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## [RE]INTEGRATING SPACES: THE COLOR OF FARMING

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### Introduction

The middle-aged man and woman stand stiffly at the very front of the painting, the peak of the house behind them visible between their shoulders. The man looks directly forward, his face expressionless, almost grim. He—nearly bald, dressed in overalls, and wearing spectacles—grips a pitchfork firmly. She—equally unsmiling, her hair pulled severely back in a bun with just one strand hanging down, wearing a dark dress with a white collar and an apron trimmed with rickrack, a locket at her throat—looks slightly toward the viewer’s right. The corner of a red barn is just visible on the right.<sup>1</sup>

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\* Professor of Law, University of California-Davis (King Hall). This Essay marks the beginning of a larger, book-length project, in which I hope to fill in some of the many gaps still left to explore. Meanwhile, thank you to Carl Anthony, who two decades ago got me thinking about the shadows history leaves on the earth, and to Alfred Brophy, whose powerful, innovative scholarship reminds us of the legal forms those shadows often take. Thank you, as well, to those who commented on early drafts of this Essay, including Andrea Freeman, Carmen Gonzalez, and participants in the *ClassCrits* VII Conference; faculty members at the University of Denver Sturm College of Law; and my own UC Davis colleagues, those at King Hall and those affiliated with the Aoki Center for the Critical Study of Race and Nation. I am grateful to the organizers of the *[Re]Integrating Spaces* Colloquium for their invitation and their graciousness in helping me prepare this Essay. While in the editing stage of this Essay, I came across Jim Chen’s magisterial article, *Of Agriculture’s First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261 (1995), and I now owe that work a debt as well.

<sup>1</sup> *The Painting*, AM. GOTHIC HOUSE CTR., <http://www.americangothichouse.net/about/the-painting/> (last visited July 24, 2015) [hereinafter *The Painting*].

Grant Wood painted *American Gothic* in 1930, and the image made him almost instantly famous.<sup>2</sup> According to the catalogue of the Art Institute of Chicago, which now owns the work:

The impetus for the painting came while Wood was visiting the small town of Eldon in his native Iowa. There he spotted a little wood farmhouse, with a single oversized window, made in a style called Carpenter Gothic. “I imagined American Gothic people with their faces stretched out long to go with this American Gothic house,” he said. He used his sister and his dentist as models, posing them as a farmer and his daughter, and dressing them as if they were “tintypes from my old family album.”<sup>3</sup>

Wood’s iconic painting might well come to mind when one is asked to imagine the quintessential “American family farm,” and despite the element of caricature in the portrayal of this famous couple, their racial identity is accurately depicted. According to the United States Department of Agriculture’s Economic Research Service, in 2007, 83% of farmers were white men.<sup>4</sup> American farming, it seems, is a white thing.

The whiteness of farming might, on first thought, be connected to the racialization of today’s rural-urban divide. In music, advertising, and fashion, the adjective “urban” is well known to be a code word for black. If we stop to think at all about the source of this association, we might think of the “Great Migration” of African Americans to United States cities in the early twentieth century, the aspirations for a freer life in the city that this enormous population shift represented, and the vibrant new forms of music, art, poetry, fiction, criticism, and social movements that it made possible.<sup>5</sup> Or we might think of the white flight of the 1950s and 1960s, which left the black underclass behind in decaying cities, and on which Marvin Gaye reported in *Inner City Blues*.<sup>6</sup>

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<sup>2</sup> THE ART INSTITUTE OF CHICAGO: THE ESSENTIAL GUIDE 56 (2013), available at <http://www.artic.edu/aic/collections/artwork/6565>.

<sup>3</sup> *Id.*

<sup>4</sup> U.S. DEP’T AGRIC. ECON. RESEARCH SERV., THE CHANGING ORGANIZATION OF FARMING 7 (2011), available at <http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib88.aspx>. According to the census, 72.4% of the U.S. population was white in 2010. U.S. Census Bureau, U.S. CENSUS: UNITED STATES PROFILE, [http://www2.census.gov/geo/maps/dc10\\_thematic/2010\\_Profile/2010\\_Profile\\_Map\\_United\\_States.pdf](http://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_United_States.pdf). About 36.2% of the population should therefore have been both white and male.

The gender of farming is a fascinating topic as well, but unfortunately, it lies beyond the scope of this Essay. For a recent popular book on contemporary women in sustainable agriculture, see TEMRA COSTA, *FARMER JANE: WOMEN CHANGING THE WAY WE EAT* (2010).

<sup>5</sup> See generally ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* (2011) (chronicling the decades-long migration of black citizens who fled the South for northern and western cities in search of a better life).

<sup>6</sup> MARVIN GAYE, *Inner City Blues (Make Me Wanna Holler)*, on *WHAT’S GOING ON* (Motown Records 1971).

Perhaps, then, the whiteness of the rural places is unexceptional. Yet perhaps we should look more closely at the whiteness of farming. Is it purely the result of choice? Or, as James Loewen wrote of small towns in the Midwest and the East, could it be that farming is white, at least partly, on purpose?<sup>7</sup>

Alfred Brophy's work investigates the impress of the past on the present—in particular, America's past of racial exclusion, marginalization, and violence, and the effects of that past on property and wealth, on geography, and on our official histories.<sup>8</sup> In this Essay, written for the *[Re]Integrating Spaces* Colloquium honoring Brophy's work, I look at the impress of white supremacy<sup>9</sup> on American farms and farming. I explore the ways in which both actual farming and our image of it—as in Grant Wood's iconic couple—are indeed white on purpose.

I argue that since the colonization of America, the idea of farming has been central to stories about who Americans are and ought to be. Agriculture has figured into stories about what it means to live in a democracy; about what it means to be “civilized”; about what it means to own property; about what it means to belong to a place; and about what kind of nation the United States aspires to be. As these stories, told and retold over time, have developed recurring characters and familiar plots, indigenous people, people of African descent, and immigrants from many nations have figured as foils for proper citizenship. Whiteness is not a fixed thing but is itself an argument; and farming has played an important role in shaping the evolution of whiteness as national

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<sup>7</sup> James Loewen defines a sundown town as “any organized jurisdiction that for decades kept African Americans or other groups from living in it and was thus ‘all-white’ on purpose.” JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 4 (2005).

<sup>8</sup> Brophy is one of our major thinkers, for example, with respect to the legal, political, and cultural dimensions of the movement for reparations for American slavery. *See, e.g.*, ALFRED L. BROPHY, *REPARATIONS, PRO AND CON* (2006); Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497 (2003); Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811 (2006); Alfred L. Brophy, *What Should Inheritance Law Be? Reparations and Intergenerational Wealth Transfers*, 20 LAW & LITERATURE 197 (2008). Brophy has also been a pioneer in analyzing the ways in which official histories are written into the built environment and into aesthetic representation. *See, e.g.*, Alfred L. Brophy, *Property and Progress: Antebellum Landscape Art and Property Law*, 40 MCGEORGE L. REV. 603 (2009); Alfred L. Brophy, *The Law and Morality of Building Renaming*, 52 S. TEX. L. REV. 37 (2010). Finally, Brophy's work on the law of property, wills, and trusts explores the influence of the past on the present through legal rules that structure not only wealth and its transmission, but even space itself. *See, e.g.*, ALFRED BROPHY, ALBERTO LOPEZ & KALI MURRAY, *INTEGRATING SPACES: PROPERTY LAW AND RACE* (2011); Alfred L. Brophy, *How Missionaries Thought: About Property Law, For Instance*, 30 U. HAW. L. REV. 373 (2008); Stephen Duane Davis, II & Alfred L. Brophy, *“The Most Solemn Act of My Life”: Family, Property, Will, and Trust in the Antebellum South*, 62 ALA. L. REV. 757 (2011).

<sup>9</sup> *See* GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* xi (1981) (defining “white supremacy” as “attitudes, ideologies, and policies associated with the rise of blatant forms of white or European dominance over ‘nonwhite’ populations,” which implies a conscious systemic effort to exclude based on race).

identity. Farms and farming, I argue, have been sites of national “race-making”—places where American white people figured out who they were and wanted to be by telling stories about who they were not, and spaces that were deliberately racially segregated and managed in order to maintain racial caste through law, culture, and public policy.<sup>10</sup>

In Part I of this Essay, I describe some of the images and meanings that have collected around the idea of the American farm—especially the iconic “family farm” figured in Wood’s painting. I pay particular attention to the “agrarian ideal” and its relationship to the idea of whiteness and national citizenship. In Part II, I explore the literal whitening of American farm ownership in the name of white supremacy, which has taken place in two different modes of farming. Through legal and extra-legal means, nonwhite individuals and communities have been pushed out of subsistence farming throughout American history—indeed, often pushed off the land altogether in order to make room for white households. Meanwhile, when industrial agriculture emerged as the economically dominant model of farming, it came to rely upon the labor of racial and ethnic minorities. Race stories told by planters and growers have contributed to a conception of low-level farm work as “degraded labor,” and the reality of this work as that which “Americans” won’t take. I conclude this Essay by observing signs of the reintegration of farming, and the reemergence of alternative American stories about the proper relationship of people along the food chain to one another and to the land. New stories about “sustainable” agriculture, new populations moving into farming, and the possibility that in the future the majority of Americans might once again have some connection to growing food, make possible the destabilization of racialized narratives about land, property, and citizenship—and, perhaps, the reintegration of farming.

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<sup>10</sup> In using the term “race-making,” I draw on the work of scholars who have used this concept to analyze American jails and prisons. *See, e.g.,* Loïc Wacquant, *Race as Civic Felony*, 57 INT’L SOC. SCI. J. 127, 128 (2005) (describing the “carceral institution” as the “main machine for ‘race-making’”); *see generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that the contemporary U.S. policy of mass incarceration continues a race-making project begun under slavery and consolidated under Jim Crow). “Race-making” is a less formal term for “racialization,” a central concept within critical race theory. As Jacqueline Johnson explains, “[R]acialization is . . . a process that reproduces and magnifies racial classifications as structures of inequality within interlocking ideologies, institutions, social systems, and everyday practices.” Jacqueline Johnson, *Mass Incarceration and Racialization: A Contemporary Mechanism of Racialization in the United States*, 47 GONZ. L. REV. 301, 305 (2012); *see generally* MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (3d ed. 2015) (“Race . . . operates in the space of intersections, at the crossroads where social structure and experience meet. It is socially constructed and historically fluid. It is continually being made and remade in everyday life. Race is continually in formation.”). Racialization is both material and symbolic: it creates differential access to political and economic resources on the basis of race, and it promotes “racial difference” as a biological and/or cultural explanation for inequality that hides that inequality’s fundamentally political character. *Cf. id.* at 13 (discussing “racial projects” as having both symbolic and material aspects).

I.

The painting *American Gothic* was already a nostalgic image when it was first exhibited. In 1930, the country was in the throes of the Great Depression, and American farming was in the midst of a crisis that was not only financial, but also environmental. The Dust Bowl has been described as the worst man-made ecological disaster in American history.<sup>11</sup> Dorothea Lange's haunting photographic images of "Okies" fleeing west were a far more accurate, if grimmer, illustration of farming in 1930 than Wood's stalwart Iowa couple.<sup>12</sup> But *American Gothic* was not intended as journalism. As art historian Wanda Corn notes, Wood deliberately posed his models not in contemporary dress, but in clothing from the late nineteenth century.<sup>13</sup> Their staring faces and rigid postures evoke the era in which photography required long exposures, and the props that surround them—the pitchfork, the potted plants on the doorstep, the house itself—echo the style of photographs made of midwestern farmers in the Victorian period.<sup>14</sup> Wood's portrait, Corn argues, was an act of recovery and homage to folkways and values already considered endangered or lost.<sup>15</sup> The Art Institute of Chicago's catalogue elaborates:

American Gothic, often understood as a satirical comment on the midwestern character, quickly became one of America's most famous paintings and is now firmly entrenched in the nation's popular culture. Yet Wood intended it to be a positive statement about rural American values, an image of reassurance at a time of great dislocation and

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<sup>11</sup> DONALD WORSTER, *DUST BOWL: THE SOUTHERN PLAINS IN THE 1930s* 4 (1979). Frieda Knobloch explains that the causes of the Dust Bowl were multiple:

[The causes] involved not only plows, climate and ecology but also the availability and use of equipment and techniques, the failure of absentee landowners to conserve soil and their tendency to abandon land to the wind once a crop failed, the inability of tenants to afford to buy "efficient" equipment and use soil conservation techniques, the scarcity of available credit, and the low price of wheat.

FRIEDA KNOBLOCH, *THE CULTURE OF WILDERNESS: AGRICULTURE AS COLONIZATION IN THE AMERICAN WEST* 65 (1996). The resulting huge dust storms, which pushed farmers off the Great Plains and turned thousands of householders into economic refugees, prolonged the Great Depression and drastically affected America's breadbasket. See WORSTER, *supra*, at 10-12; *THE DUST BOWL* (PBS television broadcast Nov. 18-19, 2012).

<sup>12</sup> "Okies" is a colloquial term for the hundreds of thousands of farmers who migrated away from Oklahoma as a result of the Dust Bowl. Photographer Dorothea Lange photographed these migrants. Many of these images can be viewed at [http://www.livinghistoryfarm.org/farminginthe30s/water\\_06.html](http://www.livinghistoryfarm.org/farminginthe30s/water_06.html).

<sup>13</sup> Wanda M. Corn, *The Birth of a National Icon: Grant Wood's "American Gothic"*, 10 *ART INST. CHI. MUSEUM STUD. (CENTENNIAL LECTURES)* 253, 256 (1983).

<sup>14</sup> *Id.* at 256-57.

<sup>15</sup> *Id.* at 268.

disillusionment. The man and woman, in their solid and well-crafted world, with all their strengths and weaknesses, represent survivors.<sup>16</sup>

Corn asserts that these “rural American values” include insularity and suspicion of anything “cultural,” but also a commitment to perseverance in the face of hardship and an ethic that accepts the necessity of unremitting hard work.<sup>17</sup> The painting also evokes a familiar constellation of associations with family, citizenship, and nation. Wood’s pinched yet enduring farming couple—standing stiffly upright, facing front and center—present moral respectability in their bodies.<sup>18</sup> That they are married, and heterosexual, seems unquestionable.<sup>19</sup> The absence of any other people in this portrait emphasizes the farming couple’s interdependence on one another and also their proud independence—and isolation—from others. Finally, the house and barn in the picture’s background, presumably the couple’s property, connect the dots of heterosexual monogamy and citizenship through a symbol—farm ownership—that has been central to American stories about the nation.<sup>20</sup>

Farming and nation-making have been connected in American history since the colonial period. The Christian beliefs of the English Puritans and Quakers who arrived as settlers shaped their view of the land they found in the New World.<sup>21</sup> Their descriptions of the eastern United States commonly employ the word “wilderness,” a word that at the time was synonymous with “waste” and “desert”—a kind of howling emptiness. Carolyn Merchant argues that for these colonists, the wildness and emptiness of the New World represented the opportunity to realize a Christian “recovery story”: “the long, slow process of

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<sup>16</sup> ART INSTITUTE OF CHICAGO, *supra* note 2, at 56. The number of times and variety of ways in which others have played with and altered *American Gothic* testifies to its enduring place in American popular culture. A quick search through Google, for instance, reveals hundreds of parodies of the image.

