

# Unconstitutional Food Inequality

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## ABSTRACT

*Racial disparities in food-related deaths and disease are vestiges of slavery and colonization that have persisted for too long. Rhetoric around personal responsibility and cultural preferences obscure the structural causes of these disparities. Regulatory capture by the food industry makes reform through the political process unlikely or subject to severe limitations. This article explores the structural causes of food inequality by examining how two U.S. Department of Agriculture nutrition programs, the Food Distribution Program on Indian Reservations and the National School Lunch Program, contribute to food-related health disparities. First, it traces food inequality back to slavery and colonization. Most slave owners carefully rationed out food to fuel labor but prevent revolts. On almost all plantations, enslaved people ate a non-nutritious diet that led to a plethora of nutrition-related illnesses and deaths. Similarly, colonization occurred in great part through the destruction of Indigenous foodways. Land theft, displacement, and the intentional elimination of food sources led to starvation and illness. Lack of access to healthy food still represents one of the most significant obstacles to Black and Indigenous Peoples' full participation in society, contributing to lower life expectancy, serious illness, and cultural erasure. The Reconstruction Amendments provide a constitutional basis for challenging these two USDA nutrition programs, in addition to other laws and policies that lead to health disparities and food injustice.*

## TABLE OF CONTENTS

INTRODUCTION.....	841
I. FOOD LAW AND INEQUALITY FROM SLAVERY AND COLONIZATION TO THE PRESENT.....	845
A. <i>Dietary Control During Slavery</i> .....	846
B. <i>Food Inequality After Slavery</i> .....	854
C. <i>A Brief History of Colonization Through Dietary Control</i> .....	857
II. MODERN FOOD INEQUALITY: USDA NUTRITION PROGRAMS .....	863
A. <i>The Food Distribution Program on Indian Reservations</i> .....	865
B. <i>The National School Lunch Program</i> .....	879
III. THE NATIONAL SCHOOL LUNCHROOMS PROGRAM AND FDPIR VIOLATE THE RECONSTRUCTION AMENDMENTS .....	898
A. <i>The Thirteenth Amendment</i> .....	898
B. <i>The Fourteenth Amendment</i> .....	904
C. <i>The Fifteenth Amendment</i> .....	908
CONCLUSION.....	911

## INTRODUCTION

In a country as rich in agriculture as the United States, the fact that more people die annually from the consequences of consuming non-nutritious food than from smoking or car accidents is indefensible.<sup>1</sup> Obesity and other food-related conditions have become a public health crisis disproportionately affecting communities of color. This is no surprise. Oppression has always been part of food's history. Food was one of the primary tools of colonization and enslavement. White settlers starved Indigenous people<sup>2</sup> to force<sup>i</sup> them to

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<sup>1</sup> The Institute for Health Metrics & Evaluation, *Dietary Risks are Leading Cause of Disease Burden in the US and Contributed to More Health Loss in 2010 than Smoking, High Blood Pressure, and High Blood Sugar*, HEALTH DATA (July 10, 2013), <http://www.healthdata.org/news-release/dietary-risks-are-leading-cause-disease-burden-us-and-contributed-more-health-loss-2010>, archived at <https://perma.cc/KK93-R3ZG>; The Institute for Health Metrics & Evaluation, *The State of US Health, 1990–2010: Burden of Diseases, Injuries, and Risk Factors*, HEALTH DATA (July 10, 2013), <http://www.healthdata.org/research-article/state-us-health-1990-2010-burden-diseases-injuries-and-risk-factors>, archived at <https://perma.cc/J3ZE-A575>. See Mat McDermott, *Poor Diet is Killing More Americans Than Smoking*, VICE: MOTHERBOARD (July 19, 2013, 1:15 PM), [https://motherboard.vice.com/en\\_us/article/vvwn9/poor-diet-is-killing-more-americans-than-smoking](https://motherboard.vice.com/en_us/article/vvwn9/poor-diet-is-killing-more-americans-than-smoking), archived at <https://perma.cc/L7VL-398A> (discussing a study by the Institute of Health Metrics and Evaluation). See also Sophie Morlin-Yron, *A Bad Diet is Worse Than Drugs, Alcohol and Tobacco Combined*, CNN (Sept. 29, 2016, 9:50 AM), <https://www.cnn.com/2016/09/29/africa/africa-view-poor-diet-and-health/index.html>, archived at <https://perma.cc/H76X-8TBF> (discussing another study by the Global Panel on Agriculture and Food Systems for Nutrition). The inclusion of lack of exercise with poor nutrition as the leading cause of preventable deaths in the U.S. reflects a long publicity campaign by the food industry to divert attention away from the connection between unhealthy food and obesity. See Alice G. Walton, *Exercise Can't Save Us: Our Sugar Intake is the Real Culprit, Say Experts*, FORBES (Apr. 24, 2015), <https://www.forbes.com/sites/alicegwalton/2015/04/24/exercise-wont-save-us-sugar-and-carbs-are-our-bodily-downfall/#625122642466>, archived at <https://perma.cc/N6T5-45MW>. See also A. Malhotra, T. Noakes, & S. Phinney, *It is Time to Bust the Myth of Physical Inactivity and Obesity: You Cannot Outrun a Bad Diet*, 49 BRIT. J. SPORTS MED. 967 (Apr. 22, 2015), <https://bjsm.bmj.com/content/49/15/967.full>, archived at <https://perma.cc/X3CC-YUTM>.

<sup>2</sup> Whenever possible, I describe individuals in reference to the tribe to which they belong. When describing people collectively, I use the term “Indigenous people” to refer to “living descendants of preinvasion inhabitants of lands now dominated by others.” S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (1996). I use the term without

move, to farm, and to turn over their children.<sup>3</sup> Slave owners withheld food from enslaved women, then dispensed it as compensation for sexual assaults.<sup>4</sup> During both periods, White people deliberately rationed out foods and carefully constructed unhealthy diets that led to widespread illness.

The resulting health disparities remain constant into the present. Now, structural factors, such as government nutrition programs and residential segregation, maintain racial disparities in food-related deaths and diseases. The popular rhetoric of personal responsibility obscures these causes of health disparities between White people and Black, Indigenous, and other people of color.<sup>5</sup> From this individualistic perspective, bad health arises from weak will, poor choices, and cultural preferences for unhealthy food such as fried chicken or frybread. Combatting these myths and reducing health disparities present significant challenges. Industry influence over law and policymakers renders change through the democratic process slow, inconsistent, and subject to rollbacks when administrations turn over. The Trump administration exacerbated food inequality by weakening the standards for healthy public-school lunches and making food stamp recipients jump through more hoops

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ascribing any particular definition to it, in recognition of the complexities of seeking to determine who belongs to this category. See Rose Cuison Villazor, *Blood Quantum Land Laws and the Race versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 804 n.14 (2008). I use the term Indian to refer to political status and as a racialized term. See Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 959 n.2 (2011) (“The term ‘Indian’ is a legal term referring to people or groups who fit within a shifting federal definition. Categorization as Indian in a legal sense implicates a range of legal rights and benefits based on the historical relationship between the United States and certain Indigenous groups. ‘Indian’ is also a term of common usage, referring to people identified as belonging to the shifting and variously defined Indian racial category.”). I do not use the term Native American because it “suggests acceptance of an unsavory assimilationist connotation.” Rose Cuison Villazor, *Blood Quantum Land Laws and the Race versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 803 n.7 (2008) (quoting Robert B. Porter, *The Meaning of Indigenous State Sovereignty*, 34 ARIZ. ST. L. J. 75, 75 n.1 (2002)).

<sup>3</sup> *Indian Reservations*, The History Channel (March 18, 2019), <https://www.history.com/topics/native-american-history/indian-reservations>, archived at <https://perma.cc/T8YF-NSWR>; *Native American History*, ALL ABOUT HIST. (Sept. 8, 2019), <https://www.allabouthistory.org/native-american-history.htm>, archived at <https://perma.cc/6N46-6RRU>; J. Weston Phippen, ‘Kill Every Buffalo You Can! Every Buffalo Dead Is an Indian Gone’, THE ATLANTIC (May 13, 2016), <https://www.theatlantic.com/national/archive/2016/05/the-buffalo-killers/482349/>, archived at <https://perma.cc/327T-VWDZ>.

<sup>4</sup> See Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11, 17 (2001); Terri L. Snyder, *Women, Race, and the Law in Early America*, OXFORD RES. ENCYCLOPEDIA (Sept. 2015), <https://oxfordre.com/americanhistorical/view/10.1093/acrefore/9780199329175.001.0001/a crefore-9780199329175-e-12>, archived at <https://perma.cc/4U8R-HZ4Q>.

<sup>5</sup> Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1251, 1269–73 (2013).

to receive basic benefits.<sup>6</sup> In this corporate-friendly climate, courts may represent the last resort for those hoping to reverse policies that lead to “slow death”<sup>7</sup> for communities of color.

This article is the first to trace current food inequality back to slavery and colonization and to take the novel approach of mobilizing the Reconstruction Amendments to solve this urgent problem. Current constitutional jurisprudence and the conservative leaning of the Court render change through the judiciary unlikely now. But these arguments may open the door to future, favorable decisions, and create a solid base on which Congress and agencies can rely in creating more equitable laws and policies.

Part II lays out the landscape of food and nutritional deficiencies during slavery. First, it demonstrates how slave owners’ control over the diets of enslaved individuals contributed to significant disparities in food-related deaths and diseases. The law supported this control, limiting it only in extreme cases where it negatively affected the property rights of slave owners who lost resources through food theft by slaves from other plantations. This part then describes constraints on Black diets from the end of slavery through the present. Despite the dramatic change in legal status from property to persons, Black peoples’ diets remained largely unhealthy due to limited access to nutritious foods and, in some cases, entrenched taste preferences. Nutrition-related diseases evolved from scurvy and rickets to diabetes and obesity, but racial health disparities persisted.

Next, Part II examines how the U.S. government systematically employed food as a tool to destroy Indigenous ways of life and implement its Indian assimilation project. It describes how deliberate policy choices separated Indigenous people from their traditional food sources, replacing them with government-supplied rations of unfamiliar and unhealthy foods. Failed attempts to re-direct Indigenous people from hunting to farming resulted in mass hunger, compelling Indigenous people to consume foods that made them sick. These practices led them to become the first populations with high rates

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<sup>6</sup> See Valerie Strauss, *More Salt and Less Whole Grain Allowed in Trump Administration’s New School Lunch Nutrition Rule*, WASH. POST (Dec. 8, 2018, 10:00 AM), <https://www.washingtonpost.com/education/2018/12/08/more-salt-fewer-whole-grains-allowed-trump-administrations-new-school-lunch-nutrition-rule/>, archived at <https://perma.cc/K67B-3SZ9>; Pamela Herd & Donald Moynihan, *Trump’s Food Stamp Rule Change will Hurt 19 Million Households*, THE HILL (Sept. 6, 2019, 8:00 AM), <https://thehill.com/blogs/congress-blog/politics/460218-trumps-food-stamp-rule-change-will-hurt-19-million-households>, archived at <https://perma.cc/F8T7-QHXL>.

<sup>7</sup> Lauren Berlant, *Slow Death (Sovereignty, Obesity, Lateral Agency)*, 33 CRITICAL INQUIRY 754, 754 (2007).

of modern food-related diseases, such as diabetes, which they continue to suffer from at much higher rates than other groups.<sup>8</sup>

Part III examines modern food inequality through the lens of two USDA nutrition programs, the Food Distribution Program on Indian Reservations<sup>9</sup> (“FDPIR”) and the National School Lunch Program.<sup>10</sup> It analyzes how the USDA uses these programs to dispose of surplus commodities subsidized through the Farm Bill, to the detriment of program participants. Unhealthy school lunches go primarily to low-income students of color, many of whom rely on school food for all their daily calories. The low nutritional content of school meals contributes to food-related health disparities between White students and Black, Indigenous and other students of color. This part also explores the complex relationship between the FDPIR’s commodity foods and Indian identity.

Part IV argues that the Reconstruction Amendments present opportunities to challenge food inequality and to reframe food injustice as a constitutional issue. Intended to ensure that deprivations designed to enforce the system of slavery would not continue past Emancipation, these amendments sought, among other things, to guarantee former slaves’ control over their bodies. Later interpretations of the amendments extended their reach to limit inequality imposed on any racialized group. Although current social conditions are dramatically different from the legalized brutality of slavery, modern laws and policies exert inordinate control over the diets of many Black and Indigenous infants, children, and adults.<sup>11</sup> These policy decisions have resulted in disproportionate food-related deaths and illnesses in Black and Indigenous communities.<sup>12</sup>

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<sup>8</sup> Elizabeth Hoover, *Food Boxes Have Already Failed for Native Communities, Why Would They Work for SNAP?*, TEEN VOGUE (Mar. 9, 2018), <https://www.teenvogue.com/story/food-boxes-have-already-failed-for-native-communities-why-would-they-work-for-snap>, archived at <https://perma.cc/5CDL-SKPX>.

<sup>9</sup> 7 C.F.R. §§ 250, 253, 254 (1973). See also FDPIR FACT SHEET, USDA (Jan. 1, 2018), <https://www.fns.usda.gov/fdpir/fdpir-fact-sheet>, archived at <https://perma.cc/AB9G-ZGPQ>.

<sup>10</sup> 7 C.F.R. §§ 210 *et seq.* (1988). See also U.S. DEP’T OF AGRIC., THE NATIONAL SCHOOL LUNCH PROGRAM (2017), <https://fns-prod.azureedge.net/sites/default/files/cn/NSLPIFactSheet.pdf>, archived at <https://perma.cc/R7EP-DQWL>.

<sup>11</sup> English settlers enslaved both Africans and Indigenous Peoples. Matthew Wills, *When Native Americans were Slaves*, JSTOR DAILY (Feb. 14, 2018), <https://daily.jstor.org/when-native-americans-were-slaves/>, archived at <https://perma.cc/JQX4-3TQX>. Other racialized groups also suffer from dietary control through USDA programs, including the Latinx community.

<sup>12</sup> See Jessie A. Satia, *Diet-Related Disparities: Understanding the Problem and Accelerating Solutions*, 109 J. AM. DIETETIC ASS’N 610, 611 (2009); see also Anna Maria Barry-Jester, *Patterns of Death in the South Still Show the Outlines of Slavery*, FIVETHIRTYEIGHT (Apr. 20, 2017), <https://fivethirtyeight.com/features/mortality-black-belt/>, archived at

This article argues that these racial disparities represent vestiges of slavery and colonization that violate the spirit and letter of the Reconstruction Amendments. Food-related racial disparities are incidents of slavery that violate the Thirteenth Amendment. Laws and policies that create racial health disparities are a manifestation of unequal protection of the law that contravenes the Fourteenth Amendment. The resulting illnesses and premature deaths<sup>13</sup> restrict the ability to exercise the full citizenship guaranteed by the Fifteenth Amendment. Broadly, the Reconstruction Amendments lay a moral and ethical foundation for food justice-oriented social movements that demand greater government accountability for all Americans' health and well-being.

## I. FOOD LAW AND INEQUALITY FROM SLAVERY AND COLONIZATION TO THE PRESENT

Slave owners held the legal right and responsibility to control enslaved peoples' food intake. Many neglected to fulfill this duty, driving enslaved individuals to theft and starvation. Others strove to provide the minimum amount of food required to maintain the strength needed for labor but avoid a revolt. Constantly experimenting with this formula, slave owners circulated recommendations among each other regarding the ideal contents and portions of rations, such as one quart of cornmeal a day per adult, and half of that per

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<https://perma.cc/S9WX-BE46> (“[R]ural, Southern black Americans who live in communities founded on slavery routinely have some of the worst health outcomes in the country.”).

<sup>13</sup> Black people ages 18–49 are two times more likely to die from heart disease than White people. From ages 35–64, Black people are also 50 percent more likely to have high blood pressure than White people. *Vitalsigns: African American Health: Creating Equal Opportunities for Health*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 2017), <https://www.cdc.gov/vitalsigns/pdf/2017-05-vitalsigns.pdf>, *archived at* <https://perma.cc/73AT-PA47>. The death rate for some types of cancer is 25 percent higher for Black people than White people. *Cancer Disparities*, NAT'L CANCER INST. (Mar. 11, 2019), <https://www.cancer.gov/about-nci/organization/crhd/cancer-health-disparities-fact-sheet>, *archived at* <https://perma.cc/5FA7-FPC9>. 35.2 percent of Black youths ages 2–19 are overweight or obese, compared to 31.8 percent of all children and adolescents. *Overweight and Obesity Among African American Youths*, ROBERT WOOD JOHNSON FOUND. 1 (May 2014), [http://www.ebony.com/wp-content/uploads/2017/03/LHC\\_African\\_American\\_Factsheet\\_FINAL.pdf](http://www.ebony.com/wp-content/uploads/2017/03/LHC_African_American_Factsheet_FINAL.pdf), *archived at* <https://perma.cc/8BXM-WHA8>. Among children born in 2000, Black boys have a 40.2 percent risk of being diagnosed with diabetes compared to 26.7 percent of White boys, and Black girls have a 49 percent risk compared to 31.2 percent of White girls. *Id.* at 2.

child.<sup>14</sup> On almost all plantations, enslaved people ate a non-nutritious diet that led to a plethora of nutrition-related illnesses and deaths.<sup>15</sup> Slave owners shaped enslaved bodies through a dietary regime designed to weaken the spirit and limit pleasure.

The U.S. government similarly used food to control Indigenous people. Recognizing traditional foods' cultural significance, it systematically destroyed Indigenous Peoples' ability to feed themselves. It slaughtered bison and ruined crops, forcing Indigenous people onto barren land with the intent of "civilizing" them through agriculture.<sup>16</sup> One U.S. army colonel instructed a hunter who expressed remorse at killing thirty buffalo at once, "Kill every buffalo you can! Every buffalo dead is an Indian gone."<sup>17</sup> This strategy contributed to mass starvation and a long history of inadequate food rations that led to disproportionately high incidences of food-related diseases and deaths among Indigenous people.

### A. Dietary Control During Slavery

Several states passed laws requiring slave owners to provide adequate food or to pay damages when famished slaves stole from other plantations.<sup>18</sup>

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<sup>14</sup> HERBERT C. COVEY & DWIGHT EISNACH, WHAT THE SLAVES ATE: RECOLLECTIONS OF AFRICAN AMERICAN FOODS AND FOODWAYS FROM THE SLAVE NARRATIVES 20–25 (2009).

<sup>15</sup> 2 THE CAMBRIDGE WORLD HISTORY OF FOOD 1282 (Kenneth F. Kiple & Kriemhild Coneè Ornelas eds., 2000) [hereinafter HISTORY OF FOOD]; Tyson Gibbs et al., *Nutrition in a Slave Population: An Anthropological Examination*, 4 MED. ANTHROPOLOGY 175, 175–262 (1980).

<sup>16</sup> Phippen, *supra* note 3.

<sup>17</sup> *Id.*

<sup>18</sup> *See, e.g.*, A Bill for the General Laws of the Province of East New-Jersey, Ch. VIII, § XXVI (Mar. 1682), *quoted in* AARON LEARNING & JACOB SPICER, THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY, THE ACTS PASSED DURING THE PROPRIETARY GOVERNMENTS 237 (2002); Alabama Slave Code, art. VII, § 3297; Jenny Bourne Wahl, *Legal Constrains on Slave Masters: The Problem of Social Cost*, 41 AM. J. LEGAL HIST. 1, 5 n.15 (Jan. 1997). Although some accounts of the period assert that enslaved people customarily received enough food to survive, many historians dispute the claim that slave owners sought to maintain enslaved people's health and strength through their allotted diet. *See, e.g.*, MARY BETH NORTON ET AL., A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES 262 (10th ed. 2015). The most famous and controversial account to paint enslaved people's nutrition and health as robust is Robert Fogel and Stanley Engerman's *Time on the Cross*. Although scholars have refuted and disproved their claims, their work remains an oft-cited source for conditions of slavery. *See* Charles Crowe, *Time on the Cross: The Historical Monograph as a Pop Event*, 9 HIST. TEACHER 588, 594–602 (1976); Kenneth F. Kiple, *A Survey of Recent Literature on the Biological Past of the Black*, 10 SOC. SCI. HIST. 343, 374 (1986); Philip R.P. Coelho & Robert A. McGuire, *Diet Versus Diseases: The Anthropometrics of Slave Children*, 60 J. ECON. HIST. 232, 232 (2000) (challenging Fogel and Engerman's claims as applied to newborn, infant, and child slaves);

Despite the existence of these laws, prosecuting slave owners for generally accepted conduct, such as withholding food, was rare. But in some extreme cases, the burden this behavior put on other slave owners prompted charges.

For example, in *State v. Bowen*,<sup>19</sup> a plantation owner challenged his conviction under South Carolina's Act of 1740 for refusing or neglecting to provide "sufficient" food and clothing to his slave Eliza for a period of five months.<sup>20</sup> The Act did not define the term "sufficient." Instead, the court allowed local custom to determine appropriate standards.<sup>21</sup> In Bowen's case, he fed his slaves only cornmeal, and in such meager quantities that the court surmised he must have "reduced them to famine."<sup>22</sup> The slaves also did not receive clothing or shoes for seventeen months, resulting in sore, frostbitten feet.<sup>23</sup> Rejecting Bowen's request to exculpate himself from the charge through his own oath, the court explained that the law served the important purpose of deterrence through opprobrium.<sup>24</sup> It also noted that "[i]nstances do sometimes, though rarely, occur, in which it is necessary to interfere in behalf of the slave against the avarice of his master."<sup>25</sup> This need arose from "public sentiment" and an imperative "to protect property from the depredation of famishing slaves."<sup>26</sup>

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Kenneth F. Kiple & Virginia H. Kiple, *Slave Child Mortality: Some Answers to a Perennial Puzzle*, 10 J. SOC. HIST. 284, 299 (1977) [hereinafter *Slave Child Mortality*]. But see MARY BETH NORTON ET AL., *A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES* 262 (10th ed. 2015).

<sup>19</sup> 34 S.C.L. 573 (1894).

<sup>20</sup> *Id.* at 573.

<sup>21</sup> *Id.* at 574.

<sup>22</sup> *Id.* at 573–75 ("The defendant did not give his [slaves] enough even of meal, the only provision he did give. Five bushels of meal weekly, the largest quantity stated by any witness, even if not reduced in the ratio of three eighths of a bushel, in two bushels, to the standard of the defendant's measure, was plainly insufficient for a family of eight whites and twenty-one slaves. But it appears from the testimony of Jackson, the defendant's overseer, that this supply was not regular. The grown [slaves] had only a quart of meal a day. Many days, he says, they had no meal. Sometimes it gave out Thursday and sometimes Friday. They would then have a quart to last them till Monday evening.")

<sup>23</sup> *Id.* at 575.

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

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

<sup>26</sup> *Id.*



South Carolina was the first state to prohibit owners from starving their slaves.<sup>27</sup> Alabama,<sup>28</sup> Louisiana,<sup>29</sup> Florida,<sup>30</sup> North Carolina,<sup>31</sup> Texas,<sup>32</sup> and Georgia<sup>33</sup> eventually followed suit.<sup>34</sup> An 1852 Alabama act penalized slave owners for not providing a sufficient amount of healthy food to slaves.<sup>35</sup> Although this law was likely primarily deterrent, it provides evidence of how commonplace starvation was. Enslaved people also sometimes stole in accordance with slave owners' orders.<sup>36</sup>

In the only other recorded case of a slave owner's prosecution under this type of law, *Cheek v. State*,<sup>37</sup> a grand jury in Lowndes County, Alabama, indicted Randall Cheek for starvation in 1861.<sup>38</sup> Cheek's overseer testified against him, reporting that meat on the plantation had run out by the summer of 1858.<sup>39</sup>

<sup>27</sup> THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860* 183 (1996).

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

<sup>29</sup> The Act of July 7, 1806 provided requirements for food. WILLIAM GOODELL, *THE AMERICAN SLAVE CODE* 135 (New York, John A. Gray 1853); GEORGE MCDOWELL STROUD, *A SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA* 46–47 (Philadelphia, Kimber & Sharpless 1856).

<sup>30</sup> Joseph Conan Thompson, *Toward a More Humane Oppression: Florida's Slave Codes, 1821–1861*, 71 FLA. HIST. Q. 324, 324 (1993)

<sup>31</sup> GOODELL, *supra* note 29; STROUD, *supra* note 29, at 47; H.M. Henry, *The Slave Laws of Tennessee*, 2 TENN. HIST. MAG. 175, 186 (1916) (noting that the act “made it obligatory on the master to provide wholesome food for his slaves and white servants.”).

<sup>32</sup> A constitutional provision empowered the legislature to pass laws requiring masters “to provide for their necessary food and clothing.” TEX. CONST. of 1845, art. VIII, § 1, available at <https://tarltonapps.law.utexas.edu/constitutions/texas1845/a8>, archived at <https://perma.cc/4PHM-2S94>. See also COVEY & EISNACH, *supra* note 14, at 12.

<sup>33</sup> The Act of 1817 made it a punishable offense for masters to withhold proper food and sustenance. GOODELL, *supra* note 29, at 135; STROUD, *supra* note 29, at 48. See also DONALD L. GRANT, *THE WAY IT WAS IN THE SOUTH: THE BLACK EXPERIENCE IN GEORGIA* 54 (2001).

<sup>34</sup> MORRIS, *supra* note 27, at 195.

<sup>35</sup> Code of Alabama, art. VII § 3297 (1852) (“Any master, or other person standing towards the slave in that relation, who inflicts, or allows another to inflict on him, any cruel punishment, or fails to provide him with a sufficiency of healthy food or necessary clothing, or to provide for him properly in sickness or old age, or treats him in any other way with inhumanity, on conviction thereof, must be fined not less than twenty-five, or more than one thousand dollars.”). See also MORRIS, *supra* note 27, at 195; PETER KOLCHIN, *AMERICAN SLAVERY: 1619–1877* 130 (1993).

<sup>36</sup> According to Henry Johnson, a former slave: “Our master would make us surround a herd of his neighbor's cattle, round them up at night and make us slaves stay up all night long and kill and skin every one of them critters, salt the skins down in layers in the master's cellar, and put the cattle piled ceiling high in the smokehouse so nobody could identify skinned cattle.” Wahl, *supra* note 18, at 6 n.16 (citing JULIUS LESTER, *TO BE A SLAVE* 37 (1970)).

<sup>37</sup> 38 Ala. 227 (1861).

<sup>38</sup> *Id.* at 228.

<sup>39</sup> *Id.* at 229.

The Alabama Supreme Court remanded the case to allow Cheek to provide evidence in support of his claim that he had slaughtered thirty-two hogs to feed his enslaved plantation workers in December 1858.<sup>40</sup> Other states with similar laws likely did not enforce them.<sup>41</sup>

The need for these laws is evidence that widespread starvation was a problem. The fact that enslaved people sometimes stole food (often flour or pigs) from their own and other plantations also suggests that they did not receive adequate provisions from their owners.<sup>42</sup> Booker T. Washington explained why this type of “theft” was not immoral:

One of my earliest recollections is that of my mother cooking a chicken late at night, and awakening her children for the purpose of feeding them. How or where she got it I do not know. I presume, however, it was procured from our owner’s farm. Some people may call this theft . . . But taking place at the time it did, and for the reason it did, no one could ever make me believe that my mother was guilty of thieving. She was simply a victim of the system of slavery.<sup>43</sup>

Many owners carefully calculated the amount of food required for enslaved workers to survive and maintain productivity.<sup>44</sup> They gave smaller rations to children, elders, and others who could not work.<sup>45</sup> This unequal distribution reflected an economic assessment of property, not people. Slave owners sometimes sought to give the false impression of generous treatment when putting enslaved people up for sale.<sup>46</sup> To achieve this illusion, they smeared grease around their enslaved workers’ mouths to make it look like they had eaten meat.<sup>47</sup> Malnourished slaves would reap scant profits at market.

*DeBow’s Review*, first published in 1846, provided specific guidelines to help slave owners determine exactly which foods and portions would

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

<sup>41</sup> Wahl, *supra* note 18, at 4–5 (citing David C. Rankin, *The Tannenbaum Thesis Reconsidered: Slavery and Race Relations in Antebellum Louisiana*, in ARTICLES ON AMERICAN SLAVERY: SOUTHERN SLAVERY AT THE STATE AND LOCAL LEVEL 207, 208 (Paul Finkelman ed., 1989)).

<sup>42</sup> See Wahl, *supra* note 18, at 4–5; COVEY & EISNACH, *supra* note 14, at 34; 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, 157–58 (Jennifer Jensen Wallach ed., 2015); see also TODD SAVITT, *MEDICINE AND SLAVERY: THE DISEASES AND HEALTH CARE OF BLACKS IN ANTEBELLUM VIRGINIA* 97, 98 (1981).

<sup>43</sup> BOOKER T. WASHINGTON, *UP FROM SLAVERY* 4–5 (1907).

<sup>44</sup> See COVEY & EISNACH, *supra* note 14, at 11.

<sup>45</sup> *Id.* at 21–26 (explaining that weekly rations were proportional to the relative values placed on slaves) (“Men fared best, followed by women, children, and older slaves.”).

<sup>46</sup> *Id.* at 11.

