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REMNANTS OF CASTE: BLACK FARMERS, WHITE FARMERS, CONGRESS, AND THE USDA

KATHRYN FITZGERALD*

I. INTRODUCTION

> "Remnants of caste persist. . . . The challenge ahead is to demonstrate…why such subordination and the institutions that give rise to it are incompatible with the equality the Constitution promises."[1]

For decades, Black farmers faced discriminatory practices at the hands of the United States Department of Agriculture (USDA).[2] Recently, however, a group of white farmers claimed reverse discrimination over government fund allocation to "socially disadvantaged farmers and ranchers"[3] in a number of lawsuits filed in the spring of 2021.[4]

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[1] Owen Fiss, *Another Equality*, 2 ISSUES LEGAL SCHOLARSHIP i, 25 (2004) [hereinafter Fiss I].

[2] *See* PETE DANIEL, DISPOSSESSION: DISCRIMINATION AGAINST AFRICAN AMERICAN FARMERS IN THE AGE OF CIVIL RIGHTS 16-17 (2013) (explaining that during the 1950s through the 1980s, USDA staff voiced support for civil rights laws but still ignored them, and that the USDA alienated Black farms because they were "too small to bother with" them).

[3] American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005(a), 135 Stat. 4, 12-13 (2021).

[4] Each of the following cases challenged Section 1005 and 1006 on equal protection grounds for effectively the same concerns over racial discrimination: Miller v. Vilsack, No. 4:21-CV-0595, 2021 WL 6129207, at *1 (N.D. Tex. Dec. 8, 2021), *rev'd and remanded on other grounds,* No. 21-11271, 2022 WL 851782 (5th Cir. Mar. 22, 2022); Wynn v. Vilsack, No. 21-CV-514, 2021 WL 7501821, at *1 (M.D. Fla. Dec. 7, 2021); Faust v. Vilsack, No. 21-C-548, 2021 WL 4295769, at *1 (E.D. Wis. Aug. 23, 2021); Carpenter v. Vilsack, No. 21-CV-0103, 2021 U.S. Dist. LEXIS 219377, at *3 (D. Wyo. Aug. 16, 2021); McKinney v. Vilsack, No. 21-CV-00212, 2021 U.S. Dist. LEXIS 218624, at *1-2 (E.D. Tex. Aug. 30, 2021); Kent v. Vilsack, No. 21-CV-540, 2021 WL 6139523, at *1 (S.D. Ill. Nov. 10, 2021); Joyner v. Vilsack, No. 21-CV-

One complaint filed on April 26, 2021, resulted in a class-action lawsuit against the USDA alleging that Sections 1005 and 1006 of the American Rescue Plan Act of 2021 (ARPA) violated both the Constitution and Title VI of the Civil Rights Act for "discriminating on the grounds of race, color, and national origin in administering its programs."[5]

The claim focuses on the term "socially disadvantaged farmers and ranchers"[6] used to earmark funds for debt relief to farmers and ranchers who were "subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities."[7] Other white farmers filed eleven additional lawsuits of a similar nature.[8] Notably, the suit filed in Wisconsin plainly alleged in its complaint that each claimant would be eligible for the debt relief described in Section 1005 of the ARPA due to them "except" for the fact that "[they are] white."[9]

The question that arises from these cases is not that dissimilar from a question facing the Supreme Court as it reconsiders the role of affirmative action in education today: is there still a need for race-based classification to level the playing field throughout the country, have we moved beyond that need, or do we still need it in some places, but not others?[10] In considering the well-documented, unfortunate history of

01089, 2021 WL 3699869, at *1 (W.D. Tenn. Aug. 19, 2021); Dunlap v. Vilsack, No. 21-CV-00942, 2021 WL 4955037, at *1-2 (D. Or. Sept. 21, 2021); Rogers v. Vilsack, No. 21-CV-01779, 2022 WL 1037574, at *1 (D. Colo. Mar. 31, 2022); Tiegs v. Vilsack, No. 21-CV-147, 2021 U.S. Dist. LEXIS 218585, at *1-2 (D.N.D. Sept. 7, 2021); Complaint for Declaratory & Injunctive Relief at 2, Nuest v. Vilsack, No. 21-CV-01572 (D. Minn. July 7, 2021); and Holman v. Vilsack, No. 21-CV-01085, 2021 WL 3354169, at *1 (W.D. Tenn. Aug. 2, 2021).

[5] Plaintiff's Class-Action Complaint at 3, 7, Miller v. Vilsack, No. 21-CV-0595, 2021 WL 1624668 (N.D. Tex. Apr. 26, 2021).

[6] *See* American Rescue Plan Act § 1005(a).

[7] 7 U.S.C. § 2279(a)(5)-(6).

[8] *See* cases cited *supra* note 4.

[9] Complaint for Declaratory & Injunctive Relief at 3-4, Faust v. Vilsack, No. 21-CV-00548, 2021 WL 1710643 (E.D. Wis. Apr. 29, 2021).

[10] *See generally* Richard D. Kahlenberg, *The Affirmative Action that Colleges Really Need*, THE ATLANTIC (Oct. 26, 2022), https://www.theatlantic.com/ideas/archive/2022/10/supreme-court-harvard-affirmative-action-legacy-admissions-equity/671869/ (arguing that economic diversity becomes as important as racial diversity in undergraduate settings). *But see* Valerie Strauss, *Why Race-Based Affirmative Action Is Still Needed in College Admissions*, WASH. POST (Jan. 30, 2022, 2:44 PM), https://www.washingtonpost.com/education/2022/01/30/needed-affirmative-action-in-college-admissions/ (arguing that historical and contemporary economic inequities continue to require race-based affirmative action policies to provide a chance for Black, Latino, and Native American youths to improve their lives).

rampant racial discrimination by the USDA since its inception[11] and the resulting impact on Black land ownership loss throughout at least the Twentieth Century,[12] these race-based classifications appear to still be relevant in the context of the American agricultural landscape.

For Black farmers to have a chance at surviving, the Court and ultimately the legal community, need to adopt an anti-subordination view of the Equal Protection Clause of the Fourteenth Amendment. Part II of this paper includes a brief discussion of the USDA's history of discrimination and the resulting *Pigford* cases.[13] Part III of this paper looks at the language of both ARPA and the Inflation Reduction Act (IRA)[14] as well as the emerging impact of the litigation brought by the white farmers for violations of their rights under the Fourteenth Amendment's Equal Protection Clause.[15] Finally, in Part IV, this Comment concludes with a review of the anti-subordination principle and its essential role in ensuring the survival of Black farmers in this country.[16]

II. THE USDA'S DISCRIMINATORY PAST CREATED AND PERPETUATES A SUBORDINATE CLASS OF BLACK FARMERS

The extensive documentation of discrimination by the USDA cements this discriminatory history as fact.[17] If, however, claims about fraudulent data provided by the USDA to hide its continuing discriminatory patterns prove true,[18] then the discrimination faced by Black and

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[11] *See* DANIEL, *supra* note 2, at 26-27 (discussing the investigation by the Student Nonviolent Coordinating Committee into discriminatory practices at the USDA in the spring of 1964 and concluding that "the layers and layers of racism that the department has picked up through the years . . . is the big reason why it's going to be so hard to undo it") (citation omitted).