<sup>17</sup> Corn, *supra* note 13, at 267-68.

<sup>18</sup> Corn observes that Wood originally posed the man with a rake, but decided that a pitchfork would better emphasize the elongated vertical lines of the composition. *Id.* at 256. This, too, was an anachronism; Corn quotes a farm wife of the time who sniffed that her community no longer used such antiquated equipment. *Id.*

<sup>19</sup> Interestingly, Corn notes that Wood originally imagined the woman in the painting as the farmer’s daughter, but she was immediately read by audiences as his wife, and Wood came to accept that interpretation. *Id.* at 267.

<sup>20</sup> For an argument that the nineteenth-century white, heterosexual, and nuclear family, envisioned as a source of republican virtue, served as a key resource in building a constitutional order in the western territories, see Mark E. Brandon, *Home on the Range: Family and Constitutionalism in American Continental Settlement*, 52 EMORY L.J. 645 (2003). Brandon concludes of such families that they served the purpose of domesticating the frontier: “Their arduous role was not to revise the political world, but to secure the United States’ military conquests over Indians and Mexicans. They would accomplish this purpose by serving as social and political instruments for extending the nation’s political authority over the conquered territories.” *Id.* at 707.

<sup>21</sup> Jim Chen argues that the first biblical account of the creation of the world in Genesis expresses a “*dominion ethic* of agriculture,” under which it is man’s responsibility to “subdue” the earth. See Chen, *supra* note \*, at 1266-67.

returning humans to the Garden of Eden through labor in the earth.”<sup>22</sup> She outlines this story as follows:

Both nature and human nature were capable of redemption. Science and technology offered the means of transforming nature; labor in the earth, the means of saving human souls. The earth could be plowed, cultivated, and improved as human beings mixed their labor with the soil. . . . Thus both the cultivated earth and cultivated humans would be prepared for the final moment of redemption, or Parousia, when earth would merge with heaven, re-creating the original oneness. With the discovery of the New World, a new earth could be reconstructed with the image of the original garden as paradigm.<sup>23</sup>

Painters, preachers, colonists, migrants, and policymakers depicted America as a potential site for this Garden redemption, to be made possible through a combination of capitalism, technology, and Christian values.<sup>24</sup> Merchant quotes Ralph Waldo Emerson on the promise of this new Eden:

This great savage country should be furrowed by the plough, and combed by the harrow; these rough Alleghanies should know their master; these foaming torrents should be bestridden by proud arches of stone; these wild prairies should be loaded with wheat; the swamps with rice; the hill-tops should pasture innumerable sheep and cattle. . . . How much better when the whole land is a garden, and the people have grown up in the bowers of a paradise.<sup>25</sup>

In contemporary times, this vision of a new Eden has shifted in emphasis away from control of nature and toward an ideal of humble stewardship.<sup>26</sup> But agriculture—the place where humans and nature compete and cooperate—remains a powerful symbol of redemption, visible today in the rhetoric of “sustainable agriculture.”<sup>27</sup>

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<sup>22</sup> Carolyn Merchant, *Reinventing Eden: Western Culture as a Recovery Narrative, in UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE* 132, 133 (William Cronon ed., 1996).

<sup>23</sup> *Id.* at 139–40.

<sup>24</sup> *See id.* at 142–43.

<sup>25</sup> *Id.* at 142.

<sup>26</sup> Chen argues that this vision of agricultural “stewardship” is also rooted in biblical text and values, stemming from a second Creation story in Genesis in which “the Lord God took the man, and put him into the garden of Eden to dress it and to keep it.” Chen, *supra* note \*, at 1268 (quoting *Genesis* 2:15) (emphasis omitted).

<sup>27</sup> Chen argues:

Both [the dominion and the stewardship] schools ascribe theological significance to the meager human acts of planting and harvesting: “Whoever owns land has . . . assumed, whether he knows it or not, the divine functions of creating and destroying plants.” At heart, both the dominion and the stewardship ethics embody an abiding faith in the perfectibility of agriculture as a human enterprise.

*Id.* (quoting ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 67 (1949)).

In the revolutionary period, farming became important to many political thinkers as an occupation that could teach citizens to be self-governing—an important skill in a new nation to be ruled by the people rather than by a monarch. As Kimberly Smith explains, “Democratic agrarians’ central claim was that owning a farm and cultivating it through one’s own labor creates a character ideally suited to republican government.”<sup>28</sup> For the democratic agrarians, ownership of property provided the economic independence for a man to speak, debate, and vote his conscience rather than attempting to please a landlord or master.<sup>29</sup> Farm labor, meanwhile, cultivated other virtues conducive to responsible citizenship, such as “self-sufficiency, industriousness, humility, spirituality (through contemplation of God’s creation and the cycle of birth and death), and prudence.”<sup>30</sup> According to the agrarian ideal, America could succeed as a democracy because the United States would be a republic of freeholders—self-sufficient, morally virtuous, politically independent, free-thinking and freedom-loving “yeomen.”<sup>31</sup>

Thomas Jefferson is generally identified as the standard-bearer of agrarian democracy. In his 1776 draft of a constitution for the State of Virginia, Jefferson provided that unappropriated or forfeited lands should be given to citizens in fifty-acre plots to be held in fee simple; in the same year, he saw through the Virginia legislature bills abolishing primogeniture and entail.<sup>32</sup> Later in life, reflecting on these texts, Jefferson wrote that they “form[ed] a system by which

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Tarla Rai Peterson observes that this Christian theological understanding of agriculture survived well into the twentieth century. She quotes from a 1986 publication of the National Association of Conservation Districts:

Land was (and is) the Biblical inheritance of the human race. . . . We have an obligation to help make possible the survival of our descendants [sic]. . . . The land . . . will become the sustainer of our seed in the same way the Promised Land was to pass to the offsprings [sic] of Abraham.

Tarla Rai Peterson, *Jefferson’s Yeoman Farmer as Frontier Hero: A Self-Defeating Mythic Structure*, 42 AGRIC. & HUM. VALUES 9, 16 (1990) (citations omitted).

<sup>28</sup> KIMBERLY K. SMITH, AFRICAN AMERICAN ENVIRONMENTAL THOUGHT 43-44 (2007).

<sup>29</sup> *Id.* at 44.

<sup>30</sup> *Id.* Smith notes that this agrarian narrative was used by anti-slavery writers and activists to suggest that without free labor, the virtues of citizenship would never develop, and that white plantation owners had thus created a culture of decadence. Those southern planters, of course, saw it differently; they argued that civic virtue was the result not of labor but of leisure.

<sup>31</sup> “Yeoman” originally referred in English history to a person who owned a small farm and belonged to a class of English freeholders between the gentry and laborers. *Yeoman definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/yeoman> (last visited July 24, 2015). In late eighteenth-century American political thought, the term came to mean “farmers who owned small tracts of land and traded on local and national markets but who retained economic autonomy because they produced much of their own food and avoided entangling indebtedness.” Allan Kulikoff, *The Transition to Capitalism in Rural America*, 46 WM. & MARY Q. 120, 142 (1989).

<sup>32</sup> A. Whitney Griswold, *The Agrarian Democracy of Thomas Jefferson*, 40 AM. POL. SCI. REV. 657, 660-61 (1946).

every fibre would be eradicated of ancient or future aristocracy; and a foundation laid for a government truly republican.”<sup>33</sup> Jefferson articulated the agrarian theory this way: “Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent [sic], the most virtuous, & they are tied to their country, & wedded to it’s [sic] liberty & interests by the most lasting bonds.”<sup>34</sup>

As the new country consolidated its new form of government and began to expand its territory, the agrarian ideal influenced federal law and policy. In 1862, President Abraham Lincoln signed into law four related statutes central to American agricultural history: the Homestead Act,<sup>35</sup> the Morrill Act,<sup>36</sup> the Pacific Railway Act, authorizing and subsidizing a transcontinental railroad between the agrarian capitals of Omaha and Sacramento,<sup>37</sup> and the statute establishing the United States Department of Agriculture.<sup>38</sup> The Homestead Act permitted any person who was the “head of a family,” at least twenty-one years old, and a current or future American citizen to claim up to 160 acres of federal land by paying a registration fee and “improving” the land, which meant erecting a dwelling upon it and farming the soil continuously for five years.<sup>39</sup> By the end of the Civil War, 15,000 homestead claims had been established, and more followed in the postwar years. Eventually, 1.6 million individual homestead claims would be approved.<sup>40</sup> The Homestead Act was intended to put land under the control of ordinary people rather than business interests. Andrew Johnson later said of it:

The homestead policy was established only after long and earnest resistance; experience proves its wisdom. The lands in the hands of industrious settlers, whose labor creates wealth and contributes to the

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<sup>33</sup> *Id.* at 678.

<sup>34</sup> *Id.* at 675. Jefferson’s vision of agrarian democracy drew on John Locke’s theory of property as acquired through the application of labor to the natural world. As Whitney Griswold puts it:

By picking up fruit, or tilling a field, or filling his pitcher at a fountain, a man appropriated exclusively to himself what was given by nature to all men equally and in common, with two important qualifications. There must be “enough, and as good left in common for others.” And no one must take more than he can use.

*Id.*

<sup>35</sup> Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976) (codified as amended at 43 U.S.C. § 161 (1982)).

<sup>36</sup> Morrill Act of 1862, ch. 130, 12 Stat. 503 (1862).

<sup>37</sup> Pacific Railway Act of 1862, ch. 120, 12 Stat. 489 (1862).

<sup>38</sup> Act of May 15, 1862, ch. 72, 12 Stat. 387 (1862) (codified as amended at 7 U.S.C. §§ 2201-2279h).

<sup>39</sup> Homestead Act of 1862, ch. 75.

<sup>40</sup> *Teaching With Documents: The Homestead Act of 1862*, NAT’L ARCHIVES, <http://www.Archives.gov/education/lessons/homestead-act> (last visited July 24, 2015).

public resources, are worth more to the United States than if they had been reserved as a solitude for future purchasers.<sup>41</sup>

The second important bill relating to farming that President Lincoln signed, the Morrill Act, was intended to foster development and distribution of scientific and technical knowledge to ensure that the new settlers would use their land efficiently and productively.<sup>42</sup> The Act distributed federally owned land to each state for the purpose of

the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.<sup>43</sup>

This establishment of the Morrill Act “land-grant” institutions was followed in 1914 with the establishment of the United States Department of Agriculture’s Cooperative Extension System, a partnership between the USDA and the land-grant institutions meant to ensure that the latest agricultural research would quickly be transformed into practical knowledge for farmers.<sup>44</sup> The third important bill signed by President Lincoln, the Pacific Railway Act, providing for the transcontinental railroad, both created the infrastructure that would allow the United States to become a player in the first global food regime, and became the source of later conflict between corporate interests, represented by powerful private railroads, and homesteaders.<sup>45</sup>

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<sup>41</sup> *Presidential Quotes About the Homestead Act*, NAT’L PARK SERV., <http://www.nps.gov/home/historyculture/presquotes.htm> (last visited July 24, 2015). The Homestead Act served as an economic engine for the growing United States. Unfortunately, those of its proponents who, like Lincoln, favored labor over capital were to be disappointed.

<sup>42</sup> Morrill Act of 1862, ch. 130, 12 Stat. 503 (1862).

<sup>43</sup> *Id.* A second Morrill Act in 1890 was aimed at the former Confederate states. This Act required each state to show that race was not a criterion for admission to its land-grant institution, or else to designate a separate land-grant institution for persons of color. Among the seventy colleges and universities, which eventually evolved from the 1862 and 1890 iterations of the Morrill Act, are several of today’s historically black colleges and universities. Morrill Act of 1890, ch. 841, 26 Stat. 417 (codified as amended at 7 U.S.C. §§ 321-329 (1890)).

<sup>44</sup> Smith-Lever Act of 1914, 7 U.S.C. §§ 341-349 (1914). “The Cooperative Extension System is a nationwide, non-credit educational network. Each U.S. state and territory has a state office at its land-grant university and a network of local or regional offices. These offices are staffed by one or more experts who provide useful, practical, and research-based information to agricultural producers, small business owners, youth, consumers, and others in rural areas and communities of all sizes.” *About Us*, U.S. DEP’T AGRIC., <http://www.csrees.usda.gov/Extension> (last visited July 24, 2015). For a history of cooperative extension, see Everett M. Rogers, *The Intellectual Foundation and History of the Agricultural Extension Model*, 9 SCI. COMM. 492 (1988).

<sup>45</sup> Pacific Railway Act of 1862, ch. 120, 12 Stat. 489 (1862). For a detailed account of the politics of the transcontinental railroad and Lincoln’s interest in building railroads,

Finally, farming was so important to the United States economy—most Americans at the time lived on farms—that it merited establishment of one of the first federal agencies.<sup>46</sup> The fourth of the farming bills President Lincoln signed in 1862 created the United States Department of Agriculture (USDA).<sup>47</sup> In his final annual speech to Congress two-and-a-half years later, Lincoln called the USDA “The People’s Department.”<sup>48</sup> Generations later, long after farming had ceased to be the occupation of more than a small minority of Americans, the agrarian ideal remained the official story of the USDA. In 1940, for instance, a committee that represented all federal agencies concerned with agriculture and appointed by USDA Secretary Claude Wickard proclaimed:

The U.S. Department of Agriculture believes that the welfare of agriculture and of the Nation will be promoted by an agricultural land tenure pattern characterized by efficient family-size owner-operated farms, and one of the continuing major objectives of the Department will be the establishment and maintenance of such farms as the predominating operating farm unit in the United States.<sup>49</sup>

Capital intensive and highly productive, twentieth-century farming had a new face—“agribusiness”—defined by Steven Stoll as “the vertically integrated process of making food with as much technology and as few people as possible.”<sup>50</sup> Farmers represented about 25% of the total U.S. population in 1935, but only about 12% in 1955, and less than 5% in 1970.<sup>51</sup> During the same period, however, agricultural productivity rose dramatically. As Drew Kershen observes, this seeming contradiction was accomplished by substituting capital, in the form of investments in new technologies, for labor, a dynamic known as “intensification”:

Beginning in the early twentieth century and especially after World War II, farmers adopted technology at a rapid rate. Since World War II, farmers have increased the amount of agricultural harvests primarily by intensification. Using the concept of total factor productivity, agricultural outputs have quadrupled since 1910 while inputs have remained relatively steady. But the inputs since 1910 have changed

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see Roger D. Billings, *The Homestead Act, Pacific Railroad Act and Morrill Act*, 39 N. Ky. L. REV. 699 (2012).

