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An Agricultural Law Research Article

Of Agriculture's First Disobedience and Its Fruit

Part 2

by

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

5. The Song of the South

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

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

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

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

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

363. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

374. *Id.* at 147.

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

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

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

378. *Id.* at 3.

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

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

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

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

C. Agrarian Apocalypse

1. The Twilight of the Farm

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

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

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

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

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

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

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

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

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

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

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

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

390. Compare Jeremiah 8:21-22:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

409. 43 U.S.C. §§ 371-616yyyy (1988).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

431. 7 U.S.C. § 304 (1994).

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

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

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

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

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

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

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

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

438. *Id.* at 2113.

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

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

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

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

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

2. Stories of Origin, Songs of Experience

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. REDEMPTION WITHOUT ROMANCE

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

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

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

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

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

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

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

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

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

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

467. Ecclesiastes 1:9 (emphasis omitted).

468. Ecclesiastes 1:11 (emphasis omitted).

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

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

469. Genesis 4:2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

495. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

504. See 1 Timothy 6:10.

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

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

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

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

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

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

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

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

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

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

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

515. Genesis 3:5.