<sup>47</sup> *Id.*

adequately maintain their work force.<sup>48</sup> The *Review* recommended allotments of bacon and cornmeal corresponding to enslaved workers' positions as either field hands or indoor hands, and whether they were men, women, or children.<sup>49</sup> It suggested that owners could add milk, buttermilk, or molasses to the cornmeal.<sup>50</sup>

To avoid excessive deaths and illnesses due to vitamin and mineral deficiencies, and to prevent stealing, a farmers' register advised planting a garden of fruit trees.<sup>51</sup> On some plantations, enslaved workers had hens that supplied them with eggs.<sup>52</sup> Both these practices were most common in South Carolina and Georgia, providing additional food sources and items for trade.<sup>53</sup> One book on slave management went even further in promoting health, recommending a diet of unlimited vegetables.<sup>54</sup> The vegetables available during this period were potatoes, cabbage, turnips, peas, and yams.<sup>55</sup>

When slave owners chose to supplement meat and cornmeal rations with fresh vegetables, their slaves could avoid many of the worst food-related

<sup>48</sup> See generally J.D.B. DEBOW, DEBOW'S REVIEW (1846–1884); COVEY & EISNACH, *supra* note 14, at 13.

<sup>49</sup> COVEY & EISNACH, *supra* note 14, at 13 (citing *Agricultural Improvements and Progress*, 14 DEBOW'S REVIEW 177 (1853)).

<sup>50</sup> DEBOW, *supra* note 48, at 14; SAVITT, *supra* note 42, at 91–94.

<sup>51</sup> *Id.* at 14.

<sup>52</sup> *Id.* at 13 (citing *Negro Slavery at the South (Part 2)*, 7 DEBOW'S REVIEW 380–81 (1849)). See also SAVITT, *supra* note 42, at 84.

<sup>53</sup> JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY, FROM SLAVERY TO THE PRESENT 13 (2009) (“Some slaves, such as those in the Rice Kingdom of low-country South Carolina and Georgia, accumulated modest amounts of personal property, and kept chickens and tended gardens. And slaves throughout the South trafficked in goods they appropriated from their masters and sold to other blacks or whites for gain.”); see also SAVITT, *supra* note 42, at 95 (“Many agricultural authors and slavemasters indicated in their writings that blacks often raised vegetables, poultry, and even pigs on their own plots of land near the quarters.”).

<sup>54</sup> COVEY & EISNACH, *supra* note 14, at 15.

<sup>55</sup> The potato's prominent place in Black diets, despite its relatively low nutritional value, continues today. See *United States African Americans*, FOOD EVERY COUNTRY, <http://www.foodbycountry.com/Spain-to-Zimbabwe-Cumulative-Index/United-States-African-Americans.html>, archived at <https://perma.cc/TD2D-G76J>. In addition to being a staple of a fast food diet in the form of the french fry, it represents thirty-five percent of the vegetables served in school lunchrooms. Martha Kubik et al., *The Association of the School Food Environment with Dietary Behaviors of Young Adolescents*, 93 AM. J. PUB. HEALTH 1168, 1170 (Aug. 2003) (noting that fried potatoes represented 37 percent of all fruit and vegetable servings, and more than 56 percent of all vegetable servings). Pizza also counts as a vegetable for school lunch purposes. Mary Clare Jalonick, *Pizza is a Vegetable? Congress says Yes*, NBC NEWS (Nov. 15, 2011), [http://www.nbcnews.com/id/45306416/ns/health-diet\\_and\\_nutrition/t/pizza-vegetable-congress-says-yes/#.XbSkJedKjs0](http://www.nbcnews.com/id/45306416/ns/health-diet_and_nutrition/t/pizza-vegetable-congress-says-yes/#.XbSkJedKjs0), available at <https://perma.cc/54EJ-4MD6>.

afflictions rampant during the period.<sup>56</sup> It appears, however, that many slave owners did not make health a priority. Indeed, they were more likely to follow the advice dispensed in one popular pamphlet: to allot enslaved people a peck of corn and a pint of salt each week, and a piece of meat once a month.<sup>57</sup> The cuts of meat slaves received were the least desirable.<sup>58</sup> The quality of their food generally was inferior to what slave owners ate, consisting mainly of scraps or seconds.<sup>59</sup>

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.<sup>60</sup> Some medical research from the period sought to explain these disparities as the product of inherent racial differences.<sup>61</sup> The preponderance of medical and scientific research, however, attributes the prevalence of certain conditions among putative races to social determinants or geography, not physiology or genetics.<sup>62</sup>

Although both slave owners and the people they enslaved contracted diseases caused by vitamin and mineral deficiencies, Black people suffered from them at the highest rates.<sup>63</sup> Children fared worst of all among the enslaved population. Half of those who survived birth died before they turned

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<sup>56</sup> SAVITT, *supra* note 42, at 103.

<sup>57</sup> COVEY & EISNACH, *supra* note 14, at 14.

<sup>58</sup> *Id.*

<sup>59</sup> SAVITT, *supra* note 42, at 86 n.8 (discussing some scholars' measurement of diets during slavery by the "disappearance technique," which assumes that slave owners gave what was left after use for feed, seed, and sale to slaves); COVEY & EISNACH, *supra* note 14, at 14.

<sup>60</sup> HISTORY OF FOOD, *supra* note 15, at 1282; Gibbs et al., *supra* note 15, at 175–262.

<sup>61</sup> See Nancy Krieger, *Shades of Difference: Theoretical Underpinnings of the Medical Controversy on Black/White Differences in the United States, 1830–1870*, 17 INT'L J. HEALTH SERVS. 259 (1987) (surveying medical literature on racial differences and slavery published in the U.S. from 1831 to 1865).

<sup>62</sup> See Jacqueline Howard, *What Scientists Mean When They Say 'Race' is not Genetic*, HUFF. POST (Feb. 9, 2016, 9:39 AM), [https://www.huffingtonpost.com/entry/race-is-not-biological\\_us\\_56b8db83e4b04f9b57da89ed](https://www.huffingtonpost.com/entry/race-is-not-biological_us_56b8db83e4b04f9b57da89ed), archived at <https://perma.cc/DR94-W95E>; see also Catherine Elton, *Why Racial Profiling Persists in Medical Research*, TIME (Aug. 22, 2009), <http://content.time.com/time/health/article/0,8599,1916755,00.html>, archived at <https://perma.cc/8SG8-ZV6P>; Vence L. Bonham & Sarah Knerr, *Social and Ethical Implications of Genomics, Race, Ethnicity and Health Inequities*, 24 SEMIN. ONCOL. NURS. 254, 254–61 (2008). See generally BRIAN D. SMEDLEY ET AL., *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* (2003).

<sup>63</sup> See, e.g., Shani V. Davis, *Vitamin D Deficiency and Type 2 Diabetes in African Americans: The Common Denominators*, 24 DIABETES SPECTRUM 148, 148–53 (2011); Susan S. Harris, *Vitamin D and African Americans*, 136 J. NUTRITION 1126, 1126–29 (2006).

a year old.<sup>64</sup> Malnutrition likely caused most of these deaths.<sup>65</sup> Those who lived subsisted on a bare minimum of food. Slave owners forced mothers to wean their infants, usually at three months old at the latest. After that, enslaved children received a steady and monotonous diet of gruel or cornmeal porridge until they turned three years old.<sup>66</sup> At that age, they began to consume vegetable soups, potatoes, molasses, grits, hominy, and cornbread.<sup>67</sup>

Meals were inconsistent and unpredictable. Booker T. Washington recalls scavenging for corn fed to animals on the plantation when his mother was not there to feed him:

At the times when I had failed to get any other breakfast, I used to go to the places where the cows and pigs were fed and make my breakfast off the boiled corn, or else go to the place where it was the custom to boil the corn and get my share there before it was taken to the animals.<sup>68</sup>

He continued, “If I was not there at the exact moment of feeding, I could still find enough corn scattered around the fence or the trough to satisfy me.”<sup>69</sup> 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>70</sup>

The most prevalent diseases of the period included pellagra, beriberi, rickets, kwashiorkor, tetany, pica, worms, and scurvy. Today, these diseases are much more common in developing nations than in the United States, primarily due to the politics of food distribution.<sup>71</sup> Enslaved people often contracted pellagra, a severe deficiency of the complex B vitamin niacin, as the result of a

<sup>64</sup> Steven Mintz, *Children in North American Slavery*, in *THE ROUTLEDGE HISTORY OF CHILDHOOD IN THE WESTERN WORLD* 334 (Paula S. Fass ed., 2013).

<sup>65</sup> W. MICHAEL BYRD & LINDA A. CLAYTON, *AN AMERICAN HEALTH DILEMMA: A MEDICAL HISTORY OF AFRICAN AMERICANS AND THE PROBLEM OF RACE* (PINCITE) (2000).

<sup>66</sup> *HISTORY OF FOOD*, *supra* note 15; KENNETH F. KIPLE & VIRGINIA HIMMELSTEIB KING, *ANOTHER DIMENSION TO THE BLACK DIASPORA: DIET, DISEASE, AND RACISM* 97 (2003).

<sup>67</sup> *Slave Child Mortality*, *supra* note 18, at 288.

<sup>68</sup> 1 *THE BOOKER T. WASHINGTON PAPERS: THE AUTOBIOGRAPHICAL WRITINGS* 420 (Louis R. Harlan & John W. Blassingame eds., 1972).

<sup>69</sup> *Id.*

<sup>70</sup> COVEY & EISNACH, *supra* note 14, at 14; *HISTORY OF FOOD*, *supra* note 15; KIPLE & KING, *supra* note 66, at 102; *Slave Child Mortality*, *supra* note 18, at 287.

<sup>71</sup> See Marie Ruel et al., *Diet Quality in Developing Countries*, in 2 *DIET QUALITY* 239, 240 (2013); *The Slave Experience: Living Conditions*, THIRTEEN, <https://www.thirteen.org/wnet/slavery/experience/living/history2.html>, archived at <https://perma.cc/UD88-JWZ4>; Olaf Müller & Michael Krawinkel, *Malnutrition and Health in Developing Countries*, 173 *CAN. MED. ASS'N J.* 279 (2005).

diet that consisted primarily of meat, cornmeal, and molasses.<sup>72</sup> Pellagra leads to skin lesions, diarrhea, dementia, and death.<sup>73</sup> Even after emancipation, pellagra continued to plague poor Black people in the South.<sup>74</sup> From 1906 to 1940, it afflicted three million people, killing 100,000 of them.<sup>75</sup> This scourge represented one of the largest public-health crises of the first half of the twentieth century.<sup>76</sup>

Beriberi develops from a diet consisting primarily of white rice.<sup>77</sup> At its worst, it causes extreme swelling that leads to cardiac arrest.<sup>78</sup> Lack of vitamin D causes rickets, a softening of the bones that manifests in bow-leggedness.<sup>79</sup> During slavery, Black children had rickets fourteen times more often than White children.<sup>80</sup> In women, rickets can distort the pelvic canal, trapping a fetus inside.<sup>81</sup> The pervasiveness of rickets among enslaved women contributed to high rates of stillbirths and maternal deaths.<sup>82</sup>

Kwashiorkor, a disease that develops from protein deficiency, manifests in distended stomachs and thin limbs. In modern times, malnourished children in poorer countries often have this appearance.<sup>83</sup> Tetany, caused by calcium deficiency, leads to muscle spasms.<sup>84</sup> Scurvy, a lack of vitamin C, was common among enslaved people who ate either no vegetables or vegetables devoid of nutrients due to overcooking.<sup>85</sup> Anemia, or iron deficiency, was another

<sup>72</sup> WILMA A. DUNAWAY, *THE AFRICAN-AMERICAN FAMILY IN SLAVERY AND EMANCIPATION* 101 (2003). *See also* Kenneth F. Kiple & Virginia H. Kiple, *Black Tongue and Black Men: Pellagra and Slavery in the Antebellum South*, in *MEDICINE, NUTRITION, DEMOGRAPHY, AND SLAVERY* 410–414 (Paul Finkelman ed., 1989).

<sup>73</sup> COVEY & EISNACH, *supra* note 14, at 15.

<sup>74</sup> KIPLE & KING, *supra* note 66, at 189.

<sup>75</sup> Alfred Jay Bollet, *Politics and Pellagra: The Epidemic of Pellagra in the U.S. in the Early Twentieth Century*, 65 *YALE J. BIOLOGY & MED.* 211, 214 (1992).

<sup>76</sup> *See id.* at 212–14; Karen Clay et al., *The Rise and Fall of Pellagra in the American South* 7–8 (Nat'l Bureau of Econ. Research, Working Paper No. 23730).

<sup>77</sup> *See* COVEY & EISNACH, *supra* note 14, at 18 (noting that beriberi was more common in regions where rice supplanted corn in slaves' diet).

<sup>78</sup> *HISTORY OF FOOD*, *supra* note 15, at 1282.

<sup>79</sup> *Slave Child Mortality*, *supra* note 18, at 293–94.

<sup>80</sup> DUNAWAY, *supra* note 72, at 81; *see also* *Slave Child Mortality*, *supra* note 18, at 293 (noting that of the twenty-five deaths from rickets during 1849–1850, twenty-one of the victims were Black children).

<sup>81</sup> DUNAWAY, *supra* note 72, at 31.

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

<sup>83</sup> KIPLE & KING, *supra* note 66, at 112; *Slave Child Mortality*, *supra* note 18, at 296–97.

<sup>84</sup> JULIA FLOYD SMITH, *SLAVERY AND RICE CULTURE IN LOW COUNTRY GEORGIA, 1750–1860*, at 137 (1985); KIPLE & KING, *supra* note 66, at 101–02; *Slave Child Mortality*, *supra* note 18, at 291–92.

<sup>85</sup> COVEY & EISNACH, *supra* note 14, at 16.

common ailment during slavery.<sup>86</sup> Children often ate dirt,<sup>87</sup> and would then suffer from intestinal worms present in the dirt.<sup>88</sup>

During the Civil War, many freed slaves moved north to join the Union. This labor drain, in addition to the loss of some important Southern agricultural areas to the North, severed transportation arteries, and bad weather collectively impeded food distribution in the South to such an extent that Southern soldiers began to starve.<sup>89</sup> Even so, conditions for escaped slaves remained worse.<sup>90</sup> In *Sick from Freedom*, Jim Downs describes how freed slaves continued to suffer:

Disease and sickness had a more devastating and fatal effect on emancipated slaves than on soldiers since ex-slaves often lacked the basic necessities to survive. Emancipation liberated bondspeople from slavery, but they often lacked clean clothing, adequate shelter, proper food, and access to medicine in their escape toward Union lines. Many freed slaves died once they secured refuge behind Union camps.<sup>91</sup>

Without food and other basic necessities, freedom simply meant death.

### *B. Food Inequality After Slavery*

The pronounced disparities in food-related deaths and diseases that began during slavery have persisted throughout United States history,<sup>92</sup> even as the

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<sup>86</sup> COVEY & EISNACH, *supra* note 14, at 15–16; HISTORY OF FOOD, *supra* note 15, at 1282.

<sup>87</sup> W.M. Carpenter, *Cachexia Africana or the Habits and Effects of Dirt-Eating in the Negro Race*, 4 N.Y. J. MED. & COLLATERAL SCIS. 132 (1845). Eating dirt is an example of pica, the craving to eat non-nutritive substances, that arises from iron deficiency.

<sup>88</sup> See Jennie Gunn, *Geophagia (Eating Dirt)*, MISS. ENCYCLOPEDIA, <https://mississippiencyclopedia.org/entries/geophagia/>, archived at <https://perma.cc/9F92-G448>. See also *Slave Child Mortality*, *supra* note 18, at 297–98; DUNAWAY, *supra* note 72, at 148–49.

<sup>89</sup> Andrew F. Smith, *Did Hunger Defeat the Confederacy?*, 13 NORTH & SOUTH 40, 42 (2011), <http://andrewsmith.com/wp-content/themes/wooden-mannequin/pdf/HungerArticle.pdf>, archived at <https://perma.cc/JY3C-ALD5>. The lack of access to healthy food in the South likely played a part in ending the Civil War and the institution of slavery. Carolyn D. Berdanier, *Hunger and the Civil War*, 50 NUTRITION TODAY 209, 209–13 (2015).

<sup>90</sup> JIM DOWNS, *SICK FROM FREEDOM: AFRICAN-AMERICAN ILLNESS AND SUFFERING DURING THE CIVIL WAR AND RECONSTRUCTION* 4–5 (2012).

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., KANT PATEL & MARK E. RUSHEFSKY, *HEALTH CARE IN AMERICA: SEPARATE AND UNEQUAL* 55 (2008); Jamy D. Ard et al., *Perceptions of African-American Culture and Implications for Clinical Trial Design*, 15 ETHNICITY & DISEASE 292 (2005); Collinso Airhihenbuwa et al., *Cultural Aspects of African American Eating Patterns*, 1 ETHNICITY & HEALTH 245 (1996); Delores James, *Factors Influencing Food Choices, Dietary*

nature of these diseases changed and as law and policy evolved to incorporate more formal rights and protection against different forms of discrimination. In the South, Black diets changed very little after emancipation.<sup>93</sup> Many former slaves who lacked land or sufficient wages to afford food became sharecroppers reliant on their landlords for sustenance.<sup>94</sup> The food that they purchased on credit from plantation owners was identical to the subsistence diets of slavery.<sup>95</sup> Plantation owners stocked their commissaries primarily with cornmeal, molasses, and small rations of meat.<sup>96</sup>

Even some Black Southerners who were not beholden to landlords continued to eat meals that closely resembled those they ate during slavery. Many lacked refrigeration systems, gardening skills, or time to prepare complicated meals.<sup>97</sup> Others came to develop a taste for the foods they ate on plantations.<sup>98</sup> In those cases, even when they had access to gardens and the possibility of introducing new vegetables into their diets, they preferred familiar dishes.<sup>99</sup>

In contrast, some Black people who migrated north were among the first Americans to encounter immigrants from China, Italy, and Mexico, and became early adopters of their food.<sup>100</sup> Even when Northern Black people

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*Intake, and Nutrition-Related Attitudes among African Americans: Application of a Culturally Sensitive Model*, 9 ETHNICITY & HEALTH 349, 351 (2004); Genesis Belle, *Can the African American Diet Be Made Healthier Without Giving Up Culture*, YORK REV. (2009), <https://www.york.cuny.edu/academics/writing-program/the-york-scholar-1/volume-5.2-spring-2009/can-the-african-american-diet-be-made-healthier-without-giving-up-culture>, archived at <https://perma.cc/X6E8-AXZ8>.

<sup>93</sup> Freed slaves primarily had access only to the same foods that they ate while enslaved, allowing for little change in their nutritional health. Kalah Elantra Vance, *Culture, Food, and Racism: The Effects on African American Health* 19 (Aug. 2018) (published B.S. honors thesis, University of Tennessee at Chattanooga) (on file with the Student Research, Creative Works, and Publications at UTC Scholar).

<sup>94</sup> *Sharecropping*, The History Channel (last updated June 7, 2019), <https://www.history.com/topics/black-history/sharecropping>, archived at <https://perma.cc/RC9Y-K59S>.

<sup>95</sup> JENNIFER JENSON WALLACH, EVERY NATION HAS ITS DISH: BLACK BODIES AND BLACK FOOD IN TWENTIETH-CENTURY AMERICA 104–05 (2019).

<sup>96</sup> *Id.* at 105.

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

<sup>98</sup> *Id.* (citing ALLISON DAVIS, BURLEIGH B. GARDNER & MARY R. GARDNER, DEEP SOUTH: A SOCIAL ANTHROPOLOGICAL STUDY OF CASTE AND CLASS 384 (2009)).

<sup>99</sup> *Id.*

<sup>100</sup> Adrian Miller, *An Illustrated History of Soul Food*, FIRST WE FEAST (Aug. 25, 2015), <https://firstwefeast.com/eat/2015/08/an-illustrated-history-of-soul-food>, archived at <https://perma.cc/9WDA-JAES>; see also Robert T. Dirks & Nancy Duran, *African American Dietary Patterns at the Beginning of the 20th Century*, 131 J. NUTRITION 1881, 1887 (2001) (explaining that the further north that Black people migrated, the less likely they were to eat traditional soul foods, including salted pork sides and cornbread, than those who stayed in the South).



wanted to eat familiar foods, many ingredients that were cheap and plentiful in the South were either seasonal or just unavailable up north.<sup>101</sup> Northern urban environments were characterized by residential segregation enforced formally through the federal policy of redlining<sup>102</sup> and informally through violence.<sup>103</sup> Black people often lived in food deserts — areas lacking healthy, fresh, affordable food. Concentrated in these types of neighborhoods, Black migrants to the North often made do with the meager provisions available at local corner and liquor stores.

Food deserts existed in the South and North, restricting food choice in Black communities situated in both rural and urban areas. These food deserts still exist in rural and ‘blighted’ urban areas, in addition to food swamps, where fast food establishments inundate communities with an overabundance of choice between equally undesirable, unhealthy options.<sup>104</sup> Consistent lack of access to healthy foods ensured that food-related racial health disparities did not diminish, they only evolved.

Instead of starvation, Black communities began to suffer from the overconsumption of processed, non-nutritious foods.<sup>105</sup> This development tracked a national trend. Congress designed the first Agricultural Adjustment Act (now known as the Farm Bill) in 1933 during the Great Depression to support the agricultural industry and combat hunger.<sup>106</sup> To achieve the second goal, Congress subsidized foods that would increase Americans’ intake of fats and sugars.<sup>107</sup> These subsidies succeeded in reducing food insecurity by creating an abundance of cheap and filling, but non-nutritious, foods.<sup>108</sup> As government nutrition programs developed, subsidized foods disproportionately went to low-income Black families and other families of

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<sup>101</sup> See Miller, *supra* note 100.

<sup>102</sup> Beatrix Lockwood, *The History of Redlining*, THOUGHTCO (last updated July 30, 2019), <https://www.thoughtco.com/redlining-definition-4157858>, archived at <https://perma.cc/YQ46-BRHX>.

<sup>103</sup> JEANNINE BELL, HATE THY NEIGHBOR: MOVE IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICA 2 (2013).

<sup>104</sup> See *infra*, note 389.

<sup>105</sup> See Adelia Bovell-Benjamin et al., *Dietary Consumption Practices and Cancer Risk in African Americans in the Rural South*, 21 J. HEALTH CARE POOR UNDESERVED 57, 67 (Aug. 2010).

<sup>106</sup> See, e.g., Dan Imhoff & Michael Dimock, *America Needs a Farm Bill that Works*, L.A. TIMES (June 8, 2012), <https://www.latimes.com/opinion/la-xpm-2012-jun-08-la-oe-imhoff-farm-bill-20120608-story.html>, archived at <https://perma.cc/XH85-DYWE>.

<sup>107</sup> The Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601 *et seq.* (1934)).

<sup>108</sup> See Chris Dobbs, *Agricultural Adjustment Act*, NEW GA. ENCYCLOPEDIA (Jan. 29, 2016), <https://www.georgiaencyclopedia.org/articles/business-economy/agricultural-adjustment-act>, archived at <https://perma.cc/97ZG-T7XF>.

color.<sup>109</sup> USDA programs, purportedly intended to provide nutrition assistance, instead contributed to racial health disparities by giving the least nutritious foods to the most vulnerable communities.

### *C. A Brief History of Colonization Through Dietary Control*

Through government intervention, Indigenous diets transformed from healthy and sustainable to non-nutritious and insecure in a relatively short time. For thousands of years, geography and the natural environment dictated Indigenous Peoples' diets. Plains Indians' main source of food was bison.<sup>110</sup> Northwestern tribes fished and ate berries.<sup>111</sup> Before settler colonialism, some Eastern tribes, including the Chahta, derived their primary sustenance from the "three sisters"—corn (maize), squash, and beans.<sup>112</sup> Corn holds spiritual significance for many tribes, being part of the creation stories of the Hopi, Navajo, Cherokee, Apache, and Iroquois tribes.<sup>113</sup> Growing and eating this trio has substantial horticultural and nutritional benefits. Corn stalks serve as a ladder for pole or climbing beans, while squash leaves fend off other plants and provide shade, protection, and moisture for corn's roots.<sup>114</sup> Other foods common in Indigenous diets included peppers, potatoes, peanuts, pecans, cherries, acorns, black walnuts, hickory nuts, raspberries, strawberries, cactus, and cacao.<sup>115</sup> Additionally, Indigenous people consumed alligators, bears, beavers, buffalo, caribou, deer, moose, ducks, elk, fish, geese, insects, opossums, raccoons, squirrels, turtles, seals, shellfish, and whales.<sup>116</sup>

English settlers wanted Indigenous land and resources for themselves. To this end, they engaged in a pattern of making, then breaking, treaties with tribes to facilitate the usurpation of their land and destruction of their way of life.<sup>117</sup> For example, in the 1785 Treaty of Hopewell, U.S. commissioners contracted

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<sup>109</sup> See, e.g., Katherine Ralston et al., U.S. DEP'T OF AGRIC., ECON. RES. SERV., THE NATIONAL SCHOOL LUNCH PROGRAM: BACKGROUND, TRENDS AND ISSUES 14 fig. 6 (2008); U.S. DEP'T OF AGRIC., WIC PARTICIPANT AND PROGRAM CHARACTERISTICS 2014: SUMMARY, 1 (Nov. 2015), <https://fns-prod.azureedge.net/sites/default/files/ops/WICPC2014-Summary.pdf>, archived at <https://perma.cc/C2Z6-23QX>.

<sup>110</sup> Dana Vantrease, *Commod Bods and Frybread Power: Government Food Aid in American Indian Culture*, 126 J. AM. FOLKLORE 55, 56 (2013).

<sup>111</sup> *Id.*

<sup>112</sup> Devon A. Mihesuah, *Decolonizing Our Diets by Recovering Our Ancestors' Gardens*, 27 AM. INDIAN Q. 807, 814–5 (2003).

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

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

<sup>115</sup> *Id.* at 811.

<sup>116</sup> *Id.* at 812.

<sup>117</sup> For an excellent history of Indian resistance, see generally CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2005).

with the Cherokee to create boundaries on the tribe's land.<sup>118</sup> But settlers soon violated the treaty by invading the set-aside lands, leading to conflict. In the subsequent 1791 Treaty of Holston, the Cherokee agreed to give up claims to land outside the original boundaries established for their tribe at Hopewell.<sup>119</sup> This pattern repeated across lands belonging to tribes. The newly formed U.S. government continued to make claims on land occupied by Indigenous Peoples, seeking to push tribes farther and farther west.<sup>120</sup>

Through a complicated system of allotments, tribes lost access to most of the land settlers had initially ceded to them.<sup>121</sup> Some of the first treaties between the government and tribes recognized the importance of traditional food by allowing tribe members to continue fishing, hunting, and gathering on the land usurped by the United States.<sup>122</sup> The benefits of these agreements quickly eroded, however, through restrictions on these rights that severely curtailed access to traditional foods.<sup>123</sup> As part of the Indian assimilation project, the United States deliberately destroyed the buffalo herds that many tribes depended on for sustenance.<sup>124</sup> Also recognizing the importance of traditional agriculture to Indigenous Peoples' culture and way of life, President Washington devised a scheme to "ruin their crops on the ground and prevent them planting more."<sup>125</sup>

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<sup>118</sup> Treaty of Hopewell, Nov. 28, 1785, 7 Stat. 18. The treaty was signed by commissioners appointed by the U.S. government under the Confederation Congress, including Benjamin Hawkins, Joseph Martin, and Andrew Pickens, and the Cherokee representatives. James Pate, *Treaty of Hopewell*, MISS. ENCYCLOPEDIA, <https://mississippiencyclopedia.org/entries/treaty-of-hopewell/>, archived at <https://perma.cc/37H8-8LXG>.

<sup>119</sup> Treaty of Holston, U.S.-Cherokee Nation, pmbl., July 2, 1791, 7 Stat. 39.

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

<sup>121</sup> Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1561 (2001); Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 68 (2005); *Land Tenure History*, INDIAN LAND TENURE FOUND, <https://iltf.org/land-issues/history/>, archived at <https://perma.cc/M8GD-JF4T>.

<sup>122</sup> Carmen Byker Shanks et al., *Assessing Foods Offered in the Food Distribution Program on Indian Reservations (FDPIR) Using the Healthy Eating Index 2010*, 19 PUB. HEALTH NUTRITION 1315, 1316 (2015).

<sup>123</sup> See Charles Wilkinson & John Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" – How Long a Time is That?*, 63 CAL. L. REV. 601, 606 (1975). See, e.g., Betty Geishirt Cantrell, *Access and Barriers to Food Items and Food Preparation Among Plains Indians*, 16 WICAZO SA REV. 65–67 (2001); Vantrease, *supra* note 110.

<sup>124</sup> J. Weston Phippen, *The Buffalo Killers*, THE ATLANTIC (May 13, 2016), <https://www.theatlantic.com/national/archive/2016/05/the-buffalo-killers/482349/>, archived at <https://perma.cc/T3YD-REUX>.