<sup>46</sup> At the time, fully half of the United States’ population consisted of rural farmers. Michael R. Haines, *Urban and Rural Territory - Number Of Places By Size Of Place: 1790-1990*, in HISTORICAL STATISTICS OF THE UNITED STATES, EARLIEST TIMES TO THE PRESENT 684, 684-98 (2006).

<sup>47</sup> Act of May 15, 1862, ch. 72, 12 Stat. 387 (1862) (codified as amended at 7 U.S.C. §§ 2201-2279h).

<sup>48</sup> U.S. DEP’T AGRIC., USDA CELEBRATES 150 YEARS, <http://www.usda.gov/wps/portal/usda/usdahome?navid=USDA150> (last visited July 24, 2015).

<sup>49</sup> Griswold, *supra* note 32, at 661.

<sup>50</sup> STEVEN STOLL, THE FRUITS OF NATURAL ADVANTAGE: MAKING THE INDUSTRIAL COUNTRYSIDE IN CALIFORNIA 9, 173 (1998).

<sup>51</sup> BILL WINDERS, THE POLITICS OF FOOD SUPPLY: U.S. AGRICULTURAL POLICY IN THE WORLD ECONOMY 17 (2009).

drastically from inputs primarily in labor to inputs based on technology such as mechanization, seed, chemicals, and irrigation.<sup>52</sup>

The industrial model of agriculture also brought with it changes in farm management. Sociologists Linda Lobao and Curtis Stofferahn distinguish contemporary “industrialized” farms from non-industrialized, “family” farms.<sup>53</sup> They define industrialized farms along two dimensions: scale and organizational attributes.<sup>54</sup> In terms of scale, they take note of a sharp dichotomy between small-scale farms and large-scale farms, a dichotomy also visible in USDA data.<sup>55</sup> According to a report by the Economic Research Service of the USDA using 2007 data, “small family farms,” those with annual gross farm sales of less than \$250,000, made up 88.3% of all farms, yet accounted for only 16% of sales.<sup>56</sup> “Large family farms,” those with annual gross sales of over \$250,000, made up only 9.3% of farms, but accounted for 65.9% of sales;<sup>57</sup> indeed, “very large” family farms constituted just 5% of all U.S. farms yet accounted for 53.7% of the total U.S. value of production.<sup>58</sup> Organizational attributes also distinguish farms. Industrialized farms are more reliant on hired labor: they may be owned by one group of people, managed by another, and worked by a third.<sup>59</sup> The Economic Research Service of the USDA notes that “[o]nce farm sales reach the \$1 million mark, . . . hired and contract labor account for 89% of labor hours.”<sup>60</sup>

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<sup>52</sup> Drew L. Kershen, *The Contested Vision for Agriculture’s Future: Sustainable Intensive Agriculture and Agroecology*, 46 CREIGHTON L. REV. 591, 595 (2012). As a report by the USDA Economic Research Service summarizes,

[t]echnology . . . plays an important role in driving increases in farm size, by allowing a single farmer to operate and manage more acres. Labor-saving innovations—from bigger and faster capital equipment to information technology, chemical herbicides, seed genetics, and changing tillage techniques—have substantially reduced the total amount of labor used in agriculture and facilitated the shift to larger crop farms.

JAMES M. McDONALD, PENNI KORB & ROBERT A. HOPPE, U.S. DEP’T AGRIC. ECON. RESEARCH SERV., FARM SIZE AND THE ORGANIZATION OF U.S. CROP FARMING, (2013), <http://www.ers.usda.gov/publications/err-economic-research-report/err152.aspx>; see also ERIC J. O’DONOGHUE ET AL., U.S. DEP’T AGRIC. ECON. RESEARCH SERV., THE CHANGING ORGANIZATION OF U.S. FARMING, (2011), [http://www.ers.usda.gov/media/176816/eib88\\_1\\_1\\_.pdf](http://www.ers.usda.gov/media/176816/eib88_1_1_.pdf) (finding that “despite declines in the use of land and labor, agricultural productivity has maintained a linear growth pattern”).

<sup>53</sup> Linda Lobao & Curtis W. Stofferahn, *The Community Effects of Industrialized Farming: Social Science Research and Challenges to Corporate Farming Laws*, 25 AGRIC. & HUM. VALUES 219, 220-21 (2008).

<sup>54</sup> *Id.* at 221.

<sup>55</sup> *Id.* at 220-21.

<sup>56</sup> ROBERT A. HOPPE & DAVID E. BANKER, U.S. DEP’T. AGRIC. ECON. RESEARCH SERV., STRUCTURE AND FINANCES OF U.S. FARMS: FAMILY FARM REPORT 6-7 (2010), [http://www.ers.usda.gov/media/184479/eib66\\_1\\_1\\_.pdf](http://www.ers.usda.gov/media/184479/eib66_1_1_.pdf).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 8 (Table 2).

<sup>59</sup> Lobao & Stofferahn, *supra* note 53, at 220-21.

<sup>60</sup> O’DONOGHUE ET AL., *supra* note 52, at 6.

Yet, the image of the yeoman farmer and his family as what farming is really all about has not disappeared, nor has the outsized role this image plays in envisioning America. Tarla Rai Peterson argues that a narrative about the family farmer as a latter-day hero continues to affect contemporary public discourse and public policy:

Farmers are presented as *civilization's caretakers*, or those who understand the essentials required for its continuation. Although these caretakers demand little in return for their efforts, they do require *independence*. Armed with independence, farmers plunge into *battle*. Various evil forces have assembled, all aiming to destroy our heroes, and through them, the civilization they represent. These concepts are articulated both by farmers, and organizations representing agricultural interests.<sup>61</sup>

According to Peterson, this heroic myth continues to recycle the associative links between domination of the earth, the idea of the frontier, and farming as central to national identity, despite radically altered political, economic, and social conditions since the founding of the United States. She argues:

Agricultural histories continue to be dominated by an emphasis on technology and the frontier. Our language continues to describe the earth as a giant machine over which humans must gain control by using tools extracted from the machine itself. Rural environments continue to be idealized as the source of real “American heroes.” Inhabitants from the “empty spaces” of the agricultural West compete for the honor of being selected as nuclear waste disposal sites. Farmers continue to view themselves as foundational to American culture. Banners carried by tractors and trucks at a 1985 “tractorcade” in Idaho proclaimed that “farmers will go under just before America does.”<sup>62</sup>

Similarly, the heterosexual, nuclear, white family continues as an American metonym for the virtue, respectability, and good citizenship connected with farming. As a narrative resource, this family, indelibly pictured by Grant Wood, seems equally irresistible today. Monsanto Corporation—a multinational firm attacked in recent litigation by a coalition of small farmers for its policies regarding patented seeds<sup>63</sup>—cheerfully describes “America’s Farmers” as “brought to you by Monsanto,” invites its website visitors to “explore the family farm,” and congratulates Heather Dineen (an attractive blonde, blue-eyed, white woman) for being named “the 2014 Farm Mom of the Year!”<sup>64</sup>

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<sup>61</sup> Peterson, *supra* note 27, at 14.

<sup>62</sup> *Id.* at 16 (citation omitted).

<sup>63</sup> See, e.g., Brief for Appellants, Organic Seed Growers and Trade Ass’n et al. v. Monsanto Co., No. 11-CV-2163 (S.D.N.Y. July 5, 2012).

<sup>64</sup> *America’s Farmers*, MONSANTO, <http://www.americasfarmers.com/recognition-programs/farm-mom/> (last visited July 24, 2015).

## II.

In the previous Part, I argued that agriculture has been central to narratives about American citizenship and civic virtue and that the agrarian ideal continues to have rhetorical power today despite the fact that we are no longer a nation of yeoman farmers. Here, in Part II, I argue that these narratives also reflect arguments and anxieties about race; indeed, I suggest that farming—like mass incarceration—is a race-making activity in the United States.<sup>65</sup>

One of these racialization projects has been the association of farm ownership with whiteness. From colonial times through the nineteenth century in the United States, agriculture was central to arguments about group fitness for citizenship, arguments that soon became the basis for justifying exclusion and exploitation on the basis of “race.” In the twentieth century, race was offered as a justification for exclusion of some groups from owning farmland in the American West. Meanwhile, in the American South, the USDA would be described bitterly by black farmers as “the last plantation.”<sup>66</sup> Section A reviews the history of the whitening of farms and farming, with a focus on the subsistence farming originally central to the agrarian ideal.

A converse project of race-making has accompanied farm labor within the less appealing, but more economically and politically influential mode of American farming. This story begins with chattel slavery and continues with the invention of a new kind of slavery, one that did not end with emancipation. In the postbellum South, white planters used state power, market power, and private terror to maintain access to cheap black labor for a very different model of agriculture than the subsistence family farm. In the West, white growers working large tracts of land with enormous harvests quickly moved beyond household labor, ultimately abandoned the search for white hired workers, and came to depend on the labor of racialized minorities, especially those drawn as immigrants to the United States. In a neat twist on the connection between farm ownership and citizenship, farm work today is largely considered the province of noncitizens—often, undocumented persons who can provide necessary labor without making political and economic demands. Thus, a class of people at the heart of the ostensibly most American occupation—farming—is both economically essential and politically vilified. Section B explores the coloring of farm labor within industrial agriculture.

## A.

Begin with Eldon, Iowa (population 927), the town where the Gothic Revival farmhouse that so charmed Grant Wood still stands.<sup>67</sup> Eldon was 98.4%

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<sup>65</sup> See Johnson, *supra* note 10.

<sup>66</sup> The USDA’s reputation for discrimination has been so pervasive that the agency has been referred to colloquially as “the last plantation.” ALISON HOPE ALKON, BLACK, WHITE, AND GREEN: FARMERS MARKETS, RACE, AND THE GREEN ECONOMY, 79 (2012).

<sup>67</sup> See Corn, *supra* note 13, at 255.

white in 2010, according to U.S. Census data.<sup>68</sup> It is not on James Loewen's list of suspected "sundown towns"—white communities that excluded non-white residents through the threat or use of violence—but Bloomfield, Iowa (98.3% white in 2010), twenty miles away, is on the list.<sup>69</sup> Turn over the coin stamped with the face of a yeoman farmer, and the violence and suffering of racial exploitation and exclusion appears. We have seen the centrality of farming to national stories about the land, about citizenship and civic virtues, and about political economy and democracy. In this Section, I note the extent to which, figuratively and literally, these stories have been used to whiten American farming.

As scholars have noted, the ideology known as "classical racialism" did not reach its fullest articulation until the nineteenth century, well after European settlers had colonized the New World and established the Atlantic trade in slaves and agricultural products as a powerful economic engine for the United States.<sup>70</sup> An important element of the white identity that influential Americans began to claim for themselves, however, involved the contrast between themselves and the native peoples they displaced, with particular focus on contrasting relationships to the earth.

Bethany Berger notes that "on reaching the New World, the colonists found that not only did the tribes they encountered farm their lands, but that the English were dependent on native harvests to survive."<sup>71</sup> Yet, she continues:

the insistence that Indians were a people that did not farm had become a fundamental symbol of American Indian inferiority and Anglo American genius. Locke's image of "the wild Indian" who could not feed his community and had not established any property rights in America for "want of improving it by labor" became a convenient foil for the Anglo Saxon notion of property rights.<sup>72</sup>

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<sup>68</sup> DEP'T OF COMMERCE, U.S. CENSUS BUREAU, 2010 U.S. CENSUS DATA (2010), available at <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>.

<sup>69</sup> As James Loewen explains, the term comes from "the signs that many [such towns] formerly sported at their corporate limits—signs that usually said, "Nigger, Don't Let the Sun Go Down on You in [this town]." LOEWEN, *supra* note 7, at 3. For a list of Iowa communities suspected to have been sundown towns, see <http://sundown.afro.illinois.edu/sundowntownshow.php?id=764>.

<sup>70</sup> For a history of the emergence and development of the idea of race, see AUDREY SMEDLEY, *RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLD VIEW* (4th ed. 2011). For an exploration of classical racialism, its roots, and its nineteenth-century apotheosis, see Ronald S. Sullivan, Jr., *Classical Racialism, Justice Story, and Margaret Morgan's Journey from Freedom to Slavery: The Story of Prigg v. Pennsylvania*, in *RACE LAW STORIES* 59 (Rachel Moran & Devon Carbado eds., 2008).

<sup>71</sup> Bethany R. Berger, *Red: Racism and the American Indian*, 56 *UCLA L. REV.* 591, 607 (2009). Berger notes, "The very first records of the new Connecticut colony, for example, concerned punishment for a man who illegally traded a gun to the local Indians for corn." *Id.*

<sup>72</sup> *Id.* at 608.

The idea that farming distinguished settlers from Indians justified the notion that the settlers had a superior, even God-given, moral claim to the land. It also did legal and political work. Thus, John Winthrop, governor for over a decade of the Massachusetts Bay Colony, declared: “As for the Natives in New England, they inclose noe Land neither have any setled habytation, nor any tame Cattle to improve the Land by, and soe have noe other but a Naturall Right to those Countries.”<sup>73</sup> Berger notes that acceptance of this claim was a precondition of the settlers’ own right to plant.<sup>74</sup> In the following century, in his famous opinion in *Johnson v. McIntosh*,<sup>75</sup> Chief Justice John Marshall repeated the story to justify his adoption of the Doctrine of Discovery, a principle of the law of nations, with the result that only the European “discovering” nations could hold full title in North America; Indians had only a right of possession or occupancy.<sup>76</sup> Justice Marshall explained: “[T]he tribes of Indians inhabiting this country were fierce savages whose occupation was war and whose subsistence was drawn chiefly from the forest.”<sup>77</sup> In contrast, the settlers were “agriculturists, merchants, and manufacturers.”<sup>78</sup>

By the nineteenth century, formal ideologies of race were developing in intellectual circles. Race theory gained a scientific foundation in the emerging disciplines of anthropology and biology. For example, race scientists argued that the races could be distinguished by their cranial capacities.<sup>79</sup> But cultural differences also continued to play a role in evolving conceptions of race, and the canard that Indians did not farm consistently appeared in racist accounts. For instance, Henry Schoolcraft, compiler of a government-commissioned report titled *Information Respecting the History, Condition, and Prospects of the Indian Tribes of the United States*,<sup>80</sup> was not concerned about the cranial capacity of Indians as an obstacle to their assimilation.<sup>81</sup> However, in Schoolcraft’s view,

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<sup>73</sup> John Winthrop, *Reasons to Be Considered, and Objections with Answers, in 2 WINTHROP PAPERS* 138, 141 (Mass. Hist. Soc’y ed., 1931) (quoted in Bethany Berger, *It’s Not About the Fox: The Untold History of Pierson v. Post*, 55 DUKE L.J. 1089, 1103 (2006)).

