

# The Abolition of Food Oppression

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*Public health experts trace the heightened risk of mortality from COVID-19 among historically marginalized populations to their high rates of diabetes, asthma, and hypertension, among other diet-related comorbidities. However, food justice activists call attention to structural oppression in global food systems, perhaps best illuminated by the prevalence of unhealthy fast-food restaurants (and the lack of healthy alternatives) in low-income Black and Hispanic/Latinx neighborhoods nationwide. In response, local governments have begun to prioritize local food production to reduce food insecurity. Yet, even well-intentioned food justice initiatives, such as urban farming programs, can perpetuate structural inequities by glorifying entrepreneurialism or privatization as effective solutions to poverty. Further still, when lawmakers propose targeted relief programs for food insecure communities, such as the Biden Administration's federal debt relief program for socially disadvantaged farmers, they are routinely challenged on constitutional grounds for preferencing non-White racial and ethnic groups. Thus, food insecurity in the urban ghettos and rural towns of America persists.*

*To defeat this impasse, this Article advocates an abolition constitutionalist framing of food insecurity in the United States. Specifically, it argues that framing the problem of food insecurity in historically marginalized communities as a badge of the antebellum system of chattel slavery invokes the legislative potential of the Thirteenth Amendment's Enforcement Clause. Although the Supreme Court has empowered Congress to pass laws necessary for abolishing all badges and incidents of slavery, there remains a lack of clarity on the scope of material conditions or forms of discrimination that constitute such lingering harms, leading some lower courts to limit the Amendment's enforcement to literal slavery or involuntary servitude. Accordingly, this Article proposes a dignity-*

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*based normative framework to assess the nature of injuries or material conditions that are proximately traceable to the political economic system of American slavery. Using the problem of food insecurity as a guiding explanatory thread, this framework reveals how modern badges of slavery can inflict: (i) equality-based; (ii) liberty-based; and (iii) integrity-based dignitary harms. These dignitary harms, individually and collectively, can perpetuate the types of oppression levied by chattel slavery; in this instance, the exploitative, marginalizing, and violent harms of food oppression. Whether modern-day food oppression is animated by state action (or inaction) or by private actors, it not only hinders public health and degrades democracy, but most importantly, it also violates the spirit and letter of the Thirteenth Amendment.*

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*“Born sinner, the opposite of a winner  
Remember when I used to eat sardines for dinner?”*

— Notorious B.I.G.<sup>1</sup>

*“I have often been so pinched with hunger,  
that I have fought with the dog . . . .”*

— Frederick Douglass<sup>2</sup>

#### INTRODUCTION

A middle-aged Black man stands in front of a window with a smile.<sup>3</sup> “Hello,” he says with bouncing shoulders while pointing toward the glass pane. “Do you look good? Do you look good?” As the camera pans out, a young Black girl emerges next to him on the television screen, visibly embarrassed as the anxious man continues to speak to something or someone beyond the crystalline barrier. The girl utters in a hushed voice, “Daaaad,” as she listens to her father employ a tone of speech commonly associated with infants. “Yes, you do. Yeees yooou dooo,” the man sings before plucking his lips playfully while uttering cooing sounds. One presumes that the father and daughter are both peering through the window of a hospital nursery, until the camera pans out further still and several rows of miniature hamburger sliders come into view, each neatly organized upon a restaurant counter. A White man adorning a chef’s apron and a coy smirk packages the burgers one by one into small cardboard boxes and the commercial ends abruptly with the company’s logo and slogan plastered across the screen: *White Castle. What you crave.*

Growing up in the South Bronx, I spent several years obsessed with White Castle hamburger sliders. It became a weekly tradition, a cheap and savory reprieve from the monotony of Sunday afternoons before the sound of my

1. NOTORIOUS B.I.G., *Juicy*, on THE NOTORIOUS B.I.G.: GREATEST HITS, at 00:52 (Bad Boy Records 2007).

2. FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 75 (1855).

3. See TheClassicSports, 1999 – *White Castle Has “What You Crave,”* YOUTUBE (July 14, 2016), <https://www.youtube.com/watch?v=93-jPvmQk14>.

grandmother's voice on Monday mornings would snap me back into my weekday routine. As one might expect, I was a chubby kid. Although my mother refused to purchase the latest Air Jordan sneakers for me, our fridge and snack cabinet were rarely empty. As a result, when I first heard the phrase *food desert*—a geographical area with “limited access to affordable and nutritious food”<sup>4</sup>—I did not think of my home neighborhood in the South Bronx, a place where C-Town Supermarket was nestled between two corner store bodegas, and where Chinese food takeout spots dotted almost every avenue under the elevated train tracks. But, when I learned about the phrase *food swamp*—“a spatial metaphor to describe neighborhoods where fast food and junk food inundate healthy alternatives”<sup>5</sup>—I immediately thought about White Castle, McDonald's, Subway, Popeyes, Kentucky Fried Chicken, and several other lesser known fast-food restaurants, all within a one-mile radius of my childhood home.<sup>6</sup> Years later, I would question what it means for one to have grown up in a place referred to as a swamp—an overwhelming yet uncultivated place; a place inhabited by dangerous creatures; a place of transition—and emerge, I suppose, as one of America's swamp things.

These forgotten memories and unresolved questions resurfaced in early 2020 when the COVID-19 pandemic emerged. The world witnessed the disparate impact of the novel coronavirus on historically marginalized communities<sup>7</sup> across the United States, rapidly exposing America's uneven geography of public health.<sup>8</sup> The terror hit close to home as the spring of 2020 saw people living in the

4. U.S. DEP'T OF AGRIC., ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD: MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR CONSEQUENCES: REPORT TO CONGRESS 1 (2009), [https://www.ers.usda.gov/webdocs/publications/42711/12716\\_ap036\\_1\\_1.pdf](https://www.ers.usda.gov/webdocs/publications/42711/12716_ap036_1_1.pdf) [<https://perma.cc/S72E-VQ9V>].

5. Kristen Cooksey-Stowers, Marlene B. Schwartz & Kelly D. Brownell, *Food Swamps Predict Obesity Rates Better than Food Deserts in the United States*, INT'L J. ENV'T RSCH. & PUB. HEALTH, Nov. 14, 2017, at 1, 2.

6. See Olivia Limone & Nadia Sanchez, *Mapping Food Deserts (and Swamps) in Manhattan and the Bronx*, MEDIUM (Dec. 16, 2019), <https://medium.com/@olivialimone/mapping-food-deserts-and-swamps-in-manhattan-and-the-bronx-46c6d8fc0804> [<https://perma.cc/B627-CX2H>] (“65% of Manhattan's zip codes have zero fast food restaurant[s], while 71% of Bronx zip codes have at least one fast-food restaurant. And both boroughs are nearly the same in population, with the Bronx having about 1.5 million residents and Manhattan having about 1.6 million residents.”).

7. In this Article, I use the term “historically marginalized communities” to describe geographical areas that are primarily populated by cultural groups that have been pushed to the margins of society based upon racial, cultural, or other social categorizations, such as Black Americans, Hispanic/Latinx Americans, certain immigrants, and some religious groups. Importantly, class also embodies another way that certain groups are pushed to the margins of society where they often experience labor exploitation or governmental neglect. Thus, as this Article makes clear, communities primarily populated by people racialized as White can also be marginalized. Studies of the impact of the COVID-19 pandemic did not always clarify this nuance.

8. See Tiffany N. Ford, Sarah Reber & Richard V. Reeves, *Race Gaps in COVID-19 Deaths Are Even Bigger than They Appear*, BROOKINGS (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/KXF3-XLJN>]; Gregorio A. Millett, Austin T. Jones, David Benkeser, Stefan Baral, Laina Mercer, Chris Beyrer, Brian Honermann, Elise Lankiewicz, Leandro Mena, Jeffrey S. Crowley, Jennifer Sherwood & Patrick S. Sullivan, *Assessing Differential Impacts of COVID-19 on Black Communities*, 47 ANNALS EPIDEMIOLOGY 37, 37 (2020); Gina Kolata, *Social Inequities Explain Racial Gaps in Pandemic*, *STUDIES FIND*, N.Y. TIMES (July 27, 2021), <https://www.nytimes.com/2020/12/09/health/coronavirus-black-hispanic.html> (noting that higher rates of infection in Black American communities are not due to a

predominantly Black and Hispanic/Latinx low-income neighborhoods of the Bronx die at almost twice the rate of New York City's four other boroughs.<sup>9</sup> Other historically marginalized communities across the country soon reported similar devastation, from Detroit, Michigan; to Chicago, Illinois; to the nation's capital, Washington, D.C.<sup>10</sup> Public health experts have traced the heightened risk of mortality from COVID-19 among these populations to their high rates of diabetes, asthma, and hypertension, among other comorbidities.<sup>11</sup> Many critics blame the prevalence of such coexisting conditions on the food consumption choices of these vulnerable populations, reflecting the politics of personal responsibility that “dominates medical, scientific, and social views of health.”<sup>12</sup>

However, food justice activists and progressive scholars have deepened the analysis by calling attention to structural oppression levied by the U.S. food system.<sup>13</sup> Pushing further than the traditional conception of oppression as the exercise of “tyranny of a ruling group over another,” the political theorist Iris Marion Young defined oppression as “systemic constraints on groups” and as “structural, rather than the result of a few people's choices or policies,” adding that such “oppressions are systematically reproduced in major economic, political, and cultural institutions.”<sup>14</sup> Thus, the prevalence of unhealthy fast-food restaurants (and the lack of healthy alternatives) in low-income Black and Hispanic/Latinx

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higher susceptibility to the virus, but instead to higher rates of exposure instigated by social determinants such as type of employment and use of public transportation).

9. Ese Olumhense & Ann Choi, *Bronx Residents Twice As Likely to Die from COVID-19 in NYC*, BRONX TIMES (Apr. 6, 2020), <https://www.bxtimes.com/bronx-residents-twice-as-likely-to-die-from-covid-19-in-nyc/> [https://perma.cc/R87B-CZ2R]; Jeffrey C. Mays & Andy Newman, *Virus Is Twice As Deadly for Black and Latino People than Whites in N.Y.C.*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/04/08/nyregion/coronavirus-race-deaths.html>.

10. See RASHAWN RAY, JANE FRAN MORGAN, LYDIA WILEDEN, SAMANTHA ELIZONDO & DESTINY WILEY-YANCY, BROOKINGS, EXAMINING AND ADDRESSING COVID-19 RACIAL DISPARITIES IN DETROIT 2, 13 (2021), [https://www.brookings.edu/wp-content/uploads/2021/02/Detroit\\_Covid\\_report\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2021/02/Detroit_Covid_report_final.pdf) [https://perma.cc/LD46-ZLA3]; Kelly Bauer, *See How Coronavirus Has Impacted Every Corner of Chicago*, BLOCK CLUB CHI. (Jan. 25, 2021, 9:05 AM), <https://blockclubchicago.org/2021/01/25/see-how-coronavirus-has-impacted-every-corner-of-chicago/> [https://perma.cc/57UX-G5RG]; Jaclyn Diaz & Matthew S. Schwartz, *The Nation's Capital Has the Highest COVID Risk Level in the Country*, NPR (Dec. 28, 2021, 11:20 AM), <https://www.npr.org/2021/12/28/1068417547/the-nations-capital-is-the-worst-place-for-covid-19-infections-right-now> [https://perma.cc/5UQ8-KF3N].

11. See Ford et al., *supra* note 8; *Diabetes and African Americans*, OFF. OF MINORITY HEALTH, U.S. DEP'T OF HEALTH & HUM. SERVS. (Feb. 17, 2023, 3:35 PM), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=18> [https://perma.cc/GE6N-77U4]; *Heart Disease and African Americans*, OFF. OF MINORITY HEALTH, U.S. DEP'T OF HEALTH & HUM. SERVS. (Mar. 9, 2023, 10:20 AM), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=19> [https://perma.cc/CB3Q-BUPJ].

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

13. For example, the experience of immigrant farmworkers in the United States during the COVID-19 pandemic reflects the systematic exploitation, marginalization, and violence inflicted upon that labor force. See Helena Bottemiller Evich, Ximena Bustillo & Liz Crampton, *Harvest of Shame: Farmworkers Face Coronavirus Disaster*, POLITICO (Sept. 8, 2020, 4:30 AM), <https://www.politico.com/news/2020/09/08/farmworkers-coronavirus-disaster-409339> [https://perma.cc/S4LX-PERF].

14. Iris Marion Young, *Five Faces of Oppression*, in LISA HELDKE & PEG O'CONNOR, OPPRESSION, PRIVILEGE, AND RESISTANCE: THEORETICAL PERSPECTIVES ON RACISM, SEXISM, AND HETEROSEXISM 37, 39 (2004).

neighborhoods nationwide suggests not merely the possibility of structural racism,<sup>15</sup> but even more, the prospect of structural oppression rooted in the “exploitation, marginalization, powerlessness, cultural imperialism, and violence” produced by food ecosystems.<sup>16</sup> The COVID-19 pandemic has only made matters worse. Prior to the pandemic, studies reported that *food insecurity*—defined by the U.S. Department of Agriculture (USDA) as “a lack of consistent access to enough food for every person in a household to live an active, healthy life”<sup>17</sup>—plagued more than thirteen million households across the United States, with a disparate impact on Black and Hispanic/Latinx households.<sup>18</sup> Whereas in 2018, eleven percent of households experienced food insecurity, by March 2020, thirty-eight percent of households were experiencing food insecurity as global food systems grew increasingly fragile.<sup>19</sup> Beyond the social determinants of health,<sup>20</sup> the marginality and powerlessness experienced by such populations in relation to global food markets, this Article argues, find their roots in the antebellum political and economic system of chattel slavery.<sup>21</sup>

To address food insecurity and boost public health in the wake of COVID-19’s wrath, U.S. local governments have begun to emphasize local food production. Yet, even well-intentioned local food systems, such as urban farming programs,

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15. See generally CTR. FOR REG’L FOOD SYS., MICH. STATE UNIV., AN ANNOTATED BIBLIOGRAPHY ON STRUCTURAL RACISM PRESENT IN THE U.S. FOOD SYSTEM (9th ed. 2022), <https://www.canr.msu.edu/foodsystems/uploads/files/Annotated-Bibliography-on-Structural-Racism-Present-in-the-U.S.-Food-System-Ninth-Edition.pdf> [<https://perma.cc/T7MT-QWF2>] (compiling list of research and outreach focused on “structural racism in the U.S. food system”).

16. Young, *supra* note 14, at 38; see 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); Andrew Small, *How Fast Food Cornered the Urban Market*, BLOOMBERG (Mar. 31, 2017, 12:23 PM), <https://www.bloomberg.com/news/articles/2017-03-31/how-the-government-promoted-fast-food-in-cities>.

17. *Hunger and Food Insecurity*, FEEDING AM., <https://www.feedingamerica.org/hunger-in-america/food-insecurity> [<https://perma.cc/VSH9-9BMJ>] (last visited Mar. 31, 2023).

18. ALISHA COLEMAN-JENSEN, MATTHEW P. RABBITT, CHRISTIAN A. GREGORY & ANITA SINGH, U.S. DEP’T OF AGRIC., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2019, at 4, 16 (2020), <https://www.ers.usda.gov/webdocs/publications/99282/err-275.pdf> [<https://perma.cc/NK2N-XBNZ>]; see Sarah Bowen, Sinikka Elliott & Annie Hardison-Moody, *The Structural Roots of Food Insecurity: How Racism is a Fundamental Cause of Food Insecurity*, SOC. COMPASS, July 2021, at 1, 2.

19. See Hojatollah Kakaei, Heshmatollah Nourmoradi, Salar Bakhtiyari, Mohsen Jalilian & Amin Mirzai, *Effect of COVID-19 on Food Security, Hunger, and Food Crisis, in COVID-19 AND THE SUSTAINABLE DEVELOPMENT GOALS 3, 5* (Mohammad Hadi Dehghani et al. eds., 2022). To be sure, governmental support during the COVID-19 pandemic reduced food insecurity among families with children. See Diane Schanzenbach, *The Pandemic Drop in Food Insecurity Among Families with Children*, ECONOFACT (Oct. 13, 2022), <https://econofact.org/the-pandemic-drop-in-food-insecurity-among-households-with-children> [<https://perma.cc/LFM9-SQF3>]. But such trends are showing signs of reversal as pandemic aid comes to an end. See *id.*

20. See Paula Braveman & Laura Gottlieb, *The Social Determinants of Health: It’s Time to Consider the Causes of the Causes*, 129 PUB. HEALTH REP. 19, 19 (2014) (discussing a variety of social health determinants, such as “the conditions in which people are born, grow, live, work and age” as fundamental drivers of health outcomes).

21. See *The History of Our Food System Is Rooted in Racism*, FREIGHT FARMS (Aug. 10, 2020), <https://www.freightfarms.com/blog/history-food-system> [<https://perma.cc/8HKX-5YYW>]; Andrea Freeman, *Unconstitutional Food Inequality*, 55 HARV. C.R.-C.L.L. REV. 840, 903–04 (2020).

can entrench “neoliberal” norms into expanding food markets<sup>22</sup> (for example, pro-business policies that promote entrepreneurialism and the privatization of local property through tax-based incentives).<sup>23</sup> When such efforts overlook the benefits of community ownership models for land development and food production, such as community land trusts and worker-owned cooperatives,<sup>24</sup> they tend to perpetuate the very systems of oppression they seek to overcome. For example, Washington, D.C.’s recent efforts to update its decades-old urban farming legislation has yet to resolve the pervasive food insecurity in the District’s predominantly Black and Hispanic/Latinx wards, which also house the capital’s lowest-income residents.<sup>25</sup> Further still, even when lawmakers propose progressive food justice programs that address food insecurity in historically marginalized communities, such as the Biden Administration’s federal debt relief program for socially disadvantaged farmers and ranchers under the American Rescue Plan Act of 2021,<sup>26</sup> they are routinely challenged on constitutional grounds for preferring non-White racial and ethnic groups.<sup>27</sup>

As a result, food insecurity in the urban ghettos and rural towns of America persists as poverty cycles from generation to generation and structural oppression becomes increasingly normalized. However, this problem is not new. Since the abolition of chattel slavery in 1865, U.S. law and policy makers have been divided on the appropriate role for government in the battle against poverty and food insecurity, especially with respect to the plight of Black Americans. On the one hand, critics of progressive governmental programs during Reconstruction, such as the Redeemers and Bourbon Democrats, advocated for a libertarian

22. See 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, 1789 n.21 (2020) (“Neoliberalism is a mode of governance and legitimation that enforces specific distributions and configurations of ‘market discipline’ that support profits and managerial power over democratically determined social guarantees—for instance, labor market ‘liberalization,’ erosion of unions’ role in the economy, and rollbacks of social provision.”).

23. See Etienne C. Toussaint, *Black Urban Ecologies and Structural Extermination*, 45 HARV. ENV’T L. REV. 447, 475 (2021).

24. *Plants and Policies: How Urban Farming Is Transforming Cities*, AURORA UNIV. (Sept. 19, 2019), <https://online.aurora.edu/plants-policies-urban-farming/> [https://perma.cc/DBT9-JGEJ].

25. See Toussaint, *supra* note 23, at 486 (“D.C.’s urban farming program, as it currently stands, will not significantly reduce food insecurity. Rather, the fate of D.C.’s Black urban ecologies may grow worse, in large part due to the racial capitalist norms and neoliberal ideals incorporated into the legislation.”).

26. American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 1005–1006, 135 Stat. 4, 12–14. The program built upon the Justice for Black Farmers Act introduced by U.S. Senators Cory Booker (D-NJ) and Elizabeth Warren (D-MA), among others, in February 2021. For more information, see *Booker, Warren, Gillibrand, Smith, Warnock, and Leahy Announce Comprehensive Bill to Address the History of Discrimination in Federal Agricultural Policy*, CORY BOOKER (Feb. 9, 2021), <https://www.booker.senate.gov/news/press/booker-warren-gillibrand-smith-warnock-and-leahy-announce-comprehensive-bill-to-address-the-history-of-discrimination-in-federal-agricultural-policy> [https://perma.cc/4VKF-6PDU].

27. Although a discussion of these constitutional challenges is beyond the scope of this Article, for an example of a race-based challenge to the American Rescue Plan Act, see generally *Wynn v. Vilsack*, 545 F. Supp. 3d 1271 (M.D. Fla. 2021). For a broader discussion of constitutional challenges to race-based programs, see generally Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21 (2004).

approach to poverty alleviation that prioritizes free markets and private business development.<sup>28</sup> Similar to the social theories advanced by many modern conservatives to explain the food insecurity of low-income neighborhoods,<sup>29</sup> Redeemers and Bourbon Democrats likely contended that formerly enslaved Black people were to blame for their poor diets, poor health, and high rates of food-related disease.<sup>30</sup> As to be expected, nineteenth-century social conservatives viewed the race-based food programs initiated by The Bureau of Refugees, Freedmen, and Abandoned Lands (also known as the Freedmen's Bureau) with suspicion and contempt.<sup>31</sup>

On the other hand, much like the Radical Republicans of the Reconstruction Era, modern progressives have advocated for a welfare state political system, whereby the government takes a hands-on approach toward bolstering the social and economic well-being of all citizens to establish the basis for equality under law.<sup>32</sup> Modern researchers have shown that limited access to affordable, healthy, and nutrient-rich food, coupled with inadequate resources for health education, has routinely plagued impoverished communities across U.S. history.<sup>33</sup> Such scholars emphasize the political and economic dimensions of poverty that drive food insecurity in historically marginalized communities, both urban and rural. There, residents routinely suffer from inadequate health care services, limited educational resources, housing instability, environmental insecurity, unstable and low-wage jobs, and other missing institutional structures necessary for resilience.<sup>34</sup> Consequently, advocates have pushed for more aggressive relief and public assistance programs, and have increasingly turned to the Reconstruction Era's

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28. See *infra* notes 60–66 and accompanying text.

29. See, e.g., Andrea Freeman, Comment, *Fast Food: Oppression Through Poor Nutrition*, 95 CALIF. L. REV. 2221, 2223 (2007) (“[A]dvocates of ‘personal choice’ blame low-income people of color for their own weight issues and health crises, linking these problems to individual moral and cultural failures instead of placing the problems in the broader, historical context of long-entrenched policies and practices.”).

30. Cf. Brett Milano, *How Slavery Still Shadows Health Care*, HARV. GAZETTE (Oct. 29, 2019), <https://news.harvard.edu/gazette/story/2019/10/ramifications-of-slavery-persist-in-health-care-inequality/> [<https://perma.cc/PU92-WTEP>]. Indeed, many emancipated Black people worked cooperatively to provide their own healthy food resources, notwithstanding limited governmental support. See generally MONICA M. WHITE, *FREEDOM FARMERS: AGRICULTURAL RESISTANCE AND THE BLACK FREEDOM MOVEMENT* (2018) (describing historic efforts among Black farmers to work collectively and resist discriminatory market forces).

31. For discussions of attitudes toward Freedmen's Bureau programs, see generally GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN'S BUREAU* (1955); Ira C. Colby, *The Freedman's Bureau: From Social Welfare to Segregation*, 46 PHYLON 219 (1985); and Reggie L. Pearson, “*There are Many Sick, Feeble, and Suffering Freedmen*”: *The Freedmen's Bureau's Health-Care Activities During Reconstruction in North Carolina, 1865-1868*, 79 N.C. HIST. REV. 141 (2002).

32. See *infra* note 243 and accompanying text.

33. See Mariam K. Ahmed, (*Not*) *My Plate: The Factors That Affect the Diets of Impoverished Communities*, AM. BAR ASS'N, [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-state-of-healthcare-in-the-united-states/diets-of-impoverished-communities/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/diets-of-impoverished-communities/) [<https://perma.cc/C7QH-DA2C>] (last visited Apr. 3, 2023); Hilmers et al., *supra* note 16, at 1644–45, 1652.

34. See Etienne C. Toussaint, *Of American Fragility: Public Rituals, Human Rights, and the End of Invisible Man*, 52 COLUM. HUM. RTS. L. REV. 826, 826, 890 (2021) (“[W]hile some Americans may in fact experience a shared sense of dependency across time, others may experience a shared sense of being



Thirteenth Amendment as a legislative weapon to address lingering badges of the antebellum system of chattel slavery in modern society.<sup>35</sup>

This Article does not settle once and for all the age-old debate over the appropriate governmental stance toward the political, social, and economic well-being of the descendants of formerly enslaved Americans and other marginalized populations in the United States,<sup>36</sup> notwithstanding its salience to ongoing food justice efforts. Instead, it begins with a more fundamental question: has political debate over the legitimacy and scope of the American welfare state obscured the unfinished work of the Reconstruction Amendments? One might argue, as Professor Andrea Freeman asserts, that the persistence of food insecurity in historically marginalized communities across the United States reflects not merely the shortcomings of state-sponsored food distribution and nutrition programs, but more fundamentally, the stain of the antebellum system of chattel slavery.<sup>37</sup> To Freeman, the saturation of unhealthy fast-food restaurants in low-income Black and Hispanic/Latinx neighborhoods nationwide, coupled with a lack of access to healthy and nutrient-rich alternatives, amounts to *food oppression*—“not the product of individual acts of discrimination,” but “the institutionalized practices and policies of government and the fast-food industry.”<sup>38</sup> Beyond probing the reach of the welfare state, this assertion calls into question the very structure of the U.S. law and political economy that undergirds its modern food system. Does modern food insecurity reflect a type of structural oppression that stems from the antebellum era, and if so, can anything be done to abolish it?

As part of a recent wave of legal scholarship resurfacing the significance of the Reconstruction Amendments to the social, economic, and environmental crises of our modern age,<sup>39</sup> this Article builds upon the work of Andrea Freeman and other food justice scholars to advance an abolition constitutionalist framing of food insecurity in the United States.<sup>40</sup> It similarly argues that food insecurity in

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*time-haunted*, or chased by an American past invoked by rituals of white supremacy that circumscribe their daily lives.”).

35. See, e.g., William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1316 & n.13 (2007).

36. This debate has shaped debate within the Black community regarding the best strategies to combat racial discrimination and overcome structural oppression. See W. E. BURGHARDT DU BOIS, *Of Mr. Booker T. Washington and Others*, in THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES 41, 41–59 (5th ed. 1904); Lateef Mtima, *African-American Economic Empowerment Strategies for the New Millennium – Revisiting the Washington–DuBois Dialectic*, 42 HOW. L.J. 391, 394–99 (1999). See generally Etienne C. Toussaint, *Dismantling the Master’s House: Toward a Justice-Based Theory of Community Economic Development*, 53 U. MICH. J.L. REFORM 337 (2019) (describing the historic dialogue between Booker T. Washington and W.E.B. Du Bois during the early twentieth century over the best methods to aid Black American communities suffering under an oppressive Jim Crow legal regime).

37. Freeman, *supra* note 21.

38. See Freeman, *supra* note 29, at 2222.

39. See, e.g., Freeman, *supra* note 21, at 840; Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 87 (2022); Fareed Hayat, *Abolish Gang Statutes with the Power of the Thirteenth Amendment*, 70 UCLA L. REV. (forthcoming 2023) (manuscript at 1) (on file with author).

40. For a discussion of abolition constitutionalism, see Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 491–92 (2003) (“The radical abolitionists’ ideology, which gave birth to the idea [of

historically marginalized communities can and should be viewed as a vestige of the antebellum system of chattel slavery. As the Supreme Court declared in *Jones v. Alfred H. Mayer Co.*, Congress is empowered to “pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.”<sup>41</sup> Still, as Professor William M. Carter, Jr. and other constitutional scholars have noted, there remains a lack of clarity on the scope of material conditions or forms of discrimination that constitute badges of American slavery,<sup>42</sup> often rendering it “fool’s gold” in the eyes of progressives as a tool for structural reform.<sup>43</sup> When does food insecurity become a badge of the antebellum system of chattel slavery? Even if certain types of food insecurity are deemed badges of slavery, does the Amendment apply to non-racial classifications, such as groupings by gender?<sup>44</sup> Further still, does the Amendment abolish those types of food insecurity that embody a badge of slavery even in the absence of implementing legislation?<sup>45</sup> Can aggrieved parties bring a direct cause of action under the Amendment?<sup>46</sup>

To begin resolving these discrepancies, this Article pursues two primary objectives. First, it describes how food oppression was used during the antebellum era to constitute the subordinate social status of enslaved Black people. White enslavers not only expropriated the labor value of the enslaved population, but also used food access to inflict violence upon Black people and confine them to the margins of social life. Specifically, enslavers rationed nutrient-rich and fresh food to the enslaved class, exposed the enslaved class to food-related diseases, and isolated the enslaved class in communities of food deprivation.<sup>47</sup> As this Article argues, these material conditions of structural food oppression signified the abjection of

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reinterpreting the Constitution as a means of transforming America from a slave-holding nation to a humanity-upholding nation for the betterment of *all*, stands as the most authoritative point of reference in evaluating the civil rights law that has subsequently developed.”) and Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 60 (2019) (defining “abolition constitutionalism” as “a mixture of natural law and constitutional principles that opposed slavery”).

41. 392 U.S. 409, 439 (1968).

42. See Carter, Jr., *supra* note 35, at 1316; see also Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment’s Role in the Struggle for Reproductive Rights*, 3 J. GENDER, RACE & JUST. 401, 424 (2000) (“[T]he precise scope of the Thirteenth Amendment remains undefined. This creates an opportunity for creative litigators and legal scholars to attempt to persuade courts that a particular practice or condition violates the Thirteenth Amendment.”).

43. See, e.g., Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1737–38 (2012).

44. See Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1143 (1998) (“[T]he promise of the Thirteenth Amendment for women is split down race lines. All women may claim the Amendment’s protections against states of [actual] servitude . . . . Black women may invoke the civil rights statutes based on the Thirteenth Amendment for claims of racial discrimination.” (footnote omitted)).

45. See *City of Memphis v. Greene*, 451 U.S. 100, 125 (1981) (noting that Congress’s power to eliminate the badges and incidents of slavery “is not inconsistent with the view that the Amendment has self-executing force”).

46. See *Sanders v. A.J. Canfield Co.*, 635 F. Supp. 85, 87 (N.D. Ill. 1986) (suggesting that the Thirteenth Amendment does grant a right to bring a “direct private cause of action” for being harmed by a badge or incident of slavery).

47. See Freeman, *supra* note 21, at 845–54.

Black life, thereby legitimating the institution of slavery by casting Blackness as undeserving of equality, liberty, or bodily integrity. To put it bluntly, Blackness was conveyed as something less than human.