[12] Dania V. Francis et al., *Black Land Loss: 1920-1997*, 112 AEA PAPERS & PROC. 38, 38 (2022).

[13] *See infra* Part II.

[14] *See infra* Part III.

[15] *See infra* Part III.

[16] *See infra* Part IV.

[17] *See generally* DANIEL, *supra* note 2. Black farmers continued to struggle despite the promises and hopes provided by the Civil Rights movement. *Id.* at 16-17. Daniel provides details about the discriminatory practices at the USDA as well as the circumstances leading to the controversial settlement terms negotiated by Black farmers and the federal government in *Pigford v. Glickman*. *Id.* at 246-60. *See also* Stephen Carpenter, *The USDA Discrimination Cases:* Pigford, In re Black Farmers, Keepseagle, Garcia*, and* Love, 17 DRAKE J. AGRIC. L. 1, 7 (2012) ("No one can deny discrimination in the [USDA] occurred during the first century of its existence.").

[18] Nathan Rosenberg & Bryce Wilson Stucki, *How USDA Distorted Data to Conceal Decades of Discrimination Against Black Farmers*, THE COUNTER (June 26, 2019, 7:00 AM), https://thecounter.org/usda-black-farmers-discrimination-tom-

minority farmers is ongoing and not merely a thing of the past. Section A focuses on one family's struggle to work with the USDA and maintain their family farm.[19] Section B summarizes a number of congressional reports to set the stage for the current climate of distrust that permeates minority farmer associations when believing that the new IRA legislation will actually result in at least proportionate aid to Black and minority farmers.[20] Section C details past settlement attempts between groups of Black litigants and the federal government that provided mostly modest financial relief to Black farmers who faced discrimination at the hands of the USDA, but ultimately failed to address the systemic impact of the poorly managed agency.[21]

A. Ongoing Discrimination at the USDA: a Family's Story

To confirm the USDA's unfortunate history and continuing discriminatory practices, *Mother Jones* chronicled the history of Valee Taylor and Renee Stewart's family farm in North Carolina's Orange County from the 1930s until 2019.[22] The article explains how beginning in 1930, the siblings' grandfather, who sharecropped for the majority of his life, took some gold coins gifted by his parents and purchased a 1300-acre tobacco farm.[23] That purchase and the fruits of his work propelled him to becoming "a pillar of the local Black bourgeoise" and he was eventually able to build "a church and a school for the local Black community."[24] Taylor and Stewart helped run the farm and eventually returned to the family business with a loan from the USDA in 2009 which they used to start an aquaculture operation that began supplying fish to the University of North Carolina, Chapel Hill.[25] To get that original loan for their aquaculture enterprise, Taylor and Stewart faced discrimination reminiscent of the Jim Crow era.[26] After two years of interrogation level questioning by various state Farm Services Administration (FSA) officers, they eventually secured their loan.[27] Departing from common practice, their local FSA prohibited the siblings

vilsack-reparations-civil-rights/.

19 *See infra* Part II.A.

20 *See infra* Part II.B.

21 *See infra* Part II.C.

22 Kathryn Joyce et al., *The "Machine That Eats Up Black Farmland"*, MOTHER JONES, May-June 2021 at 24-30.

23 *Id.* at 26.

24 *Id.*

25 *Id.*

26 *Id.* at 26-27.

27 *Id.* at 29.

from applying for their loan as a limited liability company, which required the siblings to post their now eighty-acre tobacco farm and Stewart's home as collateral.[28]

After a series of natural disasters in 2014 and the USDA's refusal to defer their loan payments despite constant communication and compliance by the siblings, Stewart lost the eighty-acre tobacco farm she used to qualify for the loan, resulting in both Taylor and Stewart developing medical conditions from the stress.[29] Working around the FSA, the siblings nearly secured a bank loan for $670,000 to stay in business.[30] The FSA, however, blocked this new loan, claiming that its loan had to take priority, while continuing to refuse to restructure the siblings' loans for deferred payments– a common practice in the farming community.[31] After their loan was denied, the siblings filed a discrimination complaint against their FSA officers with the Office of the Assistant Secretary for Civil Rights (OASCR) at the USDA in June of 2016.[32] They did not hear about that complaint until May of 2017—eleven months later—when they were asked to submit additional information.[33] They did not hear back from the investigator until September of 2018 when they were given more questions to answer within the week and then they did not receive a verdict on their claim until September of 2019.[34] After three years of waiting and adhering to the seemingly random requests of the investigator, the siblings received a decision that valued the FSA loan officer's statements and dismissed the bulk of their complaint.[35]

Unsurprisingly, without the new loan or deferred payments on the FSA loan, and because of the painfully slow response to their discrimination claim from the USDA, the siblings closed the Taylor Fish Farm in 2019.[36] Queen Kavanaugh, a senior official at OASCR's Center for Civil Rights Enforcement, noted in a twelve-page memo that the investigator failed to follow proper protocol by contacting the Taylors directly instead of their lawyer and although the siblings made seven claims of discrimination, OASCR only investigated one.[37] In her investigations Kavanaugh was often reprimanded by her superior officers that

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[28] *Id.*
[29] *Id.* at 29-30.
[30] *Id.* at 30.
[31] *Id.* at 29-30.
[32] *Id.*
[33] *Id.* at 30.
[34] *Id.*
[35] *Id.* The siblings indicated that they felt the entire process was "absurd." *Id.*
[36] *Id.* at 29-30.
[37] *Id.* at 30.

her reports took too long and that she was too critical of the Agency.[38] Based on this testimony, as recently as 2018 the Agency made it clear that the mere appearance of an investigation sufficed when handling claims of discrimination.[39]

This story is not unique to Taylor Fish Farm and its timeliness speaks to the continuing nature of discrimination at the USDA, despite the Agency's protestations that all of the discriminatory issues are fixed and in the past.[40]

B. Documented Discriminatory Practices by the USDA and Attempts at Reform: 1990-2000s

Discrimination by the USDA in the 1990s and the 2000s continued to be prevalent and well-documented by various reports issued by the Government Accountability Office (GAO) as well as Congressional Research Services (CRS).[41] Each of these reports supports its investigations through data from the U.S. Census Bureau as well as interviews of farmers and internal document review.