<sup>125</sup> Simon Moya-Smith, *Hitler Said to Have Been Inspired by US Indian Reservation System*, INDIAN COUNTRY TODAY (Aug. 27, 2017), <https://newsmaven.io/indiancountrytoday/archive/hitler-said-to-have-been-inspired-by-us->

Subsequent administrations persisted in seizing tribal land and battling with tribes who resisted.<sup>126</sup> As Americans stole Indigenous land, they destroyed traditional food sources.<sup>127</sup> Consequently, new treaties included agreements to supply tribes with rations to prevent starvation.<sup>128</sup> Still, the attacks on Indigenous sovereignty continued.<sup>129</sup> The 1830 Indian Removal Act, signed by President Jackson, laid the legal foundation for the forced dislocation of Indigenous Peoples from their lands and to the west, along the infamous Trail of Tears.<sup>130</sup> Ironically, Jackson justified this oppressive law, in part, by arguing that tribal lands could no longer sustain Indigenous Peoples' way of life because of the damage done to traditional foodways by American occupation.<sup>131</sup>

The food rations distributed to tribes represented a cost-benefit analysis by the United States. The 1850 Annual Report of the Commissioner of Indian Affairs explained that “[i]t is, in the end, cheaper to feed the whole flock for a year than to fight them for a week.”<sup>132</sup> The 1851 Indian Appropriations Act codified the creation of Indian reservations,<sup>133</sup> and the Office of Indian Affairs, transferred from the War Department to the Department of the Interior, took charge of distributing rations.<sup>134</sup> But rations continued to serve as a tool of conflict, not peace.

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indian-reservation-system-V3MQ5A4QjU2GDXxTL980\_w/, archived at <https://perma.cc/R73L-T2ZT> (citing TOVE SKUTNABB-KANGAS, LINGUISTIC GENOCIDE IN EDUCATION-OR WORLDWIDE DIVERSITY AND HUMAN RIGHTS? (1st ed. 2000)).

<sup>126</sup> See Kibbe M. Conti, *Diabetes Prevention in Indian Country: Developing Nutrition Models to Tell the Story of Food-System Change*, 17 J. TRANSCULTURAL NURSING 234, 235 (July 2006) (noting that “Indigenous people have witnessed a steady erosion of their traditional food systems . . . since contact with non-Native settlers”); *Indian Reservations*, *supra* note 3.

<sup>127</sup> Conti, *supra* note 126, at 235.

<sup>128</sup> *Id.* at 237.

<sup>129</sup> See *Indian Reservations*, *supra* note 3.

<sup>130</sup> ANTHONY F. C. WALLACE, *THE LONG, BITTER TRAIL: ANDREW JACKSON AND THE INDIANS* 17–20 (Eric Foner, ed., 1993).

<sup>131</sup> *Id.* at 17–18.

<sup>132</sup> William Least Heat-Moon, *A Stark Reminder of How the U.S. Forced American Indians Into a New Way of Life*, SMITHSONIAN MAG. (Nov. 2013), <https://www.smithsonianmag.com/history/a-stark-reminder-of-how-the-us-forced-american-indians-into-a-new-way-of-life-3954109/>, archived at <https://perma.cc/D3NX-FMUM>.

<sup>133</sup> Appropriation Bill for Indian Affairs (Indian Appropriations Act of 1851), ch. 14, 9 Stat. 574 (1851).

<sup>134</sup> *Irresponsible and Unaccountable*, INDIANS, INSANITY, AND AMERICAN HISTORY BLOG (June 25, 2017), [http://cantonasylumforinsaneindians.com/history\\_blog/category/bia-bureau-of-indian-affairs/](http://cantonasylumforinsaneindians.com/history_blog/category/bia-bureau-of-indian-affairs/), archived at <https://perma.cc/JN6G-BDJA>.

Initially, the United States envisioned reservations as European-style farming communities, but without Indigenous children, who the government forcibly removed to boarding schools to rid them of their language and culture.<sup>135</sup> The farming project largely failed, due to cultural resistance, infertile land, and inadequate education and assistance.<sup>136</sup> When some tribes, such as the Comanche, Kiowa, and Apache, sought to expand beyond the confining boundaries of reservations to enhance their food sources, the government labeled them prisoners of war and incarcerated them at Fort Marion in Florida.<sup>137</sup>

Without sustainable agriculture, many Indigenous people faced starvation, despite government promises to provide rations to reservations. The United States wielded these rations as a weapon, withholding them from families who resisted their children's removal<sup>138</sup> or rejected Christianity.<sup>139</sup> When provided, rations were a cheap way for the government to handle its debt to Indigenous Peoples, in part because these rations consisted of the poorest quality foods, which often arrived at reservations spoiled or moldy—if they arrived at all.<sup>140</sup> In some cases, the United States' breach of agreements to distribute food rations led to mass starvation and war. The 1862 Dakota War, sparked by the deliberate withholding of rations, ended in President Lincoln ordering the execution of thirty-eight Dakota men, the largest mass execution in U.S.

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<sup>135</sup> Vantrease, *supra* note 110, at 62–63. Richard Henry Pratt, founder of the Carlisle Indian Industrial School, which served as a model for boarding schools designed to “civilize” Indian children, stated that the purpose of his school was to “[k]ill the Indian in him, and save the man.” “*Kill the Indian, and Save the Man*”: Capt. Richard H. Pratt on the Education of Native Americans, HISTORY MATTERS, <http://historymatters.gmu.edu/d/4929/>, archived at <https://perma.cc/VP66-VX9J>.

<sup>136</sup> Vantrease, *supra* note 110, at 56–57.

<sup>137</sup> Dennis Wiedman, *Native American Embodiment of the Chronicities of Modernity: Reservation Food, Diabetes, and the Metabolic Syndrome among the Kiowa, Comanche, and Apache*, 26 MED. ANTHROPOLOGY Q. 595, 599 (2012); see also Patrick Strickland, *Life on the Pine Ridge Native American Reservation*, AL JAZEERA (Nov. 2, 2016), <https://www.aljazeera.com/indepth/features/2016/10/life-pine-ridge-native-american-reservation-161031113119935.html>, archived at <https://perma.cc/QH6S-6AYV> (Pine Ridge reservation in South Dakota also initially served as a prison camp and the legacy of that history persists into the present, where the life expectancy for adult males is 48 years.).

<sup>138</sup> Alexandra E. Stern, *Reconstructing Approaches to America's Indian Problem*, U.S. HISTORY SCENE (Oct. 25, 2015), <http://ushistoryscene.com/article/usindian-policy/>, archived at <https://perma.cc/EU79-U6UU>. Ironically, one of the only positive aspects of some of these cruel schools, where children suffered from corporal punishment, isolation, and disease, was plentiful food.

<sup>139</sup> See Steve Talbot, *Spiritual Genocide: The Denial of American Indian Religious Freedom, from Conquest to 1934*, 21 WICAZO SA REVIEW 7, 19 (2006).

<sup>140</sup> Heat-Moon, *supra* note 132.

history.<sup>141</sup> Minnesota subsequently put a bounty on the head of every Dakota.<sup>142</sup> One-quarter of the Dakota died the following year as a result of exile, imprisonment, famine, and sickness.<sup>143</sup>

When the U.S. provided rations, they consisted of food items that were low quality, unfamiliar, and culturally inappropriate.<sup>144</sup> Refined sugar took the place of maple syrup, honey, and dried fruits.<sup>145</sup> Wheat flour replaced cornmeal.<sup>146</sup> The United States provided bacon as a substitute for cooking oil.<sup>147</sup> When tribes asked for a different meat, the government denied the request.<sup>148</sup> Although the U.S. could have included traditional foods in the rations, it intentionally left them out as part of its “civilizing” efforts. Initially, most of the food came from England, heavily preserved to survive a long sea voyage.<sup>149</sup> Despite these precautions, government officials deemed many of the food items sent over “unfit for soldiers” upon arrival.<sup>150</sup> Nonetheless, they had no qualms about distributing these foods to tribes. Indifference to Indigenous Peoples’ health along with acts designed to strip them of their culture shaped U.S. policy regarding Indigenous food throughout this period.

At the beginning of the twentieth century, the United States renewed efforts to promote nutritional self-sufficiency for tribes and avoid distributing rations when possible. In 1901, the government made land allotments to members of the Comanche, Kiowa, Apache, and Wichita tribes to grow corn, wheat, millet, oats, and fruit trees.<sup>151</sup> It then cut off rations to families who could sustain themselves on these crops and made work requirements a condition for others to receive rations.<sup>152</sup> Despite some initial success with crop production, the Depression, the Dust Bowl (a period of severe dust storms), and crop limitations imposed by the 1933 Agricultural Adjustment Act destroyed Indigenous agriculture.<sup>153</sup> Tribe members reverted to dependence on government rations and store-bought foods.<sup>154</sup> Rations soon began to reflect the priorities of the U.S. Farm Bills. The Farm Bill initially

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<sup>141</sup> Ruth Hopkins, *Treaties Between the United States and Indigenous Nations, Explained*, TEEN VOGUE (Feb. 24, 2018), <https://www.teenvogue.com/story/treaties-between-the-united-states-and-Indigenous-nations-explained>, archived at <https://perma.cc/8J2Z-YEQ4>.

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

<sup>143</sup> *Id.*

<sup>144</sup> Shanks et al., *supra* note 122, at 1316.

<sup>145</sup> *Id.* at 56–57.

<sup>146</sup> *Id.*

<sup>147</sup> Wiedman, *supra* note 137, at 601.

<sup>148</sup> *Id.*

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

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

<sup>151</sup> *Id.*

<sup>152</sup> Wiedman, *supra* note 137, at 602.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 602–03.

sought to combat hunger by subsidizing food items that would make people full, such as wheat, corn, and soy, instead of ones that would promote health.<sup>155</sup> The USDA purchased the surpluses of these commodities both to ensure that farmers would continue to produce them and to feed indigent families.<sup>156</sup>

In 1949, amendments to the Agricultural Act provided funding for processing and packaging commodity foods, making them available for distribution on Indian reservations.<sup>157</sup> Over the next couple of decades, commodity food surpluses began to decline.<sup>158</sup> In response, the 1973 Agricultural and Consumer Protection Act authorized the purchase of non-commodity foods to include in the reservation food distribution program, expanding the types of food available.<sup>159</sup> In 1977, Congress enacted the Food Distribution Program for Indian Reservations (“FDPIR”) to provide an alternative to the general food assistance program, Supplemental Nutritional Assistance Program (“SNAP”), which was difficult to access on many reservations.<sup>160</sup>

With diets consisting primarily of government rations, commodity foods, FDPIR boxes, and food found at trading posts, Indigenous people were the first Americans to consume large amounts of processed foods and suffer the resulting health consequences, including high rates of Type II diabetes.<sup>161</sup> Some tribes, such as the Navajo, maintained most of their traditional foodways through the 1930s and 1940s.<sup>162</sup> But by the 1950s, the Navajo relied heavily on the processed foods available at trading posts usually operated by White people.<sup>163</sup> Trading posts evolved into modern convenience stores, providing

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<sup>155</sup> See Dobbs, *supra* note 108; *Farm Bill: A Short History and Summary*, FARM POL’Y FACTS, <https://www.farmpolicyfacts.org/farm-policy-history/>, available at <https://perma.cc/J964-QMMG>.

<sup>156</sup> See WAYNE RASMUSSEN ET AL., A SHORT HISTORY OF AGRICULTURAL ADJUSTMENT, 1933–1975 6–8 (1976). Modern U.S. agricultural spending continues to model the subsidy scheme of the first Farm Bills.

<sup>157</sup> Agricultural Act of 1949 § 416, 63 Stat. 1051, 1058 (1949) (current version at 7 U.S.C. § 1431 (2018)).

<sup>158</sup> Douglas Hedley & David Peacock, *Food for Peace, PL: 480 and American Agriculture*, 156 AGRICULTURAL ECONOMICS REPORT 1, 14 (1970).

<sup>159</sup> Agriculture and Consumer Protection Act of 1973 § 3, 87 Stat. 221, 247 (1973) (current version at 7 U.S.C. § 1431 (2018)).

<sup>160</sup> Food and Agriculture Act of 1977 § 1304, 91 Stat. 913, 980–981 (1977) (current version at 7 U.S.C. § 1281 (2018)).

<sup>161</sup> See Hoover, *supra* note 8; Wiedman, *supra* note 137, at 596–98, 603.

<sup>162</sup> Mihesuah, *supra* note 112, at 821.

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

similarly unhealthy foods.<sup>164</sup> They introduced many Indigenous people to soda, peanut butter, canned milk, lard, sugar, and wheat flour.<sup>165</sup>

Despite their unwholesome offerings and high prices, local vendors attracted the loyalty of many tribal members.<sup>166</sup> Sandra Faiman-Silva, studying the Choctaw in Oklahoma, reported that they prefer shopping at local stores to driving to retail outlets located further away, even when local stores charge exploitative prices and offer spoiled, non-nutritious, and culturally inappropriate food.<sup>167</sup> Despite their customers' loyalty, local store owners often take advantage of their patrons by charging exorbitant rates for credit purchases.<sup>168</sup> In some other Indigenous communities, there is greater resistance to the low quality and high prices typical of reservation grocery stores, but few or no alternatives.<sup>169</sup> U.S. food policy puts many Indigenous people living on reservations in the untenable position of choosing between equally undesirable food options or starving. The following part examines the inner workings and often harmful effects of the Food Distribution Program on Indian Reservations and the National School Lunch Program.

## II. MODERN FOOD INEQUALITY: USDA NUTRITION PROGRAMS

Since the 1930s, the government has developed a number of cash and food assistance programs designed to sell surplus commodities and relieve hunger.<sup>170</sup> In 2020, the USDA's nutrition programs include food distribution programs such as the Emergency Food Assistance Program (which supplies

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<sup>164</sup> See *Eating Well: Grocery Program Takes Off in the Navajo Nation*, PARTNERS HEALTH (June 26, 2018), <https://www.pih.org/article/eating-well-grocery-program-takes-navajo-nation>, archived at <https://perma.cc/2JAF-H3TZ>; *The National Park Service Finds an Operator for the Trading Post*, NAT'L PARK SERV., <http://npshistory.com/publications/hutr/adhi/chap4.htm>, archived at <https://perma.cc/77ZJ-D5Z7>.

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

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

<sup>167</sup> *Id.*; SANDRA FAIMAN-SILVA, CHOCTAWS AT THE CROSSROADS: THE POLITICAL ECONOMY OF CLASS AND CULTURE IN THE OKLAHOMA TIMBER REGION 166–69 (1997).

<sup>168</sup> Faiman-Silva, *supra* note 167, at 168–69; Mihesuah, *supra* note 112, at 821.

<sup>169</sup> Cecily Hilleary, *Native American Tribes Fighting High Prices, Poor Food Quality*, VOA NEWS (Mar. 24, 2017, 9:19 AM), <https://www.voanews.com/a/tribes-fighting-high-prices-poor-food-quality-in-indian-country/3780303.html>, archived at <https://perma.cc/2WUV-PH6X>. Lisa Hope-Heth, a resident of South Dakota's Crow Creek Indian Reservation, explained, "A lot of the prices are too high. Some of the meat is not always fresh. And the bread—you know how in some larger stores when bread doesn't sell and it gets stale, they take it off the shelf? I sometimes think that we get that bread." *Id.*

<sup>170</sup> U.S. DEP'T OF AGRIC., USDA NUTRITION ASSISTANCE PROGRAMS, <https://www.nal.usda.gov/fnic/usda-nutrition-assistance-programs>, archived at <https://perma.cc/ELK6-7PY8>.



food banks), the Commodity Supplemental Food Program for the elderly, and the FDPIR.<sup>171</sup> The Farm Bill subsidizes specific products, including soy, corn, milk, and meat, resulting in surpluses that the USDA must reduce or eliminate.<sup>172</sup> When these foods reach nutrition program participants, they take the form of unhealthy products such as processed cheese and tinned meats.<sup>173</sup> The foods that receive agricultural subsidies have not changed substantially since the 1933 Agricultural Act, despite dramatic differences in nutrition-related health issues between then and now.<sup>174</sup> In 1933, the primary nutritional goal of food assistance programs was to eliminate hunger.<sup>175</sup> In 2020, obesity, diabetes, and food-related incidences of heart disease, cancers, and strokes are responsible for the greatest number of preventable deaths in the United States.<sup>176</sup> They are also underlying risk factors for the most severe cases of COVID-19. The Farm Bill has failed to keep up with these developments.

The USDA also gives food to women and children through the Special Supplemental Nutrition Program for Women, Infants, and Children (“WIC”).<sup>177</sup> Black women are overrepresented in WIC.<sup>178</sup> Additionally, the USDA is responsible for providing cash assistance for food through SNAP.

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<sup>171</sup> U.S. DEP’T OF AGRIC., THE EMERGENCY FOOD ASSISTANCE PROGRAM, <https://www.fns.usda.gov/tefap/emergency-food-assistance-program-tefap>, archived at <https://perma.cc/S7J5-3PQX>.

<sup>172</sup> See Availability of Foods for Fiscal Year 2017, 82 Fed. Reg. 16021, 16021 (Mar. 30, 2017).

<sup>173</sup> Mo Barnes, *The Return of Government Cheese, Canned Beef, and Stigmatizing the Poor*, ROLLING OUT (Feb. 16, 2018), <https://rollingout.com/2018/02/16/return-government-cheese-canned-beef-stigmatizing-poor/>, archived at <https://perma.cc/EWU2-HB3U>.

<sup>174</sup> Laura Collins, *The 2014 Farm Bill Subsidy Reforms Don’t Go Far Enough*, AM. ACTION F. (Feb. 7, 2014), <http://americanactionforum.org/research/the-2014-farm-bill-subsidy-reforms-dontgo-far-enough>, archived at <https://perma.cc/W36W-8UKE>; Scott Fields, *The Fat of the Land: Do Agricultural Subsidies Foster Poor Health*, 112 ENVTL. HEALTH PERSP. A820, A821–22 (Oct. 2004).

<sup>175</sup> Marion Nestle, *Hunger in America: A Matter of Policy*, 66 FOOD: NATURE & CULTURE 1, 271 (1999).

<sup>176</sup> Hannah Ritchie, *Does the News Reflect What We Die From?*, OUR WORLD IN DATA (May 29, 2019), <https://ourworldindata.org/does-the-news-reflect-what-we-die-from>, archived at <https://perma.cc/HYA7-HX6U>.

<sup>177</sup> U.S. DEP’T OF AGRIC., ABOUT WIC – WIC AT A GLANCE, <https://www.fns.usda.gov/wic/about-wic-wic-glance>, archived at <https://perma.cc/R378-9NDE>.

<sup>178</sup> Although Black women make up only 13.7 percent of the U.S. population, *Women of Color in the United States*, CATALYST (Oct. 12, 2017), <http://www.catalyst.org/knowledge/women-color-united-states-0>, archived at <https://perma.cc/J5BG-NWF>, they represent 20.3 percent of WIC recipients. *WIC Participant and Program Characteristics 2014: Summary*, supra note 109; *Women of Color in the United States*, CATALYST (Oct. 12, 2017), <http://www.catalyst.org/knowledge/women-color-united-states-0>, archived at <https://perma.cc/J5BG-NWFM>.

This program takes up most of the Farm Bill's budget.<sup>179</sup> When SNAP became difficult for people living on reservations to access, the USDA created the Food Distribution Program on Indian Reservations.<sup>180</sup>

### A. *The Food Distribution Program on Indian Reservations*

The Food Distribution Program on Indian Reservations (“FDPIR”),<sup>181</sup> which formally began in 1977, is the most recent incarnation of government food assistance to Indigenous Peoples.<sup>182</sup> After colonizers claimed Indigenous land, they embarked on a program of systematic dislocation and destruction of Indigenous food systems and traditions. Indigenous people suffered severe food insecurity as a result.<sup>183</sup> Today, they continue to experience higher levels of all food-related diseases and deaths than White people and other racial groups.<sup>184</sup>

Indigenous people (including Alaska Natives) have more type II diabetes than any other race or ethnic group.<sup>185</sup> This form of diabetes often leads to paralysis, amputation, and blindness.<sup>186</sup> The rate of deaths from diabetes is 177 percent higher for Indigenous people than for any other group.<sup>187</sup> Indigenous adults are diagnosed with obesity sixty percent more often than White adults.<sup>188</sup> On the Dakota reservation, life expectancy for males is between forty and fifty

<sup>179</sup> U.S. DEP'T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP), <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap>, archived at <https://perma.cc/PK3Z-ZDAL>.

<sup>180</sup> Megan Mucioki, Jennifer Sowerwine & Daniel Sarna-Wojcicki, *Thinking Inside and Outside the Box: Local and National Considerations of the Food Distribution Program on Indian Reservations (FDPIR)*, 57 J. OF RURAL STUD. 88, 89 (2018).

<sup>181</sup> *Food Distribution Program on Indian Reservations*, U.S. DEP'T OF AGRIC., <https://www.fns.usda.gov/fdpi/food-distribution-program-indian-reservations-fdpi>, archived at <http://perma.cc/FJR7-AWE7> (introducing the FDPIR).

<sup>182</sup> Mucioki, Sowerwine & Sarna-Wojcicki, *supra* note 180, at 89.

<sup>183</sup> *Id.* at 88.

<sup>184</sup> Cantrell, *supra* note 123, at 71.

<sup>185</sup> Shanks et al., *supra* note 122, at 1315 (“American Indian and Alaska Natives have a higher age-adjusted prevalence of diabetes mellitus than any other race or ethnic group in the USA.”); Sue McLaughlin, *Traditions and Diabetes Prevention: A Healthy Path for Native Americans*, 23 DIABETES SPECTRUM 272, 272 (2010) (“[B]y 2009, diabetes had jumped to number four on the list. American Indians and Alaska Natives now have the highest diabetes prevalence rates of all racial and ethnic groups in the United States.”).

<sup>186</sup> Margaret Moss, *Trauma Lives on in Native Americans by Making Us Sick—While the US Looks Away*, THE GUARDIAN (May 9, 2019), <https://www.theguardian.com/commentisfree/2019/may/09/trauma-lives-on-in-native-americans-while-the-us-looks-away>, archived at <http://perma.cc/G2WS-P8GX> (describing adverse health outcomes in Indigenous communities).

<sup>187</sup> *Id.*

<sup>188</sup> Shanks et al., *supra* note 122, at 1315.

years old, as opposed to seventy-six in the general population.<sup>189</sup> These disparities in large part reflect the non-nutritious nature of the food that the U.S. government has distributed to Indigenous Peoples as a form of “assistance.”

### *FDPIR Boxes*

The USDA created FDPIR as an alternative to SNAP because of the difficulties many rural tribe members had accessing SNAP offices and authorized vendors.<sup>190</sup> Sixty-eight percent of Indigenous people live on or near their tribal ancestral territories and fifty-four percent live in rural areas.<sup>191</sup> Instead of providing food stamps for program participants to use to purchase foods, as SNAP does, FDPIR gives food boxes to low-income households living on Indian reservations or that include one member of a federally recognized tribe living near a reservation or in Oklahoma.<sup>192</sup> Approximately 276 out of 573 federally recognized tribes<sup>193</sup> receive FDPIR. One hundred and two Indian Tribal Organizations (“TTOs”) and three state agencies administer the program.<sup>194</sup> These entities store food, determine who is eligible to participate in the program, and offer nutrition education.<sup>195</sup>

In 1991, Charles “Red” Gates began advocating for better and more culturally appropriate food in FDPIR boxes. In early testimony about the boxes’ canned meats, he asked government representatives,

“Did you ever see what’s in these cans?” This guy said, “No. Show us. We want to see,” so I grabbed a can of pork and I told him, “You’re going to get a bad smell. It doesn’t smell good and it doesn’t look good when I open it, so you take a look.” I got a can of chicken, a can of beef, and a can of pork. The first one I opened everybody

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<sup>189</sup> Moss, *supra* note 186.

<sup>190</sup> Mucioki, Sowerwine & Sarna-Wojcicki, *supra* note 180.

<sup>191</sup> Sara Dewees & Benjamin Marks, *Twice Invisible: Understanding Rural Native America*, FIRST NATIONS DEV. INST. (Apr. 2017), [https://www.usetinc.org/wp-content/uploads/bvenuti/WWS/2017/May percent202017/May percent202017/Twice percent20Invisible percent20- percent20Research percent20Note.pdf](https://www.usetinc.org/wp-content/uploads/bvenuti/WWS/2017/May%202017/May%202017/Twice%20Invisible%20-%20Research%20Note.pdf), archived at <https://perma.cc/9USQ-MB3Y> (providing a data analysis of American Indian and Alaska Native residency in rural areas).

<sup>192</sup> Mucioki, Sowerwine & Sarna-Wojcicki, *supra* note 180, at 91; *Food Distribution Program on Indian Reservations*, U.S. DEP’T OF AGRIC. (Jan. 2018), <https://fns-prod.azureedge.net/sites/default/files/fdpir/pfs-fdpir.pdf>, archived at <https://perma.cc/9A3Z-7QHZ> (explaining the FDPIR).

<sup>193</sup> *Federal and State Recognized Tribes*, NAT’L CONF. OF STATE LEGIS. (Nov. 2018), <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx>, archived at <https://perma.cc/LU76-9DZT>.

<sup>194</sup> *Food Distribution Program on Indian Reservations*, *supra* note 192.

<sup>195</sup> *Id.*; Shanks et al., *supra* note 122, at 1316.

crowded around. . . . I opened it up, and as soon as I opened it up a couple of them backed away and grabbed their noses and their mouths. When I began to dump it out they both ran outside and threw up. That's what they were giving us . . . and I showed them all the connective tissue, the blood vessels. It was some pretty terrible stuff.  
 . . .<sup>196</sup>

The food offered by the FDPIR is often so unpalatable that participants can only bring themselves to eat the sugar and carbohydrates in the boxes, forgoing proteins and produce. The boxes' contents purportedly reflect the nutrition standards in the federal Dietary Guidelines.<sup>197</sup> Commenting on the 1995 guidelines, Bernard and Brown asserted that, by “promoting a meaty, cheesy diet [the guidelines] amount to, perhaps inadvertently, the nutritional equivalent of smallpox-infected blankets.”<sup>198</sup> Although mandated to reflect medical research on nutrition, the guidelines suffer from inordinate influence from the food industry.<sup>199</sup> Their recommendations, therefore, tend to promote foods with powerful lobbies, such as milk and meat, instead of healthy foods that receive meager or few government subsidies, such as lentils, beans, and nuts.<sup>200</sup> Many Americans are free to ignore the guidelines and choose foods according to their own preferences and budgets. But people who subsist largely on food provided by USDA nutrition programs are at the mercy of the government's deference to corporate interests.

Food boxes contained set items for most of FDPIR's history. But changes instituted by the FDPIR Food Package Review Work Group, formed in 2002, allowed for greater flexibility, giving many participants the opportunity to make selections from a list of available items based on their household size.<sup>201</sup> The USDA then purchases these products and ships them to the appropriate state agency or ITO,<sup>202</sup> and provides these entities funding to administer the

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<sup>196</sup> Mucioki, Sowerwine & Sarna-Wojcicki, *supra* note 180, at 92.

<sup>197</sup> U.S. DEP'T OF HEALTH & HUM. SERVS. & U.S. DEP'T OF AGRIC., 2015–2020 DIETARY GUIDELINES FOR AMERICANS 1, 69 fig. 3-2 (Dec. 2015) [hereinafter 2015–2020 GUIDELINES], [https://health.gov/dietaryguidelines/2015/resources/2015-2020\\_Dietary\\_Guidelines.pdf](https://health.gov/dietaryguidelines/2015/resources/2015-2020_Dietary_Guidelines.pdf), *archived at* <https://perma.cc/FBL5-XBKL>

<sup>198</sup> Neal D. Barnard & Derek M. Brown, *U.S. Dietary Guidelines Unfit for Native Americans*, LONGEVITY PROFESSOR, <https://longevityprofessor.com/articles/10-u-s-dietary-guidelines-unfit-for-native-americans>, *archived at* <https://perma.cc/TDX7-4VMD> (explaining that U.S. dietary guidelines fail to capture Indigenous nutritional needs).

<sup>199</sup> Nestle, *supra* note 175, at 260.

<sup>200</sup> Michele Simon, *Protein Propaganda: It's What's for Dinner*, GRIST (Feb. 1, 2012) <https://grist.org/food/protein-propaganda-its-whats-for-dinner/>, *archived at* <https://perma.cc/BE6H-KRSJ> (introducing the politics surrounding protein propaganda).

<sup>201</sup> Shanks et al., *supra* note 122, at 1316.

<sup>202</sup> *Id.*

program.<sup>203</sup> However, food boxes, often referred to as “commods,” are still the most common form of distribution. These boxes primarily contain the non-nutritious commodity surpluses that also make up the majority of food in school meals. Commods often fail to live up to even the low standards mandated by the Dietary Guidelines.<sup>204</sup> Commodity food is unappealing, lacking in nutrients, and difficult and time-consuming to prepare in comparison to familiar convenience foods.<sup>205</sup>

Until 2008, the USDA did not even attempt to include culturally appropriate or nutritious foods in the boxes. Instead, it stocked them with processed, shelf-stable foods that, while staunching hunger, led to malnutrition, obesity, and related illnesses, particularly for participants who could not supplement the boxes with other foods.<sup>206</sup> In 2012, the boxes contained canned meats, canned beans, canned vegetables, canned soups, canned fruits (often prunes), bottled juices, cereal, rice, pasta, flour, processed cheese, powdered egg mix, shelf-stable milk, buttery spread, corn syrup, and vegetable oil.<sup>207</sup> Later, in response to Charles Gates’ continued demands to improve the program, some distribution centers added bison meat.<sup>208</sup>

Karuk ceremonial leader Leaf Hillman describes the health crisis on reservations due to nutritional colonialism through FDPIR as “a modern extension of tribal termination and genocide.”<sup>209</sup> The most vulnerable community members—the elderly, children, and people living on the most isolated reservations—face additional nutrition challenges. Seniors who receive Supplemental Security Income (“SSI”) are not eligible for food boxes. Because the SSI income is only enough to cover rent and bills, lack of access to the FDPIR often results in severe food insecurity among tribal elders.<sup>210</sup> Additionally, geographically isolated participants who do not live near distribution centers often miss out on fresh produce or do not receive their boxes.<sup>211</sup>

The lack of traditional foods in commod boxes inflicts health and emotional harms on their recipients.<sup>212</sup> The USDA’s requirement that all foods included in the boxes be distributed nationwide poses a significant obstacle to

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<sup>203</sup> *Food Distribution Program on Indian Reservations*, *supra* note 192.