After emancipation, the U.S. government allowed these tools of state-sanctioned food oppression to persist in overt and surreptitious ways. In so doing, U.S. state and local governments perpetuated the food insecurity of marginalized Black American communities, as well as other minoritized and exploited populations.<sup>48</sup> These practices inspired the development of the term “food-apartheid,” which describes neighborhoods where exploitative and inequitable food practices predominantly harm low-income and non-White groups, often in support of the profit-making ends of global food corporations.<sup>49</sup> Efforts by the U.S. federal government to mitigate food insecurity—for example, the USDA Food Stamps Program, now known as SNAP<sup>50</sup>—have struggled to overcome the racial biases and stigmas embedded in modern food systems.<sup>51</sup> As a result, residents of food insecure neighborhoods continue to endure the exploitation, marginalization, and violence of food oppression, not dissimilar from that experienced by the enslaved class during the antebellum era.<sup>52</sup> Whether modern-day food oppression is state-sponsored or animated by private actors, it not only hinders public health, but calls into question both the spirit and letter of the Thirteenth Amendment.<sup>53</sup> To be sure, this descriptive claim lacks an explicitly normative dimension, suggesting that food oppression in Black neighborhoods could be mere coincidence or a tenuous correlation. Indeed, not every hardship of antebellum life should be lumped under the mantle of slavery. What are the fundamental injustices of food oppression that render it a badge of slavery?

This Article’s second objective, then, is to clarify the normative dimensions of modern food oppression that link it to the antebellum era. Specifically, it proposes a dignity-based normative framework to guide judges, legislators, prospective litigants, and scholars in deciding whether certain modern-day harms constitute a badge of slavery. Characterizing the lingering harms of slavery requires a more robust conception of the way the so-called peculiar institution oppressed enslaved

48. See *id.* at 846, 856–57. This Article defines “Black American communities” as neighborhoods where the majority of the people who live there identify as African-American or as members of other African diaspora cultures.

49. Toussaint, *supra* note 23, at 451; see Shawn “Pepper” Roussel, *The Carrot Is the Stick: Food as a Weapon of Systemic Oppression for Black Consumers and the Disenfranchisement of Black Farmers*, 36 J. ENV’T L. & LITIG. 129, 130, 132, 141 (2021).

50. See *infra* Section II.B.

51. See Parker Gilkesson, *Finalized SNAP Rule is Rooted in Racial Discrimination*, CTR. FOR L. & SOC. POL’Y (Dec. 10, 2019), <https://www.clasp.org/blog/finalized-snap-rule-rooted-racial-discrimination/> [<https://perma.cc/WVP6-YJNK>].

52. See *infra* Part II; cf. Carter, Jr., *supra* note 35, at 1317 (noting the importance of “analyzing whether the practice or condition at issue has a real connection to the institution of chattel slavery . . . and the consequent injuries thereof that motivated the Amendment’s adoption”).

53. The Civil Rights Cases, 109 U.S. 3, 20 (1883) (“[T]he [Thirteenth] amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”).

people, individually, and shaped the lives of all antebellum era citizens, collectively.<sup>54</sup> Unarmed with a clear legal framework to assess the nature of the harms that litigants claim are vestiges of chattel slavery, several lower courts have already limited the Thirteenth Amendment's Enforcement Clause to only literal slavery or involuntary servitude.<sup>55</sup> William M. Carter, Jr. has advocated that: "[T]he badges and incidents of slavery prohibited by the Thirteenth Amendment be defined with reference to two primary issues: (1) the connection between the class to which the plaintiff belongs and the institution of chattel slavery, and (2) the connection the complained-of injury has to that institution."<sup>56</sup> Building upon Carter's two-pronged approach, this Article's dignity-based framework seeks to assess, more intentionally, the nature of injuries or material conditions that are proximately traceable to chattel slavery as a political economic system. Slavery's system of oppression influenced class-based relations during the antebellum era, shaping beliefs about the meaning of free and unfree labor in the United States. However, beyond coordinating the labor expropriation of enslaved Black people who toiled under the threat of violence or death, as well as coordinating the labor exploitation of indentured and low-wage workers who faced the threat of poverty or starvation, the U.S. system of chattel slavery, this Article argues, also inflicted dignitary harms upon its marginalized workers, thereby shaping the meaning of human dignity that undergirds U.S. citizenship.

More specifically, the ubiquity of dignitary harms experienced by the enslaved population during the antebellum era framed broader discussions about human dignity in U.S. law and political economy. The dignitary harms of slavery not only established the social inferiority of Black people, but they also granted moral legitimacy to the ideology of White supremacy that both governed the southern plantation economy and bolstered free wage labor in northern industrial markets.<sup>57</sup> Further, such harms contextualized constitutional debates after the Civil

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54. By exploring this question, this Article adds to the rich volume of literature exploring this fundamental aspect of the Thirteenth Amendment. *See, e.g.*, ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* 7 (2004); Bridgewater, *supra* note 42, at 403, 410; William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 17 (2004); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 1 (1995); Marco Masoni, Note, *The Green Badge of Slavery*, 2 GEO. J. ON FIGHTING POVERTY 97, 98 (1994) (arguing that environmental degradation of Black American communities is remnant of slavery); Larry J. Pittman, *A Thirteenth Amendment Challenge to Both Racial Disparities in Medical Treatments and Improper Physicians' Informed Consent Disclosures*, 48 ST. LOUIS U. L.J. 131, 133 (2003).

55. *See Crenshaw v. City of Defuniak Springs*, 891 F. Supp. 1548, 1556 (N.D. Fla. 1995) ("While neither the Supreme Court . . . or the Courts of Appeal have decided the extent to which a direct cause of action exists under the Thirteenth Amendment, district courts have uniformly held that the amendment does not reach forms of discrimination other than slavery or involuntary servitude."); *see also* Carter, Jr., *supra* note 54, at 52 n.184, 79 (discussing lower courts' narrow interpretation of the judiciary's power under the Thirteenth Amendment).

56. Carter, Jr., *supra* note 35, at 1366.

57. This Article employs Frances Lee Ansley's definition of White supremacy, which emphasizes not merely its interpersonal dimensions, but more poignantly, its structural manifestations across social institutions. *See* Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989). According to Ansley, White supremacy is "a

War on the meaning of liberty, equality, and bodily integrity in relation to U.S. citizenship. To be sure, the concept of human dignity can seem nebulous, deployed in various and sometimes contradictory ways by constitutional courts around the world. Indeed, the U.S. Constitution does not define the term. This Article proposes that three popular philosophical framings of human dignity—dignity as equality; dignity as liberty; and dignity as integrity—be integrated into a unified ontological conception of the human condition essential for democratic citizenship. Consequently, the constitutional rights of citizenship established by the Reconstruction Amendments, beginning with the Thirteenth Amendment’s commitment to freedom from enslavement and indentured servitude, should be viewed, at a minimum, as a right to be free from the types of oppression that established the indignity of slavery.

This Article proceeds in three parts. Part I begins by describing how food insecurity was weaponized during the antebellum era to oppress enslaved Black people and establish their status as less than human and thereby undeserving of citizenship. Then, it discusses the abolitionist purpose of the Thirteenth Amendment. Specifically, this Part notes the work of the Freedman’s Bureau during Reconstruction to mitigate food insecurity, demonstrating a view that improving access to life-sustaining food was a necessary step toward dismantling the lingering vestiges of slavery. Finally, this Part discusses some of the ongoing efforts of racial justice activists toward using the Thirteenth Amendment’s enforcement power to achieve the reconstructive goals of the Freedman’s Bureau. A review of important case law shows how the Supreme Court has affirmed the power of Congress to abolish all lingering badges and incidents of slavery. Yet, the Court has failed to provide clarity on the scope of material conditions and forms of discrimination that are applicable to the Amendment.

Part II follows by building the causal link between modern food insecure neighborhoods and the oppressive culture of the plantation economy, thereby demonstrating how vestiges of antebellum food oppression have shaped food laws and public policies since emancipation.<sup>58</sup> Through a historical survey of food justice efforts since Reconstruction, this Part highlights how food laws and public policies have failed to resolve the unmet food needs of marginalized communities. Specifically, local governments have enabled the rationing of nutrient-rich food to historically marginalized communities, the exposure of such communities to food-related disease, and the isolation of such communities within geographies characterized by food deprivation. These vectors of food oppression have operated collectively to further the capital accumulation and profit-making ends of large corporations that dominate the global food industry. By sanctioning

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political, economic and cultural system in which whites overwhelmingly control power and material resources,” and in which “white dominance and non-white subordination are daily reenacted across a broad array of institutional and social settings.” *Id.*

58. See Carter, Jr., *supra* note 35, at 1318 (“Defining the badges and incidents of slavery requires an examination of the nexus between group history and the nature and genesis of the complained of injury or condition.”).

a political economic system premised on exploiting the marginality of disempowered citizens, the U.S. government has allowed the injustices of the antebellum system of chattel slavery to haunt modern day life and frustrate the liberatory goals of Reconstruction.

Finally, Part III proposes a dignity-based normative framework to assess the nature of injuries or material conditions that are proximately traceable to chattel slavery as a political economic system. Drawing from a breadth of Supreme Court constitutional jurisprudence, it advances a legal conception of human dignity defined as: (i) the equal opportunity to express inherent human capacities (that is, dignity as equality); (ii) liberated from the unjustified constraints of others (that is, dignity as liberty); (iii) toward the full development of an integrated personhood (that is, dignity as integrity). Then, using the modern problem of food insecurity as a guiding explanatory thread, it clarifies how equality-based, liberty-based, and integrity-based dignitary harms that were central to the system of chattel slavery persist today. Such harms normalize an undignified human existence that, this Part argues, not only hinders public health, but also violates the spirit and letter of the Thirteenth Amendment.

Taken together, this Article's exploration of food insecurity and abolition constitutionalism through the lens of dignity suggests that the notion of a colorblind constitution and the politics of personal responsibility may be to blame for food insecurity's racial dilemma. Modern constitutional challenges to race-based food justice programs reflect an unwillingness to reckon with racialized structural oppression embedded in the very fabric of the modern U.S. food system. As this Article concludes, perhaps the answer to resolving the indignities of food insecurity provoked by gross inequities in modern food markets lies in embracing a progressive vision of the constitution that affirms social and economic rights as foundational to human dignity and equal protection under law.

### I. SLAVERY, FOOD OPPRESSION, AND RECONSTRUCTION

The story of food insecurity across U.S. history can be told from at least two distinct vantage points. On the one hand, food insecurity tracks the general progression of industry, commerce, technology, and medicine in our modern age. As urban and rural landscapes have developed, as food production technologies have improved, and as access to health care services has increased across time and space, both poverty and food insecurity have decreased.<sup>59</sup> On the other hand, since the nation's Declaration of Independence, diverse political groups—shaped by deeply-held religious, ideological, and cultural beliefs—have debated the appropriate role of the U.S. government (at the federal, state, and local levels) in

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59. See Philip Nelson, *Food Science and Technology: A Weapon for the Fight Against Hunger, Malnutrition and Poverty*, WORLD FOOD PRIZE FOUND.: BORLAUG BLOG (Oct. 30, 2017, 4:12 PM), [https://www.worldfoodprize.org/index.cfm/88533/18100/food\\_science\\_and\\_technology\\_a\\_weapon\\_for\\_the\\_fight\\_against\\_hunger\\_malnutrition\\_and\\_poverty](https://www.worldfoodprize.org/index.cfm/88533/18100/food_science_and_technology_a_weapon_for_the_fight_against_hunger_malnutrition_and_poverty) [<https://perma.cc/4FUY-TZAQ>]; Dhruv Khullar & Dave A. Chokshi, *Health, Income, & Poverty: Where We Are & What Could Help*, HEALTH AFFS. (Oct. 4, 2018), <https://www.healthaffairs.org/doi/10.1377/hpb20180817.901935/> [<https://perma.cc/D8B2-FBQB>].

ameliorating the class conflicts that emerge from the unequal social and economic lives of the nation's inhabitants as they navigate competitive markets. These debates have determined the scope of governmental efforts to enhance food access and food security for citizens living in marginalized and impoverished communities.

Take, for example, the efforts of an early faction of the Republican Party known as the Radical Republicans after the abolition of chattel slavery. Led by Senator John C. Fremont, Senator Charles Sumner, and Representative Thaddeus Stevens, among others, these advocates called for a welfare state political system to address the plight of the formerly enslaved and indentured classes, and Civil War refugees.<sup>60</sup> During the era known today as Reconstruction (lasting from the end of the Civil War until the Compromise of 1877), Radical Republicans pioneered various political efforts to further racial justice for Black people and low-wage workers, including the 1866 Civil Rights Act, the 1867 Anti-Peonage Act, the 1868 Eight Hour Act, and the Reconstruction Amendments (comprising the Thirteenth, Fourteenth, and Fifteenth Amendments).<sup>61</sup> Radical Republicans also helped to establish the Bureau of Refugees, Freedmen, and Abandoned Lands in 1865, commonly known as the Freedmen's Bureau.<sup>62</sup> This government agency was lauded by abolitionists for its efforts to provide "food, shelter, clothing, medical services, and land to displaced Southerners, including newly freed African Americans," but was met with staunch resistance by former Confederates.<sup>63</sup>

Conversely, other political groups during Reconstruction, such as the Redeemers and Bourbon Democrats, viewed the calls for social and economic rights advanced by anti-slavery activists as an attack on White supremacy.<sup>64</sup> As a result, these politicians decried governmental assistance to formerly enslaved Black Americans and advocated in its place a conservative, "libertarian" style of governance that limited federal interference into so-called state matters.<sup>65</sup> To be

60. See Roberts, *supra* note 40, at 62–71. See generally HEATHER COX RICHARDSON, *THE DEATH OF RECONSTRUCTION: RACE, LABOR, AND POLITICS IN THE POST-CIVIL WAR NORTH, 1865–1901* (2001) (tracing the development of a backlash to the welfare-state Reconstruction agenda in the North as racial justice efforts in the South threatened northern class-based market interests).

61. See generally LAURA F. EDWARDS, *A LEGAL HISTORY OF THE CIVIL WAR AND RECONSTRUCTION: A NATION OF RIGHTS* (2015) (exploring innovations in law during the Reconstruction Era).

62. See *Freedmen's Bureau Acts of 1865 and 1866*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/FreedmensBureau.htm> [<https://perma.cc/LQK9-S47X>] (last visited Apr. 3, 2023).

63. *Id.*

64. See James Tice Moore, *Redeemers Reconsidered: Change and Continuity in the Democratic South, 1870–1900*, 44 J.S. HIST. 357, 357 (1978).

65. Today, libertarianism is commonly understood as a political philosophy that prioritizes individual autonomy and freedom of choice and often calls for the restriction or dissolution of governmental intrusion into private market affairs. See *Libertarianism*, STAN. ENCYC. PHIL. (Jan. 28, 2019), <https://plato.stanford.edu/entries/libertarianism/> [<https://perma.cc/FMN9-JKKS>]. Many libertarians exist in the United States today who believe in freedom of choice for everyone, regardless of race, gender, or class. See David Boaz, *Key Concepts of Libertarianism*, CATO INST. (Apr. 12, 2019), <https://www.cato.org/commentary/key-concepts-libertarianism> [<https://perma.cc/3TX6-RPUP>]. However, a study of the Reconstruction Era of U.S. history reveals that some factions of American libertarianism represent a convergence of the White supremacist views of Redeemers and the pro-business views of the southern wing of the Bourbon Democrats. See Moore, *supra* note 64, at

sure, the evolution of U.S. law and political economy, from Reconstruction to the Civil Rights Era, demonstrates a broad-based political will among many Americans to address social and economic inequality head on, especially in regard to the rights of free wage laborers. Yet, episodes of progressivism across U.S. history, such as workplace regulations established by President Franklin D. Roosevelt's New Deal, have typically been met by the backlash of conservatism, often resulting in political retrenchment. Some scholars conclude that the conservative push for a "laissez-faire" political economy as a corrective for social and economic inequities has rendered the U.S. government—at the federal, state, and local levels—complicit with inequality as a mainstay of American capitalism.<sup>66</sup>

This Part contends that both vantage points of food insecurity's story—the byproduct of sociology versus the byproduct of politics—bear markers of the truth. As Section I.A argues, enslavers during the antebellum era of state-sanctioned chattel slavery advanced a program of racialized labor expropriation that employed food oppression as a weapon to subjugate the enslaved class. Nutrient-rich and fresh food was rationed to the enslaved class based upon their perceived fitness for work and their labor's estimated economic value. As a result, enslaved Black people were disproportionately exposed to food-related disease due to their unhealthy diets.<sup>67</sup> Even more, enslaved Black people were segregated into food-insecure communities and were limited in their ability to produce their own food. By subjecting enslaved Black people to the violence of food insecurity, enslavers not only perpetuated the marginality and abjection of Black social life. They also constituted the indignity of Blackness itself in American culture. These food-related dignitary harms—the assertion of Black life as undeserving of equality, liberty, and bodily integrity in relation to food (explored further in Part III of this Article)—was weaponized by enslavers to legitimate the institution of chattel slavery and rationalize the political and economic institutions that served as its bedrock.

Yet, as Section I.B describes, progressives during Reconstruction sought to abolish food oppression and other dimensions of the system of chattel slavery through the Thirteenth Amendment. Even after enslaved Black people were released from their chains, as it were, few possessed the economic resources and social capital to subsist, much less thrive. As this Section details, while some advocates called for a conservative "labor theory" view of the Thirteenth Amendment, limiting its reach to workers' rights and workplace conditions, others advanced an "equal rights theory" that inspired legislation designed to mitigate the vast array of social and economic injustices wrought by chattel

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357–59. Both groups staunchly opposed the public welfare programs of the Reconstruction Era as an intrusion into states' rights and federal effort to upset the dominant social order. See JOHN C. RODRIGUE, *RECONSTRUCTION IN THE CANE FIELDS: FROM SLAVERY TO FREE LABOR IN LOUISIANA'S SUGAR PARISHES, 1862–1880*, at 168 (2001).

66. See, e.g., Jeff Madrick, *How Laissez-Faire Economics Led to Inequality and Recession*, HUFFPOST (Dec. 14, 2014), [https://www.huffpost.com/entry/laissez-faire-economics-inequality\\_b\\_5943056](https://www.huffpost.com/entry/laissez-faire-economics-inequality_b_5943056) [<https://perma.cc/K6B3-N3E9>].

67. Freedman, *supra* note 21, at 846, 851.



slavery.<sup>68</sup> Central to this work was the efforts of the Freedman's Bureau, which sought to resolve gross inequities in housing, healthcare, education, and food access, among other challenges, among the formerly enslaved class and war refugees.

Notwithstanding, as Section I.C reveals, the Supreme Court would fail to provide a clear framework for defining the badges and incidents of slavery, suggesting the need for clear congressional action toward that end. Indeed, the Court would take definitive steps to limit the scope of the Thirteenth Amendment during the twentieth century, upsetting the goals expressed by its drafters during the early Reconstruction Congress debates. Perhaps as a result, as this Article contends, many harms endured by the enslaved class under the plantation economy's program of food oppression persists today.

#### A. FOOD OPPRESSION DURING SLAVERY

Enslavers during the antebellum era wielded total control over the enslaved population's access to food.<sup>69</sup> As Frederick Douglass described his experience of food oppression during his enslavement,

Not to give a slave enough to eat, is regarded as the most aggravated development of meanness even among slaveholders. The rule is, no matter how coarse the food, only let there be enough of it. This is the theory; and in the part of Maryland from which I came, it is the general practice . . . .<sup>70</sup>

To oppress enslaved Black people and perpetuate their labor expropriation, enslavers relied upon three discrete methods of food oppression in their slave labor camps. As argued below, these strategies not only reflect Andrea Freeman's definition of food oppression as "institutional, systemic, food-related action or policy that physically debilitates a socially subordinated group."<sup>71</sup> They also evoke Iris Marion Young's articulation of structural oppression as being rooted in exploitation, marginalization, disempowerment, cultural imperialism, and violence.<sup>72</sup>

#### 1. Food Rationing as Exploitation

First, enslavers rationed food to their enslaved workers based upon the worker's perceived economic value.<sup>73</sup> Because enslaved people were deemed

68. See *infra* Section I.B.

69. See HERBERT C. COVEY & DWIGHT EISNACH, WHAT THE SLAVES ATE: RECOLLECTIONS OF AFRICAN AMERICAN FOODS AND FOODWAYS FROM THE SLAVE NARRATIVES 12, 20, 23 (2009).

70. FREDERICK DOUGLASS, NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE 51 (1845); see also CHARLES BALL, FIFTY YEARS IN CHAINS: OR, THE LIFE OF AN AMERICAN SLAVE 16 (Univ. N.C. Press 2012) (1859) ("[I] suffered greatly for want of sufficient and proper food.").

71. Freeman, *supra* note 12.

72. See *supra* note 16 and accompanying text.

73. See COVEY & EISNACH, *supra* note 69, at 20 ("The amount of rations per individual depended on the size of the plantation; perceived value, age, and work role of the slave; time of year; and other factors." (citation omitted)); see also COLLINS, PRACTICAL RULES FOR THE MANAGEMENT AND MEDICAL TREATMENT OF NEGRO SLAVES, IN THE SUGAR COLONIES 25 (1803) ("It may be laid down as a principle,

economic property to be traded in slave markets as commodities, or pledged as human collateral to secure business loans from financiers, enslavers rationed food based upon a strict analysis of opportunity costs and prospective future gains.<sup>74</sup> Under the dominant patriarchal culture of the southern plantation, enslaved males were customarily fed more food than weaker and less productive women and children.<sup>75</sup> To be sure, such rationing was often irrational. Many enslaved Black women were worked just as hard as their male counterparts, if not harder, and often performed the same type of labor.<sup>76</sup> Moreover, Black women were further subjected to forced reproductive labor, often coerced to mother children with enslaved Black men to ensure the next generation of enslaved workers. Even more, Black women were systematically raped and sexually abused by White enslavers and overseers to satisfy the sadistic erotic whims of White men.<sup>77</sup> Enslavers attempted to balance the benefits of maintaining strength in plantation fields with the fluctuating costs of food and the ever-present threat of slave rebellions. Indeed, even as so-called best practices for plantation management encouraged a healthy diet of unlimited vegetables for enslaved workers,<sup>78</sup> antebellum slavery periodicals routinely suggested allotments of meat and grain that corresponded with an enslaved worker's role on the plantation.<sup>79</sup> In any event, such rations were rarely healthy or nutritious, reflecting the general sense among White enslavers that the quality of slave rations, whether abundant or slight, should reflect the worker's inferior social status.<sup>80</sup>

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susceptible of the clearest demonstration, that every benefit conferred on the slaves, whether in food, or clothing, or rest, must ultimately terminate in the interest of the owner.”); Christopher Farrish, *Theft, Food Labor, and Culinary Insurrection in the Virginia Plantation Yard*, in *DETHRONING THE DECEITFUL PORK CHOP: RETHINKING AFRICAN AMERICAN FOODWAYS FROM SLAVERY TO OBAMA* 151, 155–57 (Jennifer Jensen Wallach ed., 2015).

74. See Farrish, *supra* note 73, at 156–57 (“The violence of rationing was the system itself. Regulating and rationing reduced the act of eating to a metric of inputs and outputs, and shifted power away from the enslaved. Rationing acted as the sanctioned culinary flow of the antebellum plantation home, and it defined the conditions of culinary production for the enslaved.”).

75. See COVEY & EISNACH, *supra* note 69, at 11, 22.

76. See Jennifer Hallam, *The Slave Experience: Men, Women, and Gender*, THIRTEEN, <https://www.thirteen.org/wnet/slavery/experience/gender/history.html> [<https://perma.cc/6HQ6-W3W8>] (last visited Apr. 3, 2023). In some cases, such as in the rice fields of South Carolina, most of the enslaved workers were Black women. See Lydia Wilson Marshall, *Women, Slavery, and Labor in the United States*, 11 J. AFR. DIASPORA ARCHAEOLOGY & HERITAGE 93, 93 (2022).

77. See Hallam, *supra* note 76; Marshall, *supra* note 76. After their children were born, enslaved Black women were “forced to quickly return to agricultural labor” while Black children or the elderly tended to infants. Marshall, *supra* note 76. Half of such infants were lost to early death. *Id.*

78. See PETER KOLCHIN, *AMERICAN SLAVERY: 1619–1877*, at 113 (1993); COLLINS, *supra* note 73, at 93–94; Freeman, *supra* note 21, at 850.

79. See KOLCHIN, *supra* note 78 (“The peck (eight quarts) of cornmeal and two and a half to four pounds of pork or bacon per week . . . became the widely accepted standard ration for healthy adult field hands . . . .”); Freeman, *supra* note 21, at 851; Farrish, *supra* note 73, at 156.

80. See Freeman, *supra* note 21, at 846 (“Slave owners shaped enslaved bodies through a dietary regime designed to weaken the spirit and limit pleasure.”); see also COVEY & EISNACH, *supra* note 69, at 23 (“Rationing provided a control mechanism for planters . . . . It reinforced the social economic hierarchy present in plantation society.”).

The White supremacist ideology that permeated antebellum life legitimated (on moral grounds) the class distinctions established by the expropriation of Black labor. It was deemed morally legitimate to subject the enslaved class to food rationing and unhealthy working conditions because their humanity was perceived as medically different than that of White Americans. For example, physicians who treated the enslaved population correctly observed that Black people were seemingly immune from the effects of malaria and were more tolerant of the damp and humid climates that characterized the U.S. South.<sup>81</sup> However, such physical differences were manipulated by enslavers to illustrate the supposed inferiority of Black people and suggest that Black bodies were better suited for the harsh working conditions of Southern plantations, thereby justifying their enslavement.<sup>82</sup> Modern scientists have revealed that the antebellum Black American's perceived resistance to malaria was caused by a lack of certain antigens in the red blood cells of many African Americans, as well as the prevalence of sickle-cell disease and sickle-cell trait.<sup>83</sup> Further, although modern scientists recognize that African descendants laboring in the humid and hot antebellum South might have benefited from an "inherent ability to discharge smaller amounts of vital body salts (electrolytes) into sweat and urine," European descendants eventually became acclimatized to the environment as well.<sup>84</sup>

Ultimately, the injustice of food oppression experienced by the enslaved class was rooted in its exploitation. Specifically, enslaved Black people were compelled to "exercise their capacities under the control, according to the purposes, and for the benefit" of their enslavers.<sup>85</sup> As the enslaver "extract[ed] benefits" from the enslaved worker by exploiting their food insecurity for economic gain, the oppressed worker suffered domination, deprivation, and social denigration.<sup>86</sup> Correcting the injustice of this food oppression, therefore, demanded a replacement of food insecurity on the plantation with empowering "institutional forms that enable[d] all to develop and use their capacities in a way that [did] not inhibit, but rather . . . enhance[d], similar development and use in others."<sup>87</sup> In other words, food justice for the emancipated Black worker demanded equitable access to healthy and nutrient-rich food. The food programs of the Freedman's Bureau sought to achieve this goal. For example, between 1865 and 1869, the agency distributed fifteen million rations of food to emancipated Black people and five million rations to impoverished White people.<sup>88</sup> However, in some Southern states, such as Alabama, more relief was given to needy White refugees than to the marginalized Black population, hindering the reach of the programs racial justice

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81. See Todd L. Savitt, *Black Health on the Plantation: Owners, the Enslaved, and Physicians*, 19 *MED. & HIST.* 14, 14–15 (2005).

82. *See id.*

83. *See id.* at 14.

84. *Id.* at 15.

85. Young, *supra* note 14, at 46.

86. *Id.*

87. *Id.*

88. THE CIVIL WAR AND RECONSTRUCTION ERAS 48 (Tracey Baptiste ed., 2016).

aims.<sup>89</sup> The eventual termination of the Freedman's Bureau would halt such efforts altogether.

## 2. Food Disease as Violence

Second, enslavers perpetuated food oppression by overlooking the unique exposure of their enslaved workers to food-related diseases.<sup>90</sup> Such risks were principally due to the unhealthy diets and poor living and working conditions of the enslaved population, who maintained little to no power to change their material conditions.<sup>91</sup> Some enslaved workers suffered from a lack of adequate food, or food insufficiency, which generated illness.<sup>92</sup> Yet, even when enslaved Black people were granted sufficient portions of food, or allowed to hunt or grow their own food on small plots, their food options were often bereft of important vitamins and nutrients that are essential for healthy human growth and functioning.<sup>93</sup> As a result, forced to toil under food conditions that evoke today's conception of a "food desert"—an area with limited access to affordable and nutrient-rich healthy food<sup>94</sup>—many enslaved Black people in antebellum America suffered from a wide range of food-related illnesses and deaths.<sup>95</sup>

Children often suffered the most, with many dying in their first year of life from malnutrition, especially after being forcibly weaned from their mothers at

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89. See John Hope Franklin, *Public Welfare in the South During the Reconstruction Era, 1865–80*, 44 SOC. SERV. REV. 379, 382 (1970) ("In 1867 Arkansas established a system of free public education limited to whites." (citation omitted)); Elizabeth Bethel, *The Freedmen's Bureau in Alabama*, 14 J.S. HIST. 49, 59 (1948) ("[I]t was sometimes necessary to issue two or three times as many rations to whites as to Negroes. The issues were made without regard to loyalty, and thus many persons loyal to the Confederacy during the war were the recipients of the charity of the Government.").

90. See ROBERT A. MCGUIRE & PHILIP R. P. COELHO, *Slavery and Diseases in the Antebellum American South* ("The nutritional diseases in the slave quarters were caused by ignorance rather than malice . . ."), in PARASITES, PATHOGENS, AND PROGRESS: DISEASES AND ECONOMIC DEVELOPMENT 115, 127 (2011); Farrish, *supra* note 73, at 156; Freeman, *supra* note 21, at 851–52.

91. See Savitt, *supra* note 81, at 15 ("The slave quarters provided an ideal setting for the spread of disease. Sneezing, coughing, or contact with improperly washed utensils and personal belongings promoted transmission of germs among family members. Poor ventilation, lack of sufficient windows for sunshine, and damp earthen floors added to the problem by aiding the growth of fungus and bacteria on food, clothing, floors, and utensils, as well as the development of worm and insect larvae. Improper personal hygiene (infrequent baths, hairbrushings, and haircuts; unwashed clothes; unclean beds) led to such nuisances as bedbugs, body lice, ringworm of skin and scalp, and pinworms.").

92. See Freeman, *supra* note 21, at 851.

93. See COVEY & EISNACH, *supra* note 69, at 29 ("[H]aving enough to eat did not always imply that the food was of high quality. . . . [S]ome owners tried to convince their slaves that better foods were not good for them."). For a discussion of diet and nutrients, see generally KENNETH F. KIPLE & VIRGINIA HIMMELSTEIB KING, *ANOTHER DIMENSION TO THE BLACK DIASPORA: DIET, DISEASE, AND RACISM* (1981) and 1 MACMILLAN ENCYCLOPEDIA OF WORLD SLAVERY (Paul Finkelman & Joseph C. Miller eds., 1998).