In 1994, the USDA commissioned a study with an outside consulting firm to assess crop payments and disaster payments from 1990 to 1995 as a way to analyze the treatment of minorities and women by the Agency.[42] Ultimately the study revealed minimal participation in FSA programs by minorities and this resulted in minorities receiving "less than their fair share of USDA money for crop payments, disaster payments, and loans."[43] Those who did attempt to access the FSA programs and were denied rarely appealed those decisions because the process was too slow, they lacked confidence that their appeals would achieve a different result, confusion about the rules, and the overwhelming bureaucracy of the various agencies hindered the process.[44] The

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[38] *Id.*

[39] *See id.* at 30-31. Kavanaugh explains the investigation process, noting that the USDA investigators review complaints and then send complainants written questionnaires that may not cover the most important information but nevertheless becomes their main testimony in the affidavit. *Id.* The affidavits are then sent to USDA employees accused of discrimination—employees who can ensure the document is written and filed in a way that supports their version of events. *Id*

[40] *See* Rosenberg & Stucki, *supra* note 18. This investigative piece chronicles the USDA's failure to document complaints and actions taken by its offices in civil rights claims made against the Agency by Black farmers in particular. *Id.*

[41] Carpenter, *supra* note 17, at 7-10.

[42] TADLOCK COWAN & JODY FEDER, CONG. RSCH. SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS 2 (2013).

[43] *Id.*

[44] *Id.*

study also revealed statistical findings indicating a disparity in loan distributions among racial classes.[45] Ultimately, the study indicated that the reason for the large disparities in loan distributions was due to "'gross deficiencies' in USDA data collection and handling."[46]

By the end of 1996, Dan Glickman, then Secretary of Agriculture, ordered that all farm foreclosures be suspended while the USDA investigated racial discrimination.[47] In February of 1997, the just commissioned USDA Civil Rights Task Force recommended ninety-two changes at the USDA to combat racial bias after engaging in an investigation that included twelve civil rights listening sessions across the country.[48] These sessions revealed a culture at the USDA that included allegations that "USDA ha[d] participated in a conspiracy to acquire land belonging to [minority farmers] and transfer it to wealthy landowners."[49] One of the largest issues to arise for the farmers at the listening sessions was the lack of accountability of USDA Managers who were responsible for issuing loans to farmers through the local FSAs.[50] The complaints appeared to echo the same sentiment that these officials consistently exhibited "racial bias, unfair lending practices, and

[45] *Id.*
[46] *Id.* (citation removed).
[47] *Id.*
[48] *Id. See also* U.S. DEP'T OF AGRIC., CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE 2, (Feb. 1997) [hereinafter CRAT REPORT]. This report included some background information that helps explain the culture of discrimination that continued to permeate the USDA at the time of the report. The report indicates that people still refer to the USDA as "the last plantation" and indicated that it was one of the "last Federal agencies to integrate and perhaps the last to include women and minorities in leadership positions." *Id.* Additionally, the report includes a brief history of the discriminatory treatment of minority employees throughout the 1960s, 1970s, and 1980s, noting that the Agency was "insensitive to issues regarding equal opportunity and civil rights" and that the "Farmers Home Administration had not placed adequate emphasis on dealing with the crisis facing [B]lack farmers." *Id.* The report also contains a brief summary of the Congressional Committee on Government Operations report from 1990 that "identified Farmers Home Administration as one of the key causes of the drastic decline in [B]lack farm ownership." *Id*
[49] CRAT REPORT, *supra* note 48, at 3-4. At the listening sessions, advocates stated that minority farmers were similar to "endangered species" and asserted that the USDA assisted in the decline of landownership by minorities through its fund distribution system that "intentionally or not—shut out minority and limited-resource farmers and ranchers" from programs that benefitted non-minority farmers navigate the changing agricultural system since the 1950s. *Id.* at 14 ("For African Americans, the number [of farms operated] fell from 925,000, 14 percent of all farms in 1920, to 18,000, 1 percent of all farms in 1992.").
[50] *Id.* at 6.

discrimination" while exhibiting an arrogant "sense of immunity."[51] Even when farmers managed to file complaints against the USDA and the USDA admitted to that discrimination, pay-outs were seldom made.[52] Perhaps most indicative of the inability of minority farmers to receive a fair shot at loans is the incentive program for employees that rewards officers "for having low default rates[] and for dispensing all of the funds allocated to them[.]"[53] This type of system ultimately incentivizes working with "financially sound producers" while neglecting the smaller farms that are more often owned by minorities.[54] Ultimately, the report revealed a lack of consistency of civil rights leadership at the USDA as a critical hurdle to fixing the problems asserted by the farmers.[55] Without a sense of who to contact and what channels to follow, it is no wonder that a series of discrimination suits soon followed this report.

Data from the 2007 Census of Agriculture cements the impact of these disproportionate loan distributions. Data collection revealed that of the 2.2 million farms operated in the United States only 32,938 had principal operators that were Black.[56] While the number of farms operated by Black farmers was up significantly from 1997, when the Census reported that only 18,451 farms were operated by those identifying as Black,[57] by 2007 Black-operated farms only accounted for 1.5% of all farms in the country.[58] Perhaps more significant is the decline of acreage of farmland experienced by Black farmers from 1910 to 2007.[59] Estimates indicate that by 1910, Black farmers owned more than sixteen million acres of land,[60] and by 2007, that number steadily fell to 3,826,403 acres.[61]

Additionally in 2007, Black farmers received an average of $4,260 as compared to the national average government farm payment

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[51] *Id*. One of the employees at a Texas outreach center shared a story about a supervisor who took an applicant's plan for a farm that required a loan and simply threw it in the trash can. *Id.* at 7.
[52] *Id.* at 7-8. Farmers that had managed to appeal their cases claimed that "even when decisions are overturned, local offices often do not honor the decision" and they are ignored. *Id.* at 23.
[53] *Id.* at 8.
[54] *Id.*
[55] *Id.* at 48.
[56] U.S.D.A. NAT'L AGRIC. STAT. SERV., 2007 CENSUS OF AGRIC.: U.S. SUMMARY & STATE DATA 7 tbl.1 (2009); *id.* at 62 tbl.55.
[57] U.S.D.A. NAT'L AGRIC. STAT. SERV., *supra* note 56, at 25 tbl.17.
[58] U.S.D.A. NAT'L AGRIC. STAT. SERV., *supra* note 56, at 62 tbl.55.
[59] Francis et al., *supra* note 12, at 38.
[60] *Id.* (citation omitted).
[61] U.S.D.A. NAT'L AGRIC. STAT. SERV., *supra* note 56, at 62 tbl.55.

of $9,523.[62] In total, approximately thirty-two percent of all Black famers received some type of government payment, while fifty percent of all white farmers received payments.[63] Finally, the Commodity Credit Corporation (CCC) issued 348 loans to Black farmers in 2007,[64] as opposed to 757 in 2002,[65] totaling approximately $9.9 million.[66] In 2007, this amounted to approximately $28,408 per Black farmer when the average CCC loan value per white farmer was $88,389.[67] These disparities seem to mirror the testimonies of the farmers who shared their stories with the Civil Rights Action Team in 1997, suggesting that as of the early 2000s, the USDA still had plenty of work to do.[68]

