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## **The Carrot Is the Stick: Food as a Weapon of Systemic Oppression for Black Consumers and the Disenfranchisement of Black Farmers**

Introduction.....	129
I. The Confidence of a Mediocre White Guy: Andrew Johnson’s Tenure .....	133
II. Making It Right: Freedmen’s Bureau and Other Failed Experiments .....	137
III. Refugees in Their Own Land: Black Americans .....	139
IV. Name That Oppression: Food .....	141
V. Colonizers Gonna Colonize: Native American Land Dispossession .....	145
VI. There’s No Such Thing as Separate but Equal: Black Farmer Discrimination .....	148
Conclusion: Everything Old Is New Again .....	152

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## INTRODUCTION

Disparities are commonly incorporated into the laws and policies of the U.S., making it near impossible for Blacks to achieve parity and equity with White counterparts.<sup>1</sup> This article posits that discussions around types of oppressions ignore the most basic, if not most insidious, form: food. Food oppression is an utterly heinous means of oppression because food is a necessity for continued life, and it informs public health.

In an April 2020 factsheet on COVID-19, the Centers for Disease Control (CDC) identifies COVID-19 as “an illness caused by a virus.”<sup>2</sup> COVID-19 is an upper respiratory disease that is spread “mainly through close contact from person to person.”<sup>3</sup> But, as with most other viral infections, treatment relies heavily upon the body’s own immune system to combat it.<sup>4</sup>

The immune system is the body’s defense system, and its purpose is to attack viruses that cause colds, flu, and the coronavirus.<sup>5</sup> However,

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<sup>1</sup> Historically, discrimination has been protected by force of law in areas such as education, employment, housing, and policing. *Plessy v. Ferguson*, 163 U.S. 537 (1896) served as foundation for “equal but separate” treatment of Blacks post-Reconstruction. However, that treatment was notoriously not equivalent. Coupled with Jim Crow laws that were embedded in the Constitutions of Southern states, Blacks were subject to segregated schools, refusal of accommodation, and ejection from public spaces at the whim of Whites. The laws have changed to afford Blacks integrated and thereby equal opportunities. Unfortunately, legal policy, workplace culture, and even medical canons are still employed to maintain disparate impacts. Modern examples include “tough on crime” efforts leading to hyper-policing policies in Black and Brown neighborhoods, *see* Violent Crime Control and Law Enforcement Act of 1994, H.R. 3255, 103rd Cong. (1994); legal denial of employment for Black women wearing natural hairstyles, *see* CROWN Act, H.R. 5309, 116th Cong. (2020); and centuries of unethical medical testing on unconsenting Blacks leaving them unable to work, ravaged with disease, or even dead for the supposed benefit of all, *see* HARRIET WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* (2006).

<sup>2</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, WHAT YOU SHOULD KNOW ABOUT COVID-19 TO PROTECT YOURSELF AND OTHERS (2020).

<sup>3</sup> COVID-19: Frequently Asked Questions, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> [https://perma.cc/97HA-TK4T] (last visited Mar. 25, 2021).

<sup>4</sup> *Viral Infections*, U.S. NAT’L LIBR. MED., <https://medlineplus.gov/viralinfections.html> [https://perma.cc/F582-3CYK] (last visited Mar. 9, 2021).

<sup>5</sup> *Preventing the Spread of the Coronavirus*, HARV. HEALTH PUBL’G, HARV. MED. SCHOOL, <https://www.health.harvard.edu/diseases-and-conditions/preventing-the-spread-of-the-coronavirus#:~:text=%2D%20Don%27t%20smoke,nose%2C%20and%20mouth> [https://perma.cc/3HSD-35P6] (last visited Mar. 9, 2021).

the immune system must be supported and bolstered to function at its best.<sup>6</sup> Some strategies to improve the functionality of the immune system include eating a diet high in fruits, vegetables, and whole grains; exercising regularly; maintaining a healthy weight; controlling stress levels; and controlling blood pressure.<sup>7</sup> The lack of these needs being met within the Black community explains the high rate of Black people contracting and perishing from COVID-19.

Although the numbers are incomplete because we are still in the midst of the pandemic, the Brookings Institute released an article asserting death rates among Black and Hispanic/Latino people dwarf those of White people based on data from the CDC.<sup>8</sup> Much of these stark disparities in mortality rates are tied to healthcare access and comorbidities from preventable diseases.<sup>9</sup>

Oppression is defined as “discrimination backed up by systemic or structural power, sometimes referred to as institutionalized power, including government, education, legal, and health system policies and practices.”<sup>10</sup>

“Food oppression is institutional, systemic, food-related action or policy that physically debilitates a socially subordinated group.”<sup>11</sup> But food oppression is far more than relegating entire communities to living in food deserts,<sup>12</sup> and more than municipalities conspiring with fast food conglomerates to leave large swaths of Black and Brown people in food swamps.<sup>13</sup> Food oppression is intertwined with every other type

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Tiffany N. Ford et al., *Race Gaps in COVID-19 Deaths Are Even Bigger than They Appear*, BROOKINGS INST. (June 16, 2020), <https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear/> [https://perma.cc/PNQ5-ZJNN].

<sup>9</sup> Jamila Taylor, *With COVID-19 Testing, We Can't – Once Again – Overlook Communities of Color*, THE CENTURY FOUND. (May 22, 2020) [https://tcf.org/content/commentary/covid-19-testing-cant-overlook-communities-color/?mc\\_cid=52695648ed&mc\\_cid=9be3ef8524&agreed=1&agreed=1](https://tcf.org/content/commentary/covid-19-testing-cant-overlook-communities-color/?mc_cid=52695648ed&mc_cid=9be3ef8524&agreed=1&agreed=1) [https://perma.cc/KRB4-M72U] (last visited Mar. 9, 2021).

<sup>10</sup> OPPRESSION: A SOCIAL DETERMINANT OF HEALTH 30 (Elizabeth A. McGibbon ed., 2012).

<sup>11</sup> Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1251, 1253 (2013).

<sup>12</sup> “Food deserts are areas where people have limited access to a variety of healthy and affordable food.” PAULA DUTKO ET AL., USDA, CHARACTERISTICS AND INFLUENTIAL FACTORS OF FOOD DESERTS, at iii (2012).

<sup>13</sup> 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>

and instance of oppression from housing and health to frequent couplings with wage, education, and environmental disparities.

This Article explores themes of food oppression and the laws that permit and substantiate it. First is the missed opportunity for President Andrew Johnson's administration to support a progressive agenda, which undermined and crippled the Freedman's Bureau.<sup>14</sup> Johnson's leniency toward the Southern states and their purported rights effectively re-subjugated freed Blacks, weaponized hunger, and left millions of refugees destitute. Then, we review the Morrill Land-Grant Act<sup>15</sup> and how through dislocation native people were left without arable land, dependent upon commodities, and fraught with the same preventable diseases that plague Black, Indigenous, and People of Color (BIPOC) communities in modern-day U.S.<sup>16</sup> Then, we explore the Southern Homestead Act of 1866 and how it was the foundation for the terrorism that prevailed in the South.<sup>17</sup> This terrorism, led by individuals and government entities including the United States Department of Agriculture (USDA), undermined Black farmers, Black farming, and ultimately the ability of Black people to feed themselves and their communities.<sup>18</sup> Finally, we look at whether litigation has improved the condition of Blacks and Black farmers in their quest to be self-sustaining.

Centuries of systemic racism and legally sanctioned oppression of Blacks has kept an entire demographic of U.S. citizens in economic bondage since the first boats of kidnapped and enslaved people arrived on the shores of Florida. Pervasive use of law to create and inflict brutality upon then-vulnerable populations ensures Black people remain hyper-focused on survival as opposed to being able to fully thrive and build for the future. The eschewed opportunity to offer true

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-promoted-fast-food-in-cities [https://perma.cc/Z67E-CFMG]. “[T]he term ‘food swamp’ as a spatial metaphor to describe neighborhoods where fast food and junk food inundate healthy alternatives.” Kristen Cooksey-Stowers et al., *Food Swamps Predict Obesity Rates Better than Food Deserts in the United States*, 14 INT’L J. ENV’T RSCH. & PUB. HEALTH 1366, 1367 (2017).