94. See Freeman, *supra* note 21, at 856.

95. See *id.* at 851 ("As a result, enslaved people suffered from a plethora of diseases, deaths, and conditions arising from inadequate and non-nutritious diets, even when they received the rations required by law."); Kenneth Kiple & Virginia Kiple, *The African Connection: Slavery, Disease and Racism*, 41 PHYLON 211, 221 (1980).

three months of age.<sup>96</sup> Instead of breastmilk, these infants were typically fed a diet of gruel or cornmeal porridge until the age of three.<sup>97</sup> Around that time, children were transitioned to a diet of “vegetables soups, potatoes, molasses, grits, hominy, and cornbread.”<sup>98</sup> Older children did not fare much better.<sup>99</sup> For example, enslaved children under the age of fourteen on President Thomas Jefferson’s Monticello estate received “0.45 kg of pork a month compared with 1.80 to 2.03 kg for adults.”<sup>100</sup> In many instances, children on large plantations in the American South were fed weekday meals (using their hands as spoons) from troughs filled with milk and cornbread or bread and pot liquor.<sup>101</sup> Malnourishment led to disease and illness. As Freeman explains, “Without protein, thiamine, niacin, calcium, magnesium, or vitamin D, the children of slaves often had bowed legs and severe rashes, as well as night blindness, abdominal and muscle swelling, toothaches, and convulsions.”<sup>102</sup> Due to inadequate portions of healthy food, many enslaved children were small, with an average height at age three “shorter than 99 percent of 20th-century American three year olds,” while “[a]t age 17, slave men were shorter than 96 percent of present day 17-year-old men and slave women were shorter than 80 percent of contemporary women.”<sup>103</sup> Professor Alexander Tsesis argues that preventing enslaved parents from making independent decisions about the health and well-being of their children represents an incident of the system of U.S. chattel slavery.<sup>104</sup>

For those children who made it to adulthood, diseases that are now commonly associated with so-called developing countries in the global South were prominent, including pellagra, beriberi, rickets, kwashiorkor, tetany, pica, worms, and scurvy.<sup>105</sup> Enslavers justified widespread disease and high rates of mortality among the enslaved population with White supremacist theories about the

96. Freeman, *supra* note 21, at 851–52; *see also* Steven Mintz, *Childhood and Transatlantic Slavery*, CHILD. & YOUTH HIST., <https://chnm.gmu.edu/cyh/case-studies/57.html> [<https://perma.cc/RV9E-TXAV>] (last visited Apr. 3, 2023) (“Infant and child mortality rates were twice as high among slave children as among southern white children. A major contributor to the high infant and child death rate was chronic undernourishment. Slaveowners showed surprisingly little concern for slave mothers’ health or diet during pregnancy, providing pregnant women with no extra rations and employing them in intensive field work even in the last week before they gave birth.”); Emily West & R.J. Knight, *Mothers’ Milk: Slavery, Wet-Nursing, and Black and White Women in the Antebellum South*, 83 J.S. HIST. 37, 43 (2017).

97. Freeman, *supra* note 21, at 851–52.

98. Mintz, *supra* note 96.

99. *See* Freeman, *supra* note 21, at 852 (“Those who lived subsisted on a bare minimum of food.”).

100. Gwyn Campbell, *Children and Slavery in the New World: A Review*, 27 SLAVERY & ABOLITION 261, 268 (2006).

101. *See id.*

102. Freeman, *supra* note 21, at 852.

103. Mintz, *supra* note 96.

104. *See* Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 377–79 (2004).

105. *See* Freeman, *supra* note 21, at 852–54; *see also* MCGUIRE & COELHO, *supra* note 90, at 127–28 (discussing the prevalence of nutritional diseases, such as pellagra, among enslaved people).

physiological and genetic compositions of Black people.<sup>106</sup> The notion that Black people were inferior humans by nature not only legitimated the food oppression that accompanied enslavement, but also supported the political economy's broader denial of equality, liberty, and bodily integrity to Black people.<sup>107</sup> Scholars now agree that it was not inherent racial differences that led to high rates of mortality among enslaved Black people from food-related diseases.<sup>108</sup> The concept of race has been debunked as a sociolegal construction that was leveraged by enslavers to further the coerced labor of Africans, Native populations, and impoverished immigrants.<sup>109</sup> Rather than race, it was the social determinants of health (constituted by the racism and structural oppression that Black people endured) that structured the livelihood and well-being of the enslaved population.

Exposure to food-related disease embodies the violence of food oppression. This violence existed because the plantation economy systematically devalued the life of any member of the enslaved class due to their social group status. To be sure, the violence of food oppression in this context was irrational; it weakened the labor productivity of the enslaved worker, thereby limiting the prospective profits of the enslaver. Nevertheless, such violence existed for at least two reasons. First, it maintained the social dominance and class-based privilege of White enslavers, which was crucial to the broader system of racial capitalism that coordinated class-based relations in Antebellum America. Second, the violence of food-related disease was a byproduct of “unconscious structures of identity formation” projected onto the body of the subjected Black worker—the notion that Blackness was a diseased form of human being—that reinforced the superior racialized identity of White Americans.<sup>110</sup> In other words, everyday cultural practices, ideological beliefs, and institutional rules projected meaning onto the experiences of marginalized populations that, in a self-reinforcing feedback loop, determined the coherence of dominant cultural beliefs, despite their fiction.

### 3. Food Access as Marginalization

Third, enslavers promoted food oppression by isolating enslaved Africans in racially segregated communities that suffered from food deprivation and limited resources for food production.<sup>111</sup> On the Southern plantation, the enslaved were

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106. See Freeman, *supra* note 21, at 851; Paula Braveman & Tyan Parker Dominguez, *Abandon “Race.” Focus on Racism*, FRONTIERS PUB. HEALTH, Sept. 2021, at 1, 3; Savitt, *supra* note 81, at 14.

107. See Braveman & Dominguez, *supra* note 106.

108. See Freeman, *supra* note 21, at 851; Allan S. Noonan, Hector Eduardo Velasco-Mondragon & Fernando A. Wagner, *Improving the Health of African Americans in the USA: An Overdue Opportunity for Social Justice*, PUB. HEALTH REVS., Oct. 2016, at 1, 1 (“The fact that the African American population is the least healthy ethnic group in the USA is not due to chance. . . . The transport itself from Africa to the New World remains one of the best examples of the ability of one sector of humanity to destroy the health of another.”).

109. See Braveman & Dominguez, *supra* note 106, at 1–3 (“‘Race’ has been used to justify the exploitation, denigration, and decimation of groups of people throughout our history.”).

110. Iris Marion Young, *Five Faces of Oppression*, 19 PHIL. F. 270, 287 (1988).

111. See Ramiro Alberto Flores Guzmán, *The Feeding of Slave Population in the United States, the Caribbean, and Brazil: Some Remarks in the State of the Art*, AM. LATINA HIST. ECON., May–Aug. 2013, at 5, 8–9.

concentrated into segregated quarters when they were not working.<sup>112</sup> North American planters frequently allowed their enslaved laborers to grow their own food in small plots, such as “maize, potatoes, pumpkins, [and] water melons.”<sup>113</sup> Nevertheless, the practice of enslavers giving chicken and eggs to their sick slaves, coupled with the efforts of the enslaved population to supplement their diets through hunting, suggests that their food rations and small gardens were not enough.<sup>114</sup> Indeed, starvation was common among enslaved Black people, with many resorting to food theft for survival.<sup>115</sup> However, death or disease from food deprivation was not usually due to a lack of food on the plantation.<sup>116</sup> Rather, food deprivation was intentionally leveraged as a means for the enslaver to enhance profits and diminish the dignity of the enslaved class by hindering their self-esteem and denying social esteem, each critical components of dignity-as-integrity.<sup>117</sup> Accordingly, beyond the establishment of unequal living conditions through the enforcement of Slave Codes that limited everyday liberties<sup>118</sup>—such as restrictions on speech or the freedom of assembly—food deprivation was utilized to degrade the dignity of Black people so that they would be viewed as less than human, thereby justifying their denial of citizenship.

The proliferation of food insufficiency on the Southern plantation—akin to the material conditions of the modern food desert—served to demean Black humanity, bolster White supremacy, and grant political legitimacy to the plantation economy, notwithstanding pressures from abolitionists to eradicate chattel slavery.<sup>119</sup> Although enslavers often claimed that their human chattel was no more than mere economic property, they were cognizant of the essential humanity of

112. See Nicholas Boston, *The Slave Experience: Living Conditions*, THIRTEEN, <https://www.thirteen.org/wnet/slavery/experience/living/history.html> [<https://perma.cc/5ZZP-629U>] (last visited Apr. 7, 2023); see also MCGUIRE & COELHO, *supra* note 90, at 127 (discussing the dense and confined housing of enslaved people).

113. Campbell, *supra* note 100.

114. See *id.*; COVEY & EISNACH, *supra* note 69, at 22 (“For example, in South Carolina, the Gowrie rice plantation did not provide a regular meat allowance. Rather, Gowrie slaves were expected to find their own meat through hunting and fishing.” (citation omitted)).

115. See Freeman, *supra* note 21, at 848 (commenting on “how commonplace starvation was”); FARRISH, *supra* note 73, at 157 (“If rationing was a form of violence, then theft was a form of resistance imbricated with the regulation of comestibles. Woven into the material practices of white supremacy were the modes of resistance enacted by the enslaved. As the locked larder and the closely guarded keys suggested, the system of rationing was inextricable from the practice of theft.”).

116. See Vivian Nun Halloran, *Recipes as Memory Work: Slave Food*, 53 *CULTURE, THEORY & CRITIQUE* 147, 153 (2012) (“Millie Evans, an octogenarian at the time of her interview, recalls: ‘My ma had to work hard, so every time Old Mistress though we little black chillums was hungry between meals she would call us up to de house to eat. Sometimes she would give us johnnycakes and plenty of buttermilk to drink with it. Dey had a long trough for us dat dey would keep so clean.’”); MCGUIRE & COELHO, *supra* note 90, at 122, 127.

117. See *infra* Section III.C (discussing the concept of dignity as integrity).

118. For more on Slave Codes, see generally A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978).

119. For an overview of abolitionists efforts, see generally MANISHA SINHA, *THE SLAVE’S CAUSE: A HISTORY OF ABOLITION* (2016) (providing a comprehensive history of the abolition movement in a transnational context) and *The African American Odyssey: A Quest for Full Citizenship: Abolition, Anti-Slavery Movements, and the Rise of the Sectional Controversy*, LIBR. OF CONG., <https://www.loc.gov/>

the Black people they kept in bondage.<sup>120</sup> The U.S. government was, too. In fact, from South Carolina to Louisiana and Texas, many states made it illegal for enslavers to deprive their enslaved workers of adequate food.<sup>121</sup> In some instances, state laws imposed liability upon plantation owners when their enslaved workers stole food from other plantations, intended to incentivize better working conditions.<sup>122</sup>

Notwithstanding these efforts to dampen the brutality of slavery, state laws designed to protect the health and well-being of enslaved workers had little material effect on their daily lives. Enslavers were rarely prosecuted for withholding food from their human chattel.<sup>123</sup> Further, some courts deferred to local custom when defining appropriate standards for feeding enslaved workers,<sup>124</sup> enabling White supremacist beliefs about Black humanity to govern the meaning of *adequacy* with respect to enslaved worker diets and the meaning of *oppression* with respect to the Black body.<sup>125</sup> As a result, control over food access and food quality remained a primary weapon for enslavers to oppress their workers.<sup>126</sup>

By relegating Black people, broadly speaking, and the enslaved Black population, specifically, to the margins of social life as a permanent underclass, enslavers (directly) and the U.S. government (indirectly) deprived Black people of the autonomy that liberated agents in liberal democracies enjoy as a privilege of citizenship. Of course, the notion that full democratic citizenship requires autonomous decisionmaking and individual agency is a presumption that has been critiqued by feminist scholars.<sup>127</sup> Although it accords with general conceptions of liberty and equality evident in the U.S. Constitution, the presumption prioritizes a fundamentally individualistic and male-centric conception of humanity that

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exhibits/african-american-odyssey/abolition.html [https://perma.cc/7LZ7-CN79] (last visited Apr. 7, 2023) (providing an overview of the American abolition movement).

120. Cf. Greg Timmons, *How Slavery Became the Economic Engine of the South*, HIST. (Sept. 2, 2020), <https://www.history.com/news/slavery-profitable-southern-economy> [https://perma.cc/DPQ6-E9J3].

121. See Freeman, *supra* note 21, at 848 (“South Carolina was the first state to prohibit owners from starving their slaves. Alabama, Louisiana, Florida, North Carolina, Texas, and Georgia eventually followed suit. An 1852 Alabama act penalized slave owners for not providing a sufficient amount of healthy food to slaves.” (footnotes omitted)).

122. See *id.* at 846–47.

123. *Id.* at 847.

124. *Id.* (discussing *State v. Bowen*, 34 S.C.L. 573 (1849), where “the court allowed local custom to determine appropriate standards”).

125. See *id.*; see, e.g., *Bowen*, 34 S.C.L. at 574 (“The Act does not prescribe what kind or quality of food shall be sufficient. It was probably wiser to leave that matter to be determined by the custom of the country.”).

126. Nina Martyris, *Frederick Douglass on How Slave Owners Used Food as a Weapon of Control*, NPR (Feb. 10, 2017, 11:42 AM), <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/6DB8-T5CM].

127. See, e.g., Young, *supra* note 110, at 282 (“Female experience of social relations, arising both from women’s typical domestic care responsibilities and from the kinds of paid work that many women do, tends to recognize dependence as a basic human condition. Whereas on the autonomy model a just society would as much as possible give people the opportunity to be independent, the feminist model instead envisions justice as according respect and decision-making participation to those who are dependent as well as those who are independent.”).



ignores “dependence as a basic human condition.”<sup>128</sup> Notwithstanding such critiques, the injustice of the marginalization produced by food oppression is conveyed by the marginal’s inability to fully engage “in productive activities of social cooperation” as an equal member of the polity.<sup>129</sup> Instead, the marginalized individual is forced to live without “the means of consumption” necessary for their human health and well-being.<sup>130</sup> Rectifying the marginalization of the plantation economy demanded, then, certain social and economic rights that might enable emancipated Black people to engage in democratic processes as equal citizens. Was this the goal of the Thirteenth Amendment?

#### B. THE THIRTEENTH AMENDMENT

When President Abraham Lincoln issued the Emancipation Proclamation on the eve of January 1, 1863, also known as “Freedom’s Eve,” and declared that human enslavement in the Confederate States of America was outlawed, many Southern enslavers did not concede to his presidential authority.<sup>131</sup> As a result, many enslaved people were not told that they were free.<sup>132</sup> Instead, it would take over two and a half years for chattel slavery to officially end in the United States<sup>133</sup> (other than “as a punishment for crime whereof the party shall have been duly convicted”<sup>134</sup>). On June 19, 1865, Union Army Major General Gordon Granger proclaimed in Galveston Island, Texas that the estimated 250,000 enslaved people in the geographically isolated state of Texas had been liberated.<sup>135</sup> However, although June 19th is celebrated today in cities across America as Jubilee Day—and widely known by the portmanteau “Juneteenth”<sup>136</sup>—it was not until the ratification of the Thirteenth Amendment on December 6, 1865, that emancipation finally materialized for the enslaved people in Delaware, Kentucky, and New Jersey.<sup>137</sup>

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128. *Id.*

129. *Id.*

130. *Id.*

131. *Emancipation Proclamation (1863)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/emancipation-proclamation> [<https://perma.cc/AL92-CXHF>] (last visited Apr. 7, 2023) (explaining the limitations of the Emancipation Proclamation, which, for example, “expressly exempted parts of the Confederacy that had already come under Union control”); see DEVON GALENA, CONG. RSCH. SERV., R44865, JUNETEENTH: FACT SHEET 1 (2023), <https://sgp.fas.org/crs/misc/R44865.pdf> [<https://perma.cc/U8PW-37PN>]; *Freedom’s Eve: Awaiting the Passage of the Emancipation Proclamation*, NAT’L PARK SERV. (Dec. 31, 2022), <https://www.nps.gov/articles/000/freedoms-eve.htm> [<https://perma.cc/4P5G-K8ZZ>].

132. *Cf. Juneteenth and General Orders, No. 3*, GALVESTON HIST. (June 13, 2021), <https://www.galvestonhistory.org/news/juneteenth-and-general-order-no-3> [<https://perma.cc/J7PE-37LT>].

133. Or rather, to evolve. *See infra* notes 137–40 and accompanying text.

134. U.S. CONST. amend. XIII, § 1.

135. *Juneteenth and General Orders, No. 3*, *supra* note 132; GALENA, *supra* note 131; DeNeen L. Brown, *After Juneteenth, Many Black People in Texas Remained Enslaved*, WASH. POST (June 19, 2022, 6:00 AM), <https://www.washingtonpost.com/history/2022/06/19/juneteenth-texas-black-still-enslaved/>.

136. *Juneteenth and General Orders, No. 3*, *supra* note 132; GALENA, *supra* note 131.

137. *See 13th Amendment Ratified*, HIST. (Dec. 4, 2020), <https://www.history.com/this-day-in-history/13th-amendment-ratified> [<https://perma.cc/9L3Q-A6D6>]; Noelle Lorraine Williams, *New Jersey, The Last*

The Thirteenth Amendment was the first of three Reconstruction Amendments passed after the Civil War that sought to abolish the system of human enslavement in the United States and rebuild a new political society premised on liberty and equality for all.<sup>138</sup> As Alexander Tsesis explains, the Amendment “signaled a break from moderate antislavery leanings. Moderates wanted states gradually and separately to end slavery.”<sup>139</sup> Reconstruction pursued a more radical approach. Under Section 1, the Thirteenth Amendment declares, “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.”<sup>140</sup> Section 2 of the Amendment, known as the Enforcement Clause, provides Congress with power to enforce the Amendment by “appropriate legislation.”<sup>141</sup>

In so doing, the drafters of the Thirteenth Amendment recognized that it was not enough to merely abolish the practice of unfree slave labor and indentured servitude. Rebuilding the nation after an intense period of war and political division required an empowered state to affirmatively dismantle the sociopolitical culture of White supremacy that infringed upon the liberty interests of formerly enslaved Black people and hindered their equal protection under the law.<sup>142</sup> Even more, antislavery advocates understood that the liberty of newly freed Black Americans was threatened by existing cultural norms and political economic institutions that perpetuated the material conditions of the former system of chattel slavery in explicit and covert ways.<sup>143</sup> Nevertheless, the members of the Thirty-Eighth Congress that would ultimately approve the Thirteenth Amendment held differing views on the scope of the rights that should accompany freedom, perhaps due to the stronghold of White supremacy’s governing logic. As Professor Rebecca Zietlow argues, some anti-slavery advocates framed

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*Northern State to End Slavery*, N.J. HIST. COMM’N, DEP’T STATE, <https://nj.gov/state/historical/his-2021-juneteenth.shtml> [<https://perma.cc/55YU-WMWL>] (last visited Apr. 7, 2023); Clarence Lusane, *The Emancipation Proclamation Did Not End Slavery. Here’s What Did.*, WASH. POST (June 25, 2021, 7:00 AM), <https://www.washingtonpost.com/politics/2021/06/25/emancipation-proclamation-did-not-end-slavery-heres-what-did/>; Karen Nikos-Rose, *Juneteenth Marks End of a Sustained Slavery That Lasted Beyond Emancipation Proclamation*, U.C. DAVIS (June 19, 2020), <https://www.ucdavis.edu/curiosity/news/juneteenth-marks-end-sustained-slavery-lasting-beyond-emancipation-proclamation> [<https://perma.cc/6HS5-ET73>].

138. TSEGIS, *supra* note 54, at 95 (“Eventually two more Reconstruction amendments followed, but the congressional framers initially considered the Thirteenth Amendment as the bedrock of Reconstruction.”).

139. *Id.* at 102.

140. U.S. CONST. amend. XIII, § 1.

141. *Id.* § 2.

142. See Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 866–67 (1986) (“The most important question for the framers [of the Reconstruction Amendments] was whether the national or the state governments possessed primary authority to determine and secure the status and rights of American citizens.”); Rebecca E. Zietlow, *James Ashley’s Thirteenth Amendment*, 112 COLUM. L. REV. 1697, 1698–99 (2012); BRUCE LEVINE, THADDEUS STEVENS: CIVIL WAR REVOLUTIONARY, FIGHTER FOR RACIAL JUSTICE 179–80 (2021).

143. See Zietlow, *supra* note 142.

the Thirteenth Amendment as fundamentally clarifying workers' rights. Zietlow calls this view the "labor theory" of the Thirteenth Amendment.<sup>144</sup> Others, Zietlow explains, argued that the Thirteenth Amendment opened the door for more substantive social and economic rights geared toward racial equality and a radical transformation of American life, which she calls the "equal rights theory."<sup>145</sup>

### 1. The Labor Theory

As Congress debated the Thirteenth Amendment and subsequent legislative efforts to eradicate the stains of chattel slavery after the Civil War, their central task was to define the scope of the Amendment's prohibitions and demarcate the range of liberties necessary to achieve freedom for formerly enslaved and indentured workers. Certain members of Congress emphasized the need for the government to protect the "autonomy and control [of workers] over the conditions of the workplace," which Rebecca Zietlow calls the labor theory of the Thirteenth Amendment due to its emphasis on workers' rights.<sup>146</sup> A minority of members, such as Senators Edgar Cowan of Pennsylvania and William Saulsbury of Delaware, promoted a narrow view of this labor theory,<sup>147</sup> declaring that the Amendment was "simply made to liberate the Negro slave from his master," and nothing more.<sup>148</sup> According to Senator Saulsbury, the Amendment "does not of itself declare, and human ingenuity cannot torture it into meaning that the Congress of the United States shall invade the States and attempt to regulate property and personal rights within the States any further than refers simply and solely to the condition and *status* of slavery."<sup>149</sup>

However, most members of Congress during Reconstruction held a broader labor view of the Thirteenth Amendment. Specifically, they believed that it granted rights to all workers to be free in the workplace from coercive, exploitative, and oppressive work conditions.<sup>150</sup> This view reflected the ideology of the Free Soil Party (and later the Republican Party), which emphasized the worker's right to be free from the interference of overt racial discrimination or workplace oppression.<sup>151</sup> For example, Representative John Bingham argued that "no man shall be wrongfully deprived of the fruit of his toil any more than of his life."<sup>152</sup> Such deprivation infringes upon what many scholars today call the *negative*

144. *Id.* at 1701.

145. *Id.* at 1707.

146. *Id.* at 1701.

147. *See id.* at 1701–02.

148. *Id.*; CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (statement of Sen. Edgar Cowan).

149. Zietlow, *supra* note 142, at 1702; CONG. GLOBE, 39th Cong., 1st Sess. 476 (1866) (statement of Sen. William Saulsbury).

150. *See* Zietlow, *supra* note 142, at 1704; CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866) (statement of Sen. Henry Wilson) ("[W]e have advocated the rights of the black man because the black man was the most oppressed type of the toiling men of this country.").

151. *See* Zietlow, *supra* note 142, at 1704.

152. *Id.*; CONG. GLOBE, 34th Cong., 3d Sess. app. 140 (1857) (statement of Rep. John Bingham).

liberty interests of workers,<sup>153</sup> but what Radical Republicans likely called civil liberties. Free Soilers believed that protecting the civil liberties of Black workers by ending slavery would benefit all workers, including White indentured servants and northern free wage laborers.<sup>154</sup>

Notwithstanding the popularity of the broader labor view of the Thirteenth Amendment among members of Congress, the Supreme Court quickly took steps to narrow the scope of the Thirteenth Amendment in several seminal cases during and following Reconstruction.<sup>155</sup> In the *Slaughter-House Cases*, for example, which involved a constitutional challenge to a Louisiana regulation limiting butchering to select slaughterhouses in the state, the Supreme Court interpreted the Reconstruction Amendments narrowly.<sup>156</sup> Writing for the Court, Justice Miller argued that the “obvious purpose” of the Reconstruction Amendments “was to forbid all shades and conditions of African slavery” and not to regulate the broader experiences of non-enslaved or indentured workers in the workplace.<sup>157</sup>

Congress would subsequently pass the Civil Rights Act of 1875 “to protect the persons of the United States in their civil rights.”<sup>158</sup> Initially drafted by Radical Republican Senator Charles Sumner in 1870, the Act sought to affirmatively protect the liberty of Black Americans to be free from racial discrimination in public transportation, public accommodations, and during service on juries, each critical protections for emancipated Black people to enjoy the fruits of liberty.<sup>159</sup> However, in 1883, the Supreme Court ruled in the *Civil Rights Cases* that the Thirteenth and Fourteenth Amendments to the Constitution did not grant Congress the power to prohibit racial discrimination by private individuals in public places of accommodation.<sup>160</sup>

Writing for the majority, Justice Bradley declared that the Fourteenth Amendment was not designed to meddle with the “[i]ndividual invasion of

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153. See Ian Carter, *Positive and Negative Liberty*, STAN. ENCYC. PHIL. (Nov. 19, 2021), <https://plato.stanford.edu/entries/liberty-positive-negative/> [<https://perma.cc/QZ6U-ZG63>] (“Negative liberty is the absence of obstacles, barriers or constraints.”).

154. See Zietlow, *supra* note 142, at 1704.

155. See TESIS, *supra* note 54, at 3 (“After Reconstruction . . . a series of Supreme Court decisions substantially diminished the amendment’s significance in achieving genuine liberation.”); see, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896) (“Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or, at least the control of the labor and services of one man for the benefit of another . . . .”); *Hodges v. United States*, 203 U.S. 1, 37 (1906) (Harlan, J., dissenting) (“The interpretation now placed on the Thirteenth Amendment is, I think, entirely too narrow and is hostile to the freedom established by the supreme law of the land.”); *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926) (“The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro race.”).

156. 83 U.S. (16 Wall.) 36, 69 (1873).

157. *Id.*

158. Alfred Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873, 876 (1966).

159. See *id.* at 876, 903 n.161.

160. 109 U.S. 3, 25–26 (1883).

individual rights,” but more pointedly, to “nullif[y] and make[] void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens . . . or which injures them in life, liberty or property without due process of law, or which denies . . . them the equal protection of the laws.”<sup>161</sup> Regarding the Thirteenth Amendment, Justice Bradley concluded that it “merely abolishes slavery,” contending,

When a man has emerged from slavery . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen . . . and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected.<sup>162</sup>

Notably, Justice Harlan dissented, proclaiming,

[S]ince slavery . . . was the moving or principal cause of the adoption of [the Thirteenth Amendment], and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against, all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races.<sup>163</sup>

Harlan’s sole dissenting opinion deemed the majority’s interpretation contrary to the “substance and spirit” of the Thirteenth Amendment.<sup>164</sup> However, it was not enough to dissuade the Court.<sup>165</sup> Still, Justice Bradley’s majority opinion included important language for future legislation, declaring that “it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing *all badges and incidents of slavery* in the United States.”<sup>166</sup> Unfortunately, such legislation would be limited to literal slavery and indentured servitude until the Civil Rights Era.<sup>167</sup> As a result, in *Hodges v. United States*, the Court would reject the claim that preventing Black workers from working at a lumber mill on the basis of their race was a violation of their rights under the Thirteenth Amendment.<sup>168</sup> As Justice Brewer reasoned, “While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to

161. *Id.* at 11.

162. *Id.* at 25.

163. *Id.* at 36 (Harlan, J., dissenting).

164. *Id.* at 26.

165. *See id.*

166. *Id.* at 20 (majority opinion) (emphasis added).

167. *See* Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867) (codified as amended at 42 U.S.C. § 1994); *Clyatt v. United States*, 197 U.S. 207, 215, 217–18 (1905); *see also* *Pollock v. Williams*, 322 U.S. 4, 17 (1944) (“The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor . . .”).

168. 203 U.S. 1, 19–20; *id.* at 20–22 n.2 (Harlan, J., dissenting).

commit that race to the care of the Nation. It is the denunciation of a condition and not a declaration in favor of a particular people.”<sup>169</sup>

Even when the labor movement of the early twentieth century finally secured greater protections for workers through the National Labor Relations Act of 1935, also known as the Wagner Act,<sup>170</sup> the legislation would fail to resolve the challenges facing many Black people and other racially and ethnically minoritized low-wage workers in the labor market.<sup>171</sup> Although labor activists argued that workers should have rights to control their working conditions by unionizing, bargaining collectively, or striking until a compromise could be reached with their employer, they did not emphasize issues of racial justice (even as they built their advocacy efforts upon a capacious view of the Thirteenth Amendment).<sup>172</sup> Indeed, to appease the racist interests of Southern Democrats, the predominantly Black domestic and agricultural workers across the U.S. South were excluded from the workplace protections established under the Wagner Act.<sup>173</sup>

## 2. The Equal Rights Theory

Other members of the Reconstruction Congress advanced a more progressive vision of the Thirteenth Amendment. These advocates adhered to the views of the outspoken Senator Charles Sumner from Massachusetts, who believed that the Thirteenth Amendment called for formerly enslaved Black people to be deemed “equal before the law.”<sup>174</sup> For many advocates, this “equal rights theory” of the Thirteenth Amendment, as Zietlow describes it, similarly expressed (like the labor theory) a fundamentally *negative* conception of the liberty interests granted to the formerly enslaved and indentured classes—the right to be free from overt racial discrimination.<sup>175</sup> Thus, Representative John F. Farnsworth of Illinois, for example, highlighted the importance of protecting familial autonomy, or the right to create and maintain a family free from public and private interference.<sup>176</sup> Senator James Harlan of Iowa similarly argued, in the words of

169. *Id.* at 16–17 (majority opinion).

170. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–166).

171. See REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 93 (2006).

172. See *id.* at 79–80, 94 (discussing efforts of some union officials to invoke the Thirteenth Amendment as support for the passing of the Wagner Act).

173. See *id.* at 94–95.

174. See Zietlow, *supra* note 142, at 1707; CONG. GLOBE, 38th Cong., 1st Sess. 521 (1864) (statement of Sen. Charles Sumner). Sumner’s framing would eventually manifest in the language of the Equal Protection Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); accord Zietlow, *supra* note 142, at 1707.

175. See *supra* note 153 and accompanying text.

176. CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865) (statement of Rep. John Farnsworth) (“What vested rights so high or so sacred as a man’s right to himself, to his wife and children, to his liberty, and to the fruits of his own industry? Did not our fathers declare that those rights were inalienable? And if a man cannot himself alienate those rights, how can another man alienate them without being himself a robber of the vested rights of his brother-man?”).

Alexander Tsesis, that “*interference* with family life, discriminatory jury selection, and barriers to property ownership” amounted to “incidents of slavery.”<sup>177</sup> Senator Henry Wilson of Massachusetts further underscored the ability to provide for one’s family as a defining measure of liberty, declaring, “the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom.”<sup>178</sup>

However, other pro-abolition advocates of this era stressed the need for Congress to leverage its powers under the Enforcement Clause to promote what Radical Republicans referred to as social and political liberties, or what many progressive scholars of today call *positive* liberty interests.<sup>179</sup> This conception of liberty provides that one has the right to be free not merely from interference, but even more, from the *domination* of others that might impair political equality and degrade democratic citizenship.<sup>180</sup> For example, Representative Schuyler Colfax of Indiana, Speaker of the Thirty-Ninth Congress, urged the U.S. federal government in 1865 to

enact legislation which . . . shall establish [state governments] anew on such a basis of enduring justice as will guaranty all necessary safeguards to the people, and afford, what our Magna Charta, the Declaration of Independence, proclaims is the chief object of government—protection to all men in their inalienable rights.<sup>181</sup>

Representative Joseph K. Edgerton of Indiana argued that the Amendment must “accomplish the very purpose with which they charged us in the beginning, namely, the abolition of slavery in the United States, and the *political* and *social* elevation of negroes to all the rights of white men.”<sup>182</sup> Representative Thaddeus Stevens called for the United States to make reparations<sup>183</sup> while Senator Charles Sumner demanded that the Amendment “abolish[] slavery entirely . . . abolish[] its root and branch.”<sup>184</sup>

177. Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 J. CONST. L. 1337, 1339 (2009) (emphasis added); CONG. GLOBE, 38th Cong., 1st Sess. 1439–40 (1864) (statement of Sen. James Harlan).

178. CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864) (statement of Sen. Henry Wilson); see Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1297 (2012) (arguing that, during the Reconstruction Era, “Congress understood that reproductive subordination and exploitation were constitutive elements of slavery and that racialized policies that touch on reproductive capacity could constitute badges or incidents of slavery”).

179. See Carter, *supra* note 153 (“Positive liberty is the possibility of acting—or the fact of acting—in such a way as to take control of one’s life and realize one’s fundamental purposes.”); see also Carter, Jr., *supra* note 35, at 1324.

180. See TSESIS, *supra* note 54, at 97; Carter, Jr., *supra* note 35, at 1324 & n.33; Carter, *supra* note 153.

181. Tsesis, *supra* note 177 (omission and alteration in original).

182. CONG. GLOBE, 38th Cong., 1st Sess. 2987 (1864) (statement of Rep. Joseph Edgerton) (emphasis added).

183. Lance S. Hamilton, Note, *Ethnomiseducationalization: A Legal Challenge*, 100 YALE L.J. 1815, 1820 n.19 (1991).

184. CONG. GLOBE, 42d Cong., 2d Sess. 728 (1872) (statement of Sen. Charles Sumner).

Such views also included a progressive vision of the role of government during Reconstruction in addressing food insecurity. For example, from 1866–1867, crop failure and a resultant famine pushed many people across the South to the brink of starvation.<sup>185</sup> Congress responded with a relief resolution that directed the Freedmen’s Bureau to provide “supplies of food sufficient to prevent starvation and extreme want to any and all classes of destitute or helpless persons.”<sup>186</sup> In response to political opponents concerned about congressional authorization for funding so-called charitable programs,<sup>187</sup> Representative John Bingham of Ohio argued that Congress must not “degrade itself in the presence of the civilized world by refusing supplies to its own citizens who are famishing for bread, and stop to inquire of the starving thousands whether they were friends or enemies.”<sup>188</sup> Congress ultimately “failed to appropriate additional funds for the 1867 [Destitution] Relief Resolution,” requiring the Freedman’s Bureau to use already allocated funds to address food insecurity across the South.<sup>189</sup> As a result, the Freedmen’s Bureau saw its resources for aiding formerly enslaved Black people dwindle as such funds were diverted toward general poverty alleviation efforts.<sup>190</sup>

Rebecca Zietlow highlights other advocates who held an even broader equal rights view of the Thirteenth Amendment. For example, Zietlow uplifts the crucial role of women abolitionists, such as Harriet Beecher Stowe, who highlighted the impact of slavery on women and the family, as well as the sexual violence that had been normalized during the antebellum era.<sup>191</sup> Further, other advocates such as the Grimké sisters, Lucretia Mott, and Elizabeth Cady Stanton highlighted the subordination of women in U.S. politics and the labor market, drawing parallels to the institution of chattel slavery.<sup>192</sup> Zietlow notes, in particular, the advocacy of Representative James Ashley of Ohio, who “believed that slavery violated fundamental human rights” and “maintained that ending slavery would restore those rights, not only to slaves, but also to all free blacks and workers of all races.”<sup>193</sup> Democracy, according to Ashley, called for the government to empower impoverished people of all races and restrain the political dominance of the wealthy elite who “control the government as absolutely as if they were the only citizens of the republic.”<sup>194</sup> Ashley not only viewed liberty as a “birthright

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185. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 775–76 (1985).

186. H.R.J. Res. 28, 40th Cong., 15 Stat. 28 (1867); see also James W. Fox Jr., *Citizenship, Poverty, and Federalism: 1787–1882*, 60 U. PITT. L. REV. 421, 544 (1999) (“The supporters of the resolution understood, much as had James Madison before them, that starvation and destitution were special situations, that freedom and citizenship had a basic threshold below which governments should not let people fall.” (footnote omitted)).

187. See, e.g., CONG. GLOBE, 40th Cong., 1st Sess. 235 (1867) (statement of Rep. Fernando Wood).

188. CONG. GLOBE, 40th Cong., 1st Sess. 90 (1867) (statement of Rep. John Bingham).

189. Fox Jr., *supra* note 186, at 543–44.

190. See *id.* at 544.

191. Zietlow, *supra* note 142, at 1711.

192. *Id.*

193. *Id.* at 1712.

194. *Id.* at 1713.



of the human race,” “enshrined in the Declaration of Independence,” alongside rights to life and property.<sup>195</sup> He also believed that such natural rights supported a positive right of citizenship to participate in democratic governance, especially through voting.<sup>196</sup> This was a radical view during this era.<sup>197</sup>

Even more, Representative Ashley argued that a positive right to participatory democracy underscored a constitutional right to free labor, as well as the social and economic institutions necessary to support it.<sup>198</sup> Ashley envisioned a world where

[O]ur system of free labor, guaranteed by the national Constitution to all generations of men, with free schools and colleges, and a free press, with churches no longer fettered with the manacles of the slave-master, with manufacturers and commerce exceeding in vastness anything which had ever been known, and a nation unrivaled in culture, enterprise, and wealth . . . because of the constitutional guarantee of the government to protect the rights of all and secure liberty and equality of the people . . . .<sup>199</sup>

Perhaps most noteworthy, Ashley’s conception of the individual right to free labor, as Zietlow explains, recognized the intersection of race and class in the antebellum plantation economy.<sup>200</sup> Ashley believed that racial slavery legitimated the class status of enslaved Black laborers.<sup>201</sup> He also contended that social and economic rights might overcome such stains of racism, declaring,

[T]he hatred of the negro is not that he is black or of mixed blood, but because he is a slave. It is the hatred born of the spirit of caste, and not the hatred of color. Wherever the negro is free and is educated and owns property, you will find him respected and treated with consideration.<sup>202</sup>

It would take until the Civil Rights Era for the Supreme Court to take seriously the arguments of more progressive advocates such as James Ashley. In 1968, in *Jones v. Alfred H. Mayer Co.*, the Court would effectively overrule the *Civil Rights Cases* by clarifying Congress’s authority under the Thirteenth Amendment’s Enforcement Clause.<sup>203</sup> In *Jones*, the Court considered whether the private owner of a home could refuse to sell their property to an interracial couple based upon their race.<sup>204</sup> The Court concluded, assessing the plaintiffs’

195. *Id.* at 1715–16.

196. *See id.* 1716.

197. *See id.* at 1716 n.115 (“In the year 1856, this was as radical a statement as an orator dared to make.” (quoting ROBERT F. HOROWITZ, *THE GREAT IMPEACHER: A POLITICAL BIOGRAPHY OF JAMES M. ASHLEY* 36 (1979))).

198. *See id.* at 1717.

199. *Id.* (alteration and omissions in original).

200. *See id.* at 1720–22.

201. *See id.* at 1720.

202. *Id.*

203. 392 U.S. 409, 413 (1968).

204. *Id.* at 412.

claim under Section 1982 of the Civil Rights Act of 1866, that the enforcement power of Congress under the Thirteenth Amendment authorized government regulation of racial discrimination in both the private and public sale of real property.<sup>205</sup> Further, the Court held that racial discrimination in the private housing market was a badge and incident of slavery: “Just as the Black Codes, enacted after the Civil War to restrict the free exercise of [the freedmen’s] rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes.”<sup>206</sup>

Explaining the legislative intent of the Civil Rights Act of 1866, the Court cited Senator Lyman Trumbull’s introduction of the bill, which noted that the Act sought to “give effect to [the Thirteenth Amendment] and secure to all persons within the United States practical freedom” from racial oppression, especially by state attempts to enforce Black Codes to maintain White supremacy.<sup>207</sup> Thus, the *Jones* Court made clear that the Thirteenth Amendment granted Congress “the power . . . rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.”<sup>208</sup>

The Court did not clarify, however, the nature of the harms inflicted upon the plaintiffs by the identified vestiges of slavery (racial discrimination in housing), other than the plaintiffs’ inability to access certain property rights “enjoyed by white citizens” that correlate to similar societal constraints prevalent during the antebellum era.<sup>209</sup> To be sure, a key purpose of the Thirteenth Amendment was to end the racial oppression of enslaved Black people in the United States,<sup>210</sup> which must be situated in relation to their positionality to White enslavers in a racial capitalist marketplace under the dominant White supremacist culture of the antebellum era. Nevertheless, locating the nature of the harms imposed by slavery’s lingering vestiges as simply the denial of access to Whiteness as a mode of subjective human being, or access to Whiteness as a type of fictive property right that manifests in racial disparities,<sup>211</sup> embeds (implicitly) an assumption of White racial hierarchy into the Court’s legal analysis. In other words, this analytical framework renders Whiteness as the normative baseline for conceptualizing equality under the law. Here, equality as a political concept simply means the treatment of a non-White person equal to that of persons who are racialized as White. This mode of legal analysis is ambitious, yet ultimately sophomoric. To

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205. *Id.* at 413; 42 U.S.C. § 1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”).

206. *Jones*, 392 U.S. at 441–42; see also *id.* at 443.

207. *Id.* at 431–32 (footnote omitted).

208. *Id.* at 440.

209. *Id.* at 422.

210. Carter, Jr., *supra* note 35, at 1318 n.15 (“[T]he Thirteenth Amendment’s framers conceived their mission as remedying the permanent disabilities that the institution of slavery inflicted in perpetuity upon an identifiable and stigmatized group, where those injuries were inflicted in furtherance of maintaining slavery and subordination.”).

211. See Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1751–52 (1993).

be fair, it reflects the exceptional nature of 42 U.S.C. § 1982 as one of only two antidiscrimination statutes that refer explicitly to White racial identity.<sup>212</sup> As Nancy Leong argues, 42 U.S.C. § 1982 provides a rare opportunity for courts to reckon with the way White supremacy has shaped the enjoyment of property (or lack thereof) for non-White people.<sup>213</sup> Still, it fails to clarify, on normative grounds, why the relationship that White people maintain with property should be deemed as enjoyable.<sup>214</sup> Thus, it becomes reductive, buoyed only by the White supremacist notion that Whiteness must always be viewed as a superior lived experience.

If we instead center the experiences of the enslaved class in the legal analysis, then what appears to be missing is a way to normatively characterize the harm of unjust housing described in *Jones* in relation to the constitutional rights and privileges of citizenship. The true harm of slavery cannot be viewed as merely a failure to be granted the privileges of Whiteness. Indeed, there existed citizens racialized as White during the antebellum era who endured direct and indirect harms by the political economic system of slavery and indentured servitude.<sup>215</sup> A recognition of such harms can be gleaned in the arguments of Reconstruction advocates who adhered to the broad labor theory and the equal rights theory of the Thirteenth Amendment. Rather, the true harm of slavery, this Article contends, is the denial of human dignity to the enslaved and indentured classes; treating such persons as less than human (and thus ineligible for citizenship), hindering their capacity to equally participate in democratic life, and denying their access to the natural human rights enshrined (as James Ashley argued) in the nation's founding documents.

### C. THE LIMITS OF ENFORCEMENT

The *Civil Rights Cases* made clear that the Thirteenth Amendment is “an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”<sup>216</sup> In this vein, scholars have argued that modern practices that constitute coerced labor or physical domination akin to slavery must be abolished.<sup>217</sup> However, outside of and in the years following *Jones*, the Court has narrowly interpreted the range of conditions that might constitute modern “badges and incidents” of slavery and involuntary servitude, largely rendering *Jones* an

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212. The other is 42 U.S.C. § 1981. See Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. 1421, 1426 (2021).

213. *Id.* at 1424–26.

214. *Cf. id.* at 1421.

215. See, e.g., *supra* note 154 and accompanying text.

216. 109 U.S. 3, 20 (1883).

217. See, e.g., Samantha C. Halem, *Slaves to Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry*, 36 SAN DIEGO L. REV. 397, 398 (1999); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 974–75 (2002); Donald C. Hancock, Comment, *The Thirteenth Amendment and the Juvenile Justice System*, 83 J. CRIM. L. & CRIMINOLOGY 614, 615–16 (1992); Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 792 (1993).

exception.<sup>218</sup> For example, in *United States v. Kozminski*, the Court limited “involuntary servitude” to “cases involving the compulsion of services by the use or threatened use of physical or legal coercion.”<sup>219</sup> Further, it has declined to extend the reach of the Thirteenth Amendment beyond cases arising in relation to congressional legislation or that do not directly involve labor. For example, in *Palmer v. Thompson*, the Court held that the closing of public swimming pools in Jackson, Mississippi to avoid racial integration did not constitute a badge or incident of slavery in the absence of congressional action because it was not a matter of coerced labor.<sup>220</sup>

Scholars have attempted to explain the Court’s narrow reading of the Thirteenth Amendment by exploring the historical meaning of the text. According to Professor Jennifer McAward, the word “incident” has historically referred to “any legal right or restriction that necessarily accompanied the institution of slavery,”<sup>221</sup> and the word “badge” has historically referred to the way “southern governments and white citizens endeavored to reimpose upon freed slaves the incidents of slavery or, more generally, to restrict their rights in such a way as to mark them as a subordinate brand of citizens.”<sup>222</sup> From this framing, McAward concludes that a modern badge or incident of slavery must “[f]irst . . . mirror a historical incident of slavery” and “[s]econd . . . pose a risk of causing the renewed legal subjugation of the targeted class.”<sup>223</sup> However, McAward’s framing of “incident” does not help scholars determine what types of legal restrictions accompanied the institution of slavery, especially because the members of the Reconstruction Congress had divergent views on the range of rights—civil, social, or economic—that were owed to emancipated Black people as equal citizens. Further, McAward’s framing of “badge” does not help scholars understand how the system of enslavement could be reimposed because there was similar disagreement upon the range of rights that were being restricted from the enslaved and indentured populations. Were emancipated Black people owed merely “civil rights,”<sup>224</sup> or were they also owed social and political rights to become liberated?<sup>225</sup> What rights were being restricted during enslavement, both on and off the plantation? Put simply, what does equal citizenship demand?

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218. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896) (“Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another . . . .”); *Hodges v. United States*, 203 U.S. 1, 17 (1906); *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926).

219. 487 U.S. 931, 948 (1988).

220. 403 U.S. 217, 226–27 (1971).

221. Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 575 (2012).

222. *Id.* at 577–78.

223. *Id.* at 622.

224. CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Lyman Trumbull) (“I trust there are no differences of opinion among the friends of the constitutional amendment, among those who are for real freedom to the black man, as to his being entitled to equality in civil rights.”).

225. See Carter, Jr., *supra* note 35, at 1324 (“The debates also reveal disagreement between Republicans and Democrats, and among Republicans themselves, over exactly how far the Amendment

Progressive scholars have urged Congress and the Judiciary to push further, arguing that “[t]he scope of the Amendment . . . encompasses liberty interests far beyond receiving reasonable compensation for work.”<sup>226</sup> The “spirit of the Amendment,” they declare, should inspire broader and “more expansive interpretations” that might engender an abolition constitutionalism rooted in the dismantling of White supremacy.<sup>227</sup> Andrea Freeman has already argued that Congress’s enforcement power recognized by the *Jones* Court should be extended to include legislation to eliminate racialized food oppression.<sup>228</sup> Such an extension requires that one reasonably believes that certain types of food oppression constitute an incident of slavery, or a badge of the antebellum system of slavery that restrains, in the words of the *Jones* Court, “those fundamental rights which are the essence of civil freedom, namely, the same right . . . as is enjoyed by white citizens.”<sup>229</sup> Yet, although the *Jones* Court appropriately recognizes the power of Congress to “rationally . . . determine what are the badges and the incidents of slavery,” the Court’s analysis problematically centers the experience of citizens racialized as White as a governing norm of freedom.<sup>230</sup> Should a fundamental right not to experience food oppression as a badge of slavery be defined as a lack of access to the food privileges enjoyed by people racialized as White?

The “essence of civil freedom”<sup>231</sup> is not Whiteness. Chattel slavery did not merely impact the lives of enslaved Black people; it impacted the very structure of the U.S. political economy, rendering the nation a slave society. Thus, anyone (even people racialized as White) can be harmed by its lingering effects because the institution of slavery shaped many aspects of the antebellum political economy that existed beyond the walls of the plantation, such as what it means to be a free wage laborer.<sup>232</sup> Although some scholars argue that it is unreasonable to

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would go in protecting the freedmen’s rights. The Republican coalition’s conservatives and moderates agreed with progressive Republicans that the federal government should protect the civil rights of African Americans, but disagreed as to whether this included rights to full political participation or ‘social’ equality.”).

226. Tsesis, *supra* note 177, at 1344; see Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 975 (2019).

227. Freeman, *supra* note 21, at 902; see Edward H. Kyle III, *Symbolism and the Thirteenth Amendment: The Injury of Exposure to Governmentally Endorsed Symbols of Racial Superiority*, 25 MICH. J. RACE & L. 77, 94–98 (2019) (“What is clear from the Amendment itself as well as the writing of the courts at the time is that the intention of the Thirteenth Amendment was not merely the ending of literal slavery, but also an ending to those elements that allowed the institution of slavery to exist.”).

228. See Freeman, *supra* note 21, at 901.

229. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968) (quoting *Civil Rights Cases*, 109 U.S. 3, 35 (1883) (Harlan, J., dissenting)).

230. *Id.* at 440; see also *id.* at 443 (“At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live.”).

231. *Id.* at 441.

232. See Tsesis, *supra* note 104, at 326–27 (noting that Representative Ebon C. Ingersoll of Illinois argued that the Amendment would apply to “the seven millions of poor white people who live in the slave States but who have ever been deprived of the blessings of manhood” because of slavery); Colbert, *supra* note 54, at 10 (noting that Senator Henry Wilson of Massachusetts argued that “the poor white man” had been “impoverished, debased, dishonored by the system that makes toil a badge of disgrace”).

“fear the return of an entire race (or even a single individual of that race) to slavery or legally subordinate status,”<sup>233</sup> perhaps it is unreasonable to presume that the antebellum system of enslavement was completely abolished in the first place. Why else would the drafters of the Thirteenth Amendment include an Enforcement Clause? Why else have racialized class distinctions continued into our modern age, with many low-income Black workers in urban centers and many low-income White workers in rural peripheries struggling to subsist? Abolishing the badges of slavery demands a more nuanced understanding of the nature of the harms experienced by enslaved Black people and indentured servants that were facilitated by the antebellum plantation economy. As Part II argues below, the fundamental harms of slavery as a political economic system included dignitary harms that degraded democratic citizenship.

The Supreme Court has made clear that a badge or incident of slavery and involuntary servitude need not be directly tied to the practice of slavery and indentured servitude during the antebellum era.<sup>234</sup> Instead, the historical record demonstrates that it need merely reflect an extension, or vestige of chattel slavery.<sup>235</sup> Accordingly, both Congress and the Judiciary should interpret the Thirteenth Amendment’s Enforcement Clause as beckoning state action whenever modern-day systems of structural oppression inflict the same types of harms that the antebellum system of chattel slavery and indentured servitude inflicted upon those classes prior to the Thirteenth Amendment. Framing enslavement as a political economic system invites a more robust analysis of structural oppression in the modern U.S. political economy.<sup>236</sup> Viewed in this way, the plight of food insecurity among historically marginalized low-income communities nationwide might reasonably be conceived as a specter of the system of food oppression that plagued the laboring classes in the plantation economy.

Noting these patterns, scholars have long queried whether the Constitution can be wielded toward progressive ends, or what Professor Robin West has defined as “a particular moral and political response to the sadness of lesser lives, lives unnecessarily diminished by economic, psychic and physical insecurity in the midst of a society or world that offers plenty.”<sup>237</sup> To West, “the constitutional story . . . is a part of progressivism’s core moral and political imperative.”<sup>238</sup> Professor Mark Tushnet has similarly argued, more recently, that a progressive

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233. McAward, *supra* note 221, at 626.

234. See *Hodges v. United States*, 203 U.S. 1, 17 (1906) (“Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within [the Thirteenth Amendment’s] compass as slavery or involuntary servitude of the African.”).

235. See David P. Tedhams, *The Reincarnation of “Jim Crow”: A Thirteenth Amendment Analysis of Colorado’s Amendment 2*, 4 TEMP. POL. & C.R.L. REV. 133, 137 (1994) (describing the desire of “proponents of the amendment” to “obliterate the last vestiges of slavery in America”).

236. See Carter, Jr., *supra* note 35, at 1318 (“[B]ecause the institution of slavery was about the interaction of race, power, and group status, the Thirteenth Amendment should be expressly construed in terms of race, power, and group status.” (footnote omitted)).

237. Robin West, *Is Progressive Constitutionalism Possible?*, 4 WIDENER L. SYMP. J. 1, 1 (1999).

238. *Id.* at 3.

vision of constitutionalism seeks to enforce, by legislative and executive actions, the “hierarchy of values” enshrined in the U.S. Constitution.<sup>239</sup> By adopting a “political-constitutionalist frame,” Tushnet suggests a critical role for lawmakers to embrace Congress’s enforcement power under the Thirteenth Amendment and engage in deliberative political processes to target “the material conditions of those existing under material conditions of existence that place them in positions of reasonably severe deprivation.”<sup>240</sup> Scholars have advanced a wide range of bold and creative arguments applying the Thirteenth Amendment to a variety of social problems that purportedly perpetuate the harms of the antebellum system of slavery and involuntary servitude, from racial profiling to payday lending and even abortion.<sup>241</sup> Yet, courts have been reluctant to embrace such arguments since *Jones* in the absence of congressional legislation designed to enact the Thirteenth Amendment’s Enforcement Clause.<sup>242</sup> This Article resurfaces such debates once again. Before offering a dignity-based normative framework to clarify how enslaved workers were oppressed, Part II below provides a descriptive analysis of food insecurity from the antebellum era to our modern age that clarifies the causal link and beckons deeper analysis under the Thirteenth Amendment.

## II. FOOD INSECURITY AS A VESTIGE OF SLAVERY

After the abolition of chattel slavery by the Thirteenth Amendment, food insecurity persisted in the United States in varying degrees. Section II.A explores the period from Reconstruction into the Jim Crow Era, describing how racially and ethnically minoritized people were segregated into food insecure communities that catalyzed into modern food-apartheid neighborhoods. The U.S. government, at both the federal and local levels, has pursued various social welfare and food assistance programs since Reconstruction. For example, this Section describes the development of the Federal Food Stamps Program following the Great Depression of the 1930s.<sup>243</sup> However, political efforts to alleviate hunger and poverty have faced staunch resistance by conservative political groups that demand a more limited role for the government in the U.S. political economy.

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239. Mark Tushnet, *Progressive Constitutionalism: What Is “It”?*, 72 OHIO ST. L.J. 1073, 1076 (2011).

240. *Id.* at 1073, 1078.

241. *See, e.g.*, Carter, Jr., *supra* note 54, at 17 (“[T]his Article contends that the use of race as a proxy for criminality is also a badge and incident of slavery in violation of the Thirteenth Amendment.”); Greene, *supra* note 43, at 1733 (“In prominent legal scholarship, Thirteenth Amendment optimism has supported constitutional rights to abortion and health care and constitutional powers to prohibit hate speech and domestic violence, among other things.”).

242. *See, e.g.*, *Palmer v. Thompson*, 403 U.S. 217, 227 (1971); *City of Memphis v. Greene*, 451 U.S. 100, 125, 128 (1981); *Wong v. Stripling*, 881 F.2d 200, 203 (5th Cir. 1989) (“The proscription in the thirteenth amendment is a broad one, but no court has held that its words alone create a general right to be free from private racial discrimination in all areas of life.”).

243. *See, e.g.*, DENNIS ROTH, U.S. DEP’T OF AGRIC., FOOD STAMPS: 1932–1977: FROM PROVISIONAL AND PILOT PROGRAMS TO PERMANENT POLICY (2006), <https://naldc.nal.usda.gov/download/7052441/PDF> [<https://perma.cc/KK8X-VYFF>].

Section II.B describes the evolution of government debates about food insecurity following the Civil Rights Era. Opposition to progressive food programs designed to alleviate hunger and boost public health were frequently steeped in racist undertones that cast certain social groups as unworthy of government assistance, as culturally moribund, or as a threat to law and order. As this Section reveals, food insecurity in communities nationwide has continued to correlate with the types of racial disparities that characterized the antebellum era.

Finally, Section II.C contends that modern attempts to mitigate food insecurity continue to fall short due to an unwillingness to reckon with the embeddedness of White supremacist norms in the political economic structure of modern food markets. The popular notion of the United States as a “fast food nation”<sup>244</sup> underscores the way the harmful practices of global food corporations have become part and parcel of the country’s political economy. Many citizens continue to experience the rationing of healthy and nutrient-rich food in food swamps, concentrated exposure to food-related disease in areas that lack access to adequate healthcare, and isolation in food deserts that lack sufficient food altogether. Yet, scholars lack a vocabulary to clarify how these food-related harms relate to the harms of food oppression that accompanied slavery during the antebellum era.

#### A. FOOD INSECURITY IN THE JIM CROW ERA

Emancipation transitioned the formerly enslaved population into a new state of unfreedom. Without access to land, adequate housing, adequate healthcare, adequate education, or adequate nutrient-rich and healthy food, Black Americans literally became “sick from freedom.”<sup>245</sup> As Jim Downs explains, “Disease and sickness had a more devastating and fatal effects [sic] on emancipated slaves than on soldiers, since ex-slaves often lacked the basic necessities to survive.”<sup>246</sup> Vagrancy laws that criminalized unemployment threatened to snatch Black people back into the pits of slavery through the convict leasing system.<sup>247</sup> Pig laws criminalized the theft of cattle, swine, and chickens for survival as grand larceny, threatening the same.<sup>248</sup> As a result, although some Black people braved the

244. ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 7 (2001).

245. JIM DOWNS, *SICK FROM FREEDOM: AFRICAN-AMERICAN ILLNESS AND SUFFERING DURING THE CIVIL WAR AND RECONSTRUCTION* 4 (2012) (“Bondspeople who fled from plantation slavery during and after the war, and embraced their freedom with hope and optimism did not expect that it would lead to sickness, disease, suffering, and death.”); *see also* William H. Burks, *The Freedmen’s Bureau, Politics, and Stability Operations During Reconstruction in the South* 62–63 (Dec. 6, 2009) (M.A. thesis, U.S. Air Force Academy) (available at <https://apps.dtic.mil/sti/citations/ADA501927> [<https://perma.cc/9YGG-3TCQ>]) (“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.”).

246. DOWNS, *supra* note 245.

247. *See* DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 56 (2008).

248. *See* 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); Christopher R. Adamson, *Punishment After Slavery: Southern State Penal Systems, 1865–1890*, 30 *SOC. PROBS.* 555, 562 (1983).



wilderness of the western terrain and vied for access to land with limited economic resources for business development, and little to no governmental protection from racial terrorists, many others returned to their former plantations and were ushered into a less exploitative version of their prior labor arrangement: sharecropping.<sup>249</sup> Equipped with oppressive contracts that were tainted by coercion and economic duress in their formation, White planters (some as former enslavers) enlisted Black people to perform the same toil they had endured as enslaved workers on the same land that previously served as their prison in exchange for the opportunity to survive.<sup>250</sup> In many ways, emancipated life for Black people replicated their former lives as human chattel, rendering sharecropping as simply a vestige of slavery.<sup>251</sup>

The sharecropping industry perpetuated food oppression in marginalized Black American communities. For example, the landlords of former slave plantations offered their new sharecroppers the ability to purchase food on credit.<sup>252</sup> In this way, because the formerly enslaved had limited options, landlords retained complete control over their workers' diets.<sup>253</sup> The food selection was often no different than the menu offered to former enslaved workers—a diet of cornmeal, molasses, and rations of meat.<sup>254</sup> As one might expect, food-related diseases and death among Black people persisted.<sup>255</sup> The food culture of the antebellum plantation persisted as well. After surviving generations of the slave diet, even when some Black Americans finally obtained their own farmland, many retained the taste for and habit of eating so-called plantation food.<sup>256</sup>

Many Black Americans would eventually decide to leave the South altogether. As Isabel Wilkerson details in her award-winning book, *The Warmth of Other Suns*, more than six million Black Americans relocated to cities in the West, Midwest, and North from the early 1900s to the end of the Civil Rights Era.<sup>257</sup> However, the North proved to be not much better than the South in improving race relations. In racially segregated urban environments, many Black people moved into available housing in glorified shantytowns that lacked living-wage jobs, adequate housing, adequate education, adequate public health services, and

249. See Adamson, *supra* note 248, at 559.

250. See *id.*; William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 31 (1976).

251. See DOWNS, *supra* note 245, at 155 (“By the early 1880s, many of the changes that Reconstruction had promised had slowly receded. White Southerners regained more power and began to impose a number of restrictions that limited freedpeople’s political, economic, and social gains. From the unlawful creation of voting restrictions that prevented freedpeople from participating in elections, to the widespread economic abuses that bankrupted black sharecroppers, to the white-hooded vigilantes who terrified and lynched black people at nightfall, white Southerners undermined the revolutionary gains made by freedpeople.”).

252. See Freeman, *supra* note 21, at 855.

253. See *id.*

254. See *id.*

255. See *id.* at 854–55.

256. See *id.* at 855.

257. ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* 9 (2010).

adequate access to healthy and nutrient-rich food.<sup>258</sup> As a result, as many Black people in the South continued to live on or near former slave plantations, most Black people in the North populated urban versions of their old food deserts.<sup>259</sup> Much like the Southern plantations of antebellum America, Black people living in urban ghettos still struggled with food insecurity.

Although the transition from Reconstruction to Jim Crow saw sustained food oppression in Black American communities, Black people were not the only people suffering from food insecurity at the turn of the twentieth century. Stemming from fifteenth-century English poor laws, poverty in the United States has long been viewed as a personal moral failing, not as an indication of labor exploitation or as an externality of competitive capitalist markets.<sup>260</sup> The resistance of White supremacists during Reconstruction to aid emancipated Black Americans shaped the meaning of citizenship for all low-income Americans in the late nineteenth and early twentieth century. The reluctance of political leaders to confer social and economic rights upon low-wage workers for fear of empowering Black Americans demonstrates how conceptions of human well-being and the role of government in improving the lives of struggling citizens were developing in response to vestiges of the social and political culture of the antebellum era. Even as the U.S. labor movement grew during Reconstruction in response to the social and economic impacts of the industrial revolution, public welfare and food assistance remained primarily the task of churches, charitable organizations, and philanthropists.<sup>261</sup> Although large cities often provided limited services for the unhoused in “poorhouses,”<sup>262</sup> it was not until the worldwide Great Depression of the 1930s, triggered by the 1929 stock market crash, that the federal government began taking an active role in food assistance.<sup>263</sup> By 1932, unemployment in the United States had risen to twenty-five percent, countless businesses and banks had failed, and hundreds of thousands of Americans had become unhoused.<sup>264</sup> Farmers were suffering, too. As agricultural prices and exports fell during the

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258. For an example of the way racism stymied the development of predominantly Black American communities in the northern United States, see generally ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940–1960* (1983) (revealing the way urban renewal efforts in post-depression Chicago were shaped by the racial struggles that responded to the great migration of southern Black Americans in the 1940s).