C. Breaking down the actual impact of the settlements in Pigford I and In re Black Litigants (Pigford II)

The late 1990s and early 2000s marked the beginning of a series of settlements between the USDA and different classes of minority farmers.[69] In August of 1997, Timothy Pigford filed a class action lawsuit against the USDA in the U.S. District Court for the District of Columbia.[70] The lawsuit alleged that the USDA discriminated against Black farmers on the basis of race and that the Agency did not respond to complaints of discrimination from 1983 to 1997.[71] The lawsuit was certified as a class action after Judge Paul Friedman determined that a class action was "the most appropriate mechanism for resolving the issue of liability" due in part to the incredible backlog of complaints from minority farmers at the USDA.[72]

The Black farmers faced another hurdle, however, in the two-year statute of limitations attached to the Equal Credit Opportunity Act.[73] Available credit determines the success of a farm, regardless of the race or ethnicity of the farm's operator.[74] Farmers rely on credit to

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62 *Id.* at 15 tbl.6; COWAN & FEDER, *supra* note 42, at 1 (citation omitted).
63 U.S.D.A. NAT'L AGRIC. STAT. SERV., *supra* note 56, at 62 tbl.55; COWAN & FEDER, *supra* note 42, at 1 (citation omitted).
64 U.S.D.A. NAT'L AGRIC. STAT. SERV., *supra* note 56, at 62 tbl.55.
65 *Id.* at 48 tbl.47.
66 COWAN & FEDER, *supra* note 42, at 1 (citation omitted).
67 *Id.*
68 *See supra* Part II.B.
69 *See* Carpenter, *supra* note 17, at 13-15.
70 *See* COWAN & FEDER, *supra* note 42, at 2.
71 *Id.*
72 Pigford v. Glickman, 182 F.R.D. 341, 342, 344 (D.D.C. 1998).
73 *See* Carpenter, *supra* note 17, at 15-16.
74 *Id.* at 11.

purchase seed and fertilizer in the spring and then use the harvest to repay the debt in the fall, hoping for some leftover profit.[75] Credit allows farmers to expand whether through purchasing more land, more equipment, or more livestock.[76] The Equal Credit Opportunity Act made discriminating against credit applicants on the basis of race, sex, and national origin illegal.[77]

Aware of the importance of the litigation, Congress worked to pass an omnibus bill that waived this statute of limitations for civil rights cases and complaints made against the USDA between 1981 and 1996.[78] Ultimately, the plaintiffs and the USDA entered into a consent decree.[79] While the *Pigford I* settlement is often credited as the most significant victory for Black farmers because it resulted in the largest pay-out to date—$1.06 billion—criticisms still arose regarding the track system, terms of the decree itself, and the slow actions of the attorneys assisting the farmers.[80]

To be eligible for settlement funds under the consent decree, applicants had to be Black farmers who:

> (1) farmed . . . between January 1, 1981 and December 31, 1996; (2) applied to the United States Department of Agriculture (USDA) during that time period for participation in a federal farm credit or benefit program and who believed that they were discriminated against on the basis of race by the USDA's response to that application; and (3) filed a discrimination complaint on or before July

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[75] *Id.*
[76] *Id.*
[77] 15 U.S.C. § 1691(a).
[78] *See* COWAN & FEDER, *supra* note 42, at 3.
[79] *See generally* Consent Decree, Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999) (No. 97-1978).
[80] *See* COWAN & FEDER, *supra* note 42, at 5-7; Monitor's Final Report on Good Faith Implementation of the Consent Decree and Recommendation for Status Conference at 84, Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999) (No. 97-1978) [hereinafter Monitor's Final Report]; Emma Hurt, *The USDA Is Set To Give Black Farmers Debt Relief. They've Heard That One Before*, NPR (June 4, 2021, 4:48 PM), https://www.npr.org/2021/06/04/1003313657/the-usda-is-set-to-give-black-farmers-debt-relief-theyve-heard-that-one-before ("In 1999, Black farmers won what became the largest civil rights class action settlement in U.S. history, Pigford v. Glickman. The legal victory acknowledged discrimination by the department and its failure to address these complaints. But . . . under Pigford, nearly 16,000 claims were approved for monetary payments. But just under 7,000 were flat out denied, and roughly 60,000 were rejected for being filed late.").

> 1, 1997, regarding USDA's treatment of such farm credit or benefit application.[81]

The decree created a two-track mechanism for those who met the initial requirements to pursue their claim.[82] Track A claimants began their process by establishing that they "owned or leased, or attempted to own or lease farmland" in the relevant period.[83] Then, the claimants had to prove they applied for a loan from a USDA county office during that time and their loan application was either (1) denied, (2) late, (3) "encumbered by restrictive provisions," (4) less than requested, or (5) that the USDA provided lesser service than what was provided to "similarly situated white farmers."[84] Finally, claimants had to prove that this treatment of the loan application economically damaged the class member.[85] If the farmer could meet these requirements by the relatively low burden of substantial evidence, any debts to the USDA were discharged and they were awarded a monetary settlement of $50,000 that could be used for loan forgiveness and to offset tax liability.[86]

Although Track B claimants were required to prove the same factors as Track A above, they faced a higher burden of proof under the preponderance of the evidence standard.[87] Their efforts could result in a higher payment, but their claims were reviewed by a third-party arbitrator whose decision was binding.[88] The consent decree reveals little about how the claimants could prevail on their Track B claims and what would amount to preponderance of the evidence as opposed to substantial evidence for the various factors.[89] As defined in the decree, preponderance of the evidence means "such relevant evidence as is necessary to prove something is more likely true than not true."[90] Conversely, Track A's more lenient standard of substantial evidence is defined as "such relevant evidence as appears in the record before the adjudicator that a reasonable person might accept as adequate to support a conclusion after taking into account other evidence in the record that fairly detracts from

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81 Consent Decree, *supra* note 79, at 5-6.
82 *See id.* at 13-20 (describing the separate processes and requirements for each track).
83 *Id.* at 14.
84 *Id.*
85 *Id.*
86 *Id.* at 14-15.
87 *Id.* at 19.
88 *Id.* at 19-20.
89 *Id.* at 18-19.
90 *Id.* at 4.

that conclusion."[91] With this discrepancy in the standards, far fewer claimants chose to pursue Track B claims, regardless of the potential for much higher pay-outs and instead opted for the nearly guaranteed relief of $50,000 in Track A.[92]

Despite eventually paying out $1.06 billion to the farmers, Judge Friedman, who oversaw the case from beginning to end, expressed deep concern for the failures of the attorneys representing the farmers who missed deadlines and even said their representation "border[ed] on legal malpractice."[93] He also expressed concern that the USDA refused to add any language to the consent decree expressing that "USDA would exert 'best efforts to ensure compliance with all applicable statutes and regulations prohibiting discrimination.'"[94] These concerns, while significant, should not overshadow the precedential wins that came from this case. First, the attorneys representing those farmers collected their payment through fee-shifting statutes used for government litigation, not from what was paid to the class.[95] Second, there was no cap on the amount of money that could be paid from the judgment fund for this settlement, suggesting that so long as the farmers met the deadlines and qualified, they would all be compensated.[96]

The final court monitor report for *Pigford I* was filed on April 1, 2012.[97] Even in light of the significant pay-outs, concerns lingered regarding a large number of applicants who did not receive a determination for their claims due to late filings, lack of notice, and other factors.[98] Ultimately, however, the report described the results of *Pigford I*, just as Judge Friedman said in his initial opinion[99] approving the settlement in 1999, as a "good first step" towards addressing "race discrimination

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[91] *Id.* at 5.