<sup>14</sup> Sarah Fling, *The Formerly Enslaved Households of President Andrew Johnson*, WHITE HOUSE HIST. ASS’N (Mar. 5, 2020), <https://www.whitehousehistory.org/the-formerly-enslaved-households-of-president-andrew-johnson> [https://perma.cc/PF7T-QP3U].

<sup>15</sup> Morrill Act, 7 U.S.C. § 301.

<sup>16</sup> See Margaret A. Nash, *Entangled Pasts: Land-Grant Colleges and American Indian Dispossession*, 59 HIST. EDUC. Q. 437, 467 (2019).

<sup>17</sup> *June 21, 1866: Southern Homestead Act*, ZINN EDUC. PROJECT, <https://www.zinnproject.org/news/tdih/southern-homestead-act/> [https://perma.cc/P7Q4-L2FW] (last visited Mar. 11, 2021) [hereinafter Southern Homestead].

<sup>18</sup> See *infra* Part VI.

recompense to freedmen in 1864, in favor of continued traumatization, informs and is directly correlative to the plight of descendants thereof. Historically, there were no protections, leaving millions of Blacks at risk of institutionalized oppression via many levels and avenues.

*The function, the very serious function of racism [] is distraction. It keeps you from doing your work. It keeps you explaining, over and over again, your reason for being.*<sup>19</sup>

— Toni Morrison

## I THE CONFIDENCE OF A MEDIOCRE WHITE GUY: ANDREW JOHNSON’S TENURE

President Andrew Johnson’s veto of bills designed to rebuild the South and provide equity for millions of recently freed Black people exposed them to an exceedingly precarious situation.<sup>20</sup> They were no longer expressly subjugated, but they had neither real protections nor status as citizens of the United States.<sup>21</sup>

People have to eat in good times and in bad. Not many times were as bad as the years following “The War Between the States” in the South. For Black people, war refugees, and veterans, this era was difficult. To address the destitution and rebuild the South, Congress, led by Radical Republicans, created the Bureau of Refugees, Freedmen and Abandoned Lands (commonly the Freedmen’s Bureau) that

issued food and clothing, operated hospitals and temporary camps, helped locate family members, promoted education, helped freedmen legalize marriages, provided employment, supervised labor contracts, provided legal representation, investigated racial confrontations, settled freedmen on abandoned or confiscated lands, and worked with African American soldiers and sailors and their heirs to secure back pay, bounty payments, and pensions.<sup>22</sup>

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<sup>19</sup> Toni Morrison, *A Humanist View*, Keynote Address at Portland State University (May 30, 1975), <https://pdxscholar.library.pdx.edu/orspeakers/90/>.

<sup>20</sup> See *Presidential Vetoes*, HIST., ART & ARCHIVES: U.S. HOUSE REPRESENTATIVES, <https://history.house.gov/Institution/Presidential-Vetoes/Presidential-Vetoes/> [<https://perma.cc/8X7C-QSKX>] (last updated Jan. 1, 2021) [hereinafter *Presidential Vetoes*].

<sup>21</sup> See *African American Records: Freedmen’s Bureau*, NAT’L ARCHIVES, <https://www.archives.gov/research/african-americans/freedmens-bureau> [<https://perma.cc/94AQ-43DH>] (last visited Mar. 11, 2021) [hereinafter *Freedmen’s Bureau*]; *Veto of the Freedmen’s Bureau Bill*, NAT’L PARK SERV., <https://www.nps.gov/anjo/learn/history/culture/freedmens-bureau.htm> [<https://perma.cc/BN7A-SQGE>] (last updated Apr. 14, 2015) [hereinafter *Veto of Freedmen’s Bureau Bill*].

<sup>22</sup> *Freedmen’s Bureau*, *supra* note 21.

This humanitarian aid was a compassionate and progressive approach to addressing both the immediate needs of the Southern refugees and the need of the South on the whole to rebuild.<sup>23</sup> However, President Andrew Johnson, the former Vice President who assumed the presidency after the Lincoln assassination in 1865, would not allow such interference from the federal government.<sup>24</sup>

Andrew Johnson was a Tennessean, Unionist, and Democratic Vice President who succeeded Republican President Abraham Lincoln in 1865.<sup>25</sup> A Jacksonian Democrat,<sup>26</sup> Johnson grew up poor.<sup>27</sup> His election to the Tennessee House of Representatives in 1835, then to the Tennessee Senate in 1841, elevated his social status and increased his personal income such that he could afford to purchase enslaved siblings.<sup>28</sup> Both a proud Southerner and slave owner, Johnson was a proponent of a lenient Reconstruction.<sup>29</sup> Johnson simply did not abide by the aggressive methods and laws Radical Republicans sought to employ, which would inevitably provide “equal treatment and enfranchisement of the freed [B]lacks”<sup>30</sup>

As a Unionist, Johnson wanted to restore the Southern states to their place in the Union as quickly as possible, and accepting Northern versions of democracy was not of any importance.<sup>31</sup> President Johnson was of the impression that the states themselves should decide, manage, and deal with issues such as property rights, Black citizenship, and other Constitutionally provided rights to citizens, like voting and being able to hold office.<sup>32</sup> This bipolar approach to governance established

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<sup>23</sup> *Id.*

<sup>24</sup> *Veto of the Freedmen's Bureau Bill*, *supra* note 21.

<sup>25</sup> *Andrew Johnson*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/andrew-johnson/> [<https://perma.cc/8NTN-RTJN>] (last visited Mar. 11, 2021).

<sup>26</sup> STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *Andrew Johnson*, in *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 174 (2008). *See also Jacksonian Democracy*, HIST., <https://www.history.com/topics/19th-century/jacksonian-democracy> [<https://perma.cc/25WX-CL9W>] (last updated June 7, 2019) (“Jacksonianism appears as a political impulse tied to slavery, the subjugation of Native Americans, and the celebration of white supremacy. . .”).

<sup>27</sup> *Fling*, *supra* note 14.

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

<sup>29</sup> *Andrew Johnson*, *supra* note 25.

<sup>30</sup> *Radical Republican*, BRITANNICA.COM, <https://www.britannica.com/topic/Radical-Republican> [<https://perma.cc/F7B9-VL7D>] (last visited Mar. 11, 2021).

<sup>31</sup> MICHAEL LES BENEDICT, *THE PRESIDENTS AND THE CONSTITUTION: A LIVING HISTORY* 229 (2016).

<sup>32</sup> *Id.*

the conditions for Johnson to set the record at fifteen for Congressional overrides to Presidential regular veto.<sup>33</sup>

Johnson vetoed the First, Second, and Third Military Reconstruction Acts.<sup>34</sup> The First Military Reconstruction Act was to turn control of the South over to brigadier generals who would ensure compliance by governors in order for that State to be readmitted to the Union.<sup>35</sup> Johnson opposed it because Black suffrage would “Africanize the southern part of our territory.”<sup>36</sup> The Second Military Reconstruction Act established that military commanders held the responsibility to register voters and hold elections in their territories; required that every voter took an oath to support the constitution and obey the law; and stripped Southern office holders of their office were they not to take an oath of allegiance.<sup>37</sup> The Third Military Reconstruction Act gave supreme power to the Union generals overseeing Reconstruction in the Southern districts to remove officials that were believed to impede Reconstruction.<sup>38</sup>

Johnson vetoed the Civil Rights Bill of 1866<sup>39</sup> that called for the government to make good on its assertions of equality and justice by declaring anyone born in the United States would be a citizen regardless of race, color, or prior condition of enslavement.<sup>40</sup> The benefits of citizenship were the ability to “make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and

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<sup>33</sup> HISTORY, ART, & ARCHIVES: UNITED STATES HOUSE OF REPRESENTATIVES, PRESIDENTIAL VETOES, <https://history.house.gov/Institution/Presidential-Vetoes/Presidential-Vetoes/> [https://perma.cc/8X7C-QSKX] (last visited Mar. 11, 2021).