<sup>204</sup> Vantrease, *supra* note 110, at 56-57; David Lulka, *Bison and the Food Distribution Program on Indian Reservations*, 16 GREAT PLAINS RES. 73, 73 (2006).

<sup>205</sup> Shanks et al., *supra* note 122, at 1323.

<sup>206</sup> Mucioki, Sowerwine & Sarna-Wojcicki, *supra* note 180, at 90.

<sup>207</sup> Vantrease, *supra* note 110, at 57.

<sup>208</sup> Shanks et al., *supra* note 122, at 1324; *see also* Lulka, *supra* note 204, at 74.

<sup>209</sup> Mucioki, Sowerwine, & Sarna-Wojcicki, *supra* note 180, at 92.

<sup>210</sup> *Id.* at 94.

<sup>211</sup> *Id.* at 92.

<sup>212</sup> *See id.* at 90-92.

the program's ability to incorporate traditional foods.<sup>213</sup> Local and Indigenous providers often lack the scale of production and complicated certification necessary to become national FDPIR food vendors.<sup>214</sup> Instead, USDA contracts go to large industrial producers.<sup>215</sup> Although ostensibly motivated by a desire to keep the program's costs down, this policy ultimately creates greater government expenses in the form of higher medical expenditures on nutrition-related illnesses.<sup>216</sup> This suggests that there is more than a cost-benefit analysis at work here. Instead, the boxes appear to perpetuate an enduring U.S. indifference to Indigenous health and culture.

The USDA defends the low nutritional value of the boxes by claiming that the food they contain is merely supplemental.<sup>217</sup> This claim is false. Sixty percent of program participants rely on the FDPIR boxes for all their nutritional needs.<sup>218</sup> This makes USDA control over their diet virtually complete. Although other recipients can and do supplement their diets with non-FDPIR foods, many Indigenous people have extremely limited access to nutritious foods because of their geographical isolation from grocery stores, limited gardening opportunities, and the destruction of traditional foodways.<sup>219</sup>

#### *Commodity Foods and Indigenous Identity*

The unhealthy nature and effects of the “commods” distributed by FDPIR have a complicated relationship to Indian identity. In some ways, commods

<sup>213</sup> *Id.* at 94.

<sup>214</sup> *Id.*

<sup>215</sup> Mucioki, Sowerwine & Sarna-Wojcicki, *supra* note 180, at 94.

<sup>216</sup> *Id.* at 90-92, 94-95.

<sup>217</sup> U.S. DEP'T OF AGRIC., STUDY OF THE FOOD DISTRIBUTION PROGRAM ON INDIAN RESERVATIONS (FDPIR) FINAL REPORT 91 (June 2016).

<sup>218</sup> Maria Godoy, *How Might Trump's Food Box Plan Affect Health? Native Americans Know All Too Well*, NPR (Feb. 18, 2018), <https://www.npr.org/sections/thesalt/2018/02/25/588098959/how-might-trump-plan-for-food-boxes-affect-health-native-americans-know-all-too>, *archived at* <https://perma.cc/FK5T-QV2B> (explaining the health effects of the food distribution program offered by the federal government on Indigenous communities). In 2018, Trump proposed similar boxes for SNAP recipients, but received pushback from a number of major constituents, including large retailers. Tracy Jan, Caitlin Dewey & Jeff Stein, *Trump's Budget Hits Poor Americans the Hardest; Aims to Replace Food Stamps with High-End Meal Kits*, CHI. TRIB. (Feb. 12, 2018), <http://www.chicagotribune.com/news/nationworld/politics/ct-trump-budget-poor-americans-20180212-story.html>, *archived at* <https://perma.cc/T9DV-2W3M> (explaining the potentially adverse effects of President Trump's budget on federal programs that serve low-income Americans).

<sup>219</sup> Amy McDermott, *Many Native Americans Lack Access to Healthy Food, but There's a Growing Movement to Change That*, GRIST (Jan. 31, 2017), <https://grist.org/food/food-access-is-a-big-problem-for-many-native-nations-heres-how-one-community-is-fighting-back/>, *archived at* <https://perma.cc/B4LQ-L7WZ>.

represent a pan-Indian identity expressed, for example, through a love of frybread.<sup>220</sup> But these uniting experiences are often negative. Only an Indian can have a “commod bod,” shaped by the processed, chemically preserved, empty calories offered by the USDA.<sup>221</sup> FDPIR foods are distinctive in that many of the products offered in the boxes are either not available outside reservations or come in unique packaging indicating their designation for FDPIR.<sup>222</sup> Yet some observers celebrate the program’s contribution to a pan-Indian, or super-tribal, identity that might otherwise be hard to establish in light of the great variations in culture, traditions, and lifestyle among tribes.<sup>223</sup>

### *Commodity Cheese*

Commodity cheese is the most popular food offered by FDPIR.<sup>224</sup> It originally took the form of a five-pound block that was more than twice as heavy as its commonplace counterpart, Velveeta.<sup>225</sup> Now it is available in slices. Dana Vantrease offers several examples of commodity cheese’s infiltration into popular Indigenous culture and identity. A quiz titled “How to Tell If You’re ‘Rezzed Out’” invites participants to respond yes if: “Every time you see a line, you jump in thinking that you’re getting surplus cheese.”<sup>226</sup> Musician Wade Fernandez, a member of the Menominee tribe, has a song on his award-winning album *Song of the Black Wolf* titled “Commodity Cheese Blues.” Its first verse laments: “I went downtown to the commod shop/Met the blues ‘cause they were out of stock. Tell me please when I’ll get my commod cheese.”<sup>227</sup>

Nicknamed pasteurized gold, these yellow bricks can also operate as currency. Vantrease cites an editorial proposing the term “Visa cheese” to refer to “a mode of exchange in which a block of commodity cheese can purchase other goods or services.”<sup>228</sup> The irony of this purported treasure is not lost on critics. In 2006, an *Indian Country Today* article observed, “Some Lakota still say to this day that the only brick of gold the Lakota people got out of the Black

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<sup>220</sup> Jen Miller, *Frybread*, SMITHSONIAN (July 2008), <https://www.smithsonianmag.com/arts-culture/frybread-79191/>, archived at <https://perma.cc/GW57-R3U5>.

<sup>221</sup> Vantrease, *supra* note 110, at 58.

<sup>222</sup> *Id.* at 57.

<sup>223</sup> *Id.* at 56.

<sup>224</sup> *Id.* at 60.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* (quoting WADE FERNANDEZ, *Commodity Cheese Blues*, on *SONG OF THE BLACK WOLF* (SBW Productions 2005)).

<sup>228</sup> *Id.* at 61 (quoting Cheryl Long Feather, *Four Directions*, BISMARCK TRIB., June 13, 2001, at 1B).

Hills is the brick of cheese rationed out on commodity day.”<sup>229</sup> Although many Indigenous people savor the taste and texture of commodity cheese, it is harmful to their health. Most Indigenous people suffer from lactose intolerance, causing pain and discomfort after consuming dairy products.<sup>230</sup> Milk consumption also contributes to several serious health problems and has no positive health effects.<sup>231</sup> Finally, the chemicals and processes that go into commodity cheese strip it of any potential nutritional value. But these facts do not stop the USDA from including processed cheese and condensed milk in FDPIR boxes.

*Frybread: “A Weapon of Health Destruction”*<sup>232</sup>

Frybread is a simple food typically made of flour, baking powder, salt, sugar, water, and shortening, lard, or oil. People both revere and despise it. Its story embodies the complex relationship between commodity foods and Indian identity. Frybread transforms the plain and unappetizing contents of government food boxes into something truly delicious. It is a testament to the skills and resilience of Indigenous cooks. But it is also a symbol of colonization. It is therefore the site of heated controversy among Indigenous food-sovereignty activists.<sup>233</sup>

Frybread has different origin stories, but they all connect it to oppression. Ivan Star explains: “The government used flour as a treaty annuity in the 1800s and in one instance the flour, being stored improperly, became infested with weevil larvae. Natives, not having much else to eat, fried the flour dough in hot lard to kill the parasites. Thus, ‘fried bread’ came into existence.”<sup>234</sup> By another account:

[I]t was born on the banks of the Pecos River in Fort Sumner at what was essentially a concentration camp for Navajos and Apaches forced from their homelands by U.S. raids. The imprisoned Indians were given rations they had never seen before: sacks of white flour, salt and

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<sup>229</sup> *Id.* at 64 (quoting Sharon Marrufo, *The Future of American Indian Peoples*, INDIAN COUNTRY TODAY, Feb. 7, 2006).

<sup>230</sup> *Health Concerns About Dairy*, PHYSICIANS COMM. FOR RESPONSIBLE MED., <http://www.pcrm.org/health/diets/vegdiets/health-concerns-about-dairy-products>, archived at <https://perma.cc/SM9P-GZ97>.

<sup>231</sup> See e.g. Freeman, *Unbearable Whiteness*, *supra* note 5, at 1266.

<sup>232</sup> Hilleary, *supra* note 169.

<sup>233</sup> See Devon Mihesuah, *Indigenous Health Initiatives, Frybread, and the Marketing of Nontraditional “Traditional” American Indian Foods*, 3 NAIS 45, 63 (2016); MILLER, *supra* note 100.

<sup>234</sup> Ivan Star, *Fry Bread is Just Another Legacy of Colonization*, INDIANZ (Jan. 15, 2019), <https://www.indianz.com/News/2019/01/15/ivan-star-comes-out-fry-bread-is-just-an.asp>, archived at <https://perma.cc/NM9Q-QCPJ>.



iron pots. The women did their best with the alien flour and formed dough balls they patted flat and cooked in boiling animal fat over fires. What is now called Navajo fry bread had been born. When Navajos returned to the reservation that had been carved out for them, fry bread came, too.<sup>235</sup>

Frybread has come to represent the quintessential commodity food. One woman describes how frybread connects her to her past and family:

Fry bread is important for me and [my boyfriend]. The smell of it keeps us happy . . . It makes me think about my moms and how she'd cook that up every morning. [My boyfriend] used to dance in the powwow circuit, so it also reminds us of being young and kicking our heels up.<sup>236</sup>

Frybread has also infiltrated popular culture. In 1996, Ojibwe rock artist Keith Secola released "Frybread," a musical tribute to the delicacy. In one version of the song, he associates frybread with Indian resistance. "But they couldn't keep the people down," Secola sings, "because born to the people was a Frybread Messiah, who said 'You can't do much with sugar, flour, lard and salt. But you can add one fundamental ingredient: love.'"<sup>237</sup> He also serenades the unifying power of frybread: "A mile long frybread line/We're all the same inside/Frybread all the time/All I'm asking for . . . Frybread."<sup>238</sup> In the 1998 movie *Smoke Signals*, about a road trip that starts on a reservation, one character dons a "Frybread Power" t-shirt in an effort to look like a "real" Indian.<sup>239</sup> According to Sherman Alexie, the writer of *Smoke Signals* and other award-winning novels, poetry, and short stories about Indian life, "Frybread is the story of our survival."<sup>240</sup>

<sup>235</sup> Leslie Linthicum, *American Indian Activist Raises Ruckus Over Fry Bread*, ARIZ. DAILY SUN (Feb. 27, 2005), [https://azdailysun.com/american-indian-activist-raises-ruckus-over-fry-bread/article\\_b52246b6-2605-5e6a-9541-657dd1f65eaf.html](https://azdailysun.com/american-indian-activist-raises-ruckus-over-fry-bread/article_b52246b6-2605-5e6a-9541-657dd1f65eaf.html), archived at <https://perma.cc/FY9U-9MMV>.

<sup>236</sup> Michèle Companion, *Obesogenic Cultural Drift and Nutritional Transition: Identifying Barriers to Healthier Food Consumption in Urban Native American Populations*, 7 J. APPLIED SOC. SCI. 80, 89 (2013).

<sup>237</sup> Jen Miller, *Frybread*, SMITHSONIAN MAG. (July 2008), <https://www.smithsonianmag.com/arts-culture/frybread-79191/>, archived at <https://perma.cc/5NEF-58RC>.

<sup>238</sup> *Native Roots – Frybread Lyrics*, METROLYRICS, <https://www.metrolyrics.com/frybread-lyrics-native-roots.html>, archived at <https://perma.cc/XF5B-WY5G>.

<sup>239</sup> SMOKE SIGNALS (ShadowCatcher Entertainment 1998); see also Linda Tate, *Sherman Alexie: "Smoke Signals"*, STORYWEB (May 30, 2016), <http://www.thestoryweb.com/alexie/>, archived at <https://perma.cc/6ZPB-VRXS> ("While this scene is funny, it is also searing, as Alexie deftly skewers the stereotypes white Americans have of Indian people.").

<sup>240</sup> Miller, *supra* note 100.

Frybread also plays a role in creating a pan-Indian, or super-tribal identity. T-shirts asking “Got Frybread?” or identifying the wearer as a “Fry bread investigator” are common at pow wows.<sup>241</sup> Dana Vantrease asserts that these shirts help Indians pick each other out from non-Indians in environments where wearing traditional regalia is no longer common.<sup>242</sup> In 2005, South Dakota declared frybread its official state bread.<sup>243</sup> A 2012 mockumentary, *More Than Frybread*, comically portrays the cutthroat competition among tribes in an Arizona frybread championship.<sup>244</sup> The late anthropologist George P. Horse Capture called frybread “a divine gift in exchange for hardships such as racism and disease that native people have endured.”<sup>245</sup>

But frybread has two sides. Keith Secola contends that, “Frybread has killed more Indians than the federal government.”<sup>246</sup> In a controversial 2005 article, Cheyenne and Muscogee Indian rights activist Suzan Shown Harjo vowed to give up frybread as a New Year’s resolution because of the harm it inflicts on her community. She explains: “Frybread is emblematic of the long trails from home and freedom to confinement and rations. It’s the connecting dot between healthy children and obesity, hypertension, diabetes, dialysis, blindness, amputations and slow death. If frybread were a movie, it would be hard-core porn. No redeeming qualities. Zero nutrition.”<sup>247</sup> She also decries the use of frybread as the latest stigmatizing stereotype associated with Indigenous people. She likens it to the worn-out trope of Indians drinking “firewater,” and abhors portrayals of Indigenous people as “simple-minded people who salute the little grease bread and get misty-eyed about it.”<sup>248</sup>

Because of its origins in persecution and its lack of connection to pre-colonization foods, some activists compare frybread to soul food.<sup>249</sup> Dana

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<sup>241</sup> Vantrease, *supra* note 110, at 59.

<sup>242</sup> *Id.*

<sup>243</sup> *Fry Bread*, STATE SYMBOLS USA, <https://statesymbolsusa.org/symbol-official-item/south-dakota/state-food-agriculture-symbol/fry-bread>, *archived at* <https://perma.cc/EYF2-J8LV>.

<sup>244</sup> MORE THAN FRYBREAD (Holt Hamilton Productions 2012).

<sup>245</sup> Liza F. Kay, *Fry Bread: Two Sides of a Powwow Staple*, BALTIMORE SUN (Aug. 23, 2006), <https://www.baltimoresun.com/news/bs-xpm-2006-08-23-0608220073-story.html>, *archived at* <https://perma.cc/58X6-WJBV>.

<sup>246</sup> Miller, *supra* note 100.

<sup>247</sup> Suzan Shown Harjo, *My New Year’s Resolution: No More Fat ‘Indian’ Food*, INDIAN COUNTRY TODAY (Jan. 26, 2005), <https://newsmaven.io/indiancountrytoday/archive/my-new-year-s-resolution-no-more-fat-indian-food-M6Fd3dv8tkWPjg383hjFyA/>, *archived at* <https://perma.cc/RQ3Z-NEAX>.

<sup>248</sup> *Id.*

<sup>249</sup> Simon Moya Smith, *Native American Fry Bread is the Food of Our Oppression*, NBC NEWS: THINK (Apr. 6, 2019, 3:05 AM), <https://www.nbcnews.com/think/opinion/native-american-fry-bread-food-our-oppression-it-s-also-ncna991591>, *archived at* <https://perma.cc/V8UA-JBVX>.

Vantrease explains: “Just as commodities are an artifact of the reservation system, African American soul food is an artifact of enslavement. Like commodities, ‘soul foods’ are used as ethnic signifiers and considered traditional. And like commodities, items like chitterlings, fried chicken, and cobblers are linked to numerous health problems.”<sup>250</sup>

One of the more problematic aspects of frybread is that it serves as a tool for blaming Indigenous people for their own health problems.<sup>251</sup> There is a long history of conflating structural determinants of Indigenous Peoples’ health with cultural practices.<sup>252</sup> A 2000 NIH study of Indigenous elementary school students concluded that caregivers’ and communities’ encouragement of children to consume large quantities of unhealthy food contributed to childhood obesity.<sup>253</sup> Assigning the blame to Indigenous communities for their health problems overlooks the true, structural causes. Systemic issues, including colonization, displacement, broken treaties, inadequate medical services on and off reservations, the destruction of traditional foodways, lack of access to nutritious foods, poverty, and racism, are at the heart of health

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<sup>250</sup> Vantrease, *supra* note 110, at 66 (citing Jennifer Iré, *The Power of the Pepper: From Slave Food to Spirit Food*, in *THROUGH THE KITCHEN WINDOW* 255–63 (Arlene Voski Avakian ed., 1997)).

<sup>251</sup> Tom Robertson, *Tribal Members Try to Break Bad Eating Habits*, INDIAN COUNTRY (May 2010), <https://www.indiancountrynews.com/index.php/167-culture/food-a-health/9017-tribal-members-try-to-break-bad-eating-habits>, archived at <https://perma.cc/P74W-AGJR> (“We as Anishinaabe people, we have to take a look at ourselves, because some of the things that we have started to own as Anishinaabe culture are so bad for us . . . Fry bread. I mean, my God, is there a worse kind of food that we can eat? It’s just filled with everything that’s killing us. But somehow we have embraced this, that this is part of our culture.”).

<sup>252</sup> See Joanna Woolman & Sarah Deer, *Protecting Native Mothers and their Children: A Feminist Lawyering Approach*, 40 WM. MITCHELL L. REV. 943, 956 (2014). (“One example emerges from a health care campaign to address high rates of infant mortality on reservations in the early 1900s, called ‘Save the Babies.’ The national program was intended to teach Native mothers proper sanitation and health care for newborns. Unfortunately, this campaign also came at a price—practitioners often operated with a racist assumption that Native women were ignorant about infant care and that Native ways of caring for children were inferior to those of the Euro-American culture. In reality, the cause of high infant mortality rates in tribal communities was more likely related to poverty, malnutrition, and oppression. But because of the disrespectful nature of such programs, Native mothers were often inclined to avoid these health care practitioners and social workers.”).

<sup>253</sup> Gittelsohn, et. al., *Food Perceptions and Dietary Behavior of American-Indian Children, Their Caregivers and Educators, Formative Assessment Findings from Pathways*, 32 J. NUTR. EDUC. 2, 11–13 (2000), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5033233/>, archived at <https://perma.cc/J24G-KFHR>; see also Janice Sabin et al., *Clinician’s Implicit and Explicit Attitudes about Weight and Race and Treatment Approaches to Overweight for American Indian Children*, 11 CHILDHOOD OBESITY 456, 457 (Aug. 2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4692112/pdf/chi.2014.0125.pdf>, archived at <https://perma.cc/FB4J-ENNQ>.

disparities between Indigenous people and other racialized groups. Frybread is not among them. Other observers point to symptoms of modern life, such as cars, easy chairs, and remote controls, as contributors to poor Indigenous health.<sup>254</sup> Even among unhealthy foods with harmful effects, frybread does not stand out. The contents of commodity boxes<sup>255</sup> and the offerings of stores on reservations and in urban centers are just as unhealthy, without the redeeming cultural comforts of frybread. The demonization of Indigenous Peoples' transformation of unhealthy government offerings into a delicious food simply distracts from the USDA's role in harming Indigenous health and the potential for policy reform to improve it.

### *FDPIR as Food Oppression*

The U.S. government's role in creating and perpetuating health disparities between Indigenous Peoples and other groups should compel it to provide healthy, culturally appropriate food as part of FDPIR. Instead, it uses the program as an outlet for surplus commodities,<sup>256</sup> paying lip service to cultural accountability and the voices of the constituents it purports to serve. Although FDPIR resolves some of the problems associated with SNAP benefits for rural Indigenous people, such as distance from food providers, it also causes others. SNAP provides nutrition education to participants through activities such as cooking demonstrations and taste tests, but FDPIR outsources this aspect of the program, often to organizations that do little more than put up posters.<sup>257</sup>

FDPIR contributes to "nutrition transition," defined as a shift from being underweight and experiencing high rates of communicable diseases to being overweight and suffering from nutrition-related diseases.<sup>258</sup> Commods address the hunger caused by living on geographically isolated reservations where traditional food sources do not exist. But solving the problem of hunger by

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<sup>254</sup> Linthicum, *supra* note 235.

<sup>255</sup> As Michael Roberts, president and CEO of the First Nations Development Institute, observed, "When you look at high rates of diabetes and hypertension on reservations, it's not hard to trace it back to the FDPIR boxes." Sarah Jones, *Whitewashing Trump Country*, THE NEW REPUBLIC (Feb. 21, 2018), <https://newrepublic.com/article/147136/whitewashing-trump-country>, *archived at* <https://perma.cc/PS9M-322N>.

<sup>256</sup> Vantrease, *supra* note 110, at 55.

<sup>257</sup> Suzanne R. Stluka, *Bountiful Backpacks: The Role of Nutrition Education and Food Preparation Skills in Increasing Food Security & Diet Quality Among Limited Resource Families in South Dakota* (May 2018) (unpublished Ph.D. dissertation, University of Nebraska).

<sup>258</sup> Companion, *supra* note 236, at 80.

providing recipients with empty calories creates new nutritional crises, including obesity and type 2 diabetes.<sup>259</sup>

FDPIR's influence extends beyond reservations, permanently affecting the habits and tastes of Indigenous people who move to urban centers.<sup>260</sup> Consuming commodity-type foods can bring absent friends and relatives closer. One woman who moved away from her reservation explains how frybread is a conduit between her children and their community: "I don't want to lose all of who I am, you know? I want my kids to at least have some kinda sense that they are special and not like everyone else here. So, I cook up fry bread instead of donuts on the weekends."<sup>261</sup> Another participant in Michèle Companion's study of urban Indigenous Peoples' food preferences explains:

I wouldn't dare turn my nose up to Spam! When I first came home after being away for a while, I told my mom I didn't want to eat like that anymore . . . She accused me of being citified and being too good for everyone else. She was *real* insulted. She said Spam was all they got and if that was good enough for them, it ought to be good enough for me!<sup>262</sup>

Another woman describes how Spam connects her to her mother: "My mom was real creative. She taught me a million different ways to cook up Spam. I buy a lot of it. It makes me feel close to her."<sup>263</sup>

Other participants similarly emphasize the importance of including commodity foods in their diets after they left their reservations. One recounts:

My kids tease me about Spam. They don't want it. It's too low [class] for them. I make them eat it anyway. For one, it tastes good and it's cheap. For two, I don't want to get sucked up into those frou-frou ways of eating. I grew up eating real food, hearty food. That's traditional food. I mean, real Indians don't eat bean sprouts!<sup>264</sup>

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<sup>259</sup> *Id.* at 81. Forced relocation to communities far from urban centers also increases the dominance of television as a leisure activity. This leads to sedentary lifestyles in addition to exposing young people to marketing that encourages the consumption of the unhealthy foods available in FDPIR boxes or in reservation stores. *Id.*

<sup>260</sup> "The Governmental Relocation Program in the 1950s moved thousands of Native people into urban areas with the hope of assimilating them into modern American society. These programs have generally failed since Native people have been integrated into mostly poor urban areas and have been subject to the food deserts of the already existing marginalized communities of color." Rachel V. Vernon, *A Native Perspective: Food is More Than Consumption*, 5 J. OF AGRIC., FOOD SYSTEMS, & COMMUNITY DEV. 137, 140 (2015) (citations omitted).

<sup>261</sup> Companion, *supra* note 236, at 88.

<sup>262</sup> *Id.* at 89.

<sup>263</sup> *Id.* at 88.

<sup>264</sup> *Id.*

Another describes her attachment to commodity cheese: “You know, we got the commodities. I liked making stuff with that cheese. It melted real well on everything. I always try to get blocks of Velveeta ‘cause it is similar. My kids won’t touch a vegetable without cheese sauce!”<sup>265</sup>

Other lasting effects of FDPIR on urban Indigenous people include unfamiliarity with how to prepare new foods and a fear of wasting food that has always been scarce. One woman complains:

I can’t afford to experiment, no matter how much it is on sale for! I’m bored. I’d love to try new things but my kids are the real problem. And my boyfriend. They don’t want to try new stuff. They like what they like. If I try something new, they won’t even taste it and we waste the food. Maybe that is why I buy so many different kinds of chips! I need some variety!<sup>266</sup>

USDA resistance to diversifying and increasing FDPIR foods and its failure to provide culinary education leads former recipients to this nutritional impasse.

In addition to continuing to eat commodity-type foods after moving away from areas serviced by FDPIR because of cultural reasons, many urban Indigenous people—like many urban Black people—live in low-income food swamps where a diet dominated by fast food is the only option.<sup>267</sup> This highly processed food is familiar and can help Indigenous youth get along with their peers. A mother explains:

I can buy them each a breakfast bun at Mickey’s [McDonald’s] for a buck and some change. Then, they can go to school with the bag. It helps them fit in. They don’t want to stand out because they eat stuff that the other kids think is gross!<sup>268</sup>

For many young people, deflecting social stigma is more important than avoiding long-term health consequences. One young woman asserts, “I’m not embarrassed to be Indian. I just don’t like to call attention to it. I just want to be myself. Sometimes, if wearing the right clothes or carrying around fast food stuff makes it easier, okay. It’s worth the extra money to not always stand out.”<sup>269</sup> A young man agrees: “There are so many negative images of us out

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<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 89.

<sup>267</sup> See Valarie Blue Bird Jernigan et al., *Addressing Food Insecurity in a Native American Reservation Using Community-Based Participatory Research*, 27 HEALTH EDUC. RES. 645, 645, 647 (Aug. 2012); Amy McDermott, *Many Native Americans Lack Access to Healthy Food, but There’s a Growing Movement to Change That*, GRIST (Jan 31, 2017), <https://grist.org/food/food-access-is-a-big-problem-for-many-native-nations-heres-how-one-community-is-fighting-back/>, archived at <https://perma.cc/57WK-QZT3>.

<sup>268</sup> *Id.* at 87.

<sup>269</sup> *Id.*

there: crazies, drunks. Sometimes it is just easier to do small stuff to kinda blend[.]”<sup>270</sup> These comments point to larger problems including marketing that convinces young people that fast food brands are status symbols, the lack of association between healthy, nutritious foods and Black, Indigenous, and other communities of color in general, and the dearth of healthy food options in poor urban centers.<sup>271</sup> Government programs that would bring nutritious food into underserved neighborhoods could go a long way toward eliminating food-related health disparities.

### *Challenges to Improving FDPIR*

Indigenous activists have long promoted policy reform that would increase food equality in a way that is culturally appropriate, because “[s]olutions that do not account for the cultural and historical realities of Native people are not real solutions.”<sup>272</sup> The USDA could offer healthier food items through FDPIR. The greatest obstacle to this shift is the higher budget it would require. Fruits and vegetables (except for corn) do not receive meaningful subsidies through the Farm Bill.<sup>273</sup> White rice is a subsidized commodity,<sup>274</sup> but grains traditionally eaten by Indigenous Peoples—wild rice, barley, quinoa, blue sorghum, and rye—are not. The addition of bison to the boxes, inspired by Charles Gates’ tireless advocacy, was a step in the right direction, but not all tribes eat bison.<sup>275</sup>

Some efforts to improve FDPIR focus on stigma and education. On some reservations, instead of receiving a box, participants can select items from a shelf or cooler and carry them home in a bag. This increases participation, which alleviates hunger issues, but not nutritional ones.<sup>276</sup> Efforts by

<sup>270</sup> *Id.*

<sup>271</sup> Alison Hope Alkon et al., *Foodways of the Urban Poor*, 48 *GEOFORUM* 126, 132 (2013).

<sup>272</sup> Vernon, *supra* note 260, at 137 (“Those devising strategies to build food sovereignty must have a deep historical understanding of how food has been lost, how people have been moved or constrained, and how food acts as a community-bonding factor. The narrow focus on food consumption and access as they relate to physical health limits Native attempts to achieve food justice for our communities.”).

