# COLUMBIA LAW REVIEW




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### NOTE



### ESSAY

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## ABSTRACTS

### NOTE



*Food is a powerful drug. Big companies have pumped meals full of addictive substances that keep people hooked on unhealthy foods at the expense of their health. Modern scientific research has demonstrated that hyper-palatable foods have the same neurological effects as other addictive substances. Given that unbridled consumption of food can have serious health effects, food addiction is a dangerous illness. Despite these deleterious impacts, the industry often evades robust regulation or liability. Instead, states have shielded Big Food from liability. Twenty-six states have passed statutes, called Commonsense Consumption Acts (CCAs), that bar the private regulation of Big Food through food-addiction tort and consumer protection lawsuits.*

*These statutes suffer from two main flaws. First, they are scientifically unfounded. They espouse untrue and harmful positions on food addiction's relationship with personal choice. Second, they inappropriately foreclose judicial consideration of food addiction. This limits plaintiffs' ability to seek redress for real harms and prevents judicial validation of food addiction. Most of the statutes hinder both tort and unfair and deceptive acts or practices claims alleging obesity-related harms, preventing the issue from being properly litigated. Food addiction should be given its day in court.*

*CCAs should be amended to accord with modern science, track public sentiment, allow for plaintiffs to receive redress, and vitiate judicial consideration of food addiction.*

### ESSAY



*Black farm ownership has declined by more than 90% since the 1920s, making it one of the starkest yet least examined examples of racial injustice in American history. This Essay argues that these losses are not the product of isolated discriminatory acts, but the consequence of a durable agricultural oligarchy: a system of concentrated economic, political, and cultural power that has structured American agriculture*

*since the antebellum era. By tracing this oligarchic order across slavery, Reconstruction, Jim Crow, and modern agribusiness, the Essay situates the struggles of Black farmers within the constitutional and political economy dimensions of American governance.*

*In doing so, this Essay makes three contributions to legal scholarship. First, it reframes the exploitation, land expropriation, and erasure of Black farmers as constitutional failures to guarantee republican government by permitting oligarchic control of land, credit, and markets. Second, it links the* Pigford v. Glickman *settlements to recent federal initiatives, including the American Rescue Plan Act and the Inflation Reduction Act, revealing persistent resistance to redistributive agricultural reform. Third, it critiques* Wynn v. Vilsack *and related cases, showing how colorblind constitutionalism entrenches oligarchic power and implies remedies for systemic inequities.*

*Building on the USDA Equity Commission's 2024 recommendations, the Essay advances a structural framework for combining race-conscious and class-based reforms that address historical injustice while navigating constitutional limits. By situating agricultural discrimination within the broader problem of oligarchic power, the Essay highlights the stakes of agricultural equity for constitutional theory, democratic governance, and racial justice.*

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# NOTE

## CHEESEBURGER KINGPINS: AMENDING COMMONSENSE CONSUMPTION ACTS AND VALIDATING FOOD ADDICTION AS A LEGAL CONCEPT

*Weston Brown**

*Food is a powerful drug. Big companies have pumped meals full of addictive substances that keep people hooked on unhealthy foods at the expense of their health. Modern scientific research has demonstrated that hyper-palatable foods have the same neurological effects as other addictive substances. Given that unbridled consumption of food can have serious health effects, food addiction is a dangerous illness. Despite these deleterious impacts, the industry often evades robust regulation or liability. Instead, states have shielded Big Food from liability. Twenty-six states have passed statutes, called Commonsense Consumption Acts (CCAs), that bar the private regulation of Big Food through food-addiction tort and consumer protection lawsuits.*

*These statutes suffer from two main flaws. First, they are scientifically unfounded. They espouse untrue and harmful positions on food addiction's relationship with personal choice. Second, they inappropriately foreclose judicial consideration of food addiction. This limits plaintiffs' ability to seek redress for real harms and prevents judicial validation of food addiction. Most of the statutes hinder both tort and unfair and deceptive acts or practices claims alleging obesity-related harms, preventing the issue from being properly litigated. Food addiction should be given its day in court.*

* J.D. Candidate 2026, Columbia Law School; Articles Editor, *Columbia Law Review*. I would like to thank Professor Ashraf Ahmed for his valuable mentorship throughout the drafting process. For their helpful input, I would also like to thank Jennifer Brown, Dr. Scott Brown, and Abbe Riffle. Finally, I would like to thank the members of the *Columbia Law Review* for their incredible editorial work.

*CCAs should be amended to accord with modern science, track public sentiment, allow for plaintiffs to receive redress, and vitiate judicial consideration of food addiction.*



## INTRODUCTION

Sara Somers, a survivor of food addiction, once counseled that "there is a solution to the addiction of compulsively eating that is killing people."[1] Like many, Somers struggled with food addiction. Her life was plagued with, as she described, "sullenness, self-centeredness, self-pity at being fat, anger, blaming others, and an inability to stop bingeing once certain

1. Sara Somers, Saving Sara: A Memoir of Food Addiction, at xv (2020).

substances entered [her] system."[2] As with other substance-based addictions, food addiction left Somers feeling "helpless and powerless."[3] And yet, as so often happens, her addiction was met with resentment and "violence."[4] Although neuroscientists and psychologists validate food addiction as a disease,[5] many still consider it a "kind of defect of the will,"[6] not a medical condition. Food addicts are left rejected and discredited, without meaningful support to counter their addictions. But for Somers, food-addicted people do not lack "willpower."[7] Rather, they "exert tremendous will to overcome the prejudices that are heaped on them."[8]

The main prejudice, of course, is the erroneous assumption that food-addicted people can simply stop eating in great quantities.[9] Food, these critics decry, is not an addictive substance.[10] They surmise that the problem must be internal: Food-addicted people must be too lazy or too weak to get in shape. But neuroscience counsels the opposite. Scientific studies have validated the existence of food addiction.[11] For a startling example, when given the choice between drinking water laced with sugar or cocaine, most lab rats choose to abuse the sweets.[12] This jarringly simple fact reveals

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2. Id. at xi.

3. Id.

4. See id. (meaning intense vitriol and pushback).

5. See infra section II.A.

6. R. Jay Wallace, Addiction as Defect of the Will: Some Philosophical Reflections, 18 Law & Phil. 621, 621 (1999).

7. Somers, supra note 1, at xii.

8. Id.

9. See Lee J. Munger, Is Ronald McDonald the Next Joe Camel? Regulating Fast Food Advertisements that Target Children in Light of the American Overweight and Obesity Epidemic, 3 Conn. Pub. Int. L.J. 390, 410 (2004) ("Many believe the harm caused by eating fast food is indirect, remote, or caused by intervening circumstances, such as . . . poor personal and independent choices . . . ."). This perception is prevalent on the internet. Comments on popular social media websites reflect this troubling view. For example, the influencer Jesse Mulley, who has lost over two hundred pounds, maintains a video series called "Curls & Criticism" in which he responds to his detractors' comments while curling weights. See, e.g., Video Posted by Jesse Mulley (@progressive.overhaul), Instagram, Curls & Criticism: Part 6 (Nov. 10, 2024), https://www.instagram.com/reel/DCNEqzRtIiC/ (on file with the *Columbia Law Review*) (responding to a critic's charge that he shouldn't "act like loosing [sic] weight is something hard to do"). Many of those comments dismiss struggles with food addiction and weight loss. See, e.g., id.

10. See Bonnie Hershberger, Supersized America: Are Lawsuits the Right Remedy?, 4 J. Food L. & Pol'y 71, 90 (2008) ("Despite the multiple factors that can contribute to obesity, the public continues to believe that personal choice is more influential than unhealthy food offered by the food industry, so much so that a large majority of jurors deems lawsuits against fast-food companies to be bogus.").

11. See infra section II.A.

12. Magalie Lenoir, Fuschia Serre, Lauriane Cantin & Serge H. Ahmed, Intense Sweetness Surpasses Cocaine Reward, PLoS One, Aug. 1, 2007, at 1, 6, https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0000698&type=printable [https://perma.cc/VGH8-WCTH] ("[T]he discovery that intense sweetness takes precedence over cocaine, one of the most addictive and harmful substance currently known, suggests that highly sweetened beverages, such as those widely available in modern human

a growing conclusion in the scientific community: Food is an addictive substance.[13] Like drugs and alcohol, certain foods trigger the neural centers in the brain responsible for forming addictive behaviors.[14] Despite many scientific efforts to validate food addiction[15] and growing public acceptance,[16] the concept has yet to achieve legitimacy among policymakers.[17]

Concerningly, another set of actors is meticulously aware of the prevalence of food addiction—the food industry.[18] Food producers intentionally "pump[] edible and drinkable products full" of addictive additives like "sugar, caffeine, fat, sodium and carbs," employing the "same tactics" the tobacco industry used to hook the country on cigarettes.[19] Consumers across the United States become dependent on these "hyper-palatable" foods (HPFs), which contain calorically rich, unhealthy, and

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societies, may function as supernormal stimuli." (footnote omitted)); see also Denise Gellene, For Rats, Sweets Are the Drug of Choice, L.A. Times (Nov. 10, 2007), https://www.latimes.com/archives/la-xpm-2007-nov-10-sci-sweet10-story.html [https://perma.cc/52MT-ATEA] ("Researchers have learned that rats overwhelmingly prefer water sweetened with saccharin to cocaine, a finding that demonstrates the addictive potential of sweets."); Marta Zaraska, Food Can Be Literally Addictive, New Evidence Suggests, Sci. Am. (Sep. 11, 2023), https://www.scientificamerican.com/article/food-can-be-literally-addictive-new-evidence-suggests/ [https://perma.cc/P7K5-8X7P] ("Given the option, most rats will choose sugar instead of cocaine. Their lust for the carbohydrate is so intense that they will go as far as to self-administer electric shocks in their desperation to consume sugar. Rats aren't alone in this drive. Humans, it seems, do something similar.").

13. See Michael Moss, Hooked: Food, Free Will, and How the Food Giants Exploit Our Addictions 20–22 (2021) [hereinafter Moss, Hooked] (describing the Yale Food Addiction Scale, which measures the addictiveness of food).

14. See Nora D. Volkow, Gene-Jack Wang, Dardo Tomasi & Ruben D. Baler, The Addictive Dimensionality of Obesity, 73 Biological Psychiatry 811, 812 (2013) ("[R]esults strongly suggest the possibility that food and drugs may be competing for overlapping reward mechanisms.").

15. See, e.g., Jose Manuel Lerma-Cabrera, Francisca Carvajal & Patricia Lopez-Legarrea, Food Addiction as a New Piece of the Obesity Framework, Nutrition J., Jan. 2016, at 1, 3 (identifying food addiction as a causal factor for a multitude of adverse health conditions).

16. See Helen K. Ruddock & Charlotte A. Hardman, Food Addiction Beliefs Amongst the Lay Public: What Are the Consequences for Eating Behaviour?, 4 Current Addiction Reps. 110, 111 (2017) (outlining recent empirical studies indicating growing public belief in the existence of food addiction); see also Moss, Hooked, supra note 13, at 133 (describing the growing acceptance of the existence of food addiction among the public).

17. See, e.g., Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. § 2(a) ("Congress finds that . . . fostering a culture of acceptance of personal responsibility is one of the most important ways to promote a healthier society . . . .").

18. See Mary Whitfill Roeloffs, Did Tobacco Companies Also Get Us Hooked on Junk Food? New Research Says Yes, Forbes (Sep. 8, 2023), https://www.forbes.com/sites/maryroeloffs/2023/09/08/did-tobacco-companies-also-get-us-hooked-on-junk-food-new-research-says-yes/ (on file with the *Columbia Law Review*) (describing the intentional choice of putting addictive ingredients in mass-produced foods).

19. Id.

addictive substances, driving up the profits for producers.[20] And given the lack of any meaningful regulation of HPFs, consumers are left to fend for themselves.[21]

Private law presents a potential alternative to redress this issue. Tort litigation has proven to be a viable tool for advancing the interests of consumers against large corporations peddling harmful products.[22] In recent years, the tobacco[23] and opioid[24] industries have settled lawsuits with multiple plaintiffs over the harms of their dangerously addictive goods. Persistent plaintiffs forced these industries to shift their practices, benefiting the health of consumers.[25] And media coverage of these massive lawsuits spurred widespread conversations about addiction.[26] The judiciary's constant reaffirmation of addiction in mass tort cases has legitimized it as a palatable legal concept.[27]

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20. Id. HPFs are food products that have high concentrations and "combinations of fat, sugar, sodium, and carbohydrates that are designed to maximize palatability and consumption." Tera L. Fazzino, Kaitlyn Rohde & Debra K. Sullivan, Hyper-Palatable Foods: Development of a Quantitative Definition and Application to the US Food System Database, 27 Obesity 1761, 1761–62 (2019). The "food industry has well-established food formulas" utilizing these ingredients to create exceedingly enticing foods. Id.

21. See Roeloffs, supra note 18 ("Despite growing evidence that such foods are harmful, there are no federal regulations in the United States regarding foods that are hyper-palatable.").

22. See Richard J. Pierce, Jr., Encouraging Safety: The Limits of Tort Law and Government Regulation, 33 Vand. L. Rev. 1281, 1282 (1980) ("Through tort law and safety regulation, the legal system places implicit values on human life in varying contexts and translates those values into either commands or inducements to reduce accident costs.").

23. Press Release, DOJ, Court Issues Order Requiring Cigarette Companies to Post Corrective Statements; Resolves Historic RICO Tobacco Litigation (Dec. 6, 2022), https://www.justice.gov/archives/opa/pr/court-issues-order-requiring-cigarette-companies-post-corrective-statements-resolves-historic [https://perma.cc/F3DF-H3YH].

24. Opioids, Nat'l Ass'n Att'ys Gen., https://www.naag.org/issues/opioids/ [https://perma.cc/3B7R-F9ZN] (last visited Oct. 6, 2025).

25. See, e.g., Walter J. Jones & Gerard A. Silvestri, The Master Settlement Agreement and Its Impact on Tobacco Use 10 Years Later, 137 Chest 692, 692 (2010) (discussing the decrease in tobacco use after the settlement of a class action lawsuit brought by state attorneys general against the tobacco industry).

26. For an example of media coverage on massive lawsuits that discuss the danger of addiction, see Who Is Really Benefiting From the Tobacco Settlement Money?, Am. Lung Ass'n: Each Breath (Feb. 2, 2016), https://www.lung.org/blog/who-benefit-tobacco-settlement [https://perma.cc/3YVE-BRCN] ("[T]here was a time when the tobacco industry even more openly and brazenly marketed tobacco products to our kids. It was then and continues today to be their business plan: they hook kids young, which can lead to a lifetime of addiction and tobacco industry profits.").

27. The Supreme Court recently recognized the validity of addiction as a legal concept. See Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2078 (2024) ("Because of the *addictive quality* of opioids, doctors had traditionally reserved their use for cancer patients . . . ." (emphasis added)). Producers of addictive products have recognized that judges consider addiction as a harm in mass tort cases, which has encouraged settlements. Christina Jewett & Julie Creswell, Juul Reaches $462 Million Settlement With New York, California and Other States, N.Y. Times (Apr. 12, 2023), https://www.nytimes.com/2023/04/12/health/juul-vaping-settlement-new-york-

In its most extreme form, food addiction can cause severe obesity, which is comorbid with a plethora of other health impacts.[28] Given the judicial and scientific validations of addiction litigation and coercive food practices,[29] food addiction seems, at first blush, a viable basis for tort litigation. Due to strong food industry lobbying and reactionary legislatures, however, a majority of states prohibit any sort of tort litigation alleging obesity-related harms against food providers.[30] They do this through misguided statutes, known as Commonsense Consumption Acts (CCAs), which were passed beginning in the early 2000s as a response to seemingly frivolous obesity-related tort litigation.[31] The statutes closed off judicial consideration of any obesity-related tort and, in some cases, explicitly denied that food addiction could be a scientific and legal concept.[32] Furthermore, they raised the burdens of proof for nontort claims, making any recovery for food addiction harms essentially impossible.[33] This foreclosure was premature. The statutes were passed before knowledge of food addiction became common among the scientific community or the American public.[34] Modern science undermines the

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california.html (on file with the *Columbia Law Review*) ("[Juul's settlement] follows other[s] . . . that took Juul to task for failing to warn young users that the high levels of nicotine in their e-cigarettes would prove addictive.").

28. See Lerma-Cabrera et al., supra note 15, at 3 (finding that food addiction has a high correlation "with binge eating disorder, compulsive-overeating, [and] bulimia nervosa," which in turn are all highly correlated with obesity).

29. The Supreme Court has even come close to acknowledging the addictive quality of food in a nontort context. In 2001, the Supreme Court admitted that the food industry, similarly to the tobacco industry, hooks its consumer base on harmful products. Though Justice Clarence Thomas stopped short of asserting that food is "addictive in the same way tobacco is," he acknowledged that "exposure to fast food advertising can have deleterious consequences that are difficult to reverse." Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 588 (2001) (Thomas, J., concurring in part and concurring in the judgment).

30. The National Restaurant Association spearheaded this initiative. See Cara L. Wilking & Richard A. Daynard, Beyond Cheeseburgers: The Impact of Commonsense Consumption Acts on Future Obesity-Related Lawsuits, 68 Food & Drug L.J. 229, 229 (2013) ("The National Restaurant Association . . . took a leadership role and mounted federal and state campaigns to enact 'tort reform' legislation immunizing the food industry from tobacco-like lawsuits.").

31. See id. (discussing food providers' lobbying efforts after early obesity-related tort litigation).

32. See, e.g., Colo. Rev. Stat. § 13-21-1102 (2025) (claiming that obesity is a matter of choice).

33. See infra section I.C.2.

34. According to Dr. Adrian Meule, "[i]n recent years, the concept of food addiction has become increasingly popular" with the American public. Adrian Meule, Back by Popular Demand: A Narrative Review on the History of Food Addiction Research, 88 Yale J. Biology & Med. 295, 295 (2015). His analysis of the scientific community's acceptance of food addiction is more nuanced. Meule argues that the scientific concept of food addiction has been around since the 1950s or earlier. Id. But Meule also concedes that "[a]lthough food addiction has been discussed in the scientific community for decades, it remains a highly controversial and heavily debated topic." Id. at 300. He also indicates that the recent validation "is reflected not only in a high number of media reports and lay literature, but

justifications for CCAs, directly contradicting the legislatures that invalidated food addiction as a legal concept. In light of these changed circumstances, state legislatures should reevaluate the viability of CCAs.

This Note argues that CCAs should be amended to recognize food addiction as a legal concept. Part I will address the history of addiction litigation, including the ill-fated attempts at pleading obesity-related torts and the subsequent barrage of CCA enactments. Part II will identify the two main issues with CCAs: their failure to accord with modern behavioral science and their premature foreclosure of judicial consideration of obesity and food addiction. Part III will advocate for the amendment of CCAs to legally validate food addiction and to open the courthouse doors to the possible adjudication of obesity litigation.

## I. LEGAL AND HISTORICAL BACKGROUND OF FOOD ADDICTION

The law struggles to accommodate addiction. The disease's widespread, harmful impacts[35] and complex interaction with personal responsibility make it a difficult pill for the American legal system to swallow. This Part assesses legal frameworks for addiction. First, it tackles addiction's interaction with personal responsibility. It then evaluates the role of addiction in tort law, illustrating those principles with examples from tobacco and opioid litigation. After setting this groundwork, this Part explores past obesity-related tort litigation and its fallout, including the enactment of flawed CCAs.

### A. *Addiction and Personal Responsibility*

Free will and personal choice are required for the assignment of legal liability.[36] The law presumes "a free agent confronted with a choice between doing right and wrong, and choosing freely to do wrong."[37] Tort law specifically presumes that actors should be held liable for the harms caused by their autonomous choices, whether those harms are intentional

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also in [the] substantial increase in the number of scientific publications." Id. at 295 (footnotes omitted). Therefore, though the concept may have existed before the modern era, it is only now being given popular legitimacy by the scientific community. See infra section II.A.

35. Addiction is harmful on a biological, social, and economic level. See Adam Felman, What Are the Complications of Addiction?, Med. News Today (Oct. 26, 2018), https://www.medicalnewstoday.com/articles/323461 [https://perma.cc/5QUH-KE6W] ("[Addiction] can lead to a range of adverse psychological, physiological, and personal effects.").

36. See Adam J. Kolber, Free Will as a Matter of Law, *in* Philosophical Foundations of Law and Neuroscience 9, 27–28 (Dennis Patterson & Michael S. Pardo eds., 2016) (describing free will as "a matter of law" with great "centrality" to the American legal regime).

37. United States v. Lyons, 739 F.2d 994, 995 (5th Cir. 1984) (Rubin, J., dissenting) (internal quotation marks omitted) (quoting Morissette v. United States, 342 U.S. 246, 250 n.4 (1952)).

or accidental.[38] The law's prioritization of free choice tracks the age-old philosophical tenet that autonomy is required to assign responsibility[39] for one's actions.[40] The logic is intuitive: Blame should only be assigned if the offender "could have done otherwise."[41] If the offender could not avoid their harmful conduct, then the assignment of blame would not track fundamental conceptions of fairness.[42]

Addiction poses a difficult challenge to traditional understandings of free will and responsibility. Philosophers argue that "addiction [is] a kind of defect of the will."[43] But because addicted persons lack control over their compulsive behavior, it is unclear that they have the capacity to choose otherwise.[44] In affected persons, the "craving" for the addictive material "is an irresistible urge."[45] If the urge to abuse an addictive substance is irresistible, then the addicted individual could not have possibly "done otherwise."[46] Therefore, the overwhelming compulsions of addiction undermine the traditional formulation of free will. Still, critics insist that the person is simply not resilient enough to overcome this tantalizing stimulus.[47] Through such a lens, the locus of responsibility is still, to some extent, placed on addicted people. They are "defective"

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38. See David G. Owen, Expectations in Tort, 43 Ariz. St. L.J. 1287, 1297–98 (2011) ("Autonomy entails the notion that people may—indeed, must—make choices based upon expected outcomes, and then act upon those choices.").

39. Responsibility, as used here, is meant to encompass both civil liability and criminal guilt.

40. See Matthew Talbert, Moral Responsibility, Stan. Encyc. Phil. (Oct. 16, 2019), https://plato.stanford.edu/entries/moral-responsibility/ [https://perma.cc/BB8U-LX2P] (last updated June 3, 2024) ("A largely unquestioned assumption was that free will is required for moral responsibility . . . ."); see also Immanuel Kant, Groundwork of the Metaphysics of Morals 63 (Lawrence Pasternack ed., Routledge 2002) (1785) ("Autonomy is therefore the ground of the dignity of human nature and of every rational nature." (emphasis omitted)).

41. Talbert, supra note 40 (emphasis omitted).

42. See Carlos J. Moya, Moral Responsibility: The Ways of Scepticism 1 (2006) ("We assume that . . . conditions for moral responsibility . . . are actually met by human beings. If we come to think that, at some particular occasion, they are not, we naturally soften or even withdraw our judgement."). This is, of course, a lofty ideal—the legal system punishes people for conduct beyond their control frequently. See, e.g., People v. Eckert, 138 N.E.2d 794, 796 (N.Y. 1956) ("Tersely stated, the indictment in this case accuses the defendant of having caused the death of one Dorothy Ann Sager as a result of having lost control of an automobile he was operating when he lost consciousness during an epileptic seizure . . . ."), abrogated by People v. Jennings, 504 N.E.2d 1079 (N.Y. 1986).

43. Wallace, supra note 6, at 621.

44. See Gary Watson, Excusing Addiction, 18 Law & Phil. 589, 591 (1999) (stating that it is a common presumption that "addictions involve *compulsion*").

45. James A. Halikas, Kenneth L. Kuhn, Ross Crosby, Gregory Carlson & Frederick Crea, The Measurement of Craving in Cocaine Patients Using the Minnesota Cocaine Craving Scale, 32 Comprehensive Psychiatry 22, 22 (1991).

46. Talbert, supra note 40 (emphasis omitted).

47. See Wallace, supra note 6, at 621 (proposing that the defect is internal to the will of the addicted person).

because of their inability to resist the irresistible. By pinning the blame on addicted persons, this narrative of defect presumes their personal responsibility for their disease and exposes them to significant prejudice.

Modern advances in neuropsychology have buttressed the understanding of addiction as a disease beyond the autonomous control of the individual.[48] Neuroscientists have discovered the neural networks that constitute "the brain's common pathways of addiction."[49] Addiction can be broken down into three physical stages, each involving different networks in the brain: binge, withdrawal, and craving/anticipation.[50] In the binge stage, the addictive substance triggers the individual's reward systems, which "produce[s] feelings of pleasure."[51] After coming down from the intoxication, the individual experiences withdrawal, which includes "negative emotions and, sometimes, symptoms of physical illness."[52] Withdrawal triggers the brain's stress system and correspondingly decreases the "activity of the dopamine system" that gave the initial pleasure reward.[53] These neurological reactions occur whether the stimulant is a drug or a "natural reinforcer[] such as *food*."[54] In response to the withdrawal, the individual develops a strong craving, during which they are "preoccupied with using substances again."[55] Craving is accompanied by anticipation of further use of the substance, which eventually becomes its own dopaminergic reward.[56]

The decision to give in to a craving is governed by the prefrontal cortex, the brain structure responsible for "executive function," or "the ability to . . . make decisions[] and regulate one's own actions, emotions, and impulses."[57] The prefrontal cortex's ability to inhibit cravings is diminished by "increased activity of stress circuitry."[58] Over time, the

48. See Richard J. Bonnie, Addiction and Responsibility, 68 Soc. Rsch. 813, 813 (2001) ("Remarkable scientific achievements over the past 25 years—especially in the last decade—have significantly advanced our understanding of addiction in a variety of respects.").

49. Id. The neuroscience involved in addiction is decidedly complex. A cursory explanation is offered here.

50. HHS, Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health 2-6 to -8 (2016), https://www.hhs.gov/sites/default/files/facing-addiction-in-america-surgeon-generals-report.pdf [https://perma.cc/LWC3-4G2J] [hereinafter HHS, Addiction in America].

51. Id. at 2-8 to -9 (explaining that the "dopamine and opioid signaling system" within the brain's basal ganglia sends neurotransmitters that give the individual a pleasure reward).

52. Id. at 2-12.

53. Id. at 2-13.

54. Id. (emphasis added).

55. Id. at 2-15.

56. See Stephen M. Stahl, Stahl's Essential Psychopharmacology: Neuroscientific Basis and Practical Applications 544 (5th ed. 2021) ("Once addicted, the brain is no longer rewarded principally by the drug itself, but as well by *anticipation* of the drug and its reward.").

57. HHS, Addiction in America, supra note 50, at 2-16.

58. Id. at 2-17.

individual loses the ability to exert executive control over their cravings.[59] Addictive behavior becomes a "compuls[ion]," which is the "performance of repetitive and dysfunctionally impairing behavior that has no adaptive function."[60] These compulsions are undertaken habitually and thoughtlessly as a response to the anticipation of the addictive substance.[61] Once addictive behavior becomes compulsive, it is an inexorable habit, "not any longer being simply naughty or giving in to temptation."[62] At this stage, addiction becomes a "chronic disease" that neurologically undermines the addicted individual's capacity to exert their free will over their actions.[63] Mental health professionals have ratified this understanding by classifying substance abuse and addiction disorders as their own category of mental diseases in the *Diagnostic and Statistical Manual of Mental Disorders*.[64]

The upshot is simple: Addiction is incompatible with the traditional understanding of individual free will. The addicted individual does not possess the same ability to choose freely as an unencumbered person. Addictive substances rewire the individual's brain, robbing them of their neurological capacity to say "no" to the addictive substance. Pinning the locus of responsibility for addictive behavior on the individual, as many philosophers and critics do,[65] is misguided. This poses significant issues for a legal system that rests on a powerful presumption of free choice in its governing structures.

### B. *Addiction in Tort and Consumer Protection Law*

In recent decades, individuals harmed by addiction have looked to tort law for redress.[66] The law struggles with how to handle addiction and personal responsibility.[67] On one hand, federal law defines an addict as

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59. See Stahl, supra note 56, at 539 (explaining that addiction "can be viewed as *conditioned responses* to the *conditioned stimuli* of . . . having craving and withdrawal").

60. Id. at 538 (emphasis omitted).

61. Id.

62. Id. at 544.

63. Bonnie, supra note 48, at 814; see also Stahl, supra note 56, at 544 ("Addiction is a horrible disease.").

64. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 545 (5th ed., text rev. 2022) [hereinafter DSM-5-TR]. The *DSM-5-TR* is the most updated version of the American Psychiatric Association's "guide in the diagnosis of mental disorders." Id. at 5.

65. See, e.g., Ayn Rand, The Comprachicos, *in* The New Left: The Anti-Industrial Revolution 152, 202 (1971) (arguing that all people have the "deep-down knowledge that drug addiction is nothing but a public confession of personal impotence").

66. See Nora Freeman Engstrom & Robert L. Rabin, Pursuing Public Health Through Litigation: Lessons From Tobacco and Opioids, 73 Stan. L. Rev. 285, 289 (2021) (describing the uptick of addiction litigation since the 1950s).

67. See Michael Louis Corrado, Addiction and Responsibility: An Introduction, 18 Law & Phil. 579, 579 (1999) ("The law appears to be inconsistent in its treatment of addicts.

"any individual who . . . is so far addicted . . . as to have lost the power of self-control with reference to his addiction."[68] On the other hand, the law is sometimes skeptical of addiction's undermining effect on free will.[69] This tension in the law touches the entire legal system, as free will is a requisite for assigning responsibility.[70] Tort law, however, has cautiously embraced addiction by allowing plaintiffs to recover in some addiction lawsuits.[71] This section seeks to explain the doctrinal role of addiction in tort law and expands on the theory underlying the tobacco and opioid litigation.

The tension between addiction and free will has become increasingly prevalent in tort law. One might think that addiction could plausibly be construed as an actionable harm. The Restatement of Torts conceptualizes harm in a direct and corporal manner.[72] Plaintiffs asserting bodily harm "usually provide[] objective evidence of its existence and extent," which courts look to in order to determine whether the claim can be remedied.[73] The classic examples of tortious bodily harms include "physical injury, illness, disease, impairment of bodily function, and death."[74] Addiction is a disease[75] that manifests with objective evidence[76] and can certainly cause death or impairment of bodily function.[77] If addiction were classified as a

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It sometimes treats them as if they are responsible for what they do, and sometimes as if they are not responsible for what they do.").

68. 21 U.S.C. § 802(1) (2018) (defining "addict" in the context of narcotic drug use).

69. See, e.g., Powell v. Texas, 392 U.S. 514, 525 (1968) (plurality opinion) ("[T]here is serious question whether the record can be read to support a finding of either loss of control or inability to abstain."); see also Norman S. Miller & Sara Spratt, Addictions and the Law, *in* Principles of Addictions and the Law: Applications in Forensic, Mental Health, and Medical Practice 17, 31–32 (Norman S. Miller ed., 2010) ("In general, the law views alcohol and drug addiction as an illness in an individual who bears responsibility for its consequences, including punishment and therapeutic treatments. The individual is not completely guilty or absolved from criminal or civil responsibilities because of addictive disease.").

70. See supra notes 36–48 and accompanying text.

71. See infra section I.B.1.

72. See Restatement (Third) of Torts: Physical & Emotional Harm § 4 (Am. L. Inst. 2010) (defining physical harm as "the physical impairment of the human body . . . includ[ing] physical injury, illness, disease, impairment of bodily function, and death").

73. Id. § 4 cmt. b.

74. Id. § 4.

75. See Bonnie, supra note 48, at 814 (describing addiction as a "chronic disease").

76. See DSM-5-TR, supra note 64, at 546–48 (providing the diagnostic benchmarks for substance use disorder).

77. See, e.g., Harms of Cigarette Smoking and Health Benefits of Quitting, Nat'l Cancer Inst., https://www.cancer.gov/about-cancer/causes-prevention/risk/tobacco/cessation-fact-sheet [https://perma.cc/AY5Y-FVYR] (last updated Dec. 19, 2017) ("Cigarette smoking and exposure to tobacco smoke cause about 480,000 premature deaths each year in the United States. Of those premature deaths, about 36% are from cancer, 39% are from heart disease and stroke, and 24% are from lung disease." (footnote omitted) (citing HHS, The Health Consequences of Smoking—50 Years of Progress (Jonathan M. Samet, Terry F. Pechacek, Leslie A. Norman & Peter L. Taylor eds., 2014),

legally cognizable physical harm, then individuals would be able to sue those responsible for causing their addiction—namely, the large industries that market addictive substances.[78]

Yet, despite the fact that addiction arguably meets the Restatement's criteria, tort law does not consider addiction *itself* a bodily harm.[79] This is, in part, because of the traditional conception that "addiction [is] a kind of defect of the will."[80] If an individual voluntarily uses a product, then their addiction tort claim may be muddled with legal questions of "assumption of risk, contributory (and . . . comparative) negligence, general and specific causation, and damages."[81] Tort law is skeptical of providing recourse for a "harmful state to which one has willingly exposed oneself."[82] Since American law carries a default of personal choice, tort doctrine does not consider addiction as a harm in its own right.[83]

Instead, courts treat "addiction as a harm only for purposes of warning obligations."[84] Tort law affords remedies when a company designs a product that is "defective because . . . the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor."[85] Plaintiffs have utilized these failure-to-warn claims to sue big industries

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https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf [https://perma.cc/8T2X-Z7LK])).

78. See Gregory Keating, Accountability and Addictive Wrongs, Torts, Jotwell (Oct. 26, 2021), https://torts.jotwell.com/accountability-and-addictive-wrongs/ [https://perma.cc/YP7C-ZA4S] ("But addiction . . . is also an impairment of agency . . . . It robs people of their normal power of control over what they consume; it defeats the normal capacity to avoid using products that you know to be dangerous to your health. It is a harm, and a devastating one.").

79. See id. (explaining that tort law "does not count becoming addicted as a harm in itself"). Note that tort doctrine is not without its detractors on this score. Many scholars continue to assert that addiction is a physical, as opposed to purely mental, illness. See, e.g., Michael Lyvers, Drug Addiction as a Physical Disease: The Role of Physical Dependence and Other Chronic Drug-Induced Neurophysiological Changes in Compulsive Drug Self-Administration, 6 Experimental & Clinical Psychopharmacology 107, 107 (1998).

80. See Wallace, supra note 6, at 621 (restating the traditional view that addiction is a failure of willpower, not an uncontrollable impulse).

81. See Engstrom & Rabin, supra note 66, at 297. A recent attempt by a plaintiff to establish food addiction in a tort action was dismissed because of a failure to "plead more than the mere possibility of causation." See Martinez v. Kraft Heinz Co., No. 25-377, 2025 WL 2447793, at *2 (E.D. Pa. Aug. 25, 2025) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007)).

82. Avihay Dorfman, Assumption of Risk, After All, 15 Theoretical Inquiries L. 293, 293 (2014).

83. See, e.g., Engstrom & Rabin, supra note 66, at 298 n.59 ("At trial, the tobacco companies leaned heavily on an assumed-risk defense (essentially, 'you knew that smoking could cause cancer') . . . .").

84. See Keating, supra note 78 ("Tort doctrine . . . does not count becoming addicted as a harm in itself.").

85. Restatement (Third) of Torts: Prods. Liab. § 2(c) (Am. L. Inst. 1998).

that market addictive products and have sometimes been successful.[86] Plaintiffs can argue that the defendant company's failure to warn of its harmfully addictive product rendered it tortiously defective. Addiction, according to plaintiffs, is a risk that manufacturers should have warned their consumers about.[87] That risk harms plaintiffs in the form of serious bodily injury or illness.[88] Seizing on this strategy, plaintiffs pursuing addiction claims against tobacco and opioid companies have created a roadmap that could be utilized for food-addiction torts.

Addiction also plays a role in another form of consumer protection litigation: unfair and deceptive acts and practices (UDAP) lawsuits. UDAP statutes "prohibit deceptive practices in consumer transactions and, in many states, also prohibit unfair or unconscionable practices."[89] Plaintiffs with addiction-related harms will often plead that the product manufacturers "have a statutory duty to refrain from fraudulent, unfair, and deceptive acts or trade practices in the design, development, manufacture, promotion and sale of" addictive products.[90] The relevant legal considerations differ according to the UDAP statute at issue.[91] And though UDAP claims are freestanding statutory causes of action, their similarity to common law doctrines makes them "relatively common companions" to tort claims.[92] Like closely related tort doctrines, UDAP statutes provide addiction-afflicted plaintiffs another route to redress.

The survey of addiction litigation that follows is not comprehensive. Rather, it is intended to demonstrate the role that addiction plays in tort and consumer protection claims. And perhaps more crucially, it is meant to show the judiciary's growing acceptance of addiction as a relevant legal consideration or concept.

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86. See infra sections I.B.1–2.

87. See Restatement (Third) of Torts: Prods. Liab. § 2(c); see also Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996) (pleading a failure-to-warn tort in tobacco litigation).

88. See Restatement (Third) of Torts: Physical & Emotional Harm § 4 (Am. L. Inst. 2010) (defining physical harm as "the physical impairment of the human body . . . includ[ing] physical injury, illness, disease, impairment of bodily function, and death").

89. Carolyn L. Carter, Nat'l Consumer L. Ctr., Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes 1 (2009), https://www.nclc.org/wp-content/uploads/2022/08/report_50_states.pdf [https://perma.cc/REV8-9Q3A].

90. First Amended Complaint at 46, 455, Martinez v. Kraft Heinz Co., Inc., No. 25-377 (E.D. Pa. Sep. 22, 2025) (on file with the *Columbia Law Review*) (emphasizing that the addictive products at issue were "hyper-palatable food[s]").

91. See Carter, supra note 89, at 1 (providing a brief summary of the different UDAP statutes across each of the fifty states).

92. James Cooper & Joanna Shepherd, State Unfair and Deceptive Trade Practices Laws: An Economic and Empirical Analysis, 81 Antitrust L.J. 947, 966 (2017).

1. *Tobacco Litigation.* — Cigarette smokers sued Big Tobacco under addiction tort doctrine.[93] *Castano v. American Tobacco Co.*, one of the early tobacco litigation challenges, "broke sharply with prior cases. Whereas prior cases had sought compensatory and sometimes punitive damages for smokers' personal injuries or wrongful deaths, *Castano* focused, instead, on *addiction*."[94] *Castano*'s watershed gambit convinced the district court of the legitimacy of the addiction claims, and the plaintiffs succeeded in certifying their class.[95] Using addiction, rather than death or injury, as the risk in a failure-to-warn claim "expanded the size of the class and permitted the plaintiffs to dodge tricky questions concerning general and specific causation."[96] But the *Castano* litigation was short-lived.[97] It was quickly overshadowed by a litany of lawsuits in which states sued Big Tobacco, alleging public harms.[98] The public litigation culminated in the Master Settlement Agreement (MSA), in which Big Tobacco agreed to shell out $206 billion toward outstanding healthcare reimbursement claims.[99]

In the wake of the MSA, individual addiction litigation returned.[100] The results have been mixed, with about half the cases ending in plaintiff victories and half resolving in favor of the tobacco companies.[101] But courts are increasingly willing to validate addiction as a theory of risk underlying tort claims.[102] In 2006, the Florida Supreme Court vacated a $750,000 trial verdict for an individual plaintiff but, importantly, held that the addiction theory in nicotine litigation "w[ould] have res judicata effect" in

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93. See, e.g., Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996) ("The gravamen of their complaint is the novel and wholly untested theory that the defendants fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature."). Big Tobacco refers to the large tobacco companies that "are the force behind the tobacco epidemic that currently kills more than 8 million people every year." What Is 'Big Tobacco'?, STOP (Feb. 13, 2025), https://exposetobacco.org/news/who-is-big-tobacco/ [https://perma.cc/M9XN-Q9EQ].

94. Engstrom & Rabin, supra note 66, at 300 (citing *Castano*, 84 F.3d at 737).

95. Castano v. Am. Tobacco Co., 160 F.R.D. 544, 560 (E.D. La. 1995), rev'd, 84 F.3d 734.

96. Engstrom & Rabin, supra note 66, at 301.

97. The Fifth Circuit determined that the district court's certification was incorrect, as the "predominance inquiry, or lack of it, squarely presents the problems associated with certification of immature torts." *Castano*, 84 F.3d at 749.

98. See Engstrom & Rabin, supra note 66, at 303 (describing the argument made first by Mississippi, and then by several other states, that the industry's conduct constituted a harm against not just those who actually smoked but also the general public).

99. Id. at 305.

100. See id. at 306 (discussing the revival of pre-*Castano* individualized addiction litigation).

101. See Robert L. Rabin, Tobacco Control Strategies: Past Efficacy and Future Promise, 41 Loy. L.A. L. Rev. 1721, 1741–42 (2008) ("The scorecard, in the immediately ensuing years, was mixed: a handful of trial court victories (invariably subjected to long appeals) and a roughly equal number of defeats.").

102. See Engstrom & Rabin, supra note 66, at 307 ("Plaintiffs surely fare better than they did in the first forty years of tobacco litigation . . . .").

subsequent tort suits.[103] Despite mixed results, courts have *validated* addiction as a relevant legal consideration in tort law.[104]

2. *Opioid Litigation.* — The opioid epidemic presented the next wave of addiction torts. In 1995, the FDA approved Purdue Pharma's new drug, OxyContin.[105] OxyContin "contained a novel time-release mechanism," which enabled one pill to "slowly and continuously release its oxycodone over time," allowing Purdue to load an individual pill with a much larger dose of narcotics.[106] Purdue Pharma misleadingly claimed that this mechanism made "OxyContin . . . less prone to abuse and addiction than other prescription opioids," a falsity it emphasized in its marketing.[107] Subsequently, OxyContin became Purdue Pharma's most successful product, accounting for ninety percent of its prescription sales by 2001.[108] Contrary to Purdue Pharma's assertions, OxyContin was incredibly addictive, and the narcotic quickly became the most abused opioid.[109]

Opioid addiction lawsuits against Purdue Pharma quickly followed.[110] Plaintiffs "were typically coping with and seeking compensation for addiction or the loss of a loved one" and alleged that Purdue "failed to exercise reasonable care in the painkiller's design, marketing, and promotion."[111] This flurry of litigation was largely unsuccessful, as tort

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103. Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1269 (Fla. 2006) (per curiam).

104. See, e.g., Boeken v. Philip Morris, Inc., 26 Cal. Rptr. 3d 638, 678 (Ct. App. 2005) (validating this theory); Henley v. Philip Morris, Inc., 9 Cal. Rptr. 3d. 29, 62 (Ct. App. 2004) (same); Williams v. Philip Morris Inc., 176 P.3d 1255, 1257–58 (Or. 2008) (same).

105. Letter from Robert F. Bedford, Acting Dir., Div. of Anesthetic, Critical Care & Addiction Drug Prods., FDA, to James H. Conover, Exec. Dir., Drug Regul. Affs. & Compliance, Purdue Pharma L.P. 1 (Dec. 12, 1995), https://www.accessdata.fda.gov/drugsatfda_docs/appletter/pre96/020553ltr.pdf (on file with the *Columbia Law Review*) ("[T]he application is approved effective on the date of this letter.").

106. Engstrom & Rabin, supra note 66, at 308 (citing Barry Meier, Pain Killer: An Empire of Deceit and the Origin of America's Opioid Epidemic 8–9 (2d ed. 2018)).

107. Barry Meier, Origins of an Epidemic: Purdue Pharma Knew Its Opioids Were Widely Abused, N.Y. Times (May 29, 2018), https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycontin.html (on file with the *Columbia Law Review*).

108. U.S. Gen. Acct. Off., GAO-04-110, Prescription Drugs: OxyContin Abuse and Diversion and Efforts to Address the Problem 9 (2003), https://www.gao.gov/assets/gao-04-110.pdf [https://perma.cc/4Y3Q-PN8G].

109. See Art Van Zee, The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy, 99 Am. J. Pub. Health 221, 225 (2009) ("OxyContin was associated with higher rates of abuse, and it became the most prevalent abused prescription opioid by 2004.").

110. See, e.g., Complaint ¶ 28, Burton v. Purdue Pharma, L.P., No. 01CIB005, 2001 OH C.P. Ct. Pleadings LEXIS 16 (Ohio Ct. C.P. Apr. 25, 2001) (alleging, in the first lawsuit of its kind, that "[t]he manufacturers and distributors of OxyContin . . . did not adequately or appropriately disclose related drug information to physicians in the United States").

111. Engstrom & Rabin, supra note 66, at 310 (citing Abbe R. Gluck, Ashley Hall & Gregory Curfman, Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis, 46 J.L. Med. & Ethics 351, 353 (2018); Rebecca L. Haffajee &

doctrines (such as the learned intermediary exception and the wrongful conduct rule) prevented plaintiff success.[112] Purdue, recognizing that the lawsuits were likely to fail, used the opportunity to push harmful narratives about addicted persons. The pharmaceutical giant consistently resorted to stigmatizing plaintiffs as helpless addicts who were not entitled to relief.[113] Purdue's defenses, when combined with the pitfalls in tort law, effectively halted much of this litigation.[114] Despite their failure, however, courts (including the Supreme Court of the United States) have seemingly accepted that addiction is a cognizable risk for failure-to-warn cases.[115]

Individual plaintiffs and certified classes have had a mixed record of success in their claims against tobacco and opioid producers. But throughout the litigation, courts have consistently affirmed that addiction is a legitimate risk for failure-to-warn torts. Though this conflicts with traditional "notions of personal responsibility,"[116] addiction litigation remains viable in tort and consumer protection law. By acknowledging that addiction undermines an individual's ability to behave according to their own free will, courts have helped to legitimate addiction as a devastating illness inflicted on the public through wrongful conduct by manufacturers.

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Michelle M. Mello, Drug Companies' Liability for the Opioid Epidemic, 377 NEJM 2301, 2301 (2017)).

112. These barriers hold little weight for purposes of the present discussion. But plaintiffs in opioid lawsuits had marked difficulty overcoming the learned intermediary exception, which immunizes producers from warning claims when an "intermediary," such as a doctor, has a duty to warn the consumer. See Restatement (Third) of Torts: Prods. Liab. § 2 cmt. i (Am. L. Inst. 1998) (describing the reasonableness standard for the learned intermediary exception). Despite the unfortunate legal outcomes for the patients, the underlying theory—that addiction is a cognizable harm for warning defects claims—remained viable. In fact, an underlying premise of the learned intermediary exception is that a doctor has a duty to "fulfill[] [their] disclosure obligations" about addiction. Engstrom & Rabin, supra note 66, at 311. Other tort barriers, such as causation issues or the wrongful-conduct rule, contain similar analyses. See id. at 311–12.

