction "and" between the words "subdue" and "replenish" tempers the dominion ethic.[33] Humanity may have received license to subdue the earth, but the authority to subdue carries with it the responsibility to replenish.

In the three decades since the 1962 publication of Rachel Carson's *Silent Spring* launched the modern environmental movement,[34] the alternative agriculture movement has condemned the dominion ethic as scientifically outmoded[35] or even immoral[36] for its description of agriculture as a mechanical process rather than an ecological one. These sentiments echo the somewhat different depiction of nature in Genesis' second account of Creation. That story begins with the first reference to God as "LORD"—*Yahweh*—in the Bible: "These are the generations of the heavens and of the earth when they were created, in the day that the LORD God made the earth and the heavens."[37]

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

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

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

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

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

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

37. Genesis 2:4.

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

39. Genesis 2:5.

40. Genesis 2:6.

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

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

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41. Genesis 2:7 (emphasis omitted).

42. Genesis 2:15 (emphasis added).

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

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

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

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

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

We have cause, however, to beware "the celebration and romanticization of nature."[48] Romancing the earth presents at best a tricky drill in describing reality and at worst a treacherous exercise in tempting fate. By distinguishing between the two Creation stories in Genesis, feminist scholars have invited theological scrutiny of ecofeminism. That philosophy seeks to trace "men's mistreatment and subordination of women" and "environmental despoliation" to the same root of patriarchal, phallocentric evil.[49] Ecofeminism combines nonecological feminism—in either its "cultural"[50] or its "radical"[51] manifestation[52]—with an environmentally sensitive consciousness of violence toward women and toward nature.[53] Despite the occasional clash between feminists and male agroecological writers,[54] ecofeminism stresses most of the "stewardship" themes found in contemporary environmental ethics.[55] Yet, ecofeminism finds little support in the story of Creation from which the stewardship ethic can be inferred. In the stewardship account of Creation, God creates Adam first, deciding to make Eve as "an help meet for him" only after

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

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

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

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

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

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

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

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

concluding that "[i]t is not good that the man should be alone."[56] God shapes Eve from a rib removed from the lonesome Adam[57] and eventually subjects her to Adam's authority as punishment for her more prominent role in the Fall.[58] By contrast, Genesis' first story of Creation describes God as creating "male and female" on equal terms.[59] Thus, the sexually egalitarian account of Creation is the source of the dominion ethic in agriculture, whereas the sexually hierarchical version expresses the stewardship ethic. *Sic transit gloria ecofeministae.*

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

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

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56. Genesis 2:18 (emphasis omitted).

57. See Genesis 2:21-22.

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

59. Genesis 1:27.

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

61. Id.

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

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

64. See id at 16-17. For a fuller discussion of the distinction between the Bible as historical narrative and the Bible as mythology, see James Barr, *The Scope and Authority of the Bible* 1-17 (Westminster, 1980). "[T]he entire (and supremely important) "primeval story" of "creation, . . . Noah and the flood, and so on" belong to the area of "myth and legend" rather than the realm of "history." Id. at 7.

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

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

65. Genesis 6:5.
66. Genesis 6:7.
67. Genesis 6:9, 6:8.
68. Genesis 9:2 (emphasis omitted).
69. Genesis 9:11.
70. See Genesis 9:9 ("I establish my covenant with you, and with your seed after you . . .").
71. Genesis 9:10.
72. John B. Cobb, Jr., *A Christian View of Biodiversity*, in Edward O. Wilson, ed., *Biodiversity* 485, 485 (National Academy, 1988).
73. James Barr, *The Garden of Eden and the Hope of Immortality* 75 (Fortress, 1992).
74. Wisdom of Solomon 10:1-2 (New Revised Standard Version).
75. Id. at 10:4. Note that "wisdom" in these passages takes the female pronoun, as it does throughout the Hebrew Bible.

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

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

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

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76. Genesis 8:22.

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

78. Malachi 4:5.

79. John 1:41.

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

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

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

83. Genesis 2:17.

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

"the interdependence of death and sex . . . and the necessity of killing—killing and eating—for the continuance" of life.[85]

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

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

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

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

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

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

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

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

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

89. Genesis 3:23.

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

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

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

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

II. AMERICAN AGRICULTURE'S ORIGINAL SIN

A. Fiat Lex

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

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

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

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

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

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

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

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

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

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

An agrarian reinterpretation of federalism and the legislative representation of diverse states and diverse interests sheds new light on the "oldest question of constitutional law."[101] The original Constitution so blessed agriculture that farm interests enjoyed nearly two centuries of political dominion through disproportionately favorable representation in virtually every national and state legislative body. The very idea of American union hung in the balance when the 1787 Convention reached its Great Compromise,[102] which provided that seats in the House of Representatives would be apportioned roughly according to population[103] and that each state