[92] Carpenter, *supra* note 17, at 20.

[93] *See* COWAN & FEDER, *supra* note 42, at 5, 7.

[94] *Id.* at 6 (citation omitted).

[95] Consent Decree, *supra* note 79, at 24.

[96] *Id.* at 15, 19 (first citing 31 U.S.C. § 1304, then citing 15 U.S.C. § 1691e(a)).

[97] *See* Monitor's Final Report, *supra* note 80. While the case monitor confirmed that both the USDA and plaintiffs "have acted in good faith to address and resolve many significant issues that have arisen" while implementing the decree, the monitor ultimately concluded that even as of 2011 issues remained with debt relief implementation and verification that resulted from a "complex regulatory scheme" that made the fact-specific review required to determine the validity of claims extremely cumbersome. *Id.* at 5, 78, 80.

[98] *Id.* at 77-79.

[99] *See* Pigford v. Glickman, 185 F.R.D. 82 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000).

in agriculture."[100] Not everyone agreed. While more than "22,000 farmers had presented their claims for adjudication on the merits, and more than 15,000 farmers had received monetary compensation" by September 29, 2008, "*tens of thousands*" were not able to file claims under the consent decree.[101] In the 2008 Farm Bill, Congress included a provision allowing late *Pigford I* claimants to reassert their claims in federal court.[102] The ensuing lawsuits were consolidated into *In re Black Farmers Discrimination Litigation* (*Pigford II*)[103] by Judge Paul Friedman on August 8, 2008.[104]

In following the terms of the 2008 Farm Bill, the plaintiffs in *Pigford II* sought to obtain "a full determination on the merits for each Pigford claim previously denied that determination."[105] In other words, the claimants from the original *Pigford* case whose claims were late or deficient in some way, were given a second chance in the new case. On February 18, 2010, the court announced a $1.25 billion settlement agreement for the *Pigford II* claimants.[106] This, however, had to be approved by Congress because only $100 million was made available for payment of these claims in the 2008 Farm Bill.[107] This approval was enacted by President Obama on December 8, 2010[108] after passing in the Senate and receiving unanimous consent in the House. Ultimately, the *Pigford II* settlement paid out $1.25 billion to the claimants.[109] While this appears to be a significant amount of money, it pales in comparison to the amount of land lost by Black and minority farmers as a result of the perpetual discriminatory actions of the USDA.[110] Although victories, both *Pigford* settlements, as well as a couple of other settlements more

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[100] *Id.* at 84 (hoping that the settlement is "a good first step towards assuring this kind of discrimination that has been visited on African American farmers since Reconstruction will not continue into the next century").
[101] *See* Second Amended Complaint for Determination on the Merits and Damages Pursuant to § 14012 of the Food, Conservation and Energy Act of 2008 at 3, In re Black Farmers Discrimination Litigation, 856 F.Supp.2d 1 (D.D.C. 2011) (No. 1:08-mc-00511-PLF), ECF No. 24 (emphasis in original).
[102] *See* Food, Conservation, and Energy Act, Pub. L. No. 110-246, §14012(b), 122 Stat. 1651, 2210 (2008).
[103] COWAN & FEDER, *supra* note 42, at 7.
[104] Order at 3, In re Black Farmers Discrimination Litigation, 856 F.Supp.2d 1 (D.D.C. 2011) (No. 1:08-mc-00511-PLF), ECF No. 1.
[105] Food, Conservation, and Energy Act, § 14012(d).
[106] COWAN & FEDER, *supra* note 42, at 7.
[107] *Id.* at 7-8.
[108] *Id.* at 8; *see* Claims Resolution Act of 2010, Pub. L. No. 111-291, § 201(b), 124 Stat. 3064, 3070 (2010).
[109] COWAN & FEDER, *supra* note 42, at 7.
[110] *See* Francis et al., *supra* note 12, at 38 (indicating a 90% decline in Black agricultural land from 1917 to 1997).

specific to Hispanic Americans[111] and Native Americans,[112] still only addressed a small percentage of minority farmers who lost out on the chance to secure their futures with the same advantages received by non-minority farmers.

III. CHALLENGES TO RECENT CONGRESSIONAL ATTEMPTS TO ASSIST MINORITY FARMERS

As the *Pigford* cases slowly navigated the legal system, farmers still required money to buy seed, fertilizer, and other essentials to even begin a season. The inefficiency of the court system could never provide timely relief to this industry. While the settlements indicated that actual change at the USDA was possible, the undoubtedly glacial pace of changing the culture at this enormous government bureaucracy convinced some members of Congress that to assist the farmers, they needed to act quickly and determinatively to provide immediate relief.[113] This section examines the American Rescue Plan Act as well as the litigations that forced amendments to Sections 1005 and 1006 of ARPA as part of the Inflation Reduction Act.

A. Congressional Action and Challenges

In 2020, a number of members of congress introduced the Justice for Black Farmers Act,[114] intending to provide land grants and debt relief to hopefully restore much of the land lost by Black farmers from the early 1900s through the present day.[115] This bill, however, died in committee.[116] In the wake of the Covid-19 pandemic, Congress did

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[111] *See* Garcia v. Johanns, 444 F.3d 625, 633, 637 (D.C. Cir. 2006). *See generally* JODY FEDER & TADLOCK COWAN, CONG. RSCH. SERV., R40988, *GARCIA V. VILSACK*: A POLICY AND LEGAL ANALYSIS OF A USDA DISCRIMINATION CASE (2013) (providing an in-depth analysis of the case and resulting settlement).

[112] *See generally* Keepseagle v. Glickman, 194 F.R.D. 1 (D.C. Dist. 2000); *and* HENRY W. KIPP, U.S. DEP'T OF INTERIOR BUREAU OF INDIAN AFFS., INDIANS IN AGRICULTURE: AN HISTORICAL SKETCH (1988) (providing background on Indian farming and ranching for the relevant period).