<sup>34</sup> *Military Reconstruction Acts 15 Stat. 2 (1867) 15 Stat. 14 (1867)*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/military-reconstruction-acts-15-stat-2-1867-15-stat-14-1867> [https://perma.cc/CBC4-XSTW] (last visited Aug. 24, 2020).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *The Second Reconstruction Act Is Passed*, THE HIST. ENGINE, <https://historyengine.richmond.edu/episodes/view/1430> [https://perma.cc/7JRR-T2MQ] (last visited Mar. 11, 2021).

<sup>38</sup> *Congress Passes the 3rd Reconstruction Act*, THE HIST. ENGINE, <https://historyengine.richmond.edu/episodes/view/359> [https://perma.cc/WAU6-VUNK] (last visited Mar. 11, 2021).

<sup>39</sup> Fling, *supra* note 14.

<sup>40</sup> Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27.

property, as is enjoyed by white citizens.”<sup>41</sup> His veto exposed millions of freedmen to an exceedingly precarious situation whereby they were no longer expressly subjugated, but they had no real protections nor status as citizens of the United States. Perhaps even more guileful was the outcome that Southern States could write constitutions that would successfully segregate and disenfranchise Blacks for another hundred years or so, thus giving birth to Jim Crow laws.

Johnson vetoed the Freedmen’s Bureau Bill, which was intended to provide support and humanitarian aid to the Southern States and refugees.<sup>42</sup> The Freedmen’s Bureau operated in Southern States providing much needed aid and direct services.<sup>43</sup> At its inception, the Freedmen’s Bureau provided rations of pork, beef, flour, bread, cornmeal, beans, hominy, sugar, salt, pepper, and coffee to *everybody*.<sup>44</sup> Almost immediately, a campaign was begun by White landlords who proclaimed that rations would lead to the freed Blacks in the South having no incentive to work.<sup>45</sup> This campaign would ostensibly enwrap the dastardly intent of debilitating freed men via food-related law and policy. So by 1866, rations had been restricted to the sick and orphaned, leaving millions more hungry and desperate.<sup>46</sup>

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<sup>41</sup> “That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.” *Id.*

<sup>42</sup> Fling, *supra* note 14.

<sup>43</sup> *Id.*

<sup>44</sup> FREEDMEN’S BUREAU, REPORT OF COMMISSIONERS 183 (1866). *See also* WILLIAM H. BURKS, THE FREEDMEN’S BUREAU, POLITICS, AND STABILITY OPERATIONS DURING RECONSTRUCTION IN THE SOUTH (2009). “A joint resolution by the House and Senate on 30 March 1867 allowed the Secretary of War, via the Freedmen’s Bureau, to distribute food ‘to any and all classes of destitute.’” *Id.* at 62 (citation omitted).

<sup>45</sup> ADRIAN MILLER, *SOUL FOOD: THE SURPRISING STORY OF AN AMERICAN CUISINE, ONE PLATE AT A TIME* 30 (2013).

<sup>46</sup> SMITHSONIAN NAT’L MUSEUM AFR. AM. HIST. & CULTURE, RECORDS OF THE FIELD OFFICES FOR THE STATE OF VIRGINIA, BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, 1865–1872. *See also* BURKS, *supra* note 44. “Relief continued into 1868; the average number of daily rations issued climbed to 16,804, a forty-four percent increase over the previous year yet still significantly smaller than the 1866 peak daily average of 29,819 rations. This was due primarily to efforts by Bureau agents to limit relief to the truly disadvantaged.” *Id.* at 62–63.

## II MAKING IT RIGHT: FREEDMEN'S BUREAU AND OTHER FAILED EXPERIMENTS

By the time the Civil War began in 1861, Africans had been kidnapped, pressed into slavery, and sold as property by various colonizers for two hundred ninety-six years.<sup>47</sup> Although revisionist history would support historians and their claims that the emancipation of the enslaved was a deeply moral act, a more honest temperature of Lincoln's objective clarified that he simply sought to cripple the South's economy, which depended upon the stolen labor and pressed servitude of the enslaved.

Abraham Lincoln appointed the only Southerner and supporter of the Union in Congress at the time, Andrew Johnson, to the post of military governor of Tennessee in 1862.<sup>48</sup> Johnson, by all accounts a slave-holding White supremacist,<sup>49</sup> came to support emancipation out of no love for enslaved people, rather as a matter of military expediency.<sup>50</sup> Crushing the Confederacy would only be helped by emancipating the enslaved Blacks, and it would certainly end the Civil War quickly, thereby preserving the Union. This strategic perspective also aided Johnson considerably to become Vice President to Abraham Lincoln a scant three years later in 1865.<sup>51</sup>

After the Southern surrender came the reconstruction of the South. Nothing short of dismantling Southern law, processes, and norms during a very narrow window of opportunity would have served to fully correct the injustices of slavery and right the compass of the nation. Johnson not only missed that opening but fully did his best to close the window himself.

Two pieces of legislation were introduced in 1866: The Civil Rights Act of 1866<sup>52</sup> and the Bureau of Refugees, Freedmen and Abandoned

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<sup>47</sup> "Slaves were brought by the Spaniards to Florida soon after the founding of St. Augustine, in 1565, but the first slaves brought to the colonies were landed at Jamestown, Va., in 1619, by a Dutch trading vessel." J.L. NICHOLS ET AL., *PROGRESS OF A RACE: OR THE REMARKABLE ADVANCEMENT OF THE AMERICAN NEGRO, FROM THE BONDAGE OF SLAVERY, IGNORANCE, AND POVERTY TO THE FREEDOM OF CITIZENSHIP, INTELLIGENCE, AFFLUENCE, HONOR AND TRUST* 39 (1925).

<sup>48</sup> *Andrew Johnson, supra* note 25.

<sup>49</sup> Fling, *supra* note 14.

<sup>50</sup> *Id.*

<sup>51</sup> *Andrew Johnson, supra* note 25.

<sup>52</sup> Civil Rights Act of 1866, *supra* note 40.

Lands, or the "Freedmen's Bureau" as it was more commonly known.<sup>53</sup> Johnson vetoed them both.<sup>54</sup> Congress overrode both vetoes.<sup>55</sup> But Johnson's leniency and willingness to leave rebuilding of the South to the same states that took up arms against and ceded from the Union based on the "rights" of White men to own people opened the door to Black Codes and other legal acrobatics that would keep Blacks in a condition that was starkly akin to enslavement.<sup>56</sup>

The Bureau was established in the War Department in 1865 to undertake the relief effort and the unprecedented social reconstruction that would bring freed people to full citizenship. It issued food and clothing, operated hospitals and temporary camps, helped locate family members, promoted education, helped freedmen legalize marriages, provided employment, supervised labor contracts, provided legal representation, investigated racial confrontations, settled freedmen on abandoned or confiscated lands, and worked with African American soldiers and sailors and their heirs to secure back pay, bounty payments, and pensions.<sup>57</sup>

Congressional Republicans communicated clearly that the atrocities of enslavement needed course correction that could only be accomplished with federal oversight and actual legal protections as the region rebuilt. At the core of this belief was that military victory would be futile "unless the newly emancipated Negro was assured the same political, social, and economic rights" as White Northerners.<sup>58</sup> Legal and policy protections, including the creation of the Freedmen's Bureau, were building blocks to the necessary recompense. However, "attempts of bureau officials to shield freedmen from discriminatory law and prejudiced officials ran afoul of presidential Reconstruction policy."<sup>59</sup>

Despite his best efforts, bureau commissioner General Oliver Otis Howard learned that law enforcement and judicial officials continued to deny justice to freedmen.<sup>60</sup> This was in part due to President Johnson's policies of leniency, meaning that pre-Reconstruction civil governments restored under the auspices of States' Rights and pre-

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<sup>53</sup> H.R. 613, 39th Cong. (1866).