<sup>74</sup> See Berger, *supra* note 70, at 607.

<sup>75</sup> 21 U.S. (8 Wheat.) 543 (1823).

<sup>76</sup> *Id.* at 595.

<sup>77</sup> *Id.* at 590.

<sup>78</sup> *Id.*

<sup>79</sup> See generally Sullivan, *supra* note 69, at 81 (describing the work of Samuel Morton, whose research was believed to have established that noticeable differences in cranial capacities between the races proved differences in intelligence). Many years later, the evolutionary biologist Stephen Jay Gould took a fresh look at Morton’s cranial capacity data and declared it either mistaken, fudged, or falsified. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 89 (1981).

<sup>80</sup> 3 HENRY R. SCHOOLCRAFT, *BUREAU OF INDIAN AFFAIRS, INFORMATION RESPECTING THE HISTORY, CONDITION, AND PROSPECTS OF THE INDIAN TRIBES OF THE UNITED STATES*, at vii (Paladin Press 1969) (1853), *as reprinted in* Berger, *supra* note 70, at 623.

<sup>81</sup> *Id.* at 622-23. Schoolcraft stated: “[T]he crania showed ‘no impediment to [] rise in arts and improvements,’ and gave ‘full encouragement to the efforts making for their . . . advancement.’”

tribal membership was a serious problem for Indians. Schoolcraft described tribes as “erratic and predatory hordes of hunters, without agriculture, arts, or letters, and with absolutely nothing in their civil polity that merits the name of government.”<sup>82</sup>

As this statement reveals, farming began to figure into a full theory of whiteness as a sign of the capacity to participate in “civilized” government.<sup>83</sup> Other references to the supposed Indian inability to farm as a sign of their lack of civilization appeared in judicial opinions. In *Cherokee Nation v. Georgia*,<sup>84</sup> for instance, the Cherokee Nation sought a ruling from the United States Supreme Court that the State of Georgia had violated the terms of a treaty between itself and the United States when Georgia attempted to take Cherokee lands and expel the Cherokee people.<sup>85</sup> The Cherokee, one of the “Five Civilized Tribes,” undoubtedly did farm; they even did so in the approved white Southern way, with enslaved African labor.<sup>86</sup> In his opinion for the Court, however, Chief Justice Marshall held that the Cherokee were not a “foreign nation” within the meaning of Article III, Section 2 of the Constitution; therefore, the Court had no jurisdiction over the case.<sup>87</sup> Justice Johnson, concurring, went further. In his view, the Cherokee Nation was not even a state, and the Cherokee’s lack of formal government is evident in their status as hunters rather than agriculturalists.<sup>88</sup> Johnson wrote, “The treaty of Hopewell does not even give them a name other than that of the Indians; not even nation or state, but regards them as what they were, a band of hunters, occupying as hunting grounds, just what territory we chose to allot them.”<sup>89</sup> The narrative of Christian redemption fills in the blanks: Indians had not mixed their labor with the earth to establish property rights in Lockean fashion; instead, they had left America in a wilderness state, wasting the land’s potential and their own.<sup>90</sup>

Agriculture thus figures into what Berger argues is a distinctive feature of American anti-Indian racism: Indians are only inferior when they insist on living in their own societies rather than assimilating fully into the white community.<sup>91</sup> Agriculture, according to this narrative, is one of the gifts that whites can bestow upon Indians, and its adoption signals that an Indian has successfully left tribal life behind and embraced whiteness. Federal law and policy incorporated this story. As Berger explains, under the federal Reservation Policy guiding Indian

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<sup>82</sup> Berger, *supra* note 70, at 623.

<sup>83</sup> *See id.*

<sup>84</sup> 30 U.S. (1 Pet.) 1 (1831).

<sup>85</sup> *Id.* at 14.

<sup>86</sup> “Five Civilized Tribes” refers to five Native American Nations (Cherokee, Chickasaw, Choctaw, Creek, and Seminole), which were the first five tribes Anglo-European settlers considered to be civilized because they adopted attributes of the colonists’ culture. GRANT FOREMAN, *THE FIVE CIVILIZED TRIBES: CHEROKEE, CHICKASAW, CHOCTAW, CREEK, SEMINOLE* (1934).

<sup>87</sup> *Cherokee Nation*, 30 U.S. at 2.

<sup>88</sup> *Id.* at 24.

<sup>89</sup> *Id.*

<sup>90</sup> *See Merchant, supra* note 22, at 136, 144.

<sup>91</sup> Berger, *supra* note 70, at 594.

policy between the 1850s and 1870s, Indians were to be taught to farm—if necessary, by coercion; if they resisted, they would be “controlled, and finally compelled by stern necessity to resort to agricultural labor or starve.”<sup>92</sup> The 1887 Dawes Act,<sup>93</sup> which broke up Indian land holdings into individual allotments, had a similar purpose. The Act mimicked the 1862 Homestead Act<sup>94</sup> and carried a dual intent: to encourage assimilation among Indians and to open up more land for white yeoman settlement.<sup>95</sup> Berger describes a ceremony conducted when individual Indians accepted their allotments:

After the American Indian male renounced allegiance to his tribe, shot his last arrow, and accepted the plow, the federal official said: “This act means that you have chosen to live the life of the white man—and the white man lives by work. From the earth we must all get our living . . . . Only by work do we gain a right to the land . . . .”<sup>96</sup>

Ironically—given this longstanding insistence that Indians “accept the plow”—according to the USDA, 77% of farms currently operated by Native Americans are classified as “very small,” generating a gross cash farm income (GCFI) of less than \$10,000.<sup>97</sup> What happened? Thomas Mitchell identifies the Dawes Act itself as central to Indian dispossession:

Native Americans lost millions of acres of land that were declared surplus under the Dawes Act. In addition, two-thirds of all the land allotted to individual Native Americans under the Dawes Act—roughly twenty-seven million acres—ended up in non-Indian hands by 1934, mostly by means of sale, mortgage foreclosure, and tax sale after the restrictions on alienation initially built into the Dawes Act were stripped away, beginning with passage of the Burke Act in 1906. Although the destruction of communal tenure and its impact on Native American communities under the Dawes Act is well-documented, the plight of those Native Americans who lost their individual allotments was no less damning of the policy. On most reservations that were

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<sup>92</sup> *Id.* at 623-24.

<sup>93</sup> General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331-333 (1887)) (repealed in 2000).

<sup>94</sup> Homestead Act of 1862, ch. 75, 12 Stat. 392 (repealed 1976) (codified as amended at 43 U.S.C. § 161 (1982)).

<sup>95</sup> The Dawes Act authorized the federal government to divide remaining tribal territories among individual Indian households, with land not divided declared as surplus and free for white acquisition.

<sup>96</sup> Berger, *supra* note 70, at 634. The heteronormative and gendered dynamics of citizenship are also clear in this ceremony. Berger continues:

After the American Indian female renounced allegiance to her tribe, accepted the work bag and purse, the federal official said: “This means you have chosen the life of the white woman—and the white woman loves her home. The family and home are the foundation of our civilization.”

*Id.* at 634-35.

<sup>97</sup> O'DONOGHUE ET AL., *supra* note 52, at 8.

allotted under the Act, between 75% and 100% of the Native Americans who received fee patents lost their lands in short measure, and the overwhelming majority of these Native Americans became impoverished.<sup>98</sup>

Although the official policy encouraged Indians to become farmers, the trajectory of Native American history reveals the whitening of agriculture both in theory and in practice.<sup>99</sup>

While Indians were encouraged to farm as a mark of their embrace of “civilized” ways, for other groups racialized as non-white, the struggle has been to stay in farming in the face of racist aggression.<sup>100</sup> For example, the link among farming, citizenship, and whiteness reemerged in Western land policy many generations later in a different political context, when several states passed “Alien Land Laws” prohibiting persons from owning agricultural land if they were ineligible to become U.S. citizens through naturalization.<sup>101</sup> The proximate cause of these laws, written in the early twentieth century and directed at Asian immigrants, was the outrage and panic of white farmers at the Japanese success in horticulture.<sup>102</sup> As Carey McWilliams observed in his examination of California farm work, at first Japanese immigrants were embraced as farm workers and their skill at horticulture admired.<sup>103</sup> Tensions rose when they began to organize and press for higher wages.<sup>104</sup> McWilliams argues, however, that “[t]he real prejudice against the Japanese dates from the time when they began to be small owners, rather than farm laborers.”<sup>105</sup>

The story state governments told to justify the Alien Land Laws, however, was political rather than economic. It turned on special dangers to the nation

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<sup>98</sup> Thomas Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 542-43 (2001) [hereinafter Mitchell, *Reconstruction*].

<sup>99</sup> See *id.*

<sup>100</sup> See Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 19 B.C. THIRD WORLD L.J. 37 (1998).

<sup>101</sup> See *id.*

<sup>102</sup> Aoki, *supra* note 100, at 56 (describing the California Alien Land Law as “meant as a direct attack on the Japanese agricultural community within California”).

<sup>103</sup> CAREY MCWILLIAMS, *FACTORIES IN THE FIELD* 108-109 (1966) (asserting that the Japanese were, at first, “enthusiastically welcomed. . . . Not only did they perform the most menial and undesirable varieties of field labor, but they created new crop industries and expanded the demand for farm labor.”).

<sup>104</sup> McWilliams writes:

By 1907 their labor enjoyed a scarcity value and they were the highest-paid farm labor group in the State. As they came to demand higher wages, however, they incurred the animus of the large growers and the chief group support which they had theretofore received was removed. “The patient little slant-eyed people” began to alienate middle-class groups which had previously been indifferent to their presence.

*Id.* at 111.

<sup>105</sup> *Id.*

said to be posed by foreign ownership of agricultural land. In *Terrace v. Thompson*,<sup>106</sup> upholding Washington State's alien land law against the argument that it violated treaty rights and the Fourteenth Amendment, the Supreme Court stated without citation: "The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the state itself."<sup>107</sup> The Supreme Court also cited with approbation the district court opinion in the case, which went on at greater length to identify fitness for citizenship as a principle underlying both Washington's denial of the right to own farmland and Congress's denial of the privilege of naturalization to people of Asian descent.<sup>108</sup> Turning to the history of the English yeoman farmer and the link between land ownership and the capacity for democratic self-governance, the district court explained:

Tribal laws of the progenitors of the Anglo-Saxons, while still upon the continent, made an estate in lands, similar to a freehold, a prerequisite to a voice in the tribal government. The "free-necked man," or "freeman," was synonymous with "freeholder." They were interdependent. A freeman had a vote in determining tribal policies, and no one was a freeman without an estate in lands. . . . The recognition of this principle has run throughout the history of our race and its governments.<sup>109</sup>

Conversely, therefore, it was important to keep those not of "our" race from owning land. The district court observed of the federal prohibition on naturalization for Asian immigrants:

The yellow or brown racial color is the hallmark of Oriental despotisms, or was at the time the original naturalization law was enacted. It was deemed that the subjects of these despotisms, with their fixed and ingrained pride in the type of their civilization, which works for its welfare by subordinating the individual to the personal authority of the sovereign, as the embodiment of the state, were not fitted and suited to make for the success of a republican form of Government. Hence they were denied citizenship. . . .

Congress, in withholding the right to citizenship from these Oriental races, no doubt recognized, as statesmen long have done, that it was of the essence of its duty to insure the perpetuation of our own type of civilization.<sup>110</sup>

Farming, whiteness, land ownership, and citizenship are here run together in a project of exclusion.

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<sup>106</sup> *Terrace v. Thompson*, 263 U.S. 197 (1923).

<sup>107</sup> *Id.* at 221.

<sup>108</sup> *Id.* at 223-24.

<sup>109</sup> *Terrace v. Thompson*, 274 F. 841, 850 (W.D. Wash. 1921).

<sup>110</sup> *Id.* at 849.

The dispossession of black farmers was, legally, a more complicated project. The Reconstruction Congress amended the federal Naturalization Act<sup>111</sup> to admit persons of African descent to citizenship, and many black Americans had incorporated the agrarian ideal into their own liberationist goals, before and after the Civil War. Nevertheless, African-American legal history confirms the pattern in which whiteness and farm ownership are linked both in theory and in practice.

African Americans, of course, had a longstanding relationship with agriculture in the United States, and amidst the horrors of slavery, many black people embraced farming and gardening. Kimberly Smith notes that even before emancipation, “slaves on many plantations in the Old South had gardens and were allowed to hunt and fish for food, as well as travel to other plantations and to town.”<sup>112</sup> In addition, enslaved women “often became the chief herbalists for their communities.”<sup>113</sup> Indeed, some black abolitionists argued that enslaved men and women brought specialized agricultural knowledge with them from their homelands that contributed to the flourishing of American plantations.<sup>114</sup> Frederick Douglass promoted subsistence farming as a way to achieve independence from whites;<sup>115</sup> ordinary people, such as fugitive slave William Wells Brown, similarly “wanted nothing more from freedom than to purchase ‘a little farm’ and his ‘own FREE HOME’ in Canada.”<sup>116</sup>

The first large-scale opportunity for African Americans to own land came during the Civil War, in 1863, when 76,775 acres of South Carolina land were seized by the federal government for nonpayment of taxes.<sup>117</sup> According to Faith Rivers, the federal government laid claim to 60,296 acres, and “loyal citizens” bought the remaining 16,479 acres.<sup>118</sup> President Lincoln initially approved a plan to distribute the bulk of this land to freed slaves<sup>119</sup> under a scheme similar to that of the previous year’s Homestead Act, and General Rufus Saxton encouraged prospective owners to stake out claims on the land they had previously worked as slaves.<sup>120</sup> However, Direct Tax Sale Commissioner Henry Brisbane objected to the plan on the grounds that “the pre-emption policies utilized on the open lands of the West were not ‘appropriate’ for the improved agricultural lands of

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<sup>111</sup> Naturalization Act of 1870, 41st Cong. ch. 254, 16 Stat. 254 (1870).