113. See Arthur Gale, Correspondence, Sacklers Sacked but Purdue Still Caused Opioid Epidemic, 119 Mo. Med. 109, 109 (2022) ("Purdue told its representatives to tell doctors that only persons with an 'addictive personality' became addicts.").

114. See Engstrom & Rabin, supra note 66, at 310 (relating that these claims "tended to founder").

115. See Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2078 (2024) (recognizing, in dicta, the underlying addiction theory behind the tort claims). In this case, the Court indicated that "nothing in U.S. bankruptcy law allows courts to release legal claims against non-debtors without the consent of the people who sued them." Dietrich Knauth, US Supreme Court *Purdue* Ruling Makes Mass Litigation Tougher to Resolve in Bankruptcy, Reuters (June 27, 2024), https://www.reuters.com/legal/us-supreme-court-purdue-ruling-makes-mass-torts-tougher-resolve-bankruptcy-2024-06-27/ [https://perma.cc/M9BZ-CM42]. This makes the resolution of mass torts through the bankruptcy process far more difficult. Though important, the broader implications of this holding are outside the scope of this Note.

116. Allan M. Brandt, The Cigarette Century: The Rise, Fall, and Deadly Persistence of the Product that Defined America 341 (2007).

### C. *Obesity-Related Tort Litigation*

As the tobacco and opioid litigation demonstrates, addiction can serve as a viable theory for tort litigation. This section chronicles how the legal system applied this logic to the food-addiction context. These ill-fated attempts to allege food-addiction torts elicited a strong public reaction that culminated in the enactment of the flawed CCAs.

1. Pelman v. McDonald's Corp. — The legal community's acceptance of addiction in tort claims opened the door to a world of possibilities for potential lawsuits.[117] Addiction tort claims have graced the headlines for decades, drawing much legal and public scrutiny.[118] Commentators quickly began to draw comparisons between consumer protection litigation and another industry known for its disastrous contributions to public health crises: the food industry.[119] Big Food's[120] responsibility for the current obesity crisis is noticeably similar to Big Tobacco's culpability for lung disease, cancer, and other ailments.[121] It utilizes the same "playbook" as Big Tobacco, intentionally pushing unhealthy and addictive substances while blaming the consumer.[122] Its actions have substantially contributed to the global epidemic of obesity.[123] Obesity is comorbid with a litany of

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117. See Engstrom & Rabin, supra note 66, at 300–01 ("Among other virtues, this focus on addiction—not injury—expanded the size of the class and permitted the plaintiffs to dodge tricky questions concerning general and specific causation.").

118. See, e.g., Suzanne Zhou, Evita Ricafort, Davi Bressler & Rachel Kitonyo Devotsu, Litigation in Tobacco Control: Past, Present and Future, 31 Tobacco Control 291, 291 (2022) ("Many types of tobacco control litigation . . . raise questions of global significance.").

119. See, e.g., Jonathan Bailor, Opinion, Big Food Is the New Big Tobacco. We Must Take Them On, Newsweek (Aug. 4, 2021), https://www.newsweek.com/big-food-new-big-tobacco-we-must-take-them-opinion-1615780 (on file with the *Columbia Law Review*).

120. This Note uses the term "Big Food" to describe "the domination of a major market by just a few large companies" in the food industry. Grace Hussain, How Power and Influence Corrupts Big Food Companies, Sentient (Jan. 13, 2023), https://sentientmedia.org/big-food/ [https://perma.cc/U7E6-58J6]. There are a "few major players" that "tend to have products in every aisle of the supermarket." Id. Big Food companies include the major fast-food giants, Kellogg's, Nestlé, and General Mills, among others. Id.

121. See Kevin D. Hall, Did the Food Environment Cause the Obesity Epidemic?, 26 Obesity 11, 12 (2018) ("[P]lausible explanations invoke complex changes in the overall food environment and the associated alterations in normative eating behaviors.").

122. See Michael F. Jacobson, Big Food: Sounds a Lot Like Big Tobacco, HuffPost (June 2, 2015), https://www.huffpost.com/entry/big-food-big-tobacco_b_7486934 (on file with the *Columbia Law Review*) (last updated June 2, 2016) ("[E]xecutives at some of the nation's largest food and beverage companies seem to have learned a lot from their counterparts at Big Tobacco in aggressively promoting consumption of unhealthy foods and, in the same breath, blaming the consumer.").

123. See Controlling the Global Obesity Epidemic, WHO, https://www.who.int/activities/controlling-the-global-obesity-epidemic [https://perma.cc/7TK6-EG6U] (last visited Oct. 7, 2025) ("[O]besity is predominantly a 'social and environmental disease' . . . ."); see also Hall, supra note 121, at 12–13 (arguing "that the food environment is likely the primary driver of the obesity epidemic").

conditions that cause serious health issues.[124] Further, the costs of obesity on the healthcare system are immense, burdening hospitals and the public.[125] The striking similarity between the tobacco and food industries is no accident: Many Big Food companies produced both tobacco and HPFs.[126] "RJR Nabisco, for instance, once simultaneously contained the companies that made Camel cigarettes and Chips Ahoy! cookies."[127]

The resemblance between these industries prompted some plaintiffs' lawyers to formulate creative attacks against Big Food. In the early 2000s, one lawyer, Samuel Hirsch, instigated two obesity-related tort cases against fast-food companies.[128] In both cases, the plaintiffs sued fast-food providers, claiming that the fast-food industry was liable, at least in part, for their obesity.[129]

The plaintiff in the first lawsuit[130] withdrew his complaint before he could try it in court.[131] Hirsch's second suit, which he filed on behalf of obese teenagers, lasted far longer.[132] The case, *Pelman v. McDonald's Corp.*, bounced between the Southern District of New York and the Second Circuit before finally being tossed from the docket.[133] In their original complaint, the plaintiffs alleged three tort claims.[134] The first tort claim lodged a novel and bold theory, asserting that McDonald's was liable simply for serving "foods high in fat, salt, sugar, and cholesterol content, which cause adverse health problems."[135] The second tort claim alleged a failure-to-warn claim premised on McDonald's "failure to warn consumers of its products[']ingredients, levels of fat, salt, sugar, and cholesterol, and the dire health problems that can ensue."[136]

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124. Controlling the Global Obesity Epidemic, supra note 123; see also infra section II.A.

125. Wilking & Daynard, supra note 30, at 230 ("The current medical cost of adult obesity in the U.S. is estimated at $147–$210 billion per year . . . .").

126. See Jacobson, supra note 122 ("Until the mid-2000s, the companies that manufacture Marlboro and Virginia Slims cigarettes were part of the same conglomerate, Philip Morris (now Altria), which manufactured Kraft Macaroni & Cheese and Kool Aid.").

127. Id.

128. Jonathan Benloulou, *Pelman v. McDonald's*: An In-Depth Case Study of a Fast Food & Obesity Lawsuit 4–5 (2005) (Third Year Paper, Harvard Law School), https://dash.harvard.edu/entities/publication/73120378-a203-6bd4-e053-0100007fdf3b [https://perma.cc/88YV-NW2K].

129. Id. at 5, 8.

130. See Complaint ¶¶ 34–54, Barber v. McDonald's Corp., No. 23145/2002 (N.Y. Sup. Ct. filed Jul. 24, 2002), 2002 WL 32388034 (detailing the plaintiff's claims against Big Food, which included failure-to-warn claims about the contents of the food).

131. Benloulou, supra note 128, at 5.

132. Pelman v. McDonald's Corp., 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

133. Benloulou, supra note 128, at 5.

134. See id. at 11–12. The plaintiffs also alleged two other state law claims. See id.

135. Id. at 11.

136. Id. at 12–13.

In evaluating McDonald's subsequent motion to dismiss, the court found that the plaintiffs could not recover on either of these grounds. The court held that they had not sufficiently alleged that "McDonalds products are so extraordinarily unhealthy that they are outside the reasonable contemplation of the consuming public or that the products are so extraordinarily unhealthy as to be dangerous in their intended use."[137] Much of the court's analysis centered around the fact that the "consequences of . . . over-consumption are common knowledge," meaning that McDonald's did not have a duty to warn the plaintiffs of the harm.[138]

Importantly, however, the court reserved a different analysis for the third tort claim. This claim alleged that McDonald's intentionally, negligently, or recklessly distributed food that "caused its consumers to become physically or psychologically addicted to products that cause adverse health effects."[139] This incredibly novel claim was the first to premise a theory of tort liability on food addiction.[140] The court noted that the contention's "exact basis" in tort doctrine was "unclear," a testament to its boldness.[141] The court struggled with how to treat the claim, oscillating between a design defect tort (that the products were unreasonably dangerous because they are addictive) and a warning defect tort (that McDonald's failed to warn of the addictive nature of the product).[142] In evaluating the claim, the court noted that food addiction could provide a way around the roadblocks for the other two tort claims, as addiction to food is not "a danger that is so open and obvious, or so commonly well-known, that McDonalds' customers would be expected to know about it."[143] But the court found the allegation to be too vague to support relief.[144] In its vagueness analysis, the court noted that food addiction was a "hypothesis" and "the subject of current investigations."[145] Consequently, the court dismissed the addiction claim for lack of specificity.[146]

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137. *Pelman*, 237 F. Supp. 2d at 532.

138. Id. The court also found an issue with the plaintiffs' proffered theory of causation. See id. at 540 (noting that the complaint "fails to allege with sufficient specificity that the McDonalds' products were a proximate cause of the plaintiffs' obesity and health problems").

139. Benloulou, supra note 128, at 13.

140. Id.

141. *Pelman*, 237 F. Supp. 2d at 542; see also id. at 516 ("This action presents unique and challenging issues.").

142. Id. at 537, 543.

143. Id. at 542.

144. See id. ("[T]o allow a complaint to survive merely because it alleges product liability on the basis of addiction would be to allow any complaint that alleges product liability based on the addictive nature of the products to survive dismissal . . . .").

145. Id.

146. Id. at 542–43. The court also gestured at the potential issue of proving proximate cause for the addiction claim. Id. at 543.

After the court dismissed the case with leave to amend,[147] the plaintiffs reformulated their complaint. This reformulation excluded the addiction claim,[148] meaning that the court did not need to address the addiction issues brought in the initial complaint.[149] The *Pelman* court's treatment of this claim remains the most prominent example of a court reckoning with food addiction as a legal consideration in tort or consumer protection law.[150]

2. *Commonsense Consumption Acts.* — Obesity litigation provoked intense public reaction in the media and the court of public opinion.[151] The *Pelman* case generated national attention.[152] Commentators, outraged at the lawsuits, argued that they were frivolous and asserted that people could avoid obesity by choosing to eat healthier foods and to live more active lifestyles.[153] Much of the public saw "obesity [as] a matter of individual responsibility and, at some level, [a] moral failure."[154] Implicit in this critique is the presumption that food intake is a personal choice and not a compulsion or addiction. For many Americans, the *Pelman* suit served as an example of greedy people trying to cash in on poor personal choices.

Food companies rode the wave of public sentiment to double down on their practices. In response to *Pelman*, McDonald's argued that it is a "commonly understood" fact that eating hamburgers and french fries "over a prolonged period may have consequences to one's waistline and potentially to one's health."[155] Much of the public shared the same sentiment. Food lobbyists, claiming that the lawsuits were frivolous, waged

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147. Id. at 543.

148. See Amended Verified Complaint ¶¶ 74–79, Pelman v. McDonald's Corp., 272 F.R.D. 82 (S.D.N.Y. 2010) (No. 02 Civ. 07821 (DCP)), 2003 WL 23474873 (premising the remaining tort claims on design and general warning defect and omitting addiction from the complaint, while also keeping the UDAP claims); see also Benloulou, supra note 128, at 32 (describing the procedural history of this part of the litigation).

149. The *Pelman* class was eventually denied certification, ending the litigation. *Pelman*, 272 F.R.D. at 100.

150. See Michelle M. Mello, Eric B. Rimm & David M. Studdert, The McLawsuit: The Fast-Food Industry and Legal Accountability for Obesity, 22 Health Affs. 207, 208 (2003).

151. E.g., id. at 207 ("This litigation provoked an intense, mostly negative response in the news media and the court of public opinion.").

152. See Saul Wilensky & Kerry C. O'Dell, Where's the Beef? The Challenges of Obesity Suits, Bloomberg L. (June 21, 2013), https://news.bloomberglaw.com/product-liability-and-toxics-law/wheres-the-beef-the-challenges-of-obesity-suits (on file with the *Columbia Law Review*) (describing the reaction to *Pelman* as a "media firestorm").

153. See Marc Santora, Teenagers' Suit Says McDonald's Made Them Obese, N.Y. Times (Nov. 21, 2002), https://www.nytimes.com/2002/11/21/nyregion/teenagers-suit-says-mcdonald-s-made-them-obese.html (on file with the *Columbia Law Review*) ("Most [McDonald's patrons interviewed] said they found the lawsuit absurd.").

154. Mello et al., supra note 150, at 214.

155. Defendants' Consolidated Opposition to Plaintiffs' Motion to Remand and Reply in Support of Defendants' Motion to Dismiss at 1, Pelman v. McDonald's Corp., 237 F. Supp. 2d 512 (S.D.N.Y. 2003) (No. 02 CV 7821 (RWS)), 2002 WL 32495997.

an aggressive war against future potential lawsuits.[156] This national fervor, aided by aggressive lobbying from Big Food, emboldened state legislatures to act.

Despite their win in *Pelman*, the fast-food companies quickly deployed their substantial lobbying apparatus to nip these suits in the bud.[157] Given the industry's immense wealth and influence, its lobbying efforts paid off.[158] From 2003 to 2013, twenty-six states passed CCAs, also known as "cheeseburger bills," to immunize the fast-food industry from obesity-related torts.[159] A similar effort occurred on the federal level: The United States House of Representatives passed its own CCA, only for the Senate to rebuff it.[160] Because CCAs "place accountability for obesity on the consumer, making it more difficult to sue food manufacturers,"[161] the food industry gained immunity from many cognizable obesity-related tort suits.[162]

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156. See Melanie Warner, The Food Industry Empire Strikes Back, N.Y. Times (July 7, 2005), https://www.nytimes.com/2005/07/07/business/the-food-industry-empire-strikes-back.html (on file with the *Columbia Law Review*) ("Food and restaurant companies, fearing they would be hammered with enormous judgments, as the tobacco industry was, immediately began fighting back, waging an aggressive campaign to make it impossible for anyone to sue them successfully for causing obesity or obesity-related health problems.").

157. See Christopher S. Carpenter & D. Sebastian Tello-Trillo, Do Cheeseburger Bills Work? Effects of Tort Reform for Fast Food, 58 J.L. & Econ. 805, 806 (2015) (describing how the National Restaurant Association quickly began pushing for legislation limiting food companies' liability).

158. See Wilking & Daynard, supra note 30, at 230.

159. See id. (describing the restaurant industry's lobbying efforts on these bills); see also Ala. Code § 6-5-732) (2026); Ariz. Rev. Stat. Ann. §§ 12-683(4), 12-688 (2025); Colo. Rev. Stat § 13-21-1102 (2025); Fla. Stat. Ann. § 768.37 (West 2025); Ga. Code Ann. § 26-2-432 (2025); Idaho Code § 39-8702 (2025); 745 Ill. Comp. Stat. Ann. 43/10 (West 2025); Ind. Code Ann. § 34-30-23-3 (West 2025); Kan. Stat. Ann. § 60-4801(a) (West 2025); Ky. Rev. Stat. Ann. § 411.610 (West 2025); La. Stat. Ann. § 9:2799.6(A) (2025); Me. Rev. Stat. Ann. tit. 14, § 170(2) (2025); Mich. Comp. Laws § 600.2974(1) (2026); Mo. Ann. Stat. § 537.595(3) (2025); N.C. Gen. Stat. § 99E-42 (2025); N.D. Cent. Code § 19-23-01(1) (2025); Ohio Rev. Code Ann. § 2305.36(C) (2025); Or. Rev. Stat. § 30.961(2) (2025); S.D. Codified Laws § 21-61-2 (2026); Tenn. Code Ann. § 29-34-205(a) (2025); Tex. Civ. Prac. & Rem. Code Ann. § 138.002(a)(1)–(2) (West 2025); Utah Code § 78B-4-303(1) (2025); Wash. Rev. Code § 7.72.070(1) (2025); Wis. Stat. & Ann. § 895.506(1) (2026); Wyo. Stat. Ann. § 11-47-103(a) (2025); Okla. Stat. tit. 76, § 37(B)(2) (2012) (repealed 2013). Oklahoma's CCA was struck down as unconstitutional on unrelated grounds in 2013. Douglas v. Cox Retirement Props., Inc., 302 P.2d 789, 792 (Okla. 2013). In 2025, the legislature enacted a new CCA with the same language. Okla. Stat. tit 76, § 41 (2025).

160. Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong.

161. Barbara L. Atwell, Obesity, Public Health, and the Food Supply, 4 Ind. Health L. Rev. 3, 18 (2007) (citing Lorraine M. Buerger, Comment, The Safe Games Illinois Act: Can Curbs on Violent Video Games Survive Constitutional Challenges?, 37 Loy. U. Chi. L.J. 617, 659–60 (2006)).

162. Food Industry Cooks Up Ways to Stymie Suits, Chi. Trib. (Aug. 15, 2003), https://www.chicagotribune.com/2003/08/15/food-industry-cooks-up-ways-to-stymie-suits/?clearUserState=true (on file with the *Columbia Law Review*) (last updated Aug. 21, 2021) (discussing the food industry's goal to prevent lawsuits).

State legislatures made their motives clear when passing these bills. They clearly defined obesity and other illnesses related to food addiction as "long-term manifestations of poor *choices* that are habitually made by those individuals."[163] CCAs are thus mired in an understanding of obesity that puts the choice of the consumer—not the misdeeds of Big Food—at the forefront of the obesity debate.

CCAs broadly prevent claims that arise from the repeated consumption of food and attempt to recover damages from said consumption, namely for obesity-related healthcare costs.[164] There are two types of CCAs: broad CCAs, which prevent all obesity-related claims (with limited exceptions), and narrow CCAs that specifically prohibit obesity-related tort claims.[165]

Broad CCAs immunize entities from any suit arising under state law stemming from the long-term consumption of food.[166] The statutes generally shield entities from any liability for these kinds of claims.[167] For example, Missouri's broad CCA immunizes Big Food companies from "civil liability under any state law, including all statutes, regulations, rules, common law, public policies, court or administrative decisions or decrees, or other state actions having the effect of law, for any claim arising out of weight gain, obesity, or a health condition associated with weight gain or obesity."[168]

These statutes frequently hold exceptions for claims that allege "knowing and willful" violations of state or federal regulations.[169] This is a hefty burden for plaintiffs, who must prove that the violation was committed with intent to deceive or with actual knowledge that the violation harmed consumers.[170] To prove this, plaintiffs must search through "an avalanche" of discovery to try to find evidence of intent or knowledge.[171] To make matters worse, CCAs in ten states heighten the

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163. Colo. Rev. Stat § 13-21-1102(1) (emphasis added).

164. Wilking & Daynard, supra note 30, at 231.

165. Id. at 232.

166. See, e.g., Tex. Civ. Prac. & Rem. Code Ann. § 138.002(a) (West 2025) ("Except as otherwise provided by this section, a manufacturer, seller, trade association, livestock producer, or agricultural producer is not liable under any law of this state for any claim arising out of weight gain or obesity . . . .").

167. See, e.g., Colo. Rev. Stat. § 13-21-1104(1) (providing sweeping immunity for any claim arising from obesity).

168. Mo. Ann. Stat. § 537.595(3) (2025).

169. Wilking & Daynard, supra note 30, at 232–33.

170. See, e.g., Idaho Code § 39-8704(4) (2025) (defining "[k]nowing and willful" as when "[t]he conduct constituting the violation was committed with the intent to deceive or injure consumers or with actual knowledge that such conduct was injurious to consumers").

171. See Bernadette Bollas Genetin, "Just a Bit Outside!": Proportionality in Federal Discovery and the Institutional Capacity of the Federal Courts, 34 Rev. Litig. 655, 657 (2015) ("[M]ethods of creating, saving, and using information have changed, resulting in an avalanche of information that is available—in varying formats—for discovery.").

pleading requirements for these claims.[172] This standard requires plaintiffs to plead specific violations *before discovery*.[173] After the pleading, the court will enter a mandatory stay of discovery pending the defendant's motion to dismiss.[174] This heightened standard poses a formidable burden to succeeding on obesity-related claims.

Broad CCAs can also flout UDAP claims against Big Food.[175] UDAP statutes were initially passed to "level the playing field by creating statutory claims without intent requirements."[176] Heightened pleading requirements, contrarily, force the plaintiff to plead specific intent before discovery.[177] As a result, CCAs could "reverse consumer protection legal reforms with respect to UDAP claims stemming from the long-term consumption of food."[178] Broad CCAs not only immunize defendants from basic obesity-related torts, but they raise the burden on plaintiffs trying to argue some food-related UDAP claims. Put simply, broad CCAs prevent judicial consideration of essentially all obesity lawsuits.[179]

Narrow CCAs, however, immunize entities from tort-based obesity claims only.[180] These claims do not conflict with UDAP statutes but still foreclose the possibility of plaintiffs bringing any obesity-related *tort* claim.[181] The statutes allow for UDAP claims relating to unhealthy food, which permits actionable claims in which the defendant has made a "misrepresentation to the public."[182] But only nine states—the minority of

172. See Wilking & Daynard, supra note 30, at 233 (describing the standard).

173. Id.

174. Id.

175. Id. "Every state has a consumer protection law that prohibits deceptive practices, and many prohibit unfair or unconscionable practices as well. These statutes . . . provide bedrock protections for consumers." Carter, supra note 89, at 5.

176. Wilking & Daynard, supra note 30, at 233 (citing Dee Pridgen & Richard M. Alderman, Consumer Protection and the Law § 1.1 (2011–2012 ed. 2012)).

177. See id. ("CCAs could be interpreted to require plaintiffs seeking recovery for obesity-related health harms to plead sufficient facts to establish the alleged conduct was done knowingly and willfully, while being denied any discovery . . . .").

178. Id.

179. Plaintiffs could still argue product defect claims for personal harms—for example, if a food item gave them serious food poisoning. See Restatement (Second) of Torts § 402A cmt. i (Am. L. Inst. 1965) ("Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.").

180. For example, Louisiana's statute bars claims for "personal injury or wrongful death based on an individual's consumption of food or nonalcoholic beverages in cases where liability is premised upon the individual's weight gain, obesity, or a health condition related to weight gain or obesity and resulting from his long-term consumption of a food or nonalcoholic beverage." La. Stat. Ann. § 9:2799.6(A) (2025).

181. Wilking & Daynard, supra note 30, at 233–34.

182. See id. at 234 (citing Fla. Stat. Ann. § 768.37 (West 2012); Me. Rev. Stat. Ann. tit. 14, § 170(3) (West 2012); Mich. Comp. Laws § 600.2974(2)(b) (2012); Or. Rev. Stat. § 30.961(3)(d) (2012); Wyo. Stat. Ann. § 11-47-103(b) (2012)) ("[These CCAs] should not impact claims filed by consumers or state AGs under state UDAP statutes or for violations of other food-related statutory provisions.").

the twenty-six states with CCAs—tailor their statutes this carefully.[183] And of those nine, two states[184] still impose the heightened pleading standard that makes it difficult for plaintiffs to make it to discovery.[185] Further, UDAP claims do not necessarily allow for food-addiction tort claims. UDAP claims only apply to "unfair and deceptive tactics in the marketplace" that are "inappropriate."[186] There is less flexibility to plead addiction-related harms under a UDAP statute than a tort cause of action.

CCAs effectively prohibit food-addiction tort claims and severely hinder similar UDAP lawsuits. The addictive quality of HPFs[187] is the risk that the defendants should warn consumers about.[188] The "harm" that many food-addicted plaintiffs suffer is "weight gain, obesity, or a health condition associated with weight gain or obesity."[189] Given that defendants are immunized from liability arising from these harms, most food-addiction torts will stumble out of the gate.

UDAP claims do not fair much better against CCAs. Even CCAs that allow for UDAP suits for false advertising of foods bar claims seeking to recover for a "personal injury" from the repeated consumption of food.[190] Therefore, though a plaintiff could potentially argue a UDAP claim that the defendant failed to warn of addictive foods, they would have difficulty disambiguating it from the "personal injury" immunization.[191] Even narrow CCAs make food-addiction torts difficult to cognize.

Regardless of the level of immunity, all twenty-six statutes reflect one goal—immunizing the food industry from obesity-related tort claims.[192]

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183. Ariz. Rev. Stat. Ann. §§ 12-683(4), 12-688 (2025); Fla. Stat. Ann. § 768.37 (West 2025); La. Stat. Ann. § 9:2799.6(A); Me. Rev. Stat. Ann. tit. 14, § 170(2) (West 2025); Mich. Comp. Laws § 600.2974(1) (2026); Or. Rev. Stat. § 30.961(2) (2025); S.D. Codified Laws § 21-61-2 (2026); Wash. Rev. Code § 7.72.070(1) (2025); Wyo. Stat. Ann. § 11-47-103(a) (2025).

184. Mich. Comp. Laws § 600.2974(3), (4); Or. Rev. Stat. § 30.963(2), (3).

185. See Wilking & Daynard, supra note 30, at 233–34 (highlighting that these CCAs "impose heightened pleading requirements and stays of discovery pending a motion to dismiss to exempted claims").

186. Carter, supra note 89, at 5.

187. See infra section II.A.

188. See Restatement (Third) of Torts: Prods. Liab. § 2(c) (Am. L. Inst. 1998); see also Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996) (pleading a failure-to-warn tort in the tobacco litigation).

189. Mo. Ann. Stat. § 537.595(3) (2025).

190. Wilking & Daynard, supra note 30, at 233–34.

191. Id.

192. In the wake of CCAs, plaintiffs have rarely filed obesity-related tort claims. Filed claims were quickly dismissed. See Ctr. for Sci. in the Pub. Int. v. Burger King Corp., 534 F. Supp. 2d 141, 144 (D.D.C. 2008) (dismissed on standing grounds); see also California Judge Dismisses Happy Meal Lawsuit, Fox News (Apr. 5, 2012), https://www.foxnews.com/politics/california-judge-dismisses-happy-meal-lawsuit [https://perma.cc/YKL2-VG6M] (last updated Dec. 23, 2015) (describing the dismissal of a lawsuit claiming that McDonald's Happy Meal toys were unfairly coercing children's diets). Two recent lawsuits have sought recovery from Big Food. In *Martinez v. Kraft Heinz Co.*, the

This agenda is explicitly premised on the belief that the repeated overconsumption of unhealthy food is a choice, not an irresistible compulsion.[193]

## II. FOOD ADDICTION AND CCAS

CCAs presume that food, unlike tobacco and opioids, cannot be addictive enough to cause obesity-related harms. Rather, they posit that individuals should have the willpower—or as the Acts themselves label it, "commonsense"—to choose healthier options. This Part asserts that CCAs are problematic for two crucial reasons: First, they are scientifically inaccurate and do not reflect modern understandings of food addiction. Second, they improperly restrain courts' ability to adjudicate harms arising from food addiction. When combined, these two issues prevent the validation of food addiction—a harm that should not remain unremedied.

### A. *CCAs Do Not Recognize Scientific Evidence of Food Addiction*

Food addiction was first coined by researchers in 1956.[194] Overeaters Anonymous, an organization like Alcoholics or Narcotics Anonymous that helps food addicts, was founded in 1960.[195] But in its earliest stages, food addiction was not taken seriously as a scientific concept.[196] This hesitation was, perhaps, warranted. In the abstract, the concept seems farfetched. Food, which humans must consume every day, is obviously distinct from something like tobacco or opioids. The former is a daily requirement, whereas the latter is an unnecessary luxury or a powerful narcotic. How could something so innocuous, like a cheeseburger, be addictive?

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plaintiffs alleged that the HPFs made by the defendant were "addictive in nature and heavily marketed to children" and pointed out that the food industry had "[a]dopt[ed] the tobacco industry's techniques" and "implemented addiction science techniques." No. 25-377, 2025 WL 2447793, at *1 (E.D. Pa. Aug. 25, 2025). The plaintiff's claims were dismissed. Id. at *4. The plaintiff has moved for leave to file an amended complaint. Plaintiff's Motion for Leave to Amend the Complaint and for Reconsideration of the Order Granting Defendants' Omnibus Motion to Dismiss, Martinez v. Kraft Heinz Co., No. 2:25-cv-0037 (E.D. Pa. filed Sep. 22, 2025). The suit was brought in Pennsylvania, which does not have a CCA. See Senate Bill 1260, Pa. Gen. Assembly, https://www.palegis.us/legislation/bills/2003/sb1260 [https://perma.cc/364D-L4CX] (last visited Feb. 21, 2026) (showing that the 2004 CCA bill did not make it out of committee). In another suit, the city of San Francisco has brought UDAP claims against companies who sell HPFs, seeking redress for healthcare costs associated with obesity. See Heather Knight, San Francisco Sues Ultraprocessed Food Companies, N.Y. Times (Dec. 2, 2025), https://www.nytimes.com/2025/12/02/us/san-francisco-ultraprocessed-food-lawsuit.html?smid=nytcore-ios-share (on file with the *Columbia Law Review*) (detailing the lawsuit, which is in its early stages at the time of writing).

193. See, e.g., Colo. Rev. Stat. § 13-21-1102 (2025) (describing obesity as a choice).

194. Theron G. Randolph, The Descriptive Features of Food Addiction: Addictive Eating and Drinking, 17 Q.J. Stud. on Alcohol 198 (1956).

195. Meule, supra note 34, at 297 (providing a historical account of the development of the concept of food addiction, including the rise of support organizations).

196. Id. at 296.

Despite this air of innocence, food is an addictive substance. Studies indicate that food consumption has the same neurologically rewarding effect as the consumption of other addictive substances.[197] And while the concept of food addiction isn't without its controversies, "some researchers strongly support[] [food addiction's] validity."[198] This acceptance draws on the fundamental neurobiology underlying addiction.[199] Researchers have demonstrated that food addiction follows the same three neurobiological steps discussed above.[200]

Food addicts binge HPFs, which could be "as addictive as drugs"[201] and may elicit a similar "neural response to rewarding stimuli" in the basal ganglia.[202] These HPFs are engineered to be addictive. Unlike natural foods, which "typically have one main palatability-related nutrient," HPFs have "combinations of palatability-inducing nutrients (fat, sugar, sodium, and/or carbohydrates) present at thresholds that do not occur in nature."[203] The unnatural combination of nutrients in HPFs "can excessively activate our brain reward system, leading to a highly rewarding eating experience."[204] As a result, HPFs elicit dopamine responses more

197. Id. at 299.

198. Id. There is an ongoing debate in the literature as to whether the term "food addiction" or "eating addiction" is more appropriate. Food addiction places the emphasis on the actual food. Proponents of the term food addiction argue that this is appropriate, as highly palatable agents in food (sugars, fats, etc.) are addictive. Eating addiction proponents counter that it is difficult to scientifically pin down one addictive agent in food (contrary to something like tobacco, where nicotine is the addictive agent). Thus, they argue that the term eating addiction should be used to emphasize that the disorder is a behavioral addiction, like gambling addiction. See generally Johannes Hebebrand et al., "Eating Addiction", Rather Than "Food Addiction", Better Captures Addictive-Like Eating Behavior, 47 Neurosci. & Biobehav. Revs. 295 (2014) (providing an overview of this debate).

199. See supra notes 48–64 and accompanying text.

200. See supra section I.A; see also Soumya Ravichandran et al., Alterations in Reward Network Functional Connectivity Are Associated With Increased Food Addiction in Obese Individuals, Sci. Reps., Feb. 9, 2021, at 1, 2, https://www.nature.com/articles/s41598-021-83116-0 (on file with the *Columbia Law Review*) ("While it is believed that food addiction is distinct from other behavioral eating disorders, it does share the characteristics o[f] withdrawal, tolerance, impulsivity, and emotional reactivity seen with substance-use disorders and other addictive behaviors.").

201. Aymery Constant, Romain Moirand, Ronan Thibault & David Val-Laillet, Meeting of Minds Around Food Addiction: Insights From Addiction Medicine, Nutrition, Psychology, and Neurosciences, Nutrients, Nov. 2020, at 1, 2, https://www.mdpi.com/2072-6643/12/11/3564 (on file with the *Columbia Law Review*).

202. I. García-García, A. Horstmann, M.A. Jurado, M. Garolera, S.J. Chaudhry, D.S. Margulies, A. Villringer & J. Neumann, Reward Processing in Obesity, Substance Addiction and Non-Substance Addiction, 15 Obesity Revs. 853, 854 (2014).

203. Jennifer L. Humphrey, Q & A With Researcher Tera Fazzino: What to Know About 'Hyperpalatable' Foods, Kan. U. Life Span Inst. (Sep. 5, 2023), https://lifespan.ku.edu/news/article/2023/09/05/q-researcher-tera-fazzino-what-know-about-hyperpalatable-foods [https://perma.cc/YAJ5-V66H].

204. Id.

effectively than other foods.[205] "[L]ike drugs of abuse, these highly processed foods may be more likely to trigger addictive-like biological and behavioral responses due to their unnaturally high levels of reward."[206] Research has demonstrated that the food industry has intentionally hooked the public on unhealthy foods.[207] Chains like McDonald's, Burger King, Taco Bell, Wendy's, and Kentucky Fried Chicken push these addictive foods to maximize consumers' frequent binging.[208]

This strategy carries serious consequences. There is a relationship between binge eating, food addiction, and morbid obesity.[209] Due to the disastrous health impacts and prevalence of obesity,[210] it is considered a global epidemic.[211] The foods most likely to forge addictive connections—"[p]alatable foods (such as sugar, salt, and fat)"—are also the foods highest in caloric content.[212] The repeated overconsumption of these

205. See García-García et al., supra note 202, at 853 ("[N]eurobehavioural studies point at the existence of some parallels between obesity and addiction, including similarities in the brain's dopaminergic system." (citations omitted)).

206. Erica M. Schulte, Nicole M. Avena & Ashley N. Gearhardt, Which Foods May Be Addictive? The Roles of Processing, Fat Content, and Glycemic Load, PLoS One, Feb. 18, 2015, at 3, https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0117959 [https://perma.cc/ANQ7-H3KZ].

207. See Moss, Hooked, supra note 13, at 127–59; Michael Moss, Salt Sugar Fat: How the Food Giants Hooked Us, at xxvi, 6–24 (2013) (providing an overview of how food companies use salt, sugar, fat, and marketing to "shap[e] America's eating habits"); see also Nell Boeschenstein, How the Food Industry Manipulates Taste Buds With 'Salt Sugar Fat', NPR (Feb. 26, 2013), https://www.npr.org/sections/thesalt/2013/02/26/172969363/how-the-food-industry-manipulates-taste-buds-with-salt-sugar-fat [https://perma.cc/VKE2-2SUG] (chronicling Big Food's intentional efforts to hook their consumers on hyper-palatable foods).

208. See Jacobson, supra note 122 ("[C]ompanies persuade, lure, and manipulate customers—including children—into making the very decisions that companies say should be up to them."); see also Megan Hageman, The 7 Most Addictive Fast-Food Items Ever, According to Science, Eat This, Not That! (Apr. 13, 2025), https://www.eatthis.com/most-addictive-fast-foods/ [https://perma.cc/VV42-LV4M] (describing how various fast-food brands use ingredients such as sugar, sodium, and fat in highly addictive foods).

209. See Bruna Campana, Poliana Guiomar Brasiel, Aline Silva de Aguiar & Sheila Cristina Potente Luquetti Dutra, Obesity and Food Addiction: Similarities to Drug Addiction, Obesity Med., Dec. 2019, at 1, 4, https://doi.org/10.1016/j.obmed.2019.100136 (on file with the *Columbia Law Review*).

210. Obesity can lead to numerous health issues, including heart disease, strokes, type 2 diabetes, certain cancers, sleep apnea, osteoarthritis, fatty liver disease, and heightened vulnerability to various diseases, such as COVID-19. Obesity, Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/obesity/symptoms-causes/syc-20375742 [https://perma.cc/K2ZZ-ZGSB] (last visited Oct. 7, 2025).

211. Controlling the Global Obesity Epidemic, supra note 123.

212. Campana et al., supra note 209, at 2. Though HPFs are only defined as "any type of food that may be difficult to stop eating," which might include some foods that are addictive and not calorie rich, there is still clear "overlap" between the two categories. Daiil Jun, Jeffrey M. Girard, Corby K. Martin & Terra L. Fazzino, The Role of Hyper-Palatable Foods in Energy Intake Measured Using Mobile Food Photography Methodology, Eating Behavs., Apr. 2025, at 1, 2, https://doi.org/10.1016/j.eatbeh.2025.101983 (on file with the *Columbia Law Review*). Indeed, the authors find that "fat and sodium HPF are the most

addictive, calorie-dense foods naturally leads people to dangerously gain weight.[213] Those addicted to calorically rich HPFs are likely to gain weight after the intense binges that are symptomatic of addiction.

After the binge and accompanying dopaminergic reward, food addicts experience symptoms of withdrawal.[214] As occurs with other substances, withdrawal activates the amygdala, which releases stress neurotransmitters.[215] Studies indicate that there is "similar increased activation in the right amygdala for obesity and substance addiction."[216] These stress chemicals decrease the inhibitory function of the prefrontal cortex to curtail "addiction-related enhanced activity."[217] Though the *Diagnostic and Statistical Manual of Mental Disorders* does not "yet" recognize food addiction as a "formal diagnosis,"[218] the "[d]iagnostic criteria for [substance abuse disorder] represent a cluster of cognitive, behavioral, and physiological symptoms, and most of them can apply to some patients by replacing 'substance' with 'certain food.'"[219] The scientific evidence is clear—food addiction is eerily similar to other substance use disorders. For food-addicted persons, the choice to consume unhealthy food "become[s] mindless, compulsive eating, out of control, and associated with marked distress."[220] At this stage, the compulsion to eat is "not any longer being

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prevalent type of HPF in the food environment[] and comprise most of our meals and snacks," meaning that "the foods individuals in the US encounter at most eating occasions may challenge energy balance." Id. at 6. Therefore, HPFs make it difficult for Americans to consume a healthy caloric balance.

213. See Causes: Obesity, NHS, https://www.nhs.uk/conditions/obesity/causes/ [https://perma.cc/2YX4-EKUX] (last updated Feb. 15, 2023) (describing high-calorie foods as a cause of obesity); see also Campana et al., supra note 209, at 1 (explaining the connection between food addiction and obesity). Granted, not every food-addicted person is obese. Cf. Stahl, supra note 56, at 575 (explaining that not every person with a binge eating disorder is obese). And reciprocally, not every obese person is addicted to food. See Overweight and Obesity: Causes and Risk Factors, Nat'l Heart Lung & Blood Inst., https://www.nhlbi.nih.gov/health/overweight-and-obesity/causes [https://perma.cc/DQL2-HKUP] (last updated Mar. 24, 2022) (listing multiple causes for obesity). This being said, the statistics demonstrate that food addiction is far more prevalent in obese populations than people of average weight. See Constant et al., supra note 201, at 5–6 (noting a study that found that "[food addiction] prevalence was higher in overweight/obese patients (24.9%) than in subjects with normal weight (11.1%)").

214. See Constant et al., supra note 201, at 9 ("From this perspective, pharmacological criteria, namely craving towards palatable food and withdrawal symptoms, could constitute the main . . . solid indicators of [food addiction] . . . .").

215. See García-García, supra note 202, at 854 ("[P]articipants scoring higher on questionnaires reflecting an 'addictive' or 'compulsive' pattern of eating behaviour . . . exhibited higher activity in the amygdala . . . .").

216. Id. at 864 (conducting a meta-analysis of eighty-seven studies).

217. Id. at 860.

218. Stahl, supra note 56, at 575; see also DSM-5-TR, supra note 64, at 543–666 (identifying various types of addiction diagnoses but not including food addiction as one of them).

219. Constant et al., supra note 201, at 2.

220. Stahl, supra note 56, at 575. Importantly, Professor Stephen Stahl is discussing binge eating disorder. However, he is attempting to characterize it as "falling within the

simply naughty or giving in to temptation"[221] but, rather, a neurological disease that disrupts free personal choice.

Despite this scientific evidence, regulators have failed to significantly help food addicts.[222] In other areas of the law, statutes recognize that people in active addiction are not always able to exercise free will. The federal definition of an addict as someone who has "lost the power of self-control"[223] cuts against the common perception that drug use is a matter of choice and moral responsibility.[224] Additionally, the Americans with Disabilities Act (ADA) prevents employment discrimination against addicts in recovery for substance misuse.[225] The ADA premises this protection on the theory that substance abuse disables the capacity of the user to make decisions or engage in "major life activities."[226] The law is no stranger to making exceptions for those who have limited or nonexistent self-control in exercising their consumption.

Yet CCAs make no such accommodations. By defining obesity as a "choice" and foreclosing any sort of food-addiction claim, the statutes *explicitly* invalidate food addiction as a legal concept.[227] This is not only bad policy, but it is also not in keeping with modern scientific understandings of food addiction. Put simply, CCAs are outdated and do not correctly validate the severity of food-addiction harms perpetuated by Big Food providers. This understanding is willfully ignorant of the scientific basis emphasizing the connection between unhealthy foods and addictive eating.[228] CCAs should be amended to rectify this misstatement of science.

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category of an impulsive–compulsive disorder" that supports the idea of food addiction as a "formal diagnosis" and "behavioral addiction." Id.

221. Id. at 544.

222. See Roeloffs, supra note 18 ("Despite growing evidence that such foods are harmful, there are no federal regulations in the United States regarding foods that are hyper-palatable.").

223. 21 U.S.C. § 802(1) (2018).

224. Mello et al., supra note 150, at 214.

225. See 42 U.S.C. § 12114(b)(1) (2018) (recognizing substance abuse as a disability).

226. See ADA Nat'l Network, The Americans With Disabilities Act, Addiction, and Recovery for State and Local Governments 1 (2021), https://adata.org/sites/adata.org/files/files/ADA_Addiction_Recovery_and_Govt-2021FINAL.pdf [https://perma.cc/L5NR-DHJY] ("The Americans with Disabilities Act (ADA) ensures that people with disabilities have the same rights and opportunities as everyone else. This includes people with addiction to alcohol and people in recovery from opioid and other drugs.").

227. See Colo. Rev. Stat. § 13-21-1102 (2025) ("Obesity and many other conditions that are detrimental to the health and well-being of individuals are frequently long-term manifestations of poor *choices* . . . . Despite commercial influences, individuals remain ultimately responsible for the *choices* they make . . . ." (emphasis added)).

228. Cf. Moss, Hooked, supra note 13, at 33–51 (describing significant scientific recognition of food addiction).

### B. *CCAs Inappropriately Prevent the Judiciary From Considering Food-Addiction Lawsuits*

Judicial consideration of addiction-related harms can express their danger and prevalence to the community at large. For instance, in the wake of the tobacco litigation, "Americans' trust of Big Tobacco 'plummeted to extremely low levels.'"[229] By allowing this litigation to proceed instead of opting for statutory tort reform, decisionmakers permitted the public and the legal establishment to grapple with addiction. CCAs are a kind of statutory tort reform that completely forecloses obesity-related tort claims. Without CCAs, obesity-related torts could serve as an effective check on the food industry.[230] Instead, potential litigants have been stopped in their tracks. The passage of CCAs completely chilled any lawsuits that could have the potential to be as impactful as the tobacco litigation.[231]

Perhaps more importantly, the foreclosure of these suits is inappropriate on an institutional level. By preventing the common law from adjudicating obesity claims, judges are denied the possibility to validate or reject food addiction as a legal concept. In a common law system, judicial consideration of specific topics allows for increased flexibility. The common law develops legal rules "on a case-by-case . . . basis,"[232] making adjudication responsive to the facts of the dispute. The common law's responsiveness to controversies allows it to incrementally develop, by analogy, as new information comes to light. By slamming the courthouse doors closed, CCAs do not allow courts to properly consider whether food addiction is a viable legal theory of risk underpinning an obesity-related tort claim. This robs the common law system of the flexibility it usually employs.

The fact-intensive flexibility of the judiciary can play an important expressive function.[233] When they issue judgments, courts express the values a society holds.[234] By considering and validating a type of addiction

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229. See Engstrom & Rabin, supra note 66, at 358 (quoting Michael McCann, William Haltom & Shauna Fisher, Criminalizing Big Tobacco: Legal Mobilization and the Politics of Responsibility for Health Risks in the United States, 38 Law & Soc. Inquiry 288, 314 (2013)).

230. See Grace Thompson, Note, How Commonsense Consumption Acts Are Preventing "Big Food" Litigation, 41 Seattle U. L. Rev. 695, 712 (2018) ("CCAs should be repealed to make room for tobacco-like litigation that many experts expected to plague the food industry.").

231. See id.; see also Food Industry Cooks Up Ways to Stymie Suits, supra note 162 (discussing the few attempted lawsuits regarding obesity-related torts).

232. Frank B. Cross, Identifying the Virtues of the Common Law, 15 Sup. Ct. Econ. Rev. 21, 23 (2007).

233. See Philip Bobbitt, Constitutional Fate: Theory of the Constitution 185 (paperback ed. 1984) ("Constitutional decisionmaking has, therefore, an expressive function. Of course it is a commonplace to observe that this is true of law generally.").

234. See Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2022 (1996) ("Many people support law because of the statements made by law, and disagreements about law are frequently debates over the expressive content of law.").

as a legal concept, the courts can communicate the prominence of said addiction in society, the public interest in addressing it, and the vulnerability of the victims.[235] Take, for example, the tobacco litigation. When first confronted with litigation, tobacco corporations (and much of the American public) did not consider smoking a serious addiction.[236] Now, after years of heavily publicized litigation, nicotine addiction and the hazards of smoking are well known, recognized even by cigarette producers.[237] After the judiciary's engagement with the issue, smoking has become starkly less popular.[238] As part of the MSA, the tobacco companies were forced to fund an independent national foundation organized to curb tobacco use.[239] This foundation, known as the Truth Initiative, "has prevented millions of young people from becoming smokers—including 2.5 million between 2015 and 2018 alone—and helped drive down the youth smoking rate from 23% in 2000."[240] By validating addiction as a tort concept, the judiciary expressed the importance of decreasing tobacco use. The expressive function of the judiciary helped to combat the tobacco addiction crisis.

