

## Protecting Disfavored Minorities: Toward Institutional Realism

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### ABSTRACT

Constitutional theorists in the United States once believed courts could protect politically disfavored minorities from the excesses of democracy. Eventually, many lost faith in constitutional reform through litigation, as they saw courts fail to effectively implement rights protections. Given the judiciary's institutional limitations, it appeared the only reliable way to secure constitutional rights was through democratic politics itself. "Constitutionalism outside the courts" promises to endow rights with the legitimacy and implementation capacity of the political branches, catalyzed by the energy of social movements and broad public participation. The risk, however, in turning to constitutionalism outside the courts is that we may come to idealize the political branches—just as previous generations once romanticized the courts. Successes like the civil rights movement and the landmark statutes it produced tend to loom large in our collective imagination, while periods when Congress and the executive fail to vindicate minority rights appear inevitable, an inherent part of majoritarian democracy.

This Article argues that to be realists about constitutional rights, we must scrutinize the constitutional failures of all three branches. Doing so yields a sharply different perspective. Congress and the executive branch frequently fall short in implementing constitutional principles, for reasons that go beyond lack of majority support. The basic institutional structure of American government impedes constitutional reform in all three branches—even when a national majority favors it. Separated powers, federalism, and the representation of distinct majorities in each branch of government all operate to preserve the status quo, providing determined opponents multiple opportunities to block, undermine, and undo change. The Article illustrates this pattern using a historical case study of African American farmers' long-running, largely unavailing claims for equal protection.

The implications are sobering, but illuminating, for those who care about protecting disfavored minorities. Institutional realism suggests that such groups often must win enduring supermajority support in order to obtain, implement, and preserve rights protections at the national level. The inertia-favoring design of American government is often claimed to protect liberty, but the obvious question is: Does our democracy really benefit from a constitutional structure that simultaneously stifles majority will and insulates the status quo?

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## INTRODUCTION

In a constitutional democracy, who protects the rights of politically disfavored minorities? Twentieth-century constitutional scholars thought they had solved the dilemma: Courts could do it. Politically insulated judges were well positioned to shield unpopular groups from the excesses of majoritarian politics.<sup>1</sup> That view of courts as “perfecters of pluralist democracy” fueled the Supreme Court’s civil rights revolution under Chief Justice Earl Warren.<sup>2</sup> But its idealism did not age well. The Court grew more conservative.<sup>3</sup> Scholars critiqued the Warren Court’s rulings, arguing that courts were severely constrained in their ability to oversee successful social reforms and protect minorities.<sup>4</sup>

1. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting a theory of judicial review); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102–04, 135–79 (1980) (emphasizing federal judges’ insulated position and expertise); see also Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1297 (1982) (“[A] discrete and insular minority cannot expect majoritarian politics to protect its members as it protects others.”). Building on the *Carolene Products* notion of “discrete and insular minorities,” I use “politically disfavored minorities” here to mean groups that are both politically marginalized and socially subordinated. Such groups, by definition, have not achieved rights protections through normal political processes in the past, but seek to obtain them going forward—whether through litigation, political organizing, or both.
2. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 741 (1985) (describing courts’ proposed role in safeguarding democratic processes); see also William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 505 (2001) (“[This] philosophy culminated in a series of civil rights precedents that over time have brought the U.S. Supreme Court worldwide acclaim and admiration . . . .”); Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 5–9 (1993) (describing the U.S. Supreme Court’s “revolution” under Chief Justice Warren).
3. See Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1301 fig.5 (2005) (showing a rise in the median justice’s conservatism since the 1960s); see also Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1825–74 (2012) (describing equal protection law’s shift to a bifurcated standard that shielded discriminatory government acts while invalidating remedial ones); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755–76 (2011) (describing several decades of the Court’s constriction of equality jurisprudence).
4. See, e.g., ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 98–99 (1970) (suggesting that the judicial process is unsuited to address social policy); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 422 (2d ed. 2008) (arguing, in a book originally published in 1991, that courts’ rulings rarely triggered “significant social reform”); ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 4–10 (2003) (critiquing federal courts’ institutional reform attempts as undemocratic and ineffective); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978) (arguing that adjudication is unsuitable for complex, “polycentric” problems).

Amidst profound doubts regarding courts' ability to serve as "countermajoritarian heroes,"<sup>5</sup> many have turned to the political branches, embracing elected actors' pursuit of "constitutionalism outside the courts."<sup>6</sup> Rather than arguing that officials will implement constitutional principles of their own accord, these scholars emphasize the importance of broad social movements in transforming the majority will to favor protections for formerly subordinated groups.<sup>7</sup> Such democratic transformations may often be a necessary precursor to success in the courts; sometimes they are sufficient to drive change through ordinary legislative and executive action even without judicial intervention.

Constitutionalism outside the courts holds the promise of effectiveness, insofar as it draws on the legitimacy and implementation powers of the elected

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5. See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 2 (1996) (describing the prior view of courts). For a recent example of a critical view, see ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 9–10 (2014) (arguing that the Court has failed in its "primary" task of "enforc[ing] the Constitution against the will of the majority"). For a more positive assessment of the Court's alignment with majority will, see BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 15–16, 381–85 (2009) (arguing that the Court does not simply reflect popular opinion, but forces the public to deliberate over fundamental norms until deeper accord is reached).
  6. I use the broad phrase "constitutionalism outside the courts" to reference theories describing constitutional initiatives undertaken through representative institutions or social movements. Representative works include: WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) [hereinafter Post & Siegel, *Legislative Constitutionalism*]; Robert C. Post & Reva B. Siegel, *Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) [hereinafter Post & Siegel, *Protecting*]; Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) [hereinafter Post & Siegel, *Roe Rage*]. The term "constitutionalism" itself has no settled meaning—in this article, I use it to mean the broad set of practices that are involved as officials and ordinary individuals invoke, make claims upon, contest, and implement the norms embodied in the U.S. Constitution.
  7. See, e.g., KRAMER, *supra* note 6, at 8 (suggesting that the American tradition of popular constitutionalism rests "[f]inal interpretive authority . . . with 'the people themselves,' binding both courts and representative institutions"); TUSHNET, *supra* note 6, at 186 ("Populist constitutional law returns constitutional law to the people, acting through politics."); Post & Siegel, *Roe Rage*, *supra* note 6, at 374 (describing "traditions of popular engagement that authorize citizens to make claims about the Constitution's meaning"); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and the Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323 (2006) ("Social movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding.").

branches, and the sheer force of necessity, insofar as public support is an indispensable underpinning for minority rights.<sup>8</sup> And in a time when successful rights movements appear to be relatively common, it seems natural to view constitutionalism outside the courts as a politically invigorating path to change. To the extent that such change is difficult to win, some might view that as the cost of democracy.

But this newer perspective risks idealizing the political process, just as the old view once romanticized the judicial process. The political branches' finest moments, like the passage of landmark civil rights statutes in the 1960s, tend to dominate our collective imagination.<sup>9</sup> Yet our representative institutions often fail to protect disfavored minorities, even in the face of strenuous demands for reform.

This Article argues that studying the political branches' failures to protect minorities is critical to a realistic view of constitutionalism. It is natural to assume that majority opinion is the primary barrier preventing political actors from implementing constitutional principles.<sup>10</sup> But that assumption may be inaccurate, and its sheer generality inhibits efforts to identify specific barriers to minority rights protections. If vulnerable groups must rely on the political process, we

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8. See, e.g., Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281, 313 (2002) ("[T]here is no such thing as a true safe haven for any set of political values. . . . fundamental questions of justice and rights must be fought in the out in the real world amid real institutions on a day to day basis.").
  9. E.g., ROSENBERG, *supra* note 4, at 421 (attributing progress toward racial integration to landmark civil rights statutes and executive action in the 1960s); Griffin, *supra* note 8, at 284 ("Congress has a long and impressive record, now extending over nearly forty years, in protecting constitutional and legal rights."); Post & Siegel, *Protecting*, *supra* note 6, at 44 (emphasizing "the myriad ways in which Congress itself has in the past vindicated constitutional values"); Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 949 (2005) ("[T]he 1964 Civil Rights Act is just one example of the many measures Congress has enacted to protect minority rights."). Of course, given the Court's recent jurisprudence limiting Congress's independent power to interpret Fourteenth Amendment guarantees, it has been logical for scholars to respond by emphasizing the long history of Congressional rights protections. See *infra* note 349 (describing the Court's cases striking down legislative rights protections on the ground that they exceeded Congressional powers under the Fourteenth Amendment). It may also be more difficult to study failures, since their outcomes often consist of an absence of action; other fields have foregrounded movements' political successes rather than failures for that reason. See Regina Werum & Bill Winders, *Who's "In" and Who's "Out": State Fragmentation and the Struggle Over Gay Rights, 1974–1999*, 48 SOC. PROBS. 386, 393–94 (2001) (noting political sociologists' tendency to study successful social movements and the challenges of collecting data on failed reform attempts).
  10. Cf. Griffin, *supra* note 8, at 299 ("[T]here is no guarantee that legislative majorities will always choose the interest of everyone over the interest of a large majority of voters. . . . [It] is not . . . unlikely that laws will be passed that violate the rights of individual citizens."). Some scholars reserve a backstop role for courts in protecting individual rights due to the threat from majorities. See, e.g., *id.*; Post & Siegel, *Protecting*, *supra* note 6, at 20–25.

should seek greater understanding of how often they are likely to prevail there, and what success requires. Obtaining that knowledge requires that we scrutinize the institutional constraints on the political process as closely as we have those that limit the judicial process.

To demonstrate that approach's potential, this Article examines an extended case study of one minority group's constitutional claims, which stretched over more than a century and were directed to all three branches of the U.S. federal government. This history is an understudied, compelling, and ultimately tragic one. It is the history of African American farmers, who sought land of their own from Emancipation forward, seeing independent ownership as necessary to freedom itself. But that freedom was denied to them. The federal government—the fundamental force shaping U.S. farmers' fortunes over the last century through its sweeping programs and subsidies—never treated black farmers equitably under any constitutional paradigm. Profound racism and the racial caste system shaped federal farm policy from its origins. Once a success story of triumph over incredible post-slavery barriers, black farmers have largely disappeared as a result.<sup>11</sup>

Black farmers' recent past seems to exemplify the inability of the courts to redress profound constitutional harms. A decade and a half ago, minority farmers began winning a series of historic legal settlements via class action discrimination suits against the government.<sup>12</sup> The settlements were record-setting in their

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11. See *infra* Part III. Legal scholars have devoted relatively little attention to this history. But Angela Harris has recently published a beautiful essay that discusses black farmers' history in detail, situating it within the larger context of the racialization of American agriculture over several centuries. See Angela P. Harris, *[Re]Integrating Spaces: The Color of Farming*, 2 SAVANNAH L. REV. 157 (2015). Most other articles to date have emphasized recent discrimination claims against the U.S. Department of Agriculture (USDA) instead of the longer pattern of equality claims by African American farmers. See generally Stephen Carpenter, *The USDA Discrimination Cases: Pigford, In re Black Farmers, Keepseagle, Garcia, and Love*, 17 DRAKE J. AGRIC. L. 1 (2012); Seth L. Ellis, *Disestablishing "the Last Plantation": The Need for Accountability in the United States Department of Agriculture*, 4 J. FOOD L. & POL'Y 93 (2008); Kristol Bradley Ginapp, *Jim "USDA" Crow: Symptomatic Discrimination in Agriculture*, 8 DRAKE J. AGRIC. L. 237 (2003); Cassandra Jones Havard, *African-American Farmers and Fair Lending: Racializing Rural Economic Space*, 12 STAN. L. & POL'Y REV. 333 (2001). Others have discussed the recent litigation as reparations. See, e.g., ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS 124–32 (2004); Kindaka Jamal Sanders, *Re-Assembling Osiris: Rule 23, the Black Farmers Case, and Reparations*, 118 PENN ST. L. REV. 339, 362–67 (2013); Kaimipono David Wenger, *"Too Big to Remedy?" Rethinking Mass Restitution for Slavery and Jim Crow*, 44 LOY. L.A. L. REV. 177, 191–92 (2010).
  12. See *Pigford v. Glickman*, 185 F.R.D. 82, 95 (D.D.C. 1999) (approving a consent decree in a case brought by black farmers); see also Settlement Agreement, *Keepseagle v. Vilsack*, No. 1:99-CV-03119 (D.D.C. Nov. 1, 2010) (settling claims brought by Native American farmers). The federal government created a voluntary claims process for Latino and women farmers in 2012 after class certification was denied in both suits. JODY FEDER & TADLOCK COWAN, CONG. RESEARCH SERV., *GARCIA V. VILSACK: A POLICY AND LEGAL ANALYSIS OF A USDA DISCRIMINATION*

aggregate value, yet fundamentally disappointing: They offered only minimal cash payments to most farmers, while failing to provide forward-looking reforms or to otherwise address the consequences of long-term racial exclusion in farm programs.<sup>13</sup> Even those gains rested on concessions the farmers won from Congress and the executive branch through political organizing.<sup>14</sup> Thus, the farmers' recent experiences seem to demonstrate the judiciary's relative ineffectiveness and the benefits of directing activism toward the political branches.

If we turn to the longer history of African American farmers' struggles for equality, however, a gloomier picture of the political branches emerges. Over the last century, the farmers petitioned all three branches of government for equal treatment and all three failed to provide it. During the Civil War, the government began creating farm institutions; by the mid-twentieth century, federal agricultural policy had constructed a dense network of institutions, knowledge, and capital that made American farmers prosperous, technologically advanced, and politically powerful.<sup>15</sup> The government excluded nonwhites from this system, consigning them to unequal economic and political status over many generations.<sup>16</sup> Like other parts of the federal welfare state, American agricultural policy was truly "affirmative action for whites."<sup>17</sup>

African American farmers recognized this reality from the beginning and called on their government to provide them with equal protection of the

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CASE 6-7, 11 (2013); *Hispanic and Women Farmers and Ranchers Claims Resolution Process*, USDA, <https://www.farmerclaims.gov> [<http://perma.cc/T7GZ-692Q>] (last visited Mar. 8, 2016). A second settlement for African American farmers—created because the first settlement's notice process was inadequate, excluding thousands of claimants—was finalized in 2011. See Claims Resettlement Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (2010) (appropriating funds); *In re Black Farmers Discrimination Litigation*, 856 F. Supp. 2d 1, 26-27 (D.D.C. 2011) (approving the settlement).

13. See *infra* Part II.

14. As one farmer said, "We met with the President. We tied a mule to the White House gate. We lobbied Congress. And finally farmers are getting some relief for the way they were treated in the past." David Firestone, *Agric. Dept. to Settle Lawsuit by Black Farmers*, N.Y. TIMES (Jan. 5, 1999), <http://www.nytimes.com/1999/01/05/us/agriculture-dept-to-settle-lawsuit-by-black-farmers.html> [<http://perma.cc/V93F-P4M5>].

15. See *infra* Part III. On American farmers' current prosperity and the role of technological advances and farm policy in shaping that sector, see generally CAROLYN DIMITRI ET AL., U.S. DEP'T OF AGRIC., THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY (2005). Of course, not all American farmers enjoy prosperity. See Stephen Carpenter, *A New Higher Calling in Agricultural Law*, 18 DRAKE J. AGRIC. L. 13, 21 & n.27 (2013) (noting inequality among farmers).

16. See *infra* Part III.

17. See generally IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2005) (describing the systematic exclusion of African Americans from wealth-building social programs).

law—however the era defined it.<sup>18</sup> In the era of separate but equal, they called on Congress to provide equal funding to segregated black farm institutions.<sup>19</sup> In the integration era, they asked the executive branch to stop stigmatizing African Americans and include them in agricultural programs on an equitable basis.<sup>20</sup> In the most recent era of prohibitions on individual discrimination, they filed administrative complaints seeking compensation for intentional racial bias by farm officials.<sup>21</sup> Yet they were stymied at each stage.

Those defending the racial status quo drew on the many institutional openings that the American political system offers to obstruct reform. Southerners and their allies wielded power within Congress, the Democratic (and later the Republican) Party, the federal bureaucracy, and state and local governments to block, undermine, and reverse any potential gains black farmers might have won.<sup>22</sup> Their opposition—enabled and augmented by the fragmented structure of the American policymaking process—was too much for the farmers to overcome.

Black farmers' history represents a crucial, often-overlooked part of our country's legacy of racial violence and exclusion. American farm policy, and the racism woven into it for more than a century, exemplifies the many ways in which the American state historically created, reinforced, and reproduced a racial caste structure, by infusing economic, human, and social capital into white communities while denying it to communities of color.<sup>23</sup> The racism within farm policy itself played no small part in creating racial disparity—most black wealth was once held in agriculture, yet that black capital is now largely gone.<sup>24</sup>

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18. I treat these claims as claims for equal protection, even if those making them did not always characterize them as constitutional claims. Black farmers' claims addressed the core concern of the Equal Protection Clause, racial justice from state actors, and were couched primarily in the dominant equal protection paradigm of each period. See *infra* Part III. A narrower approach would fail to detect many popular claims for constitutional justice that occur in politics, given that participants in such debates often may not expressly invoke the Constitution even as they address core constitutional norms. Cf. discussion *supra* note 6 (addressing meaning of "constitutionalism").

19. See *infra* Parts III.A, III.B.

20. See *infra* Part III.C.

21. See *infra* Part III.D.

22. See *infra* Part III.

23. See *infra* note 311 and accompanying text.

24. See Robert S. Browne, *Wealth Distribution and Its Impact on Minorities*, 4 REV. BLACK POL. ECON. 27, 30–31 (1974) (noting that in the nineteenth century, farm land and related assets were "virtually the sum total of black assets" but by 1967, farm equity was only 8.2 percent of black wealth, while in 1966, whites held \$152.3 billion in farm equity, and blacks had just \$1.9 billion, or 1.2 percent of the total); P.C. Parks, *The Industrial and Economic Progress of Negro Farmers in Georgia*, PITT. COURIER, Mar. 30, 1912, at 8 (stating that three fourths of all property acquired by African Americans in Georgia following emancipation was invested in farmland, farm equipment, and farm household goods).



Black farmers' history is thus critically important in its own right; it is also unique, because it is steeped in the particulars of past and present racial subordination of African Americans within this nation.

Yet the farmers' fate also illuminates the more general ways in which the structure of U.S. institutions may entrench systems of inequality against reform.<sup>25</sup> Black farmers seeking equal treatment were not tasked simply with winning over democratic majorities—itsself a profoundly difficult objective for African Americans during most of the twentieth century. Rather, for the farmers to secure effective protections, they would have had to overcome the structural aspects of the American governmental design that thwart even majority will and preserve the status quo: separated powers, federalism, and overlapping systems of representation within each branch, among others.<sup>26</sup>

Those structural features of American government make it easy for opponents to block, resist, and undermine affirmative actions by any branch.<sup>27</sup> That is

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25. I term this history a "case study" but do not claim that it stands in for a large universe of similar cases—in fact, its unique aspects may be the very features that "alert us to relationships that have otherwise eluded attention, and so change the questions we ask in ensuing cases." Siegel, *supra* note 7, at 1330.

26. These features are often described as producing a fragmented government structure. Robert Kagan has contrasted the U.S. government's design with more hierarchical, centralized states: "The power to make and apply policy and law . . . is fragmented among many governmental bodies and courts, staffed by officials primarily responsible to local political constituencies." ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 41 (2001). Rooted in classical liberalism's view that "governmental power must be limited and restrained," this fragmentation of authority results from "constitutions, state as well as federal, that splintered governmental authority among separate 'branches,' establishing legal constraints on each. . . . Separation of powers, bicameral legislatures, and fragmented political parties created a large number of 'veto points' at which special interests could strive to block governmental action that displeased them." *Id.* at 41, 42. Scholars contrast this design with both parliamentary systems—which do not experience divided government, with governing power split between two major parties in separate branches—and systems that centralize administrative state functions rather than diffusing them across national, state, and local government, as federalism does. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 251–54 (1991) (summarizing the perspective of those who view parliamentary systems as superior to the American governmental design); THOMAS J. ANTON, *AMERICAN FEDERALISM AND PUBLIC POLICY: HOW THE SYSTEM WORKS* 3–10 (1989) (contrasting federalism with a unitary state); WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 281–83 (1885) (critiquing the American government's separation of powers).

27. The U.S. legislative process exemplifies these opportunities for powerful minorities to obstruct majority will: Bicameralism and presentment "requir[e] the agreement of multiple, mutually antagonistic institutions to make laws," while Congress's internal rules empower particular actors to block legislation through filibusters or bottling laws up in committee. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2328 (2006); see also JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 5, 16–23 (1980) (reviewing the antimajoritarian features of Congress); McNollgast, *Legislative Intent: The Use of Positive Political*

no accident: The American system of government was designed to allow powerful defenders of the status quo to prevail, even when the public favors another course. Ostensibly the Framers intended to preserve liberty, but the union's structure was also rooted in pragmatic compromises—most prominently the slaveholding states' drive to shelter slavery.<sup>28</sup> Such features have impeded disfavored groups from attaining equality protections, from the nation's founding through the present.<sup>29</sup> And in an age when government performs so many functions, inertia is an especially significant obstacle for constitutional rights.<sup>30</sup>

Given this structure, it is quite difficult for any branch to pursue successful constitutional reform on its own against concerted opposition. Disfavored minorities are, by definition, those most likely to face passionate opponents due to their stigmatized status; if those opponents exercise sufficient power within other parts of government, then the disfavored group will likely need backing from multiple branches to overcome their resistance and secure rights protections in a lasting and effective way throughout the nation. That in turn may require support by overlapping majorities or supermajorities among the public.<sup>31</sup> This high threshold for winning rights protections flows from the basic structures of American governance, and presents issues of structural design that go well beyond the often-cited tension between majoritarian democracy and minority

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*Theory in Statutory Interpretation*, 57 L. & CONTEMP. PROBS. 3, 16–19 (1994) (discussing the role of “pivotal players” and “veto gates” in providing opportunities to block statutes).

28. Among the most prominent provisions that impeded majority will and protected slavery were those designating the constitutional amendment process (“ensur[ing] that the slaveholding states would have a perpetual veto over any constitutional changes”) and the electoral college structure, in combination with the Three-Fifths Clause, which inflated Southern political power by numbering disfranchised black slaves among their population for purposes of representation. See Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 429–30 (1999). Other provisions requiring equal state representation rather than population-based representation were in fact not sought by the South, but by the small states—yet later benefitted the South as it sought to preserve slavery. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 102–03, 109, 131–32 (2006).
29. See Cover, *supra* note 1, at 1308 (“[T]he apparently neutral structural characteristics of the Constitution had never been neutral concerning race. . . . [T]he local political controls of federalism and the subjugation of administration to politics . . . supported and facilitated southern Apartheid.”); see also *infra* note 316.
30. See MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 36–37 (2008) (arguing that the idea that federalism diffuses power, thereby protecting liberties, is premised on a “traditionalist and highly controversial” view that overlooks the role of “positive rights that only affirmative governmental action can secure”).
31. Another way of making this point is to note that separated powers, along with staggered elections, mean that a political movement must win multiple elections to obtain “plenary lawmaking authority.” See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 644 (1999).

rights. It raises a crucial question: Should this threshold really be the bar we set for disfavored minorities to secure constitutional rights?<sup>32</sup>

This Article's overarching goal is thus to reorient the study of minorities' fate in constitutionalism in two specific ways, toward what I term "institutional realism." First, we should not implicitly assume that only courts are responsible for protecting minorities by focusing solely on courts' failures, as those seeking to debunk the myth of courts as "countermajoritarian heroes" have sometimes done. Instead, we should ask how often *any* of the three branches of government are prepared to intervene, and do so effectively, on minorities' behalf. Focusing on courts' flaws allows us to better understand the judiciary, but it does not allow us to accurately understand why minorities fare as they do. Second, to the extent that the political branches of government do not perform well in this regard, we should not assume this is because they are too democratic. Just as scholars have already done for the courts, we should ask to what extent these outcomes result from specific institutional design, rather than merely inhering in democracy itself. Institutional realism means scrutinizing all three branches for institutional constraints on their ability to implement constitutional norms, with careful attention to the full historic record of successes and failures.<sup>33</sup>

What will this approach accomplish? For those who care about protecting the disfavored, it offers a more accurate understanding of the barriers to constitutional rights as well as what is necessary to overcome them. The risk of idealizing the political branches or focusing critique on the judiciary is that we

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32. Steven Calabresi asks: "Doesn't the system of checks and balances, separation of powers, and federalism make progressive change impossibly difficult?" Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 271 (1993). But Calabresi dismisses this possibility in a single sentence, claiming that these features merely "slow down the pace of change." *Id.*

33. To contextualize this in present day struggles, future research might, for example, apply this lens to the long-term campaigns for LGBT rights, for undocumented immigrants' rights, and for the rights of the poor. Legal historians' work provides rich examples that future work might draw upon. For example, William Forbath has documented the defeat of the New Deal coalition's vision of a "political Constitution of social and economic rights," including the right to earn a livelihood, by conservative Southern Democrats and Republicans in Congress who were able to "cripple or undo" administration programs in part through strategic use of their power to block legislation. See Forbath, *supra* note 6, at 205–208, 215. Identifying successes and failures may present challenges, to be sure, since these are not always bright-line categories. In this Article, I take a conservative approach, comparing the federal government's treatment of black farmers to the reigning formal constitutional paradigm of each time as evidenced in contemporaneous Supreme Court precedent (e.g., asking whether farm programs were in fact "separate but equal"), rather than taking the more demanding approach of comparing the past to present-day norms or to an independent, progressive view of equal protection. I also bracket the question of how to evaluate isolated or irregular rights violations, given that black farmers' history represents such a dramatic failure of rights protections by almost any conceivable standard; future work may develop more precise approaches to measuring relative degrees of success and failure.

underestimate—and view as democratically justified—the barriers that groups face within politics, while simultaneously undervaluing the gains to be realized from litigation. Institutional realism indicates that no single institution can fully vindicate constitutional rights. In our present system, we need constitutionalism inside *and* outside the courts if we wish to effectuate equality norms.