<sup>273</sup> Ali Condra, *Why Fruits, Vegetables Are Excluded From Farm Subsidies*, *FOOD SAFETY NEWS* (Nov. 9, 2011), <https://www.foodsafetynews.com/2011/11/fairness-why-fruits-vegetables-are-excluded-from-farm-subsidies/>, archived at <https://perma.cc/SUU2-HCM7>; Tom Philpott, *Practically All the Least Healthy Foods Have this One Thing in Common*, *MOTHER JONES* (July 11, 2016), <https://www.motherjones.com/environment/2016/07/are-farm-subsidies-killing-us/>, archived at <https://perma.cc/W5YP-XY9U>.

<sup>274</sup> Philpott, *supra* note 273.

<sup>275</sup> See Shanks et al., *supra* note 122, at 1324; see also Lulka, *supra* note 204, at 73.

<sup>276</sup> Hoover, *supra* note 8.

Indigenous food sovereignty leaders resulted in an allocation of five million dollars toward including more culturally appropriate foods in 2015.<sup>277</sup> These funds went to the addition of bison, blue cornmeal, salmon, and wild rice to some boxes.<sup>278</sup> Indigenous food activists, including Ben Jacobs, the co-founder of Denver's only Indigenous restaurant, Tocabe, run workshops on reservations on how to cook traditional foods using FDPIR boxes. The USDA offers an FDPIR toolkit with videos and a cookbook.<sup>279</sup>

These strategies are largely successful but have a small impact.<sup>280</sup> It should not be up to grassroots organizers to transform FDPIR. Instead, the USDA should gear the program toward the needs of its participants, not those of industry lobbyists. The following section argues that the National School Lunch Program similarly contributes to racial health disparities.

### *B. The National School Lunch Program*

The USDA provides school meals to students who attend qualifying public schools. These schools give breakfast and lunch to eligible students for free. The program began in response to the Great Depression and, by 1942, offered meals to six million students.<sup>281</sup> However, the government diverted surplus foods to U.S. forces after joining the Second World War, reducing the number of student meal recipients by one million.<sup>282</sup> With poor diet responsible for

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<sup>277</sup> Mucioki, Sowerwine & Sarna-Wojcicki, *supra* note 180, at 89–90.

<sup>278</sup> *Id.* at 90.

<sup>279</sup> FIRST NATIONS DEVELOPMENT INSTITUTE, COOKING HEALTHIER WITH FDPIR FOODS (2017).

<sup>280</sup> *First Nations Development Institute Unveils New Resource Toolkit, Including Cookbooks and Videos, Under its Food Distribution Program on Indian Reservations (FDPIR) Nutrition Education Effort*, GLOBE NEWSWIRE (Oct. 24, 2017), <https://www.globenewswire.com/news-release/2017/10/24/1152272/0/en/First-Nations-Development-Institute-Unveils-New-Resource-Toolkit-Including-Cookbooks-and-Videos-Under-Its-Food-Distribution-Program-on-Indian-Reservations-FDPIR-Nutrition-Education.html>, archived at <https://perma.cc/9R8G-NFNJ>; Elizabeth Dahl, *How One Denver Restaurant is Introducing Native American Food to the Hungry Masses*, MANUAL (Feb. 21, 2018, 9:00 AM), <https://www.themanual.com/food-and-drink/tocabe-native-american-food-interview-ben-jacobs/>, archived at <https://perma.cc/S467-TC9W>. These types of programs only reach small numbers of individuals who have the time and ability to learn new recipes. Structural changes to the program that make healthier food more accessible would have a more widespread effect. See Nancy Pindus & Carol Hafford, *Food Security and Access to Healthy Foods in Indian Country: Learning from the Food Distribution Program on Indian Reservations*, 19 J. PUB. AFFAIRS 1 (Aug. 2019).

<sup>281</sup> Tanya Lee, *How is the National School Lunch Program Working in Indian Country?*, INDIAN COUNTRY TODAY (Dec. 9, 2014), [https://newsmaven.io/indiancountrytoday/archive/how-is-the-national-school-lunch-program-working-in-indian-country-\\_HM7f15fHkCbr\\_X6bGitMQ/](https://newsmaven.io/indiancountrytoday/archive/how-is-the-national-school-lunch-program-working-in-indian-country-_HM7f15fHkCbr_X6bGitMQ/), archived at <https://perma.cc/NKH6-783A>.

<sup>282</sup> *Id.*



forty percent of draft rejections, Congress created the National School Lunch Program in 1946 to enhance national security.<sup>283</sup> Yet, by 2009, obesity was a primary reason for rejecting military recruits.<sup>284</sup>

Although free school meals can alleviate hunger, they also contribute to nutrition-related conditions with significant racial health disparities. The days of rickets and scurvy, prominent childhood diseases during slavery, are largely in the past. Now, Black and Indigenous children develop obesity and type II diabetes at higher rates than White children.<sup>285</sup> These conditions lead to higher incidences of heart disease, cancer, and strokes in Black and Indigenous populations.<sup>286</sup> Lack of access to health care and racialized medical treatment compound the problem.<sup>287</sup> Instead of closing the gap of racial health disparities, government programs exacerbate them.

Sixty percent of school lunches served are free because students cannot afford them,<sup>288</sup> and seventy percent of those free lunches go to students of color.<sup>289</sup> Many students who receive free school meals likely consume very few calories outside of school.<sup>290</sup> Rough calculations lead to the conclusion that six

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> See generally Hoover, *supra* note 8 (Indigenous people have the highest rates of diabetes and other metabolic disorders of any U.S. ethnic or racial group); 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*, 37 PUB. HEALTH REV. 12 (2016) (describing the leading risk factors and causes of Black mortality in the United States, including heart disease, cancer, and stroke); Wiedman, *supra* note 137 (analyzing how obesity and diabetes affect Indigenous people); Alex Zielinski, *The Native American Community Faces Dangerously High Rates Of Food Insecurity*, THINK PROGRESS (Nov. 25, 2015, 5:41 PM), <https://thinkprogress.org/the-native-american-community-faces-dangerously-high-rates-of-food-insecurity-703a7737e87d/>, archived at <https://perma.cc/3BCW-ALJ2> (stating that heart disease related to obesity is the leading cause of Indigenous Peoples' death).

<sup>286</sup> See generally Noonan, Velasco-Mondragon & Wagner, *supra* note 285; Zielinski, *supra* note 285.

<sup>287</sup> Amy Maxmen, *Researchers Highlight the Impact of Slavery on Health and Disease*, INT'L JOURNAL NATURE & SCI.: NEWS BLOG (July 8, 2012), <http://blogs.nature.com/news/2012/07/researchers-highlight-the-impact-of-slavery-on-health-and-disease.html>, archived at <https://perma.cc/YF7R-8HFQ>; Zielinski, *supra* note 285.

<sup>288</sup> *School Meal Trends & Stats*, SCH. NUTRITION ASS'N, <https://schoolnutrition.org/AboutSchoolMeals/SchoolMealTrendsStats/>, archived at <https://perma.cc/7CDC-HHBC>.

<sup>289</sup> Katherine Ralston & Alisha Coleman-Jensen, *USDA's National School Lunch Program Reduces Food Insecurity*, U.S. DEP'T OF AGRIC., ECON. RES. SERV. (Aug. 7, 2017), <https://www.ers.usda.gov/amber-waves/2017/august/usda-s-national-school-lunch-program-reduces-food-insecurity/>, archived at <https://perma.cc/VUR2-2QBL> (noting that half of the reduced-price lunches go to students of color).

<sup>290</sup> Ralston et al., *supra* note 289; Susan Scutti, *How Does Nutrition Affect Children's School Performance?*, CNN (Mar. 21, 2017), <https://www.cnn.com/2017/03/21/health/school->

to eight million Black students' diets and thirteen million students of color's diets' consist almost entirely of what the USDA feeds them at school.<sup>291</sup> The

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nutrition-program-benefits/index.html, *archived at* <https://perma.cc/2CGE-W5R9>. Some schools deal with this problem by packaging lunch leftovers into take-home dinners for students. LINDSEY HAYNES-MASLOW & JEFFREY O'HARA, LESSONS FROM THE LUNCHROOM: CHILDHOOD OBESITY, SCHOOL LUNCH, AND THE WAY TO A HEALTHIER FUTURE 2 (Feb. 2015); Kayla Epstein, *Food at an Elementary School was Going to Waste. Now, it Goes Home with Needy Children*, WASH. POST, Apr. 3, 2019, <https://www.washingtonpost.com/education/2019/04/03/food-an-elementary-school-was-going-waste-now-it-goes-home-with-needy-children/>, *archived at* <https://perma.cc/L2Y5-6YUT>; Jessica Fu & Jimin Kang, *30 Million Children Rely on Free School Lunch. Where Do They Eat When School's Out?*, NEW FOOD ECON. (July 3, 2018), <https://newfoodeconomy.org/summer-hunger-new-york-city/>, *archived at* <https://perma.cc/PJ66-SCW6>; Jessica Glazer, *For Lower-Income Students, Snow Days Can be Hungry Days*, SALT (Feb 12, 2014), <https://www.npr.org/sections/thesalt/2014/02/10/274899069/for-lower-income-students-snow-days-mean-hungry-tummies>, *archived at* <https://perma.cc/SM7A-MB2Y>; Cheyenne Lentz, *Millions of Kids go Hungry in the US Every Summer Without School Lunches. These Striking Facts Reveal the Scale of the Problem*, BUS. INSIDER (June 3, 2019), <https://www.businessinsider.com/free-school-lunch-kids-summer-hunger-2019-5>, *archived at* <https://perma.cc/AHP2-LJ2C>; Lindsay Oberst, *Why School Lunches in America are Unhealthy and 10 Ways You can Take Action to Improve Them*, FOOD REVOLUTION NETWORK (Aug. 29, 2018), <https://foodrevolution.org/blog/school-lunch-in-america/>, *archived at* <https://perma.cc/6SHQ-SASL>; see Jaimie Seaton, *More than 13 Million Kids in this Country go to School Hungry*, DENVER POST (Mar. 9, 2017), <https://www.denverpost.com/2017/03/09/childhood-hunger-school-lunch/>, *archived at* <https://perma.cc/94M6-RQVB>; Erica Sweeney, *The Problem with School Lunch: How the Wealth Gap is Shaming Students*, HUFFPOST (Aug. 20, 2018), [https://www.huffpost.com/entry/school-lunches-wealth-gap\\_n\\_5b72ee42e4b0bdd0620d0b43](https://www.huffpost.com/entry/school-lunches-wealth-gap_n_5b72ee42e4b0bdd0620d0b43), *archived at* <https://perma.cc/LJH4-5NFY>. During the COVID-19 pandemic, many school districts provided meals for students to pick up during mandatory school closures or brought food to them on buses. Cory Turner & Anya Kamenez, *Schools Race to Feed Students Amid Coronavirus Closures*, NPR (March 20, 2020), <https://www.npr.org/2020/03/20/818300504/schools-race-to-feed-students-amid-coronavirus-closures>, *archived at* <https://perma.cc/D7QQ-CAMB>.

<sup>291</sup> In 2018, there were 50.8 million public school students. *Fast Facts: Back to School Statistics*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=372>, *archived at* <https://perma.cc/YM4B-9E3Z>. Approximately fourteen percent of students are Black. INST. FOR EDUC. SCI., NAT'L CTR. FOR EDUC. STAT., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS 2018, at 52 (2019), <https://nces.ed.gov/pubs2019/2019038.pdf>, *archived at* <https://perma.cc/RF54-QBWK>. Most of them likely eat school lunches instead of bringing their own. See Thomas McDuffie & Richard George, *School Day Eating Habits of Inner-City, African American Adolescents*, 78 J. NEGRO EDUC. 114, 116 (2009). Seven percent are eligible for free school meals. *Public School Students Eligible for Free or Reduced-Price Lunch*, NAT'L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=898>, *archived at* <https://perma.cc/YR6D-34SM>. 38.5 percent of American Indian/Alaska Native children attend schools where more than 75 percent of the children are eligible for free or reduced-price lunches. *Number and Percentage Distribution of Public School Students by Percentage of Students in School Who Are*

USDA's Child Nutrition program encompasses the National School Lunch Program ("NSLP"),<sup>292</sup> the School Breakfast Program ("SBP"),<sup>293</sup> and the Special Milk Program ("SMP").<sup>294</sup> The Commodities Program, created by the Farm Bill, allows the USDA to use the NSLP to dispose of surplus commodities by incorporating them into school meals, rendering these meals unhealthy.<sup>295</sup> The USDA supports the NSLP by giving schools cash subsidies and free commodity foods in exchange for each meal served.<sup>296</sup>

To earn these benefits, school lunches must meet federal requirements and be available for free or at a reduced price to income-eligible students.<sup>297</sup> The requirements act as gatekeepers to control the source and content of school meals, ensuring that they will consist primarily of commodity foods that are not locally-sourced. The SBP works the same way, while the SMP rewards schools for serving milk. Milk is the only subsidized commodity with its own program.<sup>298</sup> This incentive is necessary to reduce the USDA's milk surplus.<sup>299</sup> The oversupply of milk that the USDA must dispose of reflects a significant

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*Eligible for Free or Reduced-Price Lunch*, NAT'L CTR. FOR EDUC. STATISTICS, [https://nces.ed.gov/programs/digest/d18/tables/dt18\\_216.60.asp](https://nces.ed.gov/programs/digest/d18/tables/dt18_216.60.asp), archived at <https://perma.cc/QDU4-CLF5>.

<sup>292</sup> *The National School Lunch Program*, U.S. DEP'T OF AGRIC., THE NATIONAL SCHOOL LUNCH PROGRAM (2017), <https://fns-prod.azureedge.net/sites/default/files/cn/NSLPFactSheet.pdf>, archived at <https://perma.cc/3T6M-79B7>.

<sup>293</sup> *School Breakfast Program*, U.S. DEP'T OF AGRIC., <https://www.fns.usda.gov/sbp/school-breakfast-program-sbp>, archived at <https://perma.cc/BJ2B-RDGJ>.

<sup>294</sup> *Special Milk Program*, U.S. DEP'T OF AGRIC., <https://www.fns.usda.gov/smp/special-milk-program>, archived at <https://perma.cc/97TF-6EJT>.

<sup>295</sup> Farm Bill of 2018, Pub. L. No. 115-334, 132 Stat. 4490; Gordon W. Gunderson, *Early Federal Aid*, USDA FOOD & NUTRITION SERVICE (July 24, 2013), [https://www.fns.usda.gov/nslp/history\\_4#Commodity](https://www.fns.usda.gov/nslp/history_4#Commodity), archived at <https://perma.cc/4848-UDLT>; Lucy Komisar, *How the Food Industry Eats your Kid's Lunch*, N.Y. TIMES (Dec. 3, 2011), <https://www.nytimes.com/2011/12/04/opinion/sunday/school-lunches-and-the-food-industry.html>, archived at <https://perma.cc/WEK7-VHHR>.

<sup>296</sup> *National School Lunch Program*, U.S. DEP'T OF AGRIC., <https://beta.sam.gov/fal/0ed5dac6838d4ba1b81559dca6e08923/view>, archived at <https://perma.cc/S7XU-3SJN>.

<sup>297</sup> *Id.*

<sup>298</sup> U.S. DEP'T OF AGRIC., SPECIAL MILK PROGRAM 1, 1 (2012), <https://fns-prod.azureedge.net/sites/default/files/SMPFactSheet.pdf>, archived at <https://perma.cc/7UXB-D5Z9>; see CONG. SERV., SCHOOL MEALS PROGRAMS AND OTHER USDA CHILD NUTRITION PROGRAMS: A PRIMER 1–2 (Feb. 11, 2019).

<sup>299</sup> See Freeman, *supra* note 5, at 1263–65 (“Reducing the milk surplus is an easily quantifiable, concrete objective [for the USDA.]”).

decrease in demand for dairy products over the past forty years.<sup>300</sup> This decline in milk sales is due to the prevalence of lactose intolerance, particularly in communities of color,<sup>301</sup> and the well-documented, undesirable health consequences of drinking milk.<sup>302</sup>

Through the NSLP, the USDA can funnel surplus milk into the communities that have the highest rates of lactose intolerance and milk-related health issues, in part because public school students have little, if any, leverage to stop the agency. Unhealthy school meals provided disproportionately to Black, Indigenous, and other students of color contribute to racial health disparities in food-related illnesses and conditions. The disparate impact of this harm on students of color highlights the need for intervention based on Reconstruction Amendment principles.

### *Milk*

The USDA controls the content of most school meals directly, by administering its Child Nutrition programs, and indirectly, by creating the

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<sup>300</sup> Jeanine Bentley, *Trends in U.S. Per Capita Consumption of Dairy Products, 1970–2012*, U.S. DEP’T AGRIC. (June 2, 2014), <https://www.ers.usda.gov/amber-waves/2014/june/trends-in-us-per-capita-consumption-of-dairy-products-1970-2012/>, archived at <https://perma.cc/K8QK-5CSX>.

<sup>301</sup> Lactose intolerance is more prevalent in Black and Latinx people than White people. Freeman, *supra* note 5, at 1262 (citing Razib Khan, *Lactose Tolerance/Intolerance*, GENE EXPRESSION (Jan. 19, 2004), <http://www.gnpx.com/MT2/archives/001681.html>, archived at <https://perma.cc/MQ72-YAUA>). “A significant percentage of individuals from all communities, with the exception of Scandinavian and Northern European whites, do not retain the enzyme lactase through adulthood.” *Id.* (citing Dallas M. Swallow, *Genetics of Lactase Persistence and Lactose Intolerance*, 37 ANN. REV. GENETICS 197, 198 (2003)). “Although statistics vary, seventy-nine percent of African American adults, forty-five percent of African American children, seventy-four percent of Mexicans from rural communities, ninety-eight percent of Southeast Asians, and ninety percent of Asian Americans cannot digest lactose.” *Id.* (citing Khan, *supra* note 301).

<sup>302</sup> See Freeman, *supra* note 5, at 1266 (“[T]he [Dietary Guidelines for Americans] underlying message that excessive, or even moderate, intake of saturated fats through dairy products is unnecessary and harmful, along with the actual health problems associated with milk consumption, led to a thirty-year decline in milk sales. Americans now drink less than a third of the milk that the dairy industry produces daily, and much of the milk purchased has undergone a process to remove the fat, so that the surplus largely comprises high-fat milk. Under the direction of the 2008 Farm Bill, the USDA purchased this surplus at above-market rates. The USDA then attempted to sell the surplus to consumers.”). Studies have also found a link between consumption of saturated fats in dairy products and increased risks of heart disease, prostate cancer, and diabetes, among others. *Id.* at 1259–60; see also Eva-Elisa Álvarez-León et al., *Dairy Products and Health: A Review of the Epidemiological Evidence*, 96 BRIT. J. NUTRITION S94, S95–S99 (2006).

federal Dietary Guidelines for Americans<sup>303</sup> in conjunction with the Department of Health and Human Services (“HHS”).<sup>304</sup> These two agencies publish the guidelines in the form of a report every five years.<sup>305</sup> The report consistently provokes heated debate.<sup>306</sup> The USDA and HHS have come under intense criticism for the deference that they give to food industry lobbyists in shaping their recommendations.<sup>307</sup> For example, over thirty years ago, when medical evidence revealed that a healthy diet should not include milk, the dairy industry successfully fought to change the guidelines’ proposed

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<sup>303</sup> 42 U.S.C. § 1758(a)(4) (2011). The Dietary Guidelines for Americans comes from the National Nutrition Monitoring and Related Research Act. National Nutrition Monitoring and Related Research Act of 1990, Pub. L. No. 101-445, 104 Stat. 1034 (codified at 7 U.S.C. §§ 5341 *et seq.*).

<sup>304</sup> In 1990, an amendment to the Richard B. Russell National School Lunch Act (NSLA), Pub. L. No. 79-396, § 9(a)(4), 60 Stat. 230 (1945), required school cafeterias to rely on the most recent guidelines to guide the nutritional content of their meals.

<sup>305</sup> *Food and Nutrition*, OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, <https://health.gov/dietaryguidelines/>, archived at <https://perma.cc/C4CC-ZG5G>.

<sup>306</sup> Diana R.H. Winters, *Everything You Need to Know About the Upcoming Farm Bill Debate*, HEALTH AFF. (Feb. 21, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180215.383921/full/>, archived at <https://perma.cc/L8LJ-UB88>.

<sup>307</sup> See MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 30, 93–95 (2007). In 2011, the Physicians’ Committee for Responsible Medicine sued the USDA, alleging that the agency knowingly hid harmful foods in the guidelines by using obscure language. See *Physicians Comm. for Responsible Med. v. Vilsack*, 867 F. Supp. 2d 24, 26 (2011). Walter Willett, Chair of the Department of Nutrition at the Harvard School of Public Health, explained that the Guidelines are “... very vague about what people should eat less of... It talks about solid fats and... that’s really obscure to most people... What Americans really should be told is we need to eat less red meat, less cheese, less ice cream, and less refined grains.” First Amended Complaint for Injunctive Relief at 20, *Physicians Comm. for Responsible Med.*, 867 F. Supp. 2d 24 (2011) (No. 11-38), 2011 WL 12544177 (citing WAMU 88.5 AMERICAN UNIVERSITY RADIO, TRANSCRIPT FOR: DIETARY GUIDELINES (2011), <http://thedianerehmsshow.org/shows/2011-02-01/dietary-guidelines/transcript>, archived at <https://perma.cc/9QRY-52A6>). Marion Nestle elaborates on this point: “the [Dietary Guidelines] translates, ‘Cut back on solid fats’ in yet another euphemism: ‘Select lean meats and poultry, and fat-free or low-fat milk and milk products.’ This, no doubt, is to avoid the politically impossible ‘eat less meat.’” First Amended Complaint for Injunctive Relief at 20, *Physicians Comm. for Responsible Med.*, 867 F. Supp. 2d 24 (2011) (No. 11-38), 2011 WL 12544177 (citing Marion Nestle, 2010 *Dietary Guidelines, Deconstructed*, FOOD POLITICS (Feb. 1, 2011), <http://www.foodpolitics.com/2011/02/2010-dietary-guidelines-deconstructed/>, archived at <https://perma.cc/F2AS-VYMU>); see also Emily J. Schaffer, *Is the Fox Guarding the Henhouse – Who Makes the Rules in American Nutrition Policy*, 57 FOOD & DRUG L.J. 371, 388, 407–09 (2002) (discussing the food industry’s lobbying efforts, such as advocating for the use of the words “avoid too much” instead of “eat less”); Ron Zimmerman, *Lawsuit Says New USDA Dietary Guidelines are Deceptive*, MEDSCAPE (Mar. 10, 2011), <https://www.medscape.com/viewarticle/790852>, archived at <https://perma.cc/N6F4-6N3M>.

recommendation of eliminating milk from a healthy diet to language dictating a switch from high-fat to low-fat milk products.<sup>308</sup>

The centerpiece of the current nutritional guidelines is MyPlate, a visual representation of the percentage of each food group that individuals should consume daily.<sup>309</sup> Fruits and vegetables take center stage on MyPlate, covering half of its surface.<sup>310</sup> Grains and proteins take up the other half.<sup>311</sup> A separate, small plate labeled dairy sits on the upper right corner of the larger plate.<sup>312</sup> This small dairy plate represents a large victory for the dairy industry.<sup>313</sup>

The preponderance of medical and scientific research reveals numerous negative effects of dairy consumption, ranging from lactose intolerance to cancer.<sup>314</sup> Although the law mandates the USDA and HHS to use this research

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<sup>308</sup> See Freeman, *supra* note 5, at 1265 (“The Guidelines’ position on milk reflects a compromise between pressures from the dairy industry and the medical findings linking high-fat milk intake to serious health conditions, resulting in mixed messages”); see also Schaffer, *supra* note 307, at 397, 400 (“Leading the protests against the *Dietary Goals* were the cattlemen, the dairymen, and the egg farmers, as their products were the ones most likely to be affected by the recommendations set forth in the publication.”); NESTLE, *supra* note 175, at 30 (“Dietary guidelines necessarily are political compromises between what science tells us about nutrition and health and what is good for the food industry.”).

<sup>309</sup> For a picture of MyPlate, see 2011: *MyPlate, A Brief History of USDA Food Guides*, USDA, <https://www.choosemyplate.gov/eathealthy/brief-history-usda-food-guides>, archived at <https://perma.cc/57W4-KJWN>. MyPlate replaced the earlier Food Pyramid, 2015–2020 GUIDELINES, *supra* note 197, which fell out of favor with nutritionists who perceived it as overly confusing. The Pyramid, for example, failed to make clear distinctions between healthy foods, such as whole grains, and unhealthier options, including white bread and bacon. William Neuman, *Goodbye Food Pyramid, Hello Dinner Plate*, N.Y. TIMES (May 27, 2011), <http://www.nytimes.com/2011/05/28/health/nutrition/28plate.html>, archived at <https://perma.cc/93U6-RTS9>. It had six levels, with the purportedly unhealthiest foods placed at the top. 1992: *Food Guide Pyramid, A Brief History of USDA Food Guides*, USDA, <https://www.choosemyplate.gov/eathealthy/brief-history-usda-food-guides>, archived at <https://perma.cc/57W4-KJWN>.

<sup>310</sup> William Neuman, *Nutrition Plate Unveiled, Replacing Food Pyramid*, N.Y. TIMES (June 2, 2011), <http://www.nytimes.com/2011/06/03/business/03plate.html>, archived at <https://perma.cc/3556-H2Z3>.

<sup>311</sup> 2015–2020 GUIDELINES, *supra* note 197.

<sup>312</sup> *Id.*

<sup>313</sup> Susan Levin, *Despite Risks, Public Schools Serve Dairy with Every Meal*, SALON (Oct. 29, 2017, 1:29 AM), [https://www.salon.com/2017/10/29/despite-risks-public-schools-serve-dairy-with-every-meal\\_partner/](https://www.salon.com/2017/10/29/despite-risks-public-schools-serve-dairy-with-every-meal_partner/), archived at <https://perma.cc/M66J-GAEG> (“When the plate was first introduced in 2011, the National Milk Producers Federation CEO celebrated it as a win for Big Dairy[.]”); see also Josh Harkinson, *The Scary New Science that Shows Milk is Bad For You*, MOTHER JONES (Nov./Dec. 2015), <https://www.motherjones.com/environment/2015/11/dairy-industry-milk-federal-dietary-guidelines/>, archived at <https://perma.cc/AKS8-XHWF>.

<sup>314</sup> See, e.g., *Health Concerns About Dairy*, *supra* note 230; June M. Chan et al., *Dairy Products, Calcium, and Prostate Cancer Risk in the Physicians’ Health Study*, 74 AM. J. CLINICAL NUTRITION 549, 549–54 (2001); Daniel W. Farlow, Xia Xu & Timothy D.

as the basis for their guidelines,<sup>315</sup> the food industry has successfully lobbied the agencies to downplay it and promote corporate interests over individual health.<sup>316</sup> The resulting harms disproportionately affect communities of color, with Black, Indigenous, and other children of color experiencing lactose intolerance and milk-related diseases at the highest rates.<sup>317</sup>

Milk's prominence in schools may carry a cultural significance that goes beyond industry capture of government food programs. Recently, White nationalists have revived historical links between milk and White supremacy. For them, lactose intolerance is a coded racial term, signifying inferiority based on a person's inability to digest the enzymes in milk.<sup>318</sup> To wit, neo-Nazi demonstrators who protested an anti-Trump art installation crafted by actor Shia LaBeouf at the Queens Museum of the Moving Image chugged milk from jugs, allowing the liquid to run down their shirtless chests, claiming opposition to the "vegan agenda."<sup>319</sup> In the Oscar-nominated film *Get Out*, a White slave trader relaxes by sipping a tall glass of milk.<sup>320</sup> She eats her colored Froot Loops separately, to maintain the milk's purity. White supremacist websites post maps

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Veenstra, *Quantitative Measurement of Endogenous Estrogen Metabolites, Risk-Factors for Development of Breast Cancer*, in *Commercial Milk Products by LC-MS/MS*, 877 J.

CHROMATOGRAPHY B. 1327, 1327–34 (2009); Susanna C. Larsson, Leif Bergkvist & Alicja Wolk, *Milk and Lactose Intakes and Ovarian Cancer Risk in the Swedish Mammography Cohort*, 80 AM. J. CLINICAL NUTRITION 1353, 1353–57 (2004); Li-Qiang Qin et al., *Milk Consumption is a Risk Factor for Prostate Cancer in Western Countries: Evidence from Cohort Studies*, 16 ASIA PAC. J. CLINICAL NUTRITION 467, 467–76 (2007).

<sup>315</sup> National Nutrition Monitoring and Related Research Act, *supra* note 303.

<sup>316</sup> NESTLE, *supra* note 175.

<sup>317</sup> See generally, Eva-Elisa Álvarez-León et al., *Dairy Products and Health: A Review of the Epidemiological Evidence*, 96 BRIT. J. NUTRITION S94 (2006) (discussing epidemiological evidence of dairy products negative impact on health); see also Freeman, *supra* note 5, at 1262 (citing Khan, *supra* note 301).