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

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

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

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

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

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

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

The original Constitution did soften the advantage granted to farm interests in one respect. It held out the Contract Clause[106] as a bulwark against the most dreaded form of legislation born of agrarian populism: general debt relief laws.[107] But the Contract Clause lost much of its power to invalidate debt relief laws at a relatively early stage in the Supreme Court's history,[108] and it never fully recovered.[109] In any event, farming interests have enjoyed great historical success in lobbying for debt relief legislation during times of financial distress.[110] In the constitutional clash between land-based apportionment and the Contract Clause, the farm sector appears to have won a complete victory.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

116. Id. at 411.

117. Id.

118. Id. at 425.

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

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

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

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

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

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

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

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

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

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

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

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

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

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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. Rölvaag, *Peder Victorious* 122-34 (Nora O. Solum and O.E. Rölvaag trans., Harper & Bros., 1929).

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

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

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

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

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

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

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

135. Id. at 151.

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

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

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

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

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

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

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

140. Id.

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

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

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

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

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

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

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

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

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

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

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

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

Nor has this story ended. The racially disparate impact of wage regulation in agriculture endures to this day.[152] Even the farthest reaching federal legislation aimed at protecting migrant and seasonal workers[153]—contemporary successors to the black sharecroppers and other landless farmworkers who were shortchanged by the New Deal—exempts certain "family farms."[154] Though scaled back, the FLSA's agricultural exemption continues to preserve part of the wage differential between agricultural and industrial labor. Agricultural employers enjoy their greatest advantage in markets where many potential workers lack the skills for seasonal or part-time urban employment, the likeliest source of competition for the farmers who hire migrant workers.[155] The continued subsidization of farm labor erases pressures to increase wages and improve working conditions within agriculture:[156] "[W]orkers with options quit farmwork," thus helping to fulfill "the prophecy that 'Americans won't do seasonal farmwork.' "[157]

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

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

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

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

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

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

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

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

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

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

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

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

161. See 7 U.S.C. § 1421 (1994).

162. See id. § 1446g.

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

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

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

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

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

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

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

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

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

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

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

170. See id.

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

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

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

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

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

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

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

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

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

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

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

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

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

The division of agricultural labor in the United States has continued to follow an all-too familiar pattern: members of darker races, by and large, have never broken into the ranks of freehold farming, the rural embodiment of the American dream. Whereas the Constitution of 1787 countenanced the importation of involuntary agricultural laborers from a militarily vanquished Africa, the United States Code of 1994 at best oversees the importation of low-paid agricultural laborers from an economically distressed Latin America. American labor law systematically favors mostly Anglo farm owners at the expense of mostly Latino farmworkers. The exclusion of farmworkers from the National Labor Relations Act eliminates one hassle for farm employers,[182] but the Agricultural Fair Practices Act of 1967[183] 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]

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

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

183. 7 U.S.C. §§ 2301-2305 (1994).

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

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

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

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

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

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

B. To Live and Die in Dixie

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

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

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

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

> stronger language, the country committing what amounted to its own Original Sin and suffering the commensurate curse.
>
> *Walker Percy*[191]

1. The Southern Crucible

"The United States was born in the country and has moved to the city."[192] If we sacrifice Richard Hofstadter's eloquence for greater geographic precision, we would find that this nation was born along the banks of the tidal James and has since moved its legal consciousness to the Tidal Basin of the Potomac. In making this progression from Jamestown, Williamsburg, and Richmond to Washington, the American people have performed over four centuries a transformative task that eluded the Grand Army of the Republic for four years. Not once but twice, the better angels of America's nature have molded an infant polity in Virginia into a mature nation.[193] By virtue of its Virginian cradle, America is a scion of the South. The Southern nation that America remains buries its greatest heroes on the former estate of Robert E. Lee.[194] "[F]rom the stink of the didie to the stench of the shroud," this nation has been Southern.[195] America's 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.[196]

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

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

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

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

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

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

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

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

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

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

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

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

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

200. Compare Genesis 3:12.

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

202. Genesis 9:25 (emphasis omitted).

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

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

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

2. Agrarian Apotheosis

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

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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").

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

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

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

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

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

Id.

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

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

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

In 1930, sixty-five years after the end of the Civil War, a group of self-described Agrarians published *I'll Take My Stand*.[216] In this collection of essays, twelve prominent Southern[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."[218] The Agrarians declared a war not merely between states, but also between states of mind: they would squarely pit "Agrarian *versus* Industrial."[219] According to the Twelve Southerners, industrialism as "the economic organization of the collective American society" rested on a grave social decision "to invest its economic resources in the applied sciences."[220] Agrarianism, by contrast, posited "that the culture of the soil is the best and most sensitive of vocations,

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212. Allen Tate, *The Fathers* (G.P. Putnams Sons, 1938).