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235. See id. at 2031–33 (explaining the importance of judicial expression of community values).

236. See Jack E. Henningfield, Christine A. Rose & Mitch Zeller, Tobacco Industry Litigation Position on Addiction: Continued Dependence on Past Views, 15 Tobacco Control, at iv27, iv27 (Supp. 2006) ("In 1994, the heads of the major US tobacco companies gave sworn testimony before the US Congress that they did not believe that nicotine was addictive.").

237. Press Release, Truth Initiative, Big Tobacco Finally Forced to Tell the Truth About Its Deadly Products Through Court-Ordered Ads (Nov. 27, 2017), https://truthinitiative.org/press/press-release/big-tobacco-finally-forced-tell-truth-about-its-deadly-products-through-court [https://perma.cc/FAM2-4SEC] ("In 2006, the tobacco industry . . . was ordered to tell the truth about the deadly and harmful effects of cigarettes. Now, after fighting and delaying the court's order for 11 years, Big Tobacco has finally been forced to begin publishing advertisements, or 'corrective statements' outlining these truths.").

238. See Frank A. Sloan & Justin G. Trogdon, The Impact of the Master Settlement Agreement on Cigarette Consumption, 23 J. Pol'y Analysis & Mgmt. 843, 852 (2004) ("The MSA and the separate state settlements have led to a significant decrease in smoking since their implementation.").

239. See The Master Settlement Agreement: 4 Ways the Landmark Tobacco Settlement Changed Tobacco Control, Truth Initiative (Nov. 30, 2023), https://truthinitiative.org/research-resources/tobacco-prevention-efforts/master-settlement-agreement-4-ways-landmark-tobacco [https://perma.cc/3RL7-7DSB] ("The MSA called for the establishment of an independent national foundation to oversee a comprehensive program of public education and study of tobacco with the goal of reducing youth tobacco use and subsequent death and disease from tobacco-related harms.").

240. Id.

Of course, private civil actions are not the only methods of regulation. States[241] and the federal government[242] can pass legislation or issue regulations,[243] including food laws, to deal with widespread issues. Legislation and regulations also possess potent expressive power in their own right.[244] Governments could issue regulations to curtail food addiction.[245] Political remedies, however, encounter two crucial pitfalls. First, the legitimacy of their pronouncement is often questioned due to partisan polarization, thus dampening their expressive potential. Second, the generality of political regulations prevents the strong confirmation of the veracity of the underlying facts, allowing for public doubt as to the law's factual legitimacy. Both issues would be resolved by allowing judicial consideration of food addiction.

Legislatures and executives, the "political branches," were designed to be responsive to the plights of their constituencies.[246] In response to ideological splits among voters, however, the political branches are deeply divided, with partisan antipathy being "deeper and more extensive[] than at any point in the last two decades."[247] This partisan gulf causes "gridlock," the inaction created by "separated institutions sharing and competing for

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241. See 2023 Update on State Food Safety Legislation, Nat'l Env't Health Ass'n (Oct. 3, 2023), https://www.neha.org/food-safety-legislation-update [https://perma.cc/V7U4-U9NS]; see also, e.g., Establishing State Agency Food Purchasing Goals for New York State Agricultural Products, N.Y. Comp. Codes R. & Regs. tit. 9, § 9.32 (2026) (mandating food purchasing laws for New York).

242. See, e.g., 21 U.S.C. § 331(a) (2018) (prohibiting "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded"); id. § 393 (establishing the FDA to issue food-related regulations).

243. Hereinafter, this Note will refer to statutes and administrative rules jointly as "regulations."

244. See James Huffman, The Presumption of Constitutionality and the Demise of Economic Liberties, 128 Penn. St. Dick. L. Rev. 1, 3 (2023) ("[D]eference has taken the form of a presumption of constitutionality—a supposition that the actions of the Executive and Congress are authorized by the Constitution, leaving those who would claim otherwise with the burden of proving unconstitutionality."). Note that the current Supreme Court has peeled back the presumption of legality for regulations. See Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024) ("Presumptions have their place in statutory interpretation, but only to the extent that they approximate reality.").

245. See, e.g., Christina Jewett & Julie Creswell, Kennedy's Vow to Take On Big Food Could Alienate His New G.O.P. Allies, N.Y. Times (Nov. 15, 2024), https://www.nytimes.com/2024/11/15/health/rfk-big-food-artificial-dyes-trump.html (on file with the *Columbia Law Review*) [hereinafter Jewett & Creswell, Big Food] (last updated Nov. 17, 2024) (describing HHS Secretary Robert F. Kennedy, Jr.'s promise to take on Big Food and their unhealthy practices through FDA regulation).

246. See Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 562 (2007) ("[T]he protection of 'public rights' belonging to the body politic.").

247. Pew Rsch. Ctr., Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life 6 (2014), https://www.pewresearch.org/wp-content/uploads/sites/4/2014/06/6-12-2014-Political-Polarization-Release.pdf [https://perma.cc/T49Y-9TMX].

power."[248] Such inaction can prevent meaningful reform in crucial areas. Take, for example, HHS Secretary Robert F. Kennedy, Jr.'s pledge to take on Big Food.[249] Despite these promises, Secretary Kennedy may run directly into "one of the country's most powerful industries whose traditional allies are Republicans."[250] And despite Secretary Kennedy's promises, the Trump Administration has continued to cozy up to Big Food.[251] Some experts even posit that Secretary Kennedy's statements are little more than a cover for President Donald Trump's deregulatory agenda.[252] Consequently, even "simple" regulations would likely result in a "knockdown battle for the multibillion-dollar food sector."[253] Even nonbinding guidelines, like Secretary Kennedy's new food pyramid that advocates for minimal consumption of HPFs,[254] are marred by the influence of political interests.[255] The politicization of this issue can prevent meaningful regulation from taking effect.

Politics, however, does more than cause gridlock—it begets a pernicious effect on public legitimacy. The legitimacy of regulation rests on the public complying with the directives of political actors.[256] In an age

248. Sarah A. Binder, Going Nowhere: A Gridlocked Congress, Brookings Inst. (Dec. 1, 2000), https://www.brookings.edu/articles/going-nowhere-a-gridlocked-congress/ [https://perma.cc/SN8J-VZED].

249. See Jewett & Creswell, Big Food, supra note 245 (describing Secretary Kennedy's promises).

250. Id.

251. See Cecilia Nowell, Inside RFK Jr's Conflicted Attempt to Rid America of Junk Food, The Guardian (July 8, 2025), https://www.theguardian.com/environment/2025/jul/08/rfk-jr-junk-food [https://perma.cc/6VYB-JFPB] (explaining the views of some food policy experts who argue that President Donald Trump's decision to appoint several cabinet members who favor deregulatory policies or have connections to the food industry undermines Secretary Kennedy's efforts to call out the role of ultra-processed food in the chronic disease crisis).

252. See id. ("The Trump administration and Maha movement have 'hijacked the food movement in order to use it as publicity for the kind of cuts that are being made,' she said. It's also being used to 'forward an agenda' . . . focused more on cutting programs than reforming industry." (quoting Marion Nestle, Professor Emerita, N. Y. Univ.)).

253. Jewett & Creswell, Big Food, supra note 245.

254. See Kerry Breen, RFK Jr.'s New Food Pyramid Emphasizes Protein, Healthy Fats. Here's What to Know About the Dietary Guidelines., CBS News, https://www.cbsnews.com/news/dietary-guidelines-rfk-jr-sugar-processed-foods-gut-health/ [https://perma.cc/MU98-2FMZ] (last updated Jan. 7, 2006) ("For the first time, the recommendations are calling for Americans to avoid eating highly processed foods.").

255. See Alice Callahan & Maggie Astor, Several of Kennedy's Dietary Advisers Have Ties to Meat and Dairy Interests, N.Y. Times (Jan. 9, 2026), https://www.nytimes.com/2026/01/09/well/dietary-guidelines-conflicts-of-interest.html (on file with the *Columbia Law Review*) ("[T]he new guidelines, which . . . emphasize protein, meat, cheese and milk, were informed by a panel of experts with several ties to the meat and dairy industries.").

256. See Tom R. Tyler & Jonathan Jackson, Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement, 20 Psych. Pub. Pol'y & L. 78, 79 (2014) ("Traditional examinations of the relationship between

of increased polarization,[257] public confidence in the political branches is waning.[258] The public is more likely to see regulation as "politics," serving the interests of politicians, as opposed to the meaningful reform of good government.[259]

Unlike the legislative branch, the American judiciary has been intentionally insulated from partisan politics.[260] The goal of the judiciary is to have "neither force nor will, but merely judgment."[261] The judiciary's lack of politicization means that its judgments are, at least theoretically, objective interpretations of the law and societal values.[262] Regulation by the political branches, on the other hand, does not serve the same expressive function—that is, affirming commonly held values—as effectively as the judiciary.[263] A regulation recognizing food addiction

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communities and legal authorities have emphasized the importance of public compliance with laws and the decisions of duly constituted legal authorities.").

257. See Pew Rsch. Ctr., supra note 247, at 6, 9 (describing increasing political polarization in the American public over the last two decades).

258. See P'ship for Pub. Serv., The State of Public Trust in Government 2024, at 4 (2024), https://ourpublicservice.org/wp-content/uploads/2024/05/The-State-of-Public-Trust-in-Government_2024.pdf [https://perma.cc/P7UB-YH5U] (reporting that, in the spring of 2024, "66% [of Americans] believe[d] the federal government is incompetent, up 10 percentage points" from the organization's 2022 survey).

259. See Callie McQuilkin, We Confuse Politics With Government. They're Not the Same., Corn. U.: ILR Buff. Co-Lab Sch. of Indus. & Lab. Rel. (Aug. 4, 2021), https://www.ilr.cornell.edu/buffalo-co-lab/we-confuse-politics-government-theyre-not-same [https://perma.cc/EM8H-AAPG] ("Politics might involve personal gain or electoral advantage; government should be above those concerns. Politics pits the parties against each other; in good government, they ideally (key caveat) work toward the same common goal of advancing American well-being.").

260. See The Federalist No. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., Gideon ed. 2001) ("[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them."). At the federal level, the appointment and life tenure protections serve as political insulation. Id.; see also U.S. Const. art. III, § 1, cl. 2 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."). Many states, however, still elect judges on a partisan ticket. Michael Kang, Election Briefing Series: American Judicial Elections, U.S. Dep't St. (June 27, 2024), https://2021-2025.state.gov/briefings-foreign-press-centers/2024-elections-fpc/judicial-elections [https://perma.cc/4BY8-XJH6]. As Professor Michael Kang notes, the goal of judicial elections is often to distance judges from politics. During America's earlier years, state judicial appointments came with a presumption that "judges really had become partisan hacks, that they had started to do what the politician wanted them to do; they weren't really applying the law in an objective way." Id. In response, states moved to election systems to "reduce politicization." Id. Therefore, even within partisan elections, the intent is to insulate the judiciary from politics.

261. The Federalist No. 78, supra note 260, at 402 (emphasis omitted).

262. See Sunstein, supra note 234, at 2022 ("The social meanings of actions are very much a function of existing social norms. . . . What can be said for actions can also be said for law.").

263. This cuts against the traditional logic of separation of powers, which posits that the legislature should be responsive to the values of the people. See The Federalist No. 52, at 273 (James Madison) (George W. Carey & James McClellan eds., Gideon ed. 2001) ("As

would potentially be delegitimized by half of the country purely based on the political party of its enactor. Judges, alternatively, are not political actors and "mostly decide issues in accordance with rule of law values."[264] Judicial proclamations are not as tainted with the stain of politics and thus carry a more powerful expressive function.

Political regulations are also necessarily general. Congress is constitutionally prohibited from passing legislation criminalizing specific individuals.[265] Congressional regulation of specific individuals, while potentially permissible, faces high constitutional burdens.[266] Administrative agencies may exert some level of individual adjudication,[267] but only in a narrowing set of cases.[268]

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it is essential to liberty, that the government in general should have a common interest with the people; so it is particularly essential, that the [legislature] should have an immediate dependence on, and an intimate sympathy with, the people."). But this presumption has soured in the modern day, when political polarization and economic elites have captured legislative action. See Martin Gilens & Benjamin I. Page, Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens, 12 Persps. on Pol. 564, 576 (2014) ("In the United States, our findings indicate, the majority does *not* rule—at least not in the causal sense of actually determining policy outcomes. When a majority of citizens disagrees with economic elites or with organized interests, they generally lose."). Meanwhile, the judiciary has demonstrated a willingness to overrule legislative judgements "where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process." Obergefell v. Hodges, 576 U.S. 644, 660 (2015).

264. Bruce A. Green & Rebecca Roiphe, Public Confidence, Judges, and Politics on and off the Bench, 87 Law & Contemp. Probs. 183, 185 (2024) (citing Charles Gardner Geyh, Can the Rule of Law Survive Judicial Politics?, 97 Corn. L. Rev. 191, 206–14 (2012)). Professors Bruce Green and Rebecca Roiphe concede that judges are "not immune to political and other biases" but affirm that most judges use the rule of law, and not politics, as their guiding light. See id. ("[T]he public perception of judges as politicians in robes is largely a misperception, or at least an exaggeration, predicated on public skepticism of whether judges' shared professional values counterbalance their personal and political interests.").

265. See U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

266. This point was forcefully argued in the First Amendment context during the recent TikTok litigation. See, e.g., Brief for Petitioners at 26–27, TikTok Inc. v. Garland, 145 S. Ct. 57 (2025) (per curiam) (No. 24-656), 2024 WL 5264712 ("Laws 'singl[ing] out' particular speakers 'present[] such a potential for abuse' that they are presumptively unconstitutional." (alterations in original) (quoting Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585, 592 (1983))).

267. See, e.g., 15 U.S.C. § 78d-1(a) (2018) (allowing the SEC to delegate individual adjudications to an administrative law judge).

268. See, e.g., Sec. & Exch. Comm'n v. Jarkesy, 144 S. Ct. 2117, 2140 (2024) (Gorsuch, J., concurring) ("Yes, ALJs enjoy some measure of independence as a matter of regulation and statute from the lawyers who pursue charges on behalf of the agency. But they remain servants of the same master—the very agency tasked with prosecuting individuals . . . .").

In the adjudication of private rights, such as in tort law, the power to hear claims rests solely with the judiciary.[269] The judiciary's role is, simply, to "resolve a dispute," frequently "between private . . . actors."[270] As part of that adjudication, the judge will hear the specific facts of the case and issue a written opinion with a "relatively detailed account of conflict between the parties and how that conflict came to be presented to the adjudicator."[271] The judge applies the law to the facts of the case and analyzes the legal legitimacy of those facts.[272] This individualized, fact-intensive adjudication carries special affirming power: Judges affirm factual truths and sustain their legal salience. For example, in tobacco litigation, a judge analyzing the facts determines that a plaintiff's nicotine addiction is factually true and that this fact carries legal significance.[273] In the eyes of the public, this rigorous individual adjudication affirms the veracity of a fact and its application to disputes. Congress's generalized legislation, tainted by the political process, does not carry the same individual scrutiny. Therefore, adjudication carries more affirming power than a general, politically influenced regulation. By slamming the courthouse doors to these disputes, tort reform inappropriately prevents the judicial affirmation of certain harms, such as food addiction, as relevant legal considerations.

Tort reform surrounding the COVID-19 pandemic presents an illustrative case study.[274] "The COVID-19 pandemic was an unprecedented public health crisis . . . ."[275] As of September 2025, the World Health Organization has identified almost 800 million infections.[276] COVID-19

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269. See U.S. Const. art. III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

270. Thomas W. Merrill, Legitimate Interpretation—Or Legitimate Adjudication?, 105 Corn. L. Rev. 1395, 1402 (2020).

271. Id. at 1404 (citing Lon L. Fuller, Anatomy of the Law 94 (1968)).

272. See id. at 1405 ("Yet the adjudicator will recite them in order to clarify how the parties came into conflict and how the various dimensions of that conflict have been resolved or have remained unresolved through earlier stages in the adjudication.").

273. See, e.g., Engle v. Liggett Grp., Inc., 945 So. 2d 1246, 1271 (Fla. 2006) (per curiam) (emphasizing that tobacco addiction is real, and that Big Tobacco's deceptions on the market could give rise to legal liability).

274. See Kevin M. Lewis, Joshua T. Lobert, Wen W. Shen & Jon O. Shimabukuro, Cong. Rsch. Serv., R46540, COVID-19 Liability: Tort, Workplace Safety, and Securities Law 1 (2020), https://www.congress.gov/crs_external_products/R/PDF/R46540/R46540.2.pdf [https://perma.cc/C257-UKNF] ("Although the COVID-19 pandemic is still unfolding, a number of plaintiffs have already filed tort lawsuits seeking compensation for personal injuries resulting from alleged coronavirus exposure . . . ." (footnote omitted)).

275. Clayton J. Masterman, COVID-19 Tort Reform, 34 Health Matrix 133, 134 (2024).

276. See COVID-19 Cases, World, WHO: WHO COVID-19 Dashboard, https://data.who.int/dashboards/covid19/cases (on file with the *Columbia Law Review*) (last updated Feb. 7, 2026) (showing 779,125,257 total reported cases worldwide).

opened the door to several types of tort claims.[277] Plaintiffs filed many such lawsuits, mainly against businesses for facilitating COVID-19 exposure.[278] Forty-six states quickly passed statutory reforms, however, immunizing or strongly protecting defendants from COVID-19-related tort claims.[279] These statutes stopped individual COVID-19 tort adjudications in their tracks.[280] Much of the country's COVID-19 response was left to "swift[]" political regulations at the local, state, and federal level.[281] Many of these measures "imposed a tremendous economic cost on the United States"[282] and quickly became hot-button political issues.[283] There is broad disagreement among Americans over whether COVID-19 was a legally salient justification for governments' responsive measures[284] and, shockingly, whether it was even a significant public health threat.[285]

277. See Masterman, supra note 275, at 138–46 (describing the potential for medical malpractice suits, negligence claims against a defendant that exposed the plaintiff to COVID-19, premises liability claims against businesses that negligently facilitated COVID-19 exposure, and product defect claims for faulty tests or medical equipment).

278. See, e.g., Requena v. Pilgrim's Pride Corp., 599 F. Supp. 3d 469, 472 (E.D. Tex. 2022) (alleging that the defendant corporation negligently exposed an employee to COVID-19 while she worked at one of its poultry processing plants); Benjamin v. JBS S.A., 516 F. Supp. 3d 463, 467 (E.D. Pa. 2021) (asserting several common law claims against the defendant corporation in the COVID-19-related death of an employee, including negligence, fraudulent misrepresentation, intentional misrepresentation, and wrongful death).

279. See Masterman, supra note 275, at 148 ("As of January 2022, 46 states have implemented some form of COVID-19 tort reform.").

280. See, e.g., *Requena*, 599 F. Supp. 3d at 472 ("[T]he Texas Legislature passed the Pandemic Liability Protection Act ("PLPA"), which establishes how an employer may be liable for exposing its employee to COVID-19. Because the Requenas have not produced evidence that satisfies some of the PLPA's elements, the court grants Pilgrim's Pride's Motion for Summary Judgment.").

281. Masterman, supra note 275, at 146.

282. Id. at 147.

283. See Reza Mousavi & Bin Gu, When Local Governments' Stay-at-Home Orders Meet the White House's "Opening Up America Again", PLoS One, Mar. 20, 2024, at 1–2, https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0298115 [https://perma.cc/K6D9-656U] ("[R]esidents' political views affect their compliance with social distancing orders imposed in response to the spread of COVID-19."); see also Giovanni Russonello, On Politics: Stay at Home? States Can't Agree, N.Y. Times (May 14, 2020), https://www.nytimes.com/2020/05/14/us/politics/coronavirus-lockdown-economy.html (on file with the *Columbia Law Review*) (describing the political fight over stay-at-home orders).

284. See Lisa Lerer, Big Government or Big Hassle?, N.Y. Times (Apr. 16, 2020), https://www.nytimes.com/2020/04/16/us/politics/stay-at-home-protests.html (on file with the *Columbia Law Review*) (discussing the belief among some citizens that COVID-19 was not a legally salient reason for lockdowns).

285. See No, COVID-19 Is Not the Flu, Johns Hopkins Bloomberg Sch. Pub. Health (Oct. 20, 2020), https://publichealth.jhu.edu/2020/no-covid-19-is-not-the-flu [https://perma.cc/A26N-LBUS] (rejecting the claim that "COVID-19 is just the flu" (internal quotation marks omitted)).

Allowing judicial consideration *may* have helped remedy these divides. If courts had been able to evaluate individual COVID-19 tort claims, judges could have ascertained the facts of the cases and determined, as a legal matter, whether defendants acted negligently in their facilitation of COVID-19 exposure. Additionally, the separation of judges from the political branches could have acted as a unifying force in the face of rampant polarization. By preventing judicial consideration, tort reform prevented the potential for the expressive function of the judiciary.[286] This foreclosed the opportunity for the legal legitimization of COVID-19 and denied private relief for severely wounded plaintiffs.[287]

Just like COVID-19 tort reform statutes, CCAs inappropriately rob the courts of their common law adjudicatory role and their ability to affirm societal values. Widespread legislative interference of this sort works as a usurpation of power from the traditional torts system. As a result, the judiciary has had limited occasion to give serious attention to this issue.[288] The unfortunate results of this interference are compounded by the fact that the judiciary is particularly "well-suited to address regulation of private behavior that has public consequences, such as . . . food consumption."[289]

And, of course, stripping the courts of the power to hear food-addiction claims also prevents harmed plaintiffs from seeking redress for their maladies.[290] Not only are courts prevented from affirming the validity of food addiction, but they are barred from assisting victims of Big Food's malicious practices. To level the balance and allow for judicial expression and plaintiff recuperation, state legislatures should amend CCAs to prop open the courthouse doors.

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286. The judiciary has been understood to play an expressive function since the founding. As Chief Justice John Marshall stated, "The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all." Proceedings and Debates of the Virginia State Convention of 1829–30, at 616 (Richmond, Samuel Shepherd & Co. 1830).

287. See, e.g., Requena v. Pilgrim's Pride Corp., 599 F. Supp. 3d 469, 483 (E.D. Tex. 2022) (granting summary judgement for the defendant employer even though the court found it to have "knowingly refused to implement or comply with applicable government-promulgated COVID-19 standards," because it was immunized by Texas's tort reforms). As Professor Clayton Masterman points out, the empirical evidence demonstrates that tort reform may have decreased COVID-19 infections by encouraging individuals to take greater precautions. Masterman, supra note 275, at 175–76. But this does not change the fact that affected individuals, such as Requena, were denied private relief.

288. See Amended Verified Complaint ¶¶ 58–81, Pelman v. McDonald's Corp., 272 F.R.D. 82 (S.D.N.Y. 2010) (No. 02 Civ. 07821 (DCP)), 2003 WL 23474873 (premising the remaining tort claims on design and general warning defect claims and omitting addiction from the complaint).

289. Ashley B. Antler, Note, The Role of Litigation in Combating Obesity Among Poor Urban Minority Youth: A Critical Analysis of *Pelman v. McDonald's Corp.*, 15 Cardozo J.L. & Gender 275, 290 (2009).

290. See Merrill, supra note 270, at 1402 (describing the judiciary's role in "resolv[ing] a dispute" that arises "between private . . . actors").

CCAs are out of touch with modern understandings of behavioral neuroscience and psychology. They prevent potential judicial validation of food addiction conceptually. And crucially, they foreclose an avenue for suffering people to seek legal redress. Given their flawed nature and disastrous effects, these statutes should be rectified to legitimize the existence of food addiction.

## III. REPEALING AND AMENDING CCAS

CCAs are bad legislation. They are scientifically outdated, effectuate bad policy, and inappropriately prevent judicial consideration of food addiction.[291] And yet more than half of the states have them on the books.[292] State legislatures have two possible remedies for this issue: repealing or amending CCAs.

### A. *The Challenge of Repealing CCAs*

First, they could repeal the legislation. But states may be reticent to repeal, as they have an interest in protecting the court system from what they perceive as wasteful lawsuits.[293] The first two claims in *Pelman*, in fact, exhibit why states may want some form of obesity-related tort immunization.[294] Broadly, these two claims alleged that McDonald's negligently administered and failed to warn about its foods' obesity-causing qualities.[295] The court rejected both claims. To the court, the consequences of overconsumption were "common knowledge," which alleviated McDonald's from any potential liability.[296] Even setting aside the question of legal viability, the acceptance of such theories would open the doors to an untold number of lawsuits.[297] To the extent these ill-fated tort claims appear frivolous to the eyes of the courts or the legislature, states may espouse a valid interest in preventing a flood of litigation.[298] Completely repealing CCAs, then, might not be the best option.

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291. See supra Part II.

292. Jennifer L. Pomeranz, Leslie Zellers, Michael Bare & Mark Pertschuk, State Preemption of Food and Nutrition Policies and Litigation: Undermining Government's Role in Public Health, 56 Am. J. Preventative Med. 47, 51 (2019).

293. See Scott DeVito & Andrew Jurs, "Doubling Down" for Defendants: The Pernicious Effects of Tort Reform, 118 Penn. St. L. Rev. 543, 599 (2014) (finding that tort reform legislation is associated with a reduction in lawsuits).

294. See supra notes 134–142 and accompanying text.

295. See Benloulou, supra note 128, at 11–12 (asserting that McDonald's is liable simply for serving or failing to warn about "foods high in fat, salt, sugar, and cholesterol content, which cause adverse health problems").

296. Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 532 (S.D.N.Y. 2003).

297. Because food addiction as a distinct legal concept played no role in these claims, this Note does not comment on their validity.

298. See Paul H. Rubin & Joanna M. Shepherd, Tort Reform and Accidental Deaths, 50 J.L. & Econ. 221, 223 (2007) ("Most state tort reforms are based on the premise that too many tort claims are filed and damage awards are too high.").

As the *Pelman* court conceded, the addiction theory changes the analysis, as addiction is not "a danger that is so open and obvious, or so commonly well-known, that McDonalds' customers would be expected to know about it."[299] Therefore, food addiction could provide a viable, nonfrivolous theory for a failure-to-warn tort claim. But for such a claim to be possible, the CCAs, which prevent these claims,[300] need to be amended. Amendments should prioritize legitimizing food addiction, recognizing it as a legal risk and allowing plaintiffs to pursue addiction failure-to-warn claims.[301] These efforts would reopen the courthouse doors, allowing for full judicial consideration of food addiction.

### B. *CCAs Should Be Amended to Recognize Food-Addiction Claims*

States should change bad statutes.[302] Therefore, CCAs should be amended to accomplish three goals: the recognition of food addiction as a real issue; the allowance of some obesity-related torts, pursuant to a modern understanding of food addiction; and, at the very least, lowering the burden of proof for potential UDAP claims.

1. *CCAs Should Accord With Science and Popular Sentiment.* — First and foremost, states ought to amend statutes to accord with scientific understandings of food addiction. Legislatures have an interest in ensuring that their statutes don't effect absurd results.[303] The language employed by multiple states—that is, that food addiction is a "choice[]"[304]—should be taken off the books. Instead, states should adopt language validating the existence of food addiction. Today, "[t]he concept of food addiction is widely endorsed amongst members of the lay public."[305] This understanding is reflected in controlled surveys and "the plethora of books, magazine articles, and self-help groups all dedicated to 'curing' people of their addiction to food."[306] Various studies indicate that the public has a high degree of awareness concerning food addiction, with one such study demonstrating that eighty-six percent of Americans and

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299. *Pelman*, 237 F. Supp. 2d at 542. True, as this Note recognizes, the public is starting to become more familiar with food addiction as a concept. See infra section III.B.1. But public acceptance of the validity of food addiction as addiction does not equate to the requisite public *understanding* of the mechanisms by which individuals become addicted to food. The public might not be as familiar with the presence of addictive HPFs in any given food item, especially when the manufacturer takes steps to market the product as healthy. Therefore, this dicta from *Pelman* could still provide a route for redress.

300. See, e.g., Ala. Code § 6-5-732(2) (2026); Ky. Rev. Stat. Ann. § 411.610 (West 2025).

301. See infra sections III.B.1–.2.

302. John Stossel, Government Should Repeal Bad Laws, Manhattan Inst. (Feb. 5, 2020), https://manhattan.institute/article/government-should-repeal-bad-laws [https://perma.cc/3WH7-ZPXE].

303. Id.

304. Colo. Rev. Stat § 13-21-1102 (2025).

305. See Ruddock & Hardman, supra note 16, at 111.

306. Id.

Australians believe that some foods are addictive.[307] A legislative affirmation of food addiction would express its scientific salience[308] and would reflect popular sentiment among the legislatures' constituencies.[309] Updating this language would rectify CCAs' scientific inaccuracies.[310] This specific amendment would come with minimal costs—amending statutory language to validate food addiction does not, itself, carry any substantive changes to the law. It does, however, carry a powerful affirmation of food addiction as truth.[311]

2. *CCAs Should Allow for Food-Addiction Obesity-Related Torts.* — Though recognizing food addiction is scientifically important, it also carries significant ramifications for obesity-related torts. CCAs should be amended further to allow certain obesity-related tort lawsuits. Though some torts could still be prohibited, food-addiction torts should be permitted. A revised statute should allow plaintiffs to file obesity-related tort claims premised on a defendant's failure to warn about the addictive qualities of their HPFs. These claims would contend that Big Food negligently provided addictive substances without proper warning to the plaintiff, causing the plaintiff a personal harm in the form of obesity (and its comorbidities).[312] This is a similar theoretical model that was judicially validated in the tobacco and opioid litigation.[313]

Like those cases, food-addiction torts would center the "gravamen of their complaint" around the theory that Big Food "fraudulently failed to inform consumers that [their food] is addictive and manipulated . . . [their food] to sustain their addictive nature."[314] Breaches of duty may cause personal harms for which plaintiffs should be able to recover—just as some of the tobacco and opioid plaintiffs did. Therefore, validating food addiction and allowing for obesity-related torts would "make room for tobacco-like litigation that many experts expected to plague the food industry."[315] These claims would grant private parties the capacity to hold Big Food "accountable for [its] actions,"[316] and would allow for judicial

307. See id.

308. See Bobbitt, supra note 233, at 185.

309. See Ruddock & Hardman, supra note 16, at 111 (describing the increasingly popular recognition of food addiction).

310. See Charles G. Morris, The Inefficient Statute, 13 Yale L.J. 430, 430 (1904) (highlighting that laws without the support of the constituency lack legitimacy).

311. Cf. Sunstein, supra note 234, at 2022 (explaining that the law functions as an expression of societal values).

312. See Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 542 (S.D.N.Y. 2003) (alleging this exact type of claim).

313. See supra sections I.B.1–.2.

314. Cf. Castano v. American Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996) (discussing the framing of such a claim in the context of tobacco litigation rather than food-addiction litigation). The omitted material is meant to demonstrate how easily food could be substituted, under this model, for nicotine and cigarettes.

315. Thompson, supra note 230, at 712.

316. Id.

reckoning with food addiction. And with amended CCAs, the expressive function of the judiciary could validate the legitimacy of food addiction and impress the importance of the fight for accountability on the public.[317] Even if these tort claims *failed*, as they did in the early tobacco[318] and opioid litigation,[319] the courts would still be able to validate food addiction as a factual and real harm.[320] By amending CCAs to allow obesity-related torts premised on food addiction, courts could validate the concept itself.

3. *CCAs Should Be Amended to Lower Burdens on UDAP Claims.* — CCAs seriously hinder another path to recovery for obese people: They limit the potential of UDAP claims alleging obesity-related harms. Broad CCAs all but completely prevent plaintiffs from bringing obesity lawsuits against private actors, even under UDAP claims.[321] Narrow CCAs categorically ban obesity-related tort claims while allowing for some UDAP lawsuits.[322] Both types of CCAs allow for some action, so long as plaintiffs can prove the defendants knowingly or willingly violated advertising or labeling regulations in the sale of their food.[323] These exemptions are often accompanied by provisions heightening the pleading standard, which requires specific pleadings before discovery, for plaintiffs attempting to try UDAP claims in court.[324] These barriers make UDAP claims alleging obesity harms nearly impossible.

Though states might be hesitant to allow obesity-related torts, they will likely be more amenable to loosening the leash on UDAP claims. Unlike tort law, UDAP plaintiffs must prove "unfair and deceptive tactics in the marketplace" that are "inappropriate."[325] This serves as a check on frivolous lawsuits that is absent in tort law. Therefore, states should be less hesitant to allow UDAP claims to proceed. At the very least, states should minimize CCAs' requisite burden of proof needed for obesity UDAP

317. See Samuel Enoch Stumpf, The Moral Element in Supreme Court Decisions, 6 Vand. L. Rev. 41, 55 (1952) ("[I]f the judge . . . feels that society is seeking a change in the values which law will protect, it is . . . he who must decide to adjust his judgment to the new values . . . ."); see also supra notes 256–265 and accompanying text.

318. See supra notes 98–105 and accompanying text.

319. See supra notes 110–115 and accompanying text.

320. Courts have validated nicotine and opioid addiction, which lends credence to their legitimacy in tort law and in society. See, e.g., Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2078 (2024) (recognizing the underlying addiction theory behind the tort claims). Admittedly, these obesity-related tort claims would face difficult barriers to success—namely in proving that the defendant's food was the proximate cause of the plaintiff's obesity. For a discussion of this issue, see Benloulou, supra note 128, at 46. Though these barriers would be difficult to surmount, many stand to benefit from courts' ability to consider them and potentially validate the reality of food addiction.

321. See, e.g., Mo. Ann. Stat. § 537.595(3) (2025) (immunizing defendants from "civil liability under any state law . . . for any claim arising out of weight gain, obesity, or a health condition associated with weight gain or obesity").

322. See, e.g., Ala. Code § 6-5-732 (2026).

323. See Wilking & Daynard, supra note 30, at 231–32.

324. E.g., Mich. Comp. Laws § 600.2974(3) (2026); Or. Rev. Stat. § 30.963(2) (2025).

325. See Carter, supra note 90, at 5.

claims. CCAs require plaintiffs to prove a "knowing and willful" violation of state or federal law to bring any claim.[326] This standard is often required at the pleading stage and is incredibly prohibitory to potential plaintiffs.[327]

As in tort law, the answer lies in the negligence standard. Negligence is a less stringent standard than knowledge or intent: The plaintiff simply must prove that the defendant did not act reasonably under the circumstances.[328] Put another way, negligent actors did not take reasonable precautions to avoid the harm.[329] This standard is kinder to plaintiffs who, instead of having to prove knowledge at the pleading, would have to demonstrate that the defendant acted unreasonably. Lowering the burden, especially at the pleading stage, would open the courthouse doors to more obesity claims. Obesity UDAP suits could still carry some level of important judicial expression—such as communicating Big Food's intentional campaign to induce food addiction. Its reliance on an unfair practice, however, may obfuscate the independent expression of the harm of food addiction, whereas in tort law, the claim would be premised on it. Though perhaps not as validating in the expressive function as allowing obesity-related torts, this would still allow for private action to hold Big Food accountable for its transgressions.[330]

4. *Impact of the Proposed CCA Amendments.* — These amendments would further three distinct goals: validating food addiction, expanding available lawsuits for harmed consumers, and remedying policy issues.

First, by amending CCAs to explicitly recognize food addiction, the legislatures would legitimize it as a real issue. This is scientifically correct, remedies flawed statutes, and carries a powerful expressive affirmation that society considers food addiction a serious problem. Though this validation is important, the second proposed amendment, which would allow for judicial consideration of the claims, is even more critical. By allowing adjudication of food-addiction torts, an amended CCA would create the potential for the firm validation provided by the fact-intensive and flexible common law system. Even if a state only lessened the burden on UDAP practices, the judiciary could still confirm the existence of food addiction. Therefore, all three amendments would give the courts ample occasion to validate the existence of food addiction—which the current legal regime sorely and erroneously lacks.

Second, relaxing CCAs could allow for food addiction to find its rightful place in tort doctrine. The *Pelman* court barely considered such a

326. See Wilking & Daynard, supra note 30, at 231–32.

327. See id. at 233 (emphasizing the outsized burden this places on plaintiffs attempting to access discovery).

328. See Restatement (Second) of Torts § 283 (Am. L. Inst. 1965).

329. See id. § 284 cmt. A ("The actor, as a reasonable man, should realize that his act involves an unreasonable risk of causing an invasion of an interest of another . . . .").

330. See Thompson, supra note 230, at 712.

claim due to the lack of scientific backing when the case was filed.[331] The claim was subsequently dropped before it could be considered further.[332] Now, with modern science, claims like this may have merit (as the *Pelman* court itself recognized[333]). This could potentially allow Big Food litigation to be the next Big Tobacco litigation, opening the courthouse doors to negligent failure-to-warn claims. Further, these amendments would minimize the tension between CCA and UDAP claims. Without broad immunization, consumers could use UDAP claims tied to obesity to proceed in the food context. This would effectuate UDAPs' goal of "level[ing] the playing field by creating statutory claims without intent requirements"[334] for obesity lawsuits. Even if courts declined to vindicate plaintiffs in obesity-related tort cases, the courts would still have the chance to decide that on an institutional level. This could have major common law and expressive impacts.[335]

Third, even if courts determine that some subsets of these lawsuits are frivolous,[336] the threat of obesity negligence claims would encourage better policy choices by Big Food.[337] Potential lawsuits would induce food providers to "take responsibility for [their] role in this problem."[338] Allowing for obesity-related torts would create a "threat of litigation," which would foster "healthier products" or compel "food manufacturers to market their products in the most informative and candid manner possible."[339] The potential for litigation could help to make our society healthier. An amended CCA would solve the scientific, policy, and institutional concerns that plague current legislation. State legislatures should not hesitate to embrace these changes.

## CONCLUSION

CCAs are bad legislation. They are not in keeping with modern understandings of food addiction. They effectuate bad policy. And they inappropriately rob the common law courts of their institutional duty to hear and settle novel tort claims. They should be amended to validate food addiction and allow the courts to consider modern research regarding food and behavior. This amendment would correct scientific falsehoods and give courts the chance to weigh in. Though these claims may not prove

331. Pelman v. McDonald's Corp., 237 F. Supp. 2d 512, 527 (S.D.N.Y. 2003).

332. Benloulou, supra note 128, at 33.

333. *Pelman*, 237 F. Supp. 2d at 533.

334. Wilking & Daynard, supra note 30, at 233.

335. See supra section II.B.

336. See Matthew Walker, Low-Fat Foods or Big Fat Lies?: The Role of Deceptive Marketing in Obesity Lawsuits, 22 Ga. St. U. L. Rev. 689, 691 (2006) ("[T]he determination as to when a lawsuit is 'frivolous' is a legal decision that should be left to the courts, and [CCAs] would be premature, given the failure of obesity lawsuits to date.").

337. See id. at 709–10.

338. Id. at 709.

339. Id. at 709–10.

to be successful in the courtroom, they could still go a long way in changing food industry practices. Most crucially, amending CCAs would finally vindicate the legitimacy, veracity, and danger of food addiction in the United States.

# ESSAY

## THE SPIRIT OF OLIGARCHY IN AMERICAN AGRICULTURE

*Etienne C. Toussaint**

*Black farm ownership has declined by more than 90% since the 1920s, making it one of the starkest yet least examined examples of racial injustice in American history. This Essay argues that these losses are not the product of isolated discriminatory acts, but the consequence of a durable agricultural oligarchy: a system of concentrated economic, political, and cultural power that has structured American agriculture since the antebellum era. By tracing this oligarchic order across slavery, Reconstruction, Jim Crow, and modern agribusiness, the Essay situates the struggles of Black farmers within the constitutional and political economy dimensions of American governance.*

*In so doing, this Essay makes three contributions to legal scholarship. First, it reframes the exploitation, land expropriation, and erasure of Black farmers as constitutional failures to guarantee republican government by permitting oligarchic control of land, credit, and markets. Second, it links the* Pigford v. Glickman *settlements to recent federal initiatives, including the American Rescue Plan Act and the Inflation Reduction Act, revealing persistent resistance to redistributive agricultural reform. Third, it critiques* Wynn v. Vilsack *and related cases, showing how colorblind constitutionalism entrenches oligarchic power and impedes remedies for systemic inequities.*

*Building on the USDA Equity Commission's 2024 recommendations, the Essay advances a structural framework for combining race-conscious and class-based reforms that address historical injustice while navigating constitutional limits. By situating agricultural discrimination within the broader problem of oligarchic power, the Essay highlights*

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*the stakes of agricultural equity for constitutional theory, democratic governance, and racial justice.*

*"How long should I stay dedicated?*
*How long 'til opportunity meet preparation?"*
*– Nipsey Hussle.*[1]

*"Now is the time to lift our national policy from the quicksand of racial injustice to the solid rock of human dignity."*
*– Martin Luther King, Jr.*[2]

## INTRODUCTION

John Boyd, Jr., was only eighteen years old when he purchased his first farm.[3] It was the early 1980s, more than a decade after the height of the Civil Rights Movement, yet Boyd recalls facing an atmosphere at the local USDA office reminiscent of the Jim Crow era.[4] Boyd, a fourth-generation Black farmer from Virginia, knew the challenge of navigating the USDA's complex system of financing, insurance, research, and education programs, especially as a Black man.[5] But Boyd was, in many ways, one of the lucky ones.

This Essay argues that Boyd's story reveals a broader pattern of oligarchic control over agricultural resources, in which a small elite has shaped policies to serve its social and economic interests, entrenching racial and economic hierarchies in the agricultural political economy. Agricultural oligarchy represents a distinct form of concentrated power that operates through economic control over land, credit, and markets; political influence over agricultural policy and rural governance; and cultural dominance over narratives about agricultural development and national identity. This system endures not through market competition but through the deliberate construction of barriers to entry, the capture of public institutions, and the deployment of state power to preserve

1. Nipsey Hussle, Dedication, *on* Victory Lap (CD, All Money In No Money Out & Atlantic Records Feb. 13, 2018).

2. Martin Luther King, Jr., Letter From Birmingham Jail, *in* Why We Can't Wait 77, 90 (1963).

3. Scott McFetridge, Black Farmers Sue Government for Promised Federal Aid, PBS: NewsHour (Dec. 6, 2022), https://www.pbs.org/newshour/politics/black-farmers-sue-government-for-promised-federal-aid (on file with the *Columbia Law Review*).

4. Id.

5. Id.

existing hierarchies. Its ideological force persists through dignitary harms that undermine the full citizenship of marginalized groups—a process this Essay terms "structural extermination," composed of three interlocking dynamics: exploitation, expropriation, and erasure.

Put simply, the story of American agriculture is one of oligarchic power—from slavery and the plantation economy to the consolidation of corporate control in the modern era. The antebellum plantation system constituted an oligarchy because it concentrated agricultural control in the hands of a small elite that used that power to shape legal frameworks, political representation, and cultural narratives to preserve its dominance. It was not merely an economic arrangement but also a comprehensive regime of social, political, and economic control, one that required the systematic subordination of Black agricultural labor to maintain both its material base and ideological legitimacy.

Although emancipation formally ended slavery, it did not dissolve the oligarchic structure underlying American agriculture. Instead, it proved remarkably adaptable, reconstituting itself through legal and economic mechanisms that preserved concentrated power while adjusting to new political conditions. Through sharecropping, discriminatory lending practices, and inequitable federal programs, White landowners sustained their wealth and influence across generations, perpetuating a system of racial and economic domination that continues to shape agricultural life today.[6]

For a brief period, the agricultural landscape looked markedly different. In the 1920s, nearly one million Black farmers were stewarding over sixteen million acres of land, about one-seventh of all U.S. farm operations at the time.[7] Yet by the 1970s, decades of systemic discrimination had produced a staggering 90% decline in Black farm ownership.[8] The federal government's role in this decline was especially

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6. See Areeba Haider, Adiam Tesfaselassie, Siddhartha Aneja & Sierra Wilson, A Growing Problem: How Market Power in Agriculture Fuels Racial and Economic Inequality 7 (2022), https://www.georgetownpoverty.org/wp-content/uploads/2022/04/AGrowing Problem-April2022.pdf [https://perma.cc/G228-NT9K] (explaining how market power, structural racism, and economic inequality resulted in structural discrimination against Black farmers).

7. See Kyle Ridgeway, Broken Promises: The Continuing Decline of Black Farm Owners and Operators in America, 27 U.C. Davis Soc. Just. L. Rev. 50, 52 (2023) ("Black farmers once made up fourteen percent of America's farm owners . . . ."); Abril Castro & Caius Z. Willingham, Progressive Governance Can Turn the Tide for Black Farmers, Ctr. for Am. Progress (Apr. 3, 2019), https://www.americanprogress.org/article/progressive-governance-can-turn-tide-black-farmers/ (on file with the *Columbia Law Review*) ("At the height of black farming in 1920, black farmers operated 925,710 farms, about one-seventh of all farm operations in the United States.").

8. See Dania V. Francis, Darrick Hamilton, Thomas W. Mitchell, Nathan A. Rosenberg & Bryce Wilson Stucki, Black Land Loss: 1920–1997, 112 AEA Papers & Procs. 38, 38 (2022) ("Black agricultural land ownership was at a peak just after the turn of the twentieth century; however, there was a nearly 90 percent decline in ownership from 1910 to 1997." (citation omitted)). Compare 5 Bureau of the Census, U.S. Dep't of Com.,

stark in 1983, when President Ronald Reagan's Administration eliminated the USDA's Office of Civil Rights Enforcement and Adjudication.[9] The Office had already accumulated decades of complaints from Black farmers alleging racial discrimination by the Farmers Home Administration.[10] Even after its Office of Civil Rights closed, the USDA continued to ignore complaints for another fifteen years, with some reports of staff throwing uninvestigated grievances into the trash.[11]

The situation reached a breaking point in 1997 when Timothy Pigford filed a class action lawsuit against the USDA and then-Secretary of Agriculture Dan Glickman.[12] Pigford alleged that the USDA had systematically failed to address Black farmers' civil rights complaints from 1983 to 1997 and had disproportionately denied or delayed their loan applications.[13] This discrimination was not speculative; the federal government had acknowledged its mistreatment of Black farmers in official reports dating back to 1965.[14] *Pigford v. Glickman* ultimately became a landmark civil rights settlement, allocating more than $1 billion to eligible claimants.[15] But the pursuit of justice was fraught. The sheer volume of claimants led Congress to expand the settlement in 2008 to $2.4

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Thirteenth Census of the United States Taken in the Year 1910: Agriculture 1909 and 1910, at 182 & tbl. 16 (1914), https://www.nass.usda.gov/AgCensus/archive/files/41033898v5ch03.pdf [https://perma.cc/S3PD-94FW] (documenting 241,221 non-White farm owners in 1910 and finding that Black farm ownership increased 16.8% in the past decade), with 1 Nat'l Agric. Stat. Serv., USDA, 1997 Census of Agriculture: United States Summary and State Data 24 tbl. 16 (1999), https://www.nass.usda.gov/AgCensus/archive/files/1997-United_States-United_States_Data-1604-Table-16.pdf [https://perma.cc/Y8W8-UMSY] (documenting only 29,397 non-White full farm owners in 1997).