<sup>318</sup> Freeman, *supra* note 5, at 1262 ("Characterizing lactose intolerance as abnormal appears to reflect the belief that the experiences of whites define the baseline of normal, and any departure signifies an unusual and undesirable condition."); Andrea Freeman, *Milk, a Symbol of Neo-Nazi Hate*, CONVERSATION (Aug. 30, 2017, 7:25 PM), <http://theconversation.com/milk-a-symbol-of-neo-nazi-hate-83292>, archived at <https://perma.cc/KER5-SN4C>.

<sup>319</sup> Sean O'Neal, *Milk-Chugging "Alt-Right" Trolls Shut Down Shia LaBeouf's Art Project*, A.V. CLUB (Feb. 13, 2017, 1:47 PM), <https://news.avclub.com/milk-chugging-alt-right-trolls-shut-down-shia-labeouf-1798257745>, archived at <https://perma.cc/Z2Y8-FQDR>; see also Freeman, *supra* note 5; Jack Smith, *Milk is the New, Creamy Symbol of White Racial Purity in Donald Trump's America*, MIC (Feb. 10, 2017), <https://mic.com/articles/168188/milk-nazis-white-supremacists-creamy-pseudo-science-trump-shia-labeouf#.gSVETZiHe>, archived at <https://perma.cc/U2W4-VKAZ>; Alex Swerdloff, *Got Milk? Neo-Nazi Trolls Sure as Hell Do*, VICE: MUNCHIES (Feb. 21, 2017, 1:00 PM), [https://munchies.vice.com/en\\_us/article/kbka39/got-milk-neo-nazi-trolls-sure-as-hell-do](https://munchies.vice.com/en_us/article/kbka39/got-milk-neo-nazi-trolls-sure-as-hell-do), archived at <https://perma.cc/DU39-PBHZ>.

<sup>320</sup> GET OUT (Blumhouse Productions 2017).

and studies tracking the ability of their ancestors to digest milk<sup>321</sup> and poems decrying President Obama's lactose intolerance.<sup>322</sup> Media coverage<sup>323</sup> of this symbolism may lead readers to associate sinister motives with the USDA's commitment to promoting milk despite the racially disproportionate harms of doing so.

Contrary to popular wisdom, milk's downsides are not balanced out by its ability to help strengthen bones.<sup>324</sup> Milk appears to have no redeeming benefits. Yet, it is the cornerstone of the USDA's National School Lunch Program. In some schools, students can leave undesired food on their plates but cannot leave the cafeteria until they have finished their milk.<sup>325</sup> Milk holds the unique and dubious honor of being the only product with a special government program that incentivizes educational institutions and day camps to sell or give away as much of an unhealthy food as possible.<sup>326</sup>

One way the dairy industry ensures that children will drink its product is by adding sugar and artificial flavors to it, rendering it less healthy but more appealing to many young people. In the face of parent-led movements to ban flavored milk from school lunchrooms,<sup>327</sup> the dairy industry consistently

<sup>321</sup> An anonymous neo-Nazi poster uploaded a graphic on 4chan from a study showing hotspots of populations with higher lactose tolerance. Smith, *supra* note 319. The graphic can be found at Andrew Curry, *Archaeology: The Milk Revolution*, NATURE (July 31, 2013), <https://www.nature.com/news/archaeology-the-milk-revolution-1.13471#/lactasemap>, archived at <https://perma.cc/4A3P-DQ5E>.

<sup>322</sup> The poem, posted on 4chan, said: "roses are red, [B]arack is half black, if you can't drink milk, you have to go back." Smith, *infra* note 319; Freeman, *Milk*, *supra* note 318.

<sup>323</sup> Amy Harmon, *Why White Supremacists Are Chugging Milk (and Why Geneticists Are Alarmed)*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/us/white-supremacists-science-dna.html>, archived at <https://perma.cc/2DP8-JDKR>; Brian Resnick, *Watch: Stephen Colbert Skewers White Supremacists' Weird Obsession With Chugging Milk*, VOX (Oct. 19, 2018), <https://www.vox.com/science-and-health/2018/10/19/17999994/stephen-colbert-skewers-white-supremacists-milk-chugging-new-york-times>, archived at <https://perma.cc/YJM3-7STP>.

<sup>324</sup> PHYSICIANS COMM. FOR RESPONSIBLE MED., PROTECTING YOUR BONES 1–2 (2005), [http://www.afa-online.org/docs/pv\\_strongbones.pdf](http://www.afa-online.org/docs/pv_strongbones.pdf), archived at <https://perma.cc/HRW3-AQ9P>; Amy Joy Lanou, Susan E. Berkow & Neal D. Barnard, *Calcium, Dairy Products, and Bone Health in Children and Young Adults: A Reevaluation of the Evidence*, 115 PEDIATRICS 736, 740–41 (2005); Michael Greger, *Why is Milk Consumption Associated with More Bone Fractures?*, NUTRITION FACTS (Jan. 31, 2017), <https://nutritionfacts.org/2017/01/31/why-is-milk-consumption-associated-with-more-bone-fractures/>, archived at <https://perma.cc/AJH3-6D9X>.

<sup>325</sup> Interview with students at Waikiki Elementary, Honolulu, HI.

<sup>326</sup> *Special Milk Program*, *supra* note 294.

<sup>327</sup> See, e.g., Kim Severson, *A School Fight Over Chocolate Milk*, N.Y. TIMES (Aug. 24, 2010), [http://www.nytimes.com/2010/08/25/dining/25Milk.html?\\_r=1&ref=dining](http://www.nytimes.com/2010/08/25/dining/25Milk.html?_r=1&ref=dining), archived at <https://perma.cc/B9AL-VYYJ>; Michael Specter, *Jamie Oliver's Milk War*, NEW YORKER (June 16, 2011), <https://www.newyorker.com/news/news-desk/jamie-olivers-milk-war>, archived at <https://perma.cc/TV6K-DCAB>.



lobbies hard to keep it in them.<sup>328</sup> In one success for the industry, the L.A. Unified School District, home to a large population of low-income Black and Latinx students,<sup>329</sup> brought strawberry and chocolate milk back into schools after a five-year ban.<sup>330</sup> Without these flavored, sweetened options, many kids rejected milk altogether, which led to considerable waste but likely improved students' health.<sup>331</sup> Nonetheless, in response to the USDA's policy to stop reimbursing school meals if cafeterias do not serve milk, school board members saw little choice in the matter.<sup>332</sup>

The USDA-sponsored Center for Behavioral Economics, operating out of Cornell University, supports the dairy industry's position that sweetened milk reduces milk waste and leads to greater milk consumption.<sup>333</sup> The Center takes no position on whether increased milk consumption benefits or harms students' health. Yet, according to many parents and nutrition advocacy groups such as SugarWatch,<sup>334</sup> no milk is better than sweetened milk, particularly for lactose intolerant children.<sup>335</sup>

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<sup>328</sup> *Dairy Groups Fight to Keep Chocolate Milk on Menu*, NPR (Dec. 9, 2009, 12:45 PM), <https://www.npr.org/templates/transcript/transcript.php?storyId=121238407>, archived at <https://perma.cc/JML5-PAR2>.

<sup>329</sup> Priya Krishnakumar, *LAUSD by the Numbers*, L.A. TIMES (Dec. 15, 2015, 11:44 AM), <http://www.latimes.com/visuals/graphics/la-me-g-0818-laUSD-numbers-20150818-htmlstory.html>, archived at <https://perma.cc/SB6L-HADH> (reporting that almost three-fourths of the students are Latinx).

<sup>330</sup> Anna M. Phillips, *The Drought is Over at L.A. Schools. For Chocolate Milk, Anyway*, L.A. TIMES (Oct. 18, 2016, 4:05 PM), <http://www.latimes.com/local/education/la-me-edu-chocolate-milk-20161018-snap-story.html>, archived at <https://perma.cc/5QG4-MKPF>.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> See generally Andrew Hanks, David Just & Brian Wansink, *Chocolate Milk Consequences: A Pilot Study Evaluating the Consequences of Banning Chocolate Milk in School Cafeterias*, PLOS ONE (2014), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0091022>, archived at <https://perma.cc/KZH5-S6CX>. The Center's research came under fire for more than its USDA sponsorship in 2018 when the questionable methodologies of its former head, Brian Wansink, came to light. Brett Dahlberg, *Cornell Food Researcher's Downfall Raises Larger Questions for Science*, SALT (Sept. 26, 2018), <https://www.npr.org/sections/thesalt/2018/09/26/651849441/cornell-food-researchers-downfall-raises-larger-questions-for-science>, archived at <https://perma.cc/SQ3G-V7QC>.

<sup>334</sup> SUGARWATCH, <http://sugarwatch.org/>, archived at <https://perma.cc/K3JV-CS9B>.

<sup>335</sup> The dairy industry has also come up with a creative "solution" to lactose intolerance. Instead of relieving children of the discomfort that drinking milk causes, they add an ingredient into some milk products, lactase, that improves digestion. See, e.g., Tina Miller, *Lactose-Free Living: Yes, it's Possible!*, MILK MEANS MORE (Feb. 15, 2018), <https://www.milkmeansmore.org/lactose-free-living-yes-possible/>, archived at <https://perma.cc/7H8W-W3SD> (drawing a distinction between an intolerance and an allergy, and advocating for products with lactase, consistent with a posting on a website for the United Dairy Industry of Michigan).

*School Meals: Contents, Consequences, and Standards*

In addition to milk, school lunchrooms serve federally approved, but nutritionally suspect, food products such as tater tots, corn dogs, and ham links.<sup>336</sup> These foods and others like them contain harmful ingredients linked to type II diabetes, obesity, high blood pressure, cancer, and other serious ailments.<sup>337</sup> Many Black, Indigenous, and other students of color consume diets that consist primarily or exclusively of these unhealthy foods provided by public schools.<sup>338</sup> These students often live in food deserts or food swamps.<sup>339</sup> They have little or no political leverage in the fight for healthier school food alternatives.

Although school meal programs are optional, public schools that participate in them and meet their requirements receive much-needed financial reimbursement from the federal government.<sup>340</sup> Eligible schools also get

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<sup>336</sup> Federal law requires lunches and after-school snacks to contain certain food components, including meats or meat alternatives (such as enriched macaroni, most nuts, yogurt, tofu, legumes, cheese, or eggs); fruits (which can be frozen with or without added sugar, canned in light syrup, dried, or pasteurized “full strength” fruit juice); and vegetables (which can be fresh, canned, frozen, or pasteurized “full strength” vegetable juice). 7 C.F.R. § 210.10(c)(2). Although schools must offer the full variety of vegetable subgroups at some point during the week, they can accomplish this by putting out a salad bar that has one of each category of dark green vegetables, red-orange vegetables, legumes, and starchy vegetables, including potatoes. Grains must be at least fifty percent whole grain, and remaining grains must be enriched. 7 C.F.R. § 210.10(c)(2)(iv)(A). Schools may count up to two grain-based desserts per week towards meeting the grains requirement. 7 C.F.R. § 210.10(c)(2)(iv)(C). Schools must implement standardized recipes from the USDA/FNA Child Nutrition Database. 7 C.F.R. § 210.10(c)(5). Alternative recipes must be standardized and added to the local database. *Id.* Schools must add any locally purchased processed foods to their local database as outlined in FNS guidance and label the levels of calories, saturated fat, and sodium in the processed foods. 7 C.F.R. § 210.10(c)(6). An appendix provides a list of foods of minimal nutritional value, which should not be served in conjunction with the NSLP, such as certain candies. 7 C.F.R. §210.10 app. B (2013). Individuals may petition to add food products to this list.

<sup>337</sup> J. Amy Dillard, *Sloppy Joe, Stop, Sloppy Joe: How USDA Commodities Dumping Ruined the National School Lunch Program*, 87 OR. L. REV. 221, 223 (2008) (discussing how the USDA “dumps” commodities that contribute to obesity, heart disease, and cancer into the NSLP).

<sup>338</sup> Lindsay Oberst, *Why School Lunches in America are Unhealthy and 10 Ways You Can Take Action to Improve Them*, FOOD REVOLUTION NETWORK (Aug. 29, 2018), <https://foodrevolution.org/blog/school-lunch-in-america/>, archived at <https://perma.cc/5NJ5-G48U>; Lauren Tonti, *Food for Thought: Flexible Farm to School Procurement Policies Can Increase Access to Fresh, Healthy School Meals*, 27 HEALTH MATRIX 463, 465 (2017).

<sup>339</sup> Daniel J. Schultz, *Food Swamps, Unhealthy Food Access and Moving Beyond Personal Responsibility*, HUFFPOST (Jan. 22, 2014), [https://www.huffpost.com/entry/food-swamps-unhealthy-foo\\_b\\_4632942](https://www.huffpost.com/entry/food-swamps-unhealthy-foo_b_4632942), archived at <https://perma.cc/RG9Z-29QB>.

<sup>340</sup> Dillard, *supra* note 337, at 229; Ralston et al., *supra* note 109, at 16.

commodities donated from the USDA that comprise up to one-fifth of school meals' content, resulting in significant savings on food purchases.<sup>341</sup> The discounted foods provided to schools under the Commodity Foods Program do not adequately promote health because the USDA's "ordering, purchasing, storage and transportation methods generally lend themselves to shelf-stable [packaged and processed] products, and not [fresh] fragile perishables."<sup>342</sup>

In 2010, the Healthy Hunger-Free Kids Act ("HHFKA") called for the USDA to update nutrition standards for school meals and to apply these standards to all foods sold on school grounds throughout the day.<sup>343</sup> In response, updates to school nutrition standards in 2012 encouraged schools to increase the presence of fruits, vegetables, and whole grains in their meals, and to offer students fat-free and low-fat milk.<sup>344</sup> They also reduced the acceptable levels of sodium, saturated fat, and trans fat in these meals.<sup>345</sup> However, in 2017, in response to industry lobbying, the Trump administration stepped in to relax the requirements related to sodium, milk, and whole grains.<sup>346</sup>

The HHFKA's requirements extended federal regulations beyond the school-run cafeteria to "competitive foods" offered to students by non-state

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<sup>341</sup> 4 COMM. ON EDUC. & LABOR, U.S. CONGRESS, CHALLENGES AND OPPORTUNITIES FOR IMPROVING SCHOOL NUTRITION: HEARING BEFORE THE COMMITTEE ON EDUCATION AND LABOR, U.S. HOUSE OF REPRESENTATIVES, ONE HUNDRED TENTH CONGRESS, SECOND SESSION, HEARING HELD IN WASHINGTON, DC, MARCH 4, 2008 19 (Jan. 1, 2008); Dillard, *supra* note 337, at 223, 230.

<sup>342</sup> Lynn Parker, *Commodity Foods and the Nutritional Quality of the National School Lunch Program: Historical Role, Current Operations, and Future Potential*, FOOD RES. & ACTION CTR., 10 (Sept. 2008), <http://njfarm2school.pbworks.com/f/FRACRole+of+Commodities08.pdf>, archived at <https://perma.cc/PE7C-HV6K>. "In [school year] 2006–07, USDA Foods purchased by states were: thirty-five percent meat; fifteen percent poultry and eggs; twenty-two percent cheese; twenty-five percent fruits and vegetables (thirty-five percent of which were potatoes); and three percent grains, peanuts, and oils." *USDA Foods: Commodities in the National School Lunch Program*, NAT'L ALL. FOR NUTRITION & ACTIVITY 1, [https://cspinet.org/sites/default/files/attachment/commodities\\_fact\\_sheet.pdf](https://cspinet.org/sites/default/files/attachment/commodities_fact_sheet.pdf), archived at <https://perma.cc/SXS7-XZ2K>.

<sup>343</sup> Healthy Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, § 201, 124 Stat. 3183 (2010) (codified as amended at 42 U.S.C. §§ 1751 *et seq.*) [hereinafter HHFKA]. Section 201 amended Section 4(b) of the NSLA. 42 U.S.C. § 1753(b). HHFKA prompted a new Final Rule in 2012 which updated meal patterns and nutrition standards for the NSL and SBP to align them with the Dietary Guidelines for Americans. Nutrition Standards in the National School Lunch and School Breakfast Programs, 77 Fed. Reg. 4088 (proposed Jan. 26, 2012) [hereinafter Nutrition Standards].

<sup>344</sup> Nutrition Standards, *supra* note 343.

<sup>345</sup> *Id.*

<sup>346</sup> Jessica Taylor, *Trump Administration Rolls Back Michelle Obama's Healthy School Lunch Push*, NPR (May 1, 2017, 6:54 PM), <http://www.npr.org/2017/05/01/526451207/trump-administration-rolls-back-2-of-michelle-obamas-signature-initiatives>, archived at <https://perma.cc/C7UF-AKLY>.

vendors.<sup>347</sup> Competitive foods are foods and beverages available for sale to students on school premises, separately from the reimbursable meals and snacks that the USDA provides.<sup>348</sup> They provide options for kids who can afford to purchase foods that the guidelines do not regulate because they are sold by private companies, often through vending machines or at snack bars. A pilot program in the San Francisco school district, conducted in 2009 and 2010, removed competitive foods from the school environment to test whether their absence would increase participation in the school lunch program.<sup>349</sup> In the process of conducting the study, the researchers discovered that competitive foods have a discriminatory effect on low-income students because they increase the degree of stigma attached to eating school lunches.<sup>350</sup> Many students rightfully consider school lunches unpalatable at best.<sup>351</sup> When faced with a choice, they select non-USDA offerings.

The ability to purchase alternative foods in San Francisco schools underscored the divide between students who could and could not afford to buy lunch. Some low-income students chose not to eat lunch at all to avoid drawing attention to their status as “free lunch” kids.<sup>352</sup> Events in Houston similarly underscored how the stigma of free lunches can lead to hunger. After Houston public school students posted pictures of their classmates standing in the free lunch line on Facebook with demeaning captions, these students

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<sup>347</sup> 7 C.F.R. § 210.11(a).

<sup>348</sup> *Competitive Foods in Schools*, CONN. OFFICIAL STATE WEBSITE, <https://portal.ct.gov/SDE/Nutrition/Competitive-Foods>, archived at <https://perma.cc/Y6BA-S997>.

<sup>349</sup> Rajiv Bhatia, Paula Jones & Zetta Reicker, *Competitive Foods, Discrimination, and Participation in the National School Lunch Program*, 101 AM. J. PUB. HEALTH 1380, 1380–86 (2011).

<sup>350</sup> *Id.* at 1382 (“[T]he elimination of competitive à la carte offerings and the implementation of a point of service system may have contributed to participation gains through a reduction in stigma.”).

<sup>351</sup> See Darryl Murphy, *What Students Think About School Lunch*, PHILADELPHIA PUB. SCH. NOTEBOOK (Feb 22, 2017), <https://thenotebook.org/articles/2017/02/22/what-students-think-about-school-lunch/>, archived at <https://perma.cc/AA7U-FRR3>; Petr Svab, *Why are Children Throwing Away School Lunches?*, EPOCH TIMES (Oct. 5, 2018), [https://www.theepochtimes.com/why-are-children-throwing-away-school-lunches\\_2247535.html](https://www.theepochtimes.com/why-are-children-throwing-away-school-lunches_2247535.html), archived at <https://perma.cc/6Z4V-NZP7>.

<sup>352</sup> Beth Fertig, *Why NYC is Afraid of Free Lunch for All*, NPR (June 9, 2014), <https://www.npr.org/sections/ed/2014/06/09/319558542/why-nyc-is-afraid-of-free-lunch-for-all>, archived at <https://perma.cc/54RP-XE33>; see Morgan Lee, *U.S. Schools Rethink ‘Lunch Shaming’ Policies that Humiliate Children with Meal Debts*, PBS NEWS HOUR (July 5, 2017), <https://www.pbs.org/newshour/education/u-s-schools-rethink-lunch-shaming-policies-humiliate-children-meal-debts>, archived at <https://perma.cc/H93J-8YNF>.

decided that not eating was better than exposing themselves to that humiliation.<sup>353</sup>

### *Lunch Shaming*

Low-income students sometimes also endure “lunch shaming” by school staff.<sup>354</sup> Some families cannot afford to pay \$1.25 or \$1.75 a day for school lunch, yet may not be eligible for, or desire, free lunches. Families living on the edge of poverty must often juggle finances, forgoing some payments some months to meet other, more pressing obligations.<sup>355</sup> In other cases, families who are eligible for free lunches do not fill out the paperwork for a variety of reasons, including undocumented immigration status, language barriers, or homelessness.<sup>356</sup> Lunch shaming occurs when lunchroom staff try to extract payment on overdue lunch accounts by throwing students’ lunch trays in the garbage, stamping their arms with the phrase “I need lunch money,” or forcing them to clean tables in exchange for food.<sup>357</sup> Many school districts in the United States withhold hot meals from students whose bills are not paid in full, making their parents’ “delinquency” obvious to their peers.<sup>358</sup> Some schools prohibit students with lunch debt from participating in field trips or attending proms.<sup>359</sup> This type of behavior provides another reason for low-income students to forego lunch despite their hunger.

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<sup>353</sup> Bettina Elias Siegel, *Social Stigma and Social Media on the Lunch Line*, LUNCH TRAY (Dec. 2, 2011), <http://www.thelunchtray.com/social-stigma-and-social-media-on-the-lunch-line/>, archived at <https://perma.cc/JJV6-EH3H>.

<sup>354</sup> See Bettina Elias Siegel, *Shaming Children So Parents Will Pay the School Lunch Bill*, N.Y. TIMES (Apr. 30, 2017), <https://www.nytimes.com/2017/04/30/well/family/lunch-shaming-children-parents-school-bills.html>, archived at <https://perma.cc/P2BT-AWE8>.

<sup>355</sup> See Paul Kiel & Annie Waldman, *The Burden of Debt on Black America*, THE ATLANTIC (Oct. 9, 2015), <https://www.theatlantic.com/business/archive/2015/10/debt-black-families/409756/>, archived at <https://perma.cc/P7DP-HWHA>; see also Andrea Freeman, *Racism in the Credit Card Industry*, 95 N.C. L. REV. 1071, 1094–95 (2017) (discussing how without a safety net of wealth on which to fall back, some Black families must live paycheck-to-paycheck and forgo medical or educational expenses).

<sup>356</sup> See Siegel, *supra* note 354.

<sup>357</sup> Bettina Elias Siegel, *New Mexico Outlaws School ‘Lunch Shaming’*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/well/family/new-mexico-outlaws-school-lunch-shaming.html>, archived at <https://perma.cc/JX2E-PLN5>.

<sup>358</sup> See *id.*

<sup>359</sup> Jessica Fu, *Countless American Families are Saddled with Student Lunch Debt. Many Won’t be Able to Pay it Off*, NEW FOOD ECON. (Apr. 22, 2019), <https://newfoodeconomy.org/school-lunch-debt-usda/>, archived at <https://perma.cc/N5T4-TYAE>; Caitlin O’Kane, *New Jersey School Bans Students with Lunch Debt from Going to Prom and Field Trips*, CBS NEWS (Oct 23, 2019), <https://www.cbsnews.com/news/school-lunch-debt-cherry-hill-new-jersey-school-bans-students-from-prom-and-field-trips-extra-curriculars/>, archived at <https://perma.cc/XKN3-UXSV>.

In the most egregious example of lunch shaming to date, Wyoming Valley West School District in eastern Pennsylvania sent a letter home to parents with a lunch debt of \$10 or more, threatening them with removal of their children to the foster care system.<sup>360</sup> The district's head of federal programs, Joseph Muth, signed a letter that said: "Your child has been sent to school every day without money and without a breakfast and/or lunch."<sup>361</sup> The letter continued: "This is a failure to provide your child with proper nutrition and you can be sent to Dependency Court for neglecting your child's right to food. If you are taken to Dependency Court, the result may be your child being removed from your home and placed in foster care."<sup>362</sup> Although disavowed by school authorities and the Pennsylvania foster care system, the letter undoubtedly caused emotional harm and raised the specter of the state punishing poverty through its welfare programs. Several wealthy people offered to clear the Wyoming Valley students' debt, but the school board denied these requests.<sup>363</sup> The board's refusal underscores that the point of the letters was not simply to balance the budget but rather to humiliate the district's low-income families.<sup>364</sup>

Thoughtful policy can eliminate the stigma of free lunches and decrease hunger and malnutrition among low-income students. For example, in 2017, New York City's Department of Education announced that it would provide free lunches to all its 1.1 million students.<sup>365</sup> In doing so, it joined Boston,

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<sup>360</sup> Derrick Bryson Taylor, *Children Face Foster Care Over School Meal Debt, District Warns*, N.Y. TIMES (July 20, 2019), <https://www.nytimes.com/2019/07/20/us/school-lunch-bills-overdue-payment.html>, archived at <https://perma.cc/P5M7-RRMG>.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> Sophie Lewis, *A school district threatened parents over lunch debt. Now, a CEO says it refused his offer to pay*, CBS NEWS (July 23, 2019), <https://www.cbsnews.com/news/pennsylvania-school-district-threatened-parents-children-could-be-put-in-foster-care-over-lunch-debt-refuses-ceo/>, archived at <https://perma.cc/9G6V-GPGA>. Similar refusals to allow wealthy individuals to pay off lunch debts have occurred in other school districts. O'Kane, *supra* note 359; Antonia Noori Farzan, *'It's embarrassing to the kids': Students who owe lunch money will get only a jelly sandwich, district says*, THE MERCURY NEWS (May 8, 2019), <https://www.mercurynews.com/2019/05/08/its-embarrassing-to-the-kids-students-who-owe-lunch-money-will-get-only-a-jelly-sandwich-district-says/>, archived at <https://perma.cc/EA9B-UPQW>.

<sup>364</sup> In some districts, efforts to erase students' lunch debt have been more successful. After the 2016 police shooting of Philando Castile, a school cafeteria supervisor in Minnesota, a charity started in his name raised over \$100,000 to pay off school lunch debts. Christine Hauser, *Rhode Island District Tells Students with Lunch Debt: Only Jelly Sandwiches for You*, N.Y. TIMES (May 8, 2019), <https://www.nytimes.com/2019/05/08/us/rhode-island-lunch-money.html>, archived at <https://perma.cc/A3S5-KWGM>.

<sup>365</sup> Sean Piccoli & Elizabeth A. Harris, *New York City Offers Free Lunch for All Public School Students*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/nyregion/free-lunch-new-york-city-schools.html>, archived at <https://perma.cc/5KUN-A75L>.

Detroit, Chicago, Dallas, Puerto Rico, and the U.S. Virgin Islands.<sup>366</sup> According to USDA regulations, a school or district may distribute free meals to all its students without requiring documentation if over forty percent of the population served is eligible for free meals.<sup>367</sup>

### *School Food Oppression*

Approximately ninety-four percent of U.S. public schools participate in the USDA's School Lunch program.<sup>368</sup> The schools that can afford not to rely on the program's financial support are in higher-income areas with a predominance of White students, such as Berkeley, California.<sup>369</sup> Students of color are the largest demographic served by the program. In 2010, seventy-four percent of Black students, seventy-seven percent of Latinx students, and sixty-eight percent of Indigenous/Alaska Native students were eligible for free or reduced-price USDA lunches, compared to only twenty-eight percent of White students.<sup>370</sup>

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<sup>366</sup> 7 C.F.R. § 245.4 (2019); Bettina Elias Siegel, *NYC to Offer Free Lunch for All Students*, CIVIL EATS (Sept. 7, 2017), <http://civileats.com/2017/09/07/nyc-to-offer-free-lunch-for-all-students/>, archived at <https://perma.cc/9MZV-LUZT>; Stephen J. Hiemstra, School Food Programs, STATEUNIVERSITY.COM, <https://education.stateuniversity.com/pages/2395/School-Food-Programs.html>, archived at <https://perma.cc/RUG8-9PK8>.

<sup>367</sup> See *Community Eligibility Provision*, U.S. DEP'T OF AGRIC., <https://www.fns.usda.gov/school-meals/community-eligibility-provision>, archived at <https://perma.cc/Z2D8-XUKP>. Before New York joined the other districts, 8.5 million students around the country received meals under this provision. See Becca Segal et al., *Community Eligibility Adoption Rises for the 2015–2016 School Year, Increasing Access to School Meals*, CTR. ON BUDGET & POL'Y PRIORITIES, FOOD RES. ACTION CTR. 1 (May 13, 2016), <https://www.cbpp.org/sites/default/files/atoms/files/4-7-16fa.pdf>, archived at <https://perma.cc/R8KK-UWVH>.

<sup>368</sup> Alexandra Sifferlin, *Why Some Schools are Saying 'No Thanks' to the School-Lunch Program*, TIME (Aug. 29, 2013), <http://healthland.time.com/2013/08/29/why-some-schools-are-saying-no-thanks-to-the-school-lunch-program/>, archived at <https://perma.cc/M6SM-XFUG>.

<sup>369</sup> Stacy Finz, *Berkeley School Lunch Program to be on its Own*, SFGATE (Mar. 30, 2009), <https://www.sfgate.com/news/article/Berkeley-school-lunch-program-to-be-on-its-own-3246686.php>, archived at <https://perma.cc/7TH2-LRPB>; Natalie Orenstein, *A Radical Decision, an Unfinished Legacy*, BERKELEYSIDE (Oct. 16, 2018), <https://www.berkeleyside.com/2018/10/16/a-radical-decision-an-unfinished-legacy>, archived at <https://perma.cc/Z3R2-XU4R>.