Institutional realism may also lead us to question our government's fragmented structure. Some leading scholars have already begun to do so for different reasons, arguing that we should do away with features that impede majority will in order to make our democracy work better.<sup>34</sup> The farmers' history highlights that the government's fractured structure may also hurt disfavored minorities by simply insulating the status quo. As counterintuitive as it may sound, politically disfavored minorities might succeed in obtaining affirmative constitutional protections more frequently in a less fractured, *more* majoritarian system.

Part I of this Article explains the rise of the view of courts as ineffective at protecting disfavored groups, and the concurrent emergence of a perspective on constitutionalism outside the courts that highlights the efficacy and inherent democratic value of directing advocacy at the political branches. Part II shows how those that emphasize the courts' unique limitations would assess minority farmers' recent experiences seeking redress through litigation; the courts' critics would likely view the inadequate response to their claims as rooted in courts' institutional weaknesses. Part III problematizes that view by presenting African American farmers' longer history—a history that highlights the other branches' roles in responding to minorities' constitutional claims, their frequently limited capacity to do so, and the fundamental constraints built into American governmental design. Part IV assesses the implications of the farmers' history, connecting it to the study of minorities' fate in American constitutionalism.

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34. See, e.g., ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 17–20, 28–29, 31, 47 (2001) (critiquing features that serve as a “barrier to majority rule at the national level”); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 6, 25–122, 159–68 (2006) (attacking “structural provisions of the Constitution that place almost insurmountable barriers in way of any acceptable notion of democracy”); LARRY J. SABATO, A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY 2, 23–40, 87–96, 123–52 (2007) (criticizing constitutional provisions that, *inter alia*, create a Congress that represents “a tyranny of a small minority”). For earlier, similar critiques, see generally JAMES L. SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT (1992); WILSON, *supra* note 26.

## I. THE COURTS CRITIQUE—AND THE TURN TO POLITICS

During the twentieth century, an idealistic vision of the federal judiciary as the protector of disfavored minorities emerged, then gradually gave way to cynicism. Liberals increasingly turned away from litigation and toward constitutionalism outside the courts as the more robust route to progressive change. The Sections that follow describe these shifts, as scholars deemphasized courts and foregrounded democratic politics as an avenue for protecting disfavored groups. I suggest that while constitutionalism outside the courts offers an inspiring and more realistic understanding of the politics of constitutional reform, the institutional constraints on the political branches' capacity to protect minority rights deserve more study.

### A. From Optimism to Pessimism About Courts

A radical new idea reshaped the American legal and political world during the mid-twentieth century. It seemed possible that the federal Constitution might affirmatively protect subordinated minorities, rather than simply shore up the status quo and the powerful.<sup>35</sup> The Supreme Court expanded constitutional protections dramatically, particularly for racial, religious, and national minorities, and a growing number of organizations took up public interest litigation on behalf of vulnerable groups.<sup>36</sup>

35. Federal courts were traditionally perceived as conservative forces allied with the powerful. See Lawrence Baum, *The Supreme Court in American Politics*, 6 ANN. REV. POL. SCI. 161, 169 (2003) ("For the first time [in the 1950s], the Court was widely viewed as an ally of people with little economic or conventional political power.").

36. The Court extended the Fourteenth Amendment to progressively limit more and more state action, incorporating the Bill of Rights piece by piece into the Due Process Clause. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (incorporating the Sixth Amendment right to trial by jury); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (incorporating the Fifth Amendment right against compelled self-incrimination); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (incorporating the Sixth Amendment right to counsel); *Robinson v. California*, 370 U.S. 660, 667 (1962) (incorporating the Eighth Amendment's bar on cruel and unusual punishments); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (incorporating the Fourth Amendment's bar on unreasonable searches and seizures); *Everson v. Bd. of Educ.*, 330 U.S. 1, 14–15 (1947) (incorporating the First Amendment's Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the First Amendment right to free exercise of religion); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (incorporating the First Amendment right to freedom of the press); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment right to free speech). Alongside its incorporation of rights against the states, the Court dramatically expanded the availability of 42 U.S.C. § 1983 as a vehicle for constitutional claims. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (ruling that local governments may be sued under § 1983); *Monroe v. Pape*, 365 U.S. 167, 172–87 (1961) (ruling that § 1983 encompasses unauthorized acts by government officials). An expanding body of constitutional jurisprudence singled out racial,

As this mode of constitutional lawmaking took root, it triggered sharp controversy. Many observers questioned whether the courts could fulfill this new role, on both legitimacy and competency grounds. Was it democratically appropriate for courts to use the “countermajoritarian” tool of judicial review to resolve difficult social issues?<sup>37</sup> Were courts equipped to go beyond traditional individual dispute resolution and intervene in sensitive areas of policymaking, attempting to restructure basic institutions?<sup>38</sup>

While judicial review’s legitimacy was never definitively resolved, many liberals who favored a robust jurisprudence of rights settled on a solution sketched out in an early Supreme Court opinion, later elaborated into a full-fledged theory

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religious, and national minorities for special judicial protection from harmful government actions. *E.g.*, *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (subjecting the ban on interracial marriage to “the most rigid scrutiny”); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (ruling that generally applicable laws burdening religious exercise require a “compelling state interest” to justify denying exemptions); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (striking down school segregation); *Hernandez v. Texas*, 347 U.S. 475, 482 (1954) (ruling that discrimination against Latino jurors violated equal protection); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (ruling that courts could not enforce racially restrictive covenants); *Oyama v. California*, 332 U.S. 633, 646–47 (1948) (striking down an Alien Land Law provision that “discriminat[ed] between citizens on the basis of their racial descent”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (ruling that officials could not compel Jehovah’s Witness children to salute the flag). *But cf.* *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding military exclusion order that required all persons of Japanese ancestry to leave locations on the West Coast to be detained in internment camps); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding conviction under a military curfew order that applied only to persons of Japanese ancestry). On the rise of groups engaged in rights litigation, see CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 52–54 (1998).

37. Prominent mid-century critics suggested that the Court was intervening in areas beyond its constitutional powers and doing so via an illegitimate, insufficiently judicial mode of reasoning. See BICKEL, *supra* note 4, at 47–96 (critiquing the Warren Court for failing to provide “coherent, analytically warranted principled declarations of general norms”); LEARNED HAND, *THE BILL OF RIGHTS* 55 (1958) (suggesting that the Court had “assume[d] the role of a third legislative chamber”); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 20–34 (1959) (critiquing the Court’s jurisprudence for being insufficiently principled).
38. Scholars argued that courts were not designed for “polycentric” disputes, but for individual, one-to-one dispute resolution of common law claims. Requiring courts to focus on private dispute resolution also helped limit courts’ intrusion into policymaking areas reserved for democratically elected bodies. Fuller, *supra* note 4, at 394–404; see also Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1406–08 (1990) (terming this line of criticism “the competency critique”). Others countered that courts’ intrusion on local democratic processes was a necessary evil and that judges were capable of adapting existing tools to meet the challenges of overseeing structural reform. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285–88, 1307–09, 1313–15 (1976) (acknowledging that the dispute resolution model cabined unelected judges’ powers, but arguing that the judiciary has institutional advantages that equip it to oversee institutional reform); Cover, *supra* note 1, at 1313 (“[G]iven the objective of ending Apartheid, the activist federal judiciary as spearhead was the mode of action least likely to destroy the ultimate values served by fragmentation of political power and local political control over administration.”).

by John Hart Ely. In 1938, the Court had already set aside the sharp scrutiny of social regulation that it imposed in the *Lochner* period, but had not yet defined the scope of judicial review in this new era.<sup>39</sup> In *United States v. Carolene Products Co.*,<sup>40</sup> the Court suggested that judges should intervene to defend minorities' rights: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."<sup>41</sup> Building on this passage, Ely argued that courts should use judicial review to safeguard democratic political processes.<sup>42</sup> Courts could do this in part by protecting "discrete and insular" minorities, whose interests might not be fairly represented within pluralist politics due to prejudice.<sup>43</sup> The *Carolene Products* footnote and Ely's "political process" theory thus asked courts to protect minorities where the political branches had refused to do so; it proved an apt justification for liberal reformers, increasingly reliant on public interest litigation.<sup>44</sup>

But Ely's solution, elegant as it was, did not endure. Instead, doubts about courts' capacity to protect unpopular groups grew in the decades that followed the Warren Court.<sup>45</sup> Outside the legal academy, social scientists had long questioned whether the democratic legitimacy problem that so troubled law professors was even a problem at all. Did courts really use judicial review to thwart majority will? Political scientist Robert Dahl, in a seminal 1957 article, argued that the Supreme Court—and by implication the rest of the federal courts—rarely did

39. See Cover, *supra* note 1, at 1288–89; Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 221–24 (1991); Louis Lusk, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1094–95 (1982).

40. 304 U.S. 144 (1938).

41. *Id.* at 152 n.4; see also Cover, *supra* note 1, at 1294 ("Minorities . . . became a special object of judicial protection only with footnote four [of *United States v. Carolene Products Co.*] . . ."). The Court suggested that it also would impose closer scrutiny on legislation that appeared to facially violate the Bill of Rights and "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." 304 U.S. at 152 n.4.

42. See ELY, *supra* note 1, at 73–104.

43. *Id.*

44. See Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) (describing the *Carolene Products* footnote as "[t]he great and modern charter for ordering the relation between judges and other agencies of government," based on a theory of "legislative failure").

45. For example, many doubted the efficacy of the Court's criminal procedure interventions, which appeared motivated in part by racial justice concerns. See Richard A. Leo & K. Alexa Koenig, *The Gatehouses and Mansions: Fifty Years Later*, 6 ANN. REV. L. & SOC. SCI. 323, 330–36 (2010) (summarizing studies indicating that *Miranda v. Arizona* failed to achieve its goals); Malcolm M. Feeley, *The Black Basis of Constitutional Development*, in EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW 66–68 (noting role of race in driving Court's earlier expansion of procedural rights).

so.<sup>46</sup> Given that the justices are picked by presidents and confirmed by the Senate, he concluded, “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.”<sup>47</sup> A number of subsequent political scientists and legal scholars have concurred that the federal courts tend to reinforce the will of governing majorities.<sup>48</sup> The Court “has seldom lagged far behind or forged far ahead of America” due to a variety of mechanisms, from the appointments process to social pressures to the justices’ anticipation of political sanctions.<sup>49</sup>

By the 1990s, many social scientists and legal scholars had converged on the view that courts are unlikely to effectively implement disfavored minorities’ rights. According to these accounts, courts lack both the will and the capacity to protect unpopular minorities and tend to trigger unproductive backlash when they try. Courts suffer from these weaknesses, they argue, because judges tend toward conservatism, lack strong enforcement powers, and have questionable legitimacy as policymakers.

A succession of works supported these arguments with historical and institutional evidence. In the 1970s political scientist Stuart Scheingold led off by attacking the “myth of rights”: the idea that a judicial declaration of rights would lead to their realization and to meaningful change.<sup>50</sup> Scheingold argued that courts were unlikely to issue sweeping rights declarations and that their decisions often engendered more conflict rather than resolution of the underlying controversy.<sup>51</sup> Judges lacked the investigative capacity and coercive force of the administrative state, and the legal process entailed such potential for delay that relying on it might ultimately undermine reformers’ cause.<sup>52</sup> Nearly two decades later, Gerald Rosenberg similarly termed the courts a “hollow hope” for reformers.<sup>53</sup>

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46. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

47. *Id.*

48. Some have also argued that the Court uses judicial review to resolve issues that majority coalitions cannot resolve internally or to overcome structural barriers to policy implementation. See, e.g., Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 39–41 (1993); Keith E. Whittington, “Interpose Your Friendly Hand”: *Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 584–93 (2005).

49. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 260–61 (5th ed. 2010); see also FRIEDMAN, *supra* note 5, at 374–76 (reviewing mechanisms that bring the Court in line with public opinion).

50. See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 5 (1974).

51. See *id.* at 98–115.

52. See *id.* at 8, 119–20, 123.

53. See ROSENBERG, *supra* note 4.



Relying on a series of case studies of legal reform movements, Rosenberg argued that judicial decisions—even landmark ones like *Brown v. Board of Education*<sup>54</sup>—had rarely brought change, with the courts merely endorsing social transformations that were already under way due to other causes and that were spearheaded in the other branches.<sup>55</sup> Law professor Michael Klarman famously emphasized the risk of “backlash” against litigation campaigns, arguing that judicial rulings tend to trigger resistance that would not ensue if the same reforms occurred through other political institutions.<sup>56</sup>

The critics of the courts had identified three fundamental limits on judicial action: (1) the reasons courts will not even try to act (problems of will), (2) the reasons courts cannot act effectively, even when they try (problems of capacity), and (3) the reasons judicial rulings will trigger heightened resistance (problems of backlash). As Alexander Hamilton pointed out at the Framing, many of these limitations are hard-wired in deliberate constitutional design.<sup>57</sup> The federal courts have specified powers within the overall system of enumerated federal powers; Article III’s “case or controversy” requirement bounds judicial power, in part to prevent courts from treading on

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54. 347 U.S. 483 (1954).

55. See ROSENBERG, *supra* note 4, at 70–71 (civil rights); *id.* at 226–27 (women’s rights); *id.* at 292 (environment); *id.* at 334–35 (criminal procedure); *id.* at 415–19 (same-sex marriage). Rosenberg argued that courts are ineffective because they labor under multiple constraints: (1) the limited nature of substantive constitutional rights, along with accompanying procedural barriers to litigation; (2) limits on judicial independence due to the politicized appointment process, the possibility of congressional sanctions, and judicial deference to the executive branch; (3) courts’ reliance on elected and administrative officials to carry out their orders; and (4) courts’ lack of bureaucratic tools, such as the ability to set a clear agenda, limit subordinates’ discretion, apply specialized expertise, initiate action, supervise follow-up, engage in long-range planning, and negotiate political compromises. *Id.* at 10–17. Given courts’ institutional weaknesses, Rosenberg thought reform litigation a bad bet for activists. Litigation might siphon resources from more effective reform strategies and trigger countermobilization. *Id.* at 423–25.

56. See Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 91 (1994) [hereinafter Klarman, *How Brown*] (arguing that *Brown v. Board of Education* brought about civil rights progress primarily by triggering massive, violent Southern resistance, which led a shocked Northern public to demand civil rights legislation). According to Klarman, judicial decisions are particularly vulnerable to backlash insofar as they are especially salient, may be perceived as undemocratic, and force change to occur outside the ordinary political sequence of reform. See Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 473 (2005) [hereinafter Klarman, *Brown and Lawrence*]; see also Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 148–53 (2013) (discussing factors that predict backlash).

57. THE FEDERALIST NO. 78, at 380 (Alexander Hamilton) (Lawrence Goldman ed., 2008) (“[The judiciary] may truly be said to have neither FORCE NOR WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”); see also Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 260–61 (2005) (describing the “hard-wired constraints” on judges).

other branches' domains.<sup>58</sup> The Article III appointment process means that judges will reflect presidential and senatorial preferences while their life tenure means that they are simultaneously insulated but open to attack as unelected, illegitimate policymakers.<sup>59</sup> Given the overlapping powers of the three branches, the judiciary relies on—and is subject to checks by—the others.<sup>60</sup> The impeachment process and Congress's powers over the courts' jurisdiction and budget give Congress targeted, though rarely used, weapons to use against the courts.<sup>61</sup> The executive branch can quietly, or overtly, refuse to enforce judicial interpretations or even defy judicial rulings.<sup>62</sup> Federalist norms counsel federal judges to avoid interfering in state or local government. Judges are socialized to believe that they must wield their powers cautiously, both because they understand themselves to be “the least democratic branch” and because common law adjudication calls for incremental change built on existing precedents.<sup>63</sup>

Given all these constraints, an influential group of scholars had concluded that looking to the judicial branch to effectively protect minorities was naïve at best, and potentially counterproductive.<sup>64</sup> In the face of that critique of courts,

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58. See U.S. CONST. art. III, § 2 (defining judicial power).

59. See *id.* art. II, § 2 (empowering the president to appoint judges “with the Advice and Consent of the Senate”); *id.* art. III, § 1 (stating that judges will “hold their Offices during good Behaviour”).

60. See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 29 (1991) (noting that the U.S. Constitution “created a government of separated institutions *sharing* powers”).

61. U.S. CONST. art. III, §§ 1–2 (authorizing Congress to establish lower courts and regulate the federal courts' jurisdiction).

62. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 262–64 (1994) (arguing for broad executive power to ignore judicial rulings based on constitutional disagreement).

63. Cf. CHOPER, *supra* note 27, at 5 (“[T]he federal judiciary . . . is the least democratic of the three branches of American national government.”).

64. The skeptical view of courts has wide influence. See, e.g., Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 8 n.8, 33 (1996) (citing Rosenberg's *Hollow Hope* for the proposition that “it may be counterproductive for the Court to insist on social reform even if the Court is right”). Another prominent perspective, associated with Critical Legal Studies, also suggests that constitutional litigation in the courts is unproductive, though it traces this to the nature of individual rights. See TUSHNET, *supra* note 6, at 141–43 (suggesting that rights claims “are *essentially* individualistic” in ways that undermine progressive change); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1349–56 (1988) (examining the Left's concern that rights-based strategies legitimate the social order without decreasing inequality); Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 719–721 (2011) (discussing the risks of subordination, legitimation, and alienation posited by the rights critique). A third tradition, associated with the renowned Critical Race theorist Derrick Bell, suggests that the courts have been unwilling to demand structural changes due to white racism and self-interest. See, e.g., Derrick A. Bell, Jr., *Brown v. Board of*

however, an obvious question arose: Who will implement the Constitution, if not judges?

## B. Embracing Politics

Over time, as criticism of courts' capacity to protect disfavored groups mounted, many scholars and reformers turned their attention to elected officials instead, emphasizing the important role of the political branches in shaping and applying constitutional norms.<sup>65</sup> Theorists of constitutionalism outside the courts emphasize that Congress and the executive branch are obligated to, and frequently do, deliberate upon, articulate, and implement constitutional rights, often in response to long-term social movements.<sup>66</sup> These themes emerge in distinct forms in different scholars' work, and generate varying prescriptions. Some conclude that the political branches are more fertile and democratic sites for reform than courts and thus that activists should generally direct their energies to political actors, instead of initiating litigation; a few argue that courts themselves should withdraw from judicial review.<sup>67</sup> Others simply point out that political

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Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 523 (1980) (arguing that courts will advance African American rights only when "the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites"); Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 5-6 (1976) ("[W]hite self-interest will prevail over black rights.").

65. Constitutionalism outside the courts had special appeal for liberals in recent decades, as an increasingly conservative judiciary often proved skeptical of disfavored minorities' claims, while striking down the attempts of other branches to protect them. See sources cited *supra* note 3; *infra* note 349. But conservatives also favor various forms of extrajudicial interpretation. See, e.g., Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 913-24 (1990) ("presidential review"); Paulsen, *supra* note 62, at 228-62 ("executive review"); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1554-64 (2004) ("coordinate constitutional review").
66. See discussion and sources cited *supra* note 6; see also Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO L.J. 347, 371 (1994) (favoring "a system within which competing institutions with differing competencies and perspectives confront one another constructively and sometimes aggressively about how best to interpret constitutional principles"); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 717-31 (1984) (arguing that Congress has both the authority and the competence to address constitutional questions); Paulsen, *supra* note 62, at 344 (defending a model that posits "the duty of all elected officials to exercise their constitutional responsibilities in legal interpretation"); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1227 (1978) (arguing that where the judiciary fails to fully enforce the Constitution, officials must interpret and apply the relevant provisions themselves); cf. Cornelia T. L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 728-39 (2005) (making the case that executive branch constitutionalism as currently practiced is not normatively attractive).
67. Scholars like Mark Tushnet and Larry Kramer have argued that the other branches are more democratic than the courts and likely no worse at interpretation, thus should not see their acts

mobilization plays a key role in securing rights protections inside and outside the courts, and argue that the courts should defer to the elected branches when they respond to such advocacy.<sup>68</sup>

For example, Robin West was an early advocate of turning to the political branches, arguing that legislative lawmaking is inherently friendlier to progressive aspirations than the judicial process.<sup>69</sup> West emphasized the greater ability of Congress to respond to an idealistic, open-ended constitutional vision, which requires positive state action toward distributive justice, as well as the benefits of proceeding in “participatory and democratic forums” and the potential for enlisting “an awakened populace” in a progressive constitutional politics.<sup>70</sup>

Others argue that reforms won in the political branches are more legitimate and more effective than those obtained through litigation, while suggesting that the democratic deliberation that results is valuable in its own right. William Eskridge and John Ferejohn write that most important structural and normative change in the United States occurs through statutes and administrative action, which they denominate small “c” constitutionalism or “administrative constitutionalism.”<sup>71</sup> They view such constitutional evolution as superior to updating

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invalidated by the courts on constitutional grounds. See KRAMER, *supra* note 6, at 233–41; TUSHNET, *supra* note 6, at 55–71; see also Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (offering a conditional argument against judicial review). Kramer once reproached those who support judicial review as “today’s aristocrats” who lack “faith in the capacity of their fellow citizens to govern responsibly.” See KRAMER, *supra*, at 247; see also Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 13–15 (2001) (distinguishing judicial supremacy and judicial sovereignty, while strongly critiquing the latter).

68. See, e.g., ESKRIDGE & FEREJOHN, *supra* note 6, at 435–36 (arguing that “the Court should defer to laws and policies that reflect the deliberated views of Congress and the president, the balance of state legislatures, or the people themselves, when they have spoken clearly enough”); Post & Siegel, *Legislative Constitutionalism*, *supra* note 6, at 1947 (calling for a model of “polycentric constitutional interpretation” which asks the Court to uphold legislation based on Congress’ own, distinct constitutional interpretations of the Fourteenth Amendment, so long as the law does not affirmatively violate other constitutional principles).

69. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 714–21 (1990) [hereinafter West, *Progressive*]; see also Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 261–64 (1993) (arguing that congressional interpretation will be more forward-looking and thus more progressive than the judiciary’s precedent-bound approach).