259. See Freeman, *supra* note 21, at 855–56.

260. See William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, 106 (1996).

261. See Marion Nestle, *The Supplemental Nutrition Assistance Program (SNAP): History, Politics, and Public Health Implications*, 109 AM. J. PUB. HEALTH 1631, 1632 (2019); ROTH, *supra* note 243.

262. See MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 3 (1986).

263. See Nestle, *supra* note 261.

264. See Paul Dickson & Thomas B. Allen, *Marching on History*, SMITHSONIAN MAG. (Feb. 2003), <https://www.smithsonianmag.com/history/marching-on-history-75797769/> [<https://perma.cc/ZTJ7-X3SS>]; *Americans React to the Great Depression*, LIBR. CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/americans-react-to-great-depression> [<https://perma.cc/8M6L-CVND>] (last visited Apr. 8, 2023).

depression, farmers demanded relief from the federal government.<sup>265</sup> Congress attempted to pass the McNary–Haugen Farm Relief Act during the 1920s to subsidize agricultural prices, but the effort was vetoed by President Calvin Coolidge.<sup>266</sup> And, although President Herbert Hoover established the Federal Farm Board to help fund farming cooperatives, the agricultural crisis continued.<sup>267</sup>

Many blamed Hoover for the failed economy and dubbed the development of informal shanty towns filled with shacks clustered near soup kitchens as Hoovervilles.<sup>268</sup> The failing economy precipitated a shift in political power, launching the Democratic Party into leadership in 1933 under President Franklin D. Roosevelt. Roosevelt’s New Deal programs focused on stimulating the economy and providing relief to impoverished communities, especially the agricultural community that had begun to destroy unsold food due to a surplus of produce that people could not afford.<sup>269</sup> In 1933, Roosevelt launched the Commodity Credit Corporation to “stabilize, support, and protect farm income and prices”;<sup>270</sup> the Agriculture Adjustment Administration (AAA), which paid farmers subsidies to reduce their production of certain commodities, such as wheat and corn, to lower supply and raise prices;<sup>271</sup> and the temporary Farm Credit Administration, which refinanced farm mortgages to help stave off defaults.<sup>272</sup> Although these programs were neutral on their face, they were unlikely to benefit Black farmers. Aside from racial discrimination, Black farmers were primarily sharecroppers at this time.<sup>273</sup> Black Americans and other non-farmers living in poverty in urban ghettos finally found some relief in 1939 with the introduction of food stamps.<sup>274</sup>

During Roosevelt’s second term as president, Secretary of Agriculture Henry A. Wallace and the USDA launched the first Food Stamp Program in 1939. The relief program enabled low-income individuals to purchase color-coded food stamps using government relief funds—orange stamps for any food item and blue stamps for surplus commodities—to acquire food at retailers and surplus produce

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265. See ROTH, *supra* note 243.

266. See *id.*

267. See *id.*

268. See JANET POPPENDIECK, BREADLINES KNEE-DEEP IN WHEAT: FOOD ASSISTANCE IN THE GREAT DEPRESSION 74 (2014); Dickson & Allen, *supra* note 264.

269. See ROTH, *supra* note 243.

270. AGRIC. COOP. SERV., U.S. DEP’T OF AGRIC., SPECIAL CROPS COOPERATIVES: FARMER COOPERATIVES IN THE UNITED STATES 22 (1983), <https://www.rd.usda.gov/sites/default/files/cir1-19.pdf> [<https://perma.cc/MGR3-XAJM>]; see also *Commodity Credit Corporation*, U.S. DEP’T AGRIC., <https://www.usda.gov/ccc> [<https://perma.cc/NS64-Q4NG>].

271. See ROTH, *supra* note 243.

272. See *History of FCA*, FARM CREDIT ADMIN. (Oct. 12, 2021), <https://www.fca.gov/about/history-of-fca> [<https://perma.cc/YLC9-KUF4>].

273. See RURAL BUS. COOP. SERV., U.S. DEP’T OF AGRIC., BLACK FARMERS IN AMERICA, 1856–2000: THE PURSUIT OF INDEPENDENT FARMING AND THE ROLE OF COOPERATIVES 8–9 (2003), <https://www.rd.usda.gov/files/RR194.pdf> [<https://perma.cc/E9DD-4C5N>].

274. See ROTH, *supra* note 243.

from farms (for example, eggs, pears, and pork).<sup>275</sup> Rather than simply using government funds to provide free food to needy families, lawmakers believed that program participants needed to purchase stamps with relief funds to avoid the program being viewed as a political hand out.<sup>276</sup> Although the program would provide more than twenty million people with nearly two-hundred-fifty million dollars' worth of food subsidies in a four-year time span, it was suspended in 1943 when food surpluses and unemployment rates declined.<sup>277</sup>

As World War II began to unfold, progressive political leaders also began advocating for a more permanent food program to address the food insecurity that remained in low-income communities nationwide. In 1944, Senators George Aiken of Vermont and Robert La Follette Jr. of Wisconsin proposed the National Food Allotment Plan, which promoted a basic food allotment through coupons as a national security strategy to bolster the "health, efficiency, and morale of the civilian population."<sup>278</sup> Unlike the original food stamp program's focus on redirecting surplus produce toward needy families, Aiken and La Follette's program selected foods based on their nutritional value.<sup>279</sup> The bill was never passed and subsequent efforts would meet continued resistance.<sup>280</sup> As Marion Nestle explains, although "urban Democrats who viewed food stamps as public welfare, distinct from commodity agriculture," tended to support the bills, "[t]he bills were largely opposed by Republicans and Southern Democrats uncomfortable with their cost and lack of benefit to farmers . . ."<sup>281</sup> To be sure, they were unlikely referring to Southern Black farmers, many of whom continued to live in poverty.

Not much changed during the Administration of President Harry S. Truman, who signed a National School Lunch Program into law in 1946,<sup>282</sup> but otherwise struggled to implement plans to continue New Deal liberalism under his Fair

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275. See *Rochester to Get First Stamp Food*, N.Y. TIMES, Apr. 18, 1939, at 15; see also Elizabeth Goodridge & Jason DeParle, *The Safety Net: A History of Food Stamps Use and Policy*, N.Y. TIMES (Feb. 11, 2010), <http://www.nytimes.com/interactive/2010/02/11/us/FOODSTAMPS.html>; Rachel Louise Moran, *Consuming Relief: Food Stamps and the New Welfare of the New Deal*, 97 J. AM. HIST. 1001, 1007–08 (2010).

276. See ROTH, *supra* note 243.

277. *Food-Stamp Program Will Halt on March 1; Gave Help to 20,000,000*, Wickard Says, N.Y. TIMES, Jan. 1, 1943, at 18; see Moran, *supra* note 275, at 1021.

278. National Food Allotment Plan, S. 1331, 78th Cong. §§ 1, 3 (1944); see also *Hearings on S. 1331 Before a Subcomm. of the S. Comm. on Agric. & Forestry*, 78th Cong. 6 (1944) [hereinafter *Food Allotment Plan Hearings*] (statement of Sen. Guy Gillette).

279. See S. 1331 § 2(c); *Food Allotment Plan Hearings*, *supra* note 278, at 10 (statement of Sen. George Aiken) ("It should be our aim to see that everyone enjoys an ample, well-balanced diet, and we might as well aim for the bull's eye in hopes that we may run up a better score than we have up to now.").

280. See POPPENDIECK, *supra* note 268, at 242–43.

281. Nestle, *supra* note 261, at 1633.

282. National School Lunch Act, 79 Pub. L. No. 396, 60 Stat. 230 (1946). See generally KATHERINE RALSTON, CONSTANCE NEWMAN, ANNETTE CLAUSON, JOANNE GUTHRIE & JEAN BUZBY, U.S. DEP'T AGRIC., THE NATIONAL SCHOOL LUNCH PROGRAM: BACKGROUND, TRENDS, AND ISSUES (2008), [https://www.ers.usda.gov/webdocs/publications/46043/12051\\_err61\\_1\\_.pdf?v=8358.2](https://www.ers.usda.gov/webdocs/publications/46043/12051_err61_1_.pdf?v=8358.2) [<https://perma.cc/FSV5-WR33>] (providing a legislative and regulatory history of the National School Lunch Program).

Deal proposals.<sup>283</sup> A two-year pilot food program was finally approved by Congress in 1959 during the administration of Republican President Dwight Eisenhower. However, Eisenhower opted not to implement the program under political pressure to contain the expansion of federal welfare spending.<sup>284</sup> As a result, during the era of Jim Crow segregation prior to the advent of the Civil Rights movement, food insecurity was primarily aided (but not resolved) by local welfare offices that provided monthly packages of lard, rice, flour, butter, and cheese to low-income families.<sup>285</sup> For communities that lacked governmental support for food assistance, such as segregated, low-income Black neighborhoods in Washington, D.C., residents often turned to community gardening and cooperatively-owned grocery stores as a solution.<sup>286</sup> However, not all Black American communities could benefit from such self-help strategies.

It would take until 1961 with the election of President John F. Kennedy for the food stamp program to be revived. On the day after his inauguration, President Kennedy issued an Executive Order for the creation of a pilot food stamp program.<sup>287</sup> The new program simplified food stamps by issuing one stamp for consumers with the price tied to the recipient's income.<sup>288</sup> The definition of eligible foods excluded certain foods imported from foreign sources, presumably to boost consumption of domestic products and benefit the agricultural sector.<sup>289</sup> Yet, many low-income households remained unable to afford food stamps.<sup>290</sup> Indeed, Black sharecroppers in the South that lacked stable income and relied on store credit to obtain essential items were forced to pay a premium to access the stamps.<sup>291</sup>

Notwithstanding such concerns, President Lyndon B. Johnson was able to negotiate with the agricultural sector to garner political support to make the food stamp program permanent.<sup>292</sup> In exchange for cotton and wheat subsidies, rural Democrats agreed to support the Food Stamp Act of 1964.<sup>293</sup> Although the

283. See generally Alonzo L. Hamby, *The Vital Center, the Fair Deal, and the Quest for a Liberal Political Economy*, 77 AM. HIST. REV. 653 (1972) (discussing President Truman's efforts to continue the mission of Roosevelt's New Deal in a post-war political climate while facing opposition from conservative politicians).

284. See MAURICE MACDONALD, *FOOD, STAMPS, AND INCOME MAINTENANCE* 6 (1977).

285. JEFFREY M. BERRY, *FEEDING HUNGRY PEOPLE: RULEMAKING IN THE FOOD STAMP PROGRAM* 24 (1984).

286. See, e.g., Ashanté Reese, *The History of Deanwood's Local Foodscape*, D.C. POL'Y CTR. (May 20, 2019), <https://www.dcpolicycenter.org/publications/black-food-geographies/> [<https://perma.cc/VZ6R-FRBH>].

287. Exec. Order No. 10914, 26 Fed. Reg. 639 (Jan. 21, 1961), *reprinted as amended in* 7 U.S.C. § 612; see also BERRY, *supra* note 285, at 25.

288. See BERRY, *supra* note 285, at 27.

289. See Maurice MacDonald, *Food Stamps: An Analytical History*, 51 SOC. SERV. REV. 642, 646–47 (1977).

290. See BERRY, *supra* note 285, at 30–33.

291. See ARDITH L. MANEY, *STILL HUNGRY AFTER ALL THESE YEARS: FOOD ASSISTANCE POLICY FROM KENNEDY TO REAGAN* 73–75 (1989).

292. See Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703; see also ROTH, *supra* note 243.

293. Republicans tended to oppose the program. See Randall B. Ripley, *Legislative Bargaining and the Food Stamp Act, 1964*, in *CONGRESS AND URBAN PROBLEMS: A CASEBOOK ON THE LEGISLATIVE PROCESS* 279, 305 (Frederic N. Cleaveland ed., 1969).

original bill excluded “luxury foods”—perhaps to reign in the notion that low-income families were gaining an unfair hand out, which was perhaps necessary to gain Republican support—the Senate rejected the exclusion due to administrative concerns.<sup>294</sup> The final program was deemed a boon for farmers and a benefit for food insecure communities.<sup>295</sup> Nevertheless, President Johnson’s so-called Great Society programs<sup>296</sup> failed to resolve the problem of food insecurity, even as the food-stamp program continued to grow in cost and size.<sup>297</sup> Between 1963 and 1970, President Johnson’s war on poverty saw the poverty rate decrease from 22.2% to 12.6% of the population.<sup>298</sup> Further, the Supplemental Program for Women, Infants and Children (WIC) was developed during this era to improve the health of low-income families, and would eventually be piloted in 1972 under President Richard Nixon.<sup>299</sup> Still, by 1968, CBS would reveal in a television documentary, *Hunger in America*, that at least thirty million Americans were not only undernourished, but a third of them also did not receive federal food assistance.<sup>300</sup> Even more, in southern states like Mississippi where antipoverty programs threatened White supremacist views, political leaders such as Congressman Jamie Whitten—who was influenced by the “Delta plantation bloc”—would use “food power” to “manipulate policies and programs at the intersection of agriculture, food, health, and welfare to maintain white supremacy and thwart any efforts of Black advancement in the state.”<sup>301</sup> Thus, the food stamp program tended to protect the interests of White rural farmers and White

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294. S. REP. NO. 88-1124, at 9 (1964), as reprinted in 1964 U.S.C.C.A.N. 3275, 3283.

295. See *Hearings on H.R. 5733 Before the H. Comm. on Agric.*, 88th Cong. 98 (1963) (statement of James G. Patton, President, National Farmers Union).

296. For more on the Great Society programs and their background, see Joseph A. Califano Jr., *What Was Really Great About the Great Society*, WASH. MONTHLY (Oct. 1, 1999), <https://washingtonmonthly.com/1999/10/01/what-was-really-great-about-the-great-society/> [<https://perma.cc/QUZ2-JQKH>].

297. See JOE RICHARDSON, CONG. RSCH. SERV., NO. 79-244, A CONCISE HISTORY OF THE FOOD STAMPS PROGRAM 3 (1979).

298. Califano Jr., *supra* note 296.

299. See *About WIC: WIC’s Mission*, U.S. DEP’T AGRIC.: FOOD & NUTRITION SERV. (Aug. 2, 2022), <https://www.fns.usda.gov/wic/about-wic-wics-mission> [<https://perma.cc/5ATM-NFBA>]. See generally STEVEN CARLSON & ZOË NEUBERGER, CTR. ON BUDGET & POL’Y PRIORITIES, WIC WORKS: ADDRESSING THE NUTRITION AND HEALTH NEEDS OF LOW-INCOME FAMILIES FOR MORE THAN FOUR DECADES (2021), <https://www.cbpp.org/sites/default/files/atoms/files/5-4-15fa.pdf> [<https://perma.cc/B8RW-MSB7>] (explaining that WIC aims to improve the health and overall well-being of low-income women and their families).

300. See Jack Gould, *TV: Hunger Amid Plenty: ‘C.B.S. Reports’ Examines Recurring Picture of Starvation Across U.S.*, N.Y. TIMES, May 22, 1968, at 95.

301. Bobby J. Smith II, *Mississippi’s War Against the War on Poverty: Food Power, Hunger, and White Supremacy*, STUDY S. (July 1, 2019), <https://southernstudies.olemiss.edu/study-the-south/ms-war-against-war-on-poverty/> [<https://perma.cc/KCA8-GVMM>]. According to Bobby J. Smith II, the “Delta plantation bloc”—comprised of White male southern business leaders with a “monopoly over agriculture, manufacturing, banking, land, and water”—established the White Citizens’ Council in 1954 and the State Sovereignty Commission in 1956 to resist civil rights efforts and maintain racial segregation. *Id.* For example, Congressman Jamie Whitten of Tallahatchie County “leveraged his clout at the national level in Washington to enhance the lives of white cotton planters in the Delta at the expense of poor rural Blacks” and “created conditions that exacerbated poverty, food insecurity and hunger among poor rural Blacks in the Delta.” *Id.*

local grocers in the South by subjecting Black families to the region's racist sociopolitical environment and blocking access to government benefits.<sup>302</sup>

#### B. FOOD INSECURITY AFTER CIVIL RIGHTS

The crisis of hunger in America became further politicized after the release of a National Nutrition Study in January 1969, which revealed high rates of undernourishment among study participants in Texas, Louisiana, New York, and Kentucky.<sup>303</sup> Senator Strom Thurmond claimed that the study was “a Democratic plot to get the Negro vote,” while President Richard Nixon’s director of communications, Herbert Klein, argued that Senator George McGovern was attempting to solve the problem of hunger by “traipsing around the country with television cameras.”<sup>304</sup> Nixon hoped to address the problem of food insecurity under a new Family Assistance Plan (FAP) that would eliminate food stamps altogether and instead provide qualifying low-income families with children with direct income supplements, a precursor to modern calls for a guaranteed basic income as a solution to poverty.<sup>305</sup> After facing resistance from conservative Democrats and some Republicans, the FAP was eventually removed from legislation during the budget reconciliation process. In December of 1969, President Nixon held a White House Conference on Nutrition, which resulted in the declaration of a hunger emergency and also increased food stamp benefits for low-income families.<sup>306</sup> To Nixon, hunger and malnutrition in the United States was not only “embarrassing,” but also “intolerable.”<sup>307</sup> Still, hunger activists argued that the proposed reforms were inadequate and benefit levels too low.<sup>308</sup>

The 1970 Food Stamp Amendment attempted to respond to such demands,<sup>309</sup> and in 1973 the program would be amended again to include imported food and food-producing seeds and plants to the list of eligible food items.<sup>310</sup> The program remained politically divisive. The inclusion of imported food was met by a ban on hot and ready-to-eat food, which meant that the program was not meant for the unhoused, but for recipients with access to kitchens and cooking supplies.<sup>311</sup>

302. *See id.*

303. Marjorie L. DeVault & James P. Pitts, *Surplus and Scarcity: Hunger and the Origins of the Food Stamp Program*, 31 SOC. PROBS. 545, 553 (1984).

304. *Id.* at 553–54.

305. Almaz Zalleke, *Fifty Years Later, Reflecting on the Defeat of Nixon’s Family Assistance Plan*, BASIC INCOME TODAY (Aug. 8, 2019), <https://basicincometoday.com/fifty-years-later-reflecting-on-the-defeat-of-nixons-family-assistance-plan/> [<https://perma.cc/UC74-D7S7>].

306. *See* DeVault & Pitts, *supra* note 303.

307. Richard Nixon, *Special Message to the Congress Recommending a Program to End Hunger in America*, AM. PRESIDENCY PROJECT (May 6, 1969), <https://www.presidency.ucsb.edu/documents/special-message-the-congress-recommending-program-end-hunger-america> [<https://perma.cc/W8U9-WCDA>].

308. DeVault & Pitts, *supra* note 303, at 555.

309. Food Stamp Act Amendments of 1970, Pub. L. No. 91-671, secs. 7(a), (b), 16(a), §§ 5, 9, 84 Stat. 2048, 2050–52 (1971).

310. *See* Agriculture and Consumer Protection Act of 1973, Pub. L. No. 93-86, sec. 3(b), § 3(1), 87 Stat. 221, 248 (1973); H.R. REP. NO. 95-464, at 333 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1978, 2268.

311. *See* H.R. REP. NO. 95-464, at 333, *as reprinted in* 1977 U.S.C.C.A.N. 1978, 2268.

Even as the program remained politically contentious, later amendments continued to expand its reach. In 1977, under the Administration of President Jimmy Carter, Congress eliminated the purchase requirement in the Food and Agriculture Act.<sup>312</sup> Although nutrition was increasingly raised by food justice advocates as a cause for concern in low-income neighborhoods, attempts to prohibit “junk food” from the program were ultimately rejected due to concerns over administrative complexity.<sup>313</sup> Notwithstanding the inclusion of unhealthy junk foods, the Food and Nutrition Service (FNS) (created by President Nixon in 1969) continued to limit grocery store participation to those that primarily sold staple food products.<sup>314</sup> Such requirements did not resolve the lack of healthy food options in low-income, racially and ethnically minoritized neighborhoods where food deserts were increasingly being transformed into food swamps.<sup>315</sup>

The 1980s, under President Ronald Reagan, would usher in a new level of political resistance to food stamps and other welfare programs aimed at addressing poverty.<sup>316</sup> Driven by a neoliberal and pro-business agenda to decrease government spending on public welfare and loosen corporate regulations under a theory of trickle-down economics, Reagan garnered political support to curtail welfare programs by appealing to racial tensions.<sup>317</sup> On the campaign trail, Reagan painted food stamp recipients as “strapping young buck[s]” splurging on luxury foods,<sup>318</sup> or as “welfare queen[s]” with intentions of abusing the program.<sup>319</sup> To Reagan, hunger was principally due to “a lack of knowledge on the part of the people as to what things are available.”<sup>320</sup> Such tropes used racism as a vehicle to blame poverty—and by extension, blame food insecurity—on the culture of low-income neighborhoods.<sup>321</sup> Accordingly, the food stamp program was significantly amended during the Reagan era, with job training requirements incorporated into

312. See *id.* at 238, as reprinted in 1977 U.S.C.C.A.N. 1978, 2183; ROTH, *supra* note 243.

313. H.R. REP. NO. 95-464, at 333, as reprinted in 1977 U.S.C.C.A.N. 1978, 2268.

314. See 7 C.F.R. § 271.2; *History of FNS*, U.S. DEPT. OF AGRIC.: FOOD & NUTRITION SERV. (Sept. 27, 2022), <https://www.fns.usda.gov/history-fns> [<https://perma.cc/FU9V-2UBS>].

315. Cf. Gabrielle Canon, ‘Food Deserts’ Become ‘Food Swamps’ as Drugstores Outsell Major Grocers, *GUARDIAN* (June 4, 2019, 2:00 PM), <https://www.theguardian.com/us-news/2019/jun/04/food-swamps-cvs-outsells-trader-joes-whole-foods-processed-shopping> [<https://perma.cc/7JJC-999S>]; N.Y. L. SCH. RACIAL JUST. PROJECT & AM. C.L. UNION, UNSHARED BOUNTY: HOW STRUCTURAL RACISM CONTRIBUTES TO THE CREATION AND PERSISTENCE OF FOOD DESERTS 6–7 (2012), [https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1002&context=racial\\_justice\\_project](https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1002&context=racial_justice_project) [<https://perma.cc/R7N4-3A66>].

316. See Tom W. Smith, *That Which We Call Welfare by Any Other Name Would Smell Sweeter: An Analysis of the Impact of Question Wording on Response Patterns*, 51 *PUB. OP. Q.* 75, 82 (1987).

317. See, e.g., Jon Nordheimer, *Reagan Is Picking His Florida Spots*, *N.Y. TIMES*, Feb. 5, 1976, at 24.

318. *Id.*

319. Gene Demby, *The Truth Behind the Lies of the Original ‘Welfare Queen,’* *NPR*: CODE SW!TCH (Dec. 20, 2013, 5:03 PM), <https://www.npr.org/sections/codeswitch/2013/12/20/255819681/the-truth-behind-the-lies-of-the-original-welfare-queen> [<https://perma.cc/9YC3-MN3H>].

320. Eleanor Clift, *Reagan Blames Hunger on ‘Lack of Knowledge,’* *L.A. TIMES* (May 22, 1986, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1986-05-22-mn-6950-story.html> (quoting President Reagan).

321. See Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 *B.C. J.L. & SOC. JUST.* 233, 244–47 (2014); Etienne C. Toussaint, *Tragedies of the Cultural Commons*, 110 *CALIF. L. REV.* 1777, 1791, 1826–28 (2022).



the Food Stamp Act of 1985.<sup>322</sup> Further, the FNS took measures to track the usage of food stamps in certain areas to stamp down on illegal usages.<sup>323</sup>

Before President Bill Clinton took office in 1993, he pledged “to end welfare as we know it.”<sup>324</sup> In 1996, Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act—often referred to as the Welfare to Work Bill—which further restricted food stamp program eligibility, reduced its benefits, and amplified its work requirements.<sup>325</sup> However, the redefinition of “retail food store” in the Food Stamp Act increased store eligibility, enabling convenience stores to process food stamp benefits, even if staple food sales did not constitute a majority of convenience store sales, and even if convenience stores did not prioritize nutritious food options.<sup>326</sup> Thus, although Clinton’s welfare reform shrunk the pool of eligible food stamp recipients, it did little to address the lack of access to healthy and nutrient-rich food in low-income neighborhoods, and perhaps made matters worse in that regard.

The late 1990s would also witness a shift toward the widespread usage of Electronic Benefit Transfers (EBT) debit cards after President George H.W. Bush eliminated paper food stamps with the Mickey Leland Memorial Domestic Hunger Relief Act of 1990. EBT cards mitigated the social stigma previously associated with physical food stamps and yielded administrative benefits to the program.<sup>327</sup> Food justice advocates increasingly called attention to the challenges that food deserts and food swamps presented to food insecure neighborhoods, even with access to EBT cards.<sup>328</sup> Indeed, the shift to EBT cards saw a parallel reduction in farmers’ markets participating in the food stamp program because

322. See Nicole Pepperl, Putting the ‘Food’ in Food Stamps: Food Eligibility in the Food Stamps Program from 1939 to 2012, at 13 n.72 (Apr. 2, 2012) (unpublished manuscript) (available at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:11940186> [<https://perma.cc/MCP9-6LK4>]).

323. See, e.g., *Barbosa v. United States*, 633 F. Supp. 16, 17–18 (E.D. Wis. 1986); *Ruszczky v. Sec’y of U.S. Dep’t of Agric.*, 662 F. Supp. 295, 295–96 (W.D.N.Y. 1986).

324. CONG. RSCH. SERV., RS20807, SHORT HISTORY OF THE 1996 WELFARE REFORM LAW 2 (2001).

325. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 815, 110 Stat. 2105, 2315.

326. See *Ensure Adequate Access to Retail Food Stores by Recipients of Food Stamps and to Maintain the Integrity of the Food Stamp Program: Hearing on H.R. 3436 Before the Subcomm. on Dep’t Operations & Nutrition of the H. Comm. on Agric.*, 103d Cong. 47–48 (1993) (testimony of Ellen Haas, Assistant Secretary, Food & Consumer Services, United States Department of Agriculture); Pepperl, *supra* note 322, at 15–16.

327. Cf. *What Is Electronic Benefits Transfer (EBT)?*, U.S. DEP’T AGRIC.: FOOD & NUTRITION SERV. (Feb. 2, 2023), <http://www.fns.usda.gov/snap/ebt/> [<https://perma.cc/7PN2-QXWZ>]; Nestle, *supra* note 261, at 1633; Luis Guardia & Allison Lacko, *To End Hunger, We Must End Stigma*, FOOD RSCH. & ACTION CTR. (Dec. 1, 2021), <https://frac.org/blog/endhungerendstigma> [<https://perma.cc/YDU8-JTPG>].

328. For a discussion of the presence of food deserts and food swamps despite EBT benefits, see generally Bob Curley, *How to Combat ‘Food Deserts’ and ‘Food Swamps,’* HEALTHLINE (Sep. 24, 2018), <https://www.healthline.com/health-news/combat-food-deserts-and-food-swamps> [<https://perma.cc/DMQ6-9DXX>] and ECON. RSCH. SERV., U.S. DEP’T OF AGRIC., ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD: MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR CONSEQUENCES (2009), [https://www.ers.usda.gov/webdocs/publications/42711/12716\\_ap036\\_1\\_.pdf?v=8864.7](https://www.ers.usda.gov/webdocs/publications/42711/12716_ap036_1_.pdf?v=8864.7) [<https://perma.cc/TQW6-VZYG>].

they lacked the technology to accept the cards.<sup>329</sup> However, even as advocates emphasized nutrition, FNS resisted calls to limit the range of foods eligible for the program to healthy food options, arguing that such limits would not only further stereotypes that low-income families make foolhardy food decisions,<sup>330</sup> but also would be administratively cost prohibitive due to diverse views on the definition of “good” or “healthy” foods.<sup>331</sup>

Although Congress changed the name of the Food Stamp Program to the Supplemental Nutritional Assistance Program (SNAP) in 2008<sup>332</sup> under the administration of President George W. Bush, with a goal of “Putting Healthy Food Within Reach,”<sup>333</sup> ongoing efforts to eliminate candy or soft drinks from SNAP eligibility—for example, Minnesota in 2004<sup>334</sup> and New York City in 2010<sup>335</sup>—have been rejected by the USDA.<sup>336</sup> Further, efforts to collect information on the types of food items that program participants obtain have been met by the refusal of retailers to comply. In 2019, the Supreme Court held that retailers cannot be forced to disclose such data.<sup>337</sup>

It is hard to argue that SNAP has not had a tremendous impact on reducing food insecurity. In 2009, President Barack Obama authorized an additional increase in SNAP benefits under the American Recovery and Reinvestment Act. By 2020, SNAP was supporting 39.9 million adults and children with an average of \$155 per month, at a total program cost of \$74.1 billion in benefits and \$5.02 billion in administrative costs.<sup>338</sup> Yet, even the political polarization wrought by former President Donald Trump has perpetuated the sentiments evoked by USDA officials in 1967 that “[t]he Food Stamp Program operated on a nervous compromise between those who insist it is not a welfare program and those who say it is.”<sup>339</sup> In the 2018 Farm Bill, Trump’s Republican Congress lobbied to transform SNAP into a block grant program, introduce more stringent work

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329. See Pepperl, *supra* note 322, at 17.

330. For a discussion of policy arguments related to healthy options limits, see generally Marlene B. Schwartz, *Moving Beyond the Debate over Restricting Sugary Drinks in the Supplemental Nutrition Assistance Program*, 52 AM. J. OF PREVENTATIVE MED. S199 (2017).

331. See FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., IMPLICATIONS OF RESTRICTING THE USE OF FOOD STAMP BENEFITS - SUMMARY 1 (2007), <https://fns-prod.azureedge.us/sites/default/files/FSPFoodRestrictions.pdf> [<https://perma.cc/7QRY-MSJP>].

332. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 4001(b), 122 Stat. 1853, 1853.

333. FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., SNAP: FACT SHEET (2008), [https://www.masslegalservices.org/system/files/library/SNAP\\_-\\_Fact\\_Sheet.pdf](https://www.masslegalservices.org/system/files/library/SNAP_-_Fact_Sheet.pdf) [<https://perma.cc/QTZ9-V4UZ>].

334. See Kelly Blondin, *Supplemental Nutrition Assistance Program Reform: A 21st Century Policy Debate*, J. SCI. POL’Y & GOVERNANCE, Sept. 2014, at 1, 3.

335. See N.Y.C. DEP’T HEALTH & MENTAL HYGIENE & N.Y.C. HUM. RES. ADMIN., REMOVING SNAP SUBSIDY FOR SUGAR-SWEETENED BEVERAGES (2010), <https://www.docin.com/p-685397910.html> [<https://perma.cc/D7ZL-NNVQ>].