<sup>112</sup> SMITH, *supra* note 28, at 27.

<sup>113</sup> *Id.* at 28.

<sup>114</sup> *Id.* at 59-60 (describing Martin Delany’s claim that West Africa was “an agricultural paradise”).

<sup>115</sup> *Id.* at 61-62 (describing a speech given by Douglass in 1873, urging former slaves to pursue agriculture).

<sup>116</sup> *Id.* at 51 (citations omitted).

<sup>117</sup> Faith Rivers, *Inequity in Equity: The Tragedy of Tenancy in Common for Heirs’ Property Owners Facing Partition in Equity*, 17 TEMP. POL. & CIV. RTS. L. REV. 1, 13 (2007).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 14.

<sup>120</sup> *Id.*

the South.”<sup>121</sup> Under the policy actually implemented, the primary beneficiaries were northern whites.<sup>122</sup>

The former slaves’ quest for land ownership, nonetheless, continued after the Civil War ended. As Rivers notes:

In January 1865, Secretary of War Edwin M. Stanton urged General William T. Sherman to convene a meeting with African-American leaders in Beaufort. The group of twenty leaders, including ministers, pilots, sailors, barbers, and former plantation overseers, engaged in a significant discussion regarding the multiplicity of problems involving the welfare of the freedmen. A key recommendation was that land acquisition was critical for the freedmen’s economic self-determination. Minister Garrison Frazier—who had purchased his own freedom in 1857—advocated that the freedmen should “have land, and . . . till it by our own labor.”<sup>123</sup>

The phrase “forty acres and a mule,” emblematic of this demand for land ownership, refers to the provisions in General Sherman’s Field Directive 15, and later in the first Freedmen’s Bureau Act, which divided confiscated land in the conquered South into tracts of forty acres to be owned by freedmen.<sup>124</sup> To the chagrin and anger of the formerly enslaved, these provisions were soon nullified when President Johnson ordered General Howard to rescind the order that set aside forty-acre tracts.<sup>125</sup> Rivers quotes one freedman who spoke out in a meeting with General Howard:

General, we want Homesteads, we were promised Homesteads by the government. If it does not carry out the promises its agents made to us, if the government haveing [sic] concluded to befriend its late enemies and to neglect to observe the principles of common faith between its self and us its allies in the war you said was over, now takes away from them all right to the soil they stand upon save such as they can get again by working for *your* late and their *all time* enemies . . . we are left in a

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 15.

<sup>123</sup> Rivers, *supra* note 117, at 17 (citations omitted).

<sup>124</sup> See CLAUDE F. OUBRE, FORTY ACRES AND A MULE: THE FREEDMEN’S BUREAU AND BLACK LAND OWNERSHIP xi, 197 (1978).

<sup>125</sup> As Rivers explains:

Freedmen’s Bureau provisions to validate the Sherman titles were replaced with a mere three-year possession period provision. President Johnson later objected to the entire Freedmen’s bill and vetoed the first measure in February 1866. The final version of the legislation only provided an opportunity for freedmen to lease government-owned land (tracts that the government acquired through the nonpayment of taxes) with a six-year option to buy.

Rivers, *supra* note 117, at 18 (citations omitted).

more unpleasant condition than our former. . . . You will see this is not the condition of really freemen.<sup>126</sup>

Nevertheless, despite the obstacles posed by the failure of the land redistribution program, low levels of capital, lack of credit, and white terror, by 1910, southern blacks had acquired between sixteen and nineteen million acres of land, and nearly 17% of southern farm owners were black.<sup>127</sup> African Americans had turned to farming in the pursuit of their own agrarian dreams.<sup>128</sup> Thomas Mitchell concludes, "As much as any group of Americans in this nation's history, these landowners embraced the republican ideal of the rural smallhold and widely distributed ownership, and believed that only through such ownership could real economic and political independence be achieved."<sup>129</sup>

Yet, shortly after the end of the twentieth century, black farm operators as a group had lost more than 90% of the land that their predecessors had acquired.<sup>130</sup> The number of black farmers in the United States, who were largely concentrated in the South, peaked in 1920 at approximately 926,000; "between 1920 and 1969, there was a 90[%] decrease, and by 1997 a 98[%] decrease."<sup>131</sup> What happened? Although as Thomas Mitchell notes, there is a woeful lack of empirical research on the question,<sup>132</sup> the available evidence points to two factors over and above the macroeconomic conditions that contributed to the consolidation of many small farms: private land loss through partition sales and fraud, and credit discrimination perpetrated by the federal government itself through the USDA.<sup>133</sup>

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<sup>126</sup> *Id.* at 19 (citations omitted).

<sup>127</sup> SMITH, *supra* note 28, at 72; see also PETE DANIEL, DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN THE AGE OF CIVIL RIGHTS (2013); Pete Daniel, *African American Farmers and Civil Rights*, 73 J. SOUTHERN HIST. 3 (2007); Thomas Mitchell, *Destabilizing the Normalization of Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557 [hereinafter Mitchell, *Destabilizing*].

<sup>128</sup> For instance, some African Americans migrated to Kansas and Oklahoma after the Civil War to establish new black towns where they could live in peace. For more on these "Exodusters," so-called after the Biblical Exodus, see NELL IRVIN PAINTER, EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION (1986).

<sup>129</sup> Mitchell, *Reconstruction*, *supra* note 98, at 507.

<sup>130</sup> Spencer D. Wood & Jess Gilbert, *Returning African American Farmers to the Land: Recent Trends and a Policy Rationale*, REV. OF BLACK POL. ECON. 43, 44 (2000).

<sup>131</sup> *Id.*

<sup>132</sup> Mitchell, *Destabilizing*, *supra* note 127, at 569.

<sup>133</sup> For examples of the scholarly literature, see DANIEL, *supra* note 127, at 4-6; see also Rivers, *supra* note 117, at 9-34. The U.S. Commission on Civil Rights also authored a number of reports detailing the USDA's steadfast commitment to white supremacy. See, e.g., U.S. COMM'N. ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN FARM PROGRAMS: AN APPRAISAL OF SERVICES RENDERED BY AGENCIES OF THE UNITED STATES DEPARTMENT OF AGRICULTURE (1965), available at <http://www.federationsoutherncoop.com/pigford/research/US%20Commission%20on%20Civil%20Rights%201965.pdf>; U.S. COMM'N. ON CIVIL RIGHTS, THE DECLINE OF BLACK FARMING IN AMERICA (1982), available at <http://www.federationsoutherncoop.com/pigford/research/US%20Commission%20on%20Civil%20Rights%201982.pdf>; CIVIL

Mitchell notes that many small farms handed down through the generations in African-American families have been lost through partition. The problem, as Mitchell explains it, is twofold. “First, . . . rural African American landowners have tended not to make wills,” and under state intestacy laws, the result is often distribution of land ownership to several different relatives in the next generation, in the form of a tenancy in common.<sup>134</sup> Second, under the common law of real property:

Any tenant in common, whether a cotenant holding a minute interest or a substantial interest, may force a sale of the land, thereby ending the tenancy in common. Any cotenant may sell her interest to someone outside of the family or ownership group, bringing a stranger into the circle of cotenants, without seeking the consent of the other cotenants. Despite these broad powers, there are no corresponding obligations to contribute to the ongoing costs of maintaining the property.<sup>135</sup>

As Mitchell observes further, “Opportunistic lawyers and land speculators have taken advantage of these legal rules in order to force sales of black-owned land.”<sup>136</sup> In 2001, the Associated Press (AP) published a series of investigative articles examining the loss of black farmland tenure and uncovered a sad and horrific story of white violence and fraud aimed at dispossessing black farmers.<sup>137</sup>

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RIGHTS ACTION TEAM, CIVIL RIGHTS AT THE UNITED STATES  
DEPARTMENT OF AGRICULTURE (1997), available at <http://www.federationsoutherncoop.com/pigford/research/CRAAT%20Report%201997.pdf>.

<sup>134</sup> Mitchell, *Reconstruction*, *supra* note 98, at 507-08; see also Dolores Barclay et al., *Landownership Made Blacks Targets of Violence and Murder*, ASSOCIATED PRESS (Dec. 3, 2001), [http://theauthenticvoice.org/mainstories/tornfromtheland/torn\\_part2/](http://theauthenticvoice.org/mainstories/tornfromtheland/torn_part2/) (part of the Associated Press (AP) series, *Torn From the Land*).

<sup>135</sup> Mitchell, *Reconstruction*, *supra* note 98, at 508.

<sup>136</sup> *Id.*

<sup>137</sup> In an eighteen-month investigation, AP journalists discovered fifty-seven historic instances of violent land takings, along with fifty instances of takings by fraud and trickery. Barclay et al., *supra* note 134. One example is the case of Anthony P. Crawford, a black cotton farmer in Abbeville County, South Carolina. When Crawford, a prosperous farmer, hauled a load of cotton into the town of Abbeville on October 21, 1916, the AP reported:

While waiting his turn at the gin, . . . Crawford entered the mercantile store of W.D. Barksdale. Contemporary newspaper accounts and the papers of then-Gov. Richard Manning detail what followed: Barksdale offered Crawford 85 cents a pound for his cottonseed. Crawford replied that he had a better offer. Barksdale called him a liar; Crawford called the storekeeper a cheat. Three clerks grabbed ax handles, and Crawford backed into the street, where the sheriff appeared and arrested Crawford—for cursing a white man.

Released on bail, Crawford was cornered by about 50 whites who beat and knifed him. The sheriff carried him back to jail. A few hours later, a deputy gave the mob the keys to Crawford’s cell. Sundown found them at a baseball field at the edge of town. There, they hanged Crawford from a solitary Southern pine.

One reason for the loss of African American farms, then has been a combination of legal and extra-legal means through which the land itself has been lost.

In addition, those black farmers who did not suffer the loss of their land altogether labored in a hostile environment characterized by a dearth of financial and technical resources. One of the chief wrongdoers in this regard, ironically, was the very agency President Lincoln had called the “people’s department.”<sup>138</sup> According to scholarly reports and reports issued by federal civil rights investigators, throughout most of the twentieth century, the USDA steadfastly resisted the push for black civil rights, and instead worked to protect white supremacy in farming.<sup>139</sup> Pete Daniel notes that “black farmers faced their most debilitating discrimination during the civil rights era when laws supposedly protected them from racist policies. While white farmers also lost land, black farmers endured not only similar economic forces but also USDA racism.”<sup>140</sup> District Judge Paul L. Friedman, in his opinion in *Pigford v. Glickman*, the case in which USDA settled a racial discrimination class action brought against it, concurred that the USDA played a large part in the decimation of black farmers:

The Department itself has recognized that there has always been a disconnect between what President Lincoln envisioned as “the people’s department,” serving all of the people, and the widespread belief that the Department is “the last plantation,” a department “perceived as playing a key role in what some see as a conspiracy to force minority and disadvantaged farmers off their land through discriminatory loan practices.”<sup>141</sup>

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*Id.* As the AP journalists reported further, the reason for the lynching went deeper than a momentary dispute: “Crawford ‘seems to have been the type of negro who is most offensive to certain elements of the white people,’ Mrs. J.B. Holman would say a few days later in a letter published by The Abbeville Press and Banner. ‘He was getting rich, for a negro, and he was insolent along with it.’” *Id.* In the aftermath of the lynching, hundreds of black people fled Abbeville. Meanwhile, the AP reported:

Two whites were appointed executors of Crawford’s estate, which included 427 acres of prime cotton land. One was Andrew J. Ferguson, cousin of two of the mob’s ringleaders, the Press and Banner reported.

Crawford’s children inherited the farm, but Ferguson liquidated much of the rest of Crawford’s property including his cotton, which went to Barksdale. Ferguson kept \$5,438—more than half the proceeds—and gave Crawford’s children just \$200 each, estate papers show.

*Id.*

<sup>138</sup> U.S. DEP’T AGRIC., USDA CELEBRATES 150 YEARS, *supra* note 48.

<sup>139</sup> DANIEL, *supra* note 127, at 4.

<sup>140</sup> *Id.* at 5.

<sup>141</sup> *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999), *aff’d*, 206 F.3d 1212 (D.C. Cir. 2000), *enforcement denied sub nom*, *Pigford v. Schafer*, 536 F. Supp. 2d 1 (D.D.C. 2008). The court continued:

For decades, despite its promise that “no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to

Daniel notes that the key agencies providing technical knowledge and credit to farmers—including the Agricultural Stabilization and Conservation Service (ASCS), the Farmers Home Administration (FHA), and the Federal Extension Service<sup>142</sup>—were led by out-and-out bigots who were affronted by the mandate to desegregate their operations after the 1954 decision in *Brown v. Board of Education*.<sup>143</sup> At the county level, meanwhile, African-American farmers were denied loans and shut out of technical training by an informal, “old boys” system that rewarded white farmers over black and large farms over small. As the Civil Rights Action Team reported in 1997:

One example of a “broken” system is that field-level employees, those closest to farmers, often work under an incentive system that is adverse to serving minority and other small producers. Minority and small farmers said that their loans are processed too late, if at all, and that often, “the money is gone” by the time they are approved. Field employees’ performance ratings are often based on measurement systems that favor large, wealthy landowners. County loan officers are rewarded based on the total number of acres served by program dollars, for having low default rates, and for dispensing all of the funds allocated to them—a performance management system that rewards service to

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discrimination under any program or activity of an applicant or recipient receiving Federal financial assistance from the Department of Agriculture,” the Department of Agriculture and the county commissioners discriminated against African American farmers when they denied, delayed or otherwise frustrated the applications of those farmers for farm loans and other credit and benefit programs. Further compounding the problem, in 1983 the Department of Agriculture disbanded its Office of Civil Rights and stopped responding to claims of discrimination. These events were the culmination of a string of broken promises that had been made to African American farmers for well over a century.

*Id.*

<sup>142</sup> Pete Daniel explains the operations of these three agencies:

The Farmers Home Administration (FHA, later FmHA), the lender of last resort, disbursed credit, but not necessarily to the most needy. The Agricultural Stabilization and Conservation Service (ASCS) awarded acreage allotments (acreage ASCS committees assigned to farms based on their historical production), heard appeals, supervised conservation programs, and even approved some categories of loans. The segregated Federal Extension Service (FES) provided the latest information on relevant science and technology, organized and supervised 4-H clubs for youth, taught better farming techniques, and offered household advice through demonstration clubs for women. The county committees of these three powerful pseudo-democratic committees hired extension and home demonstration agents, controlled information, adjusted acreage allotments, disbursed loans, adjudicated disputes, and, in many cases, looked after family and friends.