70. West, *Progressive*, *supra* note 69, at 715, 721.

71. ESKRIDGE & FEREJOHN, *supra* note 6, at 10–12. An emerging literature on administrative constitutionalism focuses specifically on federal agencies’ elaboration of constitutional principles. Legal historians like Karen Tani and Sophia Lee have examined how agencies come to develop distinctive constitutional norms over time. See generally Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010); Karen Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015). Other scholars have probed the desirability of such elaborations. See, e.g., Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897,

through judicial interpretation of the written Constitution, because “it is more adaptable to changed circumstances[,] . . . is more legitimate than the Constitutional updating that unelected judges routinely accomplish[,] . . . and produces more robust results.”<sup>72</sup> While Eskridge and Ferejohn reserve a place for judicial review, they argue that a primary goal should be to encourage public deliberation by politically accountable actors.<sup>73</sup>

Stephen Griffin and Rebecca Zietlow similarly posit that rights created by the political branches will have greater democratic legitimacy and may be more effective as a result.<sup>74</sup> According to Griffin, “the political branches have a distinct deliberative advantage over the judiciary in ensuring that racial minorities are protected against discrimination,” while Zietlow notes that Congress offers “the legitimacy of majoritarian rule and the transparency of constitutional debate,” which serve as buttresses for the rights created there.<sup>75</sup> Precisely because they are not insulated in the way courts are, Congress and the executive can engage in more inclusive deliberation and garner greater popular support when they act to enforce the Constitution. Congress also offers practical advantages over courts: a broader perspective, policy expertise, and better fact-finding resources.<sup>76</sup>

Constitutionalism outside the courts may help sustain the democratic legitimacy of the Constitution itself. Reva Siegel has written that American constitutional culture allows social movements to drive constitutional change, but in ways that slow and moderate those changes; such conditions foster collective deliberation and enable the constitutional system to evolve while retaining its legitimacy as authoritative law.<sup>77</sup> In joint work, Siegel and Robert Post have called for courts

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1901–02 (2012); Bertrall L. Ross, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 553–79 (2015).

72. ESKRIDGE & FEREJOHN, *supra* note 6, at 18.

73. *Id.* at 8–9; *see also id.* at 265–308, 431–68 (describing “deliberation-inducing,” “deliberation-protecting,” and “deliberation-respecting” roles for judicial review).

74. Griffin, *supra* note 8, at 283; Zietlow, *supra* note 9, at 991.

75. Griffin, *supra* note 8, at 283; Zietlow, *supra* note 9, at 950.

76. Griffin, *supra* note 8, at 301.

77. *See* Siegel, *supra* note 7, at 1325–30, 1339–50, 1352–66, 1418–19 (describing how meaning-based constraints embedded in U.S. constitutional culture, along with the activism of countermovements, lead social movements to couch their transformative constitutional claims in terms that officials can enforce and the public can accept, ultimately reinforcing constitutional legitimacy and the political community); *see also* Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PENN. L. REV. 927, 946 (2006) (arguing that social movements “connect legal norms to the beliefs and practices of ordinary people . . . [which] secures the normative vitality of the law, making it legitimate, efficacious, and practically enforceable”).

to defer to legislative rights protections precisely because such acts reflect evolving public values and provide ongoing legitimacy to the constitutional system.<sup>78</sup>

These overlapping literatures—the first body of work critical of courts’ capacity to protect minorities, and the other oriented toward the potential for securing constitutional reforms through democratic politics—point to several lessons. When read together, they indicate that the political branches may enjoy greater capacity than the courts to articulate and implement constitutional reforms; that marginalized groups usually must pursue their rights claims in ordinary politics if they wish to succeed; and that such reform struggles are important in sustaining American constitutional democracy. This perspective thus offers a more realistic account of how rights are won and preserved in politics. It is also a hopeful and inspiring vision—insofar as it suggests that democratic struggle is both necessary and productive, because it is likely to produce effective rights and to trigger debates over fundamental norms that are healthy for the polity as a whole.<sup>79</sup>

### C. Accounting for Institutional Constraints

But what if such struggles fail and entire groups must forgo rights protections over long periods—is this simply the price of democracy? Do these costs come with countervailing democratic benefits? Perhaps. To the extent that disfavored minorities’ struggles are extremely protracted, achieve limited success, or fail completely, arguably they may still benefit the participants and the nation by provoking deliberation over core questions of political morality. Such a view,

78. See Post & Siegel, *Legislative Constitutionalism*, *supra* note 6 (arguing that Congress’s role in articulating constitutional rights helps sustain the Constitution’s democratic legitimacy); Post & Siegel, *Protecting*, *supra* note 6, at 29–30 (critiquing the Court for suppressing the “independent constitutional perspective of a democratically elected legislature” and describing the Court’s past dialogues with Congress regarding constitutional meaning).

79. For example, Reva Siegel writes that social movement struggles over constitutional meaning help to “promote[] citizen attachment to the Constitution” and “create[] community under conditions of ongoing conflict.” See Siegel, *supra* note 7, at 1328. For William Eskridge and John Ferejohn, dialogue between the political branches concerning core normative commitments produces republican deliberation, a process that is dynamic, purposive, normatively grounded, open to a variety of inputs, and politically accountable. See ESKRIDGE & FEREJOHN, *supra* note 6, at 14–16. Heather Gerken views federalism not as a constraint, but as a resource for minorities insofar as it sometimes allows minorities to shift the status quo at the local level, build an incremental case for change, and prod national policy in the desired direction by triggering broader dialogue, thus providing “the policymaking gears that are all but essential for any movement to move forward.” See Heather K. Gerken, Windsor’s *Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 594–600 (2015) [hereinafter Gerken, Windsor’s]; see also Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1984–91 (2014); Heather K. Gerken, *Disentending by Deciding*, 57 STAN. L. REV. 1745, 1750–51, 1754–59 (2005); Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY (Spring 2012), <http://democracyjournal.org/magazine/24/a-new-progressive-federalism> [<https://perma.cc/9D95-XNBT>].

though, rests in part on the premise that the underlying processes are in fact democratic and offer deliberative benefits to participants and the broader population. Assessing this requires comprehensive inquiry, with attention to the institutions that shape such processes, and to their costs as well as their benefits. At a high level of generality, one might conclude that long-term activism eventually produces broad waves of opinion that crash over the political branches and force change, once some requisite level of majority support is reached. But treating the process impressionistically as a democratic one without further inquiry fails to nail down in any precise way what the required thresholds for success might be, and where the key barriers lie.

In fact, as constitutional scholars and political scientists have long noted, American governing institutions allow small groups of opponents to veto, stall, and undo reforms even in the face of public support, potentially rendering rights movements' struggles less democratic and their victories less effective than might otherwise appear. Among the features that make American politics non-majoritarian are: the three branches' overlapping powers, which allow them to check one another; the distinct constituencies represented in each branch (and each house of Congress), which makes it more difficult to produce accord for positive action; the party system, which can have a similar effect, empowering extreme members of the political coalition; internal congressional rules that produce "veto-gates" allowing particular officials to block the passage of legislation; the growth of a large bureaucratic state which defies the power of the president or Congress to monitor and control; and systems of federalism, including the shared powers produced by cooperative federalism features of the administrative state, as well as state and local officials' primary powers over many aspects of governance.<sup>80</sup> Like the constraints on the courts, many of these are also deliberately hard-wired in constitutional design.<sup>81</sup>

The role of these institutional limits, which make it quite difficult to win and sustain majoritarian victories in ordinary political processes at the national level, remains underdeveloped in our vision of constitutionalism outside the courts. To be sure, scholars have acknowledged these barriers and their potential costs. For example, some political scientists and legal academics have argued that the courts tend to step in to resolve constitutional controversies when "the existing lawmaking majority" cannot do so due to internal division and/or

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80. On these features, see *infra* notes 316–339 and accompanying text.

81. See *infra* notes 331–333 and accompanying text.

institutional constraints, yet prominent elected actors favor change.<sup>82</sup> Thus, they acknowledge that American institutions may inhibit reform even when substantial public will favors it. For that reason, Corinna Barrett Lain has argued that the courts may be more “majoritarian” than the other branches under some circumstances.<sup>83</sup> Other scholars have pointed out that the process of bringing about constitutional change through politics is slow and that conflict between opposing groups will tend to constrain the scope of reforms, producing more modest changes than reformers would wish.<sup>84</sup>

Ultimately, to the extent that institutional features of American governance serve to slow down and moderate rights claims, many would see this as a feature of our system, not a bug—contributing to the polity’s ability to debate, compromise, and build consensus on issues involving fundamental norms.<sup>85</sup> Yet if particular institutional constraints allow powerful opponents, ones that do not speak for the body politic as a whole (or even for a majority), to block broad-based change, one might well question whether those constraints are democratic, improve the quality of deliberation, or are truly necessary to produce sufficient social backing for the rights in question. This is particularly true if one considers the perspective of those denied rights over long periods—as the system moves ponderously toward consensus, those individuals suffer very real costs that will likely go unremedied. At a minimum, it seems that all of the costs and benefits of these features should be weighed in the balance.

How might a more detailed accounting of the structural constraints that pervade the political branches qualify existing assessments of constitutionalism, inside and outside the courts? Would we reevaluate the appeal of pursuing constitutional reform in ordinary politics or perhaps even reconsider the justifications for the challenges that disfavored groups face there?

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82. See Graber, *supra* note 48, at 36; see also Whittington, *supra* note 48, at 585–93 (discussing potential of judicial review to overcome barriers posed by federalism, entrenched interests in the national government, and fractured or cross-pressured coalitions).

83. See Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 116 (2012) (“[T]here are a number of forces that push democratic decision making away from majoritarian outcomes, just as there are a number of forces that push Supreme Court decision making the other way.”).

84. As Reva Siegel notes in the case of those that struggled to ratify the Equal Rights Amendment: “Americans mobilizing to defend the status quo can block proponents of change and lead them to qualify and moderate their claims.” Siegel, *supra* note 7, at 1369. Gerken writes that “[r]etrenchment happens at the state and local levels just as advancement does.” Gerken, Windsor’s, *supra* note 79, at 600.

85. Perhaps drawn-out struggles are necessary to achieve the kind of social support necessary for such important issues. As Bruce Ackerman has described, an advocate of separated powers would “deny that a single electoral victory is sufficient to vest plenary lawmaking authority in the victorious political movement.” Ackerman, *supra* note 31, at 644.



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In the next two Parts, I provide a more concrete context for examining the constraints on all three branches' ability to vindicate minority rights, by offering an extended case study of African American farmers' claims for equal protection. Part II focuses on the farmers' equality claims in the courts and Part III turns to their longer record of equality claims outside the courts.

## II. EQUALITY IN THE COURTS: THE CASE OF BLACK FARMERS

Minority farmers' claims for equal treatment in American farm policy offer a striking example of recent, apparently successful rights litigation. Beginning in the 1990s and stretching into the present, black, Latino, Native American, and women farmers demonstrated that they had been systematically marginalized in federal farm programs, filed class action discrimination suits, and ultimately won record-setting civil rights settlements from the U.S. Department of Agriculture (USDA). Even as the farmers won these remedies, however, the settlements' narrow scope highlighted the limits of judicial intervention. While the settlements were valued in the billions, they addressed only a small range of USDA actions, provided relatively meager compensation to individual farmers, did not require institutional reform, and obscured the long history of discrimination in farm policy, rather than illuminating it. The narrow scope of the settlements was rooted in the courts' cramped legal framework, restricted remedial powers, and self-inhibiting institutional norms—qualities that the courts' critics have consistently emphasized. At first pass, then, the farmers' litigation seems primarily to illustrate what the courts critique posits: that even in the best case, courts have limited ability to resolve deep-rooted constitutional wrongs. This Part examines this recent set of events.

### A. “Brightly Flagged Injustices”

In December 1996, a small band of black farmers marched in front of the White House.<sup>86</sup> They were protesting systematic racial discrimination in USDA farm aid. Soon, the farmers were meeting with the President and the Secretary of Agriculture.<sup>87</sup> A burst of attention to racial inequality in USDA programs followed. Congress and the agency instituted multiple investigations, while the

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86. Robert Greene, *Agriculture Department Creates Civil Rights Team*, CHARLOTTE OBSERVER, Dec. 13, 1996, at 8A; Bob Hohler, *Black Farmers March in D.C.*, BOS. GLOBE, Dec. 13, 1996, at A32.

87. Firestone, *supra* note 14; Michael A. Fletcher, *Glickman Targets Small Farmers for Help*, WASH. POST, Dec. 18, 1997, at A25; Hohler, *supra* note 86, at A32.

farmers' class action discrimination suit against the USDA began to move more quickly through the courts.<sup>88</sup>

The government's inquiries uncovered strong, troubling evidence that the USDA treated minority farmers unfairly.<sup>89</sup> Federal farm aid pervasively shapes outcomes for U.S. farmers, often making the difference between profits and ruin.<sup>90</sup> Because the government serves as lender of last resort in rural communities, exclusion from federal programs is devastating for small farmers, who often cannot access other credit.<sup>91</sup>

While small farmers have disappeared for generations, the minority farmers' stories were distinctive; they told of wholesale, race-based exclusion from the local networks controlling farm aid.<sup>92</sup> Advocacy organizations and government bodies reported that minority farmers seeking federal farm aid had faced decades of racial discrimination.<sup>93</sup> They noted that the USDA allowed committees made

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88. Regarding the investigations, see *U.S. Department of Agriculture Farm Loan Programs: Hearing Before the Subcomm. on Forestry, Res. Conservation, & Research of the H. Comm. on Agric.*, 105th Cong. (1998); *Civil Rights Legislation and Other Issues: Hearing Before the H. Comm. on Agric.*, 105th Cong. (1997) [hereinafter *Civil Rights Legislation*]; *Treatment of Minority and Limited Resource Producers by the U.S. Department of Agriculture: Hearing Before the Subcomm. on Dep't Operations, Nutrition, and Foreign Agric. & Comm. on Agric.: Comm. on Agric. H.R.*, 105th Cong. (1997) [hereinafter *Treatment*]; CIVIL RIGHTS ACTION TEAM, U.S. DEP'T OF AGRIC., CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE (1997); OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., MINORITY PARTICIPATION IN FARM SERVICE AGENCY'S FARM LOAN PROGRAMS, PHASE II (1997); OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., REPORT FOR THE SECRETARY ON CIVIL RIGHTS ISSUES, PHASE I (1997). On the progress of litigation, see *Pigford v. Glickman*, 182 F.R.D. 341, 351 (D.D.C. 1998) (certifying class).
  89. See generally CIVIL RIGHTS ACTION TEAM, *supra* note 88.
  90. See, e.g., David Hosansky, *Farm Subsidies: The Issues*, 12 CQ RESEARCHER 435, 436 (2002) ("[A] government check during hard times can mean the difference between making money or giving up the farm.").
  91. See R. DOUGLAS HURT, *AMERICAN AGRICULTURE: A BRIEF HISTORY* 333 (1994) (noting FmHA's role as "lender of last resort when other lenders would not extend loans to farmers").
  92. On small farmers' plight, see ROBERT A. HOPPE ET AL., U.S. DEP'T OF AGRIC., *SMALL FARMS IN THE UNITED STATES: PERSISTENCE UNDER PRESSURE* 27–28, 30 (2010); Michael J. Roberts & Nigel Key, *Who Benefits From Government Farm Payments?*, CHOICES, 12 tbl.2 (2003).
  93. See CIVIL RIGHTS ACTION TEAM, *supra* note 88, at 6. For prior reports of discrimination, see *Decline of Minority Farming in the United States: Hearing Before the H. Comm. on Gov't Operations, Gov't Info., Justice, and Agric. Subcomm.*, 101st Cong. (1990) [hereinafter *Decline of Minority Farming*]; THE MINORITY FARMER: A DISAPPEARING AMERICAN RESOURCE; HAS THE FARMERS HOME ADMINISTRATION BEEN THE PRIMARY CATALYST?, H.R. REP. NO. 101–984 (1990) [hereinafter *THE MINORITY FARMER*]; NANCY SCHEPER, S. RURAL RESEARCH PROJECT, *THE EXTINCTION OF THE BLACK FARMER IN ALABAMA* (1968); U.S. COMM'N ON CIVIL RIGHTS, *THE DECLINE OF BLACK FARMING IN AMERICA* (1982) [hereinafter *USCCR, DECLINE*]; U.S. COMM'N ON CIVIL RIGHTS, *EQUAL OPPORTUNITY IN FARM PROGRAMS: AN APPRAISAL OF SERVICES RENDERED BY AGENCIES OF THE UNITED STATES DEPARTMENT OF AGRICULTURE* (1965) [hereinafter *USCCR, EQUAL OPPORTUNITY*].

up of local farmers to control huge sums in farm benefits and that the committees frequently included only whites.<sup>94</sup> They recounted a culture of disrespect in USDA offices: Minorities were treated peremptorily, denied information, and forced to wait while white farmers were helped before them.<sup>95</sup> Minority applicants were rejected at higher rates; those approved received smaller loans with longer delays and the government moved to foreclose their loans more quickly.<sup>96</sup> The farmers described immense costs: their family farms lost; humiliating exclusion from farm program participation and governance; and the wrench of lost opportunities for themselves and their children, even as white neighbors prospered.<sup>97</sup> They called the USDA “the last plantation.”<sup>98</sup>

USDA officials eventually acknowledged that the government had treated minorities unfairly.<sup>99</sup> In February 1997, USDA civil rights investigators reported that “discrimination in [USDA] program delivery and employment . . . continues to exist to a large degree unabated.”<sup>100</sup> The Secretary of Agriculture, Dan Glickman, said, “We have had a system that did not encourage equitable treatment of customers as a matter of policy, and . . . some people . . . were victimized by the policy. There is no question. It is clear.”<sup>101</sup> Op-ed pages called for redress. The *Boston Globe* asked: “How long should it take the government to address brightly flagged injustices—especially the ones it has committed?”<sup>102</sup>

In 1999, the government finally offered redress in the form of a record-setting class action settlement for African American farmers.<sup>103</sup> Congress, with bipartisan support, waived the statute of limitations to allow more farmers to obtain relief.<sup>104</sup> In the words of the presiding judge, the *Pigford v.*

94. CIVIL RIGHTS ACTION TEAM, *supra* note 88, at 18–20.

95. *Id.* at 21.

96. *See id.*; *USDA Civil Rights: Hearing Before the Comm. on Agric., Nutrition, & Forestry*, 106th Cong. 48–49 (2000) (statement of Alexander Pires) [hereinafter *USDA Civil Rights*].

97. *See Treatment*, *supra* note 88, at 122–25 (statement of Rep. Waters); Melanie Eversley, *Labor of Love: Farmers Wage Struggle to Hold on to Their Legacies*, DETROIT FREE PRESS, Mar. 21, 1997, at 1A; Wil Haygood, *Heartache in the Family Fields*, BOS. GLOBE, Feb. 8, 1998, at A1; Dewy Rose, *Bias Against Black Farmers: Loan Discrimination Starts Cycle of Failure*, ATLANTA J.-CONST., June 14, 1998, at C7.

98. CIVIL RIGHTS ACTION TEAM, *supra* note 88, at 2.

99. *See* Peter Scott, *USDA Leader to Expedite Bias Suit*, ATLANTA J.-CONST., July 20, 1998, at A4 (“Glickman publicly acknowledges his department has treated black farmers differently as a matter of policy in granting farm loans and foreclosures.”); Hohler, *supra* note 86, at A32.

100. CIVIL RIGHTS ACTION TEAM, *supra* note 88, at 2.

101. Peter Scott, *Black Farmers: Betrayed*, ATLANTA J.-CONST., June 14, 1998, at A1.

102. *A Harvest of Discrimination*, BOS. GLOBE, Feb. 17, 1998, at A14.

103. Firestone, *supra* note 14; *see also* *Pigford v. Glickman*, 185 F.R.D. 82, 113 (D.D.C. 1999) (approving the consent decree).

104. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105–277, § 741, 112 Stat. 2681, 2681–30 to 2681–31 (Oct. 21, 1998) (codified at 7 U.S.C. § 2279,

*Glickman*<sup>105</sup> settlement “demonstrated [the farmers’] power to bring about fundamental change to the Department of Agriculture . . . .” Its remedies represented “a grand, historical first step toward righting the wrongs visited upon thousands of African American farmers for decades by the United States Department of Agriculture.”<sup>106</sup> *Pigford I* was reportedly the largest civil rights settlement in U.S. history, initially valued at over two billion dollars.<sup>107</sup> Over the next decade, similar settlements followed for other minority farmers, along with an additional settlement for African American farmers.<sup>108</sup>

## B. Inadequate Remedies

The historic *Pigford* settlement and its successors should have been significant triumphs. Instead, they triggered sharp discontent. Farmers and their allies argued that the settlements did not address the fundamental sources and consequences of racial injustice within the USDA and that the government behaved unfairly throughout the process.<sup>109</sup> Class action settlements inevitably provoke disappointment.<sup>110</sup> But the critics of the farmers’ settlements expressed more profound concerns, suggesting that the remedies were fundamentally inadequate to repair the wrongs in question. The settlements addressed only a relatively

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Historical and Statutory Notes); Peter Scott, *Black Family Farms: Bias Claim Extension Approved in House*, ATLANTA J.-CONST., June 25, 1998, at A11.

105. *Pigford*, 185 F.R.D. at 112.

106. *Pigford v. Glickman*, 127 F. Supp. 2d 35, 40 (D.D.C. 2001).

107. *Pigford*, 185 F.R.D. at 95. Because of problems with the *Pigford I* claim process, however, many potentially eligible farmers had to seek relief in a subsequent settlement; as a result, the final value of the relief provided in *Pigford I* was slightly over \$1 billion. See Monitor’s Final Report on Good Faith Implementation of the Consent Decree at 5 tbl.1, *Pigford v. Vilsack*, Nos. 97-1978, 98-1693 (D.D.C. April 1, 2012) (estimating the total value of relief paid out, including cash, tax payments, and debt relief, at \$1.06 billion). The second settlement paid out slightly over \$1 billion in relief to additional black farmers. See *supra* note 12; Order, *In re Black Farmers Discrimination Litig.*, No. 08-MC-0511 (D.D.C. Aug. 23, 2013).

108. See *supra* note 12.

109. See generally *Status of the Implementation of the Pigford v. Glickman Settlement: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Status*]; ENVTL. WORKING GRP., OBSTRUCTION OF JUSTICE: USDA UNDERMINES HISTORIC CIVIL RIGHTS SETTLEMENT WITH BLACK FARMERS (2004); Steven A. Holmes, *Black Farmers Are Divided on Settlement Over Racism*, N.Y. TIMES, Mar. 3, 1999, at A10; Patrik Jonsson, *Why Are USDA Officials off the Hook in Case of Bias Against Black Farmers?*, CHRISTIAN SCI. MONITOR (Dec. 8, 2010), <http://www.csmonitor.com/USA/2010/1208/Why-are-USDA-officials-off-the-hook-in-case-of-bias-against-black-farmers> [https://perma.cc/L8CJ-9NPD].

110. See, e.g., Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. REV. L. & SOC. CHANGE 487, 492–95 (1999) (discussing the inevitable tradeoffs between subgroups of plaintiffs within class action settlements).

narrow class of harms suffered by the farmers in the very recent past.<sup>111</sup> The claims framework required farmers to satisfy a demanding, unintuitive definition of discrimination.<sup>112</sup> Individual farmers could obtain limited cash payouts, but no provision was made for broader institutional reform. The real history of long-term discrimination in federal policy was not fully aired, but overshadowed by disputes over the settlement process and proof of discrimination.

Why were the settlements so narrow? For one thing, the farmers faced serious legal hurdles. Sovereign immunity and other legal barriers forced them to rely on quasi-constitutional claims of government lending discrimination under the Equal Credit Opportunity Act (ECOA)<sup>113</sup> rather than explicit constitutional claims about government discrimination across a broader range of programs beyond farm loans.<sup>114</sup> The statute of limitations under the ECOA was only two years, which severely limited the number of farmers eligible for relief.<sup>115</sup> Congress did subsequently waive the statute of limitations so that more farmers could claim redress.<sup>116</sup> Legislators only waived the claims period back to the 1980s, however, justifying that date based on evidence that USDA civil rights enforcement had stopped functioning in that period.<sup>117</sup> As a result, the farmers' claims in *Pigford I* and its successor suits ultimately encompassed allegations of intentional discrimination by one agency within the USDA, the Farmers Home

111. Class members could choose between two claims processes. "Track A" required an individual to show, under a "substantial evidence" standard, that he farmed or attempted to farm during 1981–1996; that the USDA treated his application for a farm loan in a manner "less favorable than that accorded specifically identified, similarly situated white farmers;" and that he complained of this treatment to the USDA within the Equal Credit Opportunity Act's (ECOA) two year limitations period. *Pigford*, 185 F.R.D. at 96. Successful Track A claimants received \$50,000 in cash, loan forgiveness, and priority consideration for certain USDA benefits. *Id.* at 97. "Track B" was for those who believed they could prove lending discrimination by a preponderance of the evidence; successful claimants in this track would receive full damages. *See id.* at 96–97.