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

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

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

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

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

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

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

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

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

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

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

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221. Id. at xix.

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

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

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

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

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

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

228. Id. at 189.

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

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

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

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

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

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

231. See generally id. at 629-60.

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

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

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

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

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

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

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

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

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

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

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

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

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

243. Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

two years, Congress filled the judicially created vacuum with the Soil Conservation and Domestic Allotment Act of 1936,[265] the Agricultural Marketing Agreement Act of 1937,[266] and the monumental Agricultural Adjustment Act of 1938.[267] This statutory bundle withstood various constitutional attacks[268] and continues to define the basic structure of the federal commodity programs. Just as statutes authorizing homesteading, land-grant college endowment, and railroad subsidization sparked the *developmental* phase in American agricultural law, these New Deal statutes catapulted the nation's agricultural policymakers into a new *regulatory* agenda: resource conservation and supply management, private-public cooperation in commodity marketing, and price-and-income regulation in numerous facets of the farm economy.

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

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

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

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

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

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

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

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

3. Native Son

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

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

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

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

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

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

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

This Article marks the passage of yet another sixty-five years, from the 1930 publication of *I'll Take My Stand* by the Vanderbilt-based Agrarians to the 1995 publication of *The American Ideology*[278] and *Of Agriculture's First Disobedience and Its Fruit* in the *Vanderbilt Law Review*. As unsuccessful as *I'll Take My Stand* ultimately proved in its effort to revive the legend of the Old South among a broad readership,[279] the appearance of two agricultural polemics by a son of Georgia[280] in the *Vanderbilt Law Review* must be anticlimactic indeed. Nothing mere mortals write or say, after all, can eclipse the cataclysmic significance of the American experience between 1861 and 1865.[281] Having looked homeward, however, and finding myself figuratively in Nashville amid the flow of time and the river, I have discovered that, indeed, you can't go home again. Sixty-five years of Agrarianism are enough.[282] The time has come to retire Agrarianism, once and for all.

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

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

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

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

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

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

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

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

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

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

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

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

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

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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").

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

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

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

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

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

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

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

Race ipsa loquitur. *I'll Take My Stand*'s future three-time Pulitzer Prize winner[295] and poet laureate of the United States[296] had unequivocally articulated the bedrock principle of Jim Crow's "creed of racial relations": "Negroes are necessary to the South, and it is desirable that they should stay there and not migrate to the North."[297]

4. Exodus

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

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

293. Id. at 256.

294. Id. at 260-61.

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

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

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

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

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

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

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

300. Id. at 12.

301. See id.

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

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

304. Id. at 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

can still be heard in the musical progression from Dixieland jazz to blues, from New Orleans[316] to Memphis[317] to Saint Louis[318] to Chicago.[319]

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

Back on the farm, the black exodus helped turn the managerial ranks of American agriculture into an almost exclusively white enclave. Racial exclusivity in farming was a predictable and perhaps unavoidable effect of agricultural policies geared toward protecting the economic interests of incumbent, landowning farmers. Together, the black exodus and the cumulative effect of American agricultural policies have turned farm management into a virtually all-white profession. Of America's 2,088,000 farm operators in 1987, all but 45,000 were white.[321] Out of 1,925,300 operators in 1992, 43,487 were nonwhite, including 18,816 blacks.[322] American agriculture's entrepreneurial class is roughly ninety-eight percent white[323]—a higher concentration of whites than in almost any other economic endeavor

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

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

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

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

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

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

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

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

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

In light of the racial composition of America's agricultural labor force, legally mandated economic assistance to farm proprietors operates as an almost perfectly race-matched system of affirmative action for whites. Legislative statements favoring "family farms," whether meaningful[327] or merely precatory,[328] create in their aggregate a *de facto* preference for white enterprise. To be sure, no constitutional crisis looms merely because whites receive a disproportionate share of farm subsidies.[329] Congress almost surely supports the farm "in spite of" rather than "because of" the disparity.[330] It is

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

339. See id. at 379-80.

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

341. Id. at 2, 7.

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

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

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

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

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

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

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

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

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

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

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

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

the imagination.[351] Today there are more dentists than white Democrats in Georgia's congressional delegation.[352] The few rural black representatives in Congress have no reason to perpetuate farm programs that historically paid little heed to the needs of black farmers and farmworkers; rural representatives of all colors and political leanings are beginning to favor broader approaches to rural development over the narrow agricultural fundamentalism of the New Deal.[353] The food and nutrition issues that most concern urban representatives—food stamps,[354] school lunches,[355] and the Women, Infants, Children program[356]—find little support among the 104th Congress's new crop of conservative representatives.[357] Thus the traditional "marriage of convenience" between the "hunger lobby" and supporters of "the big farm commodity programs" will face greater strain as each side accuses the other of alienation of affection.[358]

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

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

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

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

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

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

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

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

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

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