DANIEL, *supra* note 127, at 5.

<sup>143</sup> *Id.* at 5-6.

large, financially sound producers while working against small and minority farmers.<sup>144</sup>

The *Pigford v. Glickman* litigation ended in one of the largest settlements in American history, and it was followed by similar legal actions on behalf of female, native American, and Hispanic farmers.<sup>145</sup> But it was too late for many black farmers. As the Civil Rights Action Team observed in its 1997 report,

[a]ccording to the most recent Census of Agriculture, the number of all minority farms has fallen—from 950,000 in 1920 to around 60,000 in 1992. For African Americans, the number fell from 925,000, 14[%] of all farms in 1920, to only 18,000, 1[%] of all farms in 1992.<sup>146</sup>

The combination of private partition actions and a history of fraud, terror, and government discrimination had displaced thousands of black farmers from the land.

B.

As we saw in Part I, the original source of the American agrarian ideal—the Christian recovery narrative—looks to the combination of ownership of the land and labor on the land as crucial for the creation of a new Eden. The belief that farm work instills virtue is also visible, in more secular form, in later texts on farming. It appears, for instance, in Aldo Leopold’s famous articulation of a “land ethic,” which he proposed in 1948.<sup>147</sup> Under Leopold’s land ethic, the boundaries of the ethical community should be enlarged to include not only humans, but also plants, animals, and the land itself.<sup>148</sup> Among contemporary

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<sup>144</sup> CIVIL RIGHTS ACTION TEAM, CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE, *supra* note 133, at 8.

<sup>145</sup> See Stephen Carpenter, *The USDA Discrimination Cases: Pigford*, In re Black Farmers, Keepseagle, Garcia, and Love, 17 DRAKE J. AGRIC. L. 1 (2012); see also Spencer D. Wood & Jess Gilbert, *Returning African American Farmers to the Land: Recent Trends and a Policy Rationale*, 27 REV. BLACK POL. ECON., 43, 43-44 (2000), available at [http://www-personal.ksu.edu/~sdwood/RBPE\\_Official\\_Jrnl\\_Copy.pdf](http://www-personal.ksu.edu/~sdwood/RBPE_Official_Jrnl_Copy.pdf).

<sup>146</sup> CIVIL RIGHTS ACTION TEAM, CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE, *supra* note 133, at 14.

<sup>147</sup> Aldo Leopold writes:

Perhaps the most serious obstacle impeding the evolution of a land ethic is the fact that our educational and economic system is headed away from, rather than toward, a [sic] intense consciousness of land. Your true modern is separate from the land by many middlemen, and by innumerable physical gadgets. He has no vital relation to it; to him it is the space between cities on which crops grow. Turn him loose for a day on the land, and if the spot does not happen to be a golf links or a ‘scenic’ area, he is bored stiff. If crops could be raised by hydroponics instead of farming, it would suit him very well. Synthetic substitutes for wood, leather, wool, and other natural land products suit him better than the originals. In short, land is something he has ‘outgrown.’

LEOPOLD, *supra* note 27, at 223-24.

<sup>148</sup> See *Leopold’s Land Ethic*, ALDO LEOPOLD FOUNDATION, <http://www.aldoleopold.org/AldoLeopold/LandEthic.pdf> (last visited July 24, 2015).

writers on farm life, Wendell Berry similarly extols the virtue of labor on the land, seeing farming as a means of sustaining healthy social, political, and cultural institutions, as well as a means for sustaining the life and health of the land itself.<sup>149</sup>

Although rooted in a venerable tradition, Leopold's and Berry's defenses of agrarian life are written in resistance to an equally American ideology: a purely instrumental, reductionist, and economic view of land and farming, accompanied by contempt for manual labor and those who perform it. This commitment to what Berry calls "the kingdom of efficiency and specialization"<sup>150</sup> has triumphed in American farming; it is the ethic of industrial agriculture. From its very beginnings in the South and the West, moreover, large-scale agricultural production as an exercise in efficiency and specialization has depended on low-cost and degraded labor, and racism has played an important role in keeping farm laborers cheap and disposable. The flip side of the whitening of farm ownership in the United States is the racialization and degradation of the lowest rung of farm labor.<sup>151</sup>

The most infamous use of racialized unfree labor in agriculture in the United States, of course, is chattel slavery. Slave labor was crucial to the production of indigo, rice, tobacco, and especially cotton in the South.<sup>152</sup> As

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<sup>149</sup> See WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE* 9, 130-31 (1977). Berry puts it this way: "But character and community—that is, culture in the broadest, richest sense—constitute, just as much as nature, the source of food. Neither nature nor people alone can produce human sustenance, but only the two together, culturally wedded." *Id.* at 9.

<sup>150</sup> Wendell Berry, *Discipline and Hope*, in *A CONTINUOUS HARMONY: ESSAYS CULTURAL AND AGRICULTURAL* 88, 93 (1970).

<sup>151</sup> Wendell Berry puts this point brutally:

The growth of the exploiters' revolution on this continent has been accompanied by the growth of the idea that work is beneath human dignity, particularly any form of hand work. We have made it our overriding ambition to escape work, and as a consequence have debased work until it is only fit to escape from. We have debased the products of work and have been, in turn, debased by them. Out of this contempt for work arose the idea of the nigger: at first some person, and then some thing, to be used to relieve us of the burden of work. If we began by making niggers of people, we have ended by making a nigger of the world.

BERRY, *supra* note 149, at 12.

<sup>152</sup> SMITH, *supra* note 28, at 17. Sven Berckert argues that slave labor was crucial to large-scale cotton production in the eighteenth-century Atlantic world:

Slavery . . . was as essential to the new empire of cotton as proper climate and good soil. It was slavery that allowed these planters to respond rapidly to rising prices and expanding markets. Slavery allowed not only for the mobilization of very large numbers of workers on very short notice, but also for a regime of violent supervision and virtually ceaseless exploitation that matched the needs of a crop that was, in the cold language of economists, "effort intensive."

SVEN BECKERT, *EMPIRE OF COTTON: A GLOBAL HISTORY* 91 (2014).

Smith observes, antebellum southern agrarians argued that slavery was “essential to creating a virtuous citizenry capable of republican government because it relieved the political class from the degrading effects of manual labor.”<sup>153</sup> For northern agrarians, however, the separation of ownership and labor that the slave system signified was dangerous to democracy. Anti-slavery writers such as Hector St. John Crèvecoeur argued that when citizens become so prosperous that they are able to stop working, they “suffer moral degeneration as a result of idleness and luxury. The citizens, thus degraded, trade independence for the opportunity to indulge their thirst for domination, leading to social inequality, slavery, and tyranny.”<sup>154</sup>

In an address to the Wisconsin State Agricultural Society three years before the official establishment of the USDA, President Lincoln examined these competing versions of agrarianism by contrasting two perspectives on labor: the “Mud-Sill” theory and the “Free Labor” theory.<sup>155</sup> On the one hand, Lincoln suggested, was the view that people only labor under coercion: “that nobody labors, unless somebody else, owning capital, somehow, by the use of that capital, induces him to do it.”<sup>156</sup> Lincoln suggested that under this “mud-sill” theory, once induced either by the promise of wages or the threat of the lash to labor, a laborer would be a laborer for life.<sup>157</sup> According to mud-sill theory, he continued, “the education of laborers, is not only useless, but pernicious, and dangerous.”<sup>158</sup>

In contrast to mud-sill theory, Lincoln identified a “Free Labor” view, under which no one is destined by nature to be nothing but a laborer.<sup>159</sup> According to this view, manual labor should not be seen as the special province of a lower class of people, and education should be seen as potentially useful and beneficial to all.<sup>160</sup> Farming, Lincoln argued, demonstrated the falsity of the assumption that people are either capitalists or laborers.<sup>161</sup> Calling on the familiar rhetoric of the yeoman farmer, he noted that on small farms in the free states, “Men, with their families—wives, sons and daughters—work for themselves, on

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<sup>153</sup> SMITH, *supra* note 28, at 44.

<sup>154</sup> *Id.* at 45.

<sup>155</sup> President Abraham Lincoln, Address Before the Wisconsin State Agricultural Society (Sept. 30, 1859), <http://www.abrahamlincolnonline.org/lincoln/speeches/fair.htm> [hereinafter Lincoln’s Speech].

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* Lincoln continued dryly:

In fact, it is, in some sort, deemed a misfortune that laborers should have heads at all. Those same heads are regarded as explosive materials, only to be safely kept in damp places, as far as possible from that peculiar sort of fire which ignites them. A Yankee who could invent [a] strong *handed* man without a head would receive the everlasting gratitude of the ‘mud-sill’ advocates.

Lincoln’s Speech, *supra* note 155.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

their farms, in their houses and in their shops, taking the whole product to themselves, and asking no favors of capital on the one hand, nor of hirelings or slaves on the other.”<sup>162</sup>

Although Lincoln tactfully did not declare his own preference between the two theories, he expressed the assumption that his audience, “the people of Wisconsin [,] prefer[red] free labor, with its natural companion, education.”<sup>163</sup> Nevertheless, by the time he gave this speech, the practice of slavery—justified by the mud-sill theory—had resulted in the explosive birth of a form of political economy that had transformed the globe.<sup>164</sup> Sven Beckert argues that the cotton industry was the vehicle for a radical global reorganization of political and economic power, which set the stage for industrial capitalism and the world as we know it today.<sup>165</sup> He also argues that slavery was the “beating heart” of this global system:

The deportation of many millions of Africans to the Americas intensified connections to India because it increased pressure to secure more cotton cloth. It was that trade that established a more significant European mercantile presence in Africa. And it was that trade that made it possible to give economic value to the vast territories captured in the Americas, and thus to overcome Europe’s own resource constraints. This multifaceted system certainly showed variation and changed over time, but it was sufficiently different from the world that came before and the world that would emerge from it in the nineteenth century that it deserves its own name: war capitalism.<sup>166</sup>

Moreover, neither passage of the Thirteenth Amendment,<sup>167</sup> nor the eventual shift from Beckert’s “war capitalism” to a capitalism managed through

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> BECKERT, *supra* note 152, at xv-xvi (arguing that capitalism was born, not in the Industrial Revolution, but in the sixteenth century, through the violent expropriation of land and labor in Africa and the Americas).

<sup>165</sup> *Id.* at 29-31. Beckert explains:

European capitalists and rulers altered global networks through multiple means. The muscle of armed trade enabled the creation of a complex, Eurocentric maritime trade web; the forging of a military-fiscal state allowed for the projection of power into the far-flung corners of the world; the invention of financial instruments—from marine insurance to bills of lading—allowed for the transfer of capital and goods over long distances; the development of a legal system gave a modicum of security to global investments; the construction of alliances with distant capitalists and rulers provided access to local weavers and cotton growers; the expropriation of land and the deportation of Africans created flourishing plantations. Unbeknownst to contemporaries, these alterations were the first steps toward the Industrial Revolution.

*Id.* at 30-31.

<sup>166</sup> *Id.* at 37-38.

<sup>167</sup> U.S. CONST. amend. VIII.

legal and social norms, ended the exploitation of black labor in American agriculture. In a bitter example of “preservation through transformation,”<sup>168</sup> white planters were able to maintain their control over black farmworkers well into the 1940s. As we have seen, one cause was the failure of Reconstruction elites to provide the former slaves with their own lands to till.<sup>169</sup> Possessing only their labor, most black people in the South had no choice but to continue laboring for whites under arrangements known as tenant farming or sharecropping. As Risa Goluboff explains:

White planters desired cheap and docile labor while black farmworkers wanted financial and physical independence. The tenancy system that developed facilitated white economic exploitation of black farmworkers while simultaneously making black land ownership a distant possibility. As tenant farmers, and more frequently sharecroppers, many African Americans lived on the land of a (usually white) landowner. Cash tenant farmers paid the landlord with money made from the crop while other types of tenants and sharecroppers paid with a share of the crop. Those who could not even afford such arrangements or preferred mobility to potential advancement worked as wage laborers. They had no stake in the land they tilled and even less hope of eventually owning their own land.

Planters tried to ensure that tenant farmers, sharecroppers, and wage laborers lived within a closed economic universe. They wanted black farmworkers to spend what little money they had in plantation commissaries or in stores that took advantage of their lack of mobility, choice, and contact with the outside world. Planters made every effort

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<sup>168</sup> See Reva Siegel, *Why Equal Protection No Longer Protects*, 49 STAN. L. REV. 1112, 1113 (1997).

<sup>169</sup> See *supra* Part I. By the late nineteenth century, many black people despaired of ever being able to live in freedom with dignity and self-determination in the former slave states. As Nell Painter explains:

Throughout the entire nineteenth century, the Black population drifted southwest, and the pace quickened in the 1870s. Migrating Blacks attracted newspaper attention, particularly as they left Georgia and Alabama for Mississippi and Louisiana, and Tennessee for northern Mississippi and Arkansas. Texas, too, received large numbers of Blacks from the nearby states of Louisiana and Mississippi. Families moving across county lines or men traveling across state lines with labor contractors were the basic units of this overall southwesterly trend. Although most migrants stayed within the South, the prospect of leaving the region entirely for truly free soil fired the imaginations of Blacks who realized that their oppression was inextricably bound up with Southern or perhaps American life.

PAINTER, *supra* note 128, at 137 (citations omitted). Some Black people sought to emigrate to Liberia, but the largest migration from the South was the Kansas Fever Exodus of 1879, in which, terrified by deepening racial violence and disenfranchisement, “some six thousand Blacks” emigrated “from Louisiana, Mississippi, and Texas to Kansas in the space of a few months.” *Id.* at 184 (citations omitted).

to keep both tenants and wage laborers in debt. Most renters of any type rarely had the cash necessary to buy the seeds, fertilizer, storage space, or tools they would need for the coming season. They had to rely on their landlords or other local white landowners or merchants to “furnish” some or all of these things. The rates at which they repaid the loans after harvest were usually exorbitant and nonnegotiable. Sharecroppers were often so far into debt by harvest time that their share of the crop could not even cover the prior season’s debt, let alone provide enough capital to forego debt for the coming season. Debt prevented renters from gaining financial independence and land ownership, and it undermined wage laborers’ and tenants’ physical independence and ability to choose their work. Although the Supreme Court had repeatedly outlawed such peonage—whereby employers forced workers to work out their debts—the practice persisted into the 1940s.<sup>170</sup>

As scholars have detailed, white southern agriculturalists, worried about preserving this low-wage, disempowered labor pool, succeeded in cutting farmworkers out of New Deal protections.<sup>171</sup> Legally, then, the legacy of slavery continued to haunt the political economy of southern agriculture well into the twentieth century.