<sup>54</sup> H.R. 31, 39th Cong. 1st Sess. (1866); H.R. 613, 39th Cong. (1866).

<sup>55</sup> S. Res. 31, 39th Cong. 1st Sess. (1866) (enacted); H.R. 613.

<sup>56</sup> CALABRESI & YOO, *supra* note 26, at 175.

<sup>57</sup> *Freedmen's Bureau*, *supra* note 21.

<sup>58</sup> Monte M. Olenick, *Albion W. Tourgee: Radical Republican Spokesman of the Civil War Crusade*, 23 *PHYLON* 332, 332 (1962).

<sup>59</sup> Donald G. Nieman, *Andrew Johnson, the Freedmen's Bureau, and the Problem of Equal Rights, 1865-1866*, 44 *J.S. HIST.* 399, 399. (1978).

<sup>60</sup> *Id.* at 339-400.

Reconstruction laws were never directed to be set aside by Johnson.<sup>61</sup> Discriminatory laws that prohibited Blacks from certain trades, restricted the movement of freed Blacks, allowed courts to hire out Blacks to pay court costs, punished free Blacks more harshly for the same crimes committed by Whites, and prohibited Blacks from testifying against Whites remained on the Southern statute books.<sup>62</sup> So long as the pre-Civil War laws remained intact, de jure enslavement existed and de facto enslavement was not necessary. Institutional food oppression was allowed to expand. Southern refugees had no support.<sup>63</sup>

### III

#### REFUGEES IN THEIR OWN LAND: BLACK AMERICANS

Black Codes emerged post-Civil War with the sole intention “to keep the Negro exactly what he was: a propertyless rural laborer under strict controls, without political rights, and with inferior legal rights.”<sup>64</sup> The Black Codes applied only to Black people and legally compelled Blacks without visible means of support to hire themselves out during the first ten days of January.<sup>65</sup> This new legal system of state laws shifted the responsibility of servitude to the Blacks themselves and was clearly aimed at making it possible for individuals and local governments to continue to both hold and further acquire Black labor at will.<sup>66</sup> Black Codes were a far more fluid means of compelling involuntary servitude that “alternated between free and forced labor in

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<sup>61</sup> *Id.* at 400–01.

<sup>62</sup> *Id.* at 401.

<sup>63</sup> Refugees are defined by the United Nations Refugee Agency as “someone who has been forced to flee his or her country because of persecution, war or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group.” *What is a Refugee?*, UNITED NATIONS REFUGEE AGENCY, <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/> [https://perma.cc/4G83-X9J7] (last visited Mar. 15, 2021). This Article uses the term “refugee” to classify the formerly enslaved people, confederate veterans, and other residents of the Confederate States of America. The classification is appropriate because the residents spatially identified as being part of a separate nation. Their inability to leave the Southern states returned to the union should be, and herein is, viewed through the same lens as foreign survivors of war on their own soil.

<sup>64</sup> Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865-1890*, 30 SOC. PROBS. 555, 559 (1983) (quoting STAMPP, *THE ERA OF RECONSTRUCTION, 1865-1877*, at 79 (1965)).

<sup>65</sup> *Id.*

<sup>66</sup> William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 31 (1976).

time and to the rhythm of the southern labor market<sup>67</sup> that in part depended upon peonage.<sup>68</sup>

Peonage was a narrowly bound condition that allowed an individual “to be held to labor against his will in order to satisfy a debt.”<sup>69</sup> However, the distinction between slavery and peonage was often blurred because Whites could and did compel labor from freed Blacks both without debt or other pretense of legal justification.<sup>70</sup> The Peonage Act of 1867 was in that way a purely ceremonial protection for freed Blacks.<sup>71</sup> In fact, the Freedmen’s Bureau that was intended to regulate labor contracts ended up enforcing the regulations that tied freedmen to the land in ways that were very much akin to enslavement.<sup>72</sup>

There was no economic assistance for freed Blacks and the numbers working as artisans, mechanics, and shopkeepers rapidly declined after 1865, leaving freedmen as a large pool of landless labor.<sup>73</sup> Freedmen “rejoiced in . . . the right to move from place to place without the consent of any white man.”<sup>74</sup> However, the result was broad vagrancy laws permitting police to “round up idle blacks in times of labor scarcity.”<sup>75</sup> Freedmen were forced to work for either extremely low wages or payment in food, shelter, and clothing for both “southern planters and northern adventurers” who leased plantations confiscated by the federal government.<sup>76</sup> The combination of Black Codes, sharecropping, and debt peonage prevented the freedmen from obtaining the status and rights enjoyed by wage workers and created a perpetual underclass.<sup>77</sup>

This underclass was closely intertwined with manufactured criminality of the day. “Pig” laws,<sup>78</sup> for instance, sprang up across the

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<sup>67</sup> *Id.* at 33.

<sup>68</sup> Peonage is described as “the voluntary or involuntary service or labor of any person as peons, in liquidation of any debt or obligation . . .” Peonage Abolition Act of 1867, 39th Cong., 2d Sess., ch. 187.

<sup>69</sup> Cohen, *supra* note 66, at 32.

<sup>70</sup> *Id.* at 31–32.

<sup>71</sup> “[T]he holding of any person to service or labor under the system known as peonage is hereby declared to be unlawful . . .” Peonage Abolition Act of 1867, ch. 187.

<sup>72</sup> Adamson, *supra* note 64, at 559.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 558. (quoting STAMPP, *supra* note 64, at 121).

<sup>75</sup> Cohen, *supra* note 66, at 33.

<sup>76</sup> Adamson, *supra* note 64, at 559.

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

<sup>78</sup> Pig laws were Black Codes for agricultural crimes. Audrey Robinson-Nkongola, *Wandering the Web—Laws That Affect the Life of Americans from Slavery to the 21st Century*, 28 *AGAINST GRAIN* 82, 83 (2016).

South penalizing theft of cattle, swine, and even chickens as grand larceny punishable by hard labor from four to ten years.<sup>79</sup> This served the dual purpose of continuing to subjugate Black people, but more importantly, increased the available labor to the convict lease program in Southern states.<sup>80</sup>

It is important to understand that the brutal Southern system of enslavement did not end; it only morphed into a more sophisticated application of laws constructed to accomplish the same end. Making the mental connection that Pig Laws were at their core a prohibition on stealing food is, however, more important. And it is unlikely that anyone would steal a pig, cow, or chicken if they and/or their family were not hungry. So Pig Laws are indeed an early example of food oppression, meaning the laws themselves and the legal policy in support of them created additional systemic food-related harm to the freedmen.

#### IV NAME THAT OPPRESSION: FOOD

Food oppression is defined as the “institutional, systemic, food-related action or policy that physically debilitates a socially subordinated group. Politically and financially weak communities absorb the external costs of food oppression, rendering these costs largely invisible to . . .”<sup>81</sup> equitably treated groups. This is a condition that continues into modern times.<sup>82</sup>

Refugees of the Civil War suffered gravely from food insecurity post-Emancipation.<sup>83</sup> Freedmen and women struggled to live alongside Whites in what had been a war zone and faced “the physical destruction of homes, crops, livestock, farms, rail lines, and businesses that stalled economic recovery.”<sup>84</sup> The added layers of racial discrimination, individual and mob intimidation, harassment, abuse, violence, and other injustices in their everyday lives coupled with epidemics, exposure to the elements, hunger and malnutrition, and separation from

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<sup>79</sup> Adamson, *supra* note 64, at 562.