112. *See infra* notes 119–120 and accompanying text.

113. 15 U.S.C. §§ 1691 et seq. (2012).

114. *See* 15 U.S.C. § 1691a(e), (f) (2012) (defining appropriate defendants to include "government or governmental subdivision or agency" without qualification); *Moore v. U.S. Dep't of Agric.*, 55 F.3d 991, 994 (5th Cir. 1995) (ruling that the ECOA waives the federal government's sovereign immunity). Earlier suits against the USDA had failed due to the government's immunity to other types of claims, and class counsel sought to avoid those limits. *See Benoit v. U.S. Dep't of Agric.*, 608 F.3d 17, 20 (D.C. Cir. 2010); *Williams v. Glickman*, 936 F. Supp. 1, 2–3 (D.D.C. 1996); *Status*, *supra* note 109, at 199 (testimony of Alexander Pires) ("[T]he *Pigford* case grew from the failures of the *Williams* case . . .").

115. The ECOA's limitations period was extended to five years in 2010. *See* 15 U.S.C. § 1691e(f) (2012) hist. nn.

116. *See* Scott, *supra* note 99.

117. *See* CIVIL RIGHTS ACTION TEAM, *supra* note 88, at 47; Pamela Stallsmith, *Ignored Since '83, Complaints Will Need New Investigations*, RICH. TIMES DISPATCH, May 25, 1997, at A1 ("[T]he [USDA] investigative team charged with probing complaints [was] disassembled during the first term of Ronald Reagan's presidency in 1983.").

Administration (FmHA), in farm loans during a sixteen year period from 1981 to 1996.<sup>118</sup>

Once individual farmers began filing claims under the settlement framework, the claims process—with its onerous proof requirements—filtered out many who believed that they had experienced USDA discrimination. Each farmer had to show that USDA officials treated him or her differently in a particular loan transaction, relative to a specifically identified, comparable white farmer—a requirement that they likely would have faced in court as well, reflecting the narrow reach of contemporary civil rights law.<sup>119</sup> If the farmers could identify a suitable white comparator, the settlement provided a presumption of discriminatory intent and a streamlined administrative claims process. But showing disparate treatment in a particular loan transaction relative to a specific, similarly situated white farmer proved very challenging for many class members, even given those lessened proof requirements.<sup>120</sup> That was particularly true because

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118. See Seventh Amended Class Action Complaint at ¶ 79, *Pigford v. Glickman*, No. 97-1978 (D.D.C. Oct. 26, 1998), 1998 WL 35264385; see also *Pigford v. Glickman*, 185 F.R.D. 82, 92 (D.D.C. 1999) (describing final class definition).

119. Several decades ago in *Washington v. Davis*, the Supreme Court held that the Equal Protection Clause bars only intentional discrimination. 426 U.S. 229, 238–41 (1976). Antidiscrimination law since then has focused on identifying bias-driven mistreatment of particular individuals, often through comparison. For important critiques of this intentional discrimination model, see Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1008–15 (1986); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–56, 1102–18 (1978); Haney-López, *supra* note 3, at 1847–61; Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 2002–14 (2000); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324–27, 355–81 (1987); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129–46 (1997).

120. See *Status*, *supra* note 109, at 210 (testimony of Randi Roth). The lead plaintiffs' counsel in *Pigford* saw this onerous requirement as inevitable:

[T]hat was the most difficult part of the case for some people, how to find someone in their community who was treated better than they were, who was white. That was difficult. But, that is also a requirement of the law, this is after all a lawsuit. No one is going to waive that part of it.

*Id.* at 211 (testimony of Alexander Pires). The counsel was correct about the law—federal courts increasingly require comparator evidence. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 750–51 (2011); Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 839–49 (2002); Charles A. Sullivan, *The Phoenix From the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 208, 214–22 (2009). But even Republican members of Congress were surprised by this requirement and, after outcry, it was omitted from the later farmers' settlements. See *Status*, *supra* note 109, at 219 (statement of Rep. Spencer Bachus) (questioning the requirement); Carpenter, *supra* note 11, at 30 (describing later settlements).

the USDA initially refused to open its own files to help claimants identify relevant white farmers.<sup>121</sup>

For those who met the proof requirements, the resulting monetary remedies seemed meager given the severe consequences of prior denials of credit—such as foreclosures and loss of family farms. Most farmers received one-time payments of \$50,000.<sup>122</sup> As one farmer said, “[I]magine that your home has been taken, your land has been taken, your automobile has been taken, and then you can make a decision and see if \$50,000 will be enough for you.”<sup>123</sup>

The lack of systematic institutional reforms to the agency was a glaring omission and the government’s failure to discipline or remove any USDA employees rankled.<sup>124</sup> Farmers expressed “a deep and overwhelming sense that the USDA and all of the structures it has put in place have been and continue to be fundamentally hostile to the African American farmer.”<sup>125</sup> While discrimination was widely acknowledged in a general way, no institution ever offered a full accounting of the harms or an official judgment of government wrongdoing.<sup>126</sup> Instead, the executive branch and Congress seemed to assume that the judicial framework offered the only legitimate response to the farmers.<sup>127</sup> Congress did not seriously consider an official apology, new programs to rebuild minority farm

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121. See *Status*, *supra* note 109, at 205, 210 (testimony of Randi Roth); *id.* at 207 (testimony of Phillip Haynie); ENVTL. WORKING GRP., *supra* note 109.

122. See discussion *supra* note 111.

123. *Pigford v. Glickman*, 185 F.R.D. 82, 108 (D.D.C. 1999) (quoting Willie Head, objector to consent decree).

124. See Ken Morgan, *Black Farmers Mull Over Government Settlement Offer*, TRI-ST. DEFENDER, Jan. 9–13, 1999, at 5A; *President Calls Settlement Unfair*, ATLANTA DAILY WORLD, Jan. 24–25, 1999, at 7; see also Peter Scott, *12 USDA Workers Disciplined in Wake of Complaints*, ATLANTA J.-CONST., Aug. 1, 1998, at D2 (quoting the Secretary of Agriculture’s assistant for civil rights: “It is hard to do retroactive disciplining. This is as far as we can go officially.”). The class counsel, Alexander Pires, later testified to a House subcommittee that the settlement’s narrow scope was intentional: “[The settlement] was not about injunctive relief. It was not about getting all kinds of requirements from USDA. Congress does that all the time. You can do that better than a court . . . . You can require them through legislation to do what you want. It was about money.” See *Status*, *supra* note 109, at 200 (testimony of Alexander Pires).

125. *Pigford*, 185 F.R.D. at 111.

126. Compare Scott, *supra* note 101 (quoting Secretary Glickman’s acknowledgement of inequitable treatment), with Firestone, *supra* note 14 (citing the official statement that the USDA would not admit to discrimination in the settlement, but only to a flawed complaint process).

127. The USDA felt constrained by the legal model in part because the Justice Department had advised it that no money could be paid to discrimination claimants if judicial relief would be unavailable, as when the statute of limitations had run. See Wil Haygood, *Sense of Betrayal*, BOS. GLOBE, Apr. 9, 1998, at A1. Congress focused on fixing procedural obstacles within the preexisting judicial framework, as in its waiver of the statute of limitations. See, e.g., *USDA Civil Rights*, *supra* note 96 (emphasizing ongoing flaws in the discrimination complaint process).

ownership, or a legislatively enacted compensation system.<sup>128</sup> Instead, the legislators acquiesced to the remedies that could be supplied via existing antidiscrimination law, as implemented through private suits in the federal courts. The USDA, for its part, did some internal housekeeping by changing civil rights procedures and authority over lending decisions.<sup>129</sup>

Meanwhile, very few officials, commentators, or members of the public acknowledged the extent to which racial inequality had been explicitly structured into farm programs from their inception. That inadequate understanding fueled backlash against the settlement. For example, the *New York Times* ran a scathing article focusing on the potential for individual claimant fraud and calling the settlements a “spigot,” while ignoring the broader context in which African Americans had been systematically excluded from farm programs’ extremely generous benefits from their origins.<sup>130</sup>

### C. A Court-Centered Diagnosis

The legal framework imposed fundamental limitations on the nature and scope of the relief that the farmers could obtain in their discrimination suits against the USDA. Those limitations included substantive constraints within current antidiscrimination law, procedural obstacles, and limits on the remedies courts are willing to provide. The courts’ critics would likely argue that all these factors reflect the judiciary’s limited ability to produce “significant social reform.”<sup>131</sup>

If the critique suggests that courts commonly face problems of will, capacity, and backlash, the farmers’ litigation encountered all three types of limits. Civil

128. Discussion at congressional hearings did not contemplate such options. *See, e.g., Status, supra* note 109; *USDA Civil Rights, supra* note 96; *Civil Rights Legislation, supra* note 88. Apparently on her own initiative, Rep. Maxine Waters of California did apologize to a group of the farmers. ‘*We Need Change, Black Farmers Say*, DET. FREE PRESS, Apr. 24, 1997, at 4A.

129. *See* Farm Security and Rural Investment Act of 2002, Pub. L. No. 107–171, § 10704, 116 Stat. 134, 518 (2002) (codified at 7 U.S.C. §§ 6918, 7014(b)) (creating the position of Assistant Secretary for Civil Rights, reporting directly to the Secretary of Agriculture); JACKSON LEWIS LLP, *USDA CIVIL RIGHTS ASSESSMENT: FINAL REPORT* 149 (2011) (noting the removal of local committees from loan determinations); 3 U.S. COMM’N ON CIVIL RIGHTS, *TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDATIONS?* 7–12 (2003) (listing reorganizations of civil rights enforcement at USDA).

130. Sharon LaFraniere, *Federal Spigot Flows as Farmers Claim Bias*, N.Y. TIMES, April 26, 2013, at A1; *see also* Pete Daniel, *The NYT Ignores USDA Discrimination*, HISTORY NEWS NETWORK (May 6, 2013), <http://hnn.us/article/151757> [<http://perma.cc/Y83F-6EG8>] (critiquing the *New York Times* article).

131. *See* ROSENBERG, *supra* note 4, at 420–21.



rights law has triggered conservative backlash for decades and an increasingly conservative federal judiciary has narrowed the scope of civil rights in response.<sup>132</sup> The courts' capacity to address broad harms is further limited by the many legalistic barriers to successful claims.<sup>133</sup> Those restrictions on judicial powers reflect considerations of fairness to defendants, but also the desire to respect the separation of powers and federalism by avoiding sweeping injunctions against other government actors.<sup>134</sup> Together, all these substantive and procedural limits produce courts unwilling—and arguably unable—to intervene effectively on minorities' behalf.

In fact, the *Pigford* settlements were likely possible only because the farmers organized politically and induced elected actors to support the farmers' cause. Other branches' actions helped the farmers' suits surmount legal and practical barriers—the executive, by providing crucial “insider” information regarding USDA discrimination, and Congress, by waiving the statute of limitations to extend relief to more farmers. Their critical roles reflect the practical reality that courts' will and capacity to remedy minorities' constitutional harms often hinges on underlying political support. The courts' critics thus would probably see the farmers' achievements as a best-case scenario—possible only because the farmers and their allies were savvy enough to work simultaneously through democratic politics and the courts.

If courts' ability to protect minority rights is so limited, perhaps the African American farmers should have focused their efforts on officials outside the courts. In fact, in the many decades that preceded the *Pigford* litigation, they did so. Throughout the twentieth century, black farmers and their allies lodged equality claims with the elected branches of government, as well as in the courts. The next

132. On the backlash to the civil rights era, see generally THOMAS BYRNE EDSALL WITH MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* (1992). For one list of the Court's decisions restricting minority rights, see Griffin, *supra* note 8, at 288–89. The rightward shift reflected Republican presidents' success in filling federal judgeships. As of 2011, Democratic appointees held only 37.3 percent of lower federal judgeships. Sheldon Goldman et al., *Obama's First Term Judiciary: Picking Judges in the Minefield of Obstructionism*, 97 JUDICATURE 7, 23 (2013).

133. See, e.g., *Lewis v. City of Chicago*, 560 U.S. 205, 214–15 (2010) (noting the unavailability of relief for civil rights violations outside of the limitations period); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983) (ruling that to have standing for injunctive relief, the plaintiff must show “real and immediate threat” that he or she will be subject to the same constitutional violation again); *Rizzo v. Goode*, 423 U.S. 362, 377–81 (1976) (describing the considerations weighing against mandatory injunctive relief against state officials).

134. See, e.g., *Rizzo*, 423 U.S. at 378 (“Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.”).

Part considers this longer history, asking what it suggests about constitutionalism outside the courts and the institutional constraints on the political branches.

### III. EQUALITY OUTSIDE THE COURTS: THE FARMERS' LONGER HISTORY

For African Americans, farming was once a dominant way of life and land ownership was a deeply held value.<sup>135</sup> During the nineteenth century, African American slaves understood their long unpaid labor on the land to give them a profound moral claim to the land and its fruits.<sup>136</sup> When freedom finally came, owning a plot offered a precious base of potential independence from whites.<sup>137</sup> Without land, Frederick Douglass wrote, the white plantation owner held “the power of life and death” over black laborers and their livelihood.<sup>138</sup> But ownership did not come easily. At a minimum, a black purchaser had to “be acceptable to the white community, have a white sponsor, be content with the purchase of acreage least desired by the whites, and pay for it in a very few years.”<sup>139</sup> In the worst cases, whites violently opposed black landownership and black landowners paid with their lives.<sup>140</sup>

Despite the formidable barriers, African Americans made up a significant portion of the nation's farmers by the early twentieth century. Nearly a third of

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135. See AUGUST MEIER, *NEGRO THOUGHT IN AMERICA 1880–1915*, at 11 (1968); see also BOOKER T. WASHINGTON & W.E. BURGHARDT DUBOIS, *THE NEGRO IN THE SOUTH: HIS ECONOMIC PROGRESS IN RELATION TO HIS MORAL AND RELIGIOUS DEVELOPMENT* 98 (1907) (“[L]and owning . . . was the ideal toward which the great mass of black people looked.”); Manning Marable, *The Politics of Black Land Tenure: 1877–1915*, 53 *AGRIC. HIST.* 142, 145 (1979) (“The development of a strong black land-base became an ideological imperative of black thought by the 1890s.”).

136. See NORALEE FRANKEL, *BREAK THOSE CHAINS AT LAST: AFRICAN AMERICANS 1860–1880*, at 79 (1996); see also DYLAN PENNINGROTH, *THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH* 158 (2003) (detailing claims to landownership that rested not only on the freed slaves' unpaid labor during slavery, but the sale of their family members).

137. See MEIER, *supra* note 135, at 11 (“First and foremost, . . . the freedmen wanted land.”).

138. See FREDERICK DOUGLASS, *THE LIFE AND TIMES OF FREDERICK DOUGLASS* 502 (Macmillan Publ'g Co. 1962) (1892).

139. GUNNAR MYRDAL, 1 *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 241 (Transaction Publishers, 1996) (1944) (quoting ARTHUR F. RAPER, *PREFACE TO PEASANTRY* 121–22 (1936)).

140. See, e.g., William F. Holmes, *Whitecapping: Agrarian Violence in Mississippi, 1902–1906*, 35 *J.S. HIST.* 165, 166 (1969) (“[I]n Mississippi whitecapping specifically meant . . . driving Negroes off land they owned or rented.”).

Southern farmers were black<sup>141</sup> and a quarter of those black farmers owned their land.<sup>142</sup> But their progress soon halted. By the twentieth century's end, barely more black farm owners existed than immediately after the Civil War.<sup>143</sup> That whitening of American farming is often attributed to black migration northward and technological advances that diminished demand for farm labor.<sup>144</sup> When attributed to migration and technology, the racial shift appears natural and inevitable, albeit rooted in Southern systems of white supremacy. But what those accounts gloss over is that federal policy also helped shape American agriculture into the wealthy, politically powerful—and overwhelmingly white—sector that it is today.<sup>145</sup> As federal farm policy expanded dramatically over the course of the twentieth century, it systematically favored whites.

Beginning in the late nineteenth century, the national government began creating a massive, path-breaking infrastructure to support American farmers—an infrastructure that included the USDA, federally supported land grant colleges, agricultural research stations, and the agricultural extension service.<sup>146</sup> Collectively, those institutions provided cutting-edge scientific knowledge, practical education for farmers, and financial support for agricultural development. By designing these institutions to convey their benefits directly to local farmers, and allowing farmers to govern many programs from the grassroots, the national government created tremendous wealth, human capital, and political power for white farmers. African American and other minority farmers, however, were pushed to the margins.

From Reconstruction forward, black farmers and their advocates petitioned for equal protection of the law and fair treatment within national farm policy. They asked the federal government to implement agricultural policy in accord

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141. U.S. DEPT OF COMM., FOURTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1920, at 193 tbl.4 (1920), [http://www.agcensus.usda.gov/Publications/Historical\\_Publications/1920/Farm\\_Statistics\\_By\\_Color\\_and\\_Tenure.pdf](http://www.agcensus.usda.gov/Publications/Historical_Publications/1920/Farm_Statistics_By_Color_and_Tenure.pdf).

142. *Id.*

143. Loren Schweninger, *A Vanishing Breed: Black Farm Owners in the South, 1651–1982*, 63 AGRIC. HIST. 41, 53 (1989).

144. *E.g.*, HURT, *supra* note 91, at 332–333 (stating that most black farmers were forced off the land due to technology, herbicides, and government programs favoring landowners); NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* 3–6 (1991) (linking the black exodus from the rural South to the invention of the cotton picker).

145. In 2012, over 95 percent of principal farm operators were white. U.S. DEPT OF AGRIC., U.S. AGRICULTURAL CENSUS, 64 tbl.62 (2012), [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1\\_Chapter\\_1\\_US/st99\\_1\\_062\\_062.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1_Chapter_1_US/st99_1_062_062.pdf).

146. On the creation of each element, see William P. Browne, *Benign Public Policies, Malignant Consequences, and the Demise of African American Agriculture*, in *AFRICAN AMERICAN LIFE IN THE RURAL SOUTH, 1900–1950*, at 129, 131–34 (R. Douglas Hurt ed., 2003).

with the constitutional principles of each period. Beginning in the nineteenth century, they asked for separate and *equal* farm institutions so that minority farmers would receive a proportionate share of agricultural resources. Before and after *Brown v. Board of Education*,<sup>147</sup> they asked for equitably integrated institutions for minority farmers, farm employees, and others. Often they claimed redress for intentional discrimination. Those claims frequently were addressed to Congress and the executive branch, as well as the courts.<sup>148</sup>

But no branch responded effectively, leaving the nation's agricultural institutions unequal, unevenly integrated, and rife with disparate treatment. Sometimes legislators and executive officials lacked the will to take any action; sometimes they formally endorsed equality principles but lacked the capacity to effectively implement them. Opponents (most often Southern politicians) inside and outside these branches were able to block official actions, undermine implementation, and undo already-obtained protections for black farmers.<sup>149</sup> They relied on the many institutional openings that American government offers for obstruction: the checks and balances inherent in divided powers; features that provide powerful minorities with "vetoes" on national policy, such as Congress's internal rules and the president's reliance on cohesive support from his party within Congress; the opportunities for federalist defiance offered by systems of local control over federal programs; and bureaucratic intransigence. Denied the human capital, wealth, and political power provided to white farmers, African American farmers disappeared at an increasingly rapid pace. This Part describes that history.

### A. Congress Creates Separate and Unequal Institutions

How did a segregated and unequal national agricultural framework originate? During the Civil War, federal officials began building a broad system of support for American farmers. In 1862, Congress established the USDA and a system of state land grant colleges to support agricultural research and training of farmers in modern agricultural techniques.<sup>150</sup> In 1887, Congress created

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147. 347 U.S. 483 (1954).

148. Unfavorable doctrine and lack of a litigation support structure appear to have prevented farmers from filing claims for equitable funding in the courts during the "separate but equal" era, but they did direct advocacy at the political branches; later eras saw petitions directed at all three branches. See *infra* notes 186, 280 and accompanying text.

149. See *infra* Parts III.A, III.B, III.C, and III.D.

150. Morrill Act, 12 Stat. 503 (1859–1863) (codified as amended at 7 U.S.C. § 301); An Act to Establish a Department of Agriculture, 12 Stat. 387 (1859–1863) (codified as amended at 7 U.S.C. §§ 2201 et seq.).

dedicated agricultural research stations to fuel continual expansion of agricultural knowledge.<sup>151</sup> In the early 1900s, Congress also created a nationwide network of agricultural extension agents—known as farm agents—who would deliver research directly to farmers, visiting them on their farms to educate them on the newest methods.<sup>152</sup> This network of land grant colleges, research stations, and farm agents merged federal, state, and local authority and funds into a truly national, grassroots system of support for farmers. Almost half of the U.S. population worked in agriculture at the time.<sup>153</sup> By the early twentieth century, “the United States. . . [had] develop[ed] the greatest agricultural-rural development system ever devised”—but one which “kept its real benefits from African Americans.”<sup>154</sup>

As Congress designed this rural development system, the legislators understood that it implicated serious constitutional questions of racial justice. Beginning in the 1860s, Congress, including framers of the Fourteenth Amendment, debated requiring the Southern land grant institutions to admit white and black students, regardless of race.<sup>155</sup> As one senator put it, “since we have admitted, and justly so, [African American] men to the Senate there is no ground on which we can exclude them from agricultural colleges.”<sup>156</sup> Yet legislators failed to enact those integrationist proposals, in part because Republicans in Congress initially opposed extending land grant aid to the unreconstructed South.<sup>157</sup> Still, the question of racial justice persisted during subsequent decades as Senator Justin Morrill, the land grant colleges’ original proponent, continued to seek additional federal funding for the colleges.<sup>158</sup>

151. Hatch Act of 1887, 24 Stat. 440 (1885–1887) (codified as amended at 7 U.S.C. §§ 361a et seq.).

152. Smith-Lever Act, 38 Stat. 372 (1913–1915) (codified as amended at 7 U.S.C. §§ 341 et seq.).

153. CAROLYN DIMITRI ET AL., *supra* note 15, at 2.

154. R. Grant Seals, *The Formation of Agricultural and Rural Development Policy With Emphasis on African-Americans: II. The Hatch-George and Smith-Lever Acts*, 65 AGRIC. HIST. 12, 15 (1991) (italics removed from original).

155. See Alfred Avins, *Black Studies, White Separation, and Reflected Light on College Segregation and the Fourteenth Amendment From Early Land Grant College Policies*, 10 WASHBURN L.J. 181, 187–92, 198–205 (1971) (describing the debates). Avins, a conservative opponent of civil rights, relied on congressional acceptance of land grant segregation to argue against *Brown v. Board of Education*’s interpretation of the Equal Protection Clause. See *id.* at 211–13.

156. *Id.* at 191 (citing CONG. GLOBE, 41st Cong., 2d Sess. 1169, 2155 (1870) (Sen. Schurz)).

157. See *id.* at 187–88, 192, 202. Under the first Morrill Act of 1862, states “currently in rebellion” were not eligible for land grants. Kimberley S. Johnson, *Racial Orders, Congress, and the Agricultural Welfare State, 1865–1940*, 25 STUD. AM. POL. DEV. 143, 148 (2011).

158. See Avins, *supra* note 155, at 192–207. Some Reconstruction-era Republicans argued that an integration mandate would both defeat Morrill’s legislation, and in any case was “not necessary” because “the distinction between white and black has been abolished . . . in our Constitution, and [the] Constitution is a part of every law.” CONG. GLOBE, 42nd Cong., 3d Sess. 1705 (1873) (Sen. Frelinghuysen and Sen. Morrill).