<sup>370</sup> Von Diaz, *What Ever Happened to Michelle Obama's School Lunch Program*, COLORLINES (Sept. 9, 2013), <https://www.colorlines.com/articles/what-ever-happened-michelle-obamas-school-lunch-program>, archived at <https://perma.cc/A8GX-HA3H>.

With many Black students also lacking access to nutritious food outside the school setting,<sup>371</sup> it is not surprising that racial disparities between Black and White children (and adults) exist in all nutrition-related health conditions, including obesity,<sup>372</sup> type II diabetes,<sup>373</sup> high blood pressure,<sup>374</sup> bone strength,<sup>375</sup>

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<sup>371</sup> Approximately one in five, or 22.5 percent, of Black households, are food insecure as compared to one in eleven, or nine percent, of White households. *Food Insecurity*, HEALTHYPEOPLE.GOV, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/food-insecurity>, archived at <https://perma.cc/7GS7-U4XY>; Lydia Preuss, *Poverty and Food Insecurity Rates Improved in 2017, but 1 in 8 People Still at Risk of Hunger*, FEEDING AM. (Sept. 27, 2018), <https://hungerandhealth.feedingamerica.org/2018/09/poverty-food-insecurity-rates-improved-2017-1-8-people-still-risk-hunger/>, archived at <https://perma.cc/D8AB-BLNZ>. The national average of household food insecurity is fourteen percent, but is nearly double that at twenty-six percent for Black households. Joan A. Vaccaro & Fatma G. Huffman, *Sex and Race/Ethnic Disparities in Food Security and Chronic Diseases in U.S. Older Adults*, 3 GERONTOLOGY & GERIATRIC MED. 1, 1 (2017).

<sup>372</sup> See Katherine Unger Davis, *Racial Disparities in Childhood Obesity: Causes, Consequences, and Solutions*, 14 U. PA. J.L. & SOC. CHANGE 313, 323 (2011); see also Arthur Horton, *Adult Obesity in the US: Obesity Problems Affecting the African American Community*, 4 J. WOMEN'S HEALTH CARE 1 (2015), <https://www.omicsonline.org/open-access/adult-obesity-in-the-us-obesity-problems-affecting-the-african-american-community-2167-0420-1000261.php?aid=60586>, archived at <https://perma.cc/X28P-MGZJ> (linking modern obesity in African-American women to foods eaten during slavery).

<sup>373</sup> See Elizabeth J. Meyers-Davis et al., *Diabetes in African American Youth*, 32 DIABETES CARE S112 (2009). A 2009 study found that Black people were 5.3 percent more likely to have diabetes than White people. Carol L. Link & John B. McKinlay, *Disparities in the Prevalence of Diabetes: Is it Race/Ethnicity or Socioeconomic Status? Results from the Boston Area Community Health (BACH) Survey*, 19 ETHNICITY & DISEASE 1, 8 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3706078/pdf/nihms425399.pdf>, archived at <https://perma.cc/CH2E-J4XL>. A fact sheet from 2010 reports that nearly fifteen percent of Black people had diabetes compared to eight percent of White people, which is similar to the 2009 numbers. Lesley Russell, *Fact Sheet: Health Disparities by Race and Ethnicity*, CTR. FOR AM. PROGRESS 1, 2 (Dec. 16, 2010), [https://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/disparities\\_factsheet.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/disparities_factsheet.pdf), archived at <https://perma.cc/S795-UN6C>. The fact sheet also said that Latinx had higher rates of end-stage renal disease caused by diabetes and were fifty percent more likely to die from diabetes than White people.

<sup>374</sup> See *Vitalsigns*, supra note 13; see also Daniel T. Lackland, *Racial Differences in Hypertension: Implications for High Blood Pressure Management*, 348 AM. J. MED. SCI. 1,1 (2014).

<sup>375</sup> “Many African American women are at increased risk for osteoporosis because some may consume less calcium than the Recommended Dietary Allowance.” *Osteoporosis and African American Women*, NAT'L INST. OF HEALTH, <https://www.bones.nih.gov/health-info/bone/osteoporosis/background/african-american-women>, archived at <https://perma.cc/JHR5-7CZB>; see also *Bonesense*, AM. BONE HEALTH 1 (2015), [https://americanbonehealth.org/wp-content/uploads/2016/12/BONESENSEonFractureRiskinAfricanAmericans\\_FINAL.pdf](https://americanbonehealth.org/wp-content/uploads/2016/12/BONESENSEonFractureRiskinAfricanAmericans_FINAL.pdf), archived at <https://perma.cc/VVY6-DM8V>. “[N]on-Hispanic Blacks have greater femoral neck and lumbar spine BMD [bone mineral density] than Mexican-American or non-



heart failure,<sup>376</sup> strokes,<sup>377</sup> cancer,<sup>378</sup> and life expectancy.<sup>379</sup> Improving school lunches would reduce these disparities.<sup>380</sup> But, counterintuitively, instead of working to boost children's health, the USDA formulates regulations and policies that contribute significantly to the problem.

Research links foods high in corn syrup, white breads and sugars, and fried foods directly to harmful health conditions, including obesity and type II diabetes.<sup>381</sup> Nonetheless, the USDA includes these foods in school lunches through the Commodities Program.<sup>382</sup> The agency purchases excess beef, pork, milk, and other high-fat meat and dairy products to support these industries.<sup>383</sup> These commodities become part of school lunches, essentially allowing the

Hispanic Whites across the age spectrum.” William D. Leslie, *Ethnic Differences in Bone Mass—Clinical Implications*, 97 J. CLINICAL ENDOCRINOLOGY & METABOLISM 4329, 4331 (2012). “Even if most genes responsible for BMD heritability remain elusive, data from the Women’s Health Initiative provide compelling evidence that genetics affects BMD in U.S. Blacks. Women with higher African genetic admixture showed greater BMD than non-Hispanic White women, but also greater rates of bone loss.” *Id.* at 4332. “Risk factors for fracture are more commonly observed in those of greater social disadvantage, including nutritional inadequacies, smoking, physical inactivity, and comorbidities.” *Id.* at 4334. “Low family poverty-to-income ratio was associated with higher bone turnover in U.S. men, whereas Black women had higher bone turnover, attributed by the authors to ‘higher levels of social stress.’” *Id.* at 4334.

<sup>376</sup> “Among persons younger than 30 years of age, the likelihood of heart failure developing over the ensuing 20 years was 20 times as high among blacks as among whites.” Eric Peterson & Clyde W. Yancy, *Eliminating Racial and Ethnic Disparities in Cardiac Care*, 360 N. ENGL. J. MED. 1172, 1173 (2009).

<sup>377</sup> See George Howard et al., *Where to Focus Efforts to Reduce the Black-White Disparity in Stroke Mortality: Incidence vs. Case-Fatality?*, 47 STROKE 1893, 1893 (2016); see also *Racial Disparities in Stroke Incidence and Death*, NAT’L INST. OF HEALTH (June 21, 2016), <https://www.nih.gov/news-events/nih-research-matters/racial-disparities-stroke-incidence-death>, archived at <https://perma.cc/R2HU-W6MY>.

<sup>378</sup> *Cancer Disparities*, *supra* note 13.

<sup>379</sup> Barry-Jester, *supra* note 12.

<sup>380</sup> Eliminating racism is also an important step toward eliminating racial health disparities. Umar Z. Ikram et al., *Perceived Ethnic Discrimination and the Metabolic Syndrome in Ethnic Minority Groups: The Healthy Life in an Urban Setting Study*, 79 PSYCHOSOMATIC MED. 101, 101–11 (2017).

<sup>381</sup> See, e.g., James M. Rippe & Theodore J. Angelopoulos, *Relationship Between Added Sugars Consumption and Chronic Disease Risk Factors: Current Understanding*, 8 NUTRIENTS 697, 697 (2016); I.A. Macdonald, *A Review of Recent Evidence Relating to Sugars, Insulin Resistance and Diabetes*, 55 EUR. J. NUTRITION S17, S22 (2016); *The Sweet Danger of Sugar*, HARV. HEALTH PUBLISHING (May 2017), <https://www.health.harvard.edu/heart-health/the-sweet-danger-of-sugar>, archived at <https://perma.cc/XPU9-XZX9>; see also Dillard, *supra* note 337, at 223, 236 (citing Ron Haskins, *The School Lunch Lobby*, EDUC. NEXT (2005), <http://educationnext.org/the-school-lunch-lobby/>, archived at <https://perma.cc/59RX-ZJ4Q>).

<sup>382</sup> *National School Lunch Act*, USDA FOOD AND NUTRITION SERVICE (July 24, 2013), [https://www.fns.usda.gov/nslp/history\\_5](https://www.fns.usda.gov/nslp/history_5), archived at <https://perma.cc/WV8Z-WM5C>.

<sup>383</sup> Dillard, *supra* note 337, at 222–23 (2008); Parker, *supra* note 342, at 7.

USDA to use school cafeterias as a dumping ground for the foods that the agency cannot sell to consumers.<sup>384</sup> Lunchrooms transform these commodities into processed foods that are easy to heat up in school kitchens:

Two-thirds of the listed commodities being processed are meat and dairy. The remaining third covers everything from oil and fruit (in the same proportion) to flour and vegetables. The only vegetable listed with any specificity is the potato, which is processed into french fries and tater tots. The few fruits on the list are processed with flour and shortening to become high-fat muffins and fruit pastries.<sup>385</sup>

At the same time, regulations purportedly designed to ensure food safety often keep fresh produce grown in school gardens out of those schools' cafeterias.<sup>386</sup> Some schools with bountiful gardens donate their yield to local restaurants, where it is too expensive for low-income students to dine, or sell it to wealthier parents in stands on school grounds.<sup>387</sup> Students whose parents' financial situations compel them to eat school meals suffer the most harmful effects of the NSLP, while wealthier parents supplement or replace school meals with higher quality food from home.

The negative effects of the school meals programs are enduring. Dietary habits and preferences established during childhood are difficult to reverse later in life.<sup>388</sup> Students who participate in free lunch programs often continue to reside in food deserts or food swamps as adults.<sup>389</sup> USDA Child Nutrition

<sup>384</sup> Dillard, *supra* note 337, at 222–23, 232.

<sup>385</sup> *Id.* at 224.

<sup>386</sup> See 7 C.F.R. § 210.10 (2016). “Although nutritional content of meals has been the focus of the [National School Lunch Program] since it created the nutritive Type A lunch that was designed to meet one-third to one-half of the minimum daily nutritional requirements of an adolescent child, the NSLP fails to provide whole fresh food to the schools for preparation into healthy meals. Instead, food industries fortify and enrich food products in order to simplify food preparation and service for schools that lack human resources and facilities.” Dillard, *supra* note 337, at 245–46.

<sup>387</sup> These are common practices at Honolulu’s Waikiki elementary school. Mari Taketa, *If You Care About Food, See This Movie*, FROLIC HAWAII (Jan. 31, 2012), <https://www.frolichawaii.com/blogs/if-you-care-about-food-see-this-movie>, archived at <https://perma.cc/29TN-DP36>.

<sup>388</sup> See Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CAL. L. REV. 2221, 2233 (2007) (discussing the fast food industry’s targeting of children as they “represent a long-term investment” because “[e]ating habits developed in childhood usually continue through adulthood”). See also Davis, *supra* note 372, at 321 (“Because overweight and obese children are highly likely to remain overweight and obese into adulthood, any racial gap in childhood obesity may likely become a racial gap in adulthood obesity.”).

<sup>389</sup> Food deserts are communities, usually low-income, that lack grocery stores or sources for fresh food. Food swamps are communities oversaturated with fast food restaurants. See Freeman, *supra* note 5, at 1276; see also Bob Curley, *How to Combat ‘Food Deserts’ and ‘Food Swamps,’* HEALTHLINE (Jan. 18, 2018),

programs create separate nutritional tracks for low-income students and many Black, Indigenous, and other students of color, resulting in life-long health disparities. The next section describes how these programs and the Food Distribution Program for Indian Reservations contribute to unconstitutional racial health disparities.

### III. THE NATIONAL SCHOOL LUNCHROOMS PROGRAM AND FDPIR VIOLATE THE RECONSTRUCTION AMENDMENTS

Legislative or regulatory attempts to reform USDA nutritional programs that create and perpetuate racial health disparities through legislation or regulation have been—and likely will continue to be—largely unsuccessful because of the relative political powerlessness of food activists compared to food corporations. In the current political climate, industry influence supersedes the constitutional mandates to ensure equality under the law, eliminate the badges and incidents of slavery, and guarantee full citizenship. To disrupt regulatory capture by the food and agricultural industries, federal courts should step in to declare that laws and policies that promote food inequality are unconstitutional. This Part describes how analyzing the National School Lunch Program and FDPIR under the Reconstruction Amendments could reduce food inequality.

#### A. *The Thirteenth Amendment*

Under the Thirteenth Amendment, “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>390</sup> Section 2 of the Amendment empowers Congress “to enforce this article by appropriate legislation.”<sup>391</sup> Both sections provide fodder for considerable debate. The Supreme Court has interpreted the Amendment narrowly, hesitating to apply it absent Congressional action or clear cases of involuntary servitude. Nonetheless, the *Civil Rights Cases* make it clear that vestiges of slavery raise Thirteenth Amendment concerns.<sup>388</sup>

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<https://www.healthline.com/health-news/combat-food-deserts-and-food-swamps#1>, archived at <https://perma.cc/D9L6-9KA9>; Olga Khazan, *Food Swamps are the New Food Deserts*, THE ATLANTIC (Dec. 28, 2017), <https://www.theatlantic.com/health/archive/2017/12/food-swamps/549275/>, archived at <https://perma.cc/KW6Y-X68P>.

<sup>390</sup> U.S. CONST. amend. XIII, §1.

<sup>391</sup> U.S. CONST. amend. XIII, §2.

<sup>388</sup> *The Civil Rights Cases*, 109 U.S. 3, 10 (1883).

### *The Drafters' Intent*

Laws and policies that deprive individuals of the right to make choices about the food they consume are vestiges of slavery. In 1856, George Stroud published *Sketch of the Laws Relating to Slavery*, a survey of laws governing slave-owning in twelve states.<sup>392</sup> In the second chapter, entitled “Of the Incidents of Slavery—the Relation of Master and Slave,” Stroud describes laws pertaining to owners’ control over enslaved people’s food.<sup>393</sup> This control represented an important method of dominating slaves’ lives and suppressing their freedom.

Divesting parents of the important decision of what to feed their infants is another vestige of slavery.<sup>394</sup> In an 1846 case, *Lee v. Mathews*,<sup>395</sup> the Alabama Supreme Court listed the property rights of slave owners in enslaved mothers’ children as one of the incidents of slavery.<sup>396</sup> Constitutional law scholar Alexander Tsesis supports this interpretation, identifying the prevention of enslaved parents’ ability to make independent decisions about their children as an interference with autonomy properly remedied by the Thirteenth Amendment.<sup>397</sup> During the debates leading up to the Thirteenth Amendment’s ratification in 1865, Iowa Senator James Harlan referred to some of the incidents of slavery that the Amendment would enable Congress and the Court to dismantle.<sup>398</sup> Harlan’s list included slave owners’ prohibition of the “parental relation.”<sup>399</sup>

Another proponent of the Thirteenth Amendment, Senator Henry Wilson of Massachusetts, claimed that “the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child will be

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<sup>392</sup> GEORGE M. STROUD, *SKETCH OF THE LAWS RELATING TO SLAVERY IN THE SEVERAL STATES OF THE UNITED STATES OF AMERICA* (Philadelphia, Kimber & Sharpless 1856).

<sup>393</sup> *Id.* at 16–20.

<sup>394</sup> See 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) (citing DUNAWAY, *supra* note 72, at 134–41 (“Slaveholders forced enslaved women to wean their own infants early (from around six months), so they could return to their labors; yet, ironically, wet nurses had to feed white children until they were about two years old.”)).

<sup>395</sup> 10 Ala. 682, 688–89 (1846).

<sup>396</sup> *Id.* See also Alexander Tsesis, *Furthering American Freedom: Civil Rights & The Thirteenth Amendment*, 45 B.C. L. REV. 307, 377–79 (2004) [hereinafter Tsesis, *Furthering American Freedom*] (identifying the prevention of slaves’ ability to make independent parental decisions as an interference with autonomy properly remedied by the Thirteenth Amendment).

<sup>397</sup> *Id.*

<sup>398</sup> CONG. GLOBE, 38th Cong., 1st Sess. 1439–40 (1864); see also Alexander Tsesis, *Interpreting the Thirteenth Amendment*, 11 U. PA. J. CONST. L. 1337, 1339 (2009) [hereinafter Tsesis, *Interpreting the Thirteenth*].

<sup>399</sup> CONG. GLOBE., *supra* note 398.

protected by the guardian spirit of [the Amendment].”<sup>400</sup> Similarly, in discussions about the 1866 Civil Rights Act, Representative M. Russell Thayer of Pennsylvania asserted that the Thirteenth Amendment was meant to guarantee natural rights.<sup>401</sup> These natural rights would encompass the ability to parent,<sup>402</sup> including providing children with food and safeguarding their health.<sup>403</sup> This understanding further supports the idea that the deprivation of the parental right to control a child’s diet is a vestige of slavery.

### *Judicial Interpretation*

Judicial interpretations of the Thirteenth Amendment support the argument that the use of food to control enslaved populations renders food deprivation a significant incident of slavery. In the 1883 *Civil Rights Cases*, the Supreme Court opened the door to an expansive interpretation of the Amendment, asserting 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>404</sup>

However, the Court did not shed any further light on how to define this phrase until its 1968 decision in *Jones v. Alfred H. Mayer Co.*<sup>405</sup> There, the Court considered the constitutionality of an apartment owner’s refusal to sell property to an interracial couple.<sup>406</sup> The *Jones* Court identified this kind of racial housing discrimination as an incident of slavery.<sup>407</sup> Consequently, it

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<sup>400</sup> Priscilla Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1296 n.351 (2012) (quoting CONG. GLOBE, 39th Cong. 1st Sess. 1152 (1866)). Ocen argues that these legislative debates “demonstrate that 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.” *Id.* at 1297.

<sup>401</sup> See Tsesis, *Interpreting the Thirteenth*, *supra* note 398, at 1339–1340 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866)).

<sup>402</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (recognizing a parent’s fundamental right to control their children’s education); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (same).

<sup>403</sup> See Onora O’Neill, *The Dark Side of Human Rights*, 81 INT’L AFFAIRS 427, 428–29 (Mar. 2005).

<sup>404</sup> *United States v. Stanley*, 109 U.S. 3, 20 (1883).

<sup>405</sup> 392 U.S. 409 (1968).

<sup>406</sup> *Id.* at 412.

<sup>407</sup> See *id.* at 441–42 (“For this Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its ‘burdens and disabilities’—included restraints upon ‘those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.’” (quoting *Civil Rights Cases*, 109 U.S. at 22)).

upheld Congress' Thirteenth Amendment authority to prohibit this segregation under Section 1982 of the Civil Rights Act.<sup>408</sup>

To make this determination, the Court looked to the legislative history of the 1866 Civil Rights Act, which sought primarily to eliminate the continued persecution of freed slaves through the Black Codes.<sup>409</sup> The Court recounted how the Act's proponents rejected a proposal simply to void discriminatory laws as too narrow.<sup>410</sup> The Act's supporters recognized that it was necessary to combat rampant *de facto*, or socially enforced, discrimination, not just *de jure*, legal discrimination.<sup>411</sup> The Court cited Senator Lyman Trumbull's belief that the Civil Rights Act was intended to enforce the Thirteenth Amendment's abolition of slavery by "secur[ing] to all persons within the United States practical freedom."<sup>412</sup> As Trumbull explained, "[t]here is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits."<sup>413</sup>

The *Jones* Court's recognition of Congress's power to enact laws against all forms of discrimination that reinforce and echo slavery's oppression could extend to include the elimination of racial food inequality. However, *Jones* became an exception, not a rule. *Jones* is also difficult to apply to USDA action because it dealt with the scope of Congressional authority, not an executive agency's policies. Thirteenth Amendment suits based on these policies' relationship to slavery would provide an opportunity for courts to consider the possibilities and benefits of eliminating food's role in perpetuating racial inequality.

The Court has condemned and prohibited modern incarnations of slavery or involuntary servitude, somewhat narrowly defined.<sup>414</sup> It has been reluctant to extend the Amendment's application to cases that do not directly involve forced labor.<sup>415</sup> In one significant way, however, the Court has expanded the Thirteenth Amendment's reach. Its protections against legally or physically coerced involuntary labor apply not just to descendants of slaves, but to any

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<sup>408</sup> See *id.* at 438–44.

<sup>409</sup> See *id.* at 426–29.

<sup>410</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 430 (1968) (quoting CONG. GLOBE, 39th Cong., 1st Sess., 43).

<sup>411</sup> See *Jones*, 392 U.S. at 429 (“The report concluded that, even if anti-Negro legislation were ‘repealed in all the States lately in rebellion,’ equal treatment for the Negro would not yet be secured.”).

<sup>412</sup> *Id.* at 431 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 43).

<sup>413</sup> *Id.*

<sup>414</sup> See *United States v. Kozminski*, 487 U.S. 931, 948 (1988) (defining “involuntary servitude” as being “limited to cases involving the compulsion of services by the use or threatened use of physical or legal coercion”).

<sup>415</sup> See, e.g., *id.*; *Palmer v. Thompson*, 403 U.S. 217, 226–27 (1971).

individuals who experience these conditions.<sup>416</sup> However, the Court has not yet grappled with the question of whether the Thirteenth Amendment has special application to Indigenous Peoples, whom settlers enslaved alongside Africans.<sup>417</sup>

Section 2 of the Thirteenth Amendment advises that “Congress shall have power to enforce this article by appropriate legislation.”<sup>418</sup> The Court’s interpretation of Section 2 has largely doomed Thirteenth Amendment challenges that do not involve Congressional legislation.<sup>419</sup> For example, the Court’s recognition of Congress’s authority to enact Section 1982<sup>420</sup> in *Jones*<sup>421</sup> did not lead to the invalidation of Jackson, Mississippi’s shutting down of public swimming pools in *Palmer v. Thompson*<sup>422</sup> three years later.<sup>423</sup> Rather than integrate its pools, Jackson simply closed them, making swimming inaccessible to the city’s large Black population.<sup>424</sup>

The segregation and stigma embodied by the city of Jackson’s action and its consequences (including racial disparities in the ability to swim) arguably represent the “badges and incidents of slavery” referred to in the *Civil Rights Cases*.<sup>425</sup> Nonetheless, the Court declined to rely on the Thirteenth Amendment to enjoin the pool closures in the absence of Congressional action or forced labor.<sup>426</sup> These limitations, although arguably not mandated by the Thirteenth Amendment itself, have prevented it from supporting significant legal and policy reform to date. Nonetheless, the spirit of the Amendment should lead to more expansive interpretations.

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<sup>416</sup> See *Jones*, 392 U.S. at 431.

<sup>417</sup> See Matthew Wills, *When Native Americans were Slaves*, JSTOR DAILY (Feb. 14, 2018), <https://daily.jstor.org/when-native-americans-were-slaves>, archived at <https://perma.cc/PP9E-37LN>.

<sup>418</sup> U.S. CONST. amend. XIII, § 2. *Compare Civil Rights Cases*, 109 U.S. at 26 (refusing to validate legislation under the Thirteenth Amendment because it did not directly relate to slavery and involuntary servitude) with *Jones v. Alfred Mayer Co.*, 392 U.S. at 439 (upholding a statute under the Thirteenth Amendment’s enforcement section because racial barriers to property constituted “badges and incidents of slavery”).

<sup>419</sup> See, e.g., *Atta v. Sun Co.*, 596 F. Supp. 103 (E.D. Pa. 1984) (concluding that the Thirteenth Amendment does not create an independent right of action to challenge racially based employment discrimination); *Alma Soc. Inc. v. Mellon*, 601 F.2d 1225 (2d Cir. 1979) (holding that the Thirteenth Amendment did not invalidate a statute because there was no associated act of Congress).

<sup>420</sup> Section 1982 provides: “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.” 42 U.S.C. § 1982 (2011).

<sup>421</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968)

<sup>422</sup> 403 U.S. 217 (1971).

<sup>423</sup> 403 U.S. at 226–27.

<sup>424</sup> See *id.* at 218–20.

<sup>425</sup> See *United States v. Stanley*, 109 U.S. 3, 20–21 (1883).

<sup>426</sup> See *Palmer v. Thompson*, 403 U.S. 217, 226–27 (1971).

### *Scholars' Arguments*

Scholars, in contrast with the Court, have drawn on the language in the *Civil Rights Cases*<sup>427</sup> and *Jones* to envision broad applications of the Thirteenth Amendment to issues including hate speech and hate symbols,<sup>428</sup> abortion,<sup>429</sup> racial profiling,<sup>430</sup> payday lending,<sup>431</sup> and shackling incarcerated pregnant mothers.<sup>432</sup> In doing so, they have made legally and normatively persuasive arguments, but these analyses have had limited, if any, impact on Thirteenth Amendment jurisprudence. In the words of Jamal Greene, the Court's resistance to using the Thirteenth Amendment as a vehicle for progressive change renders it "fool's gold."<sup>433</sup> But the Thirteenth Amendment still has a strong social and rhetorical purpose. Despite the Court's recalcitrance, Thirteenth Amendment arguments have catalyzed activists and lobbyists, providing a theoretical framework and grounding for social movements rooted in its principles.<sup>434</sup>

The Court should deem USDA nutrition programs unconstitutional vestiges of slavery. A vestige or incident of slavery is a discriminatory social condition that began in slavery and remains in place today. The *Jones* Court's recognition of residential segregation as an incident of slavery is instructive.

<sup>427</sup> See Tsesis, *Furthering American Freedom*, *supra* note 398, at 311 (arguing that the Thirteenth Amendment's prohibition of private and public acts resulting in arbitrary deprivations of freedom makes it an "essential complement for civil rights initiatives, even in circumstances not involving economic harms").

<sup>428</sup> See, e.g., Akhil Reed Amar, Comment, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 155–160 (1992); Petal Nevella Modeste, *Race Hate Speech: The Pervasive Badge of Slavery that Mocks the Thirteenth Amendment*, 44 HOW. L.J. 311, 312 (2001); Alexander Tsesis, *Regulating Intimidating Speech*, 41 HARV. J. LEG. 389, 401–03 (2004); Alexander Tsesis, *The Problem of Confederate Symbols: A Thirteenth Amendment Approach*, 75 TEMP. L. REV. 539, 610–12 (2002).

<sup>429</sup> See Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 N.W. U.L. REV. 480, 483–84 (1990).

<sup>430</sup> See William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17, 19–20 (2004).

<sup>431</sup> See Zoë Elizabeth Lees, Note, *Payday Peonage: Thirteenth Amendment Implications in Payday Lending*, 15 SCHOLAR 63, 64 (2012).

<sup>432</sup> See Ocen, *supra* note 400, at 1308–10.

<sup>433</sup> Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733, 1738 (2012).

<sup>434</sup> See *id.* at 1735–37; Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 408 (1993) (asserting that the Thirteenth Amendment provides more fodder for battling complicated issues such as child abuse, hate speech, and minimal entitlements than due process or equal protection); see also Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1647–48 (2001) (providing a fascinating account of how the Department of Justice Civil Rights Section revived the Thirteenth Amendment to expand the definition of civil rights during the 1940s).



On plantations, Black people lived separately from White people. This segregation signaled White peoples' belief in their superiority and their desire to maintain social distinctions between the races.<sup>435</sup> Since slavery, many laws, policies, and individuals have sought to perpetuate residential segregation, based on a persistent belief in White people's elevated social status.<sup>436</sup>

Similarly, during slavery, White people sought to maintain their privileged status by controlling food. The food that slave owners designated for enslaved workers was inferior, consisting mainly of table scraps.<sup>437</sup> Food rationing led to significant health disparities between the two populations, considerably shortening the lifespan of the enslaved population.<sup>438</sup> These health and life expectancy disparities have endured throughout United States history, despite advances in many other areas of social equality.<sup>439</sup> Government policies, including the National School Lunch Program, have perpetuated this food inequality, allotting inferior foods to a disproportionate number of Black, low-income students and other students of color. This program therefore represents a vestige of slavery. FDPIR, the most recent incarnation of inadequate and unhealthy food rationing for Indigenous Peoples, whom settlers both colonized and enslaved, also should not withstand Thirteenth Amendment scrutiny.<sup>440</sup>

### B. The Fourteenth Amendment

The Fourteenth Amendment is a rich site for food policy challenges designed to create more equitable health outcomes. Both the Equal Protection

<sup>435</sup> *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring).

<sup>436</sup> *See id.* (detailing various forms of segregation, including residential segregation).

<sup>437</sup> SAVITT, *supra* note 42, at 86 n.8; COVEY & EISNACH, *supra* note 14, at 14.

<sup>438</sup> *See, e.g.*, Kenneth Kiple and Virginia Kiple, *The African Connection: Slavery, Disease and Racism*, 41 *PHYLOGEN* 211, 221 (1980); *see also* Shani V. Davis, *Vitamin D Deficiency and Type 2 Diabetes in African Americans: The Common Denominators*, 24 *DIABETES SPECTRUM* 148, 148–53 (2011); Susan S. Harris, *Vitamin D and African Americans*, 136 *J. NUTRITION* 1126, 1126–29 (2006).