<sup>80</sup> *Id.*

<sup>81</sup> Freeman, *supra* note 11, at 1253.

<sup>82</sup> *Id.*

<sup>83</sup> DIANE MILLER SOMMERVILLE, *Somethin' Went Hard Agin Her Mind: Suffering, Suicide, and Emancipation*, in *ABERRATION OF MIND: SUICIDE AND SUFFERING IN THE CIVIL WAR—ERA SOUTH* 242 (2018).

<sup>84</sup> *Id.*

supportive networks all contributed to a high mortality rate among African Americans in the years after the war.<sup>85</sup>

A vast overstatement would be to suggest enslaved people were food secure.<sup>86</sup> Slave holders knew the withholding of food compels action or inaction.<sup>87</sup> Food had been weaponized and used as a means to control and further subjugate enslaved people.<sup>88</sup> Although White author Ulrich Bonnell Phillips promoted the image of “benevolent masters” who had great concern for those they had enslaved, narratives by well-regarded, freedmen and authors are clear that access to food was elusive, fluctuating and dependent upon the mercurial nature of their subjugators.<sup>89</sup> Frederick Douglass wrote of being reduced to begging and stealing to be able to eat due to the “meanness” of his captor.<sup>90</sup> Frederick Douglass also famously wrote in *My Bondage and My Freedom*, “I have often been so pinched with hunger, that I have fought with the dog.”<sup>91</sup> In a related narrative, Charles Ball asserted his access to food was not determined by the quality or quantity of the work he performed, but how long the scarce food rations lasted.<sup>92</sup>

Post-Reconstruction ushered in the Gilded Age for Whites but more oppression for Blacks and American Indians.<sup>93</sup> “The 1880s and 1890s were years of unprecedented technological innovation, mass immigration, and intense political partisanship, including disputes over currency, tariffs, political corruption and patronage, and railroads and business trusts.”<sup>94</sup> Meanwhile, Native American dispossession spurred by White encroachment forced Plains Indians onto reservations in service to Manifest Destiny.<sup>95</sup> Blacks were being terrorized, brutalized,

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

<sup>86</sup> Nina Martyris, *Frederick Douglass on How Slave Owners Used Food as a Weapon of Control*, NPR (Feb. 10, 2017), <https://www.npr.org/sections/thesalt/2017/02/10/514385071/frederick-douglass-on-how-slave-owners-used-food-as-a-weapon-of-control> [<https://perma.cc/7Q6Q-EYTE>].

<sup>87</sup> *Id.*

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

<sup>89</sup> Ramiro Alberto Flores Gusmán, *The Feeding of Slave Population in the United States, the Caribbean, and Brazil: Some Remarks in the State of the Art*, 20(2) AM. LATINA EN LA HISTORIA ECONOMICA, 5, 8–9 (2013).

<sup>90</sup> *Id.* at 8.

<sup>91</sup> FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 75 (1855).

<sup>92</sup> Gusmán, *supra* note 89.

<sup>93</sup> *Overview of the Gilded Age*, DIGIT. HIST., <https://www.digitalhistory.uh.edu/era.cfm?eraid=9> [<https://perma.cc/LP66-BMH4>] (last visited Mar. 15 2021).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

and intimidated off what land they had managed to amass.<sup>96</sup> Many moved north for safety and job opportunities that they may not have experienced.<sup>97</sup>

Urban areas saw a boom in population as industries expanded and Southerners moved for employment and economic opportunities.<sup>98</sup> Alas, in the crowded inner city, there was little land for growing food that would offset the increased living expenses.<sup>99</sup> When cities expanded, Whites moved farther out, leaving Blacks but taking their services with them.<sup>100</sup> Those services would include full-service grocery stores, public transportation, sanitation, and hospitals to support White communities that eventually expanded to accommodate the Fair Housing Act-sponsored newly built starter homes for White veterans. Blacks were kept out of those neighborhoods by the practice of redlining.<sup>101</sup>

Remnants of redlining and the Jim Crow South are among the factors that contribute to concentrations of Blacks in urban areas with limited access to resources in impoverished and hyper-segregated communities.<sup>102</sup> These segregated communities place a considerably large toll on the health of Blacks for reasons that include lack of grocery stores.<sup>103</sup>

Living in food deserts is a major contributing factor to also living in a food swamp, where a glut of fast food restaurants dominates the food options.<sup>104</sup> Fast food restaurants contribute to the prevalence of

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<sup>96</sup> See Drew E. VandeCreek, *Illinois During the Gilded Age*, N. ILL. UNIV. DIGIT. LIBR., <https://digital.lib.niu.edu/illinois/gildedage/race> [https://perma.cc/39AQ-9XSC] (last visited Mar. 6, 2021).

<sup>97</sup> *City Life in the Late 19th Century*, LIBR. CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/city-life-in-late-19th-century/> [https://perma.cc/3CR6-UF8P] (last visited Oct. 16, 2020).

<sup>98</sup> *Id.*

<sup>99</sup> Kristen Cooksey-Stowers et al., *Food Swamps Predict Obesity Rates Better than Food Deserts in the United States*, 14 INT'L J. ENV'T RSCH. PUB. HEALTH, 1366, 1369 (2019).

<sup>100</sup> See Kalah Elantra Vance, *Culture, Food, and Racism: The Effects on African American Health*, 25 (2018) (Honors thesis, University of Tennessee at Chattanooga) [hereinafter *Culture, Food, and Racism*].

<sup>101</sup> Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america> [https://perma.cc/8TAK-WCKL].

<sup>102</sup> *Culture, Food, and Racism*, *supra* note 100, at 24.

<sup>103</sup> *Id.* at 25.

<sup>104</sup> "In regard to the relative importance of transportation in food deserts, we found that in areas where the population was less mobile, living in a food swamp was more closely

preventable and diet-related diseases because the food is nutrient poor.<sup>105</sup> Certainly, Black people are not the only demographic to suffer from diet-related diseases: “[T]he harm caused by over-consumption of fast food cuts across race and class lines, [but] its pronounced and extreme effect on low-income people of color represents a form of structural oppression . . . .”<sup>106</sup>

Because of its complexity, food oppression is often overlooked as a method of oppression in the larger context of civil and social rights. Food oppression is not the result of individual acts of discrimination; rather it stems from “institutionalized practices and policies of government and the fast food industry.”<sup>107</sup> Yet individual food choices are most often attributed to the poor health conditions and bad health outcomes of Black people.<sup>108</sup> This biased and myopic view of health disparities is pervasive and ignores how “[p]overty has the potential to play a role in both economics and overall health, as it limits an individual’s economic freedom.”<sup>109</sup> Lack of food access and disproportionate rates of poverty limit consumer ability to purchase nutrient dense and healthy foods like fruit, vegetables, lean meat, and fish.<sup>110</sup> This condition is unchanged for modern Black people.<sup>111</sup>

Urban dwellers suffer similar government policies of their forebears.<sup>112</sup> Those policies engender food oppression by allowing structural barriers to self-sufficiency and then providing insufficient public assistance for individuals and their families to sustain themselves.<sup>113</sup> And those without the privilege of owning land find themselves in a precarious situation that makes them more vulnerable

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associated with rates of obesity. This result is consistent with the idea that grocery shopping decisions are less convenience driven than food purchasing at unhealthy food retailers.” Cooksey-Stowers et al., *supra* note 99.

<sup>105</sup> Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CALIF. L. REV. 2221, 2222 (2007).

<sup>106</sup> *Id.*

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

<sup>108</sup> “It is widely acknowledged that cultural factors influence dietary preferences and behavior, particularly in minority populations. Most factors examining the influence of culture on diet have been conducted in African Americans.” Jessie A. Satia, *Diet-Related Disparities: Understanding the Problem and Accelerating Solutions*, J. AM. DIETETIC ASS’N 610, 612 (2009).