9. See Chris Kromm, The Real Story of Racism at the USDA, The Nation (July 23, 2010), https://www.thenation.com/article/archive/real-story-racism-usda/ [https://perma.cc/72RY-CXN5] ("In 1983, President Reagan pushed through budget cuts that eliminated the USDA Office of Civil Rights—and officials admitted they 'simply threw discrimination complaints in the trash without ever responding to or investigating them' until 1996, when the office re-opened.").

10. See Pigford v. Glickman, 185 F.R.D. 82, 88 (D.D.C. 1999) (noting the massive backlog of complaints from Black farmers at the USDA due to the elimination of the USDA's Office of Civil Rights).

11. Id.

12. See *Pigford*, 185 F.R.D. at 86; April Simpson & Joe Yerardi, Can USDA's Efforts on Equity Help Black Farmers Overcome 'Toxic Debt'?, Ctr. for Pub. Integrity (Oct. 24, 2023), https://publicintegrity.org/inequality-poverty-opportunity/the-heist/usda-equity-black-farmers-pigford-glickman-toxic-debt/ [https://perma.cc/49LJ-MW2Z].

13. See *Pigford*, 185 F.R.D. at 86 ("The plaintiffs in this case allege . . . that the United States Department of Agriculture . . . willfully discriminated against them . . . on the basis of their race when it denied their applications for credit and/or benefit programs or delayed processing their applications . . . .").

14. See infra section II.A (discussing the *Pigford* cases).

15. Proposed Consent Decree at 15, *Pigford*, 185 F.R.D. 82 (Nos. 97-1978, 98-1693) (outlining the details of the settlement); Jasmin Melvin, Black Farmers Win $ 1.25 Billion in Discrimination Suit, Reuters (Feb. 18, 2010), https://www.reuters.com/article/world/us/black-farmers-win-125-billion-in-discrimination-suit-idUSTRE61H5XD/ [https://perma.cc/9MNC-7T4N].

billion and allow late filers to seek recourse in federal court.[16] Even so, many Black farmers struggled to access relief, and for those who did, the compensation often fell short of addressing the deep-rooted injustices they had endured.[17]

Today, fewer than fifty thousand Black farmers remain, comprising less than 2% of all farmers.[18] Further, Black-owned farms represent just 0.4% of all U.S. farmland.[19] This drastic decline reflects not only past discrimination but also the continued consolidation of power under the rise of modern agricultural oligarchy. One of the most significant barriers to equity today is the dominance of large agribusiness corporations that control key aspects of the food system, from seed production to meatpacking.[20] Such concentration undermines the ability of small-scale and independent farmers—particularly Black and Indigenous farmers—to compete, access markets, and secure fair prices. For example, just four companies—Cargill, JBS, National Beef, and Tyson Foods—control more than 85% of the beef processing industry in the United States,[21] enabling price manipulation and contract farming models that systematically disadvantage independent producers.[22]

This corporate dominance is reinforced through political influence. Large agribusinesses spend millions lobbying Congress and shaping federal agricultural policy.[23] Groups such as the American Farm Bureau Federation have long opposed measures aimed at supporting small-scale and Black, Indigenous, and other historically marginalized farmers,

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16. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012, 122 Stat. 1651, 2209–12.

17. See Maia Foster & P.J. Austin, Rattlesnakes, Debt, and APRA § 1005: The Existential Crisis of American Black Farmers, 71 Duke L.J. Online 159, 166 (2022), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1093&context=dlj_online [https://perma.cc/5XRF-PYL8] ("Despite $2.3 billion in *Pigford* payments, Black farmers have still not been made whole." (citing Laura Reiley, Relief Bill Is Most Significant Legislation for Black Farmers Since Civil Rights Act, Experts Say, Wash. Post (Mar. 8, 2021), https://www.washingtonpost.com/business/2021/03/08/reparations-black-farmers-stimulus (on file with the *Columbia Law Review*))).

18. See Castro & Willingham, supra note 7 ("As of 2012, black farmers make up less than 2 percent of all farmers.").

19. Id.

20. James M. MacDonald, Xiao Dong & Keith O. Fuglie, USDA, Concentration and Competition in U.S. Agribusiness 25–29 (2023), https://ers.usda.gov/sites/default/files/_laserfiche/publications/106795/EIB-256.pdf?v=57453 [https://perma.cc/V2U8-AUAB].

21. The Truth About Tyson, Union Concerned Scientists (Mar. 17, 2022), https://www.ucs.org/resources/truth-about-tyson [https://perma.cc/8R2S-FD3X] (last updated Sep. 19, 2024); see also MacDonald et al., supra note 20, at iii.

22. See MacDonald et al., supra note 20, at 2–5, 27 (showing that rising market concentration and vertically coordinated contract systems leave independent producers with little pricing power and subject to integrator-controlled terms).

23. See Agribusiness Lobbying, OpenSecrets (2024), https://www.opensecrets.org/industries/lobbying?ind=A (on file with the *Columbia Law Review*).

including recent debt relief initiatives.[24] Even more, oligarchic control extends to land acquisition. Corporate entities and billionaires have rapidly accumulated farmland across the country. Bill Gates, now among the nation's largest private farmland owners, exemplifies a broader trend that further constrains land access for new and historically marginalized farmers.[25] Such extreme concentration of economic and political power raises serious questions about the Constitution's commitment to republican government and meaningful participation within and among the states.

Despite these challenges, advocacy groups like the National Black Farmers Association, along with progressive leaders such as Senators Cory Booker and Elizabeth Warren, continue to press for justice.[26] In March 2021, President Joseph Biden took a significant step toward addressing these longstanding inequities through the American Rescue Plan Act (ARPA).[27] Echoing earlier Reconstruction-era efforts to disrupt Southern agricultural oligarchy, ARPA represented a renewed federal attempt to redistribute power within American agriculture. Section 1005 created the Farm Loan Assistance for Socially Disadvantaged Farmers and Ranchers program, allocating approximately $4 billion toward debt relief, technical assistance, business development support, and agricultural education at historically black colleges and universities (HBCUs).[28] The Act also

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24. See, e.g., Madison McVan, The American Farm Bureau Federation Claims It's the 'Voice of Agriculture.' These Groups Beg to Differ., Investigate Midwest (Feb. 8, 2022), https://investigatemidwest.org/2022/02/08/the-american-farm-bureau-federation-claims-its-the-voice-of-agriculture-these-groups-beg-to-differ/ [https://perma.cc/DA3M-SD2B] (discussing small-scale and alternative farmer groups' perception of the American Farm Bureau Federation as favoring large agribusiness interests and opposing reforms sought by marginalized producers).

25. Bill Gates, The Land Report, https://landreport.com/land-report-100/bill-gates [https://perma.cc/TF3V-XGJJ] (last visited Oct. 8, 2025) ("With almost 250,000 acres of highly productive farm ground spread out over 17 states, the co-founder of M[icrosoft] ranks as the nation's largest private farmland owner.").

26. See, e.g., Press Release, Cory Booker, Booker, Warren, Gillibrand Announce Comprehensive Bill to Address the History of Discrimination in Federal Agricultural Policy (Nov. 19, 2020), https://www.booker.senate.gov/news/press/-booker-warren-gillibrand-announce-comprehensive-bill-to-address-the-history-of-discrimination-in-federal-agricultural-policy [https://perma.cc/5JS8-PVNY] [hereinafter Press Release, Cory Booker, Comprehensive Bill]; Press Release, Env't Working Grp., National Black Farmers Association and EWG Applaud the Justice for Black Farmers Act (Nov. 19, 2020), https://www.ewg.org/news-insights/news-release/national-black-farmers-association-and-ewg-applaud-justice-black-farmers [https://perma.cc/U5NF-8FPL].

27. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (codified in scattered titles of the U.S.C.); see also Press Release, White House, President Biden Announces American Rescue Plan (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/legislation/2021/01/20/president-biden-announces-american-rescue-plan/ [https://perma.cc/3JWN-EHBZ].

28. American Rescue Plan Act § 1005, repealed by Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 22008, 136 Stat. 1818, 2023; id. § 1006, amended by Inflation Reduction Act § 22007.

established an equity commission to examine the USDA's history of discrimination, signaling a broader commitment to institutional reform.[29]

Yet the debt relief initiative quickly faced opposition from conservatives due to its race- and ethnicity-based eligibility criteria. Section 1005 provided loans to "socially disadvantaged" farmers, which a related statute defined as members of groups "subjected to racial or ethnic prejudice."[30] Despite USDA clarification that this definition included all racial and ethnic groups,[31] White farmers in multiple states—from Florida to Illinois, Minnesota, Tennessee, Texas, Wisconsin, and Wyoming, among others—filed lawsuits claiming constitutional violations.[32] Several courts ruled that Congress had failed to justify its use of racial classifications and issued injunctions to halt the program.[33]

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29. American Rescue Plan Act § 1006 .

30. Id. § 1005 (repealed 2023); see also 7 U.S.C. § 2279(a)(6) (2018). Under the American Rescue Plan Act, "[t]he term 'socially disadvantaged farmer or rancher' has the meaning provided in section 2501(a) of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 2279(a))." American Rescue Plan Act § 1005. Under the Food, Agriculture, Conservation, and Trade Act of 1990, "[t]he term 'socially disadvantaged farmer or rancher' means a farmer or rancher who is a member of a socially disadvantaged group." 7 U.S.C. § 2279(a)(5). "The term 'socially disadvantaged group' means a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." Id. § 2279(a)(6).

31. The USDA has updated the website containing this information, but a web archive reveals the previous information provided to the public to answer the question, "Would you further explain the meaning of the 'socially disadvantaged farmer or rancher' designation? What are the criteria for meeting such a designation?" American Rescue Plan Debt Payments FAQ, USDA, https://web.archive.org/web/20210802115225/https://www.farmers.gov/loans/american-rescue-plan/faq (on file with the *Columbia Law Review*) (last updated May 21, 2021). The USDA clarified that this designation was "not limited to" certain enumerated groups and that "[t]he Secretary of Agriculture [would] determine on a case-by-case basis whether additional groups qualify under this definition." Id.

32. See Carpenter v. Vilsack, No. 21-CV-0103-F, 2022 WL 20813305 (D. Wyo. Oct. 7, 2022); Rogers v. Vilsack, No. 1:21-cv-01779-DDD-SKC, 2022 WL 1037574, at *1 (D. Colo. Mar. 31, 2022); Miller v. Vilsack, No. 4:21-cv-0595-O, 2021 WL 6129207, at *1 (N.D. Tex. Dec. 8, 2021), rev'd and remanded on other grounds, No. 21-11271, 2022 WL 851782 (5th Cir. Mar. 22, 2022); Wynn v. Vilsack, No. 3:21-cv-514-MMH-LLL, 2021 WL 7501821, at *1 (M.D. Fla. Dec. 7, 2021); Kent v. Vilsack, No. 3:21-cv-540-NJR, 2021 WL 6139523, at *1 (S.D. Ill. Nov. 10, 2021); Dunlap v. Vilsack, No. 2:21-cv-00942-SU, 2021 WL 4955037, at *1–2 (D. Or. Sep. 21, 2021); Tiegs v. Vilsack, No. 3:21-cv-147, 2021 U.S. Dist. LEXIS 218585, at *1–2 (D.N.D. Sep. 7, 2021); McKinney v. Vilsack, No. 2:21-CV-00212-RWS, 2021 U.S. Dist. LEXIS 218624, at *1–2 (E.D. Tex. Aug. 30, 2021); Faust v. Vilsack, No. 21-C-548, 2021 WL 4295769, at *1 (E.D. Wis. Aug. 23, 2021); Joyner v. Vilsack, 1:21-cv-01089-STA-jay, 2021 WL 3699869, at *1 (W.D. Tenn. Aug. 19, 2021); Holman v. Vilsack, 1:21-cv-01085-STA-jay, 2021 WL 3354169, at *1 (W.D. Tenn. Aug. 2, 2021); Complaint for Declaratory & Injunctive Relief at 2, Nuest v. Vilsack, 21-cv-01572-NEB-LIB (D. Minn. filed July 7, 2021) (on file with the *Columbia Law Review*).

33. See, e.g., Faust v. Vilsack, 519 F. Supp. 3d 470, 475–76 (E.D. Wis. 2021) ("Defendants point to statistical and anecdotal evidence of a history of discrimination within the agricultural industry. But Defendants cannot rely on a 'generalized assertion that there has been past discrimination in an entire industry' to establish a compelling interest." (citations omitted) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989))

In response, Congress repealed section 1005 in August 2022 and replaced it with a new debt relief program under the Inflation Reduction Act of 2022 (IRA).[34] The IRA substituted the term "distressed" for "socially disadvantaged," shifting focus to borrowers whose agricultural operations were financially at risk.[35] To address discrimination, the IRA allocated $2.2 billion in financial assistance to farmers, ranchers, and forest landowners of any racial or ethnic background who had experienced USDA discrimination before January 1, 2021.[36] Notably, the IRA broadened the scope of protected categories to include sex, religion, age, marital status, and disability, expanding the reach of federal civil rights remedies beyond racial or ethnic discrimination alone.[37]

The repeal of section 1005 and the enactment of the IRA reignited debates over race-conscious policymaking. Critics argued that the repeal validated their claim that section 1005 was unlawful and that government benefits should not depend on race.[38] Others described President Biden's initial equity-focused program as political opportunism, accusing him of playing the "race card" without a public mandate.[39] *Wynn v. Vilsack*, which resulted in a preliminary injunction against the original debt relief program, illustrates the broader tension between racial justice initiatives

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(citing Defendants' Opposition to Plaintiffs' Motion for a Temporary Restraining Order at 16–17, *Faust*, 519 F. Supp. 3d 470 )).

34. Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 22008, 136 Stat. 1818, 2023.

35. See id. § 22006, 136 Stat. at 2021; Race-Based COVID-19 Farm Loan Forgiveness Denies Equal Treatment to Farmers: *Wynn v. Vilsack*, Pac. Legal Found., https://pacificlegal.org/case/farm-loan-forgiveness/ [https://perma.cc/P4WK-ZS85] (last visited Oct. 8, 2025).

36. Inflation Reduction Act § 22007.

37. See Press Release, USDA, USDA Reminds Producers of Upcoming Discrimination Financial Assistance Program Deadline (Jan. 8, 2024), https://www.usda.gov/about-usda/news/press-releases/2024/01/08/usda-reminds-producers-upcoming-discrimination-financial-assistance-program-deadline [https://perma.cc/9P2G-N3QQ] (referencing the protected categories in explaining the Act).

38. Alan Rappeport, Climate and Tax Bill Rewrites Embattled Black Farmer Relief Program, N.Y. Times (Aug. 12, 2022), https://www.nytimes.com/2022/08/12/business/economy/inflation-reduction-act-black-farmers.html (on file with the *Columbia Law Review*) ("Generally speaking, our view is that you can't condition government benefits on the basis of race . . . ." (internal quotation marks omitted) (quoting Rick M. Esenberg, President, Wis. Inst. for L. & Liberty)).

39. George R. La Noue, The Race Card in ARPA's Food Supply Deck, 22 Federalist Soc'y Rev. 184, 184 (2021) (arguing that the Small Business Administration prioritized women, racial minorities, and veterans in its fund dispersal guidelines when it could have defined its grant priorities in other ways); Jason Smith, Opinion, One Year Later: Why Biden's 'American Rescue' Failed, Wash. Exam'r (Mar. 15, 2022), https://www.washingtonexaminer.com/opinion/op-eds/one-year-later-why-bidens-american-rescue-failed (on file with the *Columbia Law Review*) (citing a survey result and concluding that "only 21% of voters believe the law has helped them, whereas 29% say it has left them worse off").

and constitutional doctrines of equal protection.[40] The decision also highlights the limits of "colorblind constitutionalism,"[41] which, though seemingly aligned with equal protection principles, often fails to grapple with the enduring effects of historical discrimination and systemic racism.[42] This tension poses ongoing challenges for policymakers and advocates seeking to dismantle the structural barriers confronting Black farmers and other marginalized agricultural communities.

As the United States continues to grapple with these issues, the USDA Equity Commission, established in 2021, marks an important step toward a more comprehensive response to racial inequities in agriculture.[43] The Commission's 2024 Final Report offers valuable insights into the complex nature of discrimination in agriculture and recommends systemic reforms beyond individualized remedies.[44] By blending race-conscious and class-based strategies, the Commission offers a potential path forward for addressing racial disparities while navigating the legal and political constraints surrounding race-based programs. This Essay contributes to that ongoing dialogue by examining the historical, legal, and policy dimensions of racial injustice in American agriculture, and situating those inequities within the enduring persistence of oligarchic power since the antebellum era.

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40. 545 F. Supp. 3d 1271 (M.D. Fla. 2021); see also infra section III.B (discussing the *Wynn* case).

41. The idea of colorblind constitutionalism originates with Justice John Marshall Harlan's dissent in the landmark 1896 case *Plessy v. Ferguson*, in which he stated: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens." 163 U.S. 537, 559 (1896); see also Malik Edwards & William A. Darity, Jr., Why Color-Blind Solutions Won't Solve the Racial Wealth Gap: How We Can Overcome the Constitutional Hurdles to Race Conscious Remedies in Addressing the Wealth Gap, 110 Ky. L.J. 769, 771 (2022) ("The Court's apparent failure to appreciate the potential of racialized effects in seemingly race-neutral policies, and the federal role in these policies' implementation, has limited the fortitude to use race in creating remedies."); Goldburn P. Maynard, Jr., Biden's Gambit: Advancing Racial Equity While Relying on a Race-Neutral Tax Code, 131 Yale L.J. Forum 656, 673 (2022), https://www.yalelawjournal.org/pdf/F7.MaynardFinalDraftWEB_jx79r4rp.pdf [https://perma.cc/7ZVV-TK63] ("[C]ourts have tightened the reins on the use of any racial classifications, regardless of purpose. Whether they are pernicious or meant to ameliorate discrimination, such policies are treated with suspicion.").

42. See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2173 (2023) (rejecting consideration of race in college admissions despite arguments about ongoing effects of historical discrimination); Darren Lenard Hutchinson, Undignified: The Supreme Court, Racial Justice, and Dignity Claims, 69 Fla. L. Rev. 1, 15 (2017) ("The rigid application of the colorblindness doctrine impedes race-based state action implemented to remedy the harmful consequences of historical and present-day discrimination.").

43. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1006, 135 Stat. 4, 13–14; see also Exec. Order No. 13,985, 86 Fed. Reg. 7009 (laying out a foundational commitment to advancing equity).

44. USDA Equity Comm'n, Final Report 8–9 (2024), https://www.farmaid.org/wp-content/uploads/2025/02/usda_equity_commission_final_report-2024.pdf [https://perma.cc/8VY5-CCXC].

This Essay proceeds as follows. Part I traces the ideological foundations of agricultural oligarchy, showing how the systematic subjugation of Black farmers through exploitation, expropriation, and erasure has been essential to maintaining concentrated agricultural power from slavery to the present. It reveals how agricultural oligarchy has sustained itself not only through economic control but also by embedding White supremacist ideology so deeply within agricultural institutions that concentrated power appears natural rather than constructed.

Part II analyzes the major legal and legislative efforts undertaken to redress historical injustices against Black farmers, proceeding chronologically through three phases: the *Pigford* litigation, recent legislative initiatives including the Justice for Black Farmers Act and the American Rescue Plan Act debt relief program, and the political and legal resistance these efforts have encountered. Together, these developments reveal both meaningful progress and the enduring national ambivalence about race-conscious remedies.

Part III examines how colorblind constitutionalism constrains congressional authority to implement race-conscious relief programs, using *Wynn v. Vilsack* as a key case study. It demonstrates how contemporary equal protection jurisprudence may paradoxically entrench, rather than dismantle, systems of racial hierarchy and economic concentration, highlighting the complex legal terrain in which race-based agricultural remedies must operate.

Part IV draws lessons from the USDA Equity Commission's 2024 report and its subsequent dismantling under the Trump Administration to identify principles for designing more resilient equity initiatives. It argues that the systematic elimination of equity programs exposes the vulnerability of reform efforts to oligarchic capture, while also offering guidance for crafting legislative and policy interventions capable of withstanding concentrated economic and political opposition.

Taken together, this Essay reveals the deep-rooted connection between race, agriculture, and systemic injustice in America. It highlights how the concentration of agricultural power within a small elite group, from the plantation era to the present, has produced and perpetuated racial and economic inequities. Despite recent legislative reforms, the modern agricultural oligarchy continues to reinforce structural barriers that limit opportunities for Black farmers and reproduce cycles of exclusion and disempowerment. These struggles reflect broader patterns of racial capitalism, economic inequality, and rural disinvestment. Meaningful efforts to advance racial equity in agriculture must therefore confront the persistent concentration of power and resources within the sector to build a more just and equitable society for all Americans.

## I. THE IDEOLOGICAL ORIGINS OF AGRICULTURAL OLIGARCHY

The history of Black farmers in the United States is not merely a chronicle of systemic neglect. It is the story of a deliberately sustained agricultural oligarchy that endures from slavery to the present. From the brutal exploitation of enslaved labor to the subtler institutional biases of modern policy, Black farmers have long faced a regime designed to concentrate power and restrict access to land, capital, and markets. Their experience reflects more than historical injustice; it exemplifies what this Essay identifies as "structural extermination"—a process composed of three interlocking dynamics: exploitation, expropriation, and erasure.[45]

Understanding the durability of agricultural oligarchy requires examining its ideological foundations. This power has been maintained not merely through economic control but by embedding White supremacist ideology so deeply within agricultural institutions that it appears natural and inevitable rather than constructed and contingent. These ideologies conflate agricultural productivity with racial hierarchy, creating cultural narratives that justify concentrated power as both economically efficient and morally legitimate. They enable agricultural elites to sustain their dominance across generations by systematically undermining Black farmers' rights, resources, and recognition, while obscuring the political choices that created and maintain this system.

This Part exposes these ideological foundations by demonstrating how the systematic subjugation of Black farmers has been essential to preserving agricultural oligarchy from its antebellum origins to its contemporary manifestations. Agricultural oligarchy has never been merely economic; it is a comprehensive regime of social, political, and cultural control, one that requires the ongoing subordination of Black farmers to maintain its legitimacy.

The analysis unfolds across four sections. First, section I.A establishes the theoretical framework, drawing on concepts of structural oppression, "dignitary harms,"[46] and oligarchy to provide the tools for understanding how agricultural power has been concentrated and maintained through the systematic exclusion of Black farmers. This framework clarifies why viewing American agriculture as an oligarchy—rather than simply a market system with discriminatory outcomes—is essential to grasping both historical patterns and contemporary dynamics.

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45. See Etienne C. Toussaint, Black Urban Ecologies and Structural Extermination, 45 Harv. Env't L. Rev. 447, 456 (2021) ("[T]hese forces distort urban agriculture into a weapon of exploitation, expropriation, and erasure, each foundational elements of a social theory of ecological systems change this Author calls *structural extermination*.").

46. See Etienne C. Toussaint, The Abolition of Food Oppression, 111 Geo. L.J. 1043, 1054 (2023) [hereinafter Toussaint, Abolition] (explaining the concept of dignitary harms, which "established the social inferiority of Black people" and "granted moral legitimacy to the ideology of White supremacy").

Section I.B examines exploitation, focusing on historical regimes such as chattel slavery, convict leasing, and sharecropping. These systems inflicted equality-based dignitary harms by denying Black Americans recognition as equal participants in agricultural production. By linking productivity to Black subordination, these systems created legal and cultural precedents that continue to justify concentrated agricultural power.

Section I.C analyzes expropriation, detailing the systematic dispossession of Black-owned land through discriminatory policies, lending practices, and state-sanctioned violence. These liberty-based dignitary harms reveal how agricultural oligarchy adapts across historical periods, using both economic and ideological mechanisms to reinforce narratives of White agricultural superiority while consolidating land and political power.

Finally, section I.D addresses erasure, examining how the contributions and struggles of Black farmers have been rendered invisible in agricultural policy and popular cultural narratives. These integrity-based dignitary harms reveal how agricultural oligarchy preserves its ideological dominance by controlling not only material resources but also public memory and discourse.

Together, these three dimensions of structural extermination show that agricultural oligarchy sustains itself by making the subordination of Black farmers appear as a natural consequence of modernization rather than a deliberate political project. This ideological work is central to oligarchic control, obscuring the dependence of concentrated agricultural power on the ongoing exclusion and exploitation of Black farmers. By exposing these origins, this Part argues that dismantling agricultural oligarchy requires not only policy reform but a fundamental challenge to the cultural narratives that have long justified the concentration of agricultural power in White hands.

### A. *Structural Oppression, Dignitary Harms, and Agricultural Oligarchy*

The systematic subordination of Black farmers cannot be understood through conventional frameworks that cast racial discrimination as isolated market failures or episodes of policy neglect. Rather, it reflects the deliberate construction and preservation of an agricultural oligarchy that has long depended on the exclusion of Black farmers to maintain concentrated economic and political power. This section develops the conceptual tools necessary to analyze this system, drawing on theories of dignitary harm and political economy to show how agricultural oligarchy operates simultaneously as an economic regime and an ideological project.

Political theorist Iris Marion Young's conception of oppression as "systemic constraints on groups"[47] provides a useful foundation for understanding the intertwined economic, political, and cultural forces that have marginalized Black farmers while entrenching agrarian elites. Her "five faces of oppression"—exploitation, marginalization, powerlessness, cultural imperialism, and violence—help illuminate how agricultural policy has functioned as a mechanism of oligarchic control.[48] Yet Young's framework, while powerful in mapping patterns of group-based subordination, requires extension to capture the particular dynamics of agricultural power and the constitutional dimensions of dignitary harm that characterize the Black farmer experience.

Although Young's structural approach was groundbreaking in moving beyond individualistic accounts of inequality, it has been critiqued for underemphasizing the agency of oppressed groups and the mechanisms through which oppressive systems adapt to resistance.[49] Critics caution that her framework may inadvertently reify group boundaries or obscure the dynamic processes that allow systems of domination to persist.[50] These limitations underscore the need for analytical tools capable of explaining both the structural durability and the adaptive evolution of oppressive regimes—tools that account for not only how oppression operates, but also how it reconstitutes itself across historical periods to secure elite control.

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47. Iris Young, Five Faces of Oppression, *in* Oppression, Privilege, and Resistance: Theoretical Perspectives on Racism, Sexism, and Heterosexism 37, 39 (Lisa Heldke & Peg O'Connor eds., 2004).

48. Id. at 38; see also, e.g., Angela Hilmers, David C. Hilmers & Jayna Dave, Neighborhood Disparities in Access to Healthy Foods and Their Effects on Environmental Justice, 102 Am. J. Pub. Health 1644, 1644 (2012) (describing how barriers to access to healthy food "represent a significant challenge to ethnic minorities and underserved populations and violate the principle of fair treatment"); Sonari Glinton, How Racism in Agriculture Built America's Food Apartheid, Forbes (Apr. 29, 2025), https://www.forbes.com/sites/sonariglinton/2025/04/29/how-racism-in-agriculture-built-americas-food-apartheid/ (on file with the *Columbia Law Review*) ("[T]he problems of the inner cities are the problems of Black farmers, 'this isn't just about food. It's about control. It's about who gets to feed who. And who gets fed lies. . . . We are not disconnected from the food system, we've been deliberately cut off . . . .'" (quoting Anton Seals Jr., Exec. Dir., Grow Greater Englewood)); Andrew Small, How Fast Food Cornered the Urban Market, Bloomberg (Mar. 31, 2017), https://www.bloomberg.com/news/articles/2017-03-31/how-the-government-promoted-fast-food-in-cities [https://perma.cc/57EG-WXTB] ("The design of fast food franchises—and their ubiquity in communities that may otherwise be labeled 'food deserts'—helped cement their key roles in low-income areas.").

49. See, e.g., Tamara Jugov & Lea Ypi, Structural Injustice, Epistemic Opacity, and the Responsibilities of the Oppressed, 50 J. Soc. Phil. 7, 8 (2019) ("[E]ven if the way such distributions and social rules come about is independent of the will and/or intentions of any particular agent, such agents can nevertheless be attributed political responsibilities for the structural upshots of their actions."); Michael D. Kuchem, Young, Gilbert, and Social Groups, 46 Soc. Theory & Prac. 737, 738–39 (2020) (arguing that Young's group concept lacks sufficient pluralistic nuance); Maeve McKeown, Structural Injustice, Phil. Compass, July 2021, at 1, 5–8 (highlighting how systems adapt and persist beyond individual actions).

50. See supra note 49.

1. *Dignitary Harms: A Tripartite Framework.* — The concept of dignitary harms offers a more precise framework for analyzing both the constitutional dimensions of Black farmers' subordination and the ideological work that sustains agricultural oligarchy. This Essay defines "dignity" through three interrelated dimensions that together illuminate how agricultural oligarchy has eroded Black farmers' full citizenship while legitimizing concentrated power.[51]

Equality-based dignitary harms concern the basic recognition of inherent human worth and the equal opportunity to express one's capabilities.[52] When groups are systematically treated as less than fully human—denied acknowledgment of their agricultural skill, innovation, or stewardship—they suffer equality-based dignitary harms.[53] These harms arise not only from exclusion but from cultural narratives that naturalize Black subordination. Racial hierarchy has long served agricultural oligarchy by providing a moral rationale for what would otherwise appear as pure economic exploitation, reframing structural domination as differences in aptitude or deservingness.

Liberty-based dignitary harms involve the curtailment of individuals' ability to govern their own lives.[54] Related to philosophical traditions that

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51. Despite the increasing usage of the term "dignity" by the U.S. Supreme Court in recent history, its application remains largely rhetorical. Dignity is invoked to elucidate the underlying principles of equal protection or liberty in rights-based disputes, but remains undefined within U.S. law. See Leslie Meltzer Henry, The Jurisprudence of Dignity, 160 U. Pa. L. Rev. 169, 178–81 (2011) ("The Court's repeated appeals to dignity, particularly in majority opinions, appear to parallel its greater willingness to proffer dignity as a substantive value animating our constitutional rights."). This Essay's definition draws from prior scholarship on dignity and the law. See, e.g., Neomi Rao, Three Concepts of Dignity in Constitutional Law, 86 Notre Dame L. Rev. 183, 187–89 (2011) (discussing various conceptions of dignity, including "dignity as recognition" which "reflects a new political demand . . . [for] third-generation 'solidarity rights'"); Toussaint, Abolition, supra note 46, at 1054–55 (discussing dignity through the framework of equality, liberty, and integrity).

52. See Michael Ignatieff, Human Rights as Politics and Idolatry 165 (Amy Gutmann ed., 2001) ("Dignity as agency is thus the most plural, the most open definition of the word I can think of."); Alan Gewirth, Human Dignity as the Basis of Rights, *in* The Constitution of Rights: Human Dignity and American Values 10, 12 (Michael J. Meyer & William A. Parent eds., 1992) ("*[D]ignity* signifies a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human."); Charles Taylor, The Politics of Recognition, *in* Multiculturalism: Examining the Politics of Recognition 25, 57 (Amy Gutmann ed., 1994) [hereinafter Taylor, Politics of Recognition] ("[T]his [liberal] view understands human dignity to consist largely in autonomy, that is, in the ability of each person to determine for himself or herself a view of the good life.").

53. See Toussaint, Abolition, supra note 46, at 1101–08 ("[T]he Court finds an equality-based dignitary harm when a law, public policy, or social practice fails to recognize the inherent equality of all people in society by treating certain groups differently than others based upon their suspect classifications . . . .").

54. See id. at 1108 ("The idea of liberty as the basis for human dignity—a sense that the inherent equality of humans as such must be linked to the human capacity to express rational thinking and self-awareness as autonomous and self-determined agents—has historically been associated with the German philosopher Immanuel Kant.").

locate dignity in self-authorship, liberty-based dignitary harms occur when legal and economic structures foreclose meaningful avenues for self-determination.[55] For Black farmers, this has meant exclusion from land ownership, credit, and markets—constraints that deny not only economic opportunity but also the ability to participate as free agents in agricultural life.[56] Such restrictions reveal how oligarchic control depends on more than concentrated assets; it requires actively preventing alternative agricultural arrangements that might threaten elite dominance.

Integrity-based dignitary harms concern individuals' ability to achieve social recognition as full members of their political community. These harms arise when groups are denied the esteem necessary for experiencing full citizenship, which requires both internal self-worth and external validation.[57] The erasure of Black agricultural contributions, the dismissal of their claims for redress, and their exclusion from policymaking all constitute integrity-based dignitary harms that fracture citizenship by withholding social recognition.[58] This dimension is particularly vital to understanding agricultural oligarchy because it enables the system to present itself as legitimate and democratic while systematically excluding those whose participation would unsettle concentrated power.

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55. See id. ("To Kant, experiencing one's humanity in society—the act of *being* human as action, not merely as status—meant making choices; choices derived from the human capacity to determine the moral law and choose to live by it, or to locate an end in oneself.").

56. See Rural Bus.-Coop. Serv., USDA, Black Farmers in America, 1865–2000, at 1, 15–17 (2002), https://www.rd.usda.gov/files/RR194.pdf (on file with the *Columbia Law Review*) (documenting long-standing exclusion of Black farmers from land ownership and credit access, including USDA programs that "reduced opportunities . . . especially [for] black[] [farmers], to enter the business of farming" and describing discriminatory delays and denials of credit that prevented Black farmers from maintaining or expanding family landholdings).

57. See Isaiah Berlin, Two Concepts of Liberty, *in* Liberty 166, 166 n.2 (Henry Hardy ed., 2d ed. 2002) ("I cannot ignore the attitude of others . . . for I am in my own eyes as others see me. I identify myself with the point of view of my milieu: I feel myself to be somebody or nobody in terms of my position and function in the social whole . . . ."); Rao, supra note 51, at 246 ("Individual identity and worth depend on membership in the community and recognition from others within the community."); Toussaint, Abolition, supra note 46, at 1115 ("[T]he integrity-based conception of dignity . . . suggests that certain choices can enhance or hinder one's ability to experience inherent equal humanity based upon a theory that one's self-realization of his or her own humanity depends upon their relationship to a greater social whole.").

58. See George Herbert Mead, Mind, Self, and Society: The Definitive Edition 162 (Charles W. Morris ed., Daniel R. Huebner & Hans Joas annot., 2015) ("A person is a personality because he belongs to a community, because he takes over the institutions of that community into his own conduct . . . . [O]ne has to be a member of a community to be a self."); Joseph Raz, Free Expression and Personal Identification, 11 Oxford J. Legal Stud. 303, 313 (1991) ("People's relations to the society in which they live is a major component in their personal well-being. It is normally vital for personal prosperity that one will be able to identify with one's society, will not be alienated from it, will feel a full member of it.").

Together, these three dimensions reveal that dignitary harms function not merely as individual injuries but as systemic mechanisms that preserve oligarchic control by undermining the full citizenship of those most likely to challenge economic and political concentration in agriculture.

2. *From Racial Capitalism to Agricultural Oligarchy.* — While political theorist Cedric Robinson's theory of "racial capitalism" powerfully illustrates how U.S. capitalism has always been structured through racial domination,[59] the concept of oligarchy provides additional explanatory force for understanding agricultural systems. Robinson's work shows that racial exploitation is constitutive of American capitalism, not a deviation from otherwise neutral markets,[60] and it dismantles liberal accounts that frame discrimination as market failure.[61] Yet agricultural systems present distinct challenges that require closer attention to how economic concentration becomes political power, and how control over essential resources sustains both.

Viewed through a political economy lens, oligarchy describes systems in which concentrated economic power enables political dominance and produces self-reinforcing cycles of control.[62] Oligarchy entails more than wealth aggregation; it involves capturing political institutions, shaping legal frameworks, and manipulating cultural narratives to secure elite advantage. Understanding agriculture through this framework highlights dynamics that racial capitalism alone does not fully illuminate: the centrality of land control to democratic participation, the role of agricultural policy in structuring political coalitions, and the capacity of agricultural elites to maintain power across radically different economic eras.

Agricultural oligarchy occupies a distinctive position because agriculture governs fundamental human needs, historically significant sources of wealth, and deeply rooted cultural symbols shaping national identity. In the United States, agricultural oligarchy has persisted from the slaveholding aristocracy to modern corporate agribusiness by continually

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59. See Cedric J. Robinson, Black Marxism: The Making of Black Radical Tradition 2 (Univ. N.C. Press, 3rd ed. 2000) (1983).

60. Robinson argued that "[t]he development, organization, and expansion of capitalist society in [the West] pursued essentially racial directions." Id.; see also Robin D.G. Kelley, Foreword to id. ,at xiv–xvii (noting how Robinson developed the term "racial capitalism" into "a framework for understanding the general history of capitalism"); Robinson, supra note 59, at 27 ("Race became largely the rationalization for the domination, exploitation, and/or extermination of non-'Europeans' (including Slavs and Jews).").

61. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis, 129 Yale L.J. 1784, 1799–800 & n.58 (2020) (foregrounding extractive social reproduction as constitutive rather than incidental).

62. See Erik Olin Wright, Understanding Class 7–11 (2015) [hereinafter Wright, Understanding Class] (describing the ways in which "opportunity-hoarding mechanisms" create concentrations of power for landowners at the expense of nonlandowners).

adapting its methods while preserving its core structure: concentrated power sustained through the systematic exclusion of marginalized groups, especially Black farmers.

This form of oligarchy operates through interconnected mechanisms: economic control over land, credit, and markets; political influence over agricultural governance; and cultural dominance over narratives of agricultural development and national belonging. It survives not through competition but through the construction of barriers to entry, the capture of public institutions, and the deployment of state power to entrench hierarchy. Racialization has been central to this project because it transforms economic domination into seemingly natural differences in capacity or worth.

The concept of agricultural oligarchy thus extends racial capitalism by offering tools to analyze how agricultural power specifically operates, how it adapts over time, and why dismantling it requires more than policy reform. It demands confronting the underlying concentration of economic and political power. This theoretical lens clarifies how the three components of structural extermination—exploitation, expropriation, and erasure—function as integrated strategies for maintaining oligarchic control while inflicting dignitary harms that undermine the democratic citizenship of Black farmers and other marginalized rural communities.

### B. *Exploitation and Equality-Based Dignitary Harms*

The framework developed above reveals how agricultural oligarchy has sustained itself by inflicting dignitary harms that undermine the full citizenship of marginalized groups. The first dimension of structural extermination—exploitation—demonstrates how this oligarchy has long depended on equality-based dignitary harms, systematically treating Black agricultural laborers as less than fully human to justify concentrated power and extract economic value. This section traces the evolution of agricultural oligarchy from its antebellum foundations through post-emancipation adaptations and New Deal consolidation, highlighting the continuity of oligarchic control across shifting legal regimes.

The antebellum South produced the first fully developed agricultural oligarchy in American history. Although terms such as "plantation aristocracy" and "planter elite" capture aspects of its social hierarchy, agricultural oligarchy more precisely describes its political economy. Unlike aristocracy, which implies legitimacy grounded in hereditary status, oligarchy emphasizes the political project of maintaining concentrated power through the deliberate capture of economic, legal, and cultural institutions. The plantation system was oligarchic because a small elite class used control over land and labor to shape law, governance, and public narratives in ways that preserved their dominance.

This oligarchy operated not simply as an economic arrangement but as a comprehensive regime of social and political control. It required the

systematic subordination of Black agricultural labor to maintain both its material base and ideological legitimacy. Racialized exploitation was essential. Without denying Black humanity, the extreme concentration of agricultural power would have been difficult to justify in a nominal democracy.

The impact of this system on human dignity was profound. Enslaved people, whose agricultural expertise enriched the nation, were coerced into labor under conditions of total domination. Their bodies were commodified, their agency extinguished, and their productivity captured exclusively for the benefit of enslavers.[63] These practices enriched not only individual planters but a broader oligarchic class whose influence extended nationally. The slaveholding oligarchy shaped federal economic policy, constitutional doctrine, and political institutions, all while defending a system built on the systematic degradation of Black life.[64]

By 1860, the estimated market value of enslaved persons exceeded $3 billion—more than the combined value of all American railroads, factories, and banks.[65] This figure illustrates that U.S. agriculture had been deliberately structured around the commodification of Black labor. Oligarchic dominance rested on physical violence, psychological coercion, and material deprivation[66]—mechanisms that rendered enslaved people functionally powerless in precisely the manner Young identifies as central to oppressive systems.[67]

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63. See James M. McPherson, Battle Cry of Freedom: The Civil War Era 78–117 (1988) (discussing the forced labor of enslaved people and the economic dependence of the South on this system).

64. See Matthew Desmond, In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation, N.Y. Times Mag. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html (on file with the *Columbia Law Review*) ("What made the cotton economy boom in the United States . . . was our nation's unflinching willingness to use violence on nonwhite people and to exert its will on seemingly endless supplies of land and labor."); see also Nikole Hannah-Jones, Democracy, *in* The 1619 Project: A New Origin Story 7, 32 (Nikole Hannah-Jones, Caitlin Roper, Ilena Silverman & Jake Silverstein eds., 2019) ("To answer . . . how they could prize liberty abroad while simultaneously denying liberty to an entire race back home, white Americans resorted to the same racist ideology that . . . the framers had used at the nation's founding: that Black people were an inferior race whose degraded status justified their treatment.").

65. See Steven Deyle, The Domestic Slave Trade in America: The Lifeblood of the Southern Slave System, *in* The Chattel Principle: Internal Slave Trades in the Americas 91, 95 (Walter Johnson ed., 2005) (noting that the total value of the enslaved population in 1860 was at least $3 billion, roughly three times of what was invested in manufacturing, three times that in railroad, and seven times that in banks in the North and South combined).

66. See Edward E. Baptist, The Half Has Never Been Told: Slavery and the Making of American Capitalism 116–18, 136 (2014) (discussing physical and psychological methods used to coerce labor from enslaved populations).

67. See Young, supra note 47, at 52 ("[M]ost people in these societies do not regularly participate in making decisions that affect the conditions of their lives and actions, and in this sense most people lack significant power.").

White supremacist cultural narratives further fortified this regime. By portraying Black people as savage and subhuman while framing poverty as a moral failing, these narratives normalized slavery and concealed the role of power in shaping agricultural development.[68] Embedding anti-Blackness within dominant legal and cultural frameworks ensured that opposition to slavery could be cast as radical and illegitimate.[69] Such ideological work allowed oligarchic domination to appear natural rather than political, transforming exploitation into an alleged reflection of human inequality.

This system extended far beyond individual plantations. Slaveholding elites dominated Southern legislatures, crafted laws that protected slavery and suppressed Black mobility, and prevented challenges to agricultural concentration.[70] The judiciary interpreted legal frameworks in ways that favored slaveholding interests, treating enslaved persons as property.[71] Law enforcement, from slave patrols to militias, functioned as the armed wing of the oligarchy, deploying state-sanctioned violence to maintain racial subordination.[72] These forms of institutional capture demonstrate that agricultural oligarchy rests not merely on market dynamics alone but also on the active deployment of state power.

After emancipation, the agricultural oligarchy proved remarkably adaptable. Its core structure—concentrated landownership and racialized labor control—survived through new legal and economic mechanisms.[73] Convict leasing exemplified this transition, reproducing the coercive conditions of slavery through the criminal legal system.[74] Enabled by the

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68. See Oscar Lewis, The Culture of Poverty, *in* On Understanding Poverty: Perspectives From the Social Sciences 187, 199 (Daniel P. Moynihan ed., 1969) ("The subculture [of poverty] develops mechanisms that tend to perpetuate it, especially because of what happens to the world view, aspirations, and character of the children who grow up in it.").

69. See Matthew Desmond, Capitalism, *in* The 1619 Project: A New Origin Story, supra note 64, at 165, 172–75 (noting the capitalist cooptation of the Fifth and Fourteenth Amendments and how slavery supported a new economy in which a culture of speculation "produced staggering inequality and undignified working conditions").

70. See George William Van Cleve, A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic 200–23 (2010) (discussing the passage of laws that protected interests of both slave traders and states that wanted to import slaves).

71. See id. at 272 ("The Court's nominal power of judicial review was a dead letter at that time where major political intervention on the issue of slavery was concerned.").

72. See Sally E. Hadden, Slave Patrols: Law and Violence in Virginia and the Carolinas 143–47 (2001) (discussing the increased number of slave patrols and use of violence due to fear of slave insurrections).

73. See Edward Royce, The Origins of Southern Sharecropping 1–2 (1993) ("Throughout the period from roughly 1865 through 1867, despite the abolition of slavery, the plantation remained the basic unit of production . . . . By 1868, sharecropping was well on its way toward becoming the principal replacement for slavery and the dominant economic arrangement in postbellum southern agriculture.").