<sup>439</sup> *See* Noonan, Velasco-Mondragon & Wagner, *supra* note 285, at 1 (“The fact that the African American population is the least healthy ethnic group in the USA is not due to chance. The first African Americans were brought to the USA in chains as slaves. 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. Estimates of the death rate of slaves during the infamous ‘middle passage’ are wide ranging, from approximately nine to thirty-five percent. Slavery associated deaths were likely much higher.”).

<sup>440</sup> KENNETH FINEGOLD ET AL., *TRIBAL FOOD ASSISTANCE: A COMPARISON OF THE FOOD DISTRIBUTION PROGRAM ON INDIAN RESERVATIONS (FDPIR) AND THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP)* 3 (Nov. 2009); *see also* Monifa Bandele, *Seven Generations: A Food Justice Lesson from Native Americans*, *EBONY* (Feb. 26, 2014), <https://www.ebony.com/health/seven-generations-a-food-justice-lesson-from-native-americans-563/>, archived at <https://perma.cc/PSK5-8Q2V>.

and Due Process clauses promise fair treatment by the state. Read in their best light, they prohibit government action that has the effect of creating health disparities, particularly when the action harms children and infants. Modern Equal Protection jurisprudence, however, presents formidable obstacles to changing food policy that does not facially discriminate against specific groups.<sup>441</sup> The Court requires plaintiffs to provide proof of discriminatory purpose beyond empirical evidence.<sup>442</sup> Therefore, without a “smoking gun” admission of racial hatred, it is almost impossible to get past the initial phase of an Equal Protection challenge.

Currently, disparate impact, or discriminatory effect, is not enough to prove discrimination, except in the most extreme circumstances, where no other explanation for defendants’ action seems possible.<sup>443</sup> For example, the conversion of Tuskegee’s rectangular electoral district into a twenty-eight-sided figure that excluded 400 Black people from its borders and no White people was sufficient to prove discriminatory intent in *Gomillion v. Lightfoot* in 1960.<sup>444</sup> Similarly, the enforcement of a San Francisco ordinance against wooden laundries denying over 200 petitions for a waiver by Chinese laundry owners and only one from a White laundry owner demonstrated discriminatory intent in *Yick Wo v. Hopkins*.<sup>445</sup> However, aside from these two outlier cases, the Court has consistently declined to find discriminatory intent, even in the face of unquestionably methodologically sound data.

In perhaps the most discouraging of these decisions, *McCleskey v. Kemp*, the Court upheld the petitioner’s death sentence despite the existence of a study showing that, under the Georgia criminal justice system, a Black defendant convicted of killing a White victim was four times more likely to receive a death sentence than if the victim were Black.<sup>446</sup> Despite acknowledging the study’s validity, the Court found this data inadequate to prove that Georgia’s capital punishment system was discriminatory.<sup>447</sup> Instead, the Court has maintained that a plaintiff can advance an Equal Protection

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<sup>441</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 297–98 (1987); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

<sup>442</sup> *McCleskey*, 481 U.S. at 297.

<sup>443</sup> Civil Rights Act of 1968, Pub. L. No. 90-284, § 801–06, 82 Stat. 73 (1968); see, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977); *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

<sup>444</sup> *Gomillion*, 364 U.S. at 341.

<sup>445</sup> *Yick Wo*, 118 U.S. at 373–74.

<sup>446</sup> 481 U.S. at 286 (“[N]otwithstanding these efforts, murder defendants in Georgia with white victims are more than four times as likely to receive the death sentence as are defendants with black victims.”). This reflects Justice Brennan’s calculations—the number may be higher.

<sup>447</sup> *Id.* at 297.

claim only by providing concrete evidence that the law or policy is in place because of, not merely in spite of, its discriminatory effects.<sup>448</sup>

Congress has created a more realistic standard than the Court's for housing and employment discrimination cases. The fair housing and employment laws are more plaintiff-friendly than the Court's constitutional jurisprudence. They both allow evidence of disparate racial impact to demonstrate discriminatory intent.<sup>449</sup> Absent judicial recognition of the unequal protection inherent in USDA nutrition programs, Congress should enact a law against health discrimination that allows disparate impact to establish a plaintiff's case. If it does not, the courts should apply strict constitutional standards to Fourteenth Amendment Equal Protection claims grounded in health disparities.

The Fourteenth Amendment, although it stemmed directly from an intent to improve the lives of freed slaves,<sup>450</sup> now applies to all racialized groups.<sup>451</sup> Its protection therefore encompasses all students of color harmed by the National School Lunch Program and Indigenous Peoples negatively affected by FDPIR. The original purpose of the Fourteenth Amendment was to change the balance of power between the states and the federal government in a way that would provide protection for freed slaves from states' desire to return to the pre-emancipation social and economic status quo.<sup>452</sup> Although initially restricted to that narrow interpretation,<sup>453</sup> it has expanded to ensure broader protection for marginalized groups, first on the basis of race, then gender,<sup>454</sup> illegitimacy,<sup>455</sup> alienage,<sup>456</sup> and even, a class of one.<sup>457</sup>

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<sup>448</sup> *Id.* at 297–98; *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 278–80 (1979).

<sup>449</sup> Civil Rights Act of 1968, Pub. L. No. 90-284, § 801-802, 82 Stat. 73, 802 (1968). For cases where the Court has allowed disparate impact claims to move forward, *see, e.g.*, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2518–19 (2015); *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 990–91 (1988); *Connecticut v. Teal*, 457 U.S. 440, 448–49 (1982).

<sup>450</sup> *See, e.g.*, *Slaughter-House Cases*, 83 U.S. 36, 72 (1872).

<sup>451</sup> *See Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886); *Hernandez v. Texas*, 347 U.S. 475, 478 (1954). It also protects against gender discrimination, *see Feeney*, 442 U.S. at 278–80, and potentially class discrimination, *see O'Donnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018).

<sup>452</sup> *See Akhil Reed Amar, Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J. L. & PUB. POL'Y 443, 447–48 (1996) [hereinafter *Amar, Fourteenth Amendment*].

<sup>453</sup> *See Slaughter-House Cases*, 83 U.S. at 72.

<sup>454</sup> *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 532–34 (1996); *Craig v. Boren*, 429 U.S. 190, 204 (1976).

<sup>455</sup> *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 465 (1988); *Mills v. Habluetzel*, 465 U.S. 91, 92 (1982).

<sup>456</sup> *See, e.g., In re Griffiths*, 413 U.S. 717, 718 (1973); *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

<sup>457</sup> *See, e.g., Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Fourteenth Amendment jurisprudence dictates that when laws and policies create or reinforce inequalities along race or gender lines, they become suspect and deserving of heightened scrutiny.<sup>458</sup> When the nature of the discrimination harkens back to methods and conditions imposed during slavery, they should elicit even closer review, because of the Amendment's origins. Food-related health disparities arising from law or policy fall under this umbrella because they replicate the food inequality and health disparities that originated in slavery.

It is unlikely that any plaintiff could prove that the USDA and related regulatory bodies structure school lunchrooms intentionally to create a health gap between Black, Indigenous, and other students of color and White students. Similarly, the government no longer identifies food rations as a deliberate tool to oppress and control Indigenous Peoples. Nonetheless, the health disparities linked to these programs demonstrate that students of color and Indigenous people who get FDPIR receive less health protection of the law than White people do.<sup>459</sup> Health equality is foundational to all other forms of equality, which cannot be exercised or enjoyed in the face of sickness or death. The Court should therefore expand existing doctrine to accept statistics documenting racial health disparities as evidence of discrimination.

Absent this development, racial health disparities will likely continue unabated, leaving vulnerable communities with no means of holding the government accountable for laws and practices that have a disparate impact on them. Policy decisions, such as subsidizing agricultural commodities or disposing of the surpluses of those commodities through USDA nutrition programs, are not made in the context of one-on-one interactions. Therefore, no “smoking gun” evidence of how discrimination motivates or sustains these policies is likely to surface. These policies represent structural, systemic discrimination, as opposed to the harmful actions of a few “bad apples.” They target communities with little political voice or leverage. As such, they are exactly the unequal treatment that the framers intended the Fourteenth Amendment's Equal Protection Clause to prevent.<sup>460</sup>

It is also possible that challenges to the National School Lunch Program and FDPIR could mobilize Equal Protection on the grounds that the people affected most by government-sponsored food inequality are low-income. Although the Court rejected the idea of consistently applying heightened

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<sup>458</sup> See Robert Post & Reva Siegal, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 YALE L.J. 441, 464 (Dec. 2000).

<sup>459</sup> See Bethany Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 Cal. L. Rev. 1165, 1168 (2010) (discussing conflicts between equal protection and federal Indian law).

<sup>460</sup> See e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1886); Amar, *Fourteenth Amendment*, *supra* note 452.

scrutiny to cases alleging discrimination on the basis of poverty,<sup>461</sup> some of its decisions suggest an openness to applying a higher standard in some circumstances. For example, the elimination of a poll tax under Equal Protection implies that laws cannot discriminate on the basis of wealth when it comes to fundamental rights.<sup>462</sup> Similarly, the Fifth Circuit held that detaining indigent defendants for failure to pay bail violates Equal Protection.<sup>463</sup>

As argued above, the need to eliminate the health inequities linked to USDA nutrition programs mandates a new approach to Equal Protection, allowing proof of discrimination based on disparate impact.<sup>464</sup> There is an abundance of data to demonstrate an unconstitutional link between these programs and racial health disparities. And if courts or statutes allowed statistical evidence of these disparities to serve as a basis for changing the programs to promote instead of endanger health, this change would benefit all program participants. This is therefore an issue where interest convergence should create alliances across racial lines. Additionally, advocacy for Indigenous food sovereignty is the responsibility of every person who lives on the land that belongs to Indigenous Peoples.

### *C. The Fifteenth Amendment*

The Fifteenth Amendment provides that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”<sup>465</sup> Section 2 gives Congress the right to enforce this guarantee.<sup>466</sup> The Court has declared this right “preservative of other basic civil and political rights”<sup>467</sup> and “preservative of all rights.”<sup>468</sup> Although the text of the Fifteenth Amendment refers to voting rights, it symbolizes a right to full and equal participation in

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<sup>461</sup> See *Harris v. McRae*, 448 U.S. 297, 323 (1980).

<sup>462</sup> *Harper v. Va. Bd. Of Elections*, 383 U.S. 663, 668 (1966).

<sup>463</sup> *O'Donnell v. Harris Cty.*, 892 F.3d 147, 157 (5th Cir. 2018).

<sup>464</sup> Another approach to eliminating health disparities is through the Due Process Clause. Due process protects intimate acts relating to bodily autonomy, such as contraception and abortion, and a parent's right to make important decisions regarding their child. These rights have a close relationship to health. Health also underlies the ability to exercise fundamental rights guaranteed by the First Amendment, such as voting and free speech. These principles can provide a rallying cry for advocates. Publicly putting forth the ideas that food and health equity are constitutional principles can be as powerful as litigation that makes these arguments behind legal documents and closed courtroom doors.

<sup>465</sup> U.S. CONST. amend. XV, § 1.

<sup>466</sup> U.S. CONST. amend. XV, § 2.

<sup>467</sup> *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

<sup>468</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

civic life.<sup>469</sup> Civic and political engagement are impossible when food-related illness and preventable, premature deaths restrict peoples' opportunities to participate in the full spectrum of social and political life.

Courts have interpreted the Fifteenth Amendment narrowly to apply (almost) exclusively to voting rights.<sup>470</sup> However, constitutional law scholars, including Akhil Reed Amar<sup>471</sup> and Vikram David Amar,<sup>472</sup> argue that the Fifteenth Amendment's protection of the right to vote extends to other, related aspects of political participation. These include service on juries and in the military.<sup>473</sup> Akhil Reed Amar asserts that, whereas the Fourteenth Amendment safeguards citizenship rights, the Fifteenth Amendment preserves political rights.<sup>474</sup> But this line is not as bright as his distinction suggests. A person debilitated by illness or overwhelmed by caretaking responsibilities cannot enjoy full citizenship or participate in the political system. Because government programs that create food-related health disparities disproportionately affect some groups' ability to participate in political and civic life, this type of food inequality represents a violation of the Fifteenth Amendment.

Barriers to participation in civic and political life created by poor health can threaten democracy in more insidious ways than laws designed to decrease access to voting by, inter alia, restricting absentee voting,<sup>475</sup> early voting,<sup>476</sup> or requiring government-issued photo identification.<sup>477</sup> People who are sick or

<sup>469</sup> See generally Akhil Reed Amar, *The Fifteenth Amendment and "Political Rights,"* 17 CARDOZO L. REV. 2225 (1996) [hereinafter Amar, *Political Rights*].

<sup>470</sup> Victoria Freeman, *15th Amendment*, VENTURA COUNTY REP. (Aug. 2016), <https://www.vcreporter.com/2016/08/the-amendment-project-the-14th-and-15th-amendments/>, archived at <https://perma.cc/9BEN-NFKJ>; see G. Edward White, *Article: The Origins of Civil Rights in America*, 64 CASE WESTERN RES. L. REV. 755, 785–87 (2014); cf. Eric Foner, *The Supreme Court and the History of Reconstruction - And Vice-Versa*, 112 COLUM. L. REV. 1585, 1588, 1594–96 (2012).

<sup>471</sup> See generally Amar, *Political Rights*, *supra* note 469; Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J.L. & PUB. POL'Y 465 (1994).

<sup>472</sup> See generally Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1994) [hereinafter Amar, *Jury Service*].

<sup>473</sup> See Amar, *Political Rights*, *supra* note 469, at 2225; Amar, *Jury Service*, *supra* note 472, at 241.

<sup>474</sup> Amar, *Political Rights*, *supra* note 469, at 2227.

<sup>475</sup> See, e.g., *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 923–24 (W.D. Wis. 2016).

<sup>476</sup> See, e.g., *League of Women Voters of Fla. v. Detzner*, 314 F. Supp. 3d 1205, 1214 (N.D. Fla. 2018).

<sup>477</sup> *McCrary*, 831 F.3d at 226–27; see also Manny Fernandez, *Texas' Voter ID Law Does Not Discriminate and Can Stand, Appeals Panel Rules*, N.Y. TIMES (Apr. 27, 2018), <https://www.nytimes.com/2018/04/27/us/texas-voter-id.html>, archived at <https://perma.cc/EQ54-L6WE>; Dan Hopkins, *What We Know About Voter ID Laws*, FIVETHIRTYEIGHT (Aug. 21, 2018, 7:07 AM), <https://fivethirtyeight.com/features/what->

caring for others often lack time and money to register to vote or appear at the polls. Similarly, political participation in the form of holding office or performing jury or military service requires good health and the luxury of time. Laws and policies that create racial health disparities deprive many citizens of the practical ability to exercise all their political rights “on account of race.”<sup>478</sup> The Fifteenth Amendment should provide a remedy for this deprivation.

Broadly, the Fifteenth Amendment protects a spectrum of rights related to political participation and full citizenship, represented by voting. In conjunction with the other Reconstruction Amendments, its authors hoped to protect freed slaves from the worst consequences of slavery.<sup>479</sup> Food inequality is one of those consequences.

Dramatic racial disparities in mortality rates related to poor nutrition persist.<sup>480</sup> Mortality from heart disease is higher in areas of the South that had the highest rates of slavery than in other parts of the country.<sup>481</sup> Black people between the ages of eighteen and forty-nine are twice as likely to die from heart disease as White people.<sup>482</sup> Black people also have higher death rates from diabetes, and the highest death rates from all forms of cancer.<sup>483</sup> High blood pressure, or hypertension, is more prevalent among Black people,<sup>484</sup> as are

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we-know-about-voter-id-laws/, *archived at* <https://perma.cc/4J8J-ETAA>; *Voter Identification Requirements*, NAT'L CONF. OF STATE LEGIS. (May 15, 2018), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>, *archived at* <https://perma.cc/T4VA-CYC2>.

<sup>478</sup> U.S. CONST. AMEND. XV.

<sup>479</sup> *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm>, *archived at* <https://perma.cc/WA93-9H4V>.

<sup>480</sup> *See, e.g.*, Nancy Krieger et al., *Jim Crow and Premature Mortality Among the US Black and White Population, 1960–2009*, 25 *EPIDEMIOLOGY* 494, 502 (2014).

<sup>481</sup> Michael R. Kramer et al., *The Legacy of Slavery and Contemporary Declines in Heart Disease Mortality in the U.S. South*, 3 *POPULATION HEALTH* 609, 612–13 (2017); Barry-Jester, *supra* note 12.

<sup>482</sup> *Vitalsigns*, *supra* note 13, at 447. “46 percent of African Americans older than 19 years of age suffer from cardiovascular disease. According to the CDC, leading risk factors for heart disease and stroke currently are high blood pressure, high cholesterol, diabetes, current smoking, physical inactivity, and obesity. Individuals with two or more of these factors are at a higher risk for stroke and heart disease. In 2003, the prevalence of two or more of these factors was highest in African Americans, and heart disease among African Americans has been the first or second cause of Years of Potential Life Lost in the USA ever since these data have been kept.” Noonan, Velasco-Mondragon & Wagner, *supra* note 285, at 8.

<sup>483</sup> Ctrs. for Disease Control & Prevention, *Vital Signs: Racial Disparities in Age-Specific Mortality Among Blacks or African Americans – United States, 1999–2015*, 66 *MORBIDITY & MORTALITY WKLY. REP.* 444, 444 (2017).

<sup>484</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *HYPERTENSION AMONG ADULTS AGED 20 AND OVER, BY SELECTED CHARACTERISTICS: UNITED STATES, SELECTED YEARS 1988–1994 THROUGH 2013–2016* (2017),

diabetes<sup>485</sup> and obesity.<sup>486</sup> Compared with White people, Indigenous people are more overweight and obese (76.7 percent versus 63.2 percent), and suffer more from diabetes (21.4 percent versus 8.0 percent) and high blood pressure (32.9 percent versus 27.6 percent), and are more likely to report fair or poor health status (28.7 percent versus 16.3 percent), and physical inactivity (31.1 percent versus 23.0 percent).<sup>487</sup>

Full participation in political life is not possible when so many community members suffer early deaths and debilitating diseases. Food inequality has a significant but difficult to quantify effect on Black and Indigenous Peoples' ability to exercise their citizenship rights. Advocates for food equity should not ignore the potential to make persuasive Fifteenth Amendment arguments against food law and policy that reduces political participation of specific, identifiable racial groups, as the USDA nutrition programs do.

All three of the Reconstruction Amendments arose from a desire to right the wrongs of slavery and create a racially equal society. Their intentionally vague language allows for flexible application to the varied forms of discrimination that perpetuate the deep political and social divide created by slavery and other historical sources of inequality, such as colonization. Nutritional deprivation was one of the primary forms of entrenching and maintaining inequality during slavery and colonization. It continues to play this role today.

## CONCLUSION

The food and agricultural industries have consistently demonstrated their ability to fashion laws and regulations in their favor<sup>488</sup> and their willingness to

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<https://www.cdc.gov/nchs/data/hus/2017/054.pdf>, archived at <https://perma.cc/7445-SCY3>.

<sup>485</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, RACIAL AND ETHNIC APPROACHES TO COMMUNITY HEALTH (REACH): AT A GLANCE 2 (2016), <https://www.cdc.gov/chronicdisease/resources/publications/aag/pdf/2016/reach-aag.pdf>, archived at <https://perma.cc/PES8-LRUB> (“The rate of diagnosed diabetes is 77 percent higher among non-Hispanic blacks, 66 percent higher among Hispanics, and 18 percent higher among Asians than among non-Hispanic whites.”).

<sup>486</sup> Samantha Artiga et al., *Key Facts on Health and Health Care by Race and Ethnicity*, KAISER FAMILY FOUNDATION (June 7, 2016), <https://www.kff.org/report-section/key-facts-on-health-and-health-care-by-race-and-ethnicity-section-3-health-status-and-outcomes/>, archived at <https://perma.cc/E8SB-CTHZ>.

<sup>487</sup> Monique Adakai et al., *Health Disparities Among American Indians/Alaska Natives – Arizona, 2017*, CTRS. FOR DISEASE CONTROL & PREVENTION, 1314 (Nov. 30, 2018), <https://www.cdc.gov/mmwr/volumes/67/wr/mm6747a4.htm>, archived at <https://perma.cc/9NHZ-Y6QT>.

<sup>488</sup> See NESTLE, *supra* note 175, at 108–09; Freeman, *supra* note 5, at 1265; see generally Schaffer, *supra* note 307. Several of these groups are or have been members of ALEC, the



push back against even relatively benign reforms, such as nutrition labeling.<sup>489</sup> It is the courts' role to ensure that financial interests do not trample on constitutionally protected rights. The Reconstruction Amendments provide a grounding principle for the eradication of food inequality linked directly to government-corporate partnerships.

Food-related health disparities that arise from industries' influence over law and policy represent food oppression.<sup>490</sup> Food oppression is a harm that lends itself to solutions grounded in the Reconstruction Amendments because of its direct link to the laws and practices of slavery and colonization. Scholars have commandeered the Thirteenth Amendment as a salve for a host of social problems, some in the realm of health and medical treatment.<sup>491</sup> Some arguments concern child welfare<sup>492</sup> and other manifestations of exploitation and oppression reminiscent of slavery.<sup>493</sup> Food inequality fits perfectly into this

conservative group that provides model laws for Republican lawmakers to propose and push through. Brad Hooker, *Corporations Represented on ALEC's Private Enterprise Board are Big Spenders in Washington*, CTR. RESPONSIVE POL. (Sept. 12, 2011), <https://www.opensecrets.org/news/2011/09/alec-corporations-are-big-spenders/>, archived at <https://perma.cc/S5A9-PJ5W>.

<sup>489</sup> Andrea Freeman, *Transparency for Food Consumers: Nutrition Labeling and Food Oppression*, 41 AM. J.L. & MED. 315, 327 (2015).

<sup>490</sup> See generally Freeman, *supra* note 5, at 1253–54 (“Food oppression is institutional, systemic, food-related action or policy that physically debilitates a socially subordinated group . . . In the long term, food oppression diminishes already vulnerable populations in numbers and power,” and “[f]ood oppression arises from institutionalized, food-related policies and practices that undermine the physical strength and survival of socially marginalized groups.”).

<sup>491</sup> See, e.g., 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, 403 (2000) (noting that infringement of women's reproductive rights is both a remnant of the institution of slavery and a modern manifestation of slavery); Koppelman, *supra* note 429, 483–84; 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, 167–68 (2003); Larry J. Pittman, *Physician-Assisted Suicide in the Dark Ward: The Intersection of the Thirteenth Amendment and Health Care Treatments Having Disproportionate Impacts on Disfavored Groups*, 28 SETON HALL L. REV. 774, 885 (1998).

<sup>492</sup> See Akhil Reed Amar & Daniel Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1363–65 (1992); Donald C. Hancock, Comment, *The Thirteenth Amendment and the Juvenile Justice System*, 83 J. CRIM. L. & CRIMINOLOGY 614, 642–43 (1992) (arguing that the Thirteenth Amendment prohibits the state from compelling juvenile delinquents to perform involuntary labor); Kurt Mundorff, Note, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL'Y & ETHICS J. 131, 138 (2003).

<sup>493</sup> Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11, 41 (2001) (contending that the Thirteenth Amendment protects against sexual exploitation as both a badge of slavery and as an instance of involuntary servitude); Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1143 (1998)

category of injustices. The control that the USDA exercises over many Black students' diets echoes back to the legally dictated and enforced control that slave owners had over plantation diets. Similarly, the USDA's administration of FDPIR is the most recent link in a chain of colonization that began with intentional deprivation of traditional food sources and foodways.

The USDA National School Lunch Program and FDPIR represent vestiges of slavery and colonization that law and policy must dismantle. The first step in achieving this should be eliminating the USDA's conflicting

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("[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."); Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 792 (1993) (arguing that failure to enforce laws against pimping violate the Thirteenth Amendment); Vanessa B.M. Vergara, Comment, *Abusive Mail-Order Bride Marriage and the Thirteenth Amendment*, 94 NW. U.L. REV. 1547, 1548 (2000); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 208–09 (1992) (asserting that violence against women creates conditions of involuntary servitude in violation of the Thirteenth Amendment). For other creative arguments in favor of applying the Thirteenth Amendment to social and political problems, see Ryan S. Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 214 (2009) (contending that the private prison system imposes a form of involuntary servitude barred by the Thirteenth Amendment); Marco Masoni, *The Green Badge of Slavery*, 2 GEO. J. ON FIGHTING POVERTY 97, 98 (1994) (claiming that the Thirteenth Amendment prohibits environmental degradation of Black neighborhoods); Esther Slater McDonald, Note, *Patenting Human Life and the Rebirth of the Thirteenth Amendment*, 78 NOTRE DAME L. REV. 1359, 1383–84 (2002) (asserting that patenting embryonic stem cells constitutes ownership of a "human" prohibited under the Thirteenth Amendment); Douglas P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599, 682 (1992) (arguing that conditions of poverty, including "joblessness, crime, welfare dependency, drug addiction, inadequate health care, and broken families" recreate a caste society in violation of the Civil War Amendments); David P. Tedhams, *The Reincarnation of "Jim Crow": A Thirteenth Amendment Analysis of Colorado's Amendment 2*, 4 TEMP. POL. & CIV. RTS. L. REV. 133, 134 (1994) (contending that a Colorado referendum prohibiting the state from offering protection from discrimination on the basis of sexual orientation was a badge or incident of slavery because any legislation depriving "an individual, or class, of their civil rights . . . devalue[s] the subject class by relegating it to a subordinate status, [and therefore] violate[s] the mandate of equality implicit in the Thirteenth Amendment"); Sean Charles Vinck, Note, *Does the Thirteenth Amendment Provide a Jurisdictional Basis for a Federal Ban on Cloning?*, 30 J. LEGIS. 183, 183 (2003) (proposing that the Thirteenth Amendment is a source of constitutional authority for a ban on human cloning); Victor Williams & Alison M. Macdonald, *Rethinking Article II, Section I and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 230 (1994) (observing that current constitutional structures governing presidential elections were adopted as "constitutional appeasements to southern slaveholding interests" and, as such, "must be philosophically and politically scrutinized as structural 'badges and incidents' of slavery").

mandates of agricultural support and nutritional oversight. The USDA should be free to create policy independently, without the input or influence of the food industry. Next, the USDA should make radical reforms to its dietary guidelines and nutrition programs based on medical research and cultural consciousness, with the objective of reducing health disparities and ensuring food sovereignty.

FDPIR cannot just be discontinued. The program is essential to alleviate food insecurity. In its current incarnation, it does only that, and not always. As first steps toward a better program, the USDA should hand control over to tribal leaders,<sup>494</sup> relax requirements for nationwide distribution, and provide as much funding as necessary to meet tribes' nutritional needs. History and constitutional principles demand at least this much.

A social movement that recognizes unhealthy food as the next tobacco may be necessary.<sup>495</sup> It is surprising that food justice has been largely absent, or separate, from the national racial justice movement.<sup>496</sup> As Black Lives Matter emerged in the wake of the court's refusal to hold George Zimmerman accountable for the killing of unarmed Black teenager Trayvon Martin and activists from around the country joined the protests against the Dakota Access Pipeline threatening clean water and tribal lands, a national food justice movement might arise in response to the recognition that too many Black, Indigenous, and other people of color in the United States have suffered preventable "slow deaths."<sup>497</sup> The Reconstruction Amendments' constitutional mandate against repeating the harms and suffering of slavery and colonization provides a strong basis for that awakening.

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<sup>494</sup> See Janie Simms Hipp, Colby D. Duren & Erin Parker, *Building Indian Country's Future Through Food, Agriculture, Infrastructure, and Economic Development in the 2018 Farm Bill*, 14 J. Food L. & Pol'y 24, 26 (2018).

<sup>495</sup> The attorneys who succeeded in litigation against the tobacco industry have been working on strategies against the food industry. See Katie Moisse, *Lawyer Who Beat Big Tobacco Targets Food Industry*, ABC NEWS (Aug. 21, 2012), <http://abcnews.go.com/Health/Wellness/lawyer-beat-big-tobacco-targets-food-industry/story?id=17040866>, archived at <https://perma.cc/3FRY-J2KT>; Stephanie Strom, *Lawyers from Suits Against Big Tobacco Target Food Makers*, N.Y. TIMES (Aug. 18, 2012), <http://www.nytimes.com/2012/08/19/business/lawyers-of-big-tobacco-lawsuits-take-aim-at-food-industry.html>, archived at <https://perma.cc/9H6L-Z782>.

<sup>496</sup> For some discussion on this, see JENNIFER JENSEN WALLACH, *HOW TO EAT TO LIVE: BLACK NATIONALISM AND THE POST-1964 CULINARY TURN* (2014), <https://southernstudies.olemiss.edu/study-the-south/how-to-eat-to-live/>, archived at <https://perma.cc/EV9G-VPRZ>; Jazz Keyes, *Slave Food: The Impact of Unhealthy Eating Habits on the Black Community*, EBONY (Mar. 29, 2017), <http://www.ebony.com/wellness-empowerment/health/black-health-food-diet>, archived at, <https://perma.cc/B4YH-6FY3>.

<sup>497</sup> Berlant, *supra* note 7, at 754.