[113] *See, e.g.*, *Booker, Warren, Gillibrand, Smith, Warnock, and Leahy Announce Comprehensive Bill to Address the History of Discrimination in Federal Agricultural Policy*, CORY BOOKER (Nov. 19, 2020) [hereinafter *Comprehensive Bill to Address History of Discrimination*], https://www.booker.senate.gov/news/press/-booker-warren-gillibrand-announce-comprehensive-bill-to-address-the-history-of-discrimination-in-federal-agricultural-policy.

[114] Justice for Black Farmers Act of 2021, S. 300, 117th Cong. (2021).

[115] *See* Comprehensive Bill to Address History of Discrimination *supra* note 113.

[116] *Justice for Black Farmers Act of 2021*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/300/all-info#committees-content (last

include important provisions inspired by the Justice for Black Farmers Act for minority farmers in the ARPA.[117]

When the ARPA was passed in March of 2021, minority farmers at first praised the legislation.[118] On May 26, 2021, the Farm Service Agency, under the authority of the USDA, issued a notice of funds availability that clearly defined the socially disadvantaged farmer or rancher as a member who has been "subjected to racial or ethnic prejudice . . . without regard to their individual qualities."[119] Additionally, the notice indicates that Section 1005 of ARPA allows the Secretary of Agriculture to pay lenders directly in order to pay off loans to eligible recipients.[120] This piece of the notice encouraged minority farmers to go out and obtain loans, believing the funds were on the way.[121] By that summer, however, skepticism about its actual application grew.[122] ARPA's promise to pay "up to 120 percent of the outstanding indebtedness of each socially disadvantaged farmer or rancher"[123] on qualifying government issued loans lost its luster when white farmers filed multiple suits in federal district courts claiming the law violated their rights under the Equal Protection Clause of the Fourteenth Amendment.[124]

While there were twelve different suits brought, they effectively made the same argument: limiting those qualified to apply for this debt

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visited Mar. 18, 2023) (introduced to Senate and referred to the Agriculture, Nutrition, and Forestry Committee on Feb. 8, 2021.).

[117] American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 1005-06, 135 Stat. 4, 12-14 (2021).

[118] Tom Philpott, *$5 Billion of Stimulus Bill Seeks to Undo Damage to Farmers of Color*, MOTHER JONES (Mar. 10, 2021), https://www.motherjones.com/food/2021/03/5-billion-of-the-stimulus-bill-seeks-to-undo-damage-done-to-farmers-of-color/. ("Based on the amount Congress allocated to Black farmers, the current COVID-relief bill amounts to the 'most significant legislation for Black people since the Voting Rights Act,' said Virginia farmer John Boyd, founder of the National Black Farmers Association.").

[119] Notice of Funds Availability; American Rescue Plan Act of 2021 Section 1005 Loan Payment (ARPA), 86 Fed. Reg. 28329 (May 26, 2021) [hereinafter Notice of Funds Availability].

[120] *Id.* at 28330.

[121] *See* Class Action Complaint at 1-3, Boyd v. United States, No. 1:22-cv-01473 (Fed. Cl. Oct. 7, 2022).

[122] *See* Emma Hurt, *The USDA Is Set to Give Black Farmers Debt Relief. They've Heard That One Before*, NPR (June 4, 2021, 4:48 PM ET), https://www.npr.org/transcripts/1003313657. In her reporting, Ms. Hurt reveals the skepticism of John Boyd, President and founder of the National Black Farmer's Association, in the months following the enactment of ARPA as well as the skepticism voiced by Lloyd Wright, the former head of the Civil Rights Division at the USDA in the 1990s. *Id.*

[123] American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005(a)(2), 135 Stat. 4, 12 (2021).

[124] *See* cases cited *supra* note 4.

relief to "socially disadvantaged farmers and ranchers" precluded all white farmers from applying for debt relief under this law in violation of both the Equal Protection Clause of the Fourteenth Amendment as well as Title VI of the Civil Rights Act of 1964.[125] White farmers sought to enjoin the USDA from issuing funds under the Act.[126] When drafting ARPA, the legislators adopted the same definition for "socially disadvantaged farmers and ranchers" that was used in the Food, Agriculture, Commerce, and Trade Act which defines that class as "a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities."[127] The USDA further identified the members of this class as including "American Indians or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific Islanders; and Hispanics or Latinos" in a notice of funds availability issued in May of 2021.[128]

On July 1, 2021, Judge Reed O'Connor of the United States District Court for the Northern District of Texas issued an order granting Plaintiff Sid Miller, and the class of farmers he represents, an injunction against the USDA to prevent any funds from being issued to minority farmers as prescribed by sections 1005 and 1006 of ARPA.[129] In his memorandum, Judge O'Connor explained the pleading standard for seeking an injunction:

> (1) a substantial likelihood that the movant will ultimately prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that granting the injunction is not adverse to the public interest.[130]

In making his determination, the Judge spent the majority of this section of the order explaining why the plaintiffs would likely be successful on the merits of their claim.[131]

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[125] *See* Order at 2, Miller v. Vilsack, 4:21-cv-0595 (N.D. Tex. July 1, 2021), ECF No. 60.
[126] *Id.* at 1.
[127] 7 U.S.C. § 2279(a)(5)-(6).
[128] Notice of Funds Availability, *supra* note 119, at 28330.
[129] Order, *supra* note 125, at 1.
[130] *Id.* at 4.
[131] *Id.* at 15-19.

Judge O'Connor's analysis appears to be written in anticipation of how the current Supreme Court Justices would likely rule in this case instead of basing his ruling on past-precedent regarding the strict scrutiny standard for race-based government action. The standard for assessing the merits of an Equal Protection Clause claim when a state actor has enacted a race-based law to remedy the lingering effects of discriminatory action against minority groups is whether the government has a compelling interest in that reason and whether the act is narrowly-tailored to meet that interest.[132] In his order, Judge O'Connor notes that "the Government admits that the USDA is not currently discriminating against any socially disadvantaged farmers or ranchers" and proceeds to use that as the basis for his decision, despite that not being the test to determine whether remedying the discrimination is a compelling interest.[133] While the Government refuses to admonish itself by admitting that the USDA is currently discriminating against any minority groups,[134] it painstakingly lays out in both its brief,[135] and at the hearing, numerous acts, reports, and instances that illustrate discriminatory practices at the USDA as recently as 2019 and the impact of those practices up to the present day.[136]

In his order granting the injunction, Judge O'Connor stated that "the Government puts forward no evidence of intentional discrimination by the USDA in at least the past decade" and thus "[t]o find intentional

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[132] *See* Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (explaining that in the context of admissions, "[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system" and that the plan must be "flexible enough" that race is "a 'plus' factor in the context of individualized consideration of each and every applicant" and not the determinative factor.) (citations omitted).

[133] Order, *supra* note 125, at 16.