Congress ultimately chose a different way of implementing racial fairness in the land grant system. In 1890, legislators expanded federal funding of the land grants in the Second Morrill Act.<sup>159</sup> Instead of mandating integration, the Act required Southern states to provide land grant colleges for African Americans as well as whites and to provide a “just and equitable division of funds” between white and black land grant colleges.<sup>160</sup> Thus, Congress itself debated and created a “separate but equal” framework for agricultural institutions years before *Plessy v. Ferguson*.<sup>161</sup> If that framework was to be even nominally consistent with equal protection principles, the mandate of equal funding was critical.

Yet when the equality mandate was tested, Congress quickly retreated, citing separation of powers and federalism concerns. In 1891, the Republican Secretary of Interior attempted to enforce the Second Morrill Act’s requirement that states equitably divide funds between white and black land grant colleges, and withheld South Carolina’s grant.<sup>162</sup> Congress used its legislative power to immediately override the executive branch decision, effectively communicating its intent that in the future “any division of the grant made by the state legislatures should prevail.”<sup>163</sup> Supporters of the override argued that it was illegitimate for an executive branch official (“never elected to anything by anybody”) to exercise “a revisory or a veto power” over the states’ decisionmaking.<sup>164</sup>

The question of enforcing separate but equal agricultural institutions arose again in the early twentieth century. In the Smith-Lever Act of 1914, Congress created the national agricultural extension service so that local agents could bring modern farming techniques directly to farmers in their fields.<sup>165</sup> Southerners held considerable power in the Congress of this period and blocked even the formal

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159. Second Morrill Act, ch. 841, 26 Stat. 417 (1890).

160. *Id.* § 1 (codified as amended at 7 U.S.C. § 323); see also Avins, *supra* note 155, at 207–11 (discussing the debates over this provision).

161. 163 U.S. 537, 550–51 (1896) (ruling that state law requiring “equal but separate” railcars did not violate the Fourteenth Amendment); Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate but Equal*, 72 MINN. L. REV. 29, 43 (1987).

162. V.O. KEY, JR., THE ADMINISTRATION OF FEDERAL GRANTS TO STATES 161–62 (1937). The Secretary wished states to divide the funds according to each race’s proportion of the population; South Carolina, which was 60 percent black at the time, wished to divide it evenly (therefore allocating proportionally less to its black population). See 23 CONG. REC. 5200 (1892) (Rep. Culberson, Rep. Taylor).

163. KEY, *supra* note 162, at 162; see also Kujovich, *supra* note 161, at 46 n.63. For a graphic depiction of the minimal (and declining) share black land grant institutions received of federal and state funds over time, see Johnson, *supra* note 157, at 151 fig.1 & n.44.

164. 23 CONG. REC. 5202 (1892) (Rep. Storer, Rep. McMillin).

165. Smith-Lever Act of 1914, Pub. L. No. 63–95, 38 Stat. 372 (1913–1915) (codified as amended at 7 U.S.C. §§ 341 et seq.).

mandate of equality.<sup>166</sup> As proposed, the extension system was to be administered out of the state land grant colleges, meaning that in the South, white and black extension services would operate separately out of the segregated schools.<sup>167</sup> Seeing the potential for unequal treatment if funds for the black service flowed through the white colleges, black leaders and their allies lobbied Congress.<sup>168</sup> Working with the National Association for the Advancement of Colored People (NAACP), Senator Wesley Jones of Washington proposed an amendment requiring a racially equitable division of funds.<sup>169</sup> Without the Jones Amendment, its advocates argued that the law would effectively “say to every colored man North and South, ‘You are being discriminated against in this law.’”<sup>170</sup>

Southern senators did not deny their discriminatory intentions. “I will tell the Senator frankly what we will do [with the funding],” stated Senator Hoke Smith of Georgia, a cosponsor of the Act.<sup>171</sup> “We will put it in our white agricultural college. We would not appropriate a dollar in Georgia to undertake to do extension work from the [N]egro agricultural and mechanical school. It would be a waste of money.”<sup>172</sup>

The Jones Amendment’s mandate of racial equity failed. Democrats coalesced to defeat it in the Senate and the division of funds for extension work was left to the states’ discretion.<sup>173</sup> Predictably, the separate black extension service never received equal funding.<sup>174</sup> Meanwhile, the extension agents increasingly became the face of, and conduit for, federal farm research and benefits.<sup>175</sup> The

166. Southerners chaired twelve out of fourteen U.S. Senate committees and eleven out of the thirteen committees in the U.S. House of Representatives, while accounting for half the Senate Democratic majority and 40 percent of the House majority. Their strength was amplified by the Democratic administration of Woodrow Wilson, which supported Southern segregationists. See Morton Sosna, *The South in the Saddle: Racial Politics During the Wilson Years*, 54 WIS. MAG. HIST. 30, 35 (1970).

167. See *id.* at 42–43.

168. Carmen V. Harris, “*The Extension Service Is Not an Integration Agency*”: *The Idea of Race in the Cooperative Extension Service*, 82 AGRIC. HIST. 193, 197–98 (2008); Seals, *supra* note 154, at 25, 30–31, 33–34; Sosna, *supra* note 166, at 43–44.

169. Sosna, *supra* note 166, at 44.

170. Seals, *supra* note 154, at 29–30 (quoting 51 CONG. REC. 2945, 3033, 3034, 3039 (1914) (statement of Sen. Clapp)).

171. Sosna, *supra* note 166, at 44 (quoting 51 CONG. REC. 2945 (1914) (statement of Sen. Smith)).

172. *Id.*; see also Harris, *supra* note 168, at 200–01.

173. The Jones Amendment was defeated 23–32 on an almost entirely party-line vote, with only two Democratic senators (from Nebraska and Ohio) voting in its favor. See 51 CONG. REC. 3124 (1914).

174. See Kujovich, *supra* note 161, at 54; see also Earl W. Crosby, *The Struggle for Existence: The Institutionalization of the Black County Agent System*, 60 AGRIC. HIST. 123, 132–33 (1986).

175. See HOWARD R. TOLLEY, *THE FARMER CITIZEN AT WAR* 63 (1943) (“[T]he focal point of all [farm] programs . . . remains the county agricultural agent, representing Federal, state, and local governments in their cooperative aid to farmers.”).

shortage of black agents in this dual system meant that the extension service's benefits—"increased farm earnings, enhanced educational opportunities, improvements in health and home life . . . , and an increased standard of rural living"—never flowed to African American families on fair terms.<sup>176</sup> Often they did not even know what supports were available.<sup>177</sup>

Although the NAACP lost the initial fight for equal funding of the segregated extension service, black leaders and farmers continued to organize, pressing in the media and through political channels for a more equitable share of resources.<sup>178</sup> In 1924, a leading black newspaper, the *Chicago Defender*, publicized the unequal apportionment of funds between the white and black extension services: Black farmers got, on average, less than half their proportionate share of federal funds and received even less from state or county appropriations.<sup>179</sup> The *Defender* wrote: "To train the white farmer and leave the Negro farmer ignorant; to aid the white farmer financially and leave the Negro farmer indigent, is to aid one group of citizens to become independent at the expense of another . . . ."<sup>180</sup> There was "grave danger in permitting the government funds to be misappropriated, in permitting scheming Democratic politicians in the South to divert what should help all to the whites alone, thereby providing for an increasingly large gap between the white farmer and other farmers. . . ."<sup>181</sup>

The *Defender* suggested political pressure for equalization. Given heightened concern over the Great Migration and the loss of black labor in the South, "the time seems very opportune to call on the federal and state governments for a substantial increase in the number of Negro [extension] workers . . . ."<sup>182</sup> An interracial commission met to strategize ways to expand funding of the black extension service.<sup>183</sup> In 1930, a committee formed at President Hoover's suggestion again called for increased resources for black agricultural education, both by

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176. Kujovich, *supra* note 161, at 55.

177. See SCHEPER, *supra* note 93, at 6–12.

178. E.g., *Helping Our Farmers Help Themselves*, NORFOLK J. & GUIDE, Mar. 18, 1922, at 4 (criticizing the "woefully inadequate" number of black extension agents and linking it to the need for increased funding of black land grant education).

179. *White Democratic South Keeps Our Farmers Down*, CHI. DEFENDER, Nov. 1, 1924, at 8.

180. *Id.*

181. *Id.*

182. *Id.*; see also George S. Schuyler, *Views and Reviews*, PITT. COURIER, Aug. 23, 1930, at 10 (asking African American voters to "urge their congressmen to increase the number and pay of [black extension] agents").

183. *White Democratic South Keeps Our Farmers Down*, *supra* note 179, at 8.



strengthening segregated land grant colleges and providing more African American extension agents.<sup>184</sup>

Despite black leaders' pressure, the resources dedicated to these segregated institutions during this period remained highly unequal, as Congress largely turned a deaf ear.<sup>185</sup> It was Congress that controlled both federal funding and the structure of the federal-state relationships around the extension service, land grant colleges, and research stations. Congress thus had the direct power to implement and enforce that era's constitutional principle of separate but equal. Yet Southern members exercised their power at key points, buttressed by Congress's institutional rules, to quash even formal equality guarantees for black farmers. Meanwhile, the other two branches had far less capacity to intervene. It is unlikely that litigation in the federal courts could have brought about an equal funding remedy during this period, and such litigation did not materialize.<sup>186</sup> Nor does it seem that the executive branch had the actual power to do so, even when formally charged with ensuring equality. Recall that a Republican Secretary of Interior was rebuffed by Congress when he attempted to enforce the mandate of equal funding of black and white land grant colleges—an example of checks and balances, alongside federalism concerns, thwarting minority protections.<sup>187</sup> In the end, Congress, the branch with direct power to assure an equal division of funding, did almost nothing due to powerful internal opposition.

## B. Class-Based Justice in the New Deal

With the New Deal came a dramatic expansion in federal support for farming. In this era, leading liberals in the executive branch favored an alternative vision of racial equity, advocating programs that would address class inequality in a

184. *Population Shift to City Increases Negro-White Industrial Competition*, N.Y. AMSTERDAM NEWS, Oct. 22, 1930, at 3.

185. Federal funding supplied less than half the institutions' funds and white institutions were funded at over 150 percent the level of the black institutions on a per-student basis. John R. Wennersten, *The Travail of Black Land-Grant Schools in the South, 1890-1917*, 65 AGRIC. HIST. 54, 61 (1991).

186. Members of Congress apparently believed that states were immune to any such suits. See Avins, *supra* note 155, at 192. The chances of success would have been slim in any case: Very few equalization cases were brought before the 1930s, even in the context of primary and secondary schools, and a litigation support structure did not exist. See Gladys Tignor Peterson, *The Present Status of the Negro Separate School as Defined by Court Decisions*, 4 J. NEGRO EDUC. 351, 364-65 tbl.3, 368-71 (1935) (identifying twenty-eight cases challenging unequal schools adjudicated in state courts of last resort since 1865 and reporting a 32 percent success rate); Mark V. Tushnet, *Thurgood Marshall as a Lawyer: The Campaign Against School Segregation, 1945-1950*, 40 MD. L. REV. 411, 411-12 (1981) (noting that the National Association for the Advancement of Colored People (NAACP) did not begin litigating equalization cases until the 1930s).

187. See *supra* notes 162-164 and accompanying text.

nondiscriminatory way.<sup>188</sup> By aiding the poorest farmers, such policy would in fact diminish racial inequality. But that egalitarian vision foundered on Southern and conservative opposition, while unequal funding of segregated white and black farm institutions persisted.<sup>189</sup>

Southern Democrats had disproportionate power during these years due to their stranglehold on Southern politics, their status as a cohesive bloc within the Democratic Party, and the power they accrued in Congress through seniority, along with devices like the filibuster.<sup>190</sup> From 1933 to 1952, white Southerners controlled at least 40 percent of the seats in Congress and half the committee chairs.<sup>191</sup> Wielding these powers within the legislative branch, Southerners could defeat executive initiatives at will, giving them what political scientists have called “a structural veto” over all New Deal and Fair Deal legislation.<sup>192</sup> As a result, “southern Democrats became one of the obstacles around which Roosevelt would have to craft agricultural policy.”<sup>193</sup>

One of the most important developments in this period further augmented Southern power: the devolution of significant control over federal farm programs to local officials. The New Deal’s major farm programs were premised on local control, in part to allow more fine-tuned administration, but also reflecting Southerners’ attempts to insulate local governance—and the racial caste system—from federal intervention.<sup>194</sup> As a result, these federally funded programs were directed through elected or appointed county-level committees of local farmers, supervised by state-level committees.<sup>195</sup> Some saw this as laying the foundation

188. See Mary Summers, *The New Deal Farm Programs: Looking for Reconstruction in American Agriculture*, 74 AGRIC. HIST. 241, 251 (2000).

189. Even at the highest reaches of the federal agricultural agencies, white Southerners were often in control. HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE* 33 (2008) (“No other department was as controlled by white supremacists both in the bureaucracy and in Congress as was the Department of Agriculture.”); see also ROGER BILES, *THE SOUTH AND THE NEW DEAL* 39, 44 (1994) (describing the Southern role in New Deal agricultural programs and Southerners’ power over congressional agriculture committees).

190. Ira Katznelson et al., *Limiting Liberalism: The Southern Veto in Congress, 1933–1950*, 108 POL. SCI. Q. 283, 284–85 (1993).

191. *Id.*

192. See *id.* at 296; see also Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. AM. POL. DEV. 1, 1–2, 9 (2005).

193. Johnson, *supra* note 157, at 157.

194. In order to maintain the racial caste system, Southerners continually sought local control of federal programs as the welfare state expanded dramatically during the New Deal years. See ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* 34–35, 51–55 (1998); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* 21–22 (1994); Forbath, *supra* note 6, at 203–05.

195. See, e.g., Dale Clark, *The Farmer as Co-Administrator*, 3 PUB. OPIN. Q. 482, 482–86 (1939) (discussing democratic goals associated with incorporating farmers into governance of farm

for truly “democratic planning” of agriculture programs at the most grassroots level.<sup>196</sup> But these local governance committees were usually all white, belying their “democratic” claims.<sup>197</sup>

In the 1930s, black leaders took the New Deal to task for perpetuating racial discrimination.<sup>198</sup> Among their critiques, they singled out farm programs, calling once more for equitable funding of segregated black programs.<sup>199</sup> African American farm families had less than half their proportional share of extension agents in the South at a time when the local agent had become even more critical as a source of information about federal farm benefits.<sup>200</sup> Those African American agents served populations nearly three times as large as those of white agents.<sup>201</sup> Liberals in President Franklin D. Roosevelt’s administration added their voices, encouraging blacks to seek greater equity and be prepared to “fight for their rights.”<sup>202</sup>

Wartime exigencies appeared to account for the few gains African American farmers obtained. During World War II, the national government pressed all farmers to increase their production.<sup>203</sup> Black farmers’ advocates argued that this required a fairer allocation of resources. A presidential committee offered “[a] proposal to bring up to parity the existing facilities of extension service with Negroes in the Southern states” by increasing salaries and the number of agencies

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programs generally, as well as the AAA’s state and county committee structures); Pete Daniel, *African American Farmers and Civil Rights*, 73 J.S. HIST. 3, 5 (2007) (describing powers of the county committees of the Farmers Home Administration, Agricultural Stabilization and Conservation Service, and Extension Service); CIVIL RIGHTS ACTION TEAM, *supra* note 88, at 17–18 (describing more recent system for electing county committees to oversee Farm Service Agency programs).

196. Jess Gilbert, *Rural Sociology and Democratic Planning in the Third New Deal*, 82 AGRIC. HIST. 421, 424, 434 (2008).

197. SITKOFF, *supra* note 189, at 41.

198. See *Editorial Comment: The National Conference on the Economic Crisis and the Negro*, 5 J. NEGRO EDUC. 1 (1936) (volume dedicated to conference papers critiquing New Deal relief policies’ marginalization of African Americans); see also SITKOFF, *supra* note 189, at 42 (describing attacks on New Deal discrimination in the black press generally as well as at the 1936 conference).

199. E.g., John W. Davis, *The Participation of Negro Land-Grant Colleges in Permanent Federal Education Funds*, 7 J. NEGRO EDUC. 282 (1938); Doxey A. Wilkerson, *The Participation of Negroes in the Federally-Aided Program of Agricultural and Home Economics Extension*, 7 J. NEGRO EDUC. 331 (1938).

200. See *id.* at 335–36; TOLLEY, *supra* note 175, at 63–65.

201. Wilkerson, *supra* note 199, at 335–36. In 1937, only 6 percent of extension funds in sixteen Southern states went to work among black farmers—only slightly over a quarter of their proportionate share. *Id.* at 337–38.

202. *Foreman Tells Us to Fight for Our Rights*, PITT. COURIER, Nov. 18, 1933, at 1 (quoting Clark Foreman, advisor to Secretary of Interior Harold Ickes).

203. See *Negro Farmers All-Out in Food for War Drive*, PITT. COURIER, June 6, 1942, at 13.

serving black farmers.<sup>204</sup> From below, black agents themselves also asked for equal salaries.<sup>205</sup> In 1942, two African American leaders were appointed as special assistants to the Secretary of Agriculture.<sup>206</sup> They pushed for the expansion of the black extension service and urged the black press to apply pressure toward the same goal.<sup>207</sup> The number of black agents did increase, but the black extension service was never fully equalized.<sup>208</sup>

New Deal liberals also failed in their efforts to protect landless farmers and farm workers, who were disproportionately black. In fact, the New Deal's first major agricultural intervention, the Agricultural Administration Act (AAA), severely hurt landless farmers.<sup>209</sup> By paying landowners to reduce production, the program encouraged the eviction of black tenant farmers and sharecroppers.<sup>210</sup> The infusion of cash allowed farmers to buy machinery, lessening the overall need for farm labor, and to pay cash wages to seasonal laborers rather than sharing the harvest with tenants.<sup>211</sup> Landowners refused to share their federal subsidy checks with the tenants, despite their legal obligation to do so.<sup>212</sup> Complaints about the AAA program went to white-controlled local county committees. When asked why tenants were not on the committee, one white county agent reportedly said, "Hell! You wouldn't put a chicken on a poultry board, would you?"<sup>213</sup> Agency liberals battled to assure fairness in the AAA's cotton programs for (disproportionately black) tenant farmers and sharecroppers, but the conservatives won—and the liberal New Dealers were purged from the farm agency in 1935.<sup>214</sup>

204. Jeannie M. Whayne, *Black Farmers and the Agricultural Cooperative Extension Service: The Alabama Experience, 1945–1965*, 72 AGRIC. HIST. 523, 532–33 & n.25 (1998).

205. *Id.* at 539.

206. *Two Aides Named to Agriculture Chief: Patterson and Barnett Are Chosen*, CHI. DEFENDER, Mar. 21, 1942, at 8.

207. See Joel Schor, *The Black Presence in the U.S. Cooperative Extension Service Since 1945: An American Quest for Service and Equity*, 60 AGRIC. HIST. 137, 141 (1986); Debra A. Reid, *African Americans and Land Loss in Texas: Government Duplicity and Discrimination Based on Race and Class*, 77 AGRIC. HIST. 258, 285 (2003).

208. See Schor, *supra* note 207, at 141 n.9; *Over \$2,000,000 Allotted for Negro Extension Work*, ATLANTA DAILY WORLD, Jan. 22, 1947, at 2.

209. See Summers, *supra* note 188, at 248–49.

210. See USCCR, DECLINE, *supra* note 93, at 28–30; John P. Davis, *A Survey of the Problems of the Negro Under the New Deal*, 5 J. NEGRO EDUC. 3, 5 (1936).

211. See BILES, *supra* note 189, at 43, 55–56.

212. See USCCR, DECLINE, *supra* note 93, at 30; Ralph J. Bunche, *A Critique of New Deal Social Planning as It Affects Negroes*, 5 J. NEGRO EDUC. 59, 64 (1936).

213. Reid, *supra* note 207, at 276; see also SITKOFF, *supra* note 189, at 41 (“Not a single black served on an AAA county committee throughout the South.”).

214. See BILES, *supra* note 189, at 43–47; Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1362–64 (1987).

After Southern conservatives' takeover of the AAA, poor farmers found support from a new agency, the Farm Security Administration (FSA), which was founded to address rising protests over the situation of sharecroppers and the landless rural poor.<sup>215</sup> The FSA was initially led by liberal reformer Will Alexander; it was notable for treating African Americans relatively equitably, and it supported programs like cooperatives that were intended to allow smaller farmers to compete with large ones.<sup>216</sup> Yet the agency was never well funded.<sup>217</sup> Its programs alone could not counteract the structural bias of federal support toward large agriculture or the pervasive racial discrimination that was structured into all other federal farm programs.<sup>218</sup> Eventually a conservative alliance of larger farmers in the American Farm Bureau, Southern Democrats, and Republicans accused the FSA of supporting socialism and other subversive goals and killed it off.<sup>219</sup>

In the black press, the FSA's decline symbolized black farmers' inability to obtain equitable policies through politics. Attributing the FSA's death to the strength of the conservative farm lobby, one columnist concluded "[a] Negro Lobby" of similar strength was needed to rectify inequities ranging from the failure to include blacks in price and ration boards and war industry jobs, to discrimination in administering the draft.<sup>220</sup> Lacking such a cohesive lobby, the FSA was moribund by 1946. Only 3 percent of the funds appropriated for farm programs that year went to African Americans.<sup>221</sup> That same year, leaders of the black

215. See SITKOFF, *supra* note 189, at 41. An earlier agency with similar aims, the Resettlement Administration, was shifted to the USDA, renamed the Farm Security Administration, and expanded in scope.

216. See KIMBERLEY JOHNSON, REFORMING JIM CROW: SOUTHERN POLITICS AND STATE IN THE AGE BEFORE BROWN 72–74 (2010); SITKOFF, *supra* note 189, at 55–56; Reid, *supra* note 207, at 280–81. Alexander was a racial liberal who believed, based on his research and activism in the South, that chronic poverty among Southern farmers was due to “the trinity of cotton culture, farm tenancy, and race.” See SIDNEY BALDWIN, POVERTY AND POLITICS: THE RISE AND DECLINE OF THE FARM SECURITY ADMINISTRATION 95–96, 127 (1968).

217. BILES, *supra* note 189, at 49.

218. On federal agricultural policy's bias toward large farmers, see USCCR, DECLINE, *supra* note 93, at 52–53; Jess Gilbert & Carolyn Howe, *Beyond “State vs. Society”: Theories of the State and New Deal Agricultural Policies*, 56 AM. SOC. REV. 204, 208 (1991).

219. See BALDWIN, *supra* note 216, at 337–94; KENNETH FINEGOLD & THEDA SKOCPOL, STATE AND PARTY IN AMERICA'S NEW DEAL 147 (1995); DONALD H. GRUBBS, CRY FROM THE COTTON: THE SOUTHERN TENANT FARMERS' UNION AND THE NEW DEAL 159–60 (1971); Summers, *supra* note 188, at 252; *FSA Continuation Urged*, 50 CRISIS 150, 150 (1943); *Now FSA Is Under Fire*, PITT. COURIER, June 20, 1942, at 7; see also *Race to Lose if States Win Farm Policy Control*, NEW J. & GUIDE, Mar. 8, 1941, at 4 (reporting that 1 percent of the American Farm Bureau membership was black and black members were barred from meetings in the South).