336. See Blondin, *supra* note 334, at 3–4.

337. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019).

338. FOOD & NUTRITION SERV., U.S. DEP’T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM PARTICIPATION AND COSTS (2022), <https://perma.cc/TY8F-KL6N>.

339. MANEY, *supra* note 291, at 89. See generally Chad G. Marzen, *The 2018 Farm Bill: Legislative Compromise in the Trump Era*, 30 FORDHAM ENV’T L. REV. 49 (2019) (discussing the eventual

requirements for program participants, and alter the food plan calculations used to determine benefits.<sup>340</sup> Such amendments, which would have removed many people from the program, were ultimately rejected.<sup>341</sup> To be sure, in response to the food emergency needs of the COVID-19 pandemic, the Trump Administration temporarily increased SNAP benefits significantly under the 2020 Families First Coronavirus Response Act. Yet, the short-term nature of those benefits suggests that the Reconstruction-Era debate over what citizenship demands of the government has yet to be resolved.

### C. THE RISE OF FAST-FOOD OPPRESSION

Notwithstanding governmental efforts to combat poverty and hunger by providing food stamp benefits to low-income families and agricultural subsidies to domestic farmers, many racially and ethnically minoritized communities in the United States continue to endure food oppression. Reminiscent of the antebellum era, this oppression is structural. It is maintained by the laws and public policies that govern the fast-food industry, a regime that exploits low-income neighborhoods with race-based marketing and artificially low prices for mass-produced non-nutritious food. Yet, the culpability of government stakeholders is obscured by the public-private distinction in food markets, as well as cultural theories of poverty that cast blame on individual lifestyle choices. Further, federal, state, and local governments have allowed fast-food corporations to dominate food markets in low-income areas, often resulting in the limited availability of affordable, nutrient-rich, and fresh food. As a result, residents in these neighborhoods often suffer from unhealthy diets that increase the risk of food-related disease.

Fast food emerged in the early twentieth century. White Castle is regarded as the first hamburger chain in the United States, opening its doors in Wichita, Kansas, in 1920, to sell hamburgers for five cents each.<sup>342</sup> The modern concept of fast food—frozen food, preheated food, or food prepared using pre-prepared ingredients, each mass-produced and designed to be cooked quickly before, in most cases, being packaged for “take-out”—blossomed around the 1940s as automobiles, drive-through restaurants, and restaurant franchises grew in popularity.<sup>343</sup> The story of Ray Kroc became legendary when he bought the franchising rights to McDonald’s in 1954 and subsequently built the company into a leader of the fast-food industry by spreading its limited menu, low-cost hamburgers, and high speed service.<sup>344</sup> Burger King and Taco Bell followed in the 1950s, and

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congressional compromise in 2018 between competing political conceptualizations of SNAP as either enabling long-term unemployment or enabling long-term security against poverty).

340. See Marzen, *supra* note 339, at 63, 65–66, 68–69, 71 n.146; Molly Lao, *The Pitfalls of Food and Nutrition Block Grants*, CALIF. L. REV. ONLINE (Jan. 2021), <https://perma.cc/UP3C-2B4N>.

341. See Marzen, *supra* note 339, at 80, 87–88.

342. See Dave Hogan, *White Castle: How Billy Ingram Made Hamburger “The America’s Choice,”* 4 J. REST. & FOODSERVICE MKTG. 123, 125–26, 28 (2001).

343. See Freeman, *supra* note 29, at 2224–25; SCHLOSSER, *supra* note 244, at 17–22, 69.

344. See SCHLOSSER, *supra* note 244, at 19–20, 34–35.

Wendy's opened in 1969.<sup>345</sup> Today, the United States is home to the world's largest fast-food industry, employing over three million workers as of 2020 and feeding over eighty million Americans every day.<sup>346</sup> Whereas the U.S. fast-food industry generated six billion dollars annually in 1970,<sup>347</sup> it was generating over 278 billion dollars as of 2021 with over 190,000 fast-food restaurants across the United States.<sup>348</sup>

The rapid growth of the fast-food industry has impacted communities nationwide in a variety of ways, including some that are positive. This Article focuses on several harms that fast-food corporations inflict on low-income communities—particularly those that perpetuate a culture of food oppression reminiscent of the antebellum era's system of chattel slavery. These food-related dignitary harms, described further below, include: (1) rationing the access of racially and ethnically minoritized groups to nutrient-rich and fresh food; (2) ignoring the disproportionate exposure of racially and ethnically minoritized groups to food-related disease; and (3) isolating racially and ethnically minoritized groups in communities of food deprivation.

The dominance of the fast-food industry in low-income areas of the country has produced racial disparities in citizen access to nutrient-rich and fresh food.<sup>349</sup> Fast-food corporations often target low-income areas where cheap food is in high demand.<sup>350</sup> The low price of fast food is highly profitable because fast-food corporations benefit from agricultural subsidies from the federal government, alongside state and local support, that lowers the cost of animal feed, milk, sugar, oil, and staple crops (such as corn and wheat) used in fast-food production.<sup>351</sup> For example, French fries are often made from the Columbia River Basin Russett Burbank potato, which relies heavily on government subsidized irrigation systems.<sup>352</sup> Fast-food producers also benefit from the use of growth hormones to boost animal yield, market deficiency loans from the Department of Agriculture to influence market prices, and cheap non-unionized labor (often from

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345. See *id.* at 22–23; *The Wendy's Story*, WENDY'S, <https://www.wendys.com/wendys-story#:~:text=November%2015%2C%201969%20%E2%80%93%20First%20Wendy's,and%20iconic%20Frosty%C2%AE%20desserts> [https://perma.cc/U2MY-63T8] (last visited Apr. 10, 2023).

346. Danielle Diraddo, *15 Surprising Facts and Statistics About the Fast Food Industry*, TOAST, <https://pos.toasttab.com/blog/on-the-line/fast-food-industry-statistics> (last visited Apr. 10, 2023).

347. *Fast Food*, FOOD EMPOWERMENT PROJECT, <https://foodispower.org/access-health/fast-food/> [https://perma.cc/6269-ZC6M] (last visited Apr. 10, 2023).

348. See Diraddo, *supra* note 346.

349. See Small, *supra* note 16.

350. See *id.*; Freeman, *supra* note 29, at 2240.

351. See Freeman, *supra* note 29, at 2242–43 (“Government subsidies for animal feed, sugar, and fats . . . keep the price of producing fast food artificially low.”); CRAIG SAMS, *THE LITTLE FOOD BOOK: AN EXPLOSIVE ACCOUNT OF THE FOOD WE EAT TODAY* 38–39 (2003) (“[T]he [fast-food] industry is praised as an example of popular capitalism while being heavily dependent on state support.”); Gilbert M. Gaul, Sarah Cohen & Dan Morgan, *Federal Subsidies Turn Farms into Big Business*, WASH. POST (Dec. 21, 2006), <https://www.washingtonpost.com/archive/politics/2006/12/21/federal-subsidies-turn-farms-into-big-business/733c4ae8-6064-4505-aa92-db34f4c11f23>.

352. See Edward A. Chadd, *Manifest Subsidy*, COMMON CAUSE MAG., Fall 1995, at 18, 18.; Freeman, *supra* note 29, at 2242.

immigrants) to maintain high profits.<sup>353</sup> Yet, fast food has historically been deemed unhealthy because it is highly processed with chemical additives, deep-fried in partially hydrogenated oils, and combined with starchy vegetables and sugary drinks in its final packaging.<sup>354</sup> Such foods typically have a high glycemic index and are high in trans fats, which have been proven to increase the risk of obesity, diabetes, high cholesterol, and heart attacks.<sup>355</sup>

Even more, although advocates of “personal responsibility” in public health argue that there are cultural factors that draw certain populations to eat unhealthy food at fast-food restaurants, the truth is that certain populations have been historically targeted by fast-food corporations.<sup>356</sup> Restaurants like McDonald’s have focused their operations in urban neighborhoods because many urban customers have limited incomes and limited healthy food options.<sup>357</sup> As the fast-food industry grew in urban neighborhoods during the mid- to late-twentieth century, supermarkets with high quality and fresh produce were simultaneously moving to more affluent suburbs alongside the “white flight” of many middle to upper class White Americans.<sup>358</sup> Other market forces have motivated the disappearance of fresh food from urban areas, such as the reduction of farmland, especially in Black American communities.<sup>359</sup> As supermarkets and groceries left urban centers in search of neighborhoods that were safer and more economically efficient, racially and ethnically minoritized groups were left behind in food deserts that eventually became food swamps filled with fast-food restaurants.<sup>360</sup>

Fast-food corporations have historically devoted substantial resources toward attracting customers in low-income minority communities through a combination of race-based marketing and advertising.<sup>361</sup> For example, in Black American communities, food marketing campaigns have often included Black “cultural heroes,” such as athletes (e.g., Michael Jordan for McDonald’s) or entertainers (e.g.,

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353. See Freeman, *supra* note 29, at 2242 & n.145.

354. See *id.* at 2225.

355. See *id.*

356. See *id.* at 2223 (“Not only does the fast food industry exploit the market forces that drive supermarkets and produce stands out of low-income urban neighborhoods, but it also specifically targets African Americans and Latinos through race-based marketing and advertising . . .”); *id.* at 2250.

357. See *id.* at 2226–27, 2240.

358. See *id.*; WILKERSON, *supra* note 257, at 10.

359. See Freeman, *supra* note 29, at 2239.

360. See Rodolfo M. Nayga, Jr. & Zy Weinberg, *Supermarket Access in the Inner Cities*, 6 J. RETAILING & CONSUMER SERVS. 141, 141–42, 144 (1999) (“[U]rban supermarkets sometimes have to take extraordinary and expensive measures to maintain a safe shopping environment.”); Kimberly Morland, Steve Wing, Ana Diez Roux & Charles Poole, *Neighborhood Characteristics Associated with the Location of Food Stores and Food Service Places*, 22 AM. J. PREVENTIVE MED. 23, 26–28 (2002); Carol R. Horowitz, Kathryn A. Colson, Paul L. Hebert & Kristie Lancaster, *Barriers to Buying Healthy Foods for People with Diabetes: Evidence of Environmental Disparities*, 94 AM. J. PUB. HEALTH 1549, 1551–53 (2004).

361. See Ross D. Petty, Anne-Marie G. Harris, Toni Broaddus & William M. Boyd III, *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335, 342, 357–58 (2003); Freeman, *supra* note 29, at 2233.

Michael Jackson for PepsiCo), to entice customers.<sup>362</sup> In the modern era, digital campaigns enable a broader reach.<sup>363</sup> Children in low-income neighborhoods have traditionally been the targets of fast-food advertising, which is designed to develop early eating habits that will establish a lifelong relationship with fast food.<sup>364</sup> Fast-food corporations often partner with elementary and high schools for access to billboards and the rights to sell fast-food at schools or display their logo on school property.<sup>365</sup> Typically, the food options that are offered to students are unhealthy, from candy to soda and snack food.<sup>366</sup> Even when fast-food corporations are unable to target students directly on campus, they cluster their restaurants within walking distance of schools to attract students on their way to and from the school building.<sup>367</sup>

Due to the unhealthy nature of fast food and the concentration of fast food in low-income communities that suffer from a lack of affordable healthy food options and adequate health and nutrition education,<sup>368</sup> predominantly Black urban areas “tend to have nutritionally deficient diets and suffer disproportionately from diseases and deaths related to the consumption of unhealthy food.”<sup>369</sup> Further, such areas tend to lack access to quality health care to address food-related diseases.<sup>370</sup> Taken together, the racial disparities in public health across the United States are significantly correlated with the concentration of unhealthy fast food in those same communities.<sup>371</sup>

These food-related harms to predominantly low-income and non-White communities stem from the institutionalized practices and policies of the U.S. government, which has failed to adequately regulate fast-food corporations to ensure that all communities have access to healthy food. For example, the National

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362. Freeman, *supra* note 29, at 2238; see Mary Story & Simone French, *Food Advertising and Marketing Directed at Children and Adolescents in the US*, INT’L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY (Feb. 10, 2004), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC416565/pdf/1479-5868-1-3.pdf> [<https://perma.cc/MD4X-RTLZ>].

363. See KATHRYN MONTGOMERY, SONYA GRIER, JEFF CHESTER & LORI DORFMAN, *FOOD MARKETING IN THE DIGITAL AGE: A CONCEPTUAL FRAMEWORK AND AGENDA FOR RESEARCH* 3–7 (2011), [https://www.foodmarketing.org/wp-content/uploads/2012/11/bmsg\\_report\\_food\\_marketing\\_in\\_the\\_digital\\_age\\_a\\_conceptual\\_framework.pdf](https://www.foodmarketing.org/wp-content/uploads/2012/11/bmsg_report_food_marketing_in_the_digital_age_a_conceptual_framework.pdf) [<https://perma.cc/62E6-AKHM>].

364. See Freeman, *supra* note 29, at 2233–34; Dina L. G. Borzekowski & Thomas N. Robinson, *The 30-Second Effect: An Experiment Revealing the Impact of Television Commercials on Food Preferences of Preschoolers*, 101 J. AM. DIETETIC ASS’N 42, 42–43, 45 (2001).

365. NAOMI KLEIN, *NO LOGO: NO SPACE, NO CHOICE, NO JOBS* 88–91 (2000).

366. See Lisa Craypo, Amanda Purcell, Sarah E. Samuels, Peggy Agron, Elizabeth Bell & Erika Takada, *Commentary, Fast Food Sales on High School Campuses: Results from the 2000 California High School Fast Food Survey*, 72 J. SCH. HEALTH 78, 78–80 (2002).

367. See S. Bryn Austin, Steven J. Melly, Brisa N. Sanchez, Aarti Patel, Stephen Buka & Steven L. Gortmaker, *Clustering of Fast-Food Restaurants Around Schools: A Novel Application of Spatial Statistics to the Study of Food Environments*, 95 AM. J. PUB. HEALTH 1575, 1578 (2005).

368. See *supra* notes 349–60 and accompanying text.

369. Kiran Nijjer, *Food Oppression: The Lethal Inequalities Permeating Our Food System.*, MEDIUM (Feb. 25, 2020), <https://medium.com/@kiranlynn/food-oppression-b47ec82158ca> [<https://perma.cc/8XHG-UQT5>]; see Guadalupe T. Luna, *The New Deal and Food Insecurity in the “Midst of Plenty,”* 9 DRAKE J. AGRIC. L. 213, 219 (2004).

370. See Freeman, *supra* note 29, at 2222.

371. See *id.* at 2229–30.

School Lunch Program initiated by President Harry S. Truman provides meals for eligible students each day of the school week.<sup>372</sup> However, relying on USDA federal dietary guidelines that some physicians have criticized as racially biased because of their emphasis on meat and dairy products—both leading contributors to disease among African Americans, such as hypertension and diabetes<sup>373</sup>—the National School Lunch Program spends a significant portion of its budget “on ground pork, ground beef, eggs, and whole-milk cheeses instead of fruits, vegetables, and other healthy foods.”<sup>374</sup>

Moreover, the U.S. government has historically failed to regulate the labeling of fast food to ensure that consumers obtain adequate nutritional information to make informed choices about their food purchases. Indeed, the fast-food industry has enjoyed an exemption from the 1990 Federal Nutritional Labeling and Education Act,<sup>375</sup> and litigation on the issue has struggled to hold food corporations accountable. For example, in 2009, a lawsuit was brought against PepsiCo alleging that the labeling of Cap’n Crunch’s Crunch Berries was deceptive because the cereal did not contain real berries.<sup>376</sup> The court dismissed the case, concluding that no reasonable person would believe that the cereal contained real fruit.<sup>377</sup> In 2013, the Third Circuit upheld the dismissal of a class action lawsuit against Johnson & Johnson that alleged that the corporation had misrepresented the nutritional value of Benecol butter and margarine spread by claiming that the food had no trans fat and was proven to reduce cholesterol.<sup>378</sup> The court concluded that Food and Drug Administration (FDA) regulations had allowed food companies to label food products as having “zero grams per serving” when they contained less than half a gram of trans fat per serving.<sup>379</sup> Further, the court noted that the FDA had permitted food companies to claim that food products reduce cholesterol based on the inclusion of plant stanol esters.<sup>380</sup> Yet, even where claims of misleading labeling have been affirmed by courts, proving that plaintiffs relied upon the mislabeling to their detriment has been difficult to establish.<sup>381</sup>

It would take many years of advocacy for large fast-food producers, such as McDonald’s, to incorporate nutrition labeling on their menus.<sup>382</sup> The 2003 high-

372. *See id.* at 2244.

373. *See, e.g.*, Patricia Bertron, Neal D. Barnard & Milton Mills, *Racial Bias in Federal Nutrition Policy, Part II: Weak Guidelines Take a Disproportionate Toll*, 91 J. NAT’L MED. ASS’N 201, 201, 206 (1999).

374. Freeman, *supra* note 29, at 2244.

375. *See id.* at 2245.

376. *Sugawara v. PepsiCo, Inc.*, No. 08-cv-01335, 2009 WL 1439115, at \*1 (E.D. Cal. May 21, 2009).

377. *See id.* at \*1, \*3.

378. *Young v. Johnson & Johnson*, 525 F. App’x. 179, 180–81 (3d Cir. 2013).

379. *Id.* at 182–84.

380. *See id.*

381. *See, e.g.*, *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742, 2011 WL 196930, at \*1–2 (S.D.N.Y. Jan. 21, 2011) (granting summary judgment to defendant because the plaintiffs failed to establish that they paid more for Snapple’s products than they would have paid for other comparable beverages).

382. *See McDonald’s Unveils Nutrition Labeling*, FAST FOOD NEWS (Feb. 8, 2006), <http://news.foodfacts.info/2006/02/mcdonalds-unveils-nutrition-labeling.html#:~:text=The%20new%20labels%20feature>

profile class action lawsuit against McDonald's, *Pelman v. McDonald's*, in which the parents of two teenagers claimed that McDonald's food had made their children obese, played an important role in raising public awareness of McDonald's inattentiveness to the health impacts of their food.<sup>383</sup> After a number of claim dismissals, the case ultimately came down to whether McDonald's had misled their customers with deceptive advertising about the health implications and nutritional value of their food.<sup>384</sup> The district court concluded, "Nobody is forced to eat at McDonalds."<sup>385</sup> District court Judge Robert Sweet dismissed the first complaint and suggested that the plaintiffs must "allege either that the attributes of McDonalds products are so extraordinarily unhealthy that they are outside the responsible contemplation of the consuming public or that the products are so extraordinarily unhealthy as to be dangerous in their intended use."<sup>386</sup>

In 2010, after an appeal to the Second Circuit and a remand, the certification of a class action in *Pelman* was denied because the claim of a causal link between the alleged injuries and McDonald's food, according to the court, "depend[ed] heavily on a range of factors unique to each individual."<sup>387</sup> In other words, to prevail on a theory of liability, the plaintiffs needed to prove that the consumption of McDonald's fast-food products was a substantial cause of their injuries, and not merely one among "myriad other food products on the market high in fat, cholesterol, and salt, and containing beef and cheese."<sup>388</sup> The FDA supported the view that "[t]he problem of obesity in America has no single cause."<sup>389</sup>

Litigation has proven unable to hold fast-food corporations accountable for the health implications of their food products. FDA regulations do not provide clear definitions and guidance on the usage of words such as "natural," "all natural," "nutritious," "wholesome," and "healthy" on food nutrition labels. Further, not only is causality difficult to establish when consumers experience food-related harms, political leaders often embrace a politics of personal responsibility, shifting blame onto consumers.<sup>390</sup> For example, in 2004, in reaction to the *Pelman* lawsuit, Congress passed The American Personal Responsibility in Food Consumption Act, also known as the "Hamburger Bill," which sought to prohibit consumers from suing food manufacturers or sellers for health-related issues related to being overweight caused by the consumption of fast food.<sup>391</sup> The Act was never passed by the Senate.

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<sup>383</sup> *See* <https://perma.cc/YSE6-BGYJ>; Freeman, *supra* note 29, at 2245 & n.168.

<sup>384</sup> *See* *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 516, 519, 543 (S.D.N.Y. 2003) (granting leave to file an amended complaint); *see also* Freeman, *supra* note 29, at 2247–48.

<sup>385</sup> *See* *Pelman v. McDonald's Corp.*, 396 F.3d 508, 510 (2d Cir. 2005).

<sup>386</sup> *Pelman*, 237 F. Supp. 2d at 533.

<sup>387</sup> *Id.* at 532; *see id.* at 543.

<sup>388</sup> *Pelman v. McDonald's Corp.*, 272 F.R.D. 82, 93 (S.D.N.Y. 2010).

<sup>389</sup> *Id.* at 93 n.28.

<sup>390</sup> FDA, CALORIES COUNT: REPORT OF THE WORKING GROUP ON OBESITY (2014).

<sup>391</sup> *See* Freeman, *supra* note 29, at 2250–51.

<sup>392</sup> H.R. 339, 108th Cong. (2004); *see also* Freeman, *supra* note 29, at 2250–51.



If courts continue to embrace a politics of personal responsibility that casts blame for food-related harms on consumer choice, even when such choices are limited by the persistence of food deserts and food swamps nationwide, then litigation will remain an inadequate mechanism to address the food oppression that continues to impact many low-income and minoritized communities. The U.S. government must reckon with its complicity in the perpetuation of food-related harms caused by the fast-food industry by failing to hold fast-food companies accountable for the health implications of their food products. To be sure, more consumers are opting for healthier food and many fast-food companies have expanded their healthy food options.<sup>392</sup> For example, retail sales of plant-based food increased eleven percent from 2018 to 2019,<sup>393</sup> and many restaurants have started to incorporate vegan fast-food options.<sup>394</sup> Nevertheless, lawmakers should impose stricter regulations on food corporations that target low-income communities with unhealthy food for profit-making ends. Finally, political leaders at the federal and local levels should support progressive legislation that targets marginalized communities that have been harmed by the legacy of food oppression in the United States. The grounding for such race-based programming can be found in the Thirteenth Amendment.

### III. ABOLISHING FOOD OPPRESSION TODAY

The concept of human dignity has been increasingly invoked by the U.S. Supreme Court in recent years across a diverse spectrum of cases, from disputes on gun rights, freedom of speech, and even the death penalty.<sup>395</sup> Yet, the concept's usage in U.S. jurisprudence is relatively recent, having only gained prominence after the Universal Declaration of Human Rights in 1948 made dignity a central pillar of human rights discourse.<sup>396</sup> As a result, the meaning of human dignity, not only as a moral, philosophical, or religious concept, but also as a *legal* concept, remains in dispute. Constitutional courts around the world understand the term in varied ways,

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392. See, e.g., Allison Aubrey, *McDonald's Now Serving Chicken Raised Without Antibiotics—Mostly*, NPR (Aug. 2, 2016, 12:35 PM), <https://www.npr.org/sections/thesalt/2016/08/02/488285374/mcdonalds-now-serving-chicken-raised-without-antibiotics-mostly> [https://perma.cc/W3E3-PR5H]; Allison Aubrey, *Restaurants Shave Calories off New Menu Items*, NPR (Oct. 8, 2014, 3:19 AM), <https://www.npr.org/sections/thesalt/2014/10/08/354377535/restaurants-shave-calories-off-new-menu-items> [https://perma.cc/GEP2-BMV2].

393. *U.S. Plant-Based Retail Market Worth \$4.5 Billion, Growing at 5X Total Food Sales*, PLANT BASED FOODS ASS'N (July 12, 2019), <https://www.plantbasedfoods.org/2019-data-plant-based-market/> [https://perma.cc/VD8J-MUZPJ].

394. See Grace Dean, *Fast-Food Chains Are Finally Taking Vegan Food Seriously*, BUS. INSIDER (Jan. 16, 2022, 5:30 AM), <https://www.businessinsider.com/fast-food-chains-are-finally-taking-vegan-food-seriously-2022-1>.

395. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 893 (2010) (Stevens, J., dissenting) (addressing dignity in the context of a right to bear arms); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 467 (2010) (discussing dignity in the context of corporate speech and restrictions on corporate expenditures); *Wellons v. Hall*, 558 U.S. 220, 220 (2010) (per curiam) (discussing dignity in the context of death penalty judicial proceedings).

396. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. I (Dec. 10, 1948) (“All human beings are born free and equal in dignity and rights.”).

and diverse conceptions of dignity in U.S. judicial opinions reflect different articulations of its relationship to fundamental constitutional rights and liberties.<sup>397</sup>

For example, some courts have defined dignity as the inherent worth of every person, a presumption of equality that does not depend upon social rank or other external measures of individual worth.<sup>398</sup> Under this *equality* framing of dignity, humanity is defined by one's inherent capabilities for human endeavors, such as the capacity for human reason.<sup>399</sup> Other courts use dignity to describe the act of expressing one's inherent humanity, often in community with others, while remaining free from any unjustified interference with such expressions of free will.<sup>400</sup> Under this *liberty* framing of dignity, dignity is defined as one's freedom to exercise inherent human capabilities through individual human agency.<sup>401</sup> Still other courts describe dignity as the integrity one experiences while pursuing well-being through individual human agency.<sup>402</sup> Under this *integrity* framing of dignity, dignity is defined as one's ability to experience a fully integrated personal identity—which scholars argue encompasses both a positive self-perception and a reputable social recognition—that affirms one's membership in a political society.<sup>403</sup>

This Part argues that all three of these popular framings of human dignity as a philosophical concept—dignity as equality, dignity as liberty, and dignity as integrity—should be employed by courts not as discrete moral concepts to be exploited as rhetorical devices for constitutional arguments about equality or liberty, but instead as integrated elements of a unified ontological conception of the human condition essential to one's membership within a political society. Although reasonable minds may differ, for the purposes of this Part's analysis, let us assume that human dignity as a legal concept is defined by three prongs:

- (1) the equal opportunity to express inherent human capabilities;
- (2) without the unjustified constraints of others; and
- (3) toward the full development of an integrated personhood.

In this way, dignity as a legal concept describes a state of humanity necessary for the full enjoyment of constitutional rights and liberties in a democratic society. Drawing upon this normative framing of human dignity, this Part describes three possible dignitary harms that individually, or collectively, can injure one's

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397. See Giovanni Boggetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, in EUROPEAN AND US CONSTITUTIONALISM 75, 84–90 (G. Nolte ed., 2005) (“[T]he U.S. Constitution, as interpreted by the Supreme Court, seems to offer less protection to values and rights associated with the idea of human dignity than the average European Constitution.”).

398. See *infra* notes 422–30 and accompanying text.

399. See *infra* notes 409–16 and accompanying text.

400. See *infra* Section III.B.

401. See *infra* Section III.B.

402. See *infra* Section III.C.

403. See *infra* Section III.C.

ability to experience human dignity in the context of one's membership in a political society: equality-based harms, discussed in Section III.A; liberty-based harms, discussed in Section III.B; and integrity-based harms, discussed in Section III.C. This Article proposes this normative framework as a way for judges, legislators, prospective litigants, and scholars to both characterize the harms of slavery and determine whether certain modern-day harms constitute a badge or incident of slavery. To elucidate how such harms can manifest at the hands of fellow citizens, or at the hands of the state, this Part uses the modern concept of food insecurity as a type of dignitary harm. Individual dignitary harms may be inevitable in a capitalist society. However, when a political economic system imposes individual dignitary harms that collectively perpetuate the same dignitary harms levied by slavery, thereby amounting to structural oppression, they invoke the legislative potential of the Thirteenth Amendment. Consider first the condition of food insecurity as an equality-based dignitary harm.

#### A. EQUALITY-BASED DIGNITARY HARMS

##### 1. The Source of Belonging

The arc of dignity as a legal concept in U.S. jurisprudence begins with the notion of one's institutional status as their dignity. Long before the Enlightenment Era, dignity was ascribed only to the nobility, associating the concept with social ranking and hierarchy.<sup>404</sup> In part to distance themselves from the nobility ranking system of the English aristocracy, the drafters of the U.S. Constitution abolished nobility ranking and thereby established the basis for America's guiding normative principles of equality and liberty.<sup>405</sup> But equality and liberty in the land that would become the United States were not rights meant for all of its inhabitants. Alongside banning titles of nobility, the U.S. Constitution also embraced a view of humanity espoused by both Thomas Jefferson and Alexander Hamilton—all *White men*, by virtue of their equal worth as human beings, should be recognized as having equal dignity.<sup>406</sup> In so doing, the Founders not only emphasized the sovereignty of the newly established settler

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404. See Hubert Cancik, 'Dignity of Man' and 'Persona' in *Stoic Anthropology: Some Remarks on Cicero, De Officiis I 105–107*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 19, 27 (David Kretzmer & Eckart Klein eds., 2002) ("The word *dignitas* has a specifically Roman ring. It calls to mind the majesty of the Republic and the magistrate or Caesar. *Dignitas* denotes rank, authority, splendor.").

405. See U.S. CONST. art. 1, § 9, cl. 8; Carlton F.W. Larson, *Titles of Nobility, Heredity, Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U. L. REV. 1375, 1408 (2006).

406. See, e.g., Annette Gordon-Reed, *Thomas Jefferson's Vision of Equality Was Not All-Inclusive. But It Was Transformative*, TIME (Feb. 20, 2020, 7:27 AM), <https://time.com/5783989/thomas-jefferson-all-men-created-equal/>; Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 200 (2011) ("In America, this shift coincided with the ratification of the Constitution, which banned titles of nobility. Thomas Jefferson held the view that 'the dignity of man is lost in arbitrary distinctions' based on 'birth or badge,' and Alexander Hamilton agreed, arguing that a constitutional democracy was the 'safest course for your liberty, your dignity, and your happiness.' Change was afoot, and the rallying cry was one that recognized the equal worth of all human beings." (footnotes omitted)).

colonial state, now freed from the domination of the English crown, but they also affirmed the freedom of its patriots—based upon their equal nobility, as it were—to legally enforce the institution of human chattel slavery under newly established laws and newly empowered courts, immune from the judgement of other nations.<sup>407</sup> Notwithstanding the role of White supremacy and patriarchy in limiting the expression of dignity for non-White Americans and women, the notion of dignity-as-equality would become a foundational component of the evolving U.S. political economy, one premised on a commitment to laissez-faire capitalism, individualism, and liberal democracy.<sup>408</sup>

The view that dignity inheres in all humans, as Alan Gewirth explains, by virtue of “a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human,”<sup>409</sup> derives from two different theoretical claims. The first, visible in the Judeo-Christian tradition, claims that all humans are conferred with equal dignity by virtue of their *imago Dei*, or creation in the image of God.<sup>410</sup> Such ideas were espoused during the Renaissance Era, when Italian philosopher Giovanni Pico della Mirandola argued in *Oration on the Dignity of Man* that it was man’s placement in God’s kingdom—“We have made you a creature neither of heaven nor of earth, neither mortal nor immortal, in order that you may, as the free and proud shaper of your own being, fashion yourself in the form you may prefer”—that defined his intrinsic worth.<sup>411</sup> Modern religious teachings also reflect these early views. For example, in 2009, Pope Benedict XVI declared in *Caritas in Veritate*, “*God is the guarantor of man’s true development, inasmuch as, having created him in his image, he also establishes the transcendent dignity of men and women . . .*”<sup>412</sup>

The second, nontheological claim, stemming from philosophical conceptions of humanity, asserts that all humans have equal dignity because humans, as a

407. See generally Dana D. Nelson, *The Free Action of the Collective Power of Individuals’: Vernacular Democracy and the Sovereign People*, in *CIVIC CONTINUITIES IN AN AGE OF REVOLUTIONARY CHANGE, C.1750–1850: EUROPE AND THE AMERICAS* 249 (Judith Pollmann & Henk te Velde eds., 2023) (exploring the Constitution’s institutionalization of sovereignty and its relationship to vernacular or extra-institutional practices of democratic society in the early United States); Staughton Lynd & David Waldstreicher, *Forum, Free Trade, Sovereignty, and Slavery: Toward an Economic Interpretation of American Independence*, 68 *WM. & MARY Q.* 597 (2011) (exploring the question of sovereignty alongside other drivers of the American Revolution).