74. See V. Camille Westmont & Cayla B. Colclasure, An Archaeology of Convict Leasing in the American South, 13 J. Afr. Diaspora Archaeology & Heritage 134, 134–35

Thirteenth Amendment's Exceptions Clause, which permits involuntary servitude as punishment for crime,[75] Southern states enacted laws targeting Black communities. Vagrancy statutes, trespassing ordinances, and other Black Codes criminalized everyday behaviors, funneling Black people into forced labor under the guise of criminal punishment.[76] The ideological scaffolding of White supremacy remained intact, enabling agricultural elites to maintain a cheap, unfree labor supply under a veneer of legality.[77]

Sharecropping represented the oligarchy's most durable post-emancipation adaptation.[78] Rather than dismantling plantation power,

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(2024) (defining the postbellum Southern convict lease system as a racialized form of forced labor designed to control newly emancipated African Americans, driven by state profit motives, and marked by extreme brutality, disposability, and mortality); see also Christopher Muller, Freedom and Convict Leasing in the Postbellum South, 124 Am. J. Socio. 367, 368 (2018) (describing Georgia's convict lease system as resembling slavery in its violence and commodification of prisoners but distinguishing it as an industrial rather than agricultural labor regime that functioned as a punitive response to Black economic independence); Michael Ralph, Slavery and Incarceration in the Frontier: The Origin of Convict Leasing, 16 J. Cultural Econ. 337, 339 (2023) (situating the origins of convict leasing in Kentucky's frontier prisons, where debtors and incarcerated people were leased for profit before the Civil War).

75. See U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); see also Slavery by Another Name, PBS (2012) https://www.pbs.org/tpt/slavery-by-another-name/themes/convict-leasing/ [https://perma.cc/G7R3-UCWZPERMA] (describing the development of the market for convict laborers); 13th, Netflix (Kandoo Films 2016) (connecting the disproportionate amount of African Americans in prison to enslavement and the Thirteenth Amendment of the U.S. Constitution, which allows slavery as punishment for a crime).

76. Brian Sawers, What Lies Behind that 'No Trespass' Sign, The Atlantic (July 2, 2022), https://www.theatlantic.com/ideas/archive/2022/07/the-true-meaning-of-no-trespass/661471/ (on file with the *Columbia Law Review*) ("After Emancipation, every southern state enacted some type of law restricting access, outlawing hunting and fishing or grazing livestock on private land, in addition to the labor laws and vagrancy statutes that allowed courts to sentence to hard labor 'stubborn servants' and workers who did not accept customary wages.").

77. See Elizabeth Hinton, LeShae Henderson & Cindy Reed, Vera Inst. of Just., An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System 2 (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/54ZQ-S73G] ("In the South, following Emancipation, black Americans were specific targets of unique forms of policing . . . . Laws that capitalized on a loophole in the 13th Amendment that states citizens cannot be enslaved *unless* convicted of a crime intentionally targeted newly emancipated black people as a means of . . . exploiting their labor.").

78. See Royce, supra note 73, at 181–88. The Southern sharecropping or "cropper" system began as early as 1868, when planters began allocating small portions of their land to people fleeing from enslavement, who kept a portion of the crops as payment. Id. The arrangement developed largely due to a "constriction of possibilities." Id. Neither planters nor people fleeing from enslavement desired this outcome, but landowners could not establish a new labor force with immigrants and people fleeing from enslavement could not

sharecropping entrenched this power by tying formerly enslaved people to land they did not own and from which they could not easily escape.[79] Sharecropping preserved the economic asymmetry of slavery—labor extraction with minimal compensation—while avoiding the formalities of legal ownership. It sustained oligarchic dominance by keeping land concentrated,[80] restricting Black labor mobility,[81] and reinforcing cultural narratives of racial hierarchy.[82]

Although no longer slaves in name, Black sharecroppers lived under a regime that replicated slavery's core logic: concentrated wealth for an oligarchic class built on the systematic degradation of Black labor. Sharecropping exposed the limits of emancipation and the resilience of oligarchic control. While the Fourteenth Amendment promised equal protection, agricultural elites circumvented that promise by reimposing economic dependency and racial subjugation through ostensibly legal means.[83]

Institutional power reinforced this arrangement. Legislatures controlled by former slaveholders enacted laws favoring landowners; courts interpreted contracts and debts to the detriment of Black tenants;[84] and law enforcement continued to impose racial hierarchy through violence and intimidation.[85] The agricultural oligarchy remained deeply woven into the legal and political fabric of the South.

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acquire their own land. Id. Sharecropping increased the autonomy of people fleeing from enslavement, but it did not free them from planter control. Id.

79. See id. at 219 (noting that sharecropping left freedpeople in a "state of permanent indebtedness, restricting their mobility, adding to their economic dependence, and culminating in a system of debt peonage that persisted for decades").

80. See id. at 109–18 ("Black landownership undermined labor discipline, jeopardized the future of the plantation system, and thus posed a threat to the fundamental interests of white landholders. Planters were determined, therefore, to prevent freedpeople from owning land.").

81. See id. at 117–18 ("Most freedpeople were unable to establish an independent economic existence outside of the plantation system.").

82. See id. at 164–66 (explaining the perspectives of some White people who saw continued economic dominance over people fleeing from enslavement as the duty of the "superior" race).

83. See Dwayne Fatherree, Fighting to Grow: Black Farmers Continue to Battle Systemic Discrimination, S. Poverty L. Ctr. (Feb. 18, 2022), https://www.splcenter.org/news/2022/02/18/fighting-grow-black-farmers-continue-battle-systemic-discrimination [https://perma.cc/6VAH-R7Z6] (discussing the various institutional barriers and instances of governmental discrimination that have hindered the success of Black farmers).

84. See Brittany Farr, Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South, 69 UCLA L. Rev. 674, 724 (2022) ("Doctrine, procedure, and legal culture worked in tandem to create a system with steep odds for sharecropper and tenant plaintiffs.").

85. See Robert J. Haws & Michael V. Namorato, Race, Property Rights, and the Economic Consequences of Reconstruction: A Case Study, 32 Vand. L. Rev. 305, 313 (1979) ("Local law enforcement officials were required to report the number of [underaged Black orphans] to the county probate court each January and June. The probate judge then apprenticed these [individuals] to 'suitable and competent persons,' [sic] with preference

Federal intervention during the New Deal did little to disrupt this structure and often fortified it. Policies such as the Agricultural Adjustment Act of 1933, while formally race-neutral, channeled subsidies to those who already controlled land, disproportionately benefiting White landowners.[86] Black farmers—particularly sharecroppers and tenant farmers—were either excluded from these benefits or displaced as landowners evicted them to capture federal payments.[87] The New Deal thus illustrates the oligarchy's ability to reshape progressive reforms to reinforce its dominance.[88]

The violence embedded in slavery, convict leasing, and sharecropping was not merely physical. It constituted a total assault on human dignity.[89] These systems taught Black agricultural workers that their pain was inconsequential, their labor disposable, and their lives subordinate, conditions that amount to systematic equality-based dignitary harms. The plantation was not only an economic engine but also a cultural and political order that normalized undignified existence and constrained the very meaning of citizenship.[90]

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given to the former owners of freedmen." (quoting An Act to Regulate the Relation of Master and Apprentice, as Relates to Freedmen, Free Negroes, and Mulattoes, ch. 5, § 1, Miss. Laws ch. 5 (1865) (misquotation)).

86. See, e.g., Pete Daniel, Dispossession: Discrimination Against African American Farmers in the Age of Civil Rights 258 (2013) [hereinafter Daniel, Dispossession] (noting that AAA county committees and office staff minded the interests of prosperous farmers); Gavin Wright, Old South, New South: Revolutions in the Southern Economy Since the Civil War 236 (1986) [hereinafter Wright, Old South, New South] ("The South was planter's heaven by the late 1930s, with generous government subsidies, protection against risk, ready financing for new machinery, and cheap harvest labor to make it all possible.").

87. See Wright, Old South, New South, supra note 86, at 227–28 (noting that the AAA relied heavily on existing agricultural extension services and local committees dominated by landlords, who received and distributed the checks themselves with "virtually no effective federal enforcement," resulting in widespread reports of cheating, fraud, and illegal evictions).

88. See Pete Daniel, African American Farmers and Civil Rights, 73 J.S. Hist. 3, 6–7 (2007) [hereinafter Daniel, Civil Rights] (noting a U.S. Commission on Civil Rights report that discussed how various USDA programs resisted demands to share power with Black farmers).

89. See Africans in America: Judgment Day, at 39:20–43:06 (WGBH Educational Foundation 2017) (interview with Professor Deborah Gray White exploring the history of slavery in the United States, including the centrality of violence in maintaining control over enslaved people); see also Brad Evans, Histories of Violence: Slavery in America, L.A. Rev. Books (Dec. 23, 2019), https://lareviewofbooks.org/article/histories-of-violence-slavery-in-america/ [https://perma.cc/F4GL-QHBB] ("[C]hattel slavery . . . made possible the ownership of men, women, and children. Conceived as commodities, they could be bought, sold, beaten, raped, killed, and discarded. Moreover, slave owners were entitled to control enslaved bodies through use of physical punishment and psychological abuse.").

90. See Alexander Tsesis, Enforcement of the Reconstruction Amendments, 78 Wash. & Lee L. Rev. 849, 869 (2021) (describing how antebellum precedent influenced the structural vision of Reconstruction); see also Martha S. Jones, Birthright Citizens: A History of Race and Rights in Antebellum America 128–45 (2018) ("For Baltimore's free black community, no dimension of [Dred Scott v. Sandford, 60 U.S. 393 (1857),] was more salient

After slavery's formal abolition, Reconstruction-era leaders grappled with whether their mission extended beyond ending legal bondage to dismantling the oligarchic system that had sustained racial subordination.[91] Many Radical Republicans understood that the plantation oligarchy posed a direct threat to equal protection by entrenching an agricultural system fundamentally at odds with democratic governance.[92] Sharecropping, therefore, must be understood not as a transitional economic arrangement but as a systematic dignitary harm that continued to treat Black laborers as less than fully human. By denying economic independence, civic recognition, and opportunities for personal development, sharecropping entrenched precarity and social exclusion while maintaining a racialized agricultural underclass.[93]

The discriminatory conditions of slavery, convict leasing, and sharecropping inflicted equality-based dignitary harms that legitimized myths of Black inferiority and obscured the role of oligarchic power in shaping agricultural markets.[94] Their enduring impact reveals that agricultural oligarchy has always been more than an economic system. It is a political formation that requires the ongoing subordination of Black farmers to maintain its material base and ideological legitimacy. From slavery to the New Deal, agricultural oligarchy adapted to new legal

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than that which declared no black person—enslaved or free—was a citizen of the United States.").

91. See, e.g., John M. Bickers, The Power to Do What Manifestly Must Be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination, 12 Roger Williams U. L. Rev. 70, 95 (2006) (detailing the nationwide debate regarding the role of the Freedmen's Bureau in systemic reform and support for people fleeing from enslavement). See generally Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877 (Henry Steele Commager & Richard B. Morris eds., 1988) [hereinafter Foner, Unfinished Revolution] (providing a historical account of the vigorous debates on Black citizenship during Reconstruction).

92. See Eric Foner, Rights and the Constitution in Black Life During the Civil War and Reconstruction, 74 J. Am. Hist. 863, 872 (1987) ("Achieving a measure of political power seemed indispensable to attaining the other goals of the black community, including access to the South's economic resources, equal treatment in the courts, and protection against violence.").

93. See Wright, Understanding Class, supra note 62, at 6–8 (discussing the concept of "opportunity hoarding" by which economically privileged groups exclude other groups from accessing resources and opportunities that would allow them to advance within the class hierarchy); Jared Tetreau, Sharecropping: Slavery Rerouted, PBS (Aug. 16, 2023), https://www.pbs.org/wgbh/americanexperience/features/harvest-sharecropping-slavery-rerouted/ [https://perma.cc/43K7-ARJG] ("The [sharecropping] system existed, in conjunction with other institutions, to exploit Black labor at a minimum 'relative loss' to white landowners while keeping the Black population underfoot.").

94. See David Harvey, A Brief History of Neoliberalism 7 (2005) ("The assumption that individual freedoms are guaranteed by freedom of the market and of trade is a cardinal feature of neoliberal thinking, and it has long dominated the US stance towards the rest of the world."); Khalil Gibran Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America xv–xx (2010) (tracing how putatively "objective" data legitimated myths of Black inferiority).

regimes while consistently exploiting equality-based dignitary harms to preserve concentrated control.

### C. *Expropriation and Liberty-Based Dignitary Harms*

The second dimension of structural extermination—expropriation—reveals how agricultural oligarchy has systematically inflicted liberty-based dignitary harms to maintain concentrated power. While exploitation denied Black farmers recognition as fully human, expropriation stripped them of the material foundations necessary for self-governance. Across historical periods, the agricultural oligarchy adapted its mechanisms of control, repeatedly mobilizing state power to transfer resources from Black farmers to White landowners while crafting ideological narratives that framed dispossession as the natural operation of markets.

The theoretical framework developed earlier conceptions of liberty-based dignitary harms as violations of the capacity to choose one's own ends and author one's own life.[95] In agriculture, these harms emerge through the systematic denial of access to land, credit, and markets—the core resources that make autonomous agricultural life possible.[96] Expropriation thus shows how agricultural oligarchy has been sustained not only through economic concentration but through the deliberate design of legal, political, and administrative institutions to prevent the rise of alternative agricultural models that might challenge oligarchic dominance.

During Reconstruction, Congress confronted a fundamental question: What would liberty mean for formerly enslaved Black laborers within an agricultural economy still governed by oligarchic power? The debate exposed competing conceptions of freedom that would shape agricultural policy for generations. Many lawmakers embraced a negative conception of liberty—freedom from the legal constraints of slavery and discriminatory laws.[97] Within this narrow vision, emancipation meant removing formal barriers rather than addressing the structural conditions necessary for meaningful autonomy.

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95. See supra section I.A.1.

96. See Pamela Browning, Comm'n on C.R., ED-222-604, The Decline of Black Farming in America 96 (1982), https://files.eric.ed.gov/fulltext/ED222604.pdf [https://perma.cc/B7BC-2KM4] ("[B]ecause of their low incomes, limited off-farm employment, and small landholdings, it can be assumed that black farmers are disproportionately unable to obtain credit elsewhere."); Megan Buechler, The Never-Ending Drought for Black Farmers: The Lasting Effects of *Pigford* and the Continuance of USDA Discrimination, 61 U. Louisville L. Rev. 223, 228 (2022) ("Black farmers additionally struggled to obtain credit, considered to be the lifeblood of farming and ranching . . . .").

97. See, e.g., Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War 237–38 (1995) (arguing that Republicans defined liberty primarily as freedom from slavery and discriminatory laws, rooted in the free labor ideology).

This conservative vision could not account for the realities of an agricultural system in which oligarchic control over land, credit, and markets remained intact. Could mere freedom from interference[98] secure equal human dignity for emancipated Black citizens when the agricultural political economy continued to be organized for their subordination?[99] As American philosopher James Griffin observed, "Liberty guarantees not the realization of one's conception of a worthwhile life, but only its *pursuit*."[100] That presumes, however, equal access to the material and social conditions that make pursuit possible. Black farmers were systematically denied those conditions through policies crafted to preserve oligarchic control. Exclusion from land ownership, capital access, and legal protections transformed liberty from a substantive guarantee into an empty abstraction while reifying White dominance.

Congressional efforts to define freedom through the Civil Rights Act of 1866 illustrated the limits of negative liberty within an oligarchic regime.[101] The Act promised Black Americans "the same enumerated rights 'as [are] enjoyed by white citizens.'"[102] But by tying Black freedom to privileges White citizens had accumulated through centuries of racial domination, the statute reinscribed racial hierarchy into the meaning of citizenship itself. It not only failed to account for the historical theft that

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98. See Maria Dimova-Cookson, Defending Isaiah Berlin's Distinctions Between Positive and Negative Freedoms, *in* Isaiah Berlin and the Politics of Freedom: "Two Concepts of Liberty" 50 Years Later 73, 75 (Bruce Baum & Robert Nichols eds., 2013) (defining negative liberty as freedom from constraint or interference by other individuals or by the state); see also John Christman, Freedom, Autonomy, and Social Selves, *in* Isaiah Berlin and the Politics of Freedom: "Two Concepts of Liberty" 50 Years Later, supra, at 87, 87–88 (discussing the limits of negative liberty in the discussion of individual sovereignty, autonomy, and relational freedom); Three Post-War Liberals Strove to Establish the Meaning of Freedom, The Economist (Aug. 30, 2018), https://www.economist.com/schools-brief/2018/08/30/three-post-war-liberals-strove-to-establish-the-meaning-of-freedom (on file with the *Columbia Law Review*) (reflecting on different conceptions of liberalism in the context of modern politics).

99. As Isaiah Berlin framed the question, "It is important to discriminate between liberty and the conditions of its exercise. If a man is too poor or too ignorant or too feeble to make use of his legal rights, the liberty that these rights confer upon him is nothing to him, but it is not thereby annihilated." Isaiah Berlin, Introduction, *in* Liberty, supra note 57, at 3, 45.

100. James Griffin, On Human Rights 160 (2008).

101. See Robert J. Kaczorowski, The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of *Runyon v. McCrary*, 98 Yale L.J. 565, 569–70 (1989) ("Although Republicans believed that an exact enumeration of the specific rights incident to the generic rights to life, liberty, and property was impossible, they did enumerate some of these specific rights in section one of the Civil Rights Act of 1866." (footnote omitted)). See generally David Abraham, Liberty Without Equality: The Property-Rights Connection in a "Negative Citizenship" Regime, 21 Law & Soc. Inquiry 1, 7–9 (1996) (explaining that America's property-based, negative-rights conception of liberty helped to naturalize inequality and shape White democratic individualism).

102. See Kaczorowski, supra note 101, at 573 (alteration in original) (quoting Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27).

had enabled White agricultural wealth but also erased the need for restitution. By privileging formal equality without altering the underlying distribution of land and capital, the Act left the oligarchic structure of agricultural power unchallenged.[103]

Expropriation—the systematic theft of land, labor, and legal autonomy—thus provides an essential framework for understanding how agricultural oligarchy produced liberty-based dignitary harms. Drawing from Immanuel Kant's view that human dignity lies in our capacity for self-determination,[104] expropriation constitutes not merely economic loss but a fundamental denial of authorship over one's life. When legal and economic structures restrict Black farmers' access to agricultural resources, they revive the core logic of slavery: reducing persons to instruments of profit while denying them the capacity for self-governance.[105]

The tension between liberty and oligarchic control was visible even before emancipation. Revolutionary rhetoric celebrated the yeoman farmer as the backbone of American freedom, yet many Founding Fathers enslaved Black laborers and built agricultural wealth on coerced labor.[106] Their vision of rural liberty excluded those bound in servitude, embedding oligarchic control in the nation's agrarian ideology from the outset. The new constitutional order, influenced by Enlightenment

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103. See Foner, Unfinished Revolution, supra note 91, at 109–10 (discussing the implications of land redistribution after emancipation, particularly in terms of the threat Black economic independence posed to the Southern political economy).

104. See, e.g., Edward J. Eberle, Dignity and Liberty: Constitutional Visions in Germany and the United States 8, 10 n.1 (2002) (noting that U.S. constitutionalism is anchored in a liberty-based, negative-rights tradition); Gewirth, supra note 52, at 11 (explaining that human dignity, in the Kantian sense, rests on persons' capacity to choose their own ends and act as self-determining agents). But see Jeremy Waldron, Dignity, Rank, and Rights 24–27 (Meir Dan-Cohen ed., 2012) (noting the complexities of Kantian dignity and its diverse interpretations).

105. See Immanuel Kant, Grounding for the Metaphysics of Morals 36 (James W. Ellington trans., Hackett Publ'g Co., 3d ed. 1993) (1785) ("Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means."); see also Christoph Horn, Absoluteness and Contingency. Kant's Use of the Concept of Dignity, *in* Kant's Concept of Dignity 11, 26–27 (Yasushi Kato & Gerhard Schönrich eds., 2020) (explaining Kant's view that one has a duty to acknowledge the dignity of humanity of all other human beings).

106. See, e.g., Thomas Jefferson, Notes on the State of Virginia 164–65 (William Peden ed., Univ. of N.C. Press 1982) (1785) (praising yeoman farmers as "the chosen people of God" while describing "the whole commerce" between the enslaver and the enslaved Black laborers as "unremitting despotism on the one part, and degrading submissions on the other); Stephen E. Ambrose, Founding Fathers and Slaveholders, Smithsonian Mag. (Nov. 2002), https://www.smithsonianmag.com/history/founding-fathers-and-slaveholders-72262393/ [https://perma.cc/V22Y-V3DC] (observing that many Founding Fathers were enslavers, despite knowing that "slavery was wrong" and that it was wrong to "profit[] from the institution").

debates over freedom and collective welfare,[107] ultimately prioritized individual property rights over the material conditions necessary for meaningful freedom, enabling the persistence of racialized agricultural hierarchies.[108]

This laissez-faire constitutional structure constrained political efforts to address the structural prerequisites for genuine autonomy—secure land tenure, access to capital, and fair market participation.[109] Oligarchic interests seized on this framework to depict inequality as the natural result of individual merit rather than a product of deliberate political choices. In so doing, policymakers cast expropriation as market efficiency, masking the extensive institutional scaffolding required to sustain concentrated agricultural power.

Not all Reconstruction policymakers accepted this narrow vision. A larger cohort of Radical Republicans articulated an alternative conception of liberty—what contemporary theorists describe as "non-domination."[110] This view recognized that newly emancipated Black communities could not realize freedom while remaining economically subordinate to the same landholding class that had enslaved them. The Bureau of Refugees, Freedmen, and Abandoned Lands (the Freedmen's Bureau), established in 1865, embodied this richer understanding of liberty by acknowledging that liberty required affirmative intervention to dismantle structural inequality.[111]

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107. For works of political philosophy dealing with the tension that influenced the Founders' efforts in drafting the Constitution, see generally Thomas Hobbes, Leviathan, or The Matter, Forme, & Power of a Common-Wealth Ecclesiasticall and Civill 113 (1651) (arguing that individuals surrender certain liberties to a sovereign authority in exchange for security and social order); John Locke, Two Treatises of Government 323–24 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (describing political society as formed to preserve natural rights, particularly property, through majority rule for the public good); Jean-Jacques Rousseau, The Social Contract, or The Principles of Political Rights 21–22, 43 (Rose M. Harrington trans., 1893) (1762) (contending that legitimate political authority derives from the general will oriented toward the common good rather than private interest). John Stuart Mill summarized the popular sentiment regarding individual freedom in 1859: "The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it." John Stuart Mill, On Liberty 12 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859). For discussion of collective welfare, see Locke, supra, at 353, 363–64 (explaining the duty of government to legislate in favor of the common good).

108. See Mill, supra note 107, at 9 ("In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.").

109. See Charles Taylor, What's Wrong With Negative Liberty, *in* 2 Philosophy and the Human Sciences 211, 213 (1985) ("[N]egative theories [of liberty] can rely simply on an opportunity-concept, where being free is a matter of what we can do, of what it is open to us to do, whether or not we do anything to exercise these options.").

110. See, e.g., Philip Pettit, Republicanism: A Theory of Freedom and Government 51–79 (1997) (describing the concept of liberty as "non-domination").

111. See Freedmen's Bureau Acts of 1865 and 1866, U.S. Senate, https://www.senate.gov/artandhistory/history/common/generic/FreedmensBureau.htm

The Freedmen's Bureau represented a significant, though contested, federal effort to challenge agricultural oligarchy by providing the material foundations of autonomy: food, shelter, medical care, and access to land.[112] Its limited resources, fierce White resistance, and premature dissolution revealed both the transformative potential of federal intervention and the immense political power of the oligarchy determined to suppress it.[113]

The Bureau's brief existence illuminated the central tension in Reconstruction-era debates about agricultural liberty. Programs like the Bureau reflected recognition that liberty required material foundations—that formal legal equality was insufficient without addressing the structural conditions that enabled oligarchic domination. This understanding clashed with prevailing notions of White property rights, however, which prioritized restoring land to former Confederates over providing reparative justice to the formerly enslaved.[114] The agricultural oligarchy successfully mobilized these property rights narratives to resist redistribution efforts that might have challenged concentrated agricultural power.

These tensions reached their height with Special Field Order No. 15, which sought to redistribute 400,000 acres of confiscated Confederate land to Black families in forty-acre parcels.[115] The order constituted the most direct challenge to agricultural oligarchy during Reconstruction, offering Black communities the land base necessary for genuine autonomy. President Andrew Johnson's reversal—prompted by oligarchic pressure—demonstrated the enduring vitality of concentrated agricultural

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[https://perma.cc/8MK5-F4LQ] (last visited October 8, 2025); see also Act of Mar. 3, 1865, ch. 90, § 1, 13 Stat. 507, 507–08 (establishing the Bureau of Refugees, Freedmen, and Abandoned Lands to supervise and manage matters relating to freedpeople and abandoned lands); Act of July 16, 1866, ch. 200, §§ 1–2, 14 Stat. 173, 173–74 (extending and reauthorizing the Bureau and expanding its authority to provide legal protection and relief to formerly enslaved persons).

112. See Donald G. Nieman, To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks, 1865–1868, at 64–65 (1979) (describing how Bureau agents tried to block contracts from replicating the conditions of slavery but failed to meaningfully change the contracted laborers' obligations from that of planters); Daniel Backman, "A Vast Labor Bureau": The Freedmen's Bureau and the Administration of Countervailing Black Labor Power, 40 Yale J. on Regul. 837, 850 (2023) (describing the "ardent political opposition" the Bureau faced from President Andrew Johnson and the Southern States). See generally Ira C. Colby, The Freedmen's Bureau: From Social Welfare to Segregation, 46 Phylon 219, 225 (1985) ("The Freedmen's Bureau implemented and coordinated four major programs throughout the reconstructed states: rations distribution, health care, educational programs, and a judicial system.").

113. See, e.g., Michael K. Brown, Unjust Restitution: A Century of Black Struggle for Equality 19 (2025) [hereinafter Brown, Unjust Restitution] (discussing Southern opposition to the Freedmen's Bureau and the threat the Bureau posed to the racial hierarchy).

114. See id. at 76 (noting Johnson's opposition to the Bureau and his order that land be returned to former Confederates).

115. Roy W. Copeland, In the Beginning: Origins of African American Real Property Ownership in the United States, 44 J. Black Stud. 646, 653 (2013).

power and its ability to weaponize state institutions to preserve land hierarchy.[116] The betrayal demonstrated that legal emancipation alone could not dismantle oligarchic dominance when the oligarchy retained control over political institutions and cultural narratives on property rights.

The failure of land redistribution marked a turning point. As formal slavery ended, agricultural oligarchy developed new mechanisms of expropriation. While the Freedmen's Bureau initially encouraged Black Americans to enter labor contracts with White landowners,[117] these arrangements quickly morphed into sharecropping and tenancy systems that functioned as sophisticated instruments of dispossession. Sharecropping and tenant farming preserved the oligarchy's access to labor, denied Black farmers the material conditions for autonomy, and maintained a facade of legal freedom.[118]

The scale of Black land dispossession over the "long twentieth century" reveals expropriation's enduring power. Enslaved people were barred from land ownership, permitted only small subsistence plots that reinforced their dependence on plantation owners.[119] Under the Homestead Act of 1862, approximately 246 million acres of public land went to White settlers,[120] establishing massive racialized wealth gaps.[121]

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116. See id. at 653 ("As a result of the President's Order, the federal government dispossessed tens of thousands of African American landholders. In Georgia and South Carolina, some Black[] [people] fought back, driving away former owners with guns, but only 2,000 African Americans retained land they had won and worked after the war." (citation omitted) (citing Claude F. Oubre, Forty Acres and a Mule: The Freedmen's Bureau and Black Land Ownership 45–51, 69–70 (1978)); id. at 657 ("The former plantation owners appealed to President Johnson who commanded Howard to notify Saxton that Circular 15 was applicable to the Sherman Reservation. In Edisto Island, South Carolina, Howard met with a group of freedmen to inform them that pursuant to President Johnson's orders that he had to restore the land.").

117. See id. at 657–60 ("As a condition . . . to restoration, the former owners were required to ensure that the freedmen would be able to harvest the crops grown in 1865 and make no claim to the proceeds themselves. Bureau agents attempted to negotiate the best terms possible for the freedmen with their former owners.").

118. See Pete Daniel, The Metamorphosis of Slavery, 1865–1900, 66 J. Am. Hist. 88, 91–92, 95 (1979) (explaining how Southern planters developed a system of labor that had a similar structure to slavery but still provided Black Americans with formal legal freedom).

119. Toussaint, Abolition, supra note 46, at 1065 ("North American planters frequently allowed their enslaved laborers to grow their own food in small plots, such as 'maize, potatoes, pumpkins, [and] water melons.' . . . [F]ood deprivation was intentionally leveraged as a means for the enslaver to enhance profits and diminish the dignity of the enslaved class . . . ." (first alteration in original) (quoting Gwyn Campbell, Children and Slavery in the New World: A Review, 27 Slavery & Abolition 261, 268 (2006))).

120. Andrew Muhammad, Christopher Sichko & Tore C. Olsson, African Americans and Federal Land Policy: Exploring the Homestead Acts of 1862 and 1866, 46 Applied Econ. Persps. & Pol'y 95, 97 (2024).

121. See Copeland, supra note 115, at 653 ("The Federal retreat from land redistribution was not only a disappointment that cultivated a sense of betrayal, it was also a missed opportunity for economic reform that might have allowed Southern Blacks to

Though the Southern Homestead Act of 1866 aimed to open more than forty-seven million acres to Black Americans in five Southern states,[122] oligarchic control over local bureaucracy ensured that only 0.16% of eligible Black Southerners obtained titles.[123] Bureaucratic racism, violence, and widespread poverty among newly emancipated Black Americans—conditions directly created by the oligarchic system itself—kept most land out of Black hands.[124]

Those few Black farmers who did acquire land faced structural disadvantages engineered to force abandonment: less fertile land, lack of credit, minimal infrastructure support, and racial terror.[125] Yet by 1910, Black farmers still managed to control between sixteen and nineteen million acres—nearly 17% of Southern farms.[126] This achievement occurred largely through the Second Morrill Act of 1890, which established separate agricultural education institutions for Black Americans.[127] This high-water mark was followed by precipitous decline as agricultural oligarchy recalibrated to changing political and economic landscape.

Over the next half-century, Black farmers lost roughly 90% of their land.[128] Various macroeconomic factors—falling cotton prices, boll weevil devastation, Great Depression dislocations, and technological changes—affected all farmers,[129] but Black farmers lost land at more than twice the

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consolidate and hold political gains made during the early years of Reconstruction." (citing Foner, Unfinished Revolution, supra note 91, at 246)).

122. See Paul Wallace Gates, Federal Land Policy in the South 1866–1888, 6 J.S. Hist. 303, 304 (1940) (noting that the Southern Homestead Act opened over forty-seven million acres of public land in five Southern states, framed as aid to freedpeople).

123. See Claude F. Oubre, Forty Acres and a Mule: The Freedmen's Bureau and Black Land Ownership 188 (1978) ("Between 1866 and 1870 approximately 6,500 freedmen entered land; yet, probably less than 1,000 of these entrants received final certificates.").

124. See Oubre, supra note 123, at 93 (noting, for example, that in South Carolina, "the bureau's assistant commissioner took no action to encourage emigration to the homestead lands of other states" and "agents . . . completely ignored Howard's directive to supply rations and transportation to homesteaders").

125. Browning, supra note 96, at 19–20; see also Phyliss Craig-Taylor, African-American Farmers and the Fight for Survival: The Continuing Examination for Insights Into the Historical Genesis of This Dilemma, 26 N.C. Cent. L Rev. 21, 29 (2003) (noting Black farmers were typically granted plots that were "small and typically of poor quality"); Daniel, Civil Rights, supra note 88, at 10–12, 45–48 (discussing White individuals' use of violence, discrimination, and local control of credit markets to maintain dominance).

126. Angela P. Harris, [Re]Integrating Spaces: The Color of Farming, 2 Savannah L. Rev. 157, 179 (2015) [hereinafter Harris, Color of Farming].

127. Act of Aug. 30, 1890, ch. 841 § 1, 26 Stat. 417; see also Frederick S. Humphries, 1890 Land-Grant Institutions: Their Struggle for Survival and Equality, 65 Agric. Hist. 3, 3–5 (1991) (noting that all but one out of seventeen states established state-supported land-grant colleges after the Act's passage).

128. See Daniel, Dispossession, supra note 86, at 6.

129. See Browning, supra note 96, at 23–25, 38 (explaining how each of the four macroeconomic factors reduced the number of farmers and led them to take on new opportunities in the North); see also Janet K. Wadley & Everett S. Lee, The Disappearance

rate of White farmers.[130] This disparity reveals that broader economic forces were compounded by deliberate discrimination orchestrated by oligarchic interests.

Federal agencies played pivotal roles in this systematic expropriation. The USDA provided discriminatory access to loans, credit, insurance, and extension services, undermining Black farmers' ability to maintain and expand their holdings.[131] The Farmers Home Administration (FmHA), created in 1946 to support struggling rural families, became a primary mechanism for transferring agricultural wealth from Black families to White landowners through systematic discrimination in loan provision and technical assistance.[132]

The Farm Credit Act of 1971 illustrates how ostensibly race-neutral policies can entrench racialized dispossession.[133] By tying access to agricultural loans to collateral value and credit history—precisely the forms of capital that generations of exclusion had stripped from Black communities—the Act entrenched oligarchic power while maintaining a veneer of race neutrality.

The industrial transformation of American agriculture during the Green Revolution deepened these inequalities. High-cost farming equipment, high-yield seeds, and chemical inputs reshaped the industry in ways that excluded small-scale farmers without substantial capital.[134] Because Black farmers had long been deprived of financing, they were effectively shut out of modernization as large operations industrialized

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of the Black Farmer, 35 Phylon 276, 279 (1974) ("During the early 1920's, however, the boll weevil spread throughout the cotton states and the number of black farmers began a gradual decline.").

130. See David Buland, USDA, NRCS Support of Hispanic Farmers: By the Numbers 2 & fig. 1 (2002) (unpublished manuscript), https://www.nrcs.usda.gov/Internet/|FSEDOCUMENTS/nrcsl43_009843.pdf [https://perma.cc/KY23-PKZP]; see also infra section I.E.

131. See Daniel, Dispossession, supra note 86, at 2 ("[T]ens of thousands of black farmers lost their hold on the land . . . because they were denied loans, information, and access to [USDA] programs essential to survival in a capital-intensive farm structure."); see also Greg A. Francis, Just Harvest: The Story of How Black Farmers Won the Largest Civil Rights Case Against the U.S. Government 17 (2021) (arguing that "[b]ribery, corruption, and racism" dominated the USDA).

132. See Browning, supra note 96, at 3–4, 9, 11 (describing how Black farmers experienced land loss as a result of discriminatory FmHA programs and developer appropriation).

133. See 12 U.S.C. §§ 2001–2279cc (2018) (establishing a system of cooperative institutions to provide credit and financial services to farmers, ranchers, and agricultural cooperatives).

134. See Philip M. Raup, Corporate Farming in the United States, 33 J. Econ. Hist. 274, 286 (1973) ("There are types of farming for which capital requirements and economies of size are often beyond the reach of single-proprietor or family-type farms . . . . It is likely that corporation farming activity will remain strong and even expand in these types of farming.").

and consolidated.[135] This process exemplifies the "development of underdevelopment"[136]—policies that engineered stagnation and dispossession in Black communities while enabling consolidation among White agribusinesses. The exchange value of Black-owned farmland diverged from its use value to Black communities,[137] and the social capital embedded in Black landownership—its role as a symbol of autonomy and post-emancipation self-determination—was systematically stripped away without acknowledgment or compensation.[138]

These patterns of systematic expropriation reveal how agricultural oligarchy has maintained itself across different historical periods not through market efficiency but through the strategic manipulation of legal, political, and economic institutions. By monopolizing credit markets, capturing federal agencies, and shaping policy debates, oligarchic interests cast expropriation as natural economic development while obscuring its political construction.

The cumulative effect of this systematic expropriation constitutes a far-reaching pattern of liberty-based dignitary harms. By denying Black farmers access to land, capital, markets, and political representation, the oligarchy foreclosed the possibility of genuine self-governance.[139] This

135. See Daniel, Dispossession, supra note 86, at xii ("African American farmers . . . were often unable to obtain credit, the sine quo non for modern agriculture, even for spring planting, much less for buying tractors, picking machines, and chemicals, nor were they favored by USDA personnel or policies.") .

136. Andre Gunder Frank, The Development of Underdevelopment, 18 Monthly Rev. 17, 17 (1966) (presenting the argument that underdevelopment in some countries is not a natural or original condition but a result of their integration into the global capitalist system in a subordinate position).

137. See John Gowdy & Sabine O'Hara, Economic Theory for Environmentalists 9 (1995) (arguing that the neoclassical economic model collapses the social and ecological meanings of land into its market price by valuing it solely through exchange, thereby separating its exchange value from its community use value); Thomas W. Mitchell, Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism, 2005 Wis. L. Rev. 557, 590 (discussing the "noneconomic value that property ownership may provide to black rural property owners"); see also John R. Logan & Harvey L. Molotch, Urban Fortunes: The Political Economy of Place 2 (1987) ("The pursuit of exchange values in the city does not *necessarily* result in the maximization of use values for others.").

138. See Brown, Unjust Restitution, supra note 113, at 75 (discussing land ownership as the foundation for political and civil rights).

139. See Nancy Fraser, Expropriation and Exploitation in Racialized Capitalism: A Reply to Michael Dawson, 3 Critical Hist. Stud. 163, 166–73 (2016) (arguing that racialized expropriation confiscates land and labor from dependent subjects through political subjection, creating populations that are denied protection and autonomy while enabling capital accumulation); Robin D.G. Kelley, The Rest of Us: Rethinking Settler and Native, 69 Am. Q. 267, 267–76 (2017) (illustrating how White settlement in Africa operated by dispossessing Black communities of land and imposing coercive labor systems that destroyed stable forms of resistance and self-sufficiency); Anibal Quijano, Coloniality of Power, Eurocentrism, and Latin America, 1 Nepantla 533, 534–35 (2000) (arguing that colonization introduced the social reality of race and "race became the fundamental criterion for the distribution of the world population into ranks, places, and roles in the

pattern reveals that the oligarchy's power depends not merely on hoarding resources but on preventing the emergence of alternative agricultural futures that might threaten its dominance.

Understanding this history through the lens of liberty-based dignitary harms reveals how agricultural oligarchy has repeatedly adapted its methods while maintaining its essential structure: concentrated power sustained through the systematic denial of meaningful autonomy to marginalized communities. Dismantling agricultural oligarchy therefore requires more than policy reform; it demands a restructuring of the institutional arrangements that translate economic concentration into political domination over agricultural life.

### D. *Erasure and Integrity-Based Dignitary Harms*

The third dimension of structural extermination—erasure—operates through integrity-based dignitary harms that deny Black farmers full social and political recognition. Building on exploitation, which undermines their equal humanity, and expropriation, which strips material autonomy, erasure reflects the oligarchy's most sophisticated tool of control: manipulating institutional memory, public discourse, and democratic representation to render Black agricultural struggles invisible while naturalizing concentrated power.

This section traces how agricultural oligarchy has used federal institutions to erase Black farmers both materially—from land, credit, and policymaking—and symbolically, from national narratives of agricultural development. Erasure functions not as mere administrative neglect but as a deliberate strategy of oligarchic consolidation, requiring ongoing institutional capture to remain effective across shifting political environments.

1. *Institutional Capture and the Failure of Civil Rights Reform.* — The Civil Rights Movement created unprecedented opportunities to challenge agricultural oligarchy. The Civil Rights Act of 1964 banned racial discrimination in USDA loan programs and established an administrative complaint process through the Office of Civil Rights Enforcement and Adjudication (OCREA).[140] Black farmers could file complaints and, when administrative remedies failed, seek judicial review under the Equal Credit

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new society's structure of power"); Andrea Smith, Indigeneity, Settler Colonialism, and White Supremacy, *in* Racial Formation in the Twenty-First Century 66, 66–90 (Daniel Martinez HoSang, Oneka LaBennett & Laura Pulido eds., 2012) ("To keep this capitalist system in place, the logic of slavery applies a racial hierarchy to this system."); Nancy Fraser, Is Capitalism Necessarily Racist?, Pol./Letters (May 20, 2019), http://quarterly.politicsslashletters.org/is-capitalism-necessarily-racist/ (on file with the *Columbia Law Review*) ("What distinguishes free subjects of exploitation from dependent subjects of expropriation is the mark of 'race' as a sign of violability." (emphasis omitted)).

140. 29 Fed. Reg. 16,966 (Dec. 7, 1964) (promulgating 7 C.F.R. §§ 15.51–52); see also Pigford v. Glickman, 185 F.R.D. 82, 88 (D.D.C. 1999).

Opportunity Act.[141] These reforms appeared to offer meaningful pathways to dismantle oligarchic control over agricultural resources.

Yet the oligarchy quickly adapted, capturing these mechanisms to reinforce rather than disrupt concentrated power. Despite formal prohibitions against discrimination, the USDA's decentralized structure vested significant discretion in local officials—many aligned with entrenched oligarchic networks—who perpetuated discriminatory practices under the guise of administrative judgement. This pattern reveals a core feature of oligarchic governance: Democratic institutions can persist in form while their democratic substance is hollowed out through elite capture of implementation mechanisms.

The 1965 U.S. Commission on Civil Rights found that the FmHA routinely provided inferior loans and technical assistance to Black farmers compared to similarly situated White farmers.[142] By 1970, the Commission had documented chronic delays and denials in credit access for essential agricultural inputs.[143] Discrimination persisted not through overt racial exclusion, now legally impermissible, but through bureaucratic manipulation that preserved existing hierarchies under a veneer of compliance.

The persistence of discrimination despite legal reform reflects what this Essay identifies as the oligarchy's institutional capture strategy. Rather than opposing civil rights reforms directly, oligarchic interests ensured that implementation would be administered by the same networks that had long enforced explicit exclusion. The decentralized county committee structure proved crucial: It delegated immense discretion to local offices, which operated without uniform eligibility standards.[144] By

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141. See *Pigford*, 185 F.R.D. at 86 ("The plaintiffs in this case allege . . . that the [USDA] willfully discriminated against them and other similarly situated African American farmers [and] . . . both sides agree that this case essentially is brought under the Equal Credit Opportunity Act . . . .").

142. See U.S. Comm'n on C.R., ED 068-206, Equal Opportunity in Farm Programs: An Appraisal of Services Rendered by Agencies of the United States Department of Agriculture 107–11 (1965) [hereinafter U.S. Comm'n on C.R., 1965 Report] (explaining that federal agricultural programs reinforced racial hierarchies by systematically excluding Black farmers from local decisionmaking, providing inferior services, and administering segregated credit, conservation, and extension systems that accelerated the economic displacement of Black agricultural communities).

143. See Browning, supra note 96, at 5 (explaining that the Commission found the USDA and FmHA had failed to prioritize the crisis facing Black farmers, neglected civil rights enforcement, and, in some cases, actively hindered efforts by small Black farm operators to remain viable through unequal credit access and administrative neglect); Daniel, Dispossession, supra note 86, at 209–13 ("In 1974, the U.S. Commission on Civil Rights compiled a massive study of civil rights enforcement and chronicled in detail Extension Service obstinacy, evasions, and shortcomings.").

144. Browning, supra note 96, at 79–82 ("FmHA lacks specific criteria for approving loans; consequently decisions made by local FmHa county supervisors . . . are somewhat subjective and result in applicants not being treated fairly and consistently . . . ." (second alteration in original) (internal quotation marks omitted) (quoting U.S. Comptroller Gen.,

1980, only 4.3% of FmHA county committee members were Black,[145] demonstrating how administrative design can systematically exclude the very communities that civil right reforms purported to protect.

This exclusion did not simply reflect institutional trends or bureaucratic inertia. It revealed the fundamentally oligarchic character of American agricultural governance. Public institutions served the consolidation of elite power, not the public good. As political economist Thomas Ferguson has shown, policy in oligarchic systems reflects the interests of organized capital, especially when regulation is executed through captured agencies that obscure the exercise of power.[146]

The agricultural oligarchy's capacity for adaptation became even more evident during the Reagan Administration, which aggressively dismantled civil rights enforcement. In 1980 alone, Black farmers filed eighty-five civil rights complaints documenting misconduct,[147] including discriminatory appraisals, loan delays, coercive terms, and stark disparities in loan size and frequency.[148] Rather than strengthening oversight, the Administration eliminated it. In 1983, President Reagan disbanded OCREA entirely, abandoning unresolved complaints. [149] According to documented reports, USDA staff members discarded civil rights complaints without review, literally throwing away evidence of discrimination.[150] This institutional vandalism was not mere administrative negligence but deliberate erasure designed to eliminate the documentary record of discrimination to prevent future challenges to oligarchic control.

The Reagan era illustrates how oligarchic systems shift strategies as political conditions change. In the Civil Rights era, the oligarchy maintained substantive discrimination under formally nondiscriminatory

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CED-78-21, Stronger Federal Enforcements Needed to Uphold Fair Housing Laws 30 (1978))).

145. See Daniel, Dispossession, supra note 86, at 247.

146. See Thomas Ferguson, Golden Rule: The Investment Theory of Party Competition and the Logic of Money-Driven Political Systems 9–10 (1995) ("It was high time . . . to spell out precisely what was wrong with the celebrated 'median voter' approach to electoral democracy and to put forward a clear alternative, in which . . . competition between blocs of major investors drives the system.").

147. See Browning, supra note 96, at 84–85.

148. See id. at 76–87 (explaining that the Commission found a consistent pattern of discriminatory treatment in FmHA programs, in which Black farmers faced delays, inadequate assistance, and unequal loan opportunities that undermined their ability to sustain their farms); Buechler, supra note 96, at 230 ("After an investigation into an FmHA office conducted by the USDA's Office of Equal Opportunity, multiple equal opportunity violations were found . . . .").

149. See Buechler, supra note 96, at 230 (noting that "the OCREA . . . was essentially dismantled in 1983, and complaints that had been filed were never processed, investigated, or forwarded to the appropriate agencies for conciliation" (citing Pigford v. Glickman, 185 F.R.D. 82, 88 (D.D.C. 1999))).