220. Harry McAlpin, *Silver Lining*, CHI. DEFENDER, Apr. 17, 1943, at 15.

221. Carmen V. Harris, *States' Rights, Federal Bureaucrats, and Segregated 4-H Camps in the United States, 1927–1969*, 93 J. AFR. AM. HIST. 362, 368 (2008).

press presented a report to the Secretary of Agriculture documenting “gross inequalities in the distribution of federal funds to the land-grant colleges in the South,” and called yet again for greater equity between the segregated land grant institutions and increased numbers of black extension agents.<sup>222</sup>

With farm programs still strikingly unequal throughout this period, African American farmers fell farther behind whites. Minority farmers’ numbers declined from 1920 onward.<sup>223</sup> Though overall farm ownership rose during the New Deal, only a tiny fraction of the new owners were African Americans.<sup>224</sup> As one sociologist concluded in 1953: “Negro farmers as a group have lost ground in the period 1920–50 by any criteria. . . .”<sup>225</sup> Along with economic shifts and the Depression, the author pointed to black farmers’ exclusion from farm programs’ governance, which shut them off from the programs’ generous benefits.<sup>226</sup>

Thus, minority farmers were largely excluded from the tremendous national investment in agricultural development during the New Deal and postwar years as well as the apparent democratic innovation of delegating governing powers to farmers at the grassroots level. Though liberals in the executive branch tried to assist the poor farmers of the South in a racially egalitarian way, they were outmaneuvered by Southerners and conservatives inside and outside of Congress—through steps like purging liberals from the AAA and ensuring local whites’ control of the myriad New Deal farm programs. When FDR’s administration attempted more equitable programs, it met serious backlash—as when local whites greeted black farm agents with violence, or the FSA’s programs to aid landless farmers were stamped out by conservative opposition. Intermittent executive will was not powerful enough to overcome Southern resistance, in part because of the institutional rules that gave Southern Democrats disproportionate power, and in part because FDR’s administration depended so critically on those Southerners to enact its programs in Congress.<sup>227</sup>

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222. *Agriculture Dept. Promises Aid to Land Grant Colleges*, CHI. DEFENDER, Mar. 9, 1946, at 5.

223. See James S. Fisher, *Negro Farm Ownership in the South*, 63 ANNALS ASS’N AM. GEOGRAPHERS 478, 482 tbl.1 (1973).

224. Lewis W. Jones, *The Negro Farmer*, 22 J. NEGRO EDUC. 322, 327 (1953) (stating that the number of farm owners rose by 270,000 during that period, but only 11,000 of those were African Americans) (citing Arthur Raper, *Southern Agricultural Trends and Their Effect on Negro Farmers*, in THE CHANGING STATUS OF THE NEGRO IN SOUTHERN AGRICULTURE 12, 25 (Lewis W. Jones ed., 1951)).

225. *Id.* at 330.

226. *Id.* at 331 (“The fact that the Negro farmer’s participation on the local committees of the several agricultural agencies has been negligible, in keeping with the South’s general political pattern, no doubt has been important in determining his share in the benefits from the activities of the agencies.”).

227. See *supra* notes 189–193 and accompanying text.

### C. Incomplete Integration in the Executive Branch

During the middle part of the twentieth century, the federal farm system continued to exclude and segregate minority farmers. When minorities did seek federal support, local white farm officials and committee members often humiliated them. Decades later, farmers remembered this treatment. In the 1950s, a black farmer was denied an Farmers Home Administration (FmHA) loan because he wanted to build a brick house: “The white man, who reviewed the loan applications, told me that colored folks did not live in brick houses.”<sup>228</sup> Another remembered from the 1960s “a white FmHA committee member in Bullock County, Ala. [saying] that a black farmer had been denied a loan because he was ‘shooting off his mouth about civil rights.’”<sup>229</sup> Black farmers were kept waiting in the county offices while white farmers were seen first; they were addressed by their first name or worse, while whites were addressed as “Mr.” or “Mrs.”<sup>230</sup> As late as “the early 1980’s, black folks didn’t even want to go into the [FmHA] office. You had to pull your hat off, say, ‘Yes, sir.’”<sup>231</sup>

Yet a new equal protection paradigm had emerged during the second half of the twentieth century. According to the Supreme Court, equal protection no longer meant separate, equal institutions, but required “unitary system[s] in which racial discrimination would be eliminated root and branch.”<sup>232</sup> In 1954, the Supreme Court had indicated in *Brown*’s lesser-known companion case, *Bolling v. Sharpe*,<sup>233</sup> that federal programs should be integrated along with state and local institutions. African American leaders, activists, and farmers called on the federal government to make *Brown* and *Bolling*’s constitutional principle real in its national agricultural policy by integrating farm programs.

Though courts oversaw the initial stages of integration efforts in some domains—particularly schools—the same was not true in agriculture. Systemic litigation to integrate farm programs did not materialize until the 1970s, perhaps

228. Valca Valentine, *Black-Owned Farms in Md. Stabilizing*, WASH. POST, Aug. 9, 1986, at A12.

229. *Blacks Find Few Friends in Farming*, CHI. TRIB., May 14, 1989, at G14A.

230. GA. STATE ADVISORY COMM., U.S. COMM’N ON CIVIL RIGHTS, EQUAL OPPORTUNITY IN FEDERALLY ASSISTED AGRICULTURAL PROGRAMS IN GEORGIA 30 (1967); SCHEPER, *supra* note 93, at 4–5.

231. Adam Nossiter, *A Threat to Minority Aid Worries Black Farmers*, N.Y. TIMES (Nov. 28, 1995), <http://www.nytimes.com/1995/11/28/us/a-threat-to-minority-aid-worries-black-farmers.html?pagewanted=all&pagewanted=print> [<http://perma.cc/UVM5-3MRW>].

232. *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 438 (1968).

233. 347 U.S. 497, 500 (1954) (ruling that federally imposed segregation in public schools violates the Fifth Amendment’s due process guarantee); *see also* Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1013 (2004) (“*Bolling* was sufficient cause for the federal bureaucracy to reevaluate and change any affected policies, even if it was not quite tantamount to a full incorporation of equal protection.”).

due to the NAACP's concentration among urban constituencies.<sup>234</sup> Instead, enforcement of integration initially rested on the political branch. With the shift in constitutional paradigm came a shift in the relative power of Congress and the executive branch to implement equal protection standards. During earlier periods, it was Congress that could implement "separate but equal" by mandating equal funding for segregated black farm institutions. Now, the executive branch was best positioned to implement equal protection, using its powers over the internal administration of farm programs. The federal executive under Republican President Eisenhower, however, demonstrated little will to integrate farm institutions.<sup>235</sup> Integration did not really begin until Democratic President Lyndon Johnson took office and demanded progress.<sup>236</sup> Even then, opponents in Congress, the agricultural agencies, and the grassroots public slowed and subverted presidential attempts at reform. Later Republican administrations showed scant interest in bringing about real, egalitarian integration of farm institutions.<sup>237</sup>

In the years immediately after *Brown*, the Agriculture Department did little to address the rampant segregation in its programs.<sup>238</sup> In 1955, the *Chicago Defender* denounced the department's support for segregation: "[T]he department is out of step with the administration and out of tune with the times. Integration has become the byword of the capital and yet it naively plans to go right ahead with a separate and segregated [4-H] encampment . . ."<sup>239</sup> The newspaper also noted "certain segregated practices in the extension service," "the two sets of 4-H club groups," and "that [Secretary] Benson has not seen fit during his two years to include Negroes in policy making and advisory positions on his staff."<sup>240</sup>

234. See DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970*, at 114–15 (1982) (connecting NAACP growth to urbanization); M. John Bundy & Allen D. Evans, Comment, *Racial Discrimination in USDA Programs in the South: A Problem in Assuring the Integrity of the Welfare State*, 45 WASH. L. REV. 727, 772–82 (1970) (proposing litigation).

235. See *infra* notes 238–241 and accompanying text.

236. See *infra* notes 251–256 and accompanying text.

237. See *infra* note 276 and accompanying text. In a telling incident, Earl Butz, the Secretary of Agriculture who served from 1971 to 1976 under Presidents Nixon and Ford, was forced to resign amidst the presidential campaign of 1976 after making highly offensive comments regarding African Americans. See William Robbins, *Butz Quits Under Fire Amid Rising Protests About Racist Remark*, N.Y. TIMES, Oct. 5, 1976, at 1. Ford called accepting the resignation "one of the saddest decisions of my presidency." *Id.* The USDA of that time was known as an agency that "scarcely ever had blacks in high level posts." Bill Drummond, *Broad Spectrum of Jobs: Carter Opens New Doors to Top Black Appointees*, L.A. TIMES, Dec. 12, 1977, at A1.

238. See Harris, *supra* note 168, at 207–10.

239. Ethel L. Payne, *Agricultural Department Lags in Integration, Negro Appointments*, CHI. DEFENDER, Feb. 26, 1955, at 12.

240. *Id.*



As activists denounced the persistent segregation within USDA programs in the 1950s and 1960s, white supremacists used local white power over farm programs to retaliate against civil rights activists who sought to vote or to integrate schools.<sup>241</sup> Local agricultural officials cut off NAACP members from farm benefits and curtailed USDA surplus food distribution—demonstrating the power of local control to tamp down black political participation.<sup>242</sup> The NAACP, Congress of Racial Equality (CORE), and others urged federal investigations.<sup>243</sup>

Finally, in 1965, the U.S. Commission on Civil Rights catalyzed the integration of the USDA, releasing a scathing report that documented extensive segregation and discrimination within the agency's programs.<sup>244</sup> The report directly blamed the Department for "fail[ing] to assume responsibility for assuring equal opportunity and equal treatment to all those entitled to benefit from its programs."<sup>245</sup> Instead, "the prevailing practice has been to follow local patterns of racial segregation and discrimination in providing assistance paid for by Federal funds."<sup>246</sup>

Black farmers, according to the report, were left to scratch out a living as subsistence farmers, while white farmers gained access to productive, wealth-building capital.<sup>247</sup> Local racism dictated these outcomes: "Starting with a view that Negroes cannot improve as farmers, many programs have not trained

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241. See Harris, *supra* note 168, at 210–12 (describing the ongoing segregation in USDA programs in the 1960s); Harris, *supra* note 221, at 381–83 (same with respect to 4-H camps).

242. See CORE Urges Thorough Probe by U.S. of Miss. 'Freeze,' CHI. DAILY DEFENDER, Dec. 13, 1962, at 3; *Mississippi Affidavits Filed With White House*, ATLANTA DAILY WORLD, Jan. 25, 1955, at 1; *N.Y. Doctors Aid Tent City in Tennessee*, N.Y. AMSTERDAM NEWS, Feb. 18, 1961, at 11; *Plan Afoot in Dixie to Drive Negroes off Land*, PITT. COURIER, Dec. 23, 1961, at 5; *Porters Add \$10,000 to Freeze Fund*, CHI. DEFENDER, Feb. 5, 1955, at 1; *Tennessee Emergency Easing NAACP Branch Director Declares*, CHI. DAILY DEFENDER, Aug. 23, 1961, at 5. In Panola, Alabama, African American tenant farmers were evicted after claiming a share of federal crop subsidy ("allotment") checks. NAACP Urges U.S. to Halt Farmers' Evictions, 74 CRISIS 105, 105–07 (1967); see also Sheila Maroney, *Aiding the Rural Poor*, 75 CRISIS 152, 152 (1968). The retaliation was part of a more general pattern of Southern officials using their power over various federal-state cooperative programs to retaliate against civil rights activists. See James C. Cobb, "Somebody Done Nailed Us on the Cross": Federal Farm and Welfare Policy and the Civil Rights Movement in the Mississippi Delta, 77 J. AM. HIST. 912, 922–25 (1990).

243. See sources cited *supra* note 242.

244. See USCCR, EQUAL OPPORTUNITY, *supra* note 93.

245. *Id.* at 100.

246. *Id.*

247. See *id.*

Negroes in the new technology nor encouraged them to diversify, to acquire larger acreage, or to make their small acreage more productive.”<sup>248</sup>

Minority farmers also remained systematically excluded from local governance: “One of the most serious obstacles barring Negro farmers from the benefits of the Department’s programs has been the consistent exclusion of Negroes from the local decision-making process which controls the dispensing of these benefits. . . . Negroes do not join white farmers in making plans for the community.”<sup>249</sup> Black farmers’ exclusion from local governance of farm programs meant exclusion from benefits: “[T]hese local controls have been used in the South to establish and maintain racial differentials in the kinds and amounts of Federal aid available to farmers. Far from discouraging such undemocratic practices in its programs, the Department itself has generally conformed to the discriminatory regional pattern.”<sup>250</sup>

President Johnson asked the Secretary of Agriculture to respond to the report with concrete plans for action within thirty days.<sup>251</sup> Initially, the government pursued real integration in farm programs; an observer described the USDA as “one of the most active Federal agencies in civil rights.”<sup>252</sup> In April 1965, Secretary Freeman ordered the agency to comply with antidiscrimination laws.<sup>253</sup> He appointed William Seabron as assistant to the secretary for civil rights to coordinate civil rights across all USDA agencies, and created a citizens’ advisory committee on discrimination.<sup>254</sup> The agency issued integration guidelines, established a system for collecting minority participation data, and appointed African Americans to state and local committees.<sup>255</sup> Black employment in the Department increased by 41 percent in a single year.<sup>256</sup>

248. *Id.* at 101; *see also id.* at 100 (“[Discrimination] has meant a different kind of service to the two races, with Negro farmers receiving for the most part subsistence loans with limited supervision, while white farmers received supervised loans for capital expenditures.”).

249. *Id.* at 101–02.

250. *Id.* at 102.

251. *See* William M. Blair, *Race Bias Found in Southern Units of Farm Program*, N.Y. TIMES, Mar. 1, 1965, at 1.

252. William C. Payne, Jr., *Implementing Federal Nondiscrimination Policies in the Department of Agriculture, 1964–1976*, 6 POL’Y STUD. J. 507, 507 (1978).

253. *See* Daniel, *supra* note 195, at 6–7.

254. *Id.*

255. *See* GA. STATE ADVISORY COMM., *supra* note 230, at 31; Payne, *supra* note 252, at 507; *Agriculture Acts on Race Inequity*, WASH. POST, June 1, 1965, at A4; William M. Blair, *U.S. Farm Posts Go to Negroes in South*, N.Y. TIMES, Apr. 3, 1965, at 1; John Herbers, *Negro Employment Up in Agriculture Department*, N.Y. TIMES, June 28, 1965, at 12.

256. *Agriculture’s Negro Hiring Increased 41% During ‘65*, CHI. DAILY DEFENDER, Feb. 5–11, 1966, at 27. Afterward, African Americans still represented only 4.5 percent of USDA employees. *Id.*

But the Department remained constrained in its pursuit of racial equity—most prominently by the power of Southerners over congressional agricultural oversight committees and the relative autonomy of the county committee system to control local USDA programs.<sup>257</sup> Rep. Jamie Whitten of Mississippi, head of the House of Representatives' Agricultural Appropriations Subcommittee (popularly known as "the permanent Secretary of Agriculture"), told county committees to resist integration.<sup>258</sup> USDA officials feared his ability to slash their budgets.<sup>259</sup> Civil rights attorneys at the Justice Department attempted and failed to improve the USDA's racial practices.<sup>260</sup>

As a result, "[b]lack [FmHA] employees in southern states worked out of segregated offices, served only African American farmers, were barred from county FHA committee meetings, and were told to avoid civil rights issues."<sup>261</sup> African Americans had been appointed to FmHA committees as alternates, but they did not vote; apparently USDA officials lacked the will to appoint blacks as full members.<sup>262</sup> Similarly, Agricultural Stabilization and Conservation Service (ASCS) election reforms had allowed greater voting by African American farmers, but those farmers' incorporation into county committees remained minimal as they were largely slotted into positions as "alternate" members, rather than full membership.<sup>263</sup>

Resistance within the agency itself also hampered integration efforts. The new USDA civil rights office was deluged with complaints, but offered little in the way of effective remedies—"bureaucratic nullification" subverted reforms.<sup>264</sup> The staff reported that their requests to other USDA agencies were sometimes

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257. See Marquis Childs, *The Sad State of South's Unionism*, WASH. POST, Apr. 2, 1965, at A20.

258. See Cobb, *supra* note 242, at 923; Daniel, *supra* note 195, at 9; see also Summers, *supra* note 188, at 253–55 (discussing Representative Jamie Whitten).

259. Daniel, *supra* note 195, at 9.

260. U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 754–55, 755 & n.461 (1970) [hereinafter USCCR, FEDERAL] (describing Justice Department "efforts to prod . . . the Agriculture Department" regarding findings of discrimination, but noting that "despite discussions at the highest level, Agriculture took little remedial action").

261. Daniel, *supra* note 195, at 13; see also USCCR, FEDERAL, *supra* note 260, at 48–49 (reporting that the USDA's Inspector General found persistent segregation and discrimination in the extension service as of 1969); Reid, *supra* note 207, at 288 (stating that most Southern states did not integrate state extension headquarters until 1972).

262. See Daniel, *supra* note 195, at 11, 13.

263. Valerie Grim, *Black Participation in the Farmers Home Administration and Agricultural Stabilization and Conservation Service, 1964–1990*, 70 AGRIC. HIST. 321, 332 (1996); see also Henderson v. ASCS, 317 F. Supp. 430, 433–36 (M.D. Ala. 1970) (describing and invalidating committee members' practice of intentionally diluting black vote in ASCS elections in Macon County, Alabama).

264. See Daniel, *supra* note 195, at 10.

ignored.<sup>265</sup> The head of the office, Seabron, did not report directly to the Secretary; he said that he could only ensure his messages' delivery to Secretary Freeman if he hand-carried them.<sup>266</sup> Seabron's staff was miniscule, and he relied on cooperation from state and local units.<sup>267</sup>

Executive branch efforts to integrate the black extension services often backfired to hurt both black employees and black farmers. When the white and black state extension services were merged, black agents were stripped of supervisory and administrative powers.<sup>268</sup> Explicit salary disparities between white and black agents that existed before integration continued.<sup>269</sup> Farm program employees were promoted and given merit increases based in part on such intangible factors as "temperament."<sup>270</sup> Unsurprisingly, these evaluations disfavored blacks.<sup>271</sup> Because county commissioners had the power to hire local agents, in some cases the state extension service refused to recommend African Americans because they anticipated that local officials would reject them.<sup>272</sup> Black agents often continued serving only black populations under a prevailing practice that assigned them only to counties with black professionals.<sup>273</sup>

Other farm programs remained separate and unequal despite formal integration. The 4-H and homemakers' clubs that the USDA sponsored for farm youths remained segregated in practice, even as they adopted formally race-neutral membership policies.<sup>274</sup> The federal and state governments continued to oversee disproportionately low funding of black land grant colleges relative to their white peers.<sup>275</sup>

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265. *See id.* at 7 (citing unpublished 1968 USCCR study).

266. *Id.* at 7–8.

267. *See id.* at 8.

268. *See* *Wade v. Miss. Coop. Extension Serv.*, 372 F. Supp. 126, 132–33, 140 (N.D. Miss. 1974), *rev'd in part on other grounds*, 528 F.2d 508 (5th Cir. 1976); *Strain v. Philpott*, 331 F. Supp. 836, 841 (M.D. Ala. 1971); Reid, *supra* note 207, at 286; *see also* GA. STATE ADVISORY COMM., *supra* note 230, at 5–7 (noting that in Georgia, after the formal merger of the two segregated state extension service offices, blacks were not given the same titles or paid equally with whites in the same positions, even in cases when they had more experience or more advanced degrees than their white counterparts).

269. *See* *Bazemore v. Friday*, 478 U.S. 385, 394–95, 401–03 (1986) (per curiam) (Brennan, J., concurring); GA. STATE ADVISORY COMM., *supra* note 230, at 7, 10–13.

270. *See* *Wade*, 372 F. Supp. at 135–36.

271. *Id.*

272. *See id.* at 133, 138; *Strain*, 331 F. Supp. at 842.

273. *See* *Wade*, 372 F. Supp. at 134; *Strain*, 331 F. Supp. at 843; GA. STATE ADVISORY COMM., *supra* note 230, at 17; Daniel, *supra* note 195, at 13, 27.

274. GA. STATE ADVISORY COMM., *supra* note 230, at 19–25; Daniel, *supra* note 195, at 27–28.

275. *See* *Reconsideration of Prior Op. Concerning Land-Grant Colls.*, 17 Op. O.L.C. 184, 187–88 (1993).

By the 1970s, the executive branch's integration efforts had achieved limited gains, failing to eradicate the preexisting pattern of segregation, unequal resources, and disparate treatment within farm programs.<sup>276</sup> William Payne of the USDA described continued high-level intransigence to civil rights within the USDA during the 1970s, including "outright attempts to circumvent enforcement actions."<sup>277</sup> "[T]op officials" left the director's position in the Civil Rights Office vacant for twenty-seven months, and at one point attempted to do away with the office altogether by transferring 80 percent of its staff.<sup>278</sup> Payne wrote that progress came only in "brief periods following public exposure of embarrassing practices through lawsuits or protests."<sup>279</sup>

Frustrated activists had turned to litigation and eventually two cases involving segregated agricultural institutions arrived at the Supreme Court.<sup>280</sup> *Bazemore v. Friday*<sup>281</sup> dealt with the extension service in North Carolina, while *United States v. Fordice*<sup>282</sup> addressed higher education in Mississippi, including its state land grant colleges.<sup>283</sup> By then, though, the Court was no longer mandating a wholehearted push for integration, as it had done for Southern primary and secondary schools in the late 1960s. Instead, in its two decisions, the Court spelled out the limits of the integration mandate: Clear vestiges of the dual structure, such as the old race-based pay scale in the extension service, were to be eliminated.<sup>284</sup> But offshoots like the separate 4-H clubs created by the USDA in local schools did not need to be integrated.<sup>285</sup> And the system of segregated white and

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276. See *NAACP 64th Annual Convention Resolutions*, 81 CRISIS 1, 4 (1974) (condemning the Farmers Home Administration's (FmHA) civil rights record); Frank Mankiewicz & Tom Braden, *Nixon Administration's Hostility to Racial Progress Is Apparent*, WASH. POST, Apr. 14, 1970, at A17 (describing the extension service as having "one of the least defensible civil rights records of any department of government").

277. Payne, *supra* note 252, at 509.

278. *Id.*

279. *Id.*

280. For suits seeking to integrate the extension services, see *Wade v. Miss. Coop. Extension Serv.*, 528 F.2d 508 (5th Cir. 1976); *Poole v. Williams*, 7 Fair Empl. Prac. Cas. (BNA) 102 (S.D. Tex. 1974); *Strain v. Philpott*, 331 F. Supp. 836 (M.D. Ala. 1971); see also *Bazemore v. Friday*, 478 U.S. 385 (1986) (per curiam) (ruling on a 1971 suit alleging discrimination and segregation in North Carolina's extension service).

281. 478 U.S. 385.

282. 505 U.S. 717 (1992).

283. *Id.*; *Bazemore*, 478 U.S. 385.

284. See *Bazemore*, 478 U.S. at 386–87.

285. Five Justices accepted the Reagan Justice Department's argument that the state had no affirmative duty to desegregate the 4-H and homemakers' clubs that it had once expressly segregated. *Id.* at 407 (White, J., concurring).

black land grant colleges first created under the Second Morrill Act was not to be entirely dismantled.<sup>286</sup>

In both *Bazemore* and *Fordice*, the Court held that whether remediation of segregated institutions was necessary rested on whether true individual choice was possible once de jure bars were removed.<sup>287</sup> Persistent segregation that rested on such free choice was not a cognizable racial harm.<sup>288</sup> In limiting the government's obligation to achieve integration and instead focusing on the government's obligation to empower individual "choice," the Court cleared the way for equal protection's subsequent focus on remedying intentional bias, rather than the vestiges of prior discrimination. It also left much of the old, unequal structure of farm programs unchanged.

During this period, black farmers' land loss accelerated. Small farmers of all races were disappearing, but the crisis was more severe for African Americans.<sup>289</sup> From 1950 to 1974, African American farm ownership fell by 80 percent.<sup>290</sup> By the late 1970s, reports warned that African American farmers would soon disappear completely.<sup>291</sup> Congress created programs targeted to small farmers and provided more funding for the historically black land grant institutions.<sup>292</sup> But, like the FSA during the New Deal, these aids to small farmers and minorities were never substantial enough to counteract the dominance of big agriculture or the force of entrenched discrimination in local farm programs.

Thus, early executive leadership during the integration era proved only partly successful in eradicating farm institutions' segregated, unequal structure. In the 1960s, integration proceeded with President Johnson's support, but it often amounted to merely superficial changes with inequitable patterns persisting in practice. Even with a powerful president demanding progress, Southern defenders of segregation and racial subordination could oppose integration and equitable treatment of black farmers from within the executive branch's farm

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286. See *Fordice*, 505 U.S. at 742–43.