<sup>109</sup> *Culture, Food, and Racism*, *supra* note 100, at 20.

<sup>110</sup> *Id.* at 29.

<sup>111</sup> *Id.* at 25–26.

<sup>112</sup> *Id.* at 24–25.

<sup>113</sup> *Id.* at 24–25.

to food insecurity by nature of diminished access to the source of food.<sup>114</sup>

This condition extended to North American indigenous people as well. President Andrew Johnson is also infamous for his attempted genocide of Native Americans<sup>115</sup> and sold public lands to land-grant universities under the Morrill Land-Grant Act.<sup>116</sup> “The land was ‘available’ for purchase because for the previous four decades, the government had forced the removal of these tribes, often onto unhealthy, swampy and unfarmable reservations.”<sup>117</sup> This is somewhat distinguished from the disenfranchisement of Black farmers, but is nonetheless food oppression.

## V

### COLONIZERS GONNA COLONIZE: NATIVE AMERICAN LAND DISPOSSESSION

While Blacks were being tethered to Southern lands, Native Americans were being removed from midwestern ones. Though the Morrill Land-Grant Act of 1862 did not directly displace or take the land from Native Americans, it did provide a vehicle for the lands from which they were eventually displaced to be sold as public lands.<sup>118</sup>

Vermont Senator Justin Morrill introduced his Land-Grant Act that created land-grant universities.<sup>119</sup> The Act was less about producing a type of institution than it was about expanding options of higher learning beyond liberal arts—ostensibly democratizing higher education.<sup>120</sup> However, evidence suggests that students actually hailed from well-to-do families with considerable social standing.<sup>121</sup> Additionally, the support for scientific, agricultural, and engineering

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<sup>114</sup> *Id.*

<sup>115</sup> Alysa Landry, *Andrew Johnson: Racist Determined to ‘Relocate’ Indians*, INDIAN COUNTRY TODAY, Sept. 13, 2018, <https://indiancountrytoday.com/archive/andrew-johnson-racist-determined-to-relocate-indians#:~:text=In%20his%20third%20annual%20message,Johnson%20said%20the%20territories%20should> [https://perma.cc/7V8J-L8ED].

<sup>116</sup> Margaret Nash, *The Dark History of Land-Grant Universities*, WASH. POST, Nov. 8, 2019, <https://www.washingtonpost.com/outlook/2019/11/08/dark-history-land-grant-universities/> [https://perma.cc/AEH6-3JKY].

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* Morrill Act, Pub. L. No. 37-108, 12 Stat. 503 (1862).

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

<sup>120</sup> Nash, *supra* note 16, at 441–42.

<sup>121</sup> *Id.* at 442.

education had existed for decades.<sup>122</sup> Ultimately, what the Act lacked in originality, it made up in impact.

The Act granted tens of thousands of acres of what the federal government branded as public land to colleges and universities.<sup>123</sup> South Dakota State University, Iowa State University, and the University of California, for instance, have a land-grant heritage.<sup>124</sup> However, the land was already occupied, thereby making Native American dispossession fundamental to the establishment of these institutions and not an aside.<sup>125</sup> Legal justification for besetting such violence upon Native Americans was rooted in the Doctrine of Discovery in which the U.S. Supreme Court established “American Indians had no right to legal title of the land they occupied.”<sup>126</sup>

This tied nicely into the “concomitant establishment of white Protestant civilization” that by matter of process triggered the demise of Native American culture.<sup>127</sup> The “logic of elimination” was used by both settlers and the federal government to guarantee the removal of Native Americans<sup>128</sup> and allowed the blithe acceptance of genocide as necessary for settlers to establish communities. This “settler colonialism” was tied to a European agriculture that is geographically fixed and serves as a foundation for stationary communities and the growth of capitalism, and it provides an ability to feed non-food-growing people.<sup>129</sup>

However, settler colonialism is exploitative as it involves settlers moving with the intention of permanently staying in an area, bringing with and tolerating only their native social, cultural, and political systems.<sup>130</sup> “Settler colonialism results in societies where the settlers’ ‘descendants have remained politically dominant over indigenous peoples.’”<sup>131</sup> But most insidiously, settler colonialism wrenched land away from those who inhabited it and made the entire process of violent dispossession invisible by disavowing indigenous people were ever

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<sup>122</sup> *Id.* at 441–42.

<sup>123</sup> *Id.* at 439.

<sup>124</sup> *Id.* at 442.

<sup>125</sup> *Id.* at 439.

<sup>126</sup> *Id.* at 444.

<sup>127</sup> *Id.* at 445.

<sup>128</sup> *Id.* at 444.

<sup>129</sup> *Id.* at 445.

<sup>130</sup> *Id.* at 443.

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

there.<sup>132</sup> Again, those dispossessed people were then relegated to reservations with virtually unfarmable land.<sup>133</sup>

In this example of food oppression, the legal and political means ensuring only White settlers would have access to fertile and farmable land was only possible through the dispossession of Native people.<sup>134</sup> Additionally, the colleges and universities established to teach agricultural practices were built on lands of dispossessed people.<sup>135</sup> With traditional food stuff unavailable, Native Americans were left with culturally inappropriate commodities<sup>136</sup> on the reservations that seemed to contribute to the development of preventable diseases.

Commodity food boxes that continue to this day through the USDA began as rations intended as temporary assistance to the relocated people while the tribes transitioned to self-sufficient farming centers.<sup>137</sup> This was part of the government's larger "policy designed to make farmers out of the American Indians and thereby to help assimilate them into white society."<sup>138</sup> It didn't work for a multitude of reasons, including that these were culturally nomadic tribes and they were placed on barren lands.<sup>139</sup> The result was many Native Americans became "wholly dependent on these food subsidies" and the government "came to all but dictate the dietary intake of these indigenous groups."<sup>140</sup> "Beef and salt pork replaced bison, deer, and fish; wheat flour replaced cornmeal; refined sugar replaced honey, maple syrup, and dried fruits" with the goal of "civilizing" Native Americans and slowing endemic starvation, but did not emphasize nutrition.<sup>141</sup> It should not be surprising that Native Americans suffer similar health disparities and diet-related diseases as Blacks.<sup>142</sup>

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<sup>132</sup> *Id.* at 446.

<sup>133</sup> *Id.* at 455–56.

<sup>134</sup> *Id.* at 456.

<sup>135</sup> *Id.* at 457.

<sup>136</sup> *USDA Foods Available List for FDIPIR*, U.S. DEP'T AGRIC. FOOD & NUTRITION SERV. (Sept. 1, 2020), <https://www.fns.usda.gov/fdpir/usda-foods-available-list-fdpir> [<https://perma.cc/U95V-ZMYC>].

<sup>137</sup> Dana Vantrease, *Commod Bods and Frybread Power: Government Food Aid in American Indian Culture*, 126 J. AM. FOLKLORE 55, 56–57 (2013).

<sup>138</sup> *Id.* at 56.

<sup>139</sup> *Id.* at 57.

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

<sup>141</sup> *Id.*

<sup>142</sup> *Disparities*, INDIAN HEALTH SERVICE (Oct. 2019), <https://www.ihs.gov/newsroom/factsheets/disparities/#:~:text=American%20Indians%20and%20Alaska%20Natives%20continue%20to%20die%20at%20higher,and%20chronic%20lower%20respiratory%20disea>

## VI

**THERE'S NO SUCH THING AS SEPARATE BUT EQUAL:  
BLACK FARMER DISCRIMINATION**

It would seem the most logical way to encourage the independence of freedmen in the South would have been to encourage them to use their existing skill sets. Enslaved Blacks were largely agrarian, laboring in the fields and enduring the physical toil of farming pre-Industrial Revolution at the behest of their “masters.”<sup>143</sup> What might have been established was a replacement agricultural economy whereby the formerly enslaved people continued to grow all manner of agricultural products as commercial farmers, maintained contracts for production as business owners, and rebuilt the South as a global supplier via free trade.<sup>144</sup> Whether this was the intention of men like William Tecumseh Sherman and Otis Howard, we will never know. But history informs us that they were a part of multiple attempts to provide real opportunity for the freedmen to become self-sufficient.