150. *Pigford*, 185 F.R.D. at 88.

rules.[151] In the 1980s, it used neoliberal rhetoric about deregulation and efficiency to justify eliminating civil rights oversight altogether.[152] This rhetoric transformed oligarchic self-interest into principled opposition to government interference, recasting captured governance as liberation from bureaucracy. The 1980s farm crisis further shielded oligarchic consolidation,[153] as federal relief overwhelmingly flowed to large, White-owned operations while small farms—particularly Black-owned farms—received little assistance.[154]

In 1995, President Bill Clinton merged the FmHA into the new Farm Service Agency,[155] issued a temporary foreclosure moratorium, and formed a USDA Civil Rights Task Force.[156] Secretary of Agriculture Dan Glickman acknowledged the Department's discriminatory history and endorsed ninety-two reforms, yet none addressed past harms.[157] The Federal Agriculture Improvement and Reform Act of 1996 represented the culmination of this oligarchic adaptation, completing the

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151. Cf. Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, Disparate Limbo: How Administrative Law Erased Antidiscrimination, 131 Yale L.J. 370, 460–73 (2021) (arguing that faulty statutory interpretation developed a body of administrative law that is formally yet not substantively nondiscriminatory in the years and decades immediately following the civil rights movement); Sara R. Jordan & Phillip W. Gray, American Bureaucracy in an Age of Oligarchy, 32 Int'l J. Pol. Culture & Soc'y 279 (2019) (exploring the challenges that institutions of bureaucratic control face from oligarchic wealth distribution and outlining the channels through which the wealthy can achieve policy goals).

152. See, e.g., Drew S. Days III, Turning Back the Clock: The Reagan Administration and Civil Rights, 19 Harv. C.R.-C.L. L. Rev. 309, 309 (1984) ("[T]he Reagan Administration has inadequately enforced and otherwise undermined, if not violated outright, settled law in the field of civil rights.").

153. See Paul Lasley & David Ostendorf, The Unraveling of Agrarian America: A Retrospective on the 1980s, 96 Agri. Hist. 553, 561 (2022) (noting that the farm crisis "provide[d] new opportunities for others, accelerating class divisions between those losing their land and livelihoods and those profiting from others' miseries").

154. See One Million Black Families in the South Have Lost Their Farms Over the Past Century, Equal Just. Initiative (Oct. 11, 2019), https://eji.org/news/one-million-black-families-have-lost-their-farms/ [https://perma.cc/FMA2-4WFG] ("In 1984 and 1985, at the height of the farm crisis, the USDA lent a total of $1.3 billion to nearly 16,000 farmers to help them maintain their land. Only 209 of those farmers were Black." (internal quotation marks omitted) (quoting Habiba Alcindor, Losing Ground, The Nation (Mar. 20, 2005), https://www.thenation.com/article/archive/losing-ground/ [https://perma.cc/9TFK-BL4L])).

155. James Chen, Farmers Home Administration (FmHA): Meaning, History, Examples, Investopedia, https://www.investopedia.com/terms/f/farmers-home-administration-fmha.asp (on file with the *Columbia Law Review*) (last updated Oct. 11, 2021).

156. Tadlock Cowan & Jody Feder, Cong. Rsch. Serv., RS20430, The *Pigford* Cases: USDA Settlement of Discrimination Suits by Black Farmers 2 (2013), https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf [https://perma.cc/ALX2-FF3H].

157. USDA, Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team 58–92 (1997), https://acresofancestry.org/wp-content/uploads/2021/01/CRAT-Report-.pdf [https://perma.cc/2TPQ-GWPF].

transformation from state-managed discrimination to market-mediated concentration.[158] Marketed as freeing farmers from government interference, the Act accelerated corporate consolidation, deregulated agricultural markets, and converted subsidies to direct payments.[159] Within years, a handful of corporations controlled key supply chains like meat processing and grain trading, leaving small farmers increasingly subject to predatory market forces.[160]

This evolution demonstrates how agricultural oligarchy has moved from plantation regimes to corporate agribusiness dominance while maintaining its essential character: concentrated power sustained through the exclusion of marginalized communities. The neoliberal rhetoric of market freedom obscured how deregulation intensified oligarchic control by removing the last institutional constraints on concentrated economic power.

2. *The Politics of Recognition and Contemporary Erasure.* — The *Pigford* litigation, filed in 1997, marked both a breakthrough and a limit in what political theorist Charles Taylor terms "the politics of recognition."[161] Timothy Pigford and a class of Black farmers alleged decades of racial discrimination by the USDA.[162] The resulting settlement became the largest civil rights settlement in U.S. history, formally acknowledging the systematic discrimination that had decimated Black farming communities.[163]

Critical analysis of recognition politics reveals significant limitations in addressing structural oligarchy. While Taylor argues that recognition is essential to democratic legitimacy because citizens require social esteem

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158. See Federal Agriculture Improvement and Reform Act of 1996 , Pub. L. No. 104-127, § 101(b), 110 Stat. 888, 896.

159. See, e.g., Jon Lauck, After Deregulation: Constructing Agricultural Policy in the Age of "Freedom to Farm", 5 Drake J. Agric. L. 3, 51 (2000) (finding that subsidy decoupling and increased market flexibility contributed to consolidation in farm operations); see also Traci Bruckner, Agricultural Subsidies and Farm Consolidation, 75 Am. J. Econ. & Socio. 623, 630–33 (2016) (arguing that deregulation under the 1996 Act and subsequent bills removed production controls and opened the path for larger-scale farming).

160. See Lauck, supra note 159, at 51; see also C. Edwin Young & Paul C. Westcott, USDA, Agric. Info. Bull. No. 726, The 1996 Act Increases Market Orientation ( 1996) (noting that the 1996 Act "increases farmers' planting flexibility by eliminating ARP's, base acreage planting constraints, and limits on normal and optional flex acreage," thereby making planting and production decisions more fully responsive to market signals).

161. See Taylor, Politics of Recognition, supra note 52, at 30. Social recognition, Hegel argued, is foundational to the human condition. See Robert R. Williams, Hegel's Ethics of Recognition 9–10 (1997) ("Recognition is the existential genesis of the concept of spirit, and remains *aufgenhoben* in spirit."); cf. Paul Ricoeur, The Course of Recognition 17, 19 (David Pellauer trans., Harvard Univ. Press 2005) (2004) (identifying Hegel's *Anerkennung* as one of three approaches to the philosophy of recognition).

162. Pigford v. Glickman, 185 F.R.D. 82, 86 (D.D.C. 1999).

163. Id. at 112 ("As a group, they brought Secretary Glickman to the negotiating table in this case and achieved the largest civil rights settlement in history.").

to participate as full community members,[164] critics, like American philosopher Nancy Fraser, contend that recognition alone cannot remedy material inequalities that generate and sustain patterns of misrecognition.[165] *Pigford* exemplifies this tension: It provided monetary compensation and symbolic acknowledgment of past harms but left intact the structural conditions that had produced discrimination.

Drawing on philosopher Axel Honneth's theory of recognition, one might understand these dynamics as social pathologies that normalize domination by treating structural harms as episodic misconduct.[166] By framing agricultural discrimination as a series of discrete violations rather than the systematic operation of oligarchic power, the *Pigford* framework enabled the agricultural oligarchy to present itself as reformed while maintaining its essential control over land, credit, and policymaking institutions.[167] Fraser's redistributive critique is particularly relevant to agricultural oligarchy, which operates through control over material resources rather than mere cultural representation.[168] *Pigford* could not restore the millions of acres lost through a century of discriminatory credit practices, nor did it challenge accelerating agricultural consolidation that marginalized small and Black farmers.

By the time of the *Pigford* settlement, structural extermination had produced its intended outcome: Black farmers comprised less than 2% of U.S. farmers, representing a 98% decline from Reconstruction-era

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164. See Taylor, Politics of Recognition, supra note 52, at 45. See generally Claire Dupuy & Samuel Defacqz, Citizens and the Legitimacy Outcomes of Collaborative Governance: An Administrative Burden Perspective, 24 Pub. Mgmt. Rev. 752 (2022) (explaining that, following Taylor, democratic legitimacy depends on recognition, which affirms citizens as full and socially esteemed members of the political community).

165. Nancy Fraser, From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age, *in* The New Social Theory Reader 188, 191–93 (Steven Seidman & Jeffrey C. Alexander eds., 2d ed. 2008) [hereinafter Fraser, From Redistribution to Recognition].

166. See Axel Honneth, The Struggle for Recognition: The Moral Grammar of Social Conflicts 174–77 (Joel Anderson trans., 1995).

167. See Buechler, supra note 96, at 227 ("Discrimination by the USDA in connection with farm loans and other credit or benefit programs made it incredibly difficult for black farmers to gain access to land, credit, or assistance programs."); Jyotsna Ghimire, Cesar L. Escalante, Ramesh Ghimire & Charles B. Dodson, Do Farm Service Agency Borrowers' Double Minority Labels Lead to More Unfavorable Loan Packaging Terms?, 80 Agric. Fin. Rev. 633, 638–39 (2020) (finding that, compared to White borrowers, Black borrowers received significantly lower loan amounts, significantly higher interest rates, and significantly shorter loan maturities); Ximena Bustillo, 'Rampant Issues': Black Farmers Are Still Left Out at USDA, Politico (July 5, 2021), https://www.politico.com/news/2021/07/05/black-farmers-left-out-usda-497876 (on file with the *Columbia Law Review*) ("The [*Pigford*] settlement fell short of addressing the problems resulting from the discriminatory lending, advocates contend . . . . Black farmers say their interactions with FSA officials . . . are plagued by racial bias, inexperienced personnel and lack of bandwidth to help with applications.").

168. See Fraser, From Redistribution to Recognition, supra note 165, at 190–91 (illustrating the contradiction inherent in requiring recognition and redistribution, wherein a class must both affirm and deny its specificity).

levels.[169] Even during recent crises like the COVID-19 pandemic, racial disparities in agricultural policy remain stark. In 2020, Black farmers received less than 4% of the $9.2 billion distributed through the Coronavirus Food Assistance Program, despite equal or greater need. [170]

These patterns reflect what political scientists Steven Levitsky and Lucan A. Way describe as "competitive authoritarianism"—maintaining formal democratic institutions while systematically undermining their democratic substance.[171] The agricultural oligarchy no longer needs explicitly discriminatory policies when decades of systematic exclusion have produced market conditions that reproduce racial disparities while providing plausible deniability about discriminatory intent.

Fourth-generation farmer Lucious Abrams captures this lived reality: "They didn't have any idea we gonna be here twenty years later standing, fighting . . . but through His grace and mercy we're still here, fighting for justice."[172] His words reveal both the resilience of Black farmers and the depth of the structures arrayed against them.

The systematic erasure of Black farmers constitutes integrity-based dignitary harms—violations of the capacity for social recognition as full members of the political community. Drawing from Taylor while incorporating Fraser's materialist critique, this Essay finds that these harms arise when groups are denied both internal self-worth and external validation within public institutions necessary for complete citizenship.[173]

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169. See Buechler, supra note 96, at 242; see also id. at 226 ("[T]he number of black farmers has continuously declined—between 1920 and 1969, there was a 90% decrease, and a 98% decrease by 1997 . . . . [N]o other minority group has experienced a loss of farm operations at a rate comparable to that of the African American population." (citing Harris, Color of Farming, supra note 126, at 179); Buland, supra note 130, at 4 fig. 3.

170. Jared Hayes, USDA Data: Nearly All Pandemic Bailout Funds Went to White Farmers, Env't Working Grp. (Feb. 18, 2021), https://www.ewg.org/news-insights/news/usda-data-nearly-all-pandemic-bailout-funds-went-white-farmers [https://perma.cc/JUK7-DXTE] [hereinafter Hayes, Pandemic Bailout Funds] ("White farmers received nearly 97 percent of the $9.2 billion provided by October 2020 through USDA's Coronavirus Food Assistance Program . . . . The disparity . . . reflects both the design of the CFAP program—which linked payment to production—and the long history of discrimination by USDA . . . .").

171. Steven Levitsky & Lucan A. Way, Elections Without Democracy: The Rise of Competitive Authoritarianism, 13 J. Democracy 51, 52–54 (2002) (defining competitive authoritarianism as a diminished form of authoritarianism in which both the government and opposition systematically violate the rules of formal democratic institutions).

172. Acres of Ancestry Initiative - Black Agrarian Fund, Episode 17 | The Conspiracy Against Black Farmers | Luscious Abrams [sic], at 04:08–04:19 (YouTube, May 14, 2020), https://www.youtube.com/watch?v=5ivoK49-eqM (on file with the *Columbia Law Review*).

173. See Fraser, From Redistribution to Recognition, supra note 165, at 189 (describing cultural and/or symbolic injustice as a process defined by social patterns of nonrecognition and disrespect); Taylor, Politics of Recognition, supra note 52, at 36 ("The projection of an inferior or demeaning image on another can actually distort and oppress, to the extent that the image is internalized . . . . [R]ace relations and discussions of multiculturalism are undergirded by the premise that the withholding of recognition can be a form of oppression.").

But recognition operates differently in oligarchic systems. While democratic theory assumes that recognition emerges from inclusive deliberation,[174] oligarchy ensures that marginalized voices are excluded from the very forums that generate recognition.[175] The result is what this Essay terms "oligarchic recognition"—symbolic acknowledgment that legitimates concentrated power rather than challenging it.

This dynamic is evident in the constitutional dimensions of erasure. Black farmers are excluded not by formal disenfranchisement but through institutional structures—county committees dominated by White landowners,[176] extension services oriented toward large-scale operations,[177] policy research funded by agribusiness[178]—that appear democratic while excluding marginalized voices.

This exclusion denies equal citizenship by reducing affected groups to subjects rather than participants in governance—a condition fundamentally incompatible with democratic constitutionalism.[179]

The cumulative effect across generations is profound. Erasure has eliminated Black farmers' collective voice from agricultural policymaking, rural development debates, and food system governance. This impoverishes democratic deliberation while enabling oligarchic interests to frame their preferences as universal agricultural needs. Erasure thus represents agricultural oligarchy's most sophisticated strategy for maintaining power: the systematic elimination of alternative visions before they can challenge concentrated power. Unlike exploitation, which requires active domination, or expropriation, which requires systematic dispossession, erasure operates through institutional manipulation that renders alternative futures unthinkable within dominant policy frameworks.

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174. See Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 496 (William Rehg trans., 1996) ("Each and every person should receive a three-fold recognition: they should receive equal protection and equal respect in their integrity as irreplaceable individuals, as members of ethnic or cultural groups, and as citizens, that is, as members of the political community.").

175. See Taylor, Politics of Recognition, supra note 52, at 37–42 (describing how the "modern notion of identity" has given rise to a politics of difference, which has led to both discrimination and reverse discrimination against marginalized groups); see also Nancy Fraser, Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy, 25/26 Soc. Text 56, 66 (1990) ("[I]n [societies whose basic institutional framework generates unequal social groups] . . . full parity of participation in public debate and deliberation is not within the reach of possibility.").

176. See supra notes 144–145 and accompanying text.

177. See supra note 131 and accompanying text.

178. See supra note 23 and accompanying text.

179. See Mark Bovens, Public Accountability, *in* The Oxford Handbook of Public Management 182, 182–83 (Ewan Ferlie, Laurence E. Lynn & Christopher Pollitt eds., 2007) (describing public accountability as the "hallmark of modern democratic governance" and "a symbol for good governance").

By controlling access to institutions, suppressing the documentary record, and shaping national narratives, the oligarchy presents its dominance as natural rather than constructed. These ideological conditions prevent coalition building and entrench concentrated power as common sense rather than a political choice. Integrity-based dignitary harms therefore preserve not only exclusion but ideological dominance. Understanding erasure as a deliberate oligarchic strategy rather than bureaucratic is essential for developing tools to challenge agricultural concentration and restore democratic governance.

### E. *From Oligarchic Control to Democratic Transformation*

Together, the three dimensions of structural extermination—exploitation, expropriation, and erasure—reveal how agricultural policy has long functioned as an engine of White supremacy and anti-Blackness, extending back to the colonial origins of American society.[180] Viewed through the lens of agricultural oligarchy, these histories illustrate how concentrated economic power has been systematically deployed to maintain racial hierarchy and exclude Black farmers from meaningful participation in American agriculture.

American agriculture's oligarchic structure constitutes a direct challenge to democratic governance. By inflicting equality-based, liberty-based, and integrity-based dignitary harms on Black farmers, the system has preserved the essential character of the plantation economy while adapting its methods across eras. From slavery to state-managed discrimination to corporate domination, the oligarchy's capacity to capture democratic institutions allows it to convert civil rights reforms into mechanisms of legitimation, preserving substantive inequality beneath procedural compliance. The concept of "oligarchic recognition" explains how contemporary systems maintain ideological dominance through symbolic acknowledgment without structural redistribution. The *Pigford* settlement exemplifies this pattern: It offered formal acknowledgment of past harms and individual monetary compensation while leaving intact oligarchic control over land, credit, and policy institutions.[181]

Thus, the marginalization of Black farmers cannot be understood as discrete policy failures or market byproducts. Rather, it reflects the stable operation of an oligarchic system that preserves concentrated power by combining exploitation, expropriation, and erasure. Oligarchic control extends beyond economic resources to encompass the very frameworks

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180. See W.E.B. Du Bois, The African Roots of War, Atl. Monthly (May 1915), https://www.theatlantic.com/magazine/archive/1915/05/the-african-roots-of-war/528897/ (on file with the *Columbia Law Review*) ("[The slave trade], on which the British Empire and the American Republic were largely built . . . 'Color' became in the world's thought synonymous with inferiority, 'Negro' lost its capitalization, and Africa was another name for bestiality and barbarism.").

181. See supra notes 161–170 and accompanying text.

through which agricultural development is interpreted, making concentration appear inevitable.

The constitutional implications are profound. When public institutions consistently fail to represent marginalized communities—when county committees, extension services, and agricultural research centers serve oligarchic rather than democratic purposes—those communities are reduced to subjects rather than full citizens. Recognizing American agriculture as an oligarchic system makes clear that dismantling concentration requires more than policy reform. It demands structural change to the institutional arrangements that allow economic power to translate into political domination. Understanding integrity-based dignitary harms as products of deliberate oligarchic strategy provides the analytical foundation for reclaiming democratic governance in American agriculture.

## II. LEGISLATIVE EFFORTS TO ADDRESS RACIAL INJUSTICE IN AGRICULTURE

The fight for racial justice in American agriculture is as old as the nation's farming economy itself. For generations, Black farmers have endured systemic discrimination that has stripped away land, livelihoods, and the intergenerational wealth such land might have secured. This Part examines the legal and legislative efforts to redress those harms, not as historical artifacts, but as windows into the evolving struggle for equity in American agriculture.

This analysis proceeds chronologically through three phases of reform. Section II.A begins with *Pigford v. Glickman*, which produced what was then the largest civil rights settlement in U.S. history, yet whose aftermath revealed the limits of legal redress within a bureaucratic system marked by distrust, delay, and uneven implementation. Section II.B explores more recent legislative efforts, including the proposed Justice for Black Farmers Act of 2020 and the debt relief program enacted under the American Rescue Plan Act of 2021, which reflect renewed attempts to confront structural inequality in agriculture. Finally, section II.C examines the political and legal resistance these initiatives have faced, including the fierce opposition that ultimately led to the repeal of race-conscious debt relief programs.

Taken together, these developments illuminate both the measurable progress and the persistent barriers that endure. They illustrate how law can serve as a tool for justice while remaining constrained by the very institutions tasked with enforcing it. The mixed reception of these reforms underscores a deeper national ambivalence toward race-conscious remedies and highlights how attempts to advance agricultural equity remain vulnerable to political backlash rooted in the oligarchic structures that have defined American agriculture since its plantation-era origins.

### A. *The* Pigford *Cases*

The decades of racial discrimination against Black farmers that culminated in *Pigford v. Glickman* were neither isolated nor undocumented. Between 1965 and 1997, multiple government reports acknowledged pervasive discrimination in USDA lending programs, particularly those intended to support farmers.[182] These reports repeatedly called for reforms, yet the Agency failed to take meaningful action. The USDA's sustained inaction, despite ample evidence and internal acknowledgment of wrongdoing, left Black farmers with few avenues for redress and reflected a deeper bureaucratic indifference to their plight.[183]

In August 1997, Timothy Pigford filed a class-action lawsuit in the U.S. District Court for the District of Columbia on behalf of 641 Black farmers seeking redress for racial discrimination in the administration of federal farm programs.[184] The plaintiffs alleged that the USDA had functioned, in their words, as "a racist plantation, disguised as a government agency," perpetuating racial subordination through its denial of loans and services.[185] Their claims traced a lineage of discrimination stretching back to the post–Civil War era, framing the suit not only as a legal challenge but as a moral indictment of federal agricultural governance.

The resulting 1999 consent decree created two avenues for relief. Track A offered a $50,000 payment, loan forgiveness, and tax offsets for claimants able to present substantial evidence of discrimination through a relatively streamlined process.[186] Track B allowed for potentially greater compensation but required claimants to meet a higher evidentiary standard—proof of discrimination and damages by a preponderance of

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182. See U.S. Comm'n on C.R., 1965 Report, supra note 142; U.S. Comm'n on C.R., Federal Civil Rights Enforcement Effort (1970); Browning, supra note 96 (noting that loan programs designed to support low-income farmers paradoxically discriminated against Black farmers); C.R. Action Team, Civil Rights at the United States Department of Agriculture (1997) [hereinafter C.R. Action Team, 1997 Report]; Cowan & Feder, supra note 156, at 2 ("[F]indings showed that . . . the largest USDA loans (top 1%) went to corporations (65%) and white male farmers (25%); . . . loans to black males averaged $4,000 (or 25%) less than those given to white males; and . . . 97% of disaster payments went to white farmers, while less than 1% went to black farmers.").

183. See, e.g., Kristol Bradley Ginapp, Note, Jim "USDA" Crow: Symptomatic Discrimination in Agriculture, 8 Drake J. Agric. L. 237, 248 (2003) ("Within this bureaucracy, the USDA's failure to address the issue of discriminatory procedures in lending is illustrated by the fact that many loan officers charged with discriminatory practice have retained their positions.").

184. Members of the class were African Americans who had farmed between January 1, 1981, and December 31, 1996, and had also filed a discrimination complaint on or before July 1, 1997, regarding alleged discriminatory treatment by the USDA. Order Granting Class Certification, Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999) (No. 97-1978 (PLF)).

185. Francis, supra note 131, at 49 (internal quotation marks omitted) (quoting the *Pigford* plaintiffs).

186. In particular, they had to show they had been treated worse than a "specifically identified, similarly situated" White farmer. See *Pigford*, 185 F.R.D. at 105.

the evidence.[187] The settlement, initially valued at $1.06 billion, established a six-month filing window for eligible farmers to submit claims beginning on November 9, 1999.[188]

For many, however, the promise of redress proved elusive. Roughly 31% of claimants were denied compensation, often because their filings were deemed untimely.[189] The USDA's notice campaign failed to reach many eligible farmers, and a substantial number of claimants—misinformed, inadequately represented, or both—missed the tight court-imposed deadlines.[190] Attorneys frequently failed to comply with the decree's procedural requirements, leading to USDA objections and judicial dismissals.[191] Allegations of obstruction by court officers and government representatives only deepened distrust and resentment.[192] In total, approximately 97% of late-filed petitions were rejected, despite their credible claims of prior discrimination.[193]

In response to the shortcomings of *Pigford*, Congress enacted section 14012 of the Food, Conservation, and Energy Act of 2008, granting a second opportunity for claimants previously denied relief due to

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187. Id. at 105–07 ("In order to prevail on his claims, a Track B claimant must prove by a preponderance of the evidence that 'he was the victim of racial discrimination and that he suffered damages therefrom.'" (quoting Consent Decree ¶ 10(g), *Pigford*, 185 F.R.D. 82 )).

188. Cowan & Feder, supra note 156, at 3, 4, 7 (describing how "[t]he federal government provided a total of approximately $1.06 billion ($1,058,577,198) in cash relief" for claimants who "file[d] their claim . . . within 180 days of the consent decree").

189. Id. at 10 ("[N]early 7,000 Track A claims in *Pigford* (31%) were denied relief, presumably because such claims lacked merit or had other defects.").

190. 'Notice' Provision in the *Pigford v. Glickman* Consent Decree: Hearing Before the Subcomm. on the Const., 108th Cong. 2 (2004) [hereinafter Hearing on 'Notice' Provision] (statement of Rep. Chabot) ("Reports indicate that approximately 66,000 potential class members submitted their claims late, most because they did not know that they were required to submit a claim sooner, thus losing their right to sue the USDA for past wrongs."). But see *Pigford*, 185 F.R.D. at 101–02 (concluding that "class members have received more than adequate notice").

191. Pigford v. Veneman, 144 F. Supp. 2d 16, 19 (D.D.C. 2001) (stating that "[c]ounsel's negligent handling of the final stages of this case, however, runs the risk of jeopardizing counsel's prior accomplishments").

192. See Hearing on 'Notice' Provision, supra note 190, at 4 (statement of Rep. Chabot) ("The court . . . gave the Arbitrator carte blanche authority to determine whether or not late claims should be let in due to extraordinary circumstances. Unfortunately . . . virtually no one [was] able to show that they did not file due to extraordinary circumstances."); id. at 295 (prepared statement of Lawrence C. Lucas, USDA Coal. Minority Emp.) (alleging a "scheme to block settlements and obstruct justice" by USDA, DOJ, and the plaintiffs' counsel); id. at 205 (statement of Bernice Atchison, Farmer) (asserting that USDA and class counsel "defied the judge's order" to post or mail notice).

193. See Cowan & Feder, supra note 156, at 5 ("Approximately 73,800 *Pigford II* petitions (66,000 before the September 15, 2000, late filing deadline) were filed under the late filing procedure, of which 2,116 were ultimately allowed to proceed under the *Pigford I* process."); Francis, supra note 131, at 54–55 ("[N]early 66,000 petitions were filed late and thus not heard.").

procedural defects.[194] Of the roughly eighty-nine thousand claim forms distributed under this new provision, around forty thousand were returned, and about thirty-four thousand were deemed complete and eligible.[195] These claims were consolidated into *In re Black Farmers Discrimination Litigation* (*Pigford II*), yielding an additional $1.25 billion settlement with the USDA.[196]

Combined, the *Pigford* settlements distributed roughly $2.3 billion for Black farmers, one of the most substantial government-led efforts to address racial injustice in rural America since the Civil Rights Act of 1964.[197] The litigation also opened the door for similar settlements involving Native American, Hispanic American, and female farmers.[198] Nevertheless, many Black farmers who received Track A awards—the more accessible but less remunerative path—found the $50,000 payments insufficient to resolve accumulated debts or recover lost land.[199] As Judge Paul Friedman, who oversaw both cases, acknowledged, "[I]t is probable that no amount of money can fully compensate class members for past acts of discrimination."[200] Indeed, the $2.3 billion disbursed pales in comparison to the estimated $326 billion in economic losses attributed to

194. Congress overrode a veto of the law by President George W. Bush. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012(b), 122 Stat. 1651, 2210 (allowing refiling of claims by claimants "who [have] not previously obtained a determination on the merits"); see also Detailed Background Information, In Re Black Farmers Discrimination Litigation Settlement, https://blackfarmercase.com/Background.aspx (on file with the *Columbia Law Review*) (last visited Oct. 26, 2025).

195. Cowan & Feder, supra note 156, at 8.

196. In re Black Farmers Discrimination Litig., 856 F. Supp. 2d 1, 7, 23 (D.D.C. 2011).

197. Laura Reiley, Relief Bill Is Most Significant Legislation for Black Farmers Since Civil Rights Act, Experts Say, Wash. Post (Mar. 8, 2021), https://www.washingtonpost.com/business/2021/03/08/reparations-black-farmers-stimulus (on file with the *Columbia Law Review*).

198. See, e.g., Order on Plaintiffs' Motion for Final Approval of Settlement, Motion for Approval of Class Representative Service Awards, and Motion for an Award of Attorneys' Fees and Expenses at 2–3, Keepseagle v. Vilsack, No. 1:99-cv-03119-EGS(D.D.C. Apr. 28, 2011) (approving $760 million in relief for Native American farmers and ranchers); USDA's Combined Opposition to Plaintiffs' Motion to Review Defendant's Proposed Notice and Terms of Class-Wide Settlement, and to Certify a Settlement Class, and Opposition to Plaintiffs' Emergency Motion to Stay Publication of Defendant's Proposed Notice of a Class-Wide Settlement Pending Court Review at 2, Garcia v. Vilsack, No. 1:00-cv-02445-RBW (D.D.C. Oct. 20, 2010) (proposing to allocate $1.33 billion "to settle claims of Hispanic and female farmers who allege discrimination by USDA between 1981 and 2000"); see also Order at 1, Love v. Vilsack, No. 1:00-cv-02502-RBW(D.D.C. July 19, 2010) (order staying the case and administratively closing matter for female farmers pending completion of settlement negotiations).

199. See Ginapp, supra note 183, at 245–47 (stating that "most people who recover under the consent decree . . . no longer farm or own farmland" and describing the settlement as "too little, too late" (internal quotation marks omitted) (quoting Hamil R. Harris, Can't Save the Farm, Black Enter., Dec. 2000, at 34, 34)).

200. Pigford v. Glickman, 185 F.R.D. 82, 108 (1999).

the dispossession of millions of acres of Black-owned farmland throughout the twentieth century.[201]

The limits of litigation became starkly apparent during the Trump Administration's response to the COVID-19 pandemic. Emergency aid programs, including the Paycheck Protection Program and the Coronavirus Food Assistance Program, disproportionately benefited White farmers.[202] Black farmers, still reeling from generations of systemic exclusion, received only a fraction of the available support, mirroring earlier patterns of unequal treatment. Despite the formal resolution of *Pigford*, the federal government has yet to fully reckon with how state-sanctioned discrimination contributed to Black land loss or how that loss continues to fuel deep socioeconomic inequality in Black rural communities today.

### B. *Contemporary Legislative Reform Efforts*

The limitations exposed by *Pigford*'s aftermath, combined with the glaring inequities in pandemic relief, prompted advocates and progressive lawmakers to pursue more comprehensive legislative solutions. In 2020, against the backdrop of the COVID-19 pandemic and a contentious presidential election, Senator Cory Booker joined forces with other progressive Democrats to introduce landmark legislation aimed at confronting the entrenched racial disparities in American agriculture.[203] Although civil rights advocates had long challenged the racially exclusionary architecture of federal agricultural policy, White farmers remained dominant across nearly every segment of the industry.[204] That dominance reflected the enduring legacy of racial violence and dispossession in Black rural communities and contributed to persistent food insecurity in segregated Black neighborhoods nationwide.[205]

The Justice for Black Farmers Act of 2020, introduced by Senator Booker and cosponsored by Senators Elizabeth Warren and Kirsten Gillibrand, marked a comprehensive attempt to redress more than a

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201. See Francis et al., supra note 8, at 41 (conducting a quantitative analysis and finding a "cumulative value of Black land loss of roughly $326 billion").

202. Nadra Nittle, Black-Owned Farms Are Holding on by a Thread, Eater (Feb. 23, 2021), https://www.eater.com/22291510/Black-farmers-fighting-for-farmland-discrimination-inagriculture [https://perma.cc/FZP4-XG66].

203. Justice for Black Farmers Act of 2020, S. 4929, 116th Cong. (2020).

204. See, e.g., Daniel, Dispossession, supra note 86, at 5 ("[B]lack farmers suffered the most debilitating discrimination during the civil rights era, when laws supposedly protected them from bias. The increase in programs and the USDA's swelling bureaucracy had an inverse relationship to the number of farmers . . . .").

205. See generally Margaret Marietta Ramírez, The Elusive Inclusive: Black Food Geographies and Racialized Food Spaces, 47 Antipode 748, 750 (2015) (linking historical racial violence and dispossession to food insecurity and food access in Black communities).

century of anti-Black discrimination, both within and beyond the USDA.[206] At its core, the bill proposed sweeping structural reforms to USDA programs and governance systems, including the creation of an Independent Civil Rights Oversight Board, an Equity Commission to examine discriminatory practices, and a Civil Rights Ombudsman within the Agency.[207] It also sought material redress through debt relief for Black farmers with unresolved discrimination claims, business development grants, and, notably, a land grant initiative designed to return farmland wrongfully taken from Black families through fraud, violence, or discriminatory federal policy.[208]

Although the bill initially stalled in the Republican-controlled Senate, Senator Booker reintroduced it in February 2021 with expanded support from Senators Tina Smith, Raphael Warnock, and Patrick Leahy.[209] In the House, Congresswoman Alma Adams introduced a companion bill backed by more than one hundred advocacy organizations.[210] To its sponsors, the legislation represented not only agricultural reform but an effort to remedy patterns of racial exclusion long sanctioned by law.[211] As Senator Booker explained, "[T]here is a direct connection between discriminatory USDA policies and the enormous land loss we have seen among Black farmers over the past century."[212] Additionally, "[t]he Justice for Black Farmers Act will address and correct USDA discrimination and take bold steps to forgive debt and restore the land that has been lost in order to empower a new generation of Black farmers to succeed and thrive."[213]

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206. S. 4929 (proposing structural reforms to the USDA and land-based reparative measures for Black farmers).

207. Cory Booker, Justice for Black Farmers Act: Section-by-Section Summary, https://www.booker.senate.gov/imo/media/doc/JBF%20Section%20by%20Section%2011.16.20.pdf [https://perma.cc/ER3X-VUYB] (last visited Oct. 10, 2025).

208. Akin to a modern Homestead Act, the Equitable Land Access Service would seek to make no less than twenty thousand grants per year over nine years and provide farmers with access to USDA operating loans and mortgages with a broader goal of addressing the racial injustices that have plagued Black farmers since the Reconstruction Era. See id.

209. Senator Bernie Sanders would join as a cosponsor on March 10, 2021, and Senator Richard Blumenthal on November 30, 2021. S. 300, 117th Cong. (2021).

210. The reintroduced house bill was cosponsored by Representatives Joyce Beatty, Danny Davis, Alcee Hastings, Jahana Hayes, Eddie Bernice Johnson, Al Lawson, Donald Payne, Jr., Stacey Plaskett, Ayanna Pressley, Bobby Rush, and Terri Sewell. H.R. 1393, 117th Cong. (2021).

211. Press Release, Cory Booker, Comprehensive Bill, supra note 26.

212. Id. (internal quotation marks omitted) (quoting Sen. Booker); see also Cory Booker, Booker Leads Colleagues in Reintroducing the Justice for Black Farmers Act (Jan. 26, 2023), https://www.booker.senate.gov/news/press/booker-leads-colleagues-in-reintroducing-the-justice-for-black-farmers-act [https://perma.cc/7XXS-N2X6]; Jared Hayes, Timeline: Black Farmers and the USDA, Env't Working Grp. (Feb. 1, 2021), https://www.ewg.org/research/black-farmer-usda-timeline/ [https://perma.cc/LWU8-6D7U] (pointing to several moments in history which spurred decreases in farm ownership by Black Americans).

213. Press Release, Cory Booker, Comprehensive Bill, supra note 26 (internal quotation marks omitted) (quoting Sen. Booker).

While the comprehensive Justice for Black Farmers Act remained stalled in Congress, lawmakers advanced a more targeted initiative through pandemic relief. In March 2021, President Biden signed the American Rescue Plan Act of 2021 (ARPA), a $1.9 trillion economic stimulus package aimed at supporting families and businesses amid economic disruption.[214] Within that package, approximately $10.4 billion was allocated to support agricultural and food supply chain resiliency.[215] Of particular significance was section 1005, titled Farm Loan Assistance for Socially Disadvantaged Farmers and Ranchers,[216] introduced as the Emergency Relief for Farmers of Color Act by Senator Warnock.[217] The provision authorized approximately $4 billion in direct relief payments, permitting socially disadvantaged farmers to receive payments covering up to 120% of their outstanding USDA loan debts, with the additional 20% intended to offset associated taxes and fees.[218]

In addition to direct debt relief, section 1006 allocated an additional $1.01 billion for technical assistance programs, business development support, and agricultural education at HBCUs and other minority-serving institutions.[219] It also mandated the creation of a USDA equity commission to examine the agency's discriminatory history.[220] The Congressional

214. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (codified in scattered titles of the U.S.C.).

215. This initiative reflected Biden's campaign promise to "Build Back Better in Rural America." The Biden–Harris Plan to Build Back Better in Rural America, Biden Harris for President, https://joebiden.com/rural-plan (on file with the *Columbia Law Review*); Press Release, USDA, Fact Sheet: United States Department of Agriculture Provisions in H.R. 1319, the American Rescue Plan (Mar. 10, 2021), https://www.usda.gov/media/press-releases/2021/03/10/fact-sheet-united-states-department-agriculture-provisions-hr-1319 [https://perma.cc/3EL5-WAXP].

216. American Rescue Plan Act § 1005.

217. Emergency Relief for Farmers of Color Act of 2021, S. 278, 117th Cong. (2021) (proposing $5 billion in debt relief and assistance to socially disadvantaged farmers and ranchers).

218. See Congress Clears Another Round of Pandemic Aid With Historic Support for BIPOC Farmers, Nat'l Sustainable Agric. Coal.: NSAC's Blog (Mar. 11, 2021), https://sustainableagriculture.net/blog/american-rescue-plan/ [https://perma.cc/C2EU-ATLJ] ("Farmers could use the additional relief funds to pay any taxes owed as a result of the debt relief."). Direct loans, which the USDA planned to tackle first, are loans provided directly to farmers or ranchers from the USDA's Farm Service Agency ("FSA"), whereas guaranteed loans are provided to farmers or ranchers by private USDA-approved lenders with the loan guarantee of the FSA. Under the bill, both delinquent and current loans would be eligible for debt relief. See Press Release, USDA, In Historic Move, USDA to Begin Loan Payments to Socially Disadvantaged Borrowers Under American Rescue Plan Act Section 1005 (May 21, 2021), https://www.usda.gov/media/press-releases/2021/05/21/historic-move-usda-begin-loan-payments-socially-disadvantaged [https://perma.cc/E22W-V6XU] [hereinafter Press Release, USDA, Section 1005 Announcement]; see also S. 278.

219. Ass'n of Pub. & Land-Grant Univs., Analysis of the American Rescue Plan Act of 2021 (2021), https://www.aplu.org/wp-content/uploads/aplu-analysis-of-the-american-rescue-plan-act-1.pdf [https://perma.cc/YH8G-C7V5].

220. American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 1006(b)(3), 135 Stat. 4, 13 (codified at 7 U.S.C. § 2279 (2024)); Press Release, USDA, In Major Step to Implement

Budget Office estimated that the average debt relief payment under section 1006 would be roughly $20,000 and reach approximately 15,000 socially disadvantaged farmers and ranchers across the country.[221]

On May 26, 2021, the USDA's Farm Service Agency issued a Notice of Funding Availability (NOFA), which outlined the implementation plan for distributing relief payments.[222] The FSA planned to issue payment offer letters to eligible direct-loan borrowers, followed by additional guidance for guaranteed-loan borrowers.[223] Farmers could secure relief by returning a completed offer letter or by requesting one if they had not already received an offer letter by mail.[224] Disbursements were expected to begin in June 2021.

Implementation, however, quickly became mired in controversy over the statute's use of the term "socially disadvantaged." Although section 1005 did not expressly exclude White farmers who had experienced USDA discrimination from applying for relief, the statutory language—and USDA guidance—generated confusion. The USDA identified socially disadvantaged groups as including, but not limited to, "farmers who are Black or African American, American Indian or Alaska Native, Hispanic or Latino, and Asian or Pacific Islander."[225]

Conservative politicians and commentators seized on this guidance to argue that the law discriminated against White farmers, particularly those

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American Rescue Plan, USDA Announces Membership of Newly Formed Equity Commission (Feb. 10, 2022), https://www.usda.gov/about-usda/news/press-releases/2022/02/10/major-step-implement-american-rescue-plan-usda-announces-membership-newly-formed-equity-commission [https://perma.cc/CS3M-N2XW] ("[T]he launch of the independent Commission delivers on President Biden's commitment to create an independent Equity Commission and provide it with the necessary resources to support its mission to address historical discrimination at USDA.").

221. Congress Clears Another Round of Pandemic Aid with Historic Support for BIPOC Farmers, supra note 218 ("According to estimates from the Congressional Budget Office (CBO), approximately 15,000 BIPOC farmers will receive an average debt relief payment of $20,000."); Alan Rappeport & Ana Swanson, Biden Administration Ramps Up Debt Relief Program to Help Black Farmers, N.Y. Times (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/us/politics/biden-debt-relief-black-farmers.html (on file with the *Columbia Law Review*) (reporting Agriculture Department estimates that the bill could provide relief for up to 15,000 loans).

222. Notice of Funds Availability; American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA), 86 Fed. Reg. 28,329 (May 26, 2021).

223. Press Release, USDA, Section 1005 Announcement, supra note 218 ("The [FSA] today published the first [NOFA] . . . . A subsequent notice addressing guaranteed loan balances and direct loans that no longer have collateral and have been previously referred to the Department of Treasury for debt collection for offset, will be published within 120 days.").

224. Notice of Funds Availability, 86 Fed. Reg. 28,329.

225. See Foster & Austin, supra note 17, at 162 (internal quotation marks omitted) (quoting Socially Disadvantaged, Beginning, Limited Resource, and Female Farmers and Ranchers, USDA (Feb. 15, 2022), https://www.ers.usda.gov/topics/farm-economy/socially-disadvantaged-beginning-limited-resource-and-female-farmers-and-ranchers/ [https://perma.cc/7JK8-DRSJ]).

who did not receive offer letters for debt forgiveness. Critics characterized the program as racially exclusionary,[226] despite its reliance on longstanding USDA definitions and its remedial purpose of addressing decades of racially discriminatory lending. Senator Pat Toomey called the program "unconstitutional," claiming it violated the Equal Protection Clause by offering relief based on race.[227] Senator Lindsey Graham, appearing on Fox News, attacked "out-of-control liberals," contending, "your loan will be forgiven up to 120% of your loan . . . if you're African American, some other minority, but if you're [a] white person, if you're a white woman, no forgiveness. That's reparations."[228] Such claims, though politically effective, obscured the program's legal foundation and remedial rationale. Nevertheless, the political backlash would soon imperil the program's future.

### C. *Political and Legal Challenges to Racial Equity in Farming*

The Justice for Black Farmers Act drew immediate criticism from conservative lawmakers and commentators, many of whom framed it as a form of racial reparations for America's history of White supremacy and coerced Black labor in agriculture.[229] While a full evaluation of reparations for Black farmers lies beyond this Essay's scope, racism has undeniably shaped land ownership patterns throughout U.S. history. Federal and state laws repeatedly structured access to land in ways that privileged White Americans and excluded people of color. For example, the 1850 Donation Land Claim Act reserved 320-acre parcels in the Oregon Territory exclusively for White settlers following the forced removal of Indigenous nations.[230] Similarly, the 1862 Homestead Act transferred more than 270 million acres of land—roughly 10% of the United States—to White Americans alone, cementing a racialized system of land distribution and wealth accumulation.[231]

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226. See id. at 173 ("[T]he text (of the statute) may be interpreted as giving preference to the listed groups, while not making funding determinations exclusively on that basis.").

227. Jeanine Santucci, How $1.9 Trillion COVID-19 Relief Bill Aims to Help Black and Socially Disadvantaged Farmers, USA Today (Mar. 13, 2021), https://www.usatoday.com/story/news/politics/2021/03/13/how-covid-relief-bill-aims-to-help-socially-disadvantaged-farmers/4637103001/ [https://perma.cc/B7EX-47PX] (last updated Mar. 14, 2021) (internal quotation marks omitted) (quoting Sen. Toomey).

228. Id. (alteration in original) (internal quotation marks omitted)(quoting Sen. Graham).

229. John Bowden, Graham on COVID-19 Aid to Black Farmers: 'That's Reparations', The Hill (Mar. 10, 2021), https://thehill.com/homenews/senate/542483-graham-on-covid-19-relief-aid-to-black-farmers-thats-reparations [https://perma.cc/7ZVT-JBTA].

230. Margaret Riddle, Donation Land Claim Act, Spur to American Settlement of Oregon Territory, Takes Effect on September 27, 1850, HistoryLink.org (Aug. 9, 2010), https://www.historylink.org/file/9501 [https://perma.cc/N6CP-M6E2].

231. Todd Arrington, Homesteading by the Numbers, Nat'l Park Serv. (Aug. 8, 2021), https://www.nps.gov/home/learn/historyculture/bynumbers.htm [https://perma.cc/Q25Q-P7K9] (last updated Mar. 17, 2025).

This foundation of inequality only deepened as large agricultural interests consolidated political power. Reported federal lobbying expenditures increased from $4.7 million in 1966 to $76 million in 1989, even before modern disclosure requirements took effect.[232] This growth reflected the sector's expanding economic influence and its capacity to shape federal policy, often in ways that favored large agribusinesses at the expense of smaller farms, many of which were Black-owned. Corporate interests secured unparalleled access to policymakers, influencing subsidy allocations, regulatory decisions, and land use policies.[233] As a result, the voices of small farmers—especially those from historically marginalized communities—were routinely excluded from agricultural policymaking.[234] Contemporary resistance to reform thus reflects not only ideological and fiscal objections but also longstanding structural forces rooted in the plantation era. While the mechanisms of exclusion have evolved, the

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232. Jacob R. Straus, Cong. Rsch. Serv., R44292, The Lobbying Disclosure Act at 20: Analysis and Issues for Congress 16 (2015), https://www.congress.gov/crs-product/R44292 [https://perma.cc/7HBT-JH5U] (noting that 296 organizations reported $4.7 million in lobbying expenditures in 1966 (quoting First Attempt at Lobbying Reform Since 1946 Fails, CQ Almanac (1967), http://library.cqpress.com/cqalmanac/document.php?id=cqal67-1314712 (on file with the *Columbia Law Review*))); U.S. Gen. Acct. Off., T-GGD-91-56 Federal Lobbying: Federal Regulation of Lobbying Act of 1946 Is Ineffective, (1991), https://www.gao.gov/products/t-ggd-91-56 [https://perma.cc/G8BS-MEBD] (reporting $76.2 million in lobbying expenses that year).

233. See, e.g., Omanjana Goswami & Karen Perry Stillerman, Union of Concerned Scientists, Cultivating Control: Corporate Lobbying on the Food and Farm Bill 5 (2024) https://www.ucs.org/sites/default/files/2024-05/Cultivating%20Control_white%20paper%20final_May%2010_OG_PDF.pdf [https://perma.cc/D2E6-WMDX] ("Between 2019 and 2023, giant agribusinesses, food and agriculture industry associations, and other interest groups reported more than $523 million in federal lobby expenditures on disclosure reports that listed 'farm bill' among the specific lobbying issues."); T. Kirk White & Robert A. Hoppe, USDA, Changing Farm Structure and the Distribution of Farm Payments and Federal Crop Insurance, at iii (2012), https://ers.usda.gov/sites/default/files/_laserfiche/publications/44650/13729_eib91_1_.pdf [https://perma.cc/LNC2-CP3T] ("A long-term shift in production to larger farms has contributed to a shift in the distribution of commodity-related Government program payments and Federal crop indemnity payments toward larger farms . . . .").