287. The *Fordice* Court reaffirmed *Bazemore*'s emphasis on individual choice as the test for whether further desegregation was required. *Id.* (stating that state duty was to ensure that "the free choice of prospective students . . . is truly free").

288. In the higher education context, however, the state had to justify any policy rooted in the segregation era that continued to result in segregative effects. *Id.* at 729–33.

289. USCCR, *DECLINE*, *supra* note 93, at 2.

290. Schweninger, *supra* note 143, at 52–53.

291. *E.g.*, ROBERT S. BROWNE, *BLACK ECON. RESEARCH CTR., ONLY SIX MILLION ACRES: THE DECLINE OF BLACK OWNED LAND IN THE RURAL SOUTH* (1973); *THE BLACK RURAL LANDOWNER—ENDANGERED SPECIES* (Leo McGee & Robert Boone eds., 1979).

292. See *Reconsideration of Prior Op. Concerning Land Grant Colls.*, 17 Op. O.L.C. 184, 189–92 (1993); USCCR, *DECLINE*, *supra* note 93, at 54–55, 78–79; B.D. MAYBERRY, *A CENTURY OF AGRICULTURE IN THE 1890 LAND-GRANT INSTITUTIONS AND TUSKEGEE UNIVERSITY—1890–1990*, at 107, 129–30, 138, 155 (1991); Reid, *supra* note 207, at 290.

agencies, congressional oversight committees, state and local governments, and even the judicial system. Gains for African American employees and farmers were episodic, at best. Later Republican presidents showed little desire to consolidate or improve on the early advances. That uneven progress reflected the many opportunities that separated powers, federalism, and politicized administration gave white Southerners to protect existing systems of inequality, by slowing, subverting, and rolling back reforms.

#### D. Intentional Discrimination and the Administrative Process

By the 1980s, equal protection standards had shifted again. The Supreme Court held in the late 1970s that the Equal Protection Clause barred only intentional government discrimination, not “de facto” segregation or unintentional racial disparities.<sup>293</sup> To implement this substantive prohibition, agencies and courts created new procedural requirements. Federal agencies set up internal complaint processes for individuals aggrieved by discrimination, with the courts often requiring plaintiffs to exhaust these processes before filing civil rights suits.<sup>294</sup>

Black farmers continued to denounce racial injustice within the USDA during this period. In North Carolina, they complained that white officials failed to inform them about federal farm subsidies, instead encouraging them to leave farming, whereupon their land would be sold at auction to local white farmers or developers.<sup>295</sup> In Tennessee, African American farmers staged a three-week sit-in at an FmHA office over discrimination.<sup>296</sup> In Arkansas, black

293. See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (ruling that “discriminatory purpose” in the equal protection context requires proof of animus); *Washington v. Davis*, 426 U.S. 229, 238–41 (1976) (ruling that an equal protection violation requires proof of discriminatory purpose); see also Haney-López, *supra* note 3, at 1785–86, 1833–37 (arguing that *Feeney*, not *Davis*, marked the turning point in the equal protection emphasis on racial malice).

294. Agency regulations implementing Title VI of the Civil Rights Act included discrimination complaint handling procedures. USCCR, *FEDERAL*, *supra* note 260, at 702–05; see also *Nondiscrimination in Federally-Assisted Programs of the Department of Agriculture*, 29 Fed. Reg. 16,274 (Dec. 4, 1964) (to be codified at 7 C.F.R. pt. 15) (adopting final USDA Title VI regulation). Federal courts had long required plaintiffs to exhaust administrative remedies, with exceptions when the remedy was inadequate or pursuit of it futile. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938). Courts at the time were divided as to whether civil rights claims fell within an exception to the requirement. See *Recent Developments*, 17 VILL. L. REV. 336, 338–41 (1971); see also *Penn v. Schlesinger*, 497 F.2d 970, 971 (5th Cir. 1974) (en banc) (per curiam) (dismissing an Alabama employment discrimination suit against seventeen federal agencies, including the USDA, for failure to exhaust administrative remedies).

295. See USCCR, *DECLINE*, *supra* note 93, at 85–86; see also *Blacks Are Losing Farms at an Alarming Rate*, 89 CRISIS 39, 40 (1982) (noting the filing of systematic lending discrimination charges by four black North Carolina farmers in 1981).

296. USCCR, *DECLINE*, *supra* note 93, at 90–91.

farmers charged that their spring applications were delayed until it was too late to sow most crops, even as white farmers received their loans promptly.<sup>297</sup> Mississippi farmers brought a suit alleging systematic discrimination, but a court dismissed it for failure to first exhaust the USDA's internal administrative remedies.<sup>298</sup>

Yet those who did attempt to exhaust their claims by filing administrative complaints with the agency found that process ineffective. The USDA's internal civil rights enforcement had come to a halt. President Ronald Reagan's administration took a hostile stance toward civil rights remedies generally and the USDA's process was no exception.<sup>299</sup> In the early 1980s, the agency's minority affairs director sharply curtailed civil rights enforcement, halting investigations of program complaints and field compliance reviews—as he explained, minorities did not politically support Reagan, hence deserved nothing in return.<sup>300</sup> Though the director was eventually fired, civil rights enforcement at the USDA was left at “a virtual standstill” and remained gutted for years afterward—compliance reviews and investigations were rare and the complaint system was in “disarray.”<sup>301</sup> Thus, even theoretically available judicial remedies could be effectively nullified by executive branch intransigence.

Facing these barriers to redress in the executive branch, minority farmers made significant progress only after the Democrats regained the presidency in 1992. To signal his commitment to change, President Bill Clinton appointed the first African American Secretary of Agriculture.<sup>302</sup> During the 1990s, the black

297. Keith Schneider, *Hope for Black Farmers in New Rules*, N.Y. TIMES, Mar. 9, 1988, at A14.

298. See USCCR, DECLINE, *supra* note 93, at 88–89, 89 n.52.

299. On opposition from President Reagan's administration to civil rights enforcement, see IAN HANEY-LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 69–71 (2014); SEAN WILENTZ, THE AGE OF REAGAN: A HISTORY, 1974–2008, at 180–84 (2008).

300. See Ward Sinclair, *USDA, Block Scored for Stance on Rights*, WASH. POST, Apr. 7, 1983, at A8; Juan Williams & Ward Sinclair, *Agriculture's Minority Affairs Chief Would Purge Rights Rule*, WASH. POST, Feb. 17, 1983, at A22.

301. See *Controversial Aide Fired at Agriculture*, WASH. POST, Feb. 23, 1983, at A13; Ward Sinclair, *USDA Is Criticized on Rights Failures*, WASH. POST, Sept. 27, 1984, at A12; Sinclair, *supra* note 300, at A8. In 1989, the head of civil rights at the USDA stated that the FmHA “is frequently in noncompliance with civil rights requirements at the local level.” THE MINORITY FARMER, *supra* note 93, at 35. In 1997, the new head of civil rights “said his office recently discovered that no probes had taken place since the office's investigative arm was disbanded 14 years ago during the Reagan administration.” Stallsmith, *supra* note 117, at A1. The USDA's inspector general found “the complaints system . . . in total disarray” in 1997, with “little progress” by 2000. *USDA Civil Rights*, *supra* note 96, at 6–7 (statement of Richard Viadero).

302. The Secretary was Rep. Mike Espy of Mississippi, “the most tireless advocate of the minority farmer in the House.” *Decline of Minority Farming*, *supra* note 93, at 5 (remarks of Rep. Wise); *Black Farm Aid Is Less*, NEWSDAY (N.Y.), Feb. 8, 1993, at 12; Sam Fulwood III, *Black Farmers*



farmers' movement grew and gathered force. African American members of Congress played a key role in pressing the farmers to organize, originally in pursuit of legislative and administrative remedies—but once it became clear that the agricultural oversight committees in Congress were unyielding, they counseled the farmers to turn to the courts.<sup>303</sup> Minority farmers formed advocacy organizations, filed discrimination suits, marched in Washington, and met with the president; the Department of Agriculture investigated its own civil rights record again, this time with damning results.<sup>304</sup> The farmers won *Pigford I* and its successor settlements and thousands of individual farmers obtained cash awards for discrimination they had suffered in seeking farm loans.<sup>305</sup>

Still, those remedies were disappointingly incomplete in the face of the century of unequal treatment that preceded them—and even those half-measures triggered backlash. At the local level, opponents circulated fliers naming black farmers who had received settlement awards.<sup>306</sup> Allegations of fraud flew through the national and local media.<sup>307</sup> Critics charged that support from President Obama's administration for a second settlement represented a giant political bribe to black voters.<sup>308</sup> No attempt to aid the farmers went unpunished.

Today, of every hundred U.S. farmers, fewer than two are African American; they farm less than 1 percent of the nation's farmland.<sup>309</sup>

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African American farmers and their allies sought equality in farm policy for over a century. But none of the branches provided effective constitutional protections for minority farmers, even judged by the reigning legal principles of past

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*Reap a Harvest of Anger*, L.A. TIMES (June 28, 1998), <http://articles.latimes.com/1998/jun/28/news/mn-64524> [<http://perma.cc/3TNX-WN4E>].

303. See Browne, *supra* note 146, at 143–45.

304. See *supra* notes 93–97 and accompanying text.

305. See discussion *supra* note 107; Preliminary Final Accounting—Corrected, August 15, 2013, *In re Black Farmers Discrimination Litigation*, No. 08-MC-511 (D.D.C. 2013), <https://www.blackfarmerscase.com/Documents/Preliminary%20Final%20Accounting%20Report.pdf>.

306. See Peter Flaherty, *New Era of Reparations Looms for U.S.*, BALT. SUN (Aug. 5, 2001), [http://articles.baltimoresun.com/2001-08-05/topic/0108040177\\_1\\_reparations-slavery-african-americans](http://articles.baltimoresun.com/2001-08-05/topic/0108040177_1_reparations-slavery-african-americans) [<http://perma.cc/X2KK-SNYE>].

307. E.g., LaFraniere, *supra* note 130, at A1; Daniel Foster, *Pigford's Harvest: How an Honorable Farmer's Quest for Justice Launched an Epic Fraud*, NAT'L REV. (Feb. 21, 2011), <https://www.nationalreview.com/nrd/articles/309348/pigfords-harvest> [<https://perma.cc/FAN3-L9XC>].

308. See Patrik Jonsson, *Obama to Sign Bill Awarding Payments to Black Farmers: Justice or 'Fraud'?*, CHRISTIAN SCI. MONITOR (Dec. 8, 2010), <http://www.csmonitor.com/USA/2010/1208/Obama-to-sign-bill-awarding-payments-to-black-farmers-justice-or-fraud> [<https://perma.cc/AR4G-KYKR>]; Jonsson, *supra* note 109.

309. U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE: RACE/ETHNICITY/GENDER PROFILE (2014), [http://www.agcensus.usda.gov/Publications/2012/Online\\_Resources/Race,\\_Ethnicity\\_and\\_Gender\\_Profiles/cpd99000.pdf](http://www.agcensus.usda.gov/Publications/2012/Online_Resources/Race,_Ethnicity_and_Gender_Profiles/cpd99000.pdf).

eras. The most pervasive barrier was that both Congress and the executive lacked the institutional will to even attempt to enforce equal protection standards on the farmers' behalf, blocked by powerful opposition within Congress and the Democratic Party. On the rare occasions when one branch considered implementing an expansive vision of equality, it rarely went anywhere—as when post-Civil War Congresses debated integrating the land grant colleges over two decades, but never took action. Congress and the executive also frequently failed to enforce even prevailing, minimalist equality standards on the farmers' behalf, such as the requirement that segregated institutions be funded equally, due largely to the power of Southerners within the Democratic coalition and within Congress.

When the political branches did attempt to implement constitutional principles, they struggled to make them effective, facing resistance from within their own branches as well as from their coequal branches and state and local governments. As a consequence, they were rarely able to implement equality mandates successfully on their own, even when they sought to do so. Thus, liberals in Franklin Roosevelt's administration saw their vision of class justice on behalf of landless farmers dismantled by an alliance between conservative farm interests and Southern Democrats, while Lyndon Johnson's administration saw halting progress in integrating farm programs as bureaucrats and members of Congress pushed back.

Even these intermittent efforts by the political branches to implement equality guarantees provoked acrimony. The threat of backlash seemed to overhang officials' decisionmaking—it even structured some formal features of farm institutions, such as the explicit ability of local white communities to veto the presence of a black farm agent throughout much of the twentieth century.<sup>310</sup> Unsurprisingly, when farmers won judicial victories at the end of the century, public recrimination was swift and vicious.

Absent this history, it would be easy to focus on the last round of litigation and fault the courts for failing to provide effective remedies for the farmers. The longer history, though, is one of repeated, longstanding failures by all three branches of government. Opponents of racial equality consistently capitalized on their footholds in each of the branches and in state and local government to block, slow, and undermine others' attempts to implement equal protection principles. As a result, all three branches showed notable deficits of will and capacity in implementing equality mandates, while facing recurring backlash when they tried to do so. The courts critique distracts us from that bigger story.

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310. USCCR, *EQUAL OPPORTUNITY*, *supra* note 93, at 42 (“The State would not place a Negro in a county if there were strong sentiment against it.”).

#### IV. INSTITUTIONAL REALISM

African American farmers' past is a stark, understudied example of how national programs theoretically aimed at ensuring economic security for all instead fostered profound racial inequality. Such histories are key to understanding why extreme racial disparities in wealth persist today.<sup>311</sup>

There are also important lessons for constitutional scholars in the farmers' past. In studying disfavored minorities' fate in our constitutional system, we should look beyond the failures of courts to those of the political branches. As the farmers' history illustrates, the political branches often lack the will and capacity to implement constitutional principles, just as courts do. Those deficits do not always reflect a lack of democratic support for equality norms, but also institutional traits that make it exceedingly difficult to shift the status quo, even when majority opinion might favor it. The Founders deliberately constructed a government of separated powers and federalism, along with other features, to achieve a system biased toward inertia. As a consequence, each branch finds it difficult to pursue constitutional reform on its own, and disfavored groups seeking affirmative protections often must win supermajority support, enlisting all three branches in their cause, if they wish to overcome determined opposition. Those institutional arrangements have frequently served to insulate and entrench inequality, particularly systems of racial subordination.

Recognizing this institutional reality—that our government's fragmented structure constrains the authority of all three branches and often maintains the status quo—produces important insights. By highlighting that each branch is limited in its ability to implement constitutional reforms when acting alone, it corrects the distortion produced by overemphasizing courts' flaws. Each branch has distinctive areas of competence, yet is hemmed in by our government's overall design, so all three must collaborate to achieve a fully effective constitutional regime. This is especially true when there are diverse, entrenched harms from the past to be cured. For farmers and others subjected to multiple forms of state-sponsored inequality, real equal protection remedies would require the active participation of all three branches. Institutional realism also provokes profound questions about the structure of American government. Does an institutional

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311. See KATZNELSON, *supra* note 17, at 18–23 (describing Southerners' shaping of New Deal social legislation so that it collectively “constituted a program of affirmative action granting white Americans privileged access to state-sponsored economic mobility”). For other histories tracing the deliberate exclusion of racial minorities from distributive social programs, see DESMOND KING, *SEPARATE AND UNEQUAL: AFRICAN AMERICANS AND THE US FEDERAL GOVERNMENT 172–202* (rev. ed. 2007); LIEBERMAN, *supra* note 194, at 23–66; QUADAGNO, *supra* note 194, at 20–24.

design that simultaneously stifles national majority will *and* insulates the status quo serve our nation well? Would a more majoritarian design better suit a society that aspires to equality and freedom for all? For those who care about protecting the rights of the disfavored, these should be pressing questions. This Part discusses each of these issues in turn.

### A. Understanding Constitutional Failure

The litany of constitutional failures in the farmers' history points to two initial lessons: First, that all three branches share responsibility for the judiciary's inability to remedy longstanding, deeply rooted constitutional violations, and second, that the political branches face pervasive constraints rooted in American government's fragmented institutional structure, just as courts do.

#### 1. Shared Responsibility: Probing the Role of the Political Branches

One clear takeaway from the *Pigford* line of cases, and the decades of history that led up to them, is that the courts' critics are right that the judiciary struggles to address deeply rooted inequality. They are wrong, though, to the extent that they focus solely on the judiciary in seeking to understand why minority rights go unenforced. During the last decade, African American farmers obtained only limited remedies from the courts. But in earlier decades they met a similar fate when they lodged equal protection claims with the political branches. A judiciary of limited powers cannot on its own repair decades of racially inequitable farm policy constructed in Congress and the executive branch. When one recognizes that Congress and the executive branch had many opportunities to address those inequities—and failed to do so, even according to past understandings of equal protection—it becomes clear that constitutional responsibility must be spread across all three branches.

As Part III illustrated, each problem that the courts' critics diagnose in the judiciary can also be seen in the responses of the political branches to the farmers: problems of will, lack of implementation capacity, and vulnerability to backlash. Digging deeper into the farmers' history suggests a structural account of why Congress and the executive branch fail to vindicate constitutional rights, even in minimalist form. Determined opponents consistently drew on the American government's institutional design to undermine constitutional protections for black farmers.

Some, however, might resist drawing contemporary lessons from the farmers' history, particularly ones that emphasize institutions' structure over the role of overt prejudice. They would see the farmers' history as an artifact rooted in a very

different—even sharply discontinuous—past of widespread racism and sweeping political exclusion of African Americans.<sup>312</sup> From that perspective, explaining the farmers' history is straightforward: They lacked sufficient political power to get their way, due to a now-gone system of racial subordination founded on violence and disfranchisement. To the extent legislators and the executive did not vindicate the farmers' rights, they simply mirrored the popular sentiment of their times. Given subsequent progress in racial attitudes and politics, such histories cannot shed light on present-day dilemmas.<sup>313</sup>

Yet that view, even if it has intuitive appeal, is misleading. Political outcomes do not flow inevitably from public will, but rather reflect the impact of our political institutions themselves.<sup>314</sup> When we look closely at the history of black farmers, we see that interwoven with that very real system of explicit racial subordination were important features of American governance that persist today. Southerners and others who wished to preserve the racial status quo were consistently able to draw on fundamental aspects of American government—separated powers, federalism, and overlapping majorities in each branch—to stave off reform. It is impossible to prove that history would have unfolded differently for African American farmers had our government been structured differently, but that is not because the structures did not matter. Rather, our government's design and our racial past are so deeply interwoven that it is impossible and somewhat foolhardy to try to disentangle them.

From the Founding forward, the institutional structures of American governance have been negotiated by, and have shielded, those who wished to maintain existing inequality.<sup>315</sup> Those structures have provided powerful minorities at all levels of government with the ability to veto and undermine national reforms. That is a familiar lesson to students of civil rights—who know that the Senate's design and internal rules allowed white Southerners to block efforts to reform Southern racial practices for the better part of a century—and to students of the welfare state—who know that federalism allowed states and localities to administer national social programs along racially unequal lines from the New

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312. *E.g.*, Griffin, *supra* note 8, at 282, 289–91 (describing “discontinuities” that converted the post-1960s United States into a “democracy of rights”).

313. *See id.* at 292 (arguing that “[t]he new interest of the political branches in protecting rights” represents a permanent shift following the civil rights revolution).

314. *See* LEVINSON, *supra* note 34, at 171 (noting that the Constitution's structural provisions indelibly shape political processes and outcomes).

315. *See* discussion and sources cited *supra* notes 28–29.

Deal forward.<sup>316</sup> The effect of our government's fragmented design can be traced further, though.

## 2. The Institutional Constraints on the Political Branches

Within the farmers' history, the importance of institutional fragmentation was evident at key points, shaping the willingness of the political branches to take action on farmers' behalf as well as their capacity to do so. Opponents often relied on Congress's internal rules and the president's dependence on his party's support in Congress to prevent either branch from endorsing equality principles. During significant portions of the twentieth century, Southern legislators wielded enough power that they could block congressional action benefitting black farmers if they chose, and they frequently did so.<sup>317</sup> Of course, black disfranchisement throughout the South gave white Southerners an illegitimate monopoly on political power in that region over much of that period.<sup>318</sup> But the possibility of a determined minority blocking congressional action is a structural feature of our political system, not unique to that period or to African Americans.<sup>319</sup> Within Congress, a minority with enough institutional leverage can nearly always prevent legislative action due to "veto points" within both houses, such as committees' power to block legislation from reaching the floors for votes,

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316. On the barriers to congressional action on civil rights, see Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 199 (1997) (listing Senate filibusters that killed anti-lynching legislation, poll tax bans, and civil rights statutes between 1922 and 1975); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1453–54 (2003) (describing institutional barriers, including each chamber's judiciary committee—known as "graveyard[s] of civil rights legislation"). On the role of local power in maintaining racial inequality in national welfare state programs, see discussion and sources cited *supra* note 194.

317. See SITKOFF, *supra* note 189, at 34–36 (describing the power of Southern congressmen in the New Deal); Johnson, *supra* note 157, at 151, 155 (describing Southern Democrats' power in the pre-New Deal era); Sosna, *supra* note 166, at 35–36 (describing Southern congressmen's power during President Wilson's administration).

318. See RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 121–48 (2004) (describing the post-Reconstruction disenfranchisement of African Americans); Cover, *supra* note 1, at 1302–03 (describing the "private terror, public discrimination, and political exclusion, directed against Blacks for a century" in the South). African Americans were a majority in some Southern jurisdictions; disenfranchisement thus deprived them of governing power that should rightfully have been theirs. Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 66–68 (2008).

319. See McNollgast, *supra* note 27, at 16 ("In the United States, more so than in most other democracies, majority rule is tempered by granting minorities both limited veto power over changes in existing policy and, often, control over proposals to change existing policy.").

the Senate filibuster, and the House Rules Committee's agenda control.<sup>320</sup> Those features present general obstacles for all disfavored groups seeking affirmative protections from Congress.

Compared to Congress, the executive branch is less infused with formal "veto points," but the president's need for congressional support—a consequence of our system of separated powers—has consistently empowered opponents of equality seeking to block executive action.<sup>321</sup> In the farmers' case, even liberal Democratic presidents faced stubborn checks from within their own party, because they required Southern support if they wished Congress to enact their favored programs.<sup>322</sup> That reality meant that the executive branch was often reluctant to take strong action on black farmers' behalf, even when leading voices within the administration called for such steps—with the New Deal years' aborted attempts to aid the poorest farmers serving as the leading example. The executive may be undermined from within its own agencies due to lower-level bureaucrats' ability to stymie implementation.<sup>323</sup> When USDA officials wished, they could stall or undermine executive mandates, as they did in the integration era, sometimes avoiding integration altogether and sometimes complying in letter while continuing to discriminate in practice.

When Congress and the executive branch attempted but failed to effectively implement equality mandates, often it was because other branches or state or local governments directly undermined their acts—legacies of separated powers and federalism. As a result, even when farmers garnered support in one branch, they still could not expect effective implementation. When a relatively liberal administration like that of Roosevelt or Johnson formally supported equal treatment within farm programs, members of Congress with oversight power over the Agriculture Department could undermine their initiatives, sometimes in tandem with state and local officials. Agriculture programs, like so many other federal programs, relied on state and local officials for administration; "cooperative federalism" and farm programs' governance at the local level by county committees

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320. *See id.* at 18–19 (describing these institutional features).

321. *See, e.g.,* Levinson & Pildes, *supra* note 27, at 2332–33 (describing how the split within the Democratic Party over race forced the New Deal legislation "to minimize benefits to African Americans in order to hold the party together" while later Democratic administrations had to seek Republican support to achieve progress on racial issues).

322. *See, e.g.,* QUADAGNO, *supra* note 194, at 21 ("Although Roosevelt's electoral victory did not hinge on southern support, he needed southern Congressmen to move his programs past the key House and Senate Committees.").

323. *Cf.* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1069 (2013) ("[P]residential attention to agency enforcement efforts has been comparatively informal, episodic, and opaque.").

meant that lower level officials could easily evade or defy federal mandates.<sup>324</sup> Later, even if the judicial branch in the 1980s and 1990s stood ready to provide remedies for intentional discrimination for farmers, the executive branch could impede farmers' claims by constructing an agency-level civil rights complaint process that was actually a dead end.