William Sherman's Special Field Orders No. 15 provided “not more than (40) forty acres of tillable ground’ designated ‘for the settlement of the negroes now made free by the acts of war and the proclamation of the President of the United States.’”<sup>145</sup> Sherman's Reserve, established with Field Order No. 15, “reserved for settlement exclusively by former slaves the sea islands along the coast between Charleston, South Carolina, and the St. Johns River in northern Florida, together with the abandoned rice plantations extending inland for thirty miles.”<sup>146</sup> Alas, challenges to possessory titles, Johnson's veto cancelling the order, and the inability of many freedpeople to validate their ownership led to them being turned off their land.<sup>147</sup> In fact, Johnson “ordered the removal of former slaves from the coastal lands

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ses [<https://perma.cc/TS43-MM7S>]; *Creating Equal Opportunities for Health*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vitalsigns/aahealth/index.html> [<https://perma.cc/4U9X-WWM2>].

<sup>143</sup> *Culture, Food, and Racism*, *supra* note 100, at 15.

<sup>144</sup> “Free trade” is defined as “a policy by which a government does not discriminate against imports or interfere with exports by applying tariffs (to imports) or subsidies (to exports).” Editors of Encyclopedia Britannica, *Free Trade*, BRITANNICA, <https://www.britannica.com/topic/free-trade> [<https://perma.cc/6NAY-54F7>] (last visited Mar. 9, 2021).

<sup>145</sup> William Darity, Jr. & William A. Darity, Jr., *Forty Acres and a Mule in the 21st Century*, 89 SOC. SCI. Q. 656, 660 (2008). *See also* William T. Sherman, Special Field Order No. 15 – 40 Acres to Newly Freed Families (Jan. 16, 1865).

<sup>146</sup> RENÀ HAYDEN ET AL., FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867: SERIES 3, VOLUME 2: LAND AND LABOR, 1866-1867, at 216 (2013). *See also* Sherman, *supra* note 145.

<sup>147</sup> HAYDEN ET AL., *supra* note 146, at 217-21.

they had settled under the conditions of Sherman's Special Field Orders No. 15" returning the lands to former plantation owners.<sup>148</sup>

The Freedmen's Bureau Act also provided for "not more than 40 acres" of land to lease be provided to male freedmen at "three years' annual rent not exceeding 6 percent of the value of the land based on appraisal of the state tax authorities in 1860."<sup>149</sup> This was effectuated by freedmen working on "government farms" that had been seized from Confederate landowners and included an option to purchase after three years.<sup>150</sup> However, President Johnson's amnesty and pardon policies, not to mention his predilection to restore the land to the former proprietors, made land ownership for freedmen complicated to say the least.<sup>151</sup>

Under the Southern Homestead Act of 1866, freedmen "were to receive land in the southern states at a price of \$5 for 80 acres."<sup>152</sup> The Act "opened 46 million acres of federal land in Alabama, Arkansas, Florida, Louisiana, and Mississippi,"<sup>153</sup> but freedmen found it difficult to participate.<sup>154</sup> The 1866 Act is distinguished from the Homestead Act of 1862 that gave opportunity for citizens "who had never borne arms against the United States government" to claim up to 160 acres of public land.<sup>155</sup> However, the Homestead Act of 1862 granted a total of "84 million acres to settlers willing to move West, and other laws granting 127 million acres of land to railroad companies."<sup>156</sup>

The USDA preceded emancipation with its inception in 1862.<sup>157</sup> It was established "to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, rural development, aquaculture, and human nutrition, in the most general and comprehensive sense of those terms, and to procure,

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<sup>148</sup> Darity & Darrity, *supra* note 145, at 661.

<sup>149</sup> *Id.* at 660.

<sup>150</sup> HAYDEN ET AL., *supra* note 146, at 213.

<sup>151</sup> *Id.* at 212–13.

<sup>152</sup> Darity & Darrity, *supra* note 145, at 661.

<sup>153</sup> Southern Homestead, *supra* note 17.

<sup>154</sup> "Since the Homestead Act was signed into law by Lincoln in May 1862, few people from the South initially received any benefit from it. Yet given that it remained in place until 1934, well over a million and a half white families – both American-born and immigrant – profited from it." Keri Leigh Merritt, *Race, Reconstruction, and Reparations*, BLACK PERSPECTIVES (Feb. 9, 2016), <https://www.aaihs.org/race-reconstruction/> [<https://perma.cc/GF9Z-MQE4>].

<sup>155</sup> Homestead Act of 1862, Pub. L. No. 37-64 (1862).

<sup>156</sup> Nash, *supra* note 16.

<sup>157</sup> 7 U.S.C.A. § 2201 (1862).

propagate, and distribute among the people new and valuable seeds and plants.”<sup>158</sup> The responsibility of the USDA was to protect the rights, farms, and homesteads of all landowners.<sup>159</sup> Alas, “[s]ince its inception, the USDA has been accused of being the leader in discrimination among federal agencies and the major cause of black land loss in the modern era.”<sup>160</sup>

Despite the challenges, Black farmers managed to acquire, work, and retain ownership of land at a rate that reached its zenith “in 1910 at 16–19 million acres, according to the Census of Agriculture.”<sup>161</sup> The acreage owned by Black farmers has dropped to 4 million acres, which is around two percent of the total land available for farming according to the 2017 Census of Agriculture.<sup>162</sup> Although there are discrete contributing factors, Black farmers would likely say that diminished number is the direct result of systemic racism effectuated by the USDA and their representatives inflicting discriminatory policies and practices that brought financial ruin to Black farmers in the South.<sup>163</sup> And the courts have agreed.

In 1997, Black farmers filed suit against then Secretary Dan Glickman claiming the USDA discriminated against them and Black farmers as a whole in their administration of programs. Black farmers specifically claimed that “county officials have exercised their power in a racially discriminatory manner, resulting in delayed processing or denial of applications for credit and benefits by African-American farmers not experienced by white farmers who are similarly situated.”<sup>164</sup> More so, the “dismantling of the USDA’s Office of Civil Rights in 1983 [] violate[d] the Fifth Amendment, the Administrative Procedure Act, 5 U.S.C. ¶ 551 et seq.; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and the Equal Credit Opportunity Act (‘ECOA’), 15 U.S.C. § 1691, prohibiting discrimination in consumer credit.”<sup>165</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> Monica M. Clark, *So Near, Yet So Far: The Past, Present, and Future of the Complaints Process Within the USDA*, 32 S.U.L. REV. 139, 141 (2005).

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

<sup>161</sup> Jess Gilbert, Spencer D. Wood, & Gwen Sharp, *Who Owns the Land? Agricultural Land Ownership by Race/Ethnicity*, 17 RURAL AM. 55, 55 (2002).

<sup>162</sup> NAT’L AGRIC. STATS. SERV., USDA, SELECTED FARM CHARACTERISTICS BY RACE: 2017, at 72 (2017), [https://www.nass.usda.gov/Publications/AgCensus/2017/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/st99\\_1\\_0061\\_0061.pdf](https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/st99_1_0061_0061.pdf) [<https://perma.cc/FD8J-WG9Y>].

<sup>163</sup> See *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000).

<sup>164</sup> *Id.* at 1214.

<sup>165</sup> *Id.* at 1215.