408. For a discussion of U.S. political economy, see generally Lynd & Waldstreicher, *supra* note 407 and JOHN E. HILL, *DEMOCRACY, EQUALITY, AND JUSTICE: JOHN ADAMS, ADAM SMITH, AND POLITICAL ECONOMY* (2007).

409. 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).

410. Cf. GIOVANNI PICO DELLA MIRANDOLA, *ORATION ON THE DIGNITY OF MAN* 6 (A. Robert Caponigri trans., Henry Regnery Co., 3d prtg. 1956) (1496).

411. *Id.* at 7.

412. POPE BENEDICT XVI, *CARITAS IN VERITATE* ¶ 29 (2009), [https://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20090629\\_caritas-in-veritate.html](https://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate.html) [https://perma.cc/6R9Q-9375].

class of species, have unique capabilities.<sup>413</sup> Although there is no agreement on a set of capabilities that comprise human dignity, many follow in the tradition of German philosopher Immanuel Kant who emphasized man's capacity for self-awareness and autonomous decisionmaking guided by rational thinking.<sup>414</sup> In the late eighteenth century, Kant argued that every person's autonomy as a self-legislating individual to make choices—to be an end in him or herself—meant that they must also “acknowledge, in a practical way, the dignity of humanity in every other man.”<sup>415</sup> It is such agency that many philosophers have deemed fundamental to inherent dignity—the ability to make individual, rational, and autonomous decisions.<sup>416</sup>

Whether one embraces a theological or philosophical view, at least three conclusions can be drawn from the concept of dignity-as-equality as it is commonly conceptualized in constitutional jurisprudence: (1) human dignity is a universal, intrinsic quality of all human beings by virtue of their status as such, regardless of whether a person's reasoning, choices, or sense of self-worth are reflective of dominant cultural views; (2) human dignity is a permanent attribute of the human condition, one that cannot be measured by an external reference, and therefore, cannot be increased or decreased; and (3) human dignity is a relational concept that can be discerned only as one observes how individuals are treated by others, or how individuals treat themselves in relation to societal norms. An assessment of whether this albeit individualistic framing of equality as dignity—one grounded in the human capacity for autonomous agency—undermines communitarian, religious, or other conceptions of the human condition is beyond the scope of this Article.<sup>417</sup> Attempts to clarify the philosophical or moral substructure of inherent equal human dignity is less important to defining dignity as a legal concept than simply recognizing that it exists. For if “[a]ll human beings are born

413. See DAVID HUME, *Of the Dignity or Meanness of Human Nature*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 80, 82 (Eugene F. Miller ed., Liberty Fund rev. ed. 1987) (1777).

414. See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 41 (James W. Ellington trans., Hackett Publ'g Co., 3d ed. 1993) (1785) [hereinafter KANT, *METAPHYSICS*]; IMMANUEL KANT, *ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW* 9 (Hans H. Rudnick ed., Victor Lyle Dowdell trans., S. Ill. Univ. Press 1978) (1798) (“The fact that man is aware of an ego-concept raises him infinitely above all other creatures living on earth. Because of this, he is a person . . .”).

415. Gewirth, *supra* note 409, at 11; see 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); KANT, *METAPHYSICS*, *supra* note 414, at 36 (“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.”).

416. 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.”); Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 57 (Amy Gutmann ed., 1994) (“[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.”).

417. For a discussion of framing equality as dignity, see generally Connor M. Ewing, *With Dignity and Justice for All: The Jurisprudence of Equal Dignity and the Partial Convergence of Liberty and Equality in American Constitutional Law*, 16 *INT'L J. CONST. L.* 753 (2018).

free and equal in dignity and rights,” as the Universal Declaration of Human Rights declares,<sup>418</sup> then the more pressing question is what rights, liberties, or entitlements derive from that notion.

Constitutional courts have embraced the concept of equality as dignity to clarify the individual harm of unequal treatment under law. After the horrors of World War II prompted nations such as Germany to incorporate the concept of dignity into their constitutions,<sup>419</sup> and around when the international community recognized the centrality of human dignity to civil and political rights,<sup>420</sup> the U.S. Supreme Court began to clarify the concept of equality as dignity in various anti-discrimination cases.<sup>421</sup> But the narrative arc begins much earlier with the legacy of Fourteenth Amendment equal protection jurisprudence, which has long emphasized formal equality under law: the equal legal treatment of members of the citizenry regardless of racial, religious, gender, or sexual orientation classifications. As early as 1883, in his *Civil Rights Cases* dissent, Justice Harlan emphasized the role of equal access to public accommodations as a measure of the inherent “belonging” that all citizens should be granted as equal members of their community.<sup>422</sup> But White supremacy was then, and remains today, a force to be reckoned. Such discourse would evolve to also consider dignity as recognition, a point taken up in Section III.C below.

It would take until 1964 during the Civil Rights movement for equality to be protected for all Americans. In *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court rejected a constitutional challenge to the public accommodations provision of the Civil Rights Act of 1964, holding that the Commerce Clause granted Congress authority to prohibit racial discrimination in a private motel.<sup>423</sup> As Justice Goldberg explained in his concurrence, “The primary purpose of . . . [the Civil Rights Act], then, is to solve this problem, the deprivation of personal *dignity* that surely accompanies denials of equal access to public establishments.”<sup>424</sup> Similarly, in *Roberts v. United States Jaycees*, the Supreme Court upheld a Minnesota antidiscrimination law that prohibited gender discrimination in public accommodations.<sup>425</sup> Although the U.S. Junior Chamber of Commerce—or Jaycees—argued that they should have a right to select membership due to their public advocacy as a civic organization, and due to their First Amendment right of

418. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. I (Dec. 10, 1948).

419. See Doron Shultziner & Guy E. Carmi, *Human Dignity in National Constitutions: Functions, Promises and Dangers*, 62 AM. J. COMPAR. L. 461, 465 (2014).

420. See G.A. Res. 2200 (XXI), International Covenant on Civil and Political Rights, preamble (Dec. 16, 1966).

421. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964).

422. 109 U.S. 3, 26, 61 (1883) (Harlan, J., dissenting) (“The difficulty has been to compel a recognition of the legal right of the black race to take the rank of citizens, and to secure the enjoyment of privileges belonging, under the law, to them as a component part of the people for whose welfare and happiness government is ordained.”).

423. 379 U.S. at 244, 261.

424. *Id.* at 291–92 (Goldberg, J., concurring) (alteration and omission in original) (emphasis added) (quoting S. REP. NO. 88-872, at 16 (1964)).

425. 468 U.S. 609, 612 (1984).

freedom of association, the Supreme Court rejected their arguments.<sup>426</sup> The Court concluded that the state had a compelling interest in prohibiting discrimination.<sup>427</sup>

More recently, in *Rice v. Cayetano*, the Supreme Court ruled that the state of Hawaii could not restrict voting eligibility for electing members to the Office of Hawaiian Affairs Board of Trustees to people of Native ancestry.<sup>428</sup> By enacting a race-based voting system, with ancestry as a proxy for race, Hawaii was not only deemed in violation of the Fifteenth Amendment, but according to the Court, had “demean[ed] the *dignity* and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”<sup>429</sup> In each of these cases, the 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—a categorization, such as race or gender, under which a group has historically been subjected to discrimination or unfair treatment.<sup>430</sup>

## 2. Conditions of Unbelonging

How might an equality-based dignitary harm arise in the context of food insecurity? First, assume that access to certain kinds of food in sufficient quantities is a necessary condition of experiencing inherent human dignity. According to the United Nations Committee on World Food Security, “food security” is defined as having “physical, social, and economic access to sufficient” nutrient-rich and healthy food to sustain “an active and healthy life.”<sup>431</sup> If one agrees that activity and health is integral to autonomous human decisionmaking in pursuit of human well-being, then the point requires no further explanation. As a group of scholars puts it, “Health is fundamental to every aspect of life: without health, a student cannot do well in school; a worker cannot hold a job, much less excel at one; a family member cannot be an effective parent or spouse.”<sup>432</sup> Like racial or gender-based discrimination in the public accommodations or the voting context, one’s inability to physically access sufficient nutrient-rich and healthy food to pursue human well-being due to discrimination that is based upon a suspect classification might be appropriately defined as an equality-based dignitary harm.

The easy case would be that of intentional discrimination that limits one’s access to food markets, such as prohibiting a person from accessing a grocery store based upon their gender or race. Civil rights laws already address such

426. *Id.* at 612, 627–28.

427. *Id.* at 623.

428. 528 U.S. 495, 499, 522 (2000).

429. *Id.* at 517 (emphasis added).

430. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249, 261 (1964); *Rice*, 528 U.S. at 515, 517; *Roberts*, 468 U.S. at 623.

431. *Food Security*, INT’L FOOD POL’Y RSCH. INST., <https://www.ifpri.org/topic/food-security> [<https://perma.cc/67VL-J952>] (last visited Apr. 10, 2023).

432. MICHAEL K. BROWN, MARTIN CARNOY, ELLIOTT CURRIE, TROY DUSTER, DAVID B. OPPENHEIMER, MARJORIE M. SHULTZ & DAVID WELLMAN, *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 24 (2003).

concerns.<sup>433</sup> The more difficult case would be unintentional discrimination that limits one's access to nutrient-rich and healthy food based upon a law, public policy, or social policy that disproportionately impacts members of a marginalized class.<sup>434</sup> For example, consider the case of a largely racially homogenous low-income neighborhood residing within a food desert<sup>435</sup>—an area with limited access to nutrient-rich and healthy food sources.<sup>436</sup> Even more difficult, given the United Nations' incorporation of social and economic access into its definition of food security,<sup>437</sup> would be the case of discrimination based upon cultural or economic reasons. For example, consider the case of a largely racially homogenous low-income neighborhood residing within a food swamp—an area replete with unhealthy and non-nutritious fast-food alternatives, or limited healthy food options that are overpriced.<sup>438</sup> Or consider the example of a largely ethnically homogenous community residing in a neighborhood with limited access to healthy culturally-appropriate food.<sup>439</sup> Or consider yet still the example of a gentrifying neighborhood where new grocery stores and supermarkets offer healthy food that existing low-income residents cannot afford.<sup>440</sup>

What these examples demonstrate is that one can experience opportunities to physically access food markets, yet still face equality-based dignitary harms by

433. See *Roberts*, 468 U.S. at 624 (describing public accommodations laws).

434. Cf. Maida P. Galvez, Kimberly Morland, Cherita Raines, Jessica Kobil, Jodi Siskind, James Godbold & Barbara Brenner, *Race and Food Store Availability in an Inner-City Neighbourhood*, 11 PUB. HEALTH NUTRITION 624, 624 (2007).

435. See Kimberly Morland & Susan Filomena, *Disparities in the Availability of Fruits and Vegetables Between Racially Segregated Urban Neighbourhoods*, 10 PUB. HEALTH NUTRITION 1481, 1481, 1484 (2007) (noting that the presence of various types of fruits and vegetables was less common in predominately Black neighborhoods as compared to predominantly White neighborhoods in Brooklyn, New York).

436. See *supra* note 94 and accompanying text.

437. See *supra* note 431 and accompanying text.

438. See, e.g., *supra* note 5 and accompanying text; Deja Hendrickson, Chery Smith & Nicole Eikenberry, *Fruit and Vegetable Access in Four Low-Income Food Deserts Communities in Minnesota*, 23 AGRIC. & HUM. VALUES 371, 372, 379 (2006) (noting the absence of quality, affordable food for low-income residents in four Minnesota communities that prevents or diminishes their ability to choose foods that help maintain a healthy lifestyle).

439. See, e.g., Laura H. McArthur, Ruben P. Viramontez Anguiano & Deigo Nocetti, *Maintenance and Change in the Diet of Hispanic Immigrants in Eastern North Carolina*, 29 FAM. & CONSUMER SCIS. RSCH. J. 309, 328–29 (2001) (noting that Hispanic immigrants in eastern North Carolina struggled to retain their cultural food traditions and “are consuming more high-fat, high-sugar foods . . . than they did in their home country”).

440. See, e.g., Daniel Monroe Sullivan, *From Food Desert to Food Mirage: Race, Social Class, and Food Shopping in a Gentrifying Neighborhood*, 4 ADVANCES APPLIED SOCIO. 30, 30–31 (2014) (studying the Alberta neighborhood in Portland, Oregon, and arguing that “supermarkets that promote healthy living and environmental sustainability need to be sensitive to the racial ‘symbolic boundaries’ and socioeconomic barriers that may create ‘food mirages’ by limiting food access to poor and minority residents”); Lauren Ashley Brooks, *Food Deserts, Gentrification, and Public Health Nutrition: A Case Study of the Shaw/U-Street Neighborhood of Washington D.C.* (May 15, 2016) (M.A. thesis, George Washington University) (ProQuest) (arguing in a case study of gentrification in Washington, D.C., that eliminating food deserts through the process of gentrification does not resolve food disparities in low-income areas).



remaining food insecure. The critic will argue that the equality of opportunity afforded by antidiscrimination laws are sufficient. To such critics, individuals who face either physical, social, or economic barriers to food access not based on discrimination across suspect classifications should move, adapt, or work harder.<sup>441</sup> After all, if inherent dignity is grounded in the capacity for human agency, and if equality of dignity means we must not rank the worthiness of different modes of expressing human dignity through agency, then is the purpose of law not to minimize barriers for the individual pursuit of well-being in a way that also enables others to do the same?

Such critical views express a fundamentally *negative* conception of liberty; that is, a sense of liberty as freedom from the “interference” of others (or the state) in one’s exercise of human autonomy.<sup>442</sup> And, we must concede here that the critics are partly right. As Isaiah Berlin explained,

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.<sup>443</sup>

In other words, as James Griffin put it, “Liberty guarantees not the realization of one’s conception of a worthwhile life, but only its *pursuit*.”<sup>444</sup> Thus, being free to experience equality of opportunity—in recognition of one’s inherent human dignity—only guarantees that one can pursue equality. What should such equality guarantee in relation to food access? If obtaining food is viewed as an expression of one’s right to contract under 42 U.S.C. § 1981, which grants to “[a]ll persons . . . the same right . . . to make and enforce contracts . . . *as is enjoyed by white citizens*,”<sup>445</sup> then perhaps, as Nancy Leong argues, equality in this context should guarantee that non-White people “enjoy the same right to contract to obtain food as enjoyed by white citizens.”<sup>446</sup> This framing certainly calls into question the proliferation of food deserts and food swamps that dominate many marginalized non-White neighborhoods.<sup>447</sup> But it does not provide a clear answer for the food deserts and food swamps that plague low-income White neighborhoods and underscore the intersection of race and class across U.S. history. Should equality guarantee that one will not be met by socioeconomic barriers to experiencing the good life, or that one will not be met by socioeconomic conditions that make the pursuit of the good life pointless? These insights suggest that one can seemingly

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441. See Kristian Hernández, *More States Are Forgoing Extra Federal Food Aid*, PEW (July 19, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/19/more-states-are-forgoing-extra-federal-food-aid> [https://perma.cc/KG24-WCH6].

442. See J.L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499, 525–42 (2004).

443. ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY*, at liii (1969).

444. JAMES GRIFFIN, *ON HUMAN RIGHTS* § 9.3 (2008).

445. 42 U.S.C. § 1981 (emphasis added).

446. Leong, *supra* note 212, at 1448.

447. See *id.* at 1448–50.

experience equality as dignity, at least when it comes to issues of racial discrimination, yet still face other dignitary harms in relation to food that perpetuate oppression. Consider next the case of liberty-based harms.

## B. LIBERTY-BASED DIGNITARY HARMES

### 1. The Source of Freedom

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.<sup>448</sup> 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.<sup>449</sup> Yet, the notion of liberalism as fundamental to humanity not only finds earlier roots in ancient Greece and Rome,<sup>450</sup> but was also taken up by philosophers of the Enlightenment period, such as John Locke and Jean-Jacque Rousseau. Whereas Thomas Hobbes proposed a philosophical absolutism in the *Leviathan* in 1651 where human agency is subordinated to the rule of the monarch,<sup>451</sup> Locke proposed in 1689 in *Two Treatises of Government* a social contract whereby governmental power was limited to protecting so-called *natural* rights, such as life, liberty, and property.<sup>452</sup> In the early 1760s, Rousseau in *The Social Contract* similarly promoted the sovereignty of the people, but called for the abandonment of claims to natural right and instead demanded submission to the authority of a “general will.”<sup>453</sup> Ultimately, these thinkers advanced a conception of human dignity as the expression of freedom.

Accordingly, one’s freedom of expression, or dignity-as-liberty, should not be violated without appropriate justification, such as the furtherment of a social contract encapsulated in legal and political institutions toward the realization of individual and collective well-being. As John Stuart Mill put it 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

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448. See, e.g., EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 10 n.1 (2002); Gewirth, *supra* note 409, at 11. But see Jeremy Waldron, *Dignity, Rank, and Rights*, in 29 THE TANNER LECTURES ON HUMAN VALUES 209, 219 (Suzan Young ed., 2011) (noting the complexities of Kantian dignity and its diverse interpretations).

449. See *supra* notes 414–16 and accompanying text.

450. Cf. *Autonomy*, VOCABULARY.COM, <https://www.vocabulary.com/dictionary/autonomy> [<https://perma.cc/3LZU-SCRV>] (last visited Apr. 10, 2023) (“*Autonomy* comes from Greek roots *auto* meaning ‘self’ and *nomos* meaning ‘custom’ or ‘law.’”).

451. See THOMAS HOBBS, *LEVIATHAN: OR THE MATTER, FORME, & POWER OF A COMMON-WEALTH ECCLESIASTICALL AND CIVILL* 113 (Ian Shapiro ed., Yale Univ. Press 2010) (1651).

452. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press student ed. 1988) (1689) (exploring the natural rights of humans).

453. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT: OR THE PRINCIPLES OF POLITICAL RIGHTS* 21–22, 43 (Rose M. Harrington trans., 1893).

efforts to obtain it.”<sup>454</sup> This pluralistic framing of liberty that underscores the concept of fundamental rights in U.S. constitutionalism, such as the freedom of speech and religion, emphasizes the primacy of the individual in relation to the demands of the state.<sup>455</sup> However, the negative conception of liberty as reasonable freedom from interference, while seemingly neutral by respecting how individuals choose to exercise agency in pursuit of individual well-being, tends to overlook the way temporal material conditions (social, political, economic, environmental, etc.) can determine one’s ability to exercise autonomy.<sup>456</sup> If liberty is fundamentally the *pursuit* of well-being, then as Isaiah Berlin considered, is the liberty afforded a poor man “nothing to him,” even if not annihilated?<sup>457</sup> By calling for a broader conception of liberty as “non-domination,” scholars such as Philip Pettit claim that one’s ability to experience human dignity and exercise fundamental rights are both politically and culturally contingent on the minimum standards of living deemed necessary by society for one to *be* human.<sup>458</sup> In other words, the inherent equality of humanity that stems from the capacity to make choices must be distinguished from the equality of opportunity to experience one’s humanity. This perhaps explains why the institution of convict leasing that emerged after the abolition of chattel slavery has been deemed by historians as “slavery by another name,” a deprivation of the minimum socioeconomic standard of living necessary for one to escape a state of domination and experience true autonomy to pursue human agency.<sup>459</sup>

Some constitutional courts have seemingly confused positive notions of dignity-as-liberty with external standards of living the so-called dignified life.<sup>460</sup> A positive conception of liberty does not meddle with issues of decorum or the social norms of so-called good behavior. Rather, positive liberty—stemming

454. JOHN STUART MILL, *ON LIBERTY* 12 (Elizabeth Rapaport ed., Hackett Publ’g Co. 1978) (1859).

455. *See id.* 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.”); cf. Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 983 & n.126 (2007) (explaining that “[u]nlike autonomy, dignity depends upon intersubjective norms that define the forms of conduct that constitute respect between persons” (quoting Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2092 (2001))).

456. *See* CHARLES TAYLOR, *What’s Wrong with Negative Liberty*, in *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 2, at 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.”).

457. BERLIN, *supra* note 443.

458. *See, e.g.*, PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 51–79 (1997) (describing the concept of liberty as “non-domination”).

459. *See* Adamson, *supra* note 248, at 559. *See generally* BLACKMON, *supra* note 247 (discussing the practice of leasing Black prisoners for decades after Reconstruction).

460. *See* Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. TORONTO L.J. 417, 445 (2009) (“[In Germany] we see a social concern for distributive and compensatory justice hand in hand with respect for individuals’ liberty to lead a dignified life. However, it should be noted that the legislature remains unclear as to whether the definition of a dignified life remains with the individual or whether it is for the state to establish, an ambiguity that could be easily used to justify paternalism.”).

from the concept of Benjamin Constant's "liberty of the ancients"<sup>461</sup>—represents a positive right to participate, or *interfere*, with government.<sup>462</sup> One might argue that the positive conception of liberty as "freedom from non-domination" ultimately converges with the negative conception of liberty as "freedom from interference" when one considers whether there exist cases of historic state interference in the lives of citizens that *created* the socioeconomic conditions of present-day domination. That is, for some citizens, the specter of historic state interference (for example, state-sanctioned racial segregation), even when dismantled by progressive legislation (for example, the Fair Housing Act), still haunts the present-day efforts of some citizens to experience dignity (for example, the persistence of discrimination in housing markets). Notwithstanding such arguments that might serve as at least part of the basis for a progressive constitutionalism to further social and economic rights,<sup>463</sup> the U.S. Supreme Court has typically relied upon a negative framing of dignity-as-liberty to strike down laws that interfere with the private choices of citizens.

Take, for example, the 1992 case of *Planned Parenthood v. Casey*.<sup>464</sup> In this case, the Supreme Court considered a challenge to several provisions of the Pennsylvania Abortion Control Act of 1982, including requirements for informed consent at least twenty-four hours prior to an abortion, spousal notice of an abortion procedure, and parental consent for minors.<sup>465</sup> The Court upheld the constitutional right established in *Roe v. Wade* to abort a pregnancy<sup>466</sup> but changed the standard for reviewing restrictions on that right.<sup>467</sup> Specifically, among other changes to the framework established by *Roe*, the Court replaced the strict scrutiny standard of review with an undue-burden standard for abortion

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461. See generally BENJAMIN CONSTANT, THE LIBERTY OF ANCIENTS COMPARED WITH THAT OF MODERNS (1819), [https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2251/Constant\\_Liberty1521.html](https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2251/Constant_Liberty1521.html) [<https://perma.cc/E5TQ-6A6P>] (distinguishing the concept of liberty of the ancients, which "consisted in exercising collectively . . . several parts of the complete sovereignty," as compared with "liberty of the moderns").

462. See *id.* Thus, the distinction between negative and positive liberty, as philosopher Danielle Allen clarifies, is fundamentally a question of private autonomy versus public autonomy. Danielle Allen, Political Equality and Empowering Economies—Toward a New Political Economy 5–8 (Jan. 2018) (unpublished manuscript) (on file with Harvard Canvas). The question should not be whether public autonomy implicates cultural standards of leading a dignified life, but whether public autonomy is purely *instrumental*, or as Jürgen Habermas contended, *intrinsically* valuable to the pursuit of individual human flourishing. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 270 (William Rehg trans., 1996) ("[G]overnmental authority derives from the power produced communicatively in the civic practice of self-determination, and it finds its legitimation in the fact that it protects this practice by institutionalizing public liberty.").

463. See *supra* notes 221–25 and accompanying text; see also Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1393–94 (1984) ("We could of course have a different Constitution. Or, as some prefer, we need not accept this as a description of the 'true' Constitution. Its sense of history, for example, is woefully deficient. But the persuasive power of the description cannot be denied. And because it is persuasive, it obstructs the development of a more complete set of positive rights.").

464. 505 U.S. 833 (1992).

465. *Id.* at 844.

466. *Id.* at 846 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

467. *Id.* at 876 (plurality opinion).

restrictions.<sup>468</sup> According to the plurality, an undue burden occurs when a legal restriction has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”<sup>469</sup> Applying this new framing to the challenged provisions of the Pennsylvania law, the Court held that a spousal notice requirement imposed a “substantial obstacle,” or *interfered*, with a woman’s right to choose an abortion.<sup>470</sup> Further, the Court explicitly connected a woman’s constitutional liberty-based right to “personal autonomy and bodily integrity”<sup>471</sup> as it relates to reproductive decisions with her dignity: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to *personal dignity* and autonomy, are central to the *liberty* protected by the Fourteenth Amendment.”<sup>472</sup> Thus, the Court interpreted certain legal restrictions on a woman’s freedom to express her bodily autonomy as a “self-legislating” individual, in the words of Kant,<sup>473</sup> as an unjustified harm to her liberty-based dignity, or her legal right to define her own conception of what Justice O’Connor called “the mystery of human life.”<sup>474</sup>

Certainly, perspectives on what constitutes a liberty-based dignitary harm are not finite. They can be shaped by dominant political views and shaken by contentious political debate. In 2022, in *Dobbs v. Jackson Women’s Health Organization*,<sup>475</sup> the Supreme Court removed the constitutional floor protecting the right to abortion, authorizing states to “regulate, restrict, criminalize, or protect abortion.”<sup>476</sup> In so doing, the Court overruled both *Roe v. Wade* and *Planned Parenthood v. Casey*.<sup>477</sup> The notion that the term “liberty” in the Due Process Clause of the Fourteenth Amendment encompasses substantive rights that are not explicitly named in the Constitution—principally because they are “deeply rooted in the Nation’s history and tradition” and “implicit in the concept of ordered liberty”—has long been “controversial.”<sup>478</sup> The Trump Administration’s

468. *Id.* at 876–77.

469. *Id.* at 877.

470. *Id.* at 893–94 (majority opinion).

471. *Id.* at 857.

472. *Id.* at 851 (emphasis added)

473. Matthias Kettner, *Kantian Dignity Semantics. An Unreliable Resource for Human Rights Culture*, in *KANT’S CONCEPT OF DIGNITY*, *supra* note 415, at 97, 97.

474. *Casey*, 505 U.S. at 851; *see also id.* at 916 (Stevens, J., concurring in part and dissenting in part) (“The authority to make such traumatic and yet empowering decisions is an element of basic human dignity.”); Lois Shepherd, *Dignity and Autonomy After Washington v. Glucksberg: An Essay About Abortion, Death, and Crime*, 7 *CORNELL J.L. & PUB. POL’Y* 431, 443 (1998) (“The overall effect of the language of the abortion cases is a strong statement of autonomy understood as self-determination, and an understanding of dignity as the moral status appropriate to persons who have the capacity for self-determination and who can thus form beliefs about intimate and personal matters.”). *But see Casey*, 505 U.S. at 983 (Scalia, J., concurring in judgment in part and dissenting in part) (arguing that the term “liberty” was being used to “simply decorate a value judgment and conceal a political choice”).

475. 142 S. Ct. 2228 (2022).

476. Yvonne Lindgren, *Dobbs v. Jackson Women’s Health and the Post-Roe Landscape*, 35 *J. AM. ACAD. MATRIMONIAL LAWS*. 235, 236 (2022).

477. *Dobbs*, 142 S. Ct. at 2242.

478. Lindgren, *supra* note 476, at 238.

appointment of socially conservative Justice Amy Coney Barrett set the ball in motion to revisit that debate. Many scholars argue that the Court's invocation of the concept of dignity in previous abortion related rulings supports a view that the *Dobbs* case undermines the dignity and autonomy of women.<sup>479</sup> Others argue that the *Dobbs* decision will have a significant impact on protected civil rights and implied substantive due process rights.<sup>480</sup>

Similarly, in the context of First Amendment free-speech jurisprudence, the Supreme Court has invoked a negative conception of dignity-as-liberty to strike down laws that interfere with individual self-expression in the Holmesian marketplace of ideas.<sup>481</sup> During the Vietnam War, in *Cohen v. California*, the Court overturned the conviction of Paul Cohen under California law for wearing a jacket decorated with the words "Fuck the Draft" inside a Los Angeles courthouse.<sup>482</sup> The Court held that because the words on Cohen's jacket were not a direct insult aimed at a specific person, they could not be deemed "fighting words" and, therefore, were not outside of the Constitution's protections.<sup>483</sup> More poignant to the present analysis of dignity-as-liberty, the Court declared,

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to *remove governmental restraints* from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with *the premise of individual dignity and choice* upon which our political system rests.<sup>484</sup>

*Cohen* makes clear the Court's contention that alongside a premise of inherent individual dignity (that is, dignity as equality) there also exists a premise of choice (that is, dignity as liberty) that beckons the limitation of state interference. This negative conception of dignity-as-liberty does not stem from a sense that

479. See, e.g., Rachel Wechsler, *Dobbs and Dignity*, OXFORD HUM. RTS. HUB (June 30, 2022), <https://ohrh.law.ox.ac.uk/dobbs-and-dignity/> [<https://perma.cc/GCX3-D2JE>]; Amanda Hainsworth, *Dobbs and the Post-Roe Landscape*, BOS. BAR ASS'N: BOS. BAR J. (Nov. 7, 2022), <https://bostonbar.org/journal/dobbs-and-the-post-ro-landscape/> [<https://perma.cc/9YX4-UNVG>].

480. See, e.g., Nora Delaney, *Roe v. Wade Has Been Overturned. What Does That Mean for America?*, HARV. KENNEDY SCH. (June 28, 2022), <https://www.hks.harvard.edu/faculty-research/policy-topics/fairness-justice/roe-v-wade-has-been-overturned-what-does-mean> [<https://perma.cc/T2TS-7RDL>]; Terri Day & Danielle Weatherby, *The Dobbs Effect: Abortion Rights in the Rear-View Mirror and the Civil Rights Crisis That Lies Ahead*, 64 WM. & MARY L. REV. ONLINE 1, 1–2 (2022).

481. See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

482. 403 U.S. 15, 16–17 (1971).

483. *Id.* at 20.

484. *Id.* at 24 (emphasis added).

Cohen's statements were themselves dignified.<sup>485</sup> As Justice Harlan concludes, "[T]he Constitution leaves matters of taste and style so largely to the individual."<sup>486</sup> Rather, the Court's decision reflects a sense that liberty of speech must only be constrained by the State when it unjustly hinders a person's freedom to experience their humanity.<sup>487</sup> The harm experienced when someone is insulted by another person is correctly defined as an integrity-based dignitary harm, explained further in Section III.C.