234. See Pete Daniel, Farmland Blues: The Legacy of USDA Discrimination, Southern Spaces (Oct. 30, 2013), https://southernspaces.org/2013/farmland-blues-legacy-usda-discrimination [https://perma.cc/KC4L-WHAL] (linking exclusion at the county-office level to broader policy outcomes that neglected small, marginalized producers); Goswami & Stillerman, supra note 233, at 1 (urging reorientation of policymaking toward small/midsize and historically marginalized producers); Dipak Subedi, Anil K. Giri & Monika Ghimire, Commercial Farms Led in Government Payments in 2021, USDA Econ. Rsch. Serv.: Amber Waves (May 15, 2023), https://www.ers.usda.gov/amber-waves/2023/may/commercial-farms-led-in-government-payments-in-2021 [https://perma.cc/E3FP-XL7R] ("Among the farm households that received Government payments, commercial farms received an average $66,314 in Government payments in 2021 (the most recent year for which data are available); intermediate farms received an average $12,794 in payments, and the average Government payments for residence farms was $8,354.").

industry's underlying oligarchic structure—now reinforced by concentrated lobbying and institutional capture—remains largely intact.

Senator Graham's remarks suggested that the USDA intentionally excluded White individuals from the definition of "socially disadvantaged" farmers and ranchers. His comments may also reflect a deeper ideological stance aligned with a White supremacist worldview that assumes White Americans cannot experience racial discrimination by the government. Either reading tacitly acknowledges the historical privileges that White Americans have enjoyed, even among economically struggling farmers, and illustrates the discomfort that arises when White hardship is juxtaposed against the structurally embedded disadvantage endured by Black farmers. Yet Senator Graham's critique overlooks two essential points.

First, White supremacy has fundamentally shaped American agriculture, producing racial disparities that continue to define the sector.[235] These inequalities are often obscured by narratives of meritocracy and American republicanism,[236] but they also contribute to class-based stigma against low-income White Americans.[237] While Black and other historically marginalized farmers have borne the brunt of discriminatory federal policies, the racialized structure of U.S. agriculture has simultaneously obscured White poverty.[238] In a society organized around White supremacy, White individuals are often presumed to be

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235. See, e.g., Kathryn Fitzgerald, Note, Remnants of Caste: Black Farmers, White Farmers, Congress, and the USDA, 23 U. Md. L.J. Race Religion Gender & Class 81, 82–83 (2023) ("In considering the well-documented, unfortunate history of rampant racial discrimination by the USDA since its inception and the resulting impact on Black land ownership loss throughout at least the Twentieth Century, these race-based classifications appear to still be relevant in the context of the American agricultural landscape." (footnotes omitted) (citing Daniel, Dispossession, supra note 86, at 26–27; Francis et al., supra note 8, at 38)).

236. See Harris, Color of Farming, supra note 126, at 181–83 (documenting how federally administered farm credit and technical assistance programs, while formally race-neutral, functioned to preserve White control of land and capital, thereby sustaining the appearance of equal opportunity in agriculture); cf. Chris Edwards, Cutting Federal Farm Subsidies, Cato Inst. (Aug. 31, 2023), https://www.cato.org/briefing-paper/cutting-federal-farm-subsidies [https://perma.cc/7AAR-RB48] ("Farming is a risky business, but the risk does not seem to be any greater than for many other industries and therefore not a justification for farming's unique government security blanket.").

237. Cf. Edwards, supra note 236 ("The programs discourage farmers from innovating and cutting costs, and they steer resources to households with incomes much higher than average U.S. incomes."). For a broader history of stigma against lower-income White Americans, see generally Katherine J. Cramer, The Politics of Resentment: Rural Consciousness in Wisconsin and the Rise of Scott Walker 25 (2016) (capturing the lived experience of status denigration among low-income and working-class Whites); Nancy Isenberg, White Trash: The 400-Year Untold History of Class in America (tracing how elites and cultural institutions codified contempt for poor White individuals through slurs and caricatures).

238. See Fitzgerald, supra note 235, at 95–96 (discussing the assumption that White farmers were precluded from applying for debt relief).

immune from both overt and structural forms of racism,[239] making the inclusion of White Americans in remedial policies appear illogical or unnecessary.[240] Yet racial bias can manifest as privilege that paradoxically masks genuine disadvantage.[241] Low-income White farmers are frequently dismissed as unproductive or undeserving of assistance, not because their needs are absent, but because prevailing racial frameworks fail to account for their socioeconomic marginalization.[242] A more comprehensive analysis of competition and inequality in agriculture would expose how capitalism and White supremacy intersect to obstruct reforms capable of uplifting all low-income farmers, regardless of race.

Second, contrary to Senator Graham's assertion, debt relief under ARPA section 1005 was directly tethered to the COVID-19 pandemic's economic disruptions. Empirical studies have documented the historical correlation between USDA discrimination and the loss of farmland, high debt burdens, and limited access to credit in Black farming communities.[243] Black farmers have long faced systemic barriers in securing USDA loans and grants,[244] alongside predatory practices such as

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239. See id. (noting that the USDA excluded White farmers from its definition of "socially disadvantaged farmers and ranchers").

240. See, e.g. Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1344–46 (1988) (explaining that the rise of colorblind ideology narrowed the concept of racism from structural subordination to individual prejudice, which resulted in policies that might also address White disadvantages appearing conceptually incoherent within liberal legal discourse).

241. See id. at 1348 ("In antidiscrimination law, the conflicting interests actually reinforce existing social arrangements, moderated to the extent necessary to balance the civil rights challenge with the many interests still privileged over it."); Neil Gotanda, A Critique of "Our Constitution Is Color-Blind", 44 Stan. L. Rev. 1, 2–3 (1991) ("A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans."); Reva B. Siegel, Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification, 88 Calif. L. Rev. 77, 91–92, 106 (2000) ("[Colorblindness] works both to discredit and to rationalize practices that maintain social stratification."); Jonathan M. Metzl, Dying of Whiteness, Bos. Rev. (June 27, 2019), https://www.bostonreview.net/articles/jonathan-m-metzl-dying-whiteness/ (on file with the *Columbia Law Review*) (observing that some lower-income White individuals were willing to "put their lives on the line" to support racial resentment policies that also hurt themselves).

242. See Daniel, Dispossession, supra 86, at 32 (telling the story of a poor White woman whose request for assistance was denied by the USDA for four years, eventually forcing her to sell her farm).

243. See, e.g., Browning, supra note 96, at 37–40 (finding that discriminatory USDA loan practices contributed directly to widespread Black farm loss); Mitchell, supra note 137, at 570–73 (summarizing empirical data linking USDA credit discrimination to debt accumulation and foreclosure); John Francis Ficara & Juan Williams, 'Black Farmers in America', NPR (Feb. 22, 2005), https://www.npr.org/2005/02/22/5228987/black-farmers-in-america [https://perma.cc/DT9A-NYGW] ("[D]ecades of bias against black farmers by the agriculture department threatened to kill off the few remaining black farmers.").

244. See Vann R. Newkirk II, The Great Land Robbery, The Atlantic (Sep. 2019), https://www.theatlantic.com/magazine/archive/2019/09/this-land-was-our-

forced partition sales of heirs' property.[245] Meanwhile, emergency relief programs like the Trump Administration's Market Facilitation Program disproportionately benefited White farmers,[246] compounding the historic and ongoing disadvantages experienced by farmers of color. The political and legal resistance to these reform efforts reflects larger structural forces rooted in the decades-long consolidation of agricultural lobbying power. Between 1960 and 1990, agricultural lobbying expenditures grew dramatically, signaling the sector's growing capacity to influence federal policy.[247] The enduring consolidation of agricultural power thus not merely precedes but also frames the political and legal backlash to modern equity measures, including recent efforts to remedy past discrimination.

Despite Secretary Thomas Vilsack's stated commitment to advancing civil rights within the USDA,[248] the backlash to section 1005 prompted a wave of political and legal opposition. Forty-nine Republican senators unsuccessfully attempted to strip the debt relief provision from the legislation, with several denouncing it as a form of reparations.[249] Before the USDA could begin issuing debt relief payments, White farmers filed lawsuits in multiple federal courts, alleging that the program

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land/594742/ (on file with the *Columbia Law Review*) ("Major audits and investigations of the USDA have found that illegal pressures levied through its loan programs created massive transfers of wealth from black to white farmers . . . .").

245. See Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, Forced Sale Risk: Class, Race, and the "Double Discount", 37 Fla. St. U. L. Rev. 589, 618 (2010) ("[O]f all the property owners who own property under the default rules governing the partition of tenancy in common and joint tenancy property, African Americans and other minorities may be targeted for forced partition sales in one way or another.").

246. See Nathan P. Hendricks, Ashling P. Murphy, Stephen N. Morgan, Samantha L. Padilla & Nigel Key, Explaining the Source of Racial Disparities in Market Facilitation Program Payments, 107 Am. J. Agric. Econ. 1290, 1296 (2025) (concluding that "[f]arms with a White operator were eligible to receive about 4.7 times larger [Market Facilitation Program] payments than farms with a Black operator"); Hayes, Pandemic Bailout Funds, supra note 170 ("White farmers received a total of about $21 billion [in Market Facilitation Program payments], while Black farmers received a total of about $38 million.").

247. See Straus, supra note 232, at 16 (noting that federal lobbying activity and expenditures expanded dramatically in the latter half of the twentieth century); see also supra note 232 and accompanying text.

248. See Press Release, Thomas J. Vilsack, Secretary, USDA, Opening Statement of Thomas J. Vilsack Before the House Committee on Agriculture–Remarks as Prepared (Mar. 25, 2021), https://www.usda.gov/media/press-releases/2021/03/25/opening-statement-thomas-j-vilsack-house-committee-agriculture [https://perma.cc/RN2Y-MD5C] (reaffirming a commitment to "ensur[ing] all programming is equitable and works to root out systemic racism").

249. See Nicholas Ballasy, Senate Dems Reject Effort to Remove Reparations for "Disadvantaged Farmers" From Stimulus Bill, Just News (Feb. 26, 2021), https://justthenews.com/government/congress/democrats-19t-stimulus-bill-includes-reparations-socially-disadvantaged-farmers [https://perma.cc/GRY8-ZEUD] ("The legislation ultimately passed the Senate on Saturday 50–49 without votes from Republicans."); Santucci, supra note 227 (discussing Sen. Graham's characterization of the bill as a form of reparations).

discriminated against them on the basis of race.[250] In *Faust v. Vilsack*, for example, plaintiffs argued that the debt relief program's eligibility criteria relied on impermissible racial classifications in violation of their equal protection rights.[251]

These lawsuits became largely moot when President Biden signed the Inflation Reduction Act of 2022 (IRA) into law.[252] The IRA repealed ARPA section 1005 and replaced it with a race-neutral debt relief program.[253] Instead of focusing on "socially disadvantaged" farmers (which was purportedly limited to certain race and ethnic groups),[254] the IRA directed relief toward "distressed" borrowers facing financial risk, regardless of race.[255] It also created a $2.2 billion fund for farmers, ranchers, and forest landowners who had experienced USDA discrimination before January 1, 2021.[256] Unlike section 1005, the IRA's Discrimination Financial Assistance Program does not limit eligibility to specific racial or ethnic groups, instead allowing claims based on a broader range of protected characteristics, including sex, religion, age, marital status, and disability.[257]

The repeal of section 1005 raises unresolved legal and normative questions about whether the original program violated the equal protection rights of White farmers and ranchers. Part III turns to these constitutional questions through the lens of *Wynn v. Vilsack*, which further illuminates the doctrinal tensions surrounding race-conscious agricultural reform.

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250. See, e.g., Miller v. Vilsack, No. 4:21-CV-0595-O, 2021 WL 6129207, at *1 (N.D. Tex. Dec. 8, 2021); Holman v. Vilsack, No. 21-1085-STA-jay, 2021 WL 2877915, at *4 (W.D. Tenn. July 8, 2021); Wynn v. Vilsack, 545 F. Supp. 3d 1271, 1275 (M.D. Fla. 2021); Faust v. Vilsack, 519 F. Supp. 3d 470, 473 (E.D. Wis. 2021).

251. *Faust*, 519 F. Supp. 3d at 473 ("Plaintiffs assert that Section 1005 [of the ARPA] denies them equal protection of the law because eligibility to participate in the program is based solely on racial classifications.").

252. Pub. L. No. 117-169, 136 Stat. 1818 (2022); Caleb Symons, Racial Bias Suit Dropped After Aid Cut for Minority Farmers, Law360 (Aug. 30, 2022), https://www.law360.com/articles/1525752/racial-bias-suitdropped-after-aid-cut-for-minority-farmers (on file with the *Columbia Law Review*) ("[The IRA] renders moot the white farmers' April 2021 lawsuit alleging the previous loan forgiveness program—enacted as part of the American Rescue Plan—was racially prejudiced . . . .").

253. Caleb Symons, Minority Farmers Say US Broke Promise of Financial Aid, Law360 (Oct. 13, 2022), https://www.law360.com/articles/1539445/minority-farmers-say-us-broke-promise-offmancial-aid (on file with the *Columbia Law Review*) ("[T]he [IRA] repealed the racial criteria for those programs . . . and substituted race-neutral terms instead.").

254. See supra note 30 and accompanying text.

255. § 22006, 136 Stat. at 2021 (2022) (discussing the availability of a $3.1 billion fund to provide payments to and loans for "distressed borrowers").

256. Id. § 1006.

257. See id. § 1006(e) (making USDA assistance accessible to "farmers, ranchers, or forest landowners determined to have experienced discrimination prior to January 1, 2021" with no additional restrictions imposed).

## III. EQUAL PROTECTION AND COLORBLIND CONSTITUTIONALISM

In the wake of a global pandemic and a renewed national reckoning with racial injustice, the United States continues to confront a fundamental paradox: how to remedy centuries of systemic racism within a constitutional framework that purports to guarantee equal protection. This tension crystallized dramatically in *Wynn v. Vilsack*,[258] a 2021 federal district court decision that enjoined implementation of section 1005 of the ARPA.

This Part examines how the rhetoric and jurisprudence of colorblindness have constrained Congress's ability to enact race-conscious relief programs, particularly those designed to address not only material losses but also the dignitary harms endured by Black farmers after decades of systemic exclusion and discrimination. Section III.A begins by analyzing colorblind constitutionalism as a limiting framework, showing how this ostensibly neutral approach frequently obscures the ongoing effects of past discrimination and impedes efforts to dismantle structural inequities. Section III.B then applies this framework to *Wynn*, illustrating how the court's reasoning exemplifies these doctrinal constraints and reflects deeper ideological commitments embedded in contemporary equal protection jurisprudence.

Taken together, these sections illuminate the complex legal terrain in which race-based remedies must operate—a terrain shaped by evolving equal protection doctrine, the contested legacy of colorblindness, and the urgent need for more equitable policy solutions in agriculture and beyond. More fundamentally, they reveal how current interpretations of equal protection doctrine may paradoxically entrench, rather than dismantle, racial hierarchy and economic concentration. While this Part offers a descriptive and critical analysis of existing doctrine, it also points toward the need for alternative constitutional frameworks that more effectively advance racial justice, a project that warrants exploration in future work.

### A. *The Critique of Colorblind Constitutionalism*

The Constitution's guarantee of equal protection is a foundational principle of American democracy. Yet, the nation's long history of racial discrimination—particularly in agriculture—poses a constitutional paradox: How can the government remedy entrenched racial injustice without violating the very principle intended to prevent it? This section takes up that question by examining how colorblind constitutionalism has emerged as a limiting framework that often impedes, rather than advances, racial justice within the existing constitutional order.

1. *Addressing Racial Discrimination Within Equal Protection.* — The meaning of the Equal Protection Clause of the Fourteenth Amendment

258. 545 F. Supp. 3d 1271, 1295 (M.D. Fla. 2021).

has evolved significantly since its ratification in 1868.[259] Originally intended to shield Black Americans from discriminatory state laws in the aftermath of slavery,[260] the clause has become a central tool in challenges to discrimination across multiple domains.[261] That evolution, however, has brought into sharp relief a tension between two competing constitutional visions: the aspiration for a colorblind society and the imperative of remedying historical racial injustice.[262] The colorblind ideal maintains that equality is best achieved by eliminating all legal consideration of race.[263] Proponents claim fidelity to the clause's text, which prohibits any state from denying "to any person within its jurisdiction the equal protection of the laws."[264] But a strictly formal reading of this provision obscures the enduring effects of past discrimination and the structural inequalities that persist across American life. Achieving substantive equality often requires race-conscious interventions in areas such as education, employment, government contracting, and voting.[265] Such measures acknowledge that

259. See William D. Araiza, Enforcing the Equal Protection Clause: Congressional Power, Judicial Doctrine, and Constitutional Law 63–83 (2015) (documenting the development of the tiers of scrutiny framework and the Supreme Court's "formalistic" application of strict scrutiny to all legislative uses of racial categories); Tina Fernandes Botts, For Equals Only: Race, Equality, and the Equal Protection Clause 53–64 (2018) (describing the Supreme Court's shift from thinking about equal protection through a social equality framework to a legal equality framework).

260. See, e.g., Foner, Unfinished Revolution, supra note 91, at 256–58 (explaining that the Equal Protection Clause was designed to protect the civil rights of people fleeing from enslavement during Reconstruction); William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 115–19 (1988) (detailing the congressional intent to safeguard Black Americans from discriminatory state laws); see also Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard) (introducing the Equal Protection Clause as extending "life, liberty, and property" and "the equal protection of the laws" to Black Americans).

261. See, e.g., Romer v. Evans, 517 U.S. 620, 635 (1996) (invalidating a state constitutional amendment targeting gay and lesbian individuals); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985) (striking down a zoning ordinance for discriminating against people with intellectual disabilities); Reed v. Reed, 404 U.S. 71, 74 (1971) (invalidating a state law giving preference to men over women as estate administrators); Graham v. Richardson, 403 U.S. 365, 376 (1971) (striking down state laws denying welfare benefits to resident aliens).

262. See, e.g., Jed Rubenfeld, Affirmative Action, 107 Yale L.J. 427, 444–54 (1997) (exploring the constitutional tension between colorblindness and corrective justice).

263. See, e.g., R. Richard Banks, Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Disclosure, 48 UCLA L. Rev. 1075, 1112 n.147 (2001) ("One could imagine a colorblind society in which people 'notice' race but do not accord it any special significance . . . . But in such a society, in which race serves no deep purpose, one might expect race to eventually fade away.").

264. U.S. Const. amend. XIV, § 1; see also Michael B. Rappaport, Originalism and the Colorblind Constitution, 89 Notre Dame L. Rev. 71, 74–81 (2013) (summarizing Justice Antonin Scalia's and Justice Clarence Thomas's originalist accounts of the colorblind Constitution).

265. See, e.g., Crenshaw, supra note 240, at 1377–78 ("[T]he attainment of formal equality is not the end of the story. Racial hierarchy cannot be cured by the move to facial race-neutrality . . . .").

the playing field remains uneven and that true equal protection sometimes requires differentiated treatment to address historically rooted disadvantages. Beyond questions of fairness, the failure to confront racial inequity carries significant implications for the distribution of power in American society.[266] When race-conscious policies are curtailed or invalidated, economic and political power becomes increasingly concentrated in the hands of a narrow elite. In agriculture, for instance, ignoring the legacy of racial exclusion reinforces a longstanding oligarchic structure that marginalizes farmers of color and consolidates resources among a select few.[267] The case of *Wynn v. Vilsack* illustrates this constitutional tension.[268] The USDA's debt relief program was designed to respond to a well-documented pattern of discrimination against minority farmers.[269] Yet the program's race-conscious design provoked legal challenges rooted in the very equal protection doctrine meant to combat racial subordination.[270] The litigation illustrates the difficulty of crafting effective remedies that both confront historical injustice and satisfy the legal demands of formal equality under strict scrutiny. It also raises broader concerns about how the law can acknowledge past harm without reproducing new forms of unequal treatment.[271] Ultimately, refusing to meaningfully address racial disparities merely preserves existing hierarchies. When structural inequalities remain unaddressed, those already entrenched in positions of influence continue shaping the rules to

266. See Lani Guinier & Gerald Torres, The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy 11–14 (2002) (arguing that race-conscious strategies are necessary to expose systemic inequities and democratize power); Derrick A. Bell, Jr., Comment, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 523–24 (1980) (contending that remedies for racial inequality are adopted only when they converge with the interests of dominant groups); Crenshaw, supra note 240, at 1335 ("Because racism is intimately connected to both coercion and popular consciousness, the Critics' failure to examine them undermines the utility of their critique in analyzing the oppression of Black people and in explaining domination and legitimation in society as a whole.").

267. See Ashok K. Mishra, Gianna Short & Charles B. Dodson, Racial Disparities in Farm Loan Application Processing: Are Black Farmers Disadvantaged?, 46 Applied Econ. Persps. & Pol'y 111, 113 (2023) (discussing historical racially discriminatory practices in agriculture such as unequal USDA services and delayed loan processing that have restricted Black farmers' access to credit and land).

268. 545 F. Supp. 3d 1271 (M.D. Fla. 2021).

269. Id. at 1275.

270. See id. at 1276–77 ("Plaintiff contends that . . . Section 1005 is unconstitutional because it violates his right to equal protection under the law."); Foster & Austin, supra note 17, at 169–74 (examining, based on the lawsuits brought by White farmers, the challenges of creating legislation that will meet the standards of strict scrutiny, particularly those that target specific examples of past discrimination by the government).

271. See Foster & Austin, supra note 17, at 171 (noting that "pervasive evidence of continued disparity and strong legislative intent to aid the plight of Black farmers in America is not enough to outweigh courts' hesitation to allow legislation that singles out Black farmers").

their advantage, perpetuating exclusion and undermining the Constitution's promise of equal protection.

2. *The Historical Development and Contemporary Constraints of Colorblind Doctrine.* — The *Wynn* court's preference for race-neutral alternatives reflects a broader doctrinal trend known as "colorblind constitutionalism," a framework that began taking hold in the 1970s.[272] Cases such as *Regents of the University of California v. Bakke*[273] and *City of Richmond v. J.A. Croson Co.*[274] played a pivotal role in establishing the principle that all racial classifications—regardless of intent—trigger strict scrutiny.[275] As a result, courts increasingly demand exhaustive evidence of intentional discrimination and proof that race-neutral alternatives are inadequate before upholding race-conscious remedies.[276] This heightened evidentiary threshold has led to the invalidation of race-conscious remedial programs even when racial disparities are persistent and well-documented.[277]

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272. For an overview of the rise of colorblind constitutionalism, see Ariela Gross, A Grassroots History of Colorblind Conservative Constitutionalism, 44 Law & Soc. Inquiry 58, 58–59 (2019) (providing an historical overview of colorblind constitutionalism and defining it as an ideology that shifted from a mid-twentieth-century tool to combat segregation and other discriminatory practices to a more conservative instrument in the 1970s and 1980s used to oppose race-conscious remedies such as affirmative action); see also, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."); Vitolo v. Guzman, 999 F.3d 353, 361 (6th Cir. 2021) ("Because these race-neutral alternatives exist, the government's use of race is unconstitutional.").

273. 438 U.S. 265, 319–20, 319 n.53 (1978) (plurality opinion) (Powell, J.) (holding that although universities "may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose," strict racial quotas are impermissible).

274. 488 U.S. 469, 507–08 (1989) (holding that a scheme requiring contractors to subcontract a fixed percentage of contracts to minority-owned businesses violated the Equal Protection Clause).

275. See *Bakke*, 438 U.S. at 290 (plurality opinion) (holding that all racial and ethnic classifications are subject to stringent examination regardless of whether individuals are part of a "'discrete and insular minority [sic]' requiring extraordinary protection," because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people" (internal quotation marks omitted) (first quoting United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (misquotation); then quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

276. See, e.g., *Croson*, 488 U.S. at 507 (holding that a plan fails the narrowly tailored prong when "there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation"); United States v. Paradise, 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies . . . .").

277. See *Croson*, 488 U.S. at 470–72 (requiring that facially race-conscious programs survive a "searching judicial inquiry" into the evidentiary basis for their remedial justification); Ian Haney-Lopez, Blind Spot: How Reactionary Colorblindness Has Infected Our Courts—And Our Politics, U.C. Berkeley L. (Mar. 29, 2011), https://www.law.berkeley.edu/article/blind-spot-how-reactionary-colorblindness-has-infected-our-courts-and-our-politics [https://perma.cc/3F4F-5ZPV] ("For decades, the Court

Under *Adarand Constructors, Inc. v. Pena*, any federal policy that classifies individuals by race is subject to strict scrutiny and presumed unconstitutional unless it serves a compelling government interest and is narrowly tailored to achieve that interest.[278] In practice, this standard has made it exceedingly difficult for race-conscious remedial programs to survive judicial review. Courts typically uphold such programs only when three conditions are met: (1) The remedy addresses specific acts of prior discrimination, not generalized societal injustice;[279] (2) the government demonstrates that the prior discrimination was intentional, rather than an incidental result of other socioeconomic dynamics;[280] and (3) the government either directly committed or tacitly supported the discriminatory conduct.[281] Narrow tailoring further requires that the policy consider race-neutral alternatives and avoid both over- and underinclusion, lest they arbitrarily benefit or exclude certain groups.[282] This doctrinal preference for race-neutrality has made it increasingly difficult to implement targeted remedies for entrenched racial discrimination in sectors such as agriculture.[283] One illustrative example is the USDA's post–*Pigford* attempt to address discrimination through administrative reforms, such as streamlining complaint processes and increasing diversity in local Farm Service Agency committees.[284] Although these reforms were formally race-neutral, they failed to significantly reduce disparities in access to credit and assistance for minority farmers.[285]

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condemned remedial measures on the ostensible ground that they constituted 'noxious' discrimination against whites.").

278. 515 U.S. 200, 234–35 (1995); see also Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (reaffirming that, under *Adarand*, all federal racial classifications trigger strict scrutiny and are valid only if narrowly tailored to a compelling interest).

279. *Croson*, 488 U.S. at 498.

280. Id. at 503. Statistical disparities can be used to help establish intentional discrimination. See Aiken v. City of Memphis, 37 F.3d 1155, 1163 (6th Cir. 1994) ("Thus, we conclude that the statistics presented here are probative enough to satisfy the City's burden of producing strong evidence that discrimination occurred in the Memphis Police and Fire Departments."); United Black Firefighters Ass'n v. City of Akron, 976 F.2d 999, 1011 (6th Cir. 1992) ("Where a gross disparity exists between the expected percentage of minorities selected and the actual percentage of minorities selected, then prima facie proof exists to demonstrate intentional discrimination in the selection of minorities to those particular positions.").

281. *Croson*, 488 U.S. at 492.

282. See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2167–68 (2023) (striking down admissions program under the narrow-tailoring requirement because it was "overbroad" and "underinclusive").

283. See, e.g., Foster & Austin, supra note 17, at 176 ("Our current legal system does not provide a clear avenue to specifically redress past wrongs . . . . If our traditional understanding of strict scrutiny for racial classifications, reflected in current litigation, does not change, reparative legislation will face an uphill battle.").

284. See C.R. Action Team, 1997 Report, supra note 182, at 61–90 (recommending measures to "to improve workforce diversity and civil rights").

285. See Alyssa Sloan, Note, *Pigford v. Glickman* and the Remnants of Racism, 8 Oil & Gas Nat. Res. & Energy J. 19, 32 (2022) ("In 2020, the USDA approved loans for 37 percent

Similarly, the 2014 Farm Bill's provisions for "socially disadvantaged farmers or ranchers"[286]—while facially neutral—failed to account for the specific historical and structural barriers experienced by Black farmers, who have disproportionately suffered land loss, capital deprivation, and chronic exclusion from federal agricultural program over the past century.[287]

3. *The Limitations of Race-Neutrality for Racial Justice.* — In practice, race-neutral approaches often reproduce or deepen existing inequalities by failing to address the cumulative and group-specific nature of discrimination.[288] In agriculture, these inequalities manifest through discriminatory lending practices, biased allocation of subsidies, and the intergenerational dispossession of land—each compounding over time.[289] The result is a complex web of disadvantages that disproportionately affect farmers of color, impedes wealth accumulation, and restricts access to markets and capital.[290] When a policy fails to account for these structural barriers, it contributes to the consolidation of land, wealth, and influence within an increasingly narrow group of large-scale agribusinesses and landowning elites. This entrenchment perpetuates exclusion and limits the ability of marginalized communities to participate meaningfully in agricultural markets and policymaking. In this context, race-conscious interventions are not only defensible but necessary for two principal reasons. First, they directly respond to the cumulative effects of historic

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of Black applicants in contrast to 71 percent of white applicants for a program that would assist farmers paying for land, equipment, and repairs." (citing Archiebald Browne, Frozen USDA Funds Yet Another Setback for Oklahoma's Black Farmers, NonDoc (Aug. 11, 2021), https://nondoc.com/2021/08/11/frozen-usda-funds-yet-another-setback-for-oklahomas-black-farmers/ [https://perma.cc/AT86-C372])).

286. Agricultural Act of 2014, Pub. L. No. 113-79, § 7409(8)(A)(ii), 128 Stat. 649, 898–99 (adopting the definition from 7 U.S.C. § 2003(e) (2018)).

287. See Andrea Freeman, The 2014 Farm Bill: Farm Subsidies and Food Oppression, 38 Seattle U. L. Rev. 1271, 1283–84 (2015) (pointing out that facially neutral farm subsidies in the Farm Bill disproportionately go to White farmers because the subsidies prioritize agribusiness over small farms).

288. See Adewale A. Maye, Econ. Pol'y Inst., The Myth of Race-Neutral Policy 3 (2022) https://files.epi.org/uploads/270644.pdf [https://perma.cc/L63A-YZV2] (highlighting that policies designed to uplift marginalized communities often fail for not recognizing the history and intersection of race and class).

289. See Daniel, Dispossession, supra note 86, at 17–18 (detailing discriminatory lending practices that severely restricted Black farmers' ability to own and retain land, which led to widespread dispossession and a drastic decline in Black-owned farms).

290. See, e.g., Sloan, supra note 285, at 27 ("Even today, despite historical improvement, Black Americans seeking farming opportunities are met with the same barriers their ancestors faced. Whether it's discriminatory lending practices or rising costs, these obstacles not only prevent minorities from seeking a career in farming but also prevent passing inheritable wealth to descendants." (footnote omitted) (citing Jillian Forstadt, 'Make Farmers Black Again': African Americans Fight Discrimination to Own Farmland, NPR (Aug. 25, 2020), https://www.npr.org/2020/08/25/904284865/make-farmers-black-again-african-americans-fight-discrimination-to-own-farmland [https://perma.cc/M6RT-EJ4U])).

and ongoing discrimination by tailoring remedies to the particular realities of the affected group.[291] For example, programs aimed at restoring Black-owned farmland can integrate targeted financial support, technical assistance, and land restoration mechanisms that acknowledge the unique history of Black land dispossession.[292] Second, race-conscious remedies can address the intersection of racial disparities with other forms of disadvantage—such as unequal access to credit, exclusion from agricultural networks, and implicit biases in program administration. By explicitly naming race, these interventions expose and mitigate the systemic forces that continue to marginalize minority farmers,[293] something race-neutral policies are often ill-equipped to confront. The insistence on race-neutrality also imposes an impractical burden on lawmakers and policymakers. It demands that they redress racial disparities without directly referencing the racial dynamics that produced them, and without acknowledging the implicit and unconscious biases that shape institutional decisionmaking.[294] These biases—though sometimes subtle—inform lending practices, hiring, enforcement, and resource allocation, even in the absence of overt discrimination.[295] Race-neutral policies, by design, leave these dynamics unaddressed.

As disparities deepen, addressing them without invoking race becomes not only more difficult but counterproductive. In agriculture, the growing concentration of land and capital among large agribusinesses and wealthy landowners has only intensified existing inequalities.[296] Attempts to remedy these imbalances through facially neutral strategies risk entrenching racially skewed distributions of wealth and power. Over time,

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291. See Fitzgerald, supra note 235, at 97 (noting that the government "painstakingly lays out . . . numerous acts, reports, and instances that illustrate discriminatory practices at the USDA as recently as 2019"); One Million Black Families in the South Have Lost Their Farms, supra note 154 ("Half a million Black-owned farms across the country failed between 1950 and 1975. Black farmers lost about six million acres from 1950 to 1969. Black-owned cotton farms in the South almost completely disappeared, and in Mississippi from 1950 to 1964, Black farmers lost almost 800,000 acres of land . . . .").

292. See Sloan, supra note 285, at 29 ("Many Black farmers still face foreclosure due to the proven racial discrimination of the USDA. . . . Although the Farmers Home Administration ("FHA") ended in 2006, multitudes of Black farmers lost their homes, land, and livelihood at the hands of FHA agents that denied financial benefits given to white farmers." (citing Patrice Gaines, USDA Issued Billions in Subsidies This Year. Black Farmers Are Still Waiting for Their Share, NBC News (Oct. 28, 2020), https://www.nbcnews.com/news/nbcblk/usda-issued-billions-subsidies-year-black-farmers-are-still-waiting-n1245090 (on file with the *Columbia Law Review*))).

293. Id. at 32 (discussing ongoing racially discriminatory practices by the USDA, such as lending practices that continue to make acquiring and keeping land difficult).

294. See, e.g., Buechler, supra note 96, at 245 (noting that "Agriculture Department programs are so entrenched in their discriminatory practices that the system needs a substantial structural remedy to open the farming market to black farmers").

295. See id. ("[E]ven in the absence of intentional discrimination, systemic institutional processes and policies can perpetuate racial inequality.").

296. See, e.g., Sloan, supra note 285, at 27 ("Before Black farmers experienced land dispossession in the twentieth century, one in seven farmers was Black.").

these disparities become normalized within legal, economic, and cultural frameworks, making them harder to diagnose and disrupt without explicit racial analyses.[297] Such normalization fosters the illusion that persistent inequities arise from neutral market forces or individual choices, rather than from state-sanctioned discrimination and policy failure.[298] Left unchecked, this logic sustains a system in which the benefits of agricultural policy are disproportionately captured by a privileged few, while historically marginalized communities remain excluded. In so doing, it fuels the very oligarchic tendencies that racial justice efforts seek to dismantle.

4. *The Impact of White Supremacy in Legal Interpretations.* — Broader trends in legal reasoning reveal the enduring influence of White supremacy within American jurisprudence. This influence often surfaces not through overt racism, but through subtle assumptions that sustain racial hierarchies and institutional inequality. One of the clearest manifestations is the persistent presumption of White immunity from racial discrimination.[299] Courts frequently display heightened skepticism toward discrimination claims brought by minority litigants, impose steep evidentiary burdens for such claims,[300] and simultaneously adapt a more receptive posture toward so-called reverse discrimination claims brought by White plaintiffs—even in the absence of any historical pattern of racial subordination against them.

To be sure, White farmers, like all individuals, are entitled to bring claims of racial discrimination under race-based government programs. Antidiscrimination protections apply universally.[301] But the relative ease with which such claims are entertained by courts, compared to the substantial evidentiary burdens placed on historically marginalized groups, illustrates how White privilege continues to structure access to legal remedies. This asymmetry highlights a deeper truth: While individual White farmers may allege isolated discriminatory acts, they have not endured the structural, intergenerational exclusion and dispossession

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297. See Gilbert C. Gee & Margaret T. Hicken, Structural Racism: The Rules and Relations of Inequity, 31 Ethnicity & Disease 293, 295–98 (2021) (discussing how racial norms are embedded into institutional structures).

298. See Foster & Austin, supra note 17, at 175 ("Legislators have highlighted that facially race-neutral legislation has not effectuated its purpose in recent attempts to address the past discrimination of the USDA against Black farmers . . . and that Congress's 'case-by-case efforts thus far have not done enough.'" (quoting 67 Cong. Rec. S1264 (daily ed. Mar. 5, 2021) (statement of Sen. Stabenow))).

299. See Ames v. Ohio Dep't of Youth Servs., 145 S. Ct. 1540, 1544–48 (2025) (holding that plaintiffs from majority groups alleging employment discrimination do not have to meet a higher burden of proof by providing "background circumstances" to support an inference of discrimination).

300. See Foster & Austin, supra note 17, at 171 (discussing the need for specific evidence of discriminatory practice and legislative intent for claims of discrimination).

301. See *Ames*, 145 S. Ct. at 1548 (holding that members of majority groups do not have to meet a heightened burden of proof in discrimination claims).

faced by Black and other non-White farmers. Yet the judiciary's willingness to treat these claims as equivalent—untethered from any historical context—underscores the legal system's ongoing entanglement with the logic of White supremacy.

This dynamic is reinforced by a judicial conception of racism that focuses narrowly on individual acts of malice rather than systemic, institutional, and structural subordination.[302] Courts commonly treat Whiteness as a neutral, categorical experience[303]—defaulting to the assumption that White individuals are racially unmarked and therefore less likely to experience discrimination, while simultaneously requiring extraordinary evidence to substantiate claims by minority communities.[304] In so doing, the law reaffirms Whiteness as a position of normative privilege, one that insulates White claimants while subjecting claims of systemic racism to heightened scrutiny. In sectors such as agriculture—where wealth, land, and resources have long been concentrated in the hands of a racially homogeneous elite[305]—this framework impedes meaningful redistributive policies and entrenches patterns of exclusion.[306]

The presumption of White immunity also facilitates the mischaracterization of race-conscious remedial programs as impermissible reverse discrimination.[307] This framing disregards the stark differences in historical experiences, access to opportunity, and material outcomes between racial groups. It equates attempts to repair centuries of systemic harm with discriminatory treatment against the historically dominant

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302. See Crenshaw, supra note 240, at 1341–46 (arguing that U.S. antidiscrimination law has adopted an individualist model of racism that focuses on intent and malice while ignoring structural subordination).

303. See Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1707, 1715 (1993) [hereinafter Harris, Whiteness as Property] (collecting cases).

304. See Foster & Austin, supra note 17, at 169 (discussing the legal requirements to justify remedial policies based on race, particularly evidence of intentional discrimination in the past).

305. See W.E. Burghardt Du Bois, The Souls of White Folk, *in* Darkwater: Voices From Within the Veil 33, 34 (1920) ("I am given to understand that whiteness is ownership of the earth forever and ever . . . ."); see also Lauren Crosser, Those "Who Have No Interest in the Soil": Poor Southern White People and Property in Antislavery Arguments for Homesteading, 49 Soc. Sci. Hist. 340, 340–42 (2025) (tracing the persistent ideological assumption that White people have an "interest in property" to the Homestead Act of 1862); Harris, Whiteness as Property, supra note 303, at 1716 ("Even in the early years of the country, it was not the concept of race alone that operated to oppress Blacks and Indians; rather it was the *interaction* between conceptions of race and property that played a critical role in establishing and maintaining racial and economic subordination.").

306. See Foster & Austin, supra note 17, at 171 ("Clearly, pervasive evidence of continued disparity and strong legislative intent to aid the plight of Black farmers in America is not enough to outweigh courts' hesitation to allow legislation that singles out Black farmers.").

307. See generally Ellen Messer-Davidow, The Making of Reverse Discrimination: How *DeFunis* and *Bakke* Bleached Racism From Equal Protection (2021) (arguing that the concept of "reverse discrimination" reframed the equal protection doctrine in ways that obscured structural racism and recast remedial race-conscious policies as discriminatory).

group. As a result, legal doctrines designed to promote equality are redeployed to protect entrenched privilege and obstruct structural redress.

This broader legal pattern poses challenging obstacles for policymakers seeking to articulate a compelling government interest in remedying racial injustice, a requirement made increasingly stringent by the Court's evolving equal protection jurisprudence. The challenges facing race-conscious programs—in cases such as *Fisher v. University of Texas at Austin*[308] and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*[309]—illustrate the judiciary's growing insistence on narrow justifications for the use of race in public policy. In many cases, courts have downplayed or disregarded the broader structural and historical context that motivates these interventions.[310]

Moreover, the judiciary's narrow understanding of what constitutes a "compelling interest" reflects the influence of White supremacist legal logic.[311] Although courts acknowledge that remedying past discrimination or promoting diversity may qualify in theory, in practice they often demand near-impossible proof.[312] Courts routinely require highly specific evidence linking the government entity implementing a race-conscious program directly to intentional past discrimination, while dismissing extensive structural evidence of racial inequality.[313] This constricted view

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308. Fisher v. Univ. of Tex., 579 U.S. 365, 388 (2016) (upholding the university's race-conscious admissions policy, finding that using race as a factor in admissions to create a diverse student body was narrowly tailored to achieve the compelling interest of educational diversity); Fisher v. Univ. of Tex., 570 U.S. 297, 313–15 (2013) (holding that strict scrutiny applies to the use of race as a factor in admission policies).

309. 143 S. Ct. 2141, 2175 (2023) (holding that the inclusion of race in Harvard's admissions policies violated the Equal Protection Clause and Title VI of the Civil Rights Act).

310. See Joy Milligan, Animus and Its Distortion of the Past, 74 Ala. L. Rev. 725, 734 (2023) (noting the "extreme reading of the animus model," which treats discrimination as "temporally discrete" and implies that "once animus fades, or if it cannot be located in a particular moment or episode, any structural consequences need not or even cannot be addressed").

311. See Gotanda, supra note 241, at 55 (contending that the Court's colorblindness frames strict scrutiny so narrowly that race-conscious remedies are disfavored except in limited, court-mandated settings); Richard D. Kahlenberg, New Avenues for Diversity After *Students for Fair Admissions*, 48 J. Coll. & U.L. 283, 290 (2023) ("Technically, the Court did not come out and say that diversity is no longer a compelling interest; but for all intents and purposes, that is the effect of its new standard."); Reva B. Siegel, The Supreme Court, 2012 Term—Foreword: Equality Divided, 127 Harv. L. Rev. 1, 3–6, 62 (2013) ("*Fisher* represents a body of equal protection law that devotes special resources to majority claims it no longer provides to minority claims.").

312. See Buechler, supra note 96, at 245–46.

313. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94, 500 (1989) (holding that a municipality must demonstrate with a "strong basis in evidence" that it engaged in prior discrimination before enacting a race-conscious contracting program, rejecting reliance on generalized findings of societal discrimination (internal quotation marks omitted) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion))); *Wygant*, 476 U.S. at 277–78 (invalidating a race-conscious layoff policy in which

of causality shields dominant institutions—such as the USDA—from accountability for their roles in perpetuating economic exclusion. It also prevents meaningful scrutiny of systems that consolidate land and capital within an elite minority, particularly in the agricultural sector.

### B. *The Case of* Wynn v. Vilsack

Against this theoretical backdrop, *Wynn v. Vilsack* illustrates how colorblind constitutionalism constrains race-conscious remedial efforts. In June 2021, the U.S. District Court for the Middle District of Florida issued a preliminary injunction halting the implementation of section 1005 of the American Rescue Plan Act.[314] Scott Wynn, a White farmer from Florida, brought the lawsuit, alleging that the USDA's debt relief program violated the Equal Protection Clause and the Administrative Procedure Act.[315] Wynn contended that the program engaged in de jure racial discrimination by distributing benefits and burdens on the basis of race.[316] In her ruling, Judge Marcia Morales Howard concluded that, even assuming the government had a compelling interest in supporting socially disadvantaged farmers, the program was not narrowly tailored to meet constitutional scrutiny.[317] The ruling exemplifies many of the theoretical problems with colorblind constitutionalism described above, demonstrating how abstract commitments to colorblindness generate concrete barriers to racial justice.

1. *The Statutory Framework and Misinterpretations of Social Disadvantage*. — Wynn's central claim—that White farmers were categorically excluded from loan assistance—rests on a fundamental misreading of the statutory definition of "socially disadvantaged" as referenced in section 1005 of the American Rescue Plan Act.[318] That section adopts the definition provided in the Food, Agriculture, Conservation, and Trade Act of 1990, which defines socially disadvantaged farmers or ranchers as those subjected to racial or ethnic prejudice due to

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the school board relied on "societal discrimination" rather than specific past discrimination by the board itself, emphasizing that remedial measures must target proven, intentional wrongs); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (plurality opinion) (Powell, J.) (concluding that general racial disparities cannot justify a race-conscious admissions program absent concrete evidence of past institutional discrimination); see also Vinay Harpalani, Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After *Fisher*, 45 Seton Hall L. Rev. 761, 804 (2015) ("Violations of the Equal Protection Clause require proof of the intentional use of race; policies that merely have a disparate impact by race do not violate the Constitution.").

314. Wynn v. Vilsack, 545 F. Supp. 3d 1271, 1295 (M.D. Fla. 2021).

315. Id. at 1275.

316. Id.

317. Id. at 1281–82.

318. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005(b)(3), 135 Stat. 4, 13, repealed by Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 22008, 136 Stat. 1818, 2023; *Wynn*, 545 F. Supp. 3d at 1282–83 (reading "socially disadvantaged" as a "rigid, categorical, race-based qualification").

their group identity.[319] In administering this provision, the USDA has identified several racial and ethnic groups—such as American Indians, Asians, Black Americans, Native Hawaiians, Hispanics, and Latinos—as commonly falling within this classification.[320]

While Black farmers and ranchers have been recognized as socially disadvantaged, given the USDA's well-documented history of discrimination throughout the twentieth century,[321] the statutory definition is not exhaustive. The inclusion of the phrase "but are not limited to" signals that the listed groups are illustrative rather than exclusive.[322] Accordingly, the statutory and regulatory framework does not preclude White farmers from being considered socially disadvantaged when evidence of racial or ethnic prejudice directed at them exists.[323] This interpretation aligns with race-neutral equal protection principles, under which any individual, regardless of racial classification, may be subject to government-imposed racial discrimination.

Importantly, a colorblind interpretive approach does not deny the social reality of racialization in American life. Rather, it aims to eliminate normative assumptions about specific racial or ethnic groups from judicial reasoning. The relative absence of historical precedent for government-directed racial discrimination against White Americans[324]—arguably due to entrenched White supremacist cultural and political structures—does not foreclose the possibility that White individuals may be subjected to such discrimination in specific contexts.[325]

The USDA's American Rescue Plan Debt Payments FAQ affirms this broader view: "The Secretary of Agriculture will determine on a case-by-case basis whether additional groups qualify under this definition in

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319. 7 U.S.C. § 2279(a)(6) (2018) ("The term 'socially disadvantaged group' means a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities.").