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<sup>170</sup> Risa L. Goluboff, *Race, Labor, and the Thirteenth Amendment in the 1940s Department of Justice*, 38 U. TOL. L. REV. 883, 887-88 (2007). Goluboff notes that in addition to the economic coercion of debt, planters used statutory law to limit African-American farm workers’ mobility:

The roots of many such laws went all the way back to the post-Civil War Black Codes, though their overtly racial character had long been eliminated by 1940. Hitchhiking laws, for example, curtailed mobility by eliminating a critical, free mode of transportation. Emigrant agent licensing laws limited information flows by requiring labor recruiters to pay often exorbitant amounts for the opportunity to recruit labor in southern states. Some states, like Virginia, required agents soliciting on behalf of employers outside the state to pay \$5000 per year for each county or city in which they operated. Alabama went even further, requiring the same amount not only for counties in which an agent operated, but those through which he transported workers. Similarly, “anti-enticement” laws, which southern states also kept on the books into the 1940s, made it a crime for an employer to entice a laborer away from his or her current employment.

Risa L. Goluboff, “*We Live’s in a Free House Such As It Is*”: *Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977, 1982-83 (2003).

<sup>171</sup> See William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001); see also Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 (1987) (explaining that excluding farm workers was routine in New Deal legislation because in order to pass New Deal reforms, President Roosevelt needed to “compromise with southern congressmen”); Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion From the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96 (2011).

Meanwhile, in the American West, and later on a national level, the lowest rung of farm work similarly became reserved for *degraded labor*: jobs thought of as not fit for white people. In his famous exposé of California labor relations, *Factories in the Field*, Carey McWilliams argues that industrialized agriculture would never have taken root but for the confluence of large landholdings and the availability of cheap labor.<sup>172</sup> As Steven Stoll notes, California's industrial agriculture began with the determination to specialize in a single crop, taking advantage of Ricardo's principle of comparative advantage.<sup>173</sup> Specialization meant, in turn, that the need for farm labor varied wildly over the course of a season: many hands were needed all at once for the harvest, but a farm could not support that many workers for the entire year. Planters thus needed many farm workers, but farm workers who were transient and, preferably, cheap.

This cheap farm labor had at first been extracted from California Indians. Upon statehood, in its first legislative session in 1850, for instance, the California Legislature passed an Act for the Protection and Government of Indians, which permitted planters to appropriate the labor of Indian children and adults upon "permission" of a child's parent or guardian, or a showing that an adult was a "vagrant."<sup>174</sup> In making semi-coerced Indian labor available cheaply, California was following the example of the Spanish missionaries and agriculturalists—who had similarly exploited Indian labor.<sup>175</sup>

The Indian population, however, was dwindling, and the Gold Rush demanded a deeper labor pool. Thus began a long history under which a series of immigrant groups, mostly racialized as non-white, were tapped to serve the purpose of providing cheap labor; as each group gained economic power and political organization, it was swapped out for a newer, more powerless group.<sup>176</sup> Stoll observes that for a time, after California workingman's parties succeeded in pressuring Congress to pass the Chinese Exclusion Act,<sup>177</sup> growers were hopeful that white people would take up harvest work.<sup>178</sup> It soon became clear, however,

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<sup>172</sup> MCWILLIAMS, *supra* note 103, at 103.

<sup>173</sup> STOLL, *supra* note 50, at 21-23 (explaining how California agriculturalists in the early twentieth century began to study Ricardo's economic theories, concluding that "[c]ultivation close to regional natural advantages promoted the most efficient use of land, effort, and capital, resulting in larger harvests, lower costs, more food, and more affluent farmers").

<sup>174</sup> Act of April 22, 1850, Cal. Stat. ch. 133, *repealed by* Cal. Welf. & Inst. Code of 1937, ch. 269 § 20,000. This type of vagrancy statute has a long history, being modeled on fourteenth-century English legislation written for the very same purpose—preventing the free migration of peasants and appropriating their labor in the wake of the Black Death. See Caleb Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L. REV. 603, 615 (1956).

<sup>175</sup> See RICHARD STEVEN STREET, *BEASTS OF THE FIELD: A NARRATIVE HISTORY OF CALIFORNIA FARMWORKERS, 1769-1913* (2004).

<sup>176</sup> *Id.* at XV-XVI ("Appearing at the drop of a hat, dismissed with the flick of a finger, and employed in a glutted labor market, farmworkers were channeled through the landscape as routinely as if sending irrigation water down the furrows of a field.").

<sup>177</sup> Chinese Exclusion Act of 1882, ch. 126; 22 Stat. 58. (1882).

<sup>178</sup> See, e.g., STOLL, *supra* note 50, at 134 (describing an 1883 speech by the President of the California State Agricultural Society, Hugh LaRue, calling white people to come to

that whites had other options besides backbreaking, low-wage labor with little hope of advancement.<sup>179</sup> California fruit growers, thus, slowly but surely, became hooked on the labor of racialized immigrant groups—groups without other economic options, groups with little political power, and groups easily racially stigmatized as lazy, needing high levels of direction but little in the way of sanitation or wages, and unfit for owning farms themselves.<sup>180</sup> Along the way, Stoll argues, the work itself became understood as degraded, rather than ennobling as in the agrarian myth.<sup>181</sup> By the beginning of the twentieth century, he notes, “Some called farmwork unworthy of white people, concluding that it demanded certain tasks that ‘white labor ought not to be asked to do.’”<sup>182</sup> Lincoln’s “mud-sill” theory had triumphed in the West as well as the South.

By the mid-twentieth century, Mexico became the most reliable and enduring source of immigrants to perform degraded farm work. During World War I, growers turned once again to Congress—this time to plead for immigrant labor rather than to demand its exclusion.<sup>183</sup> In 1917, the federal Department of Labor responded to farmers’ cries that a labor shortage was at hand by authorizing a war measure under which Mexican nationals could enter the United States without a head tax or a literacy test if they agreed to take up agricultural work.<sup>184</sup> Stoll observes, “Law and authority so utterly circumscribed their status in the United States that if these immigrants took employment outside of agriculture they could be arrested and deported.”<sup>185</sup> Despite its being passed strictly as a wartime measure, the policy outlasted the war; indeed, it formed the basis of a web of bureaucratic and legislative tissue linking western agriculture—and eventually farmwork across the nation—especially to Mexico

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California and become farm laborers, taking up the jobs left by the exclusion of Chinese immigrants).

<sup>179</sup> *Id.* at 136 (noting that white workers could, and did, leave farm work for better-paying railroad and industrial jobs).

<sup>180</sup> *See id.* at 151 (describing stereotypes extant in the 1930s about Mexicans as a “hereditary serving class”); *id.* at 152 (“California fruit growers had accepted the idea that cheap labor of any color was preferable to expensive and insubordinate white labor.”).

<sup>181</sup> *Id.* at 124 (“Fruit growers sought a commodity they called ‘cheap labor,’ composed of people who worked in heat, slept in filth, took what wages were given, cost next to nothing to keep, and returned the next year for the same treatment. . . . The controversy over race and the falling status of rural labor coincided with the gradual realization on the part of growers that specialized horticulture demanded a detestable kind of work. Cheap labor evolved to the point that it finally defined anyone with no other options in the economy.”).

<sup>182</sup> STOLL, *supra* note 50, at 141.

<sup>183</sup> *Id.* at 150.

<sup>184</sup> *Id.*; see also Lauren Gilbert, *Fields of Hope, Fields of Despair: Legisprudential and Historic Perspectives on the Agjobs Bill of 2003*, 42 HARV. J. ON LEGIS. 417, 426 (2005).

<sup>185</sup> *Id.* at 150.

and Central America. The formal “Bracero” program was supplemented by informal employer recruitment in Mexico.<sup>186</sup>

Today, labor is intensely racialized in every phase of the food system, from production to processing to distribution to retail. For instance, a 2011 study by the Applied Research Center, *The Color of Food*, found that people of color are overrepresented in food production and processing, jobs that are typically low-paying, lack benefits, involve hazardous working conditions, and are not unionized.<sup>187</sup> The most intensely racialized job category was grading and sorting farm products, where over 83% of workers were people of color and 70% of the work force was Latino.<sup>188</sup> In food processing, people of color outnumbered white workers in all job categories except the highest-paying one (food machine operator).<sup>189</sup> Even where not overrepresented, people of color typically made less money than whites performing the same job.<sup>190</sup>

More overt than race today in producing a “mud-sill” class stuck in the most arduous and least rewarding niches of agricultural work is a globalized labor market that ensures a steady stream of poor people from the global South to the United States to do work in harvesting and processing. In her study of poultry processing in the contemporary United States, for example, Charlotte Alexander observes:

[I]mmigrant workers hold between twenty-five and sixty percent of peripheral [defined as low-wage, low-security, and high-turnover] poultry jobs. Large numbers of workers are undocumented, having crossed the border without authorization or overstayed a visa. These workers come primarily from Mexico and Guatemala, but also from countries as dispersed as Laos, Haiti, the Marshall Islands, Somalia, and Burma. The labor market for peripheral poultry jobs is therefore

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<sup>186</sup> Fred Krissman, Ph.D., Center for US-Mexican Studies, Apples and Oranges?: Recruiting Indigenous Mexicans to Divide Farm Labor Markets in the Western US 1-4 (Oct. 11, 2002) (transcript available in the University of California, Santa Cruz, library).

<sup>187</sup> According to this study:

People of color are employed in low-wage sectors at higher rates than their numbers in the general population. According to the 2008 American Community Survey, 34.6% of the general population are people of color. However, they made up 50% of food production workers and 45% of the food processing sector. On the flip side, although whites make up 65% of the general population, only 50% of food production workers, 55% of food processing workers, and 58% of food service workers are white. More whites are employed in food distribution, which pays a median wage of \$37,273, an income higher than what half of food workers make.

YVONNE YEN LIU & DOMINIQUE APOLLON PH.D., *THE COLOR OF FOOD* 12 (2011), available at [http://foodchainworkers.org/wp-content/uploads/2011/05/Color-of-Food\\_021611\\_F.pdf](http://foodchainworkers.org/wp-content/uploads/2011/05/Color-of-Food_021611_F.pdf).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

transnational, drawing from a worldwide pool of immigrant workers to meet poultry firms' labor demands.<sup>191</sup>

Because poultry processors can draw on a transnational labor market, Alexander explains, companies have access to an almost unlimited labor supply;<sup>192</sup> immigrant workers are willing to tolerate very low wages and poor working conditions because their reference point is a poorer country than the United States<sup>193</sup> and because complaining may lead to deportation or blacklisting of the individual's family and friends;<sup>194</sup> and immigrants often lack knowledge of their legal rights—and may not be covered by labor laws in any case.<sup>195</sup>

This phenomenon, seemingly driven by international economic relations, is not unrelated to race. Nancy Ehrenreich and Beth Lyon argue that the contemporary expansion of industrial agriculture to the developing world exacerbates inequalities that originated in colonial exploitation.<sup>196</sup> They argue that trade liberalization policies, which allow countries in the global North to produce agricultural products more cheaply than the global South, have the effect of destroying subsistence production in the South.<sup>197</sup> As small farmers lose their agricultural livelihoods, they migrate to urban areas in search of work, and many migrate across national borders into the global North, forming the transnational labor pool available to United States growers and processors.<sup>198</sup> Despite vigorous efforts to organize farm work undertaken by the United Farmworkers and by worker centers such as the Coalition of Imokalee

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<sup>191</sup> Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. 353, 371 (2012) (citations omitted).

<sup>192</sup> *Id.* at 372 (noting that processing companies can tolerate an extremely high level of turnover because poultry processing requires very little skill or training and “the entire developing world, populated by millions of potential peripheral poultry workers, provides a seemingly inexhaustible labor supply”).

<sup>193</sup> *Id.* at 374-75.

<sup>194</sup> *Id.* at 377.

<sup>195</sup> *Id.* at 379-83.

<sup>196</sup> Nancy Ehrenreich & Beth Lyon, *The Global Politics of Food: A Critical Overview*, 43 U. MIAMI INTER-AM. L. REV. 1 (2011). Ehrenreich and Lyon argue:

During the colonial era, European and North American powers forcibly extracted humans (chattel slaves from Africa, severely exploited workers from Asia, etc.) and natural resources (for example gold, ivory, and minerals) from less powerful nations around the world, effecting a radical redistribution of wealth and resources. Through those extractions, they destroyed indigenous societies and exterminated indigenous peoples. Today, economies of the Global North are appropriating the food crops that have formed the very foundation of the subsistence food systems in Mexico and elsewhere for centuries.

*Id.* at 14-15 (citations omitted).

<sup>197</sup> *Id.* at 17. For a similar argument using Mexico under the North American Free Trade Agreement (NAFTA) as an example, see Carmen G. Gonzalez, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms*, 32 U. PA. J. INT'L L. 723 (2011).

<sup>198</sup> Ehrenreich & Lyon, *supra* note 196, at 17-18.

Workers,<sup>199</sup> the lowest rungs of agricultural labor remain degraded today. Ehrenreich and Lyon note:

Farmworkers still have no federal right to overtime pay, and nonpayment of wages owed is a recurring problem in the farm fields of the nation. Working conditions in the fields of industrial agriculture include daily exposure to harmful pesticides and fertilizers, heat exhaustion and dehydration, grueling repetitive motion labor, and piece-work pay rates that induce rushed, unhealthy body movements. In addition, as factory farming practices become predominant throughout the U.S., laborers working in the animal farming industry experience worsened working conditions as well. Such conditions include exposure to huge quantities of manure which can have a variety of health effects including nausea and severe headaches.<sup>200</sup>

### Conclusion

In her book on African American environmentalism, Kimberly Smith quotes the black leader Eldridge Cleaver, who in a 1968 speech declared:

[B]lack people learned to hate the land. From sunup to sundown, the slaves worked the land: plowing, sowing and reaping crops for somebody else, for profit they themselves would never see or taste. . . . [B]lacks . . . have come to measure their own value according to the number of degrees they are away from the soil.<sup>201</sup>

Two decades ago, in my first conversation with Carl Anthony, the founder of Urban Habitat, he spoke somewhat differently about the relationship between African Americans and the environment, as one of loss and alienation. To Anthony, that environmentalism, for many American black people, was perceived as a “white thing” and represented not only a missed opportunity for the environmental movement, but an unhealed wound in African American memory. We were people who knew the land intimately, he reminded me. Where did that knowledge go?