## 2. Conditions of Unfreedom

How might a liberty-based dignitary harm arise in the context of food insecurity? Again, assume that access to certain food in sufficient quantities is a necessary condition of experiencing inherent human dignity as expressed by human agency. Previously, we concluded that an equality-based dignitary harm in the context of food access would arise when a food market bars the entry of a person based upon a suspect-classification, such as race or gender. Further, we noted that the absence of food markets or the absence of certain types of food beneficial to certain cultures due to law, public policy, or social policy, might be viewed as a type of *unintended* equality-based dignitary harm. The concept of liberty addresses not the existence of food markets (which relates to the concept of equality) but instead the freedom one enjoys in pursuing them. Thus, the liberty question considers not merely physical access, but also economic and social access to food.

Whether one identifies a liberty-based dignitary harm depends upon how one defines liberty. Does one embrace a purely negative conception of liberty as freedom from unjustified interference, or does one integrate a more positive conception of liberty as also meaning freedom from external domination? Consider, for example, a socioeconomically diverse neighborhood with a centrally located food supermarket.<sup>488</sup> A view of liberty as freedom from interference asks: do all residents enjoy equal opportunities to pursue entry into the store? While some may walk to the store in the morning and others may drive to the store in the evening, the focus is on whether all individuals can choose to exploit the resources at their disposal by visiting the store and pursuing their vision of well-being as it

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485. See Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 481 (1997) ("[A]utonomy would be fatally compromised if the state were to impose civility rules upon public discourse, for citizens would then be cast as already constrained and captured by one form of community rather than another.").

486. *Cohen*, 403 U.S. at 25.

487. See Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 45 (Michael Ignatieff ed., 2005) ("[T]he United States, increasingly alone, stands as a symbol for a certain kind of preference for liberty even when it conflicts with values of equality and even when it conflicts with important community values.").

488. Cf. Shannon N. Zenk, Amy J. Schulz, Barbara A. Israel, Sherman A. James, Shuming Bao & Mark L. Wilson, *Neighborhood Racial Composition, Neighborhood Poverty, and the Spatial Accessibility of Supermarkets in Metropolitan Detroit*, 95 AM. J. PUB. HEALTH 660, 660, 663 (2005) ("Racial residential segregation disproportionately places African Americans in more-improverished neighborhoods in Detroit and consequently reduces access to supermarkets.").

pertains to food consumption. Socioeconomic inequities will undoubtedly challenge some more than others, and government resources may even aid those who face such challenges (for example, a comprehensive public bus system that aids those who cannot afford vehicles and live too far away from the store to walk).<sup>489</sup> But this view of liberty does not require that all pursuits be equal in their level of ease, simply that such pursuits are free from the interference of others.

In contrast, a more capacious framing of liberty that considers domination asks: are there social, economic, or cultural barriers that dominate the decision-making of certain individuals as they decide whether to pursue food markets?<sup>490</sup> Do certain individuals face increased food prices due to the location of their neighborhood?<sup>491</sup> Do certain individuals face increased transportation costs because of the design of public transportation routes?<sup>492</sup> Do certain individuals fail to earn sufficient income to acquire the healthy and nutrient-rich food necessary for their well-being?<sup>493</sup> Do certain individuals fail to receive adequate education about nutrition or healthy dieting to make beneficial food consumption choices?<sup>494</sup> These are just some of the ways that individuals may experience liberty-based dignitary harms in the context of food security, even when they can

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489. Cf. Manisha Gupta, Glen Weisbrod & Martin Weiss, *Transportation Programs Linking to Economic Development: A Microanalysis of Different Practices*, 1932 *TRANSP. RSCH. REC.* 72, 77 (2005) (“In a broad view, all economic development programs operated by state agencies share common features . . . . [I]t is clear that these programs are evolving over time to reflect current economic needs, situational circumstances, and organizational changes.”).

490. See, e.g., Yuki Kato & Laura McKinney, *Bringing Food Desert Residents to an Alternative Food Market: A Semi-Experimental Study of Impediments to Food Access*, 32 *AGRIC. HUM. VALUES* 215, 215 (2015) (studying low-income African-American households located in a New Orleans food desert and concluding that “economic constraints are more influential in determining where the participants shop for food than spatial and temporal constraints,” and noting that “the study participants exhibit high levels of human and cultural capital regarding the purchase and consumption of locally grown produce”).

491. See, e.g., Rebecca A. Krukowski, Delia Smith West, Jean Harvey-Berino & T. Elaine Prewitt, *Neighborhood Impact on Healthy Food Availability and Pricing in Food Stores*, 35 *J. CMTY. HEALTH* 315, 315 (2010) (concluding, based on a multi-site study across Vermont and Arkansas, that “[e]ven among supermarkets, healthier foods are less available in certain neighborhoods, although, when available, the quality of healthier options did not differ,” and suggesting that “increasing access to larger stores that can offer lower prices for healthier foods may provide another avenue for enhancing food environments to lower disease risk”).

492. See Margy Waller, *High Cost or High Opportunity Cost? Transportation and Family Economic Success*, *BROOKINGS INST.: POL’Y BRIEF*, Dec. 2005, at 1, 1 (arguing that opportunity costs weigh in favor of policies “reduc[ing] car ownership costs for poor workers”).

493. See Nicole I. Larson, Mary T. Story & Melissa C. Nelson, *Neighborhood Environments: Disparities in Access to Healthy Foods in the U.S.*, 36 *AM. J. PREVENTIVE MED.* 74, 74 (2009) (finding that “neighborhood residents who have better access to supermarkets and limited access to convenience stores tend to have healthier diets and lower levels of obesity,” and “residents with limited access to fast-food restaurants have healthier diets and lower levels of obesity”).

494. See Jamie Dollahite, Christine Olson & Michelle Scott-Pierce, *The Impact of Nutrition Education on Food Insecurity Among Low-Income Participants in EFNEP*, 32 *FAM. CONSUMER SCIS. RSCH. J.* 127, 127 (2003) (studying participants in the Expanded Food and Nutrition Education Program in New York State and concluding that “[p]rograms that educate low-income families in food selection and resource management skills can decrease the risk of food insecurity, although effects vary by sociodemographic characteristics of participants and program delivery methods”); *supra* note 33 and accompanying text.



theoretically physically access food markets. When structural conditions that hinder liberty are normalized for certain individuals, or when structural conditions that hinder liberty are deemed culturally acceptable for certain communities, the implicit rationale is an unspoken societal belief that certain individuals or communities lack the worthiness of more privileged communities. The failure of society to recognize the worthiness, or inherent dignity-as-equality, of certain individuals or communities—different than a denial that equal inherent dignity exists altogether, such as the denial of humanity that legitimated chattel slavery—speaks to a third, integrity-based dignitary harm.

### C. INTEGRITY-BASED DIGNITARY HARMS

#### 1. The Source of Recognition

Unlike the equality-based aspect of dignity that is inherent, or the liberty-based aspect of dignity that is related to one's ability to experience inherent humanity through individual human agency, the integrity-based conception of dignity—what some scholars call “dignity as recognition”<sup>495</sup>—is relational. It 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.<sup>496</sup> In other words, one can *be* human (that is, experience *equality*) and *act* human (that is, experience *liberty*), but one cannot *know* that they are human (that is, experience *integrity*) without the existence of a community to constitute the idea of individuality.<sup>497</sup> This communitarian view of the human condition is reflected in the sentiments of political philosopher Michael Sandel: “[C]ommunity describes not just what they *have* as fellow citizens but also what they *are*, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity.”<sup>498</sup> Under this philosophy, to live a whole or integrated life—stemming from the Latin word *integritas* for “[w]holeness” or “unbroken state”<sup>499</sup>—not only requires a perception of self-worth that governs the individual pursuit of well-being, or self-esteem, but also a social recognition of self-worth, or social esteem, that validates the meaning of such pursuits as

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495. See, e.g., Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 243 (2011).

496. See *id.* at 244; Charles Taylor, *Hegel: History and Politics*, in LIBERALISM AND ITS CRITICS, 177, 179–80 (Michael Sandel ed., 1984) (“The idea that our highest and most complete moral existence is one we can only attain to as members of a community obviously takes us beyond the contract theory of modern natural law, or the utilitarian conception of society as an instrument of the general happiness.”).

497. See BERLIN, *supra* note 443, at 156 n.1 (“I cannot ignore the attitude of others with Byronic disdain . . . 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 . . . .”)

498. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 150 (2d ed. 1998).

499. *Integrity*, WEBSTERS DICTIONARY 1828, <https://webstersdictionary1828.com/Dictionary/integrity> [https://perma.cc/EJ92-CFCA] (last visited Apr. 10, 2023).

equal expressions of inherent humanity.<sup>500</sup> When one lacks either self-esteem or social esteem, they lack a fully integrated personhood, or integrity.

The idea that certain moral virtues evident in human behavior reflect a fully integrated life suggests a view that certain behaviors not only further self-esteem, but also are more likely to garner social esteem. If one assumes that fully integrated persons are better equipped to achieve individual well-being and further collective well-being, then the types of individual behaviors that are embraced by the social and political community as beneficial to integrity should be protected by government. Indeed, philosopher Jürgen Habermas argued that integrity demands the protection and respect of persons as individuals, as members of social groups, and as citizens.<sup>501</sup> Habermas's framing of integrity as trifold is similar to Charles Taylor's description of recognition as mediated across the "politics of universalism" and the "politics of difference."<sup>502</sup> According to Taylor, whereas the politics of universalism emphasizes "the equal dignity of all citizens,"<sup>503</sup> the politics of difference relates to distinctions among people based upon their group affiliations.<sup>504</sup> A politics of difference that inhibits one's social recognition due to their membership in a group, such as racial discrimination experienced by racially and ethnically minoritized groups, can infringe upon the attainment of social esteem necessary for integrity.<sup>505</sup>

If an ethics of recognition is foundational to our humanity, as Hegel argued,<sup>506</sup> then the development of a fully integrated personal identity calls for the state to consider whether an individual should be protected from integrity-based harms that impair their receipt of social esteem.<sup>507</sup> As U.S. Court of Appeals Judge Neomi Rao puts it, "recognition places demands not only on the state to enforce equality and basic rights, but on members of the community to provide respect

500. See Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUDS. 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."); GEORGE H. MEAD, *MIND, SELF, AND SOCIETY* 162 (Charles W. Morris ed., Univ. Chi. Press 1962) (1934) ("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.").

501. HABERMAS, *supra* note 462, at 496 ("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.").

502. Taylor, *supra* note 416, at 37–38.

503. *Id.* at 37.

504. See *id.* at 39, 42.

505. See *id.* at 71.

506. See ROBERT R. WILLIAMS, *HEGEL'S ETHICS OF RECOGNITION* 9–10 (1997); cf. PAUL RICOEUR, *THE COURSE OF RECOGNITION* 17, 19 (David Pellauer trans., Harv. Univ. Press 2005) (2004).

507. Such rights are recognized in a number of constitutions around the globe. See, e.g., Grundgesetz [GG] [Basic Law], art. 2, ¶ 1 (Ger.), translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) [<https://perma.cc/3JUG-HPUP>] ("Every person shall have the right to free development of his personality insofar as he does not violate the rights of others . . . ."); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.], art. 26, ¶¶ 1, 3, translation at <https://dre.pt/dre/geral/en/relevant-legislation/constitution-of-the-portuguese-republic> [<https://perma.cc/N2J9-XM5T>].

and recognition of their fellow citizens.”<sup>508</sup> The harms of unrecognition or under-recognition or misrecognition emerge as constraints on one’s liberty to exercise human agency toward living an integrated life. Individuals who are robbed of such integrity—*broken*, as it were, by a lack of recognition that undermines their inherent equality and diminishes their self-determination as liberated agents—can be described as living “*dis-integrated*” or less than whole lives.<sup>509</sup>

The U.S. Supreme Court has sought to protect dignity-as-integrity in at least two contexts. First, the Court has recognized integrity-based dignitary harms when individuals are unfairly judged or mistreated by others based upon singular characteristics or traits—actions that preclude “interpersonal *respect*”<sup>510</sup>—that undermine the development of a fully integrated, whole personality. As Rao clarifies, this aspect of dignity “depends on individuals receiving respect and recognition both from other individuals, who must recognize each other as citizens and community members, and also from the state, as the embodiment of the community’s legal and social norms.”<sup>511</sup> Thus, as legal and social norms evolve, so too will expectations of what interpersonal respect and recognition demands. For example, in 1990, in *Milkovich v. Lorain Journal Co.*, the Court considered whether one can express defamatory opinions in the press about another person—possible falsehoods that might impugn someone’s character and thereby violate libel laws—yet be shielded under the First Amendment’s right of free speech and free press.<sup>512</sup> Prior to *Milkovich*, opinions were presumed to be protected speech.<sup>513</sup> Michael Milkovich sued a newspaper when he discovered that its opinion column had claimed that he lied under oath during a public hearing, effectively accusing him of perjury.<sup>514</sup> Although the trial court in Ohio granted summary judgement to the newspaper company on the basis that its opinion was protected under the First Amendment, the Supreme Court reversed the Ohio court’s “recognition of a constitutionally required ‘opinion’ exception to the application of its defamation laws.”<sup>515</sup>

Writing for the majority opinion, Justice Rehnquist noted that alongside existing protections afforded to the media by the requirement for plaintiffs to prove both fault and falsity,<sup>516</sup> “expressions of ‘opinion’ may often imply an assertion of objective fact,” and resultantly, may cause “as much damage to reputation” as a factual claim.<sup>517</sup> Recognizing the potential for an integrity-based dignitary

508. See Rao, *supra* note 495, at 248.

509. Henry, *supra* note 406, at 215–16 (emphasis added).

510. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1164 (2004).

511. Rao, *supra* note 495, at 249.

512. 497 U.S. 1, 3 (1990).

513. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”).

514. See *Milkovich*, 497 U.S. at 3.

515. *Id.* at 10.

516. See *id.* at 20–21.

517. *Id.* at 18–19.

harm, the Court quoted Justice Stewart, stating that “[t]he right of a man to the protection of his own reputation from *unjustified invasion* and wrongful hurt reflects no more than our basic concept of the *essential dignity* and worth of every human being . . . .”<sup>518</sup> Thus, the Court suggests that part of the rights protected by the Constitution is a right to experience integrity, to discern within oneself the potential for a fully integrated personal identity and to have that identity recognized—not misrecognized, under-recognized, or unrecognized—by one’s community members and government. To do otherwise is an “unjustified invasion” of integrity that belies inherent dignity, impairs individual autonomy, and precludes social recognition by the political, social, and moral community.<sup>519</sup>

The Supreme Court has also sought to remedy unjustified constraints on the individual capacity to experience integrity by presenting oneself as a fully integrated, whole person who is pursuing a virtuous life. This view of integrity-based dignitary harms is perhaps most readily apparent in the Supreme Court’s support of a knock-and-announce rule for police officers engaging in the warrantless search of a home. As Justice Scalia explained in *Hudson v. Michigan*, “[T]he knock-and-announce rule protects . . . privacy and *dignity* that can be destroyed by a sudden entrance. . . . The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.”<sup>520</sup> Here, the notion that dignity-as-integrity requires one to be protected from the misrecognition of being exposed as less than a fully integrated, whole person—for example, being dressed indecently in the home, subjecting oneself to being unfairly judged by the community as less than virtuous, and to be thereby deemed unworthy of social esteem—suggests there is an aesthetic element to personal integrity. As Professor Leslie Meltzer Henry argues, “[P]eople who look unsightly, unseemly, uncomely, inelegant, disgraceful, or even revolting appear undignified.”<sup>521</sup> This Article argues that this concept applies to communities, too.

A more contentious view of integrity-based dignitary harms that has been considered by the Supreme Court is the claim that living with integrity demands certain material conditions, such as housing, healthcare, education, and a minimum income for subsistence. Such social and economic rights, as they are framed in many constitutions in other countries,<sup>522</sup> suggest that although a system of laws can enable one to *be* human (that is, experience *equality*) and *act* human (that is,

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518. *Id.* at 22 (emphasis added).

519. *Id.*; see also Rao, *supra* note 495, at 249; STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY 176 (2008) (“[T]he requirement that individuals recognize one another as human beings and community members is not simply a contingent or conventional one but is inherent in the very idea of a community.”); Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1367 (2009); Frederick Schauer, *Speaking of Dignity*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, *supra* note 409, at 178, 184–85.

520. 547 U.S. 586, 594 (2006) (emphasis added) (internal quotation marks omitted).

521. Henry, *supra* note 406, at 216.

522. See, e.g., India Const. pmbl.; S. AFR. CONST. (1996).

pursue *liberty*), certain material conditions are necessary for one to exploit equality and liberty to *feel* human (that is, perceive *integrity*). As noted above, to *know* that one is human, one must not only esteem one's inherent dignity, or equal worthiness as a human, but one's equal worthiness to make liberated choices as a human must also be esteemed by one's community.<sup>523</sup> Thus, social and economic rights confer conditions for integrity, which this Article argues is a critical element of human dignity.

Consider the Supreme Court's 1970 decision in *Goldberg v. Kelly*, which dealt with individuals who have been denied welfare benefits by New York City without a hearing.<sup>524</sup> In *Goldberg*, the Court ruled under the Due Process Clause of the Fourteenth Amendment that recipients of certain governmental welfare entitlements could not be deprived of such benefits without a full evidentiary hearing.<sup>525</sup> The Court explained that the interests of an eligible recipient in the uninterrupted receipt of public assistance outweighed a state's competing fiscal and administrative concerns with managing the welfare benefits program.<sup>526</sup> Further, the Court clarified that welfare benefits are not a "gratuity" but are "property" interests and, consequently, require pre-deprivation procedural protection like other types of property.<sup>527</sup>

The Court made clear that the delivery of welfare benefits, which facilitate the receipt of food, clothing, housing, and other essential material conditions for individual well-being, reflect "the Nation's basic commitment . . . to foster the *dignity* and well-being of all persons within its borders."<sup>528</sup> *Goldberg* and similar cases that hint at a constitutional basis for social and economic rights, or *positive* rights, are viewed as exceptions to the rule of U.S. liberal democracy.<sup>529</sup> Notwithstanding the ongoing debate on whether positive rights are supported by the Constitution, the Court's assessment in *Goldberg* makes clear its belief that a deprivation of certain material conditions deemed necessary by society for individual well-being can harm the dignity of such individuals. Further, it reveals a sense that citizens should be protected from such dignitary harms, perhaps because it impairs their ability to be fully engaged members of the demos.

Perhaps the reticence to embrace social and economic rights stems from confusion on the relationship between one's access to material conditions for well-

523. See *supra* note 497 and accompanying text.

524. 397 U.S. 254, 255–56 (1970).

525. See *id.* at 260–61.

526. See *id.* at 265–66.

527. *Id.* at 262 n.8; see also *id.* at 264.

528. *Id.* at 264–65 (emphasis added); see also Cass R. Sunstein & Randy E. Barnett, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue*, 53 DRAKE L. REV. 205, 214 (2005).

529. See, e.g., *Harris v. McRae*, 448 U.S. 297, 317–18 (1980) ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution."); Tushnet, *supra* note 463, at 1392 ("In our culture, the image of negative rights overshadows that of positive ones and may obstruct the expansion of positive rights.").

being and one's dignity. There is temptation to conclude that certain material conditions are necessary for one to have dignity. However, such a conclusion conflicts with the theory of inherent equal dignity that underscores the notion of dignity-as-equality. Instead, the more appropriate view is that certain material conditions are necessary for dignity-as-integrity; that is, a member of a society must not only possess certain material conditions to *act* human by pursuing individual well-being through human agency, but such a person must also possess certain material conditions to *feel* human by garnering a minimum level of social esteem, or respect, from their peers to affirm a self-perception of worthiness. Integrity is critical for one's self-realization of individual personhood because self-esteem enables one to perceive their humanity, embrace equality, and pursue liberty. Thus, integrity is a fundamental building block of dignity. The material conditions necessary to garner a minimum level of social recognition of one's inherent dignity are contingent, based primarily on the social and cultural norms of a society that govern what is viewed as leading a dignified life, or one worthy of respect.

## 2. Conditions of Unrecognition

How might an integrity-based harm arise in the context of food insecurity? Once again, assume that access to certain food in sufficient quantities is a necessary condition of experiencing inherent human dignity and pursuing well-being through liberty. One must eat in order to act human, and one must eat enough healthy food to thrive as a human by making autonomous choices. This Article noted earlier that an equality-based dignitary harm focuses on one's ability to access food free from discrimination,<sup>530</sup> and a liberty-based dignitary harm focuses on one's ability to pursue food that appears to be accessible by conventional measures, but upon closer examination, may not (for example, challenges related to food pricing or knowledge about healthy food options).<sup>531</sup> An integrity-based harm in the context of food security focuses on one's ability to experience integrity—both self-respect and social recognition of one's inherent worthiness—in their relationship with food.

That is, are there constraints on the individual capacity to experience and present oneself to one's community as a fully integrated, whole person in one's pursuit of food security? For example, consider a mixed-income and racially diverse community. For low-income members of such communities, are affordable food options available at all food markets, or must they shop at specific stores in certain neighborhoods that may induce feelings of embarrassment or shame?<sup>532</sup> For certain racial or ethnic groups in mixed-income communities, are culturally

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530. See *supra* notes 433–40 and accompanying text.

531. See *supra* notes 488–94 and accompanying text.

532. See generally Jessica Crowe, Constance Lacy & Yolanda Columbus, *Barriers to Food Security and Community Stress in an Urban Food Desert*, 2 URB. SCI. 46 (2018) (arguing that food deserts can cause stress in African Americans and Latinos who live in low-income neighborhoods with little access to healthier food options).

appropriate food options available at all food markets, or must they shop at specific stores in specific neighborhoods that affirm their cultural dietary needs?<sup>533</sup> Within food markets that cater to diverse groups, are affordable and healthy food options dispersed throughout the store, or is the store segregated such that individuals might experience shame or embarrassment as they navigate different aisles targeting different cultural and socioeconomic groups, such as an aisle with luxury organic food options, an aisle with cultural food options, and an aisle with cheap, highly processed food options?<sup>534</sup>

Even more, do individuals possess the necessary material conditions to garner social recognition and thereby experience integrity as they pursue food security? Here, the demands of integrity converge with those of liberty. Does one have the social and economic resources to pursue enough healthy food to garner the respect of peers?<sup>535</sup> Does one have enough income to purchase healthy food, access to transportation to pursue healthy food markets, and access to education about healthy nutrition?<sup>536</sup> Does one have housing and energy services to store healthy food?<sup>537</sup> Must one sacrifice purchasing healthy food options and rely

533. See Caitlin A. Fish, Jonisha R. Brown & Sara A. Quandt, *African American and Latino Low Income Families' Food Shopping Behaviors: Promoting Fruit and Vegetable Consumption and Use of Alternative Healthy Food Options*, 17 J. IMMIGRANT MINORITY HEALTH 498, 503 (2013) (“Both [African American and Latina mothers], but particularly Latinas, noted the need to seek out specialty foods. For Latinas, finding *tiendas* or other stores catering to the increasing Latino population was an important determinant of shopping for produce; they were willing to travel to find these stores.”).

534. See Katherine Isselmann DiSantis, Amy Hillier, Rio Holaday & Shiriki Kumanyika, *Why Do You Shop There? A Mixed Methods Study Mapping Household Food Shopping Patterns onto Weekly Routines of Black Women*, 13 INT’L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 11, 11 (2016) (“People have specific reasons for consistently shopping in areas outside of their neighborhood of residence. Incorporating considerations other than proximity (e.g. time saving while shopping, promoting less familiar foods, pricing) into food environment interventions may facilitate use of new stores by neighborhood residents and thereby increase the viability of these stores as health-promoting food environment interventions.”); Rachel Pechey & Pablo Monsivais, *Supermarket Choice, Shopping Behavior, Socioeconomic Status, and Food Purchases*, 49 AM. J. PREVENTATIVE MED. 868, 869 (2015) (“[S]upermarket environments (e.g., range, price, promotions) may influence purchases, and this environment may differ systematically between supermarkets in different price tiers.” (footnotes omitted)).

535. See Rachel Dunifon & Lori Kowaleski-Jones, *The Influences of Participation in the National School Lunch Program and Food Insecurity on Child Well-Being*, 77 SOC. SERV. REV. 72, 87 (2003) (“African-American children may attend schools in which a high percentage of children participate in the NSLP, thus reducing the stigma associated with participating compared with that felt by white children and increasing the odds that a specific child is likely to participate. Future work is needed to examine this association further.”).

536. See Michele Ver Ploeg, Paula Dutko & Vince Breneman, *Measuring Food Access and Food Deserts for Policy Purposes*, 37 APPLIED ECON. PERSPS. & POL’Y 205, 205 (2015) (arguing that measuring food store access must focus on individuals instead of neighborhoods to fully understand “the barriers that some individuals face in accessing healthy food”).

537. Cf. Joel Gittelsohn, Maria C.T. Franceschini, Irit R. Rasooly, Amy V. Ries, Lara S. Ho, Wendy Pavlovich, Valerie T. Santos, Sharla M. Jennings & Kevin D. Frick, *Understanding the Food Environment in a Low-Income Urban Setting: Implications for Food Store Interventions*, 2 J. HUNGER & ENV’T NUTRITION 33, 43 (2007) (“Factors influencing stocking decisions include the physical structure of the store (capacity for refrigeration, space), the characteristics of products (perishability, price), suppliers’ marketing strategy and delivery procedures (ability to return unsold products, promotions), and demand for a product.”); Katherine Isselmann DiSantis, Sonya A. Grier, Angela Odoms-Young,

upon fast-food alternatives to pay for other essentials, such as healthcare?<sup>538</sup> Must one present colored stamps in public to make use of governmental support,<sup>539</sup> infringing on social esteem? Is one's community inundated with unhealthy fast-food alternatives, creating a culture of unhealthy eating that becomes a sociocultural norm and perpetuates a notion that some communities do not deserve more, as a matter of human right?<sup>540</sup> The emergence of food deserts and food swamps have set the stage for integrity-based dignitary harms because they convey a lack of social esteem for the inherent worthiness of the residents of such communities to enjoy greater access to healthy and nutrient-rich food alternatives. Put simply, the dignitary harm is rooted in governmental neglect.

#### CONCLUSION

Food insecurity remains a persistent problem in marginalized communities across the United States. In many ways, it reflects the politically divisive role of the U.S. government (at the federal, state, and local levels) in allaying the social and economic inequities that are produced by the nation's capitalist political economy. More fundamentally, as this Article has shown, political debates over the legitimacy and scope of the American welfare state obscures the unfinished work of the Reconstruction Amendments. Food oppression was used during the antebellum era to constitute and perpetuate the subordinate social status of enslaved Black people, thereby justifying their labor expropriation toward furthering the profit-making ends of their enslavers. However, the material conditions of structural food oppression that signified the abjection of Black life and legitimated the institution of slavery also shaped the meaning of equality, liberty, and integrity in relation to human dignity and citizenship.

After emancipation, politicians were deeply divided on the goals of the Reconstruction Amendments. Some decried governmental assistance to formerly enslaved Black Americans, claiming that civil liberties and the opportunity to work via contract was sufficient for freedom. Others argued that social and economic constitutional rights were also necessary, not only for equal citizenship, but also as a corrective for the inequities wrought by the system of chattel slavery and indentured servitude. This Article has shown that the lens of human dignity offers a unique way to characterize the nature of injuries or material conditions that are proximately traceable to chattel slavery as a political economic system. This system was designed to expropriate and exploit labor by fashioning class-based relations of domination legitimated by White supremacist ideologies.

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Monica L. Baskin, Lori Carter-Edwards, Deborah Rohm Young, Vikki Lassiter & Shiriki K. Kumanyika, *What "Price" Means When Buying Food: Insights from a Multisite Qualitative Study with Black Americans*, 103 AM. J. PUB. HEALTH 516, 518 (2013) ("Perishable healthier foods also were considered costly because of the potential for waste.").

538. See Disantis et al., *supra* note 537, at 516 ("Accounting for how price intersects with other value considerations may improve the effectiveness of these [food pricing] strategies.").

539. See *supra* note 275 and accompanying text (explaining the United States Food Stamp color system).

540. See *supra* notes 360–71 and accompanying text.



Specifically, it deployed various dignitary harms that collectively produced structural oppression. Modern vestiges of the antebellum system of chattel slavery—viewed through the lens of political economy—emerge as those practices that perpetuate the types of dignitary harms that collectively sustained the plantation economy and shaped the lives of its oppressed workers.

The dignity-based normative framework offered in this Article suggests that the problem of food insecurity in marginalized communities across the United States can be viewed as a badge of the antebellum system of chattel slavery. Such a framing invokes the legislative potential of the Thirteenth Amendment's Enforcement Clause. While outlining the key steps for law and policymakers to deploy legislation toward such ends is beyond the scope of this Article, many states have already taken valiant steps to combat food injustice that show its potential. For example, the City of Los Angeles, California, passed an interim control ordinance prohibiting the establishment or expansion of fast-food restaurants in certain neighborhoods, while the City of Minneapolis, Minnesota, passed an ordinance requiring grocery stores to carry a minimum quantity and selection of perishable foods.<sup>541</sup> Other cities like Madison, Wisconsin, and Scott County, Minnesota, have incorporated food-security considerations into their comprehensive regional plans through policies supporting locally grown food and community gardening.<sup>542</sup> In some cities, such as Chicago, Illinois, non-profit organizations play an important role in providing healthy food to low-income and marginalized communities.<sup>543</sup> Scholars remain divided on the best approaches toward resolving food insecurity, and a discussion of such debates is beyond the scope of this Article.<sup>544</sup> Whether cities seek to address food insecurity through regulations, through tax incentives, through community-based initiatives, or through comprehensive regional planning, what remains clear is that these efforts are not framed as responses to food indignities tied to the antebellum system of chattel slavery. Doing so will not only clarify their salience, but also inspire other jurisdictions to follow suit. Much more can and should be done. As this Article has argued, change requires a reckoning with the structural oppression embedded in the very fabric of the modern U.S. food system, and the responsibility of the U.S. government—under the Thirteenth Amendment—to solve it.

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541. See PUB. HEALTH L. CTR., REDUCING COMMUNITY FOOD INSECURITY: A REVIEW OF OPTIONS 3–4, 6 (2009), <https://www.publichealthlawcenter.org/sites/default/files/resources/phlc-policy-food-insecurity.pdf> [<https://perma.cc/F55N-LZK2>].

542. See *id.* at 9–10.

543. See Lolly Bowean, *Next Stop: Fresh Produce*, CHI. TRIB. (Apr. 17, 2011, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-2011-04-17-ct-met-englewood-food-bus-20110417-story.html>.

544. *But see generally* Toussaint, *supra* note 23 (arguing that urban agriculture imbued with so-called “neutral” and “colorblind” policies that ignore historic state-sponsored racial discrimination, limit governmental market interventions, and promote individualistic competition and private ownership have failed to mitigate the structural oppression that drives food insecurity in many marginalized Black urban landscapes).