320. 7 C.F.R. § 760.107 (2025); id. § 2500.105.

321. See supra note 182 and accompanying text.

322. Notice of Funds Availability; American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA), 86 Fed. Reg. 28,329, 28,330 (May 26, 2021).

323. See Renée Johnson, Cong. Rsch. Serv., R46727, Defining a Socially Disadvantaged Farmer or Rancher (SDFR): In Brief 4 (2021), https://www.congress.gov/crs_external_products/R/PDF/R46727/R46727.2.pdf [https://perma.cc/3CL5-SXE8] ("USDA defines SDFRs as belonging to the following race and ethnic groups: African Americans, American Indians, Alaskan Natives, Asians, Hispanics, Pacific Islanders, refugees, immigrants, and groups as determined by the Secretary of Agriculture."); supra note 319.

324. See Harris, Whiteness as Property, supra note 303, at 1777–78 ("The relative economic, political, and social advantages dispensed to whites under systematic white supremacy in the United States were reinforced through patterns of oppression of Black[] and Native Americans.").

325. See Daniel, Dispossession, supra note 86, at 51, 218 (acknowledging that benefits were often withheld from both African Americans and poor White persons).

response to a written request with supporting explanation."[326] This mechanism allows any farmer, including White farmers like Wynn, to seek recognition as socially disadvantaged upon submitting evidence of discrimination. Rather than pursue this avenue, however, Wynn elected to challenge the entire debt relief program on the flawed assumption that White farmers could never qualify as socially disadvantaged.

Judge Howard endorsed this mistaken reading, asserting—without support—that White farmers and ranchers do not fall within the statutory definition.[327] Although there is scant precedent for successful discrimination claims by White farmers against the USDA,[328] the categorical presumption that White farmers are inherently immune from racial or ethnic prejudice undermines equal protection principles. Indeed, such an interpretation distorts both the statutory framework and the constitutional doctrine it implicates, replacing individualized analysis with racial essentialism under the guise of neutrality.

2. *The Application of Strict Scrutiny and Its Doctrinal Constraints.* — Judge Howard's skepticism toward both the government's asserted compelling interest and the tailoring of section 1005 exemplifies how colorblind constitutionalism functions in practice. Addressing the legacy of racial discrimination by the U.S. government requires not only grappling with historic and ongoing patterns of exclusion but also examining how ostensibly race-neutral factors may perpetuate socioeconomic disparities. It also demands reckoning with the entrenchment of White supremacy in U.S. law and political economy.

The court applied strict scrutiny because section 1005 employs racial classifications to categorize socially disadvantaged farmers and ranchers for debt relief.[329] Strict scrutiny involves two inquiries: whether the

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326. American Rescue Plan Debt Payments FAQ, USDA, https://www.farmers.gov/loans/american-rescue-plan/faq [https://perma.cc/H5F5-F79H] (last updated May 21, 2021).

327. Wynn v. Vilsack, 545 F. Supp. 3d 1271, 1275 (M.D. Fla. 2021).

328. See Alyssa R. Casey, Cong. Rsch. Serv., R46969, Racial Equity in U.S. Farming: Background in Brief 6–9 (2021), https://www.congress.gov/crs_external_products/R/PDF/R46969/R46969.1.pdf [https://perma.cc/VRC6-2RY7] (describing allegations of the USDA's prior discriminatory practices against Black, Native American, and Latino farmers); U.S. Gov't Accountability Off., GAO-12-976R, U.S. Department of Agriculture: Progress Toward Implementing GAO's Civil Rights Recommendations 6 (2012), https://www.gao.gov/assets/gao-12-976r.pdf [https://perma.cc/JL9E-G3FE] ("USDA has worked to resolve large civil rights lawsuits . . . brought by farmers who are African American (*Pigford v. Glickman*), Native American (*Keepseagle v. Vilsack*), Hispanic (*Garcia v. Vilsack*), and women (*Love v. Vilsack*)."); Browning, supra note 96, at 11 ("Available data suggest no other minority group has experienced, in the last century, a loss of farm operations at a rate comparable to [Black individuals].").

329. The Supreme Court in *Grutter v. Bollinger* explained that strict scrutiny aims to "'smoke out' illegitimate uses of race" by ensuring that the legislative body is "pursuing a goal important enough to warrant use of a highly suspect tool." 539 U.S. 306, 326 (2003) (internal quotation marks omitted) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

government has a compelling interest in addressing the identified harm and whether the remedy is narrowly tailored to achieve that interest.[330] While remedying past or present racial discrimination is "widely accepted as compelling,"[331] courts demand substantial evidence of intentional discrimination to justify race-based measures.[332] In this case, while Judge Howard acknowledged that "[i]t is undeniable—and notably uncontested by the parties—that USDA had a dark history of past discrimination against minority farmers,"[333] she declined to find that the government had met its burden.[334] Instead, she centered her analysis on whether the remedy itself was narrowly tailored to achieve the asserted compelling interest.[335]

The court concluded that it was not.[336] To justify the program's race-conscious design, the government had to show not only that it had been a "passive participant" in discrimination but also that prior remedial efforts were inadequate.[337] Judge Howard found the USDA's evidence on these points to be limited and conclusory.[338] She further suggested that racial disparities in pandemic-related relief could plausibly be attributed to race-neutral factors, such as limited farming experience, lack of business acumen, or financial illiteracy, rather than racial discrimination.[339] Citing the Supreme Court's warnings about the insufficiency of "statistical disparities untethered to evidence of discrimination,"[340] she concluded that the government had not demonstrated the requisite causal nexus between the identified harm and the race-based remedy.

The court further found that the program was overbroad.[341] Judge Howard emphasized that strict scrutiny "forbids the use even of narrowly drawn racial classifications except as a last resort,"[342] requiring the government to exhaust race-neutral alternatives and consider burdens on third parties.[343] She characterized section 1005's race-based eligibility

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330. Id. at 323–33, 345.

331. See Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994) (collecting cases).

332. See id. at 1565 ("Without an adequate showing of discrimination, the government's assertion that affirmative action is necessary lacks credibility.").

333. Wynn v. Vilsack, 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021).

334. Id. at 1281.

335. Id. at 1281–88.

336. Id. at 1288.

337. See id. at 1279 (internal quotation marks omitted) (quoting Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade Cnty., 122 F.3d 895, 911 (11th Cir. 1997)) (explaining that historical evidence does little to address the need for continued remediation though section 1005).

338. Id. at 1280–81.

339. Id. at 1281.

340. Id.

341. Id. at 1282.

342. Id. (internal quotation marks omitted) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 519 (1989) (Kennedy, J., concurring)).

343. Id. at 1287.

criteria as rigid and exclusionary, remarking: "[A] small White farmer who is on the brink of foreclosure can do nothing to qualify for debt relief. Race or ethnicity is the sole, inflexible factor that determines the availability of relief provided by the Government under Section 1005."[344] In her view, this categorical exclusion rendered the program insufficiently flexible and, therefore, constitutionally deficient.[345]

3. *Ideological Tensions and Problematic Assumptions.* — The court's reasoning reflects a deeper ideological tension between race-conscious and class-based approaches to inequality within capitalist systems. Judge Howard suggests that race-based remedies are not narrowly tailored if they fail to account for similarly situated individuals harmed by class-based disadvantage. This framing risks collapsing racial discrimination into generalized economic hardship, weakening the legal recognition of racism as a distinct and historically rooted system of social subordination. Her analysis assumes that White individuals—such as "a small White farmer . . . on the brink of foreclosure"—are presumptively excluded from racialized harm.[346] This assumption obscures the fact that White farmers could, in theory, demonstrate social disadvantage under the USDA's criteria and reflects a problematic conception of Whiteness as racially neutral or beyond race. It implies that racial discrimination is cognizable only when validated through White experiences or judicial recognition of such experience.

Judge Howard also analogized section 1005 unfavorably to the minority business enterprise (MBE) program at issue in *Cone Corp. v. Hillsborough County*.[347] In *Cone*, the Eleventh Circuit upheld the MBE program because it: (1) provided waivers for contractors unable to meet participation goals via race-neutral means; (2) excluded from benefits those not affected by discrimination; and (3) targeted its remedies to the most likely victims of discrimination.[348] Judge Howard concluded that section 1005 lacked comparable flexibility.[349] But the comparison is strained. Like the MBE program, section 1005 identified groups likely to have experienced USDA discrimination and allowed additional applicants to petition for inclusion.[350] While the statute did not provide a waiver process for those outside the presumptively disadvantaged categories, its structure was not entirely inflexible and did not preclude White applicants from seeking individualized determinations.

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344. Id. at 1283.

345. See id. at 1295 (finding that the plaintiff was likely to succeed in proving section 1005 unconstitutional).

346. Id. at 1283.

347. Id. at 1283–84 (citing Cone Corp. v. Hillsborough County, 908 F.2d 908, 910 (11th Cir. 1990)).

348. *Cone Corp.*, 908 F.2d at 916–17.

349. *Wynn*, 545 F. Supp. 3d at 1283.

350. Id. at 1275.

To be sure, Judge Howard's concerns regarding potential over- or underinclusiveness are not without merit. She rightly noted the risks inherent in presuming discrimination solely from racial or ethnic classification—for example, that a Black farmer might receive relief absent individualized proof of discrimination,[351] or that a White farmer might be denied relief despite experiencing discriminatory treatment.[352] But these concerns are not unique to race-conscious programs; they reflect the perennial difficulty of designing remedial schemes that are both administrable and constitutionally sound. Rather than invalidate the program wholesale, such concerns could have justified implementing a more rigorous, evidence-based review process for individual claims—an approach the USDA pledged to undertake but which the court failed to meaningfully evaluate.[353]

Judge Howard further questioned whether the USDA's reliance on "administrative convenience"—specifically, the urgency of delivering relief during the COVID-19 pandemic—could justify its use of racial classifications.[354] While expediency does not eliminate constitutional scrutiny, the court's analysis overlooked the extraordinary context in which section 1005 was enacted. Public health crises often exacerbate existing inequalities, and timely intervention is usually essential.[355] By refusing to evaluate the adequacy of the USDA's individualized assessment process, the court treated the program's flexibility as speculative. In so doing, the court imposed a nearly insurmountable burden on race-conscious legislation, reaffirming strict scrutiny's rigid constraints and the judiciary's hostility toward remedial racial justice efforts.

4. *Broader Implications for Constitutional Interpretation and Democratic Governance*. — Beyond doctrinal implications, the decision reflects a broader institutional reluctance to confront the structural legacy of racial capitalism. By failing to acknowledge the historical and systemic nature of agricultural discrimination, the court risks reinforcing the very systems that produced those inequities. That judicial inaction not only impedes racial equity in agriculture but helps consolidate economic and political power among those historically favored by law and policy. Left

351. See id. at 1285 ("For example, a new SDFR who applied for and received the only farm loan he or she ever sought . . . is entitled to up to 120% debt relief despite never having faced any of the discrimination catalogued by the Government.").

352. See id. at 1286 ("It provides no remedy at all for an SDFR who was unable to obtain a farm loan due to discriminatory practices or who no longer has qualifying farm loans as a result of prior discrimination.").

353. See C.R. Action Team, 1997 Report, supra note 182, at 65.

354. *Wynn*, 545 F. Supp. 3d at 1286 (internal quotation marks omitted) (quoting In re Birmingham Reverse Discrimination Emp. Litig., 20 F.3d 1525, 1548 (11th Cir. 1994)).

355. See generally Frank Curry, Gary Dymski, Tanita J. Lewis & Hanna K. Szymborska, Seeing Covid-19 Through a Subprime Crisis Lens: How Structural and Institutional Racism Have Shaped 21st-Century Crises in the U.K. and the U.S., 49 Rev. Black Pol. Econ. 77, 78–79 (2022) (explaining how public health and financial crises intensify existing racial and economic inequalities).

unaddressed, such dynamics sustain oligarchic structures that weaken democratic governance.

*Wynn* illustrates how colorblind constitutionalism constrains democratic efforts to address structural inequality. When courts routinely invalidate race-conscious programs designed to remedy documented patterns of exclusion, the result is not constitutional neutrality but the preservation of existing hierarchies under the guise of formal equality. If race-conscious remedies are constitutionally suspect while class-based strategies are preferred, policy responses will fail to redress racial injustice while obscuring its structural roots. This logic normalizes the view that persistent racial inequities stem from neutral market forces or individual failings, rather than state-sanctioned discrimination and policy failure. It maintains a system in which agricultural benefits flow disproportionately to a privileged few, while historically excluded communities remain marginalized.

The decision also demonstrates how narrow tailoring requirements function as structural barriers to racial remediation. The parallels between *Wynn* and other high-profile challenges to race-conscious programs—such as *Students for Fair Admissions*[356]—highlight a broader interpretive trend that constrains democratic responses to structural inequality. This pattern reflects not only doctrinal applications but also deeper ideological commitments that privilege formal equality over substantive justice and individual rights over collective remediation.

## IV. IMPLICATIONS FOR FUTURE LEGISLATIVE EFFORTS

In the continuing struggle for racial equity in the United States, agriculture remains a critical site where historical injustice endures and systemic discrimination continues to shape the lives of farmers and rural communities. Recent efforts by the USDA Equity Commission mark a notable attempt to confront these entrenched disparities and chart a path toward greater fairness and accountability.[357] The Commission's work offers important guidance for future legislative and policy interventions aimed at embedding equity more firmly across the federal government.

This Part examines the trajectory of recent equity efforts in agriculture through four interconnected lenses. Section IV.A reviews the USDA Equity Commission's comprehensive final report, analyzing its sixty-six recommendations and their potential to address systemic discrimination through structural rather than merely remedial approaches. Section IV.B documents how the Trump Administration's dismantling of equity programs illustrates the vulnerability of reform efforts to oligarchic capture, revealing the political economy dynamics

356. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).

357. See USDA Equity Comm'n, supra note 44, at 8–9.

that sustain agricultural concentration. Section IV.C explores alternative policy frameworks emerging from the Commission's work, particularly its integration of race-conscious and class-based measures within constitutionally grounded approaches to democratic governance. Section IV.D distills lessons from both the Commission's achievements and the subsequent policy reversals to identify principles for designing more resilient equity initiatives that can withstand concentrated economic and political opposition. Together, these analyses demonstrate that meaningful agricultural reform requires not only thoughtful program design but also institutional safeguards capable of sustaining equity initiatives against oligarchic interference. The Commission's work provides a roadmap for embedding democratic accountability within agricultural policy, while its subsequent dismantling reveals the structural challenges that future reform efforts must anticipate and address.

### A. *The USDA Equity Commission's Final Report*

Established in response to President Biden's 2021 executive order on advancing racial equity,[358] the USDA Equity Commission was charged with reviewing the Department's policies and programs to identify and address factors contributing to historical discrimination.[359] Over the course of two years, the Commission conducted a comprehensive review—soliciting public input, analyzing USDA programs, consulting historical reports and audits, and engaging with USDA leadership.[360] In February 2024, the Commission released its final report.[361]

The report contains sixty-six unanimously approved recommendations spanning the breadth of USDA's responsibilities, from agricultural subsidies to nutrition assistance and rural development.[362] Central themes include expanding access to USDA programs for underserved communities, eliminating language barriers, providing culturally appropriate technical assistance, supporting farmworkers and their families, embedding equity into climate-related initiatives, reforming procurement to benefit minority-owned businesses, resolving heirs' property challenges, and institutionalizing equity and accountability throughout the Agency.[363] Notable recommendations include establishing

358. See Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 25, 2021).

359. Meeting Notice, 87 Fed. Reg. 24,093, 24,093 (Apr. 22, 2022) ("USDA Equity Commission . . . will convene to continue its work reviewing USDA programs, services, and policies for the purpose of making recommendations for how the Department can improve access and advance equity.").

360. USDA Equity Comm'n, supra note 44, at 1.

361. Id.

362. Id. at 21–80.

363. Id. at 8 (providing nine short-term and long-term recommendations to improve equitable access to and availability of USDA services and programs).

a pathway to citizenship for farmworkers,[364] diversifying county committees to reflect the demographics of minority farmers and ranchers,[365] broadening the definitions of "farmer" and "rancher" in the Census of Agriculture,[366] and supporting legislation to hold USDA leadership accountable for implementing long-term equity reforms.[367]

Collectively, these recommendations confront longstanding disparities in agricultural policy and representation. The Commission explicitly acknowledges that many of these inequities are not new.[368] Rather, they reflect persistent structural barriers that have resisted piecemeal reform. As Commission co-chairs Arturo Rodríguez and Ertharin Cousin emphasized, addressing these challenges will require USDA to overhaul its "customer-facing business processes" and confront the ongoing legacy of past discrimination.[369]

Although the USDA has previously attempted to confront racial discrimination through class action settlements and targeted policy interventions, such measures have often been reactive and narrow in scope.[370] They have tended to address symptoms rather than systemic causes and have been vulnerable to legal and political backlash.[371] A stark example is the litigation that halted the debt relief program for socially disadvantaged farmers authorized under section 1005 of the American Rescue Plan Act.[372] In contrast, the Equity Commission calls for more proactive, comprehensive reforms that are both legally durable and capable of addressing structural inequities.

The urgency of these recommendations became tragically clear when President Trump assumed office in January 2025. Within days, a series of executive orders dismantled many of the Commission's proposed equity-

364. Id. at 51–52 (recommending that the government provide a clear and accessible path for farmers to obtain U.S. citizenship).

365. Id. at 37–38 ("Despite the many past recommendations and attempts to alleviate the documented inequities associated with the County Committee's election process and power, addressing County Committees continues to be a critical step in advancing equity in USDA's programs and services.").

366. Id. at 35 ("Direct the National Agricultural Statistics Service (NASS) to include the varying types of farmers and ranchers in the next Census of Agriculture to account for the nature of many traditional forms of how agriculture products are produced, sold, or exchanged.").

367. Id. at 21–22 ("For all equity efforts outlined in this report and those currently taking place across USDA to be successful, there is a need to enact legislation and policy to ensure that continued work towards equity in programs and services is a priority of USDA leadership over time.").

368. Id. at 2.

369. Id.

370. See supra notes 198, 328 and accompanying text (discussing the class action settlements).

371. See supra section III.A.3.

372. See supra note 250.

focused programs and institutional reforms.[373] The targeted elimination of local food initiatives,[374] coupled with the preservation and expansion of commodity subsidies,[375] underscores how entrenched agricultural interests exploit political transitions to reinforce their dominance—undermining reforms aimed at equitable redistribution of resources.

### B. *Dismantling Equity in the Trump Era*

The Trump Administration's agricultural agenda reveals the fragility of equity-focused reforms when confronted with entrenched oligarchic power. On January 20, 2025, President Trump signed an executive order titled "Ending Radical and Wasteful Government DEI Programs and Preferencing," mandating the termination of all equity-related programs within sixty days.[376] This directive was followed by mass layoffs of nearly six thousand USDA employees, including researchers investigating discrimination, conservation specialists, and loan officers serving small and minority farmers.[377] Far from a neutral policy shift, these actions

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373. See Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 31, 2025) (revoking affirmative action requirements in federal contracting and ordering the elimination of DEI programs across agencies); Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 29, 2025) (directing federal agencies to terminate DEI programs and dismantle equity-related offices and policies); Exec. Order No. 14,148, 90 Fed. Reg. 8237 (Jan. 28, 2025) (rescinding multiple Biden-era executive orders, including those establishing equity and inclusion initiatives).

374. See Marcia Brown, USDA Cancels $1B in Local Food Purchasing for Schools, Food Banks, Politico (Mar. 10, 2025), https://www.politico.com/news/2025/03/10/usda-cancels-local-food-purchasing-for-schools-food-banks-00222796 (on file with the *Columbia Law Review*) (reporting that USDA cancelled more than $1 billion in local-food purchasing programs for schools and food banks, effectively eliminating federal support for those initiatives); Lisa Held, USDA Cancels More Support for Regional Food Systems, Civ. Eats (July 15, 2025), https://civileats.com/2025/07/15/usda-cancels-more-support-for-regional-food-systems/ [https://perma.cc/LST6-LNVC] (reporting the cancellation of key regional food programs and noting concerns about reduced support for local supply chains and community-based agriculture).

375. See Press Release, Farm Serv. Agency, USDA, USDA Expediting $10 Billion in Direct Economic Assistance to Agricultural Producers (Mar. 18, 2025), https://www.fsa.usda.gov/news-events/news/03-18-2025/usda-expediting-10-billion-direct-economic-assistance-agricultural [https://perma.cc/MMH9-KKVL] [hereinafter Press Release, Farm Serv. Agency, Expediting $10 Billion] (implementing large, direct payments under the Emergency Commodity Assistance Program for commodity producers); Press Release, Farm Serv. Agency, USDA, USDA Announces 2025 Enrollment Periods for Crop and Dairy Safety-Net Programs (Jan. 13, 2025), https://www.fsa.usda.gov/news-events/news/01-13-2025/usda-announces-2025-enrollment-periods-crop-dairy-safety-net-programs [https://perma.cc/Y5C5-EQRK] (noting the continued operation of Agriculture Risk Coverage, Price Loss Coverage, and Dairy Margin Coverage safety-net programs for 2025 crop and dairy producers).

376. Exec. Order No. 14,151, 90 Fed. Reg. at 8339.

377. See Press Release, USDA, USDA Status on Workforce Litigation (Mar. 11, 2025), https://www.usda.gov/about-usda/news/press-releases/2025/03/11/usda-status-workforce-litigation [https://perma.cc/C82C-N9H3] (acknowledging that probationary employees were terminated in February 2025 and later reinstated with back pay following

represent a deliberate consolidation of oligarchic control: the dismantling of institutional capacity to identify and remediate systemic inequities, ensuring that the state once again privileges dominant agricultural producers.[378]

The USDA Equity Commission's call to "[i]nstitutionalize equity" and "accountability" proved prophetic.[379] Without structural safeguards, equity initiatives remained vulnerable to capture and reversal by oligarchic interests. Under President Trump, programs supporting local food systems, small farmers, and historically marginalized communities were systematically gutted or frozen, while billions in subsidies continued to flow to the largest commodity producers.[380] The Administration canceled both the $1.13 billion Local Food Purchase Assistance Program and the Local Food for Schools Cooperative Agreement Program,[381] even as it announced $10 billion in direct payments exclusively for traditional commodity crops.[382] Because these payments were calculated by acreage, they inherently advantaged large-scale agribusinesses.[383] In this way, oligarchic power reasserted itself through the selective allocation of state

litigation); Sky Chadde, Newly Reinstated USDA Employees on Edge as More Layoffs Loom, AgDaily (Mar. 27, 2025), https://www.agdaily.com/insights/reinstated-usda-employees-on-edge-as-more-layoffs-loom (on file with the *Columbia Law Review*) (noting that roughly 6,000 USDA staff were fired in February 2025, including specialists working on conservation, equity, and farm loan programs); Katie Langin, USDA Ordered to Reinstate Nearly 6000 Fired Workers, Science (Mar. 6, 2025), https://www.science.org/content/article/usda-ordered-reinstate-nearly-6000-fired-workers (on file with the *Columbia Law Review*) (reporting on a court order requiring USDA to reinstate thousands of employees terminated en masse).

378. See Daniel, Dispossession, supra note 86, at 248 (pointing to the pattern of USDA privileging White farmers, as in 1981 when 10% of the largest farmers took almost half of available USDA funds).

379. USDA Equity Comm'n, supra note 44, at 21.

380. See, e.g., Kevin Hardy, USDA Cuts Hit Small Farms as Trump Showers Billions on Big Farms, Wash. St. Standard (Apr. 6, 2025), https://washingtonstatestandard.com/2025/04/06/usda-cuts-hit-small-farms-as-trump-showers-billions-on-big-farms/ (on file with the *Columbia Law Review*) (explaining that the Trump Administration cut $1 billion from local food programs while expediting $10 billion in payments to commodity farmers); Annie Ma, USDA Ends Program that Helped Schools Serve Food From Local Farmers, AP News, https://apnews.com/article/school-lunch-usda-trump-c1485f824573913fe9a734bbf1273e26 [https://perma.cc/CZX4-J7AR] (last updated Mar. 12, 2025) ("The U.S. Agriculture Department is ending two pandemic-era programs that provided more than $1 billion for schools and food banks to purchase food from local farmers and producers.").

381. Aimee Picchi, USDA Cancels $1 Billion in Funding for Schools and Food Banks to Buy Food From Local Suppliers, CBS News, https://www.cbsnews.com/news/usda-cancels-local-food-purchasing-food-banks-school-meals [https://perma.cc/W8B9-T2KP] (last updated Mar. 13, 2025).

382. See Press Release, Farm Serv. Agency, Expediting $10 Billion, supra note 375 (explaining that the USDA is issuing $10 billion in funds to help large agriculture producers mitigate the impacts of increased impact costs and falling commodity prices).

383. See id. ("[E]conomic relief payments are based on planted and prevented planted crop acres for eligible commodities for the 2024 crop year.").

resources, reinforcing concentration while erasing the policy gains of equity-centered reform.

The Administration's funding decisions further reveal the oligarchic logic underlying U.S. agricultural policy. While small farmers like Thomas Eich in Indiana received just $160,[384] large commodity producers secured substantial bailouts.[385] This approach directly contravenes the USDA Equity Commission's recommendations for supporting limited-resource and historically underserved farmers. The cancellation of the $3.1 billion Partnerships for Climate-Smart Commodities program further illustrated this selective approach.[386] Organizations like Pasa Sustainable Agriculture, which had been assisting two thousand farmers across fifteen states in adopting sustainable practices, saw their funding terminated midstream, forcing layoffs and program shutdowns.[387]

The Administration's restructuring of USDA priorities exemplifies a hallmark of oligarchic governance: the capture of public institutions to advance concentrated private interests at the expense of democratic accountability and public welfare. By eliminating research capacity—particularly within the Economic Research Service and the Agricultural Research Service[388]—the Administration suppressed independent analysis

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384. Ayurella Horn-Muller, Trump Radically Remade the US Food System in Just 100 Days, Grist (May 2, 2025), https://grist.org/food-and-agriculture/trump-usda-food-system-agriculture-first-100-days/ [https://perma.cc/R2DP-7R42].

385. See Press Release, Farm Serv. Agency, Expediting $10 Billion, supra note 375 ("ECAP assistance will be calculated using a flat payment rate for the eligible commodity multiplied by the eligible reported acres. Payments are based on acreage and not production.").

386. See Press Release, USDA, USDA Cancels Biden Era Climate Slush Fund, Reprioritizes Existing Funding to Farmers (Apr. 14, 2025), https://www.usda.gov/about-usda/news/press-releases/2025/04/14/usda-cancels-biden-era-climate-slush-fund-reprioritizes-existing-funding-farmers [https://perma.cc/D5PJ-WEYH]; Lisa Held, Updated: USDA Cancels Climate-Smart Commodities Program, but Some Projects May Continue, Civ. Eats (Apr. 14, 2025), https://civileats.com/2025/04/14/usda-cancels-climate-smart-commodities-program-but-some-projects-may-continue/ [https://perma.cc/C2RQ-GJFG] ("[T]he Climate-Smart Commodities Program freeze has caused an outsized amount of turmoil among farmers and organizations that support them due to the scale of the $3.1 billion investment in 135 projects across the American farm landscape.").

387. See Julie Grant, Pennsylvania Farm Group Faces Layoffs Amid Federal Funding Freeze, Allegheny Front (Feb. 28, 2025), https://www.alleghenyfront.org/pennsylvania-farmers-pasa-sustainable-agriculture-federal-funding-freeze-climate-change/ [https://perma.cc/DE7G-2WNB]; Press Release, Pasa Sustainable Agriculture Joins Lawsuit to Restore Federal Funding to Farmers, (Mar. 20, 2025), https://pasafarming.org/public-comments/pasa-sustainable-agriculture-joins-lawsuit-to-restore-federal-funding-to-farmers/ [https://perma.cc/PC5B-C7DD] (noting that, as of March 2025, Pasa is owed more than $3 million and has furloughed over sixty staff members).

388. See USDA Staffing Crisis: Research Agencies Face Steep Losses as Reorganization Advances, Nat'l Sustainable Agric. Coal: NSAC's Blog (Sep. 17, 2025), https://sustainableagriculture.net/blog/usda-staffing-crisis-research-agencies-face-steep-losses-as-reorganization-advances/ [https://perma.cc/ETR7-RKFT] ("USDA's research agencies—the National Agricultural Statistical Service (NASS), Economic Research Service

capable of exposing market concentration, environmental harms, or racial disparities.[389] This tactic mirrors historical and contemporary patterns of oligarchic rule, from the antebellum plantation elite to modern petrostates, under which silencing critical knowledge production is central to maintaining dominance.[390] In each case, the suppression of independent inquiry is not incidental but foundational to oligarchic rule, ensuring that the narratives legitimating concentrated power remain unchallenged.

### C. *Alternative Approaches and Balanced Policy Design*

The USDA Equity Commission's work underscores the need for structural approaches to systemic discrimination.[391] Its recommendations move beyond litigation or narrow administrative fixes and instead propose durable institutional reforms—addressing heirs' property,[392] expanding nutrition assistance,[393] and diversifying USDA county committees.[394] Central to its framework is a dual focus on race-conscious and class-based measures: Set-asides for Black, Indigenous, female, and other historically marginalized farmers are paired with support for limited-resource and

(ERS), Agricultural Research Service (ARS), and National Institute of Food and Agriculture (NIFA)—have been hit particularly hard by recent staff losses and have significant cuts planned in the reorganization.").

389. See id. (describing the consequences of funding cuts to independent research projects led by NASS and ARS).

390. See Sarah Repucci, Freedom and the Media: A Downward Spiral, *in* Freedom and the Media 2019, at 1, 2–5 (2019), https://freedomhouse.org/sites/default/files/202002/FINAL07162019_Freedom_And_The_Media_2019_Report.pdf [https://perma.cc/HBN3-MCJF] (corroborating cross-national trends consistent with oligarchic knowledge suppression); Douglas L. Mann, When Facts Become Forbidden: The Past and Present History of Scientific Censorship, 10 JACC 402, 402 (2025) ("However, throughout history, scientific research has often been subject to suppression, whether from religious doctrine, political ideology, or corporate interests, often with untoward consequences for public health."); Russia: Government vs. Rights Groups: The Battle Chronicle, Hum. Rts. Watch (June 18, 2018), https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle [https://perma.cc/XR6N-BFMJ] ("[T]he Kremlin has sought to stigmatize criticism or alternative views of government policy . . . includ[ing] new legal restrictions . . . on freedom of expression . . . .").

391. See USDA Equity Comm'n, supra note 44, at 30–31 (recommending policies to mitigate the effect of land fractionation on heirs' ability to participate in USDA programs).

392. See id. at 14 (discussing how policies such as the 1933 Agricultural Adjustment Act (AAA) displaced many Black sharecroppers and tenant farmers by privileging large-scale farming operations and giving policymaking power to White farmers with no interest in supporting smaller and more diverse agricultural operations).

393. See id. at 42 (recommending that the USDA improve language access, create targeted outreach materials, and develop inclusive distribution programs and application sites to encourage farmworkers and their families to apply for nutritional support).

394. See id. at 37–39 (recommending diversity training, increased minority representation, and increased accountability to promote equity on county committees).

small-scale farmers more broadly.[395] This design advances remedies for historic exclusion while building broader coalitions that enhance political and legal resilience. Programs like expanded nutrition assistance and targeted business support exemplify this principle, combining equity for historically marginalized communities with benefits for the broader population.

The Commission also embraces an interdisciplinary approach, drawing from sociology, history, and economics to inform policy design. For example, its proposals on heirs' property issues are rooted in the historical reality that discriminatory legal structures systematically stripped Black families of landownership, accelerating the decline of Black farming across the twentieth century.[396] Similarly, its recommendations to improve access to nutrition assistance reflect sociological insights on how race, poverty, and food insecurity intersect in marginalized communities.[397] By weaving these perspectives together, the Commission outlined a roadmap for equity that is both practical and historically informed.

At the same time, the Commission sought to institutionalize accountability. Its stated aim to "interrupt the perpetuation of any and all USDA discriminatory and unfair systems, operations, policies and actions"[398] acknowledges that equity initiatives must be insulated from political or oligarchic capture. This insight reflects broader patterns in American agricultural history, throughout which concentrated land ownership and market control—from antebellum plantations to modern agribusiness—have been maintained through institutional capture and suppression of independent oversight.

By emphasizing structural reform, the Commission gestures toward a broader constitutional project. Eliminating barriers to land, credit, and markets aligns with efforts to dismantle the enduring "badges and incidents of slavery" embedded in modern agricultural institutions.[399]

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395. See id. at 27–28, 32–33, 47–48. The Commission identified SNAP eligibility policies that disproportionately limited access to nutritional support for low-income and historically marginalized communities. These include restrictions "based on immigration status," denial of SNAP benefits to residents of Puerto Rico and other territories, a "prohibition on receiving SNAP benefits and food from the Food Distribution Program on Indian Reservations" simultaneously, the time limit for "unemployed people not living with dependent children," and "the ban on SNAP assistance for people with previous felony drug convictions." Id. at 47.

396. See Jordan M. Jennings, Note, The Disappearing Act: How to Prevent the Decline of Black Farmers in the United States, 12 Ky. J. Equine Agric. & Nat. Res. L. 325, 328–29 (2020) (detailing the systematic exclusion of Black farmers from the Reconstruction Era and throughout the twentieth century).

397. See id. at 343 (discussing programs designed to combat nutrition barriers and food insecurity in low-income communities).

398. USDA Equity Comm'n, supra note 44, at 9.

399. See William M. Carter, Jr., Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery, 40 U.C. Davis L. Rev. 1311, 1376 (2007) ("[T]he badges and incidents of slavery . . . refer[] to the damaging effects of the institution of slavery itself

Likewise, the Guarantee Clause's commitment to republican government provides a lens for analyzing agricultural inequities: Concentrated control over land, markets, and governance produces anti-republican distortions in rural democracy.[400] Programs that expand access for marginalized farmers, diversify decisionmaking bodies, and strengthen oversight can thus be understood not only as equitable policy but also as efforts to restore republican governance in contexts shaped by oligarchic capture.

This constitutional connection is meaningful even without a full doctrinal analysis. The Commission's proposals embody abolitionist logic in practice: dismantling structures of exclusion, restoring opportunities for historically marginalized communities, and embedding safeguards to prevent future entrenchment.[401] By recognizing the persistence of racialized economic hierarchy in agriculture, the Commission frames equity as a structural imperative rather than a discretionary policy choice.

Taken together, the Equity Commission's work illustrates the ongoing tension between oligarchic control and democratic accountability in American agriculture. While modern agricultural oligarchy relies on concentrated ownership, political influence, and control over knowledge production to maintain dominance, the Commission seeks to disrupt these dynamics through targeted reforms. Its proposals offer a model for redressing historic inequities while building resilience against political and legal challenges.

In practice, these recommendations underscore a key insight: Addressing systemic racial inequities requires more than programmatic interventions. It demands structural reforms that are responsive to the political economy of power—how the concentration of land, credit, and markets perpetuates exclusion—and that embed safeguards against future capture. By focusing on these structural levers, the Commission offers a

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and the experience of African Americans under that system and thereafter."); Jennifer Mason McAward, Defining the Badges and Incidents of Slavery, 14 U. Pa. J. Const. L. 561, 566 (2012) ("The Thirteenth Amendment promised the freed slaves 'universal civil and political freedom.'" (quoting the Civil Rights Cases, 109 U.S. 3, 20 (1883))). As Professor Jennifer Mason McAward explained, "[t]he concept of the 'badges and incidents of slavery' is meant to assist Congress in identifying ways in which it can fulfill that promise and . . . to mark the outer boundaries of the Section 2 power." Id. "To suggest that . . . the Thirteenth Amendment confers on Congress a broad power to legislate against discrimination generally overlooks this precise terminology and tends to devalue the immediate aftermath of the slave system, in which governments and individuals alike sought to achieve the de facto reenslavement of four million African Americans." Id.

400. See Francesca L. Procaccini, Reconstructing State Republics, 89 Fordham L. Rev. 2157, 2167–68 (2021) (discussing how the Guarantee Clause enables the federal government to eliminate "aristocratic forms of government in the states" and drawing a distinction between aristocratic and republican forms of government).

401. See Robin West, Toward an Abolitionist Interpretation of the Fourteenth Amendment, 94 W. Va. L. Rev. 111, 139–40 (1991) ("There were, according to the abolitionists, at least two specific natural rights which the state is required to protect[:] . . . the right to physical security . . . [and] to have available to him the legal means to fashion a livelihood to ward off natural threats to survival.").

roadmap for sustaining equitable policy in a sector historically dominated by oligarchic interests.

Future scholarship could explore these constitutional dimensions more directly, examining how the Thirteenth Amendment's abolitionist mandate and the Guarantee Clause's republican principles intersect with contemporary equity frameworks. Even without such an expanded analysis, the Commission's recommendations signal a significant step forward: They position equity as a systemic, structural, and constitutional imperative rather than a temporary or contingent policy preference.

In sum, the USDA Equity Commission represents one of the most ambitious federal efforts in recent memory to confront systemic discrimination in agriculture. Its recommendations combine historical insight, structural reform, and a dual emphasis on race- and class-conscious measures. By embedding equity within durable institutional mechanisms, the Commission provides a template for countering entrenched oligarchic power while advancing the constitutional ideals of democratic governance and racial justice. Its work illustrates that meaningful agricultural reform requires both thoughtful program design and the recognition that equity in agriculture is not merely a policy preference, but a constitutional and democratic obligation.

### D. *Lessons, Challenges, and Implications for Future Policy Design*

The USDA Equity Commission's process and recommendations offer important guidance for future legislative and administrative efforts to advance equity. Its approach demonstrates the value of diverse representation in policymaking bodies, cross-sectoral collaboration, data-driven decisionmaking, and sustained engagement with affected communities.[402] By incorporating expertise in civil rights, economic disparity, and community-based advocacy, the Commission ensured that its recommendations reflected both lived experience and institutional knowledge while simultaneously enhancing their legitimacy and practical relevance. These principles underscore the importance of institutional architecture in shaping durable policy outcomes.

Despite the Commission's thoughtful design, its work highlights persistent challenges in translating equity initiatives into resilient programs. Legal and political opposition, fragmented stakeholder support, and the fragility of executive branch programs illustrate that

402. See USDA, USDA Equity Commission Charter 1 (2023) https://www.usda.gov/sites/default/files/documents/usda-equity-commission-charter.pdf (on file with the *Columbia Law Review*) (describing the purpose of the Commission as working to modify USDA programs and structures to "reduce [racial, economic, health, gender, and social] disparities and advance racial justice and equity for underserved communities").

meaningful reform requires more than well-crafted policy.[403] It demands institutional protections capable of withstanding coordinated resistance from entrenched interests. This observation reinforces the broader lesson that equity-focused programs must be structurally embedded within agencies and supported by legislative or constitutional foundations to avoid capture or reversal.

Several insights emerge for future policy design. First, reforms should integrate intersectional analyses that consider historical, racial, and socioeconomic disparities. Second, race-conscious measures should be paired with broader class-based initiatives to maximize political and legal viability. Third, accountability mechanisms, ongoing monitoring, and inclusive stakeholder engagement are essential to maintain transparency and prevent procedural capture. Collectively, these principles provide a blueprint for advancing equity beyond isolated or episodic reforms.

Building on the Commission's lessons for institutional design, it is equally important to recognize the role of community-led efforts in shaping equitable agricultural practices. Black- and Indigenous-led farming networks, community land trusts, and local food cooperatives demonstrate how equity can be operationalized at the ground level.[404] These efforts support marginalized producers while fostering participatory governance, local economic resilience, and cross-community knowledge sharing. Integrating such bottom-up models with federal reforms can strengthen the durability and legitimacy of federal programs,

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403. For critiques of the Final Report, see, e.g., Nichelle Harriott, HEAL Statement on USDA Equity Commission's Final Report, HEAL Food All. (Feb. 26, 2024), https://healfoodalliance.org/heal-statement-on-usda-equity-commissions-final-report/ [https://perma.cc/AJ96-R9C6PERMA] (supporting the final recommendations but also noting that "there is still much work to be done to account for the 21.5 million people working in the food and agriculture system who are not adequately protected or equitably served by the USDA" and are continuously left behind); Michelle Hughes, Reflections on the Equity Commission's Final Recommendations to USDA, Nat'l Young Farmers Coal. , https://www.youngfarmers.org/2024/02/equity-commission-report/ (on file with the *Columbia Law Review*) (last visited Oct. 9, 2025) (noting frustration "with the obstacles and limitations that exist within the federal government to address [the] legacy" of USDA discrimination against BIPOC farmers); Kari Jo Lawrence & Cole Miller, USDA Equity Commission Report Is a Missed Opportunity for Indian Country, Tribal Bus. News (Mar. 2, 2024), https://tribalbusinessnews.com/sections/opinion-op-ed/14630-usda-equity-commission-report-is-a-missed-opportunity-for-indian-country [https://perma.cc/Q3JW-QBZ2] (criticizing the Commission's report for omitting "tribal trust land and jurisdictional issues" and failing to "hold a tribal consultation in the development of [the] report," as well as expressing concern over the USDA "tak[ing] a step back from its equity commitments").

404. See, e.g., Jessica Gordon Nembhard, Collective Courage: A History of African American Cooperative Economic Thought and Practice 2 (2014) (chronicling African American cooperative business ownership into the twenty-first century and its impact on collective economic agency and grassroots economic organizing); Leah Penniman, Farming While Black: Soul Fire Farm's Practical Guide to Liberation on the Land 24 (Michael Metivier ed., 2018) (providing a guide for African-heritage farmers and gardeners to contribute to the sustainable agriculture and food justice movements).

demonstrating that structural change and community-driven innovation are mutually reinforcing pathways toward a more democratic and equitable agricultural system.

From a constitutional perspective, the Commission's work illustrates how structural reform aligns with foundational principles of equality and democratic governance. Policies designed to dismantle systemic barriers reflect the Thirteenth Amendment's mandate to eliminate enduring badges and incidents of slavery, while efforts to enhance participation and access in federal programs resonate with the Guarantee Clause's commitment to republican government. Future legislative and administrative efforts can leverage these constitutional foundations to insulate reforms from partisan or oligarchic interference.

The Commission's recommendations also suggest important considerations for judicial review. Courts evaluating race-conscious remedies could adopt a historically informed standard that considers systemic and structural indicators of inequality, rather than requiring individualized proof of intentional discrimination. Such an approach would better reflect the nature of structural racism and the concentrated power dynamics that perpetuate inequity in agriculture. By acknowledging historical harms and systemic patterns, courts could better evaluate the capacity of remedies to shift power and redress long-standing disparities, aligning judicial evaluation with the broader goals of democratic governance.

Finally, the Commission's work makes clear that equitable policy design cannot be limited to visible symptoms of discrimination. Effective reform must address underlying institutional and economic configurations that enable oligarchic capture and perpetuate inequality. This includes ensuring sustained funding, embedding equity requirements within statutory and regulatory frameworks, and incorporating antitrust and governance reforms to reduce the concentration of power. Building durable coalitions among marginalized and small-scale producers is likewise essential to reinforce democratic accountability and prevent elite capture.

In sum, the USDA Equity Commission provides a model for translating historical analysis, interdisciplinary expertise, and inclusive process into actionable policy. Its lessons extend beyond agriculture, offering guidance for federal agencies seeking to advance equity while confronting entrenched economic and political power. Meaningful reform requires not only technical design but also a sustained institutional commitment to accountability, transparency, and the protection of vulnerable communities. By internalizing these lessons, future efforts can strengthen the capacity of public institutions to challenge concentrated power, expand equity, and serve the broad public interest.

## CONCLUSION

This Essay has shown that struggles of Black farmers are not relics of the past but manifestations of enduring racial injustice embedded within the American agricultural system. From antebellum exploitation to the discriminatory practices of the twentieth and twenty-first centuries, institutions like the USDA have long reproduced patterns of exclusion that echo the Jim Crow era and continue to constrain the progress of Black farmers.

*Pigford v. Glickman* exposed these entrenched harms, offering partial relief while revealing the limits of litigation in remedying systemic discrimination. Those limits reemerged in the challenges to section 1005 of the American Rescue Plan Act, in which courts, guided by a formalist vision of equal protection, blocked race-conscious relief. The obstacles facing section 1005 demonstrate the tension between efforts to redress historic inequities and a constitutional landscape often hostile to acknowledging race.

The Inflation Reduction Act of 2022 attempted to overcome these challenges by shifting toward a broader, class-based criterion of "distressed" borrowers in addressing discrimination.[405] While this approach expands eligibility and avoids some doctrinal pitfalls, it also underscores the ongoing conflict between formal neutrality and substantive equality—and the difficulty of achieving meaningful equity within structures shaped by racial hierarchy.

The USDA Equity Commission's Final Report offers a promising avenue for addressing these ongoing issues. By recommending comprehensive reforms and integrating both race-conscious and class-based reforms, the report provides a model for creating more equitable systems. Its emphasis on diverse representation, proactive measures, and stakeholder engagement reflects a critical move toward addressing the multifaceted nature of discrimination. The Commission's approach suggests that future policy efforts must balance historical accountability with contemporary needs, challenge the limitations of colorblind constitutionalism, and advocate for a more nuanced understanding of equality.

Framing these efforts through the Thirteenth Amendment and the Guarantee Clause strengthens their constitutional foundations. This approach has the potential to reshape how we conceptualize and address systemic discrimination across all areas of government, from agriculture to education, housing, and beyond. By grounding equity efforts in these fundamental constitutional principles, we can work toward a more just and equitable society that truly fulfills the promise of equal protection under the law.

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405. Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 22006, 136 Stat. 1818, 2023.

Ultimately, while significant strides have been made in addressing racial injustices within U.S. agriculture, the journey toward true equity remains fraught with challenges. The ongoing struggle for racial justice highlights the need for policies that not only address historical wrongs but also adapt to the evolving landscape of discrimination. By embracing a more comprehensive, historically informed, and constitutionally grounded approach, policymakers can work toward a more just agricultural system that finally confronts and rectifies the enduring impacts of racial inequity.

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