Nor were the political branches immune from backlash challenging their democratic legitimacy as policymakers. The courts critique suggests that courts are distinctive in this regard because they are unelected and less flexible in their methods—thus more likely to become lightning rods triggering opponents to mobilize.<sup>325</sup> Things are not so simple in practice, though: The political branches are not always seen as democratically legitimate or accommodating. Members of Congress and the president are elected, and features of both branches sometimes force them toward compromise. But federalism, the election of national offices through different overlapping majorities, the unelected administrative state, and claims of political dysfunction are sources of recurring democratic challenge to Congress and the executive, fueling resistance to their mandates. Federal officials face perennial challenges to their democratic legitimacy when they act against state or local governments.<sup>326</sup> Congress is often denigrated as a bastion of special interests, rather than a body representing the people's interests.<sup>327</sup> The president can be challenged as tyrannical, as a winner of an electoral-college plurality rather than a national majority, and, in his final term, as a lame duck.<sup>328</sup> Administrative agencies are denigrated as unaccountable, elitist, or “captured” bureaucrats.<sup>329</sup>

Opponents of black farmers challenged the legitimacy of congressional, presidential, and agency action on many of those grounds—that the federal government was interfering with local democracy, that special (or even subversive) interests had captured Congress or the executive, or that faceless bureaucrats were acting arbitrarily. Further, even seemingly small executive or legislative steps toward equality were viewed not as compromises but as aggressions—sending a

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324. See Harry N. Scheiber, *Law and American Agricultural Development*, 52 AGRIC. HIST. 439, 447–448 (1978) (explaining that “Cooperative Federalism[] was in no respect more vividly exemplified than in agriculture-related programs”).

325. See ROSENBERG, *supra* note 4, at 425–26; Klarman, Brown and Lawrence, *supra* note 56, at 473.

326. See Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 917–18 (1985) (describing the recurring public backlash against excessive federal power).

327. See John R. Hibbing, *How to Make Congress Popular*, 27 LEGIS. STUD. Q. 219, 237 (2002).

328. See, e.g., LEVINSON, *supra* note 34, at 82–83 (listing presidents who failed to win a national majority or won a lower percentage of the popular vote than their opponents).

329. E.g., Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1508 (1996) (citing “the perception that regulatory agencies are composed of arrogant bureaucrats more concerned about their own turf and petty prerogatives than about the public interest”).



single black extension agent to a Southern county could trigger violence.<sup>330</sup> Incrementalism is no guarantee against backlash.

Many of the institutional features underlying these obstacles are deliberate aspects of the constitutional design traceable to the Framers. Such features include an arduous legislative process, divided powers, federalism, and overlapping schemes of representation that prevent any single branch from claiming to authoritatively represent majority will. The three branches were designed to exercise distinctive powers, yet ones “so far connected and blended as to give to each a constitutional control over the others.”<sup>331</sup> The “compound republic” of the United States divided authority not only among the branches, but also between the states and the national government.<sup>332</sup> The President, House, and Senate are elected by distinctive constituencies, with different geographic and temporal bases giving “each department . . . a will of its own.”<sup>333</sup> Given that each branch of government represents a different cross-section of the American public, none can claim to exclusively or unproblematically represent popular will.

Other institutional aspects of American governance that empower opponents to block reform emerged after the Framing. Congress’s internal rules—such as the filibuster, seniority privileges, and committees’ powers over the legislative agenda—developed later.<sup>334</sup> The president’s reliance on his party to enact a legislative agenda is traceable to the unanticipated rise of political parties as well as to the constitutional separation of powers.<sup>335</sup> As the administrative state grew, the executive acquired more power, but bureaucrats’ ability to subvert presidential mandates also grew as they wielded power over increasingly large and technocratic domains.<sup>336</sup> The rise of cooperative

330. See *FHA Official Chased out of Louisiana Town*, J. & GUIDE, Dec. 20, 1947, at A2 (noting the threats to a black agricultural official, forcing him to leave town, and the 1943 slaying of a Farm Security employee in the same area); Shelton Clark, *Masked Men Flog Friend of Moton*, CHI. DEFENDER, Dec. 30, 1922, at 1 (reporting the beating of a black extension agent).

331. THE FEDERALIST NO. 48, at 245 (James Madison) (Lawrence Goldman ed., 2008).

332. THE FEDERALIST NO. 51, at 258 (James Madison) (Lawrence Goldman ed., 2008).

333. *Id.* at 256. This was particularly evident in the design of Congress, with its staggered six-year elections for senators (originally by state legislatures) and its two-year universal elections for representatives (by districts within states). The goal was “to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.” *Id.* at 257.

334. See, e.g., STANDING RULES OF THE SENATE, R. XXII, S. DOC. NO. 110–9, at 16 (2007) (requiring sixty votes to end debate); McNollgast, *supra* note 27, at 7 (“[T]he rules of Congress permit the chair of a subcommittee that has jurisdiction over a legislative proposal unilaterally to decide not to allow it to be considered . . .”).

335. See Levinson & Pildes, *supra* note 27, at 2320–23 (describing the rise of parties).

336. See, e.g., David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 YALE J. ON REG. 407, 432–33 (1997) (noting that information

federalism channeled federal programs through state and local administrators, adding yet another layer of potential resistance.<sup>337</sup>

Collectively, these features subject the American state to minority vetoes across multiple institutions, making it difficult to achieve coherent, effective action unless all three branches concur. Such accord itself requires supermajority support, cutting across the diverse constituencies that each branch represents. As a result, it should be difficult for any branch to act on its own to violate the Constitution, because doing so rests on the others' acquiescence.<sup>338</sup>

Yet these same structural features make it quite difficult for any branch to respond on its own to vulnerable groups' constitutional claims, since each is subject to the others' "constitutional control" and cannot effectively coerce actions by them.<sup>339</sup> Effectively, this means that disfavored minorities are not tasked with simply winning over majority will to their cause if they face entrenched opposition. They must go further, gaining the political leverage necessary to overcome all of the potential barriers within each branch and across multiple levels of government. To get an accurate view of the prospects for disfavored minorities seeking to secure their rights through politics, we must account for those hurdles. Constitutionalism outside the courts, of the type the farmers practiced for so long, can be a grueling, near-impossible battle.

## B. Clarifying Capacity

The simple truth that all three branches operate within the fundamental constraints of separated powers and federalism also suggests a more holistic perspective on each branch's capacity. To the courts' critics, effective constitutional reforms usually must come from the political branches.<sup>340</sup> Congress's legislative and spending powers provide it with powerful leverage while the executive branch has the advantages of bureaucratic expertise, clear hierarchy,

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asymmetries and the "sheer volume of federal agency policy-making" overwhelm modern presidential and congressional oversight).

337. See Harry N. Scheiber, *Redesigning the Architecture of Federalism: An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL'Y REV. 227, 263 (1996) (describing cooperative federalism as "a system in which extensive sharing of policy authority and administrative responsibilities [between the national government and the states] was the rule").

338. See Calabresi, *supra* note 32, at 275 ("[G]overnment will only be able to act to deprive someone of life, liberty or property when all three branches concur that the contemplated action is constitutional.").

339. Cf. LEVINSON, *supra* note 34, at 36 (noting that the cost of guarding against "bad legislation" is preventing "good legislation").

340. See Sturm, *supra* note 38, at 1378–1409 (reviewing the critiques of the judicial role in institutional reform suits).

and long-term planning capacity, along with flexible tools for information-gathering and implementation.<sup>341</sup>

The courts' critics underestimate the difficulty, however, that all actors face in realizing policy reforms. Implementing policy is never easy and requires sustained commitment, a point missed by anecdotal accounts emphasizing early success.<sup>342</sup> For example, many scholars illustrate judicial weakness and the efficacy of the political branches by pointing to school desegregation: They note that the Court's decision in *Brown* had little impact on Southern segregation, while congressional enactment and executive enforcement of the Civil Rights Act of 1964 produced quick gains.<sup>343</sup> Tracing history further forward, however, shows that legislative and executive will and capacity in this area quickly waned, often proving inadequate after a brief burst of action in the late 1960s.<sup>344</sup>

Still, it is likely true that Congress and the executive are better equipped to overhaul institutions like Southern schools or urban police departments. That, however, does not suggest that the courts are globally "weak" at implementing constitutional reforms. Rather it points to the importance of the distinctive powers of each branch and the need for cross-branch cooperation. Constitutional harms and remedies are not fixed. Insofar as substantive constitutional principles (and corresponding harms) vary, each branch's capacity to implement those principles and provide adequate remedies varies in corresponding ways. Segregation was exceedingly difficult for courts to undo across many thousands of local institutions, while this was a task naturally suited to the executive branch's capacity for broad monitoring, flexible response, and speedy sanctions. In contrast, Congress was the institution best positioned to mandate equal funding during segregation. In the present, the judiciary is well positioned to administer individual remedies for intentional disparate treatment.<sup>345</sup> Under some circumstances, these distinctive powers may allow each branch to act independently to protect rights.

However, no branch operates autonomously. The separation of powers and federalism limit the ability of all three branches to implement the Constitution

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341. ROSENBERG, *supra* note 4, at 15–17 (listing courts' deficits in these areas).

342. See JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND xxi (3d ed. 1984) ("[I]mplementation, under the best of circumstances, is exceedingly difficult.").

343. E.g., ROSENBERG, *supra* note 4, at 49–54; Klarman, *How Brown*, *supra* note 56, at 84–85; Waldron, *supra* note 67, at 1405.

344. See, e.g., Robert Pear, *U.S. Alters Policy on Desegregation*, N.Y. TIMES, Nov. 20, 1981, at A14 (quoting the head of the U.S. Department of Justice's civil rights division under Reagan: "We are not going to compel children who don't choose to have an integrated education to have one.").

345. Many have observed that the judiciary most recently has shaped equal protection law to reflect its own distinctive capacity for addressing individual, tort-like wrongs. See, e.g., Freeman, *supra* note 119, at 1052–57.

alone, and this is particularly true when opponents wield power from within other parts of government. Political scientist Matthew Hall points out that the Supreme Court is an “implementer-dependent” institution; its relative capacity to implement its mandates varies, depending on whether the reform lies within direct judicial control or requires “lateral” cooperation from other government actors.<sup>346</sup> The judiciary is not unique, of course: All three branches are “implementer-dependent” institutions that require cooperation to make their edicts reality.<sup>347</sup> Like the Supreme Court issuing mandates to lower courts, Congress and the executive exercise relatively direct control in some domains. When Congress uses its spending power, or the executive changes its prosecutorial policies—examples of core “legislative” and “executive” competencies—they may face certain internal obstacles (akin to those the Court faces in securing cooperation from lower courts), but they exercise relatively direct control. Even in those core domains, though, the reality of shared, overlapping powers and federalism means that each branch is subject to checks from other actors.<sup>348</sup> Outside those domains, it is even more difficult for a branch to step into another government actor’s sphere and overhaul or correct its actions.<sup>349</sup>

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346. MATTHEW E.K. HALL, THE NATURE OF SUPREME COURT POWER 15–18 (2011). Other scholars have reasoned similarly. See, e.g., Erwin Chemerinsky, *Can Courts Make a Difference?*, in REDEFINING EQUALITY 191 (Neal Devins & Davison M. Douglas eds., 1998) (identifying the typology of judicial decisions based on their mode of enforcement and the corresponding likelihood of changing government conduct).

347. Hall acknowledges, but does not pursue, this point. See HALL, *supra* note 346, at 15–16.

348. When Congress, for example, legislates a new statutory right, it remains dependent on the courts to interpret and apply that right, and on either the executive branch or the public to enforce it. See SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 31–54 (2010). Of course, there may exist certain “zones of autonomy” within each branch—for example, the President’s powers to pardon those convicted of federal crimes and to veto legislation—but these are fairly limited powers, and ones that cannot be totally cabined off from political pressures by other branches in practice. Cf. Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 382 (1996).

349. For example, Congress has attempted to address judicial underenforcement of the Constitution through its power to enact legislation enforcing the Fourteenth Amendment, but it has encountered strong resistance from the Supreme Court. In *City of Boerne v. Flores*, the Court explained that Congress “has been given the power ‘to enforce [the Fourteenth Amendment],’ not the power to determine what constitutes a constitutional violation.” 521 U.S. 507, 519 (1997). The Court alone has the latter power. In subsequent years, the Court has frequently relied on this doctrine to strike down federal statutory provisions protecting vulnerable groups, on the premise that the provisions fail to evidence “a congruence and proportionality between the [Fourteenth Amendment] injury to be prevented or remedied and the means adopted to that end.” *Id.* at 520; see *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1333–35 (2012); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368–74 (2001); *United States v. Morrison*, 529 U.S. 598, 619–26 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83–91 (2000).

Thus, the courts' critics exaggerate the judiciary's flaws by failing to acknowledge that other institutions also face pervasive obstacles to implementation and that the difficulty of implementation does not hinge only on which institution leads the way. Rather, the key question is whether that institution has the direct power to provide the needed remedy and whether opponents have the necessary foothold in other institutions to block it. In a system of divided powers, each branch has characteristic areas of high and low capacity, and each faces hurdles in imposing its will on others. No branch rules alone; no branch is obviously preeminent in its capacity to implement the Constitution.

### C. Rethinking Structure

If basic institutional features of American government tend to impede our government's ability to implement constitutional norms, the obvious question is: Should we rethink our government's design? That inquiry is less radical than it sounds. Constitutional theorists have increasingly suggested, echoing previous generations' calls for change, that the U.S. government's structure creates too many barriers to democratic will.<sup>350</sup> They have advocated institutional reforms to align our political system more closely with the national majority will, removing or reducing the impact of features that give disproportionate power to a minority of the national population, from equal state representation in the Senate to the electoral college to the Article V constitutional amendment process.<sup>351</sup> Those scholars' focus, however, has been on overcoming gridlock and improving the general quality of governance.

The farmers' history points toward a different benefit from such reforms: A more majoritarian system of government might also aid disfavored minorities seeking constitutional protections. That runs counter to the usual wisdom about American government, that fragmenting power prevents the government from oppressing minorities. But evaluating which view is more accurate presents an empirical question, one that cannot be answered through pure theory.<sup>352</sup>

History may provide clues. Have features of American government—like separated powers, the representation of overlapping majorities, and federalism—

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350. See sources cited *supra* note 34.

351. *E.g.*, DAHL, *supra* note 34, at 16–17; LEVINSON, *supra* note 34, at 21–22; SABATO, *supra* note 34, at 2–3, 225–28.

352. *Cf.* Griffin, *supra* note 8, at 291 (arguing that “the constitutional logic of separated and divided power” serves minorities, because they can resort to multiple government actors for protection).

in fact sheltered vulnerable groups from majority tyranny?<sup>353</sup> Or have they instead empowered already-powerful groups seeking to defend their positions? As a single case study, the farmers' history cannot tell us whether a fractured government design does more harm than good. Nor can we definitively know whether the farmers would have attained greater equality in its absence. It does suggest, however, that we should consider whether our institutions' design truly serves constitutional values—particularly for the disfavored groups who most urgently require constitutional protection. Intuitively, one would think that preserving the status quo tends to favor the best-off, not the disfranchised.<sup>354</sup> Insofar as many features of American institutional fragmentation originated in compromises between powerful stakeholders at the Founding, and have historically served to shield systems of inequality, that is further reason to question whether they protect the vulnerable.<sup>355</sup> Ultimately, though, rigorous analysis and long-term, comprehensive study are needed to adequately address these questions, with due attention to the varying implications of specific institutional features.

Such research might begin by collecting case studies of numerous rights movements, both successful and failed ones, with an eye to mapping the constraints and barriers that they faced within politics and in the courts. How often has a disfavored minority found itself blocked by powerful opponents who cannot claim to represent the public as a whole? How often has the diffusion of governing power by institutional structure instead protected such groups or advanced their claims? For example, the LGBT rights movement has won historic victories in the marriage equality arena,<sup>356</sup> but that movement's battle for federal anti-discrimination legislation is now in its fourth decade, stymied by the vetogates

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353. Cf. Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619, 635–36, 643–44 (1977) (noting historical evidence against the idea that federalism protects civil rights and liberties).

354. See Frederic Bloom & Nelson Tebbe, *Countersupermajoritarianism*, 113 MICH. L. REV. 809, 817 (2015) (“In a supermajoritarian regime, those who benefit in the status quo will be more likely to benefit in the future . . . . Those who suffer now, in turn, will be more likely to suffer in the future.”); Melissa Schwartzberg, *Should Progressive Constitutionalism Embrace Popular Constitutionalism*, 72 OHIO ST. L.J. 1295, 1313 (2011) (noting that formal supermajority rules “enable not only vulnerable, but powerful, minorities to block change” thus allowing “wealthy minorities to thwart efforts at redistributive economic and social policies”).

355. See discussion and sources cited *supra* notes 28–29.

356. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (ruling that same-sex couples may not be deprived of the fundamental right to marry); *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (invalidating federal Defense of Marriage Act insofar as it barred federal recognition of lawful same-sex marriages). Heather Gerken has argued that federalism served the marriage equality movement well by allowing progressive change to be implemented locally, eventually pulling the nation in the desired direction through the power of concrete example and the deliberation it triggered. See Gerken, *Windsor's*, *supra* note 79, at 595–98.

that pervade our system despite majority support among the public.<sup>357</sup> In the meantime, individuals suffer very real harms from the absence of those protections. What costs have such barriers exacted from other groups, and how should we weigh those against the apparent benefits of gradual, consensus-driven change? Are there ways to retain the benefits of deliberation and time, while making it more feasible for movements to obtain rights protections through democratic politics?<sup>358</sup>

For now, we can simply recognize that whether our government's design protects or hurts disfavored minorities is a critical, unresolved question lurking within American constitutionalism—and one that may temper our enthusiasm for sending disfavored minorities off to seek their rights in democratic struggle. Institutional realism highlights that the deep structure of our institutions configures politics, and entails significant costs for those who are required not just to “run the race of politics” but also to clear the high hurdles erected by those institutions.<sup>359</sup>

#### D. Implications

What are the implications of the foregoing analysis? First, it suggests a more balanced view of the three branches' capacity to protect minority rights. Congress, the executive, and the judiciary are all charged with implementing and enforcing constitutional principles, yet they often fail to do so. Those struggles are partially rooted in American constitutional design, which gives opponents multiple chances to block each branch's actions. Courts are not unique in

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357. The current version of federal antidiscrimination legislation, the Employment Non-Discrimination Act (ENDA), has been introduced in every session of Congress since 1994; it finally passed the Senate for the first time in 2013, only to be blocked in the House of Representatives when then-Speaker John Boehner announced that he would not allow a floor vote. Alex Reed, *Abandoning ENDA*, 51 HARV. J. LEGIS. 277, 278–79 (2014). A majority of American support such legislation. See Maggie Haberman, *Poll: Anti-discrimination Law Support* (Sep. 30, 2013, 5:05 AM EDT), <http://www.politico.com/story/2013/09/poll-big-support-for-anti-discrimination-law-097540> [<https://perma.cc/8PYD-5HXU>]. Proponents' initial goal in the 1970s was to add sexual orientation as a protected trait under the Civil Rights Act of 1964, but they eventually settled on enacting separate employment discrimination legislation. See Reed, *supra*, at 281–86.

358. For an argument that one need not rely on formal supermajority rules to trigger delay, deliberation, and consensus-building prior to constitutional amendment, see Schwartzberg, *supra* note 354, at 1309–11.

359. See Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1294 (2004) (noting that groups “must run the long race of politics” to produce new constitutional interpretations).

that regard. None of our branches are simply majoritarian; none is free of institutional constraints.

Second, we should be careful in characterizing the courts' remedial powers. Courts may lack the bureaucratic tools and flexibility necessary to oversee reform of other government institutions. But that view risks idealizing the other branches, which also struggle to overhaul institutions and protect minority interests. Further, each branch suffers from constraints in some areas of action and enjoys heightened powers in others. At the end of the day, any branch will find it difficult to act alone to force change on other parts of government; constitutional reform is most effective when all three branches align. Such is the reality of the fragmented constitutional system the Framers gave us. Future analyses should aim to deepen the analysis offered here—by asking which institutional features of each branch decrease its members' collective will to aid marginalized groups, which diminish each branch's implementation capacity, and which characteristics heighten the potential for public backlash. The end goal would be a careful, variegated diagnosis of each branch's distinctive strengths and weaknesses in implementing constitutional rights.

Third, analyzing each branch's distinctive role in constitutional implementation has direct implications for thinking about equal protection remedies for persistent, deeply rooted racial harms. We have lived through a series of equal protection regimes in the past century. Each posited different constitutional obligations and thus resulted in different institutions having the primary power to implement those obligations.<sup>360</sup> One means of moving forward is to recognize that no branch has succeeded in implementing its responsibilities—and that all three branches would have to play a role in any program meant to address the entrenched racial inequality that has resulted. It is unrealistic to expect that judicial, legislative, or executive branch remedies alone can resolve these past harms, which have such a varied, deeply rooted nature.

To return to the farmers, this implies that remedying the harms minority farmers suffered from generations of inequitable farm policy would require action from all three branches. More adequate responses might include, for example, new programmatic interventions from Congress to open up wealth-building opportunities in agriculture to a truly diverse set of Americans, procedural reforms to farm programs from the executive branch to repair the vestiges of past segregation and discrimination, and symbolic measures such as apologies and full public accountings of past injustices—along with the individual compensatory remedies the farmers actually obtained through litigation in the courts.

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360. See *supra* note 345 and accompanying text.



Such a multipronged approach would represent a true flowering of constitutionalism inside and outside the courts, one in which all three branches have space to address the harms of the past.

Finally, if neither democracy nor our normative constitutional theories absolve the political branches from enforcing the Constitution on disfavored minorities' behalf, then we should consider how our government's structure shapes the likelihood that they will do so. Under what conditions is there institutional space and capacity for a branch to act on unpopular groups' behalf? If these conditions are very narrow, then we should consider whether there are adjustments that might widen them, either through direct institutional design changes or by shifting how we incentivize legislative, executive, and judicial responsibility for minority protections. Legal scholars have heavily critiqued the judiciary for constraining Congress's ability to implement minority-protective laws.<sup>361</sup> Are there additional ways in which each branch affects the others' incentives to protect unpopular groups? Is there an argument for constitutional overhaul to facilitate government action in aid of minorities by reducing the ease with which others can block constitutional remedies? Would this make it too easy for government to act against minorities themselves? These questions are challenging ones to resolve, but they deserve our sustained attention.

### CONCLUSION

This Article points to an important research agenda within constitutional law and politics. What can we expect of the political branches? When, if ever, will they implement the Constitution on behalf of disfavored groups? How do the institutional design of Congress and the executive branch affect their ability to do so? Instead of lamenting the courts' inadequate capacity to protect subordinated groups, we should ask how likely any of our national institutions are to do so, how they fare in comparison to one another, and whether institutional changes would encourage stronger constitutional interventions.

Moreover, serious questions remain regarding the burdens of constitutionalism outside the courts. When we ask subordinated groups to struggle to obtain constitutional protections from representative institutions, do we ask too much? What are the appropriate hurdles in a democracy, and what represents inappropriate insulation of the status quo?

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361. See, e.g., Kramer, *supra* note 67, at 143–52 (critiquing the Court's jurisprudence limiting Congress's powers to enact legislation enforcing the Fourteenth Amendment); Post & Siegel, *Legislative Constitutionalism*, *supra* note 6, at 1966–80 (same).

For African American farmers, asking such questions offers far too little, far too late. Few black farmers remain, and the structure of American agriculture appears entrenched against them.<sup>362</sup> But their history demonstrates the profound human costs that constitutional failures inflict. It should also help us recall that no part of American history has been untouched by the racial caste system. From the Founding forward, those who wish to insulate that system have helped shape our most basic institutions. Multiple Reconstructions still have not fully grappled with the implications of those structures, nor the harms inflicted by the racial subordination they sheltered. No matter how much our racial attitudes may progress or how post-racial we supposedly become, those legacies of structural constraints and racial subordination persist. That reality should drive us to continue seeking to perfect our constitutional democracy, for those harmed in the past and all those who continue to struggle for protection.

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362. *But see* Harris, *supra* note 11, at 196–98 (pointing to the potential for the reintegration of American farming, and “a new and more inclusive agrarian ideal”).