There were two Tracks (A & B) under which a remedy was available, the former being a fast-track settlement process that required less rigorous review and documentation.<sup>166</sup> Under the resulting Consent Decree a farmer claiming discrimination in a credit transaction had four conjunctive burdens to meet for Track A:

- (1) that he owned or leased, or attempted to own or lease, farm land;
- (2) that he applied for a specific credit transaction at a USDA county office between January 1, 1981 and December 31, 1996;
- (3) that the loan was denied, provided late, approved for a lesser amount than requested, encumbered by restrictive conditions, or USDA failed to provide appropriate loan service, and such treatment was less favorable than that accorded specifically identified, similarly situated white farmers; and
- (4) that USDA's treatment of the loan application led to economic damage to the class member.<sup>167</sup>

Should the adjudicator find in favor of the farmer they would receive:

- (1) a cash payment of \$50,000;
- (2) forgiveness of all debt owed to the USDA incurred under or affected by the program that formed the basis of the claim;
- (3) a tax payment directly to the IRS in the amount of 25% of the total debt forgiveness and cash payment;
- (4) immediate termination of any foreclosure proceedings that USDA initiated in connection with the loan(s) at issue in the claim; and
- (5) injunctive relief including one-time priority loan consideration and technical assistance.<sup>168</sup>

In a report compiled by the Congressional Research Service,

[c]umulative data show that as of December 31, 2011, 15,645 (69%) of the 22,721 eligible class members had final adjudications approved under the Track A process, and 104 (62%) prevailed in the Track B process for a total cost of approximately \$1.06 billion in cash relief, tax payments, and debt relief.<sup>169</sup>

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<sup>166</sup> *Id.*

<sup>167</sup> *Pigford v. Glickman*, 185 F.R.D. 82, 96 (D.D.C. 1999).

<sup>168</sup> *Id.* at 97.

<sup>169</sup> Tadlock Cowan & Jody Feder, Cong. Rsch. Serv., RS20430, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, at i (2013).

Around 89,000 claim forms were mailed out and nearly 34,000 were returned complete and timely.<sup>170</sup> This in part sparked *In re Black Farmers Discrimination Litigation* (or *Pigford II*).

The 2008 Farm Bill permitted any claimant filing late under *Pigford* and “who had not previously obtained a determination on the merits of his or her claim to petition in federal court,” meaning they could file a new suit.<sup>171</sup> Multiple individual lawsuits were filed in response and were then consolidated into *Pigford II*.<sup>172</sup> Something must have been wrong with the notice, because nearly 60,000 applications were returned late.<sup>173</sup>

And though \$2.3 billion has been paid to compensate Black farmers who were injured by the USDA’s discrimination, billions more remain unpaid and thousands of farmers are yet to be made whole.<sup>174</sup> It is illogical to presume the very system of food oppression that disenfranchised the farmers initially would effectively self-police and right its own wrongs. But we as a society continue to expect it and seem surprised that we have carried the kernel of age-old discriminations forward into the twenty-first century. The use of law to subjugate and disenfranchise is not a new process. We perhaps have become a little more sophisticated in our implementation and have modernized the vehicles of oppression, but the racism that supports the physical debilitation of socially subordinate groups never went out of style.

#### CONCLUSION: EVERYTHING OLD IS NEW AGAIN

As a collective, we have spent centuries attempting to lay the blame within and across racial groups. We do ourselves a disservice trying to encourage or convince people of their role in unjust and inequitable systems. The perpetuation of any form of oppression is most felt by those who are marginalized. Therefore, it follows that discussion with the oppressors asking them to accept and correct their role for the good of us all are largely fruitless. This surely contributes to the tension and

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<sup>170</sup> *Id.* at 8.

<sup>171</sup> *Id.* at 7.

<sup>172</sup> *See In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 24 (D.D.C. 2011).

<sup>173</sup> *Id.* at 40.

<sup>174</sup> *Pigford Payouts to Black Farmers Reach \$2.5 B. Will There Be More?*, AGRI PULSE (July 9, 2014, 10:07 AM), <https://www.agri-pulse.com/articles/4200-pigford-payouts-to-black-farmers-reach-2-3-b-will-there-be-more#:~:text=The%20%242.3%20billion%20in%20Pigford,loans%20or%20other%20USDA%20benefits> [https://perma.cc/QHT9-W6HG].

the theory held by the marginalized that they are not heard. And who could blame them?

Particularly, Blacks in America have found themselves at the brunt of disparities. These disparities are commonly incorporated into the laws and policies of the U.S., making it near impossible for Blacks to achieve parity and equity with their White counterparts.<sup>175</sup> Laws that have been enacted to provide justice have historically needed additional fail-safes for both Blacks and Indigenous people.<sup>176</sup> Land dispossession of Native Americans was in full swing by 1862 under the Morrill Act.<sup>177</sup>

Consider the ability to vote. Voting by men was memorialized at the inception of our country. However, Black men were not considered men until the Fourteenth Amendment of 1868.<sup>178</sup> The Fifteenth Amendment of 1870 expressly provided Blacks the right to vote.<sup>179</sup> But it wasn't until the Voting Rights Act of 1965 that racial discrimination in voting was finally prevented.<sup>180</sup> These disparities, if not the outright racism of elected officials, have shown themselves within almost every government funding and protection opportunity, and they continue to influence how our society views oppression and equity.<sup>181</sup>

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<sup>175</sup> See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>176</sup> See *infra* Part V.

<sup>177</sup> *Id.*

<sup>178</sup> U.S. CONST. amend. XIV.

<sup>179</sup> U.S. CONST. amend. XV, § 1. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." *Id.*

<sup>180</sup> 52 U.S.C. § 10101(a). "Race, color, or previous condition not to affect right to vote . . ." *Id.*

<sup>181</sup> Andrew Johnson believed that Blacks were racially inferior and declared that "this is a country for white men . . . as long as I am President, it shall be a government for white men." *The Impeachment of Andrew Johnson*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/grant-impeachment/> [<https://perma.cc/G3AJ-P3NE>] (last visited Feb. 1, 2021). Disparate funding and municipal policies impacted the recovery of the Lower 9th Ward of New Orleans following Hurricane Betsy. Andy Horowitz, *Hurricane Betsy and the Politics of Disaster in New Orleans' Lower Ninth Ward, 1965-1967*, 80 J.S. HIST. 893 (2014). Minorities discontented with fewer services and opportunities resort to rioting and are blamed for their substandard living conditions. Neighborhoods see no economic redevelopment investment while merchants are reimbursed for their losses. See LLANA BARBER, *LATINO CITY: IMMIGRATION AND URBAN CRISIS IN LAWRENCE, MASSACHUSETTS 1945-2000* (2017). Millions intended to replace or repair Flint, MI, water system used for economic development instead. Ann Pierret, *Why Did \$46 Million of Flint Water Crisis Funds Go to Economic Development?*, ABC 12 NEWS (Feb. 18, 2020, 4:48 PM), <https://www.abc12.com/content/news/Why-did-46-million-of-Flint-water-crisis-funds-go-to-economic-development-567990001.html> [<https://perma.cc/RF5Y-FUSS>].

We can agree that the immortal words of author Toni Morrison are true: “[T]he function, the very serious function of racism . . . is distraction. It keeps you from doing your work. It keeps you explaining over and over again, your reason for being.”<sup>182</sup> If racism is a distraction, well-honed oppression holds our attention as it expertly conceals the costs of its actions. Racism—it turns our attention from and keeps us from addressing what is real and compels focus on the fictionalized narratives that shift both blame and responsibility to the subordinate groups. It invisibilizes the costs to equitably treated folk thereby leaving the impression that oppression is free. But it is not. We can choose to eschew the distractions, be present, and engage again on the things that are paramount to our collective growth—like being able to use the carrot as food as opposed to a weapon of continued oppression.

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<sup>182</sup> Toni Morrison, *A Humanist View*, Keynote Address at Portland State University (May 30, 1975) (transcribed by Keisha E. McKenzie, available at <https://pdxscholar.library.pdx.edu/orspeakers/90/>).