[134] Hearing Transcript at 30, Miller v. Vilsack, No.: 4:21-cv-0595 (N.D. Tex. June 30, 2021) (claiming the government is not relying on current discriminatory practices to assert its compelling interest but rather those "lingering effects" of discriminatory actions as recently as 2011).

[135] Defendant's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 19-28, Miller v. Vilsack, No.: 4:21-cv-0595 (N.D. Tex. June 11, 2021). This section chronicles the history of discriminatory practices at the USDA and recognizes that "denial of equal program access and continuing institutional discrimination" resulted in "loss of scarce or irreplaceable farm lands[.]" *Id.* at 24 (citations omitted).

[136] Hearing Transcript, *supra* note 131, at 22-27. The Government argues that both the past discriminatory practices and the impact of these discriminatory practices are sufficient to find that a compelling interest exists for the government to remedy these wrongs. *See id.* at 27. The Government cites to a 2021 Government Accountability Office report in its reply brief that found that minority farmers had "received a disproportionately small share of farm loans and agricultural credit" suggesting that discrimination continued at the USDA as recently as that report. Defendant's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, *supra* note 135, at 27 (citation omitted).

discrimination [] requires a logical leap, as well as a leap back in time."[137] He claimed that "any past discrimination is too attenuated from any present-day lingering effects to justify race-based remedial action by Congress."[138] This assessment begs the question, then, what discriminatory evidence, if any were to exist, could justify remedial action on the part of the state to assist minorities if this case's documentation of discriminatory history and practices as recent as 2019 at the USDA are not sufficient?

Ultimately the injunction issued by Judge O'Connor in Texas, as well as two other injunctions issued by judges in Florida and Wisconsin, led to Congress repealing Section 1005 of ARPA in the IRA and amending Section 1006.[139] Despite the apparent noble intentions of Congress and the USDA to fix past wrongs, the jurisprudence around racially-based classifications in statutes and the required strict scrutiny standard of review convinced these judges that it was more likely than not that the white farmers would prevail in their claims should litigation continue.[140] In response to this decision, Congress amended the ARPA's classification of fund recipients to "underserved farmers and ranchers" in the IRA to eliminate the race-based classification.[141] The injunction granted by the federal district court in *Miller v. Vilsack* failed to see that the Government had both a compelling state interest in the "lingering effects" of discriminatory practices at the USDA and that Sections 1005 and 1006 were narrowly-tailored to that interest.[142]

As a result of the amendment, most of the suits brought by the white farmers were withdrawn, but fears in Black and minority farming communities have spiked again.[143] After relying on the promise from the Government that funds were on the way, many Black farmers applied for loans and purchased equipment that they may now be in danger of losing.[144] In October of 2022, John Boyd, President and Founder of the National Black Farmer's Association and Kara Boyd, President and

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137 Order, *supra* note 125, at 17.

138 *Id.* Judge O'Connor goes on to cite to *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003), to affirm his position with the following: "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.*

139 *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 22008, 136 Stat. 1818 (2022).

140 *See* Order, *supra* note 125, at 16-17.

141 Inflation Reduction Act of 2022, § 22008.

142 Order, *supra* note 125, at 17.

143 *See* Alan Rappeport, *Climate and Tax Bill Rewrites Embattled Black Farmer Relief Program*, N.Y. TIMES (Aug. 12, 2022) https://www.nytimes.com/2022/08/12/business/economy/inflation-reduction-act-black-farmers.html.

144 *Id.*

Founder of the Association of American Indian Farmers, along with two others filed a class action lawsuit in U.S. Federal Claims Court against the United States for breach of contract for providing farmers with a notice of funds under ARPA, but then never following through on those promises.[145] The failure to provide the funds meant that many minority farmers, expecting to be supported by Sections 1005 and 1006 in ARPA, obtained loans and purchased materials needed for farming, only to realize the promise was a lie.[146]

This litigation is on-going, but perhaps serves as a warning of things to come. If the courts and the government cannot come up with a way to rectify the devastation caused by the discriminatory actions of the USDA towards Black and minority farmers, these farmers will be forced to get creative with their litigation strategies until they either prevail or there is no one left to wage the fight.

IV. ANTI-SUBORDINATION AND THE EQUAL PROTECTION CLAUSE – A NECESSARY STEP TO ASSISTING THE USDA IN RIGHTING ITS PAST WRONGS

This section explains the importance of the courts fully adopting the anti-subordination principle when interpreting the Equal Protection Clause to assist the USDA with righting its discriminatory past and attempting to prevent the extinction of Black and minority farmers.

A. The Equal Protection Clause as an Assertion of a Positive Right, not a Neutral One.

At issue with ARPA is a common constitutional law problem taught to all law students: when a law is racial on its face, it will be subject to strict scrutiny and likely found to be invalid because the government shoulders the burden of proving that this law contains a legitimate and compelling state interest and the satisfaction of that state interest is narrowly tailored to achieve the goal of the legislation.[147] Other

[145] Class Action Complaint at 1, Boyd v. United States of America, No.: 22-cv-01473-EJD (Fed. Cl. Oct. 7, 2022).

[146] *Id.* at 3.

[147] *See e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that a facially race-based law dictating who one can marry is a violation of the Equal Protection Clause because the intent of the law is to maintain white supremacy); *but see* Korematsu v. United States, 323 U.S. 214, 223-24 (holding that despite applying strict scrutiny to the facially race-based law prohibiting Japanese-Americans from living along the Pacific Coast, the state had a compelling interest in national security for enacting the law).

than in matters of national security,[148] the only other time the Supreme Court has upheld facially race-based policies or laws has been in affirmative action cases.[149] Arguably, these cases do not apply the same rigid strict scrutiny that is applied in *Loving v. Virginia*, where no deference is awarded to the state actor in its determination of possessing a compelling state interest, but the precedent for these affirmative action decisions suggests a willingness by the Court to consider what are effectively reparations for past wrongs to racial minority groups, but for a limited time.[150] This willingness to recognize diversity as a compelling state interest shows that the Court is willing to consider an anti-subordination principle when interpreting the Equal Protection Clause of the Constitution.

The district court in *Miller v. Vilsack* fails to acknowledge the lingering effects of discriminatory practices and give due credit to the anti-subordination principal some legal scholars have come to recognize as the true purpose of the Equal Protection Clause.[151]

Tracing the origins of the Equal Protection Clause and considering the implications of the persistence of the "right-to-protection tradition," Professor Bernick emphasizes that the abolitionists relied on these principles to confirm that the government has a duty to secure rights for the people, not merely to state the existence of these rights.[152] This notion of the Equal Protection Clause as a positive right as opposed to a neutral one gives power to the Government to protect those who are being subordinated or have suffered under subordination for some period of time.[153] His account of the history of the origins of the Equal

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[148] *See Korematsu*, 323 U.S. at 223.