What he said made me remember the shadows of whiteness over the landscape of my own childhood. I grew up with the children of farmers in a small Ohio town, but the farmers’ kids were all white. The black kids’ parents mostly worked for the local Air Force base, like my dad. No black kid I knew had

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<sup>199</sup> For an overview of the United Farmworkers, the Coalition of Imokalee Workers, and other organizations devoted to organizing workers along the contemporary food chain, see Jordan DeLano, ¿Si se Puede?: Organizing Workers Along the Food Supply Chain: Comparing the Strategies and Tactics of Worker Centers and Unions (Apr. 19, 2013) (unpublished student thesis, Occidental College), *available at* <https://www.oxy.edu/sites/default/files/assets/UEP/Comps/2012/2013/DeLano%20FINAL%20DRAFT%20April%202019.pdf>.

<sup>200</sup> Ehrenreich & Lyon, *supra* note 196, at 18-19 (citations omitted).

<sup>201</sup> SMITH, *supra* note 28, at 187 (quoting ELDRIDGE CLEAVER, *THE LAND QUESTION AND BLACK LIBERATION* (1976)).

agrarian dreams. From my father and my father's father, I sometimes heard stories about farm life in Virginia, where that side of the family had roots. But the funny stories about close encounters with chickens were overshadowed by a darker story about the time my grandfather, still a child, saw a dead black man, noose around his neck, hanging from a tree. My father's side of the family, like so many other black people, left the country. They reinvented themselves in the city, working in Philadelphia as domestics and janitors to begin the long, multi-generational climb into the new middle class. In this last Part of the Essay, I ponder what has been lost through the racialization of farming in the United States and imagine what might yet be gained through farming's reintegration.

What has been lost in the racialization of farming? Of course, there are the losses experienced by those non-white farmers who lost their land or never had the chance to own land in the first place. The losses of the Indian nations are largely incalculable, especially for those nations "removed" from their land. Even within the framework of the United States' national project, however, the losses have been immense. To the extent that the agrarian ideal has a kernel of reality, the goods of independence, dignity, and civic virtue supposed in republican theory to be connected to land ownership have been disproportionately denied to non-whites.<sup>202</sup> To the extent that farming has been bound up with citizenship, moreover, its whitening also represents a distinctive loss—the failure to extirpate racism from theories of political belonging and to build instead what the philosopher Charles Mills calls a "second-best" theory of justice, or justice that takes as its starting point prior injustice, and the need to acknowledge and make reparation.<sup>203</sup>

Wendell Berry's book on racism, *The Hidden Wound*, speaks of white supremacy as a wound festering within white society, a wound caused by the knowing complicity of people committed to love and justice with violence and evil.<sup>204</sup> In his view, the first step to treating this wound is to recognize that it exists, and that task begins with memory.<sup>205</sup> Berry examines his own family history of slaveholding and details how Christian preachers, local historians, his own relatives, and he himself learned to compartmentalize, ignore overly inconvenient truths, and generally reconcile themselves with being the cause of suffering.<sup>206</sup> The task of giving up denial is not only for the descendants of slaveholders, but for all Americans. As one critic puts it:

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<sup>202</sup> In his study of Roanoke Farm, a black farming cooperative established in the New Deal Era, Thomas Mitchell argues that although the project did not last, its benefits were real and lasting for those families who participated. Mitchell, *Destabilizing*, *supra* note 127.

<sup>203</sup> See generally CAROLE PATEMAN & CHARLES MILLS, *CONTRACT AND DOMINATION* 1-133 (2007) (challenging contemporary contract theory as requiring either fundamental changes or total abandonment because it grossly neglects racial justice, and arguing for reparation to African Americans by means of a non-ideal contract).

<sup>204</sup> See WENDELL BERRY, *THE HIDDEN WOUND* 4 (2010).

<sup>205</sup> See *id.*

<sup>206</sup> *Id.*

Remembering is, in this sense, not a spectator sport, but requires our participation. This participation often has the effect of drawing us up into larger histories and memories than the local ones with which we began, precisely because our local history already is complicit with these larger stories. So, insofar as one is born on and nourished daily by the land that is America, the same land whose wealth in Lincoln's time—and so also even yet today in our own—was “piled by the bondsman's two hundred and fifty years of unrequited toil, then the remembering is also not only participatory but required for all who continue to live upon this land. If you are an American you are obliged to know and care about American slavery and its deep and scarring effects.”<sup>207</sup>

The infusion of white supremacy into the agrarian ideal has also meant the loss of a more capacious ideal concerning the relationship of people to the land. Kimberly Smith argues that the black agrarians of the nineteenth century held a perspective on the environment that was shaped far more by farming than from the ideal of unpeopled wilderness that so influenced the early American conservation movement.<sup>208</sup> Black-American thought emphasizes that human political and civil freedom are necessary for a healthy relationship with the land. Black environmental thinkers, Smith argues, also have had something to contribute to the conception of environmental stewardship:

This tradition emphasizes that individuals are embedded in communities, so that individual action always takes place within a social context. . . . One's proper relationship to the natural environment is therefore best understood as response rather than mastery: individual action is a response (emotionally and intellectually as well as physically) to a natural world that ongoing cultural practices have already funded with meaning.<sup>209</sup>

As Carolyn Merchant argues, environmental protection and civil rights movements have proceeded on separate tracks in the United States, the connections between these projects hidden.<sup>210</sup> In the 1980s, however, the American Environmental Justice Movement emerged as a reaction to the focus of mainstream environmentalists on the conservation of wilderness spaces and their relative lack of interest in the often urban environments within which people of color live, work, and play.<sup>211</sup> Environmental justice advocates insisted that issues of race and social justice be incorporated into environmentalism. For

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<sup>207</sup> Charles R. Pinches, *Stout, Hauerwas, and the Body of America*, 8 *POL. THEOLOGY* 9, 27 (2007).

<sup>208</sup> Smith, *supra* note 28.

<sup>209</sup> Smith, *supra* note 28, at 72-73.

<sup>210</sup> See Carolyn Merchant, *Shades of Darkness: Race and Environmental History*, 8 *ENV. HIST.* 380 (2003).

<sup>211</sup> See LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 20 (2001).

the most part, however, environmental justice advocates saw themselves as fighting a reactive battle against environmental “bads” rather than the desire for access to environmental “goods.”<sup>212</sup> The first wave of environmental justice advocacy was directed toward the disproportionate siting of locally unwanted land uses, such as hazardous waste facilities, landfills, and facilities generating air and water pollution in disproportionately poor black and brown communities.<sup>213</sup> Although the *Principles of Environmental Justice*, agreed to by movement participants in the 1991 summit, demanded sovereignty for Indian nations and respect for “mother earth,”<sup>214</sup> the desire for deeper connections to land has only recently begun to emerge as an issue.

The history in the previous Section suggests that for people of color, there are still other losses to unpack in addition to the harms caused by proximity to toxic waste dumps. Sociologists have coined the apt term “root shock” to describe the trauma suffered individually and collectively by displaced peoples.<sup>215</sup> The original forced dispossession of Indian nations and enslaved Africans from the lands they considered themselves to be part of caused a root shock that has rippled down the generations. Since that time, African Americans and Indians have both been pushed and have pulled themselves away from the land, embarking on great migrations to the cities and becoming isolated from the country people left behind. The quest for sovereignty keeps the land alive for native peoples. For the descendants of slaves today, the demand for land is no longer at the forefront of political struggle.<sup>216</sup> But farming and food have emerged again as live issues for black people through the community food security movement.

Twenty years after my conversation with Carl Anthony, African Americans and other people of color are pouring back into farming. According to the USDA, from 1982 to 2007, “the number of non-White [farm] operators grew by two-thirds, women operators more than doubled, and Hispanic operators more than tripled.”<sup>217</sup> “Overall, 6.5% of U.S. farms in 2007 were run by [minorities], up from 3% in 1982.”<sup>218</sup> But these are not Grant Wood’s farms. Many of these farms are very small, and many are located in cities. Urban agriculture is often promoted on public health grounds as an answer to the problem of “food

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> See *Principles of Environmental Justice*, EJNET.ORG, <http://www.ejnet.org/ej/principles.html> (last visited July 24, 2015).

<sup>215</sup> MINDY THOMPSON FULLILOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* 20 (2005).

<sup>216</sup> But see the Republic of New Afrika, which sought to establish sovereign territory for black people in the former slave states where black labor was the most thoroughly mixed with the earth.

<sup>217</sup> U.S. DEP’T OF AGRIC. ECON. RESEARCH SERV., *THE CHANGING ORGANIZATION OF FARMING*, *supra* note 4, at 8.

<sup>218</sup> *Id.*

deserts” and chronic disease in black and brown communities.<sup>219</sup> But urban agriculture also may open a new chapter in the United States’ story of farming, citizenship, property, and the state.

Consider, for instance, D-Town Farm, a project of the Detroit Black Community Food Security Network (DBCFSN). As researcher Monica White observes:

For decades, Detroit has been referred to as ground zero for numerous negative social conditions and social ills. Even prior to the 1967 rebellion, Detroit has been recognized as one of the most racially polarized urban center in the United States. Scholarship on the underdevelopment of Detroit has attributed its decline to housing discrimination and racial segregation; business, tax, and capital flight to the more affluent suburbs; hostile race relations, especially in residential segregation; and a combination of race relations and urban and labor conflict. The recent transformation of the automobile industry, which no longer employs armies of Detroit residents, along with the subsequent shrinking of the working and middle classes, have left Detroiters mired in poverty-induced challenges, including reduced city services, poor-quality education, and high rates of unemployment, crime, and housing foreclosures, with little or no access to healthy food.<sup>220</sup>

As I write, Detroit is the only major city in the United States to have declared bankruptcy, and the city’s financial obligations have been restructured in court.<sup>221</sup>

Sheila Foster argues that community gardening represents an opportunity for building social capital in poor urban communities, an opportunity that should be seized by land use planners.<sup>222</sup> “Progressive property” scholars such as Gregory Alexander and Joseph Singer argue more broadly that democratic norms lie at the heart of private property theory, while Ezra Rosser urges them not to ignore the glaring problem of racial subordination.<sup>223</sup> Re-integrating farming has

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<sup>219</sup> Sarah Treuhaft, PolicyLink & Allison Karpyn, THE FOOD TRUST, *The Grocery Gap, Who Has Access to Healthy Food and Why It Matters* 9, [http://thefoodtrust.org/uploads/media\\_items/grocerygap.original.pdf](http://thefoodtrust.org/uploads/media_items/grocerygap.original.pdf).

<sup>220</sup> Monica M. White, *D-Town Farm: African American Resistance to Food Insecurity and the Transformation of Detroit*, 13 ENVTL. PRAC. 406, 406-07 (2011).

<sup>221</sup> See Matthew Dolan, *Judge Approves Detroit’s Bankruptcy-Exit Plan*, WALL ST. J., Nov. 7, 2014, <http://www.wsj.com/articles/judge-approves-detroits-bankruptcy-exit-plan-1415383905>.

<sup>222</sup> Sheila Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527 (2006).

<sup>223</sup> Along with Eduardo Peñalver and Laura Underkuffler, these scholars have authored a joint statement explicating their views. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009). In a recent essay, Ezra Rosser asserts that “the progressive property school of thought consists of two linked propositions: (1) that conventional law and economics and the related assumption of a single metric—efficiency—should not be the sole means of evaluating laws and establishing property norms, and (2) that alternative, progressive frameworks should be

the potential to foster the larger project of re-integrating American life and the stories we tell about it.

Two images may be fitting to end this Essay, in answer to the farming couple painted by Grant Wood. The first comes from a photojournalism project undertaken by Erica Yoon, a graduate student at Ohio University.<sup>224</sup> Yoon visited Detroit, Michigan, in October, 2012, and spent ten days meeting and talking with people and taking pictures. D-Town was one of the stops on her visit. One photograph Yoon took on her trip shows a group of about sixteen mostly young people, black and white, male and female, standing and leaning on shovels on a sidewalk in front of two small, somewhat dilapidated houses. The yards are still mostly green but scattered with fallen leaves; the group seems to be listening to a young black man in a sweatshirt and knit cap who is pointing to a largish hole dug into the ground. The caption describes the scene as instruction in tree planting and identifies the speaker as Chris Hardy, a Citizen Forester with the Greening of Detroit.<sup>225</sup>

The second image comes from another photojournalism project, this one by Matt Black. The man and woman lie entwined at the very front of the black and white photograph, on what appears to be a blanket on the ground. A line of small shacks is visible behind them; the ground is dusty, devoid of plants. The photograph is captioned simply, “A couple outside their shanty. Fresno, California.”<sup>226</sup> It is part of a photo essay about the Great Recession and the drought in the Central Valley of California, titled *The Dispossession*.<sup>227</sup>

The reintegration of agricultural spaces—connecting the country and the city as well as whites and people of color—creates the possibility for a new and more inclusive agrarian ideal. Carl Anthony argues that “‘the knowledge of the earth, and of our place in its long evolution, can give us a sense of identity and belonging that can act as a corrective to the hubris and pride that have been weapons of our oppressors.’”<sup>228</sup> Kimberly Smith adds, “To fully realize the possibilities of creative interaction with nature[,] . . . the land itself must be liberated from social injustice.”<sup>229</sup> What remains open is whether the

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used.” Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107, 110 (2013). In Rosser’s view, however, the progressive property scholars wrongly ignore questions of acquisition and distribution, making it likely that even in a world governed by the norms they champion, “the race-based property advantages enjoyed by whites will remain and will continue to undermine the possibility that society will realize a robust version of progressive property.” *Id.* at 111-12.

<sup>224</sup> *Photographs From Detroit: Survival, Renewal and Urban Farming*, DENVER POST (Oct. 24, 2013), <http://blogs.denverpost.com/captured/2013/10/24/detroit-photos-urban-farming-community-renewal/6451/>.

<sup>225</sup> *Photographs From Detroit*, *supra* note 219.

<sup>226</sup> *The Dispossession*, MATT BLACK, <http://mattblack.com/dispossession/02.html> (last visited July 24, 2015).

<sup>227</sup> *Id.*

<sup>228</sup> Carl Anthony, *Reflections on African American Environmental History*, in “TO LOVE THE WIND AND THE RAIN” 200, 203 (Diane G. Glave & Mark Stoll eds., 2006) (quoted in SMITH, *supra* note 28, at 200).

<sup>229</sup> *Id.*

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reintegration of farming will have any effect on the linked systems of industrial food production and social exploitation that continue to harm the earth and to generate want in the midst of plenty.