[149] *See* Grutter v. Bollinger, 539 U.S. 306, 326-28 (2003) (holding under a strict scrutiny standard that state universities have a compelling interest in promoting diversity to further their educational goals).

[150] *Id.* at 343 (suggesting there is a sunset provision for affirmative action that approximately twenty-five years after the decision in this case, the country will no longer need affirmative action in education to level the playing field).

[151] *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 108 (1976) (arguing the group disadvantaging principle is the better metric for determining equal protection cases). *See also* Darrin Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 1 (2017) (arguing that dignity-based claims invoking the Fourteenth Amendment will not likely lead to racial justice but altering the Court's jurisprudence to focus on anti-subjugation principles could); and Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 4 (2021) (arguing that the Equal Protection Clause requires the prevention of subjugation of people and that Congress has an obligation to enact remedies when the State fails to furnish this protection).

[152] Bernick, *supra note* 151, at 25.

[153] *Id.* at 37-38. Prof. Bernick uses the Ku Klux Klan Act of 1871 as an example of how Congress utilized the Equal Protection Clause as a guarantee of positive rights

Protection Clause goes further to emphasize that abolitionists believed that when a person was denied the protection of the law, they were also denied their existence as a person.[154]

The Supreme Court's jurisprudence on affirmative action in the educational setting is a reflection of the Equal Protection Clause as a positive right as well as an indication of support for the anti-subordination principle.[155] Although the use of diversity as a compelling interest in education may not survive this term,[156] the original acknowledgements of diversity as the compelling interest to allow for race to be used as a plus factor in admissions created precedent that the Court favors an anti-subordination view of the Equal Protection Clause.[157] Justice O'Connor's statement in *Grutter v. Bollinger* that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized" pushes the Court towards favoring a positive view of the Equal Protection Clause as well as an anti-subordinate one.[158] Law Professor Owen Fiss's argument for the anti-subordination principle is based on his understanding that anti-subordination does not make affirmative action a "means of enriching the educational environment, but rather as a strategy for ending the subordination of disadvantaged groups."[159] In this situation, this principle is precisely what these farmers require: an end to their subordination.

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by providing that

> [I]f non-state violence (1) obstructed the execution of either state or federal laws (2) so as to deprive people of any of rights 'named in the Constitution and secured by this act' and states (3) 'from any cause' either 'fail[ed]' or 'refuse[d]' to protect them from that violence, "such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States.

Id. at 37 (citing Ku Klux Klan Act, § 3, Pub. L. No. 42- 22, 17 Stat. 13 (1871).).

[154] *Id.* at 26. Prof. Bernick contends that abolitionists like Henry Stanton emphasized that not to be known by the law meant that a person was able to be subjugated and thus was not able to be protected from violence or any other protection afforded by the laws of this country. *Id.* William Lloyd Garrison, Elijah Lovejoy, and even Karl Marx expressed this same view of equal protection of the laws in the fight to end slavery. *Id.* at 27-28.

[155] *See* Fiss I, *supra* note 1, at 6.

[156] *See* Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Oct. 31, 2022), https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html (last updated Oct. 31, 2022).

[157] *See* Fiss I, *supra* note 1, at 6 (discussing how the Court's acceptance of the anti-subordination principle makes it possible to extend affirmative action beyond the education context).

[158] Grutter v. Bollinger, 539 U.S. 306, 332 (2003).

[159] Fiss, *supra* note 1, at 6.

B. The State has a compelling interest in preserving and restoring Black and minority farmers to their careers

While affirmative action has applied only in the educational context, it seems that the situation of the Black and minority farmers warrants a similar consideration given the discriminatory history of the USDA and how these actions created a subordinated class. Despite the settlements and resulting pay-outs that came from the *Pigford* cases, Congress still felt compelled to provide specific aid to minority farmers in ARPA in the wake of the COVID-19 pandemic.[160] The injunction granted by the federal district court in *Miller v. Vilsack* failed to see that the government had both a compelling state interest in the "lingering effects" of discriminatory practices at the USDA and that Sections 1005 and 1006 were narrowly-tailored to that interest.[161]

While diversity as a compelling state interest in using race as a plus factor in university admissions is on the current Court docket chopping block,[162] the situation of the Black farmers presents a potentially even more compelling interest that deserves the protection of the Government. The history of Black farmers is a story of survival. Black farmers emerged from the harrowing origins of slavery and worked through the remarkably predatory practices of sharecropping[163] to carve-out a place for themselves and their families only to have the USDA chip away at the land wealth these farmers worked to attain for themselves.

The affirmative action of the type that ARPA promised to the farmers in this country was essential to meeting their immediate need for funds. Once Sid Miller and the other white farmers brought lawsuits in various federal district courts and won their requests for injunctions against Sections 1005 and 1006 of ARPA, those who had advocated for the farmers in Congress knew that even if they fought the injunctions in court, it would take years to get the money to the Black and minority farmers through the current ARPA language. Amending ARPA appeared to be the best way to get the farmers the money they so desperately needed,[164] but this was the mistake. Acknowledging the anti-subordination principle means that this country will move past the colorblind theory of the Constitution that appears to have protected the

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[160] *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 1005-1006, 135 Stat. 4, 12-14 (2021).
[161] Order, *supra* note 125, at 15.
[162] *See* Liptak & Hartocollis, *supra* note 156.
[163] *See* Maia Foster & P.J. Austin, Essay, *Rattlesnakes, Debt, and ARPA § 1005: The Existential Crisis of American Black Farmers*, 71 DUKE L.J. ONLINE 159, 163 (2022).
[164] *See* Rappeport, *supra* note 143.

rights of, in this case, white farmers, while continuing to subordinate farmers of color.[165]

V. CONCLUSION

The plight of Black farmers will continue until the courts and this country are willing to acknowledge the importance of the anti-subordination principle of the Equal Protection Clause.[166] While it seems unlikely that the current conservative bench on the Supreme Court will lean in this direction, Congress cannot continue to make the job of the judiciary easier by simply rolling over when tough legal battles slow the extremely important progress they are attempting to make to preserve what is left of the Black and minority farming communities.[167] To not make stronger, clearer attempts to rectify the discriminatory actions and devastating results of the USDA's troubling past reflects a cynicism in this country that does not just devastate an entire livelihood for a group of its citizens, but also suggests a genuine dysfunction with our understanding of what it means to be a citizen of value and worth.[168] More than "[r]emnants of caste persist"[169] in the agricultural arm of our society. Until Congress and the judiciary acknowledge this, Black farmers will continue to march towards extinction.

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[165] *See* Hutchinson, *supra* note 141, at 15 (claiming that "[t]he rigid application of colorblindness doctrine impedes race-based state action implemented to remedy the harmful consequences of historical and present-day discrimination.").
[166] *See supra* Part IV.
[167] *See supra* Part IV.B.
[168] *See supra* Part IV.A.
[169] Fiss, *supra* note